
6.3 Cases Involving Drugs

Any violation of law relating to a federally controlled substance will subject your noncitizen client to removal based on controlled substance grounds (with the exceptions discussed below). Certain drug offenses may also be considered aggravated felonies and carry additional adverse immigration consequences.

In many cases, the consequences of a drug conviction are worse from a noncitizen client's perspective than other criminal-based grounds of removal (except for aggravated felonies). Specifically, drug offenses will likely render an LPR client deportable and ineligible for certain forms of relief. Drug offenses will likely render non-LPR clients inadmissible and permanently bar them from acquiring LPR status. If your client is charged with a drug offense, the following options may mitigate these immigration consequences or at least the additional consequences of an aggravated felony drug conviction.

"Controlled substance" is defined by federal law and refers to substances covered by the federal drug schedules. At the time of this revised edition of this manual, it appears that all of the drugs listed in the North Carolina state drug schedules are covered by the federal drug schedules, with one exception, chorionic gonadotropin in Schedule III, which steroid users employ to avoid testicular atrophy, a side-effect from steroids (which may be significant, as discussed in A., below).

A. Manufacture, Sale, or Delivery of a Schedule III Controlled Substance

A conviction of manufacture, sale, or delivery, or possession of a *federally* controlled substance with intent to manufacture, sell, or deliver constitutes a drug trafficking aggravated felony and triggers the severe consequences associated with aggravated felonies (with the exception for marijuana discussed in E., below).

It appears that the only North Carolina controlled substance that is not a controlled substance under federal law is chorionic gonadotropin in Schedule III, which steroid users employ to avoid testicular atrophy, a side-effect from steroids. A conviction for

such an offense should not qualify as a drug trafficking aggravated felony. Also, if your client pleads guilty to a Schedule III drug and the record of conviction does not reveal the specific drug, there is a strong argument that your client is not deportable for a drug trafficking aggravated felony. *See Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017); *see also supra* § 3.4D, Conviction of Any Controlled Substance Offense. However, if the charging document names a controlled substance other than chorionic gonadotropin, the client will be deportable.

B. Simple Possession of a Controlled Substance

A conviction of possession of a federally controlled substance with intent to manufacture, sell, or deliver constitutes a drug trafficking aggravated felony and triggers the severe consequences associated with aggravated felonies.

If a defendant has no prior drug convictions, a conviction of simple possession of a federally controlled substance (with the exception of possession of more than five grams of crack cocaine and any amount of flunitrazepam, commonly known as the date rape drug) is not considered a drug-trafficking aggravated felony. *See supra* § 3.4B, Specific Types of Aggravated Felonies.

While such a possession conviction will still have adverse immigration consequences as a conviction related to a controlled substance, it will not have the more severe consequences associated with an aggravated felony conviction. The difference in consequences may be particularly significant to an LPR client. *See supra* § 5.1B, Impact on LPR of an Aggravated Felony.

C. Possession of 30 Grams or Less of Marijuana

A conviction of possession of 30 grams or less of marijuana, although a drug offense, is exempt from many immigration consequences if the defendant has no prior drug convictions. An LPR will avoid deportability (but not inadmissibility after traveling abroad). A non-LPR will be inadmissible, but he or she will not necessarily be barred from adjusting to LPR status in the future because this ground of inadmissibility can be waived by the immigration court. Regarding this exception, the immigration court is *not* limited to the elements of the offense and to the record of conviction; instead, the 30 grams exception calls for a circumstance-specific inquiry into the noncitizen's actual conduct. Thus, to meet its burden of proof, the government can look to court documents outside of the record of conviction to establish that more than 30 grams of marijuana were in fact involved. *See supra* § 3.3A, Categorical Approach and Variations.

If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana (which covers quantities of more and less than 30 grams), you should document in the record of conviction that the quantity involved is 30 grams or less, if applicable. It is important to do so in case your client is deemed inadmissible and needs to apply for a waiver of the conviction. *See supra* § 3.3C, Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility.

The 30 grams exception also covers the possession of drug paraphernalia where the paraphernalia was merely an adjunct to the noncitizen's simple possession or use of 30 grams or less of marijuana. Thus, a client who pleads guilty to marijuana paraphernalia related to less than 30 grams of marijuana should not be deportable (assuming she has no other drug convictions). If a defendant is convicted under G.S. 90-113.22A (possession of marijuana drug paraphernalia) in a case involving 30 grams or less of marijuana, defenders should ensure that the record reflects the amount of marijuana. (There is also an argument that other drug paraphernalia convictions may not be controlled substance convictions, discussed in D., below.)

D. Drug Paraphernalia

A conviction for paraphernalia related to an unnamed Schedule III drug should not be a deportable offense for the same reason that conviction of manufacture, sale, or delivery, or possession with that intent, of an unnamed Schedule III drug possession is not a deportable offense, discussed in A., above. For that reason defenders may want to negotiate such language where appropriate. *See supra* § 3.4D, Conviction of Any Controlled Substance Offense.

Additionally, there is an argument that no North Carolina conviction for possession of drug paraphernalia under G.S. 90-113.22 is a deportable offense. Under *United States v. Mathis*, ___ U.S. ___, 136 S. Ct. 2243 (2016), the identity of the controlled substance is arguably not an element of the North Carolina paraphernalia statute (except when the paraphernalia involves marijuana under G.S. 90-113.22A). Because the state schedules are broader than the federal ones (because North Carolina's covers chorionic gonadotropin, discussed in A., above), a state paraphernalia conviction is arguably never a controlled substance offense. *See supra* § 3.4D, Conviction of Any Controlled Substance Offense. That analysis would appear to apply to the manufacture or delivery of paraphernalia under G.S. 90-113.23.

E. Delivery of Marijuana

The U.S. Supreme Court has held that a statute that punishes conduct that includes the transfer of small amounts of marijuana for no remuneration is not a "drug trafficking" aggravated felony. Under this law, there is a good argument that a conviction for delivery of marijuana or possession of marijuana with intent to manufacture, sell, or deliver under G.S. 90-95(a)(1) is not a drug trafficking aggravated felony. The reason is that a defendant can be convicted of delivery or possession with intent to manufacture, sell, or deliver without any evidence of remuneration and without the State establishing the amount of the marijuana. The Board of Immigration Appeals adopted this argument in an unpublished decision. *See infra* Appendix B, Relevant Immigration Decisions. For further discussion, *see supra* § 3.4B, Specific Types of Aggravated Felonies.

F. Possession by Trafficking

There is a strong argument, as evidenced by an unpublished administrative decision, that North Carolina possession by trafficking should not qualify as an aggravated felony. *See infra* Appendix B, Relevant Immigration Decisions. Federal law punishes possession as a misdemeanor, regardless of quantity. Thus, where the state offense, like North Carolina possession by trafficking, proscribes mere possession (even where the quantity is large), the offense would not constitute a felony under federal criminal law and thus should not qualify as drug trafficking aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

G. Accessory after the Fact

The offense of accessory after the fact to a drug offense (under G.S. 14-7) is not considered a drug offense and thus does not trigger the immigration consequences associated with a drug offense. *See Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). An accessory after the fact conviction is considered an "obstruction of justice offense," however. *See id.* Thus, if accompanied by a one-year term of imprisonment (active or suspended) or more, an accessory after the fact conviction will constitute an aggravated felony. An accessory after the fact offense is generally punishable two classes lower than the principal offense under North Carolina's structured sentencing scheme.

This rule does not apply to the offenses of attempt, conspiracy, and accessory before the fact to a drug offense, which probably *are* drug offenses.

H. Non-Drug Charges

Accompanying non-drug charges may have less serious or no adverse immigration consequences and may be an appropriate basis for a plea agreement. For assistance in determining whether accompanying charges may carry adverse immigration consequences, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.