Aggravated Felonies: An Overview

"Aggravated felony" is a term of art used to describe a category of offenses carrying particularly harsh immigration consequences for noncitizens convicted of such crimes. Regardless of their immigration status, noncitizens who have been convicted of an "aggravated felony" are prohibited from receiving most forms of relief that would spare them from deportation, including asylum, and from being readmitted to the United States at any time in the future.

Despite what the ominous-sounding name may suggest, an "aggravated felony" does not require the crime to be "aggravated" or a "felony" to qualify. Instead, an "aggravated felony" is simply an offense that Congress sees fit to label as such, and today includes many nonviolent and seemingly minor offenses.

This fact sheet provides an overview of "aggravated felonies" under federal immigration law and the immigration consequences of being convicted of an "aggravated felony."

What Makes a Crime an "Aggravated Felony"?

An offense need not be "aggravated" or a "felony" in the place where the crime was committed to be considered an "aggravated felony" for purposes of federal immigration law. Instead, an "aggravated felony" is any crime that Congress decides to label as such. As two prominent immigration judges have noted, numerous "non-violent, fairly trivial misdemeanors are considered aggravated felonies under our immigration laws."[1]

As initially enacted in 1988, the term "aggravated felony" referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices.[2] Congress has since expanded the definition of "aggravated felony" on numerous occasions,[3] but has never removed a crime from the list. Today, the definition of "aggravated felony" covers more than thirty types of offenses, including simple battery,[4] theft,[5] filing a false tax return,[6] and failing to appear in court.[7]

What if the Conviction Occurred before the Crime Was Labeled an "Aggravated Felony"?

In most federal courts, a conviction for any offense listed as an "aggravated felony" is grounds for deportation, even if the crime was not considered an "aggravated felony" at the time of conviction.[8] In other words, whenever Congress adds a new offense to the list of "aggravated felonies" in the Immigration and Nationality Act (INA), lawfully present noncitizens who have previously been convicted of such crimes become immediately deportable. As a result, any addition to the list of "aggravated felonies" will automatically apply retroactively to prior convictions.

Are "Aggravated Felonies" the Only Crimes for Which an Immigrant Can Be Deported?

No. An "aggravated felony" is one—but not the only—basis to deport immigrants convicted of a criminal offense. Removal proceedings may also be initiated against immigrants convicted of one or more "crimes involving moral turpitude,"[9] a broad category of offenses that includes, but is not limited to, most crimes that qualify as an "aggravated felony." [10] Noncitizens convicted of crimes involving moral turpitude may be subject to deportation, but do not face the additional consequences associated with a conviction for an "aggravated felony." The immigration laws also permit deportation for convictions of various standalone offenses.[11]

Thus, whether a noncitizen is subject to deportation for a crime is not determined by whether the crime is labeled an "aggravated felony." Instead, the primary impact of the "aggravated felony" classification relates to the increased immigration penalties attached to the label, including the inability to apply for most forms of relief from removal.

What are the Potential Consequences of Being Convicted of an "Aggravated Felony"?

Deportation without a Removal Hearing

Certain noncitizens convicted of an "aggravated felony" are provided fewer legal protections than other immigrants. For example, any immigrant convicted of an "aggravated felony" who is not a lawful permanent resident (LPR) may be administratively deported from the United States without a formal hearing before an Immigration Judge.[12] Immigrants placed in such proceedings are not eligible for asylum or any other form of discretionary relief.[13] Immigrants found deportable in this manner may not appeal to the Board of Immigration Appeals (BIA) and can be physically removed two weeks after entry of the order.[14]

Mandatory Unreviewable Detention Following Release from Criminal Custody

Federal immigration authorities are required to detain any immigrant convicted of an "aggravated felony" upon his or her release from criminal custody.[15] To obtain bond from an immigration judge, LPRs who are detained following a conviction of a potential "aggravated felony" must demonstrate with substantial likelihood that the crime in question does not qualify as an "aggravated felony."[16]

Ineligibility for Asylum

Any immigrant convicted of an "aggravated felony" is ineligible for asylum.[17] Asylum is a form of immigration relief available to immigrants who suffered or have a well-founded fear of persecution in their country of nationality or last habitual residence.[18] Immigrants convicted of an "aggravated felony" may also be ineligible for "withholding of removal," a similar form of relief for noncitizens whose life or freedom would be threatened in the country of deportation.[19]

Ineligibility for Cancellation of Removal

Any immigrant convicted of an "aggravated felony" is ineligible for cancellation of removal ("cancellation").[20]

Cancellation is a form of relief allowing immigration judges to permit otherwise deportable immigrants to remain in the United States. The bar to cancellation for immigrants convicted of an "aggravated felony" applies regardless of whether their removal would cause "exceptional and extremely unusual hardship" to an immediate family member who is a U.S. citizen or LPR.[21]

Ineligibility for Certain Waivers of Inadmissibility

Certain LPRs may not obtain a waiver of inadmissibility under Section 212(h) of the INA if they were convicted of an "aggravated felony."[22] A waiver of inadmissibility is a means of excusing immigrants for past misconduct that makes them ineligible for admission to the United States. Waivers under Section 212(h) are available to prospective LPRs whose removal from the United States would cause "extreme hardship" to a qualifying U.S. citizen or LPR.

Ineligibility for Voluntary Departure

An immigrant convicted of an "aggravated felony" is ineligible for voluntary departure.[23] Voluntary departure is a discretionary form of relief allowing otherwise deportable immigrants to leave the country at their own expense in place of formal deportation under an order of removal.

Permanent Inadmissibility Following Departure from the United States

An immigrant removed from the United States after being convicted of an "aggravated felony" (or who leaves while an order of removal is outstanding) is permanently inadmissible.[24] To lawfully reenter the United States, such an immigrant must receive a special waiver from the Department of Homeland Security (which is very rare), in addition to meeting all other grounds of admissibility.

Enhanced Penalties for Illegally Reentering the United States

An immigrant who is removed from the United States following a conviction for an "aggravated felony," and who subsequently reenters the country illegally, may be imprisoned for up to 20 years rather than two years.[25]

Conclusion

In the words of the Supreme Court, immigrants convicted of an "aggravated felony" face the "harshest deportation consequences."[26] As Congress ponders proposals to include even more crimes under the definition of "aggravated felony," it must consider the extremely severe consequences that will result. The immigration laws already include numerous provisions that make noncitizens with certain criminal histories—including very minor convictions— subject to deportation. Once a crime is labeled an "aggravated felony," however, deportation is all but assured, regardless of the harm that would result or evidence of rehabilitation.

Endnotes

1. Hon. Dana Leigh Marks and Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, Fordham Urb. L.J. 91, 92 (2012), http://lawprofessors.typepad.com/files/a-view-through-the-looking-glass-fordham-urban-law-journal.pdf.
2. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, §§ 7342, 7344, 102 Stat. 4469, 4470.
3. Immigration Act of 1990, Pub. L. 101-649, §501, 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 109 Stat. 4305, 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(e), 110 Stat. 1276, 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 321, 110 Stat. 3009-627.
4. INA § 101(a)(43)(F).
5. INA § 101(a)(43)(G).
6. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i); *Kawashima v. Holder*, 132 S.Ct. 1166 (2012).
7. INA § 101(a)(43)(Q), (T), 8 U.S.C. § 1101(a)(43)(Q), (T).
8. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). In removal proceedings arising in the U.S. Courts of Appeals for the Seventh and Ninth Circuits, however, an "aggravated felony" conviction is grounds for removal only if the conviction occurred after November 19, 1988. *Zivkovic v. Holder*, 724 F.3d 894, 911 (7th Cir. 2013); *Ledezma-Galicia v. Holder*, 636 F.3d 1059 (9th Cir. 2010).
9. INA § 237(a)(2)(A)(i)-(ii), 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).
10. *Judulang v. Holder*, 132 S. Ct. 476, 482 (2011).
11. *See*, *e.g.*, INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv) (high speed flight from an immigration checkpoint); INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v) (failure to register as a sex offender); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (controlled substances violations); INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) (certain firearms offenses); INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D) (miscellaneous crimes); INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (crimes of domestic violence and crimes of child abuse).
12. INA § 238, 8 U.S.C. § 1228.
13. INA § 238(b)(5), 8 U.S.C. § 1228(b)(5).
14. INA § 238(b)(3), 8 U.S.C. § 1228(b)(3).
15. INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B).
16. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
17. INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).
18. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).
19. INA § 241(b)(3)(B), 8 U.S.C. § 1231(3)(B).
20. INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3); INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C).
21. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).
22. INA § 212(h), 8 U.S.C. § 1182(h); but see *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015) (holding that LPRs who were originally admitted in a nonimmigrant status and who later adjusted to LPR status are eligible for 212(h) waivers even if they have been convicted of an aggravated felony).
23. INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1); INA § 240B(b)(1)(C), 8 U.S.C. § 1229c(b)(1)(C).
24. INA § 212(a)(9)(ii), 8 U.S.C. § 1182(a)(9)(ii).
25. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).
26. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 2580 (2010).