



IMMIGRATION IMPACTS OF DUI ALCOHOL CONVICTIONS
FOR OUR NONCITIZEN CLIENTS¹

FOR ALL NONCITIZENS:

Immigration authorities do not distinguish between alcohol-related convictions for driving under the influence (DUI) and driving while impaired (DWI) or other alcohol-related driving offenses.² That is, it is not necessarily helpful to have a DWI rather than DUI conviction. In this advisory, both are referred to as DUI.

Maryland TA 21-902 includes both driving and attempting to drive. Similarly, under immigration case law, attempt convictions have the same impact as convictions for the underlying offense.

Receiving a PBJ will not alter any of the outcomes described here. A PBJ is a conviction for immigration purposes (unless there is absolutely no penalty, punishment, or restraint on liberty. Probation is a restraint on liberty. Court fines are a punishment).

A sentence of less than one year for a DUI conviction does not make it “safe.”

A DUI charge – even short of a conviction – is “a significant adverse consideration” for eligibility to bond out of ICE custody, the Board of Immigration Appeals (BIA) held.³ The BIA said immigration judges should set a monetary bond only if the detainee first establishes that he or she is not a “danger to the community.” “Drunk driving is an extremely dangerous crime,” the BIA said. A deportation case can take months or years to adjudicate, so this may be a significant consideration for your client.

If available, driving without a license (DWOL) would be a better plea option, as would be reckless or negligent driving or other non-alcohol related conviction. The client still might need to explain the incident to an immigration judge or official, and provide evidence of successful completion of probation and any treatment.

¹ © *Maryland OPD 11-6-2019*. This advisory discusses Maryland *alcohol*-related convictions under TA 21-902(a) and (b). Convictions under 21-902(c) and (d), regarding drugs, potentially are even more problematic. This advisory is not intended to be legal advice. Check for updates: *A.G. and BIA decisions can be challenged by litigants and rejected by federal courts!* The author of this advisory is Nadine Wettstein, who is grateful for as-always helpful comments and suggestions by Prof. Maureen Sweeney of the University of Maryland.

² *Matter of Castillo-Perez*, 27 I&N Dec. 664, 665, n.1 (AG October 25, 2019).

³ *Matter of Siniauskas*, 27 I&N Dec. 207, 208, 209, 210 (BIA 2018). The BIA is the immigration appellate board for the entire United States.

BY CLIENT’S STATUS:

A DUI conviction affects noncitizens differently depending upon their immigration status. Immigration advice to our clients must be *accurate*. To provide accurate advice about the immigration impact, you must know the client’s current immigration status.

Undocumented person (entered U.S. without inspection, or overstayed a visa)

An undocumented person includes someone who entered the United States without inspection, and someone who initially entered the U.S. with a visa but stayed longer than permitted. An undocumented person is deportable regardless of a conviction. A DUI conviction will make her even more of an ICE enforcement priority and will raise her profile, especially if her fingerprints were taken when she was arrested. Fingerprints automatically go to ICE.

Some undocumented people may have a *defense to deportation* called “10-year cancellation of removal.” To qualify, the applicant must prove he has lived in the United States for at least 10 years and has had “good moral character” for all that time. One DUI conviction will not disqualify him from this defense but it will be a very negative factor. He might have to show that this one incident was an aberration and that he acted promptly and successfully to address any alcohol issues. He will have to provide information about the charges and disposition and certified copies.

Under current agency case law, having two DUI convictions during the 10-year statutory period creates a very strong presumption that the person lacks good moral character and is thus disqualified from cancellation of removal.⁴ Proof of rehabilitation alone will not be enough to overcome the presumption. He also will have to show that his positive attributes outweigh the negatives, and that the DUIs were an aberration in a record that otherwise shows entirely good character.

An applicant for 10-year cancellation of removal also cannot have spent 180 days or more in custody as a result of *any and all* convictions including DWOL and other traffic matters. This refers to the actual time spent in custody including before trial if the person is convicted. It does not include back-up time.

Applicant for asylum or withholding of removal, or asylee

One or more DUI convictions will not disqualify the applicant for asylum, however it will be a negative discretionary factor that must be overcome by positive factors. A related fear-based defense to deportation, withholding of removal, is not discretionary so should not be denied based on DUI conviction(s). One or more DUI convictions will not cause an asylee to lose asylee status.

Asylee or other person applying for lawful permanent resident status (“green card”)

After one year as an asylee, the asylee can apply to “adjust status” to become a lawful permanent resident (LPR). Other people adjust status from Special Immigration Juvenile; from a nonimmigrant visa; from a visa overstay; or other situations. Immigration officials have discretion to deny adjustment to LPR status. If the person has had DUI conviction(s), officials might deny adjustment on that basis.

⁴ *Matter of Castillo-Perez*, 27 I&N Dec. 664 (AG October 25, 2019). Affected individuals likely will challenge this decision in federal courts across the country, so it is not necessarily the final word.

Students and others in the United States on a temporary visa

The DUI conviction(s) itself should not create a criminal basis for deportation. However, if she spends so much time in jail that it interferes with the reason she was admitted to the United States, she could be violating her status. E.g., if the student cannot attend school or drops below the required number of credit hours, she may have violated the terms of her admission and risks deportation.

Also, the U.S. State Department says that a DUI indicates a possible visa ineligibility for a “*physical or mental disorder*” with associated harmful behavior that is likely to pose a threat to the property, safety or welfare of the person or others. This means that just based on the person’s arrest (and more likely if he is convicted), the visa could be revoked even while he is in the United States. He will not necessarily be deported at that point, but if he leaves United States, he will have to apply for a new visa to return. He may have to go to an approved medical doctor to confirm that he does not have a physical or mental disorder related to alcohol that would cause a safety risk to the him or others.

Also, if the person is sentenced to an aggregated total of five years or more – including suspended or backup time – for two or more convictions of any kind, the person will be inadmissible, that is, not eligible to return to the United States. DUI, DWOL, and all other convictions count for this five-year inadmissibility rule.

DACA (Deferred Action for Childhood Arrivals):

A DACA recipient has a permit that protects her from deportation and allows her to work, attend school, etc. One DUI conviction *disqualifies* her from DACA. She can expect the DACA permit to be automatically and quickly revoked. She then will revert to being undocumented. ICE may take her into custody. The conviction will be a negative discretionary and/ or good moral character factor in any applications for bond or defenses to deportation.

TPS (Temporary Protected Status):

TPS still is in effect and many clients have a valid TPS work permit that protects them from deportation and allows them to work with authorization. However, any two convictions for any offense that carries a potential sentence of at least five days of jail time will disqualify the person from TPS.

A DUI conviction counts as one conviction for TPS. If a client has a prior conviction for *any* jailable offense – including a prior DWOL – a new DUI conviction, or *any* second conviction for an offense carrying at least five days of jail time, disqualifies him from TPS. His TPS permit could be revoked and he will revert to being undocumented. ICE may take him into custody. The conviction will be a negative factor in any applications for bond or defenses to deportation.

Lawful permanent residents (LPR or “green card”)

Not ground for deportation

Some good news! For an LPR, Maryland DUI *alcohol* convictions – even multiple such convictions – do not make him deportable. A DUI conviction is *not* an aggravated felony or a crime involving moral

turpitude or otherwise a basis for revoking his status or causing his deportation (Caution: DUI / *drugs*, 21-902(c) or (d) could be different result!) Also see below re inadmissibility and naturalization.

Inadmissibility: re-entering United States after a trip

A DUI conviction – especially if there has been more than one – may affect the LPR’s “admissibility,” that is, his ability to return after a trip outside the United States. Among the reasons the government can keep a person out is that that he has “a physical or mental disorder and a history of behavior associated with the disorder ... [that poses] a threat to the property, safety, or welfare ...” of the person seeking admission, or others. Also, an aggregated total of five years’ sentence including suspended time for two or more convictions of any type creates a basis for inadmissibility. Especially if an LPR has more than one DUI or any other conviction, he should be cautious about leaving the U.S. even for a short trip, and before leaving should consult with an immigration attorney or immigration nonprofit organization.

Complicating, delaying application for U.S. citizenship

Even one DUI conviction is a very negative discretionary factor when an LPR applies for U.S. citizenship, and may result in delay of approval or denial of her application. She may have to show she successfully acted to address any alcohol issues. She may need to obtain a medical certificate establishing she does not have a medical or physical condition related to alcohol that may make her a danger to herself or others. She will have to provide information about the charges and disposition and certified copies.

In addition, the LPR must successfully complete probation before her citizenship application will be approved. A cautious approach is for her to wait as much as five years (the usual “good moral character” period) after one DUI conviction before applying.⁵

Two DUI convictions within the statutory period (usually five years) will create a rebuttal presumption that the LPR is not a person of good moral character and should be denied U.S. citizenship.⁶ Two DUI convictions at any time – even if one or both was more than five years ago – very likely will be considered very negative factors and will have to be overcome with the passage of time and demonstration of clear rehabilitation.

Whatever the conviction(s), to qualify for U.S. citizenship, the LPR cannot have spent an aggregated total of 180 days or more in custody during the five-year “good moral character” period. This refers to the actual time spent in custody for any and all convictions, including time served before conviction and as a result of any probation violation. It does not include back-up or suspended time or time spent in jail if the person was not later convicted.

The LPR should consult with an immigration attorney or immigration nonprofit organization before applying for U.S. citizenship.

⁵ The five-year period is not a bright line or an “all clear.” The government can and does deny citizenship based on prior conduct.

⁶ *Matter of Castillo-Perez*, 27 I&N Dec. 664 (AG October 25, 2019).