Immigration Consequences of State Criminal Convictions

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Certain criminal convictions can cause a foreign national to be deemed deportable from the United States.¹ This is true of foreign nationals that are in the country with documentation² (either permanent residents with green cards or temporary residents, such as students), as well as those present without any documentation.³ There are many different categories of criminal convictions that can make a person removable, including crimes of domestic violence, controlled substance violations, and failure to register as a sex offender.⁴

In order to determine if a crime falls into one of the categories in the Immigration and Nationality Act (“INA”), an attorney should compare the state statute in question with the relevant federal statute. Out of the various categories, two of the most common are “crimes involving moral turpitude,” or CIMTs,⁵ and aggravated felonies.⁶ This article serves as an introduction to these two categories of crimes. Part I describes CIMTs and discusses common Arkansas convictions that may fall into this category, and Part II describes aggravated felonies. This article should in no way be construed as the definitive word on what constitutes a crime under the INA, but is merely an introduction to the types of crimes included in it to help a practitioner become familiar with the necessary analysis and structure of the INA.

1. Immigration and Nationality Act (“INA”) §§ 212(a)(2), 237(a)(2).
2. INA § 237(a)(2).
3. INA § 212(a)(2).
I. Crime Involving Moral Turpitude

A foreign national can be both removable and inadmissible for having committed a crime involving moral turpitude. For CIMTs, there is an important distinction between the two. If the person is here in status (either temporary or permanent), then the CIMT will affect their status if the crime was committed within five years of admission and is a crime for which there is a possible sentence of at least a year. If the person does not have any status, any CIMT will have immigration consequences.

A. Federal Definition

The Board of Immigration Appeals (“BIA”) has long admitted that what constitutes a CIMT is a “nebulous concept” but has stated that such a crime is one “that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man, or society in general.” Through years of analyzing various crimes, the BIA has created several “categories” of criminal activity that fall under this definition including crimes involving fraud, crimes against the person with some intent to harm, crimes against property (usually with some intent to “permanently deprive the owner” of possession), sexual offenses, and crimes against the government usually involving fraud.

Though philosophical discussions of what does or does not involve violating current social mores, the more practical question is how to determine if a specific crime is a CIMT. In a recent case, the Attorney General set out three steps for this analysis: a categorical inquiry (a direct comparison of the state statute to the federal definition), a modified categorical inquiry (if no direct answer, look to the record of conviction), and then considering evidence beyond the record of conviction (looking to outside evidence only when “necessary and appropriate.”).

In short, a practitioner should look to the specific language of the state statute (not the facts behind the crime) and compare the elements to the federal definition: for assault to be a CIMT, the BIA has stated that the federal definition includes an intentional infliction of serious bodily injury. If one of the state statutory elements is intentional infliction of serious bodily injury, it will most likely be a CIMT. If the statute is ambiguous (contains this language but it is not required in all instances), then the practitioner would move on to consider evidence in the record of conviction, or potentially other official evidence.

11. See Nunez v. Holder, 594 F.3d 1124 (9th Cir. 2010) for a criticism of this line of cases.
B. Common Convictions in Arkansas

In order to demonstrate how this analysis works, I have chosen several Arkansas statutes that are often seen in immigration cases. I will do a brief analysis of each crime to demonstrate how the determination is made and give a basic conclusion. Please remember, however, that each case is different and these conclusions should not be used to give legal advice.

1. Worthless Checks

The BIA has consistently held that a worthless check statute is a CIMT if the statute includes an “intent to defraud.” Where a statute does not include the specific requirement of an intent to defraud, the immigration adjudicator must look to how the state courts have interpreted the statute. If the state courts consistently apply a requirement of a fraudulent intent, then the statute is a CIMT. If the courts do not have this requirement, then the statute is not a CIMT. Thus the federal definition for a worthless check statute is writing a worthless check with an intent to defraud.

Arkansas currently has two main worthless check statutes: Arkansas Code Annotated Sections 5-37-302 (Unlawful Acts) and 5-37-307 (Knowingly Issuing Worthless Check). The first step is to determine if the statutes match the federal definition. Section 5-37-302 has three subsections. Sections 1 and 3 contain the language “intent to defraud” while section 2 contains the language of knowing. Section 5-37-307 specifically requires knowing in both title and language. Arkansas case law does not indicate a consistent application of an intent to defraud requirement in either sections 5-37-302(2) or 5-37-307. Thus, based on a safe interpretation of current case law, a conviction under section 5-37-302(1) and (3) would likely be a CIMT. Further, a conviction under section 5-37-307(2) and section 5-37-307 would likely not be CIMTs. It is important to note that there is a difference not only between sections 302 and 307, but also between the three subsections of section 302.

If a conviction was just for section 5-37-302 without a specific indication of which subsection, the analysis would move to looking at the official record of conviction and possibly the third step, looking at other relevant evidence, to determine if there is sufficient information to show that a specific subsection applies.

2. Driving While Intoxicated

In analyzing DUI and DWI statutes, the BIA has found that a simple DUI is a regulatory offense with no culpable mental state, thus not a CIMT. Further, multiple convictions

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17. The easiest determination is if the BIA has already addressed the specific statute in question. While the BIA has addressed the historical statute, Ark. Code Ann. § 67-720 (1957) and found it to be a CIMT, the language has changed, requiring an all new analysis. Matter of Logan, 17 I&N Dec. 367 (BIA 1980).
18. Although this is a safe interpretation, a strong argument can be made that the “intent to defraud” language is not applied since the evidence required in § 5-37-304 and § 5-37-307 is nearly identical, and state court interpretations have not drawn a bright-line distinction. See Miller v. State, 1992 WL 30405 (Ark. Appl. 1992).
for a DUI or DWI, or statutes with increased punishments for multiple convictions, cannot be deemed to be CIMTs because the base crimes still have no culpability.\textsuperscript{20} However, a statute that punished driving under the influence plus the specific intent of knowingly driving with a revoked or suspended license has the requisite mens rea element. This type of “aggravated” DUI is a CIMT because it requires a “vicious motive or corrupt mind.”\textsuperscript{21}

Arkansas has several statutes related to driving while intoxicated: section 5-65-103 which punishes intoxication while operating or in physical control of a motor vehicle, section 5-65-105 which punishes operation of a motor vehicle when one’s license has been suspended or revoked for driving while intoxicated, and section 5-65-117 which allows for the seizure of a vehicle upon the fourth violation of driving while intoxicated. None of these statutes contain a knowledge requirement or has a mental culpability element, thus none of them will be considered CIMTs. Section 5-65-103 is a simple DWI statute with no mens rea requirement at all. Although section 5-65-105 at first blush appears to be similar to BIA precedent of knowingly driving under the influence with a suspended license, it is not a CIMT because it has no mens rea requirement, and it relates only to driving, not driving while intoxicated, with a suspended license. Statutes such as section 5-65-117 have also been found not to be CIMTs because there is no additional element to the basic crime of driving while intoxicated, other than multiple convictions.

### 3. Domestic Battery

A simple assault and battery offense is not classified as a CIMT unless there is an aggravating factor.\textsuperscript{22} For instance, if the statute requires, or is interpreted as requiring, the “intentional infliction of serious bodily injury” then it is a CIMT as it involves a degree of harm greater than simple touching.\textsuperscript{23} Although the BIA has found that assault or battery on a household member does involve an aggravating factor, the court has held that the assault or battery statute must still require an intention to cause physical injury, or actually result in physical injury.\textsuperscript{24}

There are three Arkansas statutes that relate to domestic battery: section 5-26-303, domestic battering in the first degree; section 5-26-304, domestic battering in the second degree; and section 5-26-305, domestic battering in the third degree. The language of each section of all three statutes requires some intent to cause serious injury and/or physi-

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\textsuperscript{20} Matter Torres-Varela, 23 I&N Dec. 78 (BIA 2001).
\textsuperscript{22} See Danesh, 19 I&N Dec. 669 (BIA 1988).
\textsuperscript{23} Matter of Sanudo, 23 I&N Dec. 968, 971 (BIA2006).
\textsuperscript{24} Matter of Sanudo, 23 I&N Dec. 968, 972 (BIA2006).
II. Aggravated Felonies

A foreign national can be removable for having committed an aggravated felony.26 This restriction does not apply to admissibility, though there is a strong argument that most aggravated felonies could be classed in another category under the inadmissibility standards.

A. Federal Definition

The analysis for determining if a crime is an aggravated felony is similar to that used for CIMTs. A practitioner must first determine if there is a federal crime that relates to the state conviction. For instance, if the state conviction is for theft, the practitioner should look to section 101(a)(43)(G), which defines a theft or burglary offense for which a term of imprisonment is at least one year as an aggravated felony. A theft is defined as “the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.”27 Again, language of the state statute should be compared to the federal definition to determine if there was a taking with intent to deprive the owner of benefits and the sentence was at least one year.

As with CIMTs, if the language mirrors the federal definition, it is categorically an aggravated felony. If it is ambiguous and leaves open the possibility that it could be (such as when the statute includes several actions, some of which are actual takings and others that are not), the adjudicator looks to the record of conviction to determine if there is information that would limit the specific individual’s crime (for instance that he plead guilty to the element of taking a car).28

B. Categories of Crimes

The INA defines aggravated felonies in INA § 101(a)(43)(A) – (U). Some of these crimes are defined by cross-reference to federal statutes. For these sections a practitioner need only look to the federal statute to find

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25. Again, this is a safe analysis. The BIA has not addressed several aspects of this argument. For instance, the BIA has not determined exactly to what degree physical injury must occur in a domestic battery. Clearly, it should be less than “serious bodily injury” as is required in simple assault and battery, but it may still be less than “any physical injury” at all. In addition, Arkansas courts have noted that the 1999 addition of section (c) to 5-1-102(14) was added to make it easier to demonstrate physical injury, Napier v. State, 46 S.W.3d 556 (2001), and have even hinted that a knife wound described as a “fingernail scratch” could be sufficient under this new section. Conner v. State, 58 S.W.3d (2001). Further, the type of physical injury addressed in 5-26-305 has not been addressed in BIA case law. But see Matter of Mayorga-Ramirez, 2007 WL 1492254 (BIA 2007)(unpublished case finding that a statute requiring “physical pain, illness, or any impairment of physical condition is not sufficient harm).


the definition. These sections include: illicit trafficking in a controlled substance,\textsuperscript{29} illicit trafficking in firearms or destructive devices or explosive materials,\textsuperscript{30} money laundering,\textsuperscript{31} certain crimes related to explosive materials or firearms,\textsuperscript{32} crime of violence,\textsuperscript{33} kidnapping,\textsuperscript{34} child pornography,\textsuperscript{35} RICO and gambling offenses,\textsuperscript{36} prostitution offenses,\textsuperscript{37} espionage and treason,\textsuperscript{38} fraud and tax evasion,\textsuperscript{39} human smuggling,\textsuperscript{40} certain immigration offenses,\textsuperscript{41} and document fraud.\textsuperscript{42}

Others are defined through case law. Some of these sections have specific definitions developed through case law such as theft in the example above. However, some of the definitions are more vague, such as in the case of sexual abuse of a minor. These crimes include: murder/rape/sexual abuse of a minor, a theft offense, an offense involving fraud or deceit with loss to the victim exceeding $10,000, failure to appear to serve sentence under certain circumstances, commercial bribery/counterfeiting/forgery/trafficking in vehicles with at least a one year sentence, obstruction of justice/perjury/inducement of perjury/bribery of a witness with at least a one year sentence, and failure to appear before a court under certain circumstances.

**Conclusion**

With the Supreme Court’s ruling under *Padilla v. Kentucky*, it is not only clear that misinformation is ineffective assistance of counsel, but now defense attorneys must be familiar enough with immigration law to know when to warn of potential immigration consequences.\textsuperscript{43} In working with criminal defendants that are noncitizens, all actions must be treated with care. Lastly, it is also important to remember that nearly all immigration benefits are discretionary. Thus, even if a criminal conviction does not make a foreign national statutory ineligible for something, it can still be considered by the Attorney General for purposes of immigration benefits.

\begin{itemize}
\item \textsuperscript{29} Controlled substance is defined in 21 U.S.C. § 802 and 18 U.S.C. § 924(c).
\item \textsuperscript{30} As defined in 18 U.S.C. §§ 921 and 841(c).
\item \textsuperscript{31} Referring to 18 U.S.C. §§ 1956 and 1957.
\item \textsuperscript{32} Referring to 18 U.S.C. §§ 842, 844, and 922 and 26 U.S.C. § 5861.
\item \textsuperscript{33} Defining a crime of violence through 18 U.S.C. § 16.
\item \textsuperscript{34} Defined as demand for or receipt of money under 18 U.S.C. §§ 875, 876, 877 or 1202.
\item \textsuperscript{35} Referring to 18 U.S.C. §§ 2251, 2251A, 2252.
\item \textsuperscript{36} As defined in 18 U.S.C. §§ 1962, 1084, or 1955.
\item \textsuperscript{37} Relating to ownership or transportation in 18 U.S.C. §§ 2421, 2422, 2423, and trafficking in 18 U.S.C. §§ 1581-1585 or §§ 1588-1591.
\item \textsuperscript{38} As described in 18 U.S.C. §§ 793, 2381, or 2382 and 50 U.S.C. § 421.
\item \textsuperscript{39} Defining tax evasion as in 26 U.S.C. § 7201.
\item \textsuperscript{40} 18 U.S.C. § 1324(a).
\item \textsuperscript{41} 18 U.S.C. §§ 1325(a) or 1326.
\item \textsuperscript{42} 18 U.S.C. §§ 1543 and 1546(a).
\item \textsuperscript{43} 130 S. Ct. 1473 (2010).
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