



Removal Defense

Online Course

American Immigration Lawyers Association

Module 1: Custody, Bond, and Bond Appeals

Hypotheticals

Faculty Response

Hypothetical A

Jon Tran is a 29 year old individual from China who entered the United States in 2012 with an F-1 student visa to attend University in Florida. While attending the university, Jon met April Adams, a young lady born in New York City who had decided she was tired of the cold weather up north in wanted to move to a warmer climate. Jon and April quickly fell in love and moved in together into a small apartment. In 2014 Jon took a break from his studies so that he could pay the bills while his girlfriend, April, completed her engineering degree. Jon never returned to school and the couple decided to move to California where they would be married and April would start a new job at a biotech firm.

While traveling to California the couple is stopped at an immigration checkpoint in New Mexico where Jon is taken into custody for failing to maintain lawful status. Border Patrol agents permit April to continue on her way and she contacts your office as soon as she arrives in California.

What are the first steps that you should take in regards to Jon Tran? Is Jon Tran eligible for an immigration bond, assuming he has not been arrested for any criminal offenses, but has worked without authorization? What are some of the issues that will rise in a request for bond in Jon's case and how would you address those issues?

Faculty Response

The first thing that should be done in Jon's cases to locate where he is detained. Once he is located you should find the ICE office that has jurisdiction over his case. Your initial steps could be to work with ICE in order to obtain his release on his own recognizance, a parole, or an initial bond. ICE may be reluctant to release an individual who has overstayed his visa and has no immediate relief clearly available.

But Jon is eligible for an immigration bond and you should pursue this as soon as practicable if ICE is unwilling to provide for his release. Your bond motion should argue that Jon is eligible for bond because he has presence of more than four years in the United States after lawful



Removal Defense

Online Course

American Immigration Lawyers Association

admission as a student. Further, Jon has not been convicted or charged with any criminal offenses so is not a danger to the community. You will need to properly prepare to argue against Jon being a flight risk, as DHS is likely to argue that he is due to him not having a set address at the moment of detention. But his residential history in Florida prior to the move across country should evidence the existence of a continuous residence.

Finally, Jon is eligible for relief from removal in the form of an adjustment of status before the court. Although Jon and April are not yet married they can do so upon his release. This will require them to meet a higher standard under INA 204(g) with USCIS, but this standard should be met with proof of a shared life together. The couple can use evidence from when they initially began living together, showing proof of shared expenses, bank accounts and rental agreements. They will need to support their case with explanations regarding their intention to be married. But if this petition is approved, then Jon will become eligible for Adjustment of Status based on an immediate relative petition. While a potential petition filed with USCIS does not immediately provide Jon eligibility for adjustment of status, it will be helpful in proving his eligibility for relief in the foreseeable future.

You should also be prepared to argue that section 245(c) of the INA does not disqualify Jon from adjustment of status if in fact his I-130 petition is approved as this section does not apply to immediate relatives.

Make sure to strengthen your bond case with evidence of the relationship, declarations of the existing intention to marry, and evidence of April's new job offer to prove financial support for Jon during the proceedings. This should be helpful in helping you address the issues that you will find in Jon's case.

Hypothetical B

Stacy has been a lawful permanent resident since 1999. She obtained status via a petition by her lawful permanent resident father. Recently, Stacy was married to a U.S. citizen and traveled to Cancun, Mexico for her honeymoon. Before traveling, Stacy consulted with her criminal attorney regarding any potential problems she could possibly face due to her 2010 conviction in the state of Texas for possession of a dangerous drug. In 2010, Stacy was arrested when police found a small amount of cocaine in her purse while searching her at the entrance to a music festival. Her criminal lawyer consulted with an immigration lawyer and was advised



Removal Defense

Online Course

American Immigration Lawyers Association

to plea to Possession of a Dangerous Drug. Her criminal attorney assured her she would not have any problems in traveling outside of the country.

At the end of Stacy's honeymoon she applies for admission at the port of entry, and CBP begins to question her regarding her previous criminal history. The agent asks Stacy about her conviction and Stacy is unable to explain that she was not convicted for any drug possession charge, so the agent issues a deferred inspection and requires Stacy to appear at the port of entry in one week with documents related to her criminal conviction.

Stacy contacts you to assist her in her case. What can an immigration attorney do to prevent her detention when reporting for deferred inspection? Stacy tells you she does not want to report as she does not want to go to jail. How do you advise her? Is Stacy subject to mandatory detention?

Faculty Response

The first question you should address with Stacy should be the one regarding her reporting for the deferred inspection. As discussed in this module it is important for an attorney to advise a client of the consequences of any particular course of conduct. The attorney should not advise Stacy to break the law simply because of a risk of detention, but should rather advise her of the consequences of failing to report as well as the potential risks that may occur if she is placed into removal proceedings.

Deferred inspection is not an admission into the United States. Rather, it is a form of parole that permits an individual to temporarily enter the U.S. and provides them the opportunity to present evidence to support their admissibility to the country. CBP often uses this as a tool to collect evidence of inadmissibility against a person. The attorney should break down the case to determine if Stacy is in fact inadmissible, and, if so, eligible for any relief.

Generally, a lawful permanent resident is not regarded as seeking admission to the United States. However, a lawful permanent resident can be regarded as seeking admission where one of the conditions in Section 101(a)(13)(c) of the INA exists. These conditions generally have to do with abandonment of status, absence for a significant duration of time, or engaging in illegal activity after departure. However, a lawful permanent resident may also be regarded as seeking admission if he or she has been convicted of an offense described in Section 101(a)(2) of the INA.



Removal Defense

Online Course

American Immigration Lawyers Association

So your analysis should begin with an review of the criminal statute and a determination as to whether the offense makes the individual inadmissible. In order to be inadmissible, Stacy would have to be convicted of an offense relating to a controlled substance. If in fact Stacy has been convicted of a controlled substance offense she would also be subject to mandatory detention.

Module 4 of this course will discuss the categorical and modified categorical approaches to determining if a conviction under state law is a “match” for a conviction in the federal statute that would make an individual inadmissible. In Stacy’s case, Possession of a Dangerous Drug in violation of Texas Health and Safety Code § 483.041 is a unique statute. This statute provides that a person commits an offense if that person is in possession of a dangerous drug unless that person obtains a drug from a pharmacist. The term "Dangerous drug" means a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act).

By definition the statute specifically excludes drugs included in Schedules I through V of the Texas CSA, which very closely mirrors the Federal Controlled Substances Act. Thus, a conviction under this statute, that specifically excludes drugs found in the Federal Controlled Substances Act, would not qualify as a conviction for an offense relating to a controlled substance under federal immigration law.

As such, you would have an argument that Stacy is in fact not inadmissible to the United States as a returning lawful permanent resident as she does not meet any other conditions in Section 101(a)(13) of the INA. While your argument may be valid, CBP may disagree and choose to initiate removal proceedings against Stacy to allow an immigration judge to make this determination. If this were to occur, you would prepare a similar argument for both bond and termination of removal proceedings before the court. Based on the argument that Stacey has not been convicted of a controlled substance violation, she would also not be subject to mandatory detention under INA § 236(c).

While not every case will equal in complexity to Stacy’s, it is important to learn how to dissect a case like Stacy’s so that you may be able to protect your clients from further detention or removal.