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PRACTICE TIP: FAIR SENTENCING ACT

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Fair Sentencing Act Alters Immigration Treatment of Crack Convictions

On August, 3, 2010, President Obama signed into law the Fair Sentencing Act, Pub. L. 111-220, which reduces the discriminatory treatment of crack and powder cocaine under federal sentencing laws. Before the Fair Sentencing Act became law, 21 USC 844(a) provided that a conviction for possession of more than five grams of crack cocaine was a felony. As a felony under the Controlled Substances Act, a conviction for more than five grams of crack cocaine met the definition of aggravated felony under 8 USC § 1101(a)(43). *See Lopez v. Gonzales*, 549 U.S. 47, 59 (2006).

Section 3 of the Fair Sentencing Act amended 21 USC 844(a) by deleting the language that made a conviction for simple possession of more than five grams of crack cocaine a felony. Under 21 USC 844(a), as amended by the Fair Sentencing Act, possession of any quantity of crack cocaine is now a misdemeanor. This means that a conviction for possession of crack cocaine can no longer be a conviction for an aggravated felony.

Arguably, a conviction for more than five grams of cocaine can no longer be an aggravated felony regardless of the date of conviction because such a conviction no longer fits the definition in 8 USC 1101(a)(43).