THE WEAPON:
ADMISSIONS OF CRIMINAL CONDUCT WITHOUT A CONVICTION - INADMISSABILITY UNDER §212(a)(2)(A)(i)

It is no surprise to anyone in or out of the practice of law that a criminal conviction can be the basis of finding an alien inadmissible. However, lay individuals express surprise whenever they learn that an alien can also be found inadmissible for merely admitting to criminal activity even where there has been no conviction. Fellow practitioners are certainly less surprised by this fact, but are often surprised by the legal requirements that must be met for an alien to be found inadmissible. No doubt, the fact that an alien can be found inadmissible for admitting to criminal conduct is a potentially powerful weapon in the government's arsenal. Yet, for the government to use this weapon effectively, it must comply with laws that even DHS admits are little known and seldom cited. As you will see, the case law that dictates how admissions should be taken is surprisingly old.[1]

I. What does the law say?

The INA makes an alien inadmissible for admitting to two types of criminal offenses even though they may never have been convicted of those offenses:

> Except as provided in clause (ii), any alien convicted of, **or who admits having committed, or who admits committing acts which constitute the essential elements of** --
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
> >
> > (II) 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 Substance Act (21 USC 802)),
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> is inadmissible[2]

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[1] "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." Keith Hunsucker, Senior Legal Advisor, Federal Law Enforcement Training Center, *Criminal Without Conviction - Prosecuting the Unconvicted Arriving Criminal Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act*, n. 13. (Attached to this article)

[2] INA §212(a)(2)(A)(i)

On its face, two important aspects about the provision leap from the page; one obvious and one not so obvious. First, the provision obviously makes clear that an alien need only admit to criminal activity to be found inadmissible. Yet, not so obvious is the type of admission that the alien must make -- and it is under this aspect that DHS, CBP, ICE and even immigration judges routinely get it wrong from the start.

The statute requires that an alien admit to the elements that make up the criminal statute. This means that it is not enough for an alien to admit that he committed a crime involving moral turpitude or a drug offense. ***The alien must admit to the elements that make up the crime***. The perfect example of this is *Matter of C*, 1 I&N Dec. 14 (BIA AG 1940). In that case an alien admitted to committing perjury. Because there is no question that perjury is a crime involving moral turpitude, the alien would appear to be inadmissible for admitting to criminal conduct under the (old exclusion) statute. Not so fast said the court. The record did not disclose any evidence that the alien had admitted to the essential elements of the crime of perjury. The alien only told the officer that he perjured himself. Consequently, the alien was not inadmissible because he had not admitted to the elements that make up the crime of perjury.

The mistake made in that case and the mistake that practitioners see most often in this setting is where immigration officials, whether they be a district adjudications officer, a customs officer, a trial attorney or even the immigration judge, attempts to elicit an admission that the alien has committed the crime. Ironically, directly asking the alien whether the have, for example, committed bank fraud, will not, by itself, provide the basis to allege inadmissibility, but it is also the very thing that the Federal Law Enforcement Training Center teaches officers not to do![3] Practitioners are most likely to encounter this issue during interviews with CIS as the result of an application or petition that has been filed for an immigration benefit. Practitioners may also encounter this issue as the result of a statement given by the alien to CPB or ICE officers. Further, the issue could arise in removal proceedings during questioning by trial attorneys or the immigration judge. Finally, practitioners might see the issue arise in statements given to law enforcement officers or prosecutors. Regardless of who is asking the questions of the alien, strict requirements must be followed to elicit a proper admission if it is to be used as the basis for inadmissibility.

One of the concerns that the BIA seems to have with finding an alien inadmissible for merely admitting to criminal activity is the inherent position of power that an officer has when encountering an alien and the potential abuse of that power. Consequently, through several cases, the BIA has outlined the requirements that must be followed to minimize the appearance of abuse. 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

[3] "Questioning should always be in a confident presumptive manner. For example, an officer encounters as alien with an arrest for cocaine possession but no conviction. He should not ask: "Have you ever knowingly possessed a controlled substance?"" Keith Hunsucker, Senior Legal Advisor, Federal Law Enforcement Training Center, *Criminal Without Conviction - Prosecuting the Unconvicted Arriving Criminal Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act*, at 4.

unwittingly entrapped into admitting the commission of a crime involving moral turpitude."[4] It is important to note that although the precedent decisions that define these rules almost exclusively come from CIMT cases, the rules apply equally to cases that involve admissions related to controlled substance offenses as well.[5]

II. What is the officer required to do? (aka playing by the rules)

A. The officer must give a full explanation for the reason to take the statement

Interestingly this rule is not one dictated by the BIA. However, it is a rule that comports with the BIA's notion of "fair play." The rule appears in the Foreign Affairs Manual and requires consular officers to "give the applicant a full explanation of the purpose of the questioning" when eliciting admissions from visa applicants concerning the commission of criminal offenses.[6] Surprisingly, the Adjudicators Field Manual does not contain a similar provision even though an adjudications officer is often serving in essentially the same capacity as the consular officer.

The problem, of course, is determining what a "full explanation of the purpose of the questioning" looks like. Unfortunately, there does not appear to be any precedent decisions as a guide. In this respect, practitioners may have great leeway in attacking statements where the reason for the questioning is brief, non-existent, or falsely purports to be seeking information unrelated to the criminal conduct.

Of course, the fact that this "requirement" does not stem from any court case also opens the door to the additional problem that it could be argued that it is not a requirement at all. Practitioners should not surrender this point because as stated above, the requirement does exists in certain immigration procedures and is in accord with BIA's concern of fair play.

B. The officer must provide the essential elements of the criminal statute

Here we see the BIA's first attempts to limit the potential for abuse when an alien is being questioned about criminal activities.[7] Section 212(a)(2)(A)(i) requires that an alien admit to the essential elements of the offense. Thus, the only way to do this is to tell the alien what those elements are and then ask questions to determine whether the alien has acted in a manner that meets each element.

This requirement presents several hurdles for both the officer and the alien. First, unless the officer already has knowledge the alien may have engaged in criminal activity, the issue will likely only arise as the result of routine questioning, for example, during an

[4] *Matter of K*, 7 I&N Dec 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).
[5] *Pazcoguin v. Radcliff*, 292 F.3d 1209 (9th Cir 2002)
[6] 9 FAM 40.21(a) Note 5.1
[7] *Matter of K*, 7 I&N Dec.594 (BIA 1957)

application of admission or an adjustment interview. Consequently, the officer is not likely to be prepared with the appropriate criminal statute in front of them, let alone the essential elements that make up the offense. Therefore, unless the officer shifts gears to retrieve the statute, they are more likely to fail to abide by the rule and ask legally conclusory questions such as, "Have you ever possessed crack cocaine?"

Second, assuming the officer takes the time to retrieve the statute from the book shelf or internet, they will still have to be able to recognize the correct criminal statute to refer to based on the facts that the alien has provided that prompted the inquiry in the first place. Experienced prosecutors can get this wrong so there is no reason to believe that adjudications officers, for example, will always get this right. It may be the alien has indeed committed acts which make up the elements of one offense, but if the officer provides the elements of a similar, but incorrect statute, then the alien would be in a position to truthfully deny the questions or the officer will be unable to use the alien's statement as a proper admission.

Third, when confronted with direct questions about the elements that make up the criminal statute, it can be difficult for an alien to deny the factual allegations. This is especially true in situations where the alien has provided a previous statement to some authority. For example, if, as a part of a criminal investigation, the alien gives a sworn statement to police about a more serious offense, but is able to plea to a petty offense, you can bet that an immigration officer would attempt to use that sworn statement against them.

Fourth, invariably whatever criminal statute the officer retrieves will contain one or more words that have a specific legal definition. It is unlikely that the officer or the alien will know what these definitions are. Thus questions about the essential elements can breakdown because each party may have a different understanding of what the elements mean. This pitfall leads to the next rule.

C. The officer must provide an explanation of the crime in terms that the alien can understand

There is no question that criminal statutes are often long, complex and made up of divisible sections. Understanding whether an individual has violated the statute can be difficult for even experienced lawyers, much less a layman. Recognizing this, in *Matter of K* the BIA requires that the alien be provided the elements of the crime in a manner that the alien can understand and provide definitions for any word that has a legal definition. For instance, ordinary people have an idea what the definition of "possession" is in everyday usage. However, if an officer is questioning an alien whether she has possessed a controlled substance under the Texas Health & Safety Code, the officer must provide the alien with the definition of "possession" as defined in the Texas Controlled Substance Act.[8]

[8] Tex. Health & Safety §481.002(38)

It does not matter whether there is a common understanding as to a given word's definition. The only thing that matters is how the law defines that word. It is also important to note that this is an affirmative requirement. In other words, the officer must provide the definition in terms that the alien can understand before the alien can admit to the particular statutory element. The officer cannot take the position that the alien should ask a question if they do not understand something.

III. What should the practitioner do? (aka holding the government's feet to the fire)

On one hand, in the training material provided by the FLETC, the government is justifiably boastful about the weapon they have under §212(a)(2)(A)(i) and are somewhat contemptuous of the sophistication of aliens seeking immigration benefits.[9] On the other hand, there is a recognition on their part that they have several hoops to jump through to properly use the weapon. The knowledge of these hoops is the practitioner's counter to the government's weapon. From the outset, it should not be forgotten that it is the government's burden to prove by clear and convincing evidence that the charge of inadmissibility can be sustained. In a great sense, this burden is harmonious with the BIA's concern for abuse and fair play. When analyzing the government's conduct in eliciting an admission from an alien, this principal should always be at the forefront of the practitioner's mind.

Practitioners must scrutinize the transcript of the exchange between the officer and alien or the written statement provided by the alien. You should first be looking to see whether the officer has provided a full explanation for the reason to take the statement. Again, while it is true that the BIA has not made this a requirement and the AFM is silent about this as well, the argument should be asserted that such a requirement is consistent with the BIA's concern of fair play.

Next, practitioners should determine whether the officer has provided the essential elements of the offense and done so in a manner that the alien can understand, including providing any necessary legal definition. If the record does not reflect this has been done, the game should be over at that point. If the record shows that the officer did in fact provide the elements and definition, the question then becomes whether the alien understood the information provided. Does the record reflect multiple questions by the alien as to the meaning of what was being said? If so, it may be the alien was not being provided the elements in a manner that they could understand. Furthermore, it should be determined whether the interrogation was conducted in the alien's native language. If not, there is no question that the officer has not complied with the rule. Where the interrogation was conducted in the alien's language, it should be determined who served as the translator and what their skill level was in understanding complex legal issues and definitions and communicating them to the alien. The interrogation can easily breakdown where the translator does not effectively translate the officer's statements and

[9] "It is fortunate for law enforcement that an alien need only admit his criminal activity to be inadmissible to the United States. Initially, one might wonder why any individual would admit to uncharged criminal activity . . . [A]rriving aliens are often not as criminal savvy as the common street criminal." Hunsucker, *supra* at 1.

questions to the alien. In fact the FLETC training material specifically advises officers to be careful when using a translator.[10]

The BIA has dictated several other requirements that must be met for an admission to be valid, although these appear to be less likely to be violated. For instance, admissions must be voluntarily given.[11] Certainly there are examples where the officers intimidate and coerce improper admissions from aliens. However, it is not likely that you will come across the evidence to prove this. Typically, you will only have the officer's and the alien's testimony describing the interrogation setting and a transcript or written statement to review, which obviously does not reflect the entire setting or circumstances surrounding the interrogation.

Another, requirement is that admissions must be unequivocal.[12] This requirement appears to be more of a corollary to the requirement that the alien be presented the elements in terms that they understand. It goes without saying that if the alien is weaving and dodging in their answers, then they're probably not making an unequivocal admission. However, the problem for a dancing alien is that it is their burden to prove that they are admissible.[13] Dancing around the questions may quickly result in him being found inadmissible. Consequently, it is less likely that the alien will not answer questions when properly asked. Yet, if the record reflects that the alien is constantly asking questions as to the meaning of the elements, it is difficult to see how he is giving an unequivocal admission.

An additional requirement is that the admission be full and complete.[14] Again, if the officer is complying with the rules, it is less likely that this requirement would be violated. On the other hand, if the officer has disregarded the other requirements, then they probably have not set up the interrogation where the alien could provide a full and complete admission in the first place.

If representing or advising a criminal defendant, to the extent possible, written admissions for a prosecutor should be avoided because, as mentioned earlier, immigration officers would likely attempt to use the statement against the alien.[15] However, in the criminal setting, there is at least an argument that where an alien makes an admission about certain criminal conduct but then later is convicted of a different offense whether by plea or trial, the Immigration Service should be limited to what he was convicted of. In *Matter of Medina-Lopez*, in a pretrial confession, the alien admitted to robbing an individual. The court convicted him of robbery and assault as two separate

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[10] "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." *Id.* at n. 27

[11] *Matter of G*, 1 I&N Dec. 225, 227 (BIA 1942)

[12] *Matter of L*, 2 I&N Dec. 486 (BIA 1946); *Matter of P*, 4 I&N Dec. 252 (A.G. 1951)

[13] INA §291

[14] *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956)

[15] *See, Pazcoguin v. Radcliff*, 292 F.3d 1209 (9th Cir. 2002)(finding the alien inadmissible because statements he made during the visa issuance process in which he admitted to drug use to the doctor conducting a medical exam)

offenses. "Here we have a conviction, and must be guided by what the court considered the respondent had done rather than by what he said he had done." *Matter of Medina-Lopez*, 10 I&N Dec. 7, 9 (BIA 1962). Under this theory, one could argue the conviction document trumps the statement and thus the admission cannot serve as a basis for inadmissibility. Of course this assumes that the conviction itself is not a CIMT or drug offense either!

IV. Conclusion

As a weapon, §212(a)(2)(A)(i) is arguably more lethal to an alien as compared to other inadmissibility subsections since the government need not prove that the alien's criminal conduct ultimately ended in a conviction and punishment. At the same time, the government's use of this weapon is beset with hazards that are easily violated.[16]

In removal proceedings, more often than not, the government already holds virtually all the cards in the deck. Consequently, the best defense against this weapon is the knowledge of the requirements and awareness of how they are violated. If the government is going to come to the table with a winning hand, then we must ensure that they at least play by the rules. Your knowledge of the rules and awareness of how the cards are played will ensure this.

"And the knowledge that they fear is a weapon to be used against them" - Neil Peart

[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 . . . ." Hunsucker, *super* at 3