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Ten Things a Criminal Attorney Should Know When Representing the Non-Citizen in Criminal Proceedings

Cover Page Footnote

The author would like to extend her sincere thanks to Evan Joseph Law, J.D. expected 2009, University of Dayton School of Law, for his dedication and assistance in writing this article.

TEN THINGS A CRIMINAL ATTORNEY SHOULD KNOW WHEN REPRESENTING THE NON-CITIZEN IN CRIMINAL PROCEEDINGS

*Karen Denise Bradley**

I. INTRODUCTION

With the number of unauthorized immigrants currently living among us estimated to be about twelve million,¹ it seems apparent that we need immigration reform, but the country is bitterly divided over what we must do. For those who advocate comprehensive immigration reform, the changes in our immigration laws must include expanded opportunities for relatively unskilled alien workers to gain legal access to our labor markets. President George W. Bush proposed that we use large-scale guest-worker programs in an attempt to satisfy the large and persistent demand for relatively unskilled labor in the United States that attracts so many unauthorized immigrants.² In fact, both the reform bill passed by the Senate in 2006 and the compromise bill considered by the Senate in 2007 would have created such programs.³ Thus, recent reform proposals debated in Congress would have brought relatively unskilled alien workers into the United States on nonimmigrant visas rather than on immigrant visas.

As the controversy regarding immigration issues in the United States continues, perhaps the most rarely discussed topic is—defining the rights of non-citizens. This is especially a crucial issue when non-citizens are charged with committing a crime. In these instances, criminal and immigration attorneys fill two necessary roles while focusing on different aspects of representation. Issues in criminal law address inherent rights, while issues in immigration law address the non-citizen's ability to remain in the United States. Both areas of representation can have a profound impact on the future of the non-citizen.

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¹ Jeffrey S. Passel, *Pew Hispanic Center, A Pew Research Center Project, Publication, Modes of Entry for the Unauthorized Migrant Population* 3, 6, <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=19> (May 22, 2006). The total population of the United States reached 300 million in October 2006. See Sam Roberts, *A 300 Millionth American. Don't Ask Who.*, 53 N.Y. Times A15 (Oct. 18, 2006).

² See e.g. *Pres. Bush Renews Call for a Temporary Worker Program*, 82 Interpreter Releases 274 (2005); *President Bush Announces Immigration Initiative*, 81 Interpreter Releases 33 (2004).

³ See Sen. 1639, 110th Cong. (June 28, 2007); Sen. 2611, 109th Cong. (May 25, 2006); Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 459-60 (6th ed., West 2008); *Senate Passes Immigration Bill, Conference Needed to Resolve Senate and House Differences*, 83 Interpreter Releases 1037 (2006).

Often, instances involving both criminal law and immigration law initially place greater responsibility upon the criminal attorney because the criminal matters generally take place first and are resolved long before the immigration matters. Yet, because the criminal defense proceedings may have an impact on the non-citizen in future immigration proceedings, criminal attorneys should consult with an immigration attorney. This consultation will ensure that the non-citizen is effectively advised of the consequences of his or her plea or conviction. The consequences of the plea conviction include the impact on his or her future immigration status and the impact on his or her ability to remain in the United States. The purpose of this article is to inform criminal attorneys about the effect that criminal proceedings may have on non-citizens. Therefore, any attorney representing a non-citizen charged with a crime should review and respond to the following ten questions to avoid serious consequences. The serious consequences from the failure to ask these questions include negation or limitation of a particular immigration benefit or prevention from returning to the United States.

II. BACKGROUND

A. Types of Immigrant Status

All foreign-born non-citizens living in the United States are termed “aliens” for purposes of immigration law. All “aliens” fit within three categories: (1) those that are immigrants admitted permanently to the United States, also known as Lawful Permanent Residents (LPRs), or green card holders, (2) those that are nonimmigrants admitted temporarily to the United States, and (3) those that are undocumented persons or “illegal aliens” living in the United States. Undocumented persons or illegal aliens are those who have either entered the United States unlawfully, without having been admitted, or who have overstayed a temporary visa.⁴

The key difference between an “immigrant” and a “nonimmigrant” is that the former generally intends to remain in the United States and has the authorization to do so (such as an LPR, an asylee, or a refugee), while the latter must return after his or her authorized stay in the United States has expired (such as nonimmigrants who have been granted Temporary Protected Status (TPS), temporary visa holders as in the case of seasonal workers (H2A’s, H2B’s), or professional workers (H1B’s, L’s, TN’s, E’s, students, and tourists)).⁵ When a person overstays his or her temporary visa,

⁴ The Immigration and Nationality Act of June 27, 1952, Pub. L. No. 82-4141, § 101(a)(3), 66 Stat. 163 [hereinafter I.N.A.]; 8 U.S.C. § 1101(a)(3) (2000).

⁵ Overview of US Immigration Law (P.L.I. N.Y. Prac. Skills Course Handbook Series No. 14563, 2008).

he or she becomes “out of status,” similarly situated to illegal aliens who never gained lawful “status.”

i. Lawful Permanent Resident Status or Application Pending

An application to become a Lawful Permanent Resident is a necessary preparatory step to becoming a United States citizen. It naturally follows that if a non-citizen application to become an LPR is denied, the applicant’s chances of becoming a U.S. Citizen are also greatly diminished. To be afforded LPR status, a non-citizen must not have committed and/or have been convicted of certain offenses. A non-citizen will never obtain LPR status if that person is convicted of an aggravated felony or certain types of crimes which are deportable offenses. Even after a non-citizen receives the LPR status, if he or she is convicted of an aggravated felony, this status will be revoked and the non-citizen will be found deportable.⁶

ii. Asylum and Withholding of Removal

Applications for asylum and withholding of removal are handled in the same proceedings because they both involve protecting the non-citizen against persecution in his or her native country.⁷ A grant of asylum means that the non-citizen may remain in the United States and apply to become an LPR after one year, if conditions in their native country do not improve and their return is not feasible. Aliens are granted asylum based on past persecution or on credible fear of future persecution if they are required to return to their country of nationality on the basis of “race, religion, nationality, membership in a particular social group, or political opinion.”⁸ Withholding of removal does not grant the non-citizen this right, but is a means of preventing removal of a non-citizen to his or her native country due to the probability that the non-citizen’s life or freedom would be threatened on account of “race, religion, nationality, membership in a particular social group, or political opinion.”⁹

Furthermore, the non-citizen may not be eligible to apply for asylum if he or she has been convicted of an aggravated felony (discussed *infra* under question 5).¹⁰ For asylum claims, the consequences of being convicted of an aggravated felony are far more serious than in instances involving non-citizens applying for other benefits. The heightened seriousness of asylum claims is based upon the need to establish past persecution or credible fear of future persecution in the non-citizen’s home

⁶ *In re Rosas*, 22 I. & N. Dec. 616 (BIA 1999); Ira J. Kurzban, *Immigration Law Sourcebook* 71 (11th ed., Am. Immig. Law Found. 2008).

⁷ 8 C.F.R. §§ 208.3, 1208.3 (2008).

⁸ I.N.A. § 208(b)(1)(B)(i); 8 U.S.C. § 1158(b)(1)(B)(i).

⁹ I.N.A. § 241(b)(3)(A); 8 U.S.C. § 1231(b)(3)(A).

¹⁰ Natl. Lawyers Guild, *Immig. Law & Crimes* § 1:5 (West 2009).

country. If a non-citizen is denied asylum due to such a conviction, this carries a great deal more weight than applications involving regular immigration benefits because the consequences could include serious physical harm or even death if the non-citizen were required to return to his or her home country.

For withholding of removal, Congress has determined that the non-citizen must not have been involved in persecuting anyone else on the basis of race, religion, nationality, etc., and the non-citizen cannot be a danger to the United States due to being convicted of a serious crime, whether committed before or after coming to the United States.¹¹ Congress stipulated that a non-citizen who has been convicted of an aggravated felony that carries a sentence of imprisonment of at least five years constitutes a “serious crime,” although this is not an all-inclusive definition of when a crime may be deemed “serious.”¹² Criminal attorneys representing non-citizens who have a claim for asylum or withholding of removal should thus immediately contact an immigration attorney before proceeding because the stakes are very high for the non-citizen.

B. Types of Nonimmigrant Status

i. Temporary Protected Status

In an effort to assist those non-citizens who were in the United States when a natural disaster or ongoing-armed conflict affected their home country, Congress enacted the Temporary Protected Status as a temporary relief for those non-citizens to remain in the United States.¹³ Non-citizens who are granted TPS cannot be deported during the time that Congress has specified as the TPS period,¹⁴ but the non-citizen will not be eligible for TPS if he or she has been convicted of a felony that is punishable by one year or more in prison, or two or more misdemeanors.¹⁵ Therefore, for the criminal attorney representing non-citizens who have been granted TPS or who have an application pending for TPS, the first thought should be to ensure that the non-citizen does not plead guilty to or receive a conviction of such a crime. However, because a non-citizen granted TPS may eventually adjust their status to become an LPR and eventually apply for naturalization, both of which require a showing of “good moral character,” the best solution is to keep the non-citizen from having a sentence longer than six months, if possible.¹⁶

¹¹ I.N.A. § 241(b)(3); 8 U.S.C. § 1231(b)(3).

¹² *Id.*

¹³ I.N.A. § 244(b); 8 U.S.C. § 1254a(b).

¹⁴ I.N.A. § 244(a)(1)(A); 8 U.S.C. § 1254a(a)(1)(A).

¹⁵ 8 C.F.R. §§ 244.4, 1244.4.

¹⁶ I.N.A. § 101b(f); 8 U.S.C. § 1101(f).

ii. Work Visas or Application Pending for Seasonal or Professional Work Visa and Student Visas

A non-citizen with a work visa is deemed out of status and subject to deportation if convicted of a crime of violence that has a sentence of imprisonment greater than one year.¹⁷ Non-citizen students may temporarily come to the United States to pursue further education with F-1 (academic student),¹⁸ M-1 (vocational student),¹⁹ or J-1 (exchange student)²⁰ visas. Situations in which a non-citizen student is convicted of a crime can result in the student becoming out-of-status, and thereby requiring return to his or her home country if: (1) it interrupts the student's ability to continue his or her studies,²¹ or (2) it is a conviction of a violent crime with a term of imprisonment longer than one year.²²

C. Crimes Involving Moral Turpitude

A non-citizen is removable from the United States if he or she is convicted of a "crime involving moral turpitude," or a "CIMT" that is (1) committed within 5 years of admission to the United States, and (2) is convicted of a crime for which a sentence of one year or longer may be imposed.²³ A CIMT involves "conduct which is inherently base, vile, or depraved *and* contrary to the accepted rules of morality."²⁴ Regardless of whether or not the crime is prohibited by statute, a CIMT is "an act which is per se morally reprehensible and intrinsically wrong or malum in se."²⁵ A non-citizen who is involved in the conspiracy or attempts to commit a CIMT faces the same consequences as if the non-citizen had committed the actual crime.²⁶

As courts make determinations as to what types of crimes constitute a CIMT, the CIMT crimes can generally be grouped into five categories:²⁷

- 1) **crimes against the person** (such as, *inter alia*, murder, voluntary manslaughter, kidnapping, some degrees of assault, aggravated battery, child or spousal abuse, and aggravated DUI);

¹⁷ 8 C.F.R. § 214.1(g).

¹⁸ I.N.A. § 101(a)(15)(F); 8 U.S.C. § 1101(a)(15)(F).

¹⁹ I.N.A. § 101(a)(15)(M); 8 U.S.C. § 1101(a)(15)(M).

²⁰ I.N.A. § 101(a)(15)(J); 8 U.S.C. § 1101(a)(15)(J).

²¹ *In re C*, 9 I. & N. Dec. 100 (BIA 1960).

²² 8 C.F.R. § 214.1(g).

²³ I.N.A. § 237(a)(2)(A)(i)-(ii); 8 U.S.C. § 1227(a)(2)(A)(i)-(ii); Kurzban, *supra* n. 6, at 163.

²⁴ *In re Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994) (emphasis added), *aff'd*, 72 F.3d 571 (8th Cir. 1995); Kurzban, *supra* n. 6, at 71.

²⁵ *In re Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980); Kurzban, *supra* n. 6, at 71.

²⁶ Kurzban, *supra* n. 6, at 69.

²⁷ *Id.* at 75-84 (outlining examples of Crimes of Moral Turpitude).

- 2) **sexual offenses** (adultery, rape, statutory rape, prostitution, bigamy, incest, failure to register as a sex offender, and lewdness);
- 3) **crimes against property** (possession of stolen property, receipt of stolen property, burglary, larceny, arson, malicious trespass, blackmail, embezzlement, counterfeit goods, shoplifting, theft, extortion, and securities fraud);
- 4) **crimes against the government** (use of fraudulent driver's license, bribery, counterfeiting, money laundering, immigration fraud, obstruction of justice, mail fraud, perjury, tax evasion, and welfare fraud);
- 5) **crimes involving fraud** (most crimes that involve fraud are considered to be CIMT);
- 6) **drug offenses** (generally those that involve more than possession such as drug trafficking or possession with intent to distribute);²⁸
- 7) **weapons offenses** (crimes involving use of a weapon in the commission of a separate crime).²⁹

III. TEN QUESTIONS A CRIMINAL ATTORNEY SHOULD ASK A NON-CITIZEN CLIENT

QUESTION #1:

WHAT IS THE NON-CITIZEN'S IMMIGRATION STATUS?

Despite only having been in the United States temporarily, a nonimmigrant may "adjust status" to later become an immigrant. Thus, any criminal issue affecting a nonimmigrant may have a lasting impact on their ability to adjust status in the future. In the situation of an "illegal alien" who is arrested for a crime, the local law enforcement authority contacts the Immigration and Customs Enforcement (ICE), which then puts a federal "ICE Detainer" on the alien. In most cases involving misdemeanors, at least in Ohio, the state will drop the charges against the alien to allow the ICE officials to take the alien into custody. Naturally, this is not the case for more serious crimes.

Regardless of whether or not the alleged crime is serious, it is important to note that even though the alien will be deported, he or she may want to return to the United States in a lawful status, such as with a

²⁸ *Id.* at 84.

²⁹ *Id.*

nonimmigrant visa and eventually adjust status to become an LPR. This is a difficult and prolonged process for aliens who have resided in the United States unlawfully for more than one year. An individual who has been in the United States in any unlawful status for more than one year is barred from reentering the United States for ten years.³⁰ This bar can be waived through an extensive and substantive application process at the U.S. Immigration office in the foreign country.

In the case of an “illegal alien,” the criminal attorney would need to know how long the alien has been living in the United States as a precursor to determining whether deportation is a foregone conclusion. The criminal attorney must also consider other factors, as discussed below, in determining whether the deported alien would be eligible to return to the United States, once they have met certain criteria.

Another factor for the criminal attorney to consider when representing the non-citizen is that any criminal conviction may prevent an alien from requesting and obtaining Voluntary Departure rather than having the United States government incur the cost of deportation.³¹ Voluntary Departure is an available option which does not carry the same penalty for returning to the United States as a deportation.

QUESTION #2:

DOES THE NON-CITIZEN HAVE FAMILY MEMBERS IN THE U.S. WHO ARE U.S. CITIZENS OR LAWFUL PERMANENT RESIDENTS?

A non-citizen can become an LPR and eventually a citizen of the United States by having either an employer or close family member petition. When a non-citizen has been charged with a crime, it is important to ask the alien if they have close family members who are United States citizens or Lawful Permanent Residents because this directly affects whether or not they can apply for any immigration benefit. For immigration purposes, close relatives consist only of parents, spouses, children, and siblings of United States citizens.³²

³⁰ I.N.A. § 212(a)(9)(B)(i)(II); 8 U.S.C. § 1182(a)(9)(B)(i)(II).

³¹ Kurzban, *supra* n. 6 at 962.

³² I.N.A. §§ 201(b)(2)(A)(i), 203(a)(4); 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(4).

QUESTION #3:

DOES THE NON-CITIZEN HAVE AN APPLICATION PENDING FOR AN IMMIGRATION BENEFIT, OR IS THE NON-CITIZEN AFFORDED A STATUS THAT ALLOWS HIM TO RESIDE IN THE U.S. LAWFULLY, SUCH AS:

- LAWFUL PERMANENT RESIDENCY (Green card);
- ASYLUM AND WITHHOLDING OF REMOVAL;
- TEMPORARY PROTECTED STATUS (“TPS”);
- WORK VISA (H1B, H2B, H2A);
- OR STUDENT VISA (F1, M1, J1)?

If the non-citizen is arrested or detained and has an approved or pending application in any of the above categories, which allows him or her to reside and work in the United States, even on a temporary basis, that information should be obtained immediately. This is also important in preventing a non-citizen who has a pending application from having an ICE Detainer placed on him or her, even inadvertently. Occasionally this occurs to LPRs, even though the penalty for not carrying the green card at all times is a misdemeanor with a penalty of up to thirty days imprisonment and/or a one hundred dollar fine.³³

As stated earlier, the type of application the non-citizen has pending determines whether the non-citizen is an immigrant or a nonimmigrant. The consequences of criminal behavior have a more immediate effect on immigrants because they have a present intent to remain in the United States.

QUESTION #4:

HOW LONG HAS THE NON-CITIZEN LIVED IN THE U.S.?

If the non-citizen can prove that he or she has continuously resided in the United States since January 1, 1972, the non-citizen may apply for permanent residency.³⁴ The non-citizen must provide evidence to the Citizenship and Immigration Services (CIS) that he or she has in fact continuously resided in the United States from the initial entry prior to January 1, 1972, until the time the application is made. In many instances, it can be difficult to present enough evidence of this time period to the CIS. It would therefore be unfortunate if a criminal conviction or plea agreement carrying a sentence of imprisonment longer than six months would impede this immigration benefit. As noted above, the non-citizen who can demonstrate continuous physical presence since January 1, 1972, until the application is made is subject to the same conditions as the non-citizen

³³ 8 U.S.C. § 1304(e).

³⁴ I.N.A. § 249; 8 U.S.C. § 1259.

applying for LPR status. The only difference here is that a non-citizen who has physically resided in the U.S. since January 1, 1972, can independently file his or her application for LPR.

QUESTION #5:

FOR WHAT CRIME IS THE NON-CITIZEN BEING CHARGED—FELONY OR MISDEMEANOR—AND WHAT IS THE PUNISHMENT?

The punishment is the critical element when a non-citizen is charged with a crime because any non-citizen, even one here in the United States lawfully, who is convicted of a crime that carries a sentence longer than one year, regardless of having the sentence suspended, is subject to deportation. Whether or not the crime is a felony or misdemeanor is important because each state has different requirements. Some sections in the immigration law state merely that the person cannot have a felony conviction, whereas other sections state that the non-citizen cannot have a sentence of imprisonment for more than one year.

QUESTION #6:

IF IT IS A FELONY, IS IT AN AGGRAVATED FELONY UNDER THE IMMIGRATION AND NATIONALITY ACT AND IS IT AN AGGRAVATED FELONY UNDER THE RELEVANT STATE STATUTE?

Any non-citizen who is charged with an aggravated felony is subject to deportation. An aggravated felony under the INA includes the following crimes: murder, rape, sexual abuse of a minor (even where state law lists this as a misdemeanor),³⁵ violent crimes or theft offenses with a term of imprisonment of one year or more, illegal controlled substance trafficking or firearms trafficking, crimes in relation to alien smuggling, crimes involving the business of prostitution, and crimes of fraud involving loss to victims of more than ten thousand dollars.³⁶ A violent crime is one in which “the use...of physical force against the person or property of another, whether attempted or threatened, is an element of the offense, or it is a felony involving a significant risk that such physical force will be used in carrying out the crime.”³⁷

³⁵ *In re Small*, 23 I. & N. Dec. 448 (BIA 2002); Kurzban, *supra* n. 6, at 168.

³⁶ I.N.A. § 101(a)(43); 8 U.S.C. § 1101(a)(43).

³⁷ 18 U.S.C. § 16(a)-(b) (2000); Kurzban, *supra* n. 6, at 175.

QUESTION #7:

DOES THE CRIME FOR WHICH THE NON-CITIZEN IS CHARGED CONSTITUTE A CRIME INVOLVING MORAL TURPITUDE UNDER THE INA WHICH WILL SUBJECT THE NON-CITIZEN CLIENT TO REMOVAL FROM THE U.S.?

The criminal attorney should closely analyze the elements of the criminal statute to ensure that, if possible, the non-citizen is not convicted or does not plead guilty to a crime or element of a crime of moral turpitude (CIMT).

QUESTION #8:

IF THE CRIME IS A DEPORTABLE OFFENSE, AND YOU ADVISE YOUR NON-CITIZEN CLIENT TO TAKE A PLEA OFFER, DOES THIS CONSTITUTE A CONVICTION FOR IMMIGRATION PURPOSES?

A conviction for immigration purposes arises when there has been “a formal judgment of guilt” issued upon the non-citizen, when the non-citizen pleads guilty or no-contest to the charge, when the non-citizen has admitted enough facts to be found guilty, or the judge has ordered a punishment or restraint on the liberty of the non-citizen.³⁸ Courts have found that even when the only penalty of the criminal sentence is to pay fines and costs to the court, this is enough to constitute a conviction for immigration purposes.³⁹

However, some states will vacate any guilty plea entered into by the non-citizen if the judge did not properly advise the non-citizen of the immigration consequences of a plea to the charge.⁴⁰ The following states require this advisement: Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota (for felony cases), Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.⁴¹

It is important to note that vacating a guilty plea on the basis that the state court judge failed to properly advise the non-citizen of the immigration consequences of his plea does not necessarily negate the crime that was committed when there is sufficient legal basis for sustaining the charge. Vacating the plea does not vacate the charge—it is a means by which a non-citizen can attack a criminal conviction or judgment because of the failure of the court to follow the procedures set out in the state’s criminal statute.

³⁸ I.N.A. § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A).

³⁹ *In re Cabrera*, 24 I. & N. Dec. 459 (BIA 2008); Kurzban, *supra* n. 6, at 208.

⁴⁰ Kurzban, *supra* n. 6, at 213.

⁴¹ *Id.*

Therefore, it is always advisable to consult with an immigration attorney where it has been determined that the failure of the court to properly advise the non-citizen of the immigration consequences of his plea and/or conviction may render the non-citizen deportable or denied an immigration benefit which may be pending on his or her behalf.

QUESTION #9:

ARE THERE ANY POST-CONVICTION REMEDIES THAT MAY AMELIORATE A CONVICTION FOR IMMIGRATION PURPOSES SUCH AS PROBATION, VACATION OF JUDGMENT, OR PARDON?

Although expungement of a crime in state court proceedings removes the crime from a person's record as it relates to state matters, this does not lessen the consequences of a particular conviction for immigration purposes.⁴² Moreover, criminal defense attorneys should be aware that advising non-citizens regarding any plea that is entered into based on incorrect advice regarding immigration matters may be sufficient to vacate the plea due to ineffective assistance of counsel.⁴³

QUESTION #10:

IF THE NON-CITIZEN HAS BEEN CONVICTED OF A DEPORTABLE OFFENSE, ARE THERE ANY OTHER MITIGATING FACTORS THAT MAY ENABLE THE NON-CITIZEN TO SUCCESSFULLY ARGUE AN APPLICATION FOR CANCELLATION OR REMOVAL BEFORE THE IMMIGRATION COURT?

Non-citizens granted LPR status, who have maintained that status for five years, and who have continuously resided in the United States for seven years, may apply for cancellation of removal from the United States when they are placed in removal proceedings.⁴⁴ If this is granted, the non-citizen returns to the exact LPR status they had been granted previously.⁴⁵ However, this discretionary relief is not available if the non-citizen has previously been convicted of an aggravated felony.⁴⁶

All other non-citizens who have lived in the United States for ten years or longer, even unlawfully, may be able to apply for cancellation of removal if they can demonstrate that they have physically resided in the U.S. for ten years or more, have not committed any criminal offenses, have

⁴² *In re Marroquin*, 23 I. & N. Dec. 705 (Atty. Gen. 2005); I.N.A. § 101(a)(48)(A); Kurzban, *supra* n. 6, at 217.

⁴³ Kurzban, *supra* n. 6, at 213-214.

⁴⁴ I.N.A. § 240A(a); 8 U.S.C. § 1229b(a); Kurzban, *supra* n. 6, at 972.

⁴⁵ 8 C.F.R. §§ 212.3(d), 1212.3(d); *In re Przygocki*, 17 I. & N. Dec. 361 (BIA 1980); Kurzban, *supra* n. 6, at 975.

⁴⁶ Kurzban, *supra* n. 6, at 973.

“good moral character,” and that their deportation would be an extreme and unusual hardship to their spouse, parent or children, who are U.S. citizens or LPRs. If this is granted, the non-citizen may remain indefinitely in the United States and eventually adjust his or her status.⁴⁷ This is also only available for non-citizens who are in removal proceedings and who have *not* been previously convicted of an aggravated felony.⁴⁸ Additionally, the non-citizen cannot have been charged with a CIMT or two or more offenses which together have an aggregate total sentence of more than five years.⁴⁹

IV. CONCLUSION

Although criminal attorneys are not expected to be proficient in areas of immigration law, as is the same for immigration attorneys regarding criminal matters, often the criminal defense attorneys are the only advocates present to represent the non-citizens in the matters they face. However, anytime a criminal attorney faces one of the issues discussed in this article, it is always a wise decision to contact an immigration attorney in order to protect the non-citizen’s right to remain in the United States, or his or her ability to return to the United States after a departure.

⁴⁷ I.N.A. § 240A(e)(1).

⁴⁸ I.N.A. § 240A; 8 U.S.C. § 1229(b); Natalie Liem, Student Author, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More Than Aggravated Felons*, 59 Fla. L. Rev. 1071, 1079 (2007).

⁴⁹ I.N.A. § 212(a)(2)(A)-(B); 8 U.S.C. §§ 1182(a)(2)(A)-(B).