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The Implications of Proposition 47 and SB 1310 on Immigration

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The crossroads of criminal defense and immigration law has become increasingly common and at the same time progressively complex. This intersection and the passage of Proposition 47 and SB 1310 provide potential for avoiding removal of non-citizens convicted of certain criminal offenses. At the same time, it requires criminal defense attorneys to carefully evaluate and consider immigration consequences when representing non-citizens charged with criminal offenses.

Most defense attorneys are well-versed in the application of Proposition 47, SB 1310, and CA Penal Code § 18.5; however both immigration and criminal defense attorneys are struggling to understand the practical impacts of this new legislation. To provide adequate representation, criminal defense counsel must be aware of some of the basic fact patterns that can cause removal from the United States.

While a comprehensive review of all grounds of removal is beyond the scope of this article, a summary of the more common scenarios for non-citizens convicted of criminal offenses is summarized below.

Crime of Moral Turpitude

A non-citizen is subject to removal if convicted (i) of a crime of moral turpitude committed within five years after admission and (ii) of a crime for which a sentence of one year or longer may be imposed. INA 237(a)(2)(A). It should be noted that immigration law has its own definition of when an offense is a crime of moral turpitude, which may differ from interpretation by California courts.

Prior to Penal Code §18.5, many California misdemeanor offenses (including crimes that can be charged as either a felony or misdemeanor under Penal Code §17b, known as "wobblers") included a sentence of up to one year. Prior case authority held that a California misdemeanor crime of moral turpitude involving a potential sentence of up to one year would subject an individual to removal from the United States, where a non-citizen obtained status as a lawful permanent resident (green card) within five years of commission of the offense. SB 1310 limits misdemeanors to a sentence of up to 364 days as of January 1, 2015. Therefore, a single misdemeanor will no longer cause removability under INA 237(a)(2)(A).

Aggravated Felony

A non-citizen convicted of offenses defined by INA 101(a)(43) as an aggravated felony faces the most severe grounds of removal with very few (if any) options to avoid removal.

Certain offenses require a "term of imprisonment" of at least one year to be considered an aggravated felony. These offenses include crimes of violence (as defined 18 U.S.C. § 16, but not including a purely political offense), theft, burglary, racketeering, gambling, commercial bribery, counterfeiting, forgery, obstruction of justice, perjury, and subordination of perjury. INA 101(a)(48)(b).

Prior to the enactment of Penal Code §18.5, certain misdemeanors could be considered to be aggravated felonies for immigration purposes if the actual sentence imposed (even if suspended) included a term of confinement of 365 days. The passage of SB 1310 and Penal Code §18.5 decreased the maximum possible sentence for misdemeanors to 364. Therefore, a misdemeanor conviction can no longer be an aggravated felony. Additionally, non-citizens convicted of certain felonies that have been reclassified as misdemeanors may petition to have those offenses designated as misdemeanors, eliminating aggravated felonies from their record.

Lastly, felony conviction is an enforcement priority. President Obama's revamped enforcement plan will prioritize the deportation of a removable noncitizen who has any felony conviction. Prop 47 may help non-citizens by avoiding future felonies and re-categorizing prior felonies. Reduction of a felony to a misdemeanor under PC § 17 also may help.

Relief from Removal for Individuals Present in the United States without Authorization (Cancellation of Removal)

INA 240A(b) provides an avenue of potential relief for non-citizens in removal proceedings who have been present in the United States without authorization for more than ten years provided they can demonstrate extreme hardship to a U.S. citizen spouse, child, or parent. A conviction of a crime of moral turpitude with a potential sentence of one year or more precludes eligibility.[1] Prior to the enactment of Penal Code §18.5, a conviction of most misdemeanor crimes of moral turpitude precluded this avenue of relief in removal proceedings. By limiting the sentence for misdemeanor offenses to 364 days, Penal Code §18.5 extends the benefit of an avenue of relief for individuals facing removal for being unlawfully present who are convicted of a misdemeanor crime of moral turpitude.

Deferred Action for Childhood Arrivals (DACA)

For most immigration purposes, designation as a felony or misdemeanor drug offense has little effect; however, under Deferred Action for Childhood Arrivals (DACA), individuals are ineligible if they have a conviction of any felony, a "significant misdemeanor," or three non-significant misdemeanors arising out of separate incidents. Significant misdemeanors are defined as offenses that are punishable by imprisonment of one year or less and are offenses of domestic violence,

[1] A conviction of moral turpitude with a potential sentence of one year or more is only one amongst many disqualifying criteria.

sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales (distribution or trafficking), burglary, or driving under the influence of alcohol or drugs.

Proposition 47 amended the following three existing drug possession sections making each a misdemeanor: Health & Safety Code § 11350 (possession of listed or cross-referenced drug, including heroin, which was previously a felony), Health & Safety Code § 11357 (possession of concentrated cannabis, which was previously a wobbler), and Health & Safety Code § 11377 (possession of a listed or cross-referenced drug, including methamphetamines, which was previously a wobbler). A misdemeanor conviction for simple possession is not a "significant misdemeanor" as long a sentence of 90 days was not imposed. Therefore, a conviction for simple possession (as opposed to drug distribution or trafficking) is no longer a bar to eligibility.

The crimes of receipt of stolen property, passing bad checks, and forgery are wobblers. Under Proposition 47, if the amount taken was $950 or less, the offense should be treated as a misdemeanor. Provided the sentence imposed is not 90 days or greater (and this does not constitute a third misdemeanor), this misdemeanor conviction is not a bar to eligibility for DACA.

Proposition 47 reduced theft of $950 or less to a misdemeanor with a maximum sentence of six months (PC § 490.2). Prior to Proposition 47, an individual could be charged with a felony if that individual had prior convictions for petty theft. Proposition 47 significantly narrowed the number of people who could be charged with wobblers in these situations, making such a charge possible only if the defendant had at least one prior petty or theft-related conviction, and had been imprisoned as a result; and has a prior conviction for a serious or violent offense, for any registerable sex offense, or for embezzlement from a dependent adult or anyone over the age of 65. Therefore, two misdemeanor convictions of petty theft is not a bar to eligibility for DACA.

Petty Offense Exception

Under INA 212(a)(2)(A)(ii)(II) (the Petty Offense Exception), a non-citizen is automatically not inadmissible, on account of a conviction or admission of a crime involving moral turpitude, if the non-citizen:

- has committed only one crime involving moral turpitude; and
- "was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)"; and
- the offense of conviction carries a maximum possible sentence of one year or less. [2]

A non-citizen who is convicted of a misdemeanor first-offense crime of moral turpitude with a maximum of one year and a sentence imposed of six months or less is not inadmissible under the moral turpitude ground.

If a non-citizen has committed a second crime of moral turpitude, s/he will no longer be eligible for the petty offense exception to inadmissibility. Commission of a second moral turpitude offense, even if the conviction was expunged, or charges were dismissed resulting in no second conviction, will disqualify the defendant from eligibility for the Petty Offense Exception. See Matter of SR, 7 I. & N. Dec. 495 (BIA 1957). On the other hand, previous convictions that do not involve moral

turpitude, such as driving under the influence or simple assault do not disqualify the non-citizen from receiving the Petty Offense Exception. See Matter of Garcia-Hernandez, 23 I. & N. Dec. 590 (BIA May 8, 2003); Reyes-Morales v. Gonzales, 435 F.3d 937 (8th Cir. Jan. 31, 2006); Cuadra v. Gonzales, 417 F.3d 947, 949 (8th Cir. 2005).

Proposition 47 reduced the maximum sentence for theft of $950 or less to six months (as opposed to grand theft which is a wobbler). PC § 490.2. Proposition 47 also removed some conduct from commercial burglary, creating a new six-month misdemeanor for "shoplifting" which is defined as entering a store when it is open for business with the intent to steal $950 or less worth of goods. See PC § 459.5. A non-citizen convicted of one of any of these crimes would be eligible for the Petty Offense Exception, provided the non-citizen had committed no other crimes of moral turpitude.

Conclusion

Proposition 47 applies retroactively to previous felony convictions. With some exceptions (such as previous convictions for sex offense, murder, attempted murder, solicitation to commit murder, assault with a machine gun on an officer; or any serious or violent crime punishable by a life sentence or death) a person serving a felony sentence for an offense that would have been a misdemeanor under Proposition 47 may now petition a court and receive resentencing as a misdemeanor. Where the sentence has been completed, Penal Code § 1170.18 provides that a petition can be filed to reclassify a felony offense as a misdemeanor.

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