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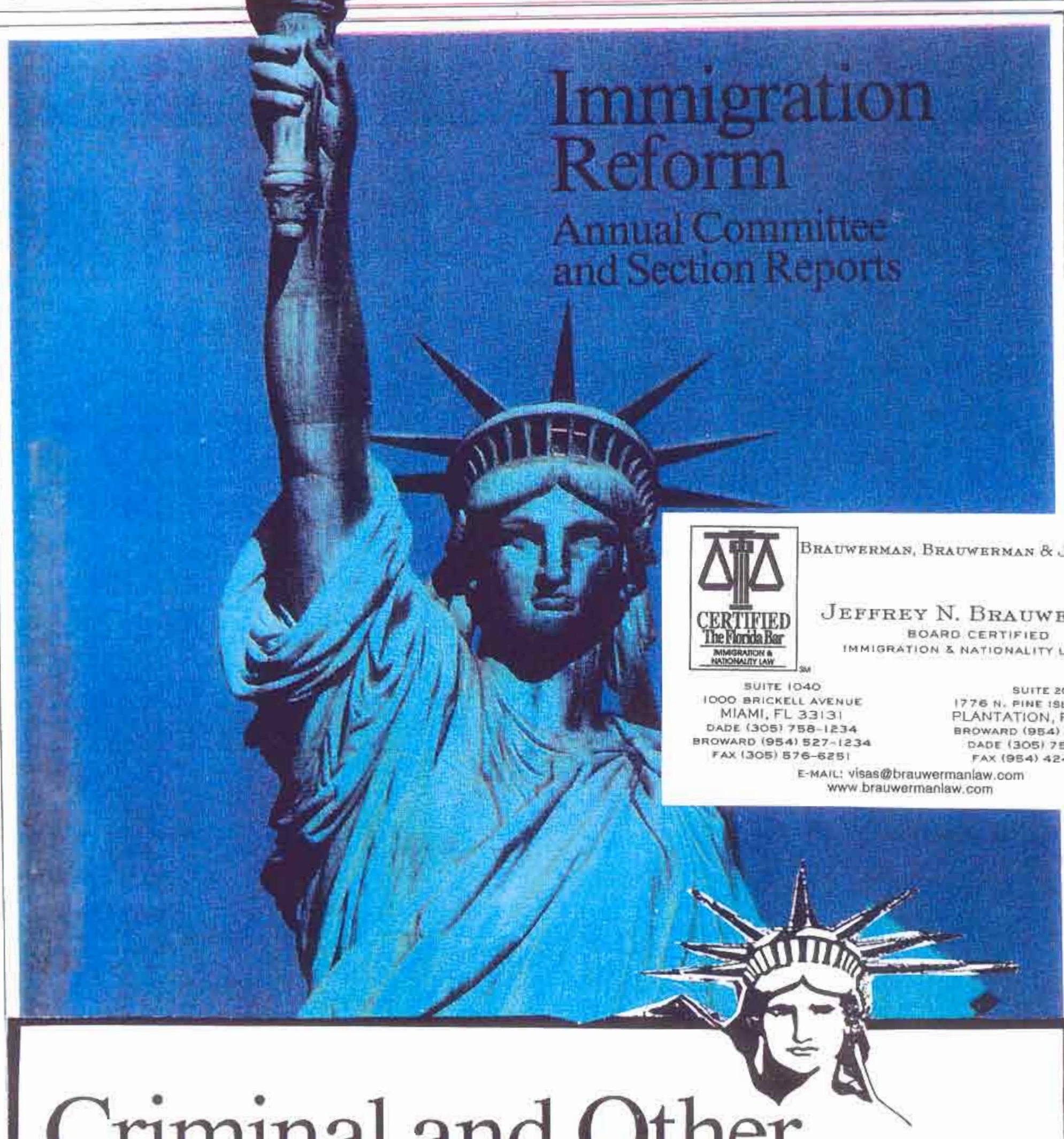

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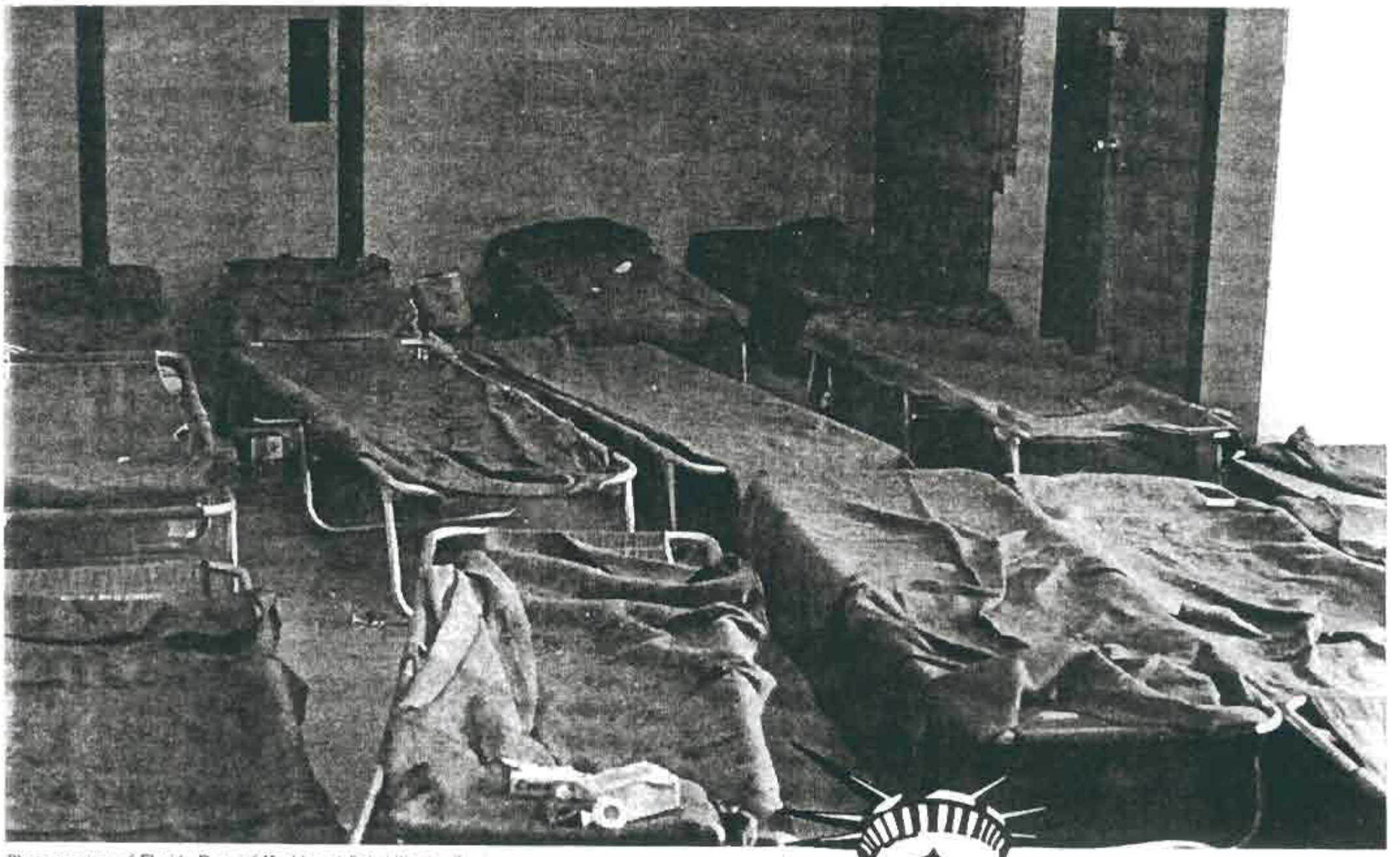

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Criminal and Other Grounds for Deportation

Criminal Defense Counsel: Know Thy Immigration Law

by Jeffrey N. Brauwerman

In many cases, the immigration consequences of a criminal act and its court disposition can be more severe than disposition of the criminal matter itself. Criminal defense counsel are professionally obligated to be fully informed of their clients' immigration status and to approach representation in criminal matters with the utmost concern for the immigration implications. An alien may be less than well served by his criminal defense counsel, even if adjudication of guilt is withheld, if as a consequence of the criminal proceeding the alien is subsequently rendered deportable or excludable.

The Immigration Reform and Control Act of 1986 is rather emphatic in amending the Immigration and Nationality Act of 1952 now to read as follows: "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of conviction."[1]

Today, more than ever before, criminal defense counsel must either know the interplay between criminal and immigration law or be closely associated with someone who does.

All aliens seeking to enter or remain in the United States are subject to exclusion or deportation statutes in certain circumstances, the chief of which involves crime.

Whether lawful permanent residents, intending immigrants, nonimmigrant visa holders, temporary residents or illegal aliens, all foreigners retain a certain susceptibility to removal and deportation. True, the longer they are here, the more difficult can be the removal, but the possibility of exclusion and deportation nonetheless remains for every alien, and lawyers counseling and representing them, particularly in criminal court, must be cognizant of the immigration implications.

An issue could arise at any time an

alien seeks entry into the United States, as well as anytime during visa application or adjustment of status proceedings, in which an alien seeks to obtain lawful permanent residence. The issue might also arise years later, after the alien has obtained and, perhaps, long held permanent residence.

An alien will be excludable from the United States if convicted of a crime involving moral turpitude or if he, although not convicted, admits the commission of such a crime.[2] This exclusion does not, however, apply to juvenile offenders in most instances and, commencing November 1, 1987, to an alien convicted of only one nondrug related offense when the prison sentence actually imposed was six months or less or, when the crime is admitted, the maximum sentence could not have exceeded one year.[3]

Moral turpitude is not always essential: an alien convicted of two crimes — whether involving moral turpitude and whether arising from a single scheme of conduct — is excludable if the sentences actually imposed totaled five years or more.[4] The Board of Immigration Appeals has held that concurrent sentences are counted only once.[5]

Excludability based on criminal grounds may sometimes be waived in the discretion of the Immigration Service;[6] however, excludability may *not* be waived if the alien is applying for residence under the new law's legalization program.[7]

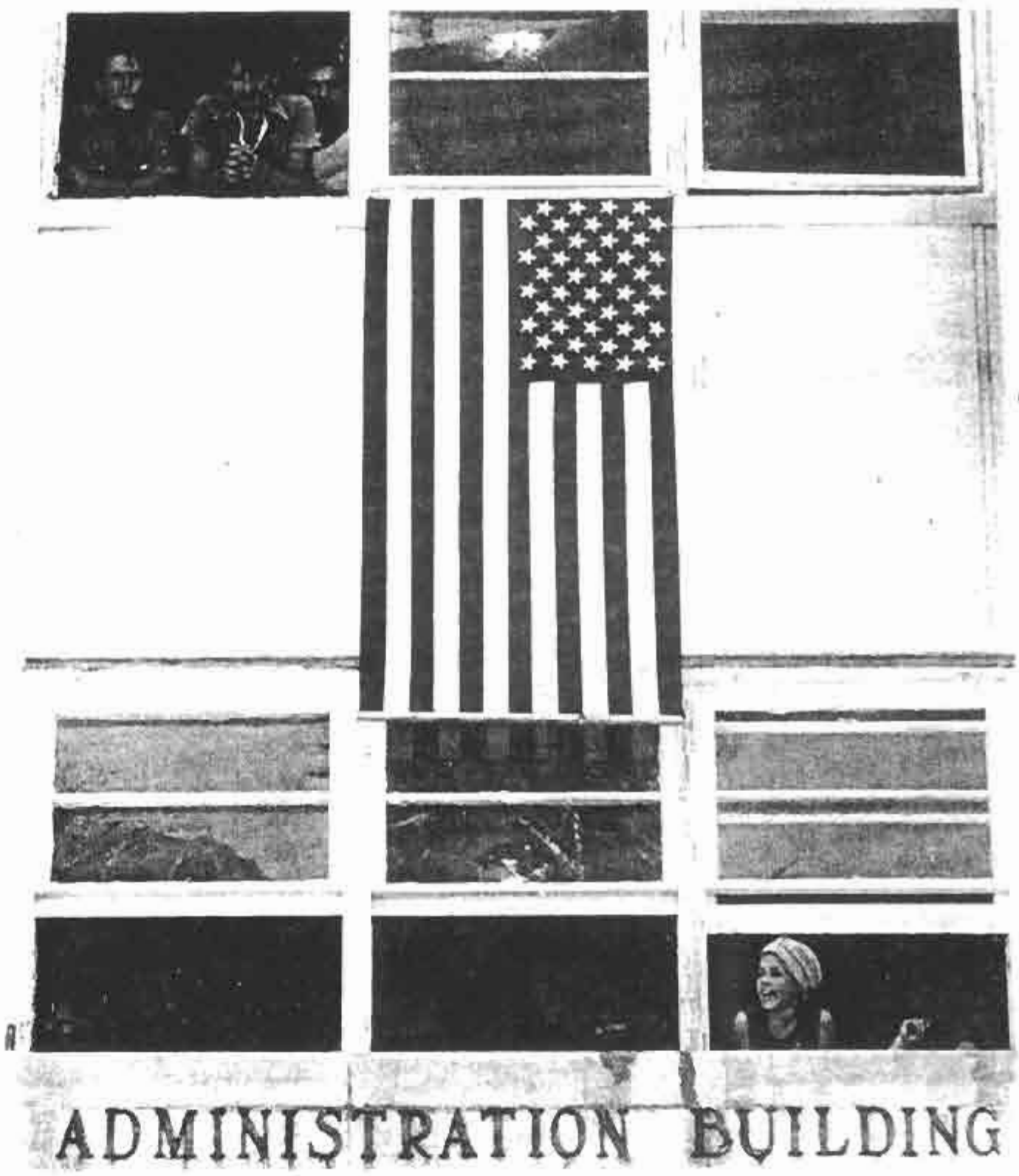
After obtaining permanent residence, an alien is deportable if within five years of entry he is convicted of a crime involving moral turpitude and confined for one year or more.[8] At any time after entry an alien may be deported if he is convicted of two crimes involving moral turpitude, not arising from a single scheme of conduct, regardless of whether he was actually confined.[9]

Except in very obvious cases, research may be necessary to determine whether a specific crime involves moral turpitude.[10]

Conviction

For immigration purposes, a "conviction" was defined by the Board of Immigration Appeals as existing when:

> (1) there has been a judicial finding of guilt, (2) the court takes action which removes the case from the category of those which are actually, or in theory, pending for consideration by the court — the court orders the defendant fined, or incarcerated or the court suspends sentence, or the court suspends imposition of sentence, and (3) the action of the court is considered a conviction by the State for at least some purposes.[11]



The withholding of adjudication of guilt in Florida is considered a conviction for immigration purposes.[12] A nolo contendere plea is generally deemed a conviction.[13] Successful completion of a pretrial intervention program would not result in a conviction.

A conviction must be final. When an appeal as of right has been filed, as opposed to a discretionary appeal or an appeal by collateral attack, the conviction is not final.[14]

If the *imposition* (in contrast to the *execution*) of the sentence is suspended, deportability cannot be established upon a single conviction of a crime involving moral turpitude; however, deportability may arise from the multiple crimes part of the statute since no sentence is necessary to activate that portion of the law.

Controlled Substances

To exclude or deport those convicted of a crime relating to the illicit possession of or trafficking in marijuana and narcotic drugs, the INS has relied on §§212(a)(23) and 241(a)(11) of the Immigration and Nationality Act.[15] However, on October 23, 1986, the Anti-Drug Abuse Act became effective,[16] amending those sections to encompass LSD, PCP and other so-called "designer drugs." No longer exempted are convictions for "use." Prior cases[17] have been, in effect, legislatively overruled.

The law remains that an alien who "is, or hereafter at any time after entry has been, a narcotic drug addict," may be deported.[18] Any pretrial intervention program which requires admission of narcotic drug addiction could lead to a deportation charge since no conviction is necessary. An attempt to enter the program should thus be made without an admission or a finding of addiction.[19]

The continued validity of *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975), is unclear. *Lennon* held that a foreign drug conviction for possession, not in accord with principles of United States law (includ-

ing the requirement of scienter), will not support a charge pursuant to §241(a)(11). The statute now explicitly includes violation of any law or regulation of a "foreign country" relating to a controlled substance.

The statutes authorize the exclusion and deportation of an alien for virtually every type of drug-related conviction no matter how "petty" the offense, although a waiver may in some circumstances be available for a one-time conviction for simple possession of 30 grams or less of marijuana or hashish.[20] The conviction may have occurred prior to or after entry.[21]

Alien smugglers: An alien is excludable if he has "knowingly and for gain, encouraged, induced, assisted, abetted or aided any other alien to enter or try to enter the United States in violation of law."[22] Such a transgression is grounds for deportation whether committed "prior to, or at the time of entry or at any time within five years of any entry."[23] A conviction is not necessary to sustain a charge under either the exclusion or deportation section.[24] However, a guilty plea to a violation does establish the smuggling element. Thereafter, only "gain" need be established.[25]

Case law has established what constitutes "for gain"; for example, the smuggling of family members, without commercial aspects, will not result in a viable exclusion or deportation charge, even though some incidental benefits may accrue to the smuggler.[26]

Weapons offenses: The Act mandates a finding of deportability for an alien convicted of possession of an automatic or semi-automatic weapon or sawed-off shotgun.[27] The INS need not establish that there was moral turpitude involved, that a sentence was imposed, or that the crime was committed within a specific period of time after entry. Criminal defense counsel should consider this section during plea bargaining. If the client may have violated this section, it may well be wise to persuade the prosecutor to amend the information or indictment to reflect a weapon other than one described in this section.

Activity relating to prostitution has long been a ground for exclusion and deportation.

Remedies: Among the remedies available to avoid deportation are those within the professional jurisdiction of criminal defense counsel, in addition to others which fall within the purview of the immigration lawyer. Expungement, executive pardons, and claims of ineffective assistance of counsel are matters with which criminal defense counsel should already be familiar; other matters are unique to immigration law.

Expungement

When a conviction is expunged after treatment under the Federal Youth Corrections Act,[28] deportation is precluded. The same is true of convictions expunged under the state counterpart. However, the federal act was repealed effective October 12, 1985.[29] The only savings provision concerns offenders already sentenced and offenses committed prior to October 12, 1984.[30]

Similarly, a conviction expunged under the Federal First Offenders Act[31] is not grounds for deportation. However, this Act has been repealed effective November 1, 1987.[32] Expungement under a state counterpart is not grounds for deportation. The Board of Immigration Appeals is of the opinion that F.S. §§948.01(3) and 948.04 (1985) are not counterparts of the federal Act.[33]

Executive Pardons

The Act[34] provides that §241(a)(4)[35] is inapplicable when a full, unconditional pardon is granted by the "President of the United States" or a "Governor of the several States";[36] foreign pardons[37] and legislative pardons[38] are *not* included.

The pardon is explicitly unavailable to preclude deportation predicated on convictions relating to a controlled substance.[39] Also, executive pardons prevent the bringing of a charge only under INA §241(a)(4).[40]

Recommendation Against Deportation

A court's recommendation against deportation can preclude a charge only under INA §241(a)(4).[41] This important remedy must be thoroughly understood by criminal defense counsel since, in order to obtain the benefits provided, the statute's requirements must be strictly met.

The "recommendation" against deportation, if made by a state or federal court at the time of "first imposing judgment or passing sentence, or within 30 days thereafter,"[42] is absolutely binding on the Attorney General. It has been held that a request made at a resentencing is untimely if the reason for vacating the original sentence was solely for the purpose of requesting the recommendation against deportation at the resentencing.[43]

Notice must be given to the interested state, the INS and to prosecution authorities, who shall be granted an opportunity to make representations in the matter.[44] Five days' notice to the district director of INS is sufficient. "If less than five days' notice is received and sufficient time remains to prepare proper presentations.

due notice shall be regarded as having been made."[45]

A basis for claiming "ineffective assistance of counsel" may exist when counsel fails to request a judicial recommendation against deportation. In *Lyons* v. *Pearce (Lyons I)*, 298 Or. 554, 694 P.2d 969 (Or. 1985), such a failure was held to constitute ineffective assistance when the convictions in question *could* result in the defendant's deportation. However, in *Lyons II*, 298 Or. 569, 694 P.2d 978 (Or. 1985), it was held that the failure does not constitute ineffective assistance of counsel when the conviction would not trigger deportability. For example, conviction of a crime involving moral turpitude that is not within five years of entry requires a second conviction to trigger a charge of deportability.

"212(c) Relief"

Section 212(c) of the Act[46] provides what is known as "212(c) relief." This allows an alien to be admitted to the United States, or to avoid deportation,[47] despite a conviction, if the lawful permanent resident alien has maintained a lawful unrelinquished domicile for seven consecutive years. The INS director or the immigration judge will weigh the adverse factors with the favorable factors in the case in deciding whether to grant the waiver in the exercise of discretion. Rehabilitation is one of the most important factors to be established by the alien whose conviction or convictions render him excludable or deportable.[48]

Other forms of relief from deportation are covered in the following article entitled "Relief from Deportation." [B]

[1] 8 U.S.C. §1252(i) (1982) as amended by Pub. L. 99-603, 100 Stat. 3359 (1987).

[2] INA §212(a)(9), 8 U.S.C. §1182(a)(9) (1982).

[3] *Id.*

[4] INA §212(a)(10), 8 U.S.C. §1182(a)(10) (1982).

[5] Matter of Fernandez, 14 I. & N. Dec. 24 (BIA 1972).

[6] *See* INA §212(h), 8 U.S.C. §1182(h) (1982), which provides for a discretionary waiver if all of the following conditions exist: certain familial relationships exist with lawful permanent resident aliens or U.S. citizens; an extreme hardship would result to any of these people if the alien were excluded; admission to the U.S. is not contrary to the national welfare, security, or safety of the U.S.; and if the Attorney General, in his discretion, consents to the alien applying or reapplying for admission to the U.S.

[7] INA §§212(a)(9), 212(a)(10), 8 U.S.C. §§1182(a)(9), 1182(a)(10) (1982). *See also* INA §245A(d)(2)(B)(ii)(I), 8 U.S.C. §1255A(d)(2)(B)(ii)(I) (1982), relating to the general legalization program, and INA §210(C)(2)(B)(ii)(I), 8 U.S.C. §1160(C)(2)(B)(ii)(I) (1982), relating to the special agricultural workers' legalization program.

[8] INA §241(a)(4), 8 U.S.C. §1251(a)(4) (1982).

[9] The *exclusion* provision discussed above in relation to two convictions does not require moral turpitude as an element; this is significant in that an alien who is not deportable will still be excludable if he departs from the U.S. and subsequently attempts to return. This can occur when an alien seeks entry as a nonimmigrant and when a lawful permanent resident returns after a departure which extends beyond being "brief, innocent and casual."

[10] A good starting point is IMMIGRATION LAW SERVICE §17:20 and National Lawyers Guild, IMMIGRATION LAW AND CRIMES Appendix E (Clark Boardman Co.).

[11] Matter of L-R-, 8 I. & N. Dec. 269, 270 (BIA 1959) [citations omitted].

[12] Matter of Zangwell, 18 I. & N. Dec. 22 (BIA 1981).

[13] Matter of Logan, 17 I. & N. Dec. 367 (BIA 1980).

[14] Morales-Alvardo v. INS, 655 F.2d 172 (9th Cir. 1981).

[15] 8 U.S.C. §§1182(a)(23), 1251(a)(11) (1982).

[16] Pub. L. No. 99-570, 100 Stat. 5053 (1986). Section 1751 of the Anti-Drug Abuse Act, subtitled M-Narcotic Traffickers Deportation Act, amended INA §§212(a)(23) (exclusion grounds) and 241(a)(11) (deportation grounds), 8 U.S.C. §§1182(a)(23) and 1251(a)(11) (1982), respectively.

[17] Matter of Sum, 13 I. & N. Dec. 569 (BIA 1970).

[18] INA §241(a)(11), 8 U.S.C. §1251(a)(11) (1982).

[19] *See* McJunkin v. INS, 579 F.2d 533 (9th Cir. 1978).

[20] INA §§212(h), 241(f), 8 U.S.C. §§1182(h), 1251(f) (1982). The INS general counsel, in a letter dated March 18, 1986, stated that "[i]t is the Service's position that . . . hashish and marijuana are the same substance."

[21] Matter of P, 5 I. & N. Dec. 651 (BIA 1954).

[22] INA §212(a)(31), 8 U.S.C. §1182(a)(31) (1982).

[23] INA §241(a)(13), 8 U.S.C. §1251(a)(13) (1982).

[24] Matter of Estrada, 17 I. & N. Dec. 187 (BIA 1979).

[25] *See* Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir. 1977); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975).

[26] Ribeiro v. INS, 531 F.2d 179 (3d Cir. 1976); Sanchez-Marquez v. INS, 725 F.2d 61 (7th Cir. 1984); Soto-Hernandez v. INS, 726 F.2d 1070 (5th Cir. 1984); Matter of Arthur, 16 I. & N. Dec. 558 (BIA 1978); Matter of R-D-, 2 I. & N. Dec. 758 (BIA 1946); Matter of G-,M-, 5 I. & N. Dec. 93 (BIA 1953).

[27] INA §241(a)(14), 8 U.S.C. §1251(a)(14) (1982).

[28] 18 U.S.C §§5005-5026.

[29] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. Repeal was effective upon enactment. However, the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, postponed the effective date of the Comprehensive Crime Control Act of 1984 for one additional year, to October 12, 1985.

[30] *See* Pub. L. No. 98-473, §235(b)(1).

[31] 21 U.S.C. §844(b)(1).

[32] The delay was similar to that described *supra* note 29. However, Pub. L. No. 98-473, enacted 18 U.S.C. §3607, appears to parallel the repealed statute and may support the generous interpretations previously adopted.

[33] *See* Matter of Zangwell, 18 I. & N. Dec. 22 (BIA 1981).

[34] INA §241(b), 8 U.S.C. §1251(b) (1982).

[35] 8 U.S.C. §1251(a)(4) (1982).

[36] Matter of C-, 5 I. & N. Dec. 630 (BIA 1954).

[37] Matter of B-, 7 I. & N. Dec. 166 (BIA 1956).

[38] Matter of R-, 6 I. & N. Dec. 444 (BIA 1954).

[39] INA §241(a)(11), 8 U.S.C. §1251(a)(11) (1982).

[40] 8 U.S.C. §1251(a)(4) (1982). *See* INA §241(b), 8 U.S.C. §1251(b) (1982).

[41] *Id.*

[42] *See id.*

[43] People v. Borja, 125 Cal. App. 3d 758, 178 Cal. Rptr. 287 (1981).

[44] INA §241(b), 8 U.S.C. §1251(b) (1982).

[45] 8 C.F.R. §241.1 (1986).

[46] 8 U.S.C. §1182(c) (1982).

[47] This section formerly applied only to aliens seeking admission to the U.S. This changed with the decision in Francis v. INS, 532 F.2d 268 (2d Cir. 1976), and its nationwide acceptance by the Board of Immigration Appeals in Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976), but only if the charge of deportability has a counterpart in the exclusion statutes. Matter of Wadud, 19 I. & N. Dec. ___, Interim Dec. 2980 (Oct. 4, 1984).

[48] *See, e.g.*, Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978).

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