

APPENDIX D

IMMIGRATION CONSEQUENCES OF SPECIFIC VERMONT DISPOSITIONS

Most crime-related grounds of deportation, and some of the crime-related grounds of inadmissibility, require a criminal conviction. Even where crime-related removal grounds do not require a conviction, immigration authorities may not be able to establish criminal conduct without a criminal conviction. Therefore, seeking a disposition that does not constitute a conviction under federal immigration law may go far in avoiding adverse immigration consequences. See Chapter 4 for the definition of a conviction for immigration purposes.

- **Practice Tip:** Defense practitioners should note that the definition of a conviction under federal immigration law includes dispositions that are NOT considered to be convictions under Vermont law. See the discussion below for more details.
- **Practice Tip:** Even if a criminal disposition does not result in a conviction for federal immigration purposes, defense practitioners should advise the noncitizen client that he or she must affirmatively disclose all previous arrests or criminal charges if applying for a future immigration benefit and the application or petition requests the information. Failure to do so may result in charges of fraud or misrepresentation and lead to further problems for the client.
- **Practice Tip:** Aside from the above scenario, a noncitizen client is generally NOT required to provide ANY information concerning his or her past or current criminal history to a DHS immigration agent. Defense practitioners should advise their noncitizen clients against answering any questions posed by DHS immigration authorities. See the Introduction and Appendix B for more details.

Pleas, Dismissals, and Acquittals

Under the federal immigration definition of a conviction, Alford pleas and pleas of guilty and *nolo contendere* are convictions for purposes of applying immigration law.

Pleas of not guilty, dismissal of charges by the prosecutor or the court, and acquittals by the judge or jury are NOT convictions under federal immigration law.

Deferred Sentences; First Time Possession of Marijuana

Under 13 V.S.A. § 7041, a court may defer sentencing after an adjudication of guilt, the filing of a presentence report, and the placement of the defendant on probation. While the conviction may be discharged and expunged from the defendant's record if the terms of probation are fulfilled under Vermont law, **this disposition would still be a conviction** for purposes of federal immigration law since a judicial finding of guilt is a prerequisite for qualification under this statute. This analysis also applies to deferred sentences received pursuant to first time offenders for possession of marijuana under 13 V.S.A. § 4230(a)(1).

- **Practice Tip:** Defense counsel should avoid this disposition for noncitizen clients at all cost since this will be considered a conviction for immigration purposes. In the alternative, counsel should seek to obtain a diversion contract pursuant to 3 V.S.A. § 164.

Vermont's Diversion Program

Under the state's adult court diversion program, pursuant to 3 V.S.A. § 164, a defendant may enter into a diversion contract with the prosecuting office. Successful completion of the terms of the contract results in the dismissal of the case by the state's attorney. The diversion program is geared to assist adult first-time offenders where the court has found probable cause, but has made no final adjudication. See 3 V.S.A. § 164 (c)(1). For purposes of federal immigration law, a **Vermont diversion contract does NOT constitute a conviction** since the client is not required to plead guilty or nolo contendere and the court does not find an adjudication of guilt.

Warning! Defense practitioners should note that any information gathered in the course of the adult diversion process that becomes a part of the court record may be relied upon by immigration authorities in immigration removal proceedings or in adjudications of applications or petitions for immigration benefits. The general strategy of keeping the record clear of triggering adverse immigration factors discussed in the Introduction and in Chapter 4 should continue to be followed here. For example, if a letter of apology is required under a diversion contract and will become a part of the court record, be sure to avoid reference to any aggravating immigration factors, such as reference to controlled substances, domestic violence, or crimes against children.

- **Practice Tip:** A defendant should be advised that even upon the successful completion of a diversion contract, which results in the dismissal of all charges and the sealing of the record, the noncitizen would still have to answer affirmatively if asked by an immigration judge or if required to provide the information on an immigration application or petition as to whether he or she has ever been arrested or charged with a criminal offense.

Juvenile Dispositions and "Blended Sentences"

Juvenile proceedings are regarded as civil findings of delinquency and **do NOT constitute criminal convictions** for purposes of applying federal immigration law. *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000). Therefore, juvenile delinquency adjudications should not trigger adverse immigration consequences based on a conviction of a crime.

Where a juvenile is transferred to adult criminal court or is otherwise treated as an adult criminal offender, i.e., receiving a **"blended sentence," there is the risk that the resulting disposition will be considered a conviction** for immigration purposes. The current analysis by immigration fact-finders as to whether such dispositions constitute juvenile delinquency is to compare the state's juvenile proceedings to the Federal Juvenile Delinquency Act (FJDA) to see if the state delinquency finding is substantially equivalent to federal law. See 18 U.S.C. §§ 5031-42. If the Vermont delinquency finding is substantially equivalent to the FJDA, then the juvenile proceeding will NOT constitute a conviction under federal immigration law.

Defense practitioners should note, however, that an act of juvenile delinquency may still have adverse immigration consequences for the noncitizen, including adversely affecting a discretionary benefit sought in any immigration application or petition. Additionally, certain criminal-related grounds of inadmissibility and deportability that do not depend on a conviction,

triggered instead by mere "bad acts," may still pose a risk to the noncitizen. "Bad acts" that potentially trigger crime-related removal grounds include those committed as a minor, a drug addict or abuser, giving the government "reason to believe" the person has ever been a drug trafficker, engaging in prostitution, using false documents, making a false claim to U.S. citizenship, and smuggling aliens. Consult with an immigration attorney or expert for further analysis.

- **Practice Tip:** Since a juvenile delinquency adjudication should not generally have the consequences of a conviction for immigration purposes, defense practitioners should seek such adjudications for any noncitizen, where possible.