

Representing Non-Citizen Clients in Light of Padilla v. Kentucky



- * Estella Cisneros, Anuj Nadadur, Rebecca Scholtz, Crystal Robles, & Bonnie Doyle, Law Student Interns
- * Muneer I. Ahmad, Clinical Professor
- * Jerome N. Frank Legal Services Organization, Yale Law School

- * Lisa Villa
- * Connecticut Criminal Defense Lawyers Association

Outline of the Training

- * Implications of *Padilla v. Kentucky*
- * Immigration Law Overview
- * Introduction to Updated CCDLA Guide
- * Hypotheticals
 - * LPR charged with larceny
 - * Undocumented client with drug charges
- * Discussion/Q&A

Connecticut Law

Pre-*Padilla v. Kentucky*

- * Collateral Consequences vs. Direct Consequences
- * “Affirmative Misadvice” Rule
- * Implications of Connecticut law pre-*Padilla* for criminal defense practice

Key Points in Padilla V. Kentucky

- * **Holding**—Defense counsel has an obligation under the 6th Amendment to affirmatively advise non-citizen clients of immigration consequences of plea and sentencing alternatives.
- * Clear vs. unclear immigration consequences?
- * Professional standards guide what constitutes “effective assistance” so as to satisfy first prong of *Strickland* (reasonableness)

Obligations recognized by Padilla

- × **Ask** your client for his/her immigration status; other relevant facts
- × **Analyze** specific immigration consequences of key defense decisions (immigration analysis)
- × **Advise** your client specifically about immigration consequences of different decisions
- × **Mitigate** and **defend** according to your client's priorities
- × **Document** advice given to client

What Are Some Other Immigration Consequences of Criminal Convictions?

- * Detention during deportation case, sometimes mandatory
- * Bar to getting lawful immigration status (green card, asylum, TPS, student or work visas)
- * Bar to citizenship (temporary or permanent)
- * Bar to returning to the United States after trip abroad or after deportation
- * Bar to relief from deportation

What Offenses Might Have Immigration Consequences?

- * Almost any offense may have an immigration consequences for some non-citizens.
- * **Individualized analysis is crucial.**

Key Terminology

(immigration terms of art)



- * Lawful Permanent Resident (“LPR”) vs. Non-immigrant vs. Undocumented
- * Inadmissibility vs. Deportability
- * Aggravated Felony (“AF”)
- * Crime Involving Moral Turpitude (“CIMT”)
- * Controlled Substance Offense (“CSO”)
- * “Conviction”

Purpose of the CCDLA Guide

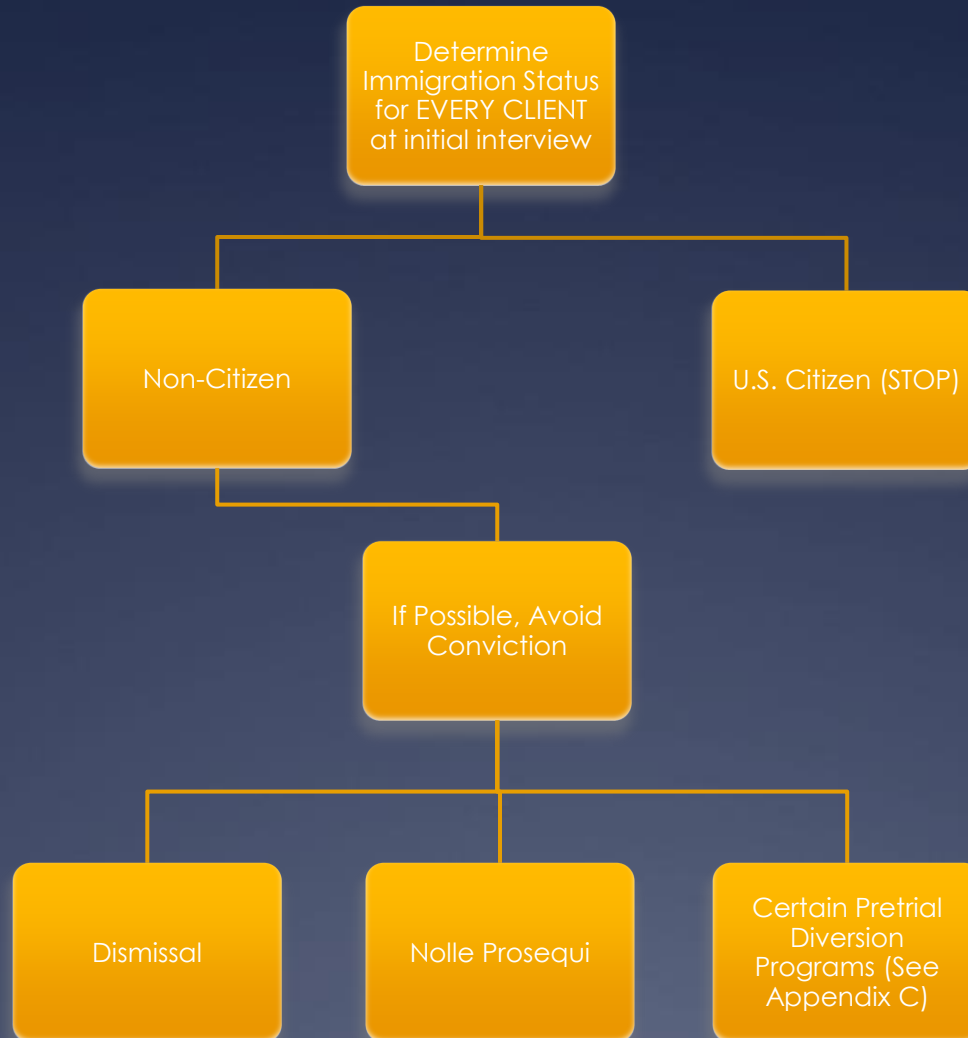
- * **Purpose**

- * To provide defense attorneys with Connecticut-specific information on how to determine what the immigration consequences of their non-citizen clients' criminal convictions might be and how to mitigate them, if possible

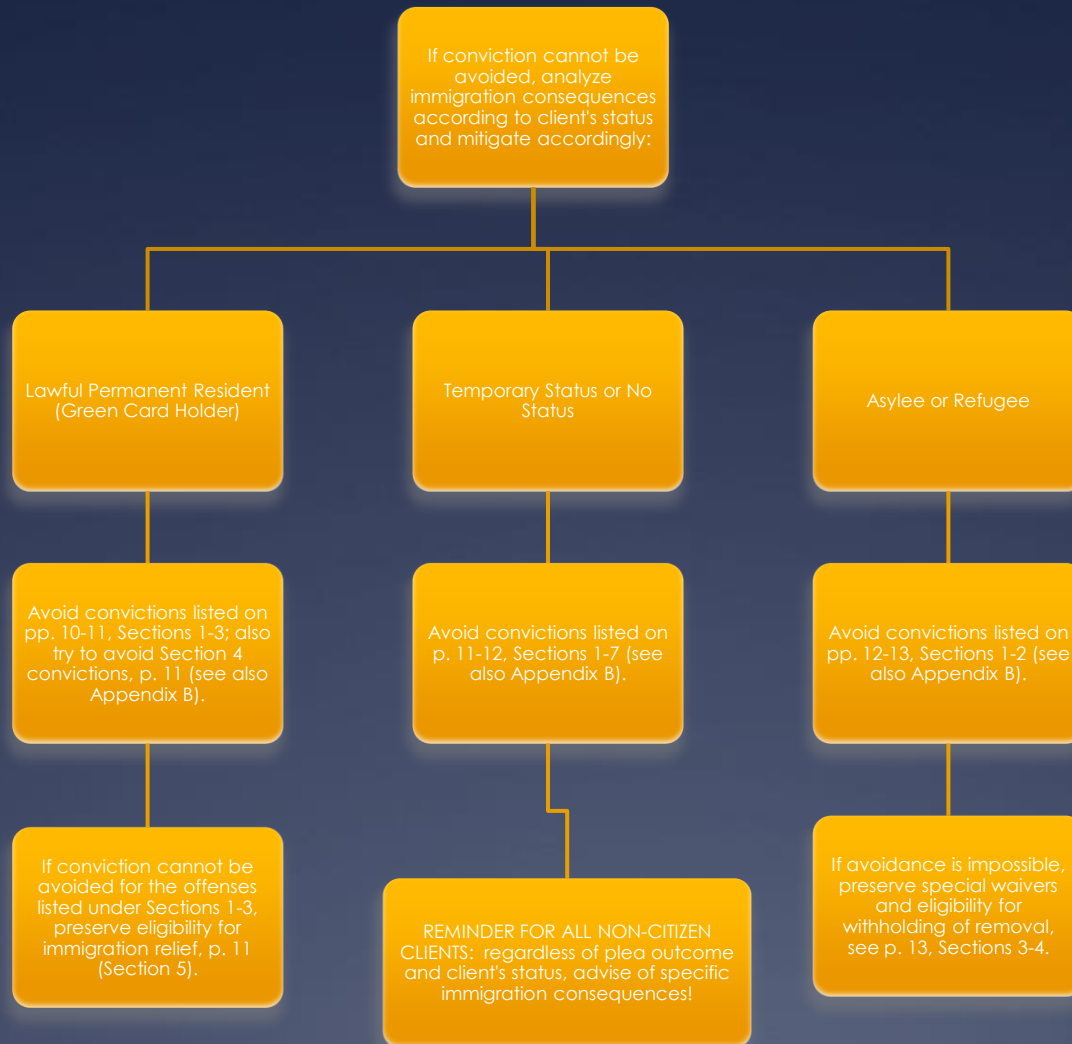
- * **Limitations**

- * Research tool, not answer key
- * Not comprehensive or definitive
- * Consult additional resources

STEPS FLOWCHART



STEPS FLOWCHART



Step 1

- * Step 1: Determine Client's Immigration Status
 - * Obtain complete criminal history, prior deportations and family ties as well
 - * Use Appendix E, Immigration Questionnaire



Step 2

- × **Step 2**: Avoid a disposition that constitutes a “conviction” for immigration law purposes
 - + Dismissal
 - + Nolle prosequi
 - + Certain Pre-trial diversion programs
 - + Note: avoid guilty plea or admission of facts warranting a finding of guilt

Step 3

- * **Step 3**: Based on client's immigration status, determine possible immigration consequences of conviction



Step 4

- × **Step 4**: Working with client, mitigate possible immigration consequences of conviction
 - + In general: plead down to “safer” offenses in order to avoid worst categories (such as AF, CIMT, and CSO)

Step 5



× Step 5: Even if adverse immigration consequences cannot be avoided, and conviction results, properly advise your client

- + Possibility of federal custody
- + Effect on future immigration benefits
- + Consequences for reentry
- + Avoiding contact with immigration system (where possible)

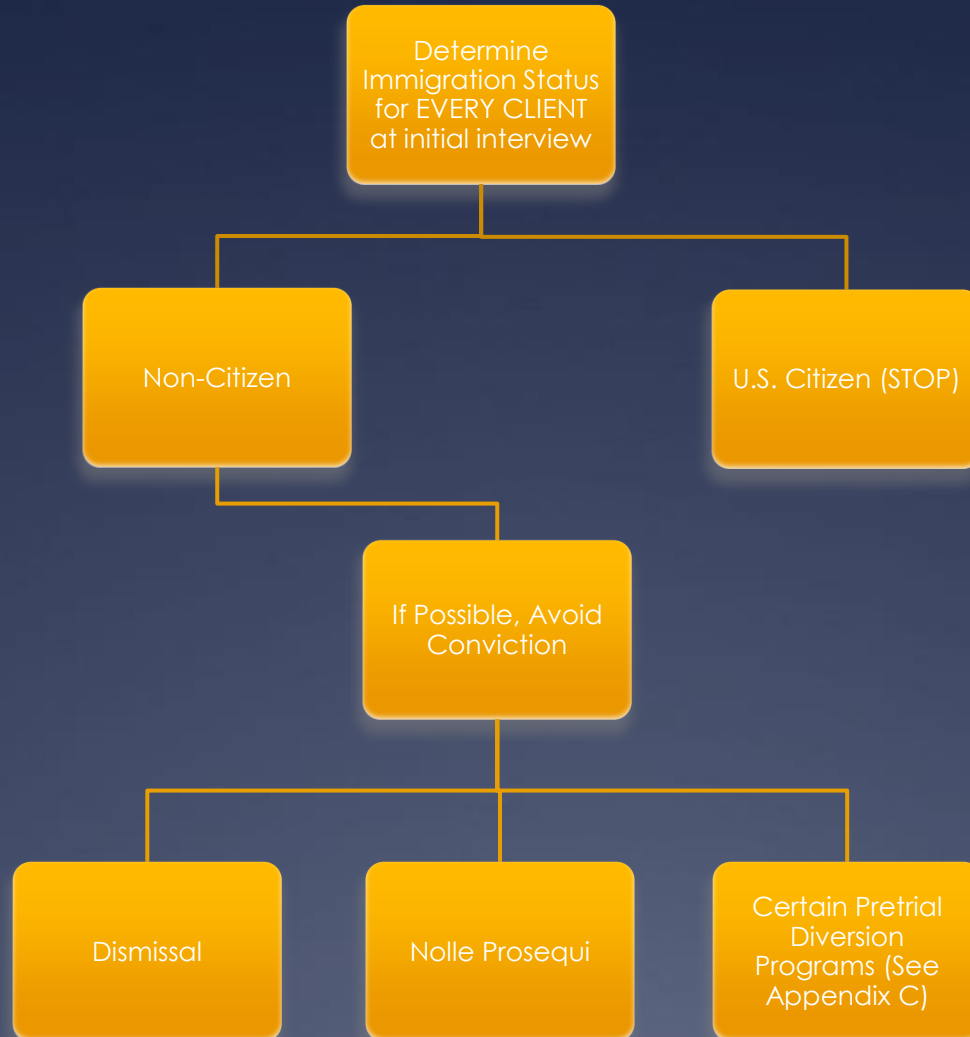
Hypothetical 1: Theresa Smith (Larceny)

- × Theresa Smith was charged with 4th degree larceny (53a-125) for stealing \$1,100 worth of merchandise from a department store
- × Theresa entered the country as an Legal Permanent Resident (“LPR”) four years ago
- × She wants to stay in the United States because she has two small U.S. citizen children who have never lived in the U.K.
- × Her father, who still resides in the U.K., is very ill
- × No prior criminal record

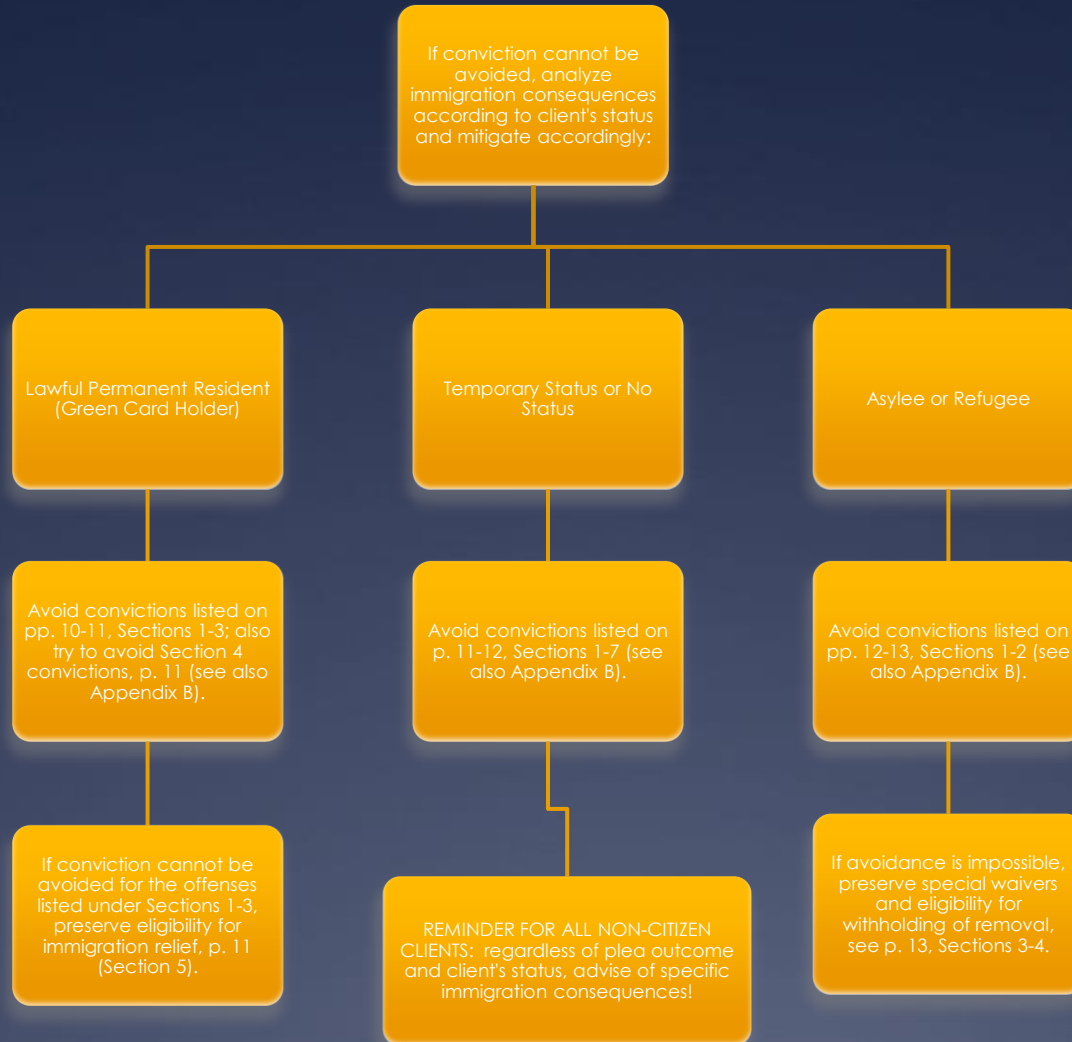
Elements of 53a-125: 4th- degree Larceny

- * Includes shoplifting
- * Class A misdemeanor (maximum sentence is one year)
- * Fourth Degree: value of property greater than \$1,000

STEPS FLOWCHART



STEPS FLOWCHART



Exercise (5 Minutes)

- * Identify the categories of deportability and inadmissibility grounds which we should be concerned about given the fact that Theresa is an LPR and has been charged with larceny (see Guide, Page 10)
- * Relate these categories to client's goals, which we can infer from the hypothetical
 - * Charged with 4th degree larceny
 - * Entered country as LPR 4 years ago
 - * Wants to stay in US because she has two small citizen children who have never lived in the U.K.
 - * Her father, who still resides in the U.K., is very ill
 - * No prior criminal record

Steps 1-2

Step 1: Determine Immigration Status

LPR

Wishes to remain in country

Step 2: Possible to Avoid

“Conviction”?

Step 3: Determine Immigration Consequences

CATEGORIES TO AVOID

* Aggravated Felony?

- * **Theft AF** = theft offense where term of imprisonment (including suspended sentence) is more than one year PLUS caselaw has determined 2nd degree larceny = 'theft' AF
 - * YES, if actual sentence is greater than or equal to one year

* Crime Involving Moral Turpitude? Deportable Offense?

- * Theft offenses are presumed to be CIMTs (2d) PLUS caselaw has determined 3^d degree larceny = CIMT
- * For a CIMT to be a deportable offense, the crime must have been committed **within five years of admission AND the maximum possible sentence** must be one year or more
 - * Yes
 - Maximum possible sentence is one year (Class A Misdemeanor)
 - Theresa was admitted four years ago, so within five years of admission

Step 3: Analyze Immigration Consequences

Elements	Analysis	
<u>Theft AF?</u>		
Theft Offense	Yes	
Actual term of imprisonment ≥ 1 year	Depends	
<u>CIMT as Deportable Offense?</u>		
Crime Involving Moral Turpitude?	Yes	
<u>Deportable CIMT?</u>		
Committed within five years of admission, AND	Yes	
Maximum possible sentence is ≥ 1 year?	Yes (Class A = 1 year)	

Step 3-4: Analyze and Mitigate

Elements	Analysis	Mitigation (Step 4)
<u>Theft AF?</u>		
Theft Offense	Yes	X
Actual term of imprisonment \geq 1 year	Depends	Obtain 364 days or less
<u>CIMT?</u>		
Crime Involving Moral Turpitude?	Yes	X
<u>Deportable CIMT?</u>		
Committed within five years of admission, AND	Yes	X
Maximum possible sentence is \geq 1 year	Yes (Class A = 1 year or less)	Plead down to 5th-degree larceny = 6 months max (class B misdemeanor)

Step 5: Advise

* Advise of immigration consequences

- * 5th-degree larceny = safest
- * 4th-degree larceny = NOT AF if plead down to 364 days
 - * AF if plead to 365 days → deportable
- * 4th-degree larceny = CIMT → deportable

* Other Consequences

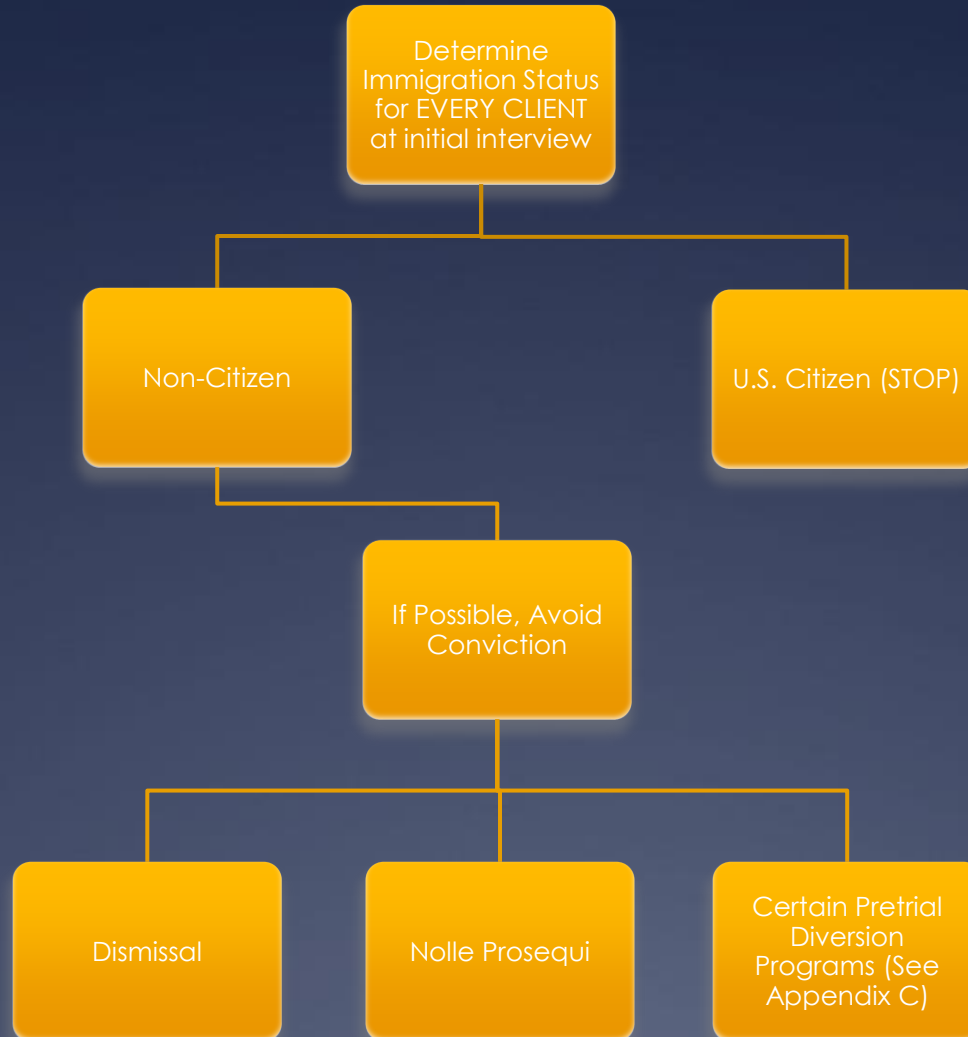
- * Federal custody
- * Consult immigration attorney when applying for citizenship, traveling abroad, requesting a replacement green card
- * Other examples in Guide

Hypothetical # 2:

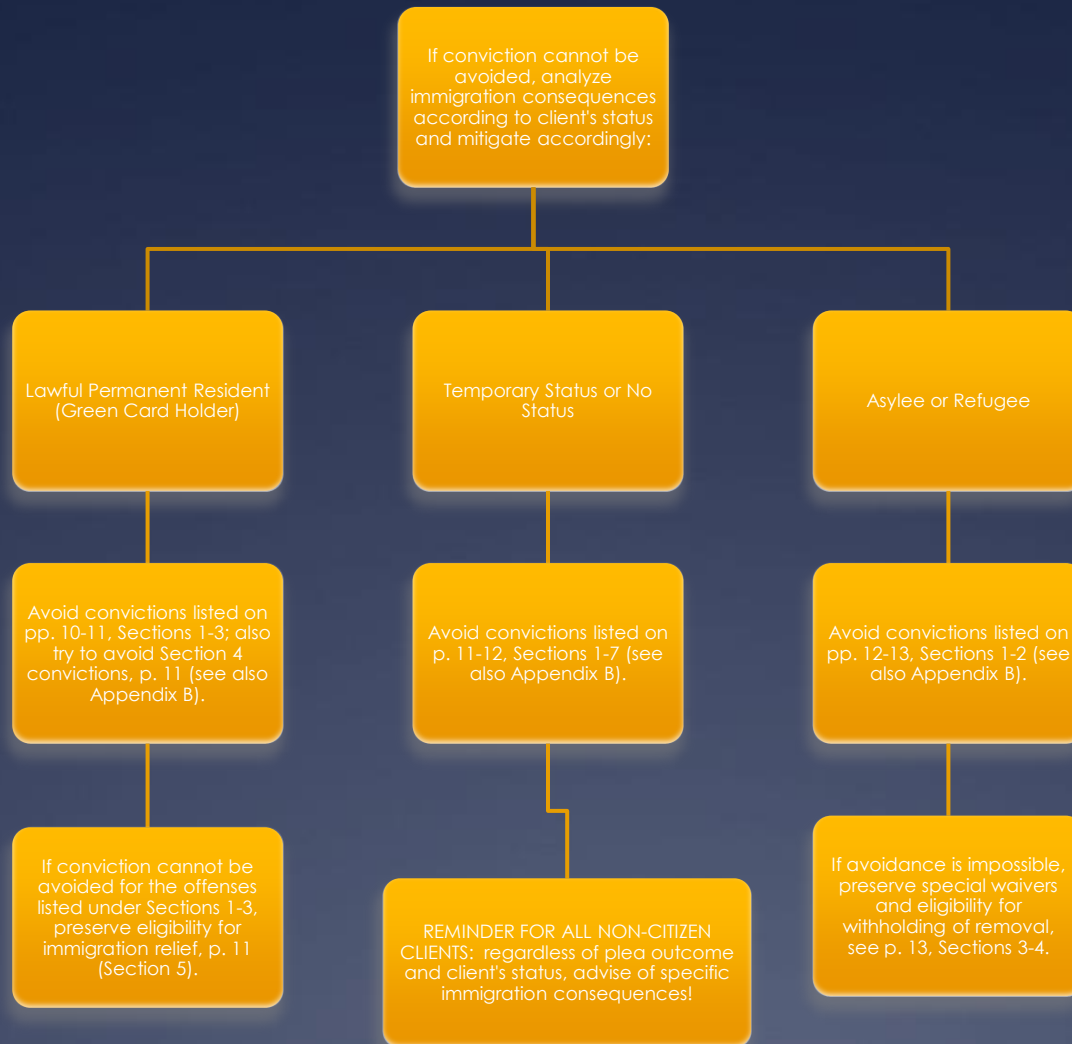
Ramon Lopez

- * Ramon Lopez is charged with possession of 25 g of marijuana with intent to sell [Ct. Gen. Stat. 21a-277(b)].
- * He is a national of Panama and an undocumented immigrant, but he wishes to preserve LPR eligibility in the future.
- * He has 4 US citizen children who were born in the US.
- * Mr. Lopez has been in the country for eight years.
- * He has never been arrested or deported before.

STEPS FLOWCHART



STEPS FLOWCHART



Step 1: Determine Immigration Status

- * Go through questionnaire.
- * Answers to questionnaire signal what forms of relief the client may potentially be eligible for.

When A Client Has No Status

B. If the client has only temporary or no status (nonimmigrant or undocumented immigrant):

1. Avoid convictions that will trigger permanent inadmissibility:

- a. Most importantly, avoid conviction for a Controlled Substance Offense, 8 U.S.C. § 1182(a)(1)(II):¹³
 - i. *Except:* If conviction is for a first-offense simple possession of 30 grams (1.06 oz) or less of marijuana, client could still ask for waiver of inadmissibility, if he or she meets additional requirements, 8 U.S.C. § 1182(h);
- b. Avoid conviction for “violent or dangerous” crime (undefined). *See In re Jean*, 23 I. & N. Dec. 373, 2002 WL 968631 (B.I.A. 2002).

2. Avoid other convictions triggering inadmissibility:

- a. Avoid conviction for Crime Involving Moral Turpitude (“CIMT”), *see* 8 U.S.C. § 1182(a)(2)(A)(i)(I):
 - i. *Except: Petty offense exception:* a conviction for a CIMT will NOT trigger inadmissibility IF the defendant has not committed a prior CIMT and the maximum potential penalty for this CIMT does not exceed one year (in Connecticut, this means it is a misdemeanor), AND the defendant was not actually sentenced to more than 6 months (including any suspended sentence), *see* 8 U.S.C. § 1182(a)(2)(A)(ii)(II);
- b. Avoid a situation where the client will have been convicted of two or more offenses *of any type* if the aggregate sentences to confinement actually imposed amount to five years or more, 8 U.S.C. § 1182(a)(2)(B);¹⁴
- c. Avoid convictions relating to prostitution, 8 U.S.C. § 1182(a)(2)(D);
- d. Avoid dispositions and admissions that may result in client being considered a “drug abuser or addict,” 8 U.S.C. 1182(a)(1)(A)(iv).
- e. Avoid other miscellaneous grounds of inadmissibility.¹⁵

Step 2: Avoid Conviction if Possible

- * For the purposes of this hypo, conviction is unavoidable.

Step 3: Determine the Consequences

Avoid a Finding of Inadmissibility

Guide shows that 21a-277(b) is a CIMT and a CSO

<p>Illegal Manufacture, Distribution, Sale, Possession w/ Intent to Distribute, etc. – NOT a Hallucinogenic or Narcotic [First Offense = up to 7 years]</p>	<p>21a-277(b)</p>	<p>Would be considered a "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 U.S.C. § 802. See note for 21a-277(a).</p>
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<p>Yes. See note for 21a-277(a).</p>	<p>CSO - Would be considered a CSO if record of conviction establishes a controlled substance as defined in 21 U.S.C. § 802.</p>	<p>DefAttys: 1) If first-time offense, strongly consider AR or CADAC; 2) Avoid reference in ROC as to specific controlled substance involved.</p>
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Step 4: Mitigate

Avoid a Finding of Inadmissibility

	21a-277(b)	21a-279(c)
Crime Involving Moral Turpitude (CIMT)	Yes	No
Controlled Substance Offense (CSO)	Yes	Yes but waiver available*

*In the context of inadmissibility, one can apply for a waiver if conviction is for possession of 30g or less of marijuana. (**make sure record reflects that client had LESS than 30g**).

Guide shows that 21a-279(c) is not a CIMT

Voluntary Departure

4. Preserve eligibility for voluntary departure, 8 U.S.C. § 1229c:

- a. Avoid conviction for an Aggravated Felony;
- b. Avoid other convictions preventing a finding of good moral character:
 - i. Avoid conviction for Controlled Substance Offense (other than single offense of simple possession of 30 grams or less of marijuana);
 - ii. Avoid conviction for Crime Involving Moral Turpitude
 - iii. Avoid convictions of any type if aggregate sentences of imprisonment are five years or more;
 - iv. Avoid convictions for two or more gambling offenses;
 - v. Avoid convictions of any type resulting in confinement to a penal institution for 180 days or more.

Avoid:

- * Aggravated Felonies
- * CSOs
- * CIMTs

Step 3: Determine the Consequences

Preserve Eligibility for Voluntary Departure

Again, guide shows that 21a-277(b) is an agfel, a CIMT, and a CSO

Illegal Manufacture, Distribution, Sale, Possession w/ Intent to Distribute, etc. – NOT a Hallucinogenic or Narcotic [First Offense = up to 7 years]	21a-277(b)	Would be considered a "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 U.S.C. § 802. See note for 21a-277(a).
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Step 4: Mitigate

Attempt to plead down to simple possession under 21a-279b or 21a-279c with the record of conviction showing 30 g of marijuana or less

	21a-277(b)	21a-279(c)
Aggravated Felony	Yes	No
Crime Involving Moral Turpitude (CIMT)	Yes	No
Controlled Substance Offense (CSO)	Yes	No (30 g marijuana exception)

*Possession of 30g or less of marijuana is not considered a CSO in the deportability context (**make sure record reflects that client had 30 g or LESS**). For purposes of voluntary departure, the deportability definition applies.

Questions?



Further Resources

- * Print Resources—Reference sheet in Guide
 - * www.defendingimmigrants.org
 - * www.immigrantdefenseproject.org
 - * Tooby Guide:
www.criminalandimmigrationlaw.com/offers/2010-01/

- * Contact information
 - * Lisa Villa
 - * (860) 655-9434 x333
 - * Elisa.Villa@jud.ct.gov