

OUR PRACTICE

Removal Proceedings

Grounds of Removal

U.S. law lists who is "inadmissible" and who is "deportable." No one should want to fit either list. The two lists are similar, but not the same. "Inadmissibility grounds," which generally are broader and thus more exclusive, apply to people who seek to enter the U.S. from outside, who have entered the U.S. illegally, or who seek to convert to permanent residence within the U.S. "Deportability grounds" apply to people who have already been admitted in the U.S. and may be required to leave. There are different types of waivers available to many of the grounds, under very specific rules and procedures. Quite a few paths to permanent residence allow exceptions to inadmissibility grounds.

Consular officers apply only inadmissibility rules, and their decisions on admissibility, though subject to input through a State Department "advisory opinion," are not reviewable by a court. Applications for waivers of inadmissibility arising from a visa application are forwarded to USCIS – the immigration service, usually at one of its overseas offices for adjudication. Within the U.S., USCIS officers may apply inadmissibility or deportability grounds, depending on the situation. With a few important exceptions, their decisions concerning both lists are reviewable in Immigration Court in unified "removal proceedings," with opportunity for administrative and sometimes federal court appeal.

Whether someone is removable is an extremely complex subject, and how to avoid removal involves a complex procedure. Baker Donelson's Immigration Group is very familiar with those complexities, and we can help in all aspects of dealing with removal grounds and waivers of them.

The Removal Grounds

Not surprisingly, the question of exactly who is inadmissible or deportable has been the subject of ever-changing statutes, regulations, local interpretation and practice, and countless administrative and federal court decisions. We cannot attempt to summarize the immense volume of authority on these issues on a web page, and an alien facing removal issues should seek help from an experienced immigration lawyer anyway. A detailed, side-by-side comparative analysis of inadmissibility and removal grounds appears in *Immigration Practice*, the book written by the chairman of Baker Donelson's Immigration Group, Robert C. Divine.

Nevertheless, we provide an extremely generalized listing of the types of conditions conduct that can lead to inadmissibility or removal, without distinguishing here which list is implicated by each (because it would be too complicated) and without discussing the many waivers available.

- **Medical Grounds.** Defined as communicable disease, physical or mental disorder with behavior posing a threat, drug abuser or addict, and lack of vaccines. Importantly, serious medical findings can arise from arrests or convictions for driving under the influence of alcohol or other drugs.
- **Criminal Grounds.** These are crimes of moral turpitude, multiple convictions, controlled substance violations, reasonable government belief of controlled substance trafficking, aggravated felonies (a brutally expansive concept, including crimes of violence, theft offenses and 19 other offenses, which can even arise from state misdemeanor prosecutions), firearms offenses, prostitution, commercialized vice and domestic crimes (including even violating a protection order). Naturally, criminal grounds have very serious immigration consequences, and immigration lawyers work with criminal defense lawyers to avoid or reduce those consequences in dealing with criminal charges.

- **National Security and Terrorism.** Inadmissibility can result even from the government's "reason to believe" the alien may engage in unlawful or dangerous conduct, and even contributions to an organization not known by the alien to be a terrorist organization can lead to deportability.
- **Public Charge.** For family-based cases, this requires the I-864 Affidavit of Support. For others, financial support without need for unlawful employment must be shown, and sometimes a Form I-134 is used. In a very rare case, someone who receives certain types of means-tested public benefits and has failed to repay them upon demand and judgment within five years after admission (usually as a permanent resident) can be deportable.
- **Health Care Workers.** Certain non-physician health care workers must have a special certificate to be admissible.
- **Immigration Violators.** An alien who has entered without inspection, failed to attend immigration hearings, been removed from the U.S. (or left after an order of removal was entered), or was "unlawfully present" in the U.S. for more than 180 days (this is the ground that makes the infamous "Section 245(i)" so important), may be inadmissible for many years after departure from the U.S. An alien is deportable if he was actually inadmissible when entering, is present in violation of law, or has violated or failed to maintain nonimmigrant status.
- **Misrepresentation and Non-registration.** Misrepresentation in visa and immigration matters is a common and permanent ground of inadmissibility (and, in effect, deportability), though waiver is available to some. Document fraud is increasingly serious, now that USCIS has settled a class action lawsuit against certain enforcement which now can resume. False claim to citizenship in any situation (entry, voting) is not subject to immigrant waiver. A finding of having entered a sham marriage results in permanent, unwaivable bar to any immigrant petition approval. Failure to register a new address with USCIS within 30 days of an address change (through Form AR-11 or just about any other USCIS filing) has been only sporadically invoked for deportation, but after September 11, 2001, should be avoided with care. Failure to register as a "foreign agent" seeking to influence the U.S. government is deportable. Misrepresentation can result in expedited removal (no hearing) at the border or port. Many of these violations are also serious criminal offenses.
- **Stowaways.** Someone who arrives via a vessel or aircraft without the master's consent is subject to expedited removal (no hearing).
- **Alien Smuggling.** Encouraging or assisting an alien unlawfully to enter the U.S. is on both lists, with limited exceptions for smuggling only one's immediate family.
- **Documentation Deficiencies.** Aliens lacking passport, visa, or other required documentation are inadmissible, and subject to expedited removal (no hearing), but there can be waivers.
- **Avoiding Military Service.** Military deserters and draft evaders are inadmissible (with important exceptions), and a conviction for failing to register for the draft (see www.sss.gov/inslink.htm to register) is deportable. Nonimmigrants are exempt from registration requirements.
- **Miscellaneous.** Polygamists, guardian accompanying inadmissible alien, child abductors, people subject to J-1 home residency rule and "confiscators" of a U.S. national's property, F-1 student visa abusers, people who have renounced citizenship to avoid taxes, persons who trade with embargoed countries (Iran, Sudan), and foreign officials responsible for violations of religious freedom are inadmissible. Aliens whose marriage-based conditional permanent residence was terminated are deportable.

Waivers

Waivers of removal grounds can be available in certain situations that are too complex to describe in detail here. The most common waivers include:

- **Nonimmigrants.** Almost any ground can be waived temporarily for a nonimmigrant through applying for a visa or by filing Form I-192 at a port of entry.

- **Returning Residents.** Waiver of passport and "visa" (permanent resident card) requirement through Form I-193.
- **Immigration Violators.** Waiver of the bar on reentry (technically, permission to reenter early) through Form I-212 or I-601 (or both).
- **Refugees.** Special waivers of certain grounds, through Form I-602.
- **J-1 Home Residency Requirement.** Waiver through Form I-612, preceded by other steps.
- **Most Other Waivers.** Particularly medical (including HIV), misrepresentation and criminal waivers, through Form I-601.
- **Cancellation of Removal.** Only in the context of removal proceedings, an alien who has been present with good moral character for seven or ten years and, if not a permanent resident, has a U.S. relative who would suffer "exceptional and extremely unusual hardship" may request permanent residence instead of removal.

With so much at stake, waivers should be pursued with the help of an immigration lawyer.

Removal Proceedings

"Removal proceedings" are the court hearings in which an Immigration Judge decides whether an alien – called the "respondent" in the hearings – will be prevented from entering or remaining in the U.S. They are preceded by inspection at the border or investigation within the U.S., a charging document and sometimes detention in a jail pending release a hearing or release on bond. They proceed with two types of hearings and conclude with an order of termination, relief or removal (and sometimes further detention pending removal). Appeals and motions may ensue. They are followed by return to existing status, receipt of permanent residence or departure from the U.S. attorneys are necessary, and we can help.

As much as removal proceedings may be feared, a worse fate is for those who can be removed without their protections, particularly through "expedited removal" for people seeking entry through fraud or lacking documents, "administrative removal" for certain criminals and "summary exclusion" for stowaways, crewmen, visa waiver entrants and suspected terrorists.

Initiating Removal

The first official step in removal proceedings is the filing and service of a "Notice to Appear" (NTA), which is the charging document like an indictment in a criminal case. The NTA describes the U.S. Department of Homeland Security's reasons why the alien is either excludable or inadmissible, and it describes in a very general way rights and procedures to be faced. There is a blank for the time and location of a court hearing, but often a hearing is not yet set by the time it is served. It is accompanied by a form by which the alien must notify the authorities of his or her correct address or any change of address, so that future notices can be mailed there. A request beforehand to delay a hearing might be granted, but failing to appear at a scheduled immigration court hearing results in an "in absentia" removal order that normally can be overcome only by proof that the hearing notice was not delivered or that exceptional circumstances beyond the alien's control prevented the appearance.

Attorney Representation

Like criminal cases for everyone, immigration court proceedings are high stakes actions. The substantive and procedural rules governing them can be incredibly complex. The choices faced in them are often counter-intuitive. Even many immigration lawyers do not deal with removal cases. Good counsel from immigration lawyers is essential, and we can help.

An alien being placed in removal proceedings has the right to legal counsel, but at no expense to the government. DHS is required to provide the "respondent" with a list of any "free legal service providers" who may have signed up with the court. There are non-profit agencies that make it their charitable business to

represent aliens in removal proceedings. Some private attorneys also sign up, and some of those do provide some wonderful "pro bono" (free) help to needy alien respondents, but just because an attorney's name is on the list does not mean free service will be provided to every alien respondent who calls.

ICE attorneys and the Immigration Court are required to send the alien's attorney any papers when the attorney has given notice of representation with the alien's consent. This means the respondent should make sure to keep the attorney informed of current contact information.

Government Custody and Criminal Aliens

As law enforcement officers, ICE and CBP agents can interrogate and arrest aliens with cause. Often ICE agents encounter someone who is already in government custody under the criminal system, and ICE places a "detainer," commonly referred to as an "ICE hold," which is an instruction to the custodial official not to release the alien without first giving ICE notice before releasing the alien, so that ICE can decide whether to take over the custody (and its expense).

Sometimes ICE decides not to take custody and allows the alien to be released, whether or not it has filed and served an NTA. When ICE does take over custody, it does not always immediately serve an NTA on the alien, and it may take an inordinate time after that to file the NTA with a court. With no NTA filed, counsel must take the initiative to file a motion for bond determination with an Immigration Court – usually the court having jurisdiction over the location of the alien. But substantial difficulty can arise for family members and counsel just to find out where ICE has taken the alien. A new bond redetermination hearing can be requested after a change in material circumstances.

ICE uses a wide range of facilities to detain aliens, ranging from hotel rooms to county jails to large designated ICE facilities. ICE applies uniform detention standards to its own facilities, is beginning to apply them to state and contractor-run facilities with whom it contracts, but refuses to apply them to facilities managed by the federal Bureau of Prisons.

When the grounds for removal involve certain criminal convictions or national security issues, the court may be powerless to require release on any bond at all. Aliens convicted of crimes generally must first serve their sentence of incarceration before being removed by ICE, and ICE has set up an "institutional hearings program" to conduct removal hearings on site at criminal detention facilities in order to avoid delays between completion of the sentence and actual removal. Federal judges may include an order of removal in a criminal order that makes an alien deportable.

Removal Hearings

The actual removal hearings occur in two stages. An "initial" or "master" hearing is like a criminal arraignment, in that the respondent states whether or not he admits the allegations of the NTA and describes any relief he will request, and the Judge sets an "individual" or "merits" hearing at which evidence will be taken. The alien faces a complex choice at the initial hearing whether to give up and request the opportunity for "voluntary departure" for up to 120 days or whether to fight the charges and have the maximum opportunity for 60 days at the end of the individual hearing. Deciding on strategies, including what kinds of relief to seek, can be quite confusing for the uninitiated.

Initial hearings may be by telephone (quite handy when the alien or attorney are far from the court), and individual hearings may be by videoconference (often despite objection by respondents). Special rules apply to detention and hearings concerning juveniles and incompetents.

Relief from Removal

ICE is not required to keep trying to remove any deportable alien it comes in contact with, and it frequently exercises "prosecutorial discretion" not to start, or to terminate, removal proceedings (also called "deferred action"). ICE may also agree to allow an alien "voluntary departure" without the ten-year bar on removed aliens, but in many cases a three- or ten-year bar arises upon departure anyway, and there are other potential problems with it.

Many options are available for the alien to survive removal proceedings: Administrative closure for USCIS to adjudicate some petition (i.e., family or employment) or application (i.e., TPS), adjustment of status to permanent residence if the alien is eligible through an immigrant petition or otherwise, "registry" for people present since 1972, waiver of the removal grounds at issue, asylum, withholding of removal, voluntary departure, cancellation of removal for persons who have been well-behaved in the U.S. seven to ten years and have a U.S. citizen or permanent resident parent, spouse or child who would suffer "exceptional and extremely unusual hardship." Many types of relief are discretionary and require the judge to weigh numerous factors. Rules for special scrutiny apply to aliens who marry after the initiation of removal proceedings because of the obvious temptation to marry for immigration purposes when the pressure is on.

Appeals and Motions to Reopen/Reconsider

Either the alien or the ICE may appeal an immigration judge's decision to the Board of Immigration Appeals, which often takes many months or years to rule. Further appeal to federal court is possible in a narrowing range of cases. Removal is automatically stayed pending a BIA appeal, but in some cases release is stayed pending ICE appeal. Most appeals are handled on paper, and personal appearances for argument are rare.

A motion can be made to the court or BIA to reopen or reconsider a case based on newly available relief (i.e., a family or employment petition has been approved), a mistake in the decision, or changed circumstances. The law places severe restrictions on the number and timing of such motions. A motion or federal court appeal after BIA decision does not automatically stay actual removal, so that the respondent must specially seek a stay from BIA or ICE to prevent ICE from removing the alien before a court decision.

Actual Removal

ICE cannot always physically remove an alien after a removal order is final, often because the alien's country does not want him back. Complex rules and even Supreme Court decision have been made about "indefinite detention" of such aliens. Those released pending actual removal can receive employment authorization.

If an alien is physically removed or departs the U.S. on their own following a removal order, they are barred from returning for at least ten years, sometimes more. To return earlier without advance permission not only is a crime (which often is indeed prosecuted), but the prior outstanding removal order can be reinstated without hearing.