IMMIGRATION DEFENSE FOR DEFENSE COUNSEL

An elementary resource and training guide for defenders

by Lory Diana Rosenberg

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National Legal Aid & Defender Association

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I. INTRODUCTION

Unlike United States citizens, most immigrants and refugees who are convicted of a crime face an additional penalty - removal from the United States. Over the past decade, the type and number of criminal offenses that trigger removal under the Immigration and Nationality Act ("INA") have increased exponentially. At the same time, administrative discretion to waive inadmissibility or deportability based on a conviction has been restricted dramatically. And, the INA and the United States Sentencing Guidelines ("USSG") provide stringent criminal penalties for convictions of illegal re-entry after removal.

A defendant's eligibility to come to or remain in the United States, as well as the possibility of avoiding either persecution or torture in his or her home country or permanent separation from his or her family, employment, and community in this country, may be at stake. Even with the recent escalation of immigration consequences, defense strategy pursued by state and federal defense counsel can make a critical difference. For that reason, it is imperative that criminal defense counsel understand the fundamental principles governing the immigration consequences of convictions.[1]

Armed with the immigration basics, defense counsel can formulate the right questions and obtain needed information from his or her client.[2] By developing an understanding of the methodology used to assess specific criminal charges in relation to individual immigration violations, a defender may be able to devise alternate pleas and sentences that can resolve certain criminal charges without immigration consequences. An informed defender also will know when to contact and seek assistance from an immigration law expert in this area of law. To a noncitizen, effective defense representation can mean the difference between deportation or removal and the chance to obtain refugee protection, to immigrate, or to continue working and living with one's family in the United States.

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[1] *Disclaimer: This guide is intended to provide state and federal defenders with an overview of the fundamental terminology, legal concepts, and case law relating to the immigration consequences of convictions. It is not a comprehensive manual and does not purport to cover or cite to each and every relevant portion of United States immigration law relating to the consequences of criminal convictions. Although every effort has been made to ensure its accuracy, this guide is not meant to provide specific advice or a dispositive answer concerning the effect of any one particular offense, and it does not create a lawyer-client relationship.*

[2] *See, e.g.,* Glossary of Common Immigration Terms, Appendix A; Grounds of Inadmissibility and Deportability, Appendix C.

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II. COLLATERAL CONSEQUENCES AND THE DUTY OF EFFECTIVE COUNSEL

A. Duty of the trial court

1. Collateral consequences. The trial court has no duty to warn a defendant of the potential immigration consequences of his guilty plea.[3] *Brady v. United States, 397 U.S. 742, 755 (1970)* (ruling that the Due Process Clause requires the trial court to explain only the direct consequences of conviction).

- Although immigration consequences may follow by operation of law, immigration proceedings are civil in nature. *Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).*

- The consequence of deportation is not punishment imposed for the crime. *Galvan v. Press*, *347 U.S. 522, 530 (1954).*

2. State statutory advisements. Over twenty states require that trial judges advise defendants that immigration consequences may result from accepting a plea agreement. *INS v. St. Cyr, 121 S. Ct. 2271, 2291 n.48 (2001) (listing rules and statutes)*. These provisions vary, particularly in relation to the remedies that may exist for violation of their terms.[4]

B. Duty of defense counsel

In *INS v. St. Cyr, 121 S. Ct. 2271, 2291, n. 50 (2001),* the Supreme Court stated that "*competent defense counsel*, following the advice of numerous practice guides, would have advised [the defendant] concerning . . .[the importance of a prior provision of the immigration law waving many grounds of crime-related inadmissibility or deportability]" (emphasis added).

1. Standard 14-3.2(f) of the ABA Standards. The ABA standard requires that "to the extent possible, 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

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[3] *See generally*, Gabriel J. Chin & Richard W. Holmes, Jr., *87 Cornell L. Rev. 697* "Effective Assistance of Counsel and the Consequences of Guilty Pleas" (2003).

[4] *See* Appendix B. *See also* Arizona Rule 17.2 Study Committee, Report of the 17.2 Study (Oct. 8, 2003) (reviewing the state statutes of 21 jurisdictions), available at www. nationalimmigrationproject.org/crimmats

from entry of the contemplated plea."[5] The standard has been relied upon as authority to find counsel ineffective for failing to advise of immigration consequences. *See, e.g., People v. Garcia, 799 P.2d 413, 415 (Colo. Ct. App. 1990),* aff'd, *815 P.2d 937 (Colo. 1991).*

2. NLADA Performance Guidelines for Criminal Defense Representation.[6] The NLADA guidelines provide that a defender's initial interview should cover "the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, *immigration status* (if applicable), employment record and history."

- Guideline 6.2 states that plea negotiations require counsel to be aware of and inform the defendant of the impact of "consequences of conviction such as deportation, and civil disabilities."

- Guideline 6.3(a) requires that counsel "should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement."

- Guideline 8.2 states that counsel should be familiar with the sentencing provisions and options applicable to the case, such as "direct and collateral consequences of the sentence and judgment, including. . . (8) deportation."

3. Affirmative advice. Some state courts have ruled that, under certain circumstances, a non-citizen defendant is entitled to advice about immigration consequences from defense counsel. *See, e.g.*,

- *Segura v. State, 749 N.E.2d 496, 500, 507 (Ind. 2001)* (holding counsel's failure to advise of immigration consequences can constitute deficient and prejudicial performance, depending on counsel's knowledge of defendant's status, familiarity with consequences, and other evidence establishing a reasonable probability that defendant would not have pled guilty)

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[5] Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) (1999).

[6] National Legal Aid & Defender Association, *Performance Guidelines for Criminal Defense Representation* (1995).

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- *Aldus v. State, 748 A.2d 463 (Me. 2000)*(holding counsel's failure to explain that noncitizen defendant wanted to defer proceedings or to inquire if defendant wished to obtain information as to why INS was interested in her before entering her plea was ineffective assistance)

- *State v. Viera,760 A.2d 840 (N.J. Super. Ct. Law Div. 2000)*(finding that counsel ineffectively represented the interest of the defendant by circling "N/A" regarding deportation on the plea form without further inquiry, where she knew defendant had difficulty reading and writing English)

- *Ledezma v. State, 626 N.W.2d 134, 152 (Iowa 2001)*(discussing consular rights and containing dicta that "when representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws" and citing *Strickland v. Washington, 466 U.S. 668, 690* (1984))

- *People v. Pozo, 746 P.2d 523, 527 (Colo. 1987)* (en banc) (holding counsel must investigate relevant immigration law when counsel is aware defendant is a noncitizen)

- *People v. Soriano, 194 Cal. App. 3d 1470, 240 Cal. Rptr. 328, 235-36 (Cal. Ct. App. 1987)* ("What is uncontested is that counsel, knowing defendant was an alien . . . did not make it her business to discover what impact his negotiated sentence would have on his deportability.")

4. Affirmative misdadvice. In many jurisdictions, affirmative misadvice may form the basis for a finding that counsel was ineffective, including:

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- *Ghanavati v. State, 820 So. 2d 989 (Fla. 4th DCA 2002); State v. Sallato, 519 So. 2d 605 (Fla. 1988)*

- *In re Resendiz, 19 P.3d 1171, 1183 (Cal. 2001)*("We conclude that neither [the state statute requiring the court's warning] nor the collateral nature of immigration consequences constitutes a per se bar to an ineffective assistance of counsel claim based on counsel's misadvice about the adverse immigration consequences of a guilty plea.")

- *State v. Garcia, 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999)* (ordering a

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hearing to determine whether counsel provided misinformation about deportation and if so whether counsel's conduct "was within the range of competence demanded of attorneys in criminal cases.")

- *People v. Correa, 108 Ill. 2d 541, 485 N.E.2d 307, 309-12 (Ill. 1985)* (finding counsel ineffective for giving erroneous advice in response to the defendant's specific questions about deportation)

- *United States v. Russell*, 222 U.S. App. D.C. 313, 686 F.2d 35, 41-42 (D.C. Cir. 1982) (allowing defendant to withdraw guilty plea pursuant to former F.R. Crim. P. 32(d) because the U.S. Attorney incorrectly informed defendant that conviction would not subject him to deportation).

III. FUNDAMENTAL PRINCIPLES

A. Who is subject to immigration consequences?

The only defendant who is ***not*** potentially subject to immigration consequences is a defendant who is an undisputed citizen of the United States.

1. Citizenship. A defendant may be a citizen because of birth in the United States, or through naturalization, or he or she may have derived or acquired citizenship by operation of law, according to the birthplace of his or her parents or grandparents, or the timing of a parent or parents naturalization. Citizenship and naturalization standards are extremely complex, and call for specific research and/or expert consultation before making a determination.[7]

In some cases, a defendant who actually is a citizen may not realize that he or she, in fact, derived citizenship as the result of one or both parents' naturalization occurring while he or she was under eighteen and residing with the parent or parents as a lawful permanent resident. It is equally likely that a defendant may believe that he or she is a citizen because other family members naturalized, when, in fact, the defendant never became a citizen. In

[7] For an excellent discussion of the various forms of citizenship ad the effect f naturalization, accompanied by all of the relevant statutory charts, *see* Kurzban, *Immigation Law Sourcebook, Ninth Edition*, American Immigration Law Foundation (April 2004).

some families, immigration status is not discussed and many young adults who came to the United States at a very early age simply presume that they are citizens.

2. Non-citizens. A defendant may be subject to removal and other immigration consequences in connection with a conviction or criminal conduct. The non-inclusive list of those affected can include someone who

- is living in the United States as a lawful permanent resident ("LPR")
- is a refugee, or is seeking or has been granted asylum
- is in the United States lawfully in a designated non-immigrant status
- has a naturalization application, or immigration status application, pending
- has been granted "temporary protected status"
- was previously adopted by U.S. citizen parents
- has U.S. citizen or lawful resident parents, children or spouses
- has "employment authorization,"
- has "ABC" class membership or "family unity" status
- has lived in the United States since infancy or childhood
- has medical needs that cannot be met in his or her country of nationality
- knows no one, cannot speak the language of his or her country of nationality

The question of citizenship must be determined as soon as possible. Discussion with your client concerning his or her immigration status - in the criminal defense context - is protected by the attorney-client relationship. If you or your intake staff discover any immigration status-related information during an initial or subsequent interview, it is critical to assess your client's actual citizenship or immigration status before providing any advice or taking any action in court. This determination is essential to effective representation.

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B. What are the immigration consequences of criminal offenses?

1. Removal. Any non-citizen convicted of an offense that constitutes a violation of the immigration law, *ie,* that constitutes a ground of inadmissibility or deportability under 8 U.S.C. §§ 1182 or 1227, INA §§ 212 or 237 may be either refused admission, or removed from the United States, *i.e.*, deported.[8]

2. Ineligibility for relief from removal. Certain convictions also may require or result in the denial of an application for various statutory exceptions, waivers, or benefits, including

- asylum or withholding of removal
- adjustment of status to that of a lawful permanent resident
- an immigrant or non-immigrant visa to come to the United States
- various waivers of inadmissibility
- cancellation of removal (two forms)
- naturalization

3. Illegal reentry after removal. Any non-citizen who re-enters or is found in the United States without the Attorney General's prior consent, after being deported, removed, or having departed under a removal order relating to certain convictions, is subject to criminal prosecution and, where applicable, to enhanced penalties. 8 U.S.C. § 1326, INA § 276. A conviction for this offense is an aggravated felony if the offender previously was removed for an aggravated felony. 8 U.S.C. § 1101(a)(43)(O), INA § 101(a)(43)(O).

C. When and where are these consequences likely to arise?

1. **Arrest and custody**. A defendant (referred to as a "respondent" in removal proceedings), may be arrested by an ICE agent with or without a warrant depending on the circumstances. ICE has 48 hours after making an arrest without a warrant in which to determine whether to charge the respondent, but he or she may be held for 72 hours or an

[8] *See* Grounds of Inadmissibility and Deportability, Appendix C.

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additional reasonable period of time in emergency circumstances. *See* 8 C.F.R. § 287.3(d).[9]

Ordinarily, a respondent who has been convicted of a criminal offense is served with a charging document called a notice to appear - NTA (formerly known as an order to show cause-OSC), which also contains an executed warrant for the arrest. If the respondent is serving a term of imprisonment, a detainer generally is issued together with the NTA. Issuance of a detainer may affect the level of penal facility in which the offender is incarcerated and compromise the defendant's eligibility to participate in various rehabilitative programs

If he or she is not imprisoned, ICE may take the individual directly into DHS custody.[10] This may occur at anytime and is happening with increasing frequency at the time a defendant appears for a meeting with his or her probation officer. In some cases these arrests are pre-arranged with probation officers.

- Bond, if any is authorized, is set by the DHS-ICE field director. The defendant may apply for release from custody in the location where he is being held in detention subsequent to his or her arrest. In the majority of cases, custody is *mandatory* under the statute based on conviction of a covered offense and there is no opportunity for a bond redetermination before an immigration judge. 8 U.S.C. § 1226©), INA § 236©). Mandatory custody rules *do not* apply to any individual who was released from criminal custody before October 9, 1998.

- In other cases, an immigration judge may review and re-determine the amount of bond that has been set. Conviction of a single crime involving moral turpitude is the only criminal offense that is not included in the statute authorizing mandatory custody. Likewise, the terms of custody of an individual released from criminal custody before October 9, 1998 may be reviewed by an IJ. Appeals from such re-determinations are directed to the Board of Immigration Appeals. Federal habeas corpus is available to

[9] *See also* Kurzban, *supra* at 234 (citing Asa Hutchinson Memorandum (Mar. 30, 2004) and USA Patriot Act of 2001, 8 U.S.C.§ 1226A, INA§ 236A (allowing 7 days to detain an individual who is to be charged as a terrorist)). Discussion of the full range of arrest and enforcement issues is beyond the scope of this guide.

[10] Discussion of the full range of custody and bond issues is beyond the scope of this guide.

challenge unlawful detentions.

- ICE may move the detainee out of the jurisdiction in which he or she was apprehended or arrested. Once the NTA is filed with an immigration court, venue is established in that district and the law of that circuit, or of the BIA, if no circuit law exists controls.

2. Removal hearing. Immigration consequences generally will arise in the context of an administrative removal hearing conducted before an immigration judge.

- Although it is a civil proceeding, this hearing is an adversarial one, in which the defendant may be represented by counsel ***only*** at his or her own expense and by his or her own arrangement.

- In a hearing in which the respondent was lawfully admitted, the burden is on ICE to prove the charges by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A), INA § 240(c)(3)(A).

- The respondent may apply for any form of relief from removal for which he or she is eligible, and is given the opportunity for an administrative appeal and some form of federal court review of an adverse decision. 8 U.S.C. § 1229a(b)(4), INA § 240(b)(4); *INS v. St. Cyr, supra.*

2. Expedited removal. Depending on the defendant's immigration status and the type of offense involved, removal may be ordered by an immigration enforcement officer without a hearing and based on only limited review of the decision. 8 U.S.C. § 1228, INA § 238. No waiver or benefit that might be considered in a hearing before an immigration judge is available. Expedited removal also may be ordered at the border or port of entry if a noncitizen does not have the proper documents. 8 U.S.C.§§ 1182 (a)(6)(7), INA §§ 212(a)(6)(7).

3. Time and location. Removal proceedings based on a conviction that constitutes an immigration violation may be initiated at any time, including

- during service of a sentence of incarceration in a jail or prison

- after service of sentence, following a violation of probation or parole

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- at the time of reporting to or registering with the INS, or reporting for probation
- when making an application for an immigration status governed by the INA
- when applying for naturalization
- upon return to the United States from travel abroad

IV. DEFINITION OF A CONVICTION UNDER THE INA

A. What constitutes a conviction for immigration purposes?

A "conviction" under immigration law is strictly defined under 8 U.S.C. § 1101(a)(48)(A), INA § 101(a)(48)(A). What constitutes a "conviction" is the subject of interpretation in decisions of the Board of Immigration Appeals ("BIA") and the various circuit courts of appeal. *See e.g., Matter of Roldan, 22 I&N Dec. 512 (BIA 1999).*[11] The definition contains two prongs.

1. Judgement or plea/admission. The first prong of the INA definition of conviction is satisfied, either, by a formal judgment of guilt entered by the court, or, if adjudication has been withheld,

- where the judge or jury found the defendant guilty or
- the defendant entered a plea of guilty or nolo contendre, or
- the defendant admitted sufficient facts to support a conviction. Caution: A defendant's stipulation to the accuracy or sufficiency of facts in a police report or probation report that is admitted in the pre-plea diversion context, may later be used to support a finding that there has been an admission to sufficient facts.

3. Punishment/restraint. The second prong of the definition of what constitutes a

[11] Board of Immigration Appeals decisions, collected in volumes designated "Immigration and Nationality Decisions," (*Matter of ____, I&N Dec.*) can be located at www.usdoj.gov/eoir.

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conviction for immigration purposes requires that "*the judge* has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." *(emphasis added)*. Punishment, penalty, or restraint on liberty may include

- Imposed jail time (whether or not suspended)
- Probation
- Participation in rehabilitative programs
- Community service
- Restitution
- Payment of fines

Payment of court costs may not constitute a punishment, penalty or restraint on liberty. However, this will only later be determined in a removal or other immigration proceeding.

4. Finality. Prior to the amendments made in 1996, a conviction on direct appeal was not considered a final conviction for immigration purposes. This principle has been called into question by the 5th circuit. *See Moosa v. INS, 171 F.3d 994, 1002 (5th Cir. 1999*). The issue of whether "finality" of conviction is required to support a charge of deportability or inadmissibility based on a conviction as defined under the current statute has not been definitively ruled upon by the Board of Immigration Appeals.

B. Which law controls in immigration proceedings?

In general, any adjudication and disposition that satisfies the two prongs in the statutory defnition of "conviction" is a conviction. Accordingly, a disposition in a state prosecution that is not considered a "conviction" under state law may very well constitute a "conviction" under the INA for immigration purposes. *Matter of Salazar, 23 I&N Dec. 223, 231 (BIA 2002).* The only exceptions occur under federal law. For example, a federal disposition that is deemed not to constitute a conviction, such as an adjudication in a federal prosecution under the Federal First Offender Act ("FFOA") or the Federal Juvenile Delinquency Act ("FJDA"), may be honored. *Id. at 231 and n. 4*.

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C. Which dispositions may not constitute convictions?

1. Diversion provisions. A disposition under a pre-plea diversion statute does not constitute a conviction. *Matter of Grullon*, *20 I&N Dec. 12 (BIA 1989).* Unlike an adjudication that is withheld after a plea or admission, no plea is taken.

2. Penalty not imposed by judge. In *Griffiths v INS, 243 F.3d 45 (1st Cir. 2001),* a Massachusetts guilty-filed disposition that was re-entered after the original disposition had been vacated was insufficient to establish a conviction where the record contained no evidence that probation or other restraint on liberty had been imposed.

3. Juvenile or youth offender dispositions. A juvenile court disposition of delinquency or a disposition comparable to it is not a conviction for immigration purposes. *Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981).* Similarly, a youthful offender disposition under a state statute deemed comparable to the FJDA is not a conviction. *Matter of Devison, 22 I&N Dec. 1362 (BIA 2000).*

4. Vacation of judgment. A conviction that a trial or appeals court vacates because it is legally defective will not constitute a conviction for immigration purposes. *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz,* 22 I&N Dec. 1378 (BIA 2000); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970). Possible legal defects include,

- Fifth and Sixth Amendment violations relating to admonitions
- The trial court's failure to follow a required state advisement regarding immigration consequences
- Affirmative misadvice from counsel, prosecutor or trial court about collateral consequences constituting ineffective counsel or violation of due process

The trial court's decision vacating a conviction on such grounds, is to be respected as a matter of comity. *Matter of Rodriguez-Ruiz, supra; Matter of Sirhan*, supra. at 600 ("On the contrary, when a court acts within its jurisdiction and vacates an original judgment of conviction, its action must be respected."). *See also Sandoval v. INS, 240 F.3d 577 (7th Cir. 2001)* (citing *Matter of Kaneda, 16 I. & N. Dec. 677, 680 (BIA 1979)*). Likewise, a guilty plea dismissed nolle prosequi after a motion for a new trial is not a conviction for immigration purposes. *Matter of O'Sullivan, 10 I&N Dec. 320 (BIA 1963).*

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In contrast, a conviction that a trial court vacates for equitable reasons remains a conviction for immigration purposes. A state court writ of audita querela will be honored only if there is "a legal defect in the conviction, or in the sentence which taints the conviction. Equities or gross injustice, in themselves, will not satisfy the legal objection requirement and will not provide a basis for relief." *Doe v. INS, 120 F.3d 200, 203 (9th Cir. 1997* (quoting *United States v. Johnson, 962 F.2d 579, 582 (7th Cir. 1992)*). *See also Beltran-Leon v. INS, 134 F.3d 1379 (9th Cir. 1998).*

Similarly, a valid vacation of conviction under the All Writs Act has been held to continue to constitute a conviction for immigration purposes. *Renteria v. INS, 310 F.3d 825 (5th Cir. 2002), vacated by, in part, substituted opinion in part at Renteria-Gonzalez v. INS*, *322 F.3d 804 (5th Cir. 2003)*.

5. Rehabilitative dismissals and expungements. Most rehabilitative expungements do not nullify a conviction for immigration purposes. Nevertheless, a dismissal or expungement under the Federal First Offender Act, 18 U.S.C. § 3607, or a state counterpart, may not constitute a conviction for immigration purposes. In cases arising within the jurisdiction of the Ninth Circuit, an offender who is accorded rehabilitative treatment under a state statute and *would have been eligible* for federal first offender treatment under the provisions of the FFOA, had he been prosecuted under federal law, is not considered to have a conviction for immigration purposes. *Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000).*

All other cases are subject to the decision of the BIA in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)(holding that dispositions under state counterparts to the Federal First Offender Act are convictions for immigration purposes). *See also Matter of Salazar, 23 I&N Dec. 223, 231 (BIA 2002).*

Several courts have rejected challenges to *Matter of Roldan's* holding by pointing to facts that distinguish the period of probation imposed under state law from that authorized under the FFOA. The Eighth Circuit found it rational to treat a petitioner who was sentenced to ten years of probation and served two years differently from a noncitizen sentenced to one year of probation, who would have been eligible for FFOA relief. *Vasquez-Velezmoro v. INS*, *281 F.3d 693, 698 (8th Cir. 2002).* The Eleventh Circuit likewise found that a noncitizen sentenced to two years of state probation could not succeed on an equal-protection claim comparing his treatment under the immigration laws to the treatment of those who would be eligible under the FFOA for one year of probation. *Fernandez-Bernal v. Attorney General of*

the United States, 257 F.3d 1304 , 1316-17 (11th Cir. 2001).

In addition, a conviction that has been expunged under state law continues to qualify as a conviction for immigration purposes. *Murillo-Espinoza v. INS, 261 F.3d 771, 774 (9th Cir. 2001)* (holding that theft conviction resulting in an 18 month sentence following a probation violation that was expunged under Arizona law supported removal based on an aggravated felony conviction). *See also Ramirez-Castro v. INS, 287 F.3d 1172 (9th Cir. 2002)* (holding that a misdemeanor firearms conviction expunged under California law remains a conviction for purposes of federal law).

In *Herrera-Inirio v. INS, 208 F.3d 299, 305 (1st Cir. 2000)* , the First Circuit ruled that "[s]tate rehabilitative programs that have the effect of vacating a conviction other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case have no bearing in determining whether an alien is to be considered 'convicted' under section 1101(a)(48)(A)." Similarly, the Second Circuit has held that a Certificate of Relief under New York law "does not eradicate or expunge the underlying conviction [citation omitted]. . . .[and] does not immunize [the petitioner] from the deportation consequences of that conviction. *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001).

V. DEFINITION OF A SENTENCE UNDER THE INA

A. Statutory definition

A "sentence" is specifically defined at 8 U.S.C. § 1101(a)(48)(B), INA §101(a) (48)(B). Both the applicability of many crime-related grounds of inadmissibility or deportability that depend on a conviction, and, a defendant's eligibility for some form of relief from removal, may turn on the particular language in the statute relating to the length of a sentence that is actually imposed, that could be imposed, or that was or will be served.

1. Suspended sentence. It is the actual sentence to incarceration or confinement imposed by the court – *regardless of the time suspended* – that counts for immigration purposes when the statute refers to a sentence that is imposed.

2. Probation. Probation does not constitute a period of incarceration or confinement. However, any jail time imposed as a condition of probation does constitute a sentence.

B. Effect on various criminal violations

A sentence to less than one year will prevent certain convictions, such as burglary, crimes of violence, obstruction of justice, from being classified as aggravated felony offenses for immigration purposes. *See e.g.*, 8 U.S.C.§§ 1101(a)(43)(F), (G), (S), INA §§ 101(a)(43)(F),(G), (S).

Certain convictions, including a crime of moral turpitude committed within 5 years of admission for which a sentence of more than one year may be imposed, a crime of moral turpitude subject to the petty offense exception, and certain espionage, sabotage, treason and sedition offenses under federal law, rely on a determination of the maximum period of imprisonment to which a convicted defendant could be sentenced. *See e.g.,* 8 U.S.C.§§ 1227(a)(2)(A)(i), (D)(i), 1182(a)(2)(A)(ii)(II), INA 237(a)(2)(A)(i), (D)(i), 212(a)(2)(A)(ii)(II). In addition, the crimes of failure to appear to answer charges or to serve a sentence, which are aggravated felony offenses, also depend on the sentence that *could be* imposed. 8 U.S.C. 1101(a)(43)(Q), (T), INA §§ 101(a)(43)(Q),(T). Adjudications under these provisions are likely to be affected, at least prospectively, by the 2004 decision of the Supreme Court in *Blakely v. Washington, 02-1632 (S.Ct. 2004)*.

C. Modification

The vacation or modification of a sentence, even after the sentence has been served, may avoid immigration consequences. *Matter of Song, 23 I&N Dec. 173 (BIA 2001).*

VI. CONVICTIONS THAT CONSTITUTE IMMIGRATION VIOLATIONS

A. What types of crimes trigger immigration consequences?

The INA covers broad categories of criminal offenses, most of which require a conviction to constitute a ground of inadmissibility or deportability. Some immigration consequences relating to inadmissibility are satisfied by a proper admission to the commission of the offense. Both defense counsel and his or her non-citizen client need to understand the potential immigration consequences that are likely to attach to a particular plea to an offense or a particular disposition that may constitute an immigration violation.

The types of offenses triggering immigration consequences include crimes involving moral turpitude (such as forms of assault, theft, fraud, abuse), relating to controlled substances, and firearms; aggravated felonies (such as murder, rape, drug trafficking, robbery, arson, shoplifting, burglary, deceit, money laundering, failure to appear, illegal reentry); crimes of domestic violence, stalking, child abuse, money laundering, fraudulent document use, and other specific offenses.

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Offenses that reference crimes "relating to" the named offense are interpreted more broadly than those that reference crimes "described in" or "defined in" another section of a statute.

1. Common predicate offenses. The most prominent crime-related grounds of both inadmissibility *and* deportability are those involving moral turpitude and relating to a controlled substance. As interpreted by the Board of Immigration Appeals and the federal courts, some offenses falling in these categories include,[12]

♦ Crime involving moral turpitude ("CIMT"), 8 U.S.C. §1182(a)(2)(A)(i)(I), INA §212 1182(a)(2)(A)(i)(I), and 8 U.S.C. §1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i).

a. The term "moral turpitude" lacks a precise definition. *Jordan v. De George, 341 U.S. 223, 229 (1951)* (fraud).

- The term "CIMT" refers to an act which is per se morally reprehensible and intrinsically wrong or malum in se, so that it is the nature of the act itself and not the statutory prohibition of it that renders a crime one of moral turpitude. *See Matter of Ajami, 22 I. & N. Dec. 949 (BIA 1999)* (stalking).

- It includes "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Torres-Varela, 23 I. & N. Dec. 78, 83-84 (BIA 2001)*(DUI not a CIMT) *; Matter of Tran, 21 I. & N. Dec. 291 (BIA 1996)* (cohabitant abuse is a CIMT)*; Matter of Danesh, 19 I. & N. Dec. 669 (BIA 1988)* (assault on peace officer is a CIMT).

- A specific intent is not an absolute prerequisite to finding that a crime involves moral turpitude. *Matter of Torres-Varela, supra* (DUI not a CIMT).

b. The statute under which the conviction occurred controls the determination whether the crime is one of moral turpitude. *Matter of Short, 20 I. & N. Dec. 136, 137 (BIA 1989)*; *Matter of B-, 6 I. & N. Dec. 98, 106 (BIA 1954)* ("It is well settled that the presence or absence of moral turpitude must be determined, in the first

[12] *See* Grounds of Inadmissibility and Deportability, Appendix C. Discussion of some of these selected grounds is adapted, in part, from earlier compilations. Brady and Kesselbrenner, "Grounds of Deportability and Inadmissibility Related to Crimes," www.nationalimmigration project.org.

instance, from a consideration of the crime as defined by the statute; that we cannot go behind the judgment of conviction to determine the precise circumstances surrounding the commission of the crime").

Thus, under a categorical approach, where a statute is "divisible," *ie,* where it describes some offenses that do constitute moral turpitude and some offenses that do not, it may not be possible to establish that the conviction is for a crime that qualifies as an immigration violation. *See e.g., Hamdan v. INS, 98 F.3d 183 (5th Cir. 1996)* (according to the terms of the statute, a conviction under Louisiana law for kidnaping may not involve moral turpitude)*; Goldesthtein v. INS, 8 F.3d 645 (9th Cir. 1993)* (same, relating to financial offense).

- Bad checks. Moral turpitude depends on whether fraud is an element of the offense. *Compare Matter of Balao, 20 I&N Dec. 440 (BIA1992)* (holding that offense of passing bad checks involves moral turpitude because fraud was an element of offense) *with Matter of Bart, 20 I&N Dec. 436 (BIA 1992)* (holding that offense of passing bad checks does not involve moral turpitude because fraud was not an element of the offense).

- Assault.

  ✓ Simple assault does not involve moral turpitude. *Matter of Short,* 20 I&N Dec.136 (BIA 1989); *Matter of S,* I&N 688 (BIA 1962).

  ✓ An assault offense that requires a mental state of criminal recklessness does not involve moral turpitude unless the statute also requires that the assault result in serious bodily injury. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

  ✓ An assault offense where injury to a spouse or child is an element of the offense involves moral turpitude. *INS v. Grageda, 12 F.3d 919 (9th Cir. 1993); Matter of Tran, 21 I&N Dec. 291 (BIA 1996).*

  ✓ An assault with a deadly weapon is a conviction for a crime involving moral turpitude. *Matter of Logan, 17 I&N Dec.367 (BIA 1980).*

- Fraud. A conviction for an offense in which fraud is an essential element of the crime always involves moral turpitude. *Jordan v. DeGeorge*, 341 U.S.

223 (1951).

- Structuring Transactions. Structuring transactions to avoid a reporting requirement in violation of 31 U.S.C. § 5324 does not involve moral turpitude. *Matter of L-V-C*, 22 I&N Dec. 594 (BIA 1999).

- Theft. An offense that includes as an element the intent to deprive the rightful owner *permanently* of his or her property involves moral turpitude. *See Matter of Grazley, 14 I. & N. Dec. 330 (BIA 1973)* (recognizing that "theft" requires an intent to deprive another of his property permanently); *Matter of D, 1 I&N Dec. 143 (BIA 1941).*

  - ✓ Theft constitutes a conviction for a crime involving moral turpitude. *Matter of De La Nues, 18 I&N Dec.140 (BIA 1981)*.

  - ✓ Joyriding does not involve moral turpitude because statute included temporary taking of a motor vehicle. *Matter of M, 2 I&N Dec. 686 (BIA 1946)*. *See also Matter of P, 2 I. & N. Dec. 887 (BIA 1947)*(holding neither breaking and entering nor joyriding under Canadian statute constitute theft or a crime of moral turpitude);

  - ✓ Possession of stolen property involves moral turpitude without regard to the triviality of the offense. *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000).

- Driving Under the Influence. Driving under the influence (DUI) in which knowledge or intent is not an element is not a crime involving moral turpitude.

  - ✓ A second or third conviction for such a DUI offense does not change the character of the offense – it does not involve moral turpitude. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

  - ✓ A noncitizen's conviction for *aggravated* driving under the influence after license revocation *does* involve moral turpitude when an element of the offense was that the defendant knew or should have known that the authorities had revoked his license. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).

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♦ Controlled substance offenses, 8 U.S.C. §1182(a)(2)(A)(i)(II), INA §212 1182(a)(2)(A)(i)(II), and 8 U.S.C. §1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i)

a. The controlled substance must be one listed within the Controlled Substances Act and its appendices. A record of conviction that does not identify the particular drug cannot support an order of deportability. *Matter of Paulus, 11 I&N Dec. 274 (BIA 1965).*

b. The " relating to" language in § 1227(a)(2) (B)(i) is construed broadly, but has its limits. *Luu-Le v. INS, 224 F.3d 911, 915-16 (9th Cir. 2000).*

- A conviction for solicitation to possess a controlled substance is not "related to" controlled substance, and therefore, not a deportable offense under the controlled substance ground of deportability. *Coronado-Durazo v. INS, 123 F.3d 1322 (9th Cir. 1997)* (drawing a negative implication from the statutory language that specifically includes "attempts or conspiracies" but not solicitation). *See also Leyva-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999).*

- A conviction for misprision of a felony is not a crime "relating to " a controlled substance. *Castenada de Esper v. INS, 557 F.2d 79, 83-84 (6th Cir. 1977).*

- The offense of accessory after the fact to a drug-trafficking crime, pursuant to 18 U.S.C. § 3, is not considered an inchoate crime and is not sufficiently *related to* a controlled substance violation to support a finding of deportability pursuant to 8 U.S.C.§ 1251(a)(2)(B)(i), INA § 241(a)(2)(B)(i). *Matter of Batista, 21 I&N Dec. 955 (BIA 1997).*

2. Other grounds of inadmissibility or deportability, cited in full in Appendix C, Grounds of Inadmissibility and Deportability, include,

- multiple offenses with an aggregate sentence of 5 years or more

- 2 crimes involving moral turpitude not arising from a single scheme of misconduct

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- firearms offenses (other than enhancements)
- crimes of domestic violence, stalking, child abuse or neglect
- violation of a protective order
- crimes relating to fraud, misuse of visas or registration requirements
- smuggling offenses

3. A conviction for an aggravated felony occurring at any time after admission is a ground of deportability. The statutory definition of "aggravated felony," applies to a broad range of offenses, and as interpreted by the Board of Immigration Appeals or the federal courts, includes,

♦ Aggravated felony, 8 U.S.C.§ 1101(a)(43)(A)-U, INA §101(a)(43)(A)-U

- Murder, rape, sexual abuse of a minor 8 U.S.C.§ 1101(a)(43)(A), INA §101(a)(43)(A).

a. Murder includes murder in the third degree. *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998). A manslaughter conviction may be a crime of violence, but it is not murder. *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

b. Statutory rape is included in rape. If the elements of the offense satisfy the definition in 8 U.S.C.§ 1101(a)(43)(F), INA§101(a)(43)(F), it also may constitute a crime of violence. *Matter of B*, (21 I&N Dec. 287 (BIA 1996). *See also Mugalli v. Ashcroft*, 258 F.3d 32 (2d Cir. 2001). *Cf. United States v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001)(distinguishing earlier decisions holding that statutory rape was not necessarily a crime of violence).

c. Sexual abuse of a minor has been interpreted using 18 U.S.C. § 3509(a)(8) as a reference against which to evaluate the elements of state offenses.

✓ A conviction for indecency with a child is a conviction that constitutes sexual abuse of a minor even if it is possible to commit the offense without touching the minor victim. *Matter of Rodriguez-Rodriguez, 22 I&N Dec. 911 (BIA 2000).*

✓ A conviction for criminal sexual assault under Illinois law constitutes sexual abuse of a minor. *United States v. Martinez-Carillo*, *250 F.3d 1101 (7th Cir. 2001); Guerrero-Perez v. INS, 242 F.3d 727, 730 (7th Cir. 2001)*.

✓ A misdemeanor conviction for sexual abuse of a minor violates 8 U.S.C. § 1101(a)(43)(A). *Matter of Small, 23 I&N Dec. 448 (BIA 2002).*

• llicit trafficking and drug trafficking, 8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B)

a. Illicit trafficking is defined as "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." The agency has interpreted the definition as having two parts, separated by a comma. *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002) (discussing history of administrative and judicial interpretation of the definition).

✓ The phrase "illicit trafficking" covers the main clause

✓ The phrase "drug trafficking crime" covers the subsidiary clause

b. Illicit trafficking is any offense involving trading or dealing according to the common meaning of "illicit trafficking," and is punishable by more than one year. *Matter of Davis, 20 I&N Dec. 536 (BIA1992).*

c. A "drug trafficking crime" turns on the wording of 18 U. S.C. § 924(c), an enhancement provision which defines a drug trafficking crime as 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*.)." In turn, the Controlled Substances Act covers "*any state* or federal *felony*."

✓ If the state designates a conviction for simple possession of a controlled substance as a felony, the offense is an aggravated felony, despite the fact that the same offense is punishable only as a

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misdemeanor under federal law . *See Matter of Yanez, 23 I&N Dec. 390 (BIA 2002), overruling Matter of K-V-D, 22 I&N Dec. 1163* (BIA 1999) and *Matter of L-G, 20 I&N Dec.905 (1995).*

✓ If the state designates a simple possession conviction as a misdemeanor, neither a first nor a second conviction will constitute an aggravated felony. *Matter of Santos-Lopez, 23 I&N Dec. 419 (BIA 2002); See also Matter of Elgendi, 23 I&N 515 Dec. (BIA 2002).*

✓ A state offense that does not correspond to a crime that is punishable under the Controlled Substance Act or the other federal acts cited in 18 U.S.C. **§** 924(c)(2) cannot constitute a conviction for an aggravated felony whether designated a misdemeanor or a felony. Therefore, a state conviction for a crime such as being under the influence of a controlled substance, or, possession of paraphernalia will not be designated an aggravated felony. However, the offense may be a crime "relating to" a controlled substance included in the Controlled Substances Act.

- Firearms and explosives offenses, 8 U.S.C. 8 U.S.C. §§ 1101(a)(43) (C), (E), INA §§ 101(a)(43) (C), (E)

a. Under 8 U.S.C. § 1101(a)(43) (C), INA § 101(a)(43) (C), firearms "trafficking" may include crimes that have a mercantile nature even if distribution is not an element of the offense. *Kuhali v. INS, 266 F.3d 93 (2d Cir. 2001).*

b. Possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code is an aggravated felony under section 101(a)(43)(E)(ii) of the Act because it is "described in" 18 U.S.C. § 922(g)(1) (1994). *Matter of Vasquez-Muniz, 23 I&N Dec. 207 (BIA 2002).*

- Crime of violence (for which at least 1 year imprisonment is imposed), 8 U.S.C.§ 1101(a)(43)(F), INA § 101(a)(43)(F).

a. A crime of violence includes an offense in which either, the actual, attempted or threatened use of force is an element, 18 U.S.C. § 16(a), or, is any felony that by its

nature presents a substantial risk that force will be used against person or property in the course of commission of the offense, 18 U.S.C.§ 16(b).

- ✓ The terms of 18 U.S.C. § 16(a) generally rely on force being an articulated element of the offense. *United States v. Wilson*, 951 F.2d 586 (4th Cir. 1991); *see also United States v. Innie, 7 F.3d 840, 850 (9th Cir. 1993)* (ruling that an element is "a 'constituent part' of the offense which must be proved . . .to sustain a conviction under a given statute") (quoting *United States v. Sherbondy, 865 F.2d 996, 1010 (9th Cir.1988)*).

- ✓ Some courts, including the BIA have found that 18 U.S.C. § 16(a) may encompass a misdemeanor offense in which the use of force is not specifically articulated as an element. *Matter of Martin 23 I&N 491 (BIA 2002)* (construing Connecticut misdemeanor assault as a crime of violence). *Cf. Chrzanoski v. Ashcroft*, *327 F.3d 188, 191 (2d Cir. 2003).*

- ✓ The terms of 18 U.S.C. § 16(b) may or may not include involuntary manslaughter. *Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994).*

- ✓ Where the statute under which the respondent is convicted is divisible, covering reckless as well as negligent conduct that may or may not involve the "use of force" or the risk that "force may be used," the record of conviction and any other admissible documents is reviewed to determine if the specific offense of which the alien was convicted satisfies the aggravated felony definition. *See Matter of Sweetser, 22 I&N Dec. 709, 714 (BIA 1999).* See also Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003) ("[i]t is possible to focus on 'the elements' of [battery]. . . as § 16(a) requires, without encountering any ambiguity, and thus without looking outside the statutory definition").

b. An offense in which there is no intentional, or at least reckless, mens rea requirement is unlikely to involve the "use of force" or a substantial risk that "force may be used."

- ✓ Driving under the influence is not a crime of violence as defined under 18 U.S.C. § 16(a) or (b). *Matter of Ramos, 23 I&N Dec. 336 (BIA*

2002); *see also Dalton v. Ashcroft, 257 F.3d 200, 207-08 (2d Cir. 2001)* (distinguishing the risk of injury and the "use of physical force" under 18 U.S.C. § 16(b)); *Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001).*

✓ An offense that requires only proof of criminal negligence, is not an offense that, by its nature, involves a substantial risk that physical force may be used in its commission. *See e.g., States v. Gracia-Cantu, 302 F.3d 308, 311-12 (5th Cir. 2002)*; *Francis v. Reno, 269 F.3d 162, 172-73 (3d Cir. 2001); Matter of Sweetser, supra.; United States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992)* (indicating that "use of physical force" refers to an intentional act, and that although a drunk driver may risk causing injury, in most cases he does not intend to "use" force to cause this harm).

• burglary or theft (including receipt of stolen property (for which at least 1 year imprisonment is imposed), 8 U.S.C. § 1101(a)(43)(G), INA § 101(a)(43)(G)

a. A taking of property constitutes a theft offense regardless of whether a permanent taking of the property is an element of the offense. *Matter of V-Z-S, 22 I&N Dec. 1338 (BIA 2000). See also Hernandez-Mancilla v. INS, 246 F.3d 1002, 1009 (7th Cir. 2001).*

b. Attempted possession of stolen property constitutes an aggravated felony. *Matter of Bahta*, 22 I&N Dec. 1381(BIA 2000) (equating possession of stolen property and "receipt of stolen property")

c. A conviction for a "burglary" offense is not necessarily a conviction for an aggravated felony unless it comports with the federal definition of burglary established in *Taylor v. United States, 495 U.S. 575, 602 (1990)* (holding that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging document and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant"). *See Matter of Perez, 22 I. & N. Dec. 1325, 1326 (BIA 1999)*.

✓ A "burglary" under *Taylor* requires an unlawful entry *into a dwelling or*

structure with the intent to commit a felony. Accordingly, a conviction for burglary of an automobile is not a "burglary offense." *Solorzano-Patlan v. INS, 207 F.3d 869 (7th Cir. 2000).*

✓ A "burglary" under *Taylor* requires *an unlawful entry* into a dwelling or structure with the intent to commit a felony. Therefore, commission of a felony following a lawful entry into a building or structure such as a hospital or other public space, or into a home upon the owner's invitation, cannot meet the *Taylor* definition. *See e.g., U.S. v. Bonat, 106 F.3d 1472, 1475 (9th Cir. 1997)*(finding that state court interpretation impermissibly expanded the definition beyond the generic burglary definition endorsed by *Taylor*, because it supported a conviction even if the intent to commit the crime was formed after entering the structure and/or the entry was privileged).

- fraud or deceit, in which the loss to the victim exceeds $10,000, 8 U.S.C. § 1101(a)(43)(M), INA § 101(a)(43)(M)

a. Conviction of possession of counterfeit securities with an intent to deceive was not an aggravated felony conviction because the offense did not necessarily mean that the defendant *caused* a loss that exceeded $10,000. *Sui v. INS, 250 F.3d 105 (2d Cir. 2001)* (taking a categorical approach to the offense even where indictment alleged that defendant possessed checks totaling more than $22,000).

b. The victim does not need to suffer an actual loss where the amount can be determined from the fraud or deceit that was attempted. *Matter of Onyido, 22 I&N Dec. 552 (BIA 1999)* (holding that a failed insurance fraud in which the claim exceeded $10,000 was an aggravated felony because the offense qualified under the broad attempt provision in the aggravated felony definition. *See* 8 U.S.C. § 1101(a)(43)(U), INA § 101(a)(43) (U).

- Offense "relating to" alien smuggling, 8 U.S.C. § 1101(a)(43)(N), INA § 101(a)(43) (N)

a. Harboring or transporting offenses are considered to be "relating to alien smuggling." *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999), *aff'd Ruiz-Romero*

v. Reno, 205 F.3d 837 (5th Cir. 2000).

b. A first offense in which the smuggler has shown affirmatively that the offense was committed for the purpose of assisting, abetting or aiding only the smuggler's parent, spouse, or child to violation a provision of the INA is not an aggravated felony offense. *See* 8 U.S.C. § 1101(a)(43)(N), INA § 101(a)(43)(N).

- obstruction of justice (for which at least 1 year imprisonment is imposed), 8 U.S.C. § 1101(a)(43)(S), INA § 101(a)(43)(S)

a. A federal conviction for "accessory after the fact" comes within the aggravated felony definition for obstruction of justice. *Matter of Batista-Hernandez, 21 I&N Dec. (BIA 1997). Cf. Matter of Espinosa, 22 I&N Dec. 889 (BIA 1999).*

b. A federal conviction for misprision of felony is not obstruction of justice. *Matter of Espinoza, 22 I. & N. Dec. 889, 891 (BIA 1999)* (ruling that misprision of a felony is not a crime relating to obstruction of justice under INA § 101(a)(43)(S) because the elements of misprision "do not constitute the crime of obstruction of justice as that term is defined in the United States Code").

- illegal re-entry after conviction of an aggravated felony followed by deportation, 8 U.S.C. § 1101(a)(43)(O), INA § 101(a)(43) (O).

- Other aggravated felony offenses include,[13]
  - ✓ money laundering, where the amount of funds exceeded $10,000
  - ✓ child pornography offenses
  - ✓ RICO offenses, with a one-year sentence of one year imprisonment
  - ✓ national defense/security offenses

[13] *See* Appendix D.

- ✓ forging or falsifying a passport
- ✓ commercial bribery, counterfeiting or forgery, with a one-year sentence
- ✓ any attempts or conspiracies to commit an aggravated felony offense

B. What exceptions exist?

1. Statutory exceptions. Some limited exceptions to crime-related grounds of inadmissibility and deportability may be applicable.

- Statutory exceptions to one crime involving moral turpitude that constitutes a ground of inadmissibility are the juvenile (under 18) exception, and the minor (petty offense) offense exception. *See* 8 U.S.C. §§1182 (a)(2)(A)(ii)(I), (II), INA §§ 212(a)(2)(A)(ii)(I),(II).
- There is an exception to the controlled substances ground of deportability in cases that involve only a single conviction of possession of less than thirty grams of marijuana. 8 U.S.C. § 1227(a)(2)(B), INA § 237(a)(2)(B).
- There is an exception for a first smuggling offense that involves a single family member, which prevents a conviction relating to smuggling from constituting an aggravated felony offense. 8 U.S.C. § 1101(a)(43)(N), INA § 101(a)(43) (N).

2. VAWA exceptions. The Violence Against Women Act incorporates several exceptions to crime-related immigration violations, which may be waived as a matter of discretion in the case of a qualifying applicant for an immigrant visa or cancellation of removal under the VAWA provisions. *See e.g.,* 8 U.S.C. §§ 1154(a)(iii), (b)(ii); 1229a(b); 1229a(b)(2), INA §§ 204(a)(iii), (b)(ii); 240A(b); 240A(b)(2). A conviction of a crime of domestic violence may be waived by a defendant who has been battered and is not the principal perpetrator. 8 U.S.C. §§ 1227 (A)(2)(E), (a)(7), INA §§ 237(A)(2)(E), (a)(7).

3. Pardons. Under 8 U.S.C. § 1227(a)(v), presidential and gubernatorial pardons,

which are unconditional, are authorized INA § 237(a)(v) to overcome crimes involving moral turpitude, multiple convictions, aggravated felony convictions and high speed flight, but not controlled substance convictions under 8 U.S.C. § 1227(a) (2)(B), INA § 237(a)(2)(B). *See Matter of Suh, 23 I&N Dec. 626 (BIA 2003).*

VI. HOW TO CONSTRUE STATE OFFENSES AND PLEA ALTERNATIVES

A. The first step in determining whether a state offense will amount to an immigration violation is to assess the specific criminal offense charged, as well as any alternate charges to which the defendant might plead.

1. Elements. Determine the elements necessary to sustain a conviction. Determining the nature of the conviction based on its elements often requires looking to state or federal decisional law interpreting the terms in the criminal statute.

2. Level of offense. If analyzing an offense in relation to whether it is a crime of violence, determine the sentence range and consider whether the offense is classified as a felony or misdemeanor under state law and federal law. For purposes of other provisions, the misdemeanor/felony distinction is generally not relevant.

B. The second step is to assess the immigration violation or violations potentially triggered by a conviction for the crime, and to determine the factors necessary to establish the existence of such a violation based on such a conviction.

1. Factors. If the elements of the offense in question do not correspond to the factors in the INA ground of inadmissibility or deportability necessary to establish the actual or potential immigration violation, the defendant may not be subject to removal or barred from relief from removal proceedings brought on other grounds.

2. Divisibility. If some of the elements of the state offense that must be proved to sustain a conviction would constitute an immigration violation, but a conviction could be obtained without proof of all of the factors necessary to constitute the immigration violation, then the state statute is considered "divisible."

- In such a case, the contents of the record of conviction (considered to include the indictment, information, plea, sentence and verdict) may be reviewed to determine whether the conviction is for a violation

described in the INA. *Matter of Short, 20 I. & N. Dec. 136, 137 (BIA 1989); Matter of Mena, 17 I&N Dec. 30 (BIA 1979).*

- This approach is similar to the "categorical approach" and "modified categorical approach" addressed in *United States v. Taylor, supra*, which is now followed by most federal courts to determine the nature of the predicate offenses in sentence enhancement cases. *See United States v. Corona-Sanchez, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc)* ("the idea of the modified categorical approach is to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive"); see also *See Chang v. INS, 307 F.3d 1185, 1189 (9th Cir. 2002).* Thus, under the modified categorical approach, the court may look beyond the statute at the charging document, jury instructions, and other "judicially noticeable facts."

- If the record of conviction does not reflect the necessary elements, the offense cannot support the immigration violation charged. *Matter of Pichardo, 21 I&N Dec. 330 (BIA 1996)*

  ✓ A police report is not part of the record of conviction. *Matter of Teixerira, 21 I&N Dec. 316 (BIA 1996).*

  ✓ Reliance on presentence reports is disfavored and rejected by some courts. *United States v. Corona-Sanchez, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc);*

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APPENDIX A

GLOSSARY OF COMMON IMMIGRATION TERMS[14]

Aggravated felony
A statutory term encompassing a broad range of criminal convictions. If a non-citizen has been convicted of an aggravated felony after admission, he or she will be subject to removal proceedings, ineligible for almost all forms of relief from removal, ordered removed (deported) from the U.S., and will face a permanent bar to ever returning. As defined, an "aggravated felony" does not necessarily include an "aggravating" factor, and may be a misdemeanor.

Alien
Any non-citizen, regardless of immigration status. This term is synonymous with "non-citizen."

Asylum
Asylum is a form of relief granted to non-citizens in the U.S. who demonstrate a well-founded fear of persecution (or having been persecuted in the past) in their native country on account of their race, religion, nationality, membership in a particular social group, or political opinion. A person granted asylum in the U.S. is called an "asylee," and can apply for lawful permanent residency one year after being granted asylee status.

Board of Immigration Appeals (BIA)
The administrative review body to which non-citizens or the DHS may appeal immigration judges' decisions in removal proceedings. The BIA is part of the Executive Office for Immigration Review (EOIR), a branch of the Department of Justice.

Crime involving moral turpitude (CIMT)
Immigration law does not define this term. However, administrative decisions have interpreted a crime of moral turpitude to be any "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality." A conviction for a CIMT can subject a non-citizen to removal proceedings.

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[14] This listing of immigration terminology is taken from *Representing Non-Citizen Criminal Defendants in the State of Illinois*, prepared by Lisa Palumbo, Ruth Edwards, Carol Waldman, and Cleo Kung of the Legal Assistance Foundation of Metropolitan Chicago, 111 W. Jackson Blvd., Suite 300, Chicago, Illinois 60604. An updated version is forthcoming in *Rosenberg, Understanding Immigration Consequences (2004).*

Department of Homeland Security (DHS)
The executive agency now responsible for immigration enforcement and benefits functions, which are administered through the Bureau of Immigration and Customs Enforcement (ICE) and the Bureau of Bureau of Citizenship and Immigration Services (BCIS).

Deportation
The process by which a person is removed from the U.S. for violations of the immigration laws, including criminal offenses.

Derivative citizen
A derivative citizen is one who automatically becomes a citizen upon the naturalization of one or both parents. A derivative citizen has all the rights and privileges of a native- born citizen. He or she cannot be deported from the United States, even if convicted of a criminal offense.

Discretionary relief
Any application to the immigration judge by which a non-citizen seeks to avoid removal from the U.S., and which requires not only proving up the statutory requirements, but also winning the judge's favorable exercise of discretion. Most applications filed with the INS are also discretionary in nature.

Divisible statute
A criminal statute that permits the State to charge an offense in various ways.. For immigration law purposes, the same statute may include some conduct that will result in removability, and some that will not. Where a conviction cannot be avoided, criminal defense counsel should seek a judgment under any provision of the criminal statute that will not result in removability.

Immigrant
An immigrant is a lawful permanent resident of the U.S. See "Lawful permanent resident," below.

Immigration judge
Immigration judges (IJs) are employees of the Executive Office for Immigration Review (EOIR), a branch of the Department of Justice, whose job it is to review actions by the INS, and to make decisions on removal of non-citizens. IJs and the immigration courts are not part of the INS. Decisions of the IJs can be appealed to the Board of Immigration Appeals (BIA).

Immigration and Nationality Act (INA)
The Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., is the statute that sets forth the immigration and nationality (citizenship) laws of the U.S.

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Immigration and Naturalization Service (INS)
The former agency within the Department of Justice with the dual role of adjudicating affirmative applications for immigration benefits, including legal admission to the U.S., and enforcing the immigration laws, including removal from the U.S. The INS has been eliminated and its components are absorbed within the Department of Homeland Security (DHS)

Lawful permanent resident (LPR)
A lawful permanent resident is entitled to live and work in the U.S., and to travel outside the U.S., but can be subject to removal proceedings if convicted of certain criminal offenses. This manual will refer to a lawful permanent resident as an "LPR."

Naturalization
The administrative process by which an LPR becomes a U.S. citizen.

Non-citizen
An immigrant, non-immigrant, or undocumented individual. This term is synonymous with "alien."

Non-immigrant
A non-immigrant holds a valid visa to remain in the U.S. for a certain period of time and for a certain purpose that does not include immigrating to the U.S. permanently. Some of the most common non-immigrant visas include student, visitor, and temporary worker visas. A non-immigrant can be subject to removal for violating the terms of his or her visa.

Refugee
A refugee has been determined by U.S. authorities abroad to have a well-founded fear of persecution in his or her native country on account of race, religion, nationality, membership in a particular social group, or political opinion. A refugee is granted "refugee status" abroad and is admitted to the U.S. as a "refugee." He or she can apply for LPR status one year later.

Removal
The process by which a person is deported or expelled from the U.S. for violations of the immigration laws, including criminal offenses.

Removal proceedings
The administrative proceeding by which an immigration judge determines whether a non-citizen is removable as charged by the INS, whether he or she is eligible for any relief from removal, and whether that relief will be granted or denied.

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Undocumented non-citizen
An individual who has no lawful status in the U.S. He or she may have originally entered lawfully, but overstayed his or her visa, or may have originally entered without any documents and "without inspection," i.e., by evading the normal port of entry or border checkpoint where documents are checked by an immigration agent.

Waiver
A discretionary application to the immigration judge (or in some circumstances, to the INS) to overcome the immigration law charges related to a criminal conviction.

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APPENDIX B

STATE IMMIGRATION CONSEQUENCES ADVISEMENT/WARNING STATUTES

Arizona [new 2004]

Cal.Penal Code Ann. § 1016.5 (West 1985)

Conn. Gen.Stat. § 54-1j (2001)

D.C.Code Ann. § 16-713 (1997)

Fla. Rule Crim. Proc. 3.172(c)(8) (1999)

Ga.Code Ann. § 17-7-93 (1997)

Haw.Rev.Stat. § 802E-2 (1993)

Md. Rule 4-242 (2001)

Mass. Gen. Laws § 278:29D (2004 Supp.)

Minn. Rule Crim. Proc. 15.01 (2000)

Mont.Code Ann. § 46-12- 210 (1997)

N.M. Rule Crim. Form 9-406 (2001)

N.Y.Crim. Proc. Law § 220.50(7)
(McKinney 2001 Cum.Supp. Pamphlet)

N.C. Gen.Stat. § 15A- 1022 (1999)

Ohio Rev.Code Ann. § 2943.031 (1997)

Ore.Rev.Stat. § 135.385 (1997)

R.I. Gen. Laws § 12-12-22 (2000)

Tex.Code Crim. Proc. Ann., Art. 26.13 (a)(4) (Vernon 1989 and Supp.2001)

Wash. Rev.Code § 10.40.200 (1990)

Wis. Stat. §971.08 (1993-1994).

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APPENDIX C

GROUNDS OF INADMISSIBILITY AND DEPORTABILITY[15]

Grounds of inadmissibility related to crimes

The criminal grounds of inadmissibility, which apply to an non-citizen seeking admission to the United States (even if previously admitted), are contained in the immigration statute at 8 U.S.C. § 1182(a)(2), INA § 212(a)(2):

Sec. 212(a)(2)(A)(I)(i)	conviction for one crime of moral turpitude (CIMT); "petty offense exception" where possible sentence of not more than one year and person did not receive more than six months; "juvenile exception" - juvenile offense and committed more than 5 years before request for admission;
Sec. 212(a)(2)(A)(I)(ii)	conviction of a violation of any controlled substance law (waiver available for a single offense of simple possession of 30 grams of less of marijuana);
Sec. 212(a)(2)(B)	two or more convictions for which the aggregate sentences to confinement are 5 years or more;
Sec. 212(a)(2)(C)	consular or immigration officer has "reason to believe" individual is a drug trafficker or is or has been a knowing assister, abettor, colluder, or conspirator to a drug trafficker;

Grounds of inadmissibility related to convictions or criminal conduct:

[15] This listing of immigration offenses in the statute is excerpted from *Immigration Consequences of Criminal Conduct*: *An Overview For Criminal Defenders, Prosecutors and Judges In Washington State,* by Ann Benson, Directing Attorney, Washington Defender Association's Immigration Project, with Joseph Justin Rollins and Mick Woynarowski.

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Sec. 212(a)(1)(A)(iii)	determined to have a physical or mental disorder that may pose or has posed a threat to the safety of the alien or others;
Sec. 212(a)(1)(A)(iv)	determined to be a drug abuser;
Sec. 212(a)(2)(D)	engaged in prostitution or commercialized vice;
Sec. 212(a)(6)(E)	engaged in alien smuggling.

Grounds of deportability relating to crimes

The grounds of deportability, which apply to any non-citizen who was lawfully admitted to the United States, including as a refugee, or to any non-citizen who is a lawful permanent resident, are contained in the immigration statute at 8 U.S.C. § 1227(a)(2), INA § 237(a)(2):

Sec. 237(a)(2)(A)(I)	conviction for one crime involving moral turpitude (CIMT), committed within 5 years of admission to U.S., for which sentence of one year or longer may be imposed;
Sec. 237(a)(2)(A)(ii)	convictions for two or more CIMTs, not arising out of single scheme of criminal conduct, regardless of sentence;
Sec. 237(a)(2)(iii)	conviction for an aggravated felony;
Sec. 237(a)(2)(B)(I)	conviction of a violation of any law relating to a controlled substance (exception for single offense of simple possession of 30 grams or less of marijuana);
Sec. 237(a)(2)(C)	conviction under any law of purchasing, selling, using, or possessing (or any attempt to purchase, sell, use or possess) a firearm or destructive device;
Sec. 237(a)(2)(D)	miscellaneous crimes (espionage, sabotage);
Sec. 237(a)(2)(E)(I)	conviction of a crime of domestic violence (as defined a 18 U.S.C. 16), stalking, child abuse, child neglect, child

	abandonment regardless of the length of sentence (Note: This provision applies to all DV convictions entered after September 30, 1996);
Sec. 237(a)(2)(E)(ii)	judicial determination of a violation of protection order involving protection against credible threats of violence, repeated harassment or bodily injury (Note: This provision applies to convictions entered after September 30, 1996);
Sec. 237(a)(3)(B)	conviction for violation of the alien registration requirements, or for fraud relating to the misuse or visas and other immigration documents.

Grounds of deportation for criminal conduct, even if there is no conviction:

Sec. 237(a)(2)(B)(ii)	drug abuse or drug addiction;
Sec. 237(a)(1)(E)	smuggling aliens into the U.S.

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APPENDIX D
AGGRAVATED FELONY CONVICTIONS

The aggravated felony definition covers convictions for offenses listed in the immigration statute under section 8 U.S.C. § 1101(a)(43), INA § 101(a)(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 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
>
> (C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);
>
> (D) an offense described in section 1956 of Title 18 (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, 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 (relating to firearms offenses); or
> (iii) section 5861 of Title 26 (relating to firearms offenses);
>
> (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least 1 year;
>
> (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least 1 year;
>
> (H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);
>
> (I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (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 (relating 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 (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;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents);

(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 Title 26 (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 1324(a) of this title (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 1325(a) or 1326 [illegal reentry after deportation] of this title 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, 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 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. Not withstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph [September 30, 1996].

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