CRIMINAL WITHOUT CONVICTION – PROSECUTING THE UNCONVICTED ARRIVING CRIMINAL ALIEN UNDER SECTION 212(a)(2)(A) OF THE IMMIGRATION AND NATIONALITY ACT

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The United States has long proscribed the admission of non-citizens who admit having committed crimes.[1] As set forth in the Immigration and Nationality Act (INA):

> any alien ... who admits having committed, or who admits committing acts which constitute the essential elements of ... a crime involving moral turpitude ... or an attempt or conspiracy to commit such a crime ... or a violation of any law ... relating to a controlled substance ... is inadmissible.[2]

It is common knowledge that many individuals have committed serious crimes for which they have not been convicted. It is fortunate for law enforcement that an alien[3] need only admit his criminal activity to be inadmissible to the United States.[4] However, to be legally effective, these admissions must be handled in strict compliance with the law.

Initially, one might wonder why any individual would admit to uncharged criminal activity. Criminals in high crime areas routinely avoid police and seldom respond to any questioning. However, arriving aliens are often not as criminal savvy as the common street criminal. Additionally, unlike the common street criminal, the arriving alien must answer law enforcement questions to gain admission to the United States. Therefore, arriving aliens are much more likely to confess their criminal acts, especially when confronted with their prior criminal activity.

Immigration Inspectors and Border Patrol Agents are the officers who most commonly encounter the arriving alien. However, other law enforcement officers frequently encounter aliens who they suspect are involved in illegal activity. If information regarding this activity is routed to appropriate immigration authorities, such information can be

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[1] Once an alien is deemed inadmissible, he might still in fact avoid removal through various forms of relief. It is impossible to address all these facets of the ever-changing immigration law in an article of this length. This article is limited to a discussion of procuring admissions of criminal activity to successfully obtain a finding of inadmissibility under the INA.

[2] INA § 212(a)(2)(A)(i), 8 U.S.C § 1182(a)(2)(A)(i)(emphasis added)

[3] An alien is "... any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C § 1101(a)(3)

[4] Due to the incredible complexity of United States immigration law, some of these individuals might still be legally allowed to remain in the United States. However, a finding of inadmissibility under section 212(a)(2)(A)(i) has a significant impact on an alien's case and usually means that the alien will not be allowed to enter the United States or adjust their legal status within the United States. A law enforcement officer working with United States immigration laws should understand that section 212(a)(2)(A)(i) is a very useful tool, but it (like many other charges under the INA) does not guarantee removal of the alien from the United States.

documented and used as a basis of questioning if the alien departs the United States and attempts re-entry, or seeks to adjust his status within the United States.[5] If the alien admits to such criminal activity, the alien can then be refused admission to the United States, even though he has not been convicted of the criminal offense.

This article gives an overview of the law in this area and provides practical advice to the law enforcement officer on how to obtain an admission of criminal activity sufficient to support a finding of inadmissibility under section 212(a)(2)(A)(i) of the INA.[6]

THE LAW

The INA provides that arriving aliens are inadmissible to the United States if they have been convicted of a crime involving moral turpitude,[7] an attempt or conspiracy to commit such a crime,[8] or a violation of a controlled substance offense of any State, the United States, or a foreign country.[9] These aliens are also inadmissible if they merely admit having committed one of those offenses, even where there was no criminal prosecution.[10] Finally, these aliens need only admit the essential elements of the criminal offense to be deemed inadmissible.[11] It is not necessary that they admit the legal conclusion that they in fact committed a specific crime.[12]

A plain reading of the statute suggests that factual admissions of criminal activity by the alien are sufficient to support a criminal charge of inadmissibility. However, these admissions must comply with seldom-cited[13] but long-standing case law from the Board of Immigration Appeals[14] (the Board) to effectively support a charge of inadmissibility.

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[5] Whether the alien has been legally admitted to the United States is a separate issue. The purpose of this article is to demonstrate how an alien an alien seeking admission to the United States or adjustment of his immigration status can be punished for criminal activity for which he has not been convicted.

[6] 8 U.S.C. § 1182(a)(1)(A)(i). Trial attorneys of the Immigration and Naturalization Service (INS) may also wish to employ the tactics suggested in this article to obtain admissions of criminal activity in Immigration Court.

[7] *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C § 1182(a)(2)(A)(i)(I)

[8] *Id.*

[9] *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C § 1182(a)(2)(A)(i)(II). There is an exception to this rule for crimes committed by minors and certain petty offenses. *See* INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii).

[10] *See* INA § 212(a)(2)(A)(i), 8 U.S.C § 1182(a)(2)(A)(i)

[11] *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953)

[12] *Id.*

[13] It is not exactly clear why there are not more recent precedent decisions on this issue. However, there are numerous different factors to consider. First, INS trial attorneys are actively discouraged from appealing adverse decisions. As a result, when the Immigration Court admits an alien charged with admitting criminal activity, it is very unlikely the INS will appeal, even if it believes the decision was wrong. Secondly, since aliens seeking admission to the United States are often detained throughout the hearing process, they frequently elect removal from the United States rather than remaining in detention throughout a lengthy appeal. Finally, it appears that many officers are simply not knowledgeable about this charge, and therefore do not use it aggressively. This article seeks to increase that knowledge, and thereby increase the application of this charge of inadmissibility.

[14] The Board of Immigration Appeals is part of the Executive Office for Immigration Review, United States Department of Justice. It is an administrative panel charged with reviewing the decisions of Immigration Judges. Its precedent decisions are binding on these judges. *See generally* 8 C.F.R. 3.1.

In *Matter of K-*, the Board held that before an alien can be charged with inadmissibility due to admitting the elements of a crime involving moral turpitude, the alien must be given the following: 1) an adequate definition of the crime, including all essential elements, and 2) an explanation of the crime in understandable terms.[15] The Board noted that these rules "were not based on any specific statutory requirement but appear to have been adopted for the purpose of insuring that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude."[16]

Experience has demonstrated that very few law enforcement officers are aware of these rigid requirements. This is probably due to several reasons. First, the statute does not suggest the need to provide a specific definition and explanation of the criminal charge to the alien. Secondly, it hardly seems to violate the notion of "fair play" to ask an arriving alien if he has been involved in criminal activity. Finally, the issue of entrapment appears entirely misplaced because there is no government inducement.

Nonetheless, since *Matter of K-* and related cases have been precedent for over 40 years, it seems unlikely that the current Board will be inclined to overrule them. While not explicitly stated, it seems that the real concern of the Board is one of self-incrimination. Therefore, the prudent officer should build his case with that thought in mind. Additionally, the officer must remember that immigration laws do not usurp criminal self-incrimination law such as *Miranda v. Arizona*.[17] Immigration proceedings are not criminal, and therefore an alien may be compelled to explain his criminal activity if he wants any immigration benefits, including admission to the United States. The alien's answers or refusal to answer may result in his being denied admission to the United States. However, if a law enforcement officer wants to obtain information for use in a criminal prosecution, he must comply with criminal rules of obtaining evidence. In sum, section 212(a)(2)(A) is a valuable tool for removing aliens who admit to criminal activity for which they have not been convicted. It is not a means to compel an individual to criminally incriminate themselves in violation of the Fifth Amendment.

THE ADMISSIONS

As noted, the alien need only admit the elements of the crime, not the legal conclusion that he actually committed the crime.[18] However, the admissions must be voluntary[19] and unequivocal.[20] The admissions must, by themselves, constitute full and complete admission of (or attempt or conspiracy to commit) a crime involving moral turpitude or a controlled substance offense.[21] If an alien has

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[15] 7 I&N 594, 597 (BIA 1957), *citing Matter of J-*, 2 I&N Dec. 285 (BIA 1945), *modified by, Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953)

[16] *Id.*

[17] 384 U.S. 436 (1966)

[18] *Matter of K-, supra, citing Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953); *see also generally Matter of G-M-*, 7 I&N Dec. 40 (BIA 1955), *affirmed* 7 I&N 40, 85 (A.G. 1956).

[19] *Matter of G-*, 1 I&N Dec. 225, 227 (BIA 1942); *see generally Jelic v. INS*, 106 F.2d 14 (2d Cir. 1939)

[20] *Matter of L-* 2 I&N Dec. 486 (BIA 1946), *see also generally Matter of P-*, 4 I&N Dec. 252 (A.G. 1951)

[21] *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956) (in dealing with a divisible statute, once the alien's admissions reach the level of the misdemeanor

received a pardon for an offense, subsequent admission to the offense will not render him inadmissible.[22] If the criminal offense was adjudicated and resulted in dismissal, subsequent admissions by the alien will not establish inadmissibility unless the dismissal by the criminal court was on purely technical grounds.[23]

BUILDING A CASE

It is the burden of an arriving alien to prove that he is admissible to the United States.[24] If an alien refuses to answer questions in support of his request to enter the United States, he can (and likely will) be deemed inadmissible. Therefore, it is unlikely that an alien will simply refuse to answer questions about criminal activity when questioned by a federal law enforcement officer.[25] An alien may lie about his prior criminal activity, but this (if discovered) will render the alien inadmissible on other grounds.[26]

Many aliens do admit to criminal activity for which they have not been convicted. The alien may believe his actions were not criminal, or he may believe that without a conviction he cannot be further prosecuted. He likely suspects that the officer is aware of his criminal activity and that an admission, coupled with a fast-talking explanation, might allow him to convince the officer to permit him entry into the United States. In many instances the officer is alert to the possibility of criminal activity, based on arrest records or other leads.

As discussed previously, the mere admission of criminal activity is not enough to establish inadmissibility. The law enforcement officer must use lawful means to obtain admissions that will be legally sufficient to support the criminal charge of inadmissibility.

To meet that goal, the following process is recommended:

First, the alien should be thoroughly questioned to determine if he has committed a crime.[27] Where available, arrest records will provide the officer a starting point to initiate questioning.[28] Questioning should always be in a confident presumptive manner. For example, an officer encounters an alien with an arrest for cocaine possession but no conviction. He should not ask: "Have you ever knowingly possessed a controlled substance?" Rather, he should assert: "I

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offense, the court may not speculate that the alien would have been sentenced as a felon and therefore rendered inadmissible); *see generally Howes v. Tozer*, 3 F.2d 849 (1st Cir. 1925)

[22] *Matter of E-V-*, 5 I&N Dec. 194 (1953)

[23] *Matter of C-Y-C-*, 3 I&N Dec. 623, 629-630 (BIA 1950)

[24] It should be noted that aliens who have entered without inspection are now inadmissible as if they were detained at the border. *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i)

[25] As noted previously, such questioning may raise evidentiary and self-incrimination concerns under *Miranda* and similar cases. Discussion of this complex issue must wait for another day.

[26] Specifically, INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i)

[27] It is essential that this questioning be done in a language which the alien is fluent. An officer should always anticipate an allegation that the alien did not understand the questions. Any use of an interpreter should be carefully documented so that the interpreter can be called as a witness if necessary.

[28] As noted previously, if the true intent of the questioning is to build a case for criminal prosecution, the officer should be aware of potential Fifth Amendment self-incrimination issues. Removal hearings in Immigration Court are not criminal. Therefore, admissions of criminal activity that are admissible in Immigration Court may not be admissible in a criminal prosecution.

see you've been involved with cocaine. Are you still dealing drugs?" When confronted with the very serious offense of trafficking in cocaine, many criminal drug users will immediately deny this offense while equivocating on the lesser offense of cocaine possession. Experience indicates that if this individual actually was involved with cocaine, they will likely admit to it if questioned properly. However, the officer must be very cognizant that the criminal alien might later assert he was improperly coerced into making damning admissions. Therefore, the officer should carefully document every circumstance surrounding the interrogation.[29]

Once the "cat is out of the bag," it is unlikely the alien will deny the criminal activity when the officer seeks to document the admissions in writing. However, before preparing the written statement, the officer must locate the precise state or federal criminal statute the alien admits violating. Within the context of a recorded[30] statement, the officer should present the elements of this statute to the alien, and have the alien admit to each element of the offense. For example, an officer learns that an arriving alien has an arrest record in the United States for sale of cocaine. This arrest did not lead to conviction. However, during questioning the alien admits that he had a personal problem with using cocaine but that he never sold it. Title 21 U.S.C. § 844 makes it unlawful to knowingly possess a controlled substance. Thereafter, the officer obtains admissions of criminal wrongdoing from the alien (in the alien's language). Such an interrogation might go as follows:

Q. A few minutes ago you told me that you tried cocaine here in the United States. Did you in fact tell me that?

A. Yes

Q. In order to possess that cocaine you had to actually have it in your possession, correct?

A. Yes

Q. This wasn't an accident, you knew you had cocaine in your possession, correct?

A. Yes

Q. Do you understand that Title 21 of the United States Code at section 844 makes it unlawful to knowingly possess a controlled substance?

A. Yes[31]

[29] The author is confident of the ability to extract these admissions because he has done so many times in open court, an environment that can hardly be called a coercive atmosphere for extracting admissions of criminal activity.

[30] The statement may be recorded in writing or by electronic device. Audio / video recordings are an excellent means to record the demeanor of the parties and preserve exactly what was said during the interview. However, for evidentiary purposes, the statement should be properly reduced to writing to insure its admissibility in Immigration Court.

[31] Having the alien confess to the actual criminal charge is actually beyond the strict requirements of existing case law. However, it is highly recommended that the officer obtain such

Q. Do you admit that on [date] you knowingly possessed cocaine?

A. Yes

Q. And this possession took place in the United States[32]?

A. Yes

The alien may likely have a further explanation, such as the use was long ago, he's learned his lesson, etc. It is best to include every bit of this explanation in the written statement. This will help rebut any future claim from the alien that he was confused or that he did not mean he actually possessed cocaine.

CONCLUSION

Some aliens have been so frequently involved with the criminal justice system that they have no idea of the crimes for which they were actually convicted. Due to plea bargaining, these convictions may not truly reflect the extent of the alien's criminal activity. In these situations, admissions by the alien regarding his actual criminal behavior provide a far more truthful revelation about his criminal activity than a conviction record.

The skillful use of legitimate interrogation tactics can result in reliable admissions of criminal activity. However, to make an alien inadmissible to the United States these admissions must comply with existing law in both scope and form. Hopefully, the suggestions in this article will assist law enforcement officers to obtain admissions that are legally sufficient.

Some advocates complain that the tactics described in this article unfairly cause the criminal alien to admit to crimes. They suggest that unless the alien has been convicted by the criminal court system, it is unfair to punish him for criminal activity for which he has managed to avoid conviction. This attitude is simply not consistent with the law of the United States.

Admission to the United States is a privilege. The United States does not need to import criminals from overseas. Used properly, INA section 212(a)(2)(A)(i) provides one more weapon the law enforcement officer can use to protect the citizens of the United States.

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confession where possible. This further negates any future claims by the alien that he did not realize he was admitting to criminal activity when he admitted the elements of the criminal offense.

[32] Jurisdiction is a critical element in demonstrating that the alien's actions constituted a crime at the place where they occurred.

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"Criminal Without Conviction - Prosecuting the Unconvicted Arriving Criminal Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act," 2 Quarterly Review, ed. 2, January, 2001

"Right to Be - Right to See, Practical Fourth Amendment Application for Law Enforcement Officers," The Police Chief, September, 2003

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