

Immigration and Deportation

If you are an illegal alien, and you are in the United States at the time of your arrest, it is virtually certain that you will be deported from this country at the conclusion of your sentence. When you arrive at your designated prison after sentencing, the prison authorities will notify the Immigration Service of your presence and Immigration will quickly file an immigration detainer against you. Then, when you are to be released at the end of your sentence, you will be turned over to the Immigration Service for deportation.

Normally you will be given a deportation hearing to officially determine your status before you are deported. Traditionally, these hearings are not held until the last few months of your prison term, or immediately after you are released from the Bureau of Prisons. The Immigration Service will continue to hold you in custody after your release from your prison sentence, until they hold this hearing. (However, if you are arrested in a state in the 9th Circuit, on the West Coast, you may be given the hearing within the first few months of your incarceration.) At this hearing the Immigration authorities will decide whether or not to deport you.

If you are an alien who is in the country legally, the same procedure will occur. In almost every case the Immigration Service will order your deportation. Immigration laws make it very difficult for an alien – even one who is legally here – to avoid deportation after conviction for a serious crime, or for virtually any drug crime. If you want to remain in this country, your best strategy is probably to ask for an immigration bond, and to try to get out on bail before your deportation hearing. That will give you a chance to get your life in order and to hire the best immigration lawyer you can. The Immigration Service will not set an immigration bond while you are still serving your prison sentence. You must wait until you are released by the Bureau of Prisons and have been taken into custody by the Immigration Service before you can ask to have an immigration bond set.

If you intend to seek a bond while you fight deportation, you should inquire as to the current practice in the area where your immigration case will be decided. Since 9/11 it has become much more difficult to obtain such bonds, and in many parts of the country they are virtually impossible to obtain. Even in those areas where the judges are not so tough, many immigration lawyers are reluctant to put out the effort that is required to prove that you are a good candidate for release on bond, so it is very helpful if you can retain a good lawyer who specializes in immigration and deportation cases and who is willing to fight for a bond.

In the past, judges were able to make a recommendation against deportation when they sentenced defendants, and the Immigration Service was bound to honor those recommendations, but the current laws have eliminated that procedure. You are now completely at the mercy of the Immigration Service with respect to deportation.

The new laws also make it much harder to qualify for a waiver of deportation after you are convicted of a serious (or drug) crime, so you should realistically expect to be deported after completion of your sentence for any of these crimes. Just being a drug user is sufficient to cause your deportation. The only exception to these harsh laws is for a person who was convicted of “a single offense involving possession for one’s own use of 30 grams or less of marijuana.” If you were caught with a small amount of marijuana for your own use, and it is your first offense, you will not be deported. It is not necessary that you actually commit a drug crime to be deported under the new laws: even an attempt to commit a drug crime is sufficient to deport you.

If you plead guilty to a drug crime, you should realize that you will almost certainly be deported upon completion of your sentence. You should also realize that the existence of an Immigration detainer

will also increase your security classification in prison, so that you will not be eligible for minimum security camps. If your lawyer or any government agent tells you differently, you should insist upon getting their promises in writing before you take any action, or accept any plea agreement, in reliance upon their words.

If deportation is likely to be a problem for you, but you do want to plead guilty, try to get the prosecutor to allow you to plead guilty to non-drug charges that do not require mandatory deportation. Telephone counts, money laundering and Travel-Act violations are examples of crimes to which you can plead guilty without exposing yourself to mandatory deportation. If you are going to receive a lengthy sentence, it may be necessary for you to plead to several counts of these crimes, in order to allow the judge to give you consecutive sentences that add up to the total you have agreed to accept.

Some lawyers tell their clients that they will be deported soon after they arrive in the prison system. These lawyers will promise the defendants that by pleading guilty, they will be speeding up the deportation process and will be returned to their own countries more quickly. *This is not true.* This lie is most often told to aliens who do not understand the system and who are anxious to return home as soon as possible. The law specifically states that a defendant has to complete his full prison term before he can be deported. You cannot be deported even one day before your legal release date from the Bureau of Prisons. (You still get credit for your Good Conduct Time against your sentence, so you will serve the total amount of your sentence, minus your Good Conduct Time credits.)

If you also have a term of supervised release, that will not prevent your deportation. You will be deported and your supervised release term will continue to run while you are in your home country. (If you return to the United States without permission during your supervised release term, you will be in violation of your supervised release and may have to serve that entire additional period in prison.)

Here are some things to keep in mind if you think that you may have immigration problems as a result of your arrest. They may help you to avoid deportation at the end of your sentence:

If you make a plea agreement, try to plead to an offense that does not involve drugs, firearms, or moral turpitude. For instance, you might plead to a "telephone count" (or even 2 or 3 such counts) instead of to a drug crime.

If you are pleading to multiple counts, make sure that they all relate to one single criminal incident, rather than to different incidents. For Immigration purposes, the number of incidents is more important than the number of counts.

Get a sentence of less than one year for any crime of violence, or for a theft conviction.

Try to get pre-trial diversion, if your crime is not a serious one. Pre-trial diversion is not usually available in the federal system, but it is common in the state courts. If you are charged with a minor offense in a state court, you should definitely ask if pre-trial diversion is available.

Don't admit to drug use, or any drug-related offense. Even if you are convicted of drug offenses, you should not admit them. Just your admission of drug addiction, or of a drug offense, even without a conviction, is enough to deport you. (Remember: You have the right to remain silent! A jury may convict you, but you do not have to admit that they were correct. This could make the difference between your ever seeing your family again, or not.)

Try to avoid any verdict or judicial finding that you are or were a drug addict, or that you engaged in drug trafficking.

Try to enter an *Alford* plea, instead of pleading guilty. An *Alford* plea is one in which you agree to be found guilty by the court, but you do not personally admit that you are guilty. It

is most often used by defendants who realize that they will probably be found guilty even though they are actually innocent; or who think they will be incarcerated for a longer time while they fight the case than they would be if they plead guilty and are promptly sentenced to a short term. But *Alford* pleas are also possible in a case such as yours, where you are just as concerned about deportation as you are about your sentence.

Some of these recommendations may seem extreme. Some of them may even cause you to have to serve a little more time, because your probation officer may interpret your desire to return to your family as a refusal to accept your responsibility for your crime. But they are important if you want to avoid deportation when you finish your prison sentence.

You will also be asked many times, by the police, jailers, and probation officers, where you were born. Be careful what you tell them. If you tell them that you were born in a foreign country, you automatically tag yourself as a likely referral to the Immigration Service. You are not required to tell them anything: it is the government's burden to prove that you are not a citizen; it is not your obligation to help them. I have known many American citizens of Mexican descent, who were born in Arizona or California, or in other states, and then returned to Mexico at a very young age. You don't have to produce a birth certificate to go to prison, so think about what you are going to say and don't be hesitant to refuse to give information that can be used against you in the future.

If an immigration officer comes to see you while you are in jail, the same rules apply. You are not required to help him make a case against you. Standard procedure is for INS officers to begin their interviews with a few basic questions, along the line of these:

Is your name Fulano de Tal?

Is your birthday January 15, 1962?

Were you born in Guadalajara, Jalisco?

If you hesitate to answer these questions, the agent will tell you that he is just trying to establish that he has the right person. But you should not answer his questions. Once you do, you have already provided him with evidence that you were not born in the U.S., and you have relieved the Immigration Service of its obligation to prove that fact. The best thing you can do is to politely say, "Yes, my name is Fulano de Tal. That is all I have to say. If you want to question me further, please do it through my lawyer." Then get up and leave. Don't let the agent intimidate you. He is not there to help you; he is there to get enough evidence to deport you. Your admission that you were born outside of the United States, plus the court records of your conviction, are all that he needs. So if you hope to avoid deportation, don't tell them anything other than your name, and refer them to your lawyer.

It is impossible to stress the importance of the new immigration and deportation laws too much because they are destroying dozens of families every day. Inmates who are convicted of any drug crimes and some other serious crimes are completing their sentences, and being deported, without any regard whatsoever for their families on the outside.

Occasionally there are stories in the newspapers about some of the worst examples of injustices under this law, and those stories are not unusual. They happen every day. You may have come to the U.S. when you were only days old, lived here forty or fifty years as a law-abiding citizen, raised a family, have children and grandchildren who are citizens by birth, own your own home, own your own business, paid your taxes every year, and you will still be deported. I see it happen virtually every day. This is probably one of the worst laws ever passed by Congress. It is tearing apart lives and families on a daily basis, and you should be aware that it exists. If you are not a citizen, and the prosecution or the Bureau of Prisons finds that out, you should expect to be deported after you complete your sentence.

As another consequence of this law, there are now many inmates in the system simply because they were unable to leave their families. These are men (and some women) who did their time and were then deported. Their spouses and children, indeed their whole lives, were still in the United States. They came back to be with their families and were arrested again. More and more of them are coming back into the federal prisons, typically with sentences between three and seven years, for the crime of “illegal reentry after deportation for an aggravated felony.” It is a vicious cycle, and it will only get worse until Congress regains its humanity.

There is one final point to consider: If you feel it is inevitable that you will be deported, and you are going to plead guilty to a deportable crime anyway, then you should try to get a little extra consideration on your sentence in exchange for waiving deportation when you complete it. All courts are doing this now, and you should try to use it as one more bargaining chip when you negotiate your plea agreement. A downward departure of two to four levels is the normal reward for your waiver of deportation, if it is part of your plea agreement. [See the chapter **Early Dispositions (Fast-Track Program for Deportable Aliens)** on page 163.]

Treaty Transfer Prisoners (Americans convicted in Mexico and other foreign countries)

If you are an American who was arrested and convicted in a foreign country, you may be eligible to serve the remainder of your sentence in the United States under the terms of a treaty between the U.S. and the country where you are presently imprisoned. If you fit into this category, you should carefully evaluate your situation before you decide whether or not to ask for a transfer.

First, before you can even apply for a transfer, you must waive your right to any and all future appeals of your case. The sending country won't process your application until you make that waiver, and the United States won't accept your application without it. Once you get to the U.S., it will be too late to change your mind, so be absolutely certain that you don't want to pursue any more appeals before you ask to transfer.

Next, you should determine exactly when you are going to be released in the country where you now are. Find out how much good conduct time you will be credited for, how much work credit time you will get, and make sure that you know about all the sentence reductions that will apply if you remain where you are. I have worked with dozens of treaty transfer inmates, mostly from Mexico, and a lot of them wind up doing more time in the United States than they would have done had they remained in a Mexican prison.

The third thing you must do is to figure out how much time you will have to serve in the United States, if you do transfer. The information in this book will enable you to do that.

In the U.S. your time will be set by the U.S. Parole Commission, which has the legal authority to decide what sentence you would have received if you had committed your crime and been prosecuted here. The Parole Commission acts like a sentencing judge, and uses the guidelines to figure out your sentence just like a judge would. It also gets a presentence report on you and your case, just like a judge would. Once it has that information, it schedules you for a hearing, and at that hearing it tells you how much time you will have to serve in the U.S.

The only other limit on the sentence the U.S.P.C. can give you is the maximum term you received in the foreign country. For example, if Mexico sentenced you to 5 years, for a crime that rates 15 years

under the federal sentencing guidelines in the United States, the U.S.P.C. can only require you to serve the remaining portion of the 5 years. On the other hand, if Mexico sentenced you to 20 years, but your crime only rates 18 months under the United States' guidelines, you will be released when you complete the 18 months. So it is critically important that you understand the sentencing guidelines and that you accurately determine what sentence you will get from the Parole Commission.

Based on my experience with inmates who transferred to the U.S. from Mexico, I estimate that at least 25% of them are unpleasantly surprised when they reach an American prison and learn how much time they still have to do. If you have prior convictions in the U.S., they will be included in your criminal history calculations under the guidelines. This has the effect of causing many inmates to serve more time than they expected to do when they transferred. Occasionally there will be an inmate sentenced in Mexico to 10 years for a homicide, or other serious crime that carries a guideline sentence of 15 or 20 years, or more, in the U.S. That inmate will have to serve the entire 10 years (less good time) before he is released in the U.S.; but had he remained in Mexico, he might have gotten out after serving only 5 years (with Mexican work and good conduct credits).

Prisoners who are more likely to come out ahead when they transfer are those who were sentenced to terms like 10 years for a relatively small amount of marijuana in Mexico. When the guidelines for those inmates are calculated in the U.S., they may have a sentence of only 2 or 3 years here. Many such inmates are released within a few months of their arrival in the U.S.

American Consular officials in Mexico often work hard to convince inmates on their caseloads to transfer back to the U.S. I have heard many horror stories about the Consuls telling inmates that they will be released as soon as they get north of the border, only to have the inmates learn unpleasant truths once they get here. So find out for yourself what your American sentence is likely to be. Don't just accept the guess of a Consular official about the time you'll have to do.

You should also know what credits you will receive against your sentence, once you are north of the border. Credits for good behavior, or good conduct, will not transfer with you. The Parole Commission will give you credit for good conduct based on the American plan, or 54 days off for each full year served, including the portion of your sentence served in the foreign country. Work credits, on the other hand, do transfer with you. For instance, if you have 500 days of work credits in Mexico, your Mexican sentence will be reduced by 250 days. Those 250 days off for work credit will also be given to you in the U.S.

If you have work credits in the foreign country, make sure that the paperwork that comes with you on the transfer clearly identifies the credits as work credits. If they are not specifically identified as being work credits, the Parole Commission will not give you the additional time off that you earned elsewhere.

You may also qualify for some additional time off because you were tortured or subjected to other inhuman conditions in the foreign country. Such credits are usually for a couple of months, and rarely exceed one year. They are not automatic; the Commission will not give them to you just because you tell them you were tortured. If you think you may qualify for extra time off because of torture, or other special circumstances, make sure that the torture or other conditions are well documented in the paperwork that the American Consul prepares on your case. If you have medical records or other evidence to back up your claims, you should also arrange to have them available to present to the probation officer who prepares your P.S.I. report, and to the Parole Commission at your hearing. [The best way to do this is to send the documents to a friend or relative in the U.S., and have that person return them to you as soon as you have been transferred. Don't count on being able to bring them with

you, although you should keep copies that you can try to carry on your trip.]* It could also be helpful to give copies of your evidence to the American Consul where you are incarcerated, so that he can enclose them in your case file.

If you are in a foreign prison and do transfer back to the U.S., you will be imprisoned in the federal prison system when you get home. This is so even if you are a state or local prisoner in the foreign country where you were convicted and sentenced. If you are a male coming from Mexico, you will first be designated to the federal prison near El Paso, called F.C.I. La Tuna. You will remain at La Tuna until the Parole Commission has determined your new release date, and probably for at least several months thereafter. If you still have more than another two years to serve, you will probably be able to get transferred to another prison, which *might* be closer to your American home.

If you return to the U.S., from a European country, you will probably be designated to a prison in New York until your new release date is set, and then you can begin to ask for a transfer elsewhere.

(Foreigners in the United States)

If you are a Mexican being prosecuted in the United States, you should not consider the possibility of transferring back to Mexico when you fight your case or plea bargain. Although some lawyers will tell you that you can transfer and serve your time back home, they are usually just saying that as a way of convincing you to plead guilty. In reality there is almost no chance that you will be given a transfer back to Mexico. There are tens of thousands of Mexican citizens in American jails. Most of them would be happy to return to Mexico to serve out their time, and many thousands of them apply for transfers every year. But the United States sends only 150-200 or so to Mexico each twelve months. The odds that you will be one of the lucky ones are more than 200-to-one against you.

Those who do go back to Mexico as treaty transfer prisoners are usually inmates who have already served most of their sentences, and who have only two or three years left before their release. It is extremely unlikely that you will be transferred back to Mexico to serve your sentence, and you should not count that possibility as a factor in deciding how to proceed with your case.

If you are wealthy and think that you can transfer to Mexico and, once there, buy your early freedom, you are also likely to be disappointed. The United States usually won't approve wealthy inmates for transfers; and when it does, the pressure that it puts on Mexico to keep those inmates in prison until their sentences are completely served is extreme. This is not to say that it can't be done, but the odds against you succeeding are immense.

If you are from Canada, however, the situation is different. Canada likes to bring its citizens home and, although the Canadian processing is very slow and often takes two years or more, once you get there, there is an excellent chance that you will be paroled much sooner than you would have been released in the United States. Many Canadians are paroled within weeks or a few months of returning to their home country.

I don't have enough experience with inmates from other countries to make country-specific comments, but in general it does seem that most foreigners in the federal prison system here would be better off to transfer home. In addition to being closer to their families, they will often be released sooner than they will be if they stay in the U.S. But, as I said above with respect to Mexicans, it would be a grave mistake to enter into a plea-agreement because you believe that you might be lucky enough

* The Mexican transportation police are generally better about letting you take your legal papers with you, as compared to the U.S. Marshals described in the chapter on **Going to Prison and Your Legal Papers**.

to get your wish; the odds are against you. Make your best deal first, planning to be here for your entire sentence. Then if you do get a transfer later, you will have reason to celebrate.

If you are a citizen of another country, but your entire family lives in the United States and you have few, or no, real ties to the country of your citizenship, then it is almost a certainty that you will never be approved for a transfer. The United States will not approve a transfer request for anyone who doesn't have close family ties in the other country. I know of only two persons who were able to transfer out of the U.S. who didn't already have their family in the other country, and in both of those cases the inmate involved first managed to marry a resident in the other country, and then had the help of his new spouse to validate his claim of roots in the country where she lived.

Here are some additional factors that govern an application for treaty transfer. They are taken from the Justice Department's website on treaty transfer:

- a. Acceptance of Responsibility. Acceptance of responsibility is a positive factor for transfer, and is demonstrated by cooperation with the authorities, providing complete and candid information as to involvement in the offense, and/or the timely entry of a guilty plea.
- b. Criminal history. There is a difference between a low-level, minor, first-time or infrequent offender, and a career criminal. Contrast, for example, the rehabilitative potential of an offender who was paid a few hundred dollars to drive drugs into the United States, with that of a drug kingpin.
- c. Seriousness of the offense. The critical factor in any sentencing decision, is equally important in evaluating whether serving out all or most of a prisoner's sentence in the United States will do more for the prisoner's rehabilitation than transferring him to what may be a less punitive and possibly less lengthy incarceration.
- d. Criminal ties to the sending and receiving countries. If a prisoner has criminal ties to the receiving country, transferring him could well be more likely to facilitate reintegration into his criminal milieu than to facilitate rehabilitation into civil society.
- e. Family and other social ties to the sending and receiving countries. This factor is critical. An important assumption of the prisoner transfer program is that social rehabilitation is most likely near the prisoner's family, and least likely far away. If the prisoner's family is in the receiving country, it is far more likely that he will stay there. If, however, that family is in the sending country, one must assume that the released prisoner will try to return to the sending country, not only negating any social rehabilitation benefits from transfer but also negating the prisoner's deportation as well.
 - i. Prisoner is single and childless. Where his parents and siblings live will be controlling for this category (except in the unusual case where the prisoner was raised by others in the receiving country);
 - ii. Prisoner is ceremonially married. The location of the spouse is controlling. The presumption is that the prisoner should be in the same country as his spouse;
 - iii. Prisoner has a common law spouse. The location of the common law spouse can be very important, depending on the apparent longevity and stability of the common law relationship (that is, how close in practice the common law spouse is to a legal spouse) and whether any children, particularly still minor children, have issued from it (that is, how close the common law situation is to a traditional family);
 - iv. Prisoner is either single or separated and has children. The prisoner's relation to the children is critical. For example, adult children living on their own in the United States would normally be less of a factor against transfer than minor children in the United States. Minor children in the United States who have always lived with the other parent and never, or almost never, with the prisoner would be less of a factor against transfer

than minor children for whom the prisoner had been the custodial parent or to whom the prisoner had otherwise been very close; in these cases, it is generally assumed that transferring the prisoner away from the children would not accomplish the social goals of transfer, and that the prisoner would attempt to return to the children upon release.

f. The United States can only transfer a prisoner to a country with which it has a prisoner transfer treaty relationship and of which the prisoner is a citizen. Occasionally, a prisoner asks for a transfer whose most significant ties are neither to the receiving country nor to the sending country, but are to a third country with which the United States does not have a treaty. Although the prisoner is applying to transfer to the "receiving" country with which the United States has a treaty relationship, the facts suggest that the prisoner will likely return to the "no treaty" third country once his sentence is complete. Such cases need to be carefully evaluated. If the receiving country will accept the prisoner, if the prisoner is not a significant offender, and if incarceration in the receiving country seems to be in the prisoner's best interests, the Justice Department will sometimes permit the transfer to take place.

g. Humanitarian concerns. Usually this means the terminal illness of the prisoner or a member of his immediate family. Occasionally, humanitarian concerns justify a transfer that would otherwise not be approved, so long as the transfer would not violate the treaty; an example of this would be the terminal illness of the prisoner himself. Other times, humanitarian concerns are simply treated as another factor supporting transfer; an example of this would be the grave illness of a parent or child. Illnesses for which the prisoner is being or could be treated in the United States, or the advanced age of parents, do not justify a transfer on humanitarian grounds.

h. Length of time in the United States. Beyond the legal requirements in the treaties with a domiciliary clause, length of time in the sending country is an important social factor. If the prisoner has been in the United States for such a long time that he has in fact become a member of this society, his social rehabilitation will not be facilitated by sending him to a different one.

i. Public sensibilities. Would the return of the prisoner to a foreign country so outrage public sensibilities because of the extremely serious nature of the prisoner's crimes or the circumstances surrounding the prisoner's crimes as to outweigh the rehabilitation considerations?

j. Public policy. Would the return of the prisoner to a foreign country be contrary to the public policy of the United States?

k. Unpaid court-ordered assessments, fines, or restitution. Because all supervisory authority over the prisoner is terminated when the prisoner transfers, financial obligations of the prisoner need to be settled prior to transfer.

l. Previous prisoner transfer. If a prisoner has previously been the beneficiary of a treaty transfer, he is ineligible for transfer. Reapplications after a previous transfer are always denied.

m. Previous deportations and illegal reentries. Recent deportation(s) or numerous illegal entries into the United States will generally bar a treaty transfer.

The United States has treaties for the transfer of prisoners with these countries:

| | | |
|-----------|---------|--------------|
| Albania | Iceland | Romania |
| Andorra | India | Russia |
| Argentina | Ireland | San Marino |
| Armenia | Israel | Saudi Arabia |
| Australia | Italy | Serbia |
| Austria | Japan | Slovakia |

| | | |
|------------------------|-----------------------------|----------------------------|
| Azerbaijan | Kazakhstan | Slovenia |
| Bahamas | Korea, Republic of | Spain |
| Belgium | Latvia | Suriname |
| Belize | Liechtenstein | Sweden |
| Bermuda | Lithuania | Switzerland |
| Bolivia | Luxembourg | Thailand |
| Bosnia and Herzegovina | Macedonia, Republic of | Tonga |
| Brazil | Malta | Trinidad/Tobago |
| Bulgaria | Marshall Islands | Turkey |
| Canada | Mauritius | Ukraine |
| Chile | Mexico | United Kingdom |
| Costa Rica | Micronesia | (including Anguilla, |
| Croatia | Moldova | Cayman Islands, Gibraltar, |
| Cyprus | Mongolia | Montserrat, Sovereign |
| Czech Republic | Montenegro | Base areas of Akrotiri |
| Denmark | Netherlands (Including | and Dhekelia in the Island |
| Ecuador | Aruba, Curacao | of Cyprus, St. Helena and |
| El Salvador | Sint Maarten, Curaçao | St. Helena Dependencies, |
| Estonia | Bonaire, Sint Eustatius and | British Indian Ocean |
| Finland | Saba) | Territory, Ducie and Oeno |
| France | Nicaragua | Islands, Henderson Island, |
| Georgia | Norway | Pitcairn, British Virgin |
| Germany | Palau | Islands, Falkland Islands, |
| Greece | Panama | Isle of Man) |
| Guatemala | Paraguay | Uruguay |
| Honduras | Peru | Venezuela |
| Hong Kong | Poland | |
| Hungry | Portugal | |

All fifty states have laws that authorize the transfer of their state prisoners to the foreign countries those prisoners come from. The District of Columbia does not have enabling legislation; however, because of D.C.'s unique relationship to the federal government, transfer has sometimes been possible where D.C. agreed to cede its decision-making authority to the U.S. Department of Justice.