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DETENTION, DEPORTATION, AND THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: AN OVERVIEW

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice.

Any individual not a citizen of the United States (U.S. or United States) could face detention and deportation for violating U.S. immigration laws. One way to violate immigration laws is to be convicted of criminal offenses. This guide will provide a general overview of the process of detention and deportation for immigrants in the United States. This paper will also provide background information as to the immigration consequences of criminal convictions. Due to the large number of Iranian immigrants in the United States, it is important that our community be aware of an expanding detention and deportation system in the United States. This guide can be particularly useful to any non-citizen who has been charged with or convicted of a criminal conviction, as well as anyone who has been placed into removal proceedings.

What is detention? Who detains and deports immigrants?

Immigration detention is the process by which the Department of Homeland Security (DHS) places individuals into custody that it seeks to remove from the United States. DHS can detain anyone pending a decision on whether or not they are to be removed.¹ Only some detained individuals are eligible for release. Detained individuals are not serving criminal sentences when detained but are rather face an administrative process for removal.

The investigative and enforcement branch of DHS, formerly the Immigration and Naturalization Service (INS), is known as Immigration and Customs Enforcement (ICE). ICE runs the Office of Detention and Removal Operations, which carries the task of enforcing U.S. immigration laws. Today, there are approximately over 28,000 immigrants

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¹ Immigration and Nationality Act of 1952, 8 U.S.C.A. § 236



detained in civil custody by DHS on any given day. Cumulatively, the U.S. Government detains over 280,000 people a year, more than triple the number of people in detention nine years ago. Immigrants are detained in over 400 facilities throughout the United States, including private facilities where bed space is essentially rented by ICE through contracts. To the extent that some detainees are being held on the basis of criminal convictions, nearly all have completed their sentences, paid their fines or restitution, performed community service, been successfully rehabilitated, and/or sometimes even expunged their criminal convictions. Still, these convictions continue to have severe immigration consequences.

In detention, there is no fixed sentence. The deportation process can take anywhere from weeks to months to years, particularly if there are federal appeals involved. Detention can also become prolonged if ICE cannot obtain permission from a country to send a deportee there. The psychological impact of not knowing when or if one might be released or deported, makes detention particularly difficult to adjust to. The increase in detention and deportation is a public policy issue that should be given great attention, as families continue to face hardships such as separation, economic devastation, and the loss of loved ones due to deaths in custody.

Who is being detained and deported?

The Department of Homeland Security can detain asylees, refugees, lawful permanent residents, student visa holders, veterans, women, children, the elderly, and people with serious illnesses. DHS can detain individuals who entered the U.S. without inspection, as well as those who entered the U.S. legally and remained here legally for many years.

Although it continues to happen, DHS cannot legally detain or deport U.S. Citizens. If you are placed in removal proceedings or have an immigration hold but were born in the United States, you are a Citizen and cannot be held in DHS custody or deported from the U.S., regardless of whether or not you have committed a crime.

Sometimes, those who were not born in the U.S. may be citizens. There are also individuals who are not removable, by virtue of having been born in certain U.S. territories. A lawful permanent resident may have derived Citizenship if one or both parents naturalized before s/he was 18 years old.

If you believe you may be a U.S. Citizen, always raise this issue before immigration officials and try to speak with an immigration attorney about your situation. Citizenship is an issue that can be raised at any time, even after you are removed from the U.S.

What is mandatory detention?

A reluctance to impose needless confinement is consistent with the rights to Individual liberty and due process, long recognized in the American legal system and by international human rights law. Article 9 of the International Covenant on Civil and Political Rights states that “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...” The current mandatory detention provisions found in today’s immigration laws, however, require detention without bail for various individuals based on non-violent, non-aggravated, first time offenses, including misdemeanors. An immigration judge has no authority to release those who are mandatorily



detained, even if he believes that the person is not dangerous and not a flight risk, and even if that individuals' detention is having a devastating impact on U.S. Citizen and other family members.

Why are immigrants being increasingly detained and deported?

Sweeping changes in immigration laws in 1996 drastically increased the number of people subject to mandatory and prolonged detention, and ultimately deportation. The changes in 1996 expanded the list of criminal offenses that would subject non-citizens to detention and deportation, while reducing available forms of relief from removal.

In the last ten years there has been an unmistakable over-reliance on detention as a primary strategy in enforcing U.S. Immigration laws. The expansion of the detention system has taken place alongside an overall expansion of the U.S. prison population, giving the U.S. the highest number of incarcerated people anywhere in the world. The events of September 11, 2001 seem only to have fueled the expansion, justifying greater enforcement in the name of national security.

What kind of crimes can result in detention and deportation?

Criminal convictions can have a devastating effect on the immigration status of any non-citizen. Even convictions for minor offenses can result in deportation or mandatory detention, sometimes permanently barring individuals from returning to the United States. [Offenses as minor as possession of drug paraphernalia, for example, and possession of a controlled substance, can trigger mandatory detention.] Other minor offenses that can subject

individuals to deportation include shoplifting or certain DUIs.

If you are arrested and charged with violation a criminal law, you must be aware of the immigration consequences of your admissions and plea bargains. Your criminal defense attorney, whether public or private, has a duty to inform you that a particular plea (or disposition in criminal court or conviction) may have immigration consequences for you if you are not a U.S. Citizen. Consulting with an immigration attorney can help you avoid certain or all immigration consequences.

Certain theft², burglary³, assault⁴, or forgery⁵ convictions with sentences of one year or more can result in automatic detention and deportation.⁶ In some cases, a sentence of 365 days or more may lead to permanent banishment from the United States whereas a 364 day sentence will not. In a fraud case the critical question is whether the amount of loss to the victim exceeded \$10,000.⁷ With drug offenses, the sentence usually does not matter. Even without jail time, a drug conviction can lead to detention without bail during immigration proceedings. A drug conviction involving any commercial element or sale, even involving a small amount of drugs, can result in automatic deportation.⁸ Immigration law has little

² INA § 101(a)(43)(G).

³ INA § 101(a)(43)(G).

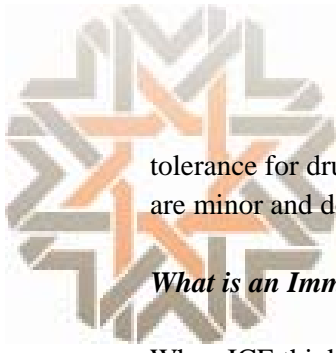
⁴ INA § 101(a)(43)(F).

⁵ INA § 101(a)(43)(P).

⁶ INA § 237(a)(2)(A)(iii).

⁷ INA § 101(a)(43)(M)(i).

⁸ INA § 101(a)(43)(B).



tolerance for drug offenses, even though many are minor and do not involve any violence.

What is an Immigration Hold?

When ICE thinks that an immigrant in criminal custody is also subject to removal from the United States, it may place an “immigration hold” or “immigration detainer” on that person. This hold instructs the jail or prison authorities where the immigrant is being held to hold the immigrant until custody can be transferred to ICE.⁹ Once an immigrant is in DHS custody, that person can be transferred to any ICE detention facility in the country, including remote areas such as Florence, Arizona.

Removal Proceedings

If placed in removal proceedings, you will be brought before an Immigration Judge who will decide whether or not you should be deported. Unlike in criminal court, immigrants in removal proceedings who cannot afford an attorney are not given one for free.¹⁰

In court, your hearings will be conducted in English, however, you have the right to have an interpreter present in the language you are most comfortable in. It is critical that you demand that your removal proceedings be conducted in the language in which you are most comfortable and the court must provide this for you.

Failing to appear to your removal hearing will likely result in an *in absentia*¹¹ removal order and may be difficult to reverse.¹²

⁹ 8 C.F.R. § 287.7

¹⁰ INA § 240(b)(4)(A).

¹¹ This means you will be removed in your absence.

If you lose your case and the Immigration Judge orders you removed, you can appeal your case to the Board of Immigration Appeals (BIA). The BIA is located in Falls Church, Virginia but is not a court before which you will physically appear. If you appeal to the BIA, you or your attorney will be responsible for writing a brief arguing your position. Note, that you must produce all evidence in support of your claim before you reach the BIA and that you do not have the right to have information translated to you before the BIA or in subsequent courts. If you lose your appeal, DHS will begin the process of arranging for your removal unless you file a Petition for Review at the U.S. Court of Appeals within 30 days after your BIA decision, accompanied by a motion asking that you be permitted to stay in the U.S. during the federal appeals process.

Important Warnings

Travel: If you have a green card and have been convicted of any crime, traveling outside of the U.S. will bring you to DHS’s attention and you may be subject to deportation proceedings upon your return. If you have a past offense, no matter how long ago, always, consult with an immigration attorney before traveling.

Naturalization: Applying for citizenship is another way that past convictions or other immigration violations can come to DHS’s attention. Consult with an immigration attorney before filing any applications in order to avoid unintended consequences.

Police and Law Enforcement: Remember that criminal law enforcement officers are

¹² INA § 240(b)(5).

increasingly cooperating with immigration officials. While you must provide law enforcement officials with your name, you do not have to provide them with your immigration status. Instead, you can state that you want to contact an attorney before you answer questions about your immigration status.

FBI agents have been known to increasingly approach Middle Eastern immigrants in detention centers post-9/11. If you are approached by such officials, ask for an opportunity to have an attorney present during any interviews. Even if officials state that they are seeking information not related to your immigration proceedings, any information you provide or statements you make could affect your immigration case

Post-Order Removal Process for Iranians: In order to physically deport someone from the United States, the receiving country must agree to accept the deportee. Removing individuals from the United States to countries with little or no diplomatic relations with the United States – including Iran - can be a long process, often leading to prolonged or indefinite detention. Iranian immigrants who are detained and ordered removed from the United States have been known to spend prolonged periods of time in detention while U.S. officials try to secure their removal. If the U.S. Government cannot arrange for the removal of Iranian Citizens, it may release them on orders of supervision. This means that they are authorized to live and work in the U.S. until their actual removal becomes possible, although they must report to DHS as instructed.¹³

¹³ INA § 241(a)(7).

Detention of Student Visa holders: Many Iranian students come to the US with student visas. It is important for the Iranian community to know that if the terms of a student visa are violated in even simple ways (failing to maintain a certain course load or grade point average), student visa status may be terminated and they can be detained (with or without a criminal record) in U.S. detention centers. For more information about the detention of student visa holders, please visit:

<http://www.midwesthumanrights.org/u-s-detention-foreign-students>.

In summary, please remember:

- 1) If you entered without inspection, violated or overstayed your visa, or are otherwise not in legal status in the U.S., you may be subject to detention and deportation.
- 2) If you have any criminal history or are currently facing criminal charges, you should obtain legal advice about the potential immigration consequences of any plea agreement or criminal disposition.
- 3) You have the right (at your own expense) to be represented by an immigration attorney. Ask for an opportunity to find one or speak to one before you answer the questions of Government officials about your immigration status.
- 4) If you are detained by DHS and are eligible for bond, you may ask an Immigration Judge to set a bond for you or lower the bond set for you by DHS.
- 5) If you have been convicted of a crime, check with an immigration attorney about the effect that traveling outside of the U.S. may have on your status.



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