5.6 Noncitizens without Immigration Status

Noncitizens without lawful status have no government authorization to be present in the United States. *See supra* § 2.2E, Individuals without Immigration Status. This category includes undocumented people who entered the U.S. without inspection (crossed the border illegally), as well as individuals who entered the U.S. on a valid visa but remained past their authorized period of stay. Some of these individuals may have pending applications for status or may be able, now or in the future, to obtain LPR status or persecution-based relief.

These noncitizens may have no current immigration 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. An individual without status can be removed because of a criminal conviction. If an individual does not have lawful immigration status, he or she also may be removed immediately on that basis alone.

Because a client without status can be removed for being here unlawfully, sometimes criminal defense attorneys assume that the outcome of the criminal case does not matter. However, a removal based on criminal grounds (especially aggravated felony grounds) carries many more adverse consequences than a removal based on unlawful presence in the U.S. Thus, the outcome of the criminal case may still be important.

A. Immigration Priorities for Noncitizen Client without Immigration Status

Some individuals without immigration status may have a pending application for status or may be able, now or in the future, to obtain LPR status through a U.S. citizen spouse, relief from removal, or persecution-based relief. Even if an individual is currently ineligible to obtain lawful status, that circumstance could change in the future, so the

client may still be concerned about offenses that bar eligibility for lawful status in the future.

A client who wants to acquire LPR status, now or in the future, will be most concerned about offenses that trigger inadmissibility. To qualify for LPR status, the noncitizen must not be convicted of an offense that triggers inadmissibility.

If your client cannot avoid an offense that triggers inadmissibility, he or she may still be able to become an LPR by seeking 212(h) relief, which allows noncitizens to adjust to LPR status despite such a conviction (if the noncitizen is otherwise eligible to obtain LPR status). A controlled substance offense bars 212(h) relief.

If your client has a fear of persecution in the country of nationality, he or she will also be concerned about any disposition that bars persecution-based relief, in particular a conviction of an aggravated felony or drug trafficking offense.

If your client is potentially eligible for Deferred Action for Childhood Arrivals (DACA) (see further description below in Section E.), he or she will be concerned about any felony conviction and certain misdemeanors, which bar eligibility for the DACA program.

In addition, your client may be concerned about "voluntary departure." Voluntary departure allows an individual to leave the U.S. voluntarily at his or her own expense in lieu of being removed by the government. If eligibility for voluntary departure is a concern, your client should avoid an aggravated felony conviction, which is a bar to voluntary departure.

Clients who cannot avoid serious convictions should be warned of enhanced prison penalties should they return to the U.S. illegally after removal.

B. Impact on Noncitizen without Immigration Status of a Criminal Disposition Triggering Inadmissibility

Your client may have a pending application for LPR status or may be otherwise concerned about his or her ability to obtain LPR status in the future. If this is a priority for your client, he or she should avoid offenses that trigger inadmissibility. *See supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility.

In most cases, the grounds of deportability are irrelevant to an undocumented person because he or she has not been admitted to the U.S.[1] Note that the criminal grounds of inadmissibility do not include some crimes that would render a person deportable—

1. The main exception is if the person will apply for non-permanent resident cancellation of removal, based upon 10-years residence in the U.S. and exceptional hardship to citizen or permanent resident relatives. *See* INA § 240A(b)(1), 8 USC § 1229b(1). A conviction for an offense described in the grounds of deportability would bar this relief.

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 bar adjustment to LPR status.

C. Impact on Noncitizen without Immigration Status of Controlled Substance and Certain Other Dispositions

If your client cannot avoid a crime of inadmissibility and is otherwise eligible to adjust status, he or she may still be able to obtain LPR status by seeking 212(h) relief. *See supra* "212(h) Waiver (if not convicted of controlled substance offense)" in § 5.4D, Forms of Relief Depending on Offense.

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 212(h) relief and consequently a permanent bar to obtaining LPR status.

In addition, a conviction of a "violent or dangerous" crime may make it more difficult to obtain 212(h) relief. *See 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.

D. Impact on Noncitizen without Immigration Status of an Offense that Bars Persecution-Based Claims

Generally. Your client may have a pending application for asylum. Or, your client may be someone who fears persecution in his or her country of nationality but never applied for asylum. Or, your client may be a national of a country designated as experiencing civil strife, environmental disaster, or other extraordinary and temporary conditions, and thus be eligible for Temporary Protected Status (TPS).

If your client has a pending application for asylum, fears persecution in the country of removal, or is a national of a TPS-designated country, it may be an important goal to avoid offenses that bar persecution-based claims.

Practice Note: The law of asylum and other persecution-based relief from removal is a complicated and constantly changing area of law. In addition, the countries that are designated for temporary grants of TPS constantly change. If your client has already

begun the process of seeking asylum or TPS, and has an immigration attorney or other representative, you should consult with that representative regarding the current status of the application. If not, and your client wants to remain in the U.S., you or your client may consider contacting an immigration lawyer to determine what options are available to your client under the current immigration laws. Once you have been able to determine more precisely your client's immigration prospects, you and your client will be in a better position to determine appropriate strategies for the criminal case.

Asylum. A conviction of a "particularly serious crime" bars asylum. *See* INA § 208(b)(2)(A) (ii), 8 U.S.C. § 1158(b)(2)(A)(ii). There is no statutory definition of a "particularly serious crime." For *asylum* purposes, an aggravated felony conviction is considered a "particularly serious crime." *See* INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i). Other offenses may be considered a conviction of a particularly serious crime 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.

In addition, a conviction of a "violent or dangerous" crime will make it more difficult to obtain asylum. *See supra* "209(c) Waiver (if not convicted of drug trafficking or violent offense)" in § 5.2D, Forms of Relief Depending on Offense.

Withholding of Removal. Even if your client is not eligible for asylum, he or she may be eligible for 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.

Temporary Protected Status (TPS). Your client may be eligible for the temporary relief of TPS if he or she is a national of a designated country. The countries designated for TPS as of August 16, 2017 are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.

Obtaining TPS is barred by any felony conviction, two or more misdemeanor convictions, or a conviction for a particularly serious crime. *See* INA § 244(c)(2)(B), 8 U.S.C. § 1254a(c)(2)(B); *see also supra* § 5.5, Noncitizens with Temporary Protected Status. Obtaining TPS is also barred by a crime involving moral turpitude (except for an offense that falls within the petty offense exception), a drug offense (except for a single offense of possession of 30 grams or less of marijuana), or evidence that supports a charge of drug trafficking. *See* INA § 244(c)(2)(A) (iii), 8 U.S.C. § 1254a (c)(2)(A)(iii).

Practice Note: TPS country designations constantly change; the designations of the countries listed above may expire or new countries may be added. If your client is a national of one of the countries listed above, check the website of the U.S. Citizenship and Immigration Service—www.uscis.gov—to determine if the country is still designated. Also, if your client is not from a country listed above, but that country is now suffering from some dangerous condition, you can check the website to determine whether it has been designated for TPS.

E. Impact on Noncitizen without Immigration Status of a Conviction that Bars Deferred Action of Childhood Arrivals (DACA)

Some individuals without status might be eligible for Deferred Action for Childhood Arrivals (DACA) or may already have DACA. On June 15, 2012, the Obama Administration announced that it would not deport certain undocumented people who entered the U.S. as children. Deferred action means that even though the noncitizen is here without status and subject to deportation, the government agrees to "defer" any actions to remove them. Individuals granted DACA receive a two year deferral of deportation and are able to apply for work authorization and a social security number. While deferred action does not provide a pathway to getting LPR status or citizenship, it does allow noncitizens without status to work legally in the U.S. To qualify, the individual must:

- be younger than 31 years old as of June 15, 2012;
- have entered the U.S. when he or she was under age 16;
- have been physically present in the U.S. on June 15, 2012, and have continuously resided in the U.S. during the preceding five years (except for brief, casual, and innocent absences); and
- currently be in school or have graduated from high school or obtained a GED, or been honorably discharged from the coast guard or armed forces.

A broad array of criminal offenses, including any felony and certain misdemeanors, will bar eligibility unless a person can show "exceptional circumstances." For a chart of the DACA criminal bars, see *supra* § 3.7, Criminal Bars to Deferred Action for Childhood Arrivals. It is unclear whether the current administration will continue to grant DACA once individuals' grants expire, but it has thus far not eliminated the program.

F. Impact on Noncitizen without Immigration Status of a Conviction that Bars Voluntary Departure

If your client cannot avoid removal, he or she may be interested in "voluntary departure." Voluntary departure allows an individual to leave the U.S. voluntarily at his or her own expense in lieu of being removed by the government. Your client may prefer this alternative to deportation. For example, if deported by the government, your client will be barred from immigrating to the U.S. for a minimum statutory period of time (depending on the basis for the removal). *See supra* § 3.2C, Long-term Consequences of a Removal Order. If your client voluntarily departs, he or she may not be subject to these statutory bars to returning to the U.S. Also, your client may want to avoid any harassment or stigma in the country to which he or she returns as a result of forcible removal from the U.S. Last, the act of unlawfully reentering the U.S. after removal is a more serious and more commonly prosecuted offense than illegal reentry following a voluntary departure.

Clients interested in voluntary departure must avoid a conviction of an aggravated felony, which is a bar to voluntary departure. *See* INA §§ 240B(a)(1), (b)(1)(C), 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C).

G. Enhanced Liability for Illegal Reentry after Removal

Many noncitizens removed from the United States subsequently reenter or attempt to reenter the country to join their families. If a noncitizen does so after a criminal conviction, he or she may face more criminal exposure than the sentence of two years otherwise possible. You should warn of enhanced prison penalties for a conviction of illegal reentry. Specifically:

- Removal after a conviction of any aggravated felony may result in a prison sentence of up to twenty years.
- Removal after a conviction of any felony may result in a prison sentence of up to ten years.
- Removal after a conviction of three or more misdemeanors involving drugs or crimes against the person, or both, may result in a prison sentence of up to ten years.