

BANKRUPTCY: HOW DOES IT AFFECT IMMIGRATION STATUS?

By: Patrick D. O'Neill
O'Neill & Gilmore, P.S.C.
Citibank Towers Suite 1701
252 Ponce de Leon Ave.
San Juan, Puerto Rico 00918
Tel: 787-620-0670 ext. 303
Fax: 787-620-0671
E-mail: pdo@go-law.com

I. INTRODUCTION

The purpose of this article is to alert the bankruptcy practitioner to the minefields lurking in the United States immigration law that may adversely affect potential clients who are lawful permanent resident aliens or non-immigrant aliens living and working lawfully, but temporarily, in the United States. If a non citizen seeks relief under the provisions of the United States Bankruptcy Code, he or she must be aware that certain provisions of the U. S. Immigration and Nationality Act ("INA"), 8 U. S. C. Sections 1101 et seq., may have a direct bearing on his/her immigration status and ability to remain in the United States lawfully. In fact, if the bankruptcy proceedings reveal certain types of conduct not sanctioned by the immigration law and regulations, the non citizen may be subject to removal from the United States and be unable to return for years (and in certain cases, for life).

II. DEFINITION OF RELEVANT TERMS AND CONCEPTS

This article has been prepared as a basic introduction to the U. S.

immigration law for the unsuspecting bankruptcy practitioner. We must therefore begin by defining the relevant “terms of art” and concepts commonly used in the parlance of the immigration practice but which are no doubt unfamiliar to the bankruptcy practitioner. Among these terms are the following:

1. AGGRAVATED FELON: A person “convicted” of any one of the numerous crimes set forth at INA, Section 101(a)(43). Aggravated felony status creates significant, if not insurmountable, substantive and procedural barriers with respect to an alien’s ability to remain lawfully in the United States. The Department of Homeland Security’s (“DHS”) definition of what constitutes an aggravated felony can, and often does, differ from the standard definitions contained in state and federal criminal statutes. Among the many crimes considered to be aggravated felonies as defined under INA Section 101(a)(43)--and of which the bankruptcy practitioner should take particular note--are the following:

(a) certain offenses relating to the laundering of monetary instruments or engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeds \$10,000.

(b) theft offenses, including the receipt of stolen property, or burglary offense for which the term of imprisonment is at least one year.

(c) certain offenses relating to RICO, or certain gambling offenses, for which a sentence of one year imprisonment or more may be imposed.

(d) offenses involving fraud or deceit in which the loss to the victim or victims exceeds the amount of \$10,000; or certain offenses relating to

tax evasion where the revenue loss to the government exceeds the amount of \$10,000.

(e) commercial bribery for which the term of imprisonment is at least one year.

2. ALIEN: Any person who is not a citizen or national of the United States of America. All persons born in the fifty states of the union, the Commonwealth of Puerto Rico, the U. S. Virgin Islands, Guam and the Mariana Islands in the Pacific Ocean are U. S. citizens under the doctrine of jus solis.

3. CONVICTION: A formal judgment of guilt entered by a court, or if adjudication of guilt is withheld, if a judge or jury has found the person guilty, or the person has entered a plea of guilty or nolo contendere and has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty, or restraint. Pursuant to the amendments passed by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (also known as "IIRAIRA"), the definition of the term " conviction" for deportation (or removal) purposes was altered so as to require merely a formal adjudication of guilt, a plea of guilty or nolo contendere, or an admission of sufficient facts to warrant a finding of guilt together with some form of punishment or restraint on liberty. A "term of imprisonment" includes periods of incarceration ordered by a court even where there is a suspension of the imposition or execution of imprisonment. In sum, the 1996 changes to the immigration law effectively eliminated the possibility of retention of lawful permanent resident status for the majority of "green card" holders with any type of criminal conviction.

In addition, these amendments eliminated judicial review for many of those subject to deportation (or removal) based on criminal convictions classified as aggravated felons.

4. **DEPORTABLE ALIEN:** An alien in and admitted to the United States subject to any grounds of removal specified in the INA. This includes any alien illegally in the United States, regardless of whether the alien entered the country by fraud or misrepresentation or entered legally but subsequently violated the terms of his or her non-immigrant classification or status.

5. **IMMIGRANT:** The term “immigrant” is defined in the negative at Section 101(a)(15) of the INA. An immigrant is what every ALIEN seeking entry to the United States is presumed to be, except an alien who can prove that he or she is within one (1) of the approximately 23 classes of NONIMMIGRANT aliens or non-immigrants under the North American Free Trade Agreement (“NAFTA”). Stated differently, the INA presumes that all aliens are intended immigrants to the United States, unless they show themselves to be the beneficiaries of a non-immigrant visa petition.

6. **INADMISSIBLE:** An alien seeking admission at a port of entry who does not meet the criteria set forth in the INA for admission. The alien may be placed in removal (deportation) proceedings or, under certain circumstances, allowed to withdraw his or her application for admission.

7. **INTRACOMPANY TRANSFEREE (or L-1A beneficiary):** An alien, employed for at least one continuous year (during the last three year period) by an international firm or corporation, who seeks to enter the United States

temporarily for the same employer, or a subsidiary or affiliate, in a capacity that is primarily managerial, executive or involves the use of specialized knowledge, and the alien's spouse and minor unmarried children. The L-1A manager or executive holds a non-immigrant visa status.

8. INVESTORS: There are non-immigrant and immigrant investors. A non-immigrant investor or the E-2 visa status is available under specified conditions to nationals of countries with which the United States has appropriate treaties of friendship, commerce, and navigation or bilateral investment treaties. Permanent, immigrant status is available on an employment creation basis for persons who invest at least \$1,000,000.00 in the United States and create at least 10 full time jobs. There are extensive regulations, interpretations, guidelines and decisions with respect to qualifying for either of these statuses, including such matters as amount and source of capital.

9. LAWFUL PERMANENT RESIDENT ("LPR"): A "green card" holder; one who has attained the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. See, Section 101(a)(20) of the INA.

10. NON-IMMIGRANT VISA: Section 101(a)(26) of the INA defines a non-immigrant visa as a "visa properly issued to an alien as an eligible non-immigrant by a competent officer as provided [in the INA]." As noted previously, every alien is presumed to be an immigrant until he or she establishes to the satisfaction of the consular officer abroad, at the time of application for a visa, AND the immigration officer, at the time of application for admission, that he/she

is entitled to a nonimmigrant status. Only H-1 and L non-immigrants are not presumed to be intending immigrants.

A non-immigrant visa is issued to an alien by the U. S. government through its consular officers working abroad at the U. S. Embassy or Consulate in a foreign country. A non-immigrant visa is affixed or actually stamped into the alien's passport or other travel document. It signifies that a U. S. consular officer believes that the alien to whom the visa is issued is eligible to apply for admission in a particular non-immigrant category. Currently, there are approximately 23 non-immigrant categories, each one identified by a letter from the Roman alphabet.

Initial issuance of visas can only be performed by U. S. consular authorities outside the United States (except for the A and G visas issued to foreign diplomats and representatives of international organizations, respectively, and their employees and dependents). Some visas (such as the L-1A intracompany transferee visa or the E-2 investor visa) can be reissued at the United States Department of State in Washington, D. C., but only under certain specified conditions.

A visa does not guarantee ADMISSION to the United States. An immigrant inspector can deny entry if he or she believes that a particular alien is not eligible to be admitted in the category for which the visa was issued. Visas are issued on the basis of reciprocity with the applicant's home country or country of citizenship and with respect to both validity and number of entries permitted with the particular visa.

The period of validity of a particular visa establishes the time during which the alien may present himself or herself at a U. S. port of entry for admission. Visas may be valid for as few as 30 days or as long as 10 years; visas may be limited to a single entry or may be valid for multiple entries during the period of their validity.

The period of validity of the visa is not the same as the “authorized stay” of the non-immigrant alien in the United States. The authorized period of temporary stay is indicated on a small white card (known as the I-94 Form, or Arrival/Departure Record). This card is stapled into the alien’s passport at the time of his/her admission. The authorized stay may be less than the period of validity of the visa or it may be much longer than the period during which the visa itself is valid (typically when single entry visas are valid only for a limited period of time). The I-94 (and not the visa in the passport) always determines a non-immigrant alien’s status and its validity as to time and purpose. An alien is not out of status if he or she was properly admitted pursuant to a valid visa (even if subsequently the visa has expired), provided the person is still within the authorized period of stay specified on his/her Form I-94.

11. PAROLE: The authority given by DHS for anyone to come to the United States without being admitted in any specific status. Examples include parole for humanitarian or family unification purposes and parole to proceed with the process of adjustment of status (to become a lawful permanent resident).

12. REMOVAL (formerly known as “deportation”): A proceeding to enforce the departure of inadmissible persons seeking admission to the United

States or persons who have been admitted but are removable.

13. RETURNING RESIDENT: Any lawful permanent resident who has been outside the United States and is returning to the U. S. If the alien has been outside of the U. S. for more than 180 days, he or she must apply for readmission to the U. S. If he/she has been outside of the country for more than one year and is returning to his or her permanent residence in the United States, he or she must be in possession of a re-entry document issued by the U. S. Citizenship and Immigration Service or an immigrant visa from the Department of State.

14. TEMPORARY PROTECTED STATUS ("TPS"): A status allowing residence and employment authorization to nationals of foreign states for a period of not less than six months or no more than 18 months, when such states have been appropriately designated by the Attorney General because of extraordinary and temporary political or physical conditions in such state(s).

15. VISA: A U. S. visa allows the bearer to apply for entry to the United States in certain non-immigrant classifications (e. g., student (F visa), visitor for business (B-1) or for pleasure (B-2), temporary worker (H), intracompany transferees (L), aliens of exceptional talent and/or extraordinary ability (O), professional athletes and group entertainers (P), etc.). A visa does not guarantee the bearer the right of admission. The Department of State is responsible for visa adjudication and issuance outside the United States, under the guidance and ultimate authority of the Department of Homeland Security. Immigration inspectors and agents of Customs and Border Protection determine

actual admission into the United States, length of stay, and conditions of stay in the country at a port of entry. The information stamped into the non-immigrant visa only relates to when an individual may apply for entry into the country. DHS inspectors record the terms of an alien's admission on the I-94 form and/or in the alien's passport.

16. VISA WAIVER PROGRAM ("VWP"): Under the visa waiver program, nationals of countries with which the United States has certain agreements can enter the United States for up to 90 days as visitors for business or pleasure without first obtaining a visa stamp from a U. S. Embassy or Consulate abroad. No extension of stay or change of status is permitted. This program applies to most of the countries in the European Union, Japan, Australia, Brunei, New Zealand, Iceland, Norway, among others.

17. CRIME OF MORAL TURPITUDE ("CRMT"): A crime of moral turpitude has been defined as a crime that is inherently base, vile or depraved, and contrary to the excepted rules of morality. Matter of Danesh, 19 I & N Dec., 669,670 (BIA 1988); In re L-V-C-, 22 I & N Dec. 594 (BIA 1999). It is a crime that is malum in se. Matter of Franklin, 20 I & N Dec. 867 (BIA 1994), aff'd, Franklin v. INS, 72 F. 3d 571 (8th Cir. 1995).

18. DEPORTATION VS. INADMISSIBILITY: The 1996 immigration laws create two categories of aliens who possess no legal right to enter or remain in the United States. These are: excludable aliens and deportable aliens. Excludable aliens are those who have sought entry (admission) into the United States, but have been determined by immigration officers to be inadmissible.

Deportable aliens are already present in the United States, but have been deemed deportable. Aliens who fall into either of these categories are placed in removal proceedings. An alien deemed excludable has the opportunity to prove “beyond doubt” his eligibility for admission. In cases involving deportable aliens, on the other hand, the burden shifts to the DHS, which must establish that the alien is deportable by “clear and convincing” evidence.

III. MANDATED DEPORTATION

Criminal convictions mandating deportation are divided into five principal categories: (a) crimes of moral turpitude; (b) aggravated felonies; © controlled substance violations; (d) firearms offenses; and (e) certain miscellaneous crimes such as domestic violence. INA, Section 237(a)(2); 8 U. S. C. Section 1227(a)(2).

A crime of moral turpitude is one committed within five years of admission (including the alien’s most recent admission) to the United States, for which a sentence of one year or longer MAY be imposed. Moreover, a non-citizen who commits two or more crimes involving moral turpitude, at any time after admission that did not rise out of a single scheme of criminal conduct, is removable. INA, Section (a)(2)(A)(i)(II); 8 U. S. C. Section 1227(a)(2)(A)(i)(II).

The DHS bears the burden of proving that the two crimes are crimes involving moral turpitude and that they are not part of a single scheme. Handman v. INS, 98 F. 3d 183 (5th Cir. 1996); Wood v. Hay, 266 F. 2d 825 (9th Cir. 1959). The issue of what constitutes a single scheme is determined by

several factors: the nature of the crimes; timing of the commission of the crimes; similarity of the crimes in terms of object or purpose; methods or techniques; identity of the participants; similarity of victims; and whether the acts or transactions that constitute the crimes are connected. INS v. Pacheco, 546 F. 2d 448 (1st Cir. 1976).

Examples of crimes that do not form part of a single scheme include:

(a) forgery of two checks on two different accounts one year apart.

Matter of O’Gorman, 11 I & N Dec. 452 (BIA 1967).

(b) use of several credit cards in names of different people with intent to defraud. Matter of Adetiba, 20 I & N Dec. 506 (BIA 1992).

(c) two separate fraudulent check convictions by two separate courts in two different states regarding criminal acts committed three weeks apart. Matter of McLean, 12 I & N Dec. 551 (BIA 1967).

Among the crimes of moral turpitude that a potential bankruptcy petitioner may have committed (and that his/her bankruptcy lawyer must be alerted to) are the following:

(a) crimes of domestic violence. Matter of Tran, 21 I & N Dec. 291 (BIA 1996).

(b) robbery. Matter of Rodriguez-Palma, 17 I & N Dec. 465 (BIA 1980).

(c) grand larceny. United States ex rel. Meyer v. Day, 54 F. 2d 336 (2nd Cir. 1931).

(d) grand theft. Nwobue v. INS, 907 F. 2d 155 (9th Cir. 1990).

- (e) petty larceny. Bret v. INS, 386 F. 2d 439 (2nd Cir. 1967).
- (f) petty theft. Matter of R-, I & N Dec. 540 (BIA 1940).
- (g) receiving stolen property. Smriko v. Ashcroft, 387 F. 3d 279 (3rd Cir. 2004).
- (h) bad checks. Matter of Bart, 20 I & N Dec. 436 (BIA 1992).
- (I) conspiracy to defraud the United States by making false statements. Matter of Arevalo, 22 I & N Dec. 398 (BIA 1998).
- (j) conspiracy to evade federal taxes. Jordan v. DeGeoirge, 341 U. S. 223 (1951).
- (k) tax evasion. Carty v. Ashcroft, 395 F. 3d 1081 (9th Cir. 2005).

In recent years, the definition of aggravated felony has been broadly expanded. Among the recently added crimes are the following:

- (a) fraud or deceit where loss to the victim exceeds \$10,000 (formerly \$200,000);
- (b) tax offenses under 26 U. S. C. Section 7201 where revenue loss to the government exceeds \$10,000 (formerly \$200,000); and
- (c) a theft offense including receipt of stolen property when the term of imprisonment is one year.

An aggravated felon, under the statute, is “conclusively presumed deportable.” Thus, if a potential client has committed fraudulent transfers in excess of \$10,000 or if he/she has failed to pay the taxing authorities an amount in excess of \$10,000, his or her bankruptcy counsel must exercise caution in the bankruptcy proceedings.

For example, if an alien debtor admits under oath at the 341 examination of creditors (or at any other stage in the bankruptcy proceedings) that he/she committed the essential elements of a fraudulent transfer in excess of \$10,000 and/or that he/she defrauded the taxing authorities of an amount in excess of \$10,000, and if the debtor is denied a discharge of the underlying debts, not only must he/she be concerned about possible criminal prosecution by the pertinent federal or state authorities, but also he/she is arguably subject to removal proceedings by the DHS.

The admission under oath of the essential elements of fraudulent criminal activity, combined with the imposition of a penalty (i. e., the denial of discharge), fits within the definition of a “conviction” for immigration purposes. An eager prosecuting attorney for the DHS would doubtless latch onto the available documentation, if brought to his/her attention, and file the appropriate charges to initiate removal proceedings against the unsuspecting alien debtor (and to the chagrin of his/her bankruptcy counsel).

Any conviction under controlled substance laws, with the exception of a single offense involving possession of 30 grams or less of marijuana for personal use, mandates deportation. Likewise, certain firearms convictions, such as purchasing, selling, or carrying a firearm, render a non-citizen removable. Lastly, certain miscellaneous offenses including domestic violence or child abuse also result in the automatic triggering of removal proceedings against non-citizens.

Non-citizens may also be subject to removal for criminal behavior which does not necessarily result in conviction. Under certain conditions, adverse

immigration consequences may result if a non-citizen admits to certain criminal activity if the person is a drug user or addict, if there is a reason to believe that a person is a drug trafficker, or if he/she is the spouse or child of a drug trafficker who has knowingly profited from drug trafficking. INA Sections 212(a)(2)(A)(i)(II), 212(a)(2)(C)(ii), and 237(a)(2)(B)(ii).

Non-citizens who admit to a crime relating to a controlled substance or to a crime of moral turpitude are subject to removal and are statutorily barred from establishing good moral character. As a result, they may be barred from various forms of discretionary relief and naturalization (that is, from becoming naturalized United States citizens).

Pursuant to the rulings of the Board of Immigration Appeals ("BIA") in Matter of J-, 2 I & N Dec. 285 (1957) and Matter of G- M-, 7 I & N Dec. 40 (AG 1956), in order for an admission of wrongdoing to constitute grounds to deny admission or remove a non-citizen from the United States, four factors must be present. First, the conduct in question must constitute a crime under the law of the place where committed. Second, the non-citizen must admit to conduct that necessarily involves moral turpitude. It cannot be an admission to a broad criminal statute. Third, the consular officer or investigating officer should provide the applicant for admission with a definition of the crime before a non-citizen can make a valid admission to a crime of moral turpitude or a crime involving a controlled substance. Fourth, any admission must be freely made and voluntary.

The practitioner must also be aware that the ramifications of removal for a criminal act exceed the deportation itself. For instance, an alien who is removed

from the United States in an expedited removal proceeding cannot seek re-entry into the United States for five years. An alien who is removed from the United States in a removal proceeding cannot re-enter for ten (10) years. An alien who is removed from the United States a second time is not able to return for twenty (20) years. Finally, an alien convicted of an aggravated felony is barred for life from re-entering the country for life.

IV. CHECKLIST OF PROCEDURES TO DETERMINE IF THE CLIENT MAY BE SUBJECT TO REMOVAL AS A RESULT OF CRIMINAL CONVICTIONS OR ACTIVITY.

If a client has admitted to the commission of a crime, has been convicted of a crime, is facing or is likely to face criminal charges, the bankruptcy practitioner is advised to undertake the following precautionary measures:

(a) Determine the debtor's immigration status and any previous contact with the relevant agencies within the DHS.

(b) File a Freedom of Information/Privacy Act Request (commonly known as a "FOIA request") with the DHS to secure a copy of the client's immigration file. The FOIA form (Form G-639) can be downloaded and printed from the USCIS website at www.uscis.gov.

(c) Determine the client's past criminal history by obtaining a copy of the client's criminal file, including a copy of the sentencing transcript, plea colloquy, and the plea agreement, if applicable.

(d) Examine the charges the client currently faces or may face as a result of certain admissions made or to be made under oath during the bankruptcy

proceedings to determine the following:

- (i) Is the crime an aggravated felony?
 - (ii) Is the sentence for a year or more?
 - (iii) Is the crime a crime of violence or theft?
 - (iv) If an element of the crime is fraud, what is the dollar amount in controversy?
 - (v) Is the crime a crime of moral turpitude?
- (e) Determine if the conviction meets the definition of conviction for immigration purposes as set forth in INA Section 101(a)(48)(A).
- (f) What is the term of imprisonment imposed or that may be imposed?
- (g) Determine whether the client has admitted to certain criminal behavior or whether the client may be forced to admit under examination to certain behavior that may result in the filing of criminal charges. If so, have the four elements which constitute an admission of criminal acts for immigration purposes been met?

V. CONCLUSION.

This article has focused primarily on the crimes that are at times committed by persons in need of bankruptcy relief, but that may result in the removal from the United States of an unsuspecting non-citizen resident alien. If an alien debtor becomes subject to removal because of criminal conduct that is revealed during the course of the bankruptcy proceedings, his/her immigration practitioner would be called upon to determine what relief from deportation, if

any, might be available to allow the alien to remain in the United States. Although the forms of relief available to non-citizens with criminal convictions have been severely curtailed in recent years, there do remain defenses for certain deportable aliens who have not been convicted of aggravated felony crimes. These include:

(a) “Cancellation of Removal” for resident aliens who have been lawfully admitted for permanent residence for five years or more, who have maintained continuous residence in the United States for seven years after having been admitted, and who lack convictions for any aggravated felony.

(b) “Cancellation of Removal” for non-permanent resident aliens who have ten (10) years of physical presence in the United States immediately preceding the date of application for cancellation, who have displayed “good moral character” during this ten year period, who can demonstrate “exceptional and extremely unusual hardship to their U. S. citizen or lawful permanent resident spouse, parent, or child, who have no convictions for crimes involving moral turpitude, crimes classified as “aggravated felony” status, drugs, weapons or domestic violence, and who make a positive showing of discretionary merit to an Immigration Judge.

(c) Former 212(c) relief, if the alien has been a lawful permanent resident who has maintained seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of a final administrative order of deportation or removal, who entered a plea of guilty or nolo contendere to an offense rendering him/her deportable or removable pursuant to a plea agreement made before April

1, 1997, and who is otherwise eligible to apply for such relief under the 212(c) standards in effect at the time the plea was made.

(d) asylum

(e) withholding of removal

(f) relief under the Convention Against Torture

(g) the general nonimmigrant waiver available under INA Section 212(d)(3); or

(h) pursuing citizenship through naturalization.

Counsel may also explore the possibility of pursuing an executive pardon in particularly compelling cases.

In conclusion, if the bankruptcy practitioner is faced with a non-citizen client who may have engaged in criminal activity or in a crime that involves moral turpitude, he/she should seek the in-put of an experienced immigration practitioner prior to filing a petition for relief under Chapter 11. The failure to do so may result in serious adverse consequences, including the removal of his/her client from the United States with the possibility of a tragic life-time bar from re-entry to the country, notwithstanding the length of years and family ties in the United States.

VI. SOURCE MATERIALS

In preparing this article, the author has consulted the following sources (which he recommends to those who have an interest in the interplay between the provisions of the Bankruptcy Code and the Immigration and Nationality Act):

1. Patrick, Michael D., "The Consequences of Criminal Behavior," published in the July 27, 1998 issue of The New York Law Journal, NLP IP Company.

2. Vail, Joseph A., Essentials of Removal and Relief, American Immigration Lawyers' Association, Washington, D. C. (2006).

3. Wang, Silvia S., "Selected Fundamentals of Immigration Law 2004-2005 Edition: General Immigration Concepts," American Immigration Lawyers' Association, Washington, D. C. (2005)

4. Immigration and Nationality Law Handbook, 2005-2006 Edition, American Immigration Lawyers' Association, Washington, D. C. (2006).

5. Kurzban's Immigration Law Sourcebook, by Ira J. Kurzban, (Eighth ed.) American Immigration Law Foundation, Washington, D. C. (2004).