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The Consequences of Pleas in Immigration Law

By Grace A. Sease and Socheat Chea

On April 27, 2000, Governor Roy Barnes signed House Bill (HB) 584 to amend O.C.G.A. § 17-7-93 by adding the provision set out below, making it effective July 1, 2000. This bill was the product of the efforts of many jurists, lawyers, and immigrant advocates who wished to bring basic due process to the burgeoning immigrant population in Georgia. As discussed in more detail in this article, the Immigration Nationality Act (INA) is perhaps one of the most complicated bodies of law[1]—all the more reason and necessity for the passage of House Bill 584 to become part of the Georgia Code.

HB 584 adds a new section (c) to O.C.G.A § 17-7-93 as follows:

> In addition to any other inquiry by the court prior to acceptance of a plea of guilty, the court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to any state offense in any court of this state or any political subdivision of this state.

This law affects all courts which exist in Georgia including municipal courts. As of July 1, 2000, HB 584 mandates that in accepting a guilty plea, the court must ask one critical question of every defendant: "Are you a U.S. citizen?"

If the answer is in the negative, the court must then ask the defendant specifically whether he or she understands the impact the plea may have on his or her immigration status. Failure to do the above may open the door for the defendant in the future to set aside the plea through a *habeas corpus* petition on the ground that the plea was not entered freely or voluntarily.

Furthermore, it is highly important for the court to make a written record of this warning. O.C.G.A. § 17-7-93(a) and (b) require the guilty plea to be immediately recorded by the clerk on the minutes of the court . Therefore, it is reasonable to conclude that the General Assembly, by adding this requirement, wanted the courts to take great care in carrying out this provision by making a written record of the proceedings.

It is recommended that criminal defense attorneys inquire at the initial meeting with their clients whether they are U.S. citizens.[2] This will allow the attorney to comply with HB 584 and to avoid undue delay in preparation for future hearings in compliance with this provision. In view of this law, it is essential that criminal defense attorneys carefully investigate the impact of the plea on their foreign national client. This does not mean a simple question or warning, such as "Do you know that you may be deported for this plea?"[3] On the contrary, due to the complexity of immigration law, it necessary that a criminal defense attorney prepare a well-detailed due diligence letter to the foreign national client outlining the possible consequences of the plea to his or her immigration status. If the defense criminal attorney is not equipped or prepared to tackle the immigration issues, it is vital to secure an opinion from an immigration attorney who has in-depth of knowledge of deportation and naturalization issues. Failure to do so opens the door to charges of ineffective assistance of counsel and perhaps a malpractice claim.

To demonstrate the importance of the above and the complexity of immigration law, we will now examine some of the pitfalls that exist in Georgia state law which may lead to a problem under the INA through several specific examples.

What are the Immigration Consequences of a Criminal Conviction?

Immigration law is fact-specific and bewildering in its application. It is subtle and highly nuanced. This is particularly true in the application of immigration law to non-citizens who have committed a criminal offense. A myriad of factors are dispositive, so that two cases which may seem identical will result in very different outcomes. As outlined below, a series of hypotheticals are presented to graphically illustrate the complexities of this area of law. Every case is fact-specific and must be analyzed in its entirety before any conclusion can be reached regarding the immigration consequences of a criminal conviction.

In case #1, Alfred Alien is a lawful permanent resident alien. He can live and work in this country without incident—unless he breaks the law. Alfred is married to Carla, a United States citizen. He has lived in the U.S. for 22 years and adjusted his status to that of a lawful permanent resident 17 years ago. He has four United States citizen children, one of whom is severely disabled and dependent upon Alfred's health insurance for expensive medical care. He and his wife own a home, and he has been a volunteer coach of the neighborhood soccer league for years.

Congress has chosen to be particularly severe with aliens who commit drug offenses, and only the most minor can be excused or waived in the parlance of immigration law.

Ten years ago, Alfred Alien was charged with shoplifting a pack of cigarettes from the neighborhood convenience store. On the advice of counsel, he entered a plea of guilty and received First Offender treatment under Georgia law. He was sentenced to 12 months confinement, suspended. Alfred heralds the new millennium by applying for citizenship, and his conviction comes to light at that time. Are there immigration consequences because of that 10-year-old conviction? Yes, and the consequences are severe.

Because Alfred Alien has been convicted of a theft offense, and because he received a sentence of 12 months, albeit suspended, his conviction, for immigration purposes, is defined as an aggravated felony, regardless of how the State of Georgia defines the offense. The ameliorative aspects of the Georgia First Offender statute are also not recognized for immigration purposes.

The definition of "conviction" for immigration purposes is found at Section 101(a)(48)(A) of the INA.[4] This was specifically drafted to ensure a more uniform definition of conviction for immigration purposes.[5] Thus, this federal definition of conviction does not recognize state first-offender or deferred adjudication treatment.

A lawful permanent resident convicted of an aggravated felony is ineligible for a waiver of the offense, and the *only* relief/protection from removal he is eligible to apply for is withholding of deportation and/or protection under the Convention against Torture. Both of these forms of relief/protection have high thresholds and more applicants than not fail to meet their burden of qualifying.

In case #2, Aretha Alien is in the United States illegally. She entered as a visitor and remained longer than permitted. She has been in the United States for 17 years. She is married to Sam Citizen and has two United States citizen children. One of her children has a relatively minor learning disability and is in a specialized treatment program. Sam filed a visa petition (I-130) on Aretha's behalf and has just received the notice that the visa was approved.

Aretha is caught shoplifting a pair of designer shoes from a department store. On advice of counsel she enters a plea of guilty, receives a sentence of 12 months confinement, suspended, and treatment under the Georgia First Offender program.

Aretha's offense is also classified as an aggravated felony, but she may have relief from deportation. Because she is here illegally and because she has an immediate relative visa available to her, she may file an application for adjustment with a section 212(h) waiver; and, if the waiver is granted, she would be able to adjust her status to that of a lawful permanent resident and remain in the United States. She must establish that extreme hardship—a term of art—would result to her United States citizen husband and children should she be deported, but she nonetheless has the opportunity to apply for relief from removal.

Let's change the facts again. In case #3, Albert Alien, a lawful permanent resident, is arrested, charged and convicted of shoplifting, but only receives a sentence of 11 months, 29 days. He has been convicted of a crime involving moral turpitude (CIMT) but not an aggravated felony, for immigration purposes. If he has no other convictions and if the conviction occurs more than five years after he obtained his legal permanent resident status, he will not even be placed in proceedings.

If Albert is a two-time offender, the consequences are different. Let's make Albert a recidivist, twice convicted of shoplifting within five years of his entering the U.S. or

obtaining his status. He can be placed in proceedings and charged with having committed two CIMTs within five years of entry. His opportunity for relief from removal is minimal at best since, given the facts above, he does not have the requisite number of years of residency in the United States to apply for Section 240A cancellation of removal.

Section 240A cancellation is a form of relief available to aliens convicted of certain offenses. The alien must have been lawfully admitted for permanent residence for at least five years and must have resided in the United States for at least seven years after having been admitted in any status. Further, the alien cannot have been convicted of an aggravated felony. There is a special "stop-time" provision in the statute that stops the accrual of time on the date the offense was committed for certain criminal offenses.[6]

If Albert had entered the United States as a lawful permanent resident when he was a child of three, fallen in with a bad crowd as a teenager and committed two CIMTs, he would be placed in removal proceedings. Can he apply for any relief from removal? Yes, he can, as long as he committed the first crime *after* he had lived in the United States for at least seven years, five of them as a lawful permanent resident. He would be eligible to apply for cancellation of removal.

Congress has chosen to be particularly severe with aliens who commit drug offenses, and only the most minor can be excused or waived in the parlance of immigration law. A drug trafficking offense is an aggravated felony. Section 212(h), the waiver that Aretha could apply for above, is not available to anyone convicted of a drug offense *other than* a single offense of simple possession of 30 grams or less of marijuana. Arthur Alien, who has been a lawful permanent resident for 10 years and has the requisite years of residency, is convicted of simple possession of cocaine. Because the drug offense is not an aggravated felony, he is eligible to apply for the Section 240A waiver mentioned above. A gubernatorial or presidential pardon does not waive a drug offense for a lawful permanent resident alien.

Certain provisions of the Immigration and Nationality Act are specifically retroactive in effect. The statute was dramatically changed in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Basic grounds of removability for criminal action were amended and enlarged significantly. Many of these changes are retroactive, so that an individual who committed a criminal offense many years ago and who has not come to the attention of the INS until now may nonetheless be subject to removal. This may happen when an individual seeks to apply for citizenship or other benefits under the Act and the mandatory criminal background check discloses any prior conviction, regardless of when it occured.

Today, the INS and local jurisdictions have a close working relationship, so that most criminal aliens are detected early in the process. The INS may take a criminal alien into custody following completion of his or her state sentence. Depending upon the nature of the offense, that individual may be subject to the mandatory detention provisions of the statute.

Further a final criminal conviction cannot be collaterally attacked in immigration proceedings. A conviction is final for immigration purposes when the direct appeal process is exhausted. Thus, one cannot remedy or repair defects in criminal defense pleading when the alien finds himself before an immigration judge.

In short, it is difficult for an alien to escape the consequences of criminal activity. The impact of a criminal conviction may be mitigated if the criminal defense attorney is aware of the consequences of a plea and the length of sentence imposed on his client's immigration status. ■

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The views expressed in the article are solely those of the individual authors.

Endnotes

1. U.S. Immigration law is the product of many revisions as determined by the political and economic needs of each period of our history. The Immigration and Nationality Act is found at 8 U.S.C. § 1101 *et seq.*
2. There may be not an obvious answer to this question because some children who are now adults may have acquired U.S. citizenship through various provisions laid out under the INA.
3. It is the authors' view that in light of the legislative changes a more vigorous inquiry into this issue is necessary.
4. 8 U.S.C. § 1101 (a)(48)(A) at § 101 (a)(48)(A).
5. *See* H.R. REP. 104-828 at 207.
6. 8 U.S.C. § 1229b(d)(1) at § 240 A(d)(1).