

Immigration Consequences of Virginia Criminal Offenses

Introduction: The accompanying chart is intended as an introductory and informative tool for criminal defense attorneys in Virginia advising their clients regarding the immigration consequences of criminal case dispositions. The chart does not attempt to provide legal advice or to give an opinion as to the immigration consequences that could apply in any particular case. This area of law changes frequently and is affected by both legislative and judicial developments. Thus, while this chart is meant to be a resource, attorneys must conduct independent research to ensure the accuracy of their advice.

Using the chart: The chart analyzes the consequences of selected Virginia criminal offenses under federal immigration law. With a few exceptions, the chart is organized numerically by Va. Code section and addresses the likelihood that convictions for the included offenses will give rise to grounds for removal (i.e. deportation). The chart takes a conservative approach and, where the law is in question, errs on the side of concluding that an offense will give rise to a ground of removability. As such, the chart is not intended for immigration attorneys who are seeking to make arguments in the context of an immigration court proceeding. Also, additional immigration consequences not listed here may arise from the offenses described in the chart, such as the denial of naturalization, inadmissibility, or the denial of discretionary relief. Finally, identifying the potential grounds of removability triggered by a particular Va. offense is never sufficient in and of itself to determine the immigration consequences of a particular conviction. **Defense attorneys must have a complete understanding of their client's immigration and criminal history in order to provide accurate advice concerning the immigration consequences of a conviction.**

Fourth Circuit Analysis: Unless otherwise noted, the analysis in this chart is based on the law within the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit. In some cases, the possible immigration consequences of an offense may be different if analyzed under the law of another jurisdiction.

Key concepts:

Deportability v. Inadmissibility: There is an important distinction between criminal “inadmissibility” and criminal “deportability.” Grounds of inadmissibility prevent a noncitizen from being admitted to the U.S., whether traveling abroad or present in the U.S. without having been lawfully admitted. The grounds of deportability lead to the deportation of a noncitizen who was previously lawfully admitted (such as a lawful permanent resident (LPR)). Although criminal inadmissibility grounds do not apply directly to those who are lawfully present, a conviction that renders noncitizens inadmissible will prevent them from re-entering the country if they leave. While many grounds of deportability and inadmissibility overlap, there are important distinctions between the two. Some of those distinctions are addressed in this cover memo and in notes used throughout the chart.

Conviction and Admissions: A “conviction” is required for most but not all grounds of deportability and inadmissibility. Under 8 U.S.C. § 1101(a)(48)(B), a conviction is “a formal judgment of guilt ... or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” Accordingly, dismissals, *nolle prosequi* dispositions, and adjudications of juvenile delinquencies are not considered convictions. However, many diversion programs, particularly those requiring an upfront guilty plea, are convictions. Also, a noncitizen’s admission to the elements of certain offenses, such as controlled substances offenses, can make him or her inadmissible.

Enforcement Priorities: In January 2017, President Trump issued an executive order broadly expanding categories for enforcement priorities, declaring that DHS will now prioritize for removal ANY immigrant who falls within a specified removal ground under the INA, including removable aliens with criminal convictions, those who have been charged with criminal offenses or committed crimes without being charged, those who have engaged in fraud or “abused” a program to receive public benefits, those who have a previous final order of removal, and those who “otherwise pose a risk to public safety or national security” in the eyes of an immigration officer. The broad enforcement priorities appear to apply to any removable immigrant, meaning that ANY interaction whatsoever with the criminal justice system could lead an undocumented or out-of-status immigrant to be an enforcement priority for ICE.

Sentence: Under 8 U.S.C. § 1101(a)(48)(B), a “sentence” for immigration purposes includes any period of incarceration ordered by a court, **whether imposed or suspended in whole or in part**. Defense attorneys should bear in mind that there is **no distinction** between a suspended sentence and a period of incarceration for immigration purposes.



Common grounds for removal:

Aggravated felony (AF): AF's are defined in 8 U.S.C. § 1101(A)(43). In general, an AF is the most severe category of criminal offense for immigration purposes and can result from crimes that are neither “aggravated” nor “felonies” (a misdemeanor with a sentence of at least one year can be considered an aggravated felony for immigration purposes). A noncitizen with an AF has very limited defenses to deportation, will likely be held in mandatory detention throughout his or her case, will be barred from becoming a citizen, and cannot return to the U.S. if deported. The following is a list of AF offenses, all of which can be found at 8 U.S.C. § 1101(a)(43)[the corresponding letter below]:

- (A) murder, rape, sexual abuse of a minor
- (B) trafficking in controlled substances
- (C) trafficking in explosives or firearms
- (D) money laundering if the amount exceeds \$10,000
- (E) firearms offenses
- (F) crime of violence with at least one year sentence imposed
- (G) burglary, receiving stolen property, or theft with at least one-year sentence imposed
- (H) extortion, kidnapping offenses , ransom offenses
- (I) child pornography
- (J) gambling/RICO offenses where one year sentence may be imposed
- (K) prostitution, slavery
- (L) security offenses such as espionage, sabotage, treason
- (M) fraud, deceit, tax evasion in which the loss to the victim exceeds \$10,000
- (N) alien harboring, smuggling, or transportation
- (O) Illegal re-entry offenses
- (P) Document fraud or passport fraud with at least one year sentence imposed
- (Q) Failure to appear
- (R) counterfeiting, forgery, or commercial bribery with at least one year sentence
- (S) perjury, subordination, obstruction of justice, or bribery of a witness with at least one year sentence
- (T) Failure to appear offenses
- (U) attempt or conspiracy to commit an aggravated felony offense

Crimes involving moral turpitude (CIMT): a conviction for a CIMT is one of the most common grounds of removal and can have severe consequences for all noncitizens, even those with very minor criminal offenses. A CIMT conviction (or the admission of conduct constituting a CIMT) will generally render a noncitizen inadmissible unless the conviction falls within the “petty offense” exception which applies to noncitizens with no other CIMTs, where the offense is not punishable by a greater than one year sentence, and the prison sentence imposed is not greater than 6 months. 8 U.S.C. § 1182(a)(2)(A)(i)-(ii). A CIMT can also render a noncitizen deportable if committed within 5 years of admission to the US and if a prison sentence of 1 year or more may be imposed; or if a noncitizen commits two CIMTs at any time after admission not arising out of a single scheme. 8 U.S.C. § 1227(a)(2)(A)(i), (ii). There is no statutory definition of CIMT, and case law is constantly evolving. In general, CIMTs result from: (1) crimes with intent to steal or defraud; (2) crimes in which bodily harm is caused or threatened by an intentional act or serious bodily harm is caused or threatened by a reckless act; and (3) sex offenses. This list is not exhaustive.

Other grounds of removal: In addition to AFs and CIMTs, the chart addresses the likelihood that offenses will trigger other grounds of removability, including:

- **Controlled substance offenses (CSO):** This is one of the most frequently applied and broadest categories of removable offenses and also makes a noncitizen ineligible for many of the most important forms of relief. Under 8 U.S.C. § 1227(a)(2)(B) (deportability), 1182(a)(2)(A)(i)(II) (inadmissibility), a CSO generally makes a noncitizen deportable or inadmissible if convicted of a violation (or conspiracy or attempt to violate) of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, **other than a single offense involving possession for one’s own use of thirty grams or less of marijuana (this exception applies to deportability only; not inadmissibility).** Even expunged CSOs will generally be considered convictions.
- **Firearms violations (FV):** Under 8 U.S.C. § 1227(a)(2)(C), a FV makes a noncitizen deportable if at any time after admission he or she is convicted of purchasing, selling, possessing or using in virtually any way a firearm or other “destructive device” in violation of any law (defined in 18 U.S.C. § 921(a)). Attempt and conspiracy will also make a person deportable.
- **Domestic violence (DV):** Under 8 U.S.C. § 1227(a)(2)(E), a noncitizen is deportable for conviction of crimes of domestic violence, stalking, child abuse, child neglect, child abandonment, and certain violations of protective orders (not including support or child custody orders or provisions).
- **Prostitution (Prost.):** Under 8 U.S.C. § 1182(a)(2)(D), prostitution is a ground of inadmissibility for persons who are coming to the U.S. “solely principally, or incidentally to engage in prostitution, or [who have] engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment” or who attempt to receive or receives the proceeds of prostitution. Regulations say that this ground of inadmissibility targets those who have engaged in a pattern of prostitution and individual instances are generally not sufficient to trigger inadmissibility.

A note concerning Temporary Protected Status (TPS): TPS is another form of temporary relief from removal for individuals from certain countries, as designated by the Secretary of DHS. Although the accompanying chart does not directly address TPS, it may be a significant factor in the advice that a criminal defense attorney provides to a client. A noncitizen is ineligible for TPS - or can have TPS revoked - if he is subject to any ground of inadmissibility, or has any felony or two misdemeanor convictions.

Key considerations when advising a client: when advising a noncitizen, criminal defense attorneys should keep in mind the following key principles, recognizing, however, that every case presents unique facts and circumstances:

- Whenever possible, avoid a criminal “conviction” (as defined above);
- For LPR clients, prioritize convictions that do not – or are unlikely to – be considered AFs under immigration law;
- Avoid “sentences” (as defined above) of more than 364 days;
- Avoid convictions for CSOs;
- Avoid all CIMTs and certainly those where 1 year or more may be imposed;
- For clients with TPS status, avoid all felonies and a second misdemeanor conviction.

Chart is a “live document,” questions/comments welcome: This chart is a “live” document and is updated frequently. As such, CAIR Coalition relies upon and greatly appreciates comments from practitioners who have information or suggestions that may improve the accuracy or thoroughness of the information contained herein. Please send all comments and questions to rachel@caircoalition.org.

Disclaimer and need for individual analysis: The information contained in this chart is intended for legal professionals and is not meant to serve as a substitute for a lawyer’s obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client’s case. Immigration consequences of crimes are a complex and constantly changing area of law. Practitioners should use this chart as a starting point rather than as a substitute for legal research.

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Immigration Consequences of Common Virginia Offenses
Table of Contents

Section I – Inchoate Offenses

OFFENSE	STATUTE
Conspiracy to commit felony	18.2-22
Conspiring to trespass or commit larceny	18.2-23(A) and (B)
Attempt to commit capital offenses	18.2-25
Attempt to commit noncapital felonies	18.2-26
Attempt to commit misdemeanors	18.2-27
Criminal solicitation	18.2-29

Section II – Crimes Against the Person

OFFENSE	STATUTE
Violation of provisions of protective orders	16.1-253.2
Murder (first and second degree)	18.2-32
Voluntary manslaughter	18.2-35
Involuntary manslaughter	18.2-36
Certain conduct punishable as involuntary manslaughter	18.2-36.1
Wounding by mob	18.2-41

OFFENSE	STATUTE
Assault or battery by mob	18.2-42
Prohibited criminal street gang participation	18.2-46.2
Recruitment of persons for criminal street gang	18.2-46.3
Abduction and kidnapping	18.2-47
Violation of court order regarding custody and visitation	18.2-49.1
Unlawful or malicious wounding	18.2-51
Aggravated malicious wounding	18.2-51.2
Reckless endangerment of others by throwing objects from places higher than one story	18.2-51.3
Strangulation	18.2-51.6
Malicious bodily injury by means of caustic substance or agent	18.2-52
Bodily injury caused by prisoners	18.2-55
Hazing of youth gang members	18.2-55.1
Assault and battery	18.2-57(A)
Assault and battery on police officer	18.2-57(C)
Assault and battery against a family or household member	18.2-57.2(A)
Robbery	18.2-58
Carjacking	18.2-58.1
Extorting money by threats	18.2-59
Threats of death or bodily injury to a person or member of his family; threats to commit serious bodily harm to persons on school property	18.2-60

OFFENSE	STATUTE
Stalking	18.2-60.3
Violation of protective order	18.2-60.4
Rape	18.2-61
Carnal knowledge of child between thirteen and fifteen years of age	18.2-63
Carnal knowledge of certain minors	18.2-64.1
Forcible sodomy	18.2-67.1(A)(1)
Object sexual penetration	18.2-67.2
Aggravated sexual battery	18.2-67.3(A)(1)
Sexual battery	18.2-67.4
Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery	18.2-67.5

Section III – Property Offenses

OFFENSE	STATUTE
Arson/burning or destroying dwelling house	18.2-77
Burning/Destroying any other building or structure	18.2-80
Burning/Destroying personal property, standing grain, etc	18.2-81
Threats to bomb or damage buildings or means of transportation; false information as to danger to such buildings, etc.; punishment; venue.	18.2-83
Setting fire to woods, fences, grass	18.2-86
Carelessly damaging property by fire.	18.2-88

OFFENSE	STATUTE
Burglary	18.2-89
Breaking and entering with intent to commit murder, rape, robbery, or arson	18.2-90
Statutory burglary	18.2-91
Breaking and entering with intent to commit other misdemeanor	18.2-92
Possession of burglary tools	18.2-94
Grand larceny	18.2-95
Petit (petty) larceny	18.2-96
Identification of certain personalty	18.2-96.1
Larceny of bank notes, checks, etc.	18.2-98
Unauthorized use of animal, aircraft, vehicle, or boat	18.2-102
Concealing or taking possession of merchandise; altering price tags; transferring goods from one container to another; counseling, etc., another in performance of such acts	18.2-103
Manufacture or sale of devices to shield against electronic detection of shoplifting	18.2-105.2
Theft or destruction of public records by others than officers	18.2-107
Receiving stolen goods	18.2-108
Larceny with intent to sell or distribute	18.2-108.01(A)
Receipt of stolen firearm	18.2-108.1
Receipt or transfer of possession of stolen vehicle, aircraft or boat	18.2-109
Embezzlement deemed larceny	18.2-111
Trespass after having been forbidden to do so	18.2-119

OFFENSE	STATUTE
Entering property of another for purpose of damaging it	18.2-121
Trespass on posted property (for hunting, fishing or trapping purposes)	18.2-134
Injuring, etc., any property, monument, etc.	18.2-137(A)
Damaging public buildings, etc.	18.2-138
Tampering with vehicle	18.2-146
Entering or setting a vehicle in motion	18.2-147
Breaking and entering railroad cars, etc.	18.2-147.1
Stealing from or tampering with parking meter, vending machine, pay telephone, etc.	18.2-152
Computer fraud	18.2-152.3
Theft of computer services	18.2-152.6
Unlawful use of, or injury to, telephone and telegraph lines; copying or obstructing messages; penalty	18.2-164

Section IV – Controlled Substances Offenses

OFFENSE	STATUTE
Manufacture, sell, give, distribute or possess w/intent to manufacture, sell, give, distribute controlled subst. or imitation controlled substance	18.2-248
Transporting controlled substances into the Comm.	18.2-248.01
Sale, gift, distribution or possession with intent to sell, give or distribute marijuana	18.2-248.1(a)

OFFENSE	STATUTE
Illegal stimulants and steroids	18.2-248.5(A)
Possession of controlled substances	18.2-250
Possession of marijuana (first offense)	18.2-250.1
Possession of marijuana (second or subsequent offense)	18.2-250.1
Possession and distribution of flunitrazepam	18.2-251.2
Defeating drug and alcohol screening tests	18.2-251.4(2)
Distribution of certain drugs to persons under 18	18.2-255(A)
Distribution, sale or advertisement of paraphernalia to minor	18.2-255.1
Sale of drugs near certain properties	18.2-255.2
Keeping drug house	18.2-258
Obtaining drugs by fraud, deceit, or forgery	18.2-258.1
Possession of controlled paraphernalia	54.1-3466
Sale, etc., of drug paraphernalia	18.2-265.3
Advertisement of drug paraphernalia	18.2-265.5

Section V – Firearms Offenses

OFFENSE	STATUTE
Shooting, etc., in attempt or commission of a felony	18.2-53
Use or display of firearm in committing felony	18.2-53.1
Reckless handling of firearms; reckless handling while hunting	18.2-56.1

OFFENSE	STATUTE
Allowing access to firearms by children	18.2-56.2
Shooting at or throwing missiles, etc., at train, car, vessel, etc.	18.2-154
Discharging firearms or missiles within or at a building or dwelling house	18.2-279
Willfully discharging firearms in public places	18.2-280
Pointing, holding, or brandishing firearm, air or gas operated weapon or object similar in appearance	18.2-282
Shooting in or across road or in street	18.2-286
Shooting from vehicles so as to endanger persons	18.2-286.1
Carrying loaded firearms in public areas	18.2-287.4
Possession or use of "sawed-off" shotgun or rifle	18.2-300
Carrying concealed weapon	18.2-308
Possession or transportation of certain firearms by certain persons	18.2-308.2:01
Sale, etc., of firearms to certain persons	18.2-308.2:1
Possession of firearms while in possession of certain substances	18.2-308.4

Section VI – Traffic Offenses

OFFENSE	STATUTE
Maiming, etc., of another resulting from driving while intoxicated	18.2-51.4

OFFENSE	STATUTE
Driving motor vehicle, engine, etc., while intoxicated, etc. (simple DUI)	18.2-266
Driving a commercial motor vehicle while intoxicated, etc.	46.2-341.24
Refusal of tests	18.2-268.3
Subsequent offense DUI	18.2-270
Driving after forfeiture of license	18.2-272
Driving without a license	46.2-300
Drinking while driving; possession of open container while operating a motor vehicle	18.2-323.1
Driving while habitual offender	46.2-357
Disregarding signal by law-enforcement officer to stop; eluding police; penalties.	46.2-817
Reckless driving	46.2-852
Driving vehicle that is not under control	46.2-853
Duty of driver to stop, etc., in event of accident involving injury or death or damage to attended property (“hit and run”)	46.2-894
Duty of certain persons accompanying driver to report accidents involving injury, death, or damage to attended property	46.2-895

Section VII – Fraud Offenses

OFFENSE	STATUTE
Forging public records	18.2-168
Making or having anything designed for forging writing	18.2-171
Forging, uttering, etc. other writings	18.2-172
Having in possession forged coin or bank notes	182.-173
Impersonating officer	18.2-174
Obtaining money or signature, etc. by false pretense	18.2-178
Issuing bad checks, etc., larceny	18.2-181
Issuance of bad checks	18.2-181.1
False statement to obtain property or credit	18.2-186
False statements or failure to disclose material facts in order to obtain housing benefits	18.2-186.2
Identity theft	18.2-186.3
Credit card theft	18.2-192
Credit card forgery	18.2-193
Credit card fraud	18.2-195
Criminally receiving goods and services fraudulently obtained	18.2-197
Fraudulent use of birth certificates, etc.	18.2-204.1
Manufacture, sale, etc., or possession of fictitious, facsimile or simulated official license or identification	18.2-204.2

OFFENSE	STATUTE
Procuring animal, aircraft, vehicle or boat with intent to defraud	18.2-206

Section VIII – Crimes Involving Morals and Decency

OFFENSE	STATUTE
Prostitution, commercial sexual conduct, commercial exploitation of a minor	18.2-346
Keeping, residing in, or frequenting a bawdy house	18.2-347
Aiding in Prostitution	18.2-348
Trafficking or taking a person to become a prostitute	18.2-355
Receive money to place a prostitute or trafficking	18.2-356
Receive money from earnings of prostitute	18.2-357
Commercial sex trafficking	18.2-357.1
Taking indecent liberties with children	18.2-370
Contributing to delinquency of a minor	18.2-371
Abuse and neglect of children; penalty; abandoned infant	18.2-371.1
Production, publication, sale, financing, etc., of child pornography	18.2-374.1
Possession, reproduction, distribution, solicitation, and facilitation of child pornography	18.2-374.1:1

OFFENSE	STATUTE
Use of communications systems to facilitate certain offenses involving children	18.2-374.3
Indecent exposure	18.2-387
Obscene sexual display	18.2-387.1
Profane swearing and intoxication in public	18.2-388

Section IV – Other Commonly Charged Offenses

OFFENSE	STATUTE
Underage possession of alcohol	4.1-305
Failing to secure medical attention for injured child	18.2-314
Disorderly conduct in public places	18.2-415
Punishment for using abusive language to another	18.2-416
Use of profane language	18.2-427
Causing telephone or pager to ring with intent to annoy	18.2-429
Perjury	18.2-434
Contempt	18.2-456
Obstruction of justice	18.2-460
Falsely summoning or giving false reports to law-enforcement officials	18.2-461

OFFENSE	STATUTE
Resisting arrest; fleeing from a law enforcement officer	18.2-479.1
Racketeering	18.2-514
Giving false identity to law-enforcement officer	19.2-82.1
Failure to appear	19.2-128
Cruelty and injuries to children; abandoned infant	40.1-103
Trademark Infringement	59.1-92.12