

State Bar of Texas Juvenile Law Conference
Immigration Related Considerations in the Juvenile Justice System
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What Constitutes an Act of Juvenile Delinquency in the State of Texas

For purposes of juvenile delinquency, the Texas Family Code defines a “child” as someone who is ten years or older and under 17, or a person 17 years or older and under 18, who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before turning 17. (Section 51.02(2), F.C.) This means that a juvenile court in Texas may prosecute anyone between the ages of 10 to 16, and in some cases 17 if the delinquent conduct was committed before turning 17. Delinquent conduct is also defined by the Family Code as conduct, other than a traffic offense, that violates a criminal law of Texas or of the United States and is punishable by imprisonment or by confinement in jail. (Section 51.03(a)(1), F.C.) Conduct indicating a need for supervision, otherwise known as a CINS offense, is conduct, other than a traffic offense, involving fine-only offenses such as public intoxication, truancy, running away, inhalant abuse, expulsion from school or violation of a “child at-risk” court order. (Section 51.03(b), F.C.)

What Constitutes an Act of Juvenile Delinquency for Immigration Purposes

Juvenile delinquency differs from state to state in so far as the age requirement under which someone is held to face juvenile jurisdiction or adult jurisdiction in the criminal justice context. While States may differ between the age of individuals included within its juvenile justice system the federal system is uniform. Specifically, under federal law a juvenile delinquency is defined as a finding made by a juvenile court of a violation of law committed by a person prior to the age of 18.¹ When an individual is determined to have a juvenile delinquency adjudication the resulting punishment is considered a

¹ 18 U.S.C. §5031.

juvenile disposition. Within the immigration (and federal) context a juvenile adjudication is not considered a conviction of a crime.²

While an offense may have been committed while the individual was a minor it does not necessarily mean that he or she has a juvenile delinquency adjudication. Whether someone falls under the juvenile delinquency act is a matter of comparison and therefore the Federal Juvenile Delinquency Act should be referenced to the present state of the minor's adjudication.³ In some instances minors charged as adults and then convicted of a criminal act will be considered convicted of a crime for immigration purposes as well. The focus tends to rest on whether a plea or finding falls under the provisions of the federal juvenile delinquency act (FJDA). In other words would the individual have been charged as a juvenile under the FJDA if it were a federal crime. It should be noted however that a child under 15 will always be considered a juvenile for purposes of the Immigration and Nationality Act (INA) even where tried as an adult.⁴ The FJDA makes it clear that a juvenile delinquency proceeding results in the adjudication of a status rather than a conviction of a crime.⁵ Until a person reaches the age of 21 he or she can be charged with as a juvenile for an offense while committed under the age of 18.

Immigration related Consequences in the Juvenile Context

Besides determining whether a criminal act falls within the federal definition of a crime or an act of juvenile delinquency consideration must be given to the immigration related consequences. Attorneys should therefore be at least minimally familiar with various terms of art within the immigration context. There are rules that determine whether someone is admissible to the United States versus rules that determine whether someone is deportable from the United States.⁶ Additionally

² See the Federal Juvenile Justice and Delinquency Prevention Act, Pub. L. No 93-415, §§101-102 (1974).

³ Federal Juvenile Delinquency Act, 18 U.S.C. §5031-50.

⁴ See 22 C.F.R. §40.21(a)(2)(i)(A); See Tex Fam Code Ann 51.02

⁵ 18 U.S.C. §§5031-5032.

⁶ See INA §212 and see INA §237.

there are rules that may affect whether someone is eligible for certain immigration related programs such as the deferred action for childhood arrivals (DACA) specific to the particular program. Practitioners should be aware of these distinctions or at least refer their client to an experienced immigration attorney so as to fully vet the consequences of any juvenile related adjudication.

While a criminal act may not firmly fall under the category of an act of juvenile delinquency an alien may NOT be inadmissible if the crime was committed when the person was under 18 years of age and was committed more than 5 years prior to the date of application for entry and for a visa to enter. Further, if the subject was imprisoned the applicant must have been released 5 years prior to the application for admission, adjustment of status (obtaining a green card within the United States), or visa.

⁷ Finally, an act that results in a juvenile delinquency will NOT be a ground of inadmissibility as it is not considered a crime. ⁸

Deportability analysis is similar. In order for an individual to be removable for criminal actions the criminal act necessitates that an adjudication fall outside the purview of the FJDA. Minors charged as adults can often find themselves subject to deportation under the Immigration and Nationality Act because they will fall under the category of an individual who was convicted of a crime. ⁹ The Act basically states that a conviction arises when there is a court ordered restraint on liberty.

Special Program Considerations Such as DACA

Finally, various immigration programs contain their own standards beyond whether someone has or has not been convicted for juvenile delinquency purposes and becomes either inadmissible or deportable. Recently the Deferred Action for Childhood Arrivals program was implemented. This program was not implemented by statute but governed by regulation and memorandum based on an

⁷ INA §212(a)(2)(A)(ii)(i).

⁸ See *Matter of Ramirez-Ramiro*, 18 I&N Dec. 135 (BIA 1981).

⁹ See INA §101(a)(48)(A); See *Matter of Devison* 22 I&N Dec. 1362, 1365-66 (BIA 2000).

executive order. Essentially the DACA program allows for those who arrived in the United States before reaching the age of 16 to obtain temporary benefits including work authorization.

The present state of DACA mandates the applicant was under the age of 31 as of June 15, 2012, entered the US before reaching the age of 16, has continuously reside in the United States since June 15, 2007 up to the present time, had no lawful status on June 15, 2012 and at the time of making the deferred action request, is currently in school, has graduated or obtained a GED or has been honorably discharged of the Armed Forces, AND has not been convicted of a felony, a significant misdemeanor or three or more misdemeanors and do not otherwise pose a threat to national security or public safety.¹⁰

Juvenile Adjudications will not automatically bar someone from DACA. A juvenile adjudication will not count towards the felony, significant misdemeanor, or three or more non-significant misdemeanors criminal bars to DACA, as long as the juvenile was not convicted as an adult. Juveniles who have been convicted as adults for a felony, or otherwise as indicated above will not be eligible unless they can show exceptional circumstances.

Consequences Arising Even When no Conviction is Present

Sometimes Juvenile Adjudications that would not necessarily bar someone based on the conviction or non- conviction as law would have it would indicate a ground for denial of the DACA application and even subject someone to deportation. Certain serious criminal activities are flagged by USCIS who may determine that the applicant poses a threat to public safety or national security. Common findings of a threat to public safety may include gang affiliation, torture, human trafficking, killing a person, sexual contact with a person that was forced or through the threatened use of force.

¹⁰ <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>; Also under the newly announced expansion of DACA the max age limit has been eliminated. Also persons now must have entered under the age of 16 before Jan 1, 2010 and remain continuously present as opposed to having entered before June of 2007.

Requestors with gang affiliation should be very wary of filing for DACA or other immigration benefit programs.¹¹

When determining the availability of a benefit such as DACA when there is past negative information an overall assessment should be made before filing. Considerations such as how long ago the offense occurred, mitigating circumstances underlying the offense, evidence of rehabilitation, positive school record, and or community contributions should be assessed. These are factual determinations and the longer the time period has passed from the date of the criminal act the better the ability to show positive factors that support rehabilitation.

Disclosure of Sealed Records

Although records may be sealed in Juvenile adjudications this does not mean that an applicant does not have to disclose the occurrence. There is no known exception for failure to disclose a juvenile adjudication for federal immigration purposes even when state law provides that that the juvenile adjudication does not exist. It is very important then for any immigration related benefit that the arrest and adjudication be disclosed even if the records are not available. This also means that any prosecutor or judge who is admonishing the juvenile inform them that although there may or may not be immigration consequences as part of a plea arrangement the incident should be disclosed in any immigration related application.

Use of Expunctions

Expunctions can be valuable tools due to the fact in DACA applications that an expunction of a criminal record will not result in an automatic bar related to the underlying offense. This does not mean that a criminal incident did not occur. An expunction does not mean that an individual should not

¹¹ Civil Immigration Enforcement : Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems, December 12, 2012.

disclose the arrest or incident as indicated previously, the arrest must be disclosed.¹² Expunction may assist in an otherwise ineligible DACA recipient with a significant misdemeanor (such as a DWI) or felony conviction a chance for his or her application to be approved. On the other hand an expunction will not necessarily assist someone who is considered to have a criminal conviction for purposes of being deportable or inadmissible. In other words, while an expunction may help someone applying for a program benefit such as DACA, they will be routinely ignored and remain convictions for immigration purposes in removal proceedings or actual visa applications such as Legal Permanent Residency.¹³ As noted throughout this paper however a juvenile adjudication does not depend on the occurrence or non-occurrence of subsequent events (such as messing up on deferred and sentenced) so it can not become a conviction.

Conclusion

Practitioners and judges alike within the juvenile system should maintain vigilance in regards to immigration related consequences in the juvenile forum. A minimal understanding of what falls within the definition of a conviction in the Immigration and Nationality Act and what falls within a juvenile adjudication within the federal Juvenile Delinquency Act are important distinctions to ascertain while admonishing a client or in making a plea agreement withstand appeal.¹⁴

¹² See *Matter of Punu*, 22 I&N 224 (BIA 1998) Texas deferred adjudication is still a conviction for immigration purposes.

¹³ See *Matter of Roldan*; 22 I &N Dec. 52 (BIA 1999).

¹⁴ See *Padilla V Kentucky*, 559 U.S. 356 (2010).

