5.4 Nonimmigrant Visa Holder

Nonimmigrant visa holders are admitted to the U.S. on a temporary visa for a specific purpose, such as tourism, study, or temporary work. *See supra* § 2.2D, Individuals with Temporary Lawful Status or Pending Application for Staus. These noncitizens may have only temporary status, but like LPRs they may have come to this country many years ago and may have lived and worked in this country for many years. They can be removed because of a criminal conviction.

A. Immigration Priorities for Nonimmigrant Visa Holder

A nonimmigrant visa holder may be removed from the U.S. based on an offense that triggers deportability. Such offenses are, therefore, their primary immigration concern.

A secondary concern is an offense that triggers inadmissibility. Certain nonimmigrant visa holders may be able to become LPRs based on a family relationship or employer sponsor. These individuals will be concerned about offenses that trigger inadmissibility, which would preclude them from becoming an LPR and remaining in the U.S permanently.

Third, if your client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. by seeking relief from removal. Dispositions to avoid include controlled substance offenses, violent offenses, and particularly serious crimes, explained further below.

B. Impact on Nonimmigrant Visa Holder of a Criminal Disposition Triggering Deportability

Concern about Deportable Offenses. The greatest immigration concern for lawfully admitted noncitizens are dispositions triggering deportability, as they can be removed from the U.S for such offenses. *See supra* § 3.4G, Chart of Principal Deportable Offenses.

Additional Concern for Nonimmigrant Visa Holder Client. As a practical matter, a criminal disposition of any kind can potentially trigger a separate ground of deportability for nonimmigrant visa holders. A nonimmigrant who has failed to meet the conditions for

continued nonimmigrant status is deportable. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i). For example, a student who has failed to maintain a full course of study because he or she was sentenced to six months in jail may be deportable on this ground, even if the conviction itself is not a deportable offense. Similarly, a nonimmigrant with "visitor" status who is sentenced to active time in jail or prison will be deemed to have failed to maintain that status. *See Matter of A-*, 6 I&N Dec. 762 (BIA 1955) (visitor status cannot be pursued in jail).

Practice Note: If your client has a nonimmigrant visa other than a visitor visa, your client should consult with an immigration attorney before addressing the pending criminal charges. The consequences for each nonimmigrant status vary substantially and are beyond the scope of this manual.

C. Impact on Nonimmigrant Visa Holder of a Criminal Disposition Triggering Inadmissibility

A second concern for a nonimmigrant is an offense that triggers inadmissibility, which would prevent them from becoming an LPR. Some noncitizens may have a pending application for LPR status or some basis for acquiring LPR status in the future. *See supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility.

Practice Note: The routes to LPR status are a complicated and constantly changing area of law. If your client is in the process of seeking LPR status, you should consult with his or her immigration attorney regarding the status of the application.

D. Forms of Relief Depending on Offense

If your client cannot avoid deportability, he or she may still be able to remain in the U.S. by seeking relief from removal. Here are three principal forms of relief. It may be helpful to consult with an immigration lawyer to determine whether your client is otherwise eligible for these forms of relief.

Adjustment of Status (if not convicted of inadmissible offense). If your client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. permanently by seeking adjustment of status and becoming an LPR. Adjusting status is a defense to deportation, but your client would need a route to seek such status. Note that the criminal grounds of inadmissibility do not include some crimes that would render a person deportable—namely, firearm and domestic violence offenses. (If, however, the firearm or domestic violence offense constitutes a crime of moral turpitude, which is one of the crimes of inadmissibility, the offense could still render the person inadmissible.) Therefore, a conviction for carrying a concealed firearm would not render your client inadmissible and would not bar adjustment of status.

212(h) Waiver (if not convicted of controlled substance offense). If your client cannot avoid a crime of inadmissibility and is otherwise able to adjust status, he or she may still be able to obtain LPR status by seeking a form of relief known as a 212(h) waiver. *See*

INA § 212(h), 8 U.S.C. § 1182(h). In many cases, to obtain this waiver, the noncitizen would need to demonstrate that she is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident and that denial of the waiver would result in "extreme hardship" to that relative. A conviction of a controlled substance offense (other than a single offense of simple possession of 30 grams or less of marijuana if the client has no prior controlled substance convictions) is a bar to a 212(h) waiver and consequently a permanent bar to obtaining LPR status.

In addition, Department of Homeland Security (DHS) regulations provide that a conviction of a "violent or dangerous" crime will presumptively bar a 212(h) waiver. *See* 8 C.F.R. 212.7(d); *see also supra* "209(c) Waiver (if not convicted of drug trafficking or violent offense)" in § 5.2D, Forms of Relief Depending on Offense.

Practice Note: A conviction for a Class 1 misdemeanor possession of marijuana may involve more or less than 30 grams of marijuana. If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana, it is important to document in the record of conviction that your client possessed 30 grams or less of marijuana, if applicable, for purposes of 212(h) relief. *See supra* § 3.3C, Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility.

Withholding of Removal (if not convicted of a particularly serious offense). If your client cannot avoid an offense triggering deportability, and fears persecution in the country of removal, he or she may still be able to remain in the U.S. by seeking "withholding of removal." *See* § INA 241(b)(3); 8 U.S.C. § 1231(b)(3). It is a less beneficial form of persecution-based relief and requires a higher threshold showing of persecution than asylum.

Withholding of removal is barred by a conviction of a "particularly serious crime." In this context, a particularly serious crime includes one or more aggravated felony convictions with an aggregate sentence of imprisonment (active or suspended) of five years or more. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The five-year sentence may be for one conviction or different convictions, whether or not resolved at the same time. A particularly serious crime presumptively includes an aggravated felony conviction involving trafficking in a controlled substance. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (recognizing that presumption of particularly serious crime is rebuttable). Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying facts of the conviction and the type of sentence imposed.