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*The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.*

*\*RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

## Anatomy of a RIAC Advisory: Part 6

### DEPORTABILITY: DRUG OFFENSES

Drug offenses are deportable offenses with the exception of ONE conviction for Unlawful Possession of Marijuana (UPM), a violation. Drug offenses fall into either the Controlled Substance Offense (CSO) ground of deportability or the Aggravated Felony (AF) ground for “drug trafficking.” If the offense is an AF, it is also a CSO, but not vice versa. There are CSOs which do not constitute an AF, and the distinction is critical.

The AF ground for drug offenses is listed in INA§ 101(a)(43)(B) as “illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act (CSA)), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).” Because of the severe consequences associated with an AF conviction (see the 2017 issue), a general understanding of what drug offenses constitute an AF is important.

In the first instance, the statute must involve a controlled substance as defined in section 102 of the CSA. The New York schedule, contained in the Public Health Law, is technically overbroad because not every NYS controlled substance found in the PHL is also found in the federal list. Nevertheless, the NY controlled substance issue has not been litigated in the immigration context and is therefore just an argument to be put forth by counsel in the immigration court. The best practice is to avoid any controlled substance offense if possible.

In addition, the statute must meet the federal definition of a “drug trafficking crime.” Federal law defines a “drug trafficking crime” as any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or Maritime Drug Law Enforcement (46 U.S.C. 75 et seq.). The statute defines a “felony” as any Federal or State offense classified by applicable Federal or State law as a felony. (21

## UPCOMING EVENTS:

October 16, 2017

1:00 pm – 2:00 pm  
Training for NYS Magistrates  
Association Annual  
Conference

October 20, 2017

12:00 pm – 2:30 pm  
Delaware Co. Bar Assoc.  
Delhi, NY  
CLE, Padilla Review:  
IMMIGRATION  
CONSEQUENCES IN  
CRIMINAL AND FAMILY  
COURT

January 28, 2018

12:00 pm – 1:00 pm  
Jefferson Co. Bar Assoc.  
CLE, Topic TBD  
Watertown, NY

February, 2018

Training for 6<sup>th</sup> Judicial  
District Judges  
TBD

### Chief Defenders & Assigned Counsel Administrators:

Contact the RIAC2 to  
schedule a training, lunch  
hour or other session in  
your office/county. We will  
provide CLE credit!

U.S.C. 802(13)) However, under 21 USC 844(a), ONE conviction for simple possession of a controlled substance is treated as a federal misdemeanor, so it is therefore possible that a state felony conviction for simple possession of a controlled substance (i.e. no intent to sell) may not be an AF. The exception to this rule involves Flunitrazepam, the “date rape” drug. A second conviction for simple possession of a controlled substance, whether a felony or misdemeanor, EVEN A UPM, constitutes an AF because the second conviction provides for an increased possible sentence of 2 years under federal law and is therefore a federal felony.

The other ground of deportability for drug offenses involves convictions for Controlled Substance Offenses (CSOs). Under INA §237(a)(2)(B), a noncitizen is deportable if, at any time after admission to the United States, he or she is convicted of a “violation of (or a *conspiracy* or *attempt* to violate) any law or regulation of a State, the United States, or a foreign country *relating to* a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), other than a *single* offense involving possession for one’s own use of 30 grams or less of marijuana. INA §237(a)(2)(B)(i). (*Emphasis added.*)

As with other grounds of criminal removal, an inchoate offense (i.e. attempt, conspiracy) is a CSO if the underlying offense is, or relates to, a controlled substance.

Consequences of having a CSO conviction, in addition to deportability, include permanent inadmissibility, ineligibility for a green card, ineligibility for cancellation of removal in immigration court proceedings and possible ineligibility for U.S. citizenship.

Intake review and why this is important in the drug offense context:

1. Provide documentation to verify your client’s immigration history and status so that we can determine the exact date of your client’s “admission” to the United States. The length of time your client has been in the U.S. is critical.
2. Provide a copy of your client’s rap sheet so that we can verify if your client has a previous UPM or other drug offense conviction.
3. Provide all charging documents to determine whether the offense is in fact a CSO under NY and federal law.
4. Provide information to help us determine your client’s eligibility for a green card, citizenship, relief from removal, or other benefit that will be affected by a drug offense conviction (other family members here in the U.S., prior deportation proceedings, etc.).

It is not safe to make any assumptions in immigration law and whether or not an offense constitutes a “controlled substance offense” is no exception. Criminally Using Drug Paraphernalia, for example, under 220.50, an A misdemeanor, has been held to constitute an offense “relating to” a controlled substance and is therefore a CSO. See *Matter of Espinoza*, 25 I. & N. Dec. at 118 (BIA 2009); *Borrome v. Attorney General*, 687 F.3d 150(3d Cir. 2012).

The best practice is to contact the RIAC so that we can provide a reliable answer and find the best possible disposition for your client.