

IMMIGRATION DEFENSE FOR ARIZONA DEFENSE ATTORNEYS

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**Quick update done 6/8/05 More thorough update soon, hopefully, on
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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, and to permit an individual to remain at liberty while his or her immigration case is pending has been restricted dramatically. In addition, the INA and the United States Sentencing Guidelines provide stringent criminal penalties for convictions of illegal re-entry after removal.

Nevertheless, the trial strategy pursued by both state and federal defense counsel can make a critical difference. Accordingly, it is imperative that criminal defense counsel understand the fundamental principles governing the immigration consequences of convictions. Moreover, given the critical role that the criminal justice system plays in trying to address problems such as family violence, prosecutors must also factor in the impact of possible deportation on the family at issue.

Armed with the basics, and a methodology to assess specific criminal charges in relation to individual immigration violations, an informed and creative attorney may be able to seek out alternative pleas and sentences to resolve certain criminal charges. For thousands of defendants, this will mean the difference between deportation and the chance to obtain refugee protection, to immigrate, to continue working and living with one’s family in the United States, or even to obtain U.S. citizenship.

II COLLATERAL CONSEQUENCES AND THE DUTY OF EFFECTIVE COUNSEL

A. Duty of the trial court

1. The Constitution does not impose upon the trial court a no duty to warn a defendant of the immigration consequences of his guilty plea.² Cf. Brady v. United States, 397 U.S. 742, 755 (1970) (the Due Process Clause requires the trial court to explain only the direct consequences of conviction). Despite (now) virtually automatic effect of plea on immigration status by operation of law, immigration consequences are *collateral*

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² See generally, Gabriel J. Chin & Richard W. Holmes, Jr., “Effective Assistance of Counsel and the Consequences of Guilty Pleas,” 87 Cornell L. Rev. 697 (March 2002).

because deportation is within the purview of an agency not subject to the criminal court's control and responsibility. United States v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2002), *cert. denied* 122 S. Ct. 1946 (2002).

2. Arizona courts have relied on the collateral consequences doctrine to find that due process does not require a warning of potential immigration consequences by the trial court prior to the entry of plea. State v. Rodriguez, 17 Ariz. App. 553, 554-55, 499 P.2d 167, 168-69 (1972); State v. Vera, 159 Ariz. 237, 239, 766 P.2d 110, 112 (App. 1988).
3. However, as of December 1, 2004, Arizona joined 21 other jurisdictions in requiring judges to advise all criminal defendants, prior to accepting a guilty plea, that, if the person is not a U.S. citizen, any plea or admission may impact his or her immigration status or ability to immigrate in the future. AZ Rule Crim Pro. 17.2. The rule has the following noteworthy characteristics:
 - A. No requirement of specific, particularized advice by judge.
 - B. Prohibition on requiring defendant to reveal his or her immigration status.
 - C. No explicit remedy for noncompliance by judge.

B. Duty of defense counsel

1. 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 waiving many grounds of crime-related inadmissibility or deportability]” (emphasis added).
2. Standard 14-3.2(f) of the ABA Standards, which 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 from entry of the contemplated plea,”⁴ has provided 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).
3. 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) (counsel’s failure to advise of immigration consequences may constitute deficient 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); Aldus v. State, 748 A.2d 463 (Me. 2000) (counsel’s failure to explain that

⁴ Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) (1999).

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) (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); People v. Pozo, 746 P.2d 523, 527 (Colo. 1987) (en banc) (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. Arizona courts have relied on the "collateral consequences doctrine" to immunize guilty pleas from collateral attack based on ineffective assistance of counsel, see State v. Rosas, 183 Ariz. 421, 423, 904 P. 2d 1245, 1247 (App. 1995).
5. Regardless of affirmative duty, courts in a growing number of jurisdictions hold that misadvice regarding immigration consequences constitutes ineffective assistance. **Stating that a conviction "may" have such consequences when removal is a virtual certainty constitutes misadvice.** State v. Paredez, 136 NM 533, 101 P. 3d 799 (2004); Gonzalez v. State, 191 Or. App. 587, 83 P. 3d 921 (2004), *cert granted*, 95 P2d 728; St. v. Rojas-Martinez, 73 P. 3d 967 (Utah Ct. App. 2003), *cert granted*, 80 P. 3d 152.

See also., 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)("[N]either [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 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). See also 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 government incorrectly informed defendant that conviction would not subject him to deportation).

III. A DEFENSE ATTORNEY'S BASIC APPROACH

A. Determine client's status and what grounds of removal may apply.

1. **Is the client at U.S. citizen?** Since U.S. citizens are not subject to removal and

need not immigrate to the U.S. or naturalize,⁵ defense counsel in *every* case should determine whether the client is a U.S. citizen.⁶

Rule of thumb: A person who was born in the U.S. or has naturalized is a U.S. citizen. A person *maybe* a U.S. citizen if –

- at least one parent or grandparent was born in the U.S., or
- at least one parent naturalized when the person was under 18

The applicable law for acquiring citizenship at birth abroad or deriving citizenship through the naturalization of one’s parents depends on the client’s date of birth. When there is just one U.S. citizen parent, the law generally requires that that parent have lived in the U.S. a certain number of years before the child’s birth. The requirements are less stringent in the case of people born after 2/27/83. The requirements may depend upon whether the parents were married when the child was born. If citizenship is an issue, consult with an immigration attorney.⁷

2. If not a U.S. citizen, did the client last enter the U.S. legally and what legal status, if any, does s/he have?

Your client’s status and/or most recent manner of entry into the U.S. will determine which criminal grounds of removal could potentially apply.

Rule of thumb: If the person –

- last entered the U.S. legally OR is a permanent resident > the grounds of deportability may apply.
- last entered illegally OR with “parole,”> the grounds of inadmissibility may apply.

⁵ Every noncitizen is ALWAYS subject to the possibility of deportation/removal from the United States if s/he violates our laws. *This is true regardless of how long s/he has been in the U.S. and what her/his family ties are here.* Adoption by U.S. citizen parents, lack of knowledge of a foreign language or of ties to any other country, marriage to a U.S. citizen, etc. does not alter this fact.

⁶ By contrast, judges who question defendants as to their immigration status risk running afoul of defendants’ constitutional rights. Noncitizens have a Fifth Amendment right to remain silent regarding their status and manner of entry due to the fact that alienage is an element of many criminal offenses, such as illegal entry. See *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972); *U.S. v. Alderete-Deras*, 743 F.2d 645 (9th Cir. 1984); *Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984). In addition, questioning a defendant as to immigration status based on ethnicity, accent, or appearance can constitute unlawful ethnic or racial profiling (In the Fourth Amendment context, factors such as race, ethnicity, accent, or a “foreign-sounding” surname, taken alone, are insufficient factors to meet the “reasonable suspicion” standard for searches and seizures. *USA v. Montero-Camargo*, 208 F. 3d 1122 (9th Cir. 2000) (en banc), *cert denied by Sanchez-Guillen v. U.S.*, 531 U.S. 889, 121 S.Ct. 211, 148 L.Ed.2d 148; *Gonzalez-Rivera v. INS*, 22 F. 3d 1441 (9th Cir. 1994); *Orhorhaghe v. INS*, 38 F. 3d 488 (9th Cir. 1994); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1986)). Moreover, many Caucasian, English speakers are Canadians present in the U.S. in violation of law (In fact, until the mid-1990s, Canadian citizens comprised the largest percentage of undocumented immigrants in the United States.).

⁷ Since the requirements are not common knowledge, and many people obtained permanent resident cards rather than proof of U.S. citizenship, the client may be a U.S. citizen without knowing it.

- One who last entered the U.S. legally or “adjusted” to lawful permanent resident (LPR) status is subject to the **grounds of deportability** at 8 U.S.C. § 1227(a); INA § 237(a). This includes LPRs (also known as “green card” holders)⁸ as well as people who entered the country with a non-immigrant visa – such as a “border crossing card,”⁹ a student visa, visitor’s visa, a temporary work visa (e.g., H-1B) – and people who entered the country with “refugee” status.

The fact that a person has a “work permit” does not necessarily mean that s/he was lawfully admitted and will be subject to the grounds of deportability. Here are 4 examples of types of people who may, in some cases, receive work permits despite having entered the country illegally: 1) the spouse of a U.S. citizen who has filed papers to become an LPR; 2) someone from a designated country (Honduras, Liberia, El Salvador) who arrived prior to a designated deadline and was granted “temporary protected status” due to circumstances such as war or natural disaster, 3) someone who is applying for or was granted “asylum” because of persecution or a reasonable fear of persecution; and 4) someone in removal proceedings (whether or not on appeal) who has applied for one of certain types of “relief” from removal such as “cancellation of removal.”

- One who entered the U.S. illegally or was given special permission to enter under 8 U.S.C. § 1182(d)(5); INA § 212(d)(5) – called “parole” – is subject to the grounds of inadmissibility at 8 U.S.C. § 1182(a); INA § 212(a).

For example, a person who entered the United States illegally and has no lawful immigration status will not face deportation for certain crimes of domestic violence; stalking; child abuse, neglect or abandonment, or for violating certain types of protective orders, whereas an LPR will. This is because these kinds of offenses constitute grounds of deportability under 8 U.S.C. § 1227(a)(2)(E), but not necessarily grounds of inadmissibility at 8 U.S.C. § 1182(a); INA § 212(a).¹⁰ The same is true with respect to a firearms offense, which is a ground of deportability¹¹ but not a ground of inadmissibility.

WARNING: Even a person with legal status in the U.S. may be subject to the grounds of inadmissibility in the future if he or she leaves the U.S. and tries to return!¹² Therefore, any noncitizen who entered legally but may leave the U.S. in the future should seek to avoid both deportability *and* admissibility.

⁸ The card is actually white or pink. A person who obtains a green card through a marriage less than two years old does so on a “conditional” basis starts out as a “Conditional Permanent Resident.”

⁹ Known in Spanish as a “pasaporte local” or “tarjeta local”. It allows stays of up to 72 hours at a time and travel within a certain distance from the border.

¹⁰ I say “not necessarily” because of the offense in question is a “crime of moral turpitude,” it will still render the person inadmissible.

¹¹ See 8 U.S.C. § 1227(a)(2)(C); INA § 237(a)(2)(C).

¹² See 8 U.S.C. § 1101(a)(13)(C). Reasons for deeming an LPR to be “seeking admission” include an absence of at least 180 days or commission, *at any time* of a “crime involving moral turpitude” or a drug offense, among others.

B. Pursue the following goals in the following order:

1. Avoid a conviction of an offense that constitutes a ground of inadmissibility or deportability under 8 U.S.C. §§ 1182 or 1227, INA §§ 212 or 237¹³ (whichever applies in his/her case).

>>>> See Part IV, *infra*.

2. If unable to do #1,¹⁴ avoid a conviction that requires the government to detain the person *throughout the pendency of his or her removal proceedings*. 8 U.S.C. §1226(c). This can last anywhere from a few weeks to years.

>>>>> See Part V, *infra*.

3. If unable to do #1, avoid a conviction that renders the individual ineligible for “relief” from removal. A person who is “removable” (inadmissible/deportable) will not necessarily be ordered removed. S/he may be eligible for a special waiver or alternative to removal, known as “relief from removal.” Seek to preserve eligibility for relief.

>>>>> See Part VI, *infra*

4. Regardless of #1-3, preserve eligibility for *future benefits*, such as an immigrant visa or naturalization, and avoid convictions that will trigger immigration consequences in the event of a departure from the U.S.

>>>>>> See part VII, *infra*.

Rule of thumb: Avoid “aggravated felony” convictions.

These render any “lawfully admitted” noncitizen deportable, subject to mandatory detention, ineligible for relief (except in limited circumstances such as likely torture or death), ineligible for naturalization, and subject to 20 years in prison for illegal reentry.

C. Use the following strategies (in addition to avoiding convictions with immigration consequences generally):

1. Avoid a “conviction”. *Sometimes*, (not always!) diversions work.

¹³ See Grounds of Inadmissibility and Deportability, Appendix B.

¹⁴ Some defendants are subject to grounds of inadmissibility or deportability regardless of any criminal convictions. For example, a nonimmigrant who has violated the terms of his or her visa (such as by failing to attend classes or staying longer than authorized) is deportable for that reason, and a person who has entered the U.S. illegally is “inadmissible” for that reason. In such cases, it is still important to follow the goals #2-4.

(Note that this will not necessarily prevent removability in cases where no conviction is required).

>>>>> What constitutes a “conviction” under immigration law? See Part VIII, *infra*.

2. Keep the record clean.

You may be able to avoid adverse immigration consequences by “sanitizing the record of conviction” and/or ensuring that the record establishes no more than a plea to an a “divisible” or “overbroad” statute.

>>>>>What constitutes the “record of conviction”? See part X, *infra*.

>>>>>What is a “divisible” or “overbroad” statute? See part X, *infra*.

3. Negotiate the proper sentence.

In some cases, immigration consequences hinge on the sentence imposed, regardless of whether imposition is suspended.

>>>>> When is the sentence relevant? See part IX, *infra*.

IV. Grounds of inadmissibility and deportability relating to crimes

A. List of criminal grounds of inadmissibility at 8 U.S.C. §1182(a)(2); INA §212(a)(2):

Sec. 212(a)(2)(A)(i)(I) one **crime involving moral turpitude** (CIMT) at any time;

"petty offense exception" – 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) violation of any **controlled substance** law (waiver available for a single offense of simple possession of 30 grams or less of marijuana if person shows his or her inadmissibility will result in “extreme hardship” to U.S. citizen or LPR spouse, parent, son, or daughter);

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;

- Sec. 212(a)(2)(D) engaged in **prostitution or commercialized vice**;
- Sec. 212(a)(2)(H) activity relating to severe forms of **trafficking in persons**
- Sec. 212(a)(2)(I) **money laundering**
- Sec. 212(a)(6)(E) **alien smuggling** (no conviction required)

Additionally, criminal convictions may be relevant to the following grounds of inadmissibility:

- 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**.

B. List of criminal grounds of deportability at 8 U.S.C. §1227(a); INA § 237(a):

- 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** (see Appendix B); includes –
- murder
 - rape
 - sexual abuse of a minor
 - any drug trafficking crime
 - certain crimes with a one year sentence to imprisonment (even if suspended): a crime of violence (as defined in 18 USC Sec. 16), theft offense (including receipt of stolen property), burglary offense, forgery, obstruction of justice, bribery, using or creating false documents
 - fraud or deceit, or money laundering, if loss to victim (or funds derived, or tax evaded) is more than \$10,000
 - failure to appear to serve sentence if offense punishable by 5 years or to face charges if offense punishable by 2 years
- 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 a **firearm or destructive device** (includes attempt);
- 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);
- exception at §237(a)(7) for certain victims of battery or extreme cruelty
- 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 all such convictions entered after September 30, 1996);
- exception at §237(a)(7) for certain victims of battery or extreme cruelty
- 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.

Also relevant are certain 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. at time of entry or within 5 years
- exception for first offense smuggling of specified family members

C. Analysis of select grounds of inadmissibility and deportability

1. **Drug crime**, or “crime relating to a controlled substance” -- 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. *Solicitation to possess* a controlled substance is not a crime “relating to” a 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 includes “conspiracy or attempt”). The same is true of solicitation to possess for sale. Leyva-Licea v. INS, 187 F. 3d 1147 (9th Cir. 1999).

- b. Current Board of Immigration Appeals case law on facilitation holds that it is a crime “relating to” a controlled substance. Matter of Del Risco, 20 I&N Dec. 109 (BIA 1989), but the issue may be arguable in light of Coronado-Durazo and state case law defining facilitation as a separate offense (and not a lesser included), see State v. Harris, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982).
- c. A record of conviction that does not identify the drug cannot support an order of deportability. Matter of Paulus, 11 I&N Dec. 274 (BIA 1965).
- d. Possession of paraphernalia is a “crime relating to a controlled substance.” Luu-Le v. INS, 224 F. 3d 911 (9th Cir. 2000). Thus, since first-time simple possession of less than 30 grams of marijuana does not subject one to deportability (although does make one “inadmissible”), possession of paraphernalia is generally a worse plea for a noncitizen who has been lawfully admitted than is a plea to possession of marijuana.
- e. Vacating a first-time simple possession conviction of either paraphernalia or drugs (not only marijuana) does work (only within the 9th Circuit) because the crime is not then a “conviction.” See part VIII, *infra*.
- f. Felony simple possession is not an aggravated felony in the 9th Cir. because, for immigration purposes (but not criminal reentry purposes), courts use a federal standard: whether offense would be a felony under federal law. Ferreira v. Ashcroft, 382 F. 3d 1045 (9th Cir. 2004). Exceptions: (possession of flunitrazepam or of more than 5 grams of crack cocaine are aggravated felonies because they are felonies under federal law).

WARNING: Tell your client that if s/he travels outside the 9th Circuit and comes into contact with immigration officials, client may find himself/herself deportable as an aggravated felon!

- g. Second offense simple possession is not at aggravated felony “must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.” Ferreira v. Ashcroft, 382 F. 3d 1045 (9th Cir. 2004), citing United States v. Corona-Sanchez, 291 F. 3d 1201, 1209 (9th Cir. 2002).

2. Crime involving moral turpitude -- 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. Definition. The term "moral turpitude" lacks a precise definition. Jordan v. De George, 341 U.S. 223, 229 (1951). 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); Matter of Tran, 21 I. & N. Dec. 291 (BIA 1996); Matter of Danesh, 19 I. & N. Dec. 669 (BIA 1988)). A specific intent is not a prerequisite to finding that a crime involves moral turpitude. Id.

- b. Mental state. Generally, crimes involving fraud, dishonesty, immorality, reckless disregard for safety of others, or intent to cause serious bodily harm are CIMTs. Evil intent must be explicit or implicit. Thus, where the minimal mental state for the offense is “criminal negligence,” the crime is not a CIMT. See Matter of Perez-Contreras, 20 I&N Dec. 615, 618 (BIA 1992) (negligent assault). Where the *mens rea* is recklessness, the crime *may* be a CIMT. However, there is not always an intent requirement. For example, statutory rape is a CIMT. Matter of Dingena, 11 I&N Dec. 723 (BIA 1966).
- c. Categorical approach: The statute under which the conviction occurred – rather than the defendant’s underlying conduct – controls the determination of 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 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 of the crime”). Only if moral turpitude “necessarily inheres” in the offense as defined by statute is the crime a CIMT. Matter of Khourn, 21 I&N Dec.1041 (BIA 1997).
- d. Specific offenses
- (i) Bad checks may or may not. 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).
 - (ii) Assault
 1. 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).¹⁵ Reckless assault causing bodily injury is not a CIMT. Id.
 2. Aggravated assault. Courts find assault to be a CIMT where there is a sufficient aggravating factor. While an “aggravated assault” label is not dispositive, Matter of G-- R--, 2 I&N Dec. 733, 747 (BIA 1946), the DHS would likely consider charge any aggravated assault

¹⁵ Thus, reckless assault coupled with an element of injury – but not serious injury – probably is not a CIMT.

under A.R.S. §13-1204 as a CIMT. Cf. Matter of Logan, 17 I&N Dec. 367 (BIA 1980) (assault with a deadly weapon is a CIMT); Matter of Danesh, 19 I&N Dec. 669 (BIA 1988) (knowing injury of a peace officer is CIMT); INS v. Grageda, 12 F. 3d 919 (9th Cir. 1993) (willfully inflicting corporal injury resulting in a traumatic condition on spouse); Matter of Tran, 21, I&N Dec. 291 (BIA 1996) (same); Guerrero de Nodahl v. INS, 407 F. 2d 1405 (9th Cir. 1969) (willful infliction on child of cruel or inhuman corporal punishment or injury resulting in a traumatic condition intent to commit a CIMT).

3. Domestic violence. That a conviction occurs under ARS §13-3601 (domestic violence) should not render the offense turpitudinous because it does not change the remaining elements of the crime. The DHS in Tucson has charged DV/simple assault as a CIMT on the theory that the relationship between the parties is a sufficient aggravating factor, but the local IJ has disagreed. Cf. INS v. Grageda, *supra*.
 4. With intent to commit a CIMT. Assault with intent to commit a CIMT is a CIMT. See Matter of Beato, 10 I&N Dec. 730 (BIA 1964) (intent to rape); United States ex rel. Rizzio v. Kenney, 50 F.2d 418 (2nd Cir. 1931) (intent to rob); Matter of Quadara, 11 I&N Dec. 457 (BIA 1966) (same).
- (iii) 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).
- (iv) Theft, burglary, trespass. A theft offense that includes as an element knowledge that the items were stolen or the intent to deprive the rightful owner permanently of his or her property involves moral turpitude. Compare Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981) (theft is a CIMT) and Wadman v. INS, 329 F. 2d 812, 814 (9th Cir. 1964) (requirement of knowledge that items were stolen was sufficient to render offense turpitudinous) with Matter of M, 2 I&N Dec. 686 (BIA 1946) (joyriding does not involve moral turpitude because statute included temporary taking of a motor vehicle). 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).

Under A.R.S. §13-1802 (theft), subsections (A)(1), (A)(3), and (A)(5) are CIMTs because each requires either intent to deprive or knowledge that the property was stolen. Shoplifting, ARS §13-1805 is a CIMT.

Burglary is generally a CIMT based on the intent to commit a crime. Possession of burglary tools in violation of ARS §13-1505 is a CIMT because it includes intent to use or permit the use of the tool to commit a burglary. See Matter of Serna, 20 I&N Dec. 579 (BIA 1992).

Criminal trespass is not a CIMT unless there is an intent to commit a CIMT while trespassing. See Matter of Esfandiary, 16 I&N Dec. 659, k 661 (BIA 1979) (conviction for malicious trespass was a CIMT because it included specific intent to commit petit larceny).

- (v) Driving Under the Influence. Misdemeanor under ARS §28-1381 or 28-1382 is not a CIMT. Aggravated DUI in violation of ARS §28-1383A.1 (DUI with license suspended) is not a CIMT if the record of conviction establishes or leaves open the possibility that the person was convicted for being in “actual physical control” of a vehicle while under the influence rather than of driving under the influence. See Hernandez-Martinez v. Ashcroft, 343 F. 3d 1075 (9th Cir. 2003) (former ARS §28-697A.1 is “divisible”) (see Part X, *infra*).¹⁶ whereas ARS §28-1383A.2 (3rd DUI in 5-year period) is not a CIMT because the fact of the prior DUIs does not change the character of the offense. Matter of Torres-Varela, 23 I&N Dec. 78 (BIA 2001).
- (vi) Endangerment. ARS §13-1201 involves recklessly endangering another with a substantial risk of imminent death or physical injury. As there is no element of actual injury, this offense *may not* be a CIMT. Cf. Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996) (reckless assault causing bodily injury is not a CIMT; reckless assault with an element of serious bodily injury would be).
- (vii) Child abuse. Whether a conviction under ARS §13-3623 involves moral turpitude may depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence probably is not a CIMT.

e. Exceptions

- (i) Petty offense: Only one CIMT (no prior CIMTs) where the offense carries a maximum sentence of one year and the actual sentence to

¹⁶ The BIA had held that aggravated DUI on a suspended license was a CIMT because the person knows or should know that s/he is not supposed to drive, Matter of Lopez-Meza, 22 I&N Dec. 1188 (BIA 1999). This case may or may not be held to control in cases where the indictment or another part of the “record of conviction” (see Part X, *infra*) establishes that the person was convicted of driving while under the influence.

imprisonment did not exceed six months. In Arizona, only misdemeanors fit the exception.

- (ii) Juvenile offense: commission and release from confinement (if any) were more than 5 years before the relevant application for admission.

3. Aggravated felony -- 8 U.S.C. § 1101(a)(43); INA §101(a)(43) and 8 U.S.C. §1227(a)(2)(A)(iii); INA § 237(a)(2)(A)(iii). See Appendix A for complete definition.

(NOTE: An offense classified by a state as a misdemeanor still fall within the definition).

Selected provisions:

- a. Sexual abuse of a minor (paragraph A). Courts evaluate use 18 U.S.C. § 3509(a)(8) as a reference point for state offenses. A conviction for indecency with a child is a conviction that constitutes sexual abuse of a minor even though it was 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).
- b. Drug trafficking (paragraph B).

This covers “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),” and has been interpreted by the agency as containing two parts: 1) “illicit trafficking” and 2) “drug trafficking crime”. Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002).

(i) Illicit trafficking is any offense that fits the common meaning of “illicit trafficking” and is punishable by more than one year. Matter of Davis, 20 I&N Dec. 536 (BIA1992).

(ii) A “drug trafficking crime” is determined under 18 U.S.C. § 924(c), which refers to a “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.*.” The Controlled Substances Act, in turn, defines “felony” as any state or federal felony and “felony drug offense” as an offense punishable by imprisonment for more than one year under federal or state laws relating to drugs.

(A) Simple possession. Accordingly, *if the potential sentence for first-time simple possession (which is an offense punishable under federal law) is*

more than one year under state law, the crime is an aggravated felony. Matter of Yanez-Garcia, 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, 21 I&N Dec. 905 (1995); United States v. Arellano-Torres, 303 F.3d 1173 (9th Cir. 2002) (although Nevada law mandates a suspended sentence and probation for first-time offenders, because probation is revocable in favor of imprisonment of up to four years, the crime is an aggravated felony).

This would appear to be the case in Arizona after implementation of Prop 302. Effective 11/25/02, if a defendant violates probation or refuses treatment for a drug possession offense, s/he may be sentenced to prison. ARS § 13-901.01.E, G. Possession is a class 4 felony with a potential sentence of two and a half years. ARS §§13-3408.A.1, B; 13-701.C.3. Therefore, first-time possession carries a potential sentence of more than one year.

NOTE: Because of the importance of uniformity in the immigration context, the 9th Cir had ruled that, while “felony” simple possession is an aggravated felony, in immigration proceedings, the standard for determining whether a state conviction is a felony should not be on the state’s characterization, but rather, on whether the same offense would be a felony under federal law. Therefore, the 9th Circuit had held that, with the exception of possession of flunitrazepam or more than 5 grams of crack cocaine (federal felonies), a state felony conviction for simple possession was NOT an aggravated felony. Cazarez-Gutierrez v. Ashcroft, 356 F. 3d 1015 (9th Cir. 2004). However, in late April, after the government filed a petition for reconsideration asserting a lack of jurisdiction, the court withdrew its decision.

(B) Offenses not punishable under federal law, such as being under the influence of a controlled substance or possession of paraphernalia, are not aggravated felonies under this test regardless of the felony/misdemeanor designation.

(C) Because “offering” is the same as solicitation, and solicitation is not prohibited by the Controlled Substances Act, Leyva-Licea v INS, 187 F. 3d 1147, 1150 (9th Cir. 1999), a conviction under a statute that includes “offering” to transport, sell, etc. is not necessarily an aggravated felony. United States v. Rivera-Sanchez, 247 F. 3d 905 (9th Cir. 2001). A.R.S. §13-3405A.4 includes offering to transport for sale or import, and offering to sell or transfer, and therefore, a document establishing only a conviction under ARS §13-3405A or under subsection 4 does not, in and of itself, establish deportability for a controlled substance violation, much less for an aggravated felony.

(D) Tips. For a discussion of plea strategies see “Note: Drug Offenses,” Quick Reference Chart at www.ilrc.org/Cal_DIP_Chart_by_section.pdf.

c. Firearms and explosives offenses, (paragraphs C and E)

(1) 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).

(2) Possession of a firearm by a felon in violation Cal. Penal Code §12021(a)(1) is an aggravated felony under 8 U.S.C. § 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).

d. crimes of violence with a 1-year sentence of imprisonment (paragraph F)

(1) A crime of violence is defined in 18 U.S.C. § 16 as (a) an offense that has 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.

(2) Courts distinguish between the likelihood of harm or injury and the likelihood that force may be used by the perpetrator. Leocal v. Ashcroft, ___ U.S. ___, 125 S. Ct. 377 (2004) (DUI causing serious bodily injury, with no mens rea, not a crime of violence); Lara-Cazares v. Gonzales, ___ F. 3d ___, 2005 WL 1206809 (9th Cir. 2005) (gross vehicular manslaughter while intoxicated is not a crime of violence); Jobson v. Ashcroft, 326 F. 3d 367 (2nd Cir 2003) (second degree manslaughter under N.Y. statute requiring simply “recklessly caus[ing] the death of another person” is not a “crime of violence” because of the many ways one could commit the offense with no risk that force will be used); Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999) (negligent child abuse resulting in death). United States v. Trinidad-Aquino, 259 F. 3d 1140 (9th Cir. 2001) (DUI with bodily injury is not a crime of violence).

(3) Mens rea. Because 18 USC §16 requires either an element of the “use” (or threatened use, etc.) of force or a substantial risk of the “use” of force, there is a “volitional” requirement, meaning that a mens rea of negligence will not satisfy the requirement. Leocal, supra. A reckless mental state, however, may be sufficient. Park v. INS, 252 F. 3d 1018, 1024 (9th Cir. 2001) (reckless mens rea *is* sufficient). But see, Leocal, 125 S. Ct. at 384 (expressly reserving the issue) and Lara-Cazares v. Gonzales, ___ F. 3d ___, 2005 WL 1206809 (9th Cir. 2005) (expressly overruling Park to the extent that it dictates that a reckless offense resulting in physical harm constitutes a crime of violence).

(4) Specific offenses:

(A) Driving under the influence. If the *mens rea* is negligence, the offense is not a “crime of violence.” Leocal, supra.

(B) Endangerment under ARS §13-1201 is not necessarily a crime of violence because the offense “is complete when the defendant engages in some conduct that could cause the imminent death of another, the conduct in fact creates such a risk as to a specific victim, and the defendant acted in conscious disregard of that risk. Thus, while there may [...] be a risk that physical force could be used after one has endangered another, there is little risk of physical force being used *in the course* of endangering another.” U.S. v. Hernandez Castellanos, 287 F. 3d 876, 881 (9th Cir. 2002) (emphasis in original; internal citation omitted).

(C) Burglary. While residential burglary is a crime of violence, burglary of a vehicle is not. Even though the California vehicle burglary statute required that the doors be locked and windows be rolled up, there are ways of committing the crime with little risk of the use of force, such as with a slim jim or misappropriated key. Ye v. INS, 214 F 3d 1128, 1133 (9th Cir. 2000) (Note: the 5th Cir. disagrees; the 5th Cir. has also found joyriding and criminal trespass to be crimes of violence).

(D) Statutory rape. The Board has held that statutory rape is 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)(incestuous penetration of a minor is a crime of violence). But see Xiong v. INS, 173 F. 3d 601 (7th Cir. 1999) (sex with a minor where statute does not specify substantial age difference was not a crime of violence).

(E) Assault. The 9th Circuit stated, in dicta, that every subsection of ARS §13-1203 has force as an element. United States v. Ceron-Sanchez, 222 F. 3d 1169 (9th Cir. 2000). It did so, however, in the context of a prosecution for assault with a deadly weapon in violation of ARS §13-1204(A)(2) (aggravated assault with a deadly weapon). Although it had stated, one week earlier, that the cases relied on in Park, supra, were no longer good law, although Ceron-Sanchez was one such case, and although the Supreme Court expressly rejected a harm-focused analysis, the 9th Circuit recently relied on Ceron-Sanchez to hold that subsections (A)(1) and (2) of ARS §13-1203, at least, have force as an element. Fernandez-Ruiz v. Gonzales, __ F. 3d ___, 2005 U.S. App. LEXIS 9912. The third subsection, which requires mere touching, should not be held to constitute a crime of violence.

e. burglary or theft (including receipt of stolen property, with a 1-year sentence of imprisonment (paragraph G)

1. With no statutory definition, the courts are left to distill the common law definitions of burglary and theft. State labels of “burglary” or “theft” are not dispositive.

(A) Burglary is the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Ye v INS, supra at 1132, adopting Supreme Court’s definition in sentencing context in Taylor v. United States, 495 U.S. 575, 602 (1990). Thus, vehicle burglary is not a “burglary.” Ye.

(B) A theft offense 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.” U.S. v. Corona-Sanchez, 291 F.3d 1201, 1205 (9th Cir. 2002).

(C) A conviction under ARS §13-1814(A) is not necessarily a “theft offense” because subsections (2), (4), and (5) do not require an intent to deprive the owner of rights and benefits. Nevarez-Martinez v INS, 326 F. 3d 1053 (9th Cir. 2003).

(D) A conviction for unlawful use of means of transportation, likewise, is not a theft offense because ARS § 13-1803 does not require an intent to deprive the owner. U.S. v. Perez-Corona, 295 F.3d 996 (9th Cir. 2002).

(E) A theft conviction under ARS §1802 is not necessarily a “theft offense” because some subsections do not require an intent to deprive. Huerta-Guevara v. Ashcroft, 321 F. 3d 883 (9th Cir. 2003). Moreover, even if “receipt of stolen property” is equated with possession of stolen property, the government must establish that the person was convicted under a subsection requiring knowledge that the property was stolen. See id., p. 887.

f. fraud or deceit, where loss to the victim exceeds \$10,000 (paragraph M)

1. Conviction of possession of counterfeit securities with intent to deceive was not an aggravated felony 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 offense even where indictment alleged that defendant possessed checks totaling more than \$22,000).

2. The victim does not need to suffer an actual loss. Matter of Onyido, 22 I&N Dec. 552 (BIA 1999) (a failed insurance fraud in which the claim exceeded \$10,000 was an aggravated felony because the offense qualified under the attempt provision, 8 U.S.C. § 1101(a)(43)(U), INA § 101(a)(43) (U)).

h. offenses “relating to” alien smuggling (paragraph N)

1. 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).

2. 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).

i. obstruction of justice, with a 1-year sentence of imprisonment imposed (paragraph S)

1. 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).

2. 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 was 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.").

j. illegal re-entry after conviction of an aggravated felony followed by deportation (paragraph O)

k. any attempt or conspiracy to commit an aggravated felony is an aggravated felony (paragraph U)

4. **Crimes of domestic violence and violations of protective orders** – 8 U.S.C. §1227(a)(2)(E)(i); INA §237(a)(2)(E)(i)

a. Domestic violence

(i) Must be against a person protected under the jurisdiction’s family violence laws and must be a crime of violence as defined by 18 U.S.C. §16:

(a) an offense that has 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.

(ii) Thus, if a misdemeanor, the offense must have force (or its attempted or threatened use) as an element. As mentioned above, the 9th Circuit stated, in dicta, that every subsection of ARS §13-1203 has force as an element. United States v. Ceron-Sanchez, 222 F.3d 1169 (9th Cir. 2000). It is the author's opinion that either the Board or the 9th Circuit will overrule this decision, especially in light of the fact that subsection (3) requires merely "touching another person with the intent to injure, insult or provoke" and is completed without the use or threat of force. In fact, the court has already held that the offense of "unlawfully touching another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causing bodily injury to another" in violation of Wyoming law is not a "misdemeanor crime of domestic violence," defined (similarly to the domestic violence removal ground) as a misdemeanor that has, as an element, "the use or attempted use of physical force, or threatened use of a deadly weapon, committed by a current or former spouse." See United States v. Belless, 338 F.3d 1063 (9th Cir. 2003).

(iii) While, at least in Tucson, the DHS has invoked this ground of deportability based on offenses such as criminal damage, at A.R.S. §13-1602, and disorderly conduct, at A.R.S. §13-2904, generally speaking, it is unlikely these offenses will support the charge. For one thing, the 8 U.S.C. §1227(a)(2)(E)(i) requires that the crime of violence be "against a person" rather than against property. Moreover, when misdemeanors, these offenses do not satisfy the US code definition of a crime of violence because force is not an element. The government could argue, however, that subsection of ARS §13-2904.6, which is a felony involving recklessly handling, displaying or discharging a deadly weapon or dangerous instrument, involves a substantial likelihood that force may be used in committing the offense.

b. Violation of protective order

Requires a court's determination that the defendant have "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." If the order is broader than this and the court's determination is not specific, the person is not deportable for the violation.

5. Child abuse, child neglect, child abandonment – 8 U.S.C. §1227(a)(2)(E)(i); INA §237(a)(2)(E)(i)

These terms are not defined. Courts will need to develop their own generic definitions, as they have done with "burglary" and "theft" (in the context of the aggravated felony definition).

V. Mandatory Detention

The Immigration Act, at 8 U.S.C. §1226(c); INA § 236(c), mandates detention of noncitizens thought to be removable for certain criminal grounds. The Supreme Court has found this constitutional even with respect to lawful permanent residents. Demore v. Kim, ___ U.S. ___, 123 S.Ct. 1708 (2003)). This applies to convictions or release from custody after 10/8/98. This appears to be the case even if the person is eligible for “relief” from removal. Detention is mandatory based on one or more of the following:

A. For ALL noncitizens --

Any drug crime (exception: if person has been “lawfully admitted” and has one conviction only for simple possession for personal use of less than 30 g marijuana, w/ no other drug convictions)

B. For those “lawfully admitted” --

- 1) any firearms offense
- 2) any aggravated felony
- 3) one CIMT within 5 years of admission with an actual sentence to imprisonment of at least one year (regardless of time served), or
- 4) more than one CIMT

C. For those NOT lawfully admitted --

- 1) prostitution or procuring (or attempting to procure) a prostitute
- 2) a CIMT that is not a petty offense exception, or any 2 CIMTs
- 3) more than one crime for which the aggregate sentences to confinement were at least 5 years (unless “lawfully admitted”)
- 4) participation in severe forms of trafficking in persons, or
- 5) money laundering

VI. Forms of Relief -- Even someone who is “removable” may be eligible for a waiver or some other form of “relief” (like a defense).

A. Waivers for long-term legal permanent residents

1. (Former) 8 U.S.C. §1182(c); INA § 212(c) (certain guilty pleas before 4/24/96)
2. 8 U.S.C. §1229b(a); INA § 240A(a) – LPR cancellation (not for aggravated felons) – see discussion *infra*

B. Relief for long-term residents (legal or not) with “good moral character”

1. 8 U.S.C. § 1229b(b)(1); INA §240A(b)(1) – 10-year cancellation (requires qualifying relative) – see discussion *infra*

2. NACARA suspension/ cancellation (El Sal, Guat, Soviet U, E Europe)
3. 8 U.S.C. §1259; INA 249 – registry (here since ‘72, current good character)

C. Relief for certain victims of persecution and/or torture

1. 8 U.S.C. §1158; INA § 208 – political asylum (1-year deadline, ag felons barred)
2. 8 U.S.C. §1251(b)(3); INA § 241(b)(3) – withholding (Ag felons w/ 5-yr sentences barred)
3. UN Convention Against Torture (most basic form has no deadlines, no bars)

D. Adjustment of status through an immediate family member (i.e., “immigrating”)

8 U.S.C. §1255(a); INA §245(a) – either admission (or parole) or 8 U.S.C. §1255(i); INA§245(i) and either admissible or eligible for a waiver (e.g., 8 U.S.C. §1182(h); INA§212(h)) – see discussion *infra*

E. Special adjustment under the Cuban Refugee Adjustment Act (admissible or 8 U.S.C. §1182(h); INA§ 212(h))

F. Abused, abandoned or neglected juveniles – 8 U.S.C. §1101(a)(27); INA §101(a)(27)(J); 8 U.S.C. §1255(h); INA §245(h) (special adjustment of status)

G. Certain Victims of Domestic Violence or of Certain Crimes (contact Southern AZ Legal Aid: 520-623-9465)

1. 8 U.S.C. §1154(a); INA §204(a) – VAWA self-petitions – abused spouse/child of USC/LPR
2. 8 U.S.C. §1229b(b)(2); INA §240A(b)(2) – 3-year cancellation – similar (in proceedings only)
3. 8 U.S.C. §1101(a)(15)(T); INA §101(a)(15)(T) -- T-visa – victims of “severe” human trafficking
4. 8 U.S.C. §1101(a)(15)(U); INA §101(a)(15)(U) -- U-visa – victims of sex crimes and certain others

H. Voluntary Departure – 8 U.S.C. §1229c; INA §240(B)

I. Temporary Protected Status – 8 U.S.C. §1254a; INA §244

J. Expired Provisions

1. NACARA – amnesty for certain Cubans and Nicaraguans
2. Haitian Refugee Fairness Act of 1998 – amnesty for certain Haitians
3. Legalization (1986) based on presence since ‘82 or farm work

VII. Selected Forms of Relief: Requirements and Bars

A. Waivers for long-term **LEGAL PERMANENT RESIDENTS** (“LPRs”) –

Cancellation of removal, 8 U.S.C. §1229b(a); INA §240A(a)

1. Requirements

- a) 5 years as LPR (note rules on counting time, part c below) (exemption for certain former members of U.S. armed forces)
- b) continuously resided in U.S. 7 years after having been lawfully admitted in any status (including a border crossing card)

2. Bars

- a) Aggravated felony
- b) Terrorist or security grounds
- c) Persecutor
- d) Prior grant of waiver under either form of “cancellation,” under former provision for

Example: Ms. Montagne is 24 and has been a legal permanent resident since 1982. Her parents are also LPRs, as are her brothers and sisters. In May of 2000, Ms. Montagne was arrested and pled guilty to possession of marijuana for sale. She was sentenced to 4 months in prison and two years of probation.

Analysis: Ms. Montagne is deportable under INA §237(a)(2)(A)(iii) (aggravated felony) and 237(a)(2)(B)(i)(drug conviction). Her aggravated felony conviction bars her from eligibility for cancellation of removal under INA §240A(a). The immigration judge must order her removal from the U.S.

“suspension” for long-term residents (documented or not), or under the former INA §212(c) for long-term LPRs.

3. Termination of "continuous residence" (the “time cut-off rule”)

Under INA §240A(d)(1), Continuous residence ends 1) when notice to appear (“NTA”) under IIRAIRA served or 2) when alien commits offense referred to in INA §212(a)(2) which either renders him/her inadmissible under INA §212(a)(2) or removable under INA §237(a)(2) or 237(a)(4).

NOTE: Domestic violence crimes and firearms offenses are not referred to in INA §212(a)(2).

B. Relief for LONG-TERM RESIDENTS (legal or not) with "good moral character" – Cancellation of removal ("10-year cancellation") 8 U.S.C. §1229b(b); INA §240A(b)

1. Requirements

a) 10 years continuous physical presence

1) service of charging document (or commission of certain crimes) cuts continuous presence (INA §240A(d)(1).

2) absence of more than 90 days at one time or absences totaling over 180 days break continuous residence, INA §240A(d)(2)

3) "administrative voluntary departure" (e.g., by the Border Patrol) breaks the period of residence. *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002).

4) exemption for certain former members of U.S. armed forces

b) 10 years good moral character

c) Exceptional and extremely unusual hardship to U.S. citizen or LPR spouse, parent or child – VERY DIFFICULT TO ESTABLISH!!!!!!

2. Bars

a) See definition of good moral character at INA §101(f); 8 U.S.C. §1101(f)

b) Convicted of crime under §212(a)(2) (includes drug crime, moral turpitude [with petty offense exception], 2 or more crimes w/ 5-year sentence), or §237(a)(2) or (3) (includes aggravated felony, firearms offense, domestic violence, violation of protection order, document fraud, false claim to citizenship)

(NOTE: waivers for certain DV victims convicted of DV, depending on circumstances)

c) Prior waiver under this section or former INA §244(a) (suspension)

d) Entered as crewman

e) Certain "J-visa" exchange visitors

f) Persecutor

Example: Mr. B is a 51-year old Mexican who has lived in the US since the early 1980s. He and his wife, an LPR, no longer have family ties in Mexico. Their children, ages 5 and 7, are U.S. citizens. Mr. B works as a janitor and his wife is a home maker. He was caught by the Border Patrol twice in 1995 and given “voluntary departure.” He returned quickly both times. He was recently apprehended in a work raid and placed in removal proceedings.

Analysis: Mr. B is inadmissible under INA §212(a)(6)(i) (present without admission). While Mr. B has lived in the U.S. continuously for more than ten years, according to the BIA, the voluntary departures break his continuous residence for purposes of 10-year cancellation under INA §240A(b). *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002). Even if he could have established the requisite ten years of physical presence, it is unlikely, absent unusual circumstances, that he could have demonstrated “exceptional and extremely unusual hardship” to his “qualifying relatives.” *Cf. Matter of Andazola-Rivas*, 23 I. & N. Dec. 319 (2002) (unmarried mother’s lack of family ties to Mexico, poor economic conditions, and diminished educational opportunities insufficient to establish requisite hardship to her school-aged U.S. citizen children).

C. Relief for Certain Victims of Persecution and/or Torture.

1. **Political asylum (INA §208; 8 U.S.C. §1158)** (similar to “withholding of removal,” *infra*, but latter is mandatory and former discretionary)

a. Requirements

- 1) Past persecution or well-founded fear of persecution on account of race, nationality, political opinion, membership in a particular social group, or religion
- 2) Applied within one year of arrival in U.S. (exceptions: material change in circumstances affecting eligibility or “extraordinary circumstances” justifying delay)

b. Bars

- 1) Conviction of "particularly serious crime" (P.S.C.) in U.S. (case-by-case analysis, except that, by statute, **any aggravated felony = P.S.C.**)
- 2) Persecuted others on account of one of the 5 grounds
- 3) Committed “serious non-political crime” before came to U.S.
- 4) “Reasonable grounds” exist to regard as danger to U.S. security
- 5) Firm resettlement in another country before arrival in U.S.

c. **Note:** A person admitted to the U.S. as a refugee or granted asylum in the U.S. may “adjust status” one year later under INA §209(a); if the refugee or asylee has not adjusted status and is placed in proceedings, s/he may apply for a waiver of inadmissibility under INA §209(c). This broadly worded waiver is available for almost any ground except drug trafficking and terrorism/security threat. However, in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), the A.G. held that the waiver is unavailable for dangerous or violent crimes except in “extraordinary circumstances,” and, in some cases, not even then.

2. Protection for those whose life or liberty would be threatened (INA §241(b)(3); 8 U.S.C. §1231(b)(3) — withholding of removal

a. Requirements

Life or liberty would be threatened in home country on account of race, religion, nationality, membership in a particular social group, or political opinion.

b. Bars

- 1) Persecuted others on account of one of the 5 grounds
- 2) Conviction of “particularly serious crime” (see “special note regarding aggravated felons,” part 3 below)
- 3) Conviction of “serious nonpolitical crime” outside U.S. prior to arrival
- 4) Reasonable grounds exist to regard as danger to U.S. security

c. Special note regarding aggravated felons

For purposes of this section, one or more AFs for which aggregate term to imprisonment was at least 5 years = P.S.C.

Drug trafficking crimes are presumptively P.S.C.s regardless of the sentence. *Matter of Y-L-*, 23 I. & N. Dec. 270 (A.G. 2002).

D. Adjustment of status through a family member (INA §245(a); 8 U.S.C. §1255(a))

1. Requirements

- a. Must have been inspected and admitted or paroled.

Note: Most bars, *including inadmissibility based on entry without admission*, were waivable with payment of \$1,000 under INA §245(i), but that section now waives bars only for beneficiaries of family visa petitions or labor certifications –

- 1) filed before 1/15/98 or,
- 2) filed thereafter but before April 30, 2001, if the beneficiary was in U.S. on 12/20/00
(when Pres. Clinton signed the “Legal Immigration Family Equity Act” or “LIFE Act).

If not grandfathered, an illegal entrant must now leave the U.S. to adjust, but when s/he does so, he or she is subject to the 3- and 10-year bars to admission under INA §212(a)(9)(B), if applicable (waivers of these grounds of inadmissibility available under INA §212(a)(9)(B)(v) based on extreme hardship to U.S.C. or L.P.R. spouse or parent).

b. Must be admissible (see grounds of inadmissibility at INA §212(a)) or get waiver of inadmissibility. No waivers available for drug crimes (except one-time simple possession of 30 g or less of marijuana) or for one who has been an LPR and has AF conviction. Waivers commonly require showing of extreme hardship to certain immediate relatives.

2. Bars to adjustment (INA §245(c)) include:

- a. admitted as nonimmigrant visitor w/o visa (except immed. relative)
- b. Worked illegally or violated nonimmigrant status (except immed relatives)

VIII. Preserving eligibility for future benefits/minimizing future harm

A. An eligible noncitizen may affirmatively apply for many of the same forms of relief when not in removal proceedings. “Cancellation of removal” and “withholding of removal” are exceptions (In fact, an LPR would not need to apply for cancellation of removal if not facing removal; for a longterm resident with no status, however, winning cancellation has the benefit of obtaining status and work authorization).

B. To be eligible for an immigrant visa, one must be “admissible” to the U.S. or eligible for a waiver of the relevant ground(s) of inadmissibility. There is no waiver of inadmissibility for a crime relating to a controlled substance, with the potential exception for one-time possession of less than 30 grams of marijuana, depending on “extreme hardship” to one of certain qualifying relatives. The same criteria apply to waivers of inadmissibility for crimes involving moral turpitude. See 8 U.S.C. §1182(h); INA §212(h).

C. Many benefits require establishing good moral character, defined at 8 US.C. §1101(f); INA §101(f). Appendix B. Certain criminal offenses are bars to establishing good moral character, as is incarceration for 180 days or more for any convictions. GMC is required in the following contexts:

1. Cancellation of removal and adjustment of status for certain nonpermanent residents, INA §240A(b), requires **10 years** of good moral character (GMC) for ordinary cancellation and **3 years** of good moral character for battered spouses and children of USCs/LPRs.

2. Voluntary departure , INA§240B(b) (at conclusion of proceedings), requires **five**

years GMC.

3. **Registry**, requires GMC (at present).
4. **Battered spouse or child self-petition**, §204(a) required **present** GMC.
5. **Naturalization**, 8 U.S.C. §1427; INA§316, requires **five years** GMC (or three years for certain spouses of U.S. citizens).

D. Anticipating future travel

1. Although a noncitizen who has entered legally is not immediately subject to the grounds of inadmissibility, if s/he plans to leave the U.S. at some point and seek to reenter, s/he will be denied a visa if inadmissible at that time. Defense counsel should anticipate this and warn the client if his/her plea will prevent his/her return.
2. Returning LPRs are not ordinarily subject to the grounds of inadmissibility as they are not deemed to be “seeking admission.” The exceptions to this rule are set forth at 8 U.S.C. §1101(a)(13)(C); INA §101(a)(13)(C). They include an absence of at least 6 months and engaging in illegal activity outside the U.S. As for crimes within the U.S., if the individual has “committed an offense identified in 212(a)(2) [8 U.S.C.A. §1182(a)(2)],” unless the offense has been previously waived in immigration court, s/he will be seeking admission. Therefore, **a crime that did not make the person deportable, such as a CIMT more than five years after admission, will make him/her inadmissible.** See Matter of Collado-Munoz, 21 I. & N. 1061, 1066 (BIA 1998). If s/he is not eligible for relief, this will be disastrous!¹⁷

The most common offenses in the 212(a)(2) list are controlled substance violations, CIMTs, drug trafficking, and prostitution. Domestic violence and gun crimes are not on the list.

E. Future prosecution for illegal reentry after deportation 8 USC § 1326; INA § 276

If a defendant is likely to return illegally, a defense attorney may seek to structure a plea that avoids enhanced penalties for illegal return. To be convicted of this federal crime, a person need only return to this country illegally after having been deported.¹⁸ If the deportation was subsequent to a criminal conviction, whether or not because of the conviction, the person is subject to an enhanced sentence. The penalties are --

- maximum 2-year sentence if no criminal conviction

¹⁷ Even if s/he is eligible for relief, the return may be traumatic, as s/he may be detained and to have to proceed with the case while incarcerated.

¹⁸ Illegal entry is also a crime. 8 U.S.C. §1325; INA §275. It is punishable by a fine and up to six months imprisonment for a first offense, and up to 2 years for a second offense. Entry after a “voluntary departure grant” by the DHS or by an Immigration Judge falls within the scope of this statute rather than the reentry statute.

- if deportation was subsequent to conviction of 3 or more separate misdemeanors that involved drugs and/or crimes against the person, or any felony that was not an aggravated felony, maximum 10-year sentence
- deportation subsequent to conviction for aggravated felony, maximum 20-year sentence

To determine the actual sentence for illegal re-entry, USSG 2L1.2 must be referenced. It requires using the greatest penalty that applies. If the defendant previously was deported, or unlawfully remained in the United States, after--

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense,

increase by 16 levels.

Crime of violence, for sentencing purposes, means “an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” USSG 2L1.2. Thus, if the crime of violence was against a person, the sentence enhancement is greater (16 levels) than if it was against property (8 levels).

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

Drug trafficking does not include possession for personal use.

(C) a conviction for an aggravated felony¹⁹, increase by 8 levels;

Aggravated felony has the same definition here as in 8 USC § 1101(a)(43)

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels. USSG 2L1.2.

Felony means a federal, state or local offense punishable by imprisonment for a term exceeding one year; misdemeanor is for one year or less.

A conviction for attempt, aiding and abetting, or conspiracy to commit any of the above qualifies the same as the actual offense.

IX. DEFINITION OF A CONVICTION UNDER THE INA

A. What constitutes a conviction for immigration purposes?

¹⁹ Aggravated felony has the same definition here as in 8 USC § 1101(a)(43); INA §101(a)(43).

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 [noncitizen] 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.

8 U.S.C. §1101(a)(48); INA §101(a)(48). Thus, the two prongs are 1) a finding or admission of guilt; and 2) some restraint on liberty. The second prong can be satisfied by imposed jail time (whether or not suspended), probation, participation in rehabilitative programs, community service, and payment of fines.

B. Which law controls?

1. The federal definition controls. A disposition that is not considered a “conviction” under state law may very well be a “conviction” for immigration purposes. Matter of Salazar, 23 I&N Dec. 223, 231 (BIA 2002). A federal law definition of a disposition that does not constitute a conviction, such as an adjudication under the Federal First Offender Act (“FFOA”) or the Federal Juvenile Delinquency Act (“FJDA”) in a federal prosecution, may be honored. Id. at 231 and n. 4.

2. Diversion for domestic violence under Ariz. Rev. Stat. § 13-3601.M is a conviction because it requires a finding of guilt and placement on probation, even though the case is “dismissed” upon completion of probation.

C. Specific dispositions

1. Pre-plea diversions

a. A disposition under a pre-plea diversion statute is not 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.

b. The Treatment Assessment Screening Centers, Inc. (TASC) diversion program is probably not a conviction. Although the defendant signs a form acknowledging guilt, the judge does not order any type of restriction. The prosecutor files a motion to suspend prosecution, and the defendant voluntarily enters the program. See A.R.S. § 11-361. If the person fails the TASC program, the state files a motion to reinstate prosecution and the person still has the right to go to trial. There is no case law on this.

2. Juvenile or Youth Offender Dispositions

a. 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 statute deemed comparable to the FJDA is not a conviction. Matter of Devison, 22 I&N Dec.1362 (BIA 2000).

b. Applicable criminal grounds. Juvenile dispositions may still be relevant because not all of the criminal provisions under immigration law require convictions. For example, a juvenile disposition for the offense of delivery of a controlled substance will likely fall under 8 U.S.C. § 1182(a)(2)(C); INA §212(a)(2)(C)'s provision requiring only "reason to believe" the noncitizen is a drug trafficker. Additionally, a finding by a juvenile court that the youth has violated a restraining/protective/no contact order will can trigger deportation under 8 U.S.C. §1227(a)(2)(E)(ii); INA § 237(a)(2)(E)(ii) for "violation of a family protective order". Sadly, making a false claim to U.S. citizenship renders even a child inadmissible, with no waiver available. 8 U.S.C. §1182(a)(6)(C)(ii); INA §212(a)(6)(C)(ii). Cf. 8 U.S.C. §1227(a)(3)(D)(i); INA §237(a)(D)(i).

c. Discretion. While not a basis for deportation/removal, a juvenile disposition can and will be considered by the DHS and the Immigration Court in making discretionary determinations such as applications for permanent residency, requests for relief from deportation/removal, and applications for U.S. citizenship.

3. Vacated Convictions

a. Legal defects. A conviction that a trial or appeals court vacates because it is legally defective is not a conviction for immigration purposes. Matter of Rodriguez-Ruiz, 22 I&N Dec.1378 (BIA 2000); Matter of Sirhan, 13 I&N Dec. 592 (BIA 1970).

b. Equitable remedies. A conviction that a trial court vacates for equitable reasons remains a conviction for immigration purposes. See Matter of Pickering, 23 I. & N. Dec. 621 (BIA 2003) (court's action vacating conviction for immigration purposes has no effect under immigration law). 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).

c. Rehabilitative statutes for drug offenses. A dismissal or expungment under a state counterpart to the Federal First Offender Act, 18 U.S.C. § 3607, which applies only to drug offenses, is not a conviction for immigration purposes.

(i) 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 s/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) (vacating first-time drug possession conviction under Ariz. Rev. Stat. § 13-907(A) eliminates conviction for immigration purposes).

(ii) In all other jurisdictions, the BIA applies Matter of Roldan, 22 I&N Dec. 512 (BIA 1999) (dispositions under state counterparts to the Federal First Offender Act are convictions for immigration purposes). See Matter of Salazar, 23 I&N Dec. 223, 231 (BIA 2002).

d. Vacating non-drug convictions. A conviction that has been expunged under state law continues to constitute a conviction for immigration purposes. Murillo-Espinoza v. INS, 261 F.3d 771, 774 (9th Cir. 2001) (theft conviction that was expunged under ARS §13-907 supported removal). See also Ramirez-Castro v. INS, 287 F.3d 1172 (9th Cir. 2002) (misdemeanor firearms conviction expunged under California law remains a conviction for purposes of federal law).

X. DEFINITION OF A SENTENCE UNDER THE INA

A. Statutory definition

A “sentence” is 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, and a defendant’s eligibility for some form of relief from removal, may turn on the language in the statute relating to the length of a sentence that is actually imposed, that may be imposed, or that was or will be served.

1. It is the actual sentence to incarceration or confinement imposed by the court – *regardless of the time suspended* – that counts for immigration purposes.
2. Probation does not constitute a period of incarceration or confinement. However, any jail time imposed as a condition of probation does constitute a sentence.
3. If probation is revoked and the person is sentenced to prison for one year, if the crime is burglary, possession of stolen property, or a crime of violence, the person becomes an aggravated felon at that point See U.S. v. Jimenez, 258 F.3d 1120, 1125 (9th Cir. 2001). (Point: think ahead!)

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 8 U.S.C. §§1101(a)(43)(F),(G),(S), INA §§ 101(a)(43)(F),(G),(S).

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). Thus, a one-day sentence reduction – from 365 days to 364 days imprisonment – will prevent many offenses from constituting aggravated felonies.

XI. SAFEGUARDING THE RECORD FOR IMMIGRATION PURPOSES

A. The “categorical approach”

1. For purposes of determining inadmissibility or deportability, courts employ a “categorical approach.” Under this approach, a court compares the conduct covered by the state statute with the conduct covered by the ground of inadmissibility or deportability. If the “full range of conduct” encompassed by the criminal statute falls within the relevant ground inadmissibility or deportability, then the person is removable as charged. See Chang v. INS, 307 F.3d 1185, 1189 (9th Cir., 2002).

2. If the state law is broader than the ground of inadmissibility/deportability, that is, if it criminalizes conduct which falls within the definition and also conduct which does not fall within it, ONLY THEN is the “modified categorical approach” is used. See id. Often, a statute with multiple subsections is considered “divisible,” meaning that some of its provisions fall outside the scope of the ground of inadmissibility or deportability. In cases of overbreadth or divisibility, the court examines documents in the “record of conviction” to determine if the offense for which the individual was convicted falls within the parameters of the ground at issue. *Regardless of the individual’s actual conduct*, if the record of fails to clarify that the elements of the statute which the individual was convicted fall within the ground of inadmissibility or deportability, that ground does not apply. See id.

B. The Record of Conviction

1. The “record of conviction” for immigration purposes consists of

- the charging document (e.g. the indictment or information);
- jury instructions;
- the defendant’s guilty plea, including the plea colloquy
- the verdict, and the judgment & sentence;
- the sentencing document

See, e.g., Matter of Pichardo, 21 Int. Dec. 330 (BIA 1996).

2. By contrast, the following are not deemed part of the record of conviction:

- a. Police reports. Matter of Teixeira, 21 I&N Dec. 316 (BIA 1996).
- b. Lab reports.
- c. Presentence reports (The Tucson IJ appears to disagree)
- d. Admissions outside of the plea or sentencing context

Thus, if an individual pleads guilty to assault with a deadly weapon, and the record of conviction does not mention the type of weapon, the individual will not be deportable for a firearms offense despite the fact that the police report reveals that the weapon used was, in fact, a gun; the fact remains that the person did not plead guilty to assault with a gun, and was not convicted of that offense. Even the individual's testimony that s/he used a gun will not render him/her deportable for a firearms offense because it will not change the nature of the conviction.

C. Why and how to safeguard/sanitize the record of conviction

If an individual must plead guilty to an offense which may or may not constitute a ground of inadmissibility or deportability, he or she may be able to avoid immigration consequences by actions such as the following:

1. If the complaint is too specific, negotiate for an amended complaint. For example, a permanent resident will be deportable for possession of cocaine, but not for possession of marijuana, unless there is a prior or unless the government shows that the amount exceeded 30 grams. If the complaint specifies that the drug was cocaine, negotiate for an amended complaint that does not specify the type of drug.
2. Avoid stipulating to facts in a police report or presentence report. Set forth a plea agreement or factual basis that avoids admissions subjecting the person to inadmissibility or deportability. Especially where a statute is overbroad or divisible, keep all unnecessary facts out of the record, and enter a plea to the generic statute rather than to a specific subsection, if possible.

APPENDIX A

AGGRAVATED FELONY DEFINITION -- 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. Notwithstanding 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].

APPENDIX B – DEFINITION OF GOOD MORAL CHARACTER

8 U.S.C. §1101(f); INA§101(f)

(Emphasis and italicized portions added)

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)[*prostitution and commercialized vice*], (6)(E) [*alien smugglers*] and (9)(A) [*previously removed within a certain time frame, or ever, if an aggravated felon*] of section 212(a) of this Act; or subparagraphs (A) [*crime involving moral turpitude subject to petty offense exception, or drug offense*] or (B) [*multiple criminal convictions with aggregate sentences to confinement of 5 years*] of section 212(a)(2) and subparagraph (C) thereof [*controlled substance traffickers*] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marijuana) 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 chapter;

(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.

APPENDIX C
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APPENDIX D

Immigration Intake Questionnaire

This information is confidential and protected by attorney-client privilege.

ATTORNEY _____ AGENCY/FIRM _____

TELEPHONE _____ DATE _____

1. Client's country of origin _____.
2. Client's current immigration status _____.
NOTE: some possibilities: Refugee/Asylee; Undocumented; Permanent Resident (green card)
3. If client has lawful status, how and when did s/he get it? (*E.g.* Client entered the United States in 1981 as a refugee from Cambodia; client got her green card through her U.S. citizen spouse in 1993; client entered on a tourists visa that has expired.)
4. Date and manner (illegally? with inspection?) of most recent entry into U.S.:
5. Starting with client's first entry into the United States, how many times, and for how long each time, has s/he departed and returned to the United States

Entry Date

Departure Date

Length of Departure

6. Client's current charge and criminal history (include all arrests and dispositions, sentences and juvenile offenses).
7. List client's immediate relatives (spouse, parent(s) and/or child(ren)) who are U.S. citizens or lawful permanent residents (green card holders).