

**NDS Immigration Services Project
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DRUG GROUNDS OF REMOVABILITY

WHAT DRUG OFFENSES CONSTITUTE GROUNDS OF DEPORTABILITY?

The grounds of deportability apply to those who have already entered the U.S. lawfully, such as LPRs.

Rule: Any "conviction" for a controlled substance offense constitutes a ground of deportability.¹

Marijuana exception: There is one statutory exception for a single offense involving possession of 30 grams or less of marijuana for one's own personal use. Id.

What constitutes a conviction?

- Definition: A "conviction" is present for immigration purposes when there is a finding of guilt and "some form of punishment, penalty, or restraint on ... liberty ... [is] imposed."²
- YO: A YO adjudication is not a conviction for immigration purposes.³
- Diversion: Under the new drug laws, we can attempt to avoid a conviction for immigration purposes by asking the court to order a diversion without a guilty plea by proving that the plea is "likely to result in severe collateral consequences."⁴

WHAT DRUG OFFENSES CONSTITUTE GROUNDS OF INADMISSIBILITY?

The grounds of inadmissibility apply to: those who entered the U.S. without inspection; those seeking to become LPRs; and LPRs returning from abroad.

Rule: Any "conviction" of a controlled substance offense or any admission to having committed a controlled substance offense constitutes a ground of inadmissibility.⁵ No exceptions.

DRUG TRAFFICKING AGGRAVATED FELONY GROUNDS:

An aggravated felony conviction renders a non-citizen ineligible for almost all types of relief from removal. Once deported as an aggravated felon, s/he faces a lifetime bar to return to the U.S.

One of the aggravated felony grounds is the "drug trafficking" ground found at 8 USC § 1101(a)(43)(B), defined with reference to the Controlled Substance Act.

What constitutes a drug trafficking aggravated felony?

1. Any sale or possession with intent to sell, with the possible exception of misdemeanor marijuana sale;⁶
2. Possession involving more than 5 grams of crack cocaine or any amount of flunitrazepam (date rape drug), punishable as a federal felony; or
3. In the Fifth and Seventh Circuits, a second or subsequent simple possession offense.⁷

¹ 8 USC § 1227(a)(2)(B)(i).

² 8 USC § 1101(a)(48)(A).

³ See Matter of Devison-Charles, 22 I. & N. Dec. 1362 (BIA 2000).

⁴ See Training Materials, "New York's New Drug Laws," New York State Defenders Association, Apr. 13, 2009.

⁵ 8 USC § 1182(a)(2)(A)(i)(II). A YO adjudication should take an offense out of the grounds of inadmissibility, but some risk remains. See Devison-Charles; talk with Heidi if you face this issue.

⁶ To constitute a drug trafficking aggravated felony, an offense must either contain an "illicit trafficking" element, or "proscribe[] conduct punishable as a felony under" the Controlled Substance Act. See Alsol v. Mukasey, 548 F.3d 207, 212 (2d Cir. 2008); Lopez v. Gonzales, 549 U.S. 47, 53-54 (2008). In the Second and Third Circuits, NY misdemeanor sale of marijuana may not categorically be considered an aggravated felony. See Martinez v. Mukasey, 551 F.3d 113 (2d Cir. 2008); Evanston v. Attorney General, 550 F.3d 284 (3d Cir. 2008). But see Matter of Aruna, 24 I. & N. Dec. 452 (BIA 2008). When NDS clients are transferred to immigration detention facilities outside of the Second Circuit, their removal cases are governed by the jurisdiction in which they are detained.

⁷ The government has argued that multiple simple possession offenses can be aggregated to constitute a drug trafficking aggravated felony. The Board of Immigration Appeals and the majority of circuit courts of appeals have rejected this argument unless the offense was specifically prosecuted as a recidivist. See, e.g., Matter of Carachuri, 24 I&N Dec. 382 (BIA 2007); Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008). The Fifth and Seventh Circuits, however, have affirmed the government's argument. See e.g., Carachuri-Rosendo v. Holder, No. 07-61006 (citation not yet available) (5th Cir. May 29, 2009); Fernandez v. Mukasey, 544 F.3d 862 (7th Cir. 2008). See Training Materials from the Defending Immigrants Partnership (DIP), Sept. 2008, and the Immigrant Defense Project's Drug Litigation Initiative at <http://www.immigrantdefenseproject.org>.