REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS:

A NATIONAL GUIDE

SUMMARY OF CONTENTS

PREFACE

This manual is an adaptation of a publication prepared mainly for use by lawyers representing noncitizen defendants accused of crimes in New York State (*Representing Noncitizen Criminal Defendants in New York State*), but revised and supplemented to address issues faced by lawyers representing noncitizen defendants in states across the country. The manual is intended to assist lawyers in complying with their professional and ethical duty to investigate and advise noncitizen clients not only of the potential penal law consequences of a criminal case, but also the potential immigration consequences and possible ways to avoid negative immigration consequences. For, as the American Bar Association recognizes in its Standards for Criminal Justice, "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction." (See Chapter 1, section 1.4).

While designed primarily for defense lawyers representing noncitizens in criminal proceedings, this manual is also intended to be useful for other lawyers or advocates representing or counseling noncitizens on issues involving the interplay between federal immigration law and state criminal law. This includes immigration lawyers who are consulted by criminal lawyers or by noncitizen defendants in criminal proceedings, or who represent noncitizens with criminal records in immigration removal proceedings. This also includes other immigrant advocates who counsel or represent noncitizens with criminal records affirmatively seeking U.S. citizenship, lawful permanent resident status, asylum, or other legal status in the United States.

This manual is also intended to be useful for the immigrant himself or herself who is facing the various potential immigration consequences of a criminal case, and who is seeking a better understanding of his or her legal situation and possible strategies to avoid any potential adverse immigration consequences.

Finally, for a listing of some of the arguments that may be raised by a convicted noncitizen in later removal proceedings in order to avoid any potential negative immigration consequences, the reader should refer to Appendix K *Removal Defense Checklist in Criminal Charge Cases*. This resource may be useful not only for immigration lawyers who represent noncitizens in immigration removal proceedings, but also for the criminal lawyer who may choose to represent some of his or her noncitizen clients in such proceedings, or for the immigrant who must defend himself or herself in these later immigration proceedings without the benefit of counsel.

This is a rapidly changing area of law. Updates on subsequent law and practice developments in this area of law can be found at www.defendingimmigrants.org and also on the individual websites of the Defending Immigrants Partnership partner organizations (see below WHERE TO GET HELP).

THE DEFENDING IMMIGRANTS PARTNERSHIP

OUR MISSION. For a noncitizen facing criminal charges today, the right to defense counsel who understands the immigration consequences of criminal dispositions may be all that stands between continued permanent, temporary or potential residence as a member of our community and the other side of the border. The Defending Immigrants Partnership, a joint initiative comprised of the National Legal Aid & Defender Association (NLADA), the New York State Defenders Association's Immigrant Defense Project (NYSDA IDP), the Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild ("National Immigration Project"), represents an unprecedented collaboration among the foremost immigration advocacy and defense organizations with expertise in the immigration consequences of crime and the one national legal organization devoted exclusively to ensuring high-quality legal representation for indigent clients in criminal and civil matters.

Since its inception in October 2002, the Partnership has coordinated on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions. To that end, the Partnership offers defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes, actively encourages and supports development of in-house immigration specialists in defender programs, forges connections between local criminal defenders and immigration advocates, and provides defenders technical assistance in criminal cases. Many of our resources are available at our website: www.defendingimmigrants.org.

Our work is guided and carried out by the following principal partners:

Katherine A. Brady, Senior Staff Attorney, ILRC
Michelle Fei, Staff Attorney, NYSDA IDP
Benita Jain, Staff Attorney, NYSDA IDP
Angie Junck, Staff Attorney, ILRC
Dan Kesselbrenner, Director, National Immigration Project
Richard Goemann, Defender Legal Services of NLADA
Joanne Macri, Director, NYSDA IDP
Manuel D. Vargas, Senior Counsel, NYSDA IDP
Jo-Ann Wallace, President & CEO, NLADA

We are also indebted to Marianne Yang, former Director of NYSDA Immigrant Defense Project, Maureen James, former Associate Attorney at NLADA, and Ross Shepard, former Director of Defender Legal Services of NLADA, who were instrumental in producing DIP's first national manual.

OUR FUNDERS. The Partnership is currently funded by the Gideon Project of the Open Society Institute. The Partnership received funding from the JEHT Foundation as well as start-up support from the Ford Foundation.

CONTACT US AT:

Immigrant Legal Resource Center
c/o Angie Junck, Staff Attorney
1663 Mission Street, Suite 602
San Francisco, CA 94103
P: 415-255-9499 ext. 586
F: 415-255-9792
ajunck@ilrc.org

National Immigration Project
c/o Dan Kesselbrenner, Executive Director
14 Beacon Street, Suite 602
Boston, MA 02108
P: 617-227-9727 ext. 2
F: 617-227-5495
dan@nationalimmigrationproject.org

National Legal Aid and Defender Association
c/o Richard Goemann, Director Defender Legal Services
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
P: 202-452-0620 x212
F: 202-872-1031
r.goemann@nlada.org

NYSDA Immigrant Defense Project
c/o Joanne Macri, Director
3 West 29th Street
Suite 803
New York, NY 10001
P: 212-725-6485
F: 800-391-5713
jmacri@nysda.org

HOW TO USE THIS MANUAL

Immigration law is a complex area of law and has become increasingly so in recent years. Unfortunately, the body of law relevant to understanding the immigration consequences of a criminal case is no exception. First and foremost, this manual attempts to organize and present this area of immigration law in a way that will be useful to criminal defense practitioners representing noncitizen criminal defendant clients in criminal proceedings. (As this area of law evolves and changes rather constantly, the defense attorney should keep abreast of changes in the law in order to properly counsel and prepare an appropriate defense for his or her client). This manual is also designed to serve as a reference source for immigration systems advocates representing or counseling noncitizens in later immigration removal proceedings, and to immigrants themselves who are facing the various potential immigration consequences of a criminal case, and who seek a better understanding of their legal situation and possible strategies to avoid any potential adverse immigration consequences in either criminal or immigration proceedings.

The user may choose to access the immigration law information presented in this manual in several different ways.

OVERVIEW: For a general introduction to the immigration issues that may be present in a criminal case and their importance, it is advised that all users of this manual first read, or at least skim, **Chapter 1**, Reasons to Consider the Immigration Consequences of a Noncitizen Criminal Defendant Client's Case.

QUICK ACCESS TO NECESSARY INFORMATION: The defense lawyer seeking quick answers and/or suggestions on immigration issues that may arise in a specific criminal case will no doubt wish to go directly to some of the appendices included in this manual. For strategies to avoid any identified potential negative immigration consequences, the "quick access" user may wish to refer to **Chapter 5**, Strategies for Avoiding the Potential Negative Immigration Consequences of a Criminal Case.

THE IN-DEPTH APPROACH: The defense lawyer seeking a more in-depth understanding of the immigration issues in a noncitizen client's criminal case is advised to read or review the five chapters of the text of this manual in the sequence in which they are presented. In addition to Chapter 1 (see above), the text of the manual covers the following:

> **Chapter 2**, Determining Your Criminal Defendant Client's Citizenship and Immigration Status, explains how you may determine whether a particular client is a noncitizen and thus subject to the immigration laws (see section 2.2). Once you have determined that a client is a noncitizen, Chapter 2 proceeds to explain how to determine the client's particular immigration status (see section 2.3). This determination may be crucial to understanding the possible immigration consequences of the criminal case.

Chapter 3, Possible Immigration Consequences of a Noncitizen Criminal Defendant Client's Case, lays out the possible immigration consequences of the criminal case based on your noncitizen client's particular immigration status. This chapter analyzes the possible consequences separately for lawful permanent residents (see section 3.2), refugees or asylees (see section 3.3), and other noncitizens who are not lawful permanent residents or refugees/asylees but who might be eligible now or in the future for such status (see section 3.4). In addition, Chapter 3 describes other immigration-related issues to consider for non- citizen clients who do not fall into any of these categories, or who do but who will be unable to avoid removal (see section 3.5).

Chapter 4, Analyzing State Criminal Dispositions Under Federal Immigration Law, first explains how to analyze whether a disposition will be deemed a "conviction" triggering immigration consequences. It then analyzes the immigration import of sentences such as prison sentences, suspended sentences, and probation. Chapter 4 also explains the analytical approach that immigration judges and federal courts take in determining whether a conviction for any particular offense falls within a category of removal (deportation). That approach, the "Categorical Approach", is a rigorous method that focuses first and foremost on the elements of an offense as set forth in the criminal statute and judicially interpreted. Only in certain prescribed situations will the courts look beyond those elements to use a "Modified Categorical Approach" that requires looking to certain other documents within the criminal record. In addition, Chapter 4 discusses various accessory and preparatory offenses as potential alternatives to convictions for underlying crimes, where a conviction for the accessory or preparatory offense might not trigger the negative immigration impact that would be triggered by a conviction for the underlying offense.

Finally, **Chapter 5** (see above) represents the culmination of the analysis of the preceding chapters. It suggests strategies for avoiding negative immigration consequences that may be available in some criminal cases and/or in subsequent immigration proceedings. Chapter 5 first lists certain generally applicable strategies (see section 5.3). It then lists strategies specific to cases involving drug charges (see section 5.4), violent offense charges (see section 5.5), property offense charges (see section 5.6), and firearm charges (see section 5.7). It concludes with a new section on strategies and resources for avoiding the potential immigration consequences of a criminal case in later immigration removal proceedings (see section 5.8).

APPENDICES: In addition to **Appendix A**, Sample Client Immigration Questionnaire, the manual contains other appendices to use as aids in determining immigration consequences. These are **Appendix B**, Alphabet Soup, **Appendix C**, Aggravated Felony Practice Aids, **Appendix D**, Crimes of Moral Turpitude: Table of Cased, **Appendix E**, Accessory or Preparatory Offenses and Their Immigration Effect, **Appendix F,** "Particularly Serious Crime" Bars on Asylum and Withholding of Removal**, Appendix J,** Some Relevant Immigration Statutory

Provisions and **Appendix K,** Removal Defense Checklist in Criminal Charge Cases.

NOTE ON REFERENCES TO PERTINENT FEDERAL GOVERNMENT AGENCIES: On March 1, 2003, as a result of the enactment of the Homeland Security Act in 2002, the former Immigration and Naturalization Service (INS) within the U.S. Department of Justice ceased to exist, and its functions were distributed among three bureaus within the new Department of Homeland Security. The three new bureaus in the Department of Homeland Security are the Bureau of Citizenship and Immigration Services (BCIS), the Bureau of Immigration and Customs Enforcement (BICE), and the Bureau of Customs and Border Protection (BCBP). This manual refers collectively to the federal government agencies that currently carry out the functions formerly carried out by the INS as the Department of Homeland Security (DHS).

WHERE TO GET HELP

We welcome defense attorneys to contact the Defending Immigrants Partnership, and to take advantage of the numerous resources we make available through our website at www.defendingimmigrants.org. Among resources created to date, the Defending Immigrants Partnership has, together with local partners, produced jurisdiction-specific charts of commonly charged criminal offenses and their potential immigration impact for **ARIZONA**, **CALIFORNIA, CONNECTICUT, FLORIDA, ILLINOIS, MASSACHUSETTS, NEW JERSEY, NEW YORK, NEW MEXICO, NORTH CAROLINA, TEXAS, VERMONT, VIRGINIA, WASHINGTON,** and for **FEDERAL CRIMES.**

For additional information and guidance on the immigration issues in criminal cases, we refer users of this manual to the following excellent national resource materials:

- ***Immigration Law and Crimes***, authored by Dan Kesselbrenner and Lory D. Rosenberg, and updated by Norton Tooby, under the auspices of the National Immigration Project of the National Lawyers Guild (published by West Group, 620 Opperman Drive, St. Paul, MN 55164 / (800) 328-4880).

- ***Criminal Defense of Immigrants***, by Norton Tooby with Katherine A. Brady (published by The Law Offices of Norton Tooby, 516 52nd Street, Oakland, CA 94604 / (510) 601-1300).

We refer defense attorneys in New York State to ***Representing Noncitizen Criminal Defendants in New York State***, principally authored by Manuel D. Vargas (published by the New York State Defenders Association / (518) 465-3524). This national manual is largely an adaptation of that publication.

Defense attorneys in the Ninth Circuit should consult ***Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws***, authored by Katherine Brady with Norton Tooby, Michael Mehr, and Angie Junck and published by the Immigrant Legal Resource Center, 415-255-9499, www.ilrc.org/publications.

For the latest information on immigration law developments relevant to representing noncitizen criminal defendants, we refer readers to the Defending Immigrants Partnership website at **www.defendingimmigrants.org,** as well as to the websites of partner organizations:

www.nlada.org	**www.ilrc.org**
www.nationalimmigrationproject.org	**www.immigrantdefenseproject.org**

When immigration counsel is required for a specific case, defense lawyers are encouraged to contact an immigration lawyer with expertise in criminal/immigration issues. An expert should be aware of the latest developments in the law relevant to your client's particular situation. For referrals to appropriate immigration lawyers, defense lawyers may contact the local chapter of the **American Immigration Lawyers Association (AILA)**. Contact the Washington, D.C. AILA national office at (202) 371-9377 for a current telephone number for these local AILA chapters.

CHAPTER 1

Reasons to Consider the Immigration Consequences of a Noncitizen Criminal Defendant Client's Case*

1.1 THE IMPACT OF RECENT LEGISLATION AND ENFORCEMENT POLICIES

During the closing years of the 20th century, Congress seven times amended the Immigration and Nationality Act (INA) to increase the possible negative consequences of criminal convictions and conduct for noncitizen criminal defendants.[1] In particular, the Antiterrorism and Effective Death Penalty Act (AEDPA), which came into effect on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which generally came into effect on April 1, 1997, dramatically increased the negative immigration consequences. In addition, the federal government has adopted stricter immigration law enforcement policies in recent years, most particularly following the tragic events of September 11, 2001.

As a result of these changes in the immigration law and in enforcement of the law, now more than ever your noncitizen criminal defendant client may be subject to detention and removal from the United States following convictions of relatively minor criminal offenses, often without any prospect of a waiver or other relief.

Your noncitizen client who is not lawfully present but who has some claim to lawful status (e.g. married to a U.S. citizen) might be made permanently ineligible to be admitted as a lawful immigrant if convicted of certain crimes, or if s/he merely admits having committed a crime. For example, such a client would be made permanently inadmissible and subject to detention and removal by a conviction or confession of any drug-related offense (with the possibility of a waiver of inadmissibility existing only for a single offense of simple possession of 30 grams or less of marijuana).

Even if your noncitizen client is someone whose life or freedom would be threatened in the country to which he or she would be removed, a conviction of certain crimes could preclude any possibility of halting such a removal.

Finally, your immigrant client who wishes to become a U.S. citizen might be made ineligible for at least five years by a criminal conviction or admission of criminal conduct or other evidence of lack of good moral character coming out of a criminal proceeding.

At the same time as Congress has been making the immigration consequences of criminal conduct and convictions ever harsher, the federal government has been devoting greatly increased resources to enforcing these consequences. As a result, the Department of Homeland Security (DHS) (formerly the Immigration and Naturalization Service (INS)) is identifying more and more noncitizens who are removable on criminal grounds, serving detainers and obtaining removal orders against such noncitizens while they are in criminal custody, and taking such noncitizens into DHS custody immediately upon release from state custody. It is thus far less likely than it was before that an individual who has become subject to removal proceedings due to a criminal conviction or to criminal conduct will "slip through the cracks" and not be placed in such proceedings, or

will otherwise avoid removal.

In fact, DHS statistics demonstrate the effect that these amendments to the law and the increased funding have had. In fiscal year 2004, the DHS removed 42,510 noncitizens based on criminal grounds, compared to only 1,221 noncitizens deported or excluded based on criminal grounds twenty years earlier in fiscal year 1984.

Together, the harsher character of the law and its increased enforcement now make it more important than ever that you determine, for each of your clients, if the client is a citizen or not (one should not jump to quick assumptions on the basis of what your client tells you—even your client may not know). If your client is a noncitizen, you then should determine in what noncitizen category he or she falls. On the basis of that information, you and your client should consider the immigration consequences of each choice that your client will face during the criminal proceedings, such as whether to plead guilty to a particular criminal charge. Indeed, for many of your noncitizen clients, the immigration consequences of a criminal conviction or other disposition may now be far more severe and lasting than the penal consequences.

1.2 THE RISK THAT A CRIMINAL DISPOSITION WILL TRIGGER YOUR NONCITIZEN CLIENT'S REMOVAL FROM THE UNITED STATES BASED ON DEPORTABILITY OR INADMISSIBILITY

Removal from the United States is the possible immigration consequence that will probably be of most immediate concern to your noncitizen criminal defendant client. Removal is a new immigration law term-of-art, introduced by IIRIRA in 1996. It encompasses both what used to be called "deportation" and "exclusion" under prior immigration law.

The immigration statute subjects a noncitizen to removal based on an ever-growing list of criminal offenses. In addition, the law now provides that, if your client is convicted of certain offenses or receives a jail sentence of a certain length, s/he will not be able to ask the immigration judge in his or her immigration hearing for any relief from removal that may have been available in the past.

1.2.A Deportability v. Inadmissibility

In order to help your noncitizen client avoid removal, you first need to know that there are two separate parts of the immigration law that may trigger removal based on a criminal offense—the grounds of "deportability"[2] and the grounds of "inadmissibility."[3] Which set of grounds applies to your client, or whether both apply, depends on your client's particular immigration status and situation.

Some criminal defense lawyers may be familiar with the old immigration law distinction between grounds of "deportability" and those of "excludability." Prior to the IIRIRA amendments, the grounds of deportability applied to individuals who had "entered" the United States, whether lawfully or not. The excludability grounds, on the other hand, applied to individuals seeking lawful admission from outside the United States or at a port of entry.

The new immigration laws preserve, to some extent, the old distinction between deportability and excludability (now inadmissibility) but make a significant modification in their respective applicability.

The deportability grounds are now applicable only to individuals who have been "lawfully admitted" to the United States, e.g., a lawful permanent resident (LPR) with a so-called green card (see Chap. 2, section 2.3.A).

The grounds of inadmissibility apply to everyone else, even individuals who have entered but have not been lawfully admitted to the United States. In addition, the inadmissibility grounds may be applied to lawfully admitted individuals when such individuals travel abroad. They may be applied to a lawfully admitted individual at the time s/he seeks readmission, or at any time after the reentry.

In practical terms, this means that your LPR client generally needs to be concerned primarily with the deportability grounds, but may also need to be concerned with the inadmissibility grounds if s/he may travel outside the United States. And, of course, the grounds of inadmissibility will be the primary concern for an LPR client arrested while seeking readmission after a trip abroad, e.g., returning LPR charged with drug possession at a U.S. international airport or at a U.S.-Canada or U.S.-Mexico border crossing point.

In contrast, your noncitizen client who is not an LPR but who wishes to remain in the United States should be concerned primarily with the grounds of inadmissibility. A non-LPR client generally need not be concerned with the deportability grounds. This may include even your noncitizen client who has been lawfully admitted but only for a temporary period of admission, e.g., admission on a valid visitor or student visa, rather than for permanent residence. Even though technically subject to the deportability grounds as a lawfully admitted individual, such a client, as a practical matter, will be in the same position as a non-lawfully admitted individual because his or her lawful status will likely expire or be terminated during or subsequent to the criminal proceedings. Such a client may be able to remain in the country only if s/he has some possibility of obtaining lawful admission status. In such a case, the issue will be avoiding inadmissibility.

1.2.B What criminal dispositions trigger deportability?

Deportability is addressed at more length in Chapter 3. By way of a brief introduction, the deportability grounds include the following:

- Conviction of an *aggravated felony*—This immigration law term-of-art is a constantly expanding category which now includes not only crimes such as murder and illicit drug or firearm trafficking, but any crime of violence, theft or burglary offense, or obstruction of justice offense for which an individual gets a prison sentence of one year or more, fraud or deceit offenses where the loss to the victim(s) exceeds $10,000, as well as an expanding list of other specific offenses. As a result of broad interpretations of the statutory language, the term may include even some state misdemeanors such as misdemeanor sexual abuse of a minor, misdemeanor drug possession if preceded by a prior drug conviction, or a misdemeanor larceny offense with a one year prison sentence even where the sentence is suspended.
- Conviction of a *crime involving moral turpitude* committed within five years of admission to the United States and punishable by a year in prison—This immigration law term-of-art could include crimes in many different offense categories, e.g., crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses); crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses); and most sex offenses. In some states, misdemeanors as well as felonies are punishable by a year so they could, if deemed to involve moral turpitude, make your client deportable if s/he committed the offense within five years after admission.
- Conviction of *two crimes involving moral turpitude*, whether felony or misdemeanor, committed at any time and regardless of actual or potential sentence.
- Conviction of any *controlled substance offense* (other than a single offense of simple possession of 30 grams or less of marijuana), whether felony or misdemeanor.
- Conviction of a *firearm or destructive device offense*, whether felony or misdemeanor.
- Conviction of a *crime of domestic violence, stalking, child abuse, child neglect, or child abandonment,* whether felony or misdemeanor, *or a finding of a violation of an order of protection*, whether issued by a civil or criminal court.

- Disposition or record of criminal case that supports federal government charge that your client falls within one of various other crime-related deportability grounds that do not require conviction, including *alien smuggling, drug abuse or addiction, document fraud, falsely claiming citizenship, criminal activity that endangers public safety or national security, and unlawful voting*.

1.2.C What criminal dispositions trigger inadmissibility?

Inadmissibility is addressed at more length in Chapter 3. By way of a brief introduction, the inadmissibility grounds include the following:

- Conviction or admitted commission of any *controlled substance offense*, whether felony or misdemeanor.
- Conviction or admitted commission of a *crime involving moral turpitude*, whether felony or misdemeanor (subject to a petty offense exception).
- Conviction of *two or more offenses of any type* with an aggregate sentence to imprisonment of at least five years.
- Disposition or record of criminal case that supports federal government charge that your client falls within one of various other crime-related inadmissibility grounds that do not require a conviction or admission, including *government knowledge or reason to believe your client is a drug trafficker, a trafficker in persons or a money launderer, prostitution and commercialized vice, criminal activity that endangers public safety or national security, drug abuse or addiction, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, and unlawful voting*.

1.2.D When do you need to be concerned that the criminal disposition may also be eliminating an available possibility of relief from deportability or inadmissibility?

Even if your noncitizen client cannot avoid an outcome of his or her criminal case that triggers deportability or inadmissibility, your client may still be able at least to preserve the possibility of obtaining relief from removal. Thus, if deportability or inadmissibility cannot be avoided, you should investigate whether your client may be eligible for relief from removal under the immigration law and whether there may be a way to avoid a disposition of the criminal case that eliminates such a possibility. For a listing of the various forms of relief or waivers, and what criminal dispositions preclude grants of these forms of relief, see the Chapter 3 section corresponding to your client's particular immigration status or situation. Because this is a complicated area of the law, you may also

wish to consult with an immigration law expert regarding the specific facts and circumstances of your client's case.

1.2.E What will happen if the disposition of the criminal case triggers deportability or inadmissibility?

If, as a result of the disposition of the criminal charge(s), your client becomes removable from the United States—based either on deportability or inadmissibility—he or she will be subject to the issuance of a DHS detainer on the penal custodian or, if your client is not sentenced to imprisonment, to immediate DHS arrest and detention. Removal proceedings before an immigration judge are then to take place expeditiously, generally either in the penal institution where your client is serving a sentence of imprisonment, or in the DHS detention facility. In fact, if your client is sentenced to imprisonment, the immigration statute now generally contemplates completion of removal proceedings and the entry of a removal order before the end of the state incarceration.[4] Even if your client is released from state custody before completion of the removal proceedings, however, this does not mean the s/he will be released from custody. In most cases, the immigration statute now requires the DHS to take and retain your client in custody upon your client's release from criminal custody without even a possibility of release on bond pending completion of the removal proceedings.[5]

In addition, the immigration statute requires that the DHS remove your client from the United States within a period of 90 days from the date of any final order of removal.[6] If your client is incarcerated when the removal order becomes final, the 90-day period begins on the date your client completes his or her criminal imprisonment and is released to DHS custody.[7] Once the removal order is final and the DHS has taken custody, the DHS is required to detain your client during the 90-day period.[8] If your client is removable for crime-related reasons, the DHS may detain the individual beyond the 90-day period until removal is accomplished.[9]

All this represents a sea change from past practice. First of all, in the past, many convicted noncitizen criminal defendants were not identified by the INS (now DHS) and were thus not placed in removal proceedings. Those who were identified by the INS and placed in proceedings often had their immigration hearing in a noncustody environment following completion of a penal sentence. They were thus in a better position to demonstrate post-crime rehabilitation and to obtain the discretionary relief from deportation that was then more readily available. Others did not appear for their immigration hearing, and still others showed but did not appear for their deportation. Thus, in the past, actual removal from the United States as a result of criminal deportability or inadmissibility often did not occur.

1.2.F What are the long-term implications of a removal order for your noncitizen client?

If your client is ordered removed from the United States, the reality in many, if not most cases, is that your client will never be able to return to the United States. If your client nevertheless returns or attempts to return unlawfully, the client will be subject to harsh federal criminal penalties.

First, in the case of a client removed on the basis of virtually any drug offense, such drug offense will most likely have the effect of making the client permanently inadmissible. For admission as a permanent resident after removal, a possibility of a waiver exists only for a single offense of simple possession for one's own use of 30 grams or less of marijuana.[10] A more general waiver exists for admission as a temporary visitor, but this waiver is difficult to obtain and will not allow your client to reestablish any lawful residence s/he previously had in the United States.[11]

A client who is removed on the basis of conviction of an aggravated felony is also made permanently inadmissible under a separate inadmissibility ground.[12] Although there is an exception to this ground of inadmissibility if your client obtains the federal government's consent prior to reapplying for admission,[13] such consent is difficult to obtain.

Finally, even if your client does not fall within the drug-related grounds of inadmissibility, or is not removed on the basis of an aggravated felony conviction, s/he may be barred from future admission after removal for 5 years (in the case of a first removal based on inadmissibility), 10 years (in the case of a first removal based on deportability), or 20 years (in the case of a second or subsequent removal).[14] Here also, there is an exception if your client obtains the federal government's consent prior to reapplying for admission, but, as noted above, such consent is difficult to obtain. Even once the period of 5, 10, or 20 years has passed, your client should not be under the impression that s/he will be able automatically to return. Although the bar on admission based on the prior removal will no longer be present, the client will still have to establish eligibility otherwise for an immigrant visa. This may very well not be a possibility for your client.

If your client attempts illegal reentry after being removed, s/he will be subject to federal prosecution under federal immigration criminal laws providing now for lengthy federal prison sentences. These laws now provide for a sentence of up to 20 years if the individual had been removed subsequent to conviction of an aggravated felony; up to 10 years if the individual had been removed subsequent to conviction of any felony other than an aggravated felony, or three or more misdemeanors involving drugs or crimes against the person; and up to 2 years in other cases.[15] In recent years, U.S. Attorneys' offices have dramatically stepped up enforcement of these criminal provisions.

Thus, removal based on criminal deportability or inadmissibility will most likely mean that your noncitizen client convicted of an offense triggering deportability or inadmissibility will be permanently separated from home, family, employment, and other ties here in the United States. In those cases of a client who might suffer political or other persecution in his or her country of nationality, removal could also mean that your client may suffer even greater hardships, including loss of life.

1.3 THE RISK THAT A CRIMINAL DISPOSITION WILL NEGATIVELY AFFECT ELIGIBILITY FOR U.S. CITIZENSHIP FOR YOUR NONCITIZEN CLIENT WHO IS A LAWFUL PERMANENT RESIDENT

In the case of a lawful permanent resident immigrant client, ineligibility for citizenship—either permanent or temporary—is an additional possible negative consequence of a criminal case. This is because your lawful permanent resident client could be made ineligible for U.S. citizenship for at least five years by a criminal conviction or admission of criminal conduct or other evidence of lack of "good moral character" coming out of a criminal proceeding (see Chap. 3, subsection 3.2.E(2)). Thus, even if such a client is able to avoid removal consequences, s/he may want to consider citizenship ineligibility consequences when making choices during criminal proceedings.

As is the case with removal consequences, recent legislation has made citizenship ineligibility an even more important consequence than it was in the past. Primary examples are the new eligibility rules for various federal and state government benefits that now or in the near future may wholly or partially bar noncitizens. Thus, for instance, a client who has AIDS and who now or in the future may need federal assistance for the disabled or Medicaid in order to survive and put together his or her life after completing any penal sentence may wish to consider the likelihood that a criminal proceedings choice will lead to ineligibility for citizenship.

Ineligibility for citizenship also, of course, leaves your client in a position where s/he is unable to naturalize and thus avoid the future risk of removal from the United States based on criminal conduct or other grounds for deportability.

1.4 THE ETHICAL DUTY TO ADVISE YOUR NONCITIZEN CLIENT OF THE IMMIGRATION CONSEQUENCES OF A CRIMINAL CASE

Defense lawyers have a generally recognized ethical duty to investigate and advise regarding potential immigration consequences of a criminal case.

In its Performance Guidelines for Criminal Defense Representation, the National Legal Aid and Defender Association (NLADA) cites the duty of defense counsel in the

plea bargaining process to "be fully aware of, and make sure the client is fully aware of . . . consequences of conviction such as deportation."[16] The commentary to the NLADA Guidelines states that deportation can be a "devastating" effect of conviction for noncitizens and notes that collateral consequences such as deportation can be greater than direct ones.[17]

The ethics standards of the American Bar Association (ABA) also recognize this ethical duty. In fact, the ABA revised its Standards for Criminal Justice, Pleas of Guilty, in 1999 to include a new standard that specifically states that defense counsel "should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."[18] The commentary to this new ABA standard makes it clear that deportation is one of the most important of such consequences:

> [I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.[19]

The ABA's commentary notes that defense counsel "should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant."[20]

In addition, many federal and state courts have recognized such a duty. For example, in *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 322-323 n. 48 & n. 50 (2001), the U.S. Supreme Court cited the ABA standards with approval, and noted that "competent defense counsel" would have advised the petitioner in that case of the importance of his eligibility for relief from deportation at the time of his plea.

In fact, in some jurisdictions, failure to comply with the duty to advise regarding immigration consequences has led to findings of ineffective assistance of counsel sufficient to support a finding of invalidity of the conviction. *See, e.g., State v. Paredez*, 101 P.3d 799 (New Mexico 2004)(holding that a criminal defendant's attorney has "an affirmative duty to determine [the client's] immigration status and provide him with specific advice regarding the impact a guilty plea would have on his immigration status."); *Williams v. State*, 641 N.E.2d 44 (Ind. App. 1994) ("attorney's duties to a client are [not] limited by a bright line between the direct consequences of a guilty plea and those consequences considered collateral"); *People v. Soriano*, 194 Cal.App. 3d 1470, 240 Cal.Rptr. 328 (1987) (citing ABA standards as evidence of defense counsel's obligation to advise clients fully about collateral consequences of their guilty pleas); *People v. Pozo*, 746 P.2d 523 (Colo. 1987) ("attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients"). Courts in most other jurisdictions either have yet to address whether the failure to advise a defendant of the possibility of deportation may constitute ineffective assistance of counsel, or have ruled that such failure does not constitute ineffective

assistance of counsel warranting a vacatur of a guilty plea.[21] Nearly all courts that have reached the question, however, have found that affirmative misstatements regarding immigration consequences by defense counsel constitute ineffective assistance.[22] For example, the United States Court of Appeals for the Second Circuit, in *United States v. Couto,* 311 F.2d 179, 188 (2d Cir. 2002), held, without reaching the question of whether the standards of attorney competence have evolved to the point that a *failure* to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable, held that an *affirmative* misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable."

The ethical responsibility to advise your noncitizen client of the immigration consequences of a criminal disposition – regardless of whether failure to do so constitutes ineffective assistance of counsel sufficient to support a finding of invalidity of the conviction -- are dramatized by cases where the immigration consequences are totally out of proportion to the criminal sentence. Consider the following cases reported in the media in recent years where longtime lawful residents of the United States with family and other ties in this country plead guilty to crimes resulting in short prison sentences but now face deportation:

> ***Example 1:*** Andre Venant, a lawful permanent resident of the United States for more than 20 years and "a New York chef who had fallen ill and on hard times, sometimes made ends meet last winter with a doctored MetroCard, evading subway fares or selling turnstile swipes to others. He was arrested a few times but never sentenced to more than seven days in jail. So he was shocked when his third jail term opened a trapdoor to deportation . . . . He soon found himself in shackles on a predawn flight to rural Louisiana. There, in the 1,000-bed Federal Detention Center in Oakdale, he learned that he could be jailed indefinitely, without legal counsel, while the government sought to deport him to his native Madagascar for "crimes involving moral turpitude" - that is, three convictions for MetroCard offenses that are commonplace in New York." (Nina Bernstein, "When a MetroCard Led Far Out of Town", *New York Times*, October 11, 2004.)
>
> ***Example 2:*** Cornelius Johnson came to New York from Jamaica in 1993. As a lawful permanent resident immigrant, he settled in upstate New York with his extended family. In 1997, he was arrested for criminal possession of marijuana. In an agreement with the state, he pleaded guilty to a misdemeanor drug offense and was sentenced to time served. Neither the lawyer nor the judge mentioned that in accepting a plea bargain, he could be deported. Today, eight years after the conviction and with a clean record, Mr. Johnson faces mandatory deportation. (Bryan Lonegan, *New York Times*, Op-Ed, "Forced to Go Home Again," February 27, 2005.)
>
> ***Example 3:*** Ana Flores is a young, lawful permanent resident immigrant from Guatemala who lives in a Virginia suburb of Washington, D.C. with her two U.S. citizen daughters, ages 9 and 8. Over several years, she complained to the police that her husband was assaulting her. Then, in June 1998, during one of their disputes, her husband sat on and hit her. She bit him and he called the police.

The police arrested her and charged her with domestic assault. After a ten-minute hearing, the judge urged her to plead guilty. She did and was sentenced to six months probation, and thirty days in jail to be suspended if she finished the probation. She successfully completed the probation but is now in deportation proceedings. (*New York Times*, December 14, 1999.)

Example 4: Maria Wigent is a 37-year-old immigrant from Italy who has lived in Rochester, New York since she was five years old, and has a U.S. citizen husband and two children. She pled guilty to petit larceny charges for stealing a stick of deodorant, some eye drops, and three packs of cigarettes. She is now facing deportation. (*Albany Times Union*, October 31, 1999.)

Example 5: Pedro Aguiar is a 21-year-old lawful resident living in Massachusetts who came to this country from the Azores when he was a baby and is currently married to a U.S. citizen. He was arrested and charged with having attacked his brother with a knife during a fight that took place when he got drunk at his brother's home. He pled guilty and was sentenced to one year in prison for assault and battery with a dangerous weapon. At the time he pled guilty, he did not know that the plea would make him mandatorily deportable. Mr. Aguiar now regrets his decision and states: "All they want you to do nowadays is to plead guilty . . . If I would have known, I would have taken the trial." (*Providence Sunday Journal,* August 10, 1997.)

It could very well be that these individuals, if fully informed, would have considered incurring the severe and lasting consequences of deportation far more serious than the risk of a greater penal sentence that might have been run by not agreeing to plead guilty. As Brooklyn federal District Judge Jack B. Weinstein has noted: "Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea."[23]

1.5 THE IMPORTANT DIFFERENCE THAT YOU AS A CRIMINAL DEFENSE LAWYER CAN MAKE FOR YOUR NONCITIZEN CLIENT

The immigration laws are very complex and it is difficult even for an immigration law practitioner to determine with certainty the immigration consequences of particular dispositions of a criminal case. The immigration consequences also have become so harsh and now extend to so many criminal dispositions that it is tempting for a criminal defense lawyer to throw his or her hands up in the air and say, in exasperation, "What can you do?"

In many cases, there are few options. But, in others, there is still a lot you could do. This manual will seek to present not only the law of immigration consequences, but potential strategies that may be followed in certain cases to eliminate or ameliorate those consequences. As examples of the potential difference that can be made by a criminal defense lawyer aware of the immigration issues lurking behind criminal proceeding choices faced by a noncitizen client, consider the following hypothetical cases:

> ***Example 1:*** Your client is an LPR green card holder who immigrated to the United States four years ago. He has been charged in your state with felony assault, which you have been able to plead down to misdemeanor assault in the third degree. In your state, that misdemeanor is punishable by up to one year in jail, and has three subsections: (1) intentionally causing physical injury; (2) recklessly causing physical injury; or (3) with criminal negligence, causing physical injury with a deadly weapon. What you should know is that if the record of conviction shows that the plea would be to the first or third subsections of misdemeanor assault in the third degree, your client could be deportable from the United States based on having been convicted of what the immigration law calls a crime involving moral turpitude possibly without any relief from removal. However, based on a precedent decision of the Board of Immigration Appeals (finding that assault based on reckless conduct that does not cause *serious* bodily injury is not a crime involving moral turpitude), if your client pleads specifically to the second subsection of assault in the third degree ("recklessly causes physical injury [but not serious physical injury] to another person") instead of first or third subsection, your client should avoid deportability entirely.
>
> ***Example 2:*** Your client came to the United States lawfully on a tourist visa but then overstayed his period of admission. He now has a U.S. citizen girlfriend whom he plans to marry. In a drug sting, the police have arrested him and others and accused your client of selling a small amount of marijuana, as well as concealing or destroying some of the drug evidence against the others arrested in the sting. Since this is a first arrest, you are able to get the charges reduced to misdemeanor sale of marijuana with no jail time. However, you research and/or consult on the immigration consequences of such a guilty plea and find that it will make your client permanently ineligible to be lawfully admitted to the United States on the basis of marriage to a U.S. citizen and will lead to mandatory removal from the country. In contrast, if you are able to get the plea charge switched to misdemeanor possession of marijuana (with the record of conviction showing that the amount involved did not exceed 30 grams) OR, even better, if you are able instead to negotiate a plea to misdemeanor hindering prosecution instead of a drug charge, your client may not be precluded from being able to legalize his status and stay in the country with his new wife.
>
> ***Example 3:*** Your client fled religious persecution in her country of birth and is applying for asylum in the United States. She has been arrested and charged with grand larceny in your state. You research and/or consult on the immigration consequences of pleading guilty and find that if you work out a plea agreement to

any larceny charge under your state's code, eligibility for asylum will probably be precluded if your client receives a sentence of imprisonment of one year or more. However, if you are able to negotiate a prison sentence of 364 days or less, asylum is not precluded.

These examples demonstrate the critical difference that you as a defense lawyer can make for your noncitizen client in criminal proceedings. Information regarding potential immigration consequences, if communicated to your client, can help your client make truly informed choices. While the choices may run counter to what you would normally advise a client to do in the particular situation, choices made by noncitizen clients must consider consequences that your citizen clients do not face.

CHAPTER 2

Determining Your Criminal Defendant Client's Citizenship and Immigration Status*

2.1 WHY A CRIMINAL DEFENSE LAWYER SHOULD CAREFULLY DETERMINE THE CITIZENSHIP AND IMMIGRATION STATUS OF EACH NEW CLIENT

As a standard preliminary inquiry when representing *any* new criminal defendant client, a defense lawyer should determine whether the client is a U.S. citizen or not. Whether a criminal defendant is subject to removal or the other possible negative immigration consequences of a criminal case depends entirely on whether the client is a U.S. citizen or other "national" of the United States. "National" is the broader term that includes not only a U.S. citizen but also a person who, though not a citizen, "owes permanent allegiance" to the United States, such as persons born in "outlying possessions" of the United States.[1] Because nationals who are not U.S. citizens are a small group, this manual uses the term "citizen" to cover anyone not subject to removal from the United States, including noncitizen nationals.

Do not make the U.S. citizenship inquiry only with respect to those who appear or sound "foreign," as many noncitizens may not look foreign to you and may have no accent whatsoever. In fact, many noncitizens have lived virtually their whole lives in the United States. Everybody else in their families may be a citizen. However, either by choice or oversight, their parents or they themselves may have never filed the necessary paperwork for them to obtain citizenship.

If your client is a U.S. citizen, s/he will not be subject to removal from the country. This is true even if your client was born outside the United States and immigrated to this country as long as, at some point, s/he naturalized and became a U.S. citizen.

If your client is not a U.S. citizen, however, s/he may be subject to removal and the other possible immigration-related consequences of criminal proceedings even if s/he is here in the United States lawfully and has been here lawfully for decades. For help in determining whether your client is a noncitizen, see section 2.2 below.

Once you have determined that your client is a noncitizen, you will need to determine your client's particular immigration status or situation in order to figure out the possible immigration consequences of a criminal conviction or other disposition of the criminal case. The consequences may vary dramatically depending on your client's particular immigration status or situation.[2] For help in determining the immigration status of your noncitizen client, see section 2.3 below.

2.2 IS YOUR CLIENT A NONCITIZEN?

Unfortunately, it may be difficult to determine if your criminal defendant client is or is not a U.S. citizen. A defense lawyer should not jump to quick assumptions on the basis of what your client tells you. Your client may believe that not informing you of his

or her noncitizen status will protect the client from any immigration consequences of the criminal case. Or your client, particularly one who came here at a young age, may simply be unaware that s/he is not a citizen. Such a client may assume that s/he is a citizen because the client has lived in the United States for as long as s/he can remember. In addition, all the client's siblings may have automatically become citizens based on their parents becoming citizens, but unfortunately the client may be the one member of the family who did not automatically become a citizen.

Conversely, in other cases, your client may be a U.S. citizen without realizing it, e.g., when the client automatically "acquired" or "derived" U.S. citizenship without the client or his or her family having to take any affirmative action. Thus, in many cases, determining whether your client is a citizen may require inquiry or investigation beyond merely asking your client.

Generally, your client is a U.S. citizen and *not* subject to removal if s/he was:

- Born in the United States, Puerto Rico, the U.S. Virgin Islands, Guam, or American Samoa and Swains Island,[3] OR
- Born outside the United States but "acquired" U.S. citizenship automatically at birth through birth to U.S. citizen parent(s),[4] OR
- Born outside the United States but "derived" U.S. citizenship during childhood through naturalization of parent(s) as U.S. citizen(s) before your client reached age 16, 18, or 21 depending on the law in effect at the time,[5] OR
- Born outside the United States but "naturalized" as a U.S. citizen (either by your client's own application as an adult, or during your client's childhood by application of a U.S. citizen parent, generally followed by a swearing in ceremony).[6]

The law on acquisition and derivation of citizenship at birth is complicated and depends on what the law was at the time of your client's birth (for acquisition of citizenship), or at the time of the naturalization of your client's parent(s) or of your client's lawful admission for permanent residence, whichever came later (for derivation of citizenship). See the charts below for assistance in determining if a client born outside the United States acquired U.S. citizenship at birth (charts A and B), or derived U.S. citizenship when his or her parent(s) were naturalized (chart C).

► **Practice Tip:** Despite what the client may say or believe, your client is not a U.S. citizen merely because s/he has a green card. The lawful permanent resident status indicated by the green card is generally a prerequisite for U.S. citizenship but in no way signifies that your client is a citizen and not subject to removal (see subsection 2.3.A below).

---

*Charts for determining citizenship of children born abroad to parents who were or later became U.S. citizens

- For determining whether legitimate children born outside the United States acquired U.S. citizenship at birth, see Chart A.
- For determining whether illegitimate children born outside the United States acquired U.S. citizenship at birth, see Chart B.
- Derivative citizenship of children, see Chart C.

**** See Appendix G for most recently produced charts (January 2008, by ILRC) for determining U.S. citizenship.***

Chart A: Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth (if child born out of wedlock see Chart B)

STEP 1	**STEP 2**	**STEP 3**	**STEP 4**
Select period in which child was born	Select applicable Parentage	Measure citizen parent's residence prior to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had met applicable residence requirements.)	Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements – never before age 26.) People who did not meet the retention requirement can now regain citizenship by taking an oath of allegiance.

PERIOD	PARENTS	RESIDENCE REQUIRED OF USC PARENT	RESIDENCE REQUIRED OF CHILD
Prior to 5/24/34	Father or mother citizen	Citizen father or mother had resided in the U.S.	None
On/after	Both parents citizens	One had resided in the U.S.	None

STEP 1 Select period in which child was born	**STEP 2** Select applicable Parentage	**STEP 3** Measure citizen parent's residence prior to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had met applicable residence requirements.)	**STEP 4** Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements – never before age 26.) People who did not meet the retention requirement can now regain citizenship by taking an oath of allegiance.
5/24/34 and prior to 1/14/41	One citizen and one alien parent	Citizen had resided in the U.S.	5 years residence in U.S. or its outlying possessions between the ages 13 and 21 if begun before 12/24/52, or 2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence[1] between ages 14 and 28 if begun before 10/27/72.[2] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. [*See*, Volume 7 of the Foreign Affairs Manual citing section 302(g) of the Nationality Act of 1940.][3]

STEP 1 Select period in which child was born	**STEP 2** Select applicable Parentage	**STEP 3** Measure citizen parent's residence prior to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had met applicable residence requirements.)	**STEP 4** Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements – never before age 26.) People who did not meet the retention requirement can now regain citizenship by taking an oath of allegiance.
On/after 1/14/41 and prior to 12/24/52	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12.[4] If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, parent needed 10 years physical presence, at least 5 of which were after age 14.[5]	2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence[6] between ages 14 and 28 if begun before 10/27/72.[7] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. [*See*, Volume 7 of the Foreign Affairs Manual citing section 302(g) of the Nationality Act of 1940.] (This exemption is not applicable if parent transmitted under the Armed Services exceptions.) People born on or after 10/10/52 have no retention requirements.[8]
	Both parents citizens; or one citizen and one national[9]	One had resided in the U.S. or its outlying possessions.	None
On/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possession.	None
	One citizen, one national parent[10]	Citizen had been physically present in U.S or its outlying possessions for a continuous period of one year.	None
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14.[11]	None

STEP 1 Select period in which child was born	STEP 2 Select applicable Parentage	STEP 3 Measure citizen parent's residence prior to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had met applicable residence requirements.)	STEP 4 Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements – never before age 26.) People who did not meet the retention requirement can now regain citizenship by taking an oath of allegiance.
On/after 11/14/86	Both parents Citizens	One had resided in the U.S. or its outlying possessions.	None
	One citizen and one national parent[12]	Citizen had been physically present in U.S. or its outlying possessions for continuous period of one year.	None
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14.[13]	None

Produced by the ILRC (September 2003) -- Adapted from the INS Chart

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information. Please see notes at end of chapter.

CHART B: ACQUISITION OF CITIZENSHIP DETERMINING IF CHILDREN BORN OUTSIDE THE U.S. AND BORN OUT OF WEDLOCK ACQUIRED U.S. CITIZENSHIP AT BIRTH

PART 1 – Mother was a U.S. citizen at the time of the child's birth.
PART 2 – Mother was not a U.S. citizen at the time of the child's birth and the child was legitimated or acknowledged by a U.S. citizen father.

PART 1: MOTHER IS A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH

Date of Child's Birth:	Requirements:
Prior to 12/24/52:	Mother was a U.S. citizen who had resided in the U.S. or its outlying possessions at some point prior to birth of child. A child whose alien father legitimated him did not acquire U.S. citizenship through his U.S. citizen mother if: 1. The child was born before 5/24/34; 2. The child was legitimated before turning 21; AND 3. The legitimation occurred before 1/13/41. **NOTE:** A child born before 5/24/34 acquired U.S. citizenship when the Nationality Act of 1940, effective 1/13/41, bestowed citizenship upon the child retroactively to the date of birth.
On/after 12/24/52:	Mother was U.S. citizen physically present in the U.S. or its outlying

	possessions for a continuous period of 1 year at some point prior to birth of child.

PART 2: MOTHER WAS NOT A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH AND THE CHILD HAS BEEN LEGITIMATED OR ACKNOWLEDGED BY A U.S. CITIZEN FATHER[14]

Date of Child's Birth:	**Requirements:**
Prior to 1/13/41:	1. Child legitimated at any time after birth, including adulthood, under law of father's domicile. 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 1/13/41 and prior to 12/24/52:	1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52.[15] 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21 under law of father or child's domicile. 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/68 and prior to 11/15/71:	1. Child legitimated before age 21 under law of father or child's domicile. 2. Use CHART A to determine if child acquired citizenship at birth. **-- OR –** 1. Child/father blood relationship established by clear and convincing evidence;[16] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity of child in writing under oath, or paternity must be established by competent court. 5. Use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/71:[17]	1. Child/father blood relationship established by clear and convincing evidence;[18] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity of child in writing under oath, or paternity must be established by competent court. 5. Use CHART A to determine if child acquired citizenship at birth.

Produced by the ILRC (July 2002)

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information.
PLEASE SEE NOTES AT END OF CHAPTER.

CHART C: DERIVATIVE CITIZENSHIP - LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP

Date of Last Act	**Requirements** - [Please note that it is the ILRC's position that all advocates should argue that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. (*See Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; *however, see also,* INS Interpretations 320.2.) Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."] Note that in at least one federal district court case, the court held that a child derived citizenship automatically even though his mother naturalized after his 18th birthday because due to factors beyond his mother's control, the mother's citizenship interview had been rescheduled to a date past the child's 18th birthday. *Rivas v Ashcroft*, ___ F. Supp. 2d _, U.S. Dist. Lexis (16254) (S.D.N.Y. 2002). See also *Harriott v. Ashcroft*, 2003 U.S. Dist Lexis 12135 (E.D. Pa.).
Prior to 5/24/34:[19]	a. Either one or both parents must have been naturalized prior to the child's 21st birthday;[20] b. Child must be lawful permanent resident before the 21st birthday;[21] c. Illegitimate child may derive through mother's naturalization only; d. A legitimated child must have been legitimated according to the laws of the father's domicile;[22] e. Adopted child and stepchild cannot derive citizenship.
5/24/34 to 1/12/41:	a. Both parents must have been naturalized and begun lawful permanent residence in the U.S. prior to the child's 21st birthday; b. If only one parent is being naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S. commencing during minority, unless the other parent is already a U.S. citizen;[23] c. Child must be lawful permanent resident before the 21st birthday; d. Illegitimate child may derive through mother's naturalization only, in which case the status of the other parent is irrelevant; e. Legitimated child must have been legitimated according to the laws of the father's domicile;[24] f. Adopted child and stepchild cannot derive citizenship.
1/13/41 to 12/23/52:	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[25] or, be deceased, or the parents must be legally separated[26] and the naturalizing parent must have custody; b. Parent or parents must have been naturalized prior to the child's 18th birthday; c. Child must have been lawfully admitted for permanent residence before the 18th birthday; d. Illegitimate child can only derive if while s/he was under 16, s/he became a lawful permanent resident and his/her mother naturalized and both of those events (naturalization of mother and permanent residence status of child) occurred on or after 1/13/41 and before 12/24/52;[27] e. Legitimated child must be legitimated under the law of the child's residence or place of domicile before turning 16 and be in the legal custody of the legitimating parent;[28] f. Adopted child and stepchild cannot derive citizenship.[29]
12/24/52 to 10/5/78:[30]	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[31] or be deceased, or the parents must be legally separated[32] and the naturalizing parent must have custody. b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes.[33] If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.[34] c. Parent or parents must have been naturalized prior to the child's 18th birthday;[35] d. Child must have been lawfully admitted for permanent residence before the 18th birthday;[36] e. Child must be unmarried;[37] f. Adopted child and stepchild cannot derive citizenship.
10/5/78 to 2/26/01:[38]	**a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[39] or be deceased, or the parents must be legally separated [40] and the naturalizing parent must have custody.** **b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes. If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.[41]**

	c. Parent or parents must have been naturalized prior to the child's 18th birthday;[42] d. Child must have been lawfully admitted for permanent residence before the 18th birthday;[43] e. Child must be unmarried;[44] f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)'s naturalization,[45] is In the legal custody of the adoptive parent(s), is a lawful permanent resident and adoption occurred before s/he turned 18.[46] Stepchild cannot derive citizenship.

Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen:[47]	a. At least one parent is a U.S. citizen either by birth or naturalization.[48] b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen and the father must not have legitimated the child,[49] OR, if the father is a US citizen through naturalization or other means then the child must have been legitimated by the father under either the law of the child's residence or domicile or the law of the father's residence or domicile and the legitimation must take place before the child reaches the age of 16.[50] c. Child is under 18 years old.[51] d. Child must be unmarried.[52] e. Child is a lawful permanent resident.[53] f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.[54] g. Adopted children qualify so long as s/he was adopted before the age of 16 and has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years.[55] An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

2.3 IF YOUR CLIENT IS A NONCITIZEN, WHAT IS YOUR CLIENT'S PARTICULAR IMMIGRATION STATUS?

Once you have determined that your criminal defendant client is a noncitizen, the next step is to determine your client's particular immigration status or situation. Many of your noncitizen clients may know or have immigration documentation showing their particular immigration status. However, others may not know and may not have any immigration documentation. And others may not have any immigration status but may have the possibility of obtaining lawful immigration status, which also should be considered by the criminal defense lawyer.

This section divides noncitizens into four broad categories of actual or potential immigration status. Those four broad categories are:

- Lawful permanent residents (see subsection 2.3.A);
- Refugees and persons granted asylum (see subsection 2.3.B);
- Other noncitizens who might be eligible now or in the future to obtain lawful permanent resident status, asylum, or other protection from removal (see subsection 2.3.C); and
- Noncitizens who do not fall into any of the above categories (see subsection 2.3.D).

The user of this manual should be aware that this categorization of immigration statuses and situations is not what you would necessarily find in the immigration law or

immigration law resource materials. Rather, it attempts to group immigration statuses and situations in a way that is useful to the criminal defense practitioner in determining immigration consequences of criminal convictions (see Chapter 3). In addition, the user should be aware that this categorization focuses only on the immigration statuses and situations that the criminal defense practitioner is most likely to encounter. For information on other immigration statuses and situations that you might encounter, you should consult immigration law resource material or an immigration attorney.

2.3.A Lawful permanent resident status

A lawful permanent resident (LPR) is a noncitizen who has been lawfully admitted to the United States to live and work here permanently. Most lawful permanent residents obtained this status by petition of a U.S. citizen or lawful permanent resident family member or an employer. Some others may have obtained this status after admission as a refugee or after being granted asylum due to threat of persecution in their country of nationality. Still others obtained this status after having resided in the United States for a certain length of time, e.g., previously undocumented individuals who legalized their status under the late 1980s "amnesty" provisions.

A lawful permanent resident may apply to be naturalized as a U.S. citizen after having resided in the United States for the requisite number of years. For most individuals, five years of lawful permanent residence is required. However, many LPRs never got around to applying for naturalization or simply chose not to do so for a variety of reasons. Thus, some lawful permanent residents have been here in such status for much longer than five years.

You will know that your client is a lawful permanent resident if s/he has what is commonly referred to as a "green card," the popular name for the DHS-issued card identifying the bearer as an LPR. The current version of the green card, which is no longer green in color, is Form I-551 and states "PERMANENT RESIDENT CARD" in large block letters on the top of the front of the card. Samples of Form I-551, along with former versions of the "green card" that your client may still have.

Just because your client does not have a green card in his or her possession does not necessarily mean that s/he is not a lawful permanent resident. Your client may have recently been admitted or adjusted to permanent resident status and has not yet been issued a green card. Or your client may have lost his or her green card or had it stolen and has not yet applied for or received a replacement card. Or the police may have taken your client's green card at the time of arrest and not returned it. If your client does not have a green card but is a permanent resident, s/he may have a temporary I-551 stamp in either a foreign passport or on a Form I-94 Arrival/Departure card, or s/he may have a Form I-327 Permit to Reenter the United States.

In order to determine the immigration consequences of a criminal case for a lawful permanent resident client, see Chapter 3, section 3.2.

2.3.B Refugee or asylee status

A refugee or person granted asylum is an individual who has been admitted to the United States or allowed to remain in the United States due to a threat of persecution in his or her country of nationality. A refugee applied for such status *before entering the United States*, was granted a visa, and then was admitted to the United States as a refugee. A person granted asylum (asylee) entered the United States in some other status or unlawfully but then applied for and was granted asylum *after entry to the United States*.

A refugee or asylee may adjust to lawful permanent resident status generally after being present in the United States for one year after being admitted as a refugee or after being granted asylum. However, many refugees or asylees have been here for longer than one year and have not had their status adjusted to that of a lawful permanent resident. Thus, even if a client who was admitted as a refugee or granted asylum has been here for many years, you should analyze the case as that of a refugee or person granted asylum, unless you obtain information showing that such a client has in fact had his or her status adjusted to that of a lawful permanent resident.

You will know that your client is a refugee or asylee if s/he has a document identifying the bearer as a refugee or individual granted asylum. In order to determine the immigration consequences of a criminal case for a refugee or asylee client, see Chapter 3, section 3.3.

►**Practice Tip:** Make sure to distinguish between a person granted asylum and a person who has applied for but has not been granted asylum. The immigration consequences and issues in the criminal case may be very different for each. Although an applicant for asylum may have an employment authorization document just as a person granted asylum would, the asylum applicant's card will be coded C-8, rather than A-3 or A-5. If your client is an asylum applicant as opposed to a person granted asylum, see section 2.3.C below.

2.3.C Client is any other noncitizen who might be eligible now or in the future to obtain lawful permanent resident status, asylum, or other protection from removal

If your noncitizen client is neither a lawful permanent resident nor a refugee/asylee, what needs to be determined—assuming your client wishes to remain in the United States—is whether the client is eligible now or in the future to obtain lawful resident status, asylum, or other protection from removal. This is probably true whether such a client is here unlawfully as a so-called illegal alien,

or lawfully in some temporary non-immigrant status, e.g., admission on a valid visitor or student visa.

Of course, if your client is here unlawfully, s/he may be deported for that reason alone. However, a client who is here in a lawful temporary status will probably be in the same position once his or her case comes to the attention of the DHS. This is because lawful status of a temporary nature will likely expire or be terminated by the DHS during or subsequent to the criminal proceedings. Therefore, such a client will be no better off than the so-called illegal alien.

The criminal defense lawyer who is not familiar with immigration law and remedies may have a difficult time determining whether a non-LPR, non-refugee/asylee client has some possibility now or in the future of obtaining lawful permanent resident status, asylum, or other protection from removal. Even an immigration lawyer may not be able to figure this out quickly or with precision, especially given the current fluidity of the nation's immigration laws. Nevertheless, it may be crucial for your client, and his or her hopes of remaining in the country or being able to immigrate lawfully in the future, for the defense lawyer to attempt to determine the immigration possibilities.

The two main possibilities for a non-LPR, non-refugee/asylee client to avoid removal are (1) relief based on a claim to permanent resident status such as having a certain U.S. citizen or lawful permanent resident family member willing to petition for your client, or (2) relief based on a fear of persecution in the country of removal or on being a national of a designated country to which the United States has a temporary policy of not removing individuals because of civil strife or disaster in that country.

To determine whether your non-LPR, non-refugee/asylee client has either of these possibilities of relief and what then are the possible immigration consequences of the criminal case, see Chapter 3, section 3.4. If the answer is yes, then the question becomes whether the client can avoid a disposition of the criminal case that would make him or her ineligible for such remedies.

2.3.D Client does not fall into any of the above categories

If your noncitizen client is not a lawful permanent resident or refugee/asylee, and does not have a claim to any such status or other protection from removal, that client probably will be unable to avoid removal for these reasons alone, regardless of what happens in the criminal proceedings. Remember, however, if such a client has any hope, even long into the future, of obtaining permanent or indefinite lawful immigration status (e.g., U.S. citizen child who would be able to petition for your client when the child reaches age 21), immigration consequences of the criminal proceedings should still be considered in order to avoid a particular outcome of the criminal case that needlessly

forecloses such possibility. Moreover, there may be other consequences of certain dispositions of the criminal case, such as ineligibility for early parole from prison for removal, that may be of great interest to your client. In order to determine such other relevant immigration consequences of a criminal case for a client who does not appear to fall into any of the above three categories, see Chapter 3, section 3.5.

CHAPTER 3

Possible Immigration Consequences of a Noncitizen Criminal Defendant Client's Case*

3.1 POTENTIAL IMMIGRATION CONSEQUENCES DEPEND ON YOUR CLIENT'S IMMIGRATION STATUS

The immigration consequences of a criminal conviction or other disposition vary depending largely on the noncitizen criminal defendant's particular immigration status or situation. This chapter discusses the possible immigration consequences of a criminal case based on your client's individual circumstances as a noncitizen. For purposes of presenting the various immigration consequences, your noncitizen criminal defendants are separated into four broad categories. These are:

- Lawful permanent residents (see section 3.2)
- Refugees and persons granted asylum (see section 3.3)
- Other noncitizens who might be eligible now or in the future to obtain lawful permanent resident status, asylum, or other protection from removal (see section 3.4)
- Noncitizens who do not fall into any of the above categories or who do but will be unable to avoid removal (see section 3.5)

A general approach to the criminal case that might be appropriate to avoid your client's removal from the United States is suggested for the first three of these categories: lawful permanent residents (3.2), refugees and asylees (3.3), and other noncitizens who might be able to avoid removal (3.4). The section dealing with lawful permanent resident clients also discusses other relevant issues, including preserving eligibility for U.S. citizenship. The last section (3.5) discusses additional issues to consider for noncitizen clients who are or will be unable to avoid removal.

The user of this manual should be aware that this chapter seeks to cover the immigration statuses and situations that the criminal defense practitioner is most likely to encounter today, but it does not address all immigration statuses and situations that you might encounter.

3.2 YOUR CLIENT IS A LAWFUL PERMANENT RESIDENT

3.2.A The client and a suggested approach to the case: Focus on avoiding deportability and inadmissibility

If your client is a lawful permanent resident (LPR) (see Chapter 2, section 2.3.A), s/he is present in the United States lawfully and is authorized by the DHS to live and work in the United States permanently. Such a client may have immigrated to this country as a child, may have lived and worked in this country for many years, and may have most, if not all, of his or her family here. An LPR who has resided in the United States the requisite number of years is eligible to apply for U.S. citizenship and, in fact, as a lawful permanent resident, already enjoys many of the privileges of citizenship.

A criminal case may place all this at risk. What is first and foremost at risk under the immigration laws is your LPR client's ability to remain in the United States. Also at risk is your LPR client's ability to attain U.S. citizenship.

LPR criminal defendants may be removed from the United States based on the crime-related grounds of deportability (see subsection 3.2.B). Some LPR defendants also need to be concerned about the separate grounds of inadmissibility (see subsection 3.2.C). Such LPRs include those whose criminal arrest took place at a port of entry while seeking readmission after a trip abroad, e.g., an LPR arrested and charged with carrying drugs into the country at a U.S. international airport or at a U.S.-Canada or U.S.-Mexico border crossing point, as well as LPRs who plan to travel abroad in the future (see Chapter 1, section 1.2.A). Although an LPR who travels outside the United States for less than 180 days is generally not subject to the inadmissibility grounds upon his or her return, this is not true when the LPR has committed an offense that comes within the criminal grounds of inadmissibility.[1]

If your LPR client cannot avoid a disposition of the criminal case that makes him or her deportable or inadmissible, the client may still be able to avoid removal by avoiding a disposition that makes him or her ineligible for any immigration law relief from removal (see subsection 3.2.D). If your LPR client will be able to avoid a disposition subjecting him or her to removal, the client may also wish to avoid a disposition that may make him or her ineligible for citizenship (see subsection 3.2.E(2)).

Suggested approach to the criminal case: As you read this section, keep in mind the following suggested general approach to representing a lawful permanent resident client (who is not already subject to removal without relief based on a prior criminal record).

- First and foremost, try to avoid a disposition triggering deportability see subsection 3.2.B), OR triggering inadmissibility if the client was arrested returning from a trip abroad or may travel abroad in the future (see subsections 3.2.C and E(1)).

- If you cannot do that, but your client has resided in the United States for over seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony" in order to preserve possible eligibility either for the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (see subsections 3.2.D(1) and (2)).

- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to

preserve possible eligibility for the relief of withholding of removal (see subsection 3.4.C(2)).

- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (see subsection 3.2.E(2)).

3.2.B Criminal dispositions that make a lawful permanent resident subject to removal based on deportability

The grounds of deportability include conviction of the following:

3.2.B(1) Aggravated felony. This immigration law term-of-art includes:

- *Murder;*
- *Rape;*
- *Sexual abuse of a minor;*
- *Drug trafficking* (which the DHS argues may include some simple possession offenses, such as second or subsequent possession offenses) – For the most recent developments on the reach of the drug trafficking aggravated felony ground of deportability under the U.S. Supreme Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), and the subsequent Board of Immigration Appeals decision in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), see legal resource materials available at: http://www.nysda.org/idp/webPages/LvGPressroom.htm.
- *Firearm trafficking;*
- *Crime of violence* PLUS a prison sentence of one year or more;
- *Theft or burglary offense* PLUS a prison sentence of one year or more;
- *Various federal criminal offenses*, such as certain money laundering offenses, firearm and explosive materials-related offenses, ransom-related offenses, child pornography offenses, RICO offenses, certain alien smuggling offenses, passport or other document fraud offenses, and other miscellaneous federal offenses, *and probably some analogous state offenses;*
- *Prostitution business*, owning, controlling, managing, or supervising of;
- *Commercial bribery, counterfeiting, forgery, or trafficking in vehicles* the identification numbers of which have been altered, PLUS a prison sentence of one year or more;

- *Obstruction of justice offenses* PLUS a prison sentence of one year or more;
- *Fraud or deceit or tax evasion offenses* PLUS loss to the victim(s) exceeds $10,000; and
- *Bail jumping* where the underlying charge was of a felony for which a sentence of two years imprisonment or more may be imposed.
- See Appendix C and INA section 101(a)(43); 8 U.S.C. 1101(a)(43).

3.2.B(2) Crime(s) involving moral turpitude. This is another immigration term-of-art. Under the case law, the "crime involving moral turpitude" concept covers crimes in many different criminal offense categories, including but not limited to:

- Crimes in which either an *intent to steal or to defraud* is an element (such as theft and forgery offenses);
- Crimes in which *bodily harm* is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses); and
- Most *sex offenses*.
- See Appendix D.

A lawful permanent resident is deportable for **one crime involving moral turpitude** committed within five years of the date of the resident's admission to the United States (which may include the date of a resident's most recent re-admission to the United States, or the date of a resident's adjustment to lawful permanent resident status within the United States even if the resident had previously been admitted in another status) and punishable by at least one year in prison.

A lawful permanent resident is deportable for **two crimes involving moral turpitude**, whether felony or misdemeanor, committed at any time and regardless of sentence.

► **Practice Tip:** In a state such as New York, not only a felony but also a Class A misdemeanor is punishable by one year in prison. Thus, one New York Class A misdemeanor constituting a crime involving moral turpitude could make your client deportable if committed within five years after admission to the United States.

3.2.B(3) Controlled substance offense. A lawful permanent resident is deportable for any violation of law relating to a controlled substance (other than a single offense of simple possession of thirty grams or less of marijuana), whether a felony or a misdemeanor.

3.2.B(4) Firearm offense. A lawful permanent resident is deportable for virtually any offense involving a firearm, whether a felony or a misdemeanor.

3.2.B(5) Crime of domestic violence, stalking, crime against children, or violation of protection order. A lawful permanent resident is deportable for a crime of domestic violence (CODV), stalking, or a crime of child abuse, neglect, or abandonment, whether a felony or a misdemeanor, or a finding of a violation of an order of protection, whether issued by a civil or criminal court. A CODV includes any crime of violence against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with person as a spouse, or other similarly situated individual. Under certain circumstances, the CODV, stalking, and violation of order of protection deportation grounds may be waived when the individual himself or herself has been battered or subjected to extreme cruelty and is not and was not the primary perpetrator of violence in the relationship. ***Note:*** These grounds only apply to convictions or violations occurring on or after October 1, 1996.[2]

3.2.B(6) Offenses that do not require conviction. A lawful permanent resident may also be deportable if the disposition or record of a criminal case supports a federal government charge that your client falls within one of various other crime-related deportability grounds that do not require conviction, including *alien smuggling, drug abuse or addiction, document fraud, falsely claiming citizenship, criminal activity that endangers public safety or national security, and unlawful voting*.

3.2.C Criminal dispositions that make a lawful permanent resident subject to removal based on inadmissibility

In summary, the crime-related grounds of inadmissibility grounds include the following:

- Conviction or admitted commission of any *controlled substance offense*, or government knowledge or reason to believe that the individual is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance.

- Conviction or admitted commission of a *crime involving moral turpitude* (see subsection 3.2.B(2) for types of offenses covered by this immigration law term-of-art), subject to a petty offense exception if no prior crime involving moral turpitude and the offense is not subject to a potential prison sentence in excess of one year and does not receive an actual prison sentence in excess of six months.
- Conviction of *two or more offenses of any type plus aggregate sentence of imprisonment of at least five years.*
- *Prostitution* and commercialized vice.
- Government knowledge or reason to believe that the individual has been a knowing aider, abettor, assister, conspirator, or colluder with certain traffickers in severe forms of *trafficking in persons*.
- Government knowledge or reason to believe that the individual has engaged, is engaging, or seeks to enter the U.S. to engage in *money laundering*, or who is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in money laundering.
- Other crime-related inadmissibility grounds that do not require a conviction or admission, including *drug abuse or addiction, criminal activity that endangers public safety or national security, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, and unlawful voting*.

► **Practice Tips:** Crime-related inadmissibility grounds include convictions that would not be covered under the comparable deportability grounds, *i.e.*, conviction of a single offense of simple possession of thirty grams or less of marijuana, and conviction of a single crime involving moral turpitude even if committed over five years after the last admission to the United States.

► Inadmissibility may be triggered by "admission" of the commission of any controlled substance offense or crime involving moral turpitude, even when there has been no actual conviction. Thus, a lawful permanent resident arrested upon return from a trip abroad or planning to travel abroad in the future (see subsection 3.2.E) may need to avoid such an admission just as much as a conviction. However, the defense lawyer should be aware that, in general, admissions during criminal proceedings will not lead to inadmissibility if no conviction results.[3]

► If there is evidence of drug trafficking, prostitution, trafficking in persons, money laundering, drug abuse or addiction, criminal activity that endangers public safety or national security, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, or unlawful voting, inadmissibility may be found even where there is no conviction or admission.[4]

3.2.D Relief from removal that may be available to a lawful permanent resident, and criminal dispositions that should be avoided in order to preserve such relief

The more common possible forms of relief for a lawful permanent resident include the following:

3.2.D(1) Cancellation of removal. This is the most common form of possible relief for a lawful permanent resident placed in removal proceedings for crime-related deportability or inadmissibility reasons.

Your lawful permanent resident client may be eligible to seek cancellation of removal if the client will have been a lawful permanent resident for at least five years by the time of his or her removal hearing.[5] In addition, your client will have to show that s/he has resided in the United States continuously for more than seven years after lawful admission in any status.[6]

The clock for the seven years residence requirement stops at the time of commission of an offense triggering deportability or inadmissibility; however, it does so only if the offense is one of those "referred to" in the INA 212(a)(2) crime-related grounds of inadmissibility.[7] The clock continues running until commencement of a removal proceeding triggered by an offense listed *only* in the deportability grounds. Thus, if your client is convicted of a drug offense or a crime involving moral turpitude coming within the inadmissibility grounds, s/he must have accumulated the seven years of continuous residence before commission of the offense to be eligible for cancellation of removal. However, if your client is convicted of a firearm offense, which is an offense triggering deportability but which is not referred to in the inadmissibility grounds, the clock continues running until s/he is "served a notice to appear" commencing removal proceedings.[8]

A grant of cancellation of removal relief is in the discretion of the Immigration Judge. Your client may have a chance at obtaining this relief if, at the time of the removal hearing, s/he will be able to demonstrate equities such as long residence in the United States, close family with lawful status in the United States, evidence of hardship to the individual and family if deportation occurred, service in the armed forces, history of employment, existence of property or business ties in the United States, evidence of value and service to the community, and proof of genuine rehabilitation.[9]

► ***Dispositions to Avoid:*** Cancellation of removal is barred to any client convicted of an *aggravated felony* (see subsection 3.2.B(1)).[10] Therefore, for

lawful permanent residents who would otherwise be eligible for cancellation of removal, a disposition of the criminal case falling within the aggravated felony deportation ground is worse than falling within any of the other deportation grounds.

In addition, because of the clock-stopping rule described above relating to the seven-years-residence requirement, this relief is also barred to any client convicted of an offense "referred to" in the INA 212(a)(2) crime-related grounds of inadmissibility, e.g., *crime involving moral turpitude or drug offense*, when the record of conviction shows that the offense was *committed within the first seven years of residence* in the United States.

3.2.D(2) Waiver of criminal inadmissibility. The "212(h)" waiver of inadmissibility is a possible form of relief for some lawful permanent residents ineligible to seek cancellation of removal because of the requirement of seven years of continuous residence (see subsection 3.2.D(1)).

Your lawful permanent resident client may be eligible to seek a 212(h) waiver of inadmissibility if s/he is inadmissible based on crime(s) involving moral turpitude, prostitution, or possession of thirty grams or less of marijuana but only if the client is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident and will be able to show that such relative will suffer extreme hardship if your client is denied lawful admission OR if the client is inadmissible only for prostitution-related conduct OR if the activities for which the client is inadmissible occurred more than fifteen years before the date of the alien's application for adjustment of status OR under certain circumstances, if the client is a battered spouse or child.[11] In addition, your client will have to accumulate seven years of continuous lawful residence in the United States by the time the DHS initiates removal proceedings.[12] However, the clock for this seven years of residence does not stop at the time of the commission of the offense as it does for cancellation of removal.

Your lawful permanent resident client may be able to seek the 212(h) waiver of criminal inadmissibility even if charged with a criminal ground of deportability rather than one of inadmissibility.

► ***Dispositions to Avoid:*** Like cancellation of removal, the 212(h) waiver of criminal inadmissibility is barred to any lawful permanent resident client convicted of an *aggravated felony*.[13] In addition, the 212(h) waiver is also barred for any *drug offense*, other than a single offense of simple possession of thirty grams or less of marijuana.[14] In addition, DHS regulations provide that noncitizens who have committed *violent or dangerous crimes* will not be granted 212(h) relief except in extraordinary circumstances.[15]

3.2.D(3) Withholding of removal. For a discussion of this relief available to an LPR whose life or freedom would be threatened in the country of removal, see subsection 3.4.C(2).

3.2.E Additional issues to consider if your client avoids removal

3.2.E(1) Inability to travel outside the United States. Many lawful permanent residents, though they now reside permanently in the United States, still have family or other ties in their country of birth or citizenship, and often travel outside the United States, particularly at holiday times. Thus, even if your lawful permanent resident client may be able to avoid removal based on deportability, and may not be currently subject to the grounds of inadmissibility because s/he is not now returning from a trip abroad, the client nevertheless may be concerned about avoiding grounds of in admissibility if s/he plans to travel abroad in the future.

► ***Dispositions to Avoid:*** If the criminal case results in a disposition that will make the client inadmissible upon his or her return to the United States after any travel abroad in the future, the client will then face the possibility of removal from the United States. For the main crime-related inadmissibility grounds, see subsection 3.2.C.

3.2.E(2) Ineligibility for U.S. citizenship. Many lawful permanent residents are now seeking U.S. citizenship because of the new citizenship status restrictions on access to government programs for the aged and disabled and other restrictions on the rights of immigrants. Indeed, your lawful permanent resident client may have an application for U.S. citizenship pending or may be planning to apply soon. Thus, even if your lawful permanent resident client may be able to avoid removal, s/he may then also be concerned about avoiding crime-related bars on eligibility for U.S. citizenship.

► ***Dispositions to Avoid:*** If your client is convicted of certain crimes, or if the client admits certain offenses, the client may be statutorily barred for up to five years (or forever in the case of an aggravated felony conviction) from being able to establish the good moral character required for citizenship. While the DHS will still have discretion to find that your client lacks the requisite moral character for citizenship whatever happens in the criminal case, avoiding these convictions or admissions prevents your client from being statutorily precluded from persuading the DHS that s/he has good moral character. A finding of good moral character is precluded by any of the following:

• Conviction of an *aggravated felony* which will, in any case, almost surely lead to your client's removal from the United States (see subsection 3.2.B(1)). ***Note:*** Conviction of an aggravated felony makes your client permanently ineligible for citizenship. This permanent bar to citizenship applies to (non-murder) aggravated felony convictions on or after November 29, 1990, and to a murder conviction regardless of the date of conviction.[16]

• Conviction or admitted commission of any *controlled substance offense* except in a case of a single offense of simple possession of thirty grams or less of marijuana.

• Conviction or admitted commission of a *crime involving moral turpitude* (see subsection 3.2.B(2)), subject to a petty offense exception if no prior crime involving moral turpitude and the offense is not subject to a potential prison sentence in excess of one year and does not receive an actual prison sentence in excess of six months.

• Conviction of *two or more offenses of any type* plus aggregate sentences of imprisonment of at least five years.

• Conviction of two or more *gambling* offenses.

• *Confinement*, as a result of conviction, to a penal institution for an aggregate period of 180 days or more.

For the statutory list of offenses that bar a finding of good moral character, see INA section 101(f); 8 U.S.C. § 1101(f).

► **Practice Tip:** Bars to a finding of good moral character include convictions or conduct that would not necessarily make your client deportable, e.g., a conviction resulting in prison confinement of 180 days or more regardless of the crime involved, or the admitted commission of any controlled substance offense or crime involving moral turpitude even when there has been no actual conviction. Thus, a lawful permanent resident seeking or planning to seek U.S. citizenship may wish to avoid any such conviction or admission of guilt just as s/he would wish to avoid a criminal disposition that makes him or her deportable.

3.3 YOUR CLIENT IS A REFUGEE OR A PERSON GRANTED ASYLUM (WHO HAS NOT YET OBTAINED LAWFUL PERMANENT RESIDENT STATUS)

3.3.A The client and a suggested approach to the case: Focus on avoiding inadmissibility

If your client has been admitted to the United States as a refugee or has been granted asylum in the United States (see Chapter 2, Section 2.3(B)), the U.S. government has already determined that the individual has a well-founded fear of persecution in his or her country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion. Clearly, the stakes are also very high for such a noncitizen client when facing a criminal proceeding outcome that may lead to removal from the United States. Thus, what is first and foremost at risk under the immigration laws as a result of the criminal case is your client's ability to remain in this country and to avoid removal to a country where s/he may be harassed, imprisoned, tortured, or even killed.

The situations of criminal defendants who are refugees and those who are asylees are slightly different; however, in the end, their immigration- related goals may be viewed as parallel.

A refugee is "lawfully admitted" and therefore technically subject to the crime-related grounds of deportability (see Chapter 1, section 1.2(A)). However, in practice, a refugee should be subject to removal proceedings only if the refugee is inadmissible; thus, avoiding the crime-related grounds of inadmissibility is of primary importance (see subsection 3.3.B). If inadmissibility cannot be avoided, a refugee may still be able to adjust to lawful permanent resident status and thereby avoid removal if the disposition does not support a charge that your client is a drug trafficker or someone who has committed a violent or dangerous crime and is therefore likely to be found ineligible for the special waiver of inadmissibility for refugees and asylees (see subsection 3.3.D(1)). Finally, if the refugee is unable to adjust to permanent resident status, the issue then becomes preserving possible eligibility for the relief of withholding of removal by avoiding conviction of a "particularly serious crime" (see subsection 3.3.D(2)).

A person granted asylum, on the other hand, should not even be placed in removal proceedings unless convicted of a "particularly serious crime," which in this context, however, means avoiding any aggravated felony, regardless of sentence (see subsection 3.3.C). Nevertheless, because adjustment to permanent resident status is usually the eventual goal of an asylee (as it is for a refugee) and because such adjustment of status is probably the best way for an asylee to escape the risk of removal in the long term, avoiding the crime-related grounds of inadmissibility may also be viewed as the primary immigration-related goal for this type of defendant (see subsection 3.3.D(1)). If inadmissibility cannot be avoided, an asylee may still be able to adjust to lawful permanent resident status if the disposition does not support a charge that your client is a drug trafficker or a person who has committed a violent or dangerous crime and ineligible for the special waiver of inadmissibility for refugees and asylees (see subsection

3.3.D(1)). Finally, if the asylee is unable to adjust to permanent resident status, then it may be viewed that the issue becomes whether the asylee may avoid conviction of a "particularly serious crime," in order to avoid ineligibility for the relief of withholding of removal if it becomes necessary (see subsection 3.3.D(2)).

Suggested approach to the criminal case. As you read this section, keep in mind the following suggested general approach to representing a refugee or asylee client (who is not already subject to removal without relief based on a prior criminal record).

- First and foremost, try to avoid a disposition triggering inadmissibility (see subsections 3.3.B and D(1)).

- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (see subsection 3.3.D(1)).

- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (see subsection 3.3.D(2)).

3.3.B Criminal dispositions that make a person admitted as a refugee subject to removal

If your client has been admitted to the United States as a refugee, the immigration law contemplates that s/he should have been notified to appear before an immigration officer and examined for eligibility for adjustment to lawful permanent resident status after having been physically present in the United States for at least one year.[17] Often this will not have occurred even if your refugee client has been present in the United States for much longer than one year. (Of course, if it has occurred, your client may now be a lawful permanent resident and his or her case should be evaluated as such—see section 3.2.) In any case, your client's current encounter with the criminal justice system may trigger his or her case now coming to the attention of the DHS for determination of his or her admissibility for permanent resident status.

If the disposition of the criminal case falls within one of the crime-related inadmissibility grounds, your refugee client is supposed to be placed in removal proceedings.[18] In summary, these grounds include the following:

- Conviction or admitted commission of any *controlled substance offense*, or government knowledge or reason to believe that the individual is an illicit trafficker, or knowing aider, abettor, assister,

conspirator, or colluder with others in the illicit trafficking, in a controlled substance.

- Conviction or admitted commission of a *crime involving moral turpitude* (see subsection 3.2.B(2)), subject to a petty offense exception if no prior crime involving moral turpitude and the offense is not subject to a potential prison sentence in excess of one year and does not receive an actual prison sentence in excess of six months.

- Conviction of *two or more offenses of any type* plus aggregate sentences of imprisonment of at least five years.

- *Prostitution* and commercialized vice.

- Government knowledge or reason to believe that the individual has been a knowing aider, abettor, assister, conspirator, or colluder with certain traffickers in severe forms of *trafficking in persons*.

- Government knowledge or reason to believe that the individual has engaged, is engaging, or seeks to enter the U.S. to engage in *money laundering*, or who is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in money laundering.

- Other crime-related inadmissibility grounds that do not require a conviction or admission, including *drug abuse or addiction, criminal activity that endangers public safety or national security, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, and unlawful voting*.

► **Practice Tips:** Inadmissibility may be triggered by "admission" of the commission of any controlled substance offense or crime involving moral turpitude, even when there has been no actual conviction. However, the defense lawyer should be aware that, in general, admissions during criminal proceedings will not lead to inadmissibility if no conviction results.[19]

► If there is evidence of drug trafficking, prostitution, trafficking in persons, money laundering, drug abuse or addiction, criminal activity that endangers public safety or national security, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, and unlawful voting, inadmissibility may be found even where there is no conviction or admission.[20]

3.3.C Criminal dispositions that make a person granted asylum subject to removal

If the defendant has been granted asylum in the United States, s/he is subject to termination of asylum status and then removal if convicted of a

"particularly serious crime."[21] Keep in mind, however, that because adjustment to permanent resident status is usually the eventual goal of an asylee (as it is for a refugee) and because such adjustment of status is probably the best way for an asylee to escape the risk of removal in the long term (see subsection 3.3.A), avoiding the crime-related grounds of inadmissibility may be viewed as the primary immigration-related goal for this type of defendant as it is for the refugee defendant. Nevertheless, your asylee client should not be subjected to removal proceedings in the first place if the following "particularly serious crime" dispositions are avoided.

- *Aggravated felony*. For asylum purposes, an individual convicted of an aggravated felony, regardless of the sentence, is deemed, by statute, to have been convicted of a "particularly serious" crime[22] (see Appendix C and INA section 101(a)(43); 8 U.S.C. 1103(a)(43).

- *Other particularly serious crimes*. There is no statutory definition of what other crimes may be considered "particularly serious." Under the case law, however, one must consider several factors: (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community[23] (see Appendix F).

3.3.D Relief from removal that may be available to your refugee or asylee client and criminal dispositions that should be avoided in order to preserve such relief

3.3.D(1) Adjustment of status. A person admitted to the United States as a refugee or granted asylum in the United States is generally eligible to apply for adjustment of status to that of a permanent resident after being physically present in the United States for at least one year after admission as a refugee or grant of asylum.[24] A grant of adjustment of status would provide relief from removal if your client is placed in removal proceedings. Although an applicant for adjustment of status is subject to the grounds of inadmissibility, a refugee or asylee may seek a "209(c)" waiver of most of the criminal inadmissibility grounds. This special waiver, which is available only to refugees and asylees, may be granted "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[25]

► ***Dispositions to Avoid:*** Adjustment of status relief is barred, without the possibility of a 209(c) waiver, to an individual who is inadmissible based on government knowledge or reason to believe that the individual is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others

in the illicit trafficking, in a controlled substance.[26] Thus, in order for your refugee or asylee client to remain eligible for adjustment of status relief, you should try to avoid any *disposition triggering inadmissibility* (see subsection 3.3.B) but, most of all, avoid any conviction, or other admission or evidence of guilt, that would support a DHS charge that the individual is an *illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance*. In addition, in a 2002 opinion, the Attorney General stated that noncitizens who have committed *violent or dangerous crimes* will not be granted 209(c) relief except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the noncitizen clearly demonstrates that the denial would result in exceptional or extremely unusual hardship.[27]

3.3.D(2) Withholding of removal. If your refugee or asylee client is inadmissible and unable to present good evidence of humanitarian, family unity, or public interest reasons why s/he should be granted a waiver of criminal inadmissibility in conjunction with adjustment of status relief, your client may be able to seek an INA 241(b)(3) "withholding of removal" relief based again on the client's previously determined fear of persecution in the country of removal.

Withholding of removal is generally available to an individual whose life or freedom would be threatened in the country of removal because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.[28]

Despite the previous grant of refugee or asylum status, however, your client should not rely on being found eligible for withholding of removal. Conditions in the country of removal may have changed and, even if they have not, the threshold showing required for withholding of removal is a higher standard than it is for refugee or asylum status. To obtain withholding of removal, the applicant must show a "clear probability" of persecution.[29] In contrast, the "well-founded fear" standard for refugee or asylum status requires only a "reasonable possibility" of persecution and can be satisfied by credible subjective evidence.[30]

► ***Dispositions to Avoid:*** Withholding of removal is barred to an individual who is convicted by a final judgment of a *particularly serious crime*. For withholding of removal purposes, this immigration law term-of-art automatically includes an individual convicted of an *aggravated felony or felonies with an aggregate sentence of imprisonment of at least five years*.[31] Under a 2002 Attorney General opinion, it also presumptively includes an individual convicted of *an aggravated felony involving unlawful trafficking in a controlled substance*.[32] A determination of whether a noncitizen convicted of any other

aggravated felony and sentenced to less than five years' imprisonment has been convicted of a particularly serious crime requires an individual examination of the offense.[33] There is no statutory definition of what other crimes may be considered particularly serious crimes. Under the Board of Immigration Appeals' approach, however, one considers several factors: (1) the nature of the conviction; (2) the circumstances and underlying facts for the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.[34] (see Appendix F).

3.3.D(3) Relief under the Torture Convention. If your refugee or asylee client may be tortured if returned to his or her country of removal, s/he may be able to avoid removal, at least temporarily, by applying for relief under the United Nations Convention Against Torture. The Convention does not include any criminal restrictions on grant of this relief. And, while the implementing legislation enacted by Congress in 1998 directs the prescribing of regulations excluding from eligibility those excluded from regular withholding of removal (see subsection 3.3.D(2) above), the legislation recognizes that the regulations should do so only "[t]o the maximum extent consistent with the obligations of the United States under the Convention. . . ."[35] In response to this Congressional action, the agency has chosen to provide for "withholding" of removal only for those who would *not* be excluded from eligibility for regular withholding of removal relief,[36] but also to provide for "deferral" of removal for those who would be excluded from withholding based on criminal record.[37] However, even if your client may still be able to pursue deferral of removal regardless of his or her criminal conviction, the client should be made aware that experience to date is that a DHS grant of deferral of removal prevents imminent removal but does not necessarily mean that your client will be released from DHS detention following completion of his or her criminal sentence.

3.4 YOUR CLIENT IS ANY OTHER NONCITIZEN WHO MIGHT BE ELIGIBLE NOW OR IN THE FUTURE FOR LAWFUL PERMANENT RESIDENT STATUS, ASYLUM, OR OTHER PROTECTION FROM REMOVAL

3.4.A The client and a suggested approach to the case

If your client is not a lawful permanent resident or a refugee/asylee, s/he may be in the United States in some other lawful temporary or indefinite status which will soon expire or could be revoked. Or s/he may be here unlawfully, i.e., stayed beyond the expiration of a period of admission as a temporary visitor or of some other temporary status, or crossed the border without inspection by an immigration officer. In either case, the client may be subject to removal simply for not being in lawful status.

Even if your client is or will soon be in unlawful immigration status, the client may be eligible now or in the future to obtain lawful permanent resident status, asylum, or other protection from removal. This section will review possible bases for eligibility for adjustment to lawful permanent resident status (see subsection 3.4.B) or for relief based on fear of persecution or based on other conditions in the country of removal (see subsection 3.4.C).

Suggested approach to the criminal case. As you read this section, keep in mind the following suggested general approach to representing a noncitizen client who is not a lawful permanent resident nor a refugee/asylee but who may be eligible for lawful permanent resident status, or for relief based on fear of persecution or based on other conditions in the country of removal (and who is not already ineligible for such relief from removal based on a prior criminal record).

IF the defendant has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor (see subsection 3.4.B(2)); being in foster care status (see subsection 3.4.B(3)); or being a national of a certain designated country (see subsections 3.4.B(4) and (5)):

- First and foremost, try to avoid a disposition triggering inadmissibility (see subsection 3.4.B(1)).

- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition in order to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (see subsections 3.4.B(2),(3), and (4)).

- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Hungary, Laos, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition relating to illicit trafficking in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (see subsection 3.4.B(5)).

IF the defendant has a fear of persecution in the country of removal (see subsections 3.4.C(1),(2), and (3)), or is a national of a certain designated country to which the United States has a temporary policy of not removing individuals based on conditions in that country (see subsections 3.4.C(4) and (5)):

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any

aggravated felony) in order to preserve eligibility for asylum (see subsection 3.4.C(1)).

- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include aggravated felony with five-year prison sentence and presumptively to include any aggravated felony involving unlawful trafficking in a controlled substance) in order to preserve eligibility for the relief of withholding of removal (see subsection 3.4.C(2)).

- In addition, if your client happens to be a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection from removal (see subsections 3.4.C(4) and (5)).

3.4.B Preserving a client's possible eligibility for lawful permanent resident status

If you have a criminal defendant client who is not currently a lawful permanent resident but who has some current or possible future claim to permanent resident status, preserving possible eligibility for such status may be a key issue in the criminal case. Your client may have a basis for applying for permanent resident status based on the client's relatives or employment situation in the United States (see subsection 3.4.B(2)), foster care status (see subsection 3.4.B(3)), or nationality (see subsections 3.4.B(4) and (5)).

The stakes for such an individual may be just as high as for a person already admitted to the United States as a lawful permanent resident. Like a lawful permanent resident, such a client may have come to this country many years ago, may have lived and worked in this country for many years, and may have most, if not all, of his or her family here. Such a client may already have pending an application for permanent resident status, or may be planning or hoping to file such an application in the future.

The various routes to lawful permanent resident status are a complicated and ever-changing area of law. If your client is in the process of seeking permanent resident status and has an immigration attorney or other representative, you should consult with that representative regarding the specific immigration benefit for which your client has already applied or is planning to apply. Otherwise, your client who wishes to remain in the United States (or you on his or her behalf) may be well-advised to consult with an immigration lawyer in order to determine what prospects for lawful permanent resident status your client currently has under the immigration laws. Once you as the criminal defense lawyer have been able to determine precisely what immigration benefit your

client is pursuing or may be able to pursue, you and your client will be in a better position to determine what strategies to follow in the criminal case.

3.4.B(1) Focus on avoiding inadmissibility. For most of the immigration law routes to lawful permanent resident status, your client needs first to be concerned about the grounds of inadmissibility. In summary, the crime-related grounds of inadmissibility include:

- Conviction or admitted commission of any *controlled substance offense*, or government knowledge or reason to believe that the individual is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance.

- Conviction or admitted commission of a *crime involving moral turpitude* (see subsection 3.4.B(2)), subject to a petty offense exception if no prior crime involving moral turpitude and the offense is not subject to a potential prison sentence in excess of one year and does not receive an actual prison sentence in excess of six months.

- Conviction of *two or more offenses of any type* plus aggregate sentences of imprisonment of at least five years.

- *Prostitution* and commercialized vice.

- Government knowledge or reason to believe that the individual has been a knowing aider, abettor, assister, conspirator, or colluder with certain traffickers in severe forms of *trafficking in persons*.

- Government knowledge or reason to believe that the individual has engaged, is engaging, or seeks to enter the U.S. to engage in *money laundering*, or who is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in money laundering.

- Other crime-related inadmissibility grounds that do not require a conviction or admission, including *drug abuse or addiction, criminal activity that endangers public safety or national security, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, and unlawful voting*.

► **Practice Tips:** Inadmissibility may be triggered by "admission" of the commission of any controlled substance offense or crime involving moral turpitude, even when there has been no actual conviction. How ever, the defense lawyer should be aware that, in general, admissions during criminal proceedings will not lead to inadmissibility if no conviction results.[38]

► If there is evidence of drug trafficking, prostitution, trafficking in persons, money laundering, drug abuse or addiction, criminal activity that endangers public safety or national security, immigration fraud, falsely claiming citizenship, alien smuggling, document fraud, and unlawful voting, inadmissibility may be found even where there is no conviction or admission.[39]

The immigration law in some instances provides for possible waivers of these grounds of inadmissibility. Thus, if your client cannot avoid a disposition of the criminal case that triggers inadmissibility, you should seek to avoid a disposition that also precludes eligibility for any available waiver of inadmissibility or other relief from removal. The specific crime-related bars on obtaining the most common waivers are described in subsections 3.4.B(2), (3), (4), and (5).

3.4.B(2) Client has a certain U.S. citizen or lawful permanent resident family member or a certain employment situation which may provide a basis for seeking lawful permanent resident status now or in the future. If your client is a non-LPR with certain family ties or, in some cases, certain employment situations in the United States, the client may be able to avoid removal by adjustment of his or her status to that of a lawful permanent resident. Or the client may be able to apply for lawful permanent resident status from outside the country in the future. Determining whether your client may be eligible for family or employment-based permanent resident status is a complicated, constantly changing area of law. Consult with an immigration attorney to determine your client's possible eligibility if one of the following family relationships or employment situations is present.

Your client may have eligibility based on family ties if one of the following applies:

- Your client is, or will soon be, married to a spouse or spouse-to-be who is a U.S. citizen or lawful permanent resident or may soon become a lawful permanent resident, or is the recent widow(er) of a U.S. citizen spouse,[40] or

- Your client has a parent who is a U.S. citizen or lawful permanent resident or may soon become a lawful permanent resident,[41] or

- Your client has an over age 21 (or soon-to-be over age 21) son or daughter who is a U.S. citizen or a lawful permanent resident who may soon become a U.S. citizen,[42] or

- Your client has a U.S. citizen sibling.[43]

Your client may have eligibility based on employment if one of the following applies:

- Your client is a person of extraordinary ability, outstanding professor or researcher, or a multinational executive or manager,[44] or

- Your client is a member of a profession holding an advanced degree or a person of exceptional ability,[45] or

- Your client is a skilled worker, professional, or other worker performing labor for which qualified workers are not available in the United States,[46] or

- Your client comes within a special immigrant visa category, such as a religious worker, current or former employee of the U.S. government abroad, current or former employee of an international organization, or a member of the family of an individual coming within one of these categories,[47] or

- Your client is an investor in the United States who hires U.S. workers as employees.[48]

► ***Dispositions to Avoid:*** In the first instance, if your client may be eligible for family or employment-based lawful permanent resident status, you should try to avoid a *disposition triggering inadmissibility* (see subsection 3.4.B(1)). If your client is or becomes inadmissible due to a criminal conviction or to criminal conduct covered under INA 212(a)(2), the general INA 212(h) waiver of criminal inadmissibility may be available but only if the client is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident and can establish that denial of admission would result in "extreme hardship" to that relative, OR if the client is inadmissible only for prostitution-related conduct OR if the activities for which the client is inadmissible occurred more than fifteen years before the date of the alien's application for adjustment of status OR under certain circumstances, if the client is a battered spouse or child.[49] The 212(h) waiver of inadmissibility is barred to an individual who is inadmissible for a conviction or admission of a *controlled substance offense* other than a single offense of simple possession of thirty grams or less of marijuana, or inadmissible based on government knowledge or reason to believe that the alien is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance.[50] In addition, DHS regulations provide that noncitizens who have committed *violent or dangerous crimes* will not be granted 212(h) relief except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the noncitizen clearly

demonstrates that the denial would result in exceptional or extremely unusual hardship.[51] If your client is seeking adjustment of status through a "self-petition" based on being the spouse or child of an abusive U.S. citizen or LPR,[52] you should also try to avoid a disposition that would bar a finding that the client is a person of good moral character.[53]

► **Practice Tip:** Obtaining lawful permanent resident status while still in the United States under immigration law adjustment of status provisions *may* also be unavailable to a non-LPR if the individual is *deportable* for having been convicted of an aggravated felony.

3.4.B(3) Client is a foster care child. If your client is a noncitizen minor placed in long-term foster care, s/he may be able to avoid removal by pursuing adjustment of status under a special provision for such individuals.

► ***Dispositions to Avoid:*** The analysis of dispositions to avoid for foster care child adjustment of status is generally the same as that for general family-based and employment-based adjustments of status discussed in subsection 3.4.B(2). However, note that, if your client is a foster care child who avoids conviction of a crime involving moral turpitude or a drug offense but nevertheless could still be considered to have become inadmissible under INA 212(a) (1)(A)(iv) (drug abuse or addiction), INA 212(a)(2)(D) (prostitution), 212(a)(6)(C)(i) (immigration fraud), 212(a)(6)(E) (alien smuggling) [none of which requires a conviction], as well as some other miscellaneous crime-related inadmissibility grounds, the child may seek a special INA 245(h)(2)(B) foster care child waiver "for humanitarian purposes, family unity, or when it is otherwise in the public interest."[54]

3.4.B(4) Client is a national of Cuba, Haiti, or Nicaragua. Your client may be able to avoid removal by pursuing special adjustment of status under provisions for certain nationals of Cuba, Haiti, and Nicaragua. The eligibility requirements for these special adjustment of status provisions vary. You may wish to consult with an immigration attorney to see if your client may meet the eligibility requirements.

► ***Dispositions to Avoid:*** The analysis of dispositions to avoid for the special adjustment of status provisions for nationals of Cuba and Nicaragua is the same as that for general family-based and employment-based adjustment of status discussed in subsection 3.4.B(1).

3.4.B(5) Client is a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam. Your client may be able to avoid removal by pursuing special adjustment of status under provisions for certain nationals of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam, or, under the Act of November 6, 2000, for certain other natives or citizens of Cambodia, Laos and Vietnam. The eligibility requirements for these various special adjustment of status provisions vary. You may wish to consult with an immigration attorney to see if your client may meet the eligibility requirements.

► ***Dispositions to Avoid:*** The analysis of dispositions to avoid for the special adjustment of status provisions for nationals of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam is the same as that for general family-based and employment-based adjustment of status discussed in subsection 3.4.B(2) except that such clients may be eligible for special waivers similar to those available to individuals seeking adjustment of status after being admitted to the United States as refugees or granted asylum in the United States (see subsection 3.3.D(1)). For such individuals, most of the criminal inadmissibility grounds may be waived "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." But, as is the case for refugees and asylees, these special waivers are barred to an individual who is inadmissible under INA 212(a)(2)(C) based on government knowledge or reason to believe that the alien is an *illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance*. The analysis of dispositions to avoid for the special adjustment of status provisions for certain natives or citizens of Cambodia, Laos, or Vietnam under the Act of November 6, 2000 is the same as that for general family-based and employment-based adjustment of status discussed in subsection 3.4.B(1).

3.4.C Preserving a client's possible eligibility for asylum or other relief from removal to a country where the client may suffer persecution or which is experiencing civil strife or disaster

Even if your client has not been admitted to the United States as a refugee, or been granted asylum in the United States, your client nevertheless may be someone who fears persecution in his or her country of nationality. In fact, your client may have applied for asylum in the United States but the application is still pending. In many cases, applications for asylum have been pending for many years. Or your client may have been afraid to come forward and apply for asylum for fear that s/he would wind up being deported rather than granted asylum. Such

a client may now be eligible for asylum or for other relief based on fear of persecution in the country of removal (see subsections 3.4.C(1)(2), and (3)).

In addition, if your client is a national of a country that the federal government has designated as experiencing civil strife, environmental disaster, or other extraordinary and temporary conditions that prevent the country's nationals from returning in safety, your client may be eligible for what is called Temporary Protected Status (TPS) (see subsection 3.4.C(4)), or some other temporary protection from removal such as Deferred Enforced Departure (DED) (see subsection 3.4.C(5)). In fact, if your client is a national of one of these designated countries, s/he may already be registered for such temporary status.

As with individuals already granted refugee or asylum status, the stakes may be very high when a client fearing persecution in his or her country of nationality faces a criminal proceeding outcome that may lead to removal from the United States. The client could suffer harassment, imprisonment, torture, or even loss of life in the country of removal. The stakes may also be high if your client is a national of a country that is experiencing civil strife, environmental disaster, or other extraordinary and temporary conditions that prevent the country's nationals from returning in safety.

The law of asylum and other persecution-based relief from removal is a complicated and ever-changing area of law. In addition, the countries that are designated for temporary grants of TPS or DED status to their nationals constantly change. If your client has already begun the process of seeking asylum, TPS, or DED status, and has an immigration attorney or other representative, you should consult with that representative regarding the current status of such application. If not, your client who wishes to remain in the United States (or you on his or her behalf) may be well-advised to consult with an immigration lawyer in order to determine what prospects your persecution-fearing client currently has under the immigration laws. Once you as the criminal defense lawyer have been able to determine more precisely your client's immigration prospects, you and your client will be in a better position to determine what strategies to follow in the criminal case.

3.4.C(1) Focus should be on avoiding conviction of a "particularly serious crime." For clients fearing removal to their country of nationality because of a fear of persecution, one should first determine whether the client has any potential basis for eligibility for lawful permanent resident status (see subsection 3.4.B). If so, the focus should generally be on preserving such eligibility. However, if that is not a possibility, the focus should be on preserving eligibility for asylum.

Asylum may be granted to an individual who was persecuted, or has a "well-founded fear" of persecution, in his or her country of nationality on account of race, religion, nationality, membership in a

particular social group, or political opinion.[55] Although this relief is generally available only to an individual who applies within one year after the date of his or her arrival to the United States and who has not previously applied for asylum and had such application denied, an application for asylum may still be considered if the individual demonstrates the existence of changed circumstances which materially affect the individual's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the one-year filing period.[56]

► ***Dispositions to Avoid:*** An individual is ineligible for asylum if s/he has been convicted by a final judgment of a *particularly serious crime*.[57] For asylum purposes, an individual convicted of an *aggravated felony* is deemed, by statute, to have been convicted of a "particularly serious" crime[58] (see Appendix C and INA section 101(a)(43); 8 U.S.C. 1103(a)(43). There is no statutory definition of what other crimes may be considered particularly serious crimes. Under the case law, however, one must consider several factors: (1) the nature of the conviction; (2) the circumstances and underlying facts for the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community[59] (see Appendix F). In addition, in a 2002 opinion, the Attorney General indicated that noncitizens who have committed *violent or dangerous crimes*, even if those crimes may not be aggravated felonies, will not be granted asylum except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the noncitizen clearly demonstrates that the denial would result in exceptional or extremely unusual hardship.[60]

3.4.C(2) Client's life or freedom might be threatened in the country of removal. Even if your client who fled from or fears persecution in his or her country of nationality is barred from asylum, he or she may be able to avoid removal by applying for INA 241(b)(3) withholding of removal.

Withholding of removal may be granted if the client is able to meet the higher standard of establishing a "clear probability" that his or her life or freedom would be threatened in the country of removal because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.[61] In contrast, the "well-founded fear" standard for asylum requires only a "reasonable possibility" of persecution and can be satisfied by credible subjective evidence.[62] This relief is available regardless of how long the client has been in the United States.

► ***Dispositions to Avoid:*** An individual is ineligible for withholding of removal if s/he has been convicted by a final judgment of a *par- ticularly serious crime*.[63] For withholding of removal purposes, an individual is deemed, by statute, to have been convicted of a particularly serious crime when convicted of an "aggravated felony or felonies" for which that individual was sentenced to an aggregate term of imprisonment of at least five years.[64] In addition, in a 2002 opinion, the Attorney General indicated that an individual convicted of an aggravated felony involving *unlawful trafficking in controlled substances* will presumptively be deemed to have been convicted of a particularly serious crime for withholding of removal purposes.[65] A determination of whether a noncitizen convicted of any other aggravated felony and sentenced to less than five years' imprisonment has been convicted of a particularly serious crime requires an individual examination of the offense.[66] There is no statutory definition of what other crimes may be considered particularly serious crimes. Under the Board of Immigration Appeals' approach, one considers several factors: (1) the nature of the conviction; (2) the circumstances and underlying facts for the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community[67] (see Appendix F).

3.4.C(3) Client might suffer torture. If your client may be tortured if returned to his or her country of removal, s/he may be able to avoid removal, at least temporarily, by applying for relief under the United Nations Convention Against Torture.

► ***Dispositions to Avoid:*** The United Nations Convention Against Torture does not include any criminal restrictions on grant of relief under the Convention. The Torture Convention implementing statute and regulations provide "withholding" of removal only for those who would *not* be excluded from regular withholding of removal relief (see subsection 3.4.C(2) above), but also provide for "deferral" of removal for those who would be excluded from withholding of removal based on criminal record (see subsection 3.3.D(3)). However, even if your client may still be able to pursue deferral of removal regardless of his or her criminal conviction, the client should be made aware that experience to date is that a DHS grant of deferral of removal prevents imminent removal but does not necessarily mean that your client will be released from DHS detention following completion of his or her criminal sentence.

3.4.C(4) Client is a national of Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia, Sudan, or other country that may be designated as experiencing civil strife or disaster at the time of the client's criminal case. If your client is a national of a country that has been designated, and is still designated, by the government as experiencing civil strife, environmental disaster, or other extraordinary and temporary condition that prevent its nationals from returning in safety, the client may be able to avoid removal temporarily by maintaining eligibility for the relief of INA 244 Temporary Protected Status. Those countries designated as of July 1, 2006 are those listed above.

► **Practice Tip:** Temporary Protected Status country designations constantly change; the designation of the countries listed above may expire, or new countries may be designated after that date. If your client is a national of one of the countries listed above, check with an up-to-date immigration resource or with an immigration lawyer to determine if the country is still so designated. If the country is not one of the designated countries listed above, but is now suffering civil strife, environmental disaster, or other extraordinary condition, determine if the country is now so designated.

► ***Dispositions to Avoid:*** Temporary Protected Status relief for nationals of the designated countries is barred to an individual who has been convicted of *any felony or two or more misdemeanors* (which may include violations that are not deemed crimes under state law, but may be deemed misdemeanors for this purpose by the DHS) committed in the United States.[68]

► Temporary Protected Status is also barred, without the possibility of a waiver, to an individual who is inadmissible under INA 212(a)(2)(A) (conviction or admission of a *crime involving moral turpitude or controlled substance offense*), or INA 212(a)(2)(C) (government knowledge or reason to believe that the alien is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance) unless what is at issue is a single offense of simple possession of less than thirty grams of marijuana.[69]

► Temporary Protected Status is also barred to an individual who is inadmissible under other crime-related inadmissibility grounds, even those where a conviction is not required, unless a waiver of such inadmissibility is available.[70] However, some of the other crime-related inadmissibility grounds, such as INA 212(a)(1)(A)(iv) (drug abuse or addiction), INA 212(a)(2)(D) (prostitution), 212(a)(6)(C)(i) (immigration fraud), 212(a)(6)(E) (alien smuggling) may be waived "for humanitarian purposes, to assure family unity, or when it is other wise in the public interest."[71]

3.5 YOUR CLIENT IS A NONCITIZEN WHO DOES NOT FALL INTO ANY OF THE ABOVE CATEGORIES OR WHO DOES BUT WILL BE UNABLE TO AVOID REMOVAL: ADDITIONAL ISSUES TO CONSIDER

Even if your client does not appear to be eligible now or in the future to obtain lawful permanent resident status, asylum, or other protection from removal, or your client states that s/he simply does not have any desire to remain in the United States or to return lawfully in the future, there may still be immigration-related issues in the criminal case.

First, your client's current ineligibility for lawful immigration status may be a circumstance that will change in the future. A client who is currently ineligible for lawful immigration status in the United States may develop possible eligibility for such status in the future. For example, Congress may change the law in the future to provide a basis for eligibility that does not now exist or conditions may change in the country of nationality providing a future legal basis for seeking refuge in the United States.

Secondly, a client's current lack of interest in remaining in the United States or in preserving any possibility of future lawful immigration status may also be a circumstance that will change in the future. A client who is frustrated with his or her problems in the United States and who now feels that s/he does not wish to remain here any longer may change his or her mind in the future after finding that s/he misses his or her family or other connections in the United States, or after experiencing possibly worse problems and hardships in his or her country of nationality. Such a client may have wished that s/he had done more to prevent the criminal case from foreclosing future immigration options.

Thus, even if your client does not have any present basis to avoid removal from the United States, the client may or should be concerned about avoiding ineligibility for future lawful admission to the United States (see subsection 3.5.A), or about avoiding some of the other possible immigration consequences such as ineligibility for voluntary departure in lieu of forcible removal from the United States (see subsection 3.5.B), and enhanced criminal liability for future illegal re-entry to the United States (see subsection 3.5.C).

3.5.A Ineligibility for readmission to the United States after removal or voluntary departure

If your client is a noncitizen of any status who will not be able to avoid removal, or who will be allowed to depart the United States voluntarily in lieu of issuance of an order of removal (see subsection 3.5.B), the client may be or should be concerned about preserving the possibility of lawful admission to the United States at some point in the future. This should be a consideration, for example, when your client now has (or in the future may have) a U.S. citizen spouse or child who now or in the future will be petitioning for your client to

obtain lawful immigrant status in the United States. This may not happen soon enough to avoid removal, or having to leave the United States voluntarily, but it may be a possibility later. If so, you should try to avoid a disposition of the criminal case that will result in permanent ineligibility for lawful admission to the United States.

► ***Dispositions to Avoid:*** Any noncitizen, whatever his or her status, with a conviction or admitted commission of any *controlled substance offense* (other than a single offense of simple possession of thirty grams or less of marijuana) appears to be forever inadmissible to the United States, whether as an immigrant or temporary non-immigrant. There is no waiver for admission as an immigrant to the United States as this inadmissibility ground may not be waived by the general INA 212(h) waiver of criminal inadmissibility (although the individual might be eligible for a waiver of inadmissibility for ad mission as a temporary non-immigrant).[72] An individual may also be found inadmissible without the possibility of a 212(h) waiver if the DHS has knowledge or reason to believe that the individual is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking, in a controlled substance. Thus, it should be cautioned that even if your client avoids a conviction or admission of guilt, s/he may still be found forever inadmissible as an immigrant without the possibility of a waiver if the DHS has other evidence that the person is a trafficker.[73]

► If your client is a legal permanent resident, s/he will also be barred for readmission by any conviction of an *aggravated felony* (unless the conviction does not make your client inadmissible, which is unlikely). This is because a person previously admitted to the United States as a lawful permanent resident who has been convicted of an aggravated felony is forever ineligible for the general INA 212(h) waiver of criminal inadmissibility.[74]

► **Practice Tip:** A client who is removed rather than departs voluntarily may be required to wait at least 5, 10, or 20 years, or more, before the DHS will even consider granting a 212(h) waiver.[75] Thus, you should advise your client who is hoping to obtain lawful admission to the United States in the not-too-distant future to ask the immigration judge in his or her later removal proceedings to issue a voluntary departure order rather than a removal order. However, keep in mind that the immigration judge will be statutorily precluded from granting a voluntary departure order rather than a removal order if your client is convicted of an aggravated felony (see subsection 3.5.B).

3.5.B Ineligibility for voluntary departure in lieu of removal

If your client is a noncitizen of any status who cannot otherwise avoid removal, the client may wish to preserve the possibility of departing the United States voluntarily at his or her own expense in lieu of issuance of an order of

removal. The client may have some prospect of obtaining a visa to reenter the United States in the future and wish to avoid the statutory bars on admission after removal—an individual who is removed rather than departing voluntarily may be statutorily required to wait at least 5, 10, or 20 years, or more, before the DHS will even consider granting lawful readmission (see Practice Tip in subsection 3.5.A). Or, if your client fears persecution in the country of removal, the client may wish to obtain voluntary departure in order to be free to leave instead for another country where s/he will not suffer persecution (assuming your client would be allowed to enter such other country). Or the client may simply wish to avoid being forcibly removed and any harassment or stigma that s/he may suffer in the country of removal as a result.

► ***Dispositions to Avoid:*** Voluntary departure is barred to an individual who is deportable based on conviction of an *aggravated felony*.[76]

► **Practice Tip:** If the individual is not granted voluntary departure prior to the conclusion of the removal proceedings, the relief may also be barred for a conviction or conduct that precludes a finding of good moral character during the five years immediately preceding the individual's application for voluntary departure.[77] Thus, if it is certain that your client will be deportable or inadmissible and ineligible for any relief from removal, you should advise your client to request permission to voluntarily depart the United States prior to conclusion of any later removal proceedings.

3.5.C Enhanced liability for illegal reentry after removal

Many noncitizens who are removed from the United States subsequently reenter or attempt to reenter the country to join their families. If they do so after being removed subsequent to a criminal conviction, they may face criminal liability far more severe than the sentence of up to two years other wise possible.

► ***Dispositions to Avoid:*** Enhanced criminal penalties may be imposed as follows:

- Removal subsequent to conviction of *any aggravated felony* subjects the individual to a prison sentence of up to twenty years;[78] or
- Removal subsequent to conviction of *any felony, or three or more misdemeanors involving drugs or crimes against the person, or both*, subjects the individual to a prison sentence of up to ten years.[79]

► **Practice Tip:** Your client should be advised that if s/he illegally reenters the United States after removal (or after departing the country while an order of removal is outstanding), s/he may be subject to heavy criminal penalties. In addition, s/he should be advised that U.S. Attorneys are now vigorously and frequently prosecuting such illegal reentry cases.

CHAPTER 4

Analyzing State Criminal Dispositions Under Federal Immigration Law

PART ONE: WHAT CONSTITUTES A CONVICTION AND SENTENCE IMPOSED FOR IMMIGRATION PURPOSES

4.1 "CONVICTION" OF A CRIME

Most of the crime-related grounds of deportability, as well as some of the crime-related grounds of inadmissibility, require a conviction in order to make the noncitizen deportable or inadmissible. Even where a conviction is not required, the DHS may not be able to establish criminal conduct without a conviction. Therefore, if your client obtains a disposition of his or her criminal case that does not constitute a conviction for immigration law purposes (or that does not meet other required elements, such as a sentence to a term of imprisonment of a certain length, or finality), she or he may be able to avoid negative immigration consequences such as being removed from the United States.

The criminal defense practitioner should know at the outset that the fact that a certain disposition is not considered a conviction under state law does not necessarily mean that it will not be considered a conviction for immigration law purposes. For example, a state disposition that may, or in fact eventually does, result in the dismissal of all criminal charges may still be a conviction for immigration purposes.

In order to determine what constitutes a conviction for immigration purposes, one must look first to the immigration statute that contains the definition of conviction for immigration purposes added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA):

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court 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.[1]

In *Matter of Roldan*,[2] the Board of Immigration Appeals interpreted this statutory definition to find that no state "rehabilitative relief" had any effect to eliminate a conviction for immigration purposes. State rehabilitative relief was loosely defined to include any procedure where a plea was withdrawn or conviction otherwise eliminated based on completion of probation or other requirement, as opposed to based on legal error. Federal circuit courts have supported this administrative interpretation, except the Ninth Circuit.[3] In immigration cases held in Ninth Circuit states, "rehabilitative relief" eliminating a conviction will be held effective for a first offense of simple possession of a controlled substance, of a "less serious" offense with no federal analogue such as being under the influence or in possession of paraphernalia, and arguably of giving away a small amount of marijuana. This is

based on an equal protection argument linked to the Federal First Offender Act, which provides similar relief in federal court.[4] The Ninth Circuit later deferred to the Board of Immigration Appeals' holding that such relief would not eliminate conviction for any other offense.[5]

4.1.A "Alternative" Dispositions

There are many procedural mechanisms to avoid convictions for state purposes. Certain mechanisms may be statutory. Other mechanisms are informal practices that may be specific to a locality or region. Regardless of the source of the mechanism, a state disposition will not constitute a conviction unless there has been some finding, plea, or admission of guilt. Hence, any special program that does not require a guilty plea up front, or where the court itself does not order any "punishment, penalty, or restraint," should still not be considered a conviction for immigration purposes.

In the context of a drug court, for example, there are risks of negative immigration consequences under the following circumstances: (1) The defendant is required to plead guilty to criminal charges prior to the referral of the defendant to a drug treatment program; (2) the defendant fails to complete the drug treatment program causing the defendant to be convicted of serious criminal charges, often drug-related, that definitely trigger negative immigration consequences; and (3) the defendant completes the drug treatment program but the plea arrangement does not provide for dismissal of *all* charges that might trigger negative immigration consequences.

Those drug treatment diversion options that require a guilty plea up front (as most do) raise difficult issues for a noncitizen criminal defendant. On the one hand, diversion to a drug treatment program may provide a way of getting all drug charges dismissed in the end. Moreover, if the individual does suffer from a drug addiction, the mandated treatment program may offer a genuine hope of assisting the person to overcome the addiction and avoid future associated criminal behavior, along with the attendant possible immigration consequences. In addition, if the diversion results in the individual being free from state custody pending final disposition, his or her case may not come to the attention of the immigration authorities.

On the other hand, a defendant should be aware that the immigration authorities may initiate removal if the defendant admits guilt and the court orders the defendant to participate in a drug treatment program. This risk exists even if the state dismisses the criminal charges for state purposes because the combination of admission of guilt and restraint on the defendant's liberty would be a conviction for immigration purposes.[6] The exception to this is a disposition eliminating a first drug disposition for certain minor offenses, in immigration cases arising within the Ninth Circuit. See discussion at § 4.1, *supra.* In addition, regardless of whether a conviction has

occurred, a defendant should be aware that admission of the elements of a drug crime, as well as the mere admission of drug addiction or abuse, may alone make certain individuals subject to charges of inadmissibility or deportability.

4.1.B Juvenile delinquency adjudication

An adjudication in juvenile delinquency proceedings does not constitute a conviction for any immigration purpose, regardless of the nature of the offense.[7] Thus, juvenile delinquency adjudications should not trigger any of the automatic adverse immigration consequences based on conviction of a crime. Because delinquency proceedings offer the tremendous advantage of not resulting in a conviction for immigration purposes, it is even more crucial for noncitizens than for other minors that their case be held in delinquency rather than adult proceedings.

What about a disposition in adult proceedings for a noncitizen who committed an offense while still a minor? Defense counsel should be aware that there exist arguments that some such dispositions should not have immigration effect if they are sufficiently analogous to a delinquency finding under the Federal Juvenile Delinquency Act (FJDA) at 18 U.S.C. §§ 5031 – 5042.

In Matter of Devison-Charles, the Board of Immigration Appeals analyzed New York law that provides that the cases of certain youths who are prosecuted in adult criminal court and found guilty of committing a crime when under the age of 19 may be handled in adult court as "youthful offender" adjudications.[8] Although New York law required an eligible youth to be convicted first, and permitted that conviction to be vacated only after the court determines his youthful offender status upon sentencing, the Board held that such a youthful offender determination was not a conviction for immigration purposes (despite the immigration definition of a "conviction").[9] It reasoned that the New York youthful offender scheme "reflect[s] the core criteria for a determination of juvenile delinquency" under the Federal Juvenile Delinquency Act (FJDA), and concluded that the New York disposition was "sufficiently analogous" to the FJDA so as not to constitute a conviction for immigration purposes.[10] The Board made this conclusion even though a delinquency finding under the FDJA is available only for youth less than eighteen years old, and the New York youthful offender adjudication is available for youth less than nineteen.

In light of *Devison-Charles*, then, a New York youthful offender disposition, or any similar disposition in another state, will *not* be considered a conviction for immigration purposes and, like a juvenile delinquency finding, should not trigger any of the automatic adverse immigration consequences based on conviction of a crime. For young clients, defense counsel should accordingly evaluate the applicable state procedures against the FJDA and the New York youthful offender statute at issue in *Devison-Charles*, and strive to achieve a

disposition that would likely be deemed by an immigration fact-finder to be sufficiently analogous to a juvenile delinquency finding under the FJDA. But see Uritsky v. Gonzalez, 399 F.3d 728 (6th Cir. 2005) (holding that noncitizen designated as a "youthful trainee" under Mich. Comp. Laws § 762.11(1) had a conviction as that term was defined in 8 U.S.C.S. § 1101(a)(48)(A)).

► **Practice Tips:** Since a juvenile delinquency adjudication should generally not have the consequences of a conviction for immigration purposes, criminal defense counsel should seek such an adjudication for any noncitizen, where possible.

► If a minor is transferred to adult proceedings, plead to an offense that would not have warranted a transfer in the first instance to try to take advantage of Congressional intent not to treat such dispositions as convictions under 18 U.S.C. § 5032.

► If a court forgoes delinquency proceedings, and a separate rehabilitative procedure for juveniles is available, seek a disposition under the separate procedure to come under the rule in *Matter of Devison-Charles*, which held that New York's Youthful Offender treatment was not a conviction for immigration purposes because it was sufficiently analogous to delinquency proceedings.

Defense counsel representing noncitizen youth should keep in mind that an act of juvenile delinquency (or other youth disposition that does not result in a "conviction") could still be considered an adverse factor in any application for a discretionary benefit under the immigration laws. Juvenile proceedings still can create problems for juvenile immigrants in other ways as well. First, certain grounds of inadmissibility and deportability do not depend upon conviction; mere "bad acts" or status can trigger the penalty.[11] Examples are engaging in prostitution, being a drug addict or abuser, making a false claim to citizenship, using false documents, smuggling aliens, or if the government has "reason to believe" the person ever has been a drug trafficker. Second, certain juvenile dispositions can bar "Family Unity" relief.[12]

4.1.C Finality of conviction

Before Congress codified the definition of conviction in 1996, the Supreme Court had required that a conviction be final before it could be used in to support a conviction-based ground of deportability.[13] Although the BIA has not addressed the issue in a precedent decision since 1996, the First Circuit (Griffiths), Fifth Circuit,[14] and Seventh Circuit[15] have held that the statutory definition of conviction erodes the finality requirement.[16] In those circuits that still require finality, a late appeal that is accepted as a direct appeal is not a final conviction for immigration purposes.[17]

4.1.D Effect of vacating a conviction

Once immigration authorities recognize a conviction as having occurred, what judicial order will be recognized as eliminating it? The Board of Immigration Appeals has ruled that when a state court acting within its jurisdiction vacates a judgment of conviction for cause, the conviction no longer constitutes a valid basis for deportation or exclusion. Immigration authorities will not question the validity under state law of the vacation of judgment, but will give "full faith and credit" to the state court.[18]

The conviction is *not* eliminated for immigration purposes, however, if it was vacated for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."[19] The key is to have an order vacating the conviction that includes some basis relating to legal defect, or at least to not include motivation to improve the immigration situation as the only basis. Thus an order vacating a conviction that cites humanitarian or rehabilitative factors as the sole basis will not be honored. In contrast, one that cites an illegal deprivation of right to effective counsel based on the attorney's failure to advise regarding immigration consequences will be.

As discussed in 4.1.A supra, state "rehabilitative relief" that, for example, permits withdrawal of plea based on completion of probation conditions, *does* constitute a conviction for immigration purposes, even if the conviction has been eliminated in the eyes of the convicting jurisdiction. The exception is for a first offense involving certain minor drug offenses, and then only within the Ninth Circuit.[20]

4.1.E Infractions

Infractions, minor offenses that are handled in non-conventional criminal proceedings that do not require the usual constitutional protections such as access to counsel and right to jury trial, are not convictions for immigration purposes.[21]

In *Matter of Eslamizar* the BIA held that the phrase "judgment of guilt," appearing in the definition of conviction in INA §101(a)(48), is "a judgment in a criminal proceeding, that is, a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication."[22] Using this definition, the BIA held that a finding of guilt of a third-degree theft offense under Oregon Revised Statute §164.043, which was treated as a Class A violation involving a non-conventional criminal proceeding, did not result in a conviction for immigration purposes. [23] The BIA based its decision on several factors. It noted that a Class A violation is not considered a crime since it does not result in any legal disability or disadvantage under Oregon law, that

prosecution of a violation does not involve a criminal prosecution since there is no right to jury or counsel, and that the prosecution only has to prove guilt by a preponderance of the evidence instead of beyond a reasonable doubt. Therefore, Mr. Eslamizar's Oregon "conviction" for third degree theft as a violation was not considered a conviction triggering deportation.

Defense counsel should analyze their state infraction statutes to see if they do not meet the definition of "judgment of guilt" set forth in *Eslamizar*. Some factors to consider include:

- The offense is not considered a crime under state law;
- The offense is not prosecuted in a typical criminal proceeding and therefore, constitutional safeguards are not present such as right to counsel and the right to jury trial;
- The offense is treated differently than misdemeanors and felonies;
- The offense is not punishable by imprisonment; and
- The burden of proof of the prosecution is less than beyond a reasonable doubt.

4.2 SENTENCE TO A "TERM OF IMPRISONMENT"

Some of the aggravated felony grounds of deportation and the ground of inadmissibility for one crime involving moral turpitude (CIMT) require sentences to a term of imprisonment of certain lengths (see Chapters 3.2.B and 3.4(B)(1)).

In addition, some forms of relief from removal—for example, cancellation of removal, the "212(h)" waiver of inadmissibility, and asylum—also depend on whether your client has been convicted of an aggravated felony, which again may turn on the length of any sentence of imprisonment. One form of relief—withholding of removal—depends on the aggregate length of the sentence(s) of imprisonment for any aggravated felony convictions (see, e.g., Chapter 3.2.D).

Thus, where a sentence to a term of imprisonment of a certain length is required to make your client deportable or inadmissible, or ineligible for relief from removal, your client may be able to avoid the negative immigration consequences by obtaining a disposition of the criminal case that avoids such a sentence.

The only explicit guidance provided by the immigration laws with respect to what constitutes a "term of imprisonment" is that such a reference is "deemed to include the period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part."[24] Thus, the fact that a sentence of imprisonment is suspended, as some states allow, will not save a convicted individual from the immigration consequences attendant upon sentence to a term of imprisonment of a certain length. However, a sentence to probation alone is not a sentence for immigration purposes unless a court suspends execution or

imposition of a sentence of imprisonment in connection with that probation sentence.[25] The state's designation of a disposition "as probation" is not controlling. The critical question in determining whether a person has been sentenced to a term of imprisonment is whether the court has ordered some time in custody to be served, even if "imposition" or "execution" has been suspended such that the immigrant did not actually serve that time.

> **Example:** In Georgia, a defendant who receives probation will also receive a suspended sentence.[26] A defendant who gets probation in Georgia therefore will have a sentence for immigration purposes not because probation is a sentence, but because Georgia probation includes a suspended sentence. The critical question in determining whether a person has been sentenced to a term of imprisonment is whether the court has ordered some time in custody to be served, even if "imposition" or "execution" has been suspended such that the immigrant did not actually serve that time.

Regardless of whether a sentencing court increases a sentence after a probation violation or reduces a sentence, it is the most recent lawful sentence that matters for immigration purposes.[27] If a defendant receives an indeterminate sentence, the upward limit of the term is the sentence for immigration purposes.[28]

4.2.A Selected sentencing strategies

The following offenses are aggravated felonies if and only if a sentence to imprisonment of one year or more is imposed.[29] Obtaining a sentence of 364 days or less will therefore prevent them from being aggravated felonies.

- Crime of violence, defined under 18 U.S.C. § 16
- Theft (including receipt of stolen property)
- Burglary
- Bribery of a witness
- Commercial bribery
- Counterfeiting
- Forgery
- Trafficking in vehicles which have had their VIN numbers altered
- Obstruction of justice
- Perjury, subornation of perjury
- Falsifying documents or trafficking in false documents (with an exception for a first offense for which the alien affirmatively shows that the offense was committed for the purpose of assisting, abetting, or aiding only the alien's spouse, child or parent)

The defense practitioner should be aware that even a *misdemeanor* offense with a suspended one-year sentence imposed may meet the one-year prison sentence requirement for these offenses to be deemed an aggravated felony.

Many other offenses are aggravated felonies regardless of sentence imposed, such as offenses relating to drug trafficking, firearms, sexual abuse of a minor, or rape.

Criminal defense counsel can sometimes avoid having an offense treated as an aggravated felony by creative plea-bargaining. The key for those aggravated felony grounds requiring a sentence imposed of one year or more is to *avoid any one count from being punished by a one-year sentence*, if the offense is the type that will be made an aggravated felony by sentence. If needed, counsel can still require significant jail time for the defendant. If immigration concerns are important, criminal defense counsel might:

- bargain for 364 days on a single conviction;
- plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
- plead to an additional or substitute offense that does not become an aggravated felony due to sentence, and take the jail time on that;
- waive credit for time already served or prospective "good time" credits and persuade the judge to take this into consideration in imposing a shorter official sentence, that will result in the same amount of time actually incarcerated as under the originally proposed sentence;
- Vacate a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent the conviction from being considered an aggravated felony.[30]

4.2.B Commitment to a mental institution or youth facility

The BIA has held that a state court's confinement of a criminally convicted individual in a mental institution, under an act directed primarily at rehabilitation and cure, does not constitute a sentence to confinement.[31] Likewise, the BIA has held that commitment to a state youth agency, under an act directed towards training and treatment rather than punishment of young persons and which act did not actually require confinement, does not constitute a sentence to confinement even if the agency elects to house the individual in jail or prison.[32]

PART TWO: ELEMENTS OF THE OFFENSE OF CONVICTION

4.3 BROADLY DEFINED STATES OFFENSES: CATEGORICAL ANALYSIS AS A CRIMINAL DEFENSE TOOL

The categorical analysis employed by immigration adjudicators to determine whether criminal offenses fit within certain criminal removal grounds is one of the most important defense tools for noncitizens accused or convicted of a crime. In 2007, the Supreme Court in *Duenas-Alvarez v. Gonzales* for the first time formally recognized the categorical analysis as a method for reviewing deportability.[33] In removal proceedings, once the government has proved that a defendant was convicted under a criminal statute, the inquiry may have only just begun. The government has the duty to establish that the "offense of conviction," i.e., the offense that actually was the subject of the conviction, in fact carries the immigration penalty that is being charged (e.g. is an aggravated felony, crime involving moral turpitude, firearm offense, offense relating to a controlled substance). Because a single criminal statute often includes multiple offenses, only some of which have immigration consequences, the government may find this a hard burden to meet. This is especially true if informed criminal defense counsel have created a "record of conviction" with immigration defense principles in mind.

4.3.A Categorical analysis and modified categorical analysis

An immigration judge, federal criminal court judge or other reviewing authority will use the "categorical analysis" (including the "modified" categorical analysis) when she examines a prior conviction. Among other things, the categorical analysis is used to determine whether the prior conviction triggers an immigration law-related penalty (e.g. is an aggravated felony, controlled substance offense, firearms offense, or crime involving moral turpitude).

The BIA uses the analytical model developed by the Supreme Court in *Taylor v. United States,*[34] when it examines a conviction to determine whether it fits under a criminal ground of deportability.[35] Under *Taylor*, courts do not examine the conduct underlying the prior offense, but "look only to the fact of conviction and the statutory definition of the prior offense."[36] *Taylor* also permits courts "to go beyond the mere fact of conviction in a narrow range of cases."[37] In *Shepard v. United States*,[38] the Supreme Court again articulated the principles for using a modified categorical approach. In *Shepard*, the defendant had pleaded guilty under a broad statute that prohibited burglary of a building, vehicle or boat. The plea did not specify which of those structures actually was burglarized, but the defendant's sentence would be enhanced only if the conviction was for a building. The government argued that the police report and complaint application should be considered evidence that the conviction was for burglary of a building. The government urged a practical approach by stressing that there was no suggestion that the burglary was of a car or boat.

The Court rejected the government's argument. It held that the permissible documents for review in a conviction by plea are: the statutory definition of an offense, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.[39] In some circuits, *Shepard* simply reaffirms prior case law; in other circuits, it sets a stricter and more beneficial standard than prior case law regarding the limited documents that may be consulted to determine the elements of an offense of prior conviction.

The categorical analysis employs the following key concepts in evaluating the immigration penalties that attach to a conviction:

- The elements of the offense as defined by statute and case law, and not the actual conduct of the defendant, is the standard used to evaluate whether an offense carries immigration penalties such as being an aggravated felony, crime involving moral turpitude, etc.;

- The minimal conduct that could constitute the offense must carry the immigration penalty in order for the offense to do so; and

- Where the criminal statute includes multiple offenses, only some of which carry immigration consequences, the immigration judge or other reviewing authority may look only to a strictly limited official record of conviction to determine the elements of the offense of conviction.

If the above principles are employed and the conviction has not been conclusively proved to carry adverse penalties, the government has not met its burden to prove deportability. Lack of information or ambiguity is resolved in favor of the noncitizen faced with the grounds of deportability. However, where the noncitizen has the burden of showing that the offense does *not* fit within an immigration category – for example, when making an application for cancellation of removal or other relief, or a non-LPRs applying for admission – then this lack of information can adversely affect the noncitizen client.

It should be noted that the Board of Immigration Appeals and some circuit courts have refused to apply the categorical analysis in certain contexts. For example, some circuits have permitted the domestic relationship required for a deportable "crime of domestic violence" to be proved based on evidence that is outside the record of conviction.[40] The Ninth Circuit, however, does require the domestic relationship to be conclusively proved in the record of conviction.[41] The Seventh Circuit has also ignored the analysis in sexual abuse of a minor and moral turpitude cases.[42]

In 2007, the BIA in *Matter of Gertsenshteyn* held for the first time that a noncitzen was deportable for having an aggravated felony conviction based on evidence that was outside the record of conviction.[43] In interpreting 8 U.S.C. §

1101(a)(43)(K)(ii), which defines the term "aggravate felony" to include an offense under 18 U.S.C. § 2422(a) "if committed for commercial advantage," the BIA held that the categorical approach doesn't apply to the inquiry of whether a violation of 18 U.S.C. §2422(a) was "committed for commercial advantage" and therefore, a fact finder can consider relevant evidence outside the record of conviction to establish that fact. The BIA focused on the absence of any element or sentencing enhancement involving commercial advantage under 18 USC § 2422(a). It thereby distinguished the "commercial advantage" inquiry from an inquiry of whether the Respondent had committed an offense under 18 U.S.C. § 2422(a) in the first place – with the latter still requiring the categorical analysis. The BIA claimed, however, that *Gertsenshteyn* was a narrow exception and that its decision was limited to the particular aggravated felony category at issue.

In *Matter of Babaisakov*,[44] the BIA significantly expanded the exception by permitting the government to use evidence outside of the record of conviction to establish that the loss to the victim exceeds $10,000. in a fraud or deceit aggravated felony. A significant aspect of Babaisakov is that the Board invoked *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[45] a Supreme Court case that allows an agency to ignore certain circuit cases that were decided when the agency had a different interpretation, which the agency now rejects. The Board is questioning published decisions of several circuits.[46] The reasoning underlying *Brand X* is the Supreme Court's decision in *Chevron v. National Resources Defense Council*, [47] which requires a reviewing court to defer to an agency's interpretation of an ambiguous statute that it administers unless the agency's interpretation is contrary to the statute or is unreasonable. Since it is based on *Chevron* deference, *Brand X* does not permit an agency to trump a circuit court decision "if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[48]

In 2008, the Board limited an attempt to erode the categorical approach, and rejected DHS' attempt to go beyond elements of offense, and beyond the record of conviction, to determine whether conviction constituted "crime of child abuse" under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).[49] The BIA will use the categorical approach, except where the language of statute invites it to do so, and where not doing so would defeat the purpose of statute by leading to an under-inclusive outcome.[50]

The circuits are split regarding whether the categorical approach should be applied in the traditional manner. At one end of the spectrum is the Ninth Circuit, which requires that the elements of the statute of conviction include all elements of ground of deportability.[51] At the other end of the spectrum is the Seventh Circuit, which appears to have eliminated categorical approach even for grounds of deportability (e.g. moral turpitude) where the BIA still applies it.[52] The First Circuit takes the view that the difference between criminal and civil charges requires a more relaxed application of the *Taylor* rule. *Conteh v. Gonzales,* 461

F.3d 45 (1st Cir. 2006).[53] In other circuits the rule seems to vary depending on the ground of deportability. [54].

4.3.B Elements of the offense

Under the categorical analysis, a fact-finder examines only the statutory definition of the offense and not the "underlying circumstances" (what the person actually did). In other words, if the person actually committed assault but was able to plead to trespass, the analysis will focus on the elements of the offense of trespass. In this way, the reviewing authority will avoid the difficulties and unfairness of essentially "re-trying" a criminal case in a subsequent proceeding.[55]

An offense qualifies as an aggravated felony, moral turpitude offense, etc. "if and only if the 'full range of conduct' covered by [the criminal statute] falls within the meaning of that term."[56] The first step is to examine only the elements of the crime as set forth in the statute and the case law of the jurisdiction applying the statute. Does the minimum or least offensive conduct that can violate the statute necessarily satisfy the adverse immigration term (e.g., be a moral turpitude offense or aggravated felony)?

In some cases, an element of the offense does not appear in the statute, but may have been provided by case law. For example if a defense of lack of guilty knowledge has arisen in the cases, the element of guilty knowledge has become part of the definition of the crime.[57] Case law that *eliminates* possible elements of an offense (and therefore creates a broader definition of the least conduct required to violate the statute) can have a beneficial immigration impact, even as it may hurt a criminal defendant. The need to thoroughly understand the elements of a criminal statute demonstrates again the need for immigration attorneys to carefully research state criminal law and/or establish working partnerships with criminal defense attorneys.

4.3.C Divisible statutes and the record of conviction

4.3.C(1) Identifying a divisible statute

The discussion above centered on the "pure" categorical analysis for determining whether a specific offense has adverse immigration consequences based on the minimum behavior required to be guilty of the offense. Where a criminal statute is broad enough to include various offenses, some of which carry immigration penalties while others do not (referred to in immigration proceedings as a "divisible" statute), the "modified" categorical analysis permits the reviewing authority to examine "documentation or judicially noticeable facts that clearly establish that the conviction" was of an offense that would trigger the immigration penalty. If this limited review of documents fails to

unequivocally identify the offense of conviction as one that satisfies a ground of deportability, then the noncitizen is not deportable.[58] The Board of Immigration Appeals has long followed this approach in non-domestic violence cases.

A single criminal code section can be divisible in several ways. For example, a code section may contain multiple subsections, some of which involve firearms and therefore trigger the firearms deportation ground and some of which do not. Or a section may be so broadly or vaguely drawn that it could include different kinds of offenses.

4.3.C(2) Record of conviction

Faced with a divisible statute, what documents may a reviewing authority consult to determine the actual offense of conviction? The Supreme Court and the Board of Immigration Appeals decisions have established that the documents that can be reviewed in a categorical analysis are strictly limited. They include only the charging papers (indictment, complaint, information), the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings, and the sentence and transcript from sentence hearing. In immigration proceedings this group of permitted documents often is referred to as "the record of conviction." Sources such as prosecutor's remarks, police reports, probation or "pre-sentence" reports, or statements by the noncitizen outside the record of conviction (e.g., to police, immigration authorities or the immigration judge) may not be consulted.[59] Neither may information from a co-defendant's case. Thus where a wife was convicted of assault with intent to commit "any felony," the immigration authorities could not look to her husband's record of conviction to define the felony.[60]

If there is insufficient information in the record of conviction to identify the offense of conviction in a divisible statute, the government has not met its burden of proving that the conviction fall within a particular ground of deportability and the reviewing authority must rule in favor of the immigrant on this issue.

> **Example:** Mr. Rivera-Sanchez was convicted under a California statute that punishes both selling and offering to sell controlled substances. Under Ninth Circuit law, felony sale is an aggravated felony, but offering to sell is not. A court reviewing his prior record can look only to limited documents in the record of conviction to determine whether he was convicted of sale or offer to sell. If information in the record of conviction fails to eliminate the possibility that he was convicted of offering to sell, the reviewing authority is required to find that he was not convicted of an aggravated felony. *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001)(en banc). *See also Hamdan v INS*, 98 F.3d 183 (5th Cir.

1996) (Louisiana kidnapping statute is divisible and not a crime involving moral turpitude unless the record of conviction establishes that the conviction was for an act involving moral turpitude)

Information from the record of conviction should not be used to add in elements that are not part of the offense. Thus, the BIA held that a defendant convicted of an assault offense that had no element of use of a firearm was not deportable under the firearms ground, even though he pled guilty to an indictment that alleged he assaulted the victim with a gun.[61] One area where some courts have not adhered to this rule is in the "sexual abuse of a minor" aggravated felony category: when analyzing a statute prohibiting sexual assault, some courts consult information beyond the record of conviction to determine the age of the victim.[62] While the decisions might be anomalies, in this area where an offense against a young child is so egregious that courts may depart from the rule, criminal defense counsel should attempt to keep the record of conviction clear of information about age.

4.3.C(3) Charging papers and plea agreements

For information in a criminal charge to be considered in a modified categorical analysis, there generally must be proof that the defendant pled to the specific charge.

In the Ninth Circuit, information alleged in a Count is not part of the record of conviction absent proof that the defendant specifically pled guilty to that Count. A fact-finder may consider charging papers only in combination with a signed plea agreement.[63] [64] Courts in some other Circuits do not adhere as strictly to this rule and allow greater latitude in using charging documents.

Plea Agreements.[65] A plea agreement gives criminal defense counsel the opportunity to create the record of conviction that will be determinative in immigration proceedings.

Where a charging paper (e.g. criminal complaint or information) alleges an offense within a divisible statute that carries an immigration penalty, criminal defense counsel should not plead to the Count. Counsel can bargain for a substitute charging paper or, more easily, correct the record as part of a plea agreement (e.g., "Defendant pleads guilty to fraud of $600" or "Defendant pleads guilty to offering to transport"). Counsel can decline to plead to the count and instead plead to the statute in its entirety, if that is the most beneficial or only possible alternative.

If the charge is wrongly phrased in the conjunctive ("and") while the statute is in the disjunctive ("or"), the defendant should make a plea

agreement to only the element that doesn't carry an immigration penalty – or, if this is not possible, to the offense in the disjunctive (for example, "I admit to entry with intent to commit larceny or any felony").

Dropped Charges. In general, a fact-finder should not consider information from dismissed charges. However, some courts do consider such information in certain situations. In some states, like New York, an indicted defendant can plead only to the charge in the indictment or to a lesser-included offense that requires no new allegations.[66] On several occasions, the BIA has used the charges to ascertain the elements in the lesser included offense to which a Respondent ultimately had pled guilty.[67] The First Circuit permits fact finder to use related charges to identify the nature of a noncitizen's conviction, which is inconsistent with categorical approach. [68]

In a case where a dropped charge would identify a defendant's plea as being to a section of a divisible statute with adverse immigration consequences, criminal defense counsel where possible should provide extra protection for the defendant by creating a specific plea agreement showing conviction of a section that does not carry those consequences. Immigration counsel may then aggressively assert the argument (binding, for example, in the Ninth Circuit) that information in a criminal charge cannot be considered absent proof that the defendant was found guilty of the particular charge.[69]

In some cases a complaint or information will charge offenses in a divisible statute in the conjunctive (using "and") even though the statute prohibits the offenses in the disjunctive (using "or"). For example a complaint might charge "sale and offer to sell" even thought the statute prohibits "sale or offer to sell."

A guilty plea to a Count charged in the conjunctive in this situation does not satisfy the government's burden of proving that the person pleaded guilty to all elements charged. In *Matter of Espinosa* the respondent was charged with deportability based on a guilty plea to an indictment for abetting a nonimmigrant visitor "to make a false and fraudulent statement" in violation of 18 USC §1001. That statute prohibits false *or* fraudulent statements, and at the time only a conviction relating to fraudulent statements was held to involve moral turpitude. Regarding the plea to false *and* fraudulent statements, the BIA stated:

> "In an indictment the elements of the crime can be set forth in the conjunctive; however a defendant can be found guilty upon proof of the commission of any one of the acts charged. Under such circumstances, there is a question as to whether the conviction was based upon the existence of

> one element rather than another. We cannot assume that the respondent pleaded guilty to fraudulent conduct rather than false conduct. Since the burden is upon the Service, we must take the case in the light most favorable to the respondent and assume that the plea of guilty concerned a false rather than a fraudulent statement." (citations omitted).[70]

The Ninth Circuit has upheld this rule in reviewing prior convictions in immigration proceedings.[71]

Jury trials. In a jury trial, the charging document can be combined with jury instructions from the prior offense to establish that the jury was actually required to find all the elements of the generic crime.[72]

4.3C(4) When may the court look to the record of conviction?

There has been some inconsistency in court decisions about when the court may look to the record of conviction. As stated above, the rule in reviewing a prior conviction is that if the minimum conduct required to violate the statute does not involve adverse immigration consequences, then consequences do not adhere. A court looks to the record of conviction *only* when an offense is a divisible statute.[73] Certain decisions, however, have begun to mix the concept of the broadly worded statute that includes divisible offenses and requires a record of conviction to identify the offense of conviction, with statutes that describe a single offense that simply can include a range of fact situations.

The Bottom Line for Defense Counsel: It's not always possible to predict when an immigration court will go to the record of conviction. For this reason, it is often to the criminal defendant's advantage to keep the record of conviction clear of damaging information, even if it appears that the least adjudicable elements do not carry an immigration penalty.

4.4 RELATED OFFENSES: SELECTED IMMIGRATION CONSEQUENCES OF NON-SUBSTANTIVE OFFENSES

This subchapter discusses the selected immigration consequences of certain non-substantive offenses; possible sentencing benefits from pleading to non-substantive offenses where there is a factual basis for such a plea; and how the Board of Immigration Appeals (the "BIA) or a federal court may equate a conviction for a substantive offense as a conviction to a non-substantive crime.

A practitioner should consider whether a conviction for a non-substantive offense, such as an attempt, conspiracy, accessory, solicitation, facilitation, or threat to

commit an offense, might have different consequences than a conviction for the underlying substantive offense. Pleading to a non-substantive or "inchoate" offense can sometimes turn an otherwise problematic substantive offense into an offense with few or no immigration consequences. However, unless there is clear authority recognizing the special treatment for a non-substantive offense, a practitioner should not plead to such an offense unless there are either other benefits to the defendant or such a disposition is no worse than pleading to the substantive offense.

For a summary chart of the below-described preparatory and accessory offenses and whether they might help avoid potential immigration consequences, see Appendix E.

4.4.A Misprision (concealing) of felony

Under federal law, a person who conceals a felony is guilty of misprision of felony.[74] The offense punishes the act of concealment as opposed to punishing the underlying concealed act. As discussed in greater specificity below, the BIA and the federal courts have treated misprision convictions as being different than the substantive act concealed.

4.4.A (1) Aggravated felony

The BIA recognizes that misprision punishes the concealment of the substantive felony rather than the substantive offense itself. Thus, there is relatively little risk in a plea to misprision of an offense which itself falls under an aggravated felony ground. Practitioners should examine their state criminal codes to determine if there is a state offense that parallels the elements of 18 U.S.C. § 3, the federal misprision statute.

As a separate matter, a noncitizen convicted for misprision of felony under 18 U.S.C. §3 is also not deportable under the aggravated felony ground for having a conviction relating to obstruction of justice.[75]

4.4.A (2) Controlled substance

The BIA has held several times that a conviction for misprision of a felony involving a controlled substance is not a deportable offense under the controlled substance ground.[76] The Sixth Circuit takes the same view.[77]

4.4.A (3) Crime involving moral turpitude

The BIA treats a conviction for federal misprision under 18 U.S.C. § 4 as a crime involving moral turpitude.[78] The Eleventh Circuit shares this view.[79]

4.4.A (4) Other possible grounds

A noncitizen convicted of misprision of a felony is convicted of an offense different than the substantive offense that she or he concealed. The reasoning of the Board of Immigration Appeals in holding that a noncitizen convicted of misprision of a drug felony was not deportable for a controlled substance offense[80] would seem to apply by analogy to the firearm and other criminal grounds of deportability. For example, there is little reason to think that a noncitizen convicted of misprision of firearm trafficking would be deportable under the firearm ground of deportability.

If the offense concealed involved drug trafficking, however, the government might charge that the noncitizen is inadmissible because the government has "reason to believe" that the person aided or colluded in the trafficking.[81]

4.4.B Accessory after the fact

4.4.B (1) Aggravated felony

Like misprision of felony, accessory after the fact does not take on the character of the underlying offense. Absent a sentence imposed of a year, accessory is a good alternative to pleading to a straight drug offense or arguably other aggravated felony such as firearms or sexual abuse of a minor.

However, the BIA has held that a noncitizen convicted of accessory after the fact under 18 U.S.C. § 3 is deportable under the aggravated felony "obstruction of justice" ground of deportability if she or he received a sentence of one year or more.[82] Consequently, a practitioner securing an accessory after the fact conviction should be wary of pleading to that offense unless the defendant will receive a sentence of less than one year. Compare this with the BIA's decision that misprision of felony does not constitute obstruction, and therefore is not an aggravated felony even with a sentence of a year imposed. See 4.4A(1), *supra.*

4.4.B (2) Controlled substance

The BIA has held that a noncitizen convicted under 18 U.S.C. § 3 as an accessory after the fact to a drug trafficking crime was not deportable under the controlled substance ground of deportability.[83]

As discussed in section 4.4.B (1), the BIA also held that an accessory after the fact conviction was an obstruction of justice aggravated felony where the defendant received a sentence of one year or more. Consequently, a practitioner securing an accessory after the fact conviction should be wary of pleading to that offense unless the defendant will receive a sentence of less than one year.

4.4.B (3) Crimes involving moral turpitude

There is authority to treat a conviction for accessory after the fact as a conviction for a crime involving moral turpitude if the underlying substantive offense involves moral turpitude.[84] However, the Ninth Circuit en banc held that accessory after the fact under a California statute is not a crime involving moral turpitude.[85]

4.4.A (4) Other possible grounds

As with misprision, a noncitizen convicted of accessory is convicted of an offense different than the substantive offense that she or he concealed. The reasoning of the Board of Immigration Appeals in holding that a noncitizen convicted of accessory of a drug felony was not deportable for a controlled substance offense would seem to apply by analogy to the firearm and other criminal grounds of deportability. For example, there is little reason to think that a noncitizen convicted of misprision of firearm trafficking would be deportable under the firearm ground of deportability.

If the offense concealed involved drug trafficking, however, the government might charge that the noncitizen is inadmissible because the government has "reason to believe" that the person aided or colluded in the trafficking.

4.4.C Solicitation

Solicitation is an offer to commit an offense. There is significant case law interpreting this type of non-substantive offense and one specific statutory provision of note.

4.4.C (1) Aggravated felony

It is likely that the BIA will hold solicitation to commit an aggravated felony to be an aggravated felony. The BIA has held that a conviction for solicitation to possess narcotics under a general solicitation statute (solicitation to commit any crime) is a controlled substance

offense,[86] and it appears likely that it would extend this rule to the aggravated felony category.

There is a split in the circuits on the issue of whether a solicitation offense is an aggravated felony. A divided panel of the Seventh Circuit held a conviction for soliciting a minor to engage in a sexual act was an aggravated felony because it constituted sexual abuse of a minor.[87] The Eleventh Circuit held that a prior conviction for solicitation to deliver cocaine did not warrant a drug trafficking offense enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(B).[88] Although the language of the Guideline in question is not the same as aggravated felony definition, it does create authority by analogy in the 11th Circuit.

The Ninth Circuit has held that a conviction under a solicitation offense is not an aggravated felony, at least as a controlled substance offense, in either a generic (solicitation to commit any crime) or specific (e.g., offering to sell heroin) offense.[89]

4.4.C (2) Controlled substance

The BIA treats a conviction for solicitation of a controlled substance as a conviction relating to a controlled substance.[90] At least in the case of a generic solicitation statute (e.g., solicitation to commit "a crime"), the Ninth Circuit does not follow this BIA decision. The Ninth Circuit held that a conviction under a generic solicitation statute was not a controlled substance conviction, where the record showed that the offense solicited involved controlled substances. The court noted that while Congress expressly provided for the deportation of a noncitizen convicted of an attempt or a conspiracy to violate a law relating to a controlled substance, Congress made no mention whatsoever of other non-substantive offenses such as solicitation. The Ninth Circuit deemed this omission intentional and under the Latin maxim *Inclusio unius, exclusio alterius* held that a conviction for solicitation to possess a controlled substance was not a deportable offense.[91] Under this reasoning, conviction of a *non-generic* solicitation offense, e.g. offering to sell a controlled substance, also should not be a basis for deportation,[92] but the Ninth Circuit has not ruled on this point and immigration judges are ruling inconsistently.

4.4.C (3) Crimes involving moral turpitude

The BIA treats a solicitation offense as being a conviction for the substantive offense.[93] Consequently, criminal defense practitioners should assume that a solicitation conviction would involve moral turpitude if the substantive offense involves moral turpitude. This caution applies even in the Ninth Circuit.[94]

4.4.C (4) Firearm offenses

The firearm ground of deportability makes deportable a noncitizen convicted of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying a firearm in violation of law.[95] The only solicitation type offense described in the firearm ground is "offering to sell." By expressly including that a noncitizen who offers to sell a firearm is deportable suggests that Congress did not intend to include as a deportable offense a conviction for an offering to purchase, exchange, use, own possess or carry a firearm in violation of law. A practitioner should pursue this strategy only if it is otherwise in the defendant's interest since it is novel and untested.

4.4.D Attempts

The Second Circuit[96] and Seventh Circuit[97] define "attempt" generically for purposes of the aggravated felony statute to mean (1) the intent to commit a crime, and (2) a substantial step toward its commission. The BIA appears to adopt the state classification of attempt.[98]

The Ninth Circuit has held that the federal definition of attempt controls and therefore, where a state definition of attempt or conspiracy is broader than the federal definition, the adverse immigration consequences will not necessarily be triggered.[99] But, even where the state attempt statute is held to be broader than the federal statute, a noncitizen still can be found removable where the reviewable record of conviction shows that he or she committed an overt act constituting a "substantial step" towards commission of the underlying offense.[100]

4.4.D (1) Aggravated felony

Congress expressly provided that an attempt to commit any of the aggravated felony grounds is also an aggravated felony.[101] Consequently, there is no distinction between a conviction for the substantive offense and a conviction for an attempt for purposes of whether the offense fits under the aggravated felony definition. See section 6.7 for a discussion of sentencing considerations.

4.4.D (2) Controlled substance

Congress expressly provides that an attempt to commit a controlled substance offense is an offense related to a controlled substance.[102] Consequently, there is no distinction between a conviction for a substantive controlled substance offense and a conviction for an attempt to commit a controlled substance offense for purposes of whether the a noncitizen faces removal consequences for the offense.

4.4.D (3) Crimes involving moral turpitude

Long-standing administrative and judicial case law treats a conviction for an attempt to commit a moral turpitude offense as no different from a conviction for the substantive offense.[103] A long-standing interpretation does not become lawful merely because of its longevity even where Congress fails to amend the provision.[104] Nevertheless, the nature of the moral turpitude offense may make it more difficult to draw a negative inference from Congress' failure to mention attempt offenses specifically. Moreover, the Supreme Court focused on the nature of the offense when it held that a conviction for conspiracy to defraud was a crime involving moral turpitude. It is difficult to argue that there is a difference in the moral blameworthiness between a noncitizen that attempts to commit a crime involving moral turpitude, but does not complete it, and a noncitizen that completes the crime successfully. For this reason, an attempted offense will involve moral turpitude if the substantive offense involves moral turpitude.

4.4.D (4) Firearm offenses

In 1992, the BIA had held that attempts and conspiracy offenses were not included in the firearm deportation ground because Congress did not include them expressly as it had for controlled substance offenses, and inferred that this was an intentional omission.[105] In 1994, in response to the Boa's decision, Congress amended the firearm ground of deportability retroactively to include attempts and conspiracies within the ground of deportability,[106] effectively superseding the BIA's earlier decision.[107]

Under the current firearm ground, Congress expressly provides that an attempt to commit a deportable firearm offense is a deportable firearm offense. Consequently, there is no difference between a conviction for an attempt to commit a firearm offense and a conviction for the substantive offense for purposes of whether the noncitizen faces removal under the firearm ground.

4.4.D (5) Crimes of domestic violence

The domestic violence ground of deportability makes deportable a noncitizen convicted of a crime of domestic violence, stalking offense, child abuse, and child neglect. Congress defined a crime of domestic violence as a conviction for a crime of violence, as defined under 18 U.S.C. §16, which is committed against a protected individual.[108] The definition of crime of violence under 18 U.S.C. §16 expressly includes attempts.

However, Congress did not expressly include attempted stalking, attempted child abuse, and attempted child neglect convictions under the domestic violence ground of deportability. Consequently, a noncitizen with a conviction for attempted stalking, attempted child abuse, or attempted child neglect may not be deportable under the domestic violence ground of deportability. A respondent may face consequences under other grounds of deportability for such offenses depending on the statutory language and the record of conviction.

4.4.E Conspiracies

4.4.E (1) Aggravated felony

Congress expressly provided that a conspiracy to commit any of the aggravated felony grounds is also an aggravated felony.[109] Consequently, there is no distinction between a conviction for a substantive offense and a conviction for a conspiracy to commit that offense for purposes of whether the offense fits under the aggravated felony definition. See section 6.8 below for a discussion of possible sentencing differences between such crimes.

4.4.E (2) Controlled substance

Congress expressly provides that a conviction for conspiracy to commit a controlled substance offense is an offense related to a controlled substance.[110] Consequently, there is no distinction between a conviction for a substantive controlled substance offense and a conviction for a conspiracy to commit a controlled substance offense for purposes of whether the a noncitizen faces removal consequences for the offense.

4.4.E (3) Crimes involving moral turpitude

Long-standing administrative and judicial case-law treats a conviction for a conspiracy to commit a moral turpitude offense as the same as a conviction for the substantive offense.[111] When the Supreme Court held that a conspiracy to defraud the United States was a conviction for a crime involving moral turpitude, it treated a conviction for a conspiracy to defraud as being no different than the underlying substantive offense.[112] A noncitizen who conspires to commit a base act, but is unsuccessful, has committed a crime that involves as much moral turpitude as a noncitizen that completes the crime successfully. For this reason, a practitioner should treat a conviction for a conspiracy offense as a crime involving moral turpitude if a conviction for the substantive offense involves moral turpitude.

4.4.E (4) Firearm offenses

In 1992, the BIA had held that attempts and conspiracy offenses were not included in the firearm deportation ground because Congress did not include them expressly as it had for controlled substance offenses and inferred that this was an intentional omission.[113] In 1994, in response to this BIA decision, Congress amended the firearm ground of deportability retroactively to include attempts and conspiracies within the ground of deportability,[114] effectively superseding the BIA's earlier decision[115]

Under the firearm ground that exists now, Congress expressly provides that a conspiracy to commit a deportable firearm offense is itself a deportable firearm offense.[116] Consequently, there is no difference between a conviction for an attempt to commit a firearm offense and a conviction for the substantive offense for purposes of whether the noncitizen faces removal under the firearm ground.

4.4.F Relationship between state and federal offenses

In analyzing a substantive offense, the BIA will examine the minimum conduct required for a state conviction and compare it with the elements of the ground of deportation. If the statute or record of conviction establishes the elements of the ground of deportability, then a noncitizen will come under that ground of deportability.[117] In general, the state label of the offense is not conclusive on whether the state conviction constitutes an aggravated felony offense.[118] In practice, however, the BIA uses a less rigorous approach than the federal courts in determining whether an offense is an "attempt[119]" or a conspiracy[120] offense.

4.4.G Sentencing considerations for non-substantive offenses

Several grounds of removal are based on maximum possible or actual sentences for offenses. For example:

- In order for a theft, burglary or crime of violence offense to be an aggravated felony, and therefore make a noncitizen deportable, the defendant must receive a sentence of a year or more.

- In order for a single crime involving moral turpitude to make a non-citizen inadmissible, the maximum possible sentence for this offense must be more than one year or the actual sentence must be more than six months.

In many jurisdictions, the sentencing range for a non-substantive offense may be different than the range for the substantive offense, and this difference may help avert removability.

In California, for example, the maximum sentence for burglary is three years as a felony and one year as a misdemeanor.[121] A noncitizen who pleads to misdemeanor burglary could be deportable for an aggravated felony if she or he receives a one-year sentence. The maximum conviction for attempted burglary in California is one half the potential maximum for the substantive offense.[122] Hence, a noncitizen who pleads guilty to misdemeanor burglary can avoid an aggravated felony because she or he can receive no more than six months for the offense.

If your state treats a conviction for a non-substantive offense less harshly for sentencing purposes than a conviction for the substantive offense, then pleading to the non-substantive offense where there is a factual basis for such a plea could mean the difference between a noncitizen being deported and being able to remain in the United States.

4.4.H When substantive offenses can be otherwise

The BIA or a federal court may treat a substantive offense as a non-substantive offense for purposes of a ground of deportability. A Seventh Circuit case involving a noncitizen convicted of vehicular burglary provides an illustration of this seemingly counterintuitive result. As mentioned above, the Seventh Circuit defines "attempt" for purposes of the aggravated felony definition[123] as the intent to commit a crime where the defendant takes a substantial step toward its commission.[124] The defendant's vehicular burglary conviction did not fit the aggravated felony definition of "burglary" because it did not satisfy the generic federal definition of burglary that the Supreme Court developed in *United States v. Taylor* 495 US 575 (1990).[125] According to the Seventh Circuit, because the defendant had entered a vehicle with the intent to commit a theft he had the intent to commit a crime and taken substantial steps towards its completion.[126] As a result, he satisfied the requirements for his offense to constitute an "attempted theft" for purposes of the aggravated felony definition.[127]

In another unpredictable decision, the BIA treated a conviction for attempted possession of stolen property as an attempted theft aggravated felony where the defendant received a sentence of one year or more.[128]

4.5 OFFENSES WITH ADDITIONAL FACTS TO BE PROVEN: SENTENCE ENHANCEMENT FACTORS OR ELEMENTS OF A SEPARATE OFFENSE?

Whether an additional fact defines a distinct offense or merely enhances the sentence for an offense can affect whether a noncitizen is deportable, what the maximum sentence is for an offense,[129] and whether an offense is a misdemeanor or a felony. [130] In 2007, the Board expressly modified its earlier interpretation of what

constituted a sentencing enhancement in light of Supreme Court decisions in *Blakely v. Washington*[131] and Apprendi v. New Jersey[132] that held that any fact, other than recidivism,[133] that increases punishment constitutes a separate offense.[134] The issue before the Board was whether a Texas statute that increased the penalty for unlawfully possessing marijuana if the possession took place in a "drug-free zone" was a conviction for simple possession of marijuana. If, on the one hand, the Texas statute that authorized increased punishment defined a separate offense other than simple possession of marijuana, then the defendant was not eligible for a § 212(h) waiver, which limits eligibility to a single conviction for simple possession of marijuana. On the other hand, if the Texas statute did not define a separate offense but merely authorized a longer sentence for those defendants whose unlawful possession took place in a "drug-free zone," then the noncitizen would be eligible for a § 212(h) waiver. The BIA held that, because being in a drug-free zone was a jury question decided beyond a reasonable doubt, it was an element of a separate offense.[135]

CHAPTER 5

Strategies for Avoiding the Potential Negative Immigration Consequences of a Criminal Case*

5.1 PRELIMINARY STEPS

The immigration laws are very complex and it is difficult even for an immigration law expert to determine with certainty the immigration consequences of a particular disposition of a criminal case. The immigration consequences also have become so harsh and now extend to so many criminal dispositions that it is tempting for a criminal defense lawyer to throw his or her hands up in the air and say, in exasperation, "What can you do?"

In many cases, there is not much to be done. But, in others, there is still a lot the criminal defense lawyer can do. This chapter will seek to present potential strategies that may be followed in certain cases to avoid or ameliorate negative immigration consequences. If used successfully, you will have made a critical difference for your noncitizen client.

In order to prepare to help your noncitizen clients avoid adverse immigration consequences as a result of their criminal cases, the criminal defense lawyer should do the following in any criminal case where the defendant may be a noncitizen:

- Determine whether your client is a noncitizen.
- If your client is a noncitizen, advise the client not to make any admissions to a DHS or other law enforcement officer not only to avoid prejudicing the criminal case but also for immigration reasons.
- Ascertain the client's particular immigration status and/or future immigration goals or options.
- Evaluate the possible immigration consequences of any past criminal record that your client already has.
- Explain the possible immigration consequences of the present (and any past) criminal case.
- Find out how high a priority avoiding immigration consequences is to the client and plan the defense accordingly.

Having exchanged the above information, you and your noncitizen client will be in a position to seek to avoid any potential negative immigration consequences of a criminal case with you, the lawyer, knowing just how important this goal is to your client. This may mean that your client will be making choices during the criminal proceedings—such as rejecting an otherwise attractive plea offer—that run counter to what you would normally advise a client to do in the particular situation. However, noncitizen clients must consider consequences your citizen clients do not face.

Keep in mind that if the client initially says s/he does not care if s/he is deported and/or unable to return to the United States in the future, this does not necessarily vitiate the lawyer's duty to know and advise the client about the long-term immigration consequences of a criminal conviction. An individual client may decide that other goals such as shorter prison time are more important than avoiding adverse immigration consequences, but the decision should be an informed one. (Consider NLADA Performance Guideline 4.1 on a lawyer's general duty to investigate a criminal case even if client initially wants to plead guilty.)

Finally, even if you do not think that you will be able to avoid the possibility of negative immigration consequences, simply communicating information to a noncitizen client regarding potential immigration consequences is an important service. Only if you have done so will your noncitizen client be making truly informed choices.

5.2 TO DISCLOSE OR NOT DISCLOSE NONCITIZEN STATUS

As a general rule, it is best to avoid disclosing your client's noncitizen status during the criminal proceedings. Some prosecutors and criminal court judges will take it on themselves to bring individuals potentially subject to removal proceedings to the attention of the DHS. However, there may be occasions where it may be advantageous or necessary for you to inform a prosecutor or the court that your client is a noncitizen. You may wish to disclose the client's noncitizen status in order to demonstrate the need for a certain disposition or action in the criminal proceedings, such as:

- Why a noncitizen defendant cooperating with law enforcement should be considered for and granted an informer visa or other commitment not to deport (see subsection 5.3.A);
- Why a noncitizen defendant who is a victim of certain criminal activity and assisting law enforcement should be considered for and granted a T- or U-visa or other commitment not to deport (see subsection 5.3.A);
- Why a motion to dismiss should be granted in the furtherance of justice (see subsection 5.3.B);
- Why a motion to remove a case of a noncitizen juvenile offender to the family or juvenile court should be granted in the furtherance of justice (see Chapter 4 and subsection 5.3.C);
- Why a deferred adjudication without a guilty plea should be granted (see Chapter 4 and subsection 5.3.D);
- Why a noncitizen defendant should receive a particular disposition of the criminal case or a particular sentence that avoids or lessens the negative immigration consequences (see subsection 5.3.E);
- Why a noncitizen defendant should be allowed to explain his or her understanding of the immigration consequences of a guilty plea (see subsection 5.3.G);

- Why a noncitizen defendant should be allowed to withdraw a guilty plea entered without an understanding of the immigration consequences (see subsection 5.3.H);
- Why a youthful offender finding should be made (see Chapter 4 and subsection 5.3.J); and
- Why a noncitizen defendant should be granted any other treatment intended to provide relief from the civil consequences of a conviction (see Chapter 4 and subsection 5.3.K).

You and your client should be aware of the risk that disclosing your client's noncitizen status could backfire. For that reason, doing so should perhaps be limited to situations where you believe the prosecutor and/or the judge will be sympathetic. Otherwise, the safer course may be to attempt to obtain favorable results for your client without revealing his or her noncitizen status.

5.3 GENERAL STRATEGIES IN CRIMINAL PROCEEDINGS

This section lists generally applicable strategies and practice tips that a criminal defense lawyer may adopt to seek to avoid or ameliorate negative immigration consequences for a noncitizen client. Subsequent sections will list strategies that are specific to some of the more common types of criminal charges: drug charge (see section 5.4); violent offense charge, such as murder, rape or other sex offense, assault, criminal mischief, and robbery (see section 5.5); property offense charge, such as theft, burglary, or fraud offense (see section 5.6); and firearm charge (see section 5.7).

5.3.A If your client is cooperating with law enforcement, or is a victim of certain crimes and assisting law enforcement, seek an informer or other special visa, or an agreement not to deport your client

If your noncitizen client is cooperating or willing to cooperate with a law enforcement criminal investigation and/or prosecution, or if your client is a victim of certain crimes and assisting or willing to assist a law enforcement criminal investigation and/or prosecution, you may be able to obtain commitments from the federal government that will prevent your client's removal from the United States, or that might even lead to legal immigration status for an unlawfully present noncitizen client.

5.3.A(1) Obtain an "informer" or "S"-visa

If your client is supplying or willing to supply to federal or state law enforcement authorities critical information regarding "a criminal organization or enterprise"[1] or a "terrorist organization, enterprise, or operation,"[2] you may work with these authorities to seek from the federal government a so-called "informer" or "S" visa in order to prevent your client's removal from the United States. Note that a request for an S visa to the Department of Homeland Security can only be initiated by a state or federal law enforcement agency.[3] If granted S-visa status, your client may be eligible three years later to adjust his or her status to that of a lawful permanent resident.

The number of noncitizens who may be provided an S-visa under the criminal activity informer category is limited to 200 per fiscal year, while the terrorist activity informer category is limited to 50 visas per fiscal year.[4] Although there is such a limited number of S-visas available each year, preliminary information is that the entire annual allotment is not being used.

Your client may be issued S-visa status regardless of what crime the client is convicted. While the immigration law states that an individual applying for S-visa status is subject to the normal criminal inadmissibility grounds that any other applicant for temporary visa status faces, all of the criminal inadmissibility grounds may be waived if the federal immigration authorities consider it "in the national interest to do so."[5]

5.3.A(2) Obtain a T-visa for trafficking victims

If your client is or has been a "victim of a severe form of trafficking in persons," as defined in section 103 of the Trafficking Victims Protection Act of 2000, and, among other requirements, either is complying with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or is not yet fifteen years old,[6] you may seek from the federal government a "T" visa in order to prevent your client's removal from the United States. If granted T-visa status, your client may be eligible three years later to adjust his or her status to that of a lawful permanent resident.[7]

A "severe form of trafficking in persons" for this purpose means sex trafficking in which (a) a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services,

through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[8]

The number of noncitizens who may be provided a T-visa is limited to 5,000 per fiscal year.[9]

T-visa status is barred to an individual, without the possibility of a waiver, if there is "substantial reason to believe" that he/she committed an act of severe trafficking in persons.[10] While an individual applying for T-visa status is also subject to the normal criminal inadmissibility grounds that any other applicant for temporary visa status faces, a criminal inadmissibility ground may be waived if the federal immigration authorities consider it to be "in the national interest to do so" and "if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the [severe trafficking] victimization".[11]

5.3.A(3) Obtain a U-visa for victims of other crimes

If your client has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity (including, but not limited to, domestic violence, trafficking, sexual assault, rape and felonious assault), possesses information concerning that criminal activity, and has been, is being, or is likely to be helpful to federal, state or local law enforcement authorities investigating or prosecuting that criminal activity,[12] you may seek from the federal government a "U" visa in order to prevent your client's removal from the United States. If granted U-visa status, your client may be eligible three years later to adjust his or her status to that of a lawful permanent resident.[13]

The number of noncitizens who may be provided a U-visa is limited to 10,000 per fiscal year.[14]

While an individual applying for U-visa status is subject to the normal criminal inadmissibility grounds that any other applicant for temporary visa status faces, all of the criminal inadmissibility grounds may be waived if the federal immigration authorities consider it to be "in the public or national interest to do so."[15] Note that guidance from Department of Homeland Security states that they will not grant interim relief to non-citizens with "aggravated felonies," as defined in immigration law. [16] However, there is nothing in the statute that restricts DHS from granting U interim relief (or U visas in the future) to aggravated felons.

5.3.A(4) Obtain commitment by the federal government not to remove your client

Short of obtaining an S-, T-, or U-visa for your client, you may seek a formal commitment by the federal government that they will not seek to remove your client from the United States. However, while some federal courts in other circuits have enforced immigration-related commitments made to noncitizen defendants by prosecutors in U.S. Attorney's offices,[17] be aware that other courts have found that promises made even by federal prosecutors are not binding on the INS (now DHS).[18]

► **Practice Tips:** There is little available information on how to obtain S-visa treatment. Normally, it is the federal or state law enforcement agency being supplied information by the client that needs to intervene with the DHS. Thus, if your client is cooperating or considering cooperating with a federal or state law enforcement agency, you should ask officials of that agency to make the preliminary contacts with the DHS and do whatever else is necessary to secure S-visa status.

► The regulations governing T-visa status set forth the T-visa application process and related evidentiary requirements.[19] Because the regulations require that T-visa applicants have contacted a *federal* law enforcement agency regarding the acts of severe trafficking in order to be eligible for T-visa status,[20] you should make that contact on behalf of your client, even if your client may, in the first instance, be assisting or receiving assistance from a State or local enforcement agency rather than a federal agency. To satisfy the requirement, you may contact any federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons, including the Department of Justice's U.S. Attorney's Offices, the Civil Rights and Criminal Divisions, the Federal Bureau of Investigations, and the U.S. Marshals Service, the Department of State's Diplomatic Security Service, and appropriate divisions of the DHS. A properly written endorsement of the T-visa application by one of these federal law enforcement agencies, while not required, should be deemed sufficient proof that your client is a victim of severe trafficking and that your client is complying with a reasonable request for assistance in the investigation or prosecution. You should therefore seek such an endorsement. Without it, your client would have to provide other, secondary evidence of victim status and compliance with law enforcement, including evidence that your client attempted in good faith to obtain the federal law enforcement agency endorsement and an explanation of why such an endorsement does not exist or is not available. In case you are unable to obtain the federal law enforcement agency endorsement, you should also gather secondary evidence of victim status (which may include, among others, trial transcripts, court

documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of the client and other witnesses)[21] and of compliance with law enforcement requests (specific requirements are set forth in the T-visa regulations).

► Regulations implementing the U-visa have not yet been promulgated, but in 2005 Congress mandated that the DHS create regulations for the U Visa by July 5, 2006. As of August 2007, the United States still has not promulgated regulations implementing U-visa provisions. However, INS (now DHS) interim guidelines provide for interim relief for those individuals eligible to apply for U-visa status once regulations are issued.[22] Whether your client chooses to petition for interim relief or to wait to petition for U-visa status after the regulations are issued, any such petition *must* be accompanied by a certification from a Federal, State or local law enforcement official, prosecutor, judge or other Federal, State or local authority investigating the criminal activity.[23] That certification *must* state that the petitioner "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of the criminal activity.[24] You should obtain the required certificate for your client while the criminal case is still in process.

► Due to what would later be a lack of incentive for the law enforcement agency to do the necessary work to secure S-, T-, or U-visa treatment for your client, the time to seek such visa status is before or during the cooperation or assistance and not later. Indeed, your client may wish to make grant of such visa status a condition of his or her cooperation/assistance.

► If granted S-visa status, your client should be advised that the lawful admission status terminates if the individual is convicted of any criminal offense punishable by a term of imprisonment of 1 year or more after the date of such admission.[25] If granted T-visa status, your client should be advised that such status may be revoked under certain circumstances, including if he/she violates the terms of the T-visa status, or if the law enforcement agency that may have endorsed your client's T-visa status notifies the DHS that he/she has unreasonably refused to cooperate with the investigation or the prosecutor.[26] In addition, the S-visa and T-visa holder (and perhaps the U-visa holder) is subject to the crime-related deportability grounds for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the federal immigration authorities prior to the alien's admission.[27]

► If you are negotiating a plea agreement based on any federal government commitment not to deport your client other than grant of S-, T- or U-visa status, seek to obtain the commitment not only from the prosecutors but in writing from the DHS itself, and make the commitment an express part of the plea agreement.

► Even if you are unable to obtain a formal federal government commitment not to remove your client from the United States, it may be helpful to obtain from prosecutors a recommendation in writing that your client not be removed from the United States. Where your client will be subject to removal proceedings but may be eligible for some discretionary form of relief from removal (see generally Chapter 3), such a recommendation—especially if it includes details about the extent and value of your client's cooperation—could be very helpful in persuading an immigration judge to grant the discretionary relief.

5.3.B Move to dismiss case of a particularly sympathetic client in furtherance of justice

If conviction of your client would lead to a consequence such as removal from the United States that would be demonstrably unjust under the circumstances, consider filing a motion to dismiss the charge in furtherance of justice if possible. Under the laws of some states, a court has discretion to grant such a motion to dismiss in cases where, in New York for example, there is some "compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant . . . would constitute or result in injustice."[28]

► **Practice Tips:** If you are filing a motion to dismiss on behalf of a noncitizen client based at least in part on the harshness of the immigration consequences of a conviction, make every effort to lay out how certain, and not merely speculative, are the negative immigration consequences. In addition, do not base the motion solely on the harshness or injustice of the immigration consequences. Address and include evidence of as many as possible of any other factors deemed relevant under the relevant state's law.

5.3.C Move to remove case of a juvenile offender client to family or juvenile court

The laws of many states provide that certain juvenile offenders may be held criminally responsible for certain specified crimes and have their cases prosecuted in adult criminal court rather than in juvenile delinquency proceedings. If convicted, such a juvenile offender will probably have little argument that s/he should not be considered to have a conviction for immigration purposes (see Chapter 4).

In contrast, a juvenile delinquency adjudication generally avoids adverse immigration consequences (see Chapter 4). Thus, where possible and appropriate, a criminal defense practitioner should make a motion to transfer a noncitizen juvenile offender case from an adult criminal court to a juvenile or family court. For a noncitizen juvenile offender client, removal to a juvenile or family court can avoid the risk of removal altogether whereas prosecution as an adult may subject the client to removal without, in some cases, any possibility of relief.

► **Practice Tips:** If you are filing a motion to remove a case to a juvenile or family court on behalf of a noncitizen juvenile offender client based at least in part on the harshness of the immigration consequences of an adult court criminal conviction, make every effort to lay out how certain, and not merely speculative, are the negative immigration consequences. In addition, do not base the motion solely on the harshness or injustice of the immigration consequences. Address and offer evidence on any other factors listed as relevant to such a determination under the state's law.

► If the case cannot be removed to a juvenile or family court, a defense attorney representing a noncitizen juvenile offender should try to obtain an outcome that avoids adverse immigration consequences. For example, a juvenile offender who is pleading guilty to a crime of violence or a theft or burglary offense that could be considered an aggravated felony might be saved from the adverse immigration consequences attached to such a conviction by negotiating to avoid a prison sentence of one year or longer (see sections 5.5 and 5.6).

5.3.D Pursue a deferred adjudication without a guilty plea if possible

When possible, you should seek a deferred adjudication that does not require a guilty plea or other admission of guilt for a noncitizen criminal defendant. Although deferred adjudications in some states may now be considered a conviction for immigration purposes under the new expanded definition of what constitutes a conviction for immigration purposes, a disposition that does not involve a finding, plea, or admission of guilt should not be (see Chapter 4).

► **Practice Tip:** If granted a deferred adjudication without a guilty plea, your client should be warned regarding the possible immigration consequences, in addition to the criminal consequences, of failing to abide by any conditions imposed on the defendant during the deferral period. If failure to abide by such conditions results in a disposition that

constitutes a criminal conviction, the immigration consequences could be grave. If addition, if the charge involved an alleged "family offense" and the court issued an order of protection for an alleged family victim in conjunction with the deferred adjudication, a subsequent violation of that order might subject a lawfully admitted noncitizen defendant (such as a lawful permanent resident) to deportability even without a criminal conviction.[29]

5.3.E If your client wishes to plead guilty, negotiate a plea and sentence that does not make your client subject to removal from the United States or that at least does not make your client ineligible for relief from removal

When a noncitizen client is charged with an offense that makes him or her deportable or inadmissible or subject to some other negative immigration consequence, it may be possible to negotiate a plea and sentence or other disposition that will not have such consequences or that will not eliminate the possibility of obtaining immigration law relief from the negative immigration consequence.

A criminal defense practitioner planning a negotiating strategy to avoid a noncitizen client's removal from the United States or other possible negative immigration consequence is referred to the suggested approaches contained in Chapter 3 of this manual. The particular approach suggested depends on the particular immigration status of the defendant. For the practitioner's convenience, the suggested approaches for clients who are (1) lawful permanent residents, (2) refugees or asylees, or (3) other noncitizens, are laid out in the "Chart of Suggested Approaches to the Criminal Case" below.

In order to obtain ideas for how to accomplish the goals set forth in the relevant suggested approach, the plea bargaining criminal defense practitioner may refer to the following sections in this Chapter:

- Drug offense (see section 5.4);
- Violent offense, including murder, rape, or other sex offense, assault, criminal mischief, and robbery (see section 5.5);
- Property offense, including theft, burglary, or fraud offense (see section 5.6); and
- Firearm offense (see section 5.7).

CHART OF SUGGESTED APPROACHES TO THE CRIMINAL CASE

[*Note:* References are to subsections in Chapter 3.]

If your client is a LAWFUL PERMANENT RESIDENT:

- First and foremost, try to avoid a disposition triggering deportability (3.2.B), OR triggering inadmissibility if the client was arrested returning from a trip abroad or may travel abroad in the future (3.2.C and E(1)).
- If you cannot do that, but your client has resided in the United States for over seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony" in order to preserve possible eligibility either for the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (3.2.E(2)).

If your client is a REFUGEE OR PERSON GRANTED ASYLUM:

- First and foremost, try to avoid a disposition triggering inadmissibility (3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (3.3.D(2)).

If your client is ANY OTHER NONCITIZEN who might be eligible now or in the future for LPR status, asylum, or other relief:

IF the defendant has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition triggering inadmissibility (3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition in order to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (3.4.B(2),(3),&(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam

and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (3.4.B(5)).

IF the defendant has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (3.4.C(2)).
- In addition, if your client happens to be a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection from removal (3.4.C(4) and (5)).

5.3.F If your client is pleading guilty, avoid admissions of conduct beyond elements of offense

If your client is pleading guilty, try to avoid having your client admit to anything other than the elements of the offense during any allocution. This will help prevent your client from becoming deportable or inadmissible or suffering other negative immigration consequences that would not otherwise be triggered. Keep in mind, however, that the immigration judge presiding over later removal proceedings may also refer to the charging papers to determine if a particular conviction falls within a particular deportability or inadmissibility ground. While the immigration judge generally may not look outside the record of conviction, the record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings.

For more information on why avoiding admissions of conduct beyond the elements of the offense charged may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool).

► **Practice Tips:** If your lawfully admitted noncitizen client is pleading guilty to a *weapon offense* that may have involved a firearm but the elements of the offense do not require it, your client should seek to avoid any admission that the weapon was a firearm in order to avoid the firearm offense deportation ground (see Practice Tip #1 in section 5.7).

► If your lawfully admitted noncitizen client is pleading guilty to a *crime of violence* that may have involved a domestic situation but the elements do not require any specific relationship of the victim to the defendant, your client should seek to avoid any admission regarding relationship to the victim in order to avoid the new deportability category for a crime of domestic violence (see Practice Tip #9 in section 5.5).

► If your noncitizen client is pleading guilty to a *sexual abuse offense* that may have involved a minor but the elements of the offense do not require it, your client should seek to avoid any admission regarding the age of the victim and any force involved in committing the offense in order to avoid the new aggravated felony category of "sexual abuse of a minor" (see Practice Tip #3 in section 5.5).

► If your noncitizen client is pleading guilty to an *offense involving fraud* (e.g., welfare fraud or insurance fraud) that may have involved a loss to the victim exceeding $10,000 but the elements of the offense do not require it, your client should seek to avoid any admission regarding the amount of the loss or specify in the record of conviction that the loss was $10,000 or under in order to avoid the aggravated felony category for offenses involving fraud or deceit (see Practice Tip #2 in section 5.6).

► If your noncitizen client is pleading guilty to an *offense such as burglary that relates to intent to commit another crime* without specifying the nature of the crime intended to be committed, your client should seek to avoid any admission regarding the nature of the crime intended to be committed if such crime might be considered to involve moral turpitude (see Practice Tip #4 in section 5.6).

► If your noncitizen client is pleading guilty to an *offense that refers to drugs or controlled substances* without specifying the particular drug or controlled substance, your client should avoid any admission regarding the particular drug or controlled substance involved (see Practice Tip #4 in section 5.4).

► You may wish to advise your client to waive allocution, if allowed, or to enter an *Alford* plea or a *nolo contendere* plea in order to avoid admissions that might be used against him or her in later immigration proceedings.

5.3.G If your client is pleading guilty based on an understanding that the conviction will not trigger negative immigration con sequences, client should so state when pleading

If your client decides to plead guilty to a particular offense based at least in part on an understanding that the conviction will not trigger negative immigration consequences or that relief from those consequences will still be available, you should consider advising your client to state this on the record during any allocution. Doing so will provide a basis for seeking to withdraw the plea later or to obtain other post-conviction relief should your client's understanding be incorrect. Even if you have carefully researched the current immigration law, it is always possible that interpretations of the law will change, or that Congress will change the law and do so retroactively. While your client's statement of his or her understanding may well not suffice to be allowed to withdraw the plea later or to get it vacated post-conviction, it may offer some basis for being able to do so.

► **Practice Tip:** The laws of several states now require criminal trial courts to advise defendants of the possibility of deportation, exclusion or denial of lawful admission, or denial of naturalization, prior to accepting a defendant's plea of guilty to a crime.[30] You may wish to advise your client to make a statement of any understanding that the conviction will not trigger adverse immigration consequences at the time the trial court judge makes this advisement. But, if the judge fails to do so, it may be advisable for your client to bring up his or her understanding anyway. Under the law of some states, the trial court judge's failure to make the advisement may not be enough alone to provide a basis for later withdrawal or vacatur of the plea.[31]

5.3.H Move to withdraw an uninformed guilty plea prior to sentencing

If a noncitizen defendant has entered a guilty plea without fully or correctly understanding the immigration consequences of so doing, the defendant should consider moving to withdraw the plea prior to sentencing. If a guilty plea is withdrawn prior to sentencing, there should not be a conviction for immigration purposes. In addition, it is generally the rule that a plea of guilty that does not result in a conviction will not support a DHS charge of inadmissibility based on admission of criminal conduct.[32] However, the practitioner would be well-advised to seek to avoid any court statement on the record that indicates that the court is allowing withdrawal of the guilty plea solely to avoid immigration consequences in order to minimize any risk that the withdrawn plea might still be deemed to meet the broad definition of a conviction in the immigration statute (see Chap. 4, section 4.1).

On behalf of your client, you may argue that your client would not have pled guilty if s/he had properly understood the immigration consequences at the time of entering the plea. It should be noted that some states require criminal trial courts to advise defendants of the possibility of deportation, exclusion or denial of lawful admission, or denial of naturalization, prior to accepting a defendant's plea of guilty to a crime.[33] Thus, where the trial court judge has done so, it may be more difficult to withdraw a guilty plea based on lack of knowledge of the immigration consequences.

► **Practice Tip:** Do not be deterred from moving to withdraw a guilty plea prior to sentencing (i.e., *pre-conviction*) by case law that has arisen in the context of motions or applications for *post-conviction* relief. For example, in many states, where individuals have sought *post-conviction* relief based on their lack of knowledge of the immigration consequences of a guilty plea at the time of the plea, the courts have held that defense counsel's failure to warn the defendant of the possibility of deportation did not constitute ineffective assistance of counsel where the defendant had not alleged "affirmative misstatements" by defense counsel.[34] Nevertheless, counsel exploring the possibility of seeking to withdraw a guilty plea prior to sentencing should be aware that the showings required for *post-conviction* relief are not necessarily required for *pre-conviction* withdrawal of a guilty plea.[35] Thus, while counsel should submit evidence of any involuntariness of a guilty plea based on misinformation or failure to inform regarding the immigration consequences of the plea, counsel should not presume that evidence of such a constitutional claim is required in the pre-sentencing motion context.[36]

5.3.I If your client does not wish to plead guilty after being informed of the immigration consequences of a plea deal, litigate legal issues and/or go to trial even where you might not have ordinarily done so

Given the current extreme harshness of the immigration consequences of certain convictions, your noncitizen client may decide that s/he does not wish to plead guilty to any offense that would make the client deportable or inadmissible or have some other negative immigration consequence. Your client could so decide even if you are able to get a very attractive plea deal based on the criminal sanctions alone. Your client could of course sincerely believe that s/he is innocent of the offense to which you have negotiated a plea or your client may just want to put the government to its proof given the harshness of the immigration penalties. If such is the case, it may be appropriate to litigate a suppression issue or make a motion to dismiss the indictment/complaint or a count thereof for insufficiency even if you would not have ordinarily done so. Or you and your client may decide to take the case to trial, even where you might not have ordinarily recommended doing so, in order to win an outright acquittal or an acquittal on charges that carry immigration penalties. Further, a conviction on appeal of right will not carry immigration consequences while the appeal is pending; see § 5.3.L.

5.3.J Make sure your client receives youthful offender treatment if your client is eligible

In some states, if your noncitizen client is a minor but whose case you could not get removed to juvenile or family court (see section 5.3.C), you might nevertheless be able to obtain some other form of youthful offender treatment that may not count as a conviction for immigration purposes. For example, the Board of Immigration Appeals has found that a New York youthful offender disposition in adult criminal court should not be considered a conviction for immigration purposes. In addition, even if a particular state's youthful offender procedure could have adverse immigration consequences, such an adjudication may not come to the attention of the DHS.

► **Practice Tip:** If your youthful offender client is pleading guilty to an offense with the understanding that it will not have the consequences of a conviction for immigration purposes, the defense attorney should seek to make such understanding part of the plea allocution. This may provide the basis for a later motion to vacate the plea should this understanding turn out to be incorrect.

5.3.K Seek any other treatment intended to provide relief from the civil consequences of a conviction if your client is eligible

If your noncitizen client is eligible, you should consider seeking any treatment available under state law to relieve a defendant of the civil consequences of a conviction. For example, in the Ninth Circuit an expungement of a first time simple possession offense or lesser drug offense such as being under the influence will eliminate all immigration consequences. Another example, is where it was previously the case—although it may no longer be so—that the issuance by a New York sentencing court of a certificate of relief from civil disabilities could save a noncitizen from removal in some cases. In any event, however, such a rehabilitative treatment is a favorable factor that may be considered by an immigration judge with respect to any application for relief from removal that your client may be eligible to seek even if the client is not saved from being subjected to removal proceedings.

► **Practice Tips:** It is good practice for a criminal defense lawyer to seek for any eligible noncitizen defendant any treatment that under state law is supposed to relieve an individual of the civil consequences of a conviction. While the potential for avoiding automatic adverse immigration consequences seems very limited at this time, there may be a potential helpful effect in some cases, if only as a favorable factor that may be considered by the DHS or an immigration judge later adjudicating any application for discretionary immigration relief for which your client may be eligible.

► In any case where your eligible noncitizen client is being convicted of first-time simple possession of drugs (arguably any possession offense not involving an intent to distribute element), the defense lawyer should seek any state rehabilitative treatment such as an expungement as it may avoid adverse immigration consequences by analogy to similar treatment under the Federal First Offender Act.[37] Currently this will work only in immigration proceedings arising in states within the Ninth Circuit.

5.3.L File a notice of appeal

If your noncitizen client is convicted of an offense that triggers deportability or inadmissibility or some other adverse immigration consequence, the client may wish to file an appeal in order to try to get the conviction reversed on appeal or simply to have time to seek to avoid removal from the United States. The filing of a direct and even a late accepted appeal of a conviction should preclude adverse immigration consequences at least until the appeal is decided because most authorities still generally require a conviction to be final before it

triggers immigration consequences.[38] While the appeal is pending, the conviction cannot serve as a basis for detention of the noncitizen by immigration authorities.

5.3.M Seek post-judgment relief

If your noncitizen client already has a final criminal disposition that triggers deportability or inadmissibility or some other adverse immigration consequence, the client may wish to seek post-judgment relief in order to try to get the conviction (or other disposition that counts as a conviction for immigration purposes) vacated or the sentence reduced. The defense practitioner and client should be aware, however, that whether the vacatur of conviction or the reduction of sentence will save your client from adverse immigration consequences may depend on the basis cited by the court for any vacatur or sentence reduction granted.

In the past, a criminal court vacatur of a conviction meant that there was no longer a conviction for immigration purposes, unless and until there was a new conviction. The Board of Immigration appeals applied this rule even to dispositions such as drug convictions where an executive pardon would not have saved the individual from the immigration consequences of a conviction.[39]

Likewise, the Board of Immigration Appeals has held that where a sentence is deemed to have been illegal and is void and of no force and effect, and the trial court reconsiders the imposition of the sentence and sentences the defendant anew, the new, reduced sentence stands as the only valid and lawful sentence imposed upon the defendant for immigration purposes.[40]

This prior case law regarding the effect of a vacatur or resentencing has been put into some question by the new statutory definition of conviction and Board of Immigrations Appeals' interpretations of the new definition (see Chapter 4). In interpreting the effect of the new definition, the Board of Immigration Appeals has ruled that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.[41] Nevertheless, the Board expressly did not extend this ruling to vacaturs where the court has determined that the vacatur is warranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings.[42] Therefore, when applying for a court order vacating a criminal disposition or a resentencing order, defense counsel would be wise to seek language in the order that relies principally on any legal error in the criminal proceedings, and that avoids express reliance—or at least sole reliance—on equitable considerations, such as the sole humanitarian desire to eliminate the adverse immigration consequences. Defense counsel should be aware that a vacatur order entered solely for immigration purposes will be ineffective.

5.4 SPECIFIC STRATEGIES: DRUG CHARGE

Drug offenses may make your noncitizen client deportable or inadmissible as a violation of law relating to a controlled substance or as an aggravated felony.

To review the possible immigration consequences of a drug case for a noncitizen client, see Chapter 3. In summary, for a lawful permanent resident client, drug charges may result in your client becoming deportable and subject to removal from the United States (section 3.2). For a client who has not yet become a lawful permanent resident, drug charges may result in your client becoming inadmissible and subject not only to being removed from the United States but also to being permanently barred from becoming a lawful permanent resident (sections 3.3 and 3.4).

It does not matter whether the offense is a felony or misdemeanor, and, in fact, deportability or inadmissibility in this area may sometimes be triggered by a non-criminal violation,[43] or by a drug treatment diversion disposition that is not even a conviction under state law (see Chapter 4, section 4.1.A), or in some cases even whether there is no conviction for immigration purposes such as a juvenile conviction (see Chapter 4). It also does not matter what sentence the client receives. The only exception for deportability purposes, and in some cases for inadmissibility purposes, is for a single offense involving possession for one's own use of thirty grams or less of marijuana or hashish, or being under the influence of such drugs.[44]

A noncitizen client may suffer additional negative consequences if the drug charges lead to conviction of an aggravated felony. These consequences include ineligibility for virtually all forms of relief from removal for a lawful permanent resident client, expedited administrative removal proceedings without eligibility for relief for a non-lawful permanent resident client, and greatly increased criminal penalties for illegal reentry after removal (see generally Chapter 3).

Under the immigration statute, the term "aggravated felony" includes "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)."[45] This definition includes virtually any federal *felony* drug offense and virtually any state *trafficking offense*, whether felony or misdemeanor. What state possession offenses constitute an aggravated felony is less clear and is an issue that has been heavily litigated across the country. That issue has now been resolved, at least in part, by the U.S. Supreme Court's decision in *Lopez v. Gonzales*, No. 05-547 (December 5, 2006). Under *Lopez*, all state first-time drug possession offenses—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—that have no trafficking component are NOT aggravated felonies, even if classified as a felony by the state. *Lopez* leaves unclear, however, whether the aggravated felony term may include a second or subsequent drug simple possession offense. See Appendix L for information on the impact on the reach of the drug trafficking aggravated felony ground of deportability of the U.S. Supreme Court's decision in *Lopez v. Gonzales*.

If your client is charged with a drug offense, some possible strategies or practice tips for seeking to avoid drug deportability/inadmissibility, or avoiding at least the added consequences of an aggravated felony drug conviction, include the following:

► **Practice Tips:**

#1: Negotiate diversion without a guilty plea. If appropriate, negotiate a diversion to drug treatment without, if possible, an up front plea to a drug offense. In the alternative, negotiate a plea that either avoids deportability/inadmissibility or at least preserves the possibility of relief from removal (see Practice Tips below).

#2: Offer alternate plea to free-standing accessory offense. If appropriate, negotiate an alternate plea to an accessory-type offense that could be considered a separate free-standing crime not related to controlled substances. For example, accessory after-the-fact crimes such as the federal offenses of accessory after the fact (18 U.S.C. 3) and misprision of felony (18 U.S.C. 4) have been found both by the BIA and federal courts not to trigger drug deportability or inadmissibility even when connected to a drug crime.[46] If pleading guilty to such an after-the-fact offense, however, be careful to consider whether the offense may trigger deportability or inadmissibility or another negative immigration consequence under a non-drug ground such as the aggravated felony of offense relating to obstruction of justice . . . for which the term of imprisonment is at least one year."[47] There is conflicting case law in various circuits on whether other accessory-type offenses, such as solicitation and facilitation, may bring one within the drug deportation ground.[48] In the Ninth Circuit, however, a plea to solicitation is neither an aggravated felony nor a deportable or inadmissible drug offense, even where the crime solicited was possession or possession for sale.[49] For a detailed discussion of the immigration consequences of various accessory and preparatory offenses, see Chapt. 4, section 4.4. For a chart of the case law on immigration consequences of different accessory-type offenses, see **Appendix E**.

> **Example:** In New York, in a case where there are facts supporting a charge that your client destroyed or concealed physical evidence such as drugs, your client might offer and be allowed to plead guilty instead to a New York Penal Law Section 205 hindering prosecution offense. As a separate free-standing after-the-fact offense not expressly related to controlled substances, hindering prosecution will probably not trigger deportability or inadmissibility as a violation of law relating to a controlled substance. However, if your client pleads guilty to hindering prosecution, you must avoid any sentence of imprisonment of one year or longer so that the conviction cannot be found to fall within the aggravated felony "obstruction of justice" category.[50]

#3: Plead to offense that does not specify what controlled substance is involved and keep identity of controlled substance out of record of conviction. If a state conviction record does not specifically identify the controlled substance involved, the conviction is not one relating to a controlled substance as defined under federal law. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (record must prove that substance was a controlled substance under federal law; federal and state definitions of controlled substance vary).

> **Example:** The defender bargains for a substitute complaint that does not identify the controlled substance involved, which is not identified under the terms of the statute. Even if the offense involved sale, it would not be an aggravated felony or a deportable or inadmissible offense or give the government "reason to believe" trafficking in controlled substances.

#4: Offer alternate plea to related offense without an express controlled substance element. If appropriate, negotiate an alternate plea to a related offense that lacks an element expressly relating the offense to a controlled substance. Try to keep out of the record of conviction any reference to a controlled substance.

#5: Plead to possession of less than thirty grams of marijuana. If your client is charged with a marijuana offense but has no prior drug conviction, negotiate a plea to any lesser included marijuana offense that would not be incompatible with an argument that your client has been convicted only of a single offense involving possession for one's own use of thirty grams or less of marijuana. If you are able to do so and your client so pleads, you avoid *deportability* (but not inadmissibility) for a lawful permanent resident client and you preserve the possibility of a waiver of *inadmissibility* for a non-LPR client eligible now or in the future to seek lawful permanent resident status.[51]

> **Example:** Your client came to the United States lawfully on a tourist visa but then overstayed his period of admission. He now has a U.S. citizen girlfriend whom he plans to marry. In a drug sting, the police have arrested him and others and accused your client of selling a small amount of marijuana. Since this is a first arrest, you are able to negotiate a plea to misdemeanor sale of marijuana with no jail time. However, you research and/or consult on the immigration consequences of such a plea and find that it will make your client permanently ineligible to be lawfully admitted to the United States on the basis of marriage to a U.S. citizen and may lead to mandatory removal from the country. In contrast, if you are able to get the plea switched to misdemeanor possession of marijuana with the record of conviction showing that the amount did not exceed 30 grams, your client is not precluded from being able to legalize his status and stay in the country with his wife-to-be.

#6: If at all possible, if your client is charged with a drug offense that may be deemed to be a trafficking offense, plead instead to a simple possession offense in order to try to avoid aggravated felony deportability. If you cannot avoid conviction of a drug offense and resulting controlled substance offense deportability, do everything possible to negotiate a plea to a simple possession or use offense, whether a felony or misdemeanor, rather than a drug offense that has some trafficking component (e.g., sale or possession with intent to sell).[85] This strategy to avoid the drug trafficking aggravated felony ground is possible in light of the Supreme Court decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006). It may not work, however, if your client has a prior drug offense; in such case, a second or subsequent possession offense may be deemed a drug trafficking aggravated felony if later removal proceedings take place in certain jurisdictions under the Board of Immigration Appeals decision in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007). In *Carachuri-Rosendo*, the BIA decided that, in the absence of controlling federal court authority finding otherwise, a noncitizen's state conviction for simple possession of a controlled substance "will not be considered an aggravated felony based on recidivism unless the individual's status as a recidivist drug offender was either admitted or determined by a judge or jury *in connection with a prosecution for that simple possession offense*." *Carachuri*, 24 I&N Dec. at 394 (emphasis added). However, the BIA did not apply this rule in the *Carachuri* case itself because it found that it was bound in that case by a contrary federal court criminal sentencing decision applying a sentence enhancement based on prior conviction of an aggravated felony because the drug possession conviction at issue was preceded by another drug conviction and thus "could have been punished" under federal law as a "drug trafficking crime." *See Carachuri*, 24 I&N Dec. at 386-88. There are adverse sentencing precedents treating second or subsequent possession offenses as aggravated felonies that may be applied to immigration removal cases arising in the Second, Fifth and Seventh Circuits.[52] For more on *Lopez* and practice tips on how to avoiding a drug aggravated felony disposition, see legal resource materials available at: http://www.nysda.org/idp/webPages/LvGPressroom.htm.

> **Example:** Your client is a lawful permanent resident who has resided in the United States for over ten years and has a wife and children here. He is charged with a felony drug sale offense. He has no prior drug convictions and you are able to negotiate a plea to the charged offense with a probation only sentence or prison sentence of less than one year. However, you research and/or consult on the immigration consequences of such a plea and find that it will lead to mandatory removal from the United States. In contrast, a guilty plea to an alternative weight-based felony simple possession offense with no intent to sell element, or to a misdemeanor possession offense, would not even if there is a prison sentence of one year or more. Such an alternative possession plea with a longer prison sentence would still make your client potentially deportable, but he would have an opportunity to present the equities in his case—long residence and family ties in the United States—to seek to obtain discretionary relief from removal from an immigration judge.

#7: Plea to accompanying non-drug charge may be better. If the drug charge is accompanied by a non-drug offense charge, your client may wish to offer to plead to the non-drug charge instead of the drug-related offense. You should check whether the non-drug offense might make your client independently subject to removal proceedings under another deportation or inadmissibility ground. However, consider that, if your client is a non-lawful permanent resident eligible for adjustment to lawful immigrant status, the client may be able to waive inadmissibility for the non-drug offense whereas s/he would probably not be able to waive drug inadmissibility.

> **Example:** In a case where the state charges that drugs were found in a car allegedly stolen or taken by your client, your non-lawful permanent resident client who is married or about to marry a U.S. citizen might offer and be allowed to plead guilty to an accompanying charge of unauthorized use of a vehicle (may or may not trigger inadmissibility depending on degree of offense) or to a charge of grand larceny (will trigger inadmissibility but without precluding the possibility of a waiver) instead of to the drug charge (would trigger inadmissibility without even the possibility of a waiver). Even if you cannot negotiate a plea to another charge that would not make your client inadmissible, your client would at least preserve the possibility of obtaining a waiver of inadmissibility (assuming that your client would have some possibility of being able to show that the U.S. citizen spouse would suffer extreme hardship if your client were denied lawful permanent resident status).

#8: Seek to have the case handled in family or delinquency proceedings. A juvenile delinquency disposition is not a "conviction" at all. Be aware, however, that a disposition involving trafficking will cause inadmissibility by giving the government "reason to believe" that the minor is a trafficker, even absent a conviction.

#9: Seek youthful offender treatment. If you cannot avoid conviction of a drug offense or treatment in delinquency or family court but your client is a minor, seek youthful offender treatment under your state's law. Under current Board of Immigration Appeals case law, a youthful offender disposition may avoid the negative immigration consequences triggered by conviction of a controlled substance offense.[53] For more information, see Chapter 4.

#10: Seek any other rehabilitative treatment intended to avoid a conviction or at least the civil consequences of a conviction. If your client is pleading guilty to a drug offense but has no prior drug conviction, seek a disposition under any rehabilitative process for which your client is eligible under state law that may avoid been deemed a conviction or that may provide relief at least from the civil consequences of a conviction. Under Ninth Circuit case law, for example, such treatment might be effective to avoid negative immigration consequences for a simple possession conviction by analogy to similar treatment under the Federal First Offender Act.[54] For more information, see Chapter 4.

#11: Keep drug admissions out of the record. If you are able to avoid conviction of a drug offense, try to keep any admissions of illegal drug activity, drug addiction, drug abuse, or drug treatment off the record. Even if there is no controlled substance conviction, the DHS could use admissions made during the course of the criminal proceedings to sustain any drug-related deportability or inadmissibility charges that do not depend on a criminal conviction, e.g., the separate deportation charge for someone who the DHS can prove is or has been a drug abuser or addict.

#12: Seek informer visa. If your client has supplied or is willing to supply information to assist a federal or state investigation or prosecution of an individual involved in a criminal drug enterprise, seek a special informer visa or agreement not to deport your client (see section 5.3.A).

5.5 SPECIFIC STRATEGIES: VIOLENT OFFENSE CHARGE (INCLUDING MURDER, RAPE OR OTHER SEX OFFENSE, ASSAULT, CRIMINAL MISCHIEF, AND ROBBERY)

There are several different deportability or inadmissibility grounds that may apply to a violent offense. A violent offense may make a lawful permanent resident client *deportable* if deemed one of the following:

- Crime of violence with a prison sentence of at least one year, thus constituting an aggravated felony;
- Murder, rape, or sexual abuse of a minor, constituting an aggravated felony regardless of sentence;
- Crime of domestic violence, regardless of sentence;
- Firearm offense, regardless of sentence;
- Crime involving moral turpitude (CIMT), if it is an offense for which a prison sentence of one year or more may be imposed and the offense was committed within five years of the individual's admission to the United States, or if it is the second of two CIMTs of any offense level committed by the individual at any time.

Note*:* The definition of a crime of violence referenced for both the aggravated felony and crime of domestic violence deportability grounds is broad. It is defined at 18 U.S.C. §16 and includes "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[55]

A violent offense may also make a lawful permanent resident or non-lawful permanent resident client *inadmissible* if deemed the following:

- Crime involving moral turpitude, regardless of state classification of the offense, unless the individual has committed no other such crime involving moral turpitude and the offense is not one for which a prison sentence of one

year or longer may be imposed and for which the individual does not receive a sentence of imprisonment in excess of six months.

To review the possible immigration consequences for a noncitizen client of a criminal case charging an offense that might fall within any of these deportability or inadmissibility grounds, see generally Chapter 3. In particular, consider that if the violent offense is deemed an aggravated felony, it will not only trigger deportability for a lawful permanent resident client but could have additional negative consequences for either an LPR or non-LPR client. These include ineligibility for virtually all forms of relief from removal for an LPR client, expedited administrative removal proceedings without eligibility for relief for a non-LPR client, and greatly increased criminal penalties for illegal reentry after removal for both.

Your noncitizen client is at risk of falling within the deportability or inadmissibility grounds that may include a violent offense if charged with any of the following:

- Assault and related offenses;
- Homicide and related offenses;
- Rape and related offenses;
- Robbery offenses; and
- Any other offense that involves the use of force or a risk of the use of force.
- If your noncitizen client is charged with any such offense, some possible strategies or practice tips for seeking to avoid deportability or inadmissibility, or avoiding at least the added consequences of an aggravated felony conviction, include the following:

► **Practice Tips:**

#1: If client is a juvenile offender, remove case to juvenile or family court if possible. If your client is a J.O. accused of a violent offense, move to remove the case to family court if appropriate (see section 5.3.C).

#2: Avoid crime of violence with prison sentence of one year or longer. If your client is pleading to an offense that covers conduct that could be considered a "crime of violence" aggravated felony if a prison sentence of one year or more is imposed, thus triggering deportability for a lawful permanent resident client, or triggering the other adverse consequences of an aggravated felony conviction for any noncitizen client (such as ineligibility for many forms of relief from removal), you should try negotiate a plea that will not necessarily establish a "crime of violence" aggravated felony, and keep out of the record of conviction information establishing that the conviction meets the referenced definition (see INA 101(a)(43)(F)). For more information on why keeping information out of the record of conviction establishing conduct beyond the elements of the offense charged may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses –

Categorical Analysis as a Criminal Defense Tool). In the alternative, you should try to keep any prison sentence under one year. This would not work if your client is convicted of an offense that is deemed to constitute murder, rape, or sexual abuse of a minor, because a separate aggravated felony category applies to such offenses regardless of sentence imposed (see Practice Tip #3 below).

> **Example:** Your client is a long-term lawful permanent resident with all his family in the United States. He has been arrested and charged with assault and robbery. You research and/or consult on the immigration consequences of pleading guilty and find that if your client pleads to only one of the charges and gets a prison sentence of at least one year, your client will have been convicted of an aggravated felony and eligibility for relief from removal will probably be precluded. However, if your client pleads guilty to both charges but does not receive a prison sentence of at least one year on either, your client will have avoided conviction of an aggravated felony. Thus, even though the sentencing agreement could provide that your client will spend the same amount of time in jail as if he had pled guilty to the one charge only, and even though your client might be deportable on other grounds, relief from removal will not be precluded.

#3: Avoid rape or sexual abuse of a minor charge. If your client is charged with a sex offense (including rape or sexual abuse), try to negotiate a plea that will not be deemed a "rape" or "sexual abuse of a minor" aggravated felony (see INA 101(a)(43)(A)). Unless you do so, your client may suffer not only deportability or inadmissibility but also the added negative consequences of an aggravated felony conviction, regardless of the sentence imposed. While the immigration statute does not define what state offenses are to be included within the terms rape or sexual abuse of a minor for immigration purposes, you might help your client avoid the aggravated felony label and its consequences by seeking to do the following:

- Avoid a plea to an offense that will or might constitute rape.
- Avoid a plea to an offense that might constitute sexual abuse of a minor, such as any charge of sexual abuse or other conduct in which the elements of the particular section or subsection charged, in combination with the record of conviction or possibly other evidence, would establish that the alleged victim was a minor. In the alternative, if the elements of the offense do not necessarily establish that the alleged victim was a minor, try to keep out of the record of conviction any admission or other evidence that the victim was a minor.[56]
- If pleading to an offense that is broadly worded and may cover conduct other than rape or sexual abuse of a minor, try to keep out of the record of conviction any information that would enable the federal government later to establish rape or sexual abuse of a minor. For more information on why keeping information out of the record of conviction establishing conduct beyond the elements of the offense charged may help your noncitizen client avoid removal or other negative

immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool).

> ***Example:*** An offense involving a minor victim is not necessarily "sexual abuse of a minor" if the offense covers conduct other than "sexual abuse." See *Stubbs v. Atty. Gen. of the United States*, 452 F.3d 251 (3d Cir. 2006)(New Jersey endangering welfare of children is not necessarily "sexual abuse of a minor" since record of conviction failed to establish that the petitioner engaged in sexual conduct *with* the child); see also *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (California annoying or molesting a child under 18 is not necessarily "*sexual abuse* of a minor").

- If your client is faced with the possibility of having to plead to an offense that might constitute rape or sexual abuse of a minor, offer if possible to plead instead to an appropriate non-sex offense even if it is of the same or greater offense level (but for some offenses only as long as you are able to avoid a prison sentence of one year or longer).

> **Example:** Instead of pleading guilty to a felony or misdemeanor that might constitute rape or sexual abuse of a minor, your client could offer, if a factual basis exists, to plead to some other same or even higher level offense such as unlawful imprisonment, coercion, criminal trespass, burglary, or endangering the welfare of a child. However, keep in mind that convictions of these alternative offenses may still trigger deportability or inadmissibility on other grounds and may still constitute an aggravated felony when deemed a crime of violence or a burglary offense if a sentence of imprisonment of at least one year is imposed. An offense such as lying to a police officer, or non-violent attempt to persuade the victim not to file a police report, might fit the facts and have less serious consequences.

#4: Avoid a plea to a crime that is necessarily a crime involving moral turpitude (CIMT). Try to negotiate a plea to a subsection of the violent offense or to any lesser included or alternative offense that would not necessarily be considered a CIMT, which could trigger either *deportability* or *inadmissibility*. Where the criminal statute is divisible or ambiguous as to whether the offense involves moral turpitude, the BIA should look beyond the statute only to the record of conviction in order to determine whether the offense is a CIMT. The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings. If you can keep out of the record of conviction information that establishes that your client was convicted of the portion of the statute that covers conduct that involves moral turpitude, you may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool).

> **Example:** Your noncitizen client is charged with assault. If this client pleads guilty to a subsection requiring a showing of physical injury caused only by recklessness or negligence, rather than a subsection requiring a showing of specific intent to cause physical injury or a subsection requiring a showing of physical injury caused by means of a deadly weapon or dangerous instrument, OR if neither the plea nor any other part of the record of conviction specifies the subsection of conviction, the client should avoid CIMT deportability or inadmissibility.[57]

#5: If no priors, avoid felony CIMT offense. If your client cannot avoid a CIMT conviction but is a lawful permanent resident or non-lawful permanent resident with no prior conviction of a crime involving moral turpitude, you can avoid *inadmissibility* by negotiating a plea to an offense for which the prison sentence may not exceed one year and by avoiding a prison sentence in excess of six months (see INA 212(a)(2)(A)(ii)(II)).

#6: If client is an LPR of less than five years, avoid a CIMT offense for which a prison sentence of one year or longer may be imposed. If your client cannot avoid a CIMT conviction but is a lawful permanent resident who was admitted to the United States less than five years ago, your client avoids CIMT *deportability* only if you are able to negotiate a plea to a level of the offense that does not have a potential prison sentence of one year or longer (see INA 237(a)(2)(A)(i)).

> **Example:** Your client is a lawful permanent resident who was admitted to the United States four years ago. He has no prior criminal record and is charged with assault in the third degree (New York Class A misdemeanor subject to sentence of one year). If you negotiate a plea instead to attempted assault in the third degree, the level of the offense is lowered to a Class B misdemeanor which does not have a potential prison sentence of one year and, therefore, your client would avoid deportability unless the record of conviction shows that the offense could be considered a crime of domestic violence or a firearm offense.

#7: If client is an LPR of over five years, avoid two CIMTs. If your client cannot avoid a CIMT conviction but is a lawful permanent resident who was admitted to the United States more than five years ago and has no prior CIMT, your client may avoid CIMT *deportability*, but not inadmissibility, if s/he is convicted of only one CIMT (see INA 237(a)(2)(A)(ii)).

#8: If client is an LPR, also avoid domestic violence or firearm charge. If your client is a lawful permanent resident or otherwise lawfully admitted, you must also try to obtain an outcome that does not trigger *deportability* as a crime of domestic violence, or as a firearm offense.

#9: If domestic violence charge, keep relationship to victim out of record of conviction. If your lawful permanent resident client is pleading to an offense that could be considered a crime of domestic violence based on the relationship of the defendant to the alleged victim, you should try to keep out of the record of conviction the relationship of defendant to victim (see INA 212(a)(2)(E)).

#10: If charged offense includes weapon element, keep mention of a firearm out of record of conviction. If your lawful permanent resident client is pleading to an offense that refers to use of a weapon, you should try to keep out of the record of conviction any indication that the weapon was a firearm (see INA 237(a)(2)(C)).

#11: In some cases, plea to weapon possession offense may be better. If the violent offense charge is accompanied by a weapon possession charge, in certain cases it may be advantageous to negotiate a plea to the weapon offense instead of the violent offense. Although there is a *deportability* ground for possession of a firearm, there is currently no *inadmissibility* ground for possession of a firearm or any other weapon. Thus, particularly if your client is not a lawful permanent resident now but may be eligible now or in the future to obtain lawful immigrant status, it may be better for such a client to plead to the weapon offense rather than to a violent offense that may trigger inadmissibility as a CIMT. It also may be better for a client who is a lawful permanent resident but who was short of having the seven years of residence in the United States required to qualify for the relief of cancellation of removal at the time of the alleged commission of the offense. This is because the clock for counting the seven years of residence should continue running until the initiation of removal proceedings if the offense triggers only deportability, and not inadmissibility.[58] However, conviction of certain weapon possession offenses that include intent to use the weapon against another as an element of the offense may be considered a CIMT.[59]

Example: Your client is an undocumented noncitizen but recently married a U.S. citizen who plans to petition for your client to obtain lawful permanent resident status. Your client is charged with robbery and weapon possession and may be able to satisfy the prosecutor by pleading guilty either to a robbery felony or a simple possession of a weapon felony. If your client wishes to avoid inadmissibility, he is better off pleading to the weapon charge which will probably not be considered a CIMT rather than the robbery charge, which will be considered a CIMT.

5.6 SPECIFIC STRATEGIES: PROPERTY OFFENSE CHARGE (INCLUDING THEFT, BURGLARY, OR FRAUD OFFENSE)

There are several different deportability or inadmissibility grounds which may apply to a property offense. A property offense may make a lawful permanent resident client *deportable* if deemed one of the following:

- Theft or burglary offense with a prison sentence of at least one year, and thus constituting an aggravated felony.
- Crime involving moral turpitude (CIMT), if it is an offense for which a sentence of one year or more may be imposed and was committed within five years of the individual's admission to the United States, or if it is the second of two CIMTs of any offense level committed by the individual at any time.

A property offense may also make a lawful permanent resident or non-lawful permanent resident client *inadmissible* if deemed the following:

- Crime involving moral turpitude, regardless of state classification of the offense, unless the individual has committed no other crime involving moral turpitude and the offense is one for which a prison sentence in excess of one year may be imposed and for which the individual does not receive an actual sentence of imprisonment in excess of six months.

To review the possible immigration consequences for a noncitizen client of a criminal case charging an offense that might fall within any of these deportability or inadmissibility grounds, see generally Chapter 3. In particular, consider that if the property offense is deemed an aggravated felony, it will not only trigger deportability for a lawful permanent resident client but could have additional negative consequences for either a lawful permanent resident or non-lawful permanent resident client. These include ineligibility for virtually all forms of relief from removal for a lawful permanent resident client, expedited administrative removal proceedings without eligibility for relief for a non-lawful permanent resident client, and greatly increased criminal penalties for illegal reentry after removal.

Your noncitizen client is at risk of falling within the deportability or inadmissibility grounds relating to property offenses if charged with virtually any offense that includes theft, fraud, or deceit as an element of the offense, including many of the following:

- Burglary offenses involving intent to commit a theft offense;
- Larceny offenses;
- Welfare fraud offenses;
- Other offenses relating to theft;
- Forgery offenses;
- Fraud offenses; and
- Any other offense that includes theft, fraud, or deceit as an element of the offense.

If your noncitizen client is charged with such an offense, some possible strategies or practice tips for seeking to avoid deportability or inadmissibility, or avoiding at least the added consequences of an aggravated felony conviction, include the following:

► **Practice Tips:**

#1: Avoid theft or burglary offense with prison sentence of one year or longer. If your client is pleading to an offense that covers conduct that could be considered a theft or burglary aggravated felony and thus trigger deportability for a lawful permanent resident client, or trigger the other adverse consequences of an aggravated felony conviction for any noncitizen client (such as ineligibility for many forms of relief from removal), you should try to negotiate a plea that will not necessarily establish theft or burglary, and keep out of the record of conviction information establishing theft or burglary (see INA 101(a)(43)(G)). For more information on why keeping information out of the record of conviction establishing conduct beyond the elements of the offense charged may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool). In the alternative, you should try to keep any prison sentence under one year.[60] This may not work if your client is convicted of a theft offense that also involves fraud or deceit because a separate aggravated felony category applies to such offenses regardless of sentence imposed (see the following Practice Tips #2 and #3).

> ***Example:*** Your client is a long-term lawful permanent resident with all his family in the United States. He has been arrested and charged with burglary and grand larceny. You research and/or consult on the immigration consequences of pleading guilty and find that if your client pleads to only one of the charges and gets a prison sentence of at least one year, your client will have been convicted of an aggravated felony and eligibility for relief from removal will probably be precluded. However, if your client pleads guilty to both charges but does not receive a prison sentence of at least one year on either, your client will have avoided conviction of an aggravated felony. Thus, even though the sentencing agreement could provide that your client will spend the same amount of time in jail as if he had pled guilty to the one charge only, and even though your client might be deportable on other grounds, relief from removal will not be precluded.

#2: Avoid fraud or deceit offense with loss to victim(s) exceeding $10,000. If your client is pleading to an offense that covers conduct that could be considered a fraud or deceit aggravated felony and thus trigger deportability for a lawful permanent resident client, or trigger the other adverse consequences of an aggravated felony conviction for

any noncitizen client (such as ineligibility for many forms of relief from removal), you should try to negotiate a plea that will not necessarily establish fraud or deceit, and keep out of the record of conviction information establishing fraud or deceit (see INA 101(a)(43)(M)(i)). In the alternative, your client may avoid the negative consequences of an aggravated felony conviction by negotiating to avoid a plea to an offense involving fraud or deceit having as a necessary element a monetary loss to the victim or victims exceeding $10,000 and by keeping out of the record of conviction any indication that the loss exceeded such amount, including any order of restitution exceeding $10,000. For more information on why keeping information out of the record of conviction establishing conduct beyond the elements of the offense charged may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool).

> ***Example:*** Your noncitizen client is charged with welfare fraud (e.g., value of benefits taken exceeds $50,000). If your client pleads instead to welfare fraud in a lesser degree (e.g., over $3,000) and the record of conviction does not otherwise establish a loss of over $10,000, your client would not be convicted of an aggravated felony.

#3: Avoid a plea to a crime that is necessarily a crime involving moral turpitude (CIMT). Try to negotiate a plea to a subsection of the offense or to any lesser included or alternative offense that would not necessarily be a CIMT triggering either *deportability* or *inadmissibility*. Where the criminal statute is divisible or ambiguous as to whether the offense involves moral turpitude, the Board of Immigration Appeals will look beyond the statute only to the "record of conviction" in order to determine whether the offense is a CIMT. If your client pleads to a burglary offense that involves "intent to commit a crime," attempt to keep out of the record of conviction any reference to a crime involving moral turpitude as the crime intended to be committed. The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings. If you can keep out of the record of conviction information that establishes that your client was convicted of conduct that involves moral turpitude, you may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool).

> ***Example:*** Your noncitizen client is charged with grand larceny for allegedly stealing a car. If he pleads guilty to unauthorized use of a vehicle,[61] rather than to a larceny charge, he may avoid CIMT deportability or inadmissibility.

> ***Example:*** Your noncitizen client is charged with burglary. If he pleads guilty to possession of burglar's tools[62] or to criminal trespass[63] rather than to burglary, OR if neither the plea nor any other part of the record of conviction specifies

what crime was intended to be committed,[64] the client should avoid CIMT deportability or inadmissibility.

#4: If no priors, avoid felony CIMT offense. If your client cannot avoid a CIMT conviction but is a lawful permanent resident or non-lawful permanent resident with no prior conviction of a CIMT, you can avoid *inadmissibility* by negotiating a plea to an offense for which the maximum potential sentence does not exceed one year and avoiding an actual prison sentence in excess of six months (see INA 212(a)(2)(A)(ii)(II)).

#5: If client is an LPR of less than five years, avoid CIMT offense for which the maximum potential sentence is one year or longer. If your client cannot avoid a CIMT conviction but is a lawful permanent resident who was admitted to the United States less than five years ago, your client avoids CIMT *deportability* only if you are able to negotiate a plea to a level of the offense that does not have a potential prison sentence of one year or longer (see INA 237(a)(2)(A)(i)).

> ***Example:*** Your client is a lawful permanent resident who was admitted to the United States four years ago. She has no prior criminal record and is charged with petty larceny (misdemeanor subject to sentence of up to one year). In some states, if you negotiate a plea instead to attempted petty larceny, the level of the offense is lowered to a lower level misdemeanor that does not have a potential prison sentence of one year and, therefore, your client would avoid deportability.

#6: If client is an LPR of over five years, avoid two CIMTs. If your client cannot avoid a CIMT conviction but is a lawful permanent resident who was admitted to the United States more than five years ago and has no prior CIMT, your client may avoid CIMT *deportability*, but not inadmissibility (e.g., if s/he travels outside the United States in the future), if s/he is convicted of only one CIMT (see INA 237(a)(2)(A)(ii)).

#7: If client is an LPR, also avoid aggravated felony or firearm charge. If your client is a lawful permanent resident or otherwise lawfully admitted, you must also try to obtain an outcome that does not trigger *deportability* as a theft or burglary aggravated felony, or as a firearm offense.

#8: If charged offense includes weapon element, keep mention of a firearm out of record of conviction. If your lawful permanent resident client is pleading to an offense that refers to use of a weapon, you should try to keep out of the record of conviction any indication that the weapon was a firearm (see INA 237(a)(2)(C)).

#9: In some cases, plea to weapon possession offense may be better. If your client is charged with a theft or burglary offense accompanied by a weapon possession charge, in certain cases it may be advantageous to negotiate a plea to the weapon offense instead of the theft or burglary offense. Although there is a *deportability* ground for possession of a firearm, there is currently no *inadmissibility* ground for possession of a firearm or any

other weapon. Thus, particularly if your client is not a lawful permanent resident now but may be eligible now or in the future to obtain lawful immigrant status, it may be better for such a client to plead to the weapon offense rather than to a theft or burglary offense that may trigger inadmissibility as a CIMT. It also may be better for a client who is a lawful permanent resident but who was short of having the seven years of residence in the United States required to qualify for the relief of cancellation of removal at the time of the alleged commission of the offense. This is because the clock for counting the seven years of residence should continue running until the initiation of removal proceedings if the offense triggers only deportability, and not inadmissibility.[65] However, conviction of certain weapon possession offenses that include intent to use the weapon against another as an element of the offense may be considered a CIMT.[66]

5.7 SPECIFIC STRATEGIES: FIREARM CHARGE

Crimes including a weapon element may make your lawful permanent resident or other lawfully admitted client fall within the firearm deportability ground. However, the elements of the offense and the record of conviction must establish that the weapon was a firearm.

Certain firearm offenses also put your noncitizen client, whether or not an LPR, at risk of suffering the additional negative immigration consequences of a firearm-related aggravated felony conviction (see INA 101(1)(43)(C)&(E)).

Your LPR client charged with an offense involving a firearm is at risk of falling within the firearm deportability grounds if charged with any of the following:

- **Weapon offense that covers firearm or dangerous weapon offenses;**
- **Assault or related offense with a firearm or dangerous weapon element;**
- **Burglary or related offense with a firearm or dangerous weapon element; and**
- **Robbery offense with a firearm or dangerous weapon element.**

If your client is charged with one of these offenses, some possible strategies or practice tips for seeking to avoid deportability, or avoiding at least the added consequences of an aggravated felony conviction, include the following:

► **Practice Tips:**

#1: If charged offense includes weapon element, negotiate a plea that does not specify that weapon was a firearm. If your client is a lawful permanent resident or otherwise lawfully admitted and is charged with a firearm or weapon offense, try to negotiate a plea to an offense or subsection of an offense that does not specify that any weapon involved was a firearm and attempt to keep out of the record of conviction any reference to a firearm. Where the criminal statute is divisible or ambiguous, the Board of Immigration Appeals will look beyond the statute only to the "record of conviction" in order to determine whether the offense is a firearm offense.[67] The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings.[68] If you can keep out of the record of conviction information that establishes that your client was convicted of a firearm offense, you may help your noncitizen client avoid removal or other negative immigration consequence, see Chapter 4, section 4.3 (Broadly Defined State Offenses – Categorical Analysis as a Criminal Defense Tool).

> **Example:** Your client is a lawful permanent resident charged with criminal possession of a weapon, an offense with several subsections under your state's law. If the client pleads guilty to a subsection of this offense relating to possession of ammunition rather than to any of the other subsections, OR if the client pleads guilty to a subsection of this offense relating to possession of a weapon including but not limited to a firearm and the record of conviction does not establish that the weapon involved was a firearm, he should be able to avoid firearm deportability.

#2: Offer alternate plea to offense that does not include a weapon as an element. If your lawful permanent resident client is charged with a firearm or weapon offense, your client may wish to offer to plead to an alternative offense that does not include a weapon as an element of the offense.[69] But in general one should do this only if the alternative offense does not make your client independently deportable or inadmissible.

> ***Example:*** Your client is a lawful permanent resident of over five years. The police state that, after responding to a 911 call, they found him with a gun on the property of another. Your client could offer to plead to a criminal trespass charge instead of a gun charge and thereby

probably avoid deportability since criminal trespass would probably not be found to be a crime involving moral turpitude.[70] Note that even if the alternative offense might be considered a CIMT (e.g., burglary), this client would not be deportable if he had no prior CIMT conviction. This is because he was admitted to the United States over five years ago and thus would be deportable under the crime involving moral turpitude deportation ground only if he has two crimes involving moral turpitude.[71] In contrast, he would be deportable under the firearm ground with just one firearm conviction. But keep in mind that an offense such as burglary could be considered an aggravated felony unless you make sure that any prison sentence imposed is less than a year.[72]

#3: Offer alternate plea to free-standing accessory offense. If appropriate, negotiate an alternate plea to an accessory-type offense that could be considered a separate free-standing crime not related to a firearm. For a detailed discussion of the immigration consequences of various accessory and preparatory offenses, see Chapt. 4, section 4.4. For a chart of the immigration consequences of different accessory-type offenses, see Appendix E.

#4: Plead to possession rather than sale and avoid prison sentence of one year or longer. If your client cannot avoid a firearm conviction, your client may at least avoid the negative consequences of an aggravated felony conviction by avoiding any state or federal offense that could constitute illicit trafficking in firearms, as well as certain specified federal firearm offenses, such as possession of a machine gun, and possibly their state analogues.[73] You should also try to keep any prison sentence under one year in order to avoid a charge that your client has been convicted of a "crime of violence" aggravated felony.

#5: In some cases, plea to weapon possession offense may be better. Whether your client is lawfully admitted or not, if your noncitizen client is charged with a firearm or weapon possession offense in conjunction with a non-weapon offense that would make your client inadmissible, it may be advantageous to negotiate a plea to the weapon offense instead of the non-weapon offense. Although there is a *deportability* ground for possession of a firearm, there is currently no *inadmissibility* ground for possession of a firearm or any other weapon. In addition, simple possession of a firearm is not considered a CIMT.[74] Thus, if your client is not lawfully admitted now (and thus not subject to the deportability grounds) but may be eligible now or in the future to obtain lawful immigrant status (and thus interested in avoiding inadmissibility grounds), it may be better for such a client to plead to a weapon possession offense rather than to another offense that triggers inadmissibility as a drug offense or as a CIMT. It also may be better for a client who is a lawful permanent resident but who was short of having the seven years of residence in the United States required to qualify for the relief of cancellation of removal at the time of the alleged commission of the offense. This is because the clock for counting the seven years of residence should continue running until the initiation of

removal proceedings if the offense triggers only deportability, and not inadmissibility.[75] However, conviction of certain weapon possession offenses that include intent to use the weapon against another as an element of the offense may be considered a CIMT.[76]

> ***Example:*** Your client is an undocumented noncitizen but recently married a U.S. citizen who plans to petition for your client to obtain lawful permanent resident status. Your client is charged with robbery and weapon possession and may be able to satisfy the prosecutor by pleading guilty either to the robbery felony or the weapon possession felony. If your client wishes to avoid inadmissibility, he is better off pleading to the weapon charge, which will probably not be considered a CIMT, rather than the robbery charge, which will be considered a CIMT.

5.8 STRATEGIES AND RESOURCES IN LATER REMOVAL PROCEEDINGS

Under the current laws, in many, if not most cases, the future immigration status fate of your noncitizen client will be decided by how the criminal case is disposed. In other words, there will be little or nothing that your noncitizen client will be able to do in later removal or other immigration proceedings in order to avoid DHS detention and eventual removal from the United States.

Nevertheless, some noncitizen clients may be able to pursue strategies in later removal proceedings that might defeat or minimize adverse immigration consequences such as detention and removal from the United States. Examples of such strategies include the following:

- Challenge mandatory detention during removal proceedings
- Persuade the DHS to exercise favorable prosecutorial discretion
- Deny deportability or inadmissibility
- Apply for relief from removal
- Raise available estoppel or constitutional law or international law arguments in certain circumstances
- Challenge indefinite detention after removal order

In case the user of this manual is a lawyer or other advocate who may be counseling or representing a noncitizen client in removal proceedings based on criminal charges, or in case the user is the affected noncitizen him or herself, Appendix K (Removal Defense Checklist in Criminal Charge Cases) lists some legal arguments and strategies that may be pursued by noncitizens and their legal representatives in removal proceedings involving crime-related charges. Even if you are not representing the noncitizen in later removal proceedings, this resource may be passed along to any available legal representative in the later removal proceedings, or, in the absence of counsel, to the noncitizen who may be able to pursue some of these arguments and/or strategies on his or her own. Please note that the Removal Defense Checklist in Criminal Charge Cases is updated and revised periodically to reflect new developments in the law, and the most recent version should always be available on the website of the New York State Defenders Association at http://www.immigrantdefenseproject.org.

NOTES CHAPTER 1

[1] *See* (1) *Anti-Drug Abuse Act of 1988* (November 18, 1988); (2) *Immigration Act of 1990* (November 29, 1990); (3) *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* (Dec. 12, 1991); (4) *Violent Crime Control and Law Enforcement Act of 1994* (September 13, 1994); (5) *Immigration and Nationality Technical Corrections Act of 1994* (October 24, 1994); (6) *Antiterrorism and Effective Death Penalty Act of 1996* (April 24, 1996); and (7) *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (September 30, 1996).
[2] *See* INA 237(a), 8 U.S.C. 1227(a).
[3] *See* INA 212(a), 8 U.S.C. 1182(a).
[4] *See* INA 238(a), 8 U.S.C. 1228(a).
[5] *See* INA 236(c), 8 U.S.C. 1226(c).
[6] *See* INA 241(a)(1)(A), 8 U.S.C. 1231(a)(1)(A).
[7] *See* INA 241(a)(1)(B), 8 U.S.C. 1231(a)(1)(B).
[8] *See* INA 241(a)(2), 8 U.S.C. 1231(a)(2).
[9] *See* INA 241(a)(6), 8 U.S.C. 1231(a)(6); *but see Zadvydas v. Davis*, 533 U.S. 678 (2001) (held that the INS (now DHS) may not hold a person six months after a removal order absent evidence that removal is "reasonably foreseeable").
[10] *See* INA 212(a)(2)(A)(i)(II) & (C), 8 U.S.C. 1182(a) (2)(A)(i)(II) & (C), in combination with the waiver provision located in INA 212(h), 8 U.S.C. 1182(h).
[11] *See* INA 212(d)(3), 8 U.S.C. 1182(d)(3).
[12] *See* INA 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A).
[13] *See* INA 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii).
[14] *See* INA 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A).
[15] *See* INA 276, 8 U.S.C. 1326.
[16] *See, e.g., People v. Ford,* 86 N.Y.2d 397 (1995).
[17] *See, e.g., People v. McDonald,* 1 N.Y.3d 109 (2003); *State v. Garcia*, 320 N.J. Super. 332 (App. Div. 1999)(noting that a guilty plea may be vacated where defendant received misinformation from his attorney on the immigration consequences of his plea, and that the answer "N/A" to question number 17 of the New Jersey plea form presents a prima facie case for misinformation).
[18] *See* NLADA Performance Guidelines for Criminal Defense Representation (1994), Guideline 6.2(a)(3).
[19] *See, id.,* commentary to NLADA Performance Guideline 6.2(a)(3) and commentary to NLADA Performance Guideline 6.3(a).
[20] ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (3rd ed. 1999).
[21] *See, id.,* commentary to ABA Pleas of Guilty, Standard 14-3.2(f).
[22] *See id.*
[23] *Mojica v. Reno,* 970 F.Supp. 130, 177 (E.D.N.Y. 1997). In another case long before the last decade's hardening of the nation's immigration laws respecting immigrants convicted of crimes, Judge Frank of the United States Court of Appeals for the Second Circuit noted that "[d]eportation, while not literally constituting criminal punishment, may have far more dire effects on [a criminal] defendant than his sentence of imprisonment." *United States v. Parrino,* 212 F.2d 919, 924 (2d Cir. 1954) (Frank, J., dissenting), *cert. denied,* 348 U.S. 840 (1954). Judge Frank observed that when the court sentenced the defendant in that case to two years imprisonment, "[f]or all practical purposes, the court sentenced him to serve (a) two years in jail and (b) the rest of his life in exile." *Id.*at 924.

NOTES CHAPTER 2:

[1] *See* INA 101(a)(22)(B), 8 U.S.C. 1101(a)(22)(B); *see also* INA 308 & 101(a)(29), 8 U.S.C. 1408 & 1101(a)(29) (defining "outlying possessions," such as American Samoa and Swains Island).
[2] *See, infra,* Chapter 3.

[3] *See* INA 301(a)&(b), 302, 304–307, 8 U.S.C. 1401(a)&(b), 1402, 1404–1407(citizen by birth in the U.S., Puerto Rico, U.S. Virgin Islands, or Guam); and INA 308, 8 U.S.C. 1408 (noncitizen national by birth in American Samoa and Swains Island).
[4] For current law, *see* INA 301(c)(d)(e)&(g), 301a, and 303, 8 U.S.C. 1401(c)(d)(e)&(g), 1401a, and 1403; and INA 309, 8 U.S.C. 1409 (child born out of wedlock).
[5.] For current law, *see* INA 320, 8 U.S.C. 1431.
[6.] *See* INA 310 et al., 8 U.S.C. 1410 et al.

NOTES [FOR CHARTS A, B, AND C IN CHAPTER 2]

---

[*] In preparing this national manual, we extensively reproduced verbatim or modified portions of the 4th and prior editions of Manuel D. Vargas, *Representing Immigrant Defendants in New York* (New York State Defenders Association ("NYSDA") Immigrant Defense Project), with NYSDA's permission. The text of this Chapter 1 has been reproduced, with modifications, from portions of Chapter 1 thereof.

Notes for Chart A:

[1] For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).
[2] If a person did not learn of the claim to U.S. citizenship before reaching age 23 or 26, whichever age was applicable, the two year retention requirement might be deemed to have been constructively met (in other words, it may be waived). *See*, INS Interpretations 301.1(b)(5)(iii) and 301.1(b)(6)(iii).
[3] People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States (*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1)). It is the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. *See Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952); *however see also* INS Interpretations 320.2. Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."
[4] *See*, INS Interpretations 301.1(b)(3)(ii) for a discussion of the residence requirements for parents who served in the Armed Forces between 12/7/41 and 12/31/46.
[5] *See*, *U.S. Citizenship and Naturalization Handbook*, Chapter 4, Page 102 (Daniel Levy, 2001 Edition) citing INS Interpretations 301.1(b)(4)(iii) & (iv) and the Act of March 16, 1956, Public Law 84-430, 70 Stat. 50.
[6] For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).
[7] *See* footnote 2.
[8] The retention requirement was repealed by Act of 10/10/78 (P.L.95-432). People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States (*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1). For information on the status of people who had on 10/10/78 failed to remain in the U.S., *please see* INS Interpretations 301.1(b)(6)(ix).
People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States. [*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1)] It is the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. *See*, INS Interpretations 320.2 and *Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952). Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."
[9] For a definition of "National," please *see* INA §§ 308 and 101(a)(29) and Chapter 7-5 of the ILRC's manual, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*.
[10] *See* footnote 9.
[11] *Please see*, INA § 301(g) for exceptions to the physical presence requirements for people who served

honorably in the U.S. military, were employed with the U.S. Government or with an intergovernmental international organization; or who were the dependent unmarried sons or daughters and member of the household of a parent in such military service or employment.

[12] *See* footnote 9.

[13] *See* footnote 11.

Notes for Chart B:

[14] If the child did not acquire citizenship through its mother, but was legitimated by a U.S. citizen father under the following conditions, apply the acquisition law pertinent to legitimate children born in a foreign country. (CHART A) Please note that the United States Supreme Court ruled that even though the laws treat children born out of wedlock to U.S. citizen fathers differently than the laws treat children born out of wedlock to U.S. citizen mothers, those laws are constitutional and do not violate equal protection. *See Tran Anh Nguyen v INS*, 121 S. Ct. (2001).

[15] If legitimated before age 21, US. Citizen father must comply with residence requirements of the Nationality Act of 1940 (See Chart A, period 1/13/41 to 12/24/52).

[16] *See Miller v. Albright*, 523 U.S. 420, 437 (1977) (clear and convincing standard of proof of paternity does not require DNA evidence). Prior to the 1986 amendment requiring proof of blood relation by clear and convincing evidence, paternity could be shown by birth certificates, school records, or hospital records. However, under State Department guidelines, an actual blood relationship must be shown; being born in wedlock is insufficient, even if the child is presumed to be the issue of the parents' marriage by the law of the jurisdiction where the child was born. *See* 7 FAM 1131.4(a). *Miller v. Albright* indicated that DNA evidence is unnecessary, but that was mere dictum in a plurality opinion joined by only one justice. Certainly DNA evidence would suffice, but it is unclear how much less convincing evidence could be and still overcome the "clear and convincing" hurdle. Practitioners would be prudent to have DNA testing conducted if possible. But *see* also *Stanley Russell Scales v. INS* (9th Circuit, November 21, 2000),

[17] *See* footnote 3. Note that if the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father under CHART A changes.

[18] *See* footnote 4.

Notes for Chart C:

[19] Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. *See* Page 217 of *U.S. Citizenship and Naturalization Handbook by Daniel Levy* (2000 Edition, West Group).

[20] It is the ILRC's position, and the ILRC believes that all advocates should argue, that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. ***See Matter of L-M- and C-Y-C-,*** 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; ***however, see also*** INS Interpretations 320.2. Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[21] Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. *See* Page 217 of *U.S. Citizenship and Naturalization Handbook by Daniel Levy* (2000 Edition, West Group), citing Sec. 5, Act of March 2, 1907.

[22] Legitimation could take place before or after the child turns 21. The child derives citizenship upon the naturalization of the parent(s) or upon the child taking up residence in the U.S. *See* Page 218 of *U.S. Citizenship and Naturalization Handbook by Daniel Levy* (2000 Edition, West Group), citing Sec. 4, Act of 1802 as supplemented by Sec. 5, Act of 1907. *See* also INS Interpretations 320.1.

[23] The five year period can commence before or after the naturalization of the parent and can last until after the child turns 21 and until after 1941. *See* Sec. 5, Act of March 2, 1907 as amended by Sec. 2, Act of May 24, 1934 and INS Interpretations 320.1(a)(3).

[24] *See* footnote 4 above.

[25] See Foreign Affairs Manual (FAM)1153.4-3.

[26] "Legal separation" of the parents as used in the 1940 statute means either a limited or an absolute divorce obtained through judicial proceedings. Generally, if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. When the parents have divorced or separated and the decree does not say who has custody of the child and the U.S. citizen parent has physical custody (meaning the child lives with that parent), the child can derive citizenship through that parent provided all the other conditions are met. See United States Department of State Passport Bulletin - 96 -18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA" which referenced Passport Bulletin 93-2, issued January 8, 1993.

According to INS Interpretations 320.1, in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place; *see also*, INS Interpretations 320.1(b). Where the actual "parents" of the child were never lawfully married, there can be no legal separation. *See* INS Interpretations 320.1(a)(6), citing, *In the Matter of H –*, 3 I.&N. Dec. 742 (1949). Thus, illegitimate children cannot derive citizenship through a father's naturalization unless the father has legitimated the child, the child is in the father's legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. Where the actual "parents" of the child were never lawfully married, there could be no legal separation. For more on this topic, please see *Bagot v. Ashcroft*, WL 325853, No. 04-2127 _ F.3d _ (3rd Cir., February 11, 2005), but see also *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. See Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, § 98.03[4](e).

[27] *See* INS Interpretations 320.1(c).

[28] *See* INS Interpretations 320.1(a)(6), explaining that in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place; *see* also INS Interpretations 320.1(b). **Please note,** the only way that an illegitimate child can derive citizenship through a father's naturalization is if 1) the father legitimates the child, and 2) both parents naturalize (unless the mother is already a citizen, or the mother is dead). Under any other circumstances, an illegitimate child never derives from a father's naturalization. The definition of "child" in INA § 101(c)(1) requires that the legitimated child be legitimated under the law of the father's or child's domicile before turning age 16.

[29] Although both the CIS and the State Department take the position that adopted children during this period could not derive citizenship, an argument can be made that children who were adopted before turning 16 and who were in the custody of the adopting parent(s) could derive citizenship. [*See* the *U.S. Citizenship and Naturalization Handbook*]

[30] As long as all the conditions in this section are met before the child's 18th birthday, the child derived citizenship regardless of the order in which the event occurred. *See* Department of State Passport Bulletin 96-18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA." The BIA cited this Passport Bulletin in *In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997).

[31] See Foreign Affairs Manual (FAM) 1153.4-4.

[32] *See* footnote 7 above.

[33] In order for an illegitimate child to derive citizenship through her mother s/he must not have been legitimated prior to obtaining derivation of citizenship. *See* INA § 321(a)(3) as amended by Pub. L. No. 95-417. However, if the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless one parent is a U.S. citizen or is deceased. *See* INA § 321(a)(1) as amended by Pub. L. No. 95-417. If legitimation occurs after the child has derived citizenship, the child remains a U.S. citizen even if the father did not naturalize.

[34] *See* footnote 9 above.

[35] 1952-1978 law stated prior to "16th birthday." The new law stating prior to the "18th birthday" is

retroactively applied to 12/24/52. *See In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997), citing Passport Bulletin 96-18.

[36] A small minority of practitioners believes that a strict reading of INA § 321(a)(5) would allow a child to derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried even if the child was not a lawful permanent resident – but only if the child began to reside permanently in the United States while under the age of 18 and after his or her parents naturalized. The argument is that there is a difference between being a lawful permanent resident and to "reside permanently." The CIS and most practitioners, however, are of the opinion that the child must be a lawful permanent resident to derive citizenship no matter the circumstances. Although there is no authoritative case law on a national level, there is some case law agreeing with the CIS' opinion on this issue. [*See* Gordon and Mailman § 98.03(3)(f)]

[37] *See* INA § 101(c)(1).

[38] *See* footnote 11 above.

[39] See Foreign Affairs Manual (FAM) 1153.4-4.

[40] *See* footnote 7 above.

[41] *See* footnote 9 above.

[42] *See* footnote 15 above.

[43] *See* footnote 16 above.

[44] *See* footnote 17 above.

[45] Adopted children must be residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the adoptive parent(s)' naturalization. *See* Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. This is different than the practice in derivation cases for biological children. *See* footnote 11.

[46] Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if adoption occurred before the child turned 16. [*See* INS Interp.320.1 (d)(2)]

[47] People born between 2/27/83 and 2/26/01 may derive citizenship by satisfying the requirements of either this row or the "10/5/78 to 2/26/01" row.

[48] INA section 320 as amended by the Child Citizenship Act of 2000.

[49] Please see U,S, Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Although the ILRC believes this Bureau of Citizenship and Immigration memo should apply to mothers who naturalized or who became U.S. citizens by birth in the U.S., derivation, or acquisition of citizenship, the CIS may successfully argue that it only applies to naturalized mothers because the memo specifically states "Assuming an alien child meets all other requirements of Section 320 and 322, an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen."

[50] The text of INA section 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA section 101(c)(1) excludes illegitimate children from the definition of "child," unless legitimated by the father under either the law of the child's domicile or the law of the father's domicile. The legitimation requirement will be a hurdle for some people for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. Please note that neither INA §320 nor 8 CFR 320.1 state the legitimation must occur before the 16th birthday. Thus, some argue that such a legitimation could take place even between the 16th and 18th birthdays. This argument appears weak because of the definition of child found in INA §101©, which applies to the citizenship and naturalization contexts. Second, many people do not think about or know about the legitimation process. It is important to note that according to the U,S, Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship only naturalized mothers can confer citizenship upon their unlegitimated children born of wedlock under INA section 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S.

also can confer citizenship under INA §320 to such children.

[51] INA section 320 as amended by the Child Citizenship Act of 2000.

[52] INA section 320 as amended by the Child Citizenship Act of 2000.

[53] INA section 320 as amended by the Child Citizenship Act of 2000.

[54] INA section 320 as amended by the Child Citizenship Act of 2000. It is the ILRC's interpretation that for purposes of the Child Citizenship Act of 2000, the CIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of the mother for section 320 citizenship. See U,S, Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Additionally, 8 CFR § 320.1 sets forth several different scenarios in which the CIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for § 320 citizenship for his/her child. First, the CIS will presume, absent evidence to the contrary, that both parents have legal custody for purposes of § 320 citizenship where their biological child currently resides with them and the parents are married, living in marital union, and not separated. Second, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of § 320 citizenship where his/her biological child lives with him/her and the child's other parent is dead. Third, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of § 320 citizenship if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child's domicile. Fourth, where the child's parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded that the parents have joint custody of the child, the CIS will presume, absent evidence to the contrary, that such joint custody means that both parents have legal custody of the child for purposes of § 320 citizenship. Fifth, in a case where the parents of the child have divorced or legally separated, the CIS will find that for the purposes of citizenship under INA §320 a parent has legal custody of the child where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence. Sixth, the regulations state there may be other factual circumstances under which the CIS will find that a U.S. citizen parent has legal custody for purposes of § 320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that the CIS should determine that a U.S. citizen parent has legal custody if the parent - child relationship does not fit into one of the categories listed above.

[55] INA section 320 as amended by the Child Citizenship Act of 2000 and INA § 101(b)(1).

*****

In preparing this national manual, we extensively reproduced verbatim or modified portions of the 4th and prior editions of Manuel D. Vargas, *Representing Immigrant Defendants in New York* (New York State Defenders Association ("NYSDA") Immigrant Defense Project), with NYSDA's permission. The text of this Chapter 3 has been reproduced, with modifications, from portions of Chapter 3 thereof.

NOTES CHAPTER 3

[1] *See* INA 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

[2] *See* Section 350(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Division C, 110 Stat. 3009-546.

[3] *See Matter of Winter,* 12 I&N Dec. 638 (BIA 1967, 1968); *Matter of C.Y.C.,* 3 I&N Dec. 623 (BIA 1950); *Matter of G,* 1 I&N Dec. 96 (BIA 1941, AG 1942); *but see Matter of I,* 4 I&N Dec. 159 (BIA, AG 1950) (independent admission of offense involving moral turpitude supports inadmissibility charge even though noncitizen only convicted of lesser offense not involving moral turpitude).

[4] *See, e.g., Matter of Rico,* 16 I&N Dec. 181 (BIA 1977).

[5] *See* INA 240A(a)(1); 8 U.S.C. 1229b(a)(1).
[6] *See* INA 240A(a)(2)); 8 U.S.C. 1229b(a)(2).
[7] *See* INA 240A(d)(1); 8 U.S.C. 1229b(d)(1).
[8] *Id.*; *see Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).
[9] *See In re C-V-T-*, 22 I&N Dec. 7 (BIA 1998).
[10] *See* INA 240A(a)(3) 8 U.S.C. 1229b(a)(3).
[11] *See* INA 212(h); 8 U.S.C. 1182(h).
[12] *See id.*
[13] *See* INA 212(h); 8 U.S.C. 1182(h). In contrast, a non-LPR may be able to obtain 212(h) relief to waive a crime involving moral turpitude even if it is an aggravated felony (see section 3.4).
[14] *Id.*
[15] *See* 8 C.F.R. 212.7(d).
[16] *See* Immigration Act of 1990, Pub.L. No. 101–649, 104 Stat. 4978; Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub.L. No. 102–232, 105 Stat. 1733.
[17] *See* INA 209(a); 8 U.S.C. 1159(a); 8 C.F.R. 209.1(a)(1).
[18] *See* 8 C.F.R 209.1(e).
[19] *See, supra,* n. 3.
[20] *See, supra,* n. 4.
[21] *See* INA 208(c)(2)(B)&(c)(3); 8 U.S.C. 1158(c)(2)(B)&(c)(3); 8 C.F.R. 208.24.
[22] *See* INA 208(b)(2)(B)(i); 8 U.S.C. 1158(b)(2)(B)(i).
[23] *See Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988)).
[24] *See* INA 209; 8 U.S.C. 1159.
[25] *See* INA 209(c); 8 U.S.C. 1159(c).
[26] *See id*.
[27] *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).
[28] *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3).
[29] *See INS v. Stevic,* 467 U.S. 407 (1984).
[30] *See INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987).
[31] *See* INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B)).
[32] *See Matter of Y-L, A-G, R-S-R*, 23 I&N Dec. 270 (A.G. 2002), and note 64 *infra.*
[33] *See Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999), *overruled in part*, *Matter of Y-L, A-G-, R-S-R*, 23 I&N Dec. 270 (A.G. 2002).
[34] *See Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988)).
[35] Foreign Affairs and Restructuring Act of 1998, § 2242(c).
[36] *See* 8 C.F.R. 208.16(c).
[37] *See* 8 C.F.R. 208.17.
[38] *See, supra,* n. 3.
[39] *See, supra,* n. 4.
[40] *See* INA 201(b)(2)(A)(i) & 203(a)(2)&(d), 8 U.S.C. 1151(b)(2)(A)(i) & 1153(a)(2)&(d).
[41] *See* INA 201(b)(2)(A)(i) & 203(a)(1)(2)&(3)&(d), 8 U.S.C. 1151(b)(2)(A)(i) & 1153(a)(1),(2),&(3) &(d).
[42] *See* INA 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i).
[43] *See* INA 203(a)(4), 8 U.S.C. 1153(a)(4).
[44] *See* INA 203(b)(1), 8 U.S.C. 1153(b)(1).
[45] *See* INA 203(b)(2), 8 U.S.C. 1153(b)(2).
[46] *See* INA 203(b)(3), 8 U.S.C. 1153(b)(3).
[47] *See* INA 203(b)(4), 8 U.S.C. 1153(b)(4)) and INA 101(a)(27), 8 U.S.C. 1101(a)(27).
[48] *See* INA 203(b)(5), 8 U.S.C. 1153(b)(5).
[49] *See* INA 212(h); 8 U.S.C. 1182(h).

[50] *See* INA 212(h); 8 U.S.C. 1182(h).
[51] *See* 8 C.F.R. 212.7(d).
[52] *See* INA 204(a)(1)(A)(iii),(iv), &(B)(ii),(iii), 8 U.S.C. 1154 (a)(1)(A)(iii),(iv), &(B)(ii),(iii).
[53] *See* 8 C.F.R. 204.2(c)(1)(vii).
[54] *See* INA 245(h)(2)(B), 8 U.S.C. 1255(h)(2)(B)).
[55] *See* INA 208(b)(1); 8 U.S.C. 1158(b)(1), and 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A).
[56] *See* INA 208(a)(2)(B),(C), & (D); 8 U.S.C. 1158(a)(12)(B), (C), & (D).
[57] *See* INA 208(b)(2)(A)(ii); 8 U.S.C. 1158(b)(2)(A)(ii); 8 C.F.R. 208.14(d)(1).
[58] *See* INA 208(b)(2)(B)(i); 8 U.S.C. 1158(b)(2)(B)(i).
[59] *See Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988)).
[60] *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).
[61] *See* INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); *see also INS v. Stevic,* 467 U.S. 407 (1984) (establishing "clear probability" standard).
[62] *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
[63] *See* INA 241(b)(3)(B)(ii), 8 U.S.C. 1231(b)(3)(B)(ii).
[64] *See* INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B).
[65] *See Matter of Y-L, A-G, R-S-R,* 23 I&N Dec. 270 (A.G. 2002). To overcome that presumption, an individual would have to demonstrate the most extenuating circumstances that are both extraordinary and compelling. Those circumstances must include, at a *minimum*: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the individual in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. Only if the individual demonstrates *all* of these criteria would it be deemed appropriate to consider whether other, more unusual circumstance—for example, the prospective distribution was solely for social purposes, rather than profit—might justify departure from the default interpretation that drug trafficking felonies are particularly serious crimes. *See* id.
[66] *See Matter of S-S-,* 22 I&N Dec. 458 (BIA 1999), *overruled in part, Matter of Y-L, A-G, R-S-R,* 23 I&N Dec. 270 (A.G. 2002).
[67] *See Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988)).
[68] *See* INA 244(c)(2)(B)(i), 8 U.S.C. 1254a(c)(2)(B)(i); and 8 C.F.R. 244.4(a). The Board of Immigration Appeals has found that an adjudication of a violation that is not deemed a criminal conviction under state law may not be deemed a conviction for immigration purposes where the adjudication involved a standard of proof less than the criminal "beyond a reasonable doubt" standard; however, the decision leaves open the possibility that a state violation that does involve this standard would be found a criminal conviction for immigration purposes. *See Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004). In fact, the DHS has found individuals ineligible for Temporary Protected Status in at least one state (New York) based on state violations not deemed crimes under state law.
[69] *See* INA 244(c)(2)(A)(iii), 8 U.S.C. 1254a(c)(2)(A)(iii); and 8 C.F.R. 244.3(c)(1).
[70] *See* INA 244(c)(1)(A)(iii), 8 U.S.C. 1254a(c)(1)(A)(iii); and 8 C.F.R. 244.2(d).
[71] *See* INA 244(c)(2)(A)(ii), 8 U.S.C. 1254a(c)(2)(A)(ii); and 8 C.F.R. 244.3(b).
[72] *See* INA 212(h), 8 U.S.C. 1182(h); for waiver of non-immigrant inadmissibility, *see* INA 212(d)(3).
[73] *See Matter of Rico,* 16 I&N Dec. 181 (BIA 1977).
[74] *See* INA 212(h), 8 U.S.C. 1182(h).
[75] *See* INA 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A).
[76] *See* INA 240B(a)(1), 8 U.S.C. 1229c(a)(1).
[77] *See* INA 240B(b)(1), 8 U.S.C. 1229c(b)(1).
[78] *See* INA 276(b)(2), 8 U.S.C. 1326(b)(2).
[79] *See* INA 276(b)(1), 8 U.S.C. 1326(b)(1).

NOTES CHAPTER 4

[1] INA 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A). The statutory definition of conviction applies to "convictions and sentences entered before, on, or after the date of enactment of the 1996 IIRIRA." See IIRIRA §§ 322(c), 304(a)(3). IIRIRA is the Illegal Immigration Reform and Immigrant Responsibility Act, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).
[2] 22 I&N Dec. 512 (BIA 1999).
[3] *Compare Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir.2002) (rejecting Lujan and construing statutory definition of conviction strictly); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (construing statutory definition to hold that non-drug offense was a conviction despite New York State Certificate of Relief for Disabilities); *Fernandez-Bernal v. Attorney General*, 257 F.3d 1304 (11th Cir. 2001) (holding that state expungement for controlled substance offense was a conviction); *with Lujan-Armendariz v INS*, 222 F.3d 728 (9th Cir. 2000) (recognizing that dismissal under rehabilitative scheme analogous to 18 U.S.C. § 3607 is not a conviction for immigration purposes where defendant has no priors).
[4] *Lujan-Armendariz v INS*, 222 F.3d 728 (9th Cir. 2000) (possession); *Cardenas- Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000) (less serious offenses with no federal analogue); and see 21 USC §841(b)(4) providing that distributing a small amount of marijuana without remuneration is treatable under the Federal First Offender Act..
[5] *Murillo-Espinoza v INS*, 261 F.3d 771 (9th Cir. 2001) (determining that expunged non-drug offense was a conviction for immigration purposes).
[6] *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002).
[7] *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) ("We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes . . . We concur with the established view that juvenile delinquency adjudications are not criminal proceedings, but are adjudications that are civil in nature"); *see also Matter of Ramirez-Rivero,* 18 I&N Dec. 135 (BIA 1981) ("It is settled that an act of juvenile delinquency is not a conviction for a crime within the meaning of our immigration laws"); *Matter of CM*, 5 I&N Dec. 327 (BIA 1953).
[8] *See* NYCPL Article 720. New York law provides: "Upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding. . . . A youthful offender adjudication is not a judgment of conviction for a crime or any other offense . . . and all official records and papers . . . are confidential and may not be made available to any person or public agency. . . ." *See* NYCPL 720.10(2).
[9] *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000).
[10] *Id.*
[11] A juvenile delinquency disposition should not, however, qualify as an "admission" for purposes of triggering the controlled substance or moral turpitude grounds of inadmissibility. *Matter of F*, 4 I&N Dec. 726 (BIA 1972). Those grounds allow for a finding of inadmissibility where a noncitizen "admits" the essential elements of a controlled substance or of a crime involving moral turpitude. 8 U.S.C. § 1182(a)(2)(A)(i)(I), INA § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1182(a)(2)(A)(i)(II), INA § 1182(a)(2)(A)(i)(II).
[12] Specifically, Family Unity protection is barred to such an individual if s/he "has committed an act of juvenile delinquency which if committed by an adult would be classified as—(A) a felony crime of violence that has as an element the use or attempted use of physical force against another individual, or (B) a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense." *See* IIRIRA Section 383.
[13] *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001)(deferred adjudication type of disposition did not require finality even though the right to appeal was still possible at a later date); *Pino v. Landon*, 349 U.S. 901 (1955) (holding that an "on file" system in Massachusetts did not constitute sufficient finality to be a basis for deportation under the Act).
[14] *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007); *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir.2002). See also *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999)("deferred adjudication by guilt" under Texas law that held limited appeal rights is final conviction)

[15] *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (petition for certiorari to Supreme Court was still pending as well as an appeal of post conviction relief decision noncitizen ordered removed even though a writ of certiorari to the United States Supreme Court and appeal from a denial of a post-conviction relief petition (neither of which were an "appeal of right," were both still pending).
[16] These cases eroding the finality requirement can be distinguished, in that they deal with a complex Texas deferred adjudication statute that had limited appeal rights (and even so, this decision has been heavily criticized), and situations where it has long been accepted that a conviction is final: petitions for certiorari, and appeals of request for post-conviction relief. The First, Fifth and Seventh Circuits have not yet ruled on a case where there is a clear appeal of right.
[17] *Matter Polanco*, 20 I&N Dec. 894 (BIA 1994).
[18] Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000).
[19] Matter of Pickering, 23 I&N 621 (BIA 2003). See also Beltran-Leon v INS, 134 F.3d 1379 (9th Cir. 1998).
[20] See discussion of *Lujan-Armendariz v Ashcroft, supra* at 4.1.A, supra.
[21] Matter of Eslamizar, 23 I. & N. Dec. 684, 687-88 (BIA 2004).
[22] Id. at 687.
[23] Oregon Revised Statutes § 153.076.
[24] 8 U.S.C. § 1101(a)(48)(B), INA §101(a)(48)(B).
[25] *See* 8 U.S.C. §1101(a)(48)(B), INA § 101(a)(48)(B), which treats a suspended sentence as a sentence regardless of whether the court suspends imposition or execution of the sentence.
[26] *See United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001)
[27] *Matter of Song*, 23 I & N Dec. 173 (BIA 2001) (respecting court order reducing sentence); *Matter of Martin*, 18 I &N Dec. 226 (BIA 1982) (same); *Matter of C-P*, 8 I&N Dec. 504 (BIA 1959) (treating increased sentence court ordered after probation violation as sentence for immigration purposes).
[28] *Matter of D,* 20 I&N Dec. 827 (BIA 1994); *Matter of Chen,* 10 I&N Dec. 671 (BIA 1964).
[29] *See* INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).
[30] *Matter of Song*, 23 I & N Dec. 173 (BIA 2001).
[31] *Matter of M,* 8 I&N Dec. 256 (BIA 1959).
[32] *Matter of N,* 8 I&N Dec. 660 (BIA 1960).
[33] *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007).
[34] 495 U.S. 575 (1990).
[35] *See, e.g.*, *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1990) (interpreting whether conviction constituted a crime of violence under the aggravated felony definition); *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (interpreting whether conviction constituted a burglary under the aggravated felony definition).
[36] 495 U.S. 575 (1990)
[37] U.S. v. Taylor 495, U.S. 575, 601 (1990).
[38] 161 L.Ed.2d 205 (2005).
[39] *Shepard v. U.S.*, 161 L.Ed.2d at 216
[40] See, e.g., Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003) (testimony of petitioner before immigration judge can be used to show domestic violence; however, offense held not to constitute a crime of violence).
[41] Compare, e.g., *Sutherland v. Reno*, 228 F.3d 171 (2d Cir. 2000); *Flores v. Ashcroft,* 350 F.3d 666 (7th Cir. 2003) (in dictum) with *Tokatly v Ashcroft*. 371 F.3d 613 (9th Cir. 2004) .
[42] *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001) (BIA used unidentified material to determine that the victim was a minor and therefore the conviction was for sexual abuse of a minor); *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008) (moral turpitude).
[43] *Matter of Gertsenshtyn*, 24 I&N Dec. 111 (BIA 2007)
[44] *Matter of Babaisakov*, 24 I. & N. Dec. 306, 2007 WL 2842400 (B.I.A. 2007).
[45] 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).
[46] *Matter of Babaisakov*, 24 I. & N. Dec. 306, 2007 WL 2842400 (B.I.A. 2007).
[47] 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).
[48] *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005). Among the cases that the BIA would be attempting to trump are: *Martinez v. Mukasey*, 508 F.3d 255 (5th Cir. 2007) (limiting to record of conviction identification of loss amounts in statute that included loss amounts greater and lesser than $10,000); *Dulal-Whiteway v. U.S. Dept. of*

Homeland Sec., 501 F.3d 116 (2d Cir. 2007) (permitting loss amount to be shown only through record of conviction) *Obasohan v. U.S. Atty. Gen.*, 479 F.3d 785 (11th Cir. 2007) (same); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), cert. denied, 127 S. Ct. 3003, 168 L. Ed. 2d 732 (U.S. 2007) (same); *Alaka v. Attorney General of U.S.*, 456 F.3d 88 (3d Cir. 2006), as amended, (Aug. 23, 2006) (same); *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005) *Chang v. I.N.S*., 307 F.3d 1185 (9th Cir. 2002) (same).

[49] *Matter of Velazquez-Herrera*,[49] 24 I. & N. Dec. 503 (BIA 2008),

[50] *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008).

[51] *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007) (en banc).

[52] *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

[53] *Conteh v. Gonzales,* 461 F.3d 45 (1st Cir. 2006).

[54] *See, e.g., Nijhawan v. A.G. of U.S.,* 523 F.3d 387 (3d Cir. 2008) (discussing Third Circuit cases).

[55] As the Supreme Court explained in *Taylor*, "[The practical difficulties and potential unfairness of a factual [as opposed to categorical] approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of available witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary?" 495 U.S. at 601.

[56] *U.S. v Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)(citation omitted). The BIA has long followed this rule in determining what constitutes a crime involving moral turpitude and also applies to aggravated felonies and other areas. See, e.g., *Matter of Palacios*, 22 I&N Dec 434 (BIA 1998); *Matter of Alcantar*, 20 I&N 801 (BIA 1994); and cases cited below.

[57] *See, e.g., Gonzalez-Martinez v Landon*, 203 F.2d 196, 197 and n.1 (9th Cir), cert. denied 345 U.S. 990 (1953), holding that bigamy under Calif. P.C. §281 involves moral turpitude because case law has established a defense of reasonable good-faith mistake of fact.)

[58] *U.S. v Rivera-Sanchez,* 247 F.3d 905, 908 (9th Cir. 2001) (en banc), quoting from Taylor v. United States, 495 U.S. 575 (1990*). Chang v INS*, 307 F.3d 1185 (9th Cir. 2002*); Matter of Sweetser*22 I&N Dec. 709 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

[59] *See, e.g., Taylor v U.S* 495 U.S. 575, (1990). This doctrine applies across the board in immigration cases and has been upheld regarding moral turpitude (*see e.g., Matter of Mena*, 17 I&N 38 (BIA 1979), *Matter of Short*, 20 I&N Dec. 136 (BIA 1989)(co-defendant's conviction is not included in reviewable record of conviction); Matter of Y, 1 I& N 137 (BIA 1941) (report of a probation officer is not included*), Matter of Cassis*si, 20 I&N 136 (BIA 1963) (statement of state' attorney at sentencing is not included); firearms (see e.g., *Matter of Madrigal-Calvo*, 21 I&N Dec.323 (BIA 1996) (transcript of plea and sentence hearing is included), *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996)(police report is not included), *Matter of Pichardo,* 21 I&N Dec. 330 (BIA 1996)(admission by respondent in immigration court is not included) and aggravated felonies (*see, e.g., Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1990). *See also Abreu-Reyes v INS*, 350 F.3d 966 (9th Cir. 2003) withdrawing and reversing 292 F.3d 1029 (9th Cir. 2002) to reaffirm that probation report is not part of the record of conviction for this purpose, accord with ruling in United States v. Corona-Sanchez*,* supra

[60] *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

[61] *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992)

[62] *See, e.g., Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001) (offense of sexual intercourse where the victim was not able to understand the nature of the act or give knowing consent, which has no age component, held to be sexual abuse of a minor, when evidence apparently from outside the record of conviction indicated that the victim was a young child).

[63] *U.S. v Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc)(emphasis added).

[64] *U.S. v. Velasco-Medina*, 305 F.3d 839, 852 (emphasis in original).

[65] *See, e.g., Chang v INS*, 307 F.3d 1185 (9th Cir. 2002). There the Ninth Circuit held that where a defendant made a written plea agreement that the "loss to the victim" in the Count he pled to was $600, the fact that he was ordered to pay restitution of over $10,000 based on dismissed counts did not make the conviction an aggravated felony as a fraud conviction with loss to the victim of $10,000 or more.

[66] *See,.e.g., Matter of Vargas-Sarmiento*, 23 I&N 651 (BIA 2004) (relying on New York rule that limited factual allegations to the facts in the initial charge).
[67] *See, e.g., Matter of Ghunaim*, 15 I&N 269 (BIA 1975); *Matter of Sanchez-Marin*, 11 I&N 264 (BIA 1965).
[68] *Montero-Ubri v. INS,* 229 F.3d 319 (1st Cir. 2000) (examining related charge to conclude that defendant used document under statute punishing use or possession of a false document).
[69] For example, as discussed above, the Ninth Circuit en banc in *U.S. v Corona-Sanchez* recently stated: "[I]f a defendant enters a guilty plea, the sentencing court may consider the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime. Charging papers alone are never sufficient*."*
[70] *Matter of Espinosa*, 10 I&N 90, 98 (BIA 1962).
[71] *Malta-Espinoza v. Gonzales*, 478 F. 3d 1080, 1083 and n.3 (9th Cir. 2007); *U.S. v Hirsch*, 308 F.2d 562, 567 (9th Cir. 1962) (regarding the same statute, a plea to the charge stated in the conjunctive does not establish guilt under each element); *United States v. Bonanno*, 852 F.2d 434, 441 (9th Cir. 1988). *See also Valansi v Aschroft*, 278 F.3d 203, 216-217 (3d Cir. 2002).
[72] *See, e.g. U.S. v Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2002) (en banc).
[73] See discussion of "modified categorical approach", supra, at subsection 4.3.A.
[74] 18 U.S.C. § 4.
[75] *Matter of Espinoza-Gonzalez*, 21 I & N Dec. 291 (BIA 1999).
[76] *Matter of Danesh*, 19 I & N Dec. 669 (BIA 1988); *Matter of Velasco*, 16 I & N Dec. 281 (BIA 1977);
[77]. *Castaneda De Esper v. INS*, 557 F.2d 79 (6th Cir. 1977) (holding that conviction under 18 U.S.C. § 4 for misprision of conspiracy to possess heroin is not conviction relating to possession or traffic in narcotic drugs under former 8 U.S.C. § 1251(a)(11))
[78] *In re Robles-Urrea,* 24 I. & N. Dec. 22 (BIA 2006)
[79] *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002).
[80] *Matter of Velasco*, 16 I & N Dec. 281 (BIA 1977); *Matter of Espinoza-Gonzalez*, 21 I & N Dec. 291 (BIA 1999).
[81] See 8 USC § 1181(a)(2)(C).
[82] *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997)
[83] In *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997),
[84] *Cabral v. INS*, 15 F.3d 193 (1st Cir. 1994).
[85] *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1072 (9th Cir. 2007) (*en banc*).
[86] *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992).
[87] *Gattem v. Gonzalez*, 412 F.3d 758 (7th Cir. 2005)
[88] *United States v. Aguilar-Ortiz,* 450 F.3d 1271 (11th Cir. 2006).
[89] *United States v. Rivera-Sanchez*, 247 F.3d 905, 908-09 (9th Cir. 2001) (*en banc*) (holding that California conviction for offering to sell marijuana is not a drug-trafficking aggravated felony because it involves solicitation; hence statute was divisible); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (holding that Arizona conviction for generic solicitation, in this case to possess marijuana for sale, is not a conviction for a drug trafficking aggravated felony). The court noted that solicitation is a distinct offense from the principal, and that the aggravated felony definition at 8 USC §§ 1101(a)(48) includes attempt and conspiracy but not solicitation.
[90] *Matter of Beltran*, 20 I&N Dec. 521.
[91] *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997).
[92] See discussion in *Rivera-Sanchez, supra*, and presentation of the argument in *California Criminal Law and Immigration*, § 3.4(G) (ILRC 2005, see www.ilrc.org).
[93] *See*, *e.g., Matter of Alfonso-Bermudez*, 12 I&N 225 (BIA 1967).
[94] The Supreme Court has held that a non-substantive offense is a crime involving moral turpitude in the absence of any language in the statute regarding non-substantive offenses. *Jordan v. De George*, 341 U.S. 223 (1951) (holding that conspiracy to defraud the United States is a crime involving moral turpitude).
[95] 8 U.S.C. § 1227(a)(2)(C), INA §237(a)(2)(C).
[96]. Sui v. INS, 250 F.3d 105, 115 (2d Cir. 2001).
[97]. United States v. Martinez-Garcia, 268 F.3d 460 (7th Cir. 2001).
[98] *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000). See also *Matter of Onyido*, Int. Dec. 3379 (BIA 1999).

[99] *Rebilas v. Keisler*, 506 F.3d 1161, 1163 (9th Cir. 2007).
[100] *Id.*
[101] 8 U.S.C. §1101(a)(43)(U), INA § 1101(a)(43)(U).
[102] 8 U.S.C. § 1227(a)(2)(B)(i), INA §237(a)(2)(B)(i).
[103] *See, e.g United States ex rel. Meyer v. Day* , 54 F.2d 336 (2d Cir. 1931); Matter of Awaijane, 14 I&N Dec. 117 (BIA 1972).
[104] See, e.g., *Demarest v. Manspeaker* 498 U.S. 184 (1991).
[105] *Matter of Hou*, 20 I. & N. Dec. 513 (BIA 1992).
[106] Section 203(b), Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (Oct. 25, 1994).
[107] *Matter of St. John*, 21I&N Dec. 594 (BIA 1996); *Drax v. Reno*, 338 F. 3d 98, (2d Cir. 2003).
[108] 8 U.S.C. § 1227(a)(2)(E), INA § 237(a)(2)(E).
[109] 8 U.S.C. §1101(a)(43)(U), INA § 1101(a)(43)(U).
[110] 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i).
[111] *See, e.g*., *Jordan v. De George*, 341 U.S. 223 (1951); *Matter of S*, 9 I&N Dec. 688 (BIA 1962).
[112] *Jordan v. De George*, 341 U.S. 223 (1951).
[113] *Matter of Hou*, 20 I&N Dec. 513 (BIA 1992).
[114] Section 203(b), Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (Oct. 25, 1994).
[115] *Matter of St. John*, 21 I&N Dec. 594 (BIA 1996); *Drax v. Reno*, 338 F. 3d 98, (2d Cir. 2003).
[116] 8 U.S.C. § 1227(a)(2)(C), INA § 237(a)(2)(C).
[117] *Matter of Sweetser,* 22 I&N Dec. 709 (BIA. 1999)
[118] *Matter of Onyido*, 22 I. & N. Dec. 552 (BIA 1999)(treating conviction for submitting a false claim as an attempted fraud aggravated felony where the unpaid claim exceeded $10,000).
[119] *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (adopting without discussing state definition of "attempt" for purposes of determining whether offense was an attempt under the aggravated felony definition).
[120] *Matter of Davis*, 20 I. & N. Dec. 536, 544-545 (BIA 1992) (allowing state offense to be treated as a conspiracy conviction with a rigorous comparison of the elements).
[121] Cal. Penal Code § 459.
[122] Cal. Penal Code § 664.
[123] 8 U.S.C. § 1101(a)(43)(U), INA § 101(a)(43)(U).
[124] *United States v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001).
[125]*Solorzano-Patlan v.INS*, 207 F.3d 869 (7th Cir. 2000).
[126] *United States v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001).
[127] *United States v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001).
[128] *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000).
[129] The length of a sentence affects, among other things, whether a defendant qualifies for the petty offense exception to moral turpitude inadmissibility pursuant to INA § 212(a)(2)(A)(ii)(II) [8 U.S.C.A. § 1182(a)(2)(A)(ii)(II)]. A noncitizen qualifies for the exception if he or she has one conviction for one crime involving moral turpitude that has a maximum sentence of a year or less and for which the defendant received a sentence of a year or less
[130] Whether an offense is a felony or misdemeanor affects, among other things, whether an offense is a crime of violence aggravated felony as defined in INA § 101(a)(43)(F) [8 U.S.C.A. § 1101(a)(43)(F)]. The definition of crime of violence is different depending on whether the offense is a felony or misdemeanor..
[131] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 6 A.L.R. Fed. 2d 619 (2004)
[132] *Apprendi v. New Jersey*,, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
[133] In *Almendarez-Torres v. U.S.*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Supreme Court held that the increased punishment for having prior convictions under 8 U.S.C.A. § 1326, the illegal reentry statute, did not define a separate offense but rather is a sentencing enhancement
[134] *Matter of Martinez-Zapata*, 24 I. & N. Dec. 424, 429, 2007 WL 4624550 (B.I.A. 2007), overruling *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 1992 WL 323803 (B.I.A. 1992), which held that a noncitizen convicted of theft with a firearm was not deportable for the firearm ground of deportability because the use of the gun in the commission of the offense did not constitute a distinct offense, but merely

increased the punishment for the theft.
[135] *Mattter of Martinez-Zapata,* 24 I. & N. Dec. 424, (BIA. 2007).

NOTES CHAPTER 5

[*] In preparing this national manual, we extensivelyreproduced verbatim or modified portions of the 4th and prior editions of Manuel D. Vargas, *Representing Immigrant Defendants in New York* (New York State Defenders Association ("NYSDA") Immigrant Defense Project ("Representing Noncitizen Criminal Defendants in New York"), with NYSDA's permission. The text of this Section 5 has been reproduced, with modifications, from portions of Chapter 5 thereof.
[1] *See* INA 101(a)(15)(S)(i), 8 U.S.C. 1101(a)(15)(S)(i).
[2] *See* INA 101(a)(15)(S)(ii), 8 U.S.C. 1101(a)(15)(S)(ii).
[3] See 8 CFR §214.2(t)(4).
[4] *See* INA 214(k)(1), 8 U.S.C. 1184(k)(1).
[5] *See* INA 212(d)(1), 8 U.S.C. 1182(d)(1)).
[6] *See* INA 101(a)(15)(T)(i), 8 U.S.C. 1101(a)(15)(T)(i).
[7] *See* INA 245(l); 8 U.S.C. 1255(l).
[8] See 22 USCS § 7102.
[9] *See* INA 214(o)(2), 8 U.S.C. 1184(o)(2).
[10] *See* INA 214(o)(1), 8 U.S.C. 1184(o)(1); 8 CFR 214.11(c).
[11] *See* INA 212(d)(13), 8 U.S.C. 1182(d)(13).
[12] *See* INA 101(a)(15)(U)(i), 8 U.S.C. 1101(a)(15)(U)(i).
[13] *See* INA 245(l), 8 U.S.C. 1255(l).
[14] *See* INA 214(p)(2), 8 U.S.C. 1184(p)(2).
[15] *See* INA 212(d)(13), 8 U.S.C. 1182(d)(13).
[16] *See* Yates, Associate Director of Operations, Centralization of Interim Relief for U Nonimmigrant Status Applicants, Memorandum for Director, Vermont Service Center (Oct. 8, 2003), *posted at* http://www.uscis.gov/graphics/lawsregs/handbood/UCntrl100803.pdf.
[17] *See Margalli-Olivera v. INS,* 43 F.3d 345 (8th Cir. 1994); *Thomas v. INS,* 35 F.3d 332 (9th Cir. 1994); *Ramallo v. Reno,* 931 F. Supp. 884 (D.D.C. 1996).
[18] *See U.S. v. Igbonwa,* 120 F.3d 437 (3d Cir. 1997) ("a promise made by the United States Attorney's Office relating to deportation does not bind the INS [now DHS] without explicit authority from the INS"), *cert. denied* 118 S.Ct. 1059; *San Pedro v. U.S.,* 79 F.3d 1065 (11th Cir. 1996), *cert. denied* 519 U.S. 980 (1996); see also 28 U.S.C. 0.197 ("The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service of the Commissioner's delegate").
[19] *See* 8 CFR 214.11 and 8 CFR 212.16.
[20] *See* 8 CFR 214.11(h)(2).
[21] *See* 8 CFR 214.11(f)(3).
[22] *See* Cronin, Office of Programs, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas, Memorandum to Michael Pearson, Office of Field Operations, INS Memo. HQINV 50/1 (Aug. 30, 2001) (also available on Domestic Violence section of the National Immigration Project of the National Lawyers Guild website at <http://www.nationalimmigrationproject.org/>).
[23] *See* INA 214(p)(1), 8 U.S.C. 1184(p)(1).
[24] *See id.*
[25] *See* INA 214(k)(4)(B), 8 U.S.C. 1184(k)(4)(B)).
[26] *See* 8 CFR 214.11(p).
[27] *See* INA 212(d)(1), 8 U.S.C. 1182(d)(1)); 8 CFR 214.11(t).
[28] *See* NYCPL 170.40 (misdemeanor charge) and NYCPL 210.40 (felony charge).
[29] *See* INA 237(a)(2)(E).
[30] *See* NYCPL 220.50(7).

[31] *Id.*
[32] *See Matter of Winter,* 12 I&N Dec. 638 (BIA 1967, 1968).
[33] *See* NYCPL 220.50(7).
[34] *See, e.g., People v. Ford,* 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995).
[35] *See* NYCPL 220.60(3).
[36] *See, e.g., People v. Kadudu,* 425 N.W.2d 784, 169 Mich. App. 278 (1988) ("trial court did not abuse its discretion in allowing immigrant defendant to withdraw his guilty plea on ground that he did not know when he pled guilty, that, because of his conviction, he would be deported"); *People v. Giron,* 11 Cal.3d 793, 523 P.2d 636, 114 Cal.Rptr. 596 (1974) (trial court had discretion to permit withdrawal of guilty plea on the ground that defendant did not realize at the time he entered the plea that deportation would be a consequence thereof).
[37] *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under Idaho law is not a conviction by analogy to the Federal First Offender Act).
[38] *See Pino v. Landon,* 349 U.S. 901 (1955); *Marino v. INS,* 537 F.2d 686 (2d Cir. 1976); *Matter of Ozkok,* 19 I&N Dec. 546 at n.7 (BIA 1988)("It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived"); *but see Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2003); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Moosa v. INS*, 171 F.2d 994 (5th Cir. 1999) ("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of "conviction" found in IIRIRA § 322(a)").
[39] *See Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970)(state court vacatur of conviction means no conviction exists under former 241(a)(11)); *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963)(state court grant of new trial and *nolle prosequi* disposition eliminated narcotics conviction for deportation purposes). Pardons may prevent deportation for crimes of moral turpitude, multiple criminal convictions, and aggravated felonies, but not for controlled substances, firearms, and domestic violence offenses. *See* INA 237(a)(2)(A)(v), 8 U.S.C. 1227(a)(2)(A)(v)).
[40] *See Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005) (trial court's decision to modify or reduce a noncitizen's criminal sentence nunc pro tunc is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982).
[41] *See Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).
[42] *Id.*, at 15; *see also Matter of Adamiak*, 23 I&N dec. 878 (BIA 2006) (conviction vacated for failure of the trail court to advise the noncitizen defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz,* 22 I&N Dec. 1378 (BIA 2000) ("We will . . . accord full faith and credit to this state court judgment [vacating a conviction under New York state law]").
[43] The Board of Immigration Appeals has found that an adjudication of a violation that is not deemed a criminal conviction under state law may not be deemed a conviction for immigration purposes where the adjudication involved a standard of proof less than the criminal "beyond a reasonable doubt" standard; however, the decision leaves open the possibility that a state violation that does involve this standard would be found a criminal conviction for immigration purposes. *See Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).
[44] *See* INA 237(a)(2)(B)(i), 8 USC 1227(a)(2)(B)(i) (deportation exception) and INA 212(h), 8 USC 1182(h) (discretionary waiver of inadmissibility for certain immigrants).
[45] *See* INA 101(a)(43)(B).
[46] *See Castaneda De Esper v. INS,* 557 F.2d 79 (6th Cir. 1977)(misprision of felony); *Matter of Velasco,* 16 I&N Dec. 281 (BIA 1977)(misprision of felony); *Matter of Batista-Hernandez,* 21 I&N Dec. 955 (BIA 1997) (accessory after-the-fact).
[47] *Compare Matter of Batista-Hernandez,* 21 I&N Dec. 955 (BIA 1997) (18 U.S.C. 3 accessory after the fact is "obstruction of justice" offense) with *Matter of Espinoza-Gonzalez,* 22 I&N Dec. 889 (BIA 1999) (18 U.S.C. 4 misprison of felony is not "obstruction of justice" offense).
[48] BIA decisions holding that solicitation and facilitation may be considered offenses relating to a controlled substance include: *Matter of Beltran,* 20 I&N Dec. 521 (BIA 1992) (solicitation under Arizona law); *Matter of Del Risco,* 20 I&N Dec. 109 (BIA 1989)(facilitation under Arizona law). Federal court

cases supporting a contrary argument include: *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997)(disregarded BIA precedent and held that Arizona solicitation is not an offense relating to a controlled substance because the statute expressly includes only "conspiracy" or "attempt" to violate any law relating to a controlled substance, and not the separate and distinct offense of solicitation); *U.S. v. Dolt,* 27 F.3d 235 (6th Cir. 1994) (held that a conviction for solicitation is not a controlled substance offense for career offender purposes); *U.S. v. Liranzo,* 944 F.2d 73 (2d Cir. 1991) (same).

[49] *See Coronado-Durazo v IN*S, 123 F.3d 1322, 1326 (9th Cir. 1997) (not a deportable offense); *Leyva-Licea v INS*, 187 F.3d 1147 (9th Cir. 1999)(not an aggravated felony).

[50] *See U.S. v. Vigil-Medina*, 2002 U.S. App. LEXIS 4961 (4th Cir. 2002) (unpub'd opinion) (holding New York hindering prosecution in the first degree to be an "obstruction of justice" aggravated felony).

[51] *See* INA 237(a)(2)(B)(i) (deportability exception), and INA 212(h) (eligibility for waiver of inadmissibility).

[52] *See,. e.g., U.S. v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008); *U.S. v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002), *U.S. v. Sanchez-Villalobos,* 412 F.3d 572 (5th Cir. 2005).

[53] *See Matter of Devison-Charles,* 22 I&N Dec. 1362 (BIA 2000), INS motion for reconsideration denied (BIA 2001).

[54] *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under Idaho law is not a conviction by analogy to the Federal First Offender Act).

[55] 18 U.S.C. 16.

[56] An offense involving a minor victim is not necessarily "sexual abuse of a minor" if a finding of the age of the victim is not required for conviction under state law. *See Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); *see also Larroulet v. Ashcroft*, 2004 U.S. App. LEXIS 18518 (9th Cir. 2004) (unpublished opinion). Note also that the federal offense of "sexual abuse of a minor" requires the victim to be (a) between the ages of 12 and 16, and (b) at least four years younger than the defendant, see 18 U.S.C. 2243(a), the Board of Immigration Appeals has found that conviction under a broader state offense may still be considered a "sexual abuse of a minor" AF, *see Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999). For a detailed analysis of federal sex abuse statutes in order to determine what Congress may have meant by the "rape, or sexual abuse of a minor" language in the definition of felony," *see Criminal Defense of Immigrants*, by Norton Tooby with Katherine A. Brady (Law Offices of Norton Tooby, Oakland, California, 1999), Chapter 5.

[57] An assault offense may be considered a crime involving moral turpitude if the offense requires specific intent to inflict bodily harm. *See Matter of O,* 3 I&N Dec. 193 (BIA 1948). Thus, a conviction under a specific intent subsection of a state assault offense might be considered a CIMT. In addition, an assault offense might be considered a crime involving moral turpitude if the elements of the offense, as elaborated upon by the indictment or the plea, establish the use of a deadly or dangerous weapon, regardless of whether specific intent to inflict bodily harm is required. *See, e.g., Matter of Medina,* 15 I&N Dec. 611 (BIA 1976) (assault with a "deadly weapon" based on reckless conduct can be a CIMT), *aff'd sub nom Medina-Luna v. INS,* 547 F.2d 1171 (7th Cir. 1977); *see also U.S. ex rel. Zaffarono v. Corsi,* 63 F.2d 757, 758 (2d Cir. 1933) (noted that conviction of assault with a "dangerous weapon" would be a crime involving moral turpitude). Thus, a conviction under a subsection of a state assault offense involving use of a dangerous weapon might be considered a CIMT. Nevertheless, if an assault offense requires only reckless conduct, it must require a showing of "serious bodily injury" in order to be considered to involve moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). Therefore, a conviction under a subsection of a state assault offense involving reckless conduct should not be considered a CIMT.

[58] The immigration statute provides that the period of seven years residence required for cancellation of removal stops at the earliest of the following events: (1) when the individual is served a notice to appear commencing removal proceedings or (2) when the individual "has committed an offense *referred to in section 212(a)(2)* that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4)." *See* INA 240A(d)(emphasis added). The italicized language thus limits applicability of the second part of this clock-stopping provision to offenses covered by the criminal inadmissibility grounds "referred to" in section 212(a)(2). *See Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

[59] *Compare Matter of Granados,* 16 I&N Dec. 726 (1979)(possession of sawed-off shotgun not a crime involving moral turpitude) with *Matter of S,* 8 I&N Dec. 344 (BIA 1959) (Minnesota "deadly weapons"

offense held to involve moral turpitude because statute included intent to use the weapon against a person).
[60] By reference to Supreme Court precedent addressing what the term "burglary" means in a federal statute where it is not defined, it may also be possible to avoid the aggravated felony label and its consequences if your client negotiates a plea to a burglary offense that could include entry into places that go beyond what is covered by the "generic" meaning of burglary as described by the U.S. Supreme Court in *Taylor v. U.S.,* 495 U.S. 575 (1990). For example, New York burglary in the third degree covers a person who knowingly enters or remains unlawfully in a "building" but the New York Penal Law defines "building" to include not only the "ordinary meaning" of the term, but also in some cases vehicles, watercraft, motor trucks, or motor truck trailers. *See* N.Y. Penal Law Sections 140.20 and 140.00(2).
[61] *See, e.g., Matter of D,* 1 I&N Dec. 143 (BIA 1941) (conviction under California vehicle-taking penal provision, which the BIA said could include "pure prankishness" as well as theft, is not a CIMT where the offense does not require an intent permanently to deprive the owner of the vehicle).
[62] *See U.S. ex rel. Guarino v. Uhl,* 107 F.2d 399 (2d Cir. 1939) (possession of burglary tools not a crime involving moral turpitude); *Matter of S,* 6 I&N Dec. 769 (BIA 1955) (same).
[63] Mere "breaking and entering" or "unlawful entry" do not involve moral turpitude where an intent to commit a crime of moral turpitude is not part of the offense. *See Matter of M,* 9 I&N Dec. 132 (BIA 1960); *Matter of M,* 2 I&N Dec. 721 (BIA 1946); and *Matter of G,* 1 I&N Dec. 403 (BIA 1943).
[64] *See Matter of M,* 2 I&N Dec. 721 (BIA 1946) (conviction under old New York Penal Code section defining burglary to include "being in any building, commit[ting] a crime therein and break[ing] out of same" was held not to be a CIMT where the conviction record did not indicate the particular crime that accompanied the burglary).
[65] *See, supra,* n. [55].
[66] *See, supra,* n. [56].
[67] *See Matter of Pichardo-Sufren,* 21 I&N Dec. 330 (BIA 1996) (held that where the record of conviction failed to identify the subdivision under which the noncitizen defendant was convicted or the weapon he was convicted of possessing, deportability cannot be proved even where the noncitizen testifies in later immigration proceedings that the weapon he possessed was a gun).
[68] *Compare Matter of Madrigal-Calvo,* 21 I&N Dec. 323 (BIA 1996) (held that a noncitizen defendant's admission during his plea and sentencing hearing that the weapon he possessed was a firearm was part of the record of conviction and was sufficient to establish that the defendant was convicted of a firearm offense), with *Matter of Teixeira,* 21 I&N Dec. 316 (BIA 1996) (held that a police report is not part of the record of conviction).
[69] *See Matter of Perez-Contreras,* 20 I&N Dec. 615 (BIA 1992)(held that a conviction for an offense that does not explicitly include a weapon as an element of the offense is not a firearm conviction even if the record of conviction states that the defendant used a firearm).
[70] *See, supra,* n. [60].
[71] *See* INA 237 (a)(2)(A)(i)&(ii).
[72] *See* INA 101(a)(43)(G).
[73] *See* INA 101(a)(43)(C)&(E).
[74] *See Matter of Granados,* 16 I&N Dec. 726 (BIA 1979).
[75] *See, supra,* n. [55].
[76] *See, supra,* n. [56].

APPENDIX A

SAMPLE Client Immigration Questionnaire
For all non-citizen defendants

Purpose: To obtain the facts necessary for an immigration expert to determine current immigration status, possible immigration relief, and immigration consequences of a conviction and. For more information on immigration relief see reference works, or referenced sections of *Defending Immigrants in the Ninth Circuit ("DINC") (www.ilrc.org/criminal.php).*

Documents: Photocopy any immigration documents/passport.

Criminal History: Rap sheets and possible current plea-bargain offenses needed before calling.

Note: While completing this questionnaire, on a separate sheet of paper create one chronology showing dates of criminal acts and convictions as well as the immigration events discussed in the questionnaire.

_____ _____
Client's Name Date of Interview
Immigration Hold: YES NO

_____ ( )_____ _____
Client's Immigration Lawyer Telephone Number Def's DOBirth

1. Entry: Date first entered U.S.? _____ Visa Type:_____

Significant departures: Date:_____ Length: _____ Purpose: _____

Date last entered U.S.? _____ Visa Type: _____
Relief: Undocumented persons here for 10 yrs with citizen or LPR family might be eligible for non-LPR cancellation. See DINC § 11.4.

2. Immigration Status: Lawful permanent resident? YES NO

If so, date client obtained green card? _____
Relief: Consider cancellation of removal for long-time residents; See DINC § 11.1.

Other special immigration status: (refugee), (asylee), (temp. resident), (work permit), (TPS), (Family Unity), (ABC), (undocumented),

(visa - type:_____) Date obtained? _____
Did anyone ever file a visa petition for you? YES NO

Name and #:_____ Date? _____.

Type of visa petition? _____ Was it granted? YES NO

3. Prior Deportations: Ever been deported or gone before an immigration judge? YES

NO Date? _____

Reason? _____

Do you have an immigration court date pending? YES NO

Date? _____

Reason?_____

4. Prior Immigration Relief: Ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?

YES NO Which:_____ Date: _____

5. Relatives with Status: Do you have a U.S. citizen (parent), (spouse),

(child -- DOB(s) _____), (brother) or (sister)?
Do you have a lawful permanent resident (spouse) or (parent)?
_____
Relief: Consider family immigration, see DINC § 11.7.

6. Employment: Would your employer help you immigrate (only a potential benefit to professionals)? YES NO

Occupation:_____ Employer's name/number:_____

7. Possible Unknown U.S. Citizenship: Were your or your spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES NO Were you a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship? YES NO

8. Have you been abused by your spouse or parents? YES NO
Relief: Consider VAWA application, see DINC § 11.10.

9. In what country were you born? _____ Would you have any fear about returning? YES NO Why?
_____
Relief: Consider asylum/withholding, or if recent civil war or natural disaster, see if entire country has been designated for "TPS." See DINC §§ 11.14-17.

10. Are you a victim of serious crime or alien trafficking and helpful in investigation or prosecution of the offense? YES NO
Relief: Consider "T" or "U" visa; see DINC §§ 11.11-12.

APPENDIX B

ALPHABET SOUP – LIST OF COMMON IMMIGRATION ABBREVIATIONS

AF Aggravated Felony

CMT Crime involving Moral Turpitude

CS Controlled Substance

EWI Entry Without Inspection

GMC Good Moral Character, a requirement for applications such as naturalization to U.S. citizenship and relief under VAWA.

INA Immigration and Nationality Act. The Act is published at Title 8 United States Code. Immigration attorneys and administrative cases usually cite according to the Act itself, which has different numbering system than in the U.S. Code. For example, INA 212(h), the so-called "212(h) waiver," appears at 8 USC § 1182(h)

PSR Pre-Sentence Report

SAM Sexual Abuse of a Minor, an aggravated felony regardless of sentence under 8 USC § 1101(a)(48)(A).

SIJS Special Immigrant Juvenile Status.

LPR Lawful permanent resident

TPS The Temporary Protected Status law gives benefits to nationals of designated countries devastated by war or natural disaster.

USC United States Citizen

VAWA The Violence Against Women Act. Immigration provisions of the Act give relief to immigrant victims of abuse by a USC or LPR spouse or parent.

8 USC Title 8 of the United States Code, where the Immigration and Nationality Act appears.

8 CFR Part 8 of the Code of Federal Regulations, where regulations controlling the INS, Border Patrol, and immigration judges appear.

Aggravated Felony Practice Aids

APPENDIX C

The Immigration and Nationality Act (INA) defines "aggravated felony" at §101(a)(43), 8 U.S.C. 1101(a)(43). This Appendix contains the following practice aids to help you determine whether a specific criminal offense (felony or misdemeanor) is or might be an aggravated felony:

For information on the immigration consequences of an aggravated felony conviction, see Chapter 3, *Possible Immigration Consequences of a Noncitizen Criminal Defendant Client's Case*. For strategies to avoid an aggravated felony conviction, see Chapter 5, *Strategies for Avoiding the Potential Negative Immigration Consequences of a New York Criminal Case*.

APPENDIX C-1
Aggravated Felony Categories

In the order listed at §101(a)(43), 8 U.S.C. 1101(a)(43):

(a) Murder, rape, or sexual abuse of a minor

(b) Illicit trafficking in a controlled substance

(c) Illicit trafficking in firearms or destructive devices, or in explosive materials

(d) Certain offenses relating to laundering of monetary instruments or engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeded $10,000

(e) Certain explosive materials and firearms offenses

(f) Crime of violence for which the term of imprisonment is at least one year

(g) Theft or burglary offense for which the term of imprisonment is at least one year

(h) Certain offenses relating to the demand for or receipt of ransom

(i) Certain offenses relating to child pornography

(j) Certain offenses relating to racketeer influenced corrupt organizations, or certain gambling offenses, for which a sentence of one year imprisonment or more may be imposed

(k) Offense relating to the owning, controlling, managing, or supervising of a prostitution business; or certain offenses relating to transportation for the purpose of prostitution; or certain offenses relating to peonage, slavery, and involuntary servitude

(l) Certain offenses relating to gathering or transmitting national defense information, disclosure of classified information, sabotage, or treason; or certain offenses relating to protecting the identity of undercover agents

(m) Offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or certain offenses relating to tax evasion in which the revenue loss to the government exceeds $10,000

(n) Certain offenses relating to alien smuggling, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent

(o) Certain improper entry or illegal reentry offenses committed by an alien who was previously deported on the basis of an aggravated felony conviction

(p) Offense which is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument, or certain other offenses relating to document fraud, for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent

(q) Offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more

(r) Offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year

(s) Offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness for which the term of imprisonment is at least one year

(t) Offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years imprisonment or more may be imposed

(u) Attempt or conspiracy to commit any of the above offenses

APPENDIX C-2
List of Offenses That Might Be Aggravated Felonies

NOTE: Bracketed capital letters refer to the relevant subsection of the definition of "aggravated felony" at INA §101(a)(43), 8 U.S.C. 1101(a)(43). (see Appendix C-1).

Accessory after the fact [S] if deemed an "obstruction of justice" offense and if the defendant is sentenced to a term of imprisonment of at least one year

Aggravated sexual abuse [A, F] under category **[A]** if deemed "sexual abuse of a minor" (see entry below for "Sexual abuse of a minor"; or under category **[F]** if deemed a "crime of violence" (see entry below for "Crime of violence") if the defendant is sentenced to a term of imprisonment of at least one year

Alien smuggling offense [N] described in 8 U.S.C. 1324(a)(1)(A) or (2), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act

Arson [F] if deemed a "crime of violence" (see entry below for "Crime of violence") if the defendant is sentenced to a term of imprisonment of at least one year

Assault [F] if deemed a "crime of violence" (see entry below for "Crime of violence") if the defendant is sentenced to a term of imprisonment of at least one year

Attempt [U] to commit any aggravated felony

Bail jumping [T] if the underlying offense is a felony for which a sentence of 2 years' imprisonment or more may be imposed

Bribery [S, R] if deemed an offense relating to "bribery of a witness" or "commercial bribery," and if the defendant is sentenced to a term of imprisonment of at least one year

Burglary [G, F] if deemed a "burglary" offense, an attempted "theft" offense, or a "crime of violence" (see entry below for "Crime of violence"), and if the defendant is sentenced to a term of imprisonment of at least one year

> NOTE: There may be an argument that a state burglary offense that penalizes vehicular burglary is not a "burglary" offense based on the U.S. Supreme Court decision in *Taylor v. U.S.*, 495 U.S. 575 (1990), discussed in Chapter 5, section 5.6; however, depending on what the record of conviction shows, it might be deemed a "crime of violence."

Child abuse [F], if deemed a "crime of violence" (see entry below for "Crime of violence") if the defendant is sentenced to a term of imprisonment of at least one year

Child pornography offense [I] described in 18 U.S.C. 2251, 2251A, or 2252

Commercial bribery offense [R] if the defendant is sentenced to a term of imprisonment of at least one year

Conspiracy [U] to commit any aggravated felony

Contempt [F, S] if deemed a "crime of violence" (see entry below for "Crime of violence") or an "obstruction of justice" offense, and if the defendant is sentenced to a term of imprisonment of at least one year

Controlled substance offense [B] if deemed "illicit trafficking in a controlled substance," including a "drug trafficking crime" as defined in 18 U.S.C. 924(c)

DEFINITION: "Controlled substance" is defined in the federal Controlled Substances Act at 21 U.S.C. 802(6) to include a drug or other substance, or immediate precursor, included in the five federal schedules of controlled substances published at 21 U.S.C. 812.

DEFINITION: "Drug trafficking crime" is defined in 18 U.S.C. 924(c) as "any felony punishable" under the federal Controlled Substances Act (21 U.S.C. 801 et seq.), the federal Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the federal Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), AND simple possession drug offenses when the defendant has a prior drug conviction (which has become final) or is convicted of possession of more than five grams of cocaine base, meaning crack cocaine, or of any amount of flunitrazepam.

NOTE: Whether a particular state drug offense is included in the "drug trafficking crime" aggravated felony category has been subject to much litigation. That issue has now been resolved, at least in part, by the U.S. Supreme Court's decision in *Lopez v. Gonzales*, No. 05-547 (Dec. 5, 2006, just before publication of this edition). Under *Lopez*, all state first-time drug possession offenses—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—that have no trafficking component are NOT aggravated felonies, even if classified as a felony by the state. *Lopez* leaves unclear, however, whether the aggravated felony term may include a state second or subsequent drug simple possession offense where the state has not charged or proven a prior drug conviction, or whether it may include some New York misdemeanor sales (e.g., criminal sale of marijuana in the fourth degree).

Counterfeiting offense [R, M] under category **[R]** if the defendant is sentenced to a term of imprisonment of at least one year, or under category **[M]** if the offense is deemed a "fraud or deceit" offense (see entry below for "Fraud or deceit" offense) and if the loss to the victim or victims exceeds $10,000

Crime of violence [F] as defined in 18 U.S.C. 16 if the defendant is sentenced to a term of imprisonment of at least one year

DEFINITION: "Crime of violence" is defined in 18 U.S.C. 16 to include "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Criminal facilitation, see "Criminal Facilitation" in Appendix E

Criminal possession of a controlled substance [B], see "Controlled substance offense"

Criminal possession of a weapon [E, F], see "Weapon, possession"

Criminal possession of marijuana [B], see "Controlled substance offense"

Criminal possession of precursors of controlled substances [B], see "Controlled substance offense"

Criminal possession of stolen property [G], see "Theft offense"

Criminal sale of a controlled substance [B], see "Controlled substance offense"

Criminal sale of a firearm [C], see "Firearm or explosive materials offense"

Criminal sale of marijuana [B], see "Controlled substance offense"

Criminal solicitation, see "Criminal Solicitation" in Appendix E

Document fraud offense [P, M] under category **[P]** if is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. 1543 or is described in 18 U.S.C. 1546(a), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act if the defendant is sentenced to a term of imprisonment of at least 12 months; or under category **[M]** if deemed a "fraud or deceit" offense (see entry below for "Fraud or deceit" offense) and if the loss to the victim or victims exceeds $10,000

Drug paraphernalia, criminally using [B], see "Controlled substance offense"

Explosive materials offense [C, E, F], see "Firearm or explosive materials offense"

Facilitation, see "Criminal Facilitation" in Appendix E

False imprisonment [F], see "Unlawful imprisonment"

Firearm or explosive materials offense [C, F, E] under category **[C]** if deemed "illicit trafficking in firearms or destructive devices or in explosive materials;" or under category **[F]** if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year; or under category **[E]** if described in 18 U.S.C. 842(h) or (i) or 844(d),(e),(f),(g),(h), or (i) (relating to explosive materials offenses), 18 U.S.C. 922(g)(1),(2), (3),(4) or (5),(j),(n),(o),(p), or (r) or 924(b) or (h) (relating to firearms offenses), or in section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses)

DEFINITIONS:

- "Firearm" is defined in 18 U.S.C. 921(a)(3) to include "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."
- "Destructive device" is defined in 18 U.S.C. 921(a)(4) to include "(A) any explosive, incendiary, or poison gas—(i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projection by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either

designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational, or cultural purposes."

- "Explosive material" is defined in 18 U.S.C. 841(c) to include "explosives, blasting agents, and detonators." For specific detailed definitions of "explosives," "blasting agents," and "detonators," see 18 U.S.C. 841(d),(e), & (f).

NOTE: Firearm offenses that may constitute aggravated felonies include those covered under category **[C]** as an "illicit trafficking" offense (e.g., Criminal sale of a firearm) or under category **[F]** as a "crime of violence" (any firearm offense that meets the federal definition of a crime of violence in 18 U.S.C. 16—see entry above for "Crime of violence") with a prison sentence of one year or more. It is uncertain to what extent category **[E]** includes additional state firearm offenses. In *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), the Board of Immigration Appeals held that category **[E]** may cover state analogues to those federal offenses cited in category **[E]**, regardless of whether the state offense contains the federal jurisdictional element of "affecting interstate commerce". In that case, the BIA held that possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code is an aggravated felony under category E because it is "described in" 18 U.S.C. 922(g)(1) (1994). *See id.*

Forgery offense [R, M] under category **[R]** if the defendant is sentenced to a term of imprisonment of at least one year, or under category **[M]** if the offense is deemed a "fraud or deceit" offense (see entry below for "Fraud or deceit" offense) and if the loss to the victim or victims exceeds $10,000

Fraud or deceit offense [M] if the loss to the victim or victims exceeds $10,000

NOTE: An *attempted* fraud or deceit offense may fall under category U/M if the *attempted* loss to the victim or victims exceeds $10,000 (even if there is no actual loss)

Gambling offense [J] described in 18 U.S.C. 1084 (if it is a second or subsequent offense) or in 18 U.S.C. 1955, and for which a sentence of one year imprisonment or more may be imposed

Grand larceny [G] if the defendant is sentenced to a term of imprisonment of at least one year

Hindering prosecution [S] if deemed an "obstruction of justice" offense and if the defendant is sentenced to a term of imprisonment of at least one year

Illegal entry offense [O] described in 8 U.S.C. 1325(a) committed by an alien who was previously deported on the basis of an aggravated felony conviction

Illegal reentry offense [O] described in 8 U.S.C. 1326 committed by an alien who was previously deported on the basis of an aggravated felony conviction

Kidnapping [F, H] if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year or if described in 18 U.S.C. 875, 876, 877, or 1202

Larceny, grand [G] if the defendant is sentenced to a term of imprisonment of at least one year

Larceny, petit [G] if the defendant is sentenced to a term of imprisonment of at least one year

Mail fraud [M] if the offense is deemed a "fraud or deceit" offense (see entry above for "Fraud or deceit" offense) and if the loss to the victim or victims exceeds $10,000

Manslaughter [F], if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Marijuana offense [B], see "Controlled substance offense"

Menacing [F], if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Mischief, criminal [F] if deemed a "crime of violence" (see entry above for "Crime of violence"), and if the defendant is sentenced to a term of imprisonment of at least one year

Money laundering offense [D] described in 18 U.S.C. 1956 or 1957 if the amount of the funds exceeded $10,000

Murder [A]

National security offense [L] described in 18 U.S.C. 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage), 2381 or 2382 (relating to treason), or in 50 U.S.C. 421

Obstruction of justice offense [S] if the defendant is sentenced to a term of imprisonment of at least one year

Passport fraud offense [P] described in 18 U.S.C. 1543, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act if the defendant is sentenced to a term of imprisonment of at least 12 months

Peonage or slavery offense [K] described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, or 1588

Perjury or subornation of perjury [S] if the defendant is sentenced to a term of imprisonment of at least one year

Petit larceny [G] if the defendant is sentenced to a term of imprisonment of at least one year

Prostitution-promoting offense [K] if deemed an offense that relates to the owning, controlling, managing, or supervising of a prostitution business, an offense described in 18 U.S.C. 2421, 2422, or 2433 (relating to transportation for the purpose of prostitution), or an offense described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, or 1588 (relating to peonage, slavery, and involuntary servitude)

Racketeer influenced corrupt organization (RICO) offense [J] described in 18 U.S.C. 1962 for which a sentence of one year imprisonment or more may be imposed

Ransom offense [H] described in 18 U.S.C. 875, 876, 877, or 1202

Rape [A, F] under category **[A]** if deemed "rape" or "sexual abuse of a minor;" or under category **[F]** if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Robbery [G, F] if deemed a "theft" offense or a "crime of violence" (see entry below for "Crime of violence"), and if the defendant is sentenced to a term of imprisonment of at least one year

Sexual abuse of a minor [A, F] under category **[A]** if deemed "rape, or sexual abuse of a minor;" or under category **[F]** if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

> NOTE: There are arguments that a state offense should not be deemed a "sex abuse of a minor" aggravated felony if, for example, the elements of the state offense do not require that the victim be a minor (see discussion in Chapter 5, section 5.5).

Smuggling, alien [N] described in 8 U.S.C. 1324(a)(1)(A) or (2), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act

Sodomy [A, F] under category **[A]** if deemed "rape" or "sexual abuse of a minor;" or under category **[F]** if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Solicitation, see "Criminal Solicitation" in Appendix E

Stalking [F] if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Stolen property, possession [G] if deemed "receipt of stolen property" and if the defendant is sentenced to a term of imprisonment of at least one year

Tax evasion offense [M] described in section 7201 of the Internal Revenue Code of 1986 if the revenue loss to the government exceeds $10,000

Terrorism [F, L], under category **[F]** if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year, or under category L if described in 18 U.S.C. 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage), 2381 or 2382 (relating to treason), or in 50 U.S.C. 421

Theft offense [G] if deemed a "theft" offense and if the defendant is sentenced to a term of imprisonment of at least one year

Trespass [F], if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Unauthorized use of a vehicle [G, F], if deemed a "theft" offense or a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Unlawful imprisonment [F], if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Vehicle trafficking [R] if offense relating to trafficking in vehicles the identification numbers of which have been altered and if the defendant is sentenced to a term of imprisonment of at least one year

Vehicular manslaughter [F], if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year

Weapon, possession [F, E] under category **[F]** if deemed a "crime of violence" (see entry above for "Crime of violence") and if the defendant is sentenced to a term of imprisonment of at least one year; or under category **[E]** if described in 18 U.S.C. 922(g)(1),(2),(3),(4) or (5),(j),(n),(o),(p), or (r) or 924(b) or (h), or in section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses) (see entry above for "Firearm or explosive materials offense")

NOTE: Weapon possession offenses that may constitute aggravated felonies include those covered under category **[F]** as a "crime of violence" (any weapon offense that meets the federal definition of a crime of violence in 18 U.S.C. 16—see entry above for "Crime of violence") with a prison sentence of one year or more. It is uncertain to what extent category **[E]** includes additional state weapon offenses involving firearms. In *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), the Board of Immigration Appeals held that category **[E]** may cover state analogues to those federal offenses cited in category **[E]**, regardless of whether the state offense contains the federal jurisdictional element of "affecting interstate commerce". In that case, the BIA held that possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code is an aggravated felony under category E because it is "described in" 18 U.S.C. 922(g)(1) (1994). *See id.*

APPENDIX C-3
Sample Aggravated Felony Case Law Determinations

***NOTE**:* A determination as to whether an offense falls within the statutory definition of aggravated felony is based on the elements of the offense as described in the relevant state or federal criminal statute and, in some cases, in the particular individual's record of conviction. Therefore, an aggravated felony determination relating to an offense in one jurisdiction and to one particular individual's record of conviction may not offer a conclusive answer for an offense of the same name in another jurisdiction. The cases collected below should be used as the starting point rather than as a substitute for legal research on the particular offense. Capital letter category references under *HOLDING* are to the relevant subsection of the statutory definition of "aggravated felony" (see Apps. C-1 and J).

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Accessory after the fact	*Matter of Batista Hernandez,* 21 I&N Dec. 955 (BIA 1997); *Matter of Espinoza-Gonzalez,* 22 I&N Dec. 889 (BIA 1999)	18 U.S.C. §3	AF—category S Note: offense falls under category S only if prison sentence of at least one year imposed
Accessory after the fact	*Ramos-Chavez v. Gonzales,* 2006 U.S. App. LEXIS 935 (9th Cir. 2006) (unpub'd opinion)	Cal. Penal Code §32	AF—category S Note: offense falls under category S only if prison sentence of at least one year imposed
Alien smuggling	*Matter of Paulin Guzman-Varela*, 27 Immig. Rptr. B1-35 (BIA 2003) (non-precedent decision)	8 U.S.C. §1325	<u>*NOT*</u> AF under category N* *category N is limited to convictions under 8 U.S.C. §1324 and does not extend to other offenses
Alien smuggling (aiding and abetting illegal entry)	*Matter of Alvarado-Alvina,* 22 I&N Dec. 718 BIA 1999); *Rivera-Sanchez v. Reno,* 198	8 U.S.C. §1325(a)	<u>*NOT*</u> AF under category N <u>*MAYBE*</u> AF under category O (but only if the alien had previously been deported on the basis of an AF conviction)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	F.3d 545 (5th Cir. 1999)		
Alien smuggling (trans-porting aliens)	*Matter of Ruiz-Romero,* 22 I&N Dec. 486 (BIA 1999); *U.S. v. Solis Campo-zano,* 312 F.3d 164 (5th Cir. 2002); *U.S. v. Galindo-Gallego,* 244 F.3d 728 (9th Cir. 2001); *Salas-Mendoza,* 237 F.3d 1246 (10th Cir. 2001)	8 U.S.C. §1324(a) (1)(A)(ii)	AF—category N Exception: in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent.
Alien smuggling (conspiracy to transport and harbor aliens)	*Gavilan-Cuate v. Yetter,* 276 F.3d 418 (8th Cir. 2002)	8 U.S.C. §1324(a) (1)(A)(ii) and (iii)	AF—category N Exception: in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent
Alien smuggling (harboring aliens)	*Castro-Expinosa v. Ashcroft,* 257 F.3d 1130 (9th Cir. 2001); *Patel v. Ashcroft,* 294 F.3d 465 (3d Cir. 2002); *Zhen v. Gonzales*, 2006 U.S. App. LEXIS 8734 (10th Cir. 2006)	8 U.S.C. §1324(a) (1)(A)(iii)	AF—category N Exception: in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent
Alien smuggling (aiding and abetting illegal reentry)	*U.S. v. Virgen-Preciado*, 2006 U.S. Dist. LEXIS 20578 (Dist.Az 2006)	8 U.S.C. 1324(a)(1)(A) (v)(II)	AF—category N

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Alien smuggling (conspiracy to smuggle illegal aliens)	*Chan v. Gantner,* 374 F.Supp. 2d 363 (SDNY 2005)	18 U.S.C. 371 (underlying offense of 8 U.S.C. 1324(a)(2))	AF—category U/N
Annoying or molesting a child	*U.S. v. Pallares-*Galan, 359 F.3d 1088 (9th Cir. 2004);	Cal Penal Code §647.6(a)	<u>*MAYBE*</u> AF under category A as sexual abuse of a minor* *sexual abuse requires more than "improper motivation" (e.g. conduct motivated by desire for sexual gratification is not, by itself, sexual abuse). Statute punishes conduct that would constitute 'sexual abuse' and conduct that would not, such as annoying or molesting without injuring, hurting or damaging the minor. Here, under the modified categorical approach, the record of conviction failed to establish that the conduct for which person was convicted falls within sexual abuse of a minor.
Arson (intention-ally starting a fire)	*Matter of Palacios-Pinera,* 22 I&N Dec. 434 (BIA 1998)	Alaska law (1st degree)	AF—category F crime of violence within 18 U.S.C. §16(b) Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, misde-meanor	*Matter of Martin,* 23 I&N Dec. 491 (BIA 2002)	Conn. Gen. Stat. §53a-61 (a)(1) (3d degree)	AF—category F crime of violence within 18 U.S.C. §16(a)* *but not COV within §16(b), which is confined to felony offenses by its terms, because the offense is a misdemeanor under state law and, because punishable by a maximum sentence of one year, is also a misdemeanor for purposes of federal law *but see *Chrzanoski v. Ashcroft, 327* F.3d 188 (2d Cir. 2003), below. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, misde-meanor	*Chrzanoski v. Ashcroft,* 327 F.3d 188 (2d Cir. 2003)	Conn. Gen. Stat. §53a-61(a)(1) [Note: identi-cal to NYPL §120.00(1) misdemeanor assault]	*NOT* AF under category F as a crime of violence within 18 U.S.C. §16(a)* *although subsection (1) of state statute requires proof that defendant intentionally caused physical injury to another, it does not have as an element (whether statutorily defined or otherwise) that defendant *use physical force* to cause that injury Note: because the offense is categorized as a misdemeanor under state law, it also does not meet the definition of a crime of violence under §16(b)
Assault of a police officer	*Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006)	Conn. Gen. Stat. §53a-167c(a)(1)	AF—category F crime of violence within 18 U.S.C. §16(b)* *assault of a *police officer* while *intentionally preventing* officer from performing his/her duties involves a substantial risk of physical force—this risk is inherent in the offense, even though one may imagine scenarios where the conduct does not create the genuine possibility that force may be used. Note that this is a divisible statute that punishes assault of several categories of people. Court held that a statute that lists alternative elements sequentially, instead of in discrete enumerated subsections, is still divisible; Court then looked at record of conviction to determine that the Respondent had been convicted of assault of a police officer, and did

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			not determine whether the conclusion is same for the other persons protected by statute. Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, felony	*Persaud v. McElroy,* 225 F.Supp. 2d 420 (S.D.N.Y. 2002)	N.Y. Penal Law §120.05(6) (2d degree)	*NOT* AF under category F as crime of violence within 18 U.S.C. §16(a)* or §16(b)** *conviction under state statute, while requiring proof of physical injury, does not require as an element of the offense that the defendant use physical force to inflict that injury **minimal criminal conduct necessary for conviction under state statute need not be conduct that by its nature presents a substantial risk that physical force may be used by the defendant
Assault, simple (reckless)	*Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005)	18 Pa. Cons. Stat. §2701(a)(1)	*NOT* AF under category F as crime of violence within 18 U.S.C. §16(a)* or 16(b)** *"use of force" requires specific intent to use force; recklessness is not sufficient. Although state statute punishes reckless, knowing and intentional conduct, the record of conviction did not establish that Respondent had pled guilty to anything higher than *reckless* simple assault **classified as a misdemeanor under Pennsylvania law
Assault, simple (menacing)	*Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006)	18 Pa. Cons. Stat. §2701(a)(3)	AF—category F crime of violence within 18 U.S.C. §16(a)* *but not within 16(b) because it is classified as a felony under state law *'physical menace,' which requires physical act intended to cause fear of imminent serious bodily injury, categorically involves specific intent to attempt or threaten use of physical force. Court also affirms that 16(a) requires specific intent, and not mere recklessness. Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, felony	*Garcia v. Gonzales*, 465 F.3d 465 (4th Cir. 2006)	N.Y. Penal Law §120.05(4)	*NOT* AF under category F crime of violence within 18 U.S.C. §16(b)* *§16(b) requires substantial risk that force will be employed *as a means to an end in the commission* of the crime, not merely that reckless conduct could result in *injury*. This statute punishes recklessly causing physical injury to another,which does not meet this substantial risk requirement.
Assault with bodily injury, misde-meanor	*U.S. v. Urias-Escobar,* 281 F.3d 165 (5th Cir.), *cert. denied,* 122 S. Ct. 2377 (2002)	Texas law	AF—category F crime of violence* *even though offense is a misdemeanor under state law *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Assault with a deadly weapon/ dangerous instrument, aggravated, attempted	*U.S. v. Ceron-Sanchez,* 222 F.3d 1169 (9th Cir. 2000)	Ariz. Rev. Stat. §13-1204) (A)(2) (along with §§13-100 & 13-1204 (B))	AF—category U/F as attempted crime of violence within 18 U.S.C. §16(a) and §16(b) *Note that conviction was based on reckless driving, and this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004), *infra.* Note: offense falls under category U/F only if prison sentence of at least one year imposed
Assault with a danger-ous weapon	*U.S. v. Ortega-Garcia,* 2001 U.S. App. LEXIS 14266 (10th Cir.) (unpub'd), *cert. denied,* 534 U.S. 883 (2001)	Okl. Stat. Tit. §645 (1983)	AF—category F crime of violence within both 18 U.S.C. §16(a) and §16(b) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Conspiracy to commit bank fraud	*Akkaraju v. Ashcroft*, 118 Fed. Appx. 90 7th Cir. 2004) (unpub'd); *Sharma v. Ashcroft*, 57 Fed. Appx. 998 (3d Cir. 2003) (unpub'd)	18 U.S.C. §371 and §1344	AF—category U/M* *the co-conspirators simply must have contemplated acts that would cause a loss in excess of $10,000; no actual loss must have been suffered by the victim Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud, conspiracy	*Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006)	18 U.S.C. § 371 with 18 U.S.C. §1344	AF—category U/M* *A conviction includes an intent to deceive a bank in order to obtain money or other property. Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Olowu v. Chertoff*, 2005 U.S. App. LEXIS 7126 (3d Cir. 2005)	18 U.S.C. §1344	AF—category M* *where count of conviction incorporates a "scheme to defraud," the amount of loss is based on the entire scheme and amount of restitution, and is not limited to the amount specifically identified in the count of conviction. Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Ogundipe v. DHS*, 2005 U.S. App. LEXIS 14306 (3d Cir. 2005)	18 U.S.C. §1344	AF—category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	(unpub'd)		
Bank fraud	*Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005)	18 U.S.C. §1344	<u>*MAYBE*</u> AF under category M* *'amount of loss' focuses on convicted counts alone and does not include amounts attributable to unconvicted counts, even if plea agreement includes stipulations to 'relevant conduct' in those unconvicted counts for sentencing and restitution on purposes. Unity of victims and common purpose of 'obtaining money for own ends' does not, by itself, create a common scheme (but court does not decide whether amount of loss includes losses from unconvicted counts that are encompassed by an overall fraudulent scheme, as held by 10th Circuit in Khalayleh). Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Chang v. INS,* 307 F.3d 1185 (9th Cir. 2002)	U.S. bank fraud statute	<u>*MAYBE*</u> AF under category M* *conviction under statute does not 'facially qualify' as AF under category M because covered offenses may include offenses for which loss to victims is not more than $10,000; court then looked to the record and held that reliance on the pre-sentence report for information on amount of loss was improper at least where such information was contradicted by explicit language in the plea agreement Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, *see Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Khalayleh v. INS,* 287 F.3d 978 (10th Cir. 2002)	18 U.S.C. §1344(1)	AF—category M Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, *see Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank larceny	*U.S. v. Nwene,* 20 F. Supp.2d 716 (D. N.J. 1998), *aff 'd*, 213 F.3d 629 (3rd Cir.), *cert. denied,* 531 U.S. 864 (2000)	Unspecified	AF—category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed
Battery, aggravated (intentionally causing physical contact)	*Larin-Ulloa v.Gonzales*, 462 F.3d 456 (5th Cir. 2006)	Kan. Stat. Ann. §21-3414(a)(1)(c)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)*
Battery	*Ortega-*	Cal. Penal	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. June 15, 2006)	Code §242	(b)** *under *Leocal*, a 'crime of violence' must actually be violent in nature. Although a conviction under this statute requires 'use of force or violence,' this is a term of art in California state jurisprudence meaning 'harmful or offensive touching' and is satisfied by non-violent force that does not cause bodily harm or pain; mere offensive touching does not rise to the level of 'crime of violence.' **offense is not a felony under California law because it is punishable by a maximum of six months imprisonment in county jail Note that the Court did not address whether and how the modified categorical approach might apply to a conviction under this statute.
Battery causing substantial bodily harm, gross misde-meanor	*U.S. v. Gonzalez-Tamariz,* 310 F.3d 1168 (9th Cir. 2002)	Nev. Rev. Stat. §200.481	AF—category F (even though offense is not a felony under state law) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary, attempted	*U.S. v. Hidalgo-Macias,* 300 F.3d 281 (2d Cir. 2002)	N.Y. law (3d degree)	AF—category U/G Note: but the court did not analyze whether a conviction for vehicle burglary under New York's 3rd degree burglary statute may *not* be an AF "burglary" offense (*cf. Matter of Perez,* 22 I&N Dec. 1325 (BIA 2000) under "Burglary of vehicle" infra) Note: offense falls under category G only if prison sentence of at least one year imposed (in this case, although original sentence imposed was for less than 1 year, the court held that a modified 1+ year sentence following probation violation must be considered the "actual sentence imposed" for category G AF analysis)
Burglary, attempted	*U.S. v. Velasquez*, 2006 U.S. App. LEXIS 13665 (3d Cir. 2006) (unpub'd)	N.Y. Penal Law §§140.25 and 110.00	AF—category U/G burglary offense* *generic definition of burglary is 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.' Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary, attempted	*Wonlah v. DHS*, 2005 U.S. Dist. LEXIS 40 (E.D. Pa. 2005)	18 Pa. Cons. Stat. §3502	AF—category U/G burglary offense* Note: offense falls under category G only if prison sentence of at least one year imposed –court held that this refers to maximum term for indeterminate sentences, not minimum term.
Burglary	*U.S. v. Borbon-Vasquez,* 2000 U.S. App. LEXIS 31861 (2d Cir. 2000) (unpub'd opinion)	New York law (second degree)	AF—category F Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Burglary	*Rivas v. Ashcroft,* 2002 U.S. Dist. LEXIS 16254 (S.D.N.Y. 2002)	N.Y. Penal Law §140.30 (1st degree)	AF—category G as burglary offense Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary, attempted	*United States v. Velasquez,* 2006 U.S. App. LEXIS 13665 (3rd Cir. 2006) (unpub'd opinion)	N.Y. Penal Law §§110/ 140.25	AF—category U/G as attempted burglary offense Note: offense falls under category U/G only if prison sentence of at least one year imposed
Burglary of a habitation	*U.S. v. Guardado,* 40 F.3d 102 (5th Cir. 1994)	Tex. Penal Code Ann. §30.02	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of a non-residential building	*U.S. v. Rodriguez-Guzman,* 56 F.3d 18 (5th Cir. 1995)	Tex. Penal Code Ann. §30.02	AF—category F as crime of violence under §16(b) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary	*U.S. v. Velasco-Medina,* 305 F.3d 839 (9th Cir. 2002)	Cal. Penal Code §459 (2d degree)	<u>*MAYBE*</u> AF under category G burglary offense* *conviction under statute does not 'facially qualify' as a burglary offense under category G because statute encompasses conduct that falls outside the generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime; court then held that the charging papers and abstract of judgment in the record established that defendant's conviction involved the requisite elements of generic burglary for purposes of category G Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary	*Maddela v. INS*, 65 Fed. Appx. 125 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §459	<u>*MAYBE*</u> AF under category G burglary offense* *conviction under statute does not "facially qualify" as burglary AF because it punishes conduct that may fall outside generic definition of burglary, which is (1) an unlawful or unprivileged entry into, or remaining in, (2) a building or structure, with (3) intent to commit a crime. State statute is broader than this generic definition because it does not require that the entry be unlawful. Court then held that record of conviction established that person pled guilty to all elements of generic definition, including unlawful entry, and conviction was therefore AF. Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Burglary	*U.S. v. Fernandez-Cervantes,* 2001 U.S. App. LEXIS 15910 (9th Cir. 2001) (unpub'd opinion)	Cal. Penal Code §459	<u>*MAYBE*</u> AF under category G as burglary offense* <u>*NOT*</u> AF under category G as theft offense** *conviction under statute does not 'facially qualify' as AF under category G as burglary offense because reaches conduct that may fall outside the generic definition of burglary (e.g. statute criminalizes both lawful and unlawful entry into a building); court then held that documents in the record did not indicate whether defendant's entry was unlawful as required under the generic burglary definition **entry with mere *intent* to commit theft is not a 'theft offense' (cf. Ninth Circuit's subsequent definition of 'theft offense' in *U.S. v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002), infra, at "Theft, petty (with prior)"
Burglary	*U.S. v. Solis-Estrada,* 1995 U.S. App. LEXIS 21024 (9th Cir. 1995) 1995) (unpub'd opinion)	Cal. Penal Code §460(1) (1st degree)	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of vehicle	*Matter of Perez,* 22 I&N Dec. 1325 (BIA 2000)	Tex. Penal Code Ann. §30.04(a)	<u>*NOT*</u> AF under category G as a burglary offense* *vehicle burglary does not fall within the generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime Note: but court did not reach issue of whether offense may be an AF under category G as a 'theft offense' or under category F as a 'crime of violence'
Burglary of vehicle	*Solorzano-Patlan v. INS,* 207 F.3d 869 (7th Cir. 2000)	720 Ill. Comp. Stat. 5/19-1(a)	<u>*MAYBE*</u> AF—category F as crime of violence within 18 U.S.C. §16(b)* *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* <u>*NOT*</u> AF under category G as a burglary offense** *statute is divisible because it criminalizes both conduct that does and conduct that does not involve substantial risk that physical force may be used; case was remanded so that IJ may review the charging papers to determine whether conduct involved substantial risk that physical force may be used so as to fall under category F Note: offense falls under category F only if prison sentence of at least one year imposed **vehicle burglary does not fall within generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime Note: but court did not reach issue of whether offense was an AF under category G as a 'theft offense'

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Burglary of vehicle	*U.S. v. Alvarez-Martinez,* 286 F.3d 470 (7th Cir.), *cert. denied,* 123 S. Ct. 198 (2002)	720 Ill. Comp. Stat. 5/19-1(a)	*MAYBE* AF under category F as crime of violence within 18 U.S.C. §16(a)* *statute is divisible because it encompasses some conduct that is a crime of violence and some that is not; here the presentence report, which indicated that the vehicle's doors were locked and the passenger side window had been pried open, established the use of physical force against the property of another for the offense to fall within §16(a) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of vehicle	*U.S. v. Martinez-Garcia,* 268 F.3d 460 (7th Cir. 2001), *cert. denied,* 534 U.S. 1149 2002)	Illinois law	AF—category U/G as attempted theft offense* *NOT* AF under category U/G as attempted burglary offense (following *Solorzano-Patlan,* supra) *court defined 'attempt', for purposes of category U analysis, as (i) an intent to commit a crime and (ii) a substantial step toward its commission; then found that the information to which defendant had pled guilty established the necessary intent to commit theft and that a substantial step (the unlawful entry into the vehicle without consent) had been taken toward it Note: offense falls under category U/G only if prison sentence of at least one year imposed
Burglary of vehicle	*U.S. v. Guzman-Landeros,* 207 F.3d 1034 (8th Cir. 2000)	Texas Law	AF—category F crime of violence within 18 U.S.C. §16(b)* *court did not reach issue of whether offense was also an AF under category G *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of vehicle	*Ye v. INS,* 214 F.3d 1128 (9th Cir. 2000)	Cal. Penal Code §459	*NOT* AF under category F (entry of a vehicle is not necessarily violent in nature) *NOT* AF under category G as a burglary offense* (vehicle burglary does not fall within generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime) *but court did not reach issue of whether offense was an AF under category G as a 'theft offense'
Burning or exploding (reckless), conspiracy	*Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005)	18 Pa. Cons. Stat. §3301	*NOT* AF under category U/F as crime of violence within 18 U.S.C. 16(a)*or (b)** *use of physical force requires specific intent to employ, generally to achieve some end; mere recklessness as to causing harm is not sufficient. **16(b) requires a substantial risk that actor will intentionally use physical force in committing the offense; substantial risk of damage to property in not sufficient. Here, the risk is only that the reckless act will cause damage, not that the actor will "step in" and commit an intentional act of violence.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Child abuse, criminally negligent	*Matter of Sweetser,* 22 I&N Dec. 709 (BIA 1999)	Colo. Rev. Stat. §18-6-401(1) & (7)(a)(II)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or 16(b)** *Colorado statute is divisible because it encompasses both offenses that do and offenses that do not include as an element 'the use, attempted use or threatened use of physical force against the person or property of another'; court then looked to record of conviction and found that respondent had been convicted of criminal negligence resulting in death of his child, and ruled that such criminal negligence under Colorado law does not include as an element the use, attempted use or threatened use of physical force against the person or property of another such as to fall within category AF as a crime of violence as defined in §16(a). **Colorado statute is divisible because it encompasses both offenses that may and offenses that may not involve a 'substantial risk that physical force against the person or property of another may be used in the course of committing the offense'; court then looked to record of conviction to conclude that defendant had been convicted under that portion of the divisible statute that criminalizes 'permitting a child to be unreasonably placed in a situation which poses a threat', which does not involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, such as to fall within category AF as a crime of violence as defined in §16(b)
Child abuse, misde-meanor (cruelty toward child)	*U.S. v. Saenz-Mendoza,* 287 F.3d 1011 (10th Cir.), *cert. denied,* 123 S. Ct. 315 (2002)	Utah law	AF—category F (even though offense is a misdemeanor under state law) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Child molestation, attempted, misde-meanor	*U.S. v. Marin-Navarette,* 244 F.3d 1284 (11th Cir.), *cert. denied,* 534 U.S. 941 (2001)	Washington Law (third degree)	AF—category U/A (even though offense is a misdemeanor under state law)
Child porn-ography (parent's consent to use of chil-dren in a sexual perform-ance)	*Gonzalez v. Ashcroft*, 369 F.Supp. 2d 442 (S.D.N.Y. 2005)	N.Y. Penal Law §263.05	<u>*MAYBE*</u> AF under categories I or A* *portion of the state statute penalizing consent by parent does not require scienter level of at least "knowing," which is required for a conviction under 18 U.S.C. §2251 (for purposes of AF category I) and also required for an offense to be a "sexual abuse of a minor" AF under category A.
Cocaine [See "Con-trolled Sub-stance" cases, infra]			

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Communication with a minor for immoral purposes	*Parrilla v. Gonzales*, 414 F.3d 1038 (9th Cir. 2005)	Wash. Rev. Code §9.68A.090	<u>*MAYBE*</u> AF under category A as sexual abuse of a minor* *conviction under statute is not categorically 'sexual abuse of a minor' or attempt to commit sexual abuse of a minor because the term 'immoral purposes' includes some conduct that is not 'abusive,' such as talking to a minor for the purpose of allowing him into a live erotic performance. Under the modified categorical approach, court examined the Certificate for Determination of Probable Cause (CDPC) as part of the record of conviction because defendant had explicitly incorporated it into his guilty plea, and found that his conduct was 'sexual abuse of a minor.' Note that Court afforded deference to BIA interpretation of sexual abuse of a minor because the INA did not define the term.
Concealment of merchandise	*Ramtulla v. Ashcroft,* 301 F.3d 202 (4th Cir. 2002)	Va. Code Ann. §18.2-103	AF—category G Note: offense falls under category G only if prison sentence of at least one year imposed
Conspiracy	*Iysheh v. Gonzales,* 437 F.3d 613 (7th Cir. 2006)	18 U.S.C. §371	<u>*MAYBE*</u> AF under category U/M* *Conviction for conspiracy under 18 U.S.C. § 371 may be divisible because it punishes two things: conspiracy to defraud the United States, and conspiracy to commit "any offense" against the United States—only the former requires as an element the intent to deceive or fraud. Here, defendant was convicted of an aggravated felony where the judgment order and plea agreement showed he pled guilty to a count of the superceding indictment; that count charged, among other things, conspiracy to defraud a financial institution in violation of 18 U.S.C. § 1344; and the plea agreement established total loss of $200,000. Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Conspiracy to commit interstate transportation of stolen property	*Omari v. Gonzales,* 419 F.3d 303 (5th Cir. 2005)	18 U.S.C. §§ 371, 2314	<u>*MAYBE*</u> AF under category U/M* *18 U.S.C. § 2314 is divisible in that it does not necessarily involve fraud or deceit. Here, the judgment and indictment do not indicate that Omari was necessarily convicted of an offense involving fraud or deceit, and the plea agreement and colloquy are not a part of the record, so the court concluded that the record does not suffice to establish AF. Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Contact with child's intimate parts	*Dos Santos v. Gonzales*, 440 F.3d 81 (2d Cir. 2006)	Conn. Gen. Stat. §53-21(a)(2)	AF—category F crime of violence within 18 U.S.C. §16(b)* *the affirmative act of touching a *child* who *cannot consent* contains an inherent risk that force may be used. Court affirmed that 16(b) refers only to those offenses in which there is a substantial likelihood that perpetrator will *intentionally* employ physical force, and that the risk to which 16(b) refers is risk of *force* and not simply risk of *harm*. Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Contempt, criminal	*Matter of Alda-besheh,* 22 I&N Dec. 983 (BIA 1999)	N.Y. Penal Law §215.51 (b)(i) (1st degree)	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Contempt, criminal	*Matter of Almonte* (BIA Dec. 5, 2001) (unpub'd opinion)	N.Y. Penal Law §215.51 (b)(iii) (1st degree)	<u>*NOT*</u> AF under category F
Contempt, criminal (disobedience of a court order)	*Alwan v. Ashcroft,* 388 F.3d 507 (5th Cir. 2004)	18 U.S.C. 1401(3)	AF—category S Note: offense falls under category S only if prison sentence of at least one year imposed
Contributing to the delinquency of a minor	*Vargas v. DHS*, 2006 U.S. App. LEXIS 15175 (10th Cir. 2006)	Colo. Rev. Stat. §18-6-701	<u>*MAYBE*</u> AF—category A as sexual abuse of a minor* *state statute punishes inducing, aiding or encouraging a minor to violate a law; whether the offense is sexual abuse of a minor depends on the nature of this predicate offense. *in the instant case, defendant was convicted of encouraging a minor to violate Colo. Rev. Stat. §18-3-404(1)(a), unlawful sexual contact, and therefore, was convicted of 'sexual abuse of a minor'
Controlled substance, aiding and betting simple possession of cocaine (first conviction)	*Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006)	S. D. Codified Laws §22-42-5 (1988); §22-6-1 (Supp. 1997); §22-3-3 (1988) (classified as a felony under South Dakota law)	<u>*NOT*</u> AF under category B (for both immigration and illegal reentry sentencing purposes)* * a state drug offense is a 'felony punishable under the Controlled Substances Act' and therefore a "drug trafficking crime" AF only if it proscribes conduct punishable as a felony under federal law. Conduct made a felony under state law but treated as a misdemeanor under federal law is not a "drug trafficking crime" AF. In this case, the conviction for aiding and abetting simple drug possession is not AF because simple possession is generally treated only as a misdemeanor under federal law. For more on *Lopez, see* App. G, section 1.b
Controlled substance, simple possession of cocaine (first or second conviction)	*Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2002), superceded in part in the 7th Circuit by Gonzales-Gomez v. Achim, 441 F3d 532 (7th Cir. 2006)(see below), and across the	720 Ill. Comp. Stat. §570/402(c) (classified as a felony under Illinois law)	AF—category B* *A state drug offense is a "drug trafficking crime" under 18 U.S.C. §924(c)(2) if it is (i) punishable under the federal Controlled Substances Act, the Controlled Substances Import and Export Act or the Maritime Drug Law Enforcement Act and (ii) a "felony" BIA will determine whether a state drug offense is a "drug trafficking crime" AF (i) by reference to the law of the circuit in which the immigration case arose in those circuits that have interpreted "drug trafficking crime" (whether in the civil immigration context or in the criminal illegal reentry sentencing context) and (ii) in those circuits that do not have an interpretation, BIA will apply the interpretation adopted by the majority of the federal circuit courts Note: Before Supreme Court decision in *Lopez v. Gonzales* (see above), majority of federal circuits had held that a state drug conviction classified

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	country by *Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006) (see above)		as a felony under state law, even if punishable only as a misdemeanor under federal law, was a "felony" for purposes of the "drug trafficking crimes" definition. *Yanez-Garcia* arose out of the 7th Circuit, which at the time did not have a published interpretation of "drug trafficking crime," so BIA applied the interpretation of the majority of federal circuits Note: **Superceded in part by *Lopez,*** which held that state first-time drug simple possession offenses—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are NOT AF. Some federal circuits (e.g. Third Circuit) hold second or subsequent state convictions for simple possession also are not AF—*see* App. G, section 1.b
Controlled substance, simple possession of marijuana (first or second conviction)	*Matter of Elgendi,* 23 I&N Dec. 515 (BIA 2002), superceded by *Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006) (see above)	N.Y. Penal Law §221.10 (CPM, 5th degree, misdemeanor)	NOT AF under category B* *A state drug offense is a "drug trafficking crime" under 18 U.S.C. §924(c)(2) if it is (i) punishable under the Controlled Substances Act and (ii) the convicting jurisdiction classifies the offense as a felony Note: Guided by *Matter of Yanez,* supra, the BIA referenced Second Circuit law because the case arose in that jurisdiction, and held the offense was not a "drug trafficking crime" AF because the convicting jurisdiction (NY) classified the offense as a misdemeanor. Note: **Superceded as to prong (ii) above by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under *federal* law; *Cf. U.S. v. Simpson,* 319 F.3d 81(2d Cir. 2002, as amended through Feb. 7, 2003), infra, under which a second state misdemeanor possession offense may be a "drug trafficking crime" if it is analogous to an offense punishable as a felony under federal law. For more information, *see* App. G, section 1.b
Controlled substance, simple possession of marijuana (first or second conviction)	*Matter of Santos-Lopez,* 23 I&N Dec. 419 (BIA 2002), superceded by *Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006) (see above)	Tex. Penal Code §481.121 (misdemeanor)	NOT AF under category B* *A state drug offense is 18 U.S.C. §924(c)(2) if it is (i) a "drug trafficking crime" under punishable under the Controlled Substances Act and (ii) the prosecuting jurisdiction classifies the offense as a felony Note: Guided by *Matter of Yanez,* supra, the BIA referenced Fifth Circuit law because the case arose in that jurisdiction, and held the offense is not a "drug trafficking crime" AF because the prosecuting jurisdiction (TX) classified the offense as a misdemeanor Note: **Superceded as to prong (ii) above by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under *federal* law; *Cf. U.S. v. Simpson,* 319 F.3d 81(2d Cir. 2002, as amended through Feb. 7, 2003), *infra*, under which a second state misdemeanor possession offense may be a "drug trafficking crime" if it is analogous to an offense punishable as a felony under federal law. For more information, *see* App. G, section 1.b
Controlled substance, simple possession of crack cocaine (second conviction)	*Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006)	Mass. Gen. Laws ch. 94C, § 34 (classified by the state as a misdemeanor or felony, depending on whether the recidivism	MAYBE AF—category B* *a state drug offense may be a "drug trafficking crime" AF if it is (i) punishable as a felony under federal law or (ii) if it is classified as a felony under state law. Both federal and Massachusetts law provide for recidivism-based sentence enhancements that punish a second or subsequent drug offense as a felony, but require that the prior conviction be charged before the government can seek the sentence enhancement. A second state

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
		sentence enhancement has been applied)	misdemeanor drug possession is not punishable as a felony under federal law if the person was not so charged. Here, using the modified categorical approach, the Court held that the second conviction was not punishable as a felony under federal law because the record of conviction for this second offense did not contain any reference to the prior conviction. Note: **Superceded as to prong (ii) above by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under *federal* law—*see* App. G, section 1.b
Controlled substance, possession with intent to distribute marijuana	*Henry v. Gonzales*, 464 F.3d 74 (1st Cir. 2006)	Mass. Gen. Laws ch. 94C, § 32C(a) (misde-meanor)	AF – category B* * A "drug trafficking crime" AF includes a state offense that is punishable as a felony under one of the three enumerated federal statutes. Even if this state statute is broader in scope than these three federal laws, the particular conduct to which respondent pled guilty, possession with intent to distribute, clearly is punishable as a felony under federal law and therefore a "drug trafficking crime" AF.
Controlled substance, traveling in interstate commerce to promote illegal activity	*Urena-Rami rez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003)	18 U.S.C. § 1952 (Travel Act) (felony)	Maybe AF—category B* *"Illicit trafficking" involves illegally "trading, selling or dealing" in specified goods. Here, the Court looked to the plea agreement, which revealed that the petitioner pled guilty to traveling in interstate commerce for the specific purpose of promoting a "business enterprise involving cocaine." The court first held that this conviction related to a controlled substance because there was a "sufficiently close nexus between the violation and the furtherance of a drug-related enterprise." Court then determined that carrying on a business enterprise that deals in narcotics is within the ambit of illicit trafficking.
Controlled substance, simple possession of cocaine (first conviction)	*U.S. v. Restrepo-A guilar,* 74 F.3d 361 (1st Cir. 1996), superceded by *Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006) (see above)	R.I. law (felony)	AF—category B* *A "drug trafficking crime" is an offense that (i) is punish- able under the CSA (or one of the other two specified federal statutes) and (ii) is a "felony." A state drug offense is a "felony" for purposes of the "drug trafficking crime" definition if the offense is a felony under the relevant state's law, even if the offense would be punishable only as a misdemeanor under federal law Note: **Superceded as to prong (ii) above by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under *federal* law—*see* App. G, section 1.b
Controlled substance, simple possession (second conviction)	*U.S. v. Forbes,* 16 F.3d 1294 (1st Cir. 1994), superceded in part by *Lopez v.*	N.Y. Penal Law §220.09 (CPCS, 4th degree, felony)	AF—category B* *One prior drug conviction turns the state felony simple possession offense into a "felony" for purposes of the "drug trafficking crime" definition since the maximum penalty under 21 U.S.C. §844(a) increases to over a year (making it a felony under federal law). Moreover, the offense is a felony under the convicting state's law so,

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	Gonzales, No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)		under the definition of felony in 21 U.S.C. §802(13), is also a felony under federal law. Note: First paragraph above may be modified by *Berhe v. Gonzales*, supra. **Second paragraph above is superceded by Lopez v. Gonzales**, supra, which held a state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b
Controlled substance, sale of a hallucino-genic/ narcotic	*Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003)	Conn. Gen. Stat. § 21a-277(a) (felony)	AF—category B* *State felony conviction constituted "illicit trafficking in a controlled substance" under 8 U.S.C. 1101(a)(43)(B) and was therefore AF. The act of selling a controlled substance is illicit trafficking. *Under the categorical approach, where the record of conviction is inconclusive as to the substance that formed the basis for the conviction, the conviction is not an AF if the state offense covers substances outside the federal definition of "controlled substance." Here, the scope of "narcotic drugs" under Conn. state law is not broader than the scope of "controlled substances" under federal law.
Controlled substance, possession of marijuana (second conviction); and sale of marijuana (first con-viction)	*U.S. v. Simpson,* 319 F.3d 81 (2d Cir. 2002, *as amended* through Feb. 7, 2003), superceded in part by *Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006) (see above)	N.Y. Penal Law §221.15 4th degree misde-meanor) and N.Y. Penal Law §221.40, (CSM, 4th degree, misde-meanor)	AF—category B* (for illegal reentry sentencing purposes) *A drug trafficking offense is an AF when it is (i) an offense punishable under the Controlled Substances Act and (ii) can be classified as a felony under either state or federal law. Here, the misdemeanor possession offense is (i) punishable under the CSA and (ii) because it followed a prior drug conviction, was punishable as a felony under federal law (pursuant to 21 U.S.C. 844(a)'s sentence enhancement). The misdemeanor sale offense is also (i) punishable under the CSA and (ii) punishable as a felony under federal law (pursuant to 21 U.S.C. 841(b)(1)(D)). Note: The court offered "no comment on whether such convictions constitute 'aggravated felonies' for any purpose other than" the federal Sentencing Guidelines. Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, simple possession of cocaine (first con-viction)	*U.S. v. Pornes-Garcia,* 171 142 (2d Cir.), *cert. denied,* 528 U.S. 880 (1999), superceded by *Lopez v. Gonzales, No. 05-547,* 549 U.S. __ (Dec. 5, 2006) (see above)	N.Y. Penal Law §220.18 (attempted CPCS, 1st degree, felony)	AF—category B* (for illegal reentry sentencing purposes) *An offense is a "drug trafficking crime" AF if it is (i) punishable under the Controlled Substances Act and (ii) is a felony under either state or federal law. A prior offense prosecuted as a state law felony satisfies the "felony" requirement, even though it would have resulted in a misdemeanor conviction under federal law Note: **Superceded as to prong (ii) above by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Controlled substance, simple possession of cocaine, attempted (first conviction)	*Aguirre v. INS,* 79 F.3d 315 (2d Cir. 1996)	N.Y. Penal Law §220.18 (CPCS, 2nd degree, felony)	NOT AF under category B (for immigration purposes)* *Because this offense, as simple possession, is not punishable as a felony under federal law. Applies the hypothetical federal felony approach that now has been endorsed by the **Supreme Court in Lopez v. Gonzales**, supra.
Controlled substance, trafficking in marijuana, cocaine, illegal drugs, metham-phetamines, LSD (first or second drug conviction)	*Gerbier v. Holmes,* 280 F.3d 297 (3rd Cir. 2002)	16 Del. Code Ann. §4753A (a)(2)(a) (felony)	MAYBE AF under category B* *A state drug conviction will constitute an AF under category B if the offense is either (i) a felony under state law and contains a "trafficking" (unlawful trading or dealing) component (the "illicit trafficking route"), or (ii) is punishable as a felony under the federal Controlled Substances Act (the "hypothetical federal felony route"). Here, the defendant's conviction was *NOT* an AF under the "illicit trafficking route" because it lacked the trafficking component. Although the state offense was labeled "trafficking in" enumerated drugs, it also punished simple possession; the court therefore looked to the plea agreement to establish that the defendant had been convicted only of possession, which lacks a "trafficking" element. The conviction was not an AF under the "hypothetical fed-eral felony route" because it was not punishable as a felony under the CSA (maximum term if punished under federal law would have been one year, a misdemeanor under federal law)** **A prior drug conviction did not cause the cocaine possession offense to be punishable as a felony under federal law (pursuant to 21 U.S.C. §844(a)'s sentencing enhancement), because the prior conviction was never litigated as part of the criminal proceeding for the cocaine possession (following *Steele v. Blackman,* infra)
Controlled substance, possession with intent to manu-facture, dis-tribute or dispense at least one ounce, and less than five pounds, of marijuana	*Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003)	N.J. Stat. Ann. § 2C: 35-5(b)(11)	MAYBE AF—category B* *The Court applied the same legal standard as *Gerbier v. Holmes*, supra, to determine whether offense was an AF under category B. A conviction under this statute is not a "drug trafficking crime" because the offense is not punishable as a felony under federal law – the state statutory elements may be satisfied by distribution of marijuana without remuneration, and federal law punishes gratuitous distribution of a small amount of marijuana with a maximum sentence of one year imprisonment (i.e. a misdemeanor). Note: The court did not decide whether a conviction under this statute may satisfy the "illicit trafficking" prong of category B.
Controlled substance, simple possession of cocaine (first conviction)	*United States v. Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005), superceded by *Lopez v. Gonzales,* No. 05-547,	Md. Code, Art. 27, 287(e) (misde-meanor)	NOT AF under category B* *A drug trafficking AF is an offense that is (i) a felony and (ii) punishable under the CSA. A state drug offense is a "felony" under prong (i) if it is classified by the state as a felony. It is not a "felony" if it is classified by the state as a misdemeanor but punishable by a term of imprisonment of more than one one year. Here, the offense was classified by the state as a misdemeanor, and therefore did not meet the "felony" requirement, even though it carried a possible sentence of four years imprisonment.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	549 U.S. __ (Dec. 5, 2006) (see above)		Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, simple possession of unknown quantity of cocaine (first conviction)	*U.S. v. Wilson,* 316 F.3d 506 (4th Cir. 2003), superceded by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Va. law (felony)	AF—category B* *The two elements of a "drug trafficking crime" AF are (i) any "felony", that is (ii) punishable under the Controlled Substances Act (or one of the other two specified federal statutes) State possession of cocaine offense can constitute a "felony" within the meaning of the "drug trafficking crime" definition if it is classified as a felony under the relevant state's law, even though the offense would be punishable as a misdemeanor under federal law Note: **Second paragraph above is superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, sale of marijuana (second conviction)	*Smith v. Gonzales,* ___F.3D ___ (5th Cir. 2006), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	N.Y. Penal Law §221.40 (misde-meanor)	NOT AF under category B* * Court indicates that Fifth Circuit precedent may be that a "drug trafficking crime" AF is an offense that (i) is punishable under the CSA (or one of the other two specified federal statutes) and (ii) is a felony under the law of the convicting jurisdiction. However, the Court does not conclusively reach this issue because it finds that this offense is not a drug trafficking crime under either convicting jurisdiction or hypothetical federal felony approach. Under the hypothetical federal felony approach, a second state misdemeanor possession offense is not a drug trafficking crime where the first conviction was not final at the time of the second conviction. The Court held that the first conviction in this case was not final at the time of his second conviction because the period to seek discretionary review of his first conviction had not yet elapsed. Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, simple possession of marijuana (first con-viction)	*U.S. v. Hinojosa-Lopez,* 130 F.3d 691 (5th Cir. 1997), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Tex. Health & Safety Code Ann. §481.121(b)(5) (felony)	AF—category B* *A "drug trafficking crime" AF is an offense that (i) is punishable under the CSA (or one of the other two specified federal statutes) and (ii) is a "felony" A state drug offense is a "felony" for purposes of the "drug trafficking crime" definition if the offense is a felony under the relevant state's law, even if the offense would be punishable only as a misdemeanor under federal law Note: **Superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Controlled cases substance, simple possession of heroin (first conviction)	*U.S. v. Hernandez-Avalos,* 251 F.3d 505 (5th Cir.), *cert. denied,* 534 U.S. 935 (2001), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Colo. Rev. Stat. §18-18-203; 18-18-405; 18-1-105 (felony)	AF—category B* (explicitly for both immigration and illegal reentry sentencing cases) *A "drug trafficking crime" AF is an offense that (i) is punishable under the CSA (or one of the other two specified federal statutes) and (ii) is a "felony" under either state or federal law (following *U.S. v. Hinojosa-Lopez*, supra) The instant offense is a "drug trafficking crime" because it is (i) punishable under the CSA and (ii) a felony under Colorado law Note: **Superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, simple possession of marijuana (first conviction)	*U.S. v. Caicedo-Cuero,* 312 F.3d 697 (5th Cir. 2002), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Tex. Health & Safety Code Ann. §481. 121(b)(3) ("state jail felony")	AF—category B* (following *U.S. v. Hinojosa-Lopez,* supra) *A "state jail felony" offense punishable by a term of up to two years is in substance a felony under Texas law (despite any sentence suspension) Fifth Circuit precedent "suggests" that if an offense is labeled as a felony under state law, it is a "felony" for purposes of whether it is a "drug trafficking crime" AF, even if the offense is not punishable by imprisonment of more than one year (citing *U.S. v. Hernandez-Avalos,* supra, & *U.S. v. Hinojosa-Lopez,* supra)** **These cases "suggest" that the proper definition of 'felony' to apply in this context is 21 U.S.C. §802(13), which asks only whether the state has labeled the crime a felony. Even assuming that the proper definition to use is 21 U.S.C. §802(44), which defines "felony drug offense" as one requiring punishment by "imprisonment for more than one year", the instant offense is a 'felony' because the maximum term of imprisonment is 2 years Note: **Superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, possession of a cocaine (second conviction)	*United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)	Ohio Rev. Code Ann. § 2925.11(A) (felony); Ky. Rev. Stat. Ann. § 218A. 1415(1) (first degree felony)	<u>*MAYBE*</u> AF under category B (in both immigration and sentencing contexts)* * State felony conviction which does not contain a trafficking element must be punishable *as a felony under federal law* in order for it to be deemed a drug trafficking crime AF. A second state possession offense is not "punishable as a felony under federal law" if it occurred before the prior drug conviction was final.
Controlled substance, simple possession of heroin (first conviction)	*Liao v. Rabbett*, 398 F.3d 389 (6th Cir. 2005)	Ohio Rev. Code § 2925.11 (fifth degree felony)	<u>*NOT*</u> AF under category B* *Court, without taking a position on which approach applies, held that offense was not a drug trafficking crime under either the hypothetical felony or guidelines approach. Under the guidelines approach, a state drug offense is not a "felony," even if it is labeled as such, unless it is punishable by a term of imprisonment of more than one year.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			Note: **Cf. *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, trafficking marijuana over 8 ounces, less than 5 pounds (first conviction)	*Garcia-Echaverria v. United States*, 376 F.3d 507 (6th Cir. 2004)	K.R.S. 218A.1421(3) (felony)	AF – category B* *The court does not take a position on the proper analysis to determine whether a state drug offense is a drug trafficking crime AF. However, the court found that the state felony offense is a drug trafficking crime AF even under the more favorable hypothetical federal felony approach. State statute penalizes possession with intent to distribute at least 8 ounces of marijuana, which is analogous to the federal felony offense of distribution. Although federal law contains an exception to the felony classification for gratuitous distribution of a small amount of marijuana, 8 ounces of marijuana is not a "small amount," and would therefore not be covered by this exception. Note: **Cf. *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, simple possession of cocaine (first conviction)	*Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006)	Illinois state law (classified by the state as a felony)	<u>*NOT*</u> AF under category B* *A state law felony that is punishable as a misdemeanor under federal law is not a drug trafficking AF
Controlled substance, simple possession of methamphetamine (second conviction)	*U.S. v. Haggerty,* 85 F.3d 403 (8th Cir. 1996), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above**)**	Cal. Health & Safety Code §1137(a) (felony)	AF—category B* *A drug offense is a "drug trafficking crime" AF if it is (i) punishable under the CSA and (ii) a "felony" Here, the offense is a felony under both federal and state law** **Under federal law, an offense is a felony if the maximum term authorized for the offense is more than one year— here, a prior drug offense causes the second drug possession offense to be punishable by more than a year (pursuant to 21 U.S.C. 844(a)'s sentence enhancement). Under state law, California defines felony as an offense punishable with death or by imprisonment in the state prison—here, the offense was punishable by imprisonment in state prison (that the sentence had been suspended in the instant case did not change the result) Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, purchasing marijuana (first conviction)	*U.S. v. Briones-Mata,* 116 F.3d 308 (8th Cir. 1997), superceded by *Lopez v. Gonzales,*	Florida law (felony)	AF—category B* *A state drug offense can be an AF if the offense is classified as a felony under the relevant state's law, even if the offense would be punishable only as a misdemeanor under federal law Note: **Superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)		G, section 1.b.
Controlled substance, possession of metham-phetamine	*Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004)	Ariz. Rev. Stat. Ann. §13 3407 (felony)	*NOT* AF under category B (for immigration purposes)* *A state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under one of the three enumerated statutes. Court notes that a state offense is "illicit trafficking" drug AF if it contains a trafficking element.
Controlled substance, possession of metham-phetamine (second conviction)	*Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004)	Cal. Health & Safety Code §11377(a) (wobbler offense; misdemeanor conviction)	NOT AF under category B (for immigration purposes)* *The Court applied the same legal standard as *Cazarez-Gutierrez v. Ashcroft,* supra, and *U.S. v. Corona-Sanchez*, infra, to determine whether this offense was an AF under category B. Simple possession of methamphetamine, without considering the separate recidivist enhancements, is punishable as a misdemeanor under federal law, and is therefore not a drug trafficking crime AF. The state offense does not contain a trafficking element, so it is also not an illicit trafficking AF. Court also noted that even if it were to consider the state felony approach, conviction would not be AF. State statute is a California wobbler offense, which is potentially punishable as a felony but is automatically converted to a misdemeanor punishable by a maximum of six months when a state prison sentence is not imposed – which was the situation in this case.
Controlled substance, simple possession of marijuana (first and second conviction)	*United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Arizona statute (misde-meanor)	*NOT* AF under category B (for illegal reentry sentencing cases)* *a drug offense is a "drug trafficking crime" AF if it is (i) punishable under the federal Controlled Substances Act and (ii) a felony *punishable by more than one year's imprisonment* under applicable state or federal law. Punishment includes only punishment for the substantive offense, not recidivist enhancements. (following *U.S. v. Corona-Sanchez*, infra. Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b.
Controlled substance, simple possession (first conviction)	*U.S. v. Arellano-Torres,* 303 F.3d 1173 (9th Cir. 2002), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Nev. Rev. Stat. §453.336(2)	AF—category B (for illegal reentry sentencing cases)* *A drug offense falls under category B if it is (i) an offense of "illicit trafficking in a controlled substance" as defined in 21 U.S.C. §802, or (ii) a "drug trafficking crime" as defined in 18 U.S.C. §924(c). A drug offense will fall within the "drug trafficking crime" definition if it is (i) punishable under the federal Controlled Substances Act and (ii) a "felony", i.e. an offense punishable by more than one year's imprisonment under applicable state or federal law An offense is punishable under the CSA if the "full range of conduct encompassed by the statute of conviction" is punishable by the CSA (citing *U.S. v. Rivera-Sanchez*, infra). If the statute of conviction reaches both conduct that would and conduct that would not be punishable under the CSA, the court may look beyond the statute to certain documents or

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			judicially noticeable facts that clearly establish that the conviction was for an offense punishable under the CSA Here, the state possession offense was held to be a "drug trafficking crime" AF because (i) the court assumed** it was punishable under the CSA and (ii) the offense was punishable by more than one year's imprisonment under Nevada law (a sentence suspension for first-time offenders does not change the result, because under the Nevada statute, the prospect of serving the originally imposed sentence "always hangs over the head of a first-time offender"). *Cf. U.S. v. Robles-Rodriguez,* infra **Note: The court assumed that the state offense was punishable under the CSA (because that issue was not challenged) and observed that it never reached the issued of whether a conviction under the statute 'facially qualifies' as an AF under category B (see *U.S. v. Rivera-Sanchez,* infra) Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b
Controlled substance, marijuana, transport, import, sell, furnish, administer, giver away, or offer to do any of above, or give away or attempt to import or transport	*U.S. v. Rivera-Sanchez,* 905 247 F.3d (9th Cir. 2001) (en banc)	Cal. Health & Safety Code §11360(a)	<u>*MAYBE*</u> AF under category B (for illegal reentry sentencing cases)* *To determine whether a state offense in punishable under the federal Controlled Substances Act, court must determine whether the full range of conduct encompassed by the state statute is punishable under the CSA. A conviction under this "extremely broad" state statute does not 'facially qualify' as AF under category B because it reaches both conduct that would and conduct that would not be punishable under the CSA (e.g. solicitation punish-able under the state statute is not an AF under category B, see *Leyva-Licea v. INS,* infra); case was remanded for a determination of whether other judicially noticeable facts in the record would establish that the conviction involved the requisite elements for purposes of category B
Controlled substance, solicitation to possess for sale marijuana	*Leyva-Licea v. INS,* 187 F.3d 1147 (9th Cir. 1999); *see also U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001), supra	Ariz. Rev. Stat. §§13-1002(A), 13-3405(A)(2)(B)(5)	<u>*NOT*</u> AF under category B* (even if underlying offense is a drug-trafficking offense) *because solicitation is not a listed offense under the federal Controlled Substances Act
Controlled substance, possession of cocaine (first con-viction)	*U.S. v. Ibarra-Galindo,* 206 F.3d 1337 (9th Cir. 2000), *cert. denied,* 531 U.S. 1102 (2001), superceded	Washington law (felony)	AF—category B* (for illegal entry sentencing purposes) *A state drug offense may be a "felony" for purposes of the "drug trafficking crime" definition if it is a felony under state law, even if the offense would be punishable only as a misdemeanor under federal law. Note: **Superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)		
Controlled substance, simple possession (second conviction)	*U.S. v. Garcia-Olmedo,* 112 F.3d 399 (9th Cir. 1997); *U.S. v. Zarate Martinez,* 133 F.3d 1994 (9th Cir.), *cert. denied,* 525 U.S. 849 (1998), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Arizona law (5 grams of marijuana) California law (2.15 grams of cocaine)	AF—category B (for illegal reentry sentencing cases)* *A "drug trafficking AF is an offense that is (i) punishable under the CSA and (ii) a "felony" A second state conviction for simple possession satisfies the "felony" requirement because it is punishable as a felony (imprisonment for more than one year) under federal law (21 U.S.C. §844(a). But see *U.S. v. Arellano-Torres,* 303 F.3d 1173 (9th Cir. 2002), which noted that second state simple possessions are not punishable as felonies under federal law because the Ninth Circuit disregards §844's sentence enhancement penalties for repeat offenders for purposes of the "felony" requirement Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b
Controlled substance, possession of cocaine (with or without intent to distribute) (first conviction)	*U.S. v. Cabrera-Sosa,* 81 F.3d 998 (10th Cir.), *cert. denied,* 519 U.S. 885 (1996), superceded in part by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	New York law (felony)	AF—category B* *To be a "drug trafficking crime" AF, a drug offense must be (i) punishable under the CSA (or one of the other two enumerated statutes) and (ii) a "felony" The state offense was a felony within the meaning of the "drug trafficking crime" definition because it was a felony under New York law Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Controlled substance, distributing marijuana (first conviction)	*U.S. v. Zamudio,* 314 F.3d 517 (10th Cir. 2002)	Utah law (upon compliance with the terms of a "Plea in Abeyance", the offense would be reduced to a misdemeanor)	AF—category B* *as "illicit trafficking in a controlled substance" as defined in 28 U.S.C. §802 Note: Defendant's "Plea in Abeyance" under Utah law was a "conviction" as defined in the INA because defendant entered a guilty plea and was subjected to a penalty in the form of a fine
Controlled substance, possession of cocaine (first conviction)	*U.S. v. Simon,* 168 F.3d 1271 (11th Cir.), *cert. denied,* 528 U.S. 844 (1999), superceded by *Lopez v. Gonzales,* No. 05-547, 549 U.S. __ (Dec. 5, 2006) (see above)	Florida law (felony)	AF—category B* *To be a "drug trafficking crime" AF, a drug offense must be (i) punishable under the CSA (or one of the other two enumerated statutes) and (ii) a "felony" Since the state offense is a felony under state law, it qualifies as a "felony" for purposes of the "drug trafficking crime" definition, even though the offense is punishable only as a misdemeanor under federal law Note: **Superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law—s*ee* App. G, section 1.b
Counterfeiting, conspiracy	*Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006)	18 U.S.C. §371 with 18 U.S.C. §513(a)	AF- category U/M* *A conviction includes an intent to deceive another person, organization or government. Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Counterfeit securities, possession with intent to deceive	*Sui v. INS,* 250 F.3d 105 (2d Cir. 2001)	18 U.S.C. §513(a)	<u>*NOT*</u> AF under category M* (there was no actual loss to victims) <u>*NOT*</u> AF under category U/M* (mere possession does not constitute an "attempt"—does not constitute a substantial step toward creating a loss to victims of more than $10,000). Cf. *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt", infra, for BIA's discussion of "attempt" as applied to category U/M analysis. *but court did not address issue of whether offense may be an AF under category R or U/R
Counterfeit securities, conspiracy to utter and possess with intent to deceive	*Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. 2004)	18 U.S.C. §§371, 513(a),	AF—category U/R Note: offense falls under category R only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Counter-feiting	*Bazuaye v. INS,* 1997 U.S. Dist. LEXIS 2996 (S.D.N.Y. 1997)	U.S. law	AF—category M Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Counterfeit access devices, conspiracy to use and traffic	*Karavolos v. Ashcroft*, 95 Fed. Appx. 397 (3d Cir. 2004) (un-pub'd)	18 U.S.C. §1029(a)(1) and §1029(c)(2)	AF—category M(i) *court used amount of restitution, as stated in judgment of conviction, to determine amount of loss Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Counter-feiting, trademark	*Fofana v. Ridge***,** 2004 U.S. App. LEXIS 23335 (3rd Cir. 2005)(un-pub'd opinion)	18 Pa. C.S.A. § 4119(a)	AF—category R Note: offense falls under category R only if prison sentence of at least one year imposed
Counterfeit obligations, possession	*Albillo Figueroa v. INS,* 221 F.3d 1070 (9th Cir. 2000)	18 U.S.C. §472	AF—category R* Note: offense falls under category R only if prison sentence of at least one year imposed *court did not reach issue of whether offense may also be an AF under category M
Counterfeit securities (conspiracy to utter and possess forged and coun-terfeit securities)	*Wilson v. INS,* 2001 U.S. Dist. LEXIS 19903 (M.D. Pa. 2001)	18 U.S.C. §513(a) and 18 U.S.C. §371	AF—category U/R* Note: offense falls under category U/R only if prison sen- tence of at least one year imposed *court did not reach issue of whether offense may also be an AF under category U/M
Death by motor vehicle, misde-meanor	*U.S. v. Alejo-Alejo,*286 F.3d 711 (4th Cir. 2002)	N.C.Gen. Stat. §20141.4(a)(2)	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Driving under the influence and causing serious bodily injury	*Leocal v. Ashcroft*, 543 U.S. 1 (2004),	Fla. Stat. Ch. §316.193(3)(c)(2)	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *offense must require a higher mens rea than negligent or mere accidental conduct in order to be a "crime of violence" under 18 U.S.C. §§16(a) or (b). §16(b) requires substantial risk of use of force, which does not encompass all offenses which create a substantial risk of injury. *court also observed that the plain and ordinary meaning of "crime of violence" and its emphasis on use of physical force "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses" and reaffirmed, in a footnote, the rule of lenity requiring that

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			ambiguity in statutes with criminal and non-criminal applications be interpreted in the petitioner's favor. Finally, Court did not decide whether an offense that requires mere *reckless* use of force might be a crime of violence.
Driving while intoxicated (operating a motor vehicle while under the influence)	*Matter of Ramos,* 23 I&N Dec. 336 (BIA 2002)	Mass. Gen. Laws ch. 90, §24(1)(a)(1)	<u>*NOT*</u> AF under category F* *On whether driving under the influence is a crime of violence (i) BIA will follow the law of the circuit in which the immigration case arose in those circuits that have addressed the question and (ii) in those circuits that have not yet ruled on the issue, BIA will require that the elements of the offense reflect that there is substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence under §16(b) and will require that an offense be committed *at least recklessly* to meet this requirement The First Circuit, in which the present case arose, had not yet ruled on whether driving under the influence is a crime of violence, so the BIA applied its own requirements and held that a violation of the Mass. statute is not a crime that, by its nature, involves a substantial risk that the perpetrator may use force to carry out the crime: even if there is a risk that an accident might occur, a conviction for the offense does not require a showing that the perpetrator intentionally or volitionally used force against another in the course of driving under the influence; and no basis exists to conclude that the perpetrator might have to cause such an accident in order to carry out his crime (crime is accomplished when the perpetrator unlawfully drives while under the influence) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra.*
Driving while intoxicated	*Matter of Olivares,* 23 I&N Dec. 148 (BIA 2001)	Tex. Penal Code §§49.04 and 49.09	<u>*NOT*</u> AF under category F
Driving while intoxicated (with two prior DWIs, a felony)	*Dalton v. Ashcroft,* 257 F.3d 200 (2d Cir. 2001)	N.Y. VTL Law §1192(3)	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *focusing on intrinsic nature of the offense, court held that the risk of use of physical force was not an element of the offense; conviction under statute was possible even where there was no risk of use of force, and the serious potential risk of physical injury from an accident did not constitute likelihood of the intentional employment of physical force
Driving while intoxicated, felony	*U.S. v. Chapa-Garza,* 243 F.3d 921 (5th Cir. 2001)	Tex. Penal Code Ann. §49.09	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *a COV as defined by §16(b) must involve the substantial likelihood that the offender will *intentionally* employ force against the person or property of another in order to effectuate the commission of the offense; intentional use of force is seldom if ever employed to commit the offense of DWI
Driving while intoxicated (driving under the influence with injury to another)	*U.S. v. Trinidad-Aquino,* 259 F.3d 1140 (9th Cir. 2001)	Cal. Vehicle Code §23153	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or 16(b)* *although §16(b) encompasses both intentional and reckless conduct, California DUI can be committed by mere negligence and therefore is not a crime of violence under §16(b)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Driving while intoxicated (driving under the Influ-ence (with multiple priors))	*Montiel-Barraza v. INS,* 275 F.3d 1178 (9th Cir. 2002); *U.S. v. Portillo Mendoza,* 273 F.3d 1224 (9th Cir. 2001)	Cal. Vehicle Code §23152 (a) (along with §23175, an enhancement provision for multiple priors	<u>*NOT*</u> AF under category F (even with prior DUI convictions)
Driving while intoxicated (driving under the influence)	*Tapia-Garcia v. INS,* 237 F.3d 1216 (10th Cir. 2001), superceded in part by *Leocal v. Ashcroft,* 543 U.S. 1 (2004), supra.	Idaho Code §18-8004(5)	AF—category F as crime of violence within 18 U.S.C. §16(b) Note: **Superceded by *Leocal,*** which held that §16 does not include offenses requiring only negligent or mere accidental conduct, such as DUI offenses.
Driving while intoxicated (driving under the influence with serious bodily injury)	*Le v. U.S. Att. Gen.,* 196 F.3d 1352 (11th Cir. 1999), superceded in part by *Leocal v. Ashcroft,* 543 U.S. 1 (2004), supra.	Fla. Stat. Ann. §§316.193(3)	AF—category F crime of violence within 18 U.S.C. §16(a)* Note: **Superceded by *Leocal,*** which held that §16 does not include offenses requiring only negligent or mere accidental conduct, such as DUI offenses.
Embezzle-ment	*Balogun v. U.S. AG*, 425 F.3d 1356 (11th Cir. 2005)	federal embezzleme nt statute (not identified)	AF—category M* *BIA's holding that government can be a 'victim' for purposes of INA 101(a)(43)(M)(i), is reasonable. Note that Court left open whether the statute might be ambiguous on this issue, but held that the BIA decision was entitled to Chevron deference. Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Endanger-ing the wel-fare of a child	*Stubbs v. Attorney General,* 452 F.3d 251 (3d Cir. 2006)	N.J. Stat. Ann. §2C-24-4(a) (3rd degree)	<u>*NOT*</u> AF under category A as sexual abuse of a minor* *BIA definition of sexual abuse of a minor requires that a past act with a child actually have occurred; however, state statute punishes conduct that *would* coerce or entice a child, even if the coercion or inducement did not occur

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Endanger-ment (reck-less)	*Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006)	18 Pa. Cons. Stat. §2705	NOT AF under category F as crime of violence within 18 U.S.C. §16(a)*or (b)** *the mens rea requirement in this statute is mere 'recklessness,' which does not sufficient **offense is classified as a felony under state law
Endanger-ment, felony	*U.S. v. Hernandez-Castellanos,* 287 F.3d 876 (9th Cir. 2002)	Ariz. Rev. Stat. §13-1201	MAYBE AF under category F as crime of violence within 18 U.S.C. §16 (b)* *conviction under statute does not 'facially qualify' as a COV within §16(b) because not all conduct punishable under statute would constitute a COV within §16 (b)—'substantial risk of imminent death or physical injury' (language of state statute) is not the same as 'substantial risk that physical force . . . may be used' (required to fall within §16(b)); in this case, record of conviction did not establish whether defendant's conviction was in fact for a COV within §16(b) Note: offense falls under category F only if prison sentence of at least one year imposed
Entering motor vehicle with intent to steal thing of value	*Novitskiy v. Ashcroft*, 2005 U.S. App. LEXIS 1178 (10th Cir. 2005) (unpub'd)	Colo. Rev. Stat. §18-4-502	AF—category G theft offense *Court found reasonable and deferred to BIA's construction of theft AF statute, defining theft as 'taking of property or exercise of control over property without consent [and] with the criminal intent to deprive owner of the rights and benefits of ownership.' Note: offense falls under category G only if prison sentence of at least one year imposed
Enticing a minor over the Internet	*Farhang v. Ashcroft*, 104 Fed. Appx. 696 (10th Cir. 2004) (unpub'd)	Utah Code Ann. §76-4-401	MAYBE AF under category A* *Court deferred to BIA's interpretation using 18 U.S.C. 3509(a)(8) as a guide to determining whether an offense is sexual abuse of a minor. State statute is arguably divisible because it punishes conduct involving a minor (which falls within scope of 18 U.S.C. 3509(a)) as well as conduct involving a person the defendant believes to be a minor (which might be broader than conduct punished by 18 U.S.C. 3509(a)(8)). In this case, Petitioner was responsible for proving jurisdictional facts (i.e. that his offense was not AF); because the administrative record did not show that the offense did not involve a minor, Court dismissed the petition.
Exhibiting a deadly weapon, with the intent to prevent or resist arrest	*Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937 (9th Cir 2004)	Cal. Penal Code §417.8 (felony)	AF—category F crime of violence within 18 U.S.C. §16(a)* *by drawing or exhibiting a deadly weapon to resist or prevent an arrest, a person is *threatening to use the weapon*, which is 'threatened use of physical force' under 18 U.S.C. §16(a) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Evading an officer	*Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006)	Cal. Veh. Code §2800.2	MAYBE AF under category F as crime of violence within 18 U.S.C. §16* *statute may be violated with negligent conduct, which is not sufficient under 18 U.S.C. 16. State statute punishes conduct done with 'willful or wanton disregard for the safety of persons or property,' and 'willful or wanton disregard' includes, but is not limited to, driving during which time

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			three or more traffic violations occurs (and the specified traffic violations include violations committed with negligence). Because record of conviction (which does not include probation report) did not establish whether Respondent was convicted of a negligent or reckless offense, government did not meet its burden of proving that offense fit within 18 U.S.C. 16.
Failure to appear before a court	*Ferraj v. Ashcroft*, 2003 U.S. Dist. LEXIS 25361 (D.Conn. 2001)	Conn. Gen. Stat. §53a-172	<u>*MAYBE*</u> AF under category T* *state statute is divisible—permits conviction for failing to appear 'when legally called', which is more expansive than failing to appear 'pursuant to a court order' required to fall within category T. Here, court granted habeas petition because the only document in the record of conviction produced by the government was the transcript of petitioner's guilty plea, which did not indicate the existence of the required court order. Note: offense falls under category T only if a prison sentence of two years or more may be imposed for the underlying crime for which the defendant failed to appear
Failure to appear before a court when legally called	*Barnaby v. Reno,* 142 F. Supp.2d 277 (D. Conn. 2001)	Conn. Gen. Stat. §53a-172	<u>*NOT*</u> AF under category T* *state statute permits conviction for failing to appear 'when legally called', which is not the same as failing to appear 'pursuant to a court order' required to fall within category T
Failure to appear before a court	*U.S. v. Mejia,* 2000 U.S. App. LEXIS 21765 (9th Cir. 2000) (unpub'd opinion), *cert. denied,* 532 U.S. 936 (2001)	Cal. Penal Code §1320	AF—category T Note: offense falls under category T only if a prison sentence of two or more years may be imposed for the underlying crime for which the defendant failed to appear
False declarations before a grand jury	*Patel v. Ridge*, *2004 U.S. Dist. LEXIS 13296 (N.D. Ill. 2004)*	18 U.S.C. § 1623	AF—category S Note: offense falls under category S only if prison sentence of at least one year imposed
False imprison-ment	*Cortez-Quinonez v. Ashcroft,* 2002 U.S. App. LEXIS 6053 (9th Cir. 2002) (unpub'd opinion)	Cal. Penal Code §§236-37	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *conviction under statute, by itself, does not establish COV because statute reaches both conduct that would constitute a COV and conduct that would not (a person may be convicted for false imprisonment by fraud or deceit, as well as by violence or menace); here, however, the judgment of conviction and charging papers established that the defendant was convicted of false imprisonment by violence, and that the crime was perpetrated with a gun Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
False imprison-ment	*Brooks v. Ashcroft,* 283 F.3d 1268 (11th Cir. 2002)	Fla. Stat. §787.02	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Filing false income tax returns	*Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004)	26 U.S.C. §7206(1)	<u>*NOT*</u> AF under category M(i)* *INA §101(a)(43)(M)(i) does not apply to tax offenses. INA §101(a)(43)(M)(ii)specifies tax evasion as the only deportable tax offense. (C.J. Alito dissents.) Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Firearms, discharge	*Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2006)	720 Ill. Comp. Stat. §5/24-1.2(a)(1)	AF—category F crime of violence within 18 U.S.C. §16(a)* and (b) *firing a gun is use of physical force. Note: offense falls under category F only if prison sentence of at least one year imposed
Firearms, possession by a felon	*Matter of Vazquez-Muniz,* 23 I&N Dec. 207 (BIA 2002); *U.S. v. Castillo-Rivera,* 244 F.3d 1020 (9th Cir.), *cert. denied,* 534 U.S. 931 (2001)	Cal. Penal Code §12021(a)	AF—category E(ii) (state firearm offense may be 'described in' a federal statute enumerated under category E, regardless of whether the state statute includes the jurisdictional element of "affecting interstate commerce")
Firearms, conspiracy to export without a license	*Kuhali v. Reno,* 266 F.3d 93 (2d Cir. 2001)	22 U.S.C. §2778; 18 U.S.C. §371	AF—category U/C
Firearms, possession by illegal alien	*U.S. v. Powell,* 2001 U.S. App. LEXIS 21868 (2d Cir. 2001) (unpub'd opinion)	18 U.S.C. §922(g)(5)	AF—category E
Firearms, possession by person convicted of serious offense	*U.S. v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir. 2003)	Wash. Rev. Code §9.41.040(1)(a)	AF—category E relating to firearms* *state statute defined "serious offense" as offense punishable by more than one year, and therefore is analogous to U.S.C §922(g)(1)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Firearms, felony possession (unlawfully carrying a firearm in an establish-ment licensed to sell alcoholic beverages)	*U.S. v. Hernandez-Neave,* 291 F.3d 296 (5th Cir. 2001)	Tex. Penal Code §46.02(c)	NOT AF under category F as crime of violence within 18 U.S.C. §16(b)* *state statute does not require a substantial likelihood that the perpetrator will intentionally employ physical force against the person or property of another (statute does require intentional, knowing or reckless carrying of hand-gun onto premises, but such *intent* portion of the crime goes to the act of carrying a firearm onto premises, and does not go to any supposed intentional force against another's person or property), and, further, physical force against the person or property of another need not be used to complete the crime (applying Fifth Circuit's *Chapa-Garza* framework (*see* "Driving while intoxicated" *supra*)).
Firearms, unlawful possession of short-barrel ed shotgun	*U.S. v. Rivas-Palacios,* 244 F.3d 396 (5th Cir. 2001)	Texas law	AF—category F as crime of violence under §16(b)* *the unlawful possession of any unregistered firearm 'involves a substantial risk that physical force against the person or property of another' will occur *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: This holding has subsequently been called into question by the Fifth Circuit in *U.S. v. Hernandez-Neave,* 291 F.3d 296 (5th Cir. 2001), *supra*, as it appears to conflict with the *Chapa-Garza* framework for analyzing crime of violence AFs (*see* "Driving while intoxicated" *supra*). Note: offense falls under category F only if prison sentence of at least one year imposed
Firearms, possession by non-citizen without a license	*U.S. v. Sandoval-Barajas,* 206 F.3d 853 (9th Cir. 2000)	Wash. Rev. Code §9.41.170	NOT AF under category E* *conviction under state statute that applies to all noncitizens is not an offense 'described in' the federal statute enumerated in category E (federal statute applies only to those illegally in the U.S.)
Firearms, possession of short-barreled shotgun	*U.S. v. Avila-Mercado,* 2001 U.S. App. LEXIS 13335 (9th Cir.) (un-pub'd opinion), *cert. denied,* U.S. LEXIS 10704 (2001)	Nev. Rev. Stat. §202.275	AF—category U/F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Firearms, possession of shotgun	*U.S. v. Villanueva-Gaxiola,* 119 F. Supp.2d 1185 (D. Kan. 2000)	Cal. Penal Code §12020	NOT AF under category E* NOT AF under category F as crime of violence within 18 U.S.C. §16(b)** *conviction under state statute that applies to any person is not an offense 'described in' the federal statute enumerated in category E (federal statute applies only to illegal aliens) **state statute encompasses misdemeanor offenses and so cannot fall within §16(b)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Forgery	*Matter of Aldabe-sheh,* 22 I&N Dec. 983 (BIA 1999)	N.Y. Penal Law §170.10(2) (2nd degree)	AF—category R Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	*U.S. v. Johnstone,* 251 F.3d 281 (1st Cir. 2001)	Colorado law (class 5 felony)	AF—category R Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	*Caesar v. Gonzales*, 2006 U.S. App. LEXIS 13528 (2d Cir. 2006) (unpub'd decision)	N.Y. Penal Law §170.10(1) (2nd Degree)	AF—category R Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery (possession of forged instrument with intent to defraud, deceive, or injure)	*Richards v. Ashcroft*, 400 F.3d 125 (2nd Cir. 2005)	Conn. Gen. Stat. § 53a-139	AF—category R* *"Even if possession of a forged instrument with intent to defraud, deceive or injure is not 'forgery' as defined at common law, it is unarguably an offense 'relating to' forgery within the broad construction we have given that term." Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	*Drakes v. Zimski,* 240 F.3d 246 (3rd Cir. 2001)	11 Del. Code §861 (second degree)	AF—category R Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	*Bobb v. AG*, 458 F.3d 213 (3rd Cir. August 3, 2006)	18 U.S.C. §510(a)(2)	AF- category (M)(i) or (R)*
Forgery	*Onyeji v. AG of the U.S.*, 2006 U.S. App. LEXIS 11956 (3rd Cir. 2006) (unpub'd opinion)	18 Pa.C.S.A. §4101(a)(1)	AF—category R* *even though the Pa. statute encompasses an intent to injure, which might be beyond the traditional definition of forgery, because "Congress evidenced an intent to define forgery in its broadest sense." Note: offense falls under category R only if prison sentence of at least one year imposed
Fraud, attempt (submitting false insurance claim with intent to defraud)	*Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999)	Ind. Code §35-43-5-4-(10)	AF—category U/M* *even though defendant was not convicted specifically of an offense denominated an "attempt" and even though no actual loss had occurred—'attempt' by its very nature is an unsuccessful effort to commit a crime). Under state statute, conviction for attempted fraud requires proof of intent to defraud and that substantial step toward commission of the fraud occurred; here, record of conviction showed substantial step was taken. Note: Cf. *Sui v. INS,* 250 F.3d 105 (2d Cir. 2001) under "Counterfeit securities, possession", *supra*, for Second Circuit's discussion of

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			"attempt" as applied to category U/M analysis. Note: offense falls under category U/M only if attempted loss to the victim(s) in excess of $10,000
Credit card fraud	*Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005)	Va. Code §18.2-195	<u>*MAYBE*</u> AF under category G *theft and fraud are distinct offenses. 'taking of property' and ' without consent' are essential elements of a theft offense. Using modified categorical analysis, court determined that conviction was not theft AF because indictment did not allege "taking goods without consent" or that defendant actually obtained property. Note: offense falls under category G only if prison sentence of at least one year imposed
Fraud and related activity in connection with access devices, conspiracy to commit	*Fierarita v. Gonzales,* 2006 U.S. App. LEXIS 15947 (9th Cir. 2006) (unpub'd opinion)	18 U.S.C. §1029(b)(2) [conspiracy to commit any of the offenses set forth at 1029(a)]	*Maybe* AF—category U/M* *Statute is divisible, because not all subsections of 18 USC 1029(a) require as an element the intent to deceive or defraud . Here, under the modified categorical approach, the court found AF where the judgment of conviction included mandatory restitution order in amount exceeding $10,000, and because restitution was to providers of credit, ruled that respondent must have been convicted of conspiring to commit an offense under a subsection that does require fraud or deceit as an element. Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Fraud (unautho-rized possession of access devices with intent to defraud)	*Agdachian v. INS,* 1999 U.S. App. LEXIS 23214 (9th Cir. 1999) (unpub'd opinion)	Unspecified	AF—category M (based on value of loss specified in plea agreement) Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Fraud and misuse of visas, permits and other documents	*Pena-Rosario v. Reno,* 83 F. Supp.2d 349 (E.D.N.Y. 2000); *Chukwuezi v. Ashcroft,* 2002 U.S. App. LEXIS 23391 (3d Cir. 2002) (unpub'd opinion)	18 U.S.C. §1546(a)	AF—category P Exception: in the case of a first offense for which the alien affirmatively has shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent Note: offense falls under category P only if prison sentence of at least twelve months imposed
Fraud, welfare	*Ferreira v. Ashcroft*, 390 F.3d 1091 (9th Cir. 2004)	Cal. Welf. & Inst. Code §10980(c)(2)	AF—category M(i)* *state statute at time of conviction did not explicitly require scienter, but Court looked to California case law indicating that the offense contained an element of intent to defraud or deceive. court may look to restitution to

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			determine amount of loss (distinguishing cases in which plea agreement or indictment contradicted that amount) Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Fraudulent tax return	*Abreu-Reyes v. INS,* 292 F.2d 1029 (9th Cir. 2002)	26 U.S.C. §7206(1)	AF—category M (court may look to presentence report to establish amount of loss to victim) Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Harassment by telephone	*Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7th Cir. 2005)	720 Ill. Comp. Stat. §135/1-1(2)	<u>*NOT*</u> AF—category F crime of violence within 18 U.S.C. §16(a)* *a conviction requires only an *intent* to abuse, threaten or harass, and does not require an *actual* threat. Court further notes that "threats" is very broad in scope and not limited to threats of physical force. Facts of the particular conduct that led to the conviction have no bearing on whether this offense is a crime of violence.
Heroin [See "Controlled Substance" cases, supra]			
Hindering prosecution	*U.S. v. Vigil-Medina,* 2002 U.S. App. LEXIS 4961 (4th Cir. 2002) (unpub'd opinion)	N.Y. law (1st degree)	AF—category S Note: offense falls under category S only if prison sentence of at least one year imposed
Indecent assault and battery on a child under 14	*Emile v. INS,* 244 F.3d 183 (1st Cir. 2000)	Mass. Gen. Laws ch. 265, §1313	AF—category A as sexual abuse of a minor
Indecent liberties with a child	*Bahar v. Ashcroft,* 264 F.3d 1309 (11th Cir. 2001)	N.C. Gen. Stat. 14-202.1	AF—category A (even if offense does not require physical contact)
Indecent assault of a child under 16	*Chuang v. US AG*, 382 F.3d 1299 (11th Cir. 2004)	Fla. Stat. ch. 800.04	AF—category A, sexual abuse of a minor* *every prong involves "a purpose associated with sexual gratification"
Indecent solicitation of a child	*Hernandez-Alvarez v. Gonzales*, 432 F. 3d 763 (7th Cir. 2005)	720 Ill. Comp. Stat. 5/11-6(a)	AF—category U/A as sexual abuse of a minor* *solicitation of a minor to engage in sexual activity constitutes sexual abuse of a minor because it contains an inherent risk of exploitation or coercion

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			*impossibility of completing offense is not a defense under state statute or similar federal criminal statutes and do not preclude its categorization as an aggravated felony under category (U) (conduct involved soliciting an undercover adult police officer posing as a minor)
Inflicting corporal injury on spouse	*U.S. v. Jimenez,* 258 F.3d 1120 (9th Cir. 2001)	Cal. Penal Code §273.5	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Injury to a child, felony	*U.S. v. Gracia-Cantu,* 302 F.3d 308 (5th Cir. 2002)	Tex. Penal Code Ann. §22.04(a)	*NOT* AF under category F as crime of violence within 18 U.S.C. §16(a)* or §16(b)** *because state statute does not require that the perpetrator actually use, attempt to use, or threaten to use physical force against a child **because conviction under statute may stem from an omission rather than an intentional use of force, the offense is not, by its nature, a crime of violence within the meaning of §16(b)
Larceny	*Plummer v. Ashcroft*, 258 F. Supp. 2d 43 (Dist. Conn. 2003)	Conn. Gen. Stat. §53a-123(a)(3) (2d degree)	AF—category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed
Lewdness with a child under 14	*Cedano-Vie ra v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003)	Nev. Rev. Stat. §201.230	AF—category A as sexual abuse of a minor* *although reach of the state statute is expansive, its punished conduct falls within common everyday meaning of the terms 'sexual,' 'minor,' and 'abuse.'
Luring a child under age 16 into vehicle or building for unlawful purpose	*U.S. v. Martinez-Jimenez,* 294 F.3d 921 (7th Cir. 2002)	720 Ill. Comp. Stat. §5/10-5(10)	AF—category F as crime of violence under §16(b)* *in illegal reentry context, sentencing court's 'aggravated felony' enhancement was not 'clear error' when conduct under statute by its nature involves a substantial risk that in the course of such offense, force may be used against the young victim *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Mail fraud	*Akorede v. Perryman,* U.S. Dist. LEXIS 6123 (N.D. Ill. 1999)	Unspecified	AF—category M Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" supra)
Man-slaughter, attempted	*Matter of Yeung,21* I&N Dec. 610 (BIA 1996)	Florida law	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Man-slaughter, involuntary (reckless)	*Matter of Alcantar,* 20 I&N Dec. 801 (BIA 1994)	Ill. Rev. Stat. Ch. 38, para. 9-3(a)	AF—category F crime of violence within 18 U.S.C. §16(b)* *the *nature* of a crime, as elucidated by its generic elements, determines whether it is a COV under §16(b); therefore the analysis is a categorical approach under which the BIA looks to the statutory definitions, not to the underlying circumstances of the crime *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Man-slaughter	*Jobson v. Ashcroft, 326* F.3d 367 (2d Cir. 2003)	N.Y. Penal Law §125.15(1)	<u>*NOT*</u> AF under category F as a crime of violence within 18 U.S.C. §16(b)* *§16(b) requires that an offense inherently pose a substantial risk that a defendant will *use physical force.* It also contemplates risk of an *intentional* use of force. Neither is an element of the state statute. Applying a categorical approach, court held that the minimum conduct required to violate the state statute is not "by its nature" a crime of violence under §16(b). First, the risk that a defendant will *use* physical force in the commission of an offense is 'materially different' from the risk that an offense will result in physical injury (the state statute requires only the latter). Passive conduct or omissions alone are sufficient for conviction under state statute. Second, an unintentional accident caused by recklessness (which would sustain a conviction under the state statute) cannot properly be said to involve a substantial risk that a defendant will use physical force. Note: But see *Matter of Jean,* 23 I&N Dec. 373 (Att. Gen. 2002), in which the attorney general questioned, in dicta, the BIA's prior determination that offense was not a crime of violence
Man-slaughter	*Vargas-Sar miento v. U.S. DOJ, BCIS*, 448 F.3d 159 (2d Cir. 2006)	N.Y. Penal Law §125.20(1) or (2)	AF—category F crime of violence within 18 U.S.C. §16(b)* *actions with an *intent* to take a life or to inflict serious physical injury are likely to meet vigorous resistance from a victim, and therefore, present an inherent substantial risk that person may intentionally use physical force to achieve his objective. Physical force is power, violence or pressure directed against a person or thing. Note: offense falls under category F only if prison sentence of at least one year imposed
Man-slaughter, simple involuntary	*Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005)	Va. Code Ann. §18.2-36	<u>*NOT*</u> AF—category F crime of violence within 18 U.S.C. §16(a) or (b)* *although offense involves substantial risk of physical harm, it does not involve a substantial risk that force will be applied. Court also noted that a reckless disregard for human life, required for a conviction, is distinguishable from a reckless disregard for whether force will need to be used.
Man-slaughter, involuntary	*Park v. INS,* 252 F.3d 1018 (9th Cir. 2001)	Cal. Penal Code §192(b)	AF—category F as crime of violence within 18 U.S.C. §16(b) *statute requires criminal negligence, which is defined in such a manner as to require a minimal mens rea of reckless *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Marijuana [See "Controlled Substance" cases, supra]			
Menacing	*U.S. v. Drummond,* 240 F.3d 1333 (11th Cir. 2001)	N.Y. Penal Law §120.14	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Mischief, criminal (intentional marking of another's property)	*U.S. v. Landeros-Gonzalez,* 262 F.3d 424 (5th Cir. 2001)	Tex. Penal Code §28.03(a)(3)	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *offense does not involve a substantial risk of force—no substantial risk that a vandal will use "destructive or violent force" in the course of unlawfully "making marks" on another person's property
Misprision of felony	*Matter of Espinoza-Gonzalez,* 22 I&N Dec. 889 (BIA 1999)	18 U.S.C. §4	<u>*NOT*</u> AF under category S Note: also should *NOT* be an AF under category B (even if underlying offense is a drug-trafficking felony)
Money laundering, aiding and abetting	*U.S. v. Cordova-Sanchez,* 2006 U.S. Dist. LEXIS 23575 (S.D. Tex. 2006)	18 U.S.C. 2 / 18 U.S.C. 1956(a)(2)(A)	AF—category D *court used PSR to determine that offense was AF, but does not discuss whether this is appropriately a part of ROC Note: offense falls under category D if amount of funds exceeds $10,000
Money laundering, conspiracy	*Oyeniyi v. Estrada,* 2002 U.S. Dist. LEXIS 17267 (N.D. Texas 2002)	18 U.S.C. §1956(h)	AF under category U/D Note: offense falls under category U/D only if amount of funds involved in the transaction exceeds $10,000
Money laundering ($1,310 check, but restitution amount ordered to victim had exceeded $10,000)	*Chowdhury v. INS,* 249 F.3d 970 (9th Cir. 2001)	18 U.S.C. §1956(a)(1)(B)(i)	<u>*MAYBE*</u> AF under category D* *offense falls under category D only if amount of funds involved in the transaction exceeds $10,000—here the amount was only $1,310, and restitution amount is not relevant to analysis)
Murder, attempted	*Cabreja v. U.S. I.N.S.*, 2003 U.S. Dist. LEXIS 26715 (SDNY 2003)	State and statute are not identified	AF—category U/A as murder

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Murder-for-hire, use of interstate commerce facilities in the commission	*Ng v. AG of the US*, 436 F.3d 392 (3d Cir. 2006)	18 U.S.C. §1958	AF—category F crime of violence within 18 U.S.C. §16(b)* *under the categorical approach, the actual intent of the hitman hired by the Respondent was irrelevant because there will always be a 'substantial risk' that physical force may be used (hitman was an informant who never intended to kill the victim) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Negligence, criminal (criminally negligent child abuse)	*Matter of Sweetser,* 22 I&N Dec. 709 (BIA 1999)	Colo. Rev. Stat. §18-6-401(1) & (7)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or §16(b)* *For explanatory notes on the holding, see "Child abuse, criminally negligent" supra
Obstructing and hindering	*Matter of Joseph,* 22 I&N Dec. 799 (BIA 1999)	Maryland common law	<u>*MAYBE*</u> AF under category S* *Note: While not squarely addressing the issue, the BIA noted that the common law state offense is divisible, as it may encompass obstructing one's own arrest in addition to obstructing the arrest of another and, finding that defendant had been convicted for obstructing his own arrest, stated that it is substantially unlikely that obstructing and hindering one's own arrest falls within "obstruction of justice" for purposes of category S Note: offense falls under category S only if prison sentence of at least one year imposed
Passing bad checks	*Mirat v. AG of the U.S.*, 2006 U.S. App. LEXIS 14244 (3d Cir. 2006) (unpub'd)	18 Pa. Cons. Stat. §4105(a)(1)	<u>*NOT*</u> AF under category M* *statute penalizing passing bad check with knowledge that it will not be honored, but not containing an express element of fraud or deceit, is not AF. Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Perjury	*Matter of Martinez-Recinos,* 23 I&N Dec. 175 (BIA 2001)	Cal. Penal Code §118(a)	AF—category S (because state law is essentially the same as the federal perjury statute at 18 U.S.C. §1621) Note: offense falls under category S only if prison sentence of at least one year imposed
Petit larceny [See "Theft, Misdemeanor" cases, infra]			
Rape (statutory rape)	*Matter of B-,* 21 I&N Dec. 287 (BIA 1996)	Mar. Ann. Code Art. 27, §463(a)(3) (2nd degree)	AF—category F as crime of violence under §16(b)* *whenever an older person attempts to sexually touch a child under the age of consent, there is invariably a substantial risk that physical force will be yielded to ensure the child's compliance *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*, supra.*

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			Note: offense falls under category F only if prison sentence of at least one year imposed
Rape (statutory rape involving minor under age 17 but over age 16)	*Mugalli v. Ashcroft,* 258 F.3d 52 (2nd Cir. 2001)	N.Y. Penal Law §130.25-2	AF—category A as sexual abuse of a minor* *even though minor was over the age of sixteen
Statutory rape	*U.S. v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006)	Tenn. Code Ann. §39-13-506	<u>*MAYBE*</u> AF—category A* *statute punishes conduct that may or may not involve physical or psychological abuse. For example, consensual sex between a 17-year-old and a 22-year-old does not involve substantial risk of physical force and does not necessarily result in physical harm or injury. Also, state courts do not require that conduct involve or result in physical abuse. Consensual sex with a late teen may not be psychologically harmful. A conviction for sexual penetration of a young teen or child would constitute sexual abuse of a minor. Note that 9th Circuit follows a bifurcated approach, in which it might give different meanings to the same term in criminal illegal reentry cases and immigration cases. This is an illegal reentry case and so the Court conducted de novo review. In *Afridi v. Gonzales*, an immigration case, the 9th Circuit afforded deference to BIA interpretation of the term, finding that statutory rape involving a minor under the age of 18 was sexual abuse of a minor.
Statutory rape	*Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006)	Cal. Penal Code §261.5	AF—category A as sexual abuse of a minor* *a conviction under statute requires sexual intercourse with a person under 18 years of age, which satisfies BIA interpretation that sexual abuse of a minor includes offenses that involves "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in…sexually explicit conduct." Note that Court afforded deference to BIA interpretation because this was a removal case. In *U.S. v. Lopez-Solis,* 9th Circuit held in an illegal reentry case that a similar state statute was not necessarily sexual abuse of a minor, and determination depended partly on age of minor.
Rape (sexual intercourse with a minor)	*Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006)	Ore. Rev. Stat. 163.355	AF—category A as rape *ordinary, contemporaneous and common meaning of "rape" requires sexual activity that is unlawful and without consent. Element of "without consent" does not require forcible compulsion, force or fear and is met by provision that a minor is incapable of consent.
Rape	*Castro-Baez v. Reno,* 217 F.3d 1057 (9th Cir. 2000)	Cal. Penal Code §261(a)(3)	AF—category A
Rape	*U.S. v. Yanez-Saucedo,* 295 F.3d 991 (9th Cir. 2002)	Wash. Rev. Code §9A.44.060	AF—category A

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Reckless endanger-ing, misde-meanor .	*Amaye v. Elwood,* 2002 U.S. Dist. LEXIS 14276 (Middle Dist. Pa. 2002)	Del. Code Ann. tit. 11, §603 (2001) (2d degree)	NOT AF under category F as crime of violence under §16(a)* or 16(b)** *crime does not include as an element the use, attempted use, or threatened use of physical force against the person or property of another—statute requires only reckless engagement in conduct which creates a substantial risk of physical injury to another person, and statute does not mention force at all **Where an offense is categorized as a misdemeanor under state law it does not meet the definition of a crime of violence under §16(b)
Robbery, attempted	*U.S. v. Fernandez-Antonia,* 278 F.3d 150 (2d Cir. 2002)	N.Y. law (3d degree robbery) & N.Y. Penal Law §110.00	AF—category U/G theft & offense* *rejecting defendant's argument that conviction under the attempt" statute, for purposes of category U analysis, falls short of the "substantial step" requirement under federal law Note: offense falls under category U/G only if prison sentence of at least one year imposed
Robbery	*Perez v. Greiner,* 296 F.3d 123 (2d Cir. 2002)	N.Y. Penal Law §160.10(1) (2d degree)	AF—category G Note: offense falls under category G only if prison sentence of at least one year imposed
Robbery, with a deadly weapon	*Chambers v. Reno,* 307 F.3d 284 (4th Cir. 2002)	Maryland law	AF—category F Note: offense falls under category F only if prison sentence of at least one year imposed
Robbery	*U.S. v. Valladares,* 304 F.3d 1300 (8th Cir. 2002)	Cal. Penal Code §211	AF—category F as crime of violence under §16(b)* MAYBE AF under category F as crime of violence within 18 U.S.C. §16(a)** *robbery achieved through 'force or fear' (state statutory language) by its nature presents a substantial risk that physical force against the person or property of another may be used **state statute encompasses conduct that may or may not include as an element the use, attempted use, or threatened use of physical force within the meaning of §16(a); underlying record of conviction, however, established that such an element existed in the instant case (provided a handgun to a co-defendant who used the gun to rob a pedestrian) Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse, attempted	*Calilap v. Gonzales*, 137 Fed. Appx. 912 (7th Cir. 2005) (unpub'd)	720 Ill. Comp. Stat. 5/12-15(C)	AF—category U/A as sexual abuse of a minor* *impossibility of completing offense is not a defense under state statute or similar federal criminal statutes and do not preclude its categorization as an aggravated felony under category (U) (conduct involved adult police officer posing as a minor)
Sexual abuse, attempted	*U.S. v. Meza-Corrales*, 2006 U.S. Dist. LEXIS	Or. Rev. Stat. §§161.405(2)(c), 163.427	MAYBE AF under category A as sexual abuse of a minor* *Some sections of state statute require the involvement of a minor, and some do not. The record of conviction, which the Court held does not include a police report, did not establish that the offense had involved a

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	11199 (E.D. Wa. 2006)		minor; therefore, under modified categorical approach, conviction was not sexual abuse of a minor.
Sexual abuse	*Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005)	720 Ill. Comp. Stat. §5/12-16	AF—category F crime of violence within 18 U.S.C. §16(b)* *a conviction inherently involves a 'substantial risk' that physical force may be used because statute punishes sexual conduct with a victim who is *unable to give consent* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse, aggravated criminal	*Espinoza-Franco v. Ashcroft*, 394 F. 3d 461 (7th Cir. 2004)	720 Ill. Comp. Stat 5/12-16(b)	AF—category A as sexual abuse of a minor* *Respondent's conviction fits squarely within the 'ordinary, contemporaneous and common meaning of the words' sexual abuse of a minor Note: State statute criminalizes sexual conduct on a family member younger than 18 years of age and defines 'sexual conduct' to include, in the case of a victim under 13 years of age, touching any part of body for sexual gratification or arousal. Court held that it was permissible to look beyond the indictment to determine victim's age, as long as it would not require an evidentiary hearing, and determined that Respondent had been convicted under this specific definition.
Sexual abuse of a minor (indecency with a child by exposure)	*Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999); *U.S. v. Zavala-Sustaita,* 214 F.3d 601 (5th Cir.) *cert. denied,* 531 U.S. 982 (2000)	Texas Penal Code §21.11(a)(2)	AF—category A* *even though physical touching of the victim is not an element of the state crime
Sexual abuse of a minor, misde-meanor	*Matter of Small,* 23 I&N Dec. 448 (BIA 2002)	N.Y. Penal Law §130.60(2)	AF—category A (even though offense is a misdemeanor under state law) *NOT* AF under category F as crime of violence within 18 U.S.C. §16(a)* or §16(b)** *offense does not have the element of use of 'violent or destructive' physical force necessary under the law of the Fifth Circuit (in whose jurisdiction this case arose) to fall within §16(a) (citing *U.S. v. Landeros-Gonzalez*, 262 F.3d 424 (5th Cir. 2001), *see* "Mischief, criminal" supra) **offense is not a felony as required to fall within COV definition at 18 U.S.C. §16(b) Note: BIA follows the law of the Fifth Circuit in this case because the case arose out of the Fifth Circuit
Sexual abuse of a minor (indecent	*Emile v. INS,* 244 F.3d 183	Mass. Gen. Laws ch. 265, §1313	AF—category A

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
assault and battery on a child under 14)	(1st Cir. 2000)		
Sexual abuse of a minor (indecency with a child sexual contact)	*U.S. v. Velazquez-Overa,* 100 F.3d 418 (5th Cir. 1996), *cert. denied,* 520 U.S. 1133 (1997)	Tex. Penal Code §21.11(a)(1)	AF—category F as crime of violence under §16(b)* *when an older person attempts to sexually touch a child, there is always a substantial risk that physical force would be used to ensure the child's compliance *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a minor, misdemeanor	*U.S. v. Gonzales-Vela,* 276 F.3d 763 (6th Cir. 2001)	Ky. Rev. Stat. Ann. §510.120(1)	AF—category A (even though offense is a misdemeanor under state law)
Sexual abuse of a minor, misde-meanor	*Guerrero Perez v. INS,* 242 F.3d 727 (7th Cir. 2001)	720 Ill. Comp. Stat. 5/12-15 (c)	F—category A (even though offense is a misdemeanor under state law)
Sexual abuse of a minor (lascivious acts with a child)	*U.S. v. Rodriguez,* 979F.2d 138 (8th Cir. 1992)	Code of Iowa §709.8	AF—category F as crime of violence under §16(b)* *the crime by its nature involves a substantial risk of physical force *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a child, attempted, felony	*U.S. v. Reyes-Castro,* 13 F.3d 377 (10th Cir. 1993)	Utah Code Ann. §76-5-404.1(1) (1990)	AF—category F as crime of violence under §16(b)* *when an older person attempts to sexually touch a child under the age of fourteen, there is always a substantial risk that physical force will be used to ensure the child's compliance *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a minor (indecent liberties with a child)	*Bahar v. Ashcroft,* 264 F.3d 1309 1309 (11th Cir. 2001)	N.C. Gen. Stat. 14-202.1	AF—category A (even if offense does not require physical contact)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Sexual act, solicitation	*Gattem v. Gonzales*, 412 F. 3d 758 (7th Cir. 2005)	720 Ill. Comp. Stat. 5/11-14.1(a)	AF—category A as sexual abuse of a minor* (complaint establishes conduct involved a person under age 18, and Respondent admitted in immigration court that minor was under age 17) *verbal solicitation of a minor, though not necessarily coercive or threatening, is still abusive because it exploits minor's vulnerabilities
Sexual activity with certain minors	*In re V---F--- D---*, 23 I. & N. Dec 859 (BIA 2006)	Fla. Stat. Ann. §794.05(1)	AF—category A as sexual abuse of a minor* *A minor is a person under the age of 18
Sexual activity with a child, soliciting	*Taylor v. US*, 396 F.3d 1322 (11th Cir. 2005)	Fla. Stat. §794-011(8)(a)	AF—category A sexual abuse of a minor* *Court applied the same definition of sexual abuse of a minor as *U.S. v. Padilla Reyes*, supra. Solicitation under this statute is 'nonphysical conduct committed for purposes of sexual gratification' which is included in this definition *whether Florida considers this offense less serious than other sex offenses is not relevant to this inquiry
Sexual assault, attempted	*U.S. v. Deagueros-Cortes*, 2003 U.S. App. LEXIS 16462 (9th Cir. 2003) (unpub'd)	Ariz. Rev. Stat. §13-1001 and Ariz. Rev. Stat. 13-1406	AF—category U/A – rape *the words 'of a minor' in category A qualifies 'sexual abuse' and not rape or murder; therefore, an offense need not involve a minor to be a rape AF
Sexual assault (lewd assault) on a child	*U.S. v. Londono-Quintero,* 289 F.3d 147 (1st Cir. 2002)	Fla. Stat. Ann. §800.04 (1994)	AF—category A (if there was physical contact with victim) Note: court did not answer question of whether a non-physical contact offense under the statute may also fall under category A, but looked to the charging documents to determine that in the instant case the petitioner did have physical contact with the victim
Sexual assault	*Lara-Ruiz v. INS,* 241 F.3d 934 (7th Cir. 2001)	Ill. Rev. Stat. 1991, ch. 38, §§12 13(a)(1) & 12-13(a)(2)	<u>*MAYBE*</u> AF under category A *state statute covered conduct that is sexual abuse of a minor and conduct that is not; record of conviction, however, established that victim was a four year old
Sexual assault (statutory rape)	*Aguiar v. Gonzales*, 438 F.3d 86 (1st Cir. 2006)	R.I. Gen. Laws §11-37-6	AF—category F crime of violence within 18 U.S.C. §16(b)* *but not within 16(a) because the offense does not have as an element the use, attempted use or threatened use of force *there is a substantial risk of use of force during sexual contact with a person who *cannot legally consent* under state law; court refuses to distinguish between legal and factual consent and also discusses legislative motivation for the statute is that physical force may be used by an older perpetrator. The Court clarifies that the "substantial risk" requirement in 16(b) relates to the use of force and not the possible effect of a person's conduct, such as injury. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra*

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault (statutory rape)	*Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003)	Conn. Gen. Stat. §53a-71	AF—category F crime of violence within 18 U.S.C. §16(b)* *sexual intercourse with a victim who cannot consent is affirmative conduct that inherently involves a substantial risk that physical force may be used in the course of committing the offense—particularly because of the age difference between defendant and victim, mental incapacity or physical helplessness of victim, or defendant's position of authority over victim. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault of a child (statutory rape)	*Xiong v. INS,* 173 F.3d 601 (7th Cir. 1999)	Wis. Stat. §948.02(2)	<u>*NOT*</u> AF under category F* (because consensual sex precluded finding of a "crime of violence," absent substantial age difference) *but court did not reach issue of whether offense was "sexual abuse of a minor" under category A
Sexual assault of a child	*U.S. v. Alas-Castro,* 184 F.3d 812 (8th Cir. 1999)	Neb. Rev. Stat. §28–320.01	AF—category F crime of violence within 18 U.S.C. §16(b)* *there is 'substantial risk' that force may be used, even if no force actually is used *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault (consensual sexual penetration)	*U.S. v. Navarro-Elizondo,* 2000 U.S. App. LEXIS 7215 (9th Cir. 2000) (unpub'd opinion)	N.J. Stat. Ann. §2C:14-2a(3)	<u>*NOT*</u> AF under category A or F (statute permits conviction for consensual sexual penetration which is neither category A 'rape' nor category F 'crime of violence')
Sexual assault of a minor (with a 10 year age difference)	*Rios v. Gonzales*, 132 Fed. Appx. 189 (10th Cir. 2005) (unpub'd)	Colo. Rev. Stat. Ann. §18-3-402 (1)(e)	AF—category A* (even though offense may be a misdemeanor under state law) *conviction falls within scope of 18 U.S.C. §3509(a)(8)
Sexual assault (lewd assault) on a child	*U.S. v. Padilla-Reyes,* 247 F.3d 1158 (11th Cir.), *cert. denied,* 534 U.S. 913 (2001)	Fla. Stat. Ann. §800.04 (1987)	AF—category A (regardless of whether there was physical contact with victim)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Sexual assault (lewd assault on a child), attempted	*Ramsey v. INS,* 55 F.3d 580 (11th Cir. 1995)	Florida Statutes §§777.04(1) & 800.04(1)	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual battery, misde-meanor	*Wireko v. Reno,* 211 F.3d 833 (4th Cir. 2000)	Va. Code §18.2-67.4	AF—category F (even though offense is a misdemeanor under state law) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual battery	*Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004)	Okla. Stat. Ann. Tit. §21, 1123(B)	AF—category F crime of violence within 18 U.S.C. §16(b)* *a conviction involves a 'substantial risk' that physical force may be used to complete offense because statute presupposes a lack of consent by the victim. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual battery (non-consensual touching)	*Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005)	Cal. Penal Code §243.4(a)	AF—category F crime of violence within 18 U.S.C. §16(b)* *but not within 16(a) because statute has no requirement of actual or threatened physical force *a conviction always involves a substantial risk that physical force may be used because it requires lack of consent by and restrain of the victim Court noted that the fact that this offense is excluded from the state's list of "violent offenses" is not dispositive of the crime of violence AF inquiry *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual battery	*Larroulet v. Ashcroft*, 108 Fed. Appx. 506 (9th Cir. 2004) (unpub'd)	Cal. Penal Code §243.4(a)	<u>*NOT*</u> AF under category A as sexual abuse of a minor* *State statute does not include age of victim as an element of offense, so conviction does not meet generic definition of sexual abuse of a minor. Court also notes that although Respondent had stipulated to the facts in the police report as part of plea of no contest, he stipulated to only those facts necessary to support his conviction; therefore, age of victim could not be considered.
Sexual behavior (lewd behavior) with individual 14 or under	*U.S. v.Baron-Medina,* 187 F.3d 1144 (9th Cir. 1999), *cert. denied,* 531	Cal. Penal Code §288(a)	AF—category A as sexual abuse of a minor

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	U.S. 116 (2001)		
Sexual conduct, unlawful	*Singh v. Ashcroft*, 383 F. 3d 144 (3d Cir. 2004)	Del. Code Ann. tit. 11, §767 (3rd degree)	NOT AF under category A as sexual abuse of a minor* *Under the formal categorical approach, a conviction under this statute cannot be 'sexual abuse of a minor' because it does not include as an element that the conduct involve a minor *The formal categorical approach applies to the analysis of whether a conviction under this statute is a 'sexual abuse of a minor' because (a) the statute of conviction is not phrased in the disjunctive in a relevant way; and (b) the phrase 'sexual abuse of a minor' in the INA does not call for a factual inquiry; it is listed in the same section as the common-law offenses of murder and rape; and many states specifically criminalize sexual abuse of a minor, supporting the conclusion that Congress intended a formal categorical approach. Note that Court decided agency was not entitled to deference in this case, and expressly reserved decision on whether some BIA interpretations of the AF definition are entitled to deference.
Sexual contact (illegal sexual contact with child under 16)	*Santos v. Gonzales*, 436 F. 3d 323 (2d Cir. 2005)	Conn. Gen. Gen. Stat. §53-21(a)(2)	AF—category A as sexual abuse of a minor
Sexual intercourse with a minor (statutory rape)	*Valencia v. Gonzales*, 2006 U.S. App. LEXIS 5581 (9th Cir. 2006)	Cal. Penal Code §261.5(c)	MAYBE AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *the full range of conduct proscribed by the state statute includes consensual sexual intercourse between a twenty-one year old and a minor who is almost 18 years old; such a minor is fully capable of freely and voluntarily consenting to sexual relations, and therefore, such conduct does not present a substantial risk that physical force may be used in the course of committing the offense. Court differentiates between legal and actual non-consent, and finds that *actual* non-consent is the relevant inquiry under 16(b) *under the modified categorical approach, record of conviction could be consulted to determine whether the offense, by its nature, involved the risk of use of physical force; however, Court notes that an increase in the age of the Respondent, if it can even be considered, does not increase this risk. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra*
Sexual seduction	*U.S. v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005)	Nev. Rev. Stat. §§200.364, 200.368	AF—category A as sexual abuse of a minor* (even though offense is not a traditional felony and is classified as a misdemeanor under state law) *the use of young children for the gratification of sexual desires constitutes an abuse
Simple domestic assault, misde-meanor	*U.S. v. Pacheco,* 225 F.3d 148 (2d Cir.2000),	R.I. law	AF—category F crime of violence within 18 U.S.C. §16(a) (even though offense is a misdemeanor under state law) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra*

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
	cert. denied, 533 U.S. 904 (2001)		Note: offense falls under category F only if prison sentence of at least one year imposed
Solicitation to possess marijuana for sale	*Leyva-Licea v. INS,* 187 F.3d 1147 (9th Cir. 1999); see also *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001), supra, under "Controlled Substances"	Ariz. Rev. Stat. §§13-1002(A) 13-3405(A)(2)(B)(5)	*NOT* AF under category B* (even if underlying offense is a drug-trafficking offense) *because solicitation is not a listed offense under the federal Controlled Substances Act
Stealing from elder	*Macapagal v. INS*, 68 Fed. Appx. 109 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §368(d)	*MAYBE* AF under category G as theft offense* *this statute is not categorically a theft offense because it criminalizes taking of 'money, labor, or real or personal property,' and taking of labor is not theft under 9th Circuit law Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen goods, conspiracy to transport	*Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005)	18 U.S.C. §371 (underlying offense 18 U.S.C. §2314)	*MAYBE* AF under category U/M* *18 U.S.C. §2314 is a divisible statute, of which the first paragraph does not necessarily "involve fraud or deceit" and second paragraph does "involve fraud." Omari's record of conviction did not establish that he was convicted of a section involving fraud, and therefore had not been convicted of AF Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Stolen mail, possession	*Ibrahim v. Ashcroft*, 2003 U.S. App. LEXIS 18917 (5th Cir. 2003)	18 U.S.C. §1708	AF—category G theft offense* *generic definition of theft is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." a conviction under this state statute requires that defendant 'knowingly possesses stolen mail,' which is included in this generic definition. Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen mail, possession	*Randhawa v. Ashcroft,* 298 F.3d 1148 (9th Cir. 2002)	18 U.S.C. §1708	AF—category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Stolen property, possession, attempted	*Matter of Bahta,* 22 I&N Dec. 1381 (BIA 2000)	Nev. Rev. Stat. §§193.330 and 205.275	AF—category U/G theft offense Note: BIA reads the 'receipt of stolen property' parenthetical in the theft offense provision broadly to include categories of offenses involving knowing receipt, possession or retention of property from the rightful owner Note: offense falls under category U/G only if prison sentence of at least one year imposed
Stolen property, possession	*Kendall v. Mooney*, 273 F.Supp.2d 216 (E.D.N.Y. 2003)	N.Y. Penal Law §165.45	AF—category G theft and receipt of stolen property offense* *intent to deprivation *permanently* not required for offense to be theft offense. Also, state does not separately penalize receipt of stolen property; instead, its criminal possession of stolen property offense contains the same elements as 'receipt of stolen property' as defined by majority of states. Thus, it is properly categorized under the 'receipt' segment of category G. Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen property, possession	*Williams v. INS,* 2002 U.S. App. LEXIS 25126 (3rd Cir. 2002) (unpub'd opinion)	N.Y. Penal Law §165.40	AF—category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen vehicle, possession	*Hernandez-Mancilla v. INS,* 246 F.3d 1002 (7th Cir. 2001)	625 Ill. Comp. Stat. 5/4-103 (a)(1)	AF—category G theft offense* *court defines "theft offense" as a taking of property or exercise of control over property without consent with criminal intent to deprive owner of rights and benefits of ownership, even if such deprivation is less than total or permanent Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen vehicle, possession	*Huerta-Guevara v. Ashcroft,* 321 F.3d 883 (9th Cir. 2003)	Ariz. Rev. Stat. §13-1802	<u>*MAYBE*</u> AF—category G theft offense* *Conviction under Arizona statute does not 'facially qualify' as a theft offense (as generically defined in *Corona-Sanchez,* infra); statute is divisible, subparts of which do not require intent (definition of theft requires intent), and the statute prohibits, among other things, theft of services and aiding and abetting theft (which do not fall within definition of theft); judgment of conviction, the only document submitted to the immigration court, did not otherwise establish defendant's offense to fall within definition of theft * Also, despite the label of the offense (possession of a stolen vehicle), the statute does not facially fall under "receipt of stolen property" because one may be convicted without knowledge that vehicle was stolen and without requisite criminal intent. Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Stolen vehicle, receiving or transferring, attempted	*U.S. v. Vasquez-Flores,* 265 F.3d 1122 (10th Cir.), *cert. denied,* 534 U.S. 1165 (2001)	Utah Code Ann. §41-1a-1316	AF—category G theft offense* *court defines "theft offense" as a taking of property or exercise of control over property without consent with criminal intent to deprive owner of rights and benefits of ownership, even if such deprivation is less than total or permanent Note: offense falls under category G only if prison sentence of at least one year imposed
Tax evasion (attempt to evade or defeat tax)	*Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004)	26 U.S.C. §7201	AF—category M(ii)* *'defeating a tax' is an offense 'relating to tax evasion.' Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Terrorism	*Matter of S-S-,* 21 I&N Dec. 900 (BIA 1997)	Iowa Code Annotated §708.6	AF—category F *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Terrorist Threats	*Bovkun v. Ashcroft,* 283 F.3d 166 (3rd Cir. 2002)	Pa. [Cons. Stat.] §2706 (1998) subsequently redesignated as §2706(a)(1)-(3))	AF—category F as crime of violence under §16(a) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Terrorist threats	*Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003)	Cal. Penal Code §422	AF—category F crime of violence within 18 U.S.C. §16(a)* *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Theft	*Martinez-Perez v. Ashcroft*, 417 F.3d 1022 (9th Cir. 2005)	Cal. Penal Code §487(c)	<u>*MAYBE*</u> AF under category G as theft offense* *generic definition of theft offense is: taking property or exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even is such deprivation is less than total or permanent, as principal and not as aider or abettor. This state statute is divisible—it proscribes conduct that might fall within generic definition, but a person may also be convicted under an aiding and abetting theory. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft	*Fernandez-Ruiz v. Gonzales*, 410 F.3d 585 (9th Cir. 2005)	Ariz. Rev. Stat. §13-1802(A)(1) & (C)	AF—category G theft offense* *state statute requirement that taking be 'without lawful authority' is not materially different from generic theft definition's requirement that taking be 'without consent.' Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft	*Rodas v. Ashcroft*, 2003 Fed. Appx. 872 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §484(a)	<u>*MAYBE*</u> AF under category G as theft offense* Note: offense falls under category G only if prison sentence of at least one year imposed
Theft	*Jaggernauth v. AG of the US*, 432 F.3d 1346 (11th Cir. 2005)	Fla. Stat. ch. §812.014(1)	<u>*MAYBE*</u> AF under category G as theft offense* *conviction under statute, which contains disjunctive clauses, is not facially a theft offense. A conviction under subsection (a) requires an "intent to deprive owner of rights and benefits of ownership," and therefore meets the BIA definition of theft; a conviction under subsection (b) lacks this intent requirement and therefore may not necessarily meet the definition of theft. Court also held that it may look to the ROC for the offense alleged to be AF, and not to the ROC for a separate conviction, in order to determine the subsection of conviction. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, misdemeanor (shoplifting; larceny under $500)	*U.S. v. Pacheco,* 225 F.3d 148 (2d Cir. 2000), *cert. denied,* 533 U.S. 904 (2001)	Rhode Island statutes	AF—category G theft offense (even though offense is a misdemeanor under state law) Note: offense falls under category G only if prison sentence
Theft, misdemeanor (petit larceny with maximum 1 year prison sentence)	*U.S. v. Graham,* 169 F.3d 787 (3d Cir.), *cert. denied,* 528 U.S. 845 1999); *Jaafar v. INS,* 77 F.Supp.2d 360 (W.D.N.Y. 1999)	N.Y. Penal Law §155.25	AF—category G theft offense (even though offense is a misdemeanor under state law) Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, misdemeanor (shoplifting)	*Erewele v. Reno,* 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000)	Illinois law	AF—category G theft offense (even though offense is a misdemeanor under state law) Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, petty (with prior jail term)	*Mutascu v. Gonzales*, 444 F.3d 710 (5th Cir. 2006)	Cal. Penal Code §666	AF—category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed. In this case, Court decided that previous jail term was element of this recidivist statute, and considered the full sentence imposed for this offense as a 'term of imprisonment.'

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft, misde-meanor (petty theft with or without prior)	*U.S. v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002)	Cal. Penal Code §484(a) (along with` §§488 & 666)	<u>*MAYBE*</u> AF under category G as theft offense* (even though offense may be a misdemeanor under state law) *court defines "theft offense" as a taking of property or exercise of control over property without consent with criminal intent to deprive owner of rights and benefits of ownership, even if such deprivation is less than total or permanent *conviction under §484(a) does not 'facially qualify' as a theft offense under category G because statute might cover conduct outside the generic definition of theft, such as aiding and abetting theft, conduct that neither takes nor exercises control over property, theft of labor, and solicitation of false credit reporting; court then found insufficient evidence in the record to otherwise establish that the offense constituted generic theft Note: offense falls under category G only if prison sentence of at least one year imposed (in this case, the court held that defendant's sentence of at least 1 year did *NOT* satisfy the sentence requirement of category G because the 1 year sentence had been imposed only as part of a sentence enhancement feature for defendants with priors
Theft, misde-meanor (theft by shoplifting)	*U.S. v. Christopher,* 239 F.3d 1191 (11th Cir.), *cert. denied*, 534 U.S. 877 (2001)	Florida law (unspecified)	AF—category G theft offense (even though offense is a misdemeanor under state law) Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of auto	*U.S. v. Rodriguez-Lopez,* 2002 U.S. App. LEXIS 23861 (9th Cir. 2002) (unpub'd opinion)	Cal. Penal Code §484 (a) (along with §487(b)(3))	<u>*MAYBE*</u> AF under category G as theft offense* *conviction under statute does not 'facially qualify' as a theft offense under category G because statute permitted conviction for aiding and abetting theft and for conduct that neither took nor exercised control over the property; court then found that nothing in the record unequivocally indicated that the defendant's actual conduct came within the generic definition of theft. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of a means of transport-tation	*Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003)	Ariz. Rev. Stat. §13-1814(A)	<u>*MAYBE*</u> AF under category G as theft offense* *conviction under statute is not facially a theft offense because it punishes conduct that falls outside the generic definition of theft. Subsections (2), (4) and (5) do not require an "intent to deprive" for conviction, which is required under this generic definition. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of vehicle	*U.S. v. Lopez-Caballero*, 69 Fed. Appx. 382 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §487(h)(a)	<u>*MAYBE*</u> AF under category G as theft offense *defendant can be convicted under this statute for aiding and abetting a grand theft (even if aiding and abetting is not specifically charged), so offense is not categorically AF; record of conviction must establish defendant convicted of grand theft as principal and not as aider/abettor. Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft by deception	*Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004)	18 Pa. Cons. Stat. Ann. §3922	<u>*MAYBE*</u> AF under category G/M* *a theft offense that is also an offense involving fraud or deceit must meet the one-year sentence requirement (AF category G) and the $10,000 loss to victim requirement (AF category M) in order to be deemed an aggravated felony under either category. Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Theft by deception	*Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003)	N.J. Stat. Ann. §2C: 20-4	AF—category M(i)* *amount of restitution may be helpful to inquiry into amount of loss if plea agreement or indictment is unclear; however, when restitution is not based on a finding as to amount of loss, and instead intended solely to affect immigration status, it does not control. Court held conviction was AF, even after state court had later reduced amount of restitution from $11,522 to $9999. (majority opinion by Alito) Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Theft, embezzlement or misapplication by bank officer or employee (embezzlement of bank funds)	*Valansi v. Ashcroft,* 278 F.3d 203 (3d. Cir. 2002)	18 U.S.C. §656	<u>*MAYBE*</u> AF under category M* *statute is divisible because crime does not necessarily involve intent to defraud or deceive—may instead involve intent to *injure*; court looked to the record and found it inconclusive as to whether defendant acted with intent to defraud; held that defendant's conviction was not an AF under category M Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" supra)
Theft, embezzlement or misapplication by bank officer or employee (misapplication of auction drafts)	*Moore v. Ashcroft,* 251 F.3d 919 (11th Cir. 2001)	18 U.S.C. §656	AF—category M (the crime necessarily involves fraud or deceit) Note: offense falls under category M only if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" supra))
Theft of government funds	*Thompson v. Ashcroft*, 117 Fed. Appx. 817 (3d Cir. 2004)	18 U.S.C. §641	AF—category M* *restitution amount applied to single offense to which defendant pled guilty (18 U.S.C. §641), although defendant had also been indicted for 18 U.S.C. §642, the companion statute punishing aiders and abettors Note: offense falls under category M if loss to the victim(s) in excess of $10,000 (but *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft, identity	*U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2005)	Iowa Code §715A.8	AF—category G theft offense* Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of retail, felony (in-determinate sentence of 0–5 years)	*U.S. v. Garcia-Armenta,* 2002 U.S. App. LEXIS 1726 (10th Cir. 2002) (unpub'd opinion)	Utah law	AF—category G Note: offense falls under category G only if prison sentence of at least one year imposed (in this case, the court held that defendant's indeterminate sentence of 0–5 years would, for purposes of the requirement of category G, be considered a definite sentence for the possible 5 year maximum period of incarceration)
Theft of services (diversion of services)	*Ilchuk v. Attorney General*, 434 F.3d 618 (3d Cir. 2006)	18 Pa. Cons. Stat. §3926(b)	AF—category G theft offense* *State statute is a theft offense because it requires 'taking or exercise of control over something of value knowing that its owner has not consented.' Note: offense falls under category G only if prison sentence of at least one year imposed. In this case, Court also held that house arrest is 'imprisonment' for this purpose.
Trespass, criminal	*U.S. v. Delgado-Enriquez,* 188 F.3d 592 (5th Cir. 1999)	Colo. Rev. Stat. Ann. §18-4-502 (1st degree)	AF—category F as crime of violence with 18 U.S.C. §16(b)* *statute requires entering or remaining in dwelling of another, which creates a substantial risk that physical force would be used against the residents in the dwelling *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Unautho-rized use of a motor vehicle	*In re Miguel Antonio Brieva-Perez*, 23 I.&N. Dec. 766 (BIA 2005)	Texas Penal Code §31.07(a)	AF—category F crime of violence within 18 U.S.C. §16(b)* *but not within 16(a) because use of force is not an element of the offense *offense carries a substantial risk that an unauthorized driver may use physical force to gain access to a vehicle and to drive it; G*alvan-Rodriguez*, supra, remains good law after *Leocal*. Note: offense falls under category F only if prison sentence of at least one year imposed
Unautho-rized use of a motor vehicle	*U.S. v. Galvan-Rodriguez,* 169 F.3d 217 (5th Cir.), *cert. denied,* 528 U.S. 837 (1999)	Texas law	AF—category F as crime of violence under §16(b)* *offense carries a 'substantial risk' that the vehicle might be broken into, stripped, or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well** Note: the Fifth Circuit subsequently limited the holding in this case 'to its property aspects', among other things (see *U.S. v. Charles,* 301 F.3d 309 (5th Cir. 2002)) *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra*

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			Note: offense falls under category F only if prison sentence of at least one year imposed
Unautho-rized use of a motor vehicle	*Ramirez v. Ashcroft*, 361 F. Supp. 2d 650 (S.D.Tx. 2005)	Texas Law	AF—category F crime of violence within 18 U.S.C. §16(b)* *a conviction requires intentional or knowing conduct and involves a 'substantial risk' that physical force may be used to commit the offense, for example to gain access to and drive the vehicle; *Galvan-Rodriguez*, supra, remains good law after *Leocal*. Note: offense falls under category F only if prison sentence of at least one year imposed
Unlawful driving or taking of vehicle	*Matter of V-Z-S,* 22 I&N Dec. 1338 1338 (BIA 2000)	Cal. Vehicle Code §10851	AF—category G theft offense* *A taking of property constitutes a theft offense within category G whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent; not all taking, however, will meet this standard because some takings entail a *de minimis* deprivation Note: offense falls under category G only if prison sentence of at least one year imposed
Unlawful driving or taking of a vehicle	*Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006);	Cal. Vehicle Code §10851(a)	<u>*MAYBE*</u> AF—category G theft offense* *statute criminalizes accessory and accomplice conduct, which does not involve taking of or exercise of control over property and is therefore not a theft offense. under the modified approach, the record of conviction must establish that person was convicted of 'unlawful driving or taking of a vehicle' as a principal and not merely as accessory or accomplice. Note: offense falls under category G only if prison sentence of at least one year imposed
Unlawful driving or taking of vehicle	*U.S. v. Cruz-Mandujano,* 2002 U.S. App. LEXIS 24417 (9th Cir. 2002) (unpub'd opinion)	Cal. Vehicle Code §10851	<u>*NOT*</u> AF under category F (following *Ye v. INS,* see "Burglary of vehicle", *supra*) <u>*MAYBE*</u> AF under category G as theft offense* *statute is broader than the generic definition of theft in that it permitted conviction for aiding and abetting; there was insufficient information in the record to determine whether defendant was in fact convicted of generic theft. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra*
Unlawful imprison-ment	*Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003)	N.Y. Penal Law 135.10	<u>*MAYBE*</u> AF—category F crime of violence within 18 U.S.C. §16(a) or (b)* *statute is divisible: restraint of a non-consenting competent adult using physical force or intimidation satisfies 16(a), and restraint of non-consenting competent adult using deception satisfies 16(b); restraint of an incompetent person or child under 16 years of age with acquiescence of the restrained person is not a crime of violence within 16(a) or (b). *under the modified categorical approach, the record of conviction can be consulted to determine whether Respondent was convicted of unlawful imprisonment of a competent adult. The narrative statement of facts in a pre-sentence report cannot be consulted for this purpose because it may not be reliable and may contain allegations that were not proven or would have been inadmissible.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			Note that this case was decided before the Supreme Court issued its decision in Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Unlawful use of means of transporta-tion	*U.S. v. Perez-Corona,* 295 F.3d 996 (9th Cir. 2002)	Ariz. Rev. Stat. §13-1803	*MAYBE* AF under category G* *not all conduct penalized under statute falls within the generic definition of theft, because intent to deprive the owner of use or possession is not an element of the offense; in this case, no judicially noticeable facts existed in the record regarding circumstances of defendant's conviction to determine if his conduct constituted a theft offense Note: offense falls under category G only if prison sentence of at least one year imposed
Use of vehicle to facilitate discharge of weapon (drive-by shooting)	*Nguyen v. Ashcroft,* 366 F.3d 386 (5th Cir. 2004)	Okla. Stat. tit. §21, 652(b)	AF—category F crime of violence within 18 U.S.C. §16(b)* *a conviction requires an actual, intentional discharge of a weapon (although not necessarily by the person charged with this offense); therefore there is always a 'substantial risk' that physical force may be used. Also, the language "*uses*… vehicle to facilitate" suggests intentionality. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft, 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Vehicle trafficking (receiving & possessing w/ intent to sell cars with altered I.D. numbers	*U.S. v. Maung*, 320 F.3d 1305 (11th Cir. 2003)	18 U.S.C. §§371, 2321(a)	AF—category R* *as an "offense relating to . . . trafficking in vehicles the identification numbers of which have been altered" Note: offense falls under category R only if prison sentence of at least one year imposed
Vehicular homicide (reckless)	*Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005)	N.J. Stat. Ann. §2C:11-5(b)(1)	*NOT* AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *a conviction under this statute requires mere *recklessness*, which is not sufficient for crime of violence. Court grounds this holding, at least partly, on the Supreme Court's repeated statement in *Leocal* that accidental conduct is not enough to qualify as a crime of violence and its [Court of Appeal's] determination that accidental conduct would 'seem to encompass recklessness'
Vehicular homicide (misde-meanor conviction with one year sentence)	*Francis v. Reno,* 269 F.3d 162 (3rd Cir. 2001)	75 Pa.C.S.A. §3732**	*NOT* AF under category F as crime of violence within §16(a) or §16(b)* *state vehicular homicide statute *at the time of conviction* in 1993 was categorized as a misdemeanor under state law. Where an offense is categorized as a misdemeanor under state law, it does not meet the definition of a crime of violence under §16(b). Even if state misdemeanors may be included under §16(b), conviction under state vehicular homicide statute still does not fall under crime of violence definition at §16(b) because statute required proof of criminal negligence only (unintentional conduct), not recklessness Note: In 2000, the Pennsylvania Legislature amended 75 Pa. C. S. A. S 3732 by substituting 'recklessly or with gross negligence' for 'uninten-

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
			tionally' and increased the offense from a misdemeanor of the first degree to a felony of the third degree
Vehicular homicide (homicide by intoxicated use of vehicle)	*Bazan-Reyes v. INS,* 256 F.3d 600 (7th Cir. 2001)	Wisc. Stat. §940.09	<u>*NOT*</u> AF under category F as crime of violence within §16(a)* or 16(b)** *because the word "use" in §16(a) requires volitional conduct **intentional force is virtually never employed to commit any of the offenses for which petitioners were convicted; §16(b) is limited to crimes in which the offender is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense.
Vehicular homicide (criminal vehicular homicide while having an alcohol concentration of 0.10 or more)	*Omar v. INS,* 298 F.3d 710 (8th Cir. 2002), superceded in part by *Leocal v. Ashcroft,* 543 U.S. 1 (2004), supra.	Minn. Stat. §609.21, subd. 1(4)	AF—category F as crime of violence under §16(b)* Note: **Superceded by *Leocal v. Ashcroft,*** 543 U.S. 1 (2004),*supra,* which held that §16 does not include offenses requiring only negligent or mere accidental conduct, such as DUI offenses.
Vehicular man-slaughter while intoxicated	*Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005	Cal. Penal Code §191.5(a)	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *a conviction under this statute requires only *gross negligence*, and therefore does not constitute the kind of *active* employment of force required by *Leocal*

Crimes of Moral Turpitude: Table of Cases

APPENDIX D

Updated 10/15/04

This file contains summaries of all BIA cases from 1 I. & N. Dec. 1 to the present, and all reported federal cases decided by the U.S. Supreme Court Circuit Courts of Appeal, and district courts from 1940 to the present, that state what offenses are and are not crimes of moral turpitude. The vast majority of the indexed decisions are cases in which the phrase “moral turpitude” was interpreted for immigration purposes; the table also includes a handful of federal court decisions interpreting "moral turpitude" for witness impeachment purposes, for whatever persuasive value they may have. These cases are signaled by an asterisk. About 2000 decisions were reviewed for possible inclusion in this table. This table is continually updated at the website of the Law Offices of Norton Tooby: http://www.CriminalAndImmigrationLaw.com.

The case summaries are organized alphabetically by a brief verbal definition of the crime involved in the case.

A determination as to the presence or absence of moral turpitude is based on the crime as defined by the statute and the record of conviction at the time of the decision. The decisions in these cases often times were the result of divisible statute analysis. Consequently, the cases collected below should be used as the starting point rather than as a substitute for legal research.

CRIME	CASE	STATUTE	HELD
AIDING AND ABETTING	See principal offense (e.g. THEFT—AIDING)		
ASSAULT	See also DOMESTIC VIOLENCE; SEX OFFENSES—INDECENT ASSAULT; BATTERY; FIREARMS		
ASSAULT	Medina v. United States, 259 F.3d 220 (4th Cir. 2001)	Va. Code § 18.2-57	NMT
ASSAULT	Matter of J, 4 I. & N. Dec. 26, 1950 WL 6612 (BIA 1950)	German Crim. Code § 223(a)	NMT

ASSAULT—AGGRAVATED	Pichardo v. INS, 104 F.3d 756 (5th Cir. 1997)	18 Pa. Cons. Stat. § 2702	MT
ASSAULT—AGGRAVATED	Matter of Medina, 15 I. & N. Dec. 611, 613-614, 1976 WL 32319 (BIA 1976)	Ill. Rev. Stats. Chapter 38, § 12-2(a)(1)	MT
ASSAULT—AGGRAVATED	Matter of O, 3 I. & N. Dec. 193 (BIA 1948)		MT
ASSAULT—AGGRAVATED—DEADLY OR DANGEROUS WEAPON	Matter of Z, 1 I. & N. Dec. 446, 1943 WL 6310 (BIA 1943)	Conn. Gen. Stats. § 6195	NMT
ASSAULT—BY MEANS OF FORCE	Matter of R, 1 I. & N. Dec. 352, 1942 WL 6548 (BIA 1942)		MT
ASSAULT—CAUSING BODILY INJURY	Matter of Fualaau, 21 I. & N. Dec. 475, 1996 WL 413576 (BIA 1996)	Hawaii Rev. Stat. § 707-712(1)(a)	NMT
ASSAULT—DANGEROUS WEAPON	Yousefi v. INS, 260 F.3d 318, 326 (4th Cir. 2001)		MT
ASSAULT—DANGEROUS WEAPON—BODILY INJURY	Lopez-Mendez v. INS, 187 F.3d 642 (Table) (8th Cir. 1999) (unpublished)	Neb. Rev. Stat. Ann. § 28-309 (Michie 1995)	MT
ASSAULT—DEADLY WEAPON	Castillo v. INS, 91 F.3d 150 (Table) (9th Cir. 1996) (unpublished)	Cal. Pen. Code § 245(a)(1)	MT
ASSAULT—DEADLY WEAPON	Niu v. INS, 963 F.2d 379 (Table) (9th Cir. 1992)	Cal. Pen. Code § 245(a)	MT
ASSAULT—DEADLY WEAPON	Gonzales v. Barber, 207 F.2d 398 (9th Cir. 1953), cert. denied, 346 U.S. 914 (1953)		MT
ASSAULT—DEADLY WEAPON	Matter of O, 3 I. & N. Dec. 193, 1948 WL 6251 (BIA 1948)	Conn. Gen. Stats. § 6195	MT
ASSAULT—DEADLY WEAPON	Matter of GR, 2 I. & N. Dec. 733, 1946 WL 6088 (BIA 1946)	Cal. Pen. Code § 245	MT
ASSAULT—DEADLY WEAPON ON OFFICER	Matter of Danesh, 19 I. & N. Dec. 669, 1988 WL 235462 (BIA 1988)		MT
ASSAULT—DEADLY WEAPON—INTENT GBI	Matter of R, 1 I. & N. Dec. 209, 1942 WL 6518 (BIA 1942)	Utah Rev. Stats. § 103-7-6	MT
ASSAULT—DOMESTIC VIOLENCE—SPOUSAL BATTERY—INFLICTION OF INJURY ON SPOUSE	Matter of Tran, 21 I. & N. Dec. 291, 1996 WL 170083 (BIA 1996)	Cal. Pen. Code § 273.5(a)	MT
ASSAULT—INTENT TO COMMIT ABORTION	Matter of M, 2 I. & N. Dec. 525, 1946 WL 6049 (BIA 1946)	N.Y. Pen. Law § 242(5)	MT

ASSAULT—INTENT TO COMMIT RAPE	Matter of Beato, 10 I. & N. Dec. 730, 1964 WL 12126 (BIA 1964)	N.Y. Pen. Law § 242(5)	MT
ASSAULT—INTENT TO COMMIT ROBBERY	Matter of Quadara, 11 I. & N. Dec. 457, 1966 WL 14276 (BIA 1966)		MT
ASSAULT—INTENT TO DO MANSLAUGHTER	Matter of J, 2 I. & N. Dec. 477 (BIA 1946)		MT
ASSAULT—INTENT TO INJURE	Matter of P, 3 I. & N. Dec. 5 (BIA 1947; A.G.1947)		MT
ASSAULT—INTENT TO INJURE—GREAT BODILY INJURY	Matter of P, 3 I. & N. Dec. 5, 1947 WL 7013 (BIA 1947)	Mich. Pen. Code § 28.279, title 28, chapter 286a	MT
ASSAULT—INTERFERING WITH OFFICER BY PULLING KNIFE	Matter of Logan, 17 I. & N. Dec. 367, 1980 WL 121892 (BIA 1980)	Ark. Stat. 41-2804(2)(i)	MT
ASSAULT—KNIFE	Matter of Goodalle, 12 I. & N. Dec. 106, 1967 WL 13971 (BIA 1967)	N.Y. Pen. Law § 242(4)	MT
ASSAULT—KNIFE	Matter of Z, 5 I. & N. Dec. 383 (BIA 1953)		MT
ASSAULT—LESIONES	Matter of L, 2 I. & N. Dec. 54, 1944 WL 5158 (BIA 1944)	Sonora, Mexico Pen. Code Article 193	MT
ASSAULT—MURDEROUS INTENT	Matter of C, 5 I. & N. Dec. 370, 1953 WL 7465 (BIA 1953)		MT
ASSAULT—NEGLIGENT ASSAULT RESULTING IN BODILY INJURY	Matter of Perez-Contreras, 20 I. & N. 615 (BIA 1992)	Wash. Rev. Code § 9A.36.031(f)	NMT
ASSAULT—ON AN OFFICIAL	Matter of O, 4 I. & N. Dec. 301, 1951 WL 7004 (BIA 1951)	German Crim. Code § 115	NMT
ASSAULT—SERIOUS BODILY INJURY	Nguyen v. Reno, 211 F.3d 692 (1st Cir. 2000)	Conn. Gen. Stats. § 53a-60	MT
ASSAULT—SIMPLE	Matter of B, 5 I. & N. Dec. 538, 1953 WL 7511 (BIA 1953)		NMT
ASSAULT—SIMPLE	Matter of E, 1 I. & N. Dec. 505, 1943 WL 6321 (BIA 1943)	N.Y. Pen. Law § 244(l)	NMT
ASSAULT—SIMPLE	U.S. ex rel. Zaffarano v. Corsi, 63 F.2d 757 (2nd Cir. 1933)	N.Y. Penal Code § 242(5)	NMT
ASSAULT—UNKNOWN WEAPON	Matter of B, 1 I. & N. Dec. 52, 1941 WL 7912 (BIA, AG 1941)	Mason's Minnesota Stats. § 10098 (1927)	NMT
ASSAULT—WEAPON	Matter of Baker, 15 I. & N. Dec. 50, 1974 WL 29998 (BIA 1974)	14 Virgin Isl. Code § 297 (1964)	MT
ATTEMPT	See principal offense (e.g. THEFT—ATTEMPTED THEFT)		
ATTEMPTED SUICIDE	Matter of D, 4 I. & N. Dec. 149, 1950 WL 6633 (BIA 1950)	Canadian Crim. Code § 270	NMT

AUTO THEFT	See THEFT—AUTO		
BAD CHECKS	See also FRAUD—CHECK FRAUD		
BAD CHECKS	Ijoma v. INS, 875 F.Supp. 625 (D. Neb. 1995), affirmed, 76 F.3d 382 (8th Cir. 1996)	Neb. Rev. Stat. § 28-611(3)	MT
BAD CHECKS	Matter of Logan, 17 I. & N. Dec. 367, 1980 WL 121892 (BIA 1980)	Ark. Stat. § 67-720	MT
BAD CHECKS	Matter of McLean, 12 I. & N. Dec. 551, 1967 WL 14089 (BIA 1967)	Col. Rev. Stats. § 40-14-20 (1963)	MT
BAD CHECKS	Matter of McLean, 12 I. & N. Dec. 551, 1967 WL 14089 (BIA 1967)	Cal. Pen. Code § 476a	MT
BAD CHECKS	Burr v. INS, 350 F.2d 87 (9th Cir. 1965), cert. denied, 383 U.S. 915, 86 S.Ct. 905, 15 L.Ed.2d 669 (1966)	Cal. Pen. Code § 476a	MT
BAD CHECKS	Matter of Stasinski, 11 I. & N. Dec. 202, 1965 WL 12260 (BIA 1965)	Wis. Stats. Para. 943.24	NMT
BAD CHECKS	Matter of Bailie, 10 I. & N. Dec. 679, 1964 WL 12113 (BIA 1964)	Kan. Gen. Stats. § 21-554 (1949)	NMT
BAD CHECKS	Matter of Ohnhauser, 10 I. & N. Dec. 501, 1964 WL 12076 (BIA 1964)	Cal. Pen. Code § 476a	MT
BAD CHECKS	Matter of M, 9 I. & N. Dec. 743 (BIA 1962), overruled by Matter of Colbourne, 13 I. & N. Dec. 319 (BIA 1969)	14 Virgin Isl. Code § 835(a)	MT
BAD CHECKS	Matter of B, 4 I. & N. Dec. 297, 1951 WL 7003 (BIA 1951)	Ohio Gen. Code § 710-176	MT
BAD CHECKS	Matter of B, 3 I. & N. Dec. 278, 1948 WL 6272 (BIA 1948)		MT
BAD CHECKS—DRAWING OR DELIVERING WORTHLESS CHECK WITHOUT INTENT TO DEFRAUD	Matter of Colbourne, 13 I. & N. Dec. 319, 1969 WL 16971 (BIA 1969)	14 Virgin Isl. Code § 835(a)(1)	NMT
BAD CHECKS—ISSUANCE	Matter of Bart, 20 I. & N. Dec. 436, 1992 WL 195800 (BIA 1992)	Ga. Code § 16-9-20(a)	MT
BAD CHECKS—PASSING	Matter of Balao, 20 I. & N. Dec. 440, 1992 WL 195801 (BIA 1992)	18 Pennsylvania Consolidated Stats. § 4105(a)(1)	NMT

BATTERY	See also SEX OFFENSES—FORCIBLE SEXUAL BATTERY; CHILD ABUSE		
BATTERY	In re Garcia-Hernandez, 23 I. & N. Dec. 590, 2003 WL 21043271 (BIA 2003)	Calif. Penal Code § 242	NMT
BATTERY—ASSAULT AND—DANGEROUS WEAPON	Matter of J, 4 I. & N. Dec. 512, 1951 WL 7052 (BIA 1951)	Mass. Laws, Ch. 265 § 15A	MT
BATTERY—ASSAULT AND—DANGEROUS WEAPON	Matter of N, 2 I. & N. Dec. 201, 1944 WL 5181 (BIA 1944)		MT
BATTERY—ASSAULT AND—MAIMING	Matter of P, 7 I. & N. Dec. 376, 1956 WL 10303 (BIA 1956)	NJ Ann. Stats. Ch. 90 § 2A: 90-1	MT
BATTERY—INTENT TO COMMIT SEXUAL ASSAULT	Aguirre-Moreno v. INS, 89 F.3d 844 (9th Cir. 1996) (unpublished)	Nev. Rev. Stat. § 200.400 (1986)	MT
BLACKMAIL	See EXTORTION		
BREACH OF PEACE—GENERAL	Chaunt v. United States, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960)		MT
BREAKING AND ENTERING	See BURGLARY—BREAKING AND ENTERING		
BRIBERY	Int'l Longshoremen's Ass'n AFL-CIO v. Waterfront Commission of New York Harbor, 642 F.2d 666 (2d Cir. 1981)	Labor Management Relations Act	MT
BRIBERY	United States ex rel. Sollazzo v. Esperdy, 285 F.2d 341 (2d Cir. 1961)	N.Y. Pen. Law § 382(1)	MT
BRIBERY—ATTEMPTED	Matter of V, 4 I. & N. Dec. 100, 1950 WL 6624 (BIA 1950)	German Crim. Code § 333	MT
BRIBERY—OF AMATEUR ATHLETE	United States ex rel. Sollazzo v. Esperdy, 187 F.Supp. 753 (D.N.Y. 1960)	N.Y. Pen. Law § 382(1)	MT
BRIBERY—OF INS OFFICER	Okabe v. INS, 671 F.2d 863 (5th Cir. 1982)	18 U.S.C. § 201(b)(3)	MT
BRIBERY—OF UNITED STATES OFFICER	Matter of H, 6 I. & N. Dec. 358, 1954 WL 7885 (BIA 1954)	18 U.S.C. § 202	MT
BURGLARY	See also POSSESSION OF BURGLARY TOOLS; UNLAWFUL ENTRY		
BURGLARY	Ortiz-Salgado v. INS, 120 F.3d 269 (Table) (9th Cir. 1997)	Cal. Pen. Code § 459	MT
BURGLARY	De La Cruz v. INS, 951 F.2d 226, 228 (9th Cir.1991)		MT
BURGLARY	Tahir v. Lehmann, 171 F.Supp. 589 (D. Ohio 1958)		MT

BURGLARY	Matter of Z, 5 I. & N. Dec. 383 (BIA 1953)	Cal. Pen. Code § 459	MT
BURGLARY	Matter of M, 2 I. & N. Dec. 721, 1946 WL 6086 (BIA 1946)	N.Y. Pen. Law § 404	NMT
BURGLARY	Matter of VT, 2 I. & N. Dec. 213, 1944 WL 5183 (BIA 1944)	Cal. Pen. Code § 459	MT
BURGLARY	Matter of R, 1 I. & N. Dec. 540, 1943 WL 6327 (BIA 1943)	N.Y. Pen. Law § 404(1)	MT
BURGLARY—ATTEMPTED 2d DEGREE	Long v. Immigration & Naturalization Service, U.S. Dist. Ct., W.D. Wash. 2003 (unpublished)	Wash. Rev. Code § 9A.52.030	NMT
BURGLARY—ATTEMPTED BURGLARY TO COMMIT LARCENY	United States ex rel. Meyer v. Day, 54 F.2d 336 (2d Cir. 1931)		MT
BURGLARY—BREAKING AND ENTERING	Matter of Moore, 13 I. & N. 711 (BIA 1971)		MT
BURGLARY—BREAKING AND ENTERING	Matter of P, 2 I. & N. Dec. 887, 1947 WL 7040 (BIA 1947)	Canadian Crim. Code § 458(a)	NMT
BURGLARY—BREAKING AND ENTERING	Matter of M, 2 I. & N. Dec. 686, 1946 WL 6077 (BIA 1946)	Canadian Crim. Code § 461	
BURGLARY—BREAKING AND ENTERING	Matter of B, 56156/586 (January 12, 1944)		MT
BURGLARY—BREAKING AND ENTERING	Matter of D, 56130/68 (March 13, 19□43)		MT
BURGLARY—BREAKING AND ENTERING AND THEFT	Matter of J, 21 I. & N. Dec. 503, 46 WL 6046 (BIA 1946)	Canadian Crim. Code § 460	MT
BURGLARY—BREAKING AND ENTERING—INTENT TO COMMIT LARCENY	Matter of L, 6 I. & N. Dec. 666, 1955 WL 8725 (BIA 1955)		MT
BURGLARY—ENTERING A BUILDING	Matter of G, 1 I. & N. Dec. 403, 1943 WL 6299 (BIA 1943)	N.Y. Pen. Law § 405	NMT
BURGLARY—INTENT TO COMMIT THEFT	Matter of Tran, 21 I. & N. Dec. 291, 292, 1996 WL 170083 (BIA 1996)		MT
BURGLARY—INTENT TO COMMIT THEFT	Matter of Frentescu, 18 I. & N. Dec. 244 (BIA 1982)		MT
BURGLARY—INTENT TO COMMIT THEFT	Matter of Z, 5 I. & N. Dec. 383, 1953 WL 7467 (BIA 1953)		MT
BURGLARY—INTENT TO STEAL	Matter of VT, 2 I. & N. Dec. 213 (BIA 1944)		MT

BURGLARY—POSSESSION OF BURGLARY TOOLS WITH INTENT TO COMMIT ANY OFFENSE	Matter of S, 6 I. & N. Dec. 769, 1955 WL 8748 (BIA 1955)	Canadian Crim. Code § 464(b)	NMT
BURGLARY—POSSESSION OF BURGLARY TOOLS WITH INTENT TO COMMIT A CRIME	United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939)	N.Y. Pen. Law § 408	NMT
BURGLARY—POSSESSION OF ITEM WITH INTENT TO COMMIT CRIME OF MORAL TURPITUDE	United States ex rel. Guarino v. Uhl, 107 F.2d 339 (2d Cir. 1939)	N.Y. Pen. Law § 408	MT
BURGLARY—UNLAWFUL ENTRY	De Bernardo v. Rogers, 254 F.2d 81 (D.C. Cir. 1958)		MT
BURGLARY—UNLAWFUL ENTRY	Petition of Knight, 122 F.Supp. 322 (D.N.Y. 1954)		NMT
BURGLARY—UNLAWFUL ENTRY OF A BUILDING	Matter of C, 8 I. & N. Dec. 276, 1959 WL 11563 (BIA 1959)	N.Y. Pen. Code § 405	MT
BURGLARY—VIOLATION OF DOMICILE	Matter of M, 9 I. & N. Dec. 132, 1960 WL 12076 (BIA 1960)	Crim. Code of 1889 § 157	NMT
BURGLARY TOOLS	See BURGLARY—POSSESSION OF BURGLARY TOOLS		
CHECK OFFENSES	See BAD CHECKS		
CHILDREN	See CONTRIBUTING TO THE DELINQUENCY OF A MINOR; SEX OFFENSES; CHILD ABANDONMENT; CHILD ABUSE; NONSUPPORT		
CHILD ABANDONMENT	Matter of R, 4 I. & N. Dec. 192, 1950 WL 6642 (BIA 1950)	Wis. Stats. § 351.30	MT
CHILD ABUSE	Matter of Nodahl, 12 I. & N. Dec. 338, 1967 WL 14027 (BIA 1967)	Cal. Pen. Code § 273d	MT
CHILD ABUSE—AGGRAVATED	Garcia v. Attorney General of U.S., 329 F.3d 1217, (11th Cir. 2003)	Florida Stat. §§ 827.01(1), (3) and 784.045(1)	MT
CHILD ABUSE—INJURY	Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969)	Cal. Pen. Code § 273d	MT
CHILD SUPPORT	See NONSUPPORT		
CLAIM TO U.S. CIIZENSHIP	See FALSE STATEMENTS		
COMMERCIAL OFFENSES—ATTEMPT TO OBSTRUCT INTERSTATE COMMERCE	Matter of PM, 4 I. & N. Dec. 461, 1951 WL 7041 (BIA 1951)	18 U.S.C. § 1992	MT
CONFIDENCE GAME	Rukavina v. INS, 303 F.2d 645 (7th Cir. 1962)		MT

CONSPIRACY	See also principal offense (e.g. THEFT—CONSPIRACY)		
CONSPIRACY	Gambino v. INS, 419 F.2d 1355 (2d Cir. 1970)		MT
CONSPIRACY	Matter of S, 2 I. & N. Dec. 225 (BIA 1944)	18 U.S.C. § 80	MT
CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES	Matter of G, 7 I. & N. Dec. 114, 1956 WL 10234 (BIA 1956)	18 U.S.C. § 88	NMT
CONSPIRACY—TO COMMIT ANY OFFENSE TO IMPEDE US FUNCTIONS	Matter of Flores, 17 I. & N. Dec. 225 (BIA 1980)	18 U.S.C. § 371	NMT
CONSPIRACY—TO COMMIT CMT	Matter of S, 9 I. & N. Dec. 688, 1962 WL 12883 (BIA 1962)		MT
CONSPIRACY—TO COMMIT CMT	Matter of B, 2 I. & N. Dec. 542, 1946 WL 6054 (BIA 1946)	Canadian Crim. Code § 573	MT
CONSPIRACY—TO COMMIT CMT	Matter of F, 2 I. & N. Dec. 754, 1946 WL 6090 (BIA 1946)		MT
CONSPIRACY—TO IMPEDE US FUNCTIONS	Matter of E, 9 I. & N. Dec. 421, 1961 WL 12183 (BIA 1961)	18 U.S.C. § 371	MT
CONSPIRACY—TO MISUSE RATION STAMPS	Matter of P, 5 I. & N. Dec. 582, 1953 WL 7524 (BIA 1953)	Second World War Powers Act of 1942	NMT
CONTEMPT OF CONGRESS	Matter of C, 9 I. & N. Dec. 524 (BIA 1962)		NMT
CONTEMPT OF COURT	Matter of P, 6 I. & N. Dec. 400 (BIA 1954)	Law of Canada	NMT
CONTRIBUTING TO THE DELINQUENCY OF A MINOR	See also SEX OFFENSES—CONTRIBUTING		
CONTRIBUTING TO DELINQUENCY OF MINOR	Matter of W, 5 I. & N. Dec. 239, 1953 WL 7440 (BIA 1953)	Juvenile Delinquents Act § 33 (Canada 1929)	MT
CONTRIBUTING TO THE DELINQUENCY OF A MINOR	Matter of C, 5 I. & N. Dec. 65, 1953 WL 7403 (BIA 1953)	Or. Gen. Laws Title 23, ch. 10, article 3, § 1034	MT
CONTRIBUTING TO DELINQUENCY OF A MINOR	Matter of RP, 4 I. & N. Dec. 607, 1952 WL 7281 (BIA 1952)	Cal. Welfare and Institutions Code § 702 (k) (May 25, 1937)	MT

CONTRIBUTING TO THE DELINQUENCY OF A MINOR	Matter of P, 3 I. & N. Dec. 290, 1948 WL 6274 (BIA 1948)	Juvenile Court Law of California § 21 subd. 11 (as reenacted under § 702 of the California Welfare and Institutions Code)	MT
CONTRIBUTING TO THE DELINQUENCY OF A MINOR	Matter of W, 2 I. & N. Dec. 795, 1947 WL 7024 (BIA 1947)	Juvenile Delinquents Act of Canada § 33, subsection 1 (b)	NMT
CONTRIBUTING TO THE DELINQUENCY OF A MINOR	Matter of F, 2 I. & N. Dec. 610, 1946 WL 6064 (BIA 1946)	Ill. Criminal Code §§ 37.090, 37.089	MT
CONTRIBUTING TO THE DELINQUENCY OF A MINOR	Matter of VT, 2 I. & N. Dec. 213, 1944 WL 5183 (BIA 1944)	Cal. Juvenile Court Law § 21	NMT
CONTRIBUTING TO DELINQUENCY OF A MINOR	Matter of P, 2 I. & N. Dec. 117, 1944 WL 5171 (BIA 1944)	Remington's Rev. Stats. of Wash. § 1987-17	NMT
CONTRIBUTING TO DELINQUENCY OF A MINOR	Matter of VT, 2 I. & N. Dec. 213, 1944 WL 5183 (BIA 1944)	Juvenile Court Law of California § 21	NMT
CONTRIBUTING TO DELINQUENCY OF MINOR	Matter of Y, 1 I. & N. Dec. 662, 1943 WL 6352 (BIA 1943)	Mich. Compiled Laws § 7696, ch. 30 (1929)	NMT
CONTROLLED SUBSTANCES—DISPOSING OF NARCOTIC DRUGS	Matter of R, 4 I. & N. Dec. 644, 1952 WL 7289 (BIA 1952)	Wash. Crim. Code, ch. 249 (S. B. 300)	NMT
CONTROLLED SUBSTANCES—DISTRIBUTION	Matter of Khourn, 21 I. & N. Dec. 1041 (BIA 1997)	21 U.S.C. § 841(a)(1) (1988)	MT
CONTROLLED SUBSTANCES—DISTRIBUTION	Matter of Abreu-Semino, 12 I. & N. Dec. 775 (BIA 1968)	21 U.S.C. §§ 331(q)(2)	NMT
CONTROLLED SUBSTANCES—IMPORTATION OF NARCOTICS	Matter of V, 1 I. & N. Dec. 293, 1942 WL 6537 (BIA 1942)	Narcotic Drugs Import and Export Act, 21 U.S.C. § 171-185	NMT
CONTROLLED SUBSTANCES—ISSUING FRAUDULENT NARCOTIC PRESCRIPTION	Matter of A, 5 I. & N. Dec. 52, 1953 WL 7400 (BIA 1953)	18 U.S.C. §§ 72 , 494	MT

CONTROLLED SUBSTANCES—NARCOTIC DRUGS IMPORT AND EXPORT ACT	Matter of YMK, 3 I. & N. Dec. 387, 1948 WL 6288 (BIA 1948)	Narcotic Drugs Import and Export Act (act of February 9, 1909, as amended, 21 U.S.C. § 174)	NMT
CONTROLLED SUBSTANCES—POSSESSION	Matter of Abreu-Semino, 12 I. & N. Dec. 775 (BIA 1968)	21 U.S.C. § 331(q)(3)	NMT
CONTROLLED SUBSTANCES—SALE OF DRUGS	Matter of Y, 2 I. & N. Dec. 600, 1946 WL 6063 (BIA 1946)	Dominion Opium and Narcotic Drug Act § 4(1)(f), (1923) as amended by the Canadian Stats. chapter 20, § 3 (1925)	MT
CONTROLLED SUBSTANCES—UTTERING FORGED DRUG PRESCRIPTION	United States ex rel. Abbenante v. Butterfield, 112 F.Supp. 324 (D. Mich. 1953)	18 U.S.C. § 1654	MT
CONVERSION OF UNITED STATES FUNDS	United States v. Concepcion, 795 F.Supp. 1262 (E.D.N.Y. 1992)		MT
COUNTERFEITING	See also FORGERY; FRAUD		
COUNTERFEITING	Matter of P, 6 I. & N. Dec. 795, 1955 WL 8755 (BIA 1955)	18 U.S.C. § 265 (now 18 U.S.C. § 472)	MT
COUNTERFEITING—CIRCULATING COUNTERFEIT MONEY	Matter of G, 4 I. & N. Dec. 17, 1950 WL 6610 (BIA 1950)	German Crim. Code §§ 146 and 147	MT
COUNTERFEITING—GOVERNMENT OBLIGATIONS	United States ex rel. Volpe v. Smith, Director of Immigration, 289 U.S. 422 (1933)		MT
COUNTERFEITING—NICKELS	U.S. ex rel. Giglio v. Neelly, 208 F.2d 337, 341 (7th Cir. 1954)	18 U.S.C. § 282 (1946)	NMT
COUNTERFEITING—OBLIGATIONS—POSSESSION OF COUNTERFEIT OBLIGATIONS WITH INTENT TO DEFRAUD	Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974)	18 U.S.C. § 472	MT
COUNTERFEITING—OBLIGATIONS—SELLING	Winestock v. INS, 576 F.2d 234 (9th Cir. 1978)	18 U.S.C. § 473	MT

COUNTERFEITING—OBLIGATIONS—TRANSFER AND DELIVERY	Winestock v. INS, 576 F.2d 234 (9th Cir. 1978)	18 U.S.C. § 473	MT
COUNTERFEITING—PASSING OR POSSESSING COUNTERFEIT COINS	Matter of K, 7 I. & N. Dec. 178 (BIA 1956), overruled by Matter of Flores, 17 I. & N. Dec. 225 (BIA 1980)	18 U.S.C. § 277 (now 18 U.S.C. § 485)	NMT
COUNTERFEITING—POSSESSION OF UNITED STATES COIN MOLDS WITH INTENT TO DEFRAUD	Matter of K, 7 I. & N. Dec. 178, 1956 WL 10250 (BIA 1956)	18 U.S.C. § 283 (now 18 U.S.C. § 487)	MT
COUNTERFEITING—SECURITIES	United States ex rel. Giglio v. Neelly, 208 F.2d 337, 338 (7th Cir. 1954)	18 U.S.C. §§ 88, 262, 265, 276	MT
COUNTERFEITING—UNITED STATES BANKNOTES	Matter of M, 5 I. & N. Dec. 598, 1954 WL 7926 (BIA 1954)	United States Pen. Code § 148	MT
COUNTERFEITING—UNITED STATES CURRENCY	United States ex rel. Giglio v. Neelly, 208 F.2d 337, 338 (7th Cir. 1954)	18 U.S.C. § 88, 276	MT
COUNTERFEITING—UTTERING COUNTERFEIT PAPER RELATING TO REGISTRY OF ALIENS	Matter of Flores, 17 I. & N. Dec. 225 (BIA 1980)	18 U.S.C. § 1426(b)	MT
COUNTERFEITING—UTTERING COUNTERFEIT PAPER WITH INTENT TO DEFRAUD	Matter of Lethbridge, 11 I. & N. Dec. 444, 1965 WL 12321 (BIA 1965)	18 U.S.C. § 472	MT
CREDIT CARD OFFENSES	See also FRAUD—CREDIT CARD FRAUD		
CREDIT CARD OFFENSES—ILLEGAL POSSESSION OF CREDIT	Balogun v. Ashcroft, 270 F.3d 274 (5th Cir. 2001)	Ala. Crim. Code § 13A-9-3	MT
CURRENCY TRANSACTION REPORT—CAUSING FINANCIAL INSTITUTION TO FAIL TO FILE REPORT	Matter of LVC, 22 I. & N. Dec. 594 (BIA 1999) (en banc)	31 U.S.C. § 5324(1) (1998)	NMT
CURRENCY VIOLATION	Petition of Yee Wing Toon, 148 F.Supp. 657 (D.N.Y. 1957)		NMT
DESERTION	See MILITARY OFFENSES—DESERTION		
DESTRUCTION OF PROPERTY—MALICIOUS MISCHIEF	See MALICIOUS MISCHIEF		

DISORDERLY CONDUCT	See also PROSTITUTION; SEX OFFENSES		
DISORDERLY CONDUCT	Matter of Alfonso-Bermudez, 12 I. & N. Dec. 225, 1967 WL 14000 (BIA 1967)	Cal. Pen. Code § 647(a)	MT
DISORDERLY CONDUCT	Wyngaard v. Kennedy, 295 F.2d 184, 185 (D.C. Cir. 1961) (per curiam)	N.Y. Pen. Law § 722(8)	MT
DISORDERLY CONDUCT	Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959)	N.Y. Pen. Law § 722(8)	MT
DISORDERLY CONDUCT—HOMOSEXUALITY	Matter of Alfonso-Bermudez, 12 I. & N. Dec. 225, 1967 WL 14000 (BIA 1967)	Cal. Pen. Code § 647(a)	MT
DISORDERLY CONDUCT—LOITERING—INTENT TO SOLICIT MEN TO COMMIT CRIME AGAINST NATURE	Matter of G, 7 I. & N. Dec. 520, 1957 WL 10564 (BIA 1957)	N.Y. Pen. Law § 722(8)	MT
DISORDERLY CONDUCT—SOLICITING MEN FOR LEWD ACTS	Matter of FR, 6 I. & N. Dec. 813, 1955 WL 8759 (BIA 1955)	N.Y. Pen. Law § 722 subd. 8	NMT
DISTRIBUTION OF HANDBILLS	Chaunt v. United States, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960)		NMT
DOMESTIC VIOLENCE	See also ASSAULT		
DOMESTIC VIOLENCE—ASSAULT	Medina v. United States, 259 F.3d 220 (4th Cir. 2001)	Va. Code § 18.2-57	MT
DOMESTIC VIOLENCE—ASSAULT ON WIFE AND SON	Dalis v. Brady, 766 F.Supp. 901 (D. Colo. 1991)		MT
DOMESTIC VIOLENCE—INFLICTION OF INJURY ON SPOUSE	Matter of Tran, 21 I. & N. Dec. 291, 1996 WL 170083 (BIA 1996)	Cal. Pen. Code § 273.5(a)	MT
DOMESTIC VIOLENCE—SPOUSAL INJURY	Grageda v. INS, 12 F.3d 919 (9th Cir. 1993)	Cal. Pen. Code § 273.5(a)	MT
DOMESTIC VIOLENCE—STALKING	Matter of Ajami, 22 I. & N. Dec. 949, 1999 WL 487022 (BIA 1999)	Mich. Ann. Compiled Laws § 750.411i	MT
DRIVING OFFENSES—DUI—(FELONY BECAUSE 3D OFFENSE)	Matter of Torres-Varela, 23 I. & N. Dec. 78, 2001 WL 534297 (BIA 2001) (en banc)	Ariz. Rev. Stat. §§ 28-692(A)(1), 28-697(A)(2), (B), (F), (H)(1), (I), (J)	NMT

DRIVING OFFENSES—DUI—(FELONY—WHILE PROHIBITED TO DRIVE)	Hernandez-Martinez v. Ashcroft, 329 F. 3d 1117 (9th Cir. 2003), rehrg. den., 343 F.3d 1075 (9th Cir. 2003)	Ariz. Rev. Stats. §§ 28-692(A)(1) and 28-697(A)(1) (now §§ 28-1381(A)(1) and 28-1383(A)(1))	NMT
DRIVING OFFENSES—DUI—(FELONY—WHILE PROHIBITED TO DRIVE)	Matter of Lopez-Meza, 22 I. & N. Dec. 1188 (BIA 1999)	Ariz. Rev. Stat. § 28-697(A)(1), (now Ariz. Rev. Stat. § 28-1383(A)(1))	MT
DRIVING OFFENSES—RECKLESS DRIVING	Matter of C, 2 I. & N. Dec. 716, 1946 WL 6085 (BIA 1946)		NMT
DRIVING OFFENSES—USE OF FALSE DRIVER'S LICENSE	See FRAUD—DOCUMENT FRAUD—USE OF FALSE DRIVER'S LICENSE		
DRUGS	See CONTROLLED SUBSTANCES		
EMBEZZLEMENT	United States v. Del Mundo, 97 F.3d 1461 (Table) (9th Cir. 1996) (unpublished)*	Nev. Rev. Stat. § 205.300(1)	MT
EMBEZZLEMENT	Matter of Batten, 11 I. & N. Dec. 271 (BIA 1965)	18 U.S.C. § 656	MT
EMBEZZLEMENT	Matter of Adamo, 10 I. & N. Dec. 593, 1964 WL 12093 (BIA 1964)	Italian Pen. Code Art. 646 and Art. 61, No. 11	MT
EMBEZZLEMENT—BANK FRAUD	Matter of Batten, 11 I. & N. Dec. 271 (BIA 1965)	18 U.S.C. § 656	MT
EMBEZZLEMENT—CONSPIRACY TO EMBEZZLE	Matter of Batten, 11 I. & N. Dec. 271, 1965 WL 12278 (BIA 1965)	18 U.S.C. § 656	MT
ENDANGERMENT—RECKLESS	Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. Sept. 17, 2004)	N.Y. Pen. Law § 120.25	MT
ENDANGERMENT—RECKLESS—ATTEMPTED	Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. Sept. 17, 2004)	N.Y. Pen. Law § 120.25	NMT
ESCAPE	United States ex rel. Manzella v. Zimmerman, 71 F.Supp. 534 (D. Pa. 1947)	Penn. P. L. 382(3)	NMT
ESCAPE—AIDING ESCAPE FROM JAIL	Matter of B, 5 I. & N. Dec. 538, 1953 WL 7511 (BIA 1953)	Mass. Ann. Laws. Ch. 268 § 15-16 (vol. 9)	NMT
ESCAPE—ATTEMPTED ESCAPE	Matter of J, 4 I. & N. Dec. 512, 1951 WL 7052 (BIA 1951)	Mass. Ann. Laws. Ch. 268 § 16	NMT
ESCAPE—BREAKING PRISION	Matter of M, 2 I. & N. Dec. 871, 1947 WL 7037 (BIA 1947)	N. J. Laws ch. 94 § 12 (1931)	NMT
ESCAPE—PRISON BREACH	Matter of Z, 1 I. & N. Dec. 235, 1942 WL 6524 (BIA 1942)	N. J. Compiled Stats. § 52-12	NMT
EXTORTION	See also MAIL OFFENSES; THREATS		

EXTORTION	Matter of C, 5 I. & N. Dec. 630, 1954 WL 7933 (BIA 1954)		MT
EXTORTION	Matter of F, 3 I. & N. Dec. 361, 1948 WL 6284 (BIA 1948)	Canadian Crim. Code § 451 (1936)	MT
EXTORTION—CONSPIRACY TO TRANSPORT PERSON FOR RANSOM	Matter of P, 5 I. & N. Dec. 444, 1953 WL 7480 (BIA 1953)		MT
FAILURE TO PREVENT CRIME	See MISPRISION OF FELONY		
FALSE CLAIM TO U.S. CITIZENSHIP	See FALSE STATEMENTS		
FALSE PERSONATION	See IMPERSONATION		
FALSE STATEMENT	See also FRAUD		
FALSE STATEMENT	Calvo-Ahumada v. Rinaldi, 435 F.2d 544 (3d Cir. 1970)	18 U.S.C. § 1546	MT
FALSE STATEMENT	Matter of Acosta, 14 I. & N. Dec. 338, 1973 WL 29443 (BIA 1973)	18 U.S.C. § 922(a)(6)	MT
FALSE STATEMENT	Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962)	18 U.S.C. § 80M, now 18 U.S.C. § 1001	NMT
FALSE STATEMENT	Matter of N & B, 2 I. & N. Dec. 206, 1944 WL 5182 (BIA 1944)	18 U.S.C. § 231	NMT
FALSE STATEMENT	Matter of B, 1 I. & N. Dec. 121, 1941 WL 7927 (BIA, AG 1941)		NMT
FALSE STATEMENT—CLAIM TO UNITED STATES CITIZENSHIP	White v. INS, 6 F.3d 1312 (8th Cir. 1993)	18 U.S.C. § 911	MT
FALSE STATEMENT—CLAIM TO UNITED STATES CITIZENSHIP	Matter of I, 4 I. & N. Dec 159 (BIA 1950)	18 U.S.C. § 911; 8 U.S.C. § 746(18)	NMT
FALSE STATEMENT—CLAIM TO UNITED STATES CITIZENSHIP	Matter of K, 3 I. & N. Dec. 69, 71 (BIA 1947)	18 U.S.C. § 911	NMT
FALSE STATEMENT—CONSPIRACY TO MAKE FALSE STATEMENTS	Matter of S, 2 I. & N. Dec. 225, 1944 WL 5185 (BIA 1944)	18 U. S. C § 80	MT
FALSE STATEMENT—DMV APPLICATION	Zaitona v. INS, 9 F.3d 432 (6th Cir. 1993)	Mich. Comp. Laws Ann. § 257.324(1)(e)	MT
FALSE STATEMENT—MATERIALITY NOT AN ELEMENT	Matter of G, 8 I. & N. Dec. 315, 1959 WL 11574 (BIA 1959)	18 U.S.C. § 1001	NMT
FALSE STATEMENT—PASSPORT APPLICATION	Matter of Correa-Garces, 20 I. & N. Dec. 451 (BIA 1992)		MT

FALSE STATEMENT—PASSPORT APPLICATION	Matter of B, 7 I. & N. Dec. 342, 1956 WL 10292 (BIA 1956)	18 U.S.C. § 1542	MT
FALSE STATEMENT—TO FEDERAL OFFICER	Kabongo v. INS, 837 F.2d 753, 758 (6th Cir. 1988)	18 U.S.C. § 1001	MT
FALSE STATEMENT—TO FEDERAL OFFICER	Matter of Marchena, 12 I. & N. Dec. 355, 1967 WL 14033 (BIA 1967)	18 U.S.C. § 1001	NMT
FALSE STATEMENT—TO FEDERAL OFFICER	Matter of Espinosa, 10 I. & N. Dec. 98, 1962 WL 12937 (BIA 1962)	18 U.S.C. § 1001	NMT
FALSE STATEMENT—TO UNITED STATES OFFICIAL	Matter of BM, 6 I. & N. Dec. 806, 1955 WL 8757 (BIA 1955)	18 U.S.C. § 1001	MT
FALSE STATEMENT—TO UNITED STATES OFFICIAL	Matter of P, 6 I. & N. Dec. 193, 1954 WL 7841 (BIA 1954)	18 U.S.C. § 1001	MT
FALSE STATEMENT—TO UNITED STATES OFFICIAL	Matter of IL, 7 I. & N. Dec. 233, 234, 1956 WL 10262 (BIA 1956)	18 U.S.C. § 1001	MT
FALSE STATEMENT—UNEMPLOYMENT FRAUD	Matter of Di Filippo, 10 I. & N. Dec. 76, 1962 WL 12907 (BIA 1962)	Unemployment Insurance Act of Canada § 106 A(a)	NMT
FARE EVASION	Santos-Gonzalez v. Reno, 93 F.Supp.2d 286, 288 n.2 (E.D.N.Y. 2000)		MT
FARE EVASION	Matter of G, 2 I. & N. Dec. 235 (BIA 1945)	N.Y. Pen. Law § 1293-c	NMT
FARE EVASION—DEPOSITING METAL DISC IN COIN BOX	Matter of G, 2 I. & N. Dec. 235, 1945 WL 5548 (BIA 1945)	N.Y. Pen. Law § 1293(c) (1935)	NMT
FIREARMS OFFENSES—ASSAULT	Matter of S, 5 I. & N. Dec. 668, 1954 WL 7942 (BIA 1954)	Wash. Rev. Stats. § 2414(4) (1932)	MT
FIREARMS OFFENSES—CARRYING CONCEALED WEAPON WITH INTENT TO USE	Matter of S, 8 I. & N. Dec. 344, 1959 WL 11579 (BIA 1959)	Minn. Ann. Stats. § 616.41 (1957)	MT
FIREARMS OFFENSES—DISCHARGE AT OCCUPIED VEHICLE	Matter of Muceros, Index Decision (BIA 2000)	Cal. Penal Code § 246	MT
FIREARMS OFFENSES—POSSESSION OF SAWED OFF SHOTGUN	Matter of Hernandez-Casillas, 20 I. & N. Dec. 262, 278, 1990 WL 385764 (BIA 1990)		NMT
FIREARMS OFFENSES—POSSESSION OF SAWED OFF SHOTGUN	Matter of Granados, 16 I. & N. Dec. 726, 1979 WL 44438 (BIA 1979)		NMT

FIREARMS OFFENSES—USE	United States v. Brown, 127 F.Supp.2d 392, 408-409 (W.D.N.Y. 2001)*	Va. Code § 18.2-53.1	MT
FOREIGN AGENT REGISTRATION ACT	Matter of O, 8 I. & N. Dec. 291, 1959 WL 11567 (BIA 1959)	Foreign Agents Registration Act of 1938	NMT
FOREIGN AGENTS REGISTRATION ACT	Matter of M, 3 I. & N. Dec. 310, 1948 WL 6277 (BIA 1948)	Foreign Agents Registration Act of June 8, 1938, as amended April 29, 1942	NMT
FORGERY	See also CONTROLLED SUBSTANCES—UTTERING FORGED PRESCRIPTION		
FORGERY	Matter of Jensen, 10 I. & N. Dec. 747, 1964 WL 12130 (BIA 1964)	Canadian Crim. Code §§ 309(1) and 311	MT
FORGERY	Matter of M, 9 I. & N. Dec. 132, 1960 WL 12076 (BIA 1960)	Italian Crim. Code §§ 275, 278, and 284 and Crim. Code of 1930 §§ 476 and 482	MT
FORGERY	Matter of SC, 3 I. & N. Dec. 350, 1948 WL 6283 (BIA 1948)	Guanajuato, Mexico Pen. Code article 203	MT
FORGERY—APPLICATION FOR PASSPORT	See also FRAUD—DOCUMENT FRAUD—PASSPORT FRAUD; FALSE STATEMENT—PASSPORT APPLICATION		
FORGERY—APPLICATION FOR PASSPORT	Matter of MYC, 3 I. & N. Dec. 76, 1947 WL 7055 (BIA 1947)		NMT
FORGERY—ATTEMPT TO PASS FORGED INSTRUMENT	Matter of LR, 7 I. & N. Dec. 318, 1956 WL 10286 (BIA 1956)	Texas Pen. Code §§ 979, 996	MT
FORGERY—POSSESSION OF FORGERY DEVICES WITH INTENT TO COMMIT FORGERY	Matter of Jimenez, 14 I. & N. Dec. 442, 1973 WL 29475 (BIA 1973)		MT
FORGERY—PRESCRIPTION DRUGS	Matter of O'B, 6 I. & N. Dec. 280, 1954 WL 7865 (BIA 1954)	Cal. Health and Safety Code § 11715	MT
FORGERY—UTTERING FORGED UNITED STATES OBLIGATIONS	U.S. ex rel. Giglio v. Neelly, 208 F.2d 337, 338 (7th Cir. 1954)	18 U.S.C. §§ 88, 265	MT
FRAUD	See also BAD CHECKS; CREDIT CARD OFFENSES; FALSE STATEMENT; TAX OFFENSES		
FRAUD	Palmer v. INS, 4 F.3d 482 (7th Cir. 1993)		MT

FRAUD	Matter of Adetiba, 20 I. & N. 506 (BIA 1992)	18 U.S.C. § 1341	MT
FRAUD	Matter of Martinez, 16 I. & N. Dec. 336, 1977 WL 39288 (BIA 1977)	18 U.S.C. § 473	MT
FRAUD	Matter of Delagadillo, 15 I. & N. Dec. 395, 1975 WL 31528 (BIA 1975)	Chihuahua Code of Social Defense Article 367	NMT
FRAUD	Matter of Katsanis, 14 I. & N. Dec. 266, 1973 WL 29429 (BIA 1973)	Greek Pen. Code of 1950 Article 386 (Fraud)	MT
FRAUD	Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951)	18 U.S.C. § 88 (now 18 U.S.C. § 371), 26 U.S.C. §§ 1155(f), 1440, 1441 (now 26 U.S.C. §§ 2806(f), 3320, 3321)	MT
FRAUD—ATTEMPTED	Chanan Din Khan v. Barber, 253 F.2d 547 (9th Cir. 1958)		MT
FRAUD—ATTEMPTED	Matter of B, 1 I. & N. Dec. 47, 1941 WL 7911 (BIA, AG 1941)	German Reich Crim. Code § 263	NMT
FRAUD—BANK—MISAPPLICATION OF BANK FUNDS	Matter of Robinson, 16 I. & N. Dec. 762, 1979 WL 44445 (BIA 1979)	18 U.S.C. § 657	MT
FRAUD—CHECK FRAUD	Matter of B, 4 I. & N. Dec. 297, 1951 WL 7003 (BIA 1951)	Ind. Stats. § 10-2105	MT
FRAUD—CONSPIRACY TO DEFRAUD	Matter of P, 3 I. & N. Dec. 56, 1947 WL 7051 (BIA 1947)	Canadian Crim. Code § 444	MT
FRAUD—CONSPIRACY TO DEFRAUD UNITED STATES	Matter of G, 7 I. & N. Dec. 114, 1956 WL 10234 (BIA 1956)	18 U.S.C. § 88	MT
FRAUD—CONSPIRACY TO AVOID TAXES	Matter of M, 8 I. & N. Dec. 535, 1960 WL 12115 (BIA 1960)	18 U.S.C. § 88 (now 18 U.S.C. § 371)	MT
FRAUD—CONSPIRACY—INTENT TO DEFRAUD	Matter of Flores, 17 I. & N. Dec. 225, 1980 WL 121870 (BIA 1980)		MT
FRAUD—CREDIT CARD	Matter of Chouinard, 11 I. & N. Dec. 839, 1966 WL 14376 (BIA 1966)	Mich. Ann. Stats. § 28.416(1)	MT
FRAUD—CREDIT CARD FRAUD AND FORGERY	Balogun v. Ashcroft, 270 F.3d 274 (5th Cir. 2001)	Ala. Crim. Code § 13A-9-14	MT
FRAUD—CRIMINAL FRAUD	White v. INS, 92 F.3d 1195 (Table) (9th Cir. 1996) (unpublished)		MT

FRAUD—DOCUMENT FRAUD—CONSPIRACY TO USE FALSE INS DOCUMENTS	Omagah v. Ashcroft, 288 F.3d 254 (5th Cir. April 22, 2002)	18 U.S.C. § 371	MT
FRAUD—DOCUMENT FRAUD—FALSE ALIEN REGISTRATION STATEMENT	Matter of C, 1 I. & N. Dec. 14 (AG 1941)	Alien Registration Act of 1940	NMT
FRAUD—DOCUMENT FRAUD—FALSE EMPLOYMENT DOCUMENT	Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000)	18 U.S.C. § 1546(b)(3)	NMT
FRAUD—DOCUMENT FRAUD—FALSE REPRESENTATION OF SOCIAL SECURITY NUMBER, USE OF	Matter of Adetiba, 20 I. & N. Dec. 506 (BIA 1992)	42 U.S.C. § 408	MT
FRAUD—DOCUMENT FRAUD—FALSE SOCIAL SECURITY NUMBER	Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000)	42 U.S.C. § 408(a)(7)(B)	NMT
FRAUD—DOCUMENT FRAUD—FALSIFICATION OF COMMERCIAL DOCUMENT	Matter of A, 4 I. & N. Dec. 378, 1951 WL 7021 (BIA 1951)	Philippine Islands of 1911 Pen. Code articles 301 and 300	MT
FRAUD—DOCUMENT FRAUD—IDENTIFICATION DOCUMENT FRAUD	Stevenson v. INS, 246 F.3d 676 (Table) (9th Cir. 2000) (unpublished)	18 U.S.C. § 1028(a)(2)	MT
FRAUD—DOCUMENT FRAUD—PASSPORT	See also FALSE STATEMENT—PASSPORT; FORGERY OF APPLICATION FOR PASSPORT		
FRAUD—DOCUMENT FRAUD—PASSPORT	Matter of H, 3 I. & N. Dec. 236, 1948 WL 6263 (BIA 1948)	18 U.S.C. § 80	MT
FRAUD—DOCUMENT FRAUD—PASSPORT—FALSE STATEMENT IN PASSPORT APPLICATION	Bisaillon v. Hogan, 257 F.2d 435 (9th Cir. 1958), cert. denied, 358 U.S. 872 (1958)	18 U.S.C. § 1542	MT
FRAUD—DOCUMENT FRAUD—PASSPORT—USE OF ANOTHER'S PASSPORT	Matter of G, 1 I. & N. Dec. 73 (BIA 1941)		MT
FRAUD—DOCUMENT FRAUD—POSSESSION OF FALSE DRIVER'S LICENSE	Montero-Ubri v. INS, 229 F.3d 319 (1st Cir. 2000)	Mass. Gen. Laws, c. 90 § 24B	NMT

FRAUD—DOCUMENT FRAUD—POSSESSION OF FRAUDULENT IMMIGRATION DOCUMENTS	Matter of Serna, 20 I. & N. Dec. 579, 581 (BIA 1992)		NMT
FRAUD—DOCUMENT FRAUD—POSSESSION OF IMPLEMENTS WITH INTENT TO PRODUCE FALSE DOCUMENTS	Babafunmi v. United States, 210 F.3d 360 (Table) (4th Cir. 2000)	18 U.S.C. § 1028(a)(5)	MT
FRAUD—DOCUMENT FRAUD—SALE OF FALSE ALIEN REGISTRATION DOCUMENTS	Matter of Flores, 17 I. & N. Dec. 225, 1980 WL 121870 (BIA 1980)	18 U.S.C. § 1426(b)	MT
FRAUD—DOCUMENT FRAUD—USE OF FALSE DRIVER'S LICENSE	Montero-Ubri v. INS, 229 F.3d 319 (1st Cir. 2000)	Mass. Gen. Laws, Ch. 90, § 24B	MT
FRAUD—FALSE PRETENSES	Squires v. INS, 689 F.2d 1276, 1278 n.5 (6th Cir. 1982)	Canadian Crim. Code § 319(1)	MT
FRAUD—FALSE PRETENSES	Ramirez v. INS, 413 F2d 405 (D.C. Cir.), cert. den., 396 U.S. 929 (1969)	Canadian Crim. Code § 451; 22 D.C. Code § 1301	MT
FRAUD—FALSE PRETENSES WITH INTENT TO DEFRAUD	Matter of P, 3 I. & N. Dec. 56, 1947 WL 7051 (BIA 1947)	Canadian Crim. Code § 573	MT
FRAUD—FRAUDULENT DESTRUCTION OF OWN PROPERTY	Matter of Marino, 15 I. & N. Dec. 284, 1975 WL 31498 (BIA 1975)	Italian Pen. Code Art. 642	MT
FRAUD—IMMIGRATION—ASSISTING ALIEN FALSELY TO OBTAIN NATURALIZATION	United States ex rel. Popoff v. Reimer, 79 F.2d 513 (2d Cir. 1935)		MT
FRAUD—MAIL	Matter of Alarcon, 20 I. & N. 557 (BIA 1992)	18 U.S.C. § 1341	MT
FRAUD—MAIL	Nason v. INS, 394 F.2d 223 (2d Cir. 1968)	18 U.S.C. § 1341	MT
FRAUD—SALE OF MISLABELLED OLEO WITH INTENT TO DEFRAUD	Matter of P, 6 I. & N. Dec. 795, 1955 WL 8755 (BIA 1955)	21 U.S.C. §§ 331, 333 (b)	MT
FRAUD—SECURITIES	Matter of McNaughton, 16 I. & N. Dec. 569, 1978 WL 36469 (BIA 1978)	Canadian Crim. Code, § 338(2); 15 U.S.C. §§ 77q(a), 78j(b)	MT
FRAUD—SECURITIES—CONSPIRACY TO AFFECT STOCK PRICE BY FRAUD	McNaughten v. INS, 612 F.2d 457 (9th Cir. 1980)		MT

FRAUD—SECURITIES—POSSESSION OF COUNTERFEIT SECURITIES	Matter of Lethbridge, 11 I. & N. Dec. 444, 445, 1965 WL 12321 (BIA 1965)	18 U.S.C. § 474	NMT
FRAUD—SECURITIES—TRANSPORTATION OF FORGED SECURITY	Matter of Acosta, 14 I. & N. Dec. 338, 1973 WL 29443 (BIA 1973)	18 U.S.C. § 2314	MT
FRAUD—STUDENT LOAN	Izedonmwen v. INS, 37 F.3d 416 (8th Cir. 1994)	Higher Education Act of 1965, § 490(a), 20 U.S.C. § 1097(a)	MT
FRAUD—STUDENT LOAN	Kabongo v. INS, 837 F.2d 753, 758 n.8 (6th Cir. 1988)	20 U.S.C. § 1097(a)	MT
FRAUD—SWINDLING	Matter of M, 9 I. & N. Dec. 132, 1960 WL 12076 (BIA 1960)	Italian Crim. Code of 1889 § 413 and Italian Crim. Code of 1930 § 640	MT
FRAUD—TELEPHONE	Matter of Afzal, A73-042-981 (BIA 2000) (unpublished)	18 U.S.C. § 2701(a)(1)	NMT
FRAUD—UNEMPLOYMENT	Matter of DG, 6 I. & N. Dec. 488, 1955 WL 8686 (BIA 1955)	Ariz. Employment Security Act of 1941	MT
FRAUD—UNEMPLOYMENT	Matter of D, 2 I. & N. Dec. 836, 1947 WL 7030 (BIA 1947)	Canadian Unemployment Insurance Act of 1945 § 67	MT
FRAUD—UNEMPLOYMENT INSURANCE	Matter of LT, 5 I. & N. Dec. 705, 1954 WL 7953 (BIA 1954)	Cal. Unemployment Insurance Act § 101(a)	MT
FRAUD—WELFARE	Flores v. INS, 66 F.3d 1069 (9th Cir. 1995), opinion withdrawn, 73 F.3d 258 (9th Cir. 1996)		MT
GAMBLING	United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991)*		NMT
GAMBLING	Matter of Gaglioti, 10 I. & N. Dec. 719, 1964 WL 12123 (BIA 1964)	18 Penn. Stats. 4302	NMT
GAMBLING	Matter of G, 1 I. & N. Dec. 59, 1941 WL 7913 (BIA, AG 1941)	N.Y. Pen. Law § 974	MT
GAMBLING—OWNING GAMBLING ESTABLISHMENT	Matter of S, 9 I. & N. Dec. 688, 696, 1962 WL 12883 (BIA 1962)	N.Y. Pen. Code §§ 970, 973	NMT
GRAND THEFT	See THEFT—GRAND THEFT		
GROSS INDECENCY	See SEX OFFENSES—GROSS INDECENCY		

HARBORING A FUGITIVE	See MISPRISION—HARBORING A FUGITIVE		
HOMICIDE—RECKLESS HOMICIDE	Matter of Szgedi, 10 I. & N. Dec. 28, 1962 WL 12898 (BIA 1962)	Wis. Stats. § 940.06	NMT
HOMICIDE—VOLUNTARY HOMICIDE	De Lucia v. Flagg, 297 F.2d 58 (7th Cir. 1961)		MT
HOMOSEXUALITY	See DISORDERLY CONDUCT—HOMOSEXUALITY; SEX OFFENSES		
ILLEGAL ENTRY	Matter of R, 1 I. & N. Dec. 118, 1941 WL 7926 (BIA 1941)		NMT
ILLEGAL ENTRY—ASSISTING ILLEGAL ENTRY	United States. v. Gloria, 494 F.2d 477, 480-481 (5th Cir. 1974)*	8 U.S.C. § 1325	NMT
ILLEGAL ENTRY—ENCOURAGING ILLEGAL ENTRY	United States v. Sucki, 748 F.Supp. 66 (E.D.N.Y. 1990)*	8 U.S.C. § 1324(a)(1)(D)	NMT
ILLEGAL ENTRY—ENTRY AND REENTRY	Matter of T, 1 I. & N. Dec. 158 (BIA 1941)		NMT
ILLEGAL ENTRY—REENTRY	Rodriguez v. Campbell, 8 F.2d 983 (5th Cir. 1925)	8 U.S.C. § 1326	NMT
IMPERSONATION OF A FEDERAL OFFICER	Matter of B, 3 I. & N. Dec. 270, 1948 WL 6269 (BIA 1948)	Crim. Code § 32, old 18 U. S. C. § 76 (now 18 U. S. C. § 912)	MT
IMPERSONATION OF A FEDERAL OFFICER	Matter of H, 1 I. & N. Dec. 509, 1943 WL 6322 (BIA, AG 1943)	18 U.S.C. § 76	MT
IMPERSONATION OF AN INS OFFICIAL	Matter of Gonzalez, 16 I. & N. Dec. 134, 1977 WL 39234 (BIA 1977)	18 U.S.C. § 912	MT
IMPERSONATION—OBTAINING FUNDS THROUGH FALSE IMPERSONATION	Matter of B, 6 I. & N. Dec. 702, 1955 WL 8732 (BIA 1955)	18 U.S.C. § 912	MT
IMPORTATION—PANCAKE TURTLES	Eyoum v. INS, 125 F.3d 889 (5th Cir. 1997)	18 U.S.C. § 545	NMT
INCEST	See SEX OFFENSES—INCEST		
INDECENT ASSAULT	See SEX OFFENSES—INDECENT ASSAULT		
INDECENT EXPOSURE	See SEX OFFENSES—INDECENT EXPOSURE		
INFLUENCING JUROR, OFFICER OR WITNESS	Knoetze v. U. S. Dept. of State, 634 F.2d 207 (5th Cir. 1981)	18 U.S.C. § 1503	MT
INTIMIDATION	See THREATS		
INVOLUNTARY MANSLAUGHTER	See MANSLAUGHTER		
JOYRIDING	See also THEFT—AUTO		

JOYRIDING	Matter of M, 2 I. & N. Dec. 686, 1946 WL 6077 (BIA 1946)	Canadian Crim. Code § 285(3)	NMT
JOYRIDING	Matter of P, 2 I. & N. Dec. 887, 1947 WL 7040 (BIA 1947)	Canadian Crim. Code § 285(3)	NMT
JOYRIDING—DRIVING WITHOUT CONSENT OF OWNER	Matter of D, 1 I. & N. Dec. 143, 1941 WL 7930 (BIA 1941)	Cal. Veh. Code § 503	NMT
KIDNAPPING	Hamdan v. INS, 98 F.3d 183 (5th Cir. 1996)	La. Rev. Stat. § 14:45	MT
KIDNAPPING	Matter of Nakoi, 14 I. & N. 208 (BIA 1972)	18 U.S.C. § 1201	MT
KIDNAPPING—ABDUCTION	United States v. Brown, 127 F.Supp.2d 392, 408-409 (W.D.N.Y. 2001)*	Va. Code 18.2-47	MT
LARCENY	See THEFT—LARCENY		
LEWD AND LASCIVIOUS CONDUCT	See SEX OFFENSES—LEWD AND LASCIVIOUS CONDUCT		
LIQUOR VIOLATIONS—BUSINESS WITHOUT PAYING FEDERAL TAX	Barrese v. Ryan, 203 F.Supp. 880, 882-883 (D. Conn. 1962)	Internal Revenue Code of 1939, § 3253	MT
LIQUOR VIOLATIONS—CONSPIRACY TO DEFRAUD US OF LIQUOR TAXES	Morgano v. Pilliod, 299 F.2d 217 (7th Cir. 1962)	18 U.S.C. § 88 (now 18 U.S.C. § 371)	MT
LIQUOR VIOLATIONS—CONSPIRACY TO TRANSPORT SPIRITS WITHOUT TAX STAMPS	Matter of G, 7 I. & N. Dec. 114, 1956 WL 10234 (BIA 1956)	26 U.S.C. §§ 2803(a), (g), 2812	NMT
LIQUOR VIOLATIONS—LIQUOR DEALER WITHOUT PAYING TAX	Matter of H, 1 I. & N. Dec. 394, 1943 WL 6297 (BIA 1943)	26 U.S.C. § 1397(a)(1)	NMT
LIQUOR VIOLATIONS—LIQUOR STAMP FRAUD	Matter of G, 7 I. & N. Dec. 114, 1956 WL 10234 (BIA 1956)	26 U.S.C. § 2803(g)	NMT
LIQUOR VIOLATIONS—POSSESSING AND CONCEALING DISTILLED SPIRITS	United States ex rel. Berlandi v. Reimer, 113 F.2d 429 (2d Cir. 1940)	18 U.S.C. § 88 (now 18 U.S.C. § 371), 26 U.S.C. §§ 1155(f), 1440, 1441 (now 26 U.S.C. §§ 2806(f), 3320, 3321)	MT
LIQUOR VIOLATIONS—POSSESSION OF LIQUOR IN DRY COUNTY	United States v. Smith, 420 F.2d 428 (5th Cir. 1970)*	29 Code of Alabama, Recompiled 1958, § 98	NMT

LIQUOR VIOLATIONS—POSSESSION OF LIQUOR WITH INTENT TO DEFRAUD US OF TAXES	Maita v. Haff, 116 F.2d 337 (9th Cir. 1940)	18 U.S.C. § 88 (now 18 U.S.C. § 371), 26 U.S.C. §§ 1155(f), 1440, 1441 (now 26 U.S.C. §§ 2806(f), 3320, 3321)	MT
LIQUOR VIOLATIONS—REMOVAL OF UNTAXED SPIRITS	Matter of A, 6 I. & N. Dec. 242, 1954 WL 7853 (BIA 1954)	26 U.S.C. § 404	NMT
LIQUOR VIOLATIONS—SELLING WITHOUT TAX	U.S. ex rel. Carrollo v. Bode, 204 F.2d 220 (8th Cir. 1953)	26 U.S.C. § 3253	MT
LIQUOR VIOLATIONS—SMUGGLING ALCOHOL INTO US WITH INTENT TO DEFRAUD US	Guarneri v. Kessler, 98 F.2d 580 (5th Cir. 1938)		MT
LIQUOR VIOLATIONS—SMUGGLING LIQUOR WITH INTENT TO DEFRAUD UNITED STATES	Matter of D, 9 I. & N. Dec. 605, 1962 WL 12867 (BIA 1962)	18 U.S.C. § 545	MT
LIQUOR VIOLATIONS—TRANSPORTATION AND POSSESSION OF DISTILLED SPIRITS	Matter of G, 7 I. & N. Dec. 114, 1956 WL 10234 (BIA 1956)	26 U.S.C. §§ 2803(a), 2812	NMT
LIQUOR VIOLATIONS—UNLAWFUL SALE OF LIQUOR	Matter of J, 2 I. & N. Dec. 99, 1944 WL 5170 (BIA, AG 1944)	25 U.S.C. § 241	NMT
LOAN BUSINESS WITHOUT LICENSE	Matter of B, 6 I. & N. Dec. 98, 1954 WL 7824 (BIA 1954)	N.Y. Banking Law §§ 340, 357	NMT
MAIL FRAUD	See FRAUD—MAIL		
MAIL OFFENSES—DAMAGING MAIL BOXES	Matter of B, 2 I. & N. Dec. 867, 1947 WL 7036 (BIA 1947)	Canadian Crim. Code §§ 510(d)(3) and (d)(5)	NMT
MAIL OFFENSES—MAILING AN OBSCENE LETTER	Matter of D, 1 I. & N. Dec. 190, 1942 WL 6514 (BIA 1942)	18 U.S.C. § 334	NMT
MAIL OFFENSES—OBSTRUCTING CORRESPONDENCE	Matter of F, 7 I. & N. Dec. 386, 1957 WL 10528 (BIA 1957)		NMT
MAIL OFFENSES—POSSESSION OF STOLEN MAIL	Okoroha v. INS, 715 F.2d 380 (8th Cir. 1983)	18 U.S.C. § 1708	MT
MAIL OFFENSES—SENDING A THREATENING LETTER	Matter of M, 2 I. & N. Dec. 196, 1944 WL 5180 (BIA 1944)	18 U.S.C. § 338a(b)	NMT

MAIL THEFT	See THEFT—MAIL		
MAILING WITH INTENT TO EXTORT MONEY	Matter of GT, 4 I. & N. Dec. 446, 1951 WL 7036 (BIA 1951)	18 U.S.C. §§ 338, 338a	MT
MALICIOUS MISCHIEF	Matter of N, 8 I. & N. Dec. 466, 1959 WL 11600 (BIA 1959)	Del. Pen. Code § 692	NMT
MALICIOUS MISCHIEF	Matter of M, 2 I. & N. Dec. 469, 1946 WL 6040 (BIA 1946)	N.Y. Pen. Law § 1433	MT
MALICIOUS MISCHIEF—PROPERTY DAMAGE	Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995)	Wash. Rev. Code § 9A.48.080	NMT
MALICIOUS MISCHIEF—PROPERTY DAMAGE	Matter of M, 3 I. & N. Dec. 272, 1948 WL 6270 (BIA 1948)	Or. Pen. Code article 6, § 23-576, volume 3	MT
MALICIOUS MISCHIEF—PROPERTY DAMAGE	Matter of C, 2 I. & N. Dec. 716, 1946 WL 6085 (BIA 1946)	Canadian Crim. Code § 539	NMT
MALICIOUS MISCHIEF—PROPERTY DAMAGE—UNLAWFUL DESTRUCTION OF RAILWAY TELEGRAPH	Matter of M, 2 I. & N. Dec. 686, 1946 WL 6077 (BIA 1946)	Canadian Crim. Code § 517(c)	NMT
MALICIOUS MISCHIEF—PROPERTY DESTRUCTION	Hernandez-Robledo v. INS, 777 F.2d 536 (9th Cir. 1985)		MT
MALICIOUS MISCHIEF—WRECKING TRAIN USED IN INTER-STATE COMMERCE	Matter of PYM, 4 I. & N. Dec. 461 (BIA 1951)	18 U.S.C. § 1992	MT
MANSLAUGHTER	Sildora v. Ashcroft, 11 Fed.Appx. 876 (9th Cir. 2001)	Hawaii Rev. Stats. § 706-660	MT
MANSLAUGHTER	Carter v. INS, 90 F.3d 14 (1st Cir. 1996)		MT
MANSLAUGHTER	Matter of Ghunaim, 15 I. & N. Dec. 269, 1975 WL 31494 (BIA 1975)	29 Ohio Rev. Code Ann. §§ 2901.01, 2901.06	MT
MANSLAUGHTER	Matter of Rosario, 15 I. & N. Dec. 416, 1975 WL 31535 (BIA 1975)	Title 33 of the Laws of Puerto Rico § 635	MT
MANSLAUGHTER	Matter of Gantus-Bobadilla, 13 I. & N. Dec. 777, 1971 WL 24423 (BIA 1971)	N.Y. Pen. Law § 125.15(1)	NMT
MANSLAUGHTER	Matter of Lopez, 13 I. & N. Dec. 725, 1971 WL 24409 (BIA 1971)	Alaska Stats. § 11.15.040	NMT
MANSLAUGHTER	Matter of Ptasi, 12 I. & N. Dec. 790, 1968 WL 14111 (BIA 1968)	Conn. Gen. Stats. § 53-13	MT

MANSLAUGHTER	Matter of Sanchez-Marin, 11 I. & N. Dec. 264, 1965 WL 12276 (BIA 1965)	Mass. Ann. Laws, Ch. 274 § 4	MT
MANSLAUGHTER	Matter of S, 9 I. & N. Dec. 496, 1961 WL 12196 (BIA 1961)	Pen. Code of Peru, Art. 153	MT
MANSLAUGHTER	Matter of R, 5 I. & N. Dec. 463, 1953 WL 7486 (BIA 1953)		MT
MANSLAUGHTER	Matter of HR, 4 I. & N. Dec. 742, 1952 WL 7319 (BIA 1952)	Cal. Pen. Code § 192	MT
MANSLAUGHTER	Matter of D, 3 I. & N. Dec. 51, 1947 WL 7050 (BIA 1947)	N.J. Crim. Stat. 2:138-5	MT
MANSLAUGHTER	Matter of J, 2 I. & N. Dec. 477 (BIA 1946)		MT
MANSLAUGHTER	Matter of S, 2 I. & N. Dec. 559, 1946 WL 6057 (BIA 1946)		MT
MANSLAUGHTER	Matter of S, 1 I. & N. Dec. 519, 1943 WL 6323 (BIA 1943)	Minn. Stats. §§ 619:14 (2), 619:15 (2) (1941)	MT
MANSLAUGHTER	Pillisz v. Smith, 46 F.2d 769 (7th Cir. 1931)		MT
MANSLAUGHTER—INVOLUNTARY	Matter of B, 4 I. & N. Dec. 493 (BIA 1951)	N.J. Crim. Stat. 2:138-5	NMT
MANSLAUGHTER—INVOLUNTARY	Franklin v. INS, 72 F.3d 571 (8th Cir. 1995)	Missouri Rev. Stats. §§ 562.016(4) and 565.024(1)	MT
MANSLAUGHTER—INVOLUNTARY	Matter of Franklin, 20 I. & N. Dec. 867, 1994 WL 520990 (BIA 1994)	Mo. Rev. Stat. §§ 562.016(4), 565.024(1)	MT
MANSLAUGHTER—INVOLUNTARY	Matter of N, 1 I. & N. Dec. 181, 1941 WL 7938 (BIA 1941	Ariz. Code § 4586	NMT
MANSLAUGHTER—PREMEDITATED	Matter of K, 4 I. & N. Dec. 108, 1950 WL 6626 (BIA 1950)		MT
MANSLAUGHTER—SECOND DEGREE	Matter of Wojtkow, 18 I. & N. Dec. 111 (BIA 1981)	N.Y. Penal Code § 125.15(1)	MT
MANSLAUGHTER—VOLUNTARY	Matter of Pataki, 15 I. & N. Dec. 324, 1975 WL 31510 (BIA 1975)	Mich. Compiled Laws § 750.321	MT
MANSLAUGHTER—VOLUNTARY	Matter of Sanchez-Marin, 11 I. & N. Dec. 264 (BIA 1965)	Ohio Gen. Code, Sec. 12403	MT
MANSLAUGHTER—VOLUNTARY	Matter of Abi-Rached, 10 I. & N. Dec. 551, 1964 WL 12088 (BIA 1964)	Ill. Rev. Stats. chapter 38 § 9-2	MT
MANSLAUGHTER—VOLUNTARY	Matter of P, 6 I. & N. Dec. 788, 1955 WL 8753 (BIA 1955)		MT
MANSLAUGHTER—VOLUNTARY	Matter of B, 4 I. & N. Dec. 493 (BIA 1951)	N.J. Crim. Stat. 2:138-5	MT

MANSLAUGHTER—VOLUNTARY	Matter of D, 3 I. & N. Dec. 51, 1947 WL 7050 (BIA 1947)		MT
MAYHEM	Matter of Santoro, 11 I. & N. Dec. 607, 1966 WL 14308 (BIA 1966)	R. I. Gen. Laws Title 11, chapter 29, § 1	MT
MILITARY OFFENSES—ABSENT WITHOUT LEAVE	United States v. Frazier, 418 F.2d 854 (4th Cir. 1969)*		NMT
MILITARY OFFENSES—DESERTION	Matter of SB, 4 I. & N. Dec. 682, 1952 WL 7297 (BIA 1952)	58th Article of War	NMT
MILITARY OFFENSES—JOINING ARMY OF FOREIGN STATE	Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 242-243 (1957)*	Neutrality Act of 1917, 40 Stat. 39 (now 18 U.S.C. § 959(a))	NMT
MILITARY OFFENSES—PROPERTY DAMAGE—DESTROYING WAR MATERIAL	Matter of M, 2 I. & N. Dec. 629, 1946 WL 6070 (BIA 1946)	50 U.S.C. § 102	MT
MILITARY OFFENSES—SELECTIVE SERVICE VIOLATIONS—DRAFT EVASION	Matter of R, 5 I. & N. Dec. 29, 1952 WL 7329 (BIA 1952)	Selective Training and Service Act of 1940 § 11	MT
MILITARY OFFENSES—SELECTIVE SERVICE VIOLATIONS—DRAFT EVASION	Matter of S, 5 I. & N. Dec. 425 (BIA 1953)	50 U.S.C. App. § 462	NMT
MILITARY OFFENSES—SELECTIVE SERVICE VIOLATIONS—FALSE SELECTIVE SERVICE AFFIDAVIT	Matter of R, 5 I. & N. Dec. 29, 1952 WL 7329 (BIA 1952)	Selective Training and Service Act of 1940	MT
MILITARY OFFENSES—SELECTIVE SERVICE VIOLATIONS—FALSE STATEMENT IN SELECTIVE SERVICE DOCUMENT	Matter of M, 1 I. & N. Dec. 619, 1943 WL 6347 (BIA 1943)	Selective Training and Service Act of 1940, 50 U.S.C. § 311	MT
MILITARY OFFENSES—SELECTIVE SERVICE VIOLATIONS—FALSE STATEMENT TO EVADE MILITARY SERVICE	Matter of S, 4 I. & N. Dec. 509, 1951 WL 7051 (BIA 1951)	Selective Training and Service Act of 1940 § 11 (50 U. S. C. § 311)	MT
MINORS	See CONTRIBUTING TO THE DELINQUENCY OF A MINOR; SEX OFFENSES; CHILD ABANDONMENT; CHILD ABUSE; NONSUPPORT		
MISPRISION OF FELONY	Itani v. Ashcroft, 298 F.3d 1213 (11th Cir. 2002)	18 U.S.C. § 4	MT

MISPRISION OF FELONY	Castaneda De Esper v. INS, 557 F.2d 79 (6th Cir. 1977)		NMT
MISPRISION OF FELONY	Smalley v. Ashcroft, 354 F.3d 332, 2003 WL 22940567 (5th Cir. 2003)	18 U.S.C. § 4	MT
MISPRISION OF FELONY—FAILURE TO PREVENT CRIME	Matter of SC, 3 I. & N. Dec. 350, 1948 WL 6283 (BIA 1948)	Guanajuato, Mexico Pen. Code article 357	NMT
MISPRISION—HARBORING A FUGITIVE	Matter of Sloan, 12 I. & N. Dec. 840, 1966 WL 14404 (BIA 1966, AG 1968)	18 U.S.C. § 1071	MT
NONSUPPORT	Matter of E, 2 I. & N. Dec. 134, 1944 WL 5175 (BIA, AG 1944)	Ohio Gen. Code § 13008	NMT
NONSUPPORT—FAILURE OF A PARENT TO PROVIDE FOR HIS MINOR CHILDEN	Matter of H, 1 I. & N. Dec. 459, 1943 WL 6312 (BIA 1943)	Canadian Crim. Code § 242(3)	NMT
NONSUPPORT—FAILURE TO PROVIDE FOR A MINOR	Matter of Y, 1 I. & N. Dec. 137, 1941 WL 7929 (BIA 1941)	Cal. Pen. Code § 270	NMT
OBSCENITY	See MAIL OFFENSES—MAILING AN OBSCENE LETTER		
OBSTRUCTION OF JUSTICE	Knoetze v. U. S. Dept. of State, 634 F.2d 207 (11th Cir. 1981)		MT
OBSTRUCTION OF JUSTICE—CONSPIRACY	Mejia v. INS, 120 F.3d 268 (Table), 1997 WL 415344 (9th Cir. 1997) (unpublished)	Cal. Pen. Code § 182(a)(5)	MT
OBSTRUCTION OF JUSTICE—INTERFERING WITH OFFICER BY PULLING KNIFE	Matter of Logan, 17 I. & N. Dec. 367, 1980 WL 121892 (BIA 1980)	Ark. Stat. 41-2804(2)(i)	MT
PASSPORT FRAUD	See FRAUD—DOCUMENT FRAUD—PASSPORT		
PERJURY	Petition of Moy Wing Yin, 167 F.Supp. 828 (D.N.Y. 1958)		MT
PERJURY	United States ex rel. Alvarez y Flores v. Savoretti, 205 F.2d 544 (5th Cir. 1953)		MT
PERJURY	Matter of R, 2 I. & N. Dec. 819, 1947 WL 7027 (BIA 1947)	Canadian Crim. Code § 170	NMT
PERJURY	Matter of H, 1 I. & N. Dec. 669, 1943 WL 6354 (BIA 1943)	Mich. Pen. Code §§ 422, 423	MT
PERJURY	Matter of L, 1 I. & N. Dec. 324, 1942 WL 6543 (BIA 1942)	Canadian Crim. Code § 170	NMT
PERJURY	Matter of G, 1 I. & N. Dec. 73, 1941 WL 7916 (BIA, AG 1941)	Canadian Immigration Act	NMT
PERJURY—FALSE SWEARING	Matter of P, 4 I. & N. Dec. 373, 1951 WL 7020 (BIA 1951)	8 U.S.C. § 414	MT

PERJURY—VOTER AFFIDAVIT	Matter of GYG, 4 I. & N. Dec. 211, 1950 WL 6645 (BIA 1950)	Cal. Pen. Code § 118	MT
POSSESSION OF BURGLARY TOOLS	See BURGLARY—POSSESSION OF BUGLARY TOOLS		
POSSESSION OF STOLEN PROPERTY	See THEFT—POSSESSION OF STOLEN PROPERTY OR GOODS		
PROPERTY DAMAGE	See MALICIOUS MISCHIEF; MILITARY OFFENSES		
PROSTITUTION	See also SEX OFFENSES; DISORDERLY CONDUCT		
PROSTITUTION	Matter of W, 4 I. & N. Dec. 401, 1951 WL 7025 (BIA 1951)	Seattle City Ordinance	MT
PROSTITUTION—ATTEMPTED COMPULSORY PROSTITUTION	Matter of E, 1 I. & N. Dec. 505, 1943 WL 6321 (BIA 1943)	N.Y. Pen. Law § 2460	MT
PROSTITUTION—DISORDERLY HOUSE	Matter of G, 1 I. & N. Dec. 217, 1942 WL 6520 (BIA 1942)	N.Y. Pen. Law § 1146	NMT
PROSTITUTION—KEEPING BROTHEL	Ablett v. Brownell, 240 F.2d 625 (D.C. Cir. 1957)	Crim. Law Amendment Act of 1885, Part II § 13(3)	MT
PROSTITUTION—KEEPING HOUSE OF ILL FAME	Matter of P, 3 I. & N. Dec. 20 (BIA 1947)		MT
PROSTITUTION—MAINTAINING A DISORDERLY HOUSE	Matter of C, 2 I. & N. Dec. 367, 1945 WL 5572 (BIA 1945)	City ordinance of Buffalo, N. Y. ch. 9 § 2	NMT
PROSTITUTION—PIMPING OR PROCURING PROSTITUTE	Matter of Lambert, 11 I. & N. Dec. 340, 1965 WL 12299 (BIA 1965)	Florida Stats. § 796.07 and Tampa City Code § 26-77	MT
RACKETEERING OFFENSES	Smalley v. Ashcroft, 354 F.3d 332, 2003 WL 22940567 (5th Cir. 2003)	18 U.S.C. § 1956(a)(3)(B) (2000)	MT
RACKETEERING OFFENSES	Smalley v. Ashcroft, 354 F.3d 332, 2003 WL 22940567 (5th Cir. 2003)	18 U.S.C. § 1952	MT
RACKETEERING OFFENSES	United States ex rel. Circella v. Neelly, 115 F.Supp. 615 (D. Ill. 1953), aff'd, 216 F.2d 33 (7th Cir. 1954)	18 U.S.C. § 420a	MT
RAPE	See SEX OFFENSES—RAPE; STATUTORY RAPE		
RECEIPT OF KICKBACKS ON GOVERNMENT CONTRACTS	Matter of Alarcon, 20 I. & N. Dec. 557 (BIA 1992)	41 U.S.C. §§ 51, 54	MT

RECEIVING STOLEN GOODS OR PROPERTY	See THEFT—RECEIVING STOLEN GOODS OR PROPERTY		
RECKLESS DRIVING	See DRIVING OFFENSES—RECKLESS DRIVING		
RECKLESS ENDANGERMENT	See ENDANGERMENT—RECKLESS		
REGULATORY OFFENSES	Matter of J, 4 I. & N. Dec. 512, 1951 WL 7052 (BIA 1951)	Mass. Ann. Laws, Ch. 268 § 16	NMT
RICO	See RACKETEERING OFFENSES		
RIOT—PARTICIPATION	Matter of O, 4 I. & N. Dec. 301, 1951 WL 7004 (BIA 1951)	German Crim. Code § 115	NMT
ROBBERY	United States v. Brown, 127 F.Supp.2d 392, 408-409 (W.D.N.Y. 2001)*	Va. Code § 18.2-58 (Michie 2000)	MT
ROBBERY	Brett v. INS, 386 F.2d 439 (2d Cir.1967)		MT
ROBBERY	Matter of GR, 2 I. & N. Dec. 733, 1946 WL 6088 (BIA 1946)	Cal. Pen. Code § 213	MT
ROBBERY WITH VIOLENCE	Matter of C, 2 I. & N. Dec. 716, 1946 WL 6085 (BIA 1946)	Canadian Crim. Code § 446	MT
ROBBERY—AIDING	Xiong v. INS, 97 F.3d 1457 (Table) (8th Cir. 1996) (unpublished)		MT
ROBBERY—THEFT FROM THE PERSON	Matter of F, 2 I. & N. Dec. 517, 1946 WL 6048 (BIA 1946)	Canadian Crim. Code § 379	MT
SECURITIES FRAUD	See FRAUD—SECURITIES		
SELECTIVE SERVICE VIOLATIONS	See MILITARY OFFENSES—SELECTIVE SERVICE VIOLATIONS		
SEX OFFENSES—ADULTERY	Application of Barug, 76 F.Supp. 407 (D. Cal. 1948)		NMT
SEX OFFENSES—ADULTERY	Matter of A, 3 I. & N. Dec. 168, 1948 WL 6245 (BIA 1948)	Mass. Laws, Ch. 272 § 14	MT
SEX OFFENSES—ADULTERY	Matter of O, 2 I. & N. Dec. 840, 1947 WL 7032 (BIA 1947)	Immigration Act of 1917 § 19(c)	NMT
SEX OFFENSES—BASTARDY	Matter of D, 1 I. & N. Dec. 186, 1941 WL 7939 (BIA 1941)		NMT
SEX OFFENSES—BAWDY HOUSE	Matter of W, 3 I. & N. Dec. 231, 1948 WL 6261 (BIA 1948)	Canadian Crim. Code §§ 229(1), (2)	MT
SEX OFFENSES—BIGAMY	Forbes v. Brownell, 149 F.Supp. 848 (D.D.C. 1957)	Canadian Crim. Code § 308	NMT
SEX OFFENSES—BIGAMY	Gonzalez-Martinez v. Landon, 203 F.2d 196 (9th Cir. 1953)		MT
SEX OFFENSES—BIGAMY	Matter of VL, 3 I. & N. Dec. 10, 1947 WL 7014 (BIA 1947)		MT

SEX OFFENSES—BIGAMY	Matter of E, 2 I. & N. Dec. 328, 1945 WL 5566 (BIA 1945, AG 1945)	Nev. Compiled Laws § 19138	MT
SEX OFFENSES—BIGAMY	Matter of Sam and Sarra C., 1 I. & N. Dec. 525, 1943 WL 6325 (BIA 1943)	Mexico Codigo Pen. para el Distrito y Territorias Federales Art. 831	MT
SEX OFFENSES—CARNAL ABUSE	United States ex rel. Marks v. Esperdy, 203 F.Supp. 389 (D.N.Y. 1962)		MT
SEX OFFENSES—CARNAL ABUSE	Schoeps v. Carmichael, 177 F.2d 391 (9th Cir. 1949), cert. denied, 339 U.S. 914 (1950)	N.Y. Pen. Law § 483	MT
SEX OFFENSES—CARNAL ABUSE OF CHILD	Pino v. Nicolls, 215 F.2d 237 (1st Cir. 1954)	Mass. Gen. Laws Ch. 265, § 23	MT
SEX OFFENSES—CARNAL ABUSE OF FEMALE MINOR	Matter of M, 9 I. & N. Dec. 452, 1961 WL 12188 (BIA 1961)	Wis. Stats. § 340.47	MT
SEX OFFENSES—CARNAL ABUSE OF MINOR	Matter of P, 5 I. & N. Dec. 392, 1953 WL 7469 (BIA 1953)	Mass. Gen. Laws, Ch. 265 § 23	MT
SEX OFFENSES—CARNAL KNOWLEDGE	Castle v. INS, 541 F.2d 1064 (4th Cir. 1976)	Code Md. 1957, art. 27, § 464 (Repl.Vol. 1976)	MT
SEX OFFENSES—CARNAL KNOWLEDGE OF YOUTH	Matter of R, 3 I. & N. Dec. 562, 1949 WL 6494 (BIA 1949)	Canadian Crim. Code § 301(2)	MT
SEX OFFENSES—CONSENSUAL SODOMY	Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972)		MT
SEX OFFENSES—CONTRIBUTING TO THE SEXUAL DELINQUENCY OF A MINOR	Palmer v. INS, 4 F.3d 482 (7th Cir. 1993)	Ill. Rev. Stat. ch. 38, para. 11-5	MT
SEX OFFENSES—CRIMINAL INDECENCY	Toutounjian v. INS, 959 F.Supp. 598 (W.D.N.Y. 1997)	Canadian Crim. Code § 173(1)(a)	NMT
SEX OFFENSES—CRIMINAL LEWDNESS	Lane ex rel. Cronin v. Tillinghast, 38 F. 2d 231 (1st Cir. 1930)	Mass. Gen. Laws, ch. 272, § 53	MT
SEX OFFENSES—DISORDERLY CONDUCT	Hudson v. Esperdy, 290 F.2d 879 (2d Cir. 1961)		MT
SEX OFFENSES—FONDLING	Kassim v. INS, 96 F.3d 1438 (Table) (4th Cir. 1996)		MT

SEX OFFENSES—FORCIBLE SEXUAL BATTERY	United States v. Kiang, 175 F.Supp.2d 942 (E.D. Mich. 2001)	Mich. Compiled Laws § 750.520e(1)	MT
SEX OFFENSES—FORNICATION	In re Van Dessel, 243 F.Supp. 328, 330-331 (D. Pa. 1965)	18 Penn. Stats. § 4506	MT
SEX OFFENSES—FORNICATION	Matter of R, 6 I. & N. Dec. 444, 1954 WL 7903 (BIA 1954)		MT
SEX OFFENSES—INCEST	Matter of Sam and Sarra C., 1 I. & N. Dec. 525, 1943 WL 6325 (BIA 1943)	Mexico Codigo Pen. para el Distrito y Territorias Federales Art. 831	MT
SEX OFFENSES—GROSS INDECENCY	Matter of S, 8 I. & N. Dec. 409, 1959 WL 11591 (BIA 1959)	Mich. Pen. Code § 338	MT
SEX OFFENSES—GROSS INDECENCY	Matter of H, 7 I. & N. Dec. 359, 1956 WL 10297 (BIA 1956)	Canadian Crim. Code § 206	MT
SEX OFFENSES—GROSS INDECENCY	Matter of S, 5 I. & N. Dec. 576, 1953 WL 7522 (BIA 1953)	Public Acts of Mich. § 338 (1931)	NMT
SEX OFFENSES—GROSS INDECENCY	Matter of Z, 2 I. & N. Dec. 316, 1945 WL 5564 (BIA 1945)	Canadian Crim. Code § 206	NMT
SEX OFFENSES—HOMOSEXUAL CONGRESS	Marinelli v. Ryan, 285 F.2d 474, 475-476 (2d Cir. 1961)	Gen. Stats. § 53-216	MT
SEX OFFENSES—INCEST	Gonzalez-Alvarado v. INS, 39 F.3d 245 (9th Cir. 1994)	Wash.Rev.Code § 9A.64.020	MT
SEX OFFENSES—INCEST	Matter of Y, 3 I. & N. Dec. 544, 1949 WL 6490 (BIA 1949)	Ohio Crim. Code § 13023	MT
SEX OFFENSES—INCEST	United States v. Francioso, 164 F.2d 163 (2d Cir. 1947)		NMT
SEX OFFENSES—INCEST	Matter of B, 2 I. & N. Dec. 617, 1946 WL 6066 (BIA 1946)	Remington's Revised Stats. of Wash. Vol. 9 § 8438, & Vol. 4 § 2455	NMT
SEX OFFENSES—INDECENT ASSAULT	Marinelli v. Ryan, 285 F.2d 474 (2d Cir. 1961)	Conn. Gen. Stats. § 53-217	MT
SEX OFFENSES—INDECENT ASSAULT	Matter of Z, 7 I. & N. Dec. 253, 1956 WL 10268 (BIA 1956)	Conn. Gen. Stats. § 6052, Revision of 1930	MT
SEX OFFENSES—INDECENT ASSAULT	Matter of S, 5 I. & N. Dec. 686, 1954 WL 7947 (BIA 1954)	Canadian Crim. Code § 292(a)	MT
SEX OFFENSES—INDECENT ASSAULT	Matter of B, 3 I. & N. Dec. 1, 1947 WL 7012 (BIA 1947)	Canadian Crim. Code § 292(b)	MT
SEX OFFENSES—INDECENT ASSAULT AND BATTERY	Maghsoudi v. INS, 181 F.3d 8 (1st Cir. 1999)	Mass. Gen. Laws ch. 265, § 13H	MT

SEX OFFENSES—INDECENT EXPOSURE	Matter of H, 7 I. & N. Dec. 301, 1956 WL 10280 (BIA 1956)	Mich. Ann. Stats. § 28.567(1); Mich. Crim. Code § 335a	NMT
SEX OFFENSES—INDECENT EXPOSURE	Matter of Mueller, 11 I. & N. Dec. 268, 1965 WL 12277 (BIA 1965)	Wis. Stats. § 944.20(2)	NMT
SEX OFFENSES—INDECENT EXPOSURE	Matter of R, 2 I. & N. Dec. 633, 1946 WL 6071 (BIA 1946) overruled by Matter of H, 7 I. & N. Dec. 301 (BIA 1956)	Mich. Ann. Stats. Vol 25 § 335 (1935)	MT
SEX OFFENSES—INDECENT LIBERTIES	Matter of Garcia, 11 I. & N. Dec. 521, 1966 WL 14289 (BIA 1966)	Mich. Pen. Code § 336 (1931)	MT
SEX OFFENSES—KEEPING A DISORDERLY HOUSE	Matter of VS, 2 I. & N. Dec. 703, 1946 WL 6082 (BIA 1946)	Canadian Crim. Code § 229	MT
SEX OFFENSES—LASCIVIOUS ACT	Matter of J, 2 I. & N. Dec. 533, 1946 WL 6051 (BIA 1946)	Mass. Gen. Laws, Ch. 272 § 35	MT
SEX OFFENSES—LASCIVIOUS CARRIAGE	Matter of H, 7 I. & N. Dec. 616, 1957 WL 10586 (BIA 1957)	Conn. Gen. Stats.§ 8553	NMT
SEX OFFENSES—LEASING ROOM FOR LEWD ACT	Matter of Lambert, 11 I. & N. Dec. 340, 1965 WL 12299 (BIA 1965)	City of Tampa Code § 26-42	MT
SEX OFFENSES—LEWD ACT WITH MALE	Matter of P, 8 I. & N. Dec. 424, 1959 WL 11594 (BIA 1959)		MT
SEX OFFENSES—LEWD AND LASCIVIOUS COHABITATION	Matter of M, 2 I. & N. Dec. 530, 1946 WL 6050 (BIA 1946)	Mass. Gen. Laws, Ch. 272 § 16	MT
SEX OFFENSES—LEWD AND LASCIVIOUS CONDUCT	Matter of M, 7 I. & N. 144 (BIA 1956)	Mass. Gen. Laws ch. 272, § 53	MT
SEX OFFENSES—LEWD AND LASCIVIOUS SPEECH OR BEHAVIOR	Matter of M, 2 I. & N. Dec. 530, 1946 WL 6050 (BIA 1946)	Mass. Gen. Laws, Ch. 272 § 53	MT
SEX OFFENSES—LEWDNESS	Matter of A, 3 I. & N. Dec. 168, 1948 WL 6245 (BIA 1948)	Mass. Gen. Laws, Ch. 272 § 53	MT
SEX OFFENSES—LOITER WITH INTENT TO COMMIT LEWD ACT	Babouris v. Murff, 175 F.Supp. 503, 504 (D.N.Y. 1958), aff'd, 269 F.2d 621 (2d Cir. 1959)	N.Y. Pen. Law, McKinney's Consol. Laws, c. 40, § 722(8)	MT
SEX OFFENSES—LOITERING TO SOLICIT LEWD ACT	Ganduxe y Marino v. Murff, 183 F.Supp. 565, 567 (D.N.Y. 1959)		MT
SEX OFFENSES—LOITERING WITH SEXUAL INTENT	United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956)*		MT

SEX OFFENSES—MANN ACT—TRANSPORTING FEMALE WITH INTENT TO INDUCE ILLICIT SEX	Matter of R, 6 I. & N. Dec. 444, 1954 WL 7903 (BIA 1954)	18 U.S.C. § 398 (now § 2421)	NMT
SEX OFFENSES—OPEN AND GROSS LEWDNESS	Matter of J, 2 I. & N. Dec. 533, 1946 WL 6051 (BIA 1946)	Mass. Gen. Laws, Ch. 272 § 16	MT
SEX OFFENSES—OPEN LEWDNESS	Matter of C, 3 I. & N. Dec. 790, 1949 WL 6543 (BIA 1949)	N. J. Rev. Stats. 2: 140-1 (1942)	MT
SEX OFFENSES—OPERATING A BROTHEL	Matter of A, 5 I. & N. Dec. 546, 1953 WL 7514 (BIA 1953)		MT
SEX OFFENSES—ORAL SEX PERVERSION	Matter of Leyva, 16 I. & N. Dec. 118 (BIA 1977)	Cal. Penal Code § 288(a)	MT
SEX OFFENSES—PANDERING	Matter of SL, 3 I. & N. Dec. 396, 1948 WL 6291 (BIA 1948)		MT
SEX OFFENSES—POLYGAMY (BIGAMY)	Matter of S, 1 I. & N. Dec. 314, 1942 WL 6541 (BIA 1942)	Mass. Gen. Laws, Ch. 272 § 15	NMT
SEX OFFENSES—PROVIDING LOCATION FOR PROSTITUTION	Matter of P, 3 I. & N. Dec. 20, 1947 WL 7015 (BIA 1947)	Cal. Pen. Code § 315 (1939)	MT
SEX OFFENSES—PROVIDING PLACE OF PROSTITUTION	Matter of A, 3 I. & N. Dec. 168, 1948 WL 6245 (BIA 1948)	Mass. Gen. Laws, Ch. 139 §§ 4, 5	NMT
SEX OFFENSES—RAPE—GANG RAPE OF MINOR	Levin v. INS, 4 Fed.Appx. 402 (9th Cir 2001)		MT
SEX OFFENSES—MISCONDUCT WITH MINOR	Matter of Imber, 16 I. & N. Dec. 256, 1977 WL 39265 (BIA 1977)	Israeli Crim. Act of 1936 §§ 159 and 168	MT
SEX OFFENSES—SEXUAL ASSAULT OF CHILD	United States v. Ekpin, 214 F.Supp.2d 707 (S.D.Tex. June 24, 2002)	Texas Penal Code § 22.021	MT
SEX OFFENSES—SEXUAL INTERCOURSE WITH FEEBLE-MINDED WOMAN	Matter of M, 2 I. & N. Dec. 17, 1944 WL 5153 (BIA 1944)	Neb. Crim. Code § 191 (R. S. 8766, 1913)	MT
SEX OFFENSES—SODOMY	In re Longstaff, 538 F.Supp. 589, 591 (D. Tex. 1982), aff'd, 716 F.2d 1439, 77 A.L.R. Fed. 803 (5th Cir. 1983)		MT
SEX OFFENSES—SOLICIT LEWD ACT	Matter of Alfonso-Bermudez, 12 I. & N. Dec. 225, 1967 WL 14000 (BIA 1967)	Cal. Pen. Code § 647(a)	MT
SEX OFFENSES—SOLICIT LEWD ACT	Wyngaard v. Rogers, 187 F.Supp. 527 (D.D.C. 1960)	N.Y. Pen. Law § 722	MT
SEX OFFENSES—STATUTORY RAPE	Rico v. INS, 262 F.Supp.2d 6 (E.D.N.Y. 2003)	N.Y. Penal Code § 130.25(2)	MT

SEX OFFENSES—STATUTORY RAPE	Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971)	Minn.Stats.Ann. §§ 609.02, subd. 9(6), 609.295(4)	MT
SEX OFFENSES—STATUTORY RAPE	Matter of S, 2 I. & N. Dec. 553, 1946 WL 6056 (BIA 1946)		MT
SEX OFFENSES—STATUTORY RAPE	Matter of M, 2 I. & N. Dec. 17, 1944 WL 5153 (BIA 1944)		MT
SEX OFFENSES—STATUTORY RAPE	Goh v. INS, 61 F.3d 910 (Table) (9th Cir. 1995) (unpublished)		MT
SEX OFFENSES—STATUTORY RAPE	Matter of Dingena, 11 I. & N. Dec. 723, 1966 WL 14346 (BIA 1966)	Wis. Stats. § 944.10(2)	MT
SMUGGLING GOODS	Matter of B, 2 I. & N. Dec. 542, 1946 WL 6054 (BIA 1946)	Customs Act of Canada § 203 (3); Tariff Act of 1930 § 593 (b) (19 U.S.C. § 1593 (b)	MT
SMUGGLING MERCHANDISE	Matter of De S, 1 I. & N. Dec. 553, 1943 WL 6331 (BIA 1943)	19 U.S.C. § 1593	MT
SMUGGLING—ALIEN	Matter of Tiwari, 19 I. & N. Dec. 875 (BIA 1989)		NMT
SMUGGLING—ALIEN	United States v. Raghunandan, 587 F. Supp. 423 (S.D.N.Y. 1984)		MT
SOCIAL SECURITY VIOLATIONS—SALE OF FALSE SOCIAL SECURITY CARD	Souza v. Ashcroft, 52 Fed.Appx. 40, 2002 WL 823816 (N.D. Cal. 2002) (No. 01-16578 unreported)	18 U.S.C. § 2 and 42 U.S.C. § 408(a)(7)(C)	MT
SOLICITATION	See principal offense (e.g. PROSTITUTION)		
SPEECH IN VIOLATION OF PARK REGULATIONS	Chaunt v. United States, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960)		NMT
SPOUSAL BATTERY/ABUSE	See ASSAULT—DOMESTIC VIOLENCE		
STALKING	See DOMESTIC VIOLENCE—STALKING		
STATUTORY RAPE	See SEX OFFENSES—STATUTORY RAPE		
STRUCTURING FINANCIAL TRANSACTIONS	Matter of LVC, 22 I. & N. Dec. 594, 1999 WL 163010 (BIA 1999)	31 U.S.C. § 5324(3) (1998)	NMT
STRUCTURING FINANCIAL TRANSACTIONS	Smalley v. Ashcroft, 354 F.3d 332 (5th Cir. 2003)	31 U.S.C. § 5324(a)(3)	NMT

STRUCTURING FINANCIAL TRANSACTIONS TO AVOID CURRENCY REPORTS	Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993)	31 U.S.C. §§ 5322(b), 5324(a)(3)	NMT
TAMPERING WITH VESSEL MOTOR	Matter of G, 4 I. & N. Dec. 409, 1951 WL 7027 (BIA 1951)	18 U.S.C. § 502 (now § 2275)	MT
TAX OFFENSES—ATTEMPTED TAX EVASION	Matter of B, 5 I. & N. Dec. 649, 1954 WL 7937 (BIA 1954)	Canadian Excise Tax Act, formerly the Special War Revenue Act	MT
TAX OFFENSES—CONSPIRACY TO AVOID TAXES	Matter of F, 2 I. & N. Dec. 754, 1946 WL 6090 (BIA 1946)	Canadian Crim. Code § 444	MT
TAX OFFENSES—CONSPIRACY TO VIOLATE TAX LAWS BY AVOIDING TAXES	Matter of M, 8 I. & N. Dec. 535, 1960 WL 12115 (BIA 1960)	18 U.S.C. § 88 (now 18 U.S.C. § 371)	MT
TAX OFFENSES—EVASION	Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957)	26 U.S.C. § 145(b)	MT
TAX OFFENSES—EVASION	Chanan Din Khan v. Barber, 147 F.Supp. 771, 774-775 (D. Cal. 1957)		MT
TAX OFFENSES—EVASION	Matter of W, 5 I. & N. Dec. 759, 1954 WL 7920 (BIA 1954)	26 U.S.C. § 145(b)	MT
TAX OFFENSES—EVASION	Matter of J, 6 I. & N. Dec. 382, 1954 WL 7890 (BIA 1954)	26 U.S.C. § 145(b)	MT
TAX OFFENSES—EVASION	Matter of R, 4 I. & N. Dec. 176, 1950 WL 6638 (BIA 1950)	German Tax Code §§ 396 and 401	NMT
TAX OFFENSES—EVASION—FALSIFYING TAX RETURN—INTENT TO EVADE PAYMENT	Matter of A, 1 I. & N. Dec. 436, 1943 WL 6307 (BIA 1943)	§ 112 (3) of the Special War Revenue Act, chapter 179, Revised Stats. of Canada	MT
TAX OFFENSES—FILING FRAUDULENT TAX RETURNS	Matter of C, 9 I. & N. Dec. 524, 1962 WL 12849 (BIA 1962)	26 U.S.C. § 145(b)	MT
TAX OFFENSES—FURNISHING FALSE INFORMATION ON FEDERAL TAX RETURN	El-Ali v. Carroll, 83 F.3d 414 (Table) (4th Cir. 1996)	26 U.S.C. § 7206(1)	MT
TAX OFFENSES—INCOME TAX EVASION	U.S. v. Carrollo, 30 F. Supp. 3 (D. Mo. 1939)*	26 U.S.C. § 145(b) (now 26 U.S.C. § 7202)	NMT

TAX OFFENSES—STATE TAX EVASION	Wittgenstein v. INS, 124 F.3d 1244 (10th Cir.1997)	N. M. Stat. Ann. § 7-1-72 (1978)	MT
TERRORIST THREATS	See THREATS		
THEFT	See also MAIL OFFENSES; ROBBERY; JOYRIDING; LARCENY		
THEFT	Okoro v. INS, 125 F.3d 920 (5th Cir. 1997)	11 Del. Code § 841	MT
THEFT	United States v. Lopez-Vasquez, 985 F.2d 1017 (9th Cir. 1993)*		MT
THEFT	Farrell-Murray v. INS, 992 F.2d 1222 (Table) (10th Cir. 1993) (unpublished)		MT
THEFT	Gutierrez-Chavez v. INS, 8 F.3d 26 (Table) (9th Cir. 1993)	Alaska Stat. §§ 11.46.130(a), 11.46.190(a)	MT
THEFT	United States v. Concepcion, 795 F.Supp. 1262 (E.D.N.Y. 1992)*		MT
THEFT	Chiaramonte v. INS, 626 F.2d 1093 (2d Cir. 1980)		MT
THEFT	Matter of Grazley, 14 I. & N. Dec. 330, 1973 WL 29441 (BIA 1973)	Canadian Crim. Code § 283	MT
THEFT	Orlando v. Robinson, 262 F.2d 850 (7th Cir. 1959), cert. denied, 359 U.S. 980, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959)		MT
THEFT	Matter of S, 5 I. & N. Dec. 552, 1953 WL 7515 (BIA 1953)	Pen. Code of France Arts. 379 and 401	MT
THEFT	United States ex rel. Teper v. Miller, 87 F.Supp. 285, 286-287 (D.N.Y. 1949)	English Larceny Act of 1916, 6 & 7 Geo. V., c. 50	MT
THEFT	Matter of W, 2 I. & N. Dec. 795, 1947 WL 7024 (BIA 1947)	Canadian Crim. Code § 347	MT
THEFT	Matter of F, 2 I. & N. Dec. 517, 1946 WL 6048 (BIA 1946)	Canadian Crim. Code § 386	MT
THEFT	Matter of T, 2 I. & N. Dec. 22 (AG 1944)	Canadian Crim. Code § 347	MT
THEFT	Matter of W, 1 I. & N. Dec. 485, 1943 WL 6316 (BIA 1943)	Army Act of the Dominion of Canada	MT
THEFT OR STEALING	Matter of T, 2 I. & N. Dec. 22, 1944 WL 5154 (BIA, AG 1944)		MT

THEFT—ATTEMPTED AUTO THEFT	United States v. Cunha, 209 F.2d 326 (1st Cir. 1954)*		MT
THEFT—AUTO	See also JOYRIDING		
THEFT—AUTO	Matter of H, 2 I. & N. Dec. 864, 1947 WL 7035 (BIA 1947)	Canadian Crim. Code § 377	NMT
THEFT—BY BAILEE	Matter of GT, 4 I. & N. Dec. 446, 1951 WL 7036 (BIA 1951)	Vernon's Annotated Pen. Code of Texas Art. 1429	MT
THEFT—CELLULAR AIR TIME	United States v. Qadeer, 953 F.Supp. 1570 (S.D. Ga. 1997)*	18 U.S.C. § 1029(a)(5)	MT
THEFT—FALSE PRETENSES	Matter of Grazley, 14 I. & N. Dec. 330, 1973 WL 29441 (BIA 1973)	Canadian Crim. Code §§ 319 or 320	MT
THEFT—FOREIGN	Matter of G, 5 I. & N. Dec. 129, 1953 WL 7414 (BIA 1953)		MT
THEFT—FROM THE PERSON	See also ROBBERY		
THEFT—FRUSTRATED THEFT	Matter of FG, 4 I. & N. Dec. 717, 1952 WL 7311 (BIA 1952)		MT
THEFT—GOVERNMENT PROPERTY	Quilodran-Brau v. Holland, 232 F.2d 183 (3d Cir. 1956)	18 U.S.C. § 82	MT
THEFT—GRAND	Garcia-Lopez v. Ashcroft, 334 F.3d 840 (9th Cir. 2003)		MT
THEFT—GRAND	Rashtabadi v. INS, 23 F.3d 1562 (9th Cir. 1994)	Cal. Pen. Code § 487(1) (West 1988)	MT
THEFT—GRAND	Nwobu v. INS, 907 F.2d 155 (Table) (9th Cir. 1990) (unpublished)		MT
THEFT—INTENT TO PERMANENTLY DEPRIVE	Matter of Medina-Lopez, 10 I. & N. Dec. 7, 1962 WL 12893 (BIA 1962)	Pen. Code of Mexico Arts. 288 and 367	MT
THEFT—INTENT TO PERMANENTLY DEPRIVE	Matter of S, 5 I. & N. Dec. 678, 1954 WL 7945 (BIA 1954)		MT
THEFT—JOYRIDING	See JOYRIDING		
THEFT—LARCENY	Matter of Kim, 17 I. & N. 144 (BIA 1972)	Cal. Penal Code § 211	MT
THEFT—LARCENY	Zgodda v. Holland, 184 F.Supp. 847, 850 (D. Pa. 1960)		MT
THEFT—LARCENY	Matter of P, 4 I. & N. Dec. 252 (BIA 1951)	Mich. Pen. Code § 28.592	MT
THEFT—LARCENY	Matter of G, 4 I. & N. Dec. 548, 1951 WL 7059 (BIA 1951)	Crimes Act of 1900 for New South Wales, Australia § 116	MT

THEFT—LARCENY	Matter of M, 2 I. & N. Dec. 530, 1946 WL 6050 (BIA 1946)	Mass. Gen. Laws, Ch. 272 § 53	MT
THEFT—LARCENY BY TRICK	Matter of Westman, 17 I. & N. Dec. 50, 1979 WL 44362 (BIA 1979)	Rev. Code. Wash. § 9.54.010	MT
THEFT—LARCENY—PETTY	Laryea v. United States, 300 F.Supp.2d 404 (E.D. Va. 2004)		MT
THEFT—LARCENY—PETTY	United Sates v. Samaei, 260 F.Supp.2d 1223 (M.D. Fla. May 5, 2003)	Florida Stat. § 812.014	MT
THEFT—LARCENY—PETTY	Henry v. Ashcroft, 175 F.Supp.2d 688 (S.D.N.Y. 2001)		MT
THEFT—LARCENY—PETTY	Brett v. INS, 386 F.2d 439 (2d Cir. 1967)		MT
THEFT—MAIL	Matter of B, 3 I. & N. Dec. 270, 1948 WL 6269 (BIA 1948)	18 U.S.C. § 317 (see new 18 U.S.C. §§ 1708, 1702)	MT
THEFT—MAIL	Matter of MB, 3 I. & N. Dec. 66, 1947 WL 7052 (BIA 1947)	18 U.S.C. § 317	NMT
THEFT—MAIL THEFT	Matter of F, 7 I. & N. Dec. 386, 1957 WL 10528 (BIA 1957)	18 U. S. C. § 1708 (1948)	MT
THEFT—OBTAINING GOODS BY FALSE PRETENCES	Matter of Kinney, 10 I. & N. Dec. 548, 1964 WL 12087 (BIA 1964)	Conn. Gen. Stats. § 8698, 1949 Revision (C.G.S.A. § 53-362)	NMT
THEFT—PERMANENT TAKING	Matter of N, 3 I. & N. Dec. 723, 1949 WL 6530 (BIA 1949)		MT
THEFT—PERMANENT TAKING	Matter of T, 3 I. & N. Dec. 641, 1949 WL 6512 (BIA 1949)	Larceny Act of 1916	MT
THEFT—PETTY	United States v. Esparza-Ponce, 193 F.3d 1133 (9th Cir. 1999)		MT
THEFT—PETTY	United States v. Esparza-Ponce, 7 F.Supp.2d 1084 (S.D. Cal. 1998)*	Cal. Pen. Code § 484	MT
THEFT—PETTY	Matter of Alarcon, 20 I. & N. Dec. 557 (BIA 1992)	Cal. Penal Code § 484	MT
THEFT—POSSESSION OF STOLEN GOODS	Matter of Salvail, 17 I. & N. Dec. 19 , 1979 WL 44356 (BIA 1979)	Canadian Crim. Code, Art. 296	MT
THEFT—POSSESSION OF STOLEN PROPERTY	Michel v. INS, 206 F.3d 253, 270 (2d Cir. 2000)	N.Y. Pen. Law § 165.40	MT
THEFT—POSSESSION OF STOLEN PROPERTY	Kim v. INS, 24 F.3d 247 (Table) (9th Cir.1994)	Wash. Rev. Code, § 9A.56.150	MT
THEFT—POSSESSION OF STOLEN PROPERTY	Matter of K, 2 I. & N. Dec. 90, 1944 WL 5167 (BIA 1944)		NMT

THEFT—RECEIVING STOLEN GOODS	Matter of A, 7 I. & N. Dec. 626, 1957 WL 10589 (BIA 1957)	Italian Pen. Code Art. 648	MT
THEFT—RECEIVING STOLEN GOODS	Matter of Z, 7 I. & N. Dec. 253, 1956 WL 10268 (BIA 1956)	Conn. Gen. Stats. § 6116, Revision of 1930	MT
THEFT—RECEIVING STOLEN GOODS	Matter of R, 6 I. & N. Dec. 772, 1955 WL 8749 (BIA 1955)	N. J. Rev. Stat. § 2:164-1	MT
THEFT—RECEIVING STOLEN GOODS	Matter of S, 4 I. & N. Dec. 365, 1951 WL 7017 (BIA 1951)	German Crim. Code § 259	NMT
THEFT—RECEIVING STOLEN GOODS	Mourikas v. Vardianos, 169 F.2d 53 (4th Cir. 1948)		MT
THEFT—RECEIVING STOLEN PROPERTY	De Leon-Reynoso v. Ashcroft, 294 F.3d 1143 (3d Cir. June 11, 2002)	Pa. Cons. Stat. Ann. § 3925(a)	MT
THEFT—RECEIVING STOLEN PROPERTY	Matter of Patel, 15 I. & N. Dec. 212, 213, 1975 WL 31479 (BIA 1975)	Cal. Pen. Code § 496.1	MT
THEFT—RECEIVING STOLEN PROPERTY	Wadman v. INS, 329 F.2d 812 (9th Cir. 1964)		MT
THEFT—RECEIVING STOLEN PROPERTY	Matter of VDB, 8 I. & N. Dec. 608, 1960 WL 12128 (BIA 1960)		MT
THEFT—RECEIVING STOLEN PROPERTY	Matter of L, 6 I. & N. Dec. 666, 668, n.8, 1955 WL 8725 (BIA 1955)		MT
THEFT—RECEIVING STOLEN PROPERTY—TRANSPORTING STOLEN PROPERTY	United States v. Castro, 26 F.3d 557 (5th Cir. 1994)*	18 U.S.C. §§ 2312, 2313	MT
THEFT—RETAINING STOLEN GOODS	Matter of G, 2 I. & N. Dec. 235, 1945 WL 5548 (BIA 1945)	Canadian Crim. Code § 399	MT
THEFT—SECOND DEGREE	DeLuca v. Ashcroft, 203 F.Supp.2d 1276 (M.D.Ala. May 16, 2002)	Alabama Code § 13A-8-4	MT
THEFT—SHOPLIFTING	Da Rosa Silva v. INS, 263 F.Supp.2d 1005 (E.D.Pa. May 8, 2003)	New Jersey Stat. An. § 2C:20-11(b)(1)	MT
THEFT—SHOPLIFTING	Hing Cheung Wong v. INS, 980 F.2d 721 (Table) (1st Cir. 1992)		MT
THEFT—STEALING FROM THE PERSON	Matter of M, 2 I. & N. Dec. 686, 1946 WL 6077 (BIA 1946)	Canadian Crim. Code § 379	MT
THREATS	See also MAIL OFFENSES		
THREATS—CRIMINAL INTIMIDATION	United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991)*	Hong Kong Laws, ch. 205, § 2(b)(i)	NMT
THREATS—TERRORIST THREATS	Chanmouny v. Ashcroft, 376 F.3d 810, 2004 WL 1586874 (8th Cir. 2004)	Minn. Stat. § 609.713(1)	MT

TRESPASS—MALICIOUS TRESPASS WITH INTENT TO COMMIT THEFT	Matter of Esfandiary, 16 I. & N. Dec. 659, 1979 WL 44422 (BIA 1979)	Fl. Stats. § 821.18	MT
UNAUTHORIZED SALE OF MERCHANDISE—FOREIGN	Matter of P, 5 I. & N. Dec. 421, 422, 1953 WL 7475 (BIA 1953)		NMT
UNLAWFUL COMPULSION—FOREIGN	Matter of K, 4 I. & N. Dec. 490, 1951 WL 7047 (BIA 1951)	German Crim. Code Para. 240	NMT
UNLAWFUL ENTRY	See BURGLARY		
VAGRANCY	Matter of GR, 5 I. & N. Dec. 18 (BIA 1953)	Cal. Pen. Code § 647.5	NMT
VAGRANCY	Matter of GR, 5 I. & N. Dec. 18, 1952 WL 7330 (BIA 1952)	Cal. Pen. Code § 647.5	NMT
VAGRANCY	Matter of VS, 2 I. & N. Dec. 703, 1946 WL 6082 (BIA 1946)	Canadian Crim. Code § 238 (i)	NMT
VAGRANCY	Matter VS, 2 I. & N. Dec. 703 (BIA 1946)		NMT
VAGRANCY FOR PROSTITUTION	United States v. Cox, 536 F.2d 65 (5th 1976)*		MT
VANDALISM	See MALICIOUS MISCHIEF		
WELFARE FRAUD	See FRAUD		

Accessory or Preparatory Offenses and Their Immigration Effect

APPENDIX E

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
FEDERAL			
Aiding and Abetting 18 U.S.C. 2	Would probably be deemed an AF if the underlying offense is an AF. BUT CONSIDER: *U.S. v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002). Conviction under California theft statute does not automatically qualify as a "theft" offense AF because statute covers conduct, such as aiding and abetting theft, outside the generic definition of theft.	Would be deemed a CIMT if the underlying offense is a CIMT. ***Case Law/Notes:*** *Matter of Short,* 20 I. & N. Dec. 136 (BIA 1989). If the underlying crime involves moral turpitude, then an 18 U.S.C. 2 conviction for aiding in the commission of the crime involves moral turpitude. *See also Matter of F*, 6 I. & N. Dec. 783 (BIA 1955)(Massachusetts offense of accessory "before the fact" found to be a CIMT when the substantive offense was a CIMT).	Would probably be deemed a CSO or FO if the underlying offense is a CSO or FO. ***Case Law/Notes:*** *United States v. Gonzalez*, 582 F. 2d 1162 (7th Cir. 1978). The Seventh Circuit found that aiding and abetting does not define separate crime but codifies a principle of who may be liable for the substantive offense and therefore that a non-citizen convicted of the unlawful distribution of heroin under 18 U.S.C. 2 had been convicted of a CSO. *Londono-Gomez v. I.N.S.*, 699 F. 2d 475 (9th Cir. 1983). The Ninth Circuit reasoned that aiding and abetting does not define a separate offense. A conviction for aiding and abetting must be accompanied by a conviction for the substantive offense and one is subject to same penalties for both.

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
Accessory after the fact 18 U.S.C. 3	Not necessarily AF even if the underlying offense is an AF; however, if term of imprisonment of at least one year is imposed, would probably be deemed an "obstruction of justice" AF. ***Case Law/Notes:*** *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997); *see also Matter of Espinoza-Gonzalez,* 22 I. & N. Dec. 889 (BIA 1999). The BIA found that an 18 U.S.C. 3 conviction as an accessory after the fact was an "obstruction of justice" AF. BUT CONSIDER: In the above cases, the BIA did not have briefing on whether accessory after the fact constituted "obstruction of justice" for purposes of the AF definition. One might still be able to argue that such an offense should not be so considered unless the evidence demonstrates that the conviction is one that relates to one of the federal "obstruction of justice" offenses described in 18 U.S.C. 1501, et seq.	Would probably be deemed a CIMT if the underlying offense is a CIMT. ***Case Law/Notes:*** *Matter of Sanchez-Marin*, 11 I. & N. Dec. 264 (BIA 1965). Non-citizen convicted under Massachusetts law as an accessory after the fact to manslaughter had been convicted of a CIMT where the principal was found guilty of a CIMT and where respondent's indictment linked him to the crime committed by the principals. *Cabral v. I.N.S.*, 15 F.3d 193 (1st Cir. 1993). The First Circuit found that the BIA had reasonably determined that a respondent who pled guilty as an accessory after the fact to murder under Massachusetts law had been convicted of a CIMT.	Would probably not be deemed a CSO or FO. ***Case Law/Notes:*** *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997). The BIA found that a non-citizen convicted as an 18 U.S.C. 3 accessory after the fact to a drug offense was not convicted of a CSO. The BIA rejected the INS' attempt to analogize the situation to one in which a noncitizen convicted of aiding a crime involving moral turpitude was found to have been convicted of a CIMT. The BIA found that while inchoate crimes always presuppose a purpose to commit another substantive offense, the offense of being an accessory after the fact is not an inchoate offense. BUT CONSIDER: Conviction of an offense such as accessory after the fact to a drug offense might support an INA 212(a)(2)(C) *inadmissibility* charge that the DHS (formerly INS) "knows or has reason to believe" that the individual is or has been an "illicit trafficker" in a controlled substance. *See Sneddon v. I.N.S.*, 107 F. 3d 17 (9th Cir. 1997) (unpublished disposition). The Ninth Circuit found that a California conviction as an accessory after the fact to a charge of drug possession with intent to sell was not a "drug trafficking" offense, but nonetheless found that the INS (now DHS) could exclude a noncitizen with such a conviction as a person whom the INS "knows or has reason to believe" is or has been an "illicit trafficker" in a controlled substance. It further held that the Board could look at the original charge, rather than the conviction, to determine whether a noncitizen was excludable as an "illicit trafficker."

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
Misprision of felony (concealing knowledge of commission of felony) 18 U.S.C. 4	No. ***Case Law/Notes:*** *Matter of Espinoza-Gonzalez,* 22 I. & N. Dec. 889 (BIA 1999).	Might be deemed a CIMT. ***Case Law/Notes:*** *Matter of Sloan*, 12 I. & N. Dec. 840 (BIA 1966, AG 1968). The Attorney General held that an analogous 18 U.S.C. 1071 conviction for harboring and concealing a person knowing that there is an outstanding warrant for the arrest of such person is a CIMT. BUT CONSIDER: In *Matter of Sloan*, the AG did not reach the issue of whether the 18 U.S.C. 4 misprision of felony conviction in the case was a CIMT. Note that, unlike 18 U.S.C. 1071, 18 U.S.C. 4 does not require knowledge of an outstanding arrest warrant. In addition, the BIA has held that the common law crime of misprision of felony is not a CIMT. *See Matter of S-C-*, 3 I. & N. 350(BIA 1949). Nevertheless, in at least one unpublished decision, the BIA has held that federal misprision under 18 U.S.C. 4 is a CIMT. *See In re Giraldo-Valencia*, A36 520 954 (unpublished BIA Index Dec., October 22, 1992); *see also Itani v. Ashcroft,* 298 F.3d 1213 (11th Cir. 2002).	Would probably not be deemed a CSO or FO. ***Case Law/Notes:*** *Castaneda De Esper v. I.N.S.*, 557 F. 2d 79 (6th Cir 1977). Misprision of felony does not establish an alien's deportability as an alien convicted of a CSO. Historically, the offense was separate and distinct from the felony concealed. The offense is also distinct from accessory after the fact and conspiracy and the language of statute does not indicate that it was contemplated to be a "narcotic law." *Matter of Velasco*, 16 I & N Dec 281 (BIA 1977). The BIA followed the Sixth Circuit's ruling in *Castaneda De Esper* that misprision of felony does not constitute a CSO. *See also Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997) (confirming that the BIA continues to follow the Sixth Circuit's rationale with respect to misprision of felony).

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
NEW YORK STATE			
Criminal solicitation NYPL 100.00-100.13	Might be deemed an AF if the underlying offense is an AF. ***Case Law/Notes:*** See discussion in column on whether solicitation may be deemed a CSO. ALSO CONSIDER: *Leyva-Licea v. INS,* 187 F.3d 1147 (9th Cir. 1999). Arizona conviction for solicitation to possess marijuana for sale is not "drug trafficking" AF as it is not listed among the drug trafficking crimes covered in the federal Controlled Substances Act. *See also U.S. v. Rivera-Sanchez*, 247 F.3d 905, 908-09 (9th Cir. 2001) (*en banc*), in which the Ninth Circuit held that California conviction for offering to sell marijuana is not a drug-trafficking aggravated felony because it involves solicitation; hence statute was divisible. *Cf. U.S. v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006), in which the Eleventh Circuit held that a prior conviction for solicitation to deliver cocaine did not warrant a drug trafficking offense enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(B). *But see Gattem v. Gonzalez*, 412 F.3d	Would probably be deemed a CIMT if the underlying offense is a CIMT. ***Case Law/Notes:*** The BIA treats a solicitation offense as being a conviction for the substantive offense. *See, e.g., Matter of Alfonso-Bermudez*, 12 I. & N. Dec. 225 (BIA 1967). Also, the New York offense of criminal solicitation is analogous to the Massachusetts offense of "accessory before the fact," which was found to be a CIMT when the substantive offense was a CIMT in *Matter of F*, 6 I & N Dec.783 (BIA 1955). *See also* discussion above of whether federal offense of "Aiding and abetting" is a CIMT.	Might be deemed a CSO or FO if the underlying offense is a CSO or FO. ***Case Law/Notes:*** *Matter of Beltran*, 20 I. & N. Dec. 521 (BIA 1992). The BIA found that a non-citizen convicted in Arizona of solicitation to possess narcotics was convicted of a CSO. The individual was convicted under a statute which provided that a person is guilty of the offense if he "'commands, encourages, requests or solicits' another person to engage in criminal activity with the intent to promote or facilitate the commission of the crime." Under Arizona law, solicitation is classified as a preparatory offense (inchoate crime), and the BIA found that the crime is more closely related to attempt, conspiracy and aiding and abetting than it is to misprision of a felony. The BIA noted that under federal law, one who commands, encourages or requests a crime is deemed to be an accomplice and guilty of the substantive offense. The BIA also based its decision of the similarity of the penalties in Arizona for solicitation and for the underlying offense. BUT CONSIDER: *Coronado-Durazo v. I.N.S.*, 123 F.3d 1322 (9th Cir. 1997). A conviction of solicitation to sell narcotics in Arizona was not a CSO where the solicitation statute specifies a general offense not limited to controlled substance violations. ALSO CONSIDER: *United States v. Liranzo*, 944 F.2d 73 (2nd Cir. 1991). A New York conviction of criminal facilitation of a narcotics offense was not a "controlled substance offense" for purposes of sentencing as a career offender. The career offender statute defines "controlled substance offense" as "an offense under federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance . . . or the possession of a controlled substance with the intent to manufacture, import, export, or distribute." U.S.S.G. 4B1.2(2).

	758 (7th Cir. 2005), in which a divided panel of the Seventh Circuit held that a conviction for soliciting a minor to engage in a sexual act was an aggravated felony because it constituted sexual abuse of a minor.		*United States v. Dolt*, 27 F. 3d 235 (6th Cir. 1994). The Sixth Circuit held that a Florida conviction for solicitation to traffic in cocaine was not a "controlled substance offense" for career offender purposes. The solicitation statute at issue did not require completion or commission of an offense or overt act to complete the crime. The court distinguished solicitation from attempt and also did not accept the government's contention that solicitation was similar to aiding and abetting (which was specifically mentioned in offender statute).

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
Conspiracy NYPL 105.00-105.17	A conspiracy to commit an AF would also be deemed an AF. ***Case Law/Notes:*** *See* INA 101(a)(43) (AF definition).	A conspiracy to commit a CIMT would probably be deemed a CIMT. ***Case Law/Notes:*** *See* INA 212(a)(2)(A)(i)(I) (CIMT inadmissibility ground). Note that when Congress added express language including "conspiracy" to the CIMT inadmissibility ground it did not do so with respect to the CIMT deportability ground. However, prior case law found or assumed that conspiracy to commit a CIMT was a CIMT. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Matter of Bader*, 17 I. & N. Dec. 525 (BIA 1990).	Conviction would be deemed a CSO or FO if the underlying offense is a CSO or FO. ***Case Law/Notes:*** *See* INA 237(a)(2)(B) and (C) (deportability grounds for CSO and FO) and 212(a)(2)(A)(i)(II) (inadmissibility ground for CSO). For case law prior to express addition of "conspiracy" to the language of these CSO and FO provisions, *see Matter of N-*, 6 I. & N. Dec. 557 (BIA, A.G. 1955).

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
Attempt NYPL 110.00	An attempt to commit an AF would also be deemed an AF. ***Case Law/Notes:*** *See* INA 101(a)(43) (AF definition).	An attempt to commit a CIMT would probably be deemed a CIMT if the underlying offense is a CIMT. ***Case Law/Notes:*** *See* INA 212(a)(2)(A)(i)(I) (CIMT inadmissibility ground). Note that when Congress added express language including "attempt" to the CIMT inadmissibility ground it did not do so with respect to the CIMT deportability ground. However, prior case law found or assumed that an attempt to commit a CIMT was a CIMT. *See U.S. ex. rel. Meyer v. Day*, 54 F. 2d 336 (2d Cir. 1931); *Matter of Katsanis*, 14 I. & N. Dec. 266 (BIA 1973). BUT CONSIDER: Two circuit courts have found that, where a New York defendant has pleaded to attempt to commit a reckless offense, such a plea is legally impossible or incoherent since under New York law a defendant can only be guilty of an attempted crime if he specifically *intends* all elements of that crime. Therefore, these courts found	Conviction would be deemed a CSO or FO if the underlying offense is a CSO or FO. ***Case Law/Notes:*** *See* INA 237(a)(2)(B) and (C) (deportability grounds for CSO and FO) and 212(a)(2)(A)(i)(II) (inadmissibility ground for CSO). For case law prior to express addition of "conspiracy" to the language of these CSO and FO provisions, *see Matter of Bronsztejn*, 15 I. & N. Dec. 281 (BIA 1974) (conviction for attempted possession of marijuana was sufficiently related to the substantive offense of criminal possession of marijuana to make it a conviction for a crime "relating to narcotic drugs or marijuana"); *Matter of G.*, 6 I & N Dec. 353(BIA 1954) (conviction for attempt to possess a narcotic drug with intent to sell is a CSO).

		that the attempted New York reckless assault and reckless endangerment offense convictions at issue could not be deemed crimes involving moral turpitude in the immigration context. *See Gill v. INS*, 420 F.3d 82 (2d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004).	

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
Criminal facilitation NYPL 115.00-115.08	Might be deemed an AF if the underlying offense is an AF. ***Case Law/Notes:*** See discussion above on whether analogous offense of "solicitation" is an AF where the underlying offense is an AF.	Would probably be deemed a CIMT if the underlying offense is a CIMT. ***Case Law/Notes:*** The New York offense of criminal facilitation is analogous to the Massachusetts offense of "accessory before the fact" which was found to be a CIMT when the substantive offense was a CIMT in *Matter of F*, 6 I. & N. Dec. 783 (BIA 1955). *See also* discussion above of whether federal offense of "Aiding and abetting" is a CIMT.	Conviction might be deemed a CSO or FO if the underlying offense is a CSO or FO. ***Case Law/Notes:*** *Matter of Del Risco*, 20 I. & N. Dec. 109 (BIA 1989). A conviction for facilitating the sale of cocaine is a conviction of a CSO. The BIA found that a conviction for facilitation under an Arizona statute providing that "with knowledge that another person is committing or intends to commit an offense, such person knowingly provides such other person with means or opportunity for the commission of the offense which in fact aids such person to commit the offense," was similar in nature to the federal offense of "aiding and abetting" which the Ninth Circuit found was a CSO in *Londono-Gomez v. INS*, 699 F. 2d 475 (9th Cir. 1983). There is some case law support for arguing that the analogous offense of solicitation may not be sufficient to establish CSO (*see* discussion above of whether state offense of "Solicitation" may be a CSO). ALSO CONSIDER: *United States v. Liranzo*, 944 F.2d 73 (2nd Cir. 1991). A New York conviction of criminal facilitation of a narcotics offense was not a "controlled substance offense" for purposes of sentencing as a career offender. The career offender statute defines "controlled substance offense" as "an offense under federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance . . . or the possession of a controlled substance with the intent to manufacture, import, export, or distribute." U.S.S.G. 4B1.2(2).

Offense	Aggravated Felony (AF)?	Crime Involving Moral Turpitude (CIMT)?	Controlled Substance Offense (CSO) or Firearm Offense (FO)?
Hindering Prosecution NYPL 205.55-205.65	Not necessarily AF even if the underlying offense is an AF; however, if term of imprisonment of at least one year is imposed, would probably be deemed an "obstruction of justice" AF if the record of conviction establishes a specific purpose of hindering the process of justice; may not do so if the record of conviction establishes only intent to assist a person in profiting or benefiting from the commission of a crime (see NYPL 205.50(6)). ***Case Law/Notes:*** *See Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999); *see also U.S. v. Vigil-Medina,* 2002 U.S. App. LEXIS 4961 (4th Cir. 2002) (unpub'd opinion) (conviction for New York hindering prosecution in the 1st degree is an "obstruction of justice" AF when conviction was based on the transport of individuals defendant knew were pursued by police and when defendant admitted in plea agreement to acting with the intent to prevent, hinder, or delay their discovery).	Might be deemed a CIMT. ***Case Law/Notes:*** *Matter of Sloan*, 12 I. & N. Dec. 840 (BIA 1966, AG 1968). The 18 U.S.C. 1071 offense of knowingly harboring and concealing a person for whom there is an outstanding arrest warrant is a CIMT. BUT CONSIDER: Unlike 18 U.S.C. 1071, New York Hindering Prosecution does not necessarily require knowledge of an outstanding arrest warrant.	Would probably not be deemed a CSO or FO. ***Case Law/Notes:*** See discussion above of whether federal offense of "Accessory after the fact" is a CSO.

	BUT CONSIDER: Even if the record of conviction establishes a specific purpose of hindering the process of justice, one might still be able to argue that an offense such as New York Hindering Prosecution should not be considered "obstruction of justice" unless the evidence demonstrates that the conviction is one that relates to one of the federal "obstruction of justice" offenses described in 18 U.S.C. 1501, et seq.		

"Particularly Serious Crime" Bars on Asylum and Withholding of Removal: Case Law Standards and Sample Determinations

APPENDIX F

[For additional information on the "particularly serious crime" ("PSC") bars to the immigration relief of asylum or withholding of removal, see Chapter 3, section 3.4.C, and Appendix I, sections 4(a) and (b).]

PSC Case Law Standards			
Offense	**PSC for Asylum?**	**PSC for Withholding?**	**Case Law/Notes**
Felony/Misdemeanor constituting an "aggravated felony" *(For sample "aggravated felony" determinations, see Appendix C.)*	Yes, for asylum, regardless of sentence.	Yes, for withholding of removal, if sentenced to 5 or more years in prison; presumptively yes, if involved unlawful trafficking in controlled substances; maybe, if sentenced to less than 5 years and did not involve unlawful trafficking in controlled substances.	For asylum purposes, an aggravated felony is deemed to be a PSC by statute. *See* 8 U.S.C. 1158(b)(2)(B)(i). For withholding of removal purposes, an aggravated felony is (1) statutorily deemed to be a PSC if the individual has been sentenced to an aggregate term of imprisonment of at least 5 years for any aggravated felony conviction(s), *see* 8 U.S.C. 1231(b)(3)(B), and (2) under Attorney General opinion, presumptively deemed to be a PSC if involved unlawful trafficking in controlled substances, regardless of sentence imposed. *See Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 270 (A.G. 2002). [See below.] A determination of whether a noncitizen convicted of any other aggravated felony and sentenced to less than five years imprisonment has been convicted of a PSC requires an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. *Matter of L-S-,* 22 I&N Dec. 645 (BIA 1999), overruled in part, *Matter of Y-L, supra; Matter of S-S-,* 22 I&N Dec. 458 (BIA 1999), *overruled in part, Matter of Y-L, supra; Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988).
Misdemeanor (single) that is *not* an "aggravated felony"	Usually not.	Usually not.	Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *See Matter of Juarez,* 19 I&N Dec. 664 (BIA 1988). ***Note:*** If the misdemeanor offense is one which may be deemed an "aggravated felony" (*e.g.,* NY misdemeanor sale of marijuana), it may nevertheless be deemed a PSC.
Felony that is not an "aggravated felony" (or for withholding of removal purposes, an aggravated felony with a prison sentence of less than 5 years and not involving unlawful trafficking in controlled substances) OR Misdemeanor (second or subsequent) that is	Depends.	Depends.	In order to determine whether a crime is a PSC (if it is not deemed or presumed to be so for withholding of removal purposes as an "aggravated felony" with a prison sentence of 5 years or more or as an aggravated felony involving unlawful trafficking in controlled substances, or not deemed to be so for asylum purposes as any "aggravated felony," regardless of sentence), the BIA considers several factors: (i) the nature of the conviction, (ii) the circumstances and underlying facts for the conviction, (iii) the type of sentence imposed, and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. *See Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20

not an "aggravated felony"			I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988). For some specific crimes that have been found to be PSCs, see the specific crimes listed by type of offense in the sample determinations that follow in this chart.
Sample PSC Case Law Determinations **NOTE:** Many of the crimes listed below that have been found in the past to be PSCs would now be considered aggravated felonies due to the expansion of the definition of aggravated felonies. They would therefore on that basis alone be deemed a PSC for asylum, but not necessarily for withholding of removal. See "Felony/ Misdemeanor constituting an 'aggravated felony'" above.			
DRUG OFFENSES			
Drug trafficking offenses (or offenses that may be deemed drug trafficking offenses), generally	Yes, since virtually always will be deemed an AF.	Yes, presumptively, but individualized determination required.	*Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 270 (A.G. 2002). An individual convicted of an aggravated felony involving unlawful trafficking in controlled substances will presumptively be deemed to have been convicted of a particularly serious crime for withholding of removal purposes. To overcome that presumption, an individual would have to demonstrate the most extenuating circumstances that are both extraordinary and compelling. Those circumstances must include, at a *minimum*, all of the following: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the individual in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. *Tunis v. Gonzales*, 447 F.3d 547 (7th Cir. 2006). Though the court determined that not all drug transactions involve an inherent risk of violence, because the individual failed to satisfy all six of the criteria set forth in *Matter of Y-L* [see above], state conviction of two counts of sale of a small amount (less than a gram) of cocaine constituted a conviction for a PSC thus barring withholding. *Santos-Melitante v. Gonzales*, No. 04-70981, 161 Fed.Appx. 634 (9th Cir. 2005) (unreported). Upheld Immigration Judge's decision that two convictions under Cal. Health and Safety Code § 11378, for "unlawful possession of a controlled substance for sale," constituted a PSC. Court found persuasive the fact that intent to sell was an element of the state crime and concluded that because the individual's crimes were also classified as an aggravated felony, there was an additional presumption that the individual's aggravated felonies were particularly serious crimes. *See Matter of Q-T-M-T*, 21 I & N. Dec. 639, 1996 WL 784581 (1996). *Gelaneh v. Ashcroft*, No. 04-3071, 153 Fed. Appx.

			881 (3d. Cir. 2005) (unreported). It was "highly improbable" that conviction for possession with intent to deliver between 21 and 41 grams of cocaine, with a sentence of 5 years probation, could satisfy the *Y-L-* six-factor test. *Perez v. Loy*, 356 F.Supp.2d 172 (D. Conn. 2005). Conviction for importing one kilogram of heroin into the United States could not satisfy the test set forth in *Matter of Y-L* and thus constituted a PSC which would bar withholding. *Steinhouse v. Ashcroft*, 247 F.Supp.2d 201 (D. Conn. 2003). Individual suffering from bi-polar disorder was convicted of racketeering and selling drug samples. She received a three year sentence, a downward departure from the sentencing guidelines due to her "significantly reduced mental capacity." The court remanded the case to the BIA to consider the four *Frentescu* factors in their totality, not simply "whether the type and circumstance of the crime indicate that the alien will be a danger to the community." By failing to apply the fourth factor in *Frentescu*, the BIA had neglected to consider whether the individual's mental impairment affected the determination whether she posed a danger to the community. "When a crime is neither per se particularly serious or per se not particularly serious, the IJ and BIA must consider whether the circumstances of the crime indicate that the alien will be a danger to the community." CASES DECIDED BEFORE *MATTER OF Y-L-*: *Matter of U-M-,* 20 I&N Dec. 327 (BIA 1991). Conviction of the sale or transportation of mari-huana is a conviction of a PSC. The Board found that "the crime of trafficking in drugs is inherently a particularly serious crime. The harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes." *Matter of Gonzalez,* 19 I&N 682 (BIA 1988). Two convictions for possession of a controlled substance with intent to deliver with a three-year prison sentence are convictions of PSCs. *Chong v. Dist. Dir.,* 264 F.3d 378 (3d Cir. 2001). Left undisturbed the Board of Immigration Appeals' determination that conspiracy to distribute heroin and possession of heroin with intent to distribute with aggregate two year sentence were aggravated felonies that, under the facts and circumstances of that case, were also PSCs for withholding of removal purposes. *Mosquera-Perez v. INS,* 3 F.3d 553 (1st Cir. 1993).

			A noncitizen convicted of possessing a half ounce of cocaine with intent to distribute, and who had received a suspended sentence and probation, had been convicted of a PSC. *Arauz v. Rivkind,* 845 F.2d 271 (11th Cir. 1988). Conviction of possession of marijuana with intent to distribute is a PSC. *Eskite v. INS,* 901 F. Supp. 530 (E.D.N.Y. 1995). Notwithstanding a pardon, an alien who was convicted in Florida of the sale of $30 of crack cocaine and of possession with intent to sell or deliver was convicted of a *per se* PSC.
Simple possession of drugs, generally	Maybe.	Maybe.	May depend on factors such as whether the offense is a felony or misdemeanor, the quantity of drugs involved (which may be viewed as speaking to whether the drugs were for personal use or for distribution), and the sentence imposed by the criminal court. *See Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (BIA 1990) (Simple possession of cocaine is not a particularly serious crime).
VIOLENT OFFENSES AND SEX OFFENSES			
Crimes against persons, generally	Usually, and always when offense is deemed an AF.	Usually, but individualized determination may be required.	Violent and sex offenses at issue in the case law have usually been found to be PSCs, at least where the conviction is of a felony. CONSIDER: Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *See Matter of Juarez,* 19 I&N Dec. 664 (BIA 1988).
Assault with a dangerous or deadly weapon	Usually, and always when offense is deemed an AF.	Usually, but individualized determination may be required.	*In re Pjeter Juncaj*, 2004 WL 1059706 (BIA 2004) (unpublished). Court looked to record of conviction to determine that using a firearm to shoot another person in the back of the head and purposefully displaying a firearm constituted a PSC. *Satamian v. Gonzales*, No. 04-71228, 2006 WL 986386 (9th Cir. 2006) (unpublished). If a conviction under California provision penalizing assault with deadly weapon or by force likely to produce great bodily injury carries one year or more in prison, it constitutes an aggravated felony and is also a "particularly serious crime," rendering the individual ineligible for withholding of deportation. *Singh v. Ashcroft*, 351 F.3d 435 (9th Cir. 2003). Assault with a weapon or with force likely to produce great bodily injury crime itself, two year sentence, and individual's conduct in kicking the victim in the head, supported the finding that this crime was particularly serious and barred eligibility for withholding. *Yousefi v. INS,* 260 F.3d 318 (4th Cir. 2001). Where neither BIA nor Immigration Judge considered the several factors set forth in *Matter of Frentescu* [see above], the case was remanded for

			such analysis. Here, the sentence was 15-45 months imprisonment, the 'dangerous weapon' was a rock, and the crime was committed in the context of a running dispute between two street vendors.
Battery, aggravated	Yes.	Yes.	*Matter of B-,* 20 I&N Dec. 427 (BIA 1991).
Child molestation	Yes.	Yes.	*Lazovic v. Ashcroft*, 2004 WL 1157680 (9th Cir. 2004) (unpublished). Conviction of touching the "intimate parts" of a 12-year-old individual constituted a PSC, rendering individual ineligible for asylum and withholding.
Criminal sexual abuse, aggravated (felony, against a minor)		Yes.	*Espinoza-Franco v. Ashcroft*, 394 F.3d 461 (7th Cir. 2004). BIA concluded, and Seventh Circuit upheld, that aggravated criminal sexual abuse is a PSC because crimes "of sexual abuse against children involve a heightened risk of violence" and in addition individual "violated his daughter's trust." Furthermore, "fondling any part of [the complaining witness's] body with a lewd intent seems particularly serious considering her young age."
Criminal sexual contact		Yes.	*Remoi v. Att'y Gen. of U.S.*, No. 04-3685, 2006 WL 116877 (3rd Cir. 2006) (unpublished). Conviction of criminal sexual contact, for which initial sentence was 364 days, but, subsequent to a probation violation, individual was re-sentenced for 18 months, constituted a crime of violence aggravated felony and a particularly serious crime barring both asylum and withholding.
Criminal sexual intercourse with a person under 18	Yes.	Maybe.	*Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006). Misdemeanor conviction for unlawful sexual intercourse with a seventeen-year-old who was more than three years younger than the perpetrator constituted an aggravated felony. However, the court of appeals concluded that, by failing to engage in a case-specific analysis as directed by *Matter of Frentescu* [see above], the BIA erred in concluding that individual had committed a PSC and denying withholding of removal.
Kidnapping and burglary	Yes.	Yes.	*Choeum v. INS,* 129 F.3d 29 (1st Cir. 1997).
Lewd and lascivious act with a child 14-15 years of age	Yes.	Yes.	*Bogle-Martinez v. INS,* 52 F.3d 332 (9th Cir. 1995).
Manslaughter (NY Manslaughter, first degree)	Yes.	Yes.	*Ahmetovic v. INS,* 62 F.3d 48 (2d Cir. 1995). The Second Circuit affirmed the findings of the Immigration Judge and the BIA that first-degree manslaughter is a *per se* "particularly serious crime" notwithstanding evidence of mitigating factors. (Ms. Ahmetovic shot and killed her husband following a domestic dispute and there was evidence that the killing had been in self-defense).
Manslaughter (NY Manslaughter, second degree)	Regardless of whether it is a PSC, is a bar to asylum because deemed a "violent and dangerous crime"	Judge did not address this in this case, finding the individual ineligible based on other	*Matter of Jean,* 23 I&N Dec. 373 (A.G. 2002). Individuals convicted of violent or dangerous crimes will not be granted asylum, even if they are technically eligible, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the individual clearly demonstrates that denial would result in exceptional and extremely unusual hardship. Here, the Attorney General

		reasons.	found the alien "manifestly unfit" for a discretionary grant of asylum relief under circumstances that included alien's confession to beating and shaking a 19-month-old child, and that a coroner corroborated a "wide-ranging collection of extraordinarily severe injuries"
Manslaughter, involuntary		Yes.	*Franklin v. INS,* 72 F.3d 571 (8th Cir. 1996).
Rape	Yes.	Yes.	*Smith v. USDOJ,* 218 F. Supp. 2d 357 (W.D.N.Y. 2002). An alien convicted of rape with a sentence of 2–6 years imprisonment is convicted of an aggravated felony and therefore a particularly serious crime for both asylum and withholding purposes
Rape, attempted	Yes.	Yes.	*Gatalski v. INS,* 72 F.3d 135 (9th Cir. 1995).
Robbery	Yes.	Yes.	*Matter of S-V-,* 22 I&N Dec. 1306 (BIA 2000). Conviction required intent to deprive a person of property through use of force, violence, assault or putting in fear, sentence imposed was 4 years, and record indicated violence against persons.
Robbery with a firearm or deadly weapon	Yes.	Yes.	*Matter of S-S-,* 22 I&N Dec. 458 (BIA 1999), *overruled in part, Matter of Y-L-, supra.* An alien convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to fifty-five months imprisonment is convicted of a PSC. *Matter of L-S-J-,* 21 I&N Dec. 973 (BIA 1997). Conviction resulting in 2½ year sentence was an aggravated felony, and the committed offense threatened violence with a handgun and put lives in danger.
Shooting with intent to kill	Yes.	Yes.	*Nguyen v. INS,* 991 F.2d 621 (10th Cir. 1993).
Unlawful sexual intercourse with a person under 18	Yes.	Yes.	*Bogle-Martinez v. INS,* 52 F.3d 332 (9th Cir. 1995).
PROPERTY OFFENSES			
Crimes against property, generally	Less likely to be found to be a PSC than crimes against persons, but will be considered a PSC for asylum if offense is deemed an AF	Less likely to be found to be a PSC than crimes against persons.	There is little case law dealing with whether offenses against property may be considered PSCs; however, the BIA stated in *Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988), that crimes against property are less likely to be categorized as PSCs than crimes against persons. CONSIDER: Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *See Matter of Juarez,* 19 I&N Dec. 664 (BIA 1988).
Attempted burglary	Yes.	No.	*Wonlah v. Dep't of Homeland Security*, No. Civ.A.04-1832, 2005 WL 19447 (E.D.P.A. 2005) (unpublished). Sentence of 11-1/2 to 23 months in county prison for which individual did not serve any time in prison constituted an aggravated felony and thus rendered individual ineligible for asylum. For withholding purposes, however, conviction did not constitute a particularly serious crime.

Burglary, aggravated (NY Burglary, first degree)	Yes.	Yes.	*Matter of Garcia-Garrocho,* 19 I&N Dec. 423 (BIA 1986), modified on other grounds, *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988). Conviction under New York Penal Law Section 140.30 (Burglary in the first degree) requires a finding that the applicant accomplished his crime with one or more aggravating circumstances that involve "physical injury or potentially life-threatening acts." Because of the potential for physical harm, the BIA found that the applicant's crime was a PSC on its face.
Burglary with intent to commit theft		Not without aggravating circumstances.	*Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-,* 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988). Conviction of burglary with intent to commit theft, where sentence imposed was for 3 months, was not a PSC given the circumstances: "Although the applicant did enter a dwelling, there is no indication that the dwelling was occupied or that the applicant was armed; nor is there any indication of an aggravating circumstance. Further, the applicant received a suspended sentence after spending a relatively short period of time in prison (3 months). Such sentence . . . reflects upon the seriousness of the applicant's danger to the community."
Conspiracy to traffic in counterfeit credit cards.	Yes.	No.	*Unuakhaulu v. Gonzales*, 416 F.3d 931 (9th Cir. 2005). Conviction which carried with it an 18-month sentence was not a particularly serious crime for the purposes of withholding. Conviction was an aggravated felony making individual ineligible for asylum.
Grand larceny in the fourth degree (felony)	Yes.	No.	*Bastien v. Dep't of Homeland Security*, No. 03-CV-611F, 2005 WL 1140709 (W.D.N.Y. 2005). Where the sentence was 1 1/2 to 3 years incarceration, though case qualified as an aggravated felony, it did not qualify as a particularly serious crime. Individual was eligible for discretionary withholding of removal.
Receipt of stolen property	Yes.		*Hernandez-Barrera v. Ashcroft*, 373 F.3d 9 (1st Cir. 2004). Conviction for receipt of stolen property for which individual received a suspended sentence of two and a half years constituted an aggravated felony but did not bar individual's eligibility for asylum because the final order of deportation was not based on that offense but was instead based on the non-criminal ground of entering the United States without inspection.
Theft of services, generally	Yes.	Yes.	*Ilchuk v. Att'y Gen. of U.S.*, 434 F.3d 618 (3d Cir. 2006). Conviction for theft of services, where sentence imposed was six to twenty-three months of house arrest with electronic monitoring, constituted an aggravated felony, and also a PSC deeming individual ineligible for withholding. "Theft of services" charge originated from two days on which the individual, an ambulance driver, had responded to calls which had been diverted from the legally designated emergency service provider to the individual's employer.

FIREARM OFFENSES			
Firearm trafficking offenses, generally	Yes, since virtually always will be deemed an AF.	Usually.	Firearm trafficking offenses are likely to be found to be PSCs. *See, e.g., Matter of Q-T-M-T-,* 21 I&N Dec. 639 (BIA 1996).
Simple possession of a firearm, generally	Maybe not.	Maybe not.	May depend on factors such as whether the offense is a felony or misdemeanor, evidence of actual or threatened use of the firearm against another, and the sentence imposed by the criminal court. CONSIDER: Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *See Matter of Juarez,* 19 I&N Dec. 664 (BIA 1988).
Illegal discharge of a firearm	Yes.	Yes.	*Granados v. Ashcroft*, No. C 03-3704, 2003 WL 22416147 (N.D.Ca. 2003). Because crime involved a substantial risk of harm to persons or property and the use of a firearm, it is "difficult to imagine facts and circumstances that would ameliorate the particularly serious nature of his offense." Derived from *Frentescu*, "[t]he Ninth Circuit has held that the determination of whether a crime qualifies as particularly serious requires an examination of (1) the nature of the conviction; (2) the type of sentence imposed; and (3) the circumstances and facts underlying the conviction." *Ursu v. INS*, No. 99-70678, 2001 U.S. App. LEXIS 29383 (9th Cir. 2001). *Note*: The Ninth Circuit does not consider *Frentescu*'s fourth factor: whether the type and circumstances of the crime indicate that the individual will be a "danger to the community." *See e.g.*, *Ursu v. INS*, No. 99-70678, 2001 U.S. App. LEXIS 29383 (9th Cir. 2001); *see also Hamama v. INS*, 78 F.3d 233 (6th Cir. 1996).
Possession of a firearm during a felony	Yes.	Yes.	*In re Pjeter Juncaj*, 2004 WL 1059706 (BIA 2004) (unpublished). Court looked to record of conviction to determine that using a firearm to shoot another person in the back of the head and purposefully displaying a firearm constituted a PSC. *Hamama v. INS,* 78 F. 3d 233 (6th Cir. 1996).
Robbery with a firearm	Yes.	Yes.	*Matter of S-S-,* 22 I&N Dec. 458 (BIA 1999), *overruled in part, Matter of Y-L-, supra.* An alien convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to fifty-five months of imprisonment is convicted of a PSC.
OTHER OFFENSES			
Bringing an illegal alien into the U.S.	Yes, since offense is an AF.	No.	*Matter of L-S-,* 22 I&N Dec. 645 (BIA 1999), *overruled in part, Matter of Y-L, supra.* Conviction of bringing an illegal alien into the United States United States in violation of 8 U.S.C. 1324(a)(2)(B)(iii) is not a PSC in light of nature of the offense, the length of the sentence imposed (here, 3½ months), and the circumstances under which this particular crime occurred.

Concealing and harboring	Yes.	No.	*Zhen v. Gonzales*, 2006 WL 895505 (10th Cir. 2006). Conviction for concealing and harboring illegal aliens, 8 U.S.C. § 1324(a)(1)(A)(iii), for which sentence amounted to 233 days, constituted an aggravated felony and thus a PSC for purposes of asylum but not for the purposes of withholding.
Hostage taking	Yes.	No.	*Acero v. INS*, No. Civ. A. 04-0223, 2005 WL 615744 (E.D.N.Y. 2005). Not a PSC, though it is an aggravated felony.
Mail fraud	Yes.	Yes.	*In re: Maurice Wilson*, 2004 WL 1398694 (BIA 2004). Conviction of mail fraud for which individual was sentenced to 15 months' imprisonment and was fined $25,000 constituted a PSC.
Racketeering	Maybe not.	Maybe not.	*Steinhouse v. Ashcroft*, 247 F.Supp.2d 201 (D. Conn. 2003). Individual suffering from bi-polar disorder was convicted of racketeering and selling drug samples. She received a three year sentence, a downward departure from the sentencing guidelines due to her "significantly reduced mental capacity." The court remanded the case to the BIA to consider the four *Frentescu* factors in their totality, not simply "whether the type and circumstance of the crime indicate that the alien will be a danger to the community." By failing to apply the fourth factor in *Frentescu*, the BIA had neglected to consider whether the individual's mental impairment affected the determination whether she posed a danger to the community. "When a crime is neither per se particularly serious or per se not particularly serious, the IJ and BIA must consider whether the circumstances of the crime indicate that the alien will be a danger to the community."

APPENDIX G: UPDATED CHAPTER 2 CITIZENSHIP CHARTS

Chart A: Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth (if child born out of wedlock see Chart B) – **Please Note: A child cannot acquire citizenship at birth through an adoption.**[1]

STEP 1	**STEP 2**	**STEP 3**	**STEP 4**
Select period in which child was born	Select applicable Parentage	Measure citizen parent's residence **prior** to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had already met applicable residence requirements.)	Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements – never before age 26.) People who did not meet the retention requirement can now regain citizenship by taking an oath of allegiance.

PERIOD	PARENTS	RESIDENCE REQUIRED OF USC PARENT	RESIDENCE REQUIRED OF CHILD
Prior to 5/24/34	Father or mother citizen	Citizen father or mother had resided in the U.S.	None
On/after 5/24/34 and prior to 1/14/41	Both parents citizens	One had resided in the U.S.	None
	One citizen and one alien parent	Citizen had resided in the U.S.	5 years residence in U.S. or its outlying possessions between the ages 13 and 21 if begun before 12/24/52, or 2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence[2] between ages 14 and 28 if begun before 10/27/72.[3] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. [*See*, Volume 7 of the Foreign Affairs Manual citing section 302(g) of the Nationality Act of 1940.][4]
On/after 1/14/41 and prior to 12/24/52	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12.[5] If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, parent needed 10 years physical presence, at least 5 of which were after age 14.[6]	2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence[7] between ages 14 and 28 if begun before 10/27/72.[8] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. [*See*, Volume 7 of the Foreign Affairs Manual citing section 302(g) of the Nationality Act of 1940.] (This exemption is not applicable if parent transmitted under the Armed Services exceptions.) People born on or after 10/10/52 have no retention requirements.[9]
	Both parents citizens; or one citizen and one national[10]	One had resided in the U.S. or its outlying possessions.	None
On/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possession.	None
	One citizen, one national parent[11]	Citizen had been physically present in U.S or its outlying possessions for a continuous period of one year.	None
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14.[12]	None
On/after 11/14/86	Both parents Citizens	One had resided in the U.S. or its outlying possessions.	None
	One citizen and one national parent[13]	Citizen had been physically present in U.S. or its outlying possessions for continuous period of one year.	None
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14.[14]	None

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information. Please see notes on next page.

Endnotes for Chart A

[1] See *Marquez-Marquez v. Gonzalez*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by United States citizen since INA § 301(g) did not address citizenship through adoption); See also *Colaianni v. INS*, 490 F.3.d 185 (2nd Cir. 2007) (same). But see *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), which found that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen; *see also Solis-Espinoza v. Gonzales*, 401 F. 3d 1091 (9th Cir. 2005).

[2] For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

[3] If a person did not learn of the claim to U.S. citizenship before reaching age 23 or 26, whichever age was applicable, the two year retention requirement might be deemed to have been constructively met (in other words, it may be waived). *See*, INS Interpretations 301.1(b)(5)(iii) and 301.1(b)(6)(iii); *See also Matter of Yanez-Carrillo*, 10 I&N Dec. 366 (BIA 1963) (holding that the retention requirement does not bar citizenship until the person has a reasonable opportunity to enter the United States as a citizen after learning of such a claim to citizenship).

[4] People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States (*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1)). It is the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" should mean prior to or on the date of the birthday. *See Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952); *however see also* INS Interpretations 320.2. Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[5] *See*, INS Interpretations 301.1(b)(3)(ii) for a discussion of the residence requirements for parents who served in the Armed Forces between 12/7/41 and 12/31/46.

[6] *See*, *U.S. Citizenship and Naturalization Handbook*, (Daniel Levy) citing INS Interpretations 301.1(b)(4)(iii) & (iv) and the Act of March 16, 1956, Public Law 84-430, 70 Stat. 50.

[7] For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

[8] *See* endnote 2.

[9] The retention requirement was repealed by Act of 10/10/78 (P.L.95-432). People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States (*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1). For information on the status of people who had on 10/10/78 failed to remain in the U.S., *please see* INS Interpretations 301.1(b)(6)(ix).

People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States. [*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1)] It is the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" should mean prior to or on the date of the birthday. *See*, INS Interpretations 320.2 and *Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952). Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[10] For a definition of "National," please *see* INA §§ 308 and 101(a)(29) and Chapter 7-5 of the ILRC's manual, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*.

[11] *See* endnote 9.

[12] *Please see*, INA § 301(g) for exceptions to the physical presence requirements for people who served honorably in the U.S. military, were employed with the U.S. Government or with an intergovernmental international organization; or who were the dependent unmarried sons or daughters and member of the household of a parent in such military service or employment.

[13] *See* endnote 9.

[14] *See* endnote 11.

CHART B: ACQUISITION OF CITIZENSHIP
DETERMINING IF CHILDREN BORN OUTSIDE THE U.S. AND BORN OUT OF WEDLOCK ACQUIRED U.S. CITIZENSHIP AT BIRTH

PART 1 – Mother was a U.S. citizen at the time of the child's birth.
PART 2 – Mother was not a U.S. citizen at the time of the child's birth and the child was legitimated or acknowledged by a U.S. citizen father.

Please Note: A child cannot acquire citizenship at birth through an adoption.[1]

PART 1: MOTHER IS A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH

Date of Child's Birth:	Requirements:
Prior to 12/24/52:	Mother was a U.S. citizen who had resided in the U.S. or its outlying possessions at some point prior to birth of child. A child whose alien father legitimated him did not acquire U.S. citizenship through his U.S. citizen mother if: 1. The child was born before 5/24/34; 2. The child was legitimated before turning 21; AND 3. The legitimation occurred before 1/13/41. **NOTE:** A child born before 5/24/34 acquired U.S. citizenship when the Nationality Act of 1940, effective 1/13/41, bestowed citizenship upon the child retroactively to the date of birth.
On/after 12/24/52:	Mother was U.S. citizen physically present in the U.S. or its outlying possessions for a continuous period of 1 year at some point prior to birth of child.

PART 2: MOTHER WAS NOT A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH AND THE CHILD HAS BEEN LEGITIMATED OR ACKNOWLEDGED BY A U.S. CITIZEN FATHER[2]

Date of Child's Birth:	Requirements:
Prior to 1/13/41:	1. Child legitimated at any time after birth, including adulthood, under law of father's domicile. 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 1/13/41 and prior to 12/24/52:	1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52.[3] 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21 under law of father or child's domicile. 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/68 and prior to 11/15/71:	1. Child legitimated before age 21 under law of father or child's domicile. 2. Use CHART A to determine if child acquired citizenship at birth. **-- OR –** 1. Child/father blood relationship established by clear and convincing evidence;[4] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity of child in writing under oath, or paternity must be established by competent court. 5. Use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/71:[5]	1. Child/father blood relationship established by clear and convincing evidence;[6] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity of child in writing under oath, or paternity must be established by competent court. 5. Use CHART A to determine if child acquired citizenship at birth.

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information.

PLEASE SEE ENDNOTES ON NEXT PAGE.

Endnotes for Chart B

[1] See *Marquez-Marquez v. Gonzalez*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by United States citizen since INA § 301(g) did not address citizenship through adoption); See also *Colaianni v. INS*, 490 F.3.d 185 (2nd Cir. 2007) (same). But see *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), which found that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen; *see also Solis-Espinoza v. Gonzales*, 401 F. 3d 1091 (9th Cir. 2005).

[2] If the child did not acquire citizenship through its mother, but was legitimated by a U.S. citizen father under the following conditions, apply the acquisition law pertinent to legitimate children born in a foreign country. (CHART A) Please note that the United States Supreme Court ruled that even though the laws treat children born out of wedlock to U.S. citizen fathers differently than the laws treat children born out of wedlock to U.S. citizen mothers, those laws are constitutional and do not violate equal protection. *See Tuan Anh Nguyen v INS*, 121 S. Ct. 2053 (2001).

[3] If legitimated before age 21, US. Citizen father must comply with residence requirements of the Nationality Act of 1940 (See Chart A, period 1/13/41 to 12/24/52).

[4] *See Miller v. Albright*, 523 U.S. 420, 437 (1977) (clear and convincing standard of proof of paternity does not require DNA evidence). Prior to the 1986 amendment requiring proof of blood relation by clear and convincing evidence, paternity could be shown by birth certificates, school records, or hospital records. However, under State Department guidelines, an actual blood relationship must be shown; being born in wedlock is insufficient, even if the child is presumed to be the issue of the parents' marriage by the law of the jurisdiction where the child was born. *See* 7 FAM 1131.4(a). *Miller v. Albright* indicated that DNA evidence is unnecessary, but that was mere dictum in a plurality opinion joined by only one justice. Certainly DNA evidence would suffice, but it is unclear how much less convincing evidence could be and still overcome the "clear and convincing" hurdle. Practitioners would be prudent to have DNA testing conducted if possible. But *see* also *Stanley Russell Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (holding that there is no requirement of a blood relationship between petitioner and his citizenship father to acquire citizenship at birth since he was born in wedlock).

[5] *See* endnote 3. Note that if the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father under CHART A changes. *See also Chau v. Dep.'t of Homeland Sec.*, 424 F. Supp. 2d 1159, 1166 (D. Ariz.) (noting that the transitional rule providing for the right to elect for application of either the post or pre-1986 version of INA § 309, which did not impose the written statement concerning financial statement, applied to petitioner since he was born before 1986).

[6] *See* endnote 4.

CHART C: DERIVATIVE CITIZENSHIP - LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP

Date of Last Act	**Requirements -** [Please note that it is the ILRC's position that all advocates should argue that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. (*See Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; INS Interpretations 320.2.) Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."] Note that in at least one federal district court case, the court held that a child derived citizenship automatically even though his mother naturalized after his 18th birthday because due to factors beyond his mother's control, the mother's citizenship interview had been rescheduled to a date past the child's 18th birthday. *Rivas v Ashcroft*, ___ F. Supp. 2d _, U.S. Dist. Lexis (16254) (S.D.N.Y. 2002). See also *Harriott v. Ashcroft*, 2003 U.S. Dist Lexis 12135 (E.D. Pa.).
Prior to 5/24/34:[1]	a. Either one or both parents must have been naturalized prior to the child's 21st birthday;[2] b. Child must be lawful permanent resident before the 21st birthday;[3] c. Illegitimate child may derive through mother's naturalization only; d. A legitimated child must have been legitimated according to the laws of the father's domicile;[4] e. Adopted child and stepchild cannot derive citizenship.
5/24/34 to 1/12/41:	a. Both parents must have been naturalized and begun lawful permanent residence in the U.S. prior to the child's 21st birthday; b. If only one parent is being naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S. commencing during minority, unless the other parent is already a U.S. citizen;[5] c. Child must be lawful permanent resident before the 21st birthday; d. Illegitimate child may derive through mother's naturalization only, in which case the status of the other parent is irrelevant; e. Legitimated child must have been legitimated according to the laws of the father's domicile;[6] f. Adopted child and stepchild cannot derive citizenship.
1/13/41 to 12/23/52:	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen, or, be deceased, or the parents must be legally separated[7] and the naturalizing parent must have legal custody;[8] b. Parent or parents must have been naturalized prior to the child's 18th birthday; c. Child must have been lawfully admitted for permanent residence before the 18th birthday; d. Illegitimate child can only derive if while s/he was under 16, s/he became a lawful permanent resident and his/her mother naturalized and both of those events (naturalization of mother and permanent residence status of child) occurred on or after 1/13/41 and before 12/24/52;[9] e. Legitimated child must be legitimated under the law of the child's residence or place of domicile before turning 16 and be in the legal custody of the legitimating parent;[10] f. Adopted child and stepchild cannot derive citizenship.[11]
12/24/52 to 10/5/78:[12]	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[13] or be deceased, or the parents must be legally separated[14] and the naturalizing parent must have custody.[15] b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes.[16] If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.[17] c. Parent or parents must have been naturalized prior to the child's 18th birthday;[18] d. Child must have been lawfully admitted for permanent residence before the 18th birthday;[19] e. Child must be unmarried;[20] f. Adopted child and stepchild cannot derive citizenship [21]
10/5/78 to 2/26/01:	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[22] or be deceased, or the parents must be legally separated [23] and the naturalizing parent must have legal custody.[24] b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes. If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.[25] c. Parent or parents must have been naturalized prior to the child's 18th birthday;[26] d. Child must have been lawfully admitted for permanent residence before the 18th birthday;[27] e. Child must be unmarried;[28] f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)'s naturalization,[29] is In the legal custody of the adoptive parent(s), is a lawful permanent resident and adoption occurred before s/he turned 18.[30] Stepchild cannot derive citizenship.

Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen:[31]	a. At least one parent is a U.S. citizen either by birth or naturalization.[32] b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen[33] OR, if the father is a US citizen through naturalization or other means then the child must have been legitimated by the father under either the law of the child's residence or domicile or the law of the father's residence or domicile and the legitimation must take place before the child reaches the age of 16.[34] c. Child is under 18 years old.[35] d. Child must be unmarried.[36] e. Child is a lawful permanent resident.[37] f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.[38] g. Adopted children qualify so long as s/he was adopted before the age of 16 and has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years.[39] An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

Endnotes for Chart C:

[1] Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West).

[2] It is the ILRC's position, and the ILRC believes that all advocates should argue, that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. ***See Matter of L-M- and C-Y-C-,*** 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; ***however, see also*** INS Interpretations 320.2. Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[3] Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West), citing Sec. 5, Act of March 2, 1907.

[4] Legitimation could take place before or after the child turns 21. The child derives citizenship upon the naturalization of the parent(s) or upon the child taking up residence in the U.S. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West), citing Sec. 4, Act of 1802 as supplemented by Sec. 5, Act of 1907. *See* also INS Interpretations 320.1.

[5] The five year period can commence before or after the naturalization of the parent and can last until after the child turns 21 and until after 1941. *See* Sec. 5, Act of March 2, 1907 as amended by Sec. 2, Act of May 24, 1934 and INS Interpretations 320.1(a)(3).

[6] *See* endnote 4 above.

[7] "Legal separation" of the parents can be a complicated topic. In *Matter of H*, 3 I.&.N. Dec.742 (BIA 1949), the BIA found that "Legal Separation" as used in the context of derivation of citizenship means some sort limited or absolute divorce through judicial proceedings. Several appeals courts have weighed in on the issue as well. Several appeals courts have weighed in on the issue as well and now there is a split in circuit courts regarding the definition of legal separation. Volume 11 of *Bender's Immigration Bulletin* has an excellent article on the definition of legal separation for derivation purposes. *See Bender's Immigration Bulletin*, Volume 11, Page 694 (June 1, 2007). *See also Wilson v. Mukasey*, 2008 U.S. App. LEXIS 681 (9th Cir. 2008); *Lewis v. Gonzales*, 481 F.3d 125, 130-32 (2nd Cir. 2007); *Afeta v. Gonzalez*, No. 05-1174 (4th Cir. 2006); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); and *Bagot v Ashcroft*, 398 F.3d 252 (3rd. Cir. 2005).

[8] *See* 7 FAM 1153.4-3 (Foreign Affairs Manual). Until recently, the general rule was that if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. *See U.S. Citizenship and Naturalization Handbook* (Daniel Levy, Thomson West Publications) citing Passport Bulletin 96-18 (November 6, 1996). Yet, in the 5th Circuit, the court of appeals recently ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship and thus, at least in the 5th Circuit, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. *See Bustamante-Barrera v Gonzalez*, 447 F.3d 388 (5th Cir.2006) (requiring naturalized citizen parent to have sole legal custody of the child for derivative citizenship). The ILRC believes this case includes faulty reasoning and practitioners should be prepared to argue so if the CIS or other courts follow the Bustamante case.

When the parents have divorced or separated and the decree does not say who has custody of the child and the U.S. citizen parent has physical custody (meaning the child lives with that parent), the child can derive citizenship through that parent provided all the other conditions are met. See United States

Department of State Passport Bulletin - 96 -18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA" which referenced Passport Bulletin 93-2, issued January 8, 1993.

According to INS Interpretations 320.1, in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place. *See* INS Interpretations 320.1(b), *Matter of M-* 3 I.&N. 850 (BIA 1950). Where the actual "parents" of the child were never lawfully married, there can be no legal separation. *See* INS Interpretations 320.1(a)(6), citing, *In the Matter of H –*, 3 I.&N. Dec. 742 (1949). Thus, illegitimate children cannot derive citizenship through a father's naturalization unless the father has legitimated the child, the child is in the father's legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. Where the actual "parents" of the child were never lawfully married, there could be no legal separation. For more on this topic, please see *Bagot v. Ashcroft*, 398 F.3d 252 (3rd Cir. 2005), and *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. See Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, § 98.03[4](e).

[9] *See* INS Interpretations 320.1(c).

[10] *See* INS Interpretations 320.1(a)(6), explaining that in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place; *see Matter of M-* 3 I.&N. (BIA 1950), INS Interpretations 320.1(b) and endnote 8 above. **Please note,** the only way that an illegitimate child can derive citizenship through a father's naturalization is if 1) the father legitimates the child, and 2) both parents naturalize (unless the mother is already a citizen, or the mother is dead). Under any other circumstances, an illegitimate child never derives from a father's naturalization. The definition of "child" in INA § 101(c)(1) requires that the legitimated child be legitimated under the law of the father's or child's domicile before turning age 16.

[11] Although both the CIS and the State Department take the position that adopted children during this period could not derive citizenship, an argument can be made that children who were adopted before turning 16 and who were in the custody of the adopting parent(s) could derive citizenship. *See U.S. Citizenship and Naturalization Handbook.*

[12] Traditionally, the view has been that as long as all the conditions in this section are met before the child's 18th birthday, the child derived citizenship regardless of the order in which the event occurred. *See* Department of State Passport Bulletin 96-18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA." The BIA cited this Passport Bulletin in *In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997). But in *Jordan v. Attorney General of the U.S.*, 424 F.3d 320 (3d Cir. 2005), the 3rd Circuit Court came out with a different position by finding that where the separation occurred after the parent naturalized, the child did not derive citizenship. Hopefully, the CIS and most circuit courts will not follow the 3rd Circuit's decision in *Jordan*.

[13] *See* 7 FAM 1153.4-4 (Foreign Affairs Manual) for a general description of the law.

[14] *See* endnote 7 above.

[15] *See* endnote 8 above.

[16] In order for an illegitimate child to derive citizenship through her mother s/he must not have been legitimated prior to obtaining derivation of citizenship. *See* INA § 321(a)(3) as amended by Pub. L. No. 95-417. However, if the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless one parent is a U.S. citizen or is deceased. *See* INA § 321(a)(1) as amended by Pub. L. No. 95-417. If legitimation occurs after the child has derived citizenship, the child remains a U.S. citizen even if the father did not naturalize. See Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, §98.03[4](e).

[17] *See* endnote 9 above.

[18] 1952-1978 law stated prior to "16th birthday." The new law stating prior to the "18th birthday" is retroactively applied to 12/24/52. *See In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997), citing Passport Bulletin 96-18.

[19] A small minority of practitioners believes that a strict reading of INA § 321(a)(5) would allow a child to derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried even if the child was not a lawful permanent resident – but only if the child began to reside permanently in

the United States while under the age of 18 and after his or her parents naturalized. The argument is that there is a difference between being a lawful permanent resident and to "reside permanently." The CIS and most practitioners, however, are of the opinion that the child must be a lawful permanent resident to derive citizenship no matter the circumstances. Although there is no authoritative case law on a national level, there is some case law agreeing with the CIS' opinion on this issue. [*See* Gordon and Mailman § 98.03(3)(f)]

[20] *See* INA § 101(c)(1).

[21] *See* endnote 11 above.

[22] *See* 7 FAM 1153.4-4 (Foreign Affairs Manual) for a general description of the law.

[23] *See* endnote 7 above.

[24] *See* endnote 8 above.

[25] *See* endnote 10 above.

[26] *See* endnote 18 above.

[27] *See* endnote 19 above.

[28] *See* endnote 20 above.

[29] Adopted children must be residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the adoptive parent(s)' naturalization. *See* Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. This is different than the practice in derivation cases for biological children. *See* endnote 11.

[30] Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if adoption occurred before the child turned 16. [*See* INS Interp.320.1 (d)(2)]

[31] People born between 2/27/83 and 2/26/01 may derive citizenship by satisfying the requirements of either this row or the "10/5/78 to 2/26/01" row.

[32] INA section 320 as amended by the Child Citizenship Act of 2000.

[33] Please see U,S, Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Although the ILRC believes this Citizenship and Immigration Service memo should apply to mothers who naturalized or who became U.S. citizens by birth in the U.S., derivation, or acquisition of citizenship, the CIS may successfully argue that it only applies to naturalized mothers because the memo specifically states "Assuming an alien child meets all other requirements of Section 320 and 322, an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen."

[34] The text of INA section 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA section 101(c)(1) excludes illegitimate children from the definition of "child," unless legitimated by the father under either the law of the child's domicile or the law of the father's domicile. The legitimation requirement will be a hurdle for some people for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. Please note that neither INA §320 nor 8 CFR 320.1 state the legitimation must occur before the 16th birthday. Thus, some argue that such a legitimation could take place even between the 16th and 18th birthdays. This argument appears weak because of the definition of child found in INA §101©, which applies to the citizenship and naturalization contexts. Second, many people do not think about or know about the legitimation process. It is important to note that according to the U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship only naturalized mothers can confer citizenship upon their unlegitimated children born of wedlock under INA section 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S. also can confer citizenship under INA §320 to such children.

[35] INA section 320 as amended by the Child Citizenship Act of 2000.

[36] INA section 320 as amended by the Child Citizenship Act of 2000.

[37] INA section 320 as amended by the Child Citizenship Act of 2000.

[38] INA section 320 as amended by the Child Citizenship Act of 2000. It is the ILRC's interpretation that for purposes of the Child Citizenship Act of 2000, the CIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of the mother for section 320 citizenship. See U,S, Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Additionally, 8 CFR §320.1 sets forth several different scenarios in which the CIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for §320 citizenship for his/her child. First, the CIS will presume, absent evidence to the contrary, that both parents have legal custody for purposes of §320 citizenship where their biological child currently resides with them and the parents are married, living in marital union, and not separated. Second, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of §320 citizenship where his/her biological child lives with him/her and the child's other parent is dead. Third, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of §320 citizenship if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child's domicile. Fourth, where the child's parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded that the parents have joint custody of the child, the CIS will presume, absent evidence to the contrary, that such joint custody means that both parents have legal custody of the child for purposes of §320 citizenship. Fifth, in a case where the parents of the child have divorced or legally separated, the CIS will find that for the purposes of citizenship under INA §320 a parent has legal custody of the child where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence. Sixth, the regulations state there may be other factual circumstances under which the CIS will find that a U.S. citizen parent has legal custody for purposes of §320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that the CIS should determine that a U.S. citizen parent has legal custody if the parent - child relationship does not fit into one of the categories listed above.

[39] INA section 320 as amended by the Child Citizenship Act of 2000 and INA §101(b)(1).

Some Relevant Immigration Statutory Provisions

APPENDIX J

SUMMARY OF CONTENTS

NOTE: INA stands for "Immigration and Nationality Act."

■ INA 101(a)(43) [8 U.S.C. 1101(a)(43)] — Definition of "Aggravated Felony"

(a) As used in this Act—

. . .

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

(J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses) for which a sentence of 1 year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18, United States Code (re lating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18, United States Code (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(O) an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

■ INA 101(a)(48)(A) [8 U.S.C. 1101(a)(48)(A)] — Definition of "Conviction" for Immigration Purposes

(a) As used in this Act—

. . .

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court 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.

■ INA 101(f) [8 U.S.C. 1101(f)] — Bars to Finding of Good Moral Character

(f) For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was

(1) a habitual drunkard;

(2) *[Removed]*

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana); if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

■ INA 208 [8 U.S.C. 1158] — Asylum

(a) Authority to Apply for Asylum.—

(1) In general.—Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions.—

(A) Safe third country.—Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit.—Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications.— Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances.—An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review.—No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for Granting Asylum.—

(1) In general.—The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(2) Exceptions.—

(A) In general.—Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is inadmissible under subclause (I), (II), (III), (IV), or (V) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules.—

(i) Conviction of aggravated felony.—For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses.—The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations.—The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review.—There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children.—

(A)In general.—A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E)) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accom panying, or following to join, such alien.

(B) Continued classification of certain aliens as children. An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 209(b)(3), if the alien attained 21 years of age after such application was filed but while it was pending.

(c) Asylum Status.—

(1) In general.—In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum.—Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his new nationality.

(3) Removal when asylum is terminated.—An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 212(a) and 237(a), and the

alien's removal or return shall be directed by the Attorney General in accordance with sections 240 and 241.

(d) Asylum Procedure.—

(1) Applications.—The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment.—An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees.—The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 209(b). Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 286(m).

(4) Notice of privilege of counsel and consequences of frivolous application.—At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications.—

(A) Procedures.—The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 240, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under sec-

tion 240, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions.—The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this Act.

(6) Frivolous applications.—If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

(7) No private right of action.—Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

■ INA 209 [8 U.S.C. 1159] — Adjustment of Status of Refugees/Asylees

(a) Criteria and procedures applicable for admission as immigrant; effect of adjustment

(1) Any alien who has been admitted to the United States under section 207—

(A) whose admission has not been terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

(C) who has not acquired permanent resident status,

shall, at the end of such year period, return or be returned to the custody of the Service for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235, 240, and 241.

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of the alien's inspection and examination shall, notwithstanding any numerical limitation specified in this Act, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

(b) Maximum number of adjustments; recordkeeping

Not more than 10,000 of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

(1) applies for adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

(c) Applicability of other Federal statutory requirements

The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) shall not be applicable to any alien seeking adjustment of status under this section, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

■ INA 212 (a)(2) [8 U.S.C. 1182(a)(2)] — Criminal Inadmissibility Grounds

(a) Classes of Aliens Ineligible for Visas or Admission.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . .

(2) Criminal and related grounds.—

(A) Conviction of certain crimes.—

(i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions.—Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved

moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers.—Any alien who the consular officer or the Attorney General knows or has reason to believe —-

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice.—Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution.

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h)),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized.—For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have engaged in particularly severe violations of religious freedom.

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time during the preceding 24-month period, particularly severe violations of religious

freedom, as defined in section 3 of the International Religious Free dom Act of 1998, and the spouse and children, if any, are inadmissible.

(H) Significant traffickers in persons.

(i) In general

Any alien who is listed in a report submitted pursuant to section 111(b) of the Trafficking Victims Protection Act of 2000, or who the consular officer or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the [*sic*] section 103 of such Act, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money Laundering.

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

■ INA 212(h) [8 U.S.C. 1182(h)] — Waiver of Criminal Inadmissibility

(h) Waiver of subsection (a)(2)(A)(i)(I),(II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B); and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

■ INA 236 [8 U.S.C. 1226] — Apprehension and Detention of Aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General —

(1) may continue to detain the arrested alien; and

(2) may release the alien on —

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who —

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

(C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system —

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available —

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

■ INA 237(a)(2) & (7) [8 U.S.C. 1227(a)(2) & (7)] — Criminal Deportability Grounds

(a) Classes of Deportable Aliens.—Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . .

(2) Criminal offenses.—

(A) General crimes.—

(i) Crimes of moral turpitude.—

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions.—Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.—Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High Speed Flight.—Any alien who is convicted of a violation of section 758 of title 18, United States Code, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to Register as a Sex Offender.—Any alien who is convicted of a violation of section 2250 of title 18, United States Code, (relating to failure to register as a sex offender) is deportable.

(vi) Waiver authorized.—Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances.—

(i) Conviction.—Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts.—Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses.—Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry,

any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

(D) Miscellaneous crimes.—Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18, United States Code;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 215 or 278 of this Act, is deportable.

(E) Crimes of Domestic violence, stalking, or violation of protection order, crimes against children and [*sic*].—

(i) Domestic violence, stalking, and child abuse.—Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders.—Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

. . .

(7) Waiver for victims of domestic violence—

(A) In general—

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship—

(i) upon a determination that—

(I) the alien was acting in self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime—

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered—

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

■ INA 240A(a) & (d) [8 U.S.C. 1229b(a) & (d)] — Cancellation of Removal for Lawful Permanent Resident

(a) Cancellation of Removal for Certain Permanent Residents.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

. . .

(d) Special Rules Relating to Continuous Residence or Physical Presence.—

(1) Termination of continuous period.—For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 239(a), or (B) when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(2) Treatment of certain breaks in presence.—An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in armed forces and presence upon entry into service.-The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

■ INA 241(b)(3) [8 U.S.C. 1231(b)(3)] — Withholding of Removal to a Country Where the Individual's Life or Freedom Would Be Threatened

(b) Countries to Which Aliens May Be Removed –

. . .

(3) Restriction on removal to a country where alien's life or freedom would be threatened.—

(A) In general.—Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.—Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

Removal Defense Checklist in Criminal Charge Cases

APPENDIX K

(Updated as of 11/21/07)

by Manuel D. Vargas*

In this checklist, we summarize defensive legal arguments and strategies that noncitizens and their legal representatives may pursue in removal proceedings involving crime-related charges. Some contrary authority is in brackets. The checklist is by no means exhaustive. We designed it as a starting point for others to develop additional arguments and strategies. Some of the listed arguments and strategies may require going into federal court and may raise complicated federal court jurisdictional issues. For further guidance, contact us or at 212-725-6422. For checklist updates, made several times a year, visit our website at www.immigrantdefenseproject.org.

NYSDA IDP is a legal resource and training center that defends the legal, constitutional and human rights of immigrants facing criminal or deportation charges. The nation's first project founded to respond to the devastating 1996 immigration law "reforms" that placed thousands of immigrants at risk of mandatory detention and deportation for virtually any interaction with the criminal justice system, IDP: develops enhanced knowledge among criminal justice advocates, immigrant advocates and immigrants themselves on how to defend against unjust immigration consequences of criminal dispositions; supports community-based advocacy against the harsh laws and policies; and, through *amicus* submissions and recruitment of *pro bono* attorneys, promotes immigrant-favorable high-impact litigation results in federal courts.

SUMMARY OF CONTENTS

*Manuel D. Vargas is Senior Counsel with NYSDA's Immigrant Defense Project (IDP) and the author of *Representing Immigrant Defendants in New York* (Fourth Edition, 2006) (available from NYSDA at 518-465-3524). Mr. Vargas and IDP acknowledge the support of the New York Community Trust and Community Funds, Inc., the New York Foundation, the Open Society Institute, the Ford Foundation and the JEHT Foundation.

CHECKLIST

Seek release from detention during removal proceedings

In general, under the Immigration and Nationality Act (INA), a noncitizen detained by the Department of Homeland Security (DHS) may be released on bond or conditional parole pending completion of removal proceedings. See INA 236(a) (2). After the initial DHS custody determination of the local district director, which is supposed to be based on whether the noncitizen has shown that he or she would not pose a danger to the community or be a risk of flight, see 8 C.F.R. 236.1(c) (8), a detainee may seek a redetermination by requesting a bond hearing before an Immigration Judge. See 8 C.F.R. 1236.1(d) (1). However, if the district director had determined that the noncitizen should not be released or has set of bond of $10,000 or more, and an Immigration Judge orders release on bond or otherwise, the DHS may obtain an automatic stay of the order if the DHS files a notice of intent to appeal the custody redetermination within one business day of issuance of the order, and the DHS files the notice of appeal with the Board of Immigration Appeals (BIA) within 10 business days of the Immigration Judge's decision. See 8 C.F.R. 1003.19(i)(2) and 1003.6(c)(1). Some detainees have been able successfully to challenge this automatic stay provision in federal court on constitutional grounds. See *Zavala v. Ridge*, 310 F. Supp.2d 1071 (N.D. Ca. 2004); *Ashley v. Ridge*, 288 F.Supp.2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F. Supp.2d 446 (D.Conn 2003); *Almonte-Vargas v. Ellwood*, 2002 U.S.Dist. LEXIS 12387 (E.D.Pa. 2002). However, the DHS has issued regulations effective November 1, 2006 limiting the duration of the automatic stay to 90 days after the DHS files its notice of appeal, subject to the authority of the DHS to seek a discretionary stay pursuant to 8 C.F.R. 1003.19(i)(1) to stay the Immigration Judge's order in the event the BIA does not issue a decision on the custody appeal within the period of the automatic stay. See 8 C.F.R. 1003.6(c)(4)&(5). A detainee charged with inadmissibility may request a parole determination from the DHS. See INA 212(d) (5) (A); 8 C.F.R. 212.5.

As amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

(IIRIRA), however, the INA now provides that a noncitizen who is deportable or inadmissible by reason of having committed an offense covered under certain deportability and inadmissibility grounds shall be subject to mandatory detention after release from criminal custody, i.e., detention without any statutory right to seek release on bond or under parole pending completion of removal proceedings. See INA 236(c) (1) (listing grounds of criminal deportability and inadmissibility covered by this new policy of mandatory detention). Under the statute, an individual may be released only if release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." INA 236(c) (2). Denial of the right to seek release on bond or under parole may be challenged before the immigration authorities or in federal court on various statutory and constitutional grounds:

- ✓ **The government has not charged the detainee with an offense that fits within any of the mandatory detention criminal deportability or inadmissibility grounds.** Certain criminal deportability or inadmissibility grounds are not subject to mandatory detention under INA 236(c) (1). Examples include INA 237(a) (2) (E) (Crimes of domestic violence, stalking, or violation of protection order, crimes against children), or offenses charged under INA 237(a) (2) (A) (i) (Crimes of moral turpitude) for which the person has not been sentenced to a term of imprisonment of at least one year. Some federal courts have held that the notice to appear must charge a person with removability based on one of the mandatory detention grounds before the person may be detained pursuant to INA 236(c) (1). See, e.g., *Alikhani v. Fasano*, 70 F. Supp. 2d 1124 (S.D. Cal. 1999)(finding that offense for which petitioner was found deportable determined whether individual was entitled to a bond hearing or subject to mandatory deportation); cf. *Alvarez-Santos v. INS*, 332 F.3d 1245, 1253 (9th Cir. 2003); *Yousefi v. INS* , 260 F.3d 318, 325 (4th Cir. 2001); *Xiong v. INS*, 173 F.3d 601, 608 (7th Cir. 1999); *Choeum v. INS*, 129 F.3d 29, 40 (1st Cir. 1997) (cases in which the courts of appeals have held that the criminal bar to judicial review is only implicated when a person actually was ordered removed on the basis of the covered deportability or inadmissibility ground); [but see *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007)(individual need not be charged with the ground that provides the basis for mandatory detention in order to be considered an alien who "is deportable" under that ground); *Fernandez v. AG*, 257 F.3d 1304, 1309-10 (11th Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 793 (5th Cir. 2000)]. In addition, even if the DHS (formerly INS) charges a deportability or inadmissibility ground that is covered by INA 236(c) (1), an individual who has an argument that the deportability/inadmissibility charge is incorrect may raise the argument in the context of an Immigration Judge hearing held pursuant to the BIA decision in *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (lawful permanent resident immigrant is not "properly included" with a mandatory detention category if the government is "substantially unlikely to establish at the merits hearing, or on appeal, the charges that would otherwise subject the alien to mandatory detention"). See below "Deny deportability or inadmissibility." In addition, if an Immigration Judge finds that an individual is not deportable or inadmissible, and the DHS invokes the automatic stay provision in 8 C.F.R. 1003.19(i) (2), the detainee may challenge such application of the automatic stay provision on constitutional grounds. See *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003).

- ✓ **The detainee may not be charged with inadmissibility after a brief trip abroad.** If the person is a lawful permanent resident charged with inadmissibility after a brief trip abroad, the individual may challenge the DHS' (formerly INS') determination that he or

she is subject to inadmissibility review in the context of a federal court *habeas corpus* challenge to detention pending completion of the inadmissibility review. See, e.g., *Made v. Ashcroft*, Civil No. 01-1039 (D. N.J. 2001); [but see *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003)]. In addition, if the returning lawful permanent resident immigrant is charged with inadmissibility based on a criminal conviction prior to April 1, 1997 (IIRIRA general effective date), the person may be able to argue that he or she is not subject to inadmissibility review based on the law in effect prior to IIRIRA. Cf. *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). For a discussion of such statutory arguments, see generally below "Move to terminate proceedings if the respondent is a permanent resident charged with inadmissibility after a brief trip abroad." Finally, detention without an individualized bond or parole hearing of an individual returning from a trip abroad may also be challenged on constitutional equal protection grounds, see *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (violation of equal protection arises if a noncitizen is penalized under the immigration laws based upon the fortuity of departure from the United States), as well as under the Constitution's due process and excessive bail clauses (see subsection below entitled "Mandatory detention is unconstitutional"); see generally below "Raise estoppel or constitutional or international law arguments."

- ✓ **The detainee was released from criminal custody prior to October 8, 1998.** IIRIRA stated that INA 236(c) mandatory detention applies to "individuals released after [the end of a 1-year or 2-year transitional period]." IIRIRA § 303(b) (2). That transitional period ended on October 8, 1998. Thus, at the very least, as the Board of Immigration Appeals (BIA) and the DHS (formerly INS) have agreed, INA 236(c) should not be applied in cases where the individual placed in removal proceedings was released from criminal custody prior to October 8, 1998. See *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) (INA 236(c) does not apply to noncitizens whose most recent release from custody by an authority other than the INS (now DHS) occurred prior to the expiration of the Transition Period Custody Rules). A sentence to probation or other non-physical restraint after October 8, 1998 does not count as a release from custody triggering mandatory detention. See *Matter of West*, 22 I&N Dec. 1405 (BIA 2000).

- ✓ **The detainee was released from criminal custody after October 8, 1998 but the detainee's criminal conviction or offense pre-dated IIRIRA.** Even if the detainee was released after October 8, 1998, the individual may argue that INA 236(c) mandatory detention does not apply when his or her criminal conviction or conduct occurred prior to IIRIRA's general effective date of April 1, 1997. Cf. *Montero v. Cobb*, 937 F.Supp. 88 (D.Mass. 1996) (finding that mandatory detention provisions in predecessor AEDPA statute did not apply retroactively in the absence of clear Congressional intent). IIRIRA did not include any statement that INA 236(c) should be applied retroactively in cases based on pre-IIRIRA convictions or conduct. All the statute provided is that INA 236(c) applies to "individuals released after [October 8, 1998]." IIRIRA § 303(b) (2). In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court held that, absent an explicit statement of legislative intent to apply a new law to past events, a statute should apply prospectively only. Recently, the Supreme Court made clear that this presumption against retroactivity applies to immigration legislation; in fact, the Court applied the presumption to another IIRIRA provision that, like IRRIRA § 303, lacked any explicit statement of retroactive legislative intent in cases based on past events. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) (holding that IIRIRA § 304(b)—eliminating a pre-IIRIRA right to apply for a discretionary waiver of deportation—could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result).

- ✓ **The detainee was released from criminal custody after October 8, 1998 but for a reason other than the conviction that falls within a mandatory detention ground.** Even if the detainee was released after October 8, 1998, the individual may argue that INA 236(c) mandatory detention does not apply if the release from custody related to an arrest/conviction that does not fall within a mandatory detention ground. See *Cox. v. Monica,* 2007 U.S. Dist. LEXIS 44660 (M.D. Pa. 2007)(date of release from the offense for which the individual is found removable determines whether the individual is entitled to an individualized bond hearing or the mandatory detention provision); *Alikhani v. Fasano,* 70 F. Supp. 2d 1124 (S.D. Cal. 1999)(finding that offense for which petitioner was found deportable determined whether individual was entitled to a bond hearing or subject to mandatory deportation); [but see *Matter of Kotliar,* 24 I&N Dec. 124 (BIA 2007)(individual is subject to mandatory detention regardless of the reason for the most recent criminal custody, provided it can be ascertained from the facts that he was released from criminal custody after October 8, 1998)].

- ✓ **The detainee was not in criminal custody when arrested by the DHS (formerly INS).** Even if the detainee was released after October 8, 1998, the individual may argue that INA 236(c) mandatory detention does not apply when he or she was not detained immediately after release from criminal custody. Detention is required "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." INA 236(c) (1). The "when released" language indicates that detention is not required of an individual who was not in criminal custody when arrested by the DHS (formerly INS). For example, an individual may argue that this "when released" language means that mandatory detention should not apply to an individual who was not sentenced to imprisonment, or who was sentenced to imprisonment but was not taken into custody by the DHS at the time the person was released from criminal custody but rather was taken into custody by the DHS at some subsequent point. See *Boonkue v. Ridge*, 2004 WL 1146525, 2004 U.S. Dist. LEXIS 9648 (D.Or. 2004), *Quezada-Bucio v. Ridge,* 317 F. Supp.2d 1221 (W.D.Wash. 2004); see also dissenting opinion of BIA member Rosenberg in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); [but see majority opinion in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001) ("A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to section 236(c) . . . even if the alien is not immediately taken into custody by the Immigration and Naturalization Service when released from incarceration."); see also *Matter of Kotliar,* 24 I&N Dec. 124 (BIA 2007)(individual apprehended at home while on probation for criminal convictions is subject to mandatory detention].

- ✓ **If the detainee is contesting removability or applying for relief from removal, mandatory detention is unconstitutional.** Prior to April 29, 2003, many noncitizens had successfully argued that detention of noncitizens without the right to an individualized bond hearing pending completion of removal proceedings deprived individuals of their liberty in violation of substantive and procedural due process, or in violation of the Eighth Amendment excessive bail clause. See, e.g., *Kim v. Ziglar,* 276 F.3d 523 (9th Cir. 2002); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); [but see *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999) (where detainee had conceded deportability)]. On April 29, 2003, however, the Supreme Court reversed the Ninth Circuit decision in *Kim v. Ziglar* and held that the government may detain classes of immigrants without

conducting individualized bond hearings. *Demore v. Kim*, 538 U.S. 510 (2003). Nevertheless, the Supreme Court's decision was premised on a finding that the petitioner in *Kim* conceded removability. Cases where the person is challenging removability, or is seeking relief from removal, may be distinguished from the Supreme Court's holding in *Kim* on that basis. See, e.g., *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004) (*Kim* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable"); *Uritsky v. Ridge*, 2003 U.S. Dist. LEXIS 17698 (E.D. Mich. 2003); see also below "Deny deportability or inadmissibility" and "Apply for relief from removal;" see also Beth Werlin, "Practice Advisory -- Mandatory Detention after *Kim v. Demore*" (American Immigration Law Foundation, Washington, D.C., August 29, 2003), available at <www.ailf.org>.

- ✓ **If detention is or may be prolonged or indefinite, mandatory detention is unconstitutional.** The Supreme Court upheld mandatory detention in *Demore v. Kim* relying, in part, on a finding that "not only does detention have a definite termination pint, in the majority of cases it lasts for less than [] 90 days." The Court did so to avoid conflict with its earlier decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) (striking down government indefinite detention of noncitizens following completion of removal proceedings), in which the Court held that individuals with final orders of removal could validly be detained for only six months. 533 U.S. at 701. Cases where the length of detention has exceeded, or is likely to exceed, such time periods may be distinguished from *Kim* on that basis. See *Kim* at 1722 (Kennedy, J., concurring) (explaining Justice Kennedy's understanding that the majority opinion may allow a challenge to detention when, for example, there has been unreasonable delay by the DHS, formerly INS); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) ("Despite the substantial powers that Congress may exercise in regard to aliens, it is constitutionally doubtful that Congress may authorize imprisonment of [two years and four months'] duration for lawfully admitted resident aliens who are subject to removal"); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (construing the statute to include a reasonable time limitation in bringing a removal proceeding to conclusion without an individualized bond hearing); *Parlak v. Baker*, 374 F. Supp. 2d 551 (E.D.Mich. 2005); *Fuller v. Gonzales*, 2005 U.S. Dist. LEXIS 5828 (D. Conn. 2005) ("Although *Kim* held that the desire to ensure an alien's presence at future proceedings and the desire to protect the community provide sufficient justification for a short mandatory detention, the sufficiency of that justification decreases as the length of incarceration increases"); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003); see also Beth Werlin, "Practice Advisory -- Mandatory Detention after *Kim v. Demore*" (American Immigration Law Foundation, Washington, D.C., August 29, 2003), available at www.ailf.org; see also below "Raise estoppel or constitutional or international law arguments."

Persuade the DHS (formerly INS) to exercise favorable prosecutorial discretion

In a particularly sympathetic case, one should always consider whether it might be possible to persuade the DHS (formerly INS) to exercise favorable prosecutorial discretion, i.e., to decline to file charges or to move to dismiss charges already brought. In the past, persuading the INS (now DHS) to exercise such prosecutorial discretion has been difficult, if not impossible. Since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRIRA, however, the INS had been under some pressure to exercise such discretion in particularly compelling cases. In a January 2000 letter responding to twenty-eight members of Congress who had inquired about INS use of prosecutorial discretion to ameliorate certain harsh consequences, the Justice Department acknowledged

that the INS has discretion with respect to both the initiation and the termination of removal proceedings and that it was working on developing additional guidance for its officers "in cases with the potential for extreme hardship." Letter of Assistant Attorney General Robert Raben to twenty-eight U.S. Congresspersons, dated January 19, 2000; see also Memorandum entitled "Prosecutorial Discretion" for All OPLA Chief Counsel, dated October 24, 2005, available via the Internet at <http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122>; Memorandum of INS Commissioner Doris Meissner, dated November 17, 2000, available via the Internet at <http://uscis.gov/graphics/lawsregs/handbook/discretion.pdf>; *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, n.8 (1999) ("At each stage [of the deportation process] the Executive has discretion to abandon the endeavor"). When a DHS (formerly INS) official needs to be persuaded that the DHS has authority to exercise such favorable discretion, the following regulatory or administrative provisions may be cited:

- ✓ **DHS (formerly INS) authority to cancel a Notice to Appear (NTA) for a removal hearing when the NTA has not yet been filed with the Office of the Immigration Judge**. See 8 C.F.R. 239.2(a). According to regulations, this authority may be exercised where the NTA was "improvidently issued," or where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." 8 C.F.R. 239.2(a) (6)&(7). These two grounds appear to give the agency wide latitude to exercise prosecutorial discretion if it is so inclined. See also *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (finding that the INS (now DHS) retains prosecutorial discretion to decide whether or not to commence removal proceedings against a respondent subsequent to the enactment of IIRIRA).

- ✓ **DHS (formerly INS) authority to move to dismiss removal proceedings when the NTA has already been filed with the Office of the Immigration Judge.** See 8 C.F.R. 239.2(c). This authority may also be exercised in the circumstances described in 8 C.F.R. 239.2(a) (6)&(7) (see authority to cancel a Notice to Appear above).

- ✓ **DHS (formerly INS) authority to defer action or otherwise decline to pursue proceedings against a particular individual.** See former INS Operating Instruction 242.1(a) (22) (describing authority to defer action). According to the INS internal administrative directive which provided for deferred action, the INS could consider "sympathetic factors which, while not legally precluding deportation, could lead to unduly protracted deportation proceedings," or "because of a desire on the part of the administrative authorities or the courts to reach a favorable result, could result in a distortion of the law with unfavorable implications for future cases," or "because of the sympathetic factors in the case, a large amount of adverse publicity will be generated which will result in a disproportionate amount of Service time being spent on responding to such publicity or justifying actions." Id. While this Operating Instruction was rescinded in 1997, the INS apparently continued to exercise such discretion. See Letter of Assistant Attorney General Robert Raben to twenty-eight U.S. Congresspersons, dated January 19, 2000; see also *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, n.8 (1999). The DHS (formerly INS) may also exercise such discretion.

Move to terminate removal proceedings if the respondent was "in proceedings" before April 1, 1997

IIRIRA's transition rules provide that the general rule is that the new IIRIRA removal rules

shall not apply in the case of an alien who is "in exclusion or deportation proceedings before the Title III-A effective date [April 1, 1997]." See IIRIRA § 309(c) (1). Thus, if a noncitizen currently in removal proceedings has any argument that he or she was in deportation or exclusion proceedings before April 1, 1997, and the individual would be better off in such pre-IIRIRA proceedings (e.g., eligible to apply for INA 212(c) relief if the person was in proceedings before April 24, 1996—see below "Apply for relief from removal—Apply for 212(c) waiver"; see also 8 C.F.R. 212.3(g)), IIRIRA § 309(c) (1) provides support for a motion to terminate removal proceedings.

Examples of cases where a noncitizen has an argument that he or she was in proceedings "before" April 1, 1997 are the following:

- ✓ **Filing of Charging Document Prior to April 1, 1997.** According to regulations, proceedings "commence" when the INS (now DHS) files a charging document with the Immigration Court. 8 C.F.R. 1003.14(a). Thus, a noncitizen was clearly in proceedings before April 1, 1997 if the INS filed with an Immigration Court a Form I-221 Order to Show Cause (relating to deportation proceedings) or a Form I-122 Notice to Alien Detained for Hearing by an Immigration Judge (relating to exclusion proceedings) prior to that date. Even if the prior proceedings were suspended (e.g., administratively closed) or terminated without entry of an order of deportation or exclusion (e.g., *Fleuti* termination) before April 1, 1997, the noncitizen should be considered to have been "in proceedings before" that date. If the prior proceedings were administratively closed, they were never formally terminated and are technically still pending. And if the prior proceedings were terminated before April 1, 1997, one can point out that the original language of the IIRIRA general transitional rule applied to aliens in proceedings "as of" April 1, 1997, but that the words "as of" were replaced by Congress with the word "before" in a technical correction passed a few days after enactment of IIRIRA. See P.L. 104-302, 110 Stat. 3656. The plain meaning of the new language covers noncitizens in proceedings anytime "before" April 1, 1997, and not only those in proceedings "as of" that date. Cf. *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000) (concurring opinion of Board Member Filppu).

- ✓ **Service or Issuance of Charging Document Prior to April 1, 1997.** Even if the INS (now DHS) did not file the pre-IIRIRA charging document with the Immigration Court prior to April 1, 1997, and instead filed a Notice to Appear for IIRIRA removal proceedings on or after April 1, 1997, federal courts have found that INS (now DHS) service or issuance of a charging document is sufficient to consider a case to be pending as of the date of service or issuance. See *Lyn Quee de Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003); *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000) (held that proceedings had begun prior to IIRIRA and AEDPA when the INS had previously served an Order to Show Cause and lodged a detainer against the noncitizen); accord *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (service of order to show cause sufficient to demonstrate pendency of deportation proceeding when AEDPA enacted); *Woo v. Reno*, 200 F.R.D. 516 (D.Ct. Md. 2000) (issuance and service of order to show cause prior to April 1, 1997); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 363 (E.D.N.Y. 2000) ("Since Pena-Rosario was served with an order to show cause before enactment of the 1996 amendments, his case was pending then."); *Dunbar v. INS*, 64 F. Supp.2d 47, 52 (D.Conn. 1999). These courts have chosen not to apply the 8 C.F.R. 1003.14(a) regulatory definition of when proceedings "commence," i.e., when the INS (now DHS) files a charging document with the Immigration Court. As the First Circuit stated in *Wallace*: "In this case we are not concerned with the INS' internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This

questions turns on considerations unrelated to the purpose of INS regulations. . . . From *this* standpoint, we think that when an order to show cause is served on the alien, the deportation process has effectively begun." 194 F.3d at 287. [But see *Arenas-Yepez v. Gonzalez*, 421 F.3d 111 (2d Cir. 2005) (in footnote 5, distinguishing *Wallace* and other cases as cases involving criminal aliens, suggesting that the Second Circuit Court might follow *Wallace* in a case involving a criminal alien); *Dipeppe v. Quarantillo*, 337 F.3d 326 (3d Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Deleon-Holguin v. Ashcroft*, 253 F.3d 811 (5th Cir. 2001); *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001); and *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000) (all requiring filing of charging document with the Immigration Court to find proceedings commenced)].

- ✓ **Detention at Port of Entry and Parole Prior to April 1, 1997.** In addition to citing the analogous case law in section 2 above, a noncitizen in this situation can point to the analysis of the U.S. Court of Appeals for the Second Circuit in *Henderson v. INS* in which the court took a broad view of when sufficient INS (now DHS) activity has occurred such that a noncitizen could be considered to be "in proceedings" on the effective date of a Congressional enactment. See *Henderson v. INS*, 157 F.3d 106 (2nd Cir. 1998). In that decision, the Second Circuit determined that one of the petitioners (Guillermo Mojica) in that case was "in exclusion proceedings" on the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) even though the INS had not yet filed a charging document with the Immigration Court. Id. at 130 n.30. The Second Circuit found it sufficient that the INS had detained Mr. Mojica at an airport port of entry and then paroled him into the country pending deferred inspection. Id. at 11[; but see *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000)].

- ✓ **Other Initiation of Process of Deportation Prior to April 1, 1997.** A noncitizen may make an argument that he or she was "in proceedings" before April 1, 1997 whenever the INS (now DHS) has in some way initiated the process of subjecting the individual to exclusion or deportation proceedings prior to that date. [But see *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (deportation proceedings may not be deemed to have begun with the issuance of a detainer notice alone)]. In the alternative, a noncitizen against whom the INS (now DHS) had initiated the process of subjecting the noncitizen to exclusion or deportation proceedings prior to April 1, 1997 can argue that the agency should be estopped from now pursuing removal proceedings, or may argue that DHS/INS initiation of removal proceedings after delaying formally commencing proceedings prior to April 1, 1997 led to a denial of the noncitizen's due process rights. Cf. *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) (INS foot-dragging in completing deportation proceedings until petitioner no longer statutorily eligible for relief stated the basis of a substantial constitutional due process claim); see also below "Raise estoppel or constitutional or international law arguments." Yet another way of raising this claim is to argue that there is no rational basis for subjecting the noncitizen to removal proceedings when similarly situated individuals were placed in pre-IIRIRA proceedings, thus violating his or her constitutional right to equal protection of the laws. See below "Raise Estoppel or Constitutional Arguments."

Move to terminate proceedings of a lawful permanent resident charged with inadmissibility after a brief trip abroad

The Immigration and Nationality Act provides that the grounds of inadmissibility apply only to those applying for a visa outside the United States or seeking admission to the United States. See INA § 212(a). As amended by IIRIRA, the Act further provides that a lawful

permanent resident "shall not" be regarded as seeking an admission into the United States unless, *inter alia*, the noncitizen has committed an offense identified in section 212(a) (2) (criminal inadmissibility grounds). The mandatory "shall not" language of this provision precludes application of the grounds of inadmissibility unless one of the exceptions applies. The provision, however, does not contain any such mandatory language requiring that, if one of the exceptions applies, the noncitizen "shall" be subject to admissibility review. This is significant because prior Supreme Court precedent held that a returning lawful permanent resident is not subject to admissibility review upon return from an "innocent, casual, and brief" trip abroad that was not meant to be "meaningfully interruptive" of his or her lawful admission status. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Therefore, although the Board of Immigration Appeals has rejected the argument that the *Fleuti* doctrine still applies after IIRIRA, see *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1997), it may be possible to persuade a federal court to find that a lawful permanent resident immigrant is not subject to the grounds of inadmissibility if the individual's departure was brief, casual, and innocent. See *Richardson v. Reno*, 994 F. Supp. 1466, 1471 (S.D. Fla. 1998), reversed and vacated on other grounds, 162 F.2d 1338 (11th Cir. 1998); see also dissenting opinion of Board member Rosenberg in *Matter of Collado-Munoz*, 21 I&N Dec. at 1067-68; [but see *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007); *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 501 (5th Cir. 2006); *Olatunji v. Ashcroft*, 387 F.3d 383, 395-96 (4th Cir. 2004); *Tineo v. Ashcroft*, 350 F.3d 382, 2003 U.S. App. LEXIS 24430 (3d Cir. 2003)]. In addition, if the returning lawful permanent resident immigrant is charged with inadmissibility based on a criminal conviction prior to April 1, 1997 (IIRIRA general effective date), the person may argue that, even if it is true that IIRIRA eliminated the *Fleuti* doctrine, this IIRIRA amendment may not be applied retroactively at least to a conviction involving a pre-4/1/97 agreement to plead guilty because there is no clear statement of such Congressional intent. See *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007); *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). Finally, a returning permanent resident may argue that it violates the Fifth Amendment's due process clause to subject a returning resident to admissibility review if his or her departure was not a meaningful interruption of previously conferred lawful admission status in the United States. See below "Raise estoppel or constitutional arguments—Substantive Due Process."

Deny deportability or inadmissibility

In the post-IIRIRA era, when relief from removal is statutorily unavailable in many cases, it becomes more important than ever to contest DHS (formerly INS) charges of deportability or inadmissibility. Keep in mind that, if the respondent has been lawfully admitted to the United States, the burden of proof is on the DHS (formerly INS) to establish deportability by "clear and convincing evidence." See INA 240(c) (3) (A); see also *Woodby v. INS*, 385 U.S. 276 (1966) (enunciating "clear, unequivocal and convincing" evidence standard). Also keep in mind that, while the burden of proof is generally on the applicant to establish admissibility, see INA 240(c) (2) (A), & 291, the burden has been held to shift to the INS (now DHS) to prove inadmissibility in the case of a lawful permanent resident returning from a trip abroad. See, e.g., *Matter of Huang*, 19 I&N 749 (BIA 1988); see also 8 C.F.R. 240.8(c).

- **Deny "alienage"**
  - ✓ **Where individual is a U.S. citizen by birth in United States**, including Puerto Rico, the U.S. Virgin Islands, and Guam. See INA 301(a)&(b), 302, 304-307 (in addition, note that prior citizenship laws no longer in the statute may apply to certain individuals).

- ✓ **Where individual acquired citizenship by birth outside United States to citizen parent(s).** See INA 301(c) (d) (e)&(g), 301a, 303 (in addition, note that prior citizenship laws no longer in the statute may apply to certain individuals).

- ✓ **Where individual derived citizenship by naturalization of parent(s) while individual was a minor.** See INA 320 (effective February 27, 2001) (note that prior citizenship laws—including former INA 320 and 321—no longer in the statute may apply to certain individuals).

- ✓ **Where individual naturalized as a citizen by applying for and being sworn in as a U.S. citizen**. See INA 310 et al.

- ✓ **Where individual is a U.S. national, even if not a U.S. citizen.** See INA 101(a) (3) (defining an "alien" as "any person not a citizen or a national of the United States") and 101(a) (22) (defining a "national" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States"). It may be possible to argue that an individual is a national if the individual has previously taken formal steps to declare allegiance to the United States. See *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996) (finding that an individual who was a permanent resident alien of the United States and who had previously applied for U.S. citizenship was a U.S. national); see also *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001) and *Oliver v. INS*, 517 F.2d 426 (2d Cir. 1975) (cases rejecting nationality claims but leaving open the possibility that the result might have been different had the petitioner in each case previously begun the process of applying for U.S. citizenship); [but see *Matter of Navas-Acosta*, 23 I&N Dec. 586 (BIA 2003); *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005) (rejecting claim that one becomes national by pledging allegiance to the U.S. prior to service in the U.S. military); *Sebastian-Soler v. U.S.A.G.*, 409 F.3d 1280 (11th Cir. 2005); *U.S. v. Jimenez-Alcala*, 353 F.3d 858 (10th Cir. 2003) (correcting jury instruction stating that a person becomes a national merely by submitting an application for U.S. citizenship); *Salim v. Ashcroft*, 350 F.3d 307 (3d Cir. 2003) (rejecting claim that one becomes national merely by submitting an application for U.S. citizenship and registering for selective service); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003) (rejecting claim that one becomes a national merely by submitting an application for U.S. citizenship)].

- ✓ **Where the DHS (formerly INS) is unable to prove alienage.** See 8 C.F.R. 240.8 ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service [now DHS] must first establish the alienage of the respondent").

- **Deny "conviction"**

Most of the criminal grounds of deportability require a "conviction." In addition, while most of the criminal grounds of inadmissibility do not require a conviction, the DHS (formerly INS) in practice usually also has relied on a criminal court "conviction" when charging inadmissibility. As a result of IIRIRA, the Immigration and Nationality Act now provides that a criminal disposition may be considered a conviction for immigration purposes in the following two circumstances: (1) a *formal judgment of guilt* of the alien has been *entered* by a court, or (2) *adjudication of guilt has been withheld*, but 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 the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See INA § 101(a) (48) (A), added by IIRIRA § 322. The Board of Immigration Appeals has broadly interpreted this new definition to find that no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute). Immigrants and their advocates should be aware that the removal order in *Roldan-Santoyo* was later vacated by the U.S. Court of Appeals for the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act—see discussion below), but *Lujan-Armendariz* is a binding precedent only within the Ninth Circuit. In fact, as a result of the new definition and *Roldan-Santoyo*, the DHS (formerly INS) seems to be taking the position that *any* criminal case disposition where there is some finding or admission of guilt is automatically and irrevocably transformed into a conviction for immigration purposes.

- ✓ **The disposition of the criminal case is not an entry of a formal judgment of guilt, nor a withholding of adjudication of guilt.** Despite its seemingly broad *Roldan-Santoyo* interpretation of the new IIRIRA definition of conviction for immigration purposes, the Board of Immigration Appeals has found that some dispositions involving a finding or admission of "guilt" may not be convictions for immigration purposes. For example, after *Roldan-Santoyo*, the Board held that a New York State youthful offender adjudication, which involves the immediate vacatur of a guilty plea conviction in certain cases involving young defendants and its substitution by a youthful offender finding, is not a conviction for immigration purposes. See *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) ("The adjudication of a person determined to be a . . . youthful offender is not a conviction *ab initio*, nor can it ripen into a conviction at a later date"). Thus, certain "guilty plea" dispositions that cannot be classified as neither a formal judgment of guilty, nor a withholding of adjudication of guilt, may be distinguished from the deferred adjudications at issue in *Roldan-Santoyo* (Idaho withholding of adjudication statute), and *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (Texas deferred adjudication statute).

- ✓ **The disposition of the criminal case is analogous to a federal disposition that is not considered a conviction of a crime under federal law.** Certain federal dispositions are specifically precluded from being deemed criminal convictions. Examples are adjudications under the Federal First Offender Act, 18 U.S.C. 3607 (relating to expungements of first-time simple possession drug offenses), and the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 (relating generally to violations of law committed by a person prior to his 18th birthday). Thus, based on constitutional equal protection requirements, one may argue that a noncitizen whose first-time drug possession offense is expunged under state or foreign law should similarly not be deemed convicted for immigration purposes. See *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (applying same principle to a foreign conviction); see also *Gradiz v. Gonzales*, 490 F.3d 1206, 1208 (10th Cir. 2007)(agreeing with *Luhan-Armendariz* in dicta); see also below "Raise estoppel or

constitutional or international law arguments—Equal Protection;" [but see *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (declining to follow *Lujan-Armendariz* in cases arising outside of the Ninth Circuit); *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003); *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003); *Vazquez-Velezmoro v. United States INS*, 281 F.3d 693 (8th Cir. 2002); *Fernandez-Bernal v. AG*, 257 F.3d 1304 (11th Cir. 2001)]. Likewise, it may be possible to argue that a noncitizen who committed a state or foreign offense under the age of 18 would have been adjudicated as a juvenile delinquent under federal law and therefore should not be considered to have been convicted of a crime. See *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) (holding that a New York State youthful offender adjudication is not a conviction as it corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) ("It is well-settled that an act of juvenile delinquency is not a conviction for a crime within the meaning of our immigration laws"); [but see *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005) (Michigan "youthful trainee" disposition counts as conviction for immigration purposes); *Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001); see aalso *Wallace v. Gonzales*, 463 F.3d 135, 139 & n.4 (2d Cir. 2006)(New York State youthful offender adjudication may be considerd as adverse discretionary factor)].

- ✓ **The disposition of the criminal case is not final.** If a conviction relied upon by the DHS (formerly INS) is on direct appeal, the individual should present evidence of such to defeat the DHS (formerly INS) charge and, if the person is in DHS custody, he or she should be released because the conviction is not yet final. See *Pino v. Landon*, 349 U.S. 901 (1955); *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971). Although there are indications that some members of the Board of Immigration Appeals believe the IIRIRA definition of "conviction" means that finality is no longer required at least with respect to a criminal deferred adjudication procedure, see *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (concurring opinion of Board member Edward R. Grant), a requirement of finality is still Board precedent. See *Matter of Ozkok*, 19 I&N Dec. 546 at n.7 (BIA 1988) ("It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived."); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (concurring and dissenting opinion of Board member Rosenberg) (finality a separate requirement from "conviction" for immigration purposes); [but see *Montenegro v.Ashcroft* , 355 F.3d 1035 (7th Cir. 2003); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) ("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of "conviction" found in IIRIRA § 322(a)")].

- ✓ **The criminal conviction has been vacated.** If a conviction has been vacated on legal or constitutional grounds, that vacatur should be respected by the immigration authorities. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will . . . accord full faith and credit to this state court judgment [vacating a conviction under New York state law]"); *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) ("[W]hen a court . . . vacates an original judgment of guilt, its action must be respected); *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). In *Rodriguez-Ruiz*, the Board distinguished the New York State statute under which Mr.

Rodriguez-Ruiz' conviction was vacated from an expungement statute or other rehabilitative statute. Thus, it may be important for an individual whose conviction has been vacated to show that the vacatur is based on legal error in the underlying criminal proceedings as opposed to an expungement or other rehabilitative statute. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (held that a conviction vacatur was ineffective to eliminate its immigration consequences since the "quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes."). However, some federal courts, including the Sixth Circuit in reversing *Matter of Pickering*, have put the burden on the government to show that the vacatur was solely to avoid adverse immigration consequences or other rehabilitative reasons, as opposed to legal defect. See *Pickering v. Gonzales*, 454 F.3d 525, (6th Cir. 2006); see also *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10th Cir. 2005) (government failed to show that Utah conviction reduced to lesser non-AF offense continued to be conviction of higher level AF offense for immigration purposes as reduction could have been based upon consideration of matters leading up to the conviction, not based upon post-conviction, rehabilitative events); *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001) (Illinois state court re-sentencing constituted a vacatur relating to violation of a fundamental statutory or constitutional right in the underlying criminal proceedings rather than involving a state rehabilitative scheme); but compare with *Sanusi v. Gonzales*, 474 F.3d 341 (6th Cir. 2007) (distinguished prior Sixth Circuit decision in *Pickering* to find that it would not give effect to Arkansas vacatur where state court *coram nobis* petition and the state court order failed to provide the evidence from which it may be reasonably inferred that the writ was granted on any recognized legal ground); *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006) (alien failed to show that the Vermont state court vacated the conviction based on a defect in the underlying criminal proceedings.); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (Arizona setting aside of conviction upon successful completion of probation constituted an expungement for rehabilitative purposes and therefore the underlying criminal disposition remains a conviction for immigration purposes); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (New York State granting of a certificate of relief from civil disabilities involves a state rehabilitation statute and therefore the underlying criminal disposition remains a conviction for immigration purposes); *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000) (a Puerto Rico dismissal of charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, does not vitiate the original admission of guilt); and *United States v. Campbell*, 167 F.3d 94 (2d Cir. 1999) (dealing with a Texas vacatur of a conviction in the context of illegal reentry sentencing). The Fifth Circuit has, in dicta, indicated that any vacated conviction remains a conviction for immigration purposes. See *Renteria-Gonzalez v. Ashcroft*, 322 F.3d 804 (5th Cir. 2002), as amended on denial of rehearing en banc (2003); but see *Gaona-Romero v. Gonzales*, 2007 U.S. App. LEXIS 19911 (5th Cir. 2007)(on motion for rehearing and at the request of the government, vacating prior panel decision and remanding the case to the BIA so that the government could withdraw charge of removability based on vacated drug conviction); *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005) (vacating prior decision published at 369 F.3d 472, which had found that a conviction vacated because of procedural and substantive errors remained a conviction for immigration purposes under *Renteria-Gonzalez*, after the government filed a motion seeking vacatur of the prior Fifth Circuit decision and a remand for agency to decide the case under *Matter of Pickering*).

- ✓ **Documentary evidence is insufficient to establish conviction of the charged offense.** When the DHS (formerly INS) offers its documentary proof of a criminal conviction, the practitioner should make sure it satisfies legal requirements. See 8 C.F.R. 1003.41 (listing documents that "shall be admissible as evidence in proving a criminal conviction"); see also INA 240(c) (3) (B) (listing documents that "shall constitute proof of a criminal conviction" in proceedings under IIRIRA). And, even where the legal requirements are met, one can still argue that the evidence does not meet the DHS' (formerly INS') burden of proof. See, e.g., *Francis v. Gonzales*, 442 F.3d 131 (2d Cir. 2006) (Jamaican police report insufficient to prove conviction for purposes of establishing deportability); United *States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004) (holding that district court improperly relied solely on an abstract of a California judgment as proof that defendant had entered a guilty plea in state court to the specific charge of sale and transportation of methamphetamine); *Dashto v. INS*, 59 F.3d 697, 701 (7th Cir. 1995) (holding that clerk's certified "statement of conviction" that crime was a firearm offense, without more, did not satisfy INS' burden of proof)[; but see *Rosales-Pineda v. Gonzales*, 452 F.3d 627 (7th Cir. 2006) (holding that rap sheet was sufficient proof to establish ineligibility for relief since government does not have burden of proving ineligibility for relief by clear and convincing evidence as it does when it must establish deportability)].

- **Deny "admission" of offense**

  Certain inadmissibility grounds are triggered not only by convictions, but also by admissions of having committed certain offenses, or having committed the essential elements of such offenses. See INA 212(a) (2) (A) (i) (covering admissions of a crime involving moral turpitude or a violation of law relating to a controlled substance). If the DHS (formerly INS) charges an individual with having admitted such an offense, one may, depending on the circumstances, raise the following arguments:

  - ✓ **Conduct admitted does not constitute a crime under the laws of the jurisdiction where it occurred.** See *Matter of M*, 1 I&N Dec. 229 (BIA 1942).

  - ✓ **Individual did not admit all factual elements of the crime.** See *Matter of E.N.*, 7 I&N Dec. 153 (BIA 1956).

  - ✓ **Individual was not provided with a definition of the crime before making the alleged admission.** See *Matter of K*, 9 I&N Dec. 715 (BIA 1962).

  - ✓ **Admission was not voluntarily given.** See *Matter of G*, 1 I&N Dec. 225 (BIA 1942).

  - ✓ **Guilty plea alone, without conviction, is ordinarily not an admission of a crime for immigration purposes**. See *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (guilty plea, which resulted in something less than a conviction, insufficient to sustain a finding of inadmissibility based on admission of offense); *Matter of Seda*, 17 I&N 550 (BIA 1980); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (limiting use of conviction on appeal to discretionary considerations); but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (where dismissal or acquittal results from purely technical infirmities or from perjured testimony, BIA will not abide by its usual practice of deference to judicial decisions); *Matter of Ozkok*,19 I&N Dec. 546 (BIA 1988) (overruling *Matter of Seda* and other BIA precedent decisions "to the extent they are inconsistent with the standard enunciated by the Board today").

- ✓ **Independent admission of crime after dismissal of criminal case is ordinarily not an admission of crime for immigration purposes**. See *Matter of G*, 1 I&N Dec. 96 (BIA 1942); *Matter of C.Y.C.*, 3 I&N Dec. 623 (BIA 1950); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (immigration authorities may make independent determinations concerning inadmissibility; however, the Board noted that it has been customary to consider the criminal court's adjudication binding as to the cause)].

- **Deny "reason to believe" that the individual is a drug trafficker**

  One often-charged inadmissibility ground is based DHS (formerly INS) "reason to believe" that the individual has been an illicit trafficker in a controlled substance. See INA 212(a) (2) (C). If the DHS (formerly INS) charges an individual with this ground of inadmissibility, one may, depending on the circumstances, raise the following arguments:

  - ✓ **Individual was not a knowing and conscious participant in the drug trafficking.** See *Matter of R.H*, 7 I&N Dec. 675 (BIA 1958).

  - ✓ **DHS (formerly INS) evidence of drug trafficking is not reasonable, substantial, and probative**. See *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977) (enunciating standard); see also *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007) (unpublished) (where individual acquitted on charges relating to the importation of heroin, drug charges alone did not constitute reasonable, substantial and probative evidence to support a belief that the individual was involved in drug trafficking).

  - ✓ **Guilty plea alone, without conviction and without independent evidence of drug trafficking, is insufficient evidence to sustain DHS (formerly INS) charge of "reason to believe."** Cf. *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (guilty plea, which resulted in something less than a conviction, insufficient to sustain a finding of inadmissibility based on admission of offense); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (limiting use of conviction on appeal to discretionary considerations); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (where dismissal or acquittal results from purely technical infirmities or from perjured testimony, BIA will not abide by its usual practice of deference to judicial decisions)].

- **Deny "aggravated felony" (AF)**

  There are many possible challenges to DHS (formerly INS) charges that an individual is deportable, or otherwise disadvantaged under the immigration laws, based on conviction of an aggravated felony. Examples of some of the possible arguments are:

  - ✓ **Offense is not an AF if it is not a felony.** Unless perhaps the definition of a particular AF category specifically provides otherwise, see, e.g., INA 101(a) (43) (F) (AF "crime of violence" category referencing federal law definition of "crime of violence," which might include offense classified by a state as a misdemeanor so long as it comes within the first prong of the 18 U.S.C. § 16 definition), legislative history and common sense dictates that Congress' use of the term "aggravated felony" evidences Congressional intent that only offenses classified as felonies would be covered. See dissenting opinions in *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2003), *cert. denied*, 538 U.S. 1008 (2003); *U.S. v. Marin-Navarette*, 244 F.3d 1284 (11th Cir. 2001), *cert. denied*, 534 U.S. 941 (2001); and *U.S. v. Pacheco*, 225

F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001); *amicus curiae* brief of the New York State Defenders Association in support of petition for rehearing in *U.S. v. Pacheco*, No. 00-1015 (2d Cir. 2000), available at http://www.nysda.org/PachecoBrief.pdf; see also dissenting opinion of Justice Thomas in *Lopez v. Gonzales*, 549 U.S. __, 127 S. Ct. 625, 638 (2006) ("It is at least anomalous, if not inconsistent, that an actual misdemeanor may be considered an "aggravated felony."); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF);[but see *Matter of Small*, 23 I&N Dec. 448 (BIA 2002) (misdemeanor offense of sexual abuse of a minor may constitute "sexual abuse of a minor" AF); *U.S. v. Cardoza-Estrada*, 385 F.3d 56 (1st Cir. 2004); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001); *U.S. v. Graham*, 169 F.3d 787 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999) (holding that the New York misdemeanor of petty larceny may be deemed a theft offense AF if the offense otherwise meets the sentence of imprisonment threshold for such an AF); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *U.S. v. Urias-Escobar*, 281 F.3d 165 (5th Cir.), *cert. denied*, 122 S. Ct. 2377 (2002); *U.S. v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001); *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2003), *cert. denied*, 538 U.S. 1008 (2003); *U.S. v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir.), *cert. denied*, 123 S. Ct. 315 (2002); *U.S. v. Christopher*, 239 F.3d 1191 (11th Cir.), *cert. denied*, 534 U.S. 877 (2001)]. Support for considering the ordinary meaning of the "aggravated *felony*" term is provided by the Supreme Court decision in *Lopez v. Gonzales*, 549 U.S. __, 127 S. Ct. 625 (2006), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (considering the ordinary meaning of the terms "drug trafficking crime" and "crime of violence" when analyzing INA references to federal definitions of these terms).

- ✓ **State offense involving a minor victim is not a "*sexual abuse of a minor*" AF if it covers conduct other than "sexual abuse" or does not necessarily involve a minor victim under state law, and/or the state offense does not contain the same elements as the federal offense of sexual abuse of a minor, and/or the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question.** See INA 101(a) (43) (A). An offense involving a minor victim is not necessarily "sexual abuse of a minor" if the offense covers conduct other than "sexual abuse." See *Stubbs v. Atty. Gen. of the United States*, 452 F.3d 251, 2006 U.S. App. LEXIS 16311 (3d Cir. 2006) (New Jersey endangering welfare of children is not necessarily "sexual abuse of a minor" since record of conviction failed to establish that the petitioner engaged in sexual conduct *with* the child, or that the abusive conduct actually occurred); *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (California annoying or molesting a child under 18 is not necessarily "sexual abuse of a minor"). Likewise, an offense involving a minor victim is not necessarily "sexual abuse of a minor" if a finding of the age of the victim is not required for conviction under state law. See *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); see also *Larroulet v. Ashcroft*, 2004 U.S. App. LEXIS 18518 (9th Cir. 2004) (unpublished opinion). Also, one could argue that an offense involving mere solicitation of a sexual act without knowledge that the person solicited is a minor is not "sexual abuse of a minor". See dissenting opinion of Judge Posner in *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005). In addition, the federal offense of "sexual abuse of a minor" requires the victim to be (a) between the ages of 12 and 16, and (b) at least four years younger than the defendant. See 18 U.S.C. 2243(a). And

the federal offense does not cover "touching" through clothing. Thus, if the state offense is broader (that is, it may have involved a victim age 16 or over, or the victim may have been less than four years younger than the defendant was, or the offense may have involved touching through clothing), the offense would not necessarily be covered under the federal offense of sexual abuse of a minor. See dissenting opinion of Board member Guendelsberger in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999); [but see *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006) (conviction of offense involving 16 or 17 year old victim may still be considered a "sexual abuse of a minor" AF); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (majority of the Board of Immigration Appeals found that conviction under a broader state offense may still be considered a "sexual abuse of a minor" AF); see also *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (statutory rape involving minor over age 16), *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001) (offense need not require physical contact)]. Finally, an offense should not be deemed a "sexual abuse of a minor" AF if the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question. See *Gonzalez v. Ashcroft*, 369 F. Supp.2d 442 (SDNY 2005) (state offense of use of a child in a sexual performance is not an AF if the offense does not require knowledge of the sexual nature of the performance).

✓ **State drug offense is not an *"illicit trafficking in a controlled substance"* AF.** See INA 101(a) (43) (B), including a "drug trafficking crime," as defined in 18 U.S.C. 924(c). The more general term -- "Illicit trafficking" -- is not defined. The narrower term -- "drug trafficking crime" -- is defined to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." As for state offenses, the U.S. Supreme Court has interpreted this definition to apply only to state offenses punishable as felonies under federal law (*Lopez v. Gonzales*, 549 U.S. __, 127 S. Ct. 625 (2006)). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), but simple possession drug offenses are punishable as felonies only when the defendant has a prior drug conviction (and the prosecution has charged and proven the existence, validity, and finality of the prior conviction) or is convicted of possession of more than five grams of cocaine base, meaning crack cocaine, or possession of flunitrazepam. See 21 U.S.C. 801 et seq., and especially 21 U.S.C. 844 (Penalties for simple possession).

Despite the Supreme Court's decision in *Lopez*, several issues relating to what state drug offenses may be deemed "illicit trafficking" aggravated felonies remain unresolved. For guidance on arguments that may be raised post-*Lopez* with respect to some of these issues, see "Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of *Lopez v. Gonzales*," posted at www.immigrantdefenseproject.org. More generally, the following arguments may be made with respect to certain state drug offenses (note that the strength or viability of the claim may depend on the law of the circuit in which the case arises):

— Drug offense should not be considered an "illicit trafficking" AF if the offense does not require the prosecution to allege and prove that the controlled substance at issue is one that is included in the definition of "controlled substance" in section 102 of the Controlled Substances Act. See INA 101(a) (43) (B). See

Gousse v. Ashcroft, 339 F.3d 91 (2d Cir. 2003) (finding offense to be AF only after conducting analysis to determine that record of conviction proved that offense involved controlled substance listed on federal schedules referenced in section 102 of the Controlled Substances Act).

— State drug offense should generally not be considered an "illicit trafficking" AF unless it is a "felony" and covers only "trafficking" conduct. On "felony" requirement, see *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF); see also Point I in Brief for NYSDA Immigrant Defense Project in *Matter of Grant*, available at http://www.nysda.org/idp/docs/file12_05_GrantAmicusBrief.pdf; Point I(A) in Brief for NYSDA Immigrant Defense Project in Martinez v. Ridge, available at http://www.nysda.org/idp/docs/07_Martinezv%20Ridge_LetterBrief.pdf; and Point I(B) in Brief for Amicus Curiae American Bar Association in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006), available at http://www.nysda.org/idp/docs/06_American%20Bar%20Association%20(Amicus).pdf. On trafficking requirement, see *Lopez v. Gonzales,* 549 U.S. __, 127 S. Ct. 625 (2006) ("ordinarily 'trafficking' means some sort of commercial dealing"); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) ("unlawful trading or dealing"); *Jeune v. Atty. Gen.*, 476 F.3d 199 (3d Cir. 2007) (same); see also Brief for Amici Curiae NYSDA Immigrant Defense Project et al., in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006), available at http://www.nysda.org/idp/docs/06_IDP,%20ACLU,%20ACLU,%20ILRC,%20NACDL,%20NLADA%20(Amicus).pdf. Support for considering the ordinary meaning of the "aggravated *felony*" and "illicit *trafficking*" terms is provided by the Supreme Court decision in *Lopez v. Gonzales,* 549 U.S. __, 127 S. Ct. 625 (2006) (considering the ordinary meaning of the term "illicit trafficking") and *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (considering the "ordinary meaning of the term "crime of violence" when analyzing an INA reference to a federal definition of the term).

— State drug possession offense should not be considered an "illicit trafficking" AF as falling within the referenced federal definition of "drug trafficking crime" unless the offense would be a felony under federal law, i.e., requires a showing of intent to sell, involves possession of more than five grams of crack or any amount of flunitrazepam, or follows a prior final drug conviction. See *Lopez v. Gonzales,* 549 U.S. __, 127 S. Ct. 625 (2006); see also *Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006) (finding state drug possession offense preceded by a prior drug conviction not to be an offense that would be a felony under federal law because later offense was committed while the individual was still within the time to seek leave to appeal the prior conviction); *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005) (second state drug possession offense not a felony under federal law because later offense was committed while prior drug case was still pending in criminal court).

— Even if an individual has a prior final drug conviction, a state possession offense should not be considered an "illicit trafficking" AF if the conviction did not require the prosecution to allege and prove the prior conviction, as is required under federal law—see 21 U.S.C. 844(a) and 851(a) (1) ("No person who stands

convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon.")—for the second possession offense to be treated as a felony. See *McNeil v. AG of the United States*, No. 05-4512 2007 U.S. App. LEXIS 20582, at *16-17 (3d Cir. Aug. 27, 2007) (unpublished) (applying *Steele v. Blackman* precedent, in post-*Lopez* case, to reaffirm that "'a prior conviction cannot be used to enhance a sentence for purposes of determining whether the alien has been convicted of an 'aggravated felony' when his prior conviction was never litigated as part of the criminal proceeding in the crime for which the alien is being deported'" (quoting *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002)); *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) ("Because Berhe's 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of hypothetical federal felony"); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) (second possession conviction should not be treated as punishable by more than one year's imprisonment and therefore a felony by virtue of a recidivist sentence enhancement); [but see *U.S. v. Pacheco-Diaz*, __ F.3d __, 2007 U.S. App. LEXIS 24737 (7th Cir. 2007) (found that second conviction of possessing marihuana was an AF for illegal re-entry sentencing purposes) (petition for rehearing pending); *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005) (finding second misdemeanor possession offense constituted AF for both criminal illegal reentry sentencing and immigration purposes); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002) (found second misdemeanor possession offense to be AF in criminal illegal reentry sentencing context but which, in footnote 9, specifically declined to comment on whether such offense would be AF in immigration context); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992)]. Federal courts strictly construe the notice requirement of 21 U.S.C. 851(a) (1). See, e.g., *Price v. U.S.*, 537 U.S. 1152 (2003) (held that petitioner's 21 U.S.C. § 844(a) drug possession offense could not be treated as a felony given the government's failure to file a notice of enhancement under § 851(a)).

— State drug "sale" offense that covers non-trafficking conduct does not necessarily fall within the referenced federal definition of "drug trafficking crime" as a felony offense punishable under the federal Controlled Substances Act. For example, a marijuana "sale" offense that might cover transfer of a small amount of marijuana for no compensation should not be considered an "illicit trafficking" AF if the offense might cover transfer of a small amount of marijuana for no compensation, by analogy to 21 U.S.C. 841(b) (4) ("distributing a small amount of marijuana for no remuneration" is treated as simple possession misdemeanor under 21 U.S.C. 844). See *Jordan v. Gonzales*, 204 Fed. Appx. 425 (5th Cir. 2006) (unpublished); *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also Point II in *amicus curiae* brief of the New York State Defenders Association in *Matter of Grant*, A40 093 259 (BIA. 2005), available at http://www.nysda.org/idp/docs/file12_05_GrantAmicusBrief.pdf [but see *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(finding NY misdemeanor marijuana "sale" offense to be a "drug trafficking crime" aggravated felony for criminal sentencing purposes without considering that the offense might cover transfer of a small amount of marijuana for no remuneration)]. For other examples, see

Sandoval-Lua v. Gonzales, 499 F.3d 1121 (9th Cir. 2007) (California conviction for transporting drugs was not necessarily an aggravated felony for purposes of determining the immigrant's eligibility for cancellation of removal given the inconclusive record of conviction); *Jeune v. Attorney General*, 476 F.3d 199 (3d Cir. 2007)(Pennsylvania "manufacture, delivery, or possession with intent to manufacture or deliver" offense where statute covers some nontrafficking conduct is not categorically an aggravated felony); *Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564 (6th Cir. 2007) (Ohio trafficking in cocaine offense is not categorically an aggravated felony where the state statute covers offering to sell) (unpublished); *Escobar v. Attorney General of U.S.*, 221 Fed. Appx. 85 (3d Cir. 2007) (New York possession offense that includes a subsection penalizing possession with intent to sell should not categorically be determined to be a aggravated felony if the government is unable to show by clear and convincing evidence that the individual was convicted under the "intent to sell" subsection) (unpublished).

— State drug-related solicitation or facilitation offense, or even a drug offense that might cover solicitation or facilitation, should not be considered an "illicit trafficking" AF as solicitation and facilitation offenses are not listed among the drug trafficking crimes covered in the federal Controlled Substances Act. See *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007) (California "transports, imports, sells, etc., . . . or offers to transport, import, sell, etc. . . . not necessarily an aggravated felony where record of conviction does not exclude solicitation-type conduct); *Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564 (6th Cir. 2007) (Ohio trafficking in cocaine offense is not categorically an aggravated felony where the state statute covers offering to sell) (unpublished); *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (applied *Leyva-Licea* in the sentencing context to find that a state offense that includes "offers" to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct not covered under the Controlled Substances Act and, thus, could not categorically be determined to be an aggravated felony) (en banc); *Leyva-Licea v. INS*, 187 F.3d 147 (9th Cir. 1999) (found that a state conviction of solicitation to possess marijuana for sale is not punishable under the federal Controlled Substances Act since that Act does not mention solicitation although it does cover attempt and conspiracy, and therefore the offense is not an aggravated felony); *cf. United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006) (holding that a prior conviction for solicitation to deliver cocaine did not warrant a drug trafficking offense enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(B)).

— Accessory-after-the-fact offense, even if connected to a drug offense, should not be considered an "illicit trafficking" AF. See *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999).

— Other state drug offenses should not be considered an "illicit trafficking" AF as falling within the referenced federal definition of "drug trafficking crime" if the state offense is broader or covers different conduct as compared to felony drug offenses under the federal Controlled Substances Act (see 21 U.S.C. 863). See, e.g., *Eudave-Mendez v. Keisler*, 2007 U.S. App. LEXIS 23415 (9th Cir. 2007) (found that BIA erred in holding that California conviction for providing place for manufacture or distribution of controlled substance was categorically an aggravated felony because the *mens rea* requirement for the comparable federal

statutory provision is only "knowingly" and not "knowingly and intentionally") (unpublished).

- ✓ **Offense is not a firearm AF under INA 101(a) (43) (E) if it does not include the same elements as one of the listed federal firearms offenses, or if it covers a broader range of conduct than the listed federal firearms offenses.** See, e.g., *U.S. v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000) (state firearm offense is not an AF when it applies to all noncitizens, whereas federal statute applies only to those illegally in the United States); [but see *U.S. v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir.), *cert. denied*, 534 U.S. 931 (2001) and *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002) (both decisions rejecting claims that a state firearm offense was not a firearm AF because the state offense did not include an "affecting commerce" element as did the analogous listed federal offense)].

- ✓ **Offense is not a *"crime of violence"* AF if it does not necessarily fall within the referenced federal definition of "crime of violence", or if the sentence did not include a term of imprisonment of at least one year.** See INA 101(a) (43) (F), referencing federal definition of "crime of violence" located at 18 U.S.C. 16. The referenced federal definition includes: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See 18 U.S.C. 16. Under the case law, the following arguments may be made with respect to certain offenses that the government charges are crimes of violence:

  — Under the categorical approach to determining whether an offense falls within the AF definition, an offense is not necessarily a "crime of violence" if the elements of the particular offense do not establish that the offense falls within this "crime of violence" definition. See *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (Colorado child abuse is not a crime of violence where the statute proscribing such conduct is divisible and the record of conviction does not establish that either of the prongs of the federal definition are met); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007) (since California harassment offense could include conduct carried on only at a long distance from the victim, the court found it impossible to say that there was a substantial risk of applying physical force to the person or property of another as required by 18 U.S.C. 16(b)); *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) (Arizona discharging firearm at residential structure that might include structure not currently inhabited is not a crime of violence); *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006) (Kansas aggravated battery offense that can be violated by physical contact that does not constitute a use of physical force is not necessarily a crime of violence); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (California simple battery offense that covers mere touching is not a crime of violence under 16(a) first prong of federal definition); *Valencia v. Gonzales*, 439 F.3d 1046, (9th Cir. 2006) (statutory rape involving age 17 victim not a crime of violence); *Gonzalez-Garcia v. Gonzales*, 166 Fed. Appx. 740, 2006 U.S. App. LEXIS 3512 (5th Cir. 2005) (unpublished) (Texas simple assault conviction not a crime of violence in that the "offensive or provocative contact" element did not require physical force); *Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7th Cir. 2005) (Illinois harassment by telephone is not "crime of violence" under 16(a) first

prong of federal definition because elements of offense do not require use, attempted use, or threatened use of physical force); *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005) (federal conviction for possession of firearm by felon did not categorically present a substantial risk of violence under federal "crime of violence" definition similar to 18 USC 16 because it did not naturally involve a person acting in disregard of the risk that physical force may have been used against another in committing an offense); *U.S. v. Martinez-Mata*, 393 F.3d 625 (5th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 3182 (2005) (Texas retaliation conviction is not a "crime of violence" under the criminal illegal reentry Sentencing Guideline that is similar to the 16(a) prong of the 18 U.S.C. 16 definition because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) (Oregon harassment conviction is not "crime of violence" under 16(a) prong as referenced by the crime of domestic violence deportation category because its elements reached acts that involved offensiveness by invasion of personal integrity, but that did not amount to the use, attempted use, or threatened use of physical force); *U.S. v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 932 (2005) (Texas child endangerment conviction is not a "crime of violence" under the criminal illegal reentry Sentencing Guideline similar to the 16(a) prong because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (Indiana battery is not "crime of violence" under 16(a) for the crime of domestic violence deportation category because the elements of the offense do not require use of physical force); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (although Connecticut assault provision requires proof that defendant intentionally caused physical injury to another, it is not a crime of violence AF under first prong of federal definition because it does not require proof that defendant used *physical force* to cause the injury); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003) (minimum conduct required to violate New York manslaughter provision is categorically not a crime of violence AF under second prong of federal definition because statute covered passive conduct or omissions that do not involve risk of use of physical force); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (violation of the New York DWI statute in question is categorically not a crime of violence AF under second prong of federal definition because risk of use of physical force is not a requisite element); *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (Texas offense of injury to a child is not a crime of violence AF under first prong of federal definition because state statute does not require use, attempted use, or threatened use of force); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999) (Wisconsin 2nd degree sexual assault is not a crime of violence because offense encompasses conduct that does not fall within the federal definition); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (Illinois burglary of a motor vehicle is a divisible statute encompassing conduct that does not constitute a crime of violence under second prong of federal definition as well as conduct that does; therefore, court may not categorically classify offense as an aggravated felony by merely reading statutory language without other evidence from the record of conviction); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (California auto burglary conviction is not a crime of violence because entry into a locked vehicle is not essentially "violent in nature," the risk of violence against a person or property is low, and the legislative history does not indicate that Congress intended to include vehicle burglaries); *U.S. v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) (Ari-

zona felony endangerment is not categorically a crime of violence AF under second prong of federal definition where not all conduct punishable under state statute involve substantial risk that physical force may be used); [but see *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005) (Texas unauthorized use of a vehicle is a crime of violence); *Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006) (Connecticut conviction for assaulting peace officer is crime of violence under 16(b) second prong of federal definition); *Vargas-Sarmiento v.United States DOJ*, 448 F.3d 159 (2d Cir. 2006) (New York manslaughter in the first degree is crime of violence under second prong of federal definition); *Aguiar v. Gonzales*, 438 F.3d 86 (1st Cri. 2006) (Rhode Island sexual assault offense that covered consensual sex with a minor involved a substantial risk of use of physical force) (collecting cases); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002) (Minnesota offense of criminal vehicular homicide is a crime of violence under second prong of federal definition); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (Texas burglary of a vehicle is a crime of violence under second prong of federal definition)].

— Furthermore, even if an offense may involve a substantial risk of physical force, it should not be considered a crime of violence if it does not require specific intent to use force, or at least recklessness. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (Florida conviction for driving under the influence and causing serious bodily injury was not a crime of violence for purposes of the deportation statute as the phrase "use of physical force against the person or property of another" required a higher *mens rea* than negligent or accidental conduct); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (held that NY reckless assault offense is not a crime of violence under 18 U.S.C. 16(b)); *Oyebanji v. Atty. Gen. USA*, 418 F.3d 260 (3rd Cir. 2005) (reckless vehicular manslaughter is not crime of violence AF); *Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006) (Pennsylvania recklessly endangering another person is not a crime of violence AF because it requires no more than a *mens rea* of recklessness); *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005) (Pennsylvania simple assault crime not a crime of violence AF under 16(a) prong since it may involve only recklessness)[but note *Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006) (separate Pennsylvania simple assault offense involving attempt by physical menace to put another in fear of imminent serious bodily injury is a crime of violence AF because it necessarily involves specific intent);]; *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2006) (Pennsylvania reckless burning offense is not a crime of violence because it does not involve intentional use of force or risk of intentional use of force); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (involuntary manslaughter is not crime of violence AF); *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005) (California conviction for gross vehicular manslaughter while intoxicated was not "crime of violence" AF as it required only gross negligence); *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005) (California conviction for evading officer was not categorically "crime of violence" AF as it included offenses involving mere negligence); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (state conviction for vehicular homicide is not a crime of violence in part because offense required only criminal negligence); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (although § 16(b) encompasses both intentional and reckless conduct, California DWI can be committed by mere negligence and therefore is not a crime of violence within § 16(b)); see also *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002) (stating, prior to Supreme Court decision in *Leocal*, that, in circuits where the federal court of appeals has not decided whether DWI is a crime of violence, an offense will be considered so only if the offense must involve at least reckless conduct). Some

cases indicate that even a reckless *mens rea* may not be sufficient; the government may be required to show that the offense involves specific intent to use physical force. See *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (Texas intoxication assault is not a crime of violence under Sentencing Guideline similar to first prong of federal definition because intentional use of force is not a necessary component of the offense); *United States v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003) (Texas driving while intoxicated offense is not a crime of violence under second prong of federal definition because it does not require intentional or close to intentional conduct); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003) (New York involuntary manslaughter provision is not a crime of violence AF under second prong of federal definition because statute covered unintentional accidents caused by recklessness); *U.S. v. Chapa-Garza*, 243 F.3d 921, as revised and amended, 262 F.3d 479 (5th Cir. 2001) (DWI is not a crime of violence under second prong of federal definition because intentional force against the person or property of another is seldom, if ever, employed to commit the offense); *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (Texas offense of injury to a child is not a crime of violence AF under second prong of federal definition because conviction under state statute may stem from omission rather than intentional use of force); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001) (DWI is not a crime of violence under either prong of the federal definition because it does not involve the intentional use of force); see also Katherine Brady and Erica Tomlinson, "Intent Requirement of the Aggravated Felony "Crime of Violence," Bender's Immigration Bulletin (Vol. 4, No. 10, May 15, 1999); [but see *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002) (holding that gross negligence or equivalent sufficient for criminal vehicular homicide to be deemed a "crime of violence" under second prong of federal definition)].

— Offense covering conduct involving mere offensive touching does not rise to level of a "crime of violence." See *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1017 (9th Cir. 2006).

— The offense may not be deemed a "crime of violence" under 18 U.S.C. 16(b) unless the offense is classified as a felony by the convicting jurisdiction. See *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (finding that a Pennsylvania misdemeanor offense could not be considered a crime of violence under 18 U.S.C. 16(b) even though the offense was punishable by more than one year in prison and therefore would have been deemed a felony under federal law); see also discussion in *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

— Finally, even if the offense is found to fall within the "crime of violence" definition, it does not constitute an AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a) (43) (F).

✓ **Offense is not a *"theft"* offense AF if the offense does not fall within a generic definition of theft, or if the offense only involved intent to commit theft, or if the sentence did not include a term of imprisonment of at least one year (and, in the case of an offense also involving fraud or deceit, a finding of loss to the victim exceeding $10,000).** See INA 101(a) (43) (G). The Supreme Court, several federal circuit courts of appeals, and the BIA have adopted a generic definition of "theft" to include offenses involving a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. See

Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007); *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). If the offense does not fall within this definition, then the offense is not a theft AF. See, e.g., *Jaggernauth v. U.S. A.G.*, 432 F.3d 1346 (11th Cir. 2005) (conviction that might have been under Florida offense subpart that requires only an intent to "appropriate use" of the property would not necessarily constitute a "theft" under the BIA's definition, because this subpart lacks the requisite intent to deprive the owner of the rights and benefits of ownership); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005) (found that Virginia credit card fraud offense did not substantially correspond to a theft offense under the INA because the indictment did not establish, among other things, that the individual was charged with taking goods without the consent of the merchant); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (holding that certain sections of the Arizona statute for "theft of a means of transportation" did not contain the "criminal intent to deprive the owner" and were therefore not properly considered theft AFs); *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (California petty theft offense is not a theft AF as it might cover conduct outside the generic definition of theft, such as aiding and abetting theft, theft of labor, and solicitation of false credit reporting); [but see *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004) (Connecticut theft offense is a theft AF even though the offense might cover theft of services)]. In addition, if an offense only involved intent to commit theft, one can argue that it is not a theft offense. See *Lopez-Elias v. Reno*, 209 F.3d 758 (5th Cir. 2000) (Texas burglary of a vehicle with intent to commit theft is not a theft offense), *cert. denied*, 531 U.S. 10691 (2001); [but see *U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001) (Illinois burglary of vehicle is an AF as an attempted theft offense where record of conviction established intent to commit theft and substantial step toward its commission), *cert. denied*, 534 U.S. 1149 (2002)]. Finally, even if an offense is a theft offense, it does not constitute a theft AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a) (43) (G). Even where a prison sentence of at least one year is imposed, one court has found that a theft offense that is also an offense involving "fraud or deceit" is not an aggravated felony if it does not also meet the $10,000 threshold for a "fraud or deceit" offense to be deemed an aggravated felony. See *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004) (involving Pennsylvania theft by deception conviction).

- ✓ **Offense is not a *"burglary"* offense AF if the offense does not fall within the generic definition of burglary set forth in *Taylor v. United States*, 495 U.S. 575 (1990), or if the sentence did not include a term of imprisonment of at least one year.** See INA 101(a) (43) (G). In *Taylor*, for purposes of a sentence enhancement statute where Congress similarly did not define what it meant by its use of the burglary term, the Supreme Court applied a generic definition encompassing only offenses involving unlawful entry into a building with the intent to commit a crime. Thus, for example, New York burglary in the third degree does not necessarily constitute burglary under this generic definition because it may include entering or remaining unlawfully in structures beyond the ordinary meaning of the term "building," such as vehicles, watercraft, motor trucks, or motor truck trailers. See New York Penal L. §§ 140.20 and 140.00(2). See *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (Texas burglary of a vehicle is not a burglary offense for AF purposes); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (Illinois burglary of a motor vehicle conviction is not a burglary offense for AF purposes); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (Texas burglary of a vehicle conviction is not a burglary offense for AF purposes), *cert. denied*, 531 U.S. 10691 (2001); *Ye v. INS*, 214 F.3d

1128 (9th Cir. 2000) (California auto burglary is not a burglary offense for AF purposes). Even if the offense does fall within the generic definition of burglary, it does not constitute a burglary AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a) (43) (G).

- ✓ **Offense is not a *"fraud or deceit"* offense AF unless fraud or deceit is a necessary or proven element of the crime and the offense is not a tax offense, or if the record of conviction does not establish loss to the victim (or revenue loss to the government) exceeding $10,000 (and, in the case of an offense also involving theft, a sentence to a term of imprisonment of at least one year)**. See INA 101(a) (43) (M) (i). An offense is not a "fraud or deceit" AF unless fraud or deceit is a necessary or proven element of the crime. See *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005) (scheme laid out in indictment referred to stolen airline tickets, not fraudulently obtained ones); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002); see also case law on fraud or deceit offenses as crimes involving moral turpitude, e.g., *Matter of Balao*, 20 I&N Dec. 440 (BIA 1992) (Pennsylvania passing a bad check not a CIMT because fraud is not an essential element) [but see *Ferreira v. Ashcroft*, 390 F.3d 1091 (9th Cir. 2004) (found that a state offense that did not explicitly involve intent to defraud or deceive nevertheless categorically qualified as an offense involving fraud or deceit where state case law held that the state statute should be construed to include an element of fraudulent intent)]. A tax offense should not be deemed a "fraud or deceit" AF as INA 101(a) (43) (M) (ii) defines the one tax offense (tax evasion under 26 USC 7201) that may be deemed an AF. See *Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004); [but see *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004) (defeating a tax and evading a tax were interchangeable terms and thus conviction for defeat of a tax was a conviction for an aggravated felony within 8 U.S.C.S. § 1101(a) (43) (M) (ii).)]. Even if fraud or deceit is a necessary or proven element of the crime at issue, the offense should not constitute an AF unless the loss to the victim or victims exceeded $10,000. See INA 101(a)(43)(M)(i). To establish this loss amount, the government may not rely on evidence outside the record of conviction. *Dulal-Whiteway v. U.S. D.H.S.*, 501 F.3d 116 (2d Cir. 2007) (under *Taylor-Shepard* modified categorical approach, Dulal's restitution order does not fall within the permissible "evidentiary cast" as it is based on a loss amount established by a preponderance of the evidence and need not be tied to the facts found by a jury or admitted by a defendant's plea); *Obasohan v. United States AG*, 479 F.3d 785 (11th Cir. 2007) (found that restitution amount--based on findings made by a preponderance of the evidence--could not, standing alone, establish removability by clear, unequivocal and convincing evidence since neither Obasohan's indictment nor his plea agreement specified a loss amount); *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004) (rejected reliance on the loss finding reflected in the judge's Guidelines sentencing decision); [but see *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (permits consideration of loss amount indicated in a pre-sentence investigation report based on conclusion that the limitations of the categorical approach are not applicable where statutory loss amount requirement is not tied to an element of the fraud or deceit offense); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006) (relied on restitution order based on reasoning that a pure categorical approach impermissibly elevates the government's burden in civil removal proceedings, effectively requiring a showing of removability beyond a reasonable doubt rather than by clear, unequivocal and convincing evidence, as provided in the INA)]. In addition, evidence that may be considered part of the record of conviction at least by some courts – e.g., loss figures charged in the indictment, tabulated for restitution purposes, or calculated for

sentencing -- is relevant only to the extent that it is consistent with jury findings or pleas of guilt. See *Alaka v. AG of the U.S.*, 456 F.3d 88 (3d Cir. 2006) (reliance on the amount of loss tied to dismissed charges is improper); *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005) (same);*Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (reliance for the amount of the loss on information in a pre-sentence report is improper at least where this information is contradicted by explicit language in the plea agreement). [but see *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002) (where count to which the petitioner had pled guilty "did not allege a discrete fraud . . . [but] alleged a scheme to defraud that encompassed a number of checks," the loss to be measured is the loss resulting from that scheme)]. Where the actual loss did not exceed $10,000, the DHS (formerly INS) may not evade this monetary loss requirement by charging the offense under INA 101(a) (43) (U) as an "attempt" to commit a fraud or deceit AF involving a loss exceeding $10,000, unless the record of conviction establishes the completion of a substantial step toward committing such an offense. See *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). [Note, however, that an offense might fall under INA 101(a) (43) (U) as an "attempt" to commit a fraud or deceit AF even without any actual loss, if the *attempted* loss to the victim or victims exceeded $10,000 and if the record of conviction does establish the completion of a substantial step toward committing such an offense. See *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).] Even where there is a finding of loss to the victim exceeding $10,000, one could argue that a fraud or deceit offense that also fits within another AF category requiring a one year or more prison sentence (e.g., a theft offense or an offense relating to counterfeiting or forgery) is not an aggravated felony if it does not also meet the one year or more prison sentence threshold. Cf. *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004); but see *Bobb v. U.S.A.G.*, 458 F.3d 213 (3d Cir. 2006) ([U]nlike in *Nugent* where we noted that the term "theft offense" defined a class that was entirely a subset of the larger class "offense," the class "offense related to forgery" is not entirely a subset of the class "offense involving fraud." Thus, *Nugent*'s holding that the universal must be proven if it subsumes the subclass is inapplicable to this case.)].

- ✓ **The government may not establish that a conviction falls within an AF category based on information outside the record of conviction.** When the statutory elements of a particular conviction cover conduct broader than that covered by a generic definition in the AF statute, a police report, pre-sentence report or other information outside the record of conviction reciting the alleged facts of the crime (at least without identifying whether the facts came from an acceptable source, such as a signed plea agreement, a transcript of a plea of hearing, or a judgment of conviction) is insufficient evidence to establish that an individual pled guilty to the elements of the generic definition in the AF statute. See *Shepard v. U.S.*, 544 U.S. 13 (2005) (rejecting reliance on a police report to determine whether an offense was a burglary offense for criminal sentencing purposes); and *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006); *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003); *Hernandez-Martinez v. Ashcroft*, 343 F.2d 1075 (9th Cir. 2003); and *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (cases rejecting reliance on pre-sentence reports); and *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (rejecting reliance on testimonial evidence outside the record of conviction to find that offense involved violence and that violence was domestic).

- ✓ **The government may not establish a term of imprisonment threshold for a conviction to fall within an AF category by means of a sentence enhancement.**

See *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (determining that petty theft offense for which the maximum prison sentence is less than one year may not be deemed an aggravated felony theft conviction because the individual received a sentence of one year or more based on statutory recidivist sentence enhancements); cf. *Matter of Rodriguez-Cortez*, 20 I&N Dec. 668 (BIA 1993) (holding that noncitizen who received an enhanced sentence for use of a firearm was not deportable under firearm ground of deportability).

- ✓ **A conviction does not meet the AF definition where the conviction was not an AF at the time of conviction.** See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003) (reversing noncitizen defendant's conviction for illegal reentry after removal after finding that prior removal order was invalid as defendant had "plausible" claim that Congress' retroactive application of IIRIRA § 321 [expanding categories of offenses falling within AF ground] violated due process); *United States v. Salvidar-Vargas*, 290 F. Supp. 2d 1210 (S.D.Cal. 2003) (followed *Ubaldo-Figueroa*).

- ✓ **A conviction does not meet the IIRIRA expanded AF definition where removal proceedings were undertaken before IIRIRA.** See *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006) (IIRIRA Section 321(c) "explicitly limits the application of the revised definition of 'aggravated felony' to *proceedings initiated* after September 30, 1996"); [but see *Biskupski v. A.G. of the U.S.*, 2007 U.S. App. LEXIS 22725 (3d Cir. 2007); *Garrido-Morato v. Gonzales*, 485 F.3d 319 (5th Cir. 2007); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999); *Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997); *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)].

- ✓ **The respondent is not deportable under AF ground where the conviction occurred prior to November 18, 1988.** See § 7344(b) of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690; [but see § 602 of the Immigration Act of 1990 (IMMACT), Pub. L. 101-649; *Gelman v. Ashcroft*, 372 F.3d 495 (2d Cir. 2004); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000); *Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000); *Lewis v. INS*, 194 F.3d 539 (4th Cir. 1999); *Matter of Lettman*, 22 I&N Dec. 3365 (BIA 1998)].

- **Deny "crime involving moral turpitude" (CIMT)**

  - ✓ **Offense is not a CIMT.** See Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law relating to particular offense.

  - ✓ **The CIMT was not committed within five years after the date of admission for purposes of INA 237(a) (2) (A) (i) deportability.** The date of "admission", for purposes of this ground of deportability, is the date of lawful entry to the U.S. upon inspection and authorization by an immigration officer, NOT the subsequent date of one's adjustment of status to lawful permanent residence. See *Shanu v. Department of Homeland Security*, 450 F.3d 578, 2006 U.S. App. LEXIS 14989 (4th Cir. 2006) (BIA impermissibly interpreted 'the date of admission" in § 237 (a) (2) (A) (i) to include the date on which Shanu's status was adjusted; however, in so ruling, the Court expressed no opinion on whether adjustment of status may properly be considered "the date of admission" where the alien sought to be removed has never been "admitted" within the meaning of § 101(a) (13) (A)); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Shivaram v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004);

[but see *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005) (holding that (1) the date of adjustment of status qualifies as "the date of admission" under § 1227(a) (2) (A) (i), and that (2) where there is more than one potential date of admission, *any* such date qualifies as "*the* date of admission" under that provision); and, on issue of what constitutes the "date of admission" when the individual has never been "admitted," see *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) (concluding that in such circumstance date of adjustment qualifies as "date of admission"); *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999) (same)].

- ✓ **The CIMT was not one for which a sentence of one year or longer may be imposed for purposes of INA 237(a) (2) (A) (i) deportability.** The maximum possible sentence of an offense should be determined without regard to any recidivist sentence enhancement. See *Rusz v. Ashcroft*, 2004 U.S. App. LEXIS 16091 (9th Cir. 2004) (unpublished opinion).

- ✓ **Two or more CIMTs arose out of a single scheme of criminal misconduct and thus do not trigger INA 237(a) (2) (A) (ii) deportability.**

- ✓ **Offense is subject to single juvenile offense exception for inadmissibility purposes.** See INA 212(a) (2) (A) (ii) (I).

- ✓ **Offense is subject to single petty offense exception for inadmissibility purposes.** See INA 212(a) (2) (A) (ii) (II).

- **Deny "controlled substance offense" (CSO)**

  - ✓ **Offense is not a CSO.** See INA 237(a) (2) (B) (i), 212(a) (2) (A) (i) (II), and Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law.

- **Deny "firearm offense" (FO)**

  - ✓ **Offense is not a FO.** See INA 237(a) (2) (C) and Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law.

- **Deny "crime of domestic violence," (CODV), "crime of stalking," "crime of child abuse, child neglect, or child abandonment," or a "violation of a protection order"**

  - ✓ **Offense is not a CODV, etc.** See INA 237(a) (2) (E).

  - ✓ **Conviction or violation pre-dated October 1, 1996, the date of enactment of the IIRIRA, which added this ground of deportability.** See IIRIRA § 350(b) (new deportation ground applies only to convictions on or after the date of enactment).

Apply for relief from removal

- **Move to terminate proceedings to permit naturalization hearing**

  Where the respondent is a lawful permanent resident who can establish prima facie eligibility for naturalization, see generally INA §§ 311 et seq., and the matter involves "exceptionally appealing or humanitarian factors," an immigration judge has discretion to terminate removal proceedings to permit the respondent to proceed to a final hearing on a

pending application or petition for naturalization. See 8 C.F.R. 1239.2(f). However, it may be necessary to obtain some written or oral communication from the DHS (formerly INS), or a finding by a court declaring the noncitizen prima facie eligible for naturalization but for the pendency of the removal proceedings. See *Matter of Acosta-Hidalgo*, 24 I&N Dec. 103 (BIA 2007) (Because the Board of Immigration Appeals and the Immigration Judges lack jurisdiction to adjudicate applications for naturalization, removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) where the Department of Homeland Security has presented an affirmative communication attesting to an alien's prima facie eligibility for naturalization**);** *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975). If the DHS (formerly INS) is unwilling to make such a representation, it may be possible to obtain such a finding from a federal court. See *Gatcliffe v. Reno*, 23 F.Supp.2d 581 (D.V.I. 1998) (finding noncitizen petitioner fully qualified to be naturalized but for the pendency of deportation proceedings); accord *Ngwana v. Attorney General*, 40 F.Supp.2d 319 (D.Md. 1999).

- **Apply for 212(c) waiver**

  Under pre-AEDPA and pre-IIRIRA law, most lawful permanent residents in pre-IIRIRA exclusion or deportation proceedings were eligible to apply for a waiver of exclusion or deportation as long as they had been lawfully domiciled in the United States for at least seven years and had not served a term of imprisonment of five years or more for conviction of one or more aggravated felonies. See former INA § 212(c) (repealed 1996). However, AEDPA restricted the availability of INA § 212(c) relief in deportation proceedings (but not exclusion proceedings), and IRRIRA repealed INA § 212(c). Nevertheless, the Supreme Court has ruled that INA 212(c) relief remains available for permanent residents who agreed to plead guilty prior to AEDPA (effective 4/24/96) and IIRIRA (effective 4/1/97) and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) (holding that AEDPA and IIRIRA 212(c) waiver bars could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result). Following *St. Cyr*, a lawful permanent resident (LPR) can argue that 212(c) relief should also be available in the following situations:

  - ✓ LPR is in "exclusion" proceedings—see *Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997) (AEDPA bar to 212(c) is inapplicable to persons in exclusion proceedings).

  - ✓ LPR is in "deportation" proceedings but would have been eligible for 212(c) relief had the LPR traveled outside the country and been placed in "exclusion" proceedings – see *Servin-Espinosa v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002) (finding equal protection violation in disparate treatment of individuals in deportation proceedings compared to those in exclusion proceedings after BIA decision in *Fuentes-Campos* and before 9th Circuit later ruled in *United States v. Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999) that individuals in exclusion proceedings also were not eligible for 212(c) relief); see also *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (striking down such a distinction in 212(c) relief eligibility between similarly situated individuals as a violation of equal protection) [but see *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001); *Almon v. Reno*, 192 F.3d 28 (1st Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999); *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999)].

- ✓ LPR is in "deportation" proceedings commenced before April 24, 1996 (AEPDA enactment date)—see 8 C.F.R. § 1003.44; see also *Alanis-Bustamante v. Reno* 201 F.3d 1303 (11th Cir. 2000) (held that proceedings had begun prior to AEDPA when the INS had previously served an Order to Show Cause and lodged a detainer against the noncitizen even though the OSC was not filed with the immigration court until after April 24, 1996); accord *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (service of order to show cause sufficient to demonstrate pendency of deportation proceeding when AEDPA enacted); *Lyn Quee de Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003) [but see *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (issuance of notice of detainer alone not sufficient to find deportation proceedings commenced) along with *Dipeppe v. Quarantillo*, 337 F.3d 326 (3d Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Deleon-Holguin v. Ashcroft*, 253 F.3d 811 (5th Cir. 2001); *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001) (all requiring filing of charging document with the Immigration Court to find proceedings commenced)]].

- ✓ LPR plead or agreed to plead guilty before 4/24/96 – As mentioned above, the Supreme Court has ruled that 212(c) relief remains available for permanent residents who agreed to plead guilty prior to AEDPA (effective 4/24/96) and IIRIRA (effective 4/1/97) and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); see also *Alvarez-Hernandez v. Acosta*, 401 F.3d 327 (5th Cir. 2005) (rejected government's argument that the date that the judgment of conviction was entered rather than the date of the plea determined application of the IIRIRA bar to § 212(c) relief).

- ✓ LPR did not plead or agree to plead guilty before 4/24/96, but the individual did do so before 10/1/96 and was not deportable at the time of the plea—Possible examples include individuals convicted of offenses now deemed "aggravated felonies" as a result of the changes made to the definition of aggravated felony in IIRIRA effective 10/1/96, but which would not have been deemed aggravated felonies under pre-IIRIRA law, such as a theft, burglary, or crime of violence with a prison sentence of less than one year--See *Maria v. McElroy*, 58 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, *Pottinger v. Reno*, 2000 U.S. App. LEXIS 33521 (2d Cir. 2000) (unpublished opinion); see also *Cordes v. Velazques*, 421 F.3d 889 (9th Cir. 2005) (finding, under Ninth Circuit case law, no violation of the statute under the presumption against retroactivity and no violation of due process, but finding equal protection violation)[; but see *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) and *U.S. v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002) (), cert. denied, 540 U.S. 1210 (2004) (finding no violation of presumption against retroactivity)].

- ✓ LPR did not have seven years of lawful domicile in the United States at the time of his or her pre-AEDPA or pre-IIRIRA agreement to plead guilty, but would otherwise have been eligible for 212(c) relief at the time and accrued seven years before entry of a final order of deportation or removal—See 8 CFR 1.1(p) (LPR status terminates only "upon entry of a final administrative order of exclusion or deportation"); 8 CFR 3.2(c) (1) ("motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) . . . may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation"); *Alvarez-Hernandez v. Acosta*, 401 F.3d 327 (5th Cir. 2005) (found that LPR, at the time of his plea, would have been

allowed to accrue additional time following his plea toward the total period of continuous domicile; therefore, the district court erred in finding that he had to have accrued seven years' lawful domicile at the time of his plea); see also J. Traci Hong, "Practice Advisory—St. Cyr and Accrual of Lawful Unrelinquished Domicile" (American Immigration Law Foundation, Washington, D.C., October 25, 2001), available at <www.ailf.org>.

- ✓ LPR did not plead guilty before AEDPA or IIRIRA, but was convicted at trial and was not deportable or would have been eligible for 212(c) relief at the time that the LPR chose not to plead guilty—See *Atkinson v. A.G.,* 479 F.3d 222 (3d Cir. 2007) (extended *Ponnapula* to case where individual not offered plea agreement prior to AEDPA/IIRIRA); *Hern v. Maurer,* 458 F.3d 1185 (10th Cir. 2006) (concluded that a defendant who proceeded to trial but gave up his right to appeal when 212(c) relief was potentially available suffered retroactive effects under IIRIRA); *Ponnapula v. Ashcroft,* 373 F.3d 480 (3d Cir. 2004) (plea agreement offered but rejected prior to AEDPA/IIRIRA in potential reliance on availability of 212(c) relief); [but see *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006); *Rankine v. Reno,* 319 F.3d 93 (2d Cir. 2003), petition for rehearing denied, 2003 U.S. App. LEXIS 14474; *Dias v. INS,* 311 F.3d 456 (1st Cir. 2002); *Chambers v. Reno,* 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik,* 291 F.3d 1116 (9th Cir. 2002); but see also *Brooks v. Ashcroft,* 283 F.3d 1268 (11th Cir. 2002) (rejecting equal protection challenge to distinction between lawful permanent residents who are convicted after trial and those who plead guilty, but not reaching statutory interpretation issue of applicability of traditional presumption against retroactivity)]. In addition, an individual who was convicted after trial but gave up or may have given up the right to apply for 212(c) relief affirmatively before AEDPA/IIRIRA in reliance on the later availability of such relief may be able to seek 212(c) relief. See *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007) (followed Second Circuit decision in *Wilson*); *Wilson v. Gonzales,* 471 F.3d 111 (2d Cir. 2006) (remanded to the BIA, under *Restrepo,* for findings as to whether the individual gave up right to apply for 212(c) relief in reliance on ability to apply for such relief at a later date); *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004).
- ✓ LPR was not convicted before AEDPA or IIRIRA either by plea or trial, but the individual's underlying criminal conduct occurred before AEDPA or IIRIRA—See *Garcia-Plascencia v. Ashcroft,* No. CV 04-1067-PA (D. Or. 2004) (holding that the date of offense, rather than the date of plea or conviction is the relevant date for retroactivity analysis); *Mohammed v. Reno,* 205 F. Supp.2d 39 (E.D.N.Y. 2002) (district court decision urging the U.S. Court of Appeals for the Second Circuit to reconsider its decision in *Domond v. INS,* 244 F.3d 81 (2d Cir. 2001), in which the Second Circuit held prior to the Supreme Court decision in *INS v. St. Cyr* that the repeal of 212(c) relief could be applied in a case where only the criminal conduct preceded the new laws); *Pena-Rosario et al. v. Reno*, 83 F. Supp.2d 349 (E.D.N.Y. 2000), motion for reconsideration denied, 2000 WL 620207 (E.D.N.Y. 2000); *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, 2000 WL 186477 (2d Cir. 2000) (unpublished opinion); see also *amicus curiae* brief of the New York State Defenders Association in *Zgombic v. Farquharson*, No. 00-6165 (2d Cir. 2000) available at <www.immigrantdefenseproject.org>; see also dissenting opinion of Judge Goodwin in *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); cf. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002), rehearing denied, 2002 U.S. App. LEXIS 6662 (holding in a related context that retroactivity analysis turns on the date

of the criminal conduct at issue) [but see *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007); *Khan v. Ashcroft*, 352 F.3d 521 (2d Cir. 2003) (finding that the Second Circuit's prior decision in *Domond* remained good law despite *St. Cyr*].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA aggravated felony conviction(s), but the individual had not yet served five years at the time of his or her deportation or removal proceedings—See *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004) (found that, where petitioners accrued more than five years' imprisonment subsequent to the legally erroneous denial of their § 212(c) applications, an award of *nunc pro tunc* relief to allow them to apply for such relief was appropriate); *De Cardenas v. Reno*, 278 F.Supp.2d 284 (D. Ct. 2003) (remanding to the BIA for the entry of an order granting 212(c) relief nunc pro tunc based on the immigration judge's finding that she would have granted such relief in the original proceedings but for the BIA's prior erroneous interpretation of the law); *Mancheno Gomez v. Ashcroft*, 2003 U.S. Dist. LEXIS 10160 (EDNY 2003) (petitioner asserted right to seek 212(c) relief after only 15 months in prison and should not be denied review because an erroneous decision of the immigration judge allowed the five year time period to expire); *Hartman v. Elwood*, 255 F.Supp.2d 510 (E.D. Pa. 2003); *Falconi v. INS*, 240 F.Supp.2d 215 (EDNY 2002) (petitioner had not yet served five years at the time of the Immigration Judge decision erroneously finding petitioner ineligible for 212(c) relief); *Archibald v. INS*, 2002 U.S. Dist. LEXIS 11963 (E.D. Pa. 2002); *Bosquet v. INS*, 2001 U.S. Dist. LEXIS 13573 (SDNY 2001); *Webster v. INS*, 2000 U.S. Dist. LEXIS 21522 (D. Conn. 2000); *Lara v. INS*, No. 3:00CV24 (D. Conn. 2000); see also *Fejzoski v. Ashcroft* 2001 U.S. Dist. LEXIS 16889 (N.D. Ill. 2001) (rejected govt. claim of petitioner's ineligibility for 212(c) based on service of five years after issuance of the notice to appear for removal proceedings noting that the petitioner "may have a viable claim that it violated his due process rights for the INS to lie in the weeds waiting for the five year period to run before seeking removal"); *Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994); see also below "Raise estoppel or constitutional arguments;" [but see *Fernandes-Pereira v. Gonzales*, 417 F.3d 38 (1st Cir. 2005) (declining to follow Second Circuit decision in *Edwards* granting *nunc pro tunc* relief); *Velez-Lotero v. Achim*, 414 F.3d 776 (7th Cir. 2005) (although petitioner had not served five years at the time of his guilty plea or at the time of his first immigration judge hearing when he did not seek 212(c) relief, he had served five years by the time of his later motion to reopen to apply for 212(c) relief); *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004) (petitioner had served five years before BIA issuance of final removal order, but had also served five years even prior to the Immigration Judge's decision)].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA aggravated felony conviction(s), but the individual had not served five years in a single term of imprisonment—See *Paulino-Jimenez v. INS*, 279 F.Supp.2d 313 (SDNY 2003); *Toledo-Hernandez v. Ashcroft*, 280 F.Supp.2d 112 (SDNY 2003) (BIA decisions vacated and remanded to the BIA for a determination on whether separate sentences of imprisonment could be aggregated for purposes of the five years served bar); see also *United States v. Figueroa-Taveras*, 228 F. Supp. 2d 428 (SDNY 2002), vacated on other grounds, 2003 U.S. App. LEXIS 13983 (2d Cir. 2003) [but see, e.g., *Herrera v. Giambruno*, 2002 U.S. Dist. LEXIS 19387 (SDNY 2002)].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA

or pre-IIRIRA conviction of an aggravated felony, but the conviction occurred before 11/29/90, the enactment date of the Immigration Act of 1990 (IMMACT), including § 511, which added the five years served bar to the INA—See 8 C.F.R. 1212.3(f) (4) (ii) (applicable only to pre-1990 plea convictions); *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003) (application of IMMACT § 511 to the pre-1990 plea conviction at issue in case was impermissibly retroactive under *St. Cyr*); see also *amici curiae* brief of the New York State Defenders Association, et al, in Bell *v. Ashcroft*, No. 03-2737 (2d Cir. 2004) available at <www.immigrantdefenseproject.org> [but see *Reid v. Holmes*, 323 F.3d 187 (2d Cir. 2003) (followed Second Circuit's pre-*St. Cyr* decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993) holding that IMMACT § 511(a) could be applied retroactively to a noncitizen with a pre-IMMACT trial conviction)].

✓ LPR is charged with deportability for criminal offense under deportation ground for which there is no exact counterpart inadmissibility (formerly, excludability) ground, but which could have triggered inadmissibility/excludability had the person traveled abroad – see *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007) (petitioners are eligible for 212(c) waiver if their particular aggravated felony offenses could form the basis of exclusion as a crime of moral turpitude); see also *Palomino-Abad v. A.G.*, 229 Fed. Appx. 891 (11th Cir. 2007) (remanded to the BIA for reconsideration in light of Second Circuit decision in *Blake)* (unpublished); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991) (found eligibility for 212(c) in deportation proceedings for AF drug trafficking conviction even though there was no AF excludability ground since there was an excludability ground for drug offenses that would have encompassed the conviction at issue); see also Section 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052 (effective Nov. 29, 1990), which amended then INA section 212(c) to include that a section 212(c) waiver "shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years," implying that some aliens who have been convicted of an aggravated felony are eligible for a section 212(c) waiver, and 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) ("Section 212(c) provides relief from exclusion and by court decision from deportation . . . . This discretionary relief is obtained by numerous excludable and deportable aliens, including aliens convicted of aggravated felonies . . . ."); see generally *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (striking down a distinction in 212(c) relief eligibility between similarly situated individuals based on whether they traveled abroad as a violation of equal protection); [but see 8 C.F.R. 1212.3(f) (5) (requiring that the person be deportable or removable on a ground that has a statutory counterpart in the inadmissibility grounds) as interpreted by *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005) (requiring that the inadmissibility ground use "similar language" as the deportation ground sought to be waived; *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007) (Because aggravated felony crime of violence ground of deportation did not have a statutory counterpart in § 212(a), petitioner could not claim relief under 212(c)); *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007) (212(c) relief denied because "the aggravated felony/sexual abuse of a minor ground under which Abebe was found deportable is not substantially identical to the CIMT ground of exclusion"); *Vo v. Gonzales*, 482 F.3d 363, 366-70 (5th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158, 162 (3d Cir. 2007) ("In order for Caroleo to establish his eligibility for § 212(c) relief, he must demonstrate . . . that the basis for his removal has a 'statutory counterpart' ground for exclusion in INA § 212(a)"); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007) ("Because there is no statutory counterpart in § 212(a) for his crime of indecent assault of a minor, Valere is not

similarly situated to an inadmissible, returning alien who is eligible to apply for § 212(c) relief"); *Kim v. Gonzales,* 468 F.3d 58, 63 (1st Cir. 2006) ("Congress never itself created waiver authority for those deported for aggravated felonies or crimes of violence . . . and Congress' own views on the subject of waivers are reflected in its repeal of section 212(c) in its entirety")]. In addition, if the individual is eligible to re-adjust to permanent residence and thereby avoid deportability, he or she may seek a 212(c) waiver to waive inadmissibility in connection with an application for adjustment of status. See *Matter of Azurin,* 23 I&N Dec. 695 (BIA 2005) and *Matter of Gabryelsky,* 20 I&N Dec. 750 (BIA 1993); see also *Drax v. Reno,* 338 F. 3d 98 (2d Cir. 2003) (noting that, even if an individual is not currently eligible for re-adjustment of status because an immigrant visa number is not immediately available, an immigration judge has discretion to continue proceedings for a reasonable length of time until an immigrant visa number is available).

- ✓ For a general discussion of these statutory interpretation arguments, see Nancy Morawetz, "Practice Advisory—Who Should Benefit from *St. Cyr*" (American Immigration Law Foundation, Washington, D.C., August 1, 2001). For a general discussion of possible constitutional arguments against government claims of ineligibility for 212(c) relief that are based on unfair treatment or irrational distinctions, see below "Raise estoppel or constitutional or international law arguments."

- **Apply for 240A(a) cancellation of removal**

Some lawful permanent residents in removal proceedings may be eligible for cancellation of removal under INA 240A(a). In order to be eligible for this relief, a lawful permanent resident respondent would have to show the following:

1. Respondent has been an LPR for at least five years.
2. Respondent has resided in the United States continuously for seven years after having been admitted in any status.
3. Respondent has not been convicted of an aggravated felony (see above "Deny aggravated felony").

The aggravated felony bar precludes eligibility for many long-term lawful permanent residents. However, it may be possible to argue that certain convictions should not be deemed aggravated felonies. See above "Deny aggravated felony." In addition, in certain situations, it may be possible to argue that it violates due process for a conviction to be retroactively deemed an "aggravated felony" for this purpose if it was not an aggravated felony at the time of conviction. See concurring and dissenting opinions of Board members Rosenberg and Espinoza in *Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2002) (finding retroactive application of a new administrative interpretation of what drug offenses constitute aggravated felonies to be contrary to due process); see below "Raise estoppel or constitutional arguments."

Another problem that may be encountered is that the IIRIRA provided that the required seven years' period of residence "shall be deemed to end when the alien is served a notice to appear . . . or when the alien has committed an offense referred to in section 212(a) (2) that renders the alien inadmissible to the United States under section 212(a) (2) or removable from the United States under section 237(a) (2) . . . , whichever is earliest." See INA 240A(d) (1). To the extent, however, that the DHS (formerly INS) is relying on

the second clause of this clock-stopping rule to argue ineligibility for cancellation of removal—i.e., that the respondent had not resided in the United States for seven years prior to *commission of the offense*—the respondent may be able to make the following arguments:

- ✓ **The respondent has continuously resided in the U.S. for at least seven years from the date of his first lawful admission to the U.S. to the date of the commission of the offense.** The period of respondent's residence in the U.S. after admission on a nonimmigrant visa may be considered in calculating these 7 years. *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002).

- ✓ **The respondent's parent has continuously resided in the U.S. for at least seven years after admission in any lawful status prior to the date of the respondent's commission of the offense.** The period of respondent's parent's residence in the U.S. after admission may be considered in calculating these 7 years. See *Cuevas-Gaspar v. Gonzales*, 430 F. 3d 1013 (9th Cir. 2005) (parent's admission for permanent resident status was imputed to an unemancipated minor child residing with the parent).

- ✓ **The "commission of offense" clock-stopping rule does not apply if the respondent did not commit an offense "referred to in section 212(a) (2)."** If the respondent has committed an offense that makes him or her removable but not inadmissible from the United States, the respondent has not committed an offense "referred to in section 212(a) (2)" and, therefore, should not be subject to this part of the clock-stopping rule. This is because the phrase "removable from the United States under section 237(a) (2)" requires that the offense be one of those listed in section 212(a) (2). Thus, for example, a firearm offense that comes within the firearm ground of deportability but which does not come within any ground of inadmissibility should not trigger this clock-stopping rule. See *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

- ✓ **The "commission of offense" clock-stopping rule does not apply to pre-IIRIRA offenses.** Where the offense at issue pre-dated April 1, 1997, the general effective date of IIRIRA, the respondent may argue that the "commission of offense" part B of the INA 240A(d)(1) clock-stopping rule should not be applied retroactively to such a case. IIRIRA expressly specified the circumstances under which the clock should stop prior to the effective date of IIIRIRA, and those circumstances do not include persons seeking cancellation relief under 240A as enacted as part of IIRIRA. In IIRIRA § 309(c)(5), entitled "Transitional Rule With Regard to Suspension of Deportation." Congress specified that the rule would apply retrospectively to persons seeking suspension of deportation under the old law. [See *Tablie v. Gonzales*, 471 F.3d 60 (2d Cir. 2006) (transitional stop-time rule of INA 240A(d)(1) part B applies retroactively to stop accrual of the seven years of continuous residence required under INA 240A(a)(2)); *Peralta v. Gonzales*, 441 F.3d 23 (1st Cir. 2006); *Okeke v. Gonzales*, 407 F. 3d 585 (3d Cir. 2005)]. No such retrospective provision was included with respect to persons seeking cancellation of removal. Furthermore, when Congress revisited the clock stop rule in section 203 of NACARA, it made clear that the retrospective provision applied only to deportation cases under the old law – thereby requiring those who enjoyed the benefits of more generous suspension rules under the old law to accept the less generous clock stop rule of the new law. Section 203 of NACARA further provides that when a person is moved from deportation

proceedings into removal proceedings "paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act shall not apply…." This provision makes clear that the retrospective application of the clock stop rule was limited to those seeking suspension under the old law. Furthermore, to the extent that there is any ambiguity, the general rule against retroactive application of new rules applies. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), Under *Landgraf* step two, the Supreme Court held that, absent an explicit statement of retroactivity, a statute should apply prospectively only. Thus, under either *Landgraf* step one or step two, the "commission of offense" clock-stopping rule should not be applied retroactively to an individual whose criminal offense predated the general effective date of IIRIRA. See *Sinotes-Cruz v. Gonzales*, 469 F.3d 1190 (9th Cir. 2006) (permanent stop-time rule of INA 240A(d)(1) part B does not apply retroactively under *Langdraf* step two to stop accrual of the seven years of continuous residence required under INA 240A(a)(2)); see also *Mulholland v. Ashcroft*, 2004 U.S. Dist. LEXIS 21426 (E.D.N.Y. 2004); *Generi v. Ashcroft*, 2004 U.S. Dist. LEXIS 6396 (W.D. Mich. 2004); *Henry v. Ashcroft*, 175 F.Supp.2d 688 (SDNY 2001); see also Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 N.Y.U. L. Rev. 97, 151-154 (April 1998) (reviews legislative history supporting the argument that Congress did not intend for this part of the clock-stopping rule to be applied retroactively); [but see *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (applying stop-time rule part B retroactively to a pre-IIRIRA offense); *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999) (holding that Congress intended retroactive application without any discussion of the negative implication and legislative history referenced above); *Valencia-Alvarez v. Gonzales*, 469 F. 3d 1319 (9th Cir. 2006)(applying clock stop rule where eligibility for discretionary relief had not "vested"); *Heaven v. Gonzales*, 473 F.3d 167 (5th Cir. 2006)(presuming that application of clock stop rule to deportation cases involving suspension relief requires application to cancellation of removal cases for LPRs).

- ✓ **The "commission of offense" clock-stopping rule does not apply if the respondent has resided in the United States continuously for 7 years after commission of the offense.** The clock-stop rule speaks of events—such as commission of the offense and service of the notice to appear for removal proceedings—that are deemed to end "any" period of continuous residence. See INA 240A(d) (1). This language indicates that an individual may accrue the required seven years of residence between events, e.g., after commission of the offense but before the DHS (formerly INS) served the notice to appear. Cf. *Matter of Cisneros-Gonzales*, 23 I&N Dec. 668 (BIA 2004) (for purposes of the analogous requirement of ten years of continuous physical presence for INA 240A(b) cancellation of removal (see below), individual who was deported and illegally reenters U.S. can begin to accrue a new period of physical presence beginning on the date of his return); *Okeke v. Gonzales*, 407 F.3d 585 (3d Cir. 2005) (individual who departs the U.S. after committing offense triggering inadmissibility and legally reenters can begin to accrue a new period of physical presence beginning on the date of his return); [but cf. *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000) (noncitizen may not accrue the requisite seven years of continuous physical presence required for INA 240A(b) predecessor relief of suspension of deportation *after* service of the charging document)].

- **Apply for 240A(b) cancellation of removal / suspension of deportation**

Some individuals in removal proceedings may be eligible for cancellation of removal under INA 240A(b). A noncitizen respondent would have to show the following:

1. Respondent has been physically present in the U.S. for a continuous period of not less than ten years (see discussion above of comparable seven years' continuous residence requirement for INA 240A(a) relief).
2. Respondent has been a person of good moral character during such period.
3. Respondent has not been convicted of an offense under INA section 212(a) (2) (criminal inadmissibility grounds), 237(a) (2) (criminal deportability grounds), or 237(a) (3) (failure to register, document fraud, and falsely claiming citizenship).
4. Respondent establishes that removal would result in exceptional and extremely unusual hardship to the noncitizen's spouse, parent, or child, who is a U.S. citizen or lawful permanent resident.

The INA 212(a) (2) and 237(a) (2) criminal ground bars preclude eligibility for many noncitizens convicted of crimes in their past. However, it may be possible to argue that certain convictions do not fall within these inadmissibility or deportability grounds. E.g., see above "Deny aggravated felony." In addition, these criminal ground bars did not apply under pre-IIRIRA law. See former INA § 244(a) (1) (repealed 1996). Thus, an individual with a pre-1996 conviction may argue that Congress did not clearly state in IIRIRA that it intended for these new restrictions to be applied retroactively to pre-1996 convictions. See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006) ("[t]o deprive Lopez-Castellanos of eligibility for discretionary relief would produce an impermissible retroactive effect for aliens who, like Lopez-Castellanos, were eligible for [suspension of deportation] at the time of the plea"). This argument is similar to those available to argue for continued eligibility for old 212(c) relief for lawful permanent resident immigrants with pre-1996 convictions. See above "Apply for 212(c) waiver".

- **Apply for adjustment of status**

  Some individuals in removal proceedings may be eligible to apply for adjustment of their status to lawful permanent residence as a defense to criminal charge removal. See INA 245. This may include an individual who is already a lawful permanent resident but for whom it may be advantageous to re-adjust their status in order to wipe the slate clean and avoid a criminal ground of deportability that does not make the individual inadmissible, e.g., firearm offense that does not constitute a crime involving moral turpitude. See *Matter of Rainford*, 20 I&N 598 (BIA 1992). A lawful permanent resident immigrant may seek a 212(c) waiver to waive a ground of inadmissibility in connection with an application for re-adjustment of status. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) and *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); see also *Drax v. Reno*, 338 F. 3d 98 (2d Cir. 2003) (noting that, even if an individual is not currently eligible for re-adjustment of status because an immigrant visa number is not immediately available, an immigration judge has discretion to continue proceedings for a reasonable length of time until an immigrant visa number is available).

- **Apply for 212(h) waiver of inadmissibility**

  Some individuals in removal proceedings, who are eligible for adjustment of status (see above) and who are not inadmissible due to a drug offense (other than a single offense of simple possession of 30 grams or less of marijuana), may be able to apply for a 212(h) waiver of other criminal inadmissibility as a defense to criminal charge removal. See INA

212(h). An individual who is a lawful permanent resident seeking readmission after a trip abroad may also seek a 212(h) waiver of criminal inadmissibility without needing to be eligible to apply for readjustment of status. In addition, a lawful permanent resident may seek a 212(h) waiver to waive deportability based on an offense that is also covered by an inadmissibility ground. See *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995). However, in IIRIRA, Congress amended 212(h) to provide that a lawful permanent resident must have resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of removal proceedings and must not have been convicted of an aggravated felony. See INA 212(h) (last paragraph). In addition, these bars on lawful permanent resident eligibility for the 212(h) waiver are subject to equal protection challenge. See *Roman v. Ashcroft*, 181 F. Supp.2d 808 (N.D. Ohio 2002), reversed on other grounds, 2003 U.S. App. LEXIS 16537 (6th Cir. 2003); *Song v. INS*, 82 F.Supp.2d 1121 (C.D.Cal. 2000); see also below "Raise estoppel or constitutional arguments—Equal Protection;" [but see *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002); *DeLeon-Reynoso v. Ashcroft*, 293 F.3d 633 (3d Cir. 2002); *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002); *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001)].

- **Apply for 209(c) waiver of inadmissibility**

  Refugees or asylees who are in removal proceedings, who are eligible for refugee/ asylee adjustment of status and who are not inadmissible based on reason to believe they are a drug trafficker, may be able to apply for a 209(c) waiver of inadmissibility as a defense to criminal charge removal. See INA 209(c) and 209 generally; see also *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004) (asylee adjustment); *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999) (refugee adjustment).

- **Apply for asylum**

  Individuals in removal proceedings who fled or fear persecution in their country of nationality may be able to apply for asylum as a defense to criminal charge removal. See INA 208. Asylum is generally barred to an individual convicted of a "particularly serious crime." See INA 208(b) (2) (A) (iii). For asylum purposes, an individual convicted of an aggravated felony is deemed by statute to have been convicted of a particularly serious crime. See INA 208(b) (2) (B) (i). It may be possible to argue that the particularly serious crime bar should not apply to pre-1990 convictions. See *Kankamalage v. INS*, 335 F.3d 858, 860, 863 (9th Cir. 2003) (immigration regulation promulgated in 1990, which made aliens convicted of "a particularly serious crime" ineligible for asylum, did not apply retroactively to an alien who pled guilty to robbery in 1988).

- **Apply for withholding of removal**

  Individuals in removal proceedings whose life or freedom would be threatened in the country of removal may be able to apply for withholding of removal as a defense to criminal charge removal. See INA 241(b) (3). Withholding of removal is generally barred to an individual convicted of a "particularly serious crime." See INA 241(b) (3) (B) (ii). For withholding of removal purposes, however, an individual convicted of an aggravated felony or felonies is deemed by statute to have been convicted of a particularly serious crime only if he or she has been sentenced to an aggregate term of imprisonment of at least five years. See INA 241(b) (3) (B). A noncitizen sentenced to less than five years' imprisonment may be determined to have been convicted of a particularly serious crime

only after an individual examination of (i) the nature of the conviction; (ii) the circumstances and underlying facts for the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); see also *Chong v. Dist. Dir., INS*, 264 F.3d 378, 387 (3d Cir. 2001) (BIA must analyze the specific facts of the case "rather than blindly following a categorical rule, i.e., that all drug convictions qualify as 'particularly serious crimes.'"). Some jurisdications require judges to assess each of the four factors, while other jurisdictions only require application of a three factor inquiry. Compare *Steinhouse v. Ashcroft*, 247 F.Supp.2d 201 (D.Conn. 2003) (remanding case to BIA for failure to examine whether the type and circumstances of the crime indicated that the individual would be a danger to the community) with *Ursu v. INS*, No. 99-70678, 2001 U.S.App. LEXIS 29383 (9th Cir. 2001) (holding that the determination of whether a crime qualifies as particularly serious requires a three-part examination and does not include the inquiry as to whether the individual will be a danger to the community). If the offense in question is not an aggravated felony, it should not be deemed a particularly serious crime. See *Alaka v. AG of the U.S.*, 456 F.3d 88 (3d Cir. 2006); [but see *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006) (U.S. Sup. Ct. cert granted)]. If the statute is ambiguous as to whether an offense is an aggravated felony, or if there is uncertainty over whether the offense is otherwise a particularly serious crime, one should argue that the decision-maker should look to international law. See Brief for Human Rights First as Amicus Curiae in Support of Petitioners in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). This is because withholding of removal relief exists in order to comply with U.S. obligations under the 1967 U.N. Protocol Relating to the Status of Refugees. Where international obligations are involved, any statutory ambiguity must be resolved in a way that respects the international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64. A key relevant source of international law is the U.N. Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook does not specifically define a "particularly serious crime," but sets a minimum standard when it defines a "serious" offense as a "capital crime or a very grave punishable act." Although the Supreme Court has determined that the Handbook is not legally binding on U.S. officials, the Court stated that it nevertheless provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

- **Apply for relief under Torture Convention**

  Individuals in removal proceedings who may be tortured or suffer other cruel treatment in their country of removal may be eligible to apply for relief under the U.N. Torture Convention as a defense to criminal charge removal. See Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in effect for the United States in 1994). The Convention does not include any bar on relief based on criminal record. And, while implementing legislation enacted in 1998 directs the prescribing of regulations excluding from eligibility those excluded from eligibility for withholding of removal (see above), the legislation recognizes that the regulations should do so only "[t]o the maximum extent consistent with the obligations of the United States under the Convention . . ." Foreign Affairs Reform and Restructuring Act of 1998 § 2242(c). Interim regulations, effective March 22, 1999, provide for withholding of removal for those who would not be excluded from eligibility for such relief, see 8 C.F.R. 208.16(c), and for "deferral" of removal for those who would be excluded from withholding based on criminal record. See 8 C.F.R. 208.17.

- **Apply for voluntary departure in lieu of a removal order**

See INA 240B.

Raise estoppel or constitutional or international law arguments

Whenever a removal case has a particularly unfair or unjust feel to it, there may be good estoppel and/or constitutional (or international law) arguments to be raised. Such an argument may eventually require going into federal court. This is because immigration judges and the BIA will generally not rule on an estoppel or constitutional argument. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991) (estoppel claim); *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991) (constitutional claim). For that reason, however, one may be able to argue that one need not have raised such an argument at the administrative level in order to raise it before a federal court. See, e.g., *Garberding v. INS*, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (although a party may be required to exhaust a procedural due process claim that could be remedied by the immigration judge, an equal protection claim that the immigration judge or the BIA cannot decide does not require exhaustion). One should, however, raise such an argument at the administrative level to avoid the risk of a later finding by a federal court that the argument has been waived for failure to raise it before the agency. See, e.g., *Ruiz-Macias v. INS*, 89 F.3d 846 (9th Cir. 1996) (alien's failure to raise estoppel argument before BIA constituted waiver of claim). In addition, even if an immigration judge or the BIA will not rule on the argument, they may consider it in ruling on other arguments. Finally, it may be necessary to raise the argument before an immigration judge in order to make the record necessary for later federal court review. See INA 242(b) (4) (A) ("the court of appeals shall decide the petition only on the administrative record on which the order of removal is based"); *INS v. Miranda*, 459 U.S. 14, 18 n.3 (1982) (noting, in refusing to find estoppel for unreasonable delay in processing, that "because the issue of estoppel was raised initially on appeal [to the BIA], the parties were unable to develop any factual record on the issue").

- **Estoppel**

  "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Services*, 467 U.S. 51 (1984). The law of estoppel has long recognized that a wrongdoer should not be permitted to reap unfair advantage from his or her own wrongful conduct. In the immigration context, estoppel-type arguments might be raised where a respondent has relied on a government misrepresentation to his or her detriment, or to prevent the government from gaining an unfair advantage from a wrongful act that deprives the respondent of a constitutionally protected liberty or property interest. In fact, it was in an immigration case that the United States Court of Appeals for the Second Circuit explained that the government may be precluded from benefiting from its own wrongful conduct even where the Act, "read in vacuo, might suggest a different result." *Corniel-Rodrigues v. INS*, 532 F.2d 301 (2d Cir. 1976).

  The traditional elements of "equitable estoppel" are: (a) a misrepresentation; (b) that the party making the misrepresentation had reason to believe the party asserting estoppel would rely on it; (c) that it was reasonable for the party asserting estoppel to rely on the misrepresentation; and (d) that the party asserting estoppel relied on the misrepresentation to his detriment. *Heckler*, 467 U.S. at 59. Several federal circuit courts have found equitable estoppel to lie where there is an element of "affirmative misconduct" on the part of the government. See *Corniel-Rodrigues*, 532 F. 2d 301 (2d Cir. 1976) (INS failure to warn alien that her visa would automatically become invalid if she married before arriving to the United States sufficient to support estoppel); *Yang v. INS*, 574 F.2d 171, 174-75 (3rd Cir. 1978) (affirmative misconduct by government official gives rise to estoppel); *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987) (allegation

that INS acted "willfully, wantonly, recklessly, and negligently" in delaying processing of alien's visa application encompassed element of affirmative misconduct necessary to state equitable estoppel claim); *Mendoza-Hernandez v. INS*, 664 F.2d 631, 639 (7th Cir. 1981) (affirmative misconduct by government official gives rise to estoppel claim). Equitable estoppel doctrine may be useful in immigration cases where the respondent is seeking to stop a removal that may be said to have resulted from affirmative misconduct by the government, e.g., where the respondent has lost waiver eligibility due to wrongful DHS (formerly INS) delay in commencing deportation or removal proceedings.

There is a another line of Supreme Court cases, which generally do not use the term estoppel, but which similarly preclude the government from gaining an unfair advantage from a wrongful act where the misconduct deprives a person of a constitutionally protected liberty or property interest. See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (Court refused to permit the government to take advantage of a BIA ruling obtained by a procedure contrary to agency regulations); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Court prevented the government from using the fruits of an illegal search and seizure as evidence in a criminal case); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Court ruled that government could not destroy a constitutionally protected property interest due to its negligent failure to hold a required mediation hearing within the statute of limitations period). This line of cases may also be useful in immigration cases where the respondent is seeking to stop a removal that may be said to have resulted in some way from government wrongdoing.

- **Procedural Due Process**

  The Fifth Amendment's due process clause protects against federal government deprivation of life, liberty, or property without fair and adequate procedures. See *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court recently reaffirmed that the protection of the due process clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 US 678 (2001). While the Court recognized that prior precedent found that full constitutional protections might not apply to an alien who had not "entered" the United States (including individuals stopped at the border and/or "paroled" into the United States), the Court did not rule out that such precedent might no longer be good law. See *Zadvydas*.

  Thus, for example, procedural due process challenges may be made to mandatory detention statutes or practices in certain situations. It is generally a violation of procedural due process for the government conclusively to presume unfitness for some benefit on the basis of some event or characteristic, without holding an individualized hearing on the issue of unfitness. Thus, procedural due process challenges may be made to mandatory detention rules that do not permit individualized hearing on the issue of whether an individual is a threat to the community or a risk of flight in certain situations. See above section entitled "Challenge mandatory detention during removal proceedings."

  Another example of where a procedural due process challenge might be raised is where removal results from a DHS (formerly INS) failure to commence deportation proceedings when statutorily required to do so. See *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) (INS foot-dragging in completing deportation proceedings until petitioner no longer statutorily eligible for relief stated the basis of a substantial constitutional due process claim); see also above discussion in subsection on "Estoppel" of the line of Supreme Court cases precluding the government from gaining an unfair advantage from a wrongful act where the misconduct deprives a person of a constitutionally protected liberty or property interest.

- **Substantive Due Process**

  The Fifth Amendment's due process clause also protects against government action infringing fundamental liberty interests, no matter what process is provided, where the infringement is not narrowly tailored to serve a compelling state interest. See *Reno v. Flores*, 507 U.S. 292, at 301-302 (1993). This fundamental or substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987), quoting *Rochin v. California*, 342 U.S. 165, 172 (1952). As the Supreme Court recently stated: "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587 (1996). Legislation imposing disproportionate penalties affecting liberty or property interests may be challenged under substantive due process notions. Id. In addition, legislation that has retroactive aspects affecting such interests may also be challenged as violative of due process where retroactive application is irrationally unfair. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation . . . must meet the test of due process"); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation"); *BMW*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a state may impose"). Thus, retroactive application of a new deportation statute may be found to violate the due process clause. See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003) (reversing noncitizen defendant's conviction for illegal reentry after removal after finding that prior removal order was invalid as defendant had "plausible" claim that Congress' retroactive application of IIRIRA § 321(expanding categories of offenses falling within AF ground) violated due process);. *Mojica v. Reno*, 970 F. Supp. 130, 169-171 (E.D.N.Y. 1997), aff'd sub nom., *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998); see generally Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 N.Y.U. L. Rev. 97 (April 1998).

- **Equal Protection**

  While the equal protection clause of the Fourteenth Amendment applies only to the states, the Fifth Amendment's due process clause has also been interpreted to bar arbitrary discrimination by the federal government. Thus, certain irrational distinctions between similarly situated noncitizens made by the federal deportation laws, or how the federal government applies these laws, may be found unconstitutional. See, e.g., *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (distinction between similarly situated individuals as to whether their expunged drug dispositions constitute convictions for immigration purposes struck down as irrational); *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995) (distinction between similarly situated individuals as to 212(h) waiver relief eligibility struck down as irrational); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (distinctions between similarly situated individuals as to 212(c) waiver relief eligibility struck down as irrational).

- **Naturalization Clause**

  When a noncitizen in one state is subject to more adverse immigration consequences than a noncitizen in another state for a similar offense solely because of varying state criminal

law standards and definitions, the noncitizen may argue that such disparate treatment violates the Constitution's Naturalization Clause, which requires a "uniform Rule" of naturalization (and hence of deportation law). See Iris Bennett, "The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions," 74 N.Y.U. L. Rev. 1696 (December 1999); see also Point III in Brief of the American Bar Association as Amicus Curiae in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). Alternatively, the noncitizen may argue that his or her rights to equal protection of the laws has been violated. See above subsection on "Equal Protection."

- **Ex Post Facto**

  Although challenges to retroactive deportation laws under the ex post facto clause have been rejected in the past on the basis that the clause only applies to criminal punishment, the now often mandatory imposition of the "civil" penalty of removal upon conviction suggests that it may be worth preserving such a claim in the hope that the courts will revisit the issue. See *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (concurring opinion of Justice Thomas) (expressing willingness to reconsider whether retroactive civil laws are unconstitutional under the ex post facto clause); *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) ("If deportation under such circumstances is not punishment, it is difficult to envision what is"); see also Robert Pauw, "A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply," 52 Adm. L.R. 305 (Winter 2000); Javier Bleichmar, "Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law," 14 Geo. Immgr. L.J. 115 (Fall 1999).

- **Double Jeopardy**

- **Cruel and Unusual Punishment**

- **International Law**

  Where international obligations are involved, any statutory ambiguity must be resolved in a way that respects the international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64; see also Brief for Human Rights First as Amicus Curiae in Support of Petitioners in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). For an example of a court decision that applies international law obligations to the interpretation of an immigration statute, see *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, 2000 WL 186477 (2d Cir. 2000) (aff'd on other grounds in an unpublished opinion) (district court decision interpreting IIRIRA amendments in a way that avoided retroactive application to pre-IIRIRA conduct in order to avoid conflict with U.S. obligations under international law).

Pursue post-conviction relief or other non-immigration remedies

- **Criminal court vacatur or resentencing**

  If a conviction has been vacated on legal or constitutional grounds, that vacatur should be respected by the immigration authorities. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will . . . accord full faith and credit to this state court judgment [vacating a conviction

under New York state law]"); *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) ("[W]hen a court . . . vacates an original judgment of guilt, its action must be respected); see also *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). See generally Norton Tooby, *Post-Conviction Relief for Immigrants* (Law Offices of Norton Tooby, Oakland, California 2000); Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group, 1999), Chapter 4 ("Amelioration of Criminal Activity: Post-Conviction Remedies); Norton Tooby, *Criminal Defense of Immigrants, National Edition* (Law Offices of Norton Tooby, Oakland, California 2000), Chapter 8 ("Vacating Criminal Convictions"); Katherine A. Brady, *California Criminal Law and Immigration* (Immigrant Legal Resource Center, San Francisco, California 1997), Chapter 8 ("Post-Conviction Relief" by Norton Tooby); Manuel D. Vargas, *Representing Noncitizen Criminal Defendants in New York State, 3rd edition* (New York State Defenders Association, Albany, New York 2003), Section 5.3.M ("Seek post-judgment relief").

In *Rodriguez-Ruiz*, the Board distinguished the New York State statute under which Mr. Rodriguez-Ruiz' conviction was vacated from an expungement statute or other rehabilitative statute. Thus, it may be important for an individual whose conviction has been vacated to show that the vacatur is based on legal error in the underlying criminal proceedings as opposed to an expungement or other rehabilitative statute. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (held that a conviction vacatur was ineffective to eliminate its immigration consequences since the "quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes."); *Ali v. Ashcroft*, 395 F.3d 722, 728-29 (7th Cir. 2005) (deferring to *Matter of Pickering*, held that a state conviction remained valid for immigration purposes even though it was amended to a misdemeanor by the state court). However, some federal courts, including the Sixth Circuit in reversing *Matter of Pickering*, have put the burden on the government to show that the vacatur was solely to avoid adverse immigration consequences or other rehabilitative reasons, as opposed to legal defect. See *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006); *Nath v. Gonzales*, 467 F.3d 1185, 1188-89 (9th Cir. 2006) (held that the DHS has the burden of showing that a vacated conviction remains valid for immigration purposes); see also discussion above under "Deny deportability or inadmissibility – Deny 'conviction' – The criminal conviction has been vacated"; [but see *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006) (held that the BIA did not err in placing the burden on the alien to show the effect of convictions which were vacated or modified after final orders of removal had entered because such a position was not contrary to the applicable statutes, which did not address the burden in such situations, was consistent with BIA regulations, and served the interest of finality)].

If an individual's conviction is vacated subsequent to entry of a removal order based on the conviction, the agency should reopen the removal case to consider whether the conviction still counts for immigration purposes. See *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th cir. 2006); *Cruz v. AG of the United States*, 452 F.3d 240 (3d Cir. 2006); *see also Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) (granting motion to reopen where conviction that supported petitioner's deportation had been vacated based on defects in underlying proceedings); *Cruz-Sanchez v. INS*, 438 F.2d 1087, 1088-89 (7th Cir. 1971) (noting the BIA's position that the proper way to attack deportation based upon a subsequently vacated conviction is in a motion to reopen); [but see *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007) (Where the respondent presented no evidence to prove that his conviction was not vacated solely for immigration purposes, he failed to meet his burden of showing that his motion to reopen should be granted)].

Finally, where an individual is re-sentenced to a shorter prison sentence, the new sentence counts for immigration purposes. See *Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005) (trial court's decision to modify or reduce an alien's criminal sentence nunc pro tunc is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction); *Matter of Song*, 23 I&N 173 (BIA 2001).

- **Congressional private bill**

  See Robert Hopper and Juan P. Osuna, "Remedies of Last Resort: Private Bills and Deferred Action," *Immigration Briefings*, No. 97-6 (Federal Publications, Washington, D.C., June 1997).

- **Executive pardon**

  See INA 237(a) (2) (A) (v).

Seek release from detention after removal order

The Supreme Court has struck down the government's practice under the current immigration statute of indefinitely detaining individuals who have been ordered deported or removed after having "entered" the United States, but whom the government is unable to deport or remove. See *Zadvydas v. Davis,* 533 U.S. 678 (2001). Noting the serious constitutional problem that would arise if the immigration statute were read to permit indefinite or permanent deprivation of human liberty (at least with respect to individuals who had formally "entered" the United States, as opposed to being stopped at the border or only "paroled" into the country), the Court interpreted the statute to limit post-order detention to a period reasonably necessary to bring about the detainee's removal from the United States. For the sake of uniform administration in the federal courts, the Court stated that six months would be a presumptively reasonable period of detention to effect a detainee's removal from the country. If removal is not accomplished within this period, the Court indicated that the individual should be released if "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." The Supreme Court has extended the rationale of its *Zadvydas* decision to individuals ordered excluded or removed after being stopped at the border or "paroled" into the country because the Court read the statute's post-order detention provisions to prohibit indefinite detention and these statutory provisions do not distinguish between different groups of detainees. See *Clark v. Martinez*, 543 U.S. 371 (2005).

If failure to remove is due to an individual's securing of a stay of removal pending court review of his or her removal order, one court has found that this does not mean that the individual may be denied meaningful consideration for release pending the court's review of the removal order. See *Oyedeji v. Ashcroft*, 332 F. Supp.2d 747 (M.D. Pa. 2004).

In addition, while the government may condition release upon the posting of a bond, one court found that the bond must be reasonable and appropriate under the circumstances and held that a bond that had the effect of preventing an immigrant's release because of inability to pay and resulted in potentially permanent detention was presumptively unreasonable. See *Shokeh v. Thompson*, 369 F.3d 865 (5th Cir. 2004).