

IMMIGRATION LAW FOR STATE APPELLATE COURTS

*COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL
ANNUAL CONFERENCE*

NOVEMBER 15, 2018
SAN DIEGO, CALIFORNIA



PRESENTERS

Hon. Rodin Rooyani


United States Assistant Chief Immigration Judge

Hon. Curtis A. Kin

Los Angeles County Superior Court Judge



GOALS & OBJECTIVES

- Provide General Background on Immigration Law of Interest to Appellate Courts
 - Discuss Areas in which Appellate Courts May Encounter Immigration-Related Issues
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- A decorative graphic consisting of several parallel white lines of varying lengths, slanted diagonally from the bottom right towards the top right, located in the lower right quadrant of the slide.

TOPICS COVERED

- IMMIGRATION LAW OVERVIEW:
BASIC CONCEPTS & TERMINOLOGY
 - IMPACT OF CRIMINAL CONVICTIONS
 - STATE COURT LITIGATION RELATING TO
IMMIGRATION ISSUES
 - q Attacks on Convictions
 - q SIJ (Special Immigrant Juvenile) Findings
 - q Misc. Proceedings
 - STATE LAW RESPONSES TO IMMIGRATION
ISSUES: CALIFORNIA EXAMPLES
- 

IMMIGRATION: Basic Concepts & Terminology



WHO IS A U.S. CITIZEN?

- Born on U.S. soil *(includes territories)*
 - Naturalized U.S. citizen
 - Born abroad to a U.S. citizen *(Acquired citizenship)*
 - Minors with “green cards” automatically become U.S. citizens when parent(s) naturalize *(Derivative Citizenship)*
- 

WHO IS A LAWFUL PERMANENT RESIDENT?

- Also called “LPR” or “green card” holder
- Right to live and work legally in the U.S. and to travel with a green card
- Can apply for U.S. citizenship after certain number of years of LPR status
- Can petition spouses and unmarried children from abroad
- Can lose status and be deported for certain crimes or offenses

WHO ELSE IS PRESENT WITH AUTHORIZATION?

▶ Visa Holders

- *Temporary, for specific time period and/or purpose*
- *Does not necessarily lead to LPR (must apply to “adjust status”)*
- *E.g., work visas, tourists/visitor visas, student visa, crime victims or cooperators, derivative visas*

▶ Refugees / Asylees

▶ DACA Recipients (“Dreamers”)

▶ TPS Recipients (Temporary Protected Status)


▶ Parolees

- *Entry for humanitarian or “public interest” reasons*

WHAT IS AN "ALIEN"?

- Our immigration laws, including the **Immigration and Nationality Act of 1952, as amended (the INA)** refer to any non-citizen, whether present in the U.S. legally or not – as an "alien"
- Otherwise referred to as "non-citizen," "immigrant," or "undocumented person"

IMMIGRATION LAW TERMINOLOGY

- **Deportation v. Removal** – old statute v. new
 - **Deportable v. Inadmissible** – to those already within the US v. those outside US or seeking to obtain status
 - **Removal Proceedings** – proceedings initiated by DHS by filing of a Notice to Appear (NTA) with the Immigration Court charging a person for being in the United States in violation of the INA
 - **Benefits or Relief** – terms used to describe statuses or applications which can be made, sometimes to USCIS as a stand-alone request or sometimes only in immigration court as a way to defend against removal
 - **Adjustment of Status** – term of art for obtaining lawful permanent resident status through application made in U.S.
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"INADMISSIBLE ALIEN"

8 USC 1182

- HEALTH (*diseases, disorders, or addictions*)
- SECURITY REASONS (*espionage, terrorism, Nazi persecutions, genocide, adverse foreign policy*)
- PUBLIC CHARGE (*over-dependence on the state*)
- NEGATIVE IMMIGRATION HISTORY (*entry w/out inspection, prior deport, fraud, alien smuggling, false claim to citizenship*)
- **CRIMINAL GROUNDS**

"DEPORTABLE ALIENS"

8 USC 1227

- INADMISSIBLE AT ENTRY / OUT OF STATUS *(but in country)*
- IMMIGRATION FRAUD
- SECURITY REASONS
- OTHER ACTS *(alien smuggling, false claim to citizenship, public charge, unlawful voters)*
- **CRIMINAL GROUNDS** *(firearms offenses, controlled substance violations, failure to register as sex offender, domestic violence, AGGRAVATED FELONY, CRIMES INVOLVING MORAL TURPITUDE (CIMT))*

**CONVICTIONS
&
IMMIGRATION
CONSEQUENCES**



CONSEQUENCES OF A CRIMINAL CONVICTION

A conviction may result in various immigration consequences for a noncitizen including:

- Inadmissibility to (8 USC 1182) or deportability from (8 USC 1227) the United States (aka “removability”)
- Mandatory detention pending removal proceedings (8 USC 1226(c))
- Ineligibility for naturalization and certain forms of relief from removal

WHAT CONSTITUTES A CONVICTION?

8 USC 1101(A)(48)(A)

A conviction exists for immigration purposes if:

- A formal judgment of guilt is entered by a court

OR

- If adjudication of guilt has been withheld,

- (1) Judge/Jury has found person guilty; Person has entered a plea of guilty or nolo contendere; or has admitted sufficient facts to warrant a finding of guilt, AND
- (2) Judge has ordered some form of punishment, penalty, or restraint on liberty

DO EXPUNGED CONVICTIONS COUNT?

Expungement of a conviction pursuant to a state rehabilitative statute has no effect for **immigration purposes**

[*Brownrigg v INS* (9th Cir. 1966) 356 F.2d 877; *Lopez-Vasquez v. Holder* (9th Cir. 2013) 706 F.3d 1072]

- **Exception**: Expunged conviction for simple drug possession prior to July 14, 2011, that would satisfy requirements of Federal First Offender Act (FFOA), 18 USC 3607 [See *Lujan-Armendariz v. INS* (9th Cir. 2000) 222 F.3d 728, 749, overruled prospectively by *Nunez-Reyes v. Holder* (9th Cir. 2011) 646 F.3d 684]

WHAT IS NOT A CONVICTION

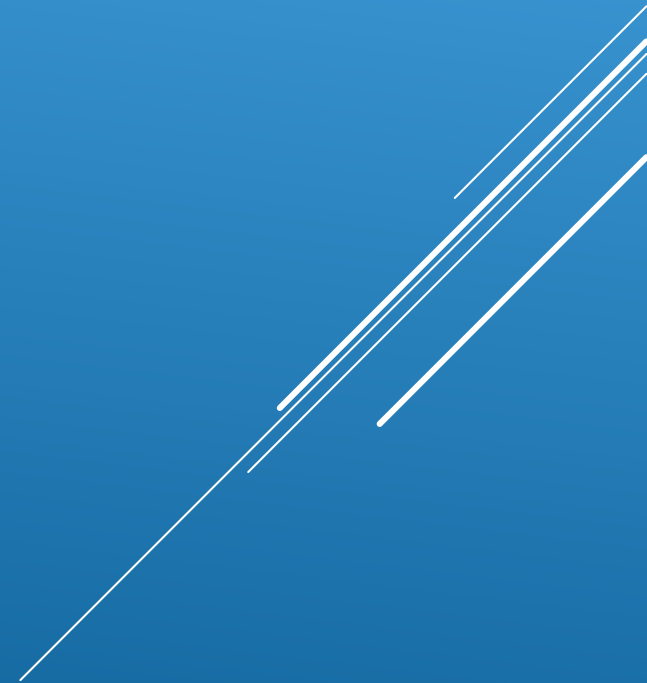
- Pretrial diversion (*i.e., pre-plea*)
- Deferred prosecution
- Conviction vacated for non-immigration reasons due to (1) legal insufficiency or (2) substantial procedural defects in criminal proceeding [*Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006)]

ALTERNATIVE DISPOSITIONS UNDER STATE LAW

Once a guilty plea has been taken and restraint such as probation or other terms and conditions have been imposed, a withdrawal of plea based on completion of probation or other terms does not remove a “conviction” for immigration purposes, regardless of state law to the contrary

- E.g., California’s Deferred Entry of Judgment (*former Cal. Penal Code 1000*) vs. Pre-Plea Drug Diversion (*current Cal. Penal Code 1000*)
- E.g., California’s Proposition 36 for Non-Violent Drug Offenders

PARTICULAR TYPES OF CONVICTIONS



COMMON CRIMES WITH IMMIGRATION CONSEQUENCES

Not every “conviction” will carry adverse immigration consequences. The following are the common categories:

- *Controlled substance offenses*
- *Crimes involving moral turpitude*
- *Aggravated felonies*
- *Firearms offenses*
- *Domestic violence and child abuse offenses*

CONTROLLED SUBSTANCE OFFENSES

8 USC 1227(A)(2)(B)(I); 8 USC 1182(A)(2)(A)(I)(II)

Any conviction relating to a controlled substance is generally a removable offense

- Exception: single offense of 30 grams or less of marijuana for personal use
- Controlled substance must be defined under the Controlled Substance Act (21 USC 802)

FIREARMS OFFENSES

8 USC 1227(A)(2)(C)

A noncitizen convicted of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying (or attempting or conspiring to do any of the foregoing) any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 USC 921(a)) in violation of any law is deportable.

- Read “broadly” to “embrace the entire panoply of firearms offenses” [*Valerio-Ochoa v. INS*, 241 F.3d 1092, 1095 (9th Cir. 2001)]
- INA expressly excludes “antique firearms” from definition of a “firearm” [*Medina-Lara v. Holder*, 771 F.3d 1106, 1115 (9th Cir. 2014)]

DOMESTIC VIOLENCE GROUNDS

8 USC 1227(A)(2)(E)

- “Domestic Violence” conviction
- Stalking conviction
- Child abuse / neglect / abandonment conviction
- Civil or criminal court finding of violation of protective order (no conviction required)

(Note: Applies to convictions or violations after September 30, 1996)

“DOMESTIC VIOLENCE CONVICTION” DEFINED

8 USC 1227(A)(2)(E)(I)

The offense must be:

- 1) A Crime of Violence as defined under 18 USC 16
(regardless of length of sentence);

AND

- 2) Committed against a current or former spouse, co-habitant, co-parent of a child or person protected under state law DV statutes (e.g., in CA, a dating relationship would count)

NOTE: Any crime of violence, regardless of victim, becomes an aggravated felony if a sentence of one year or more is imposed.


CIMTS

CRIMES INVOLVING MORAL TURPITUDE

- “Moral Turpitude” is not defined by immigration statute but refers generally to conduct that is “inherently base, vile, or depraved” OR conduct that involves an element of fraud or deceit
- Qualifying Crimes Developed through case law
- Criminal Intent is usually required (*e.g., crimes involving fraud are generally CIMTs*)
- Category of crimes include crimes against: (1) a person, (2) property, or (3) government.


Examples include: *theft, robbery, some assaults, some forms of child abuse, criminal threats, some sex-related crimes, and fraud crimes*

AGGRAVATED FELONIES

- Defined by Statute (8 USC 1101(a)(43))
 - Bars eligibility to most forms of relief from removal and immigration benefits
 - Can't establish good moral character for naturalization
 - Severe due process restrictions (mandatory detention and deportation – Judge loses ability to exercise discretion)
 - Severe sentence enhancements for illegal reentry prosecutions under 8 USC 1326
 - Permanent Bar from Returning to US
- 

"AGGRAVATED FELONIES" DEFINED

8 USC 1101(a)(43)

- A. Murder / Rape / Sexual Abuse of Minor
 - B. Drug Trafficking
 - C. Firearms Trafficking
 - D. Money Laundering
 - E. Explosives / Firearms/ Arson Offenses
 - F. Crimes of Violence *(sentence imposed 1 year or more)*
 - G. Theft / Burglary Offense *(sentence imposed 1 year or more)*
 - H. Kidnapping
 - I. Child Exploitation & Pornography
- 


"AGGRAVATED FELONIES" DEFINED *(cont'd)*

8 USC 1101(a)(43)


- J. Illegal Gambling *(sentence imposed 1 year or more)*
- K. Prostitution & Human Trafficking
- L. Espionage & Treason
- M. Fraud & Tax Evasion *(loss > \$10,000)*
- N. Alien Smuggling
- O. Illegal Entry
- P. Passport / Document Fraud *(sentence imposed 1 year or more)*
- Q. Failure to Appear for Service of Sentence *(for Crime Punishable by 5 years or more)*

"AGGRAVATED FELONIES" DEFINED (cont'd)

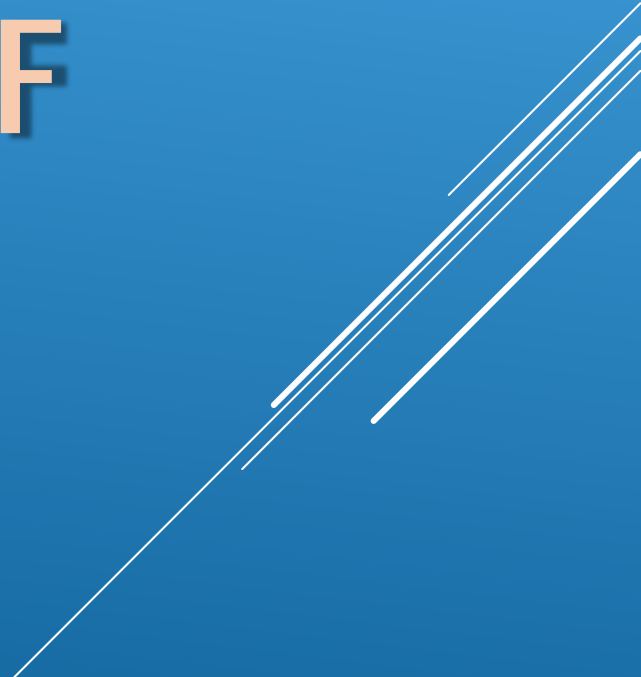
8 USC 1101(a)(43)

- R. Bribery / Counterfeiting / Forgery
(sentence imposed 1 year or more)
 - S. Obstruction of Justice *(sentence imposed 1 year or more)*
 - T. Failure to Appear before Court for Felony
 - U. Attempt / Conspiracy to Commit Any of the Foregoing
- 


DEFINITION OF "SENTENCE IMPOSED"

- A sentence remains a sentence for immigration purposes, even if imposition or execution of it has been suspended.
 - Any jail or prison term counts toward the "sentence imposed," regardless of amount of time spent in custody
 - Jail/Prison time imposed for violation of probation is added to original sentence to determine "sentence imposed"
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LITIGATION ARISING
FROM IMMIGRATION
CONSEQUENCES OF
CRIMINAL
CONVICTIONS



ATTACKS ON CONVICTIONS

- MOTIONS TO WITHDRAW PLEA
(e.g., Cal. Penal Code 1018)
 - HABEAS PETITIONS
 - PETITIONS FOR EXPUNGEMENT
 - PETITIONS TO VACATE
- 

HABEAS: IAC CLAIMS

- *Padilla v. Kentucky* (2010) 559 U.S. 356

6th Amendment requires counsel to provide affirmative and competent advice regarding potential immigration consequences

- *Lee v. U.S.* (2017) 137 S.Ct. 1958

Prejudice for IAC based on erroneous advice concerning immigration consequences of a conviction is whether, but for counsel's advice, defendant would have proceeded to trial instead of pleading guilty.

MISC. ISSUES POTENTIALLY INVOLVING IMMIGRATION CONSIDERATIONS

- **BAIL/CUSTODY CONSIDERATIONS**

E.g., *People v. Marghzar* (1987) 192 Cal.App.3d 1129, 1141 [Court MAY consider Immigration Status]

- **SENTENCING ISSUES**

Requests for Custody Time of 364 days or less

E.g., *People v. Sanchez* (1987) 190 Cal.App.3d 224 [Court MAY consider immigration status in deciding whether to grant probation]

- **PRE-TRIAL/SETTLEMENT ISSUES**

Modifications to a charge, a factual basis, or a sentence, can make a difference in rendering an alien deportable

Aliens may be willing to undergo more serious punishment in exchange for opportunity to mitigate immigration consequences.

IMMIGRATION ISSUES: FAMILY, PROBATE & JUVENILE COURTS

- Juvenile adjudications are not considered convictions under immigration law

[Matter of Devison (BIA 2000)(en banc) 22 I&N Dec. 1362]

- State Court Findings for Special Immigrant Juvenile Status

SPECIAL IMMIGRANT JUVENILE

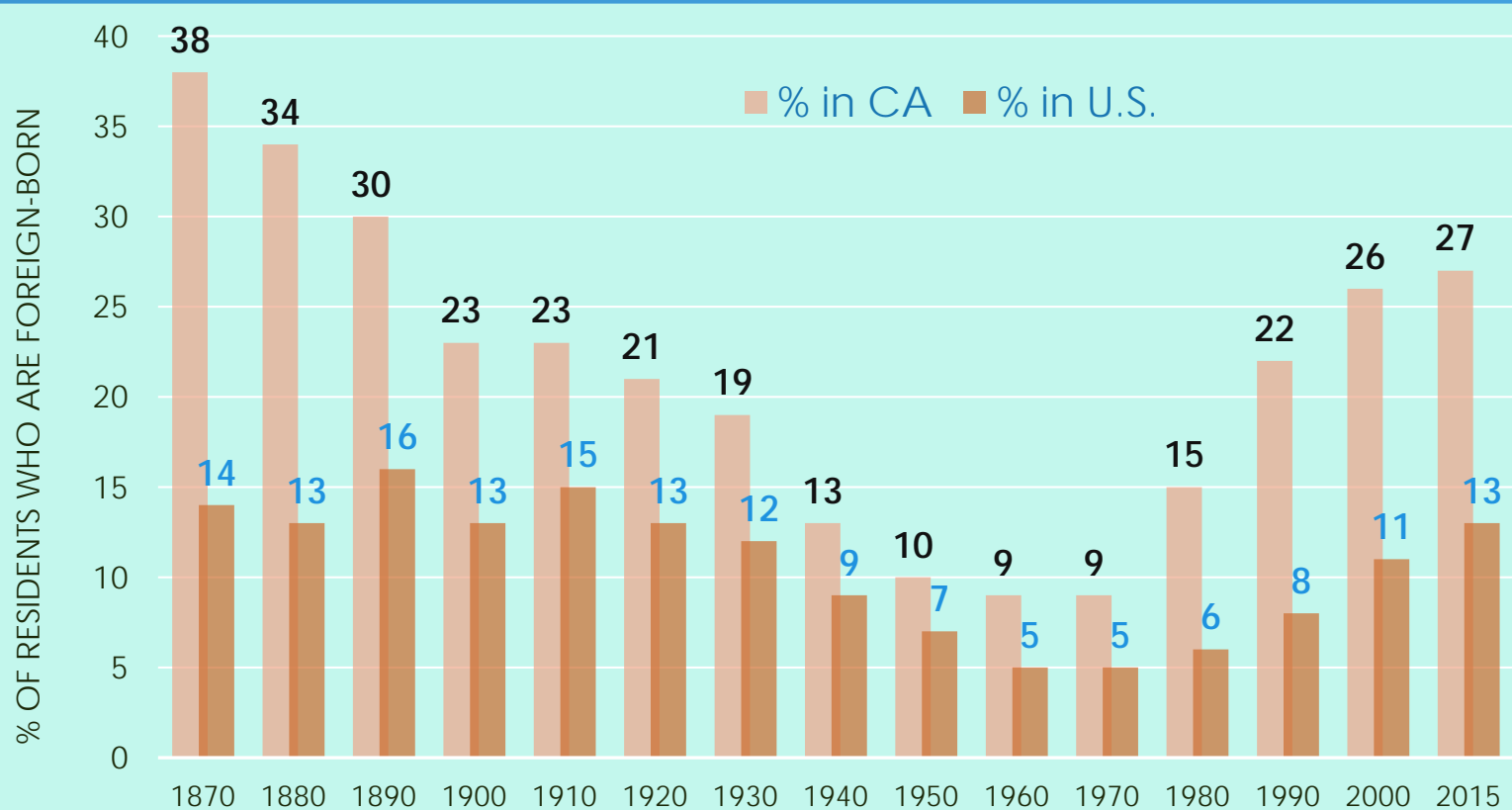
INA § 101(A)(27)(J)

- Unmarried child under 21
- Present in the United States
- May obtain Lawful Permanent Resident Status, despite unauthorized entry or presence in the country
- **If State Court finds:**
 - *Reunification with parent not viable due to abuse, neglect, or abandonment*
 - *Return to Country not in best interests of child*
- Federal authorities (USCIS) determine whether to grant status, considering: reasonable factual basis to support state court findings, purpose for seeking SIJ status

STATE LAW RESPONSES TO
IMMIGRATION ISSUES:
CALIFORNIA EXAMPLES

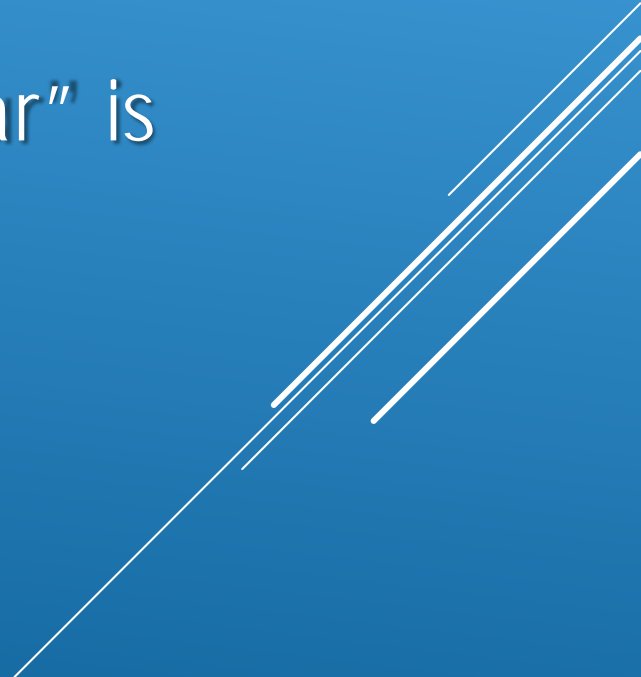


More than 1 out of 4 Californians is an Immigrant



Source: U.S. Census Bureau and American Community Survey
See: Just the Facts: Immigrants in California, PPIC
Migration Policy Institute, State Immigration Data Profiles, at
<http://www.migrationpolicy.org/data/state-profiles/state/demographics/CA>

CAL. PENAL CODE 18.5

- Enacted July 21, 2014
 - Any crime “punishable up to one year” is actually punishable up to 364 days
 - Applies retroactively
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CAL. PENAL CODE 1016.5 ADVISEMENT

- Duty of Court to Advise Defendant prior to accepting plea
- *“If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States”*
- Failure to give requires court to vacate plea and judgment upon motion of defendant

CAL. PENAL CODE 1016.2 & 1016.3

- Effective January 1, 2016
- PC 1016.2: Codify Existing Case Law
(Padilla v. Kentucky (2010) 559 U.S. 356 & California analogs)
- PC 1016.3(a): *“Defense counsel shall provide accurate and affirmative advice about . . . immigration consequences”*
- PC 1016.3(b): *“The prosecution, in the interest of justice . . . shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor . . .”*

CAL. PENAL CODE 1473.7: MOTION TO VACATE

- Effective January 1, 2017
- Petitioner need not be imprisoned or subject to restraint (*unlike habeas*)
- Makes legally invalid any conviction or sentence “*due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere*”

CAL. PENAL CODE 1000: PRE-TRIAL DRUG DIVERSION

- Signed into law October 18, 2017
- PRE-TRIAL DRUG DIVERSION
 - ü Defendant pleads Not Guilty
 - ü Defendant Waives Jury Trial & Speedy Trial Rights
 - ü Drug Treatment 12-18 months
 - ü If Successful: Court dismisses charges
 - ü If Unsuccessful: Criminal Proceedings Resume

CAL. CODE CIVIL PROC. 155: SIJ DUTIES

- Enacted September 27, 2014
- Superior Courts have jurisdiction to make SIJ findings
- “Juvenile court” includes the juvenile, family and probate divisions of the Superior Courts
- “[S]hall issue” order making necessary SIJ findings if “there is evidence to support those findings”
- SIJ proceedings are confidential

CAL. PENAL CODES 679.10 & 679.11: U-VISA & T-VISA CERTIFICATION

- Enacted 2016 (U-Visas) & 2017 (T-Visas)
- Immigration relief for: (1) victims of certain crimes who have cooperated, or are willing to cooperate, in the investigation or prosecution of the crime (U-VISA); or (2) victims of human trafficking cooperating with law enforcement (T-VISA).
- Benefits: Temporary legal status, work authorization, and the opportunity to apply for green card

CAL. PENAL CODES 679.10 & 679.11: U-VISA & T-VISA CERTIFICATION *(cont'd)*

- Applicant needs signed certification proving s/he was a qualified victim and cooperated. State judges may be certifiers. (8 C.F.R. 214.11(a), 214.14(a)(3)(ii))
- Requires CA judges to “fully complete and sign” U- and T-Visa certifications upon a sufficient showing. (679.10(e), (g), 679.11(e), (g))
- Rebuttable presumption of helpfulness/cooperation exists if the victim has not refused or failed to provide reasonably requested information and assistance. (679.10(f), 679.11(f))

QUESTIONS?



RESOURCES

IMMIGRATION JUDGE BENCHBOOK *(archived)*

<https://fileshare.eoir.justice.gov/benchbook-archived.zip>

NINTH CIRCUIT IMMIGRATION OUTLINE *(updated January 2018)*

https://www.ca9.uscourts.gov/guides/immigration_outline.php

DHS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES: INFORMATION FOR LAW ENFORCEMENT AGENCIES & JUDGES

<https://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges>

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