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LAUNCH CHAT

GUEST ARTICLE: “BUT IT WAS ONLY A DWI…”, BY DANIEL M. KOWALSKI

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Business immigration lawyers face daily hurdles in managing client expectations. Savvy clients, especially in the computer science, engineering or other high-tech fields, demand quick turnaround time. If we can order books or CDs online for next-day delivery, the thinking goes, why not visas?

Our clients soon discover, however, that U.S. immigration laws are not as "user-friendly" as the software they may be designing. One of the many hidden pitfalls has to do with minor criminal convictions that can delay - or even completely block - the issuance of working visas.

Take the case of "Jacques Jolie," an imaginary client from France. He studied for many years at the University of Texas on a valid student visa, and emerged with a Ph.D. in low-temperature physics. He's now vacationing in France with his family, but several U.S. computer chip manufacturers have e-mailed him, offering him high-paying jobs under the temporary H-1B visa category.

But "the Jackster," as his college roommates used to call him, has a bit of a history. Weekends found Jacques in the bars on 6th Street in Austin, and more than once driving back from Spring Break at Padre Island, Jacques racked up DWI convictions, one of them severe. (For purposes of discussion, we'll leave the number and specifics of the convictions vague.) And in the context of plea bargaining one DWI case, Jacques admitted possession of a marijuana cigarette in the glove-box of his car, even though he was not charged with possession. Before we can determine if Jacques will obtain his working visa to be able to re-enter the U.S., some background is needed.

The Immigration and Nationality Act ("INA") contains a long laundry list of "inadmissibility" grounds. Applicants for visas - temporary or permanent - must show that none of the inadmissibility grounds apply. If one of the grounds is triggered, a statutory waiver (if there is one) must be applied for and obtained before the visa can issue.

Many criminal convictions, no matter how minor or how old, can trigger inadmissibility. And the INA even contains inadmissibility grounds for activity not rising to the level of a conviction. For example, if a U.S. consular officer or INS inspector has "reason to believe" the applicant is or has been a "controlled substance trafficker," the applicant is inadmissible, even if the applicant was never charged with any crime, much less convicted.

To further complicate matters, many states have statutory sentencing schemes that provide for "deferred adjudication" or other options not rising to the level of "conviction" under state law. Yet the federal statutory definition of "conviction" in the INA, for immigration purposes, is so broad that it can rope in clients who have not, under state law, been convicted. See, e.g., *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999)(deferred adjudication under Tex. Code Crim. P. Ann. art. 42.12 § 5 is a "conviction" for federal immigration law purposes).

When evaluating a client's criminal history for immigration law purposes, immigration attorneys look at everything: the police report, the charging documents, the exact language of the statutes under which the client is being charged, the minimum and maximum sentences possible under those statutes, the wording of the plea bargain (or conviction after jury or bench trial) and the sentencing documents.

One question to be asked is whether the conviction is for a "crime involving moral turpitude" (a/k/a "CIMT,") one of the major inadmissibility grounds under the INA. Having survived a "void for vagueness" challenge at the Supreme Court level in 1951, that statutory phrase is now broadly defined as "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Torres-Varela*, 23 I&N Dec. 78, Interim Decision No. 3449 (BIA 2001) (2001 BIA LEXIS 10). Needless to say, much legal ink has been spilled in litigating whether the term applies to specific crimes.

Under Arizona law, for example, some DUI convictions are CIMTs, *Matter of Lopez-Meza*, 22 I&N Dec. 1188, Interim Decision No. 3423 (BIA 1999) (1999 BIA LEXIS 50), while others are not, *Torres-Varela, supra*. In Jacques's case, then, we would have to critically examine the Texas statutes (municipal or state) under which he was convicted to determine if any of them are CIMTs.

What about the joint in the glove-box? There was no conviction, but Jacques may be inadmissible as one whom the INS has "reason to believe" is or was a controlled-substance trafficker, and/or as one who "admits having committed, or who admits committing acts which constitute the essential elements of" any law "relating to" a controlled-substance.

Finally, we left the number of Jacques' convictions, and their sentences, vague: if he racked up two or more convictions (not part of a "single scheme," and regardless of whether they involve moral turpitude) and the "aggregate sentences to confinement" were five years or more, he is inadmissible.

But what if Jacques were not in France? Would his chances be any better if, after graduation, he had stayed in Austin while pondering the H-1B visa offers? Maybe not: running nearly parallel to the grounds of inadmissibility (INA Sec. 212) are the grounds of deportability under INA Sec. 237. Jacques and his immigration lawyer and criminal defense lawyer need to take a close look again at the CIMT issue, the multiple conviction issue, and, most dangerous of all, the "aggravated felony" issue.

The INA definition of "aggravated felony" at INA Sec. 101(a)(43) is so broad it

encompasses many convictions most lawyers, judges and clients deem "minor," including, incredibly enough, some *misdemeanors: see, e.g., U.S. v. Graham*, 167 F.3d 787 (3rd Cir. 1999)(cert. denied)(N.Y. petit larceny misdemeanor conviction with one year sentence is an "aggravated felony" for immigration law purposes.) One of the most dangerous sub-categories of the aggravated felony definition is the "crime of violence," referencing 18 U.S.C. Sec. 16. And here's where DWI defense work can get very tricky.

In 1998 the Board of Immigration Appeals ("BIA") issued a bombshell of a decision, *Matter of Magallanes-García*, 21 I&N Dec. 1 (BIA 1998), in which they held an Arizona DUI to be a "crime of violence" and therefore an aggravated felony. A year later they followed-up with *Matter of Puente-Salazar*, 22 I&N Dec. 1006 (BIA 1999), holding a Texas DWI to be a crime of violence / aggravated felony. The immigration bar fought back, and after fours years of federal circuit court litigation the BIA partially reversed course in April 2002 with *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002), overruling *Magallanes-García* and *Puente-Salazar* but leaving the door open: "We will follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence… In those circuits that have not yet ruled on the issue, we will require that the elements of the offense reflect that there is a substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence under § 16(b). Moreover, we will require that an offense be committed at least recklessly to meet this requirement."

So, if Jacques' DWIs are not crimes of violence / aggravated felonies, what are they? They might be a variety of our old friend, the crime involving moral turpitude, *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999)(Arizona aggravated DUI conviction is a crime involving moral turpitude), or they might not be, *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001)(conviction under different Arizona DUI statute is not a crime involving moral turpitude), depending on the exact language of the statute.

It's safe to say Jacques' immigration attorneys and criminal defense attorneys will have their work cut out for them to determine Jacques' future in the U.S. It also bears noting that if Jacques' criminal defense attorneys had consulted with immigration counsel prior to pleading or sentencing, the immigration consequences might have been minimized or eliminated.

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