Defending Non-Citizens in Illinois, Indiana, and Wisconsin

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A version of this manual has been published in 17 LAW & INEQ. J. and in *Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios*, Maria Theresa Baldini-Potermin, Esq., Copyright © 2000, 1999, 1998 Maria Theresa Baldini-Potermin, Esq. Copyright permission granted by Maria Theresa Baldini-Potermin for first edition of *Defending Non-citizens in Illinois Courts* and for first edition of *Defending Non-Citizens in Illinois, Indiana, and Wisconsin*.

Defending Non-Citizens in Illinois Courts was written by Maria Theresa Baldini-Potermin, then a National Association for Public Interest Equal Justice Fellow. Her fellowship was underwritten by the law firms of Foley & Lardner and Mayer, Brown & Platt, by the Open Society Institute, and by the Midwest Immigrant & Human Rights Center.

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CHAPTER

3

Grounds of Deportability for Non-citizens

Grounds of Deportability

Non-citizens present in the United States will become deportable or subject to removal once they act in a manner that places them within one of the grounds of deportation. Many of the grounds of deportation apply after a non-citizen has been "admitted." "Admission" in this context means that a non-citizen has made a lawful entry into the United States after being inspected and authorized by an immigration officer at an airport, seaport, or a land border.[158] A non-citizen may also be admitted by a CIS official or an Immigration Judge who adjudicates and approves the non-citizen's application for immigration benefits, such as asylum or adjustment to lawful permanent residency.[159]

"Admission" and the date of admission are important for some grounds of deportability but not others. For example, in order to find a non-citizen deportable for having committed a crime involving moral turpitude with a possible maximum sentence of one year or longer, the non-citizen must have committed the crime within five years after being admitted to

[158] *See* I.N.A. § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A); *In re* Rosas, 22 I&N Dec. 616 (BIA Apr. 7, 1999).

[159] *See* I.N.A. § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A); *In re* Rosas, 22 I&N Dec. 616 (BIA Apr. 7, 1999). Where a non-citizen has been granted immigration status through fraud or through DHS negligence in adjudicating the application, he has not lawfully acquired that status and is deemed not to have been lawfully admitted. *See* Arellano-Garcia v. Gonzales, 429 F.3d 1183 (8th Cir. Dec. 7, 2005); *In re* Koloamatangi, 23 I&N Dec. 548, 550 (BIA Jan. 8, 2003); Lai Haw Wong v. I.N.S., 474 F.2d 739, 742 (9th Cir. Feb. 28, 1973).

the United States.[160] Other grounds of deportation do not require that a non-citizen be "admitted" before deportation consequences may attach, such as the ground of deportation involving a conviction for falsification of documents.[161]

With the enactment of the IIRAIRA in 1996, Congress added new grounds of deportation. Grounds which greatly affect families are those for any conviction (either misdemeanor or felony) for domestic violence, stalking, child abuse, child neglect, child abandonment, or a violation of a protection order on or after September 30, 1996. Lawful permanent residents who are convicted and deportable for felony domestic battery and who have fewer than seven years of lawful continuous residence in the United States, including five years during which they have been lawful permanent residents, may be ineligible for relief from deportation unless they have a strong fear of persecution or torture in their home country or unless they are eligible to apply for adjustment of status again, such as being an immediate relative of a U.S. citizen.[162] Another new ground of deportation involves false claims to United States citizenship made on or after September 30, 1996, including the use of false birth certificates in order to obtain employment, marking the box labeled "United States citizen" on Form I-9 regarding employment eligibility, presenting a U.S. birth certificate to an employer for Form I-9, or claiming to be a U.S. citizen in an application to register to vote in local or federal elections.[163]

While the grounds of deportability are discussed in this Chapter, the grounds of inadmissibility in Chapter 4 must also be considered. There is considerable interplay between the grounds of deportability and inadmissibility, particularly for controlled substance offenses and crimes of moral turpitude. It is advised that both Chapter 3 and Chapter 4 be reviewed before advising a non-citizen about immigration consequences of a criminal disposition.

Crimes Involving Moral Turpitude

A non-citizen may be deportable for having been convicted of a crime involving moral turpitude in two situations. First, he is deportable for having been convicted of a crime involving moral turpitude which was committed within five years of his admission to the U.S. (or 10 years in the case of a non-citizen who was granted lawful permanent residence based on a S visa) and for which a sentence of one year or longer *may* be imposed.[164] This means that a conviction for a Class A misdemeanor offense involving retail theft in Indiana may render a non-citizen deportable because the maximum jail sentence for a Class A misdemeanor in Indiana is one year. In comparison, a conviction for misdemeanor retail theft in Illinois or Wisconsin will not render him deportable for a crime involving moral

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[160] *See* I.N.A. § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).
[161] *See* I.N.A. § 237(a)(3)(B), 8 U.S.C. § 1227(a)(3)(B).
[162] *See* Asylum and Refugees, *infra* at 6-31; Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45; Grounds of Inadmissibility and Adjustment of Status, *infra* at 4-1; Adjustment of Status, *infra*. An immediate relative is the spouse, parent, or minor child of a U.S. citizen. *See* I.N.A. § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).
[163] *See* I.N.A. § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D). Some states and cities may allow non-citizens to register to vote in local city or school board elections. Illinois, Indiana, and Wisconsin do not.
[164] *See* I.N.A. § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

turpitude as the maximum possible jail sentence is less than one year.[165]

The pertinent date for this ground of deportability is the date of "admission" which has been found by the Seventh Circuit to be the date of a non-citizen's initial (lawful) admission for purposes of determining whether an offense was committed within five years of admission.[166] Where a non-citizen entered the U.S. unlawfully and adjusted his status to become a lawful permanent resident, the date of the grant of his adjustment of status is his date of admission.[167]

Second, an alien may be deportable for having been convicted of multiple crimes involving moral turpitude not arising out of a single scheme of criminal misconduct at any time after admission.[168] The term "single scheme of criminal misconduct" has been defined by the Board and the Seventh Circuit Court of Appeals to be a recidivist statute.[169] This means that two offenses are not part of a single scheme of criminal misconduct when the acts are distinct and neither offense causes or constitutes the other.[170] Thus, two convictions for the purchase of food stamps two days apart was found to not have arisen out of a single scheme of criminal misconduct and therefore rendered the non-citizen who was a lawful permanent resident deportable for having been convicted of multiple crimes involving moral turpitude.[171]

Statute

I.N.A. § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A):

(i) Crimes of moral turpitude
Any alien who –

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[165] *See* Chart: Classification and Sentencing Ranges for State Offenses, *supra* at 2-15.
[166] *See* Abdelqadar v. Gonzales, 413 F.3d 668, 673-74 (7th Cir. Jul. 1, 2005) (distinguishing the rationale for using the initial admission where an alien was inspected and admitted by an immigration official for the ground of deportability for a crime involving moral turpitude and using the date of adjustment of status as the date of admission for the aggravated felony ground of deportability where an alien entered without being inspected by an immigration official and was convicted of an aggravated felony after becoming a lawful permanent resident); *cf. In re* Shanu, 23 I&N Dec. 754 (BIA Jun. 6, 2005) (holding that an alien may be deportable for a crime involving moral turpitude where the crime was committed within five years after the date of any admission of the non-citizen).
[167] *See id.*
[168] *See* I.N.A. § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).
[169] *See* Abdelqadar v. Gonzales, 413 F.3d 668, 675 (7th Cir. Jul. 1, 2005) (affirming the Board's interpretation of single scheme of criminal misconduct in *In re* Adetiba, 20 I&N Dec. 506 (BIA May 22, 1992) and distinguishing the characterization of multiple offenses as defined under the U.S. Sentencing Guidelines for purposes of aggregating relevant conduct).
[170] *See id.*; *see also*, Knutsen v. Gonzales, 429 F.3d 733 (7th Cir. Nov. 22, 2005) (discussing circuit case law regarding multiple crimes and a single scheme and relying on U.S. v. Brown, 209 F.3d 1020, 1030 (7th Cir. Apr. 7, 2000) in which it held that whether multiple crimes are part of a "common scheme or plan" for purposes of sentencing will depend on whether they were jointly planned or whether one crime entails the commission of the other).
[171] *See* Abdelqadar v. Gonzales, 413 F.3d 668, 674-75 (7th Cir. Jul. 1, 2005).

(I) is convicted of a crime involving moral turpitude committed *within five years* (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) *after the date of admission*, and
(II) is convicted of a crime for which a *sentence of one year* or longer *may be imposed*,
is deportable.[172]

(ii) Multiple criminal convictions
Any alien who at any time *after admission* is convicted of *two or more crimes involving moral turpitude*, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.[173]

Case Law

The current state of the case law for crimes involving moral turpitude is presently in a state of flux and may be decided by the U.S. Supreme Court in the near future. A brief recap of the precedential developments regarding the categorical approach by the Seventh Circuit Court of Appeals and the U.S. Attorney General is necessary at this point.

Prior Precedent under the Traditional Categorical Approach

The Seventh Circuit Court of Appeals previously defined a crime involving moral turpitude as "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted customary rule of right and duty between man and man . . . ."[174] Moral turpitude has also been defined as involving conduct "which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons."[175] The U.S. Supreme Court held that crimes in which fraud is an ingredient have always been regarded as involving moral turpitude.[176]

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[172] [Emphasis added].
[173] [Emphasis added] [includes misdemeanors and felonies in any state or federal jurisdiction].
[174] *See* Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. Jan. 20, 1931) (quoting *In re* Henry, 99 P. 1054, 1055 (Idaho 1909)).
[175] *See In re* D, 1 I&N Dec. 190, 194 (BIA Feb. 13, 1942).
[176] *See* Jordan v. De George, 341 U.S. 223, 227 (May 7, 1951). The Supreme Court discussed the history of the term "moral turpitude," stating that it first appeared in the Immigration Act of March 3, 1891, 26 Stat. 1084 which directed the exclusion of "'persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.'" *Id.* at 229 n.14. The court also cited to crimes involving fraud, including obtaining goods under fraudulent pretenses, conspiracy to defraud by deceit and falsehood, using the mails to defraud, concealing assets in bankruptcy, obtaining money and property by false and fraudulent pretenses, and willful evasion of federal income taxes. *See id.* at 228 & n.13. The Supreme Court reversed the Seventh Circuit Court of Appeals and held that 1938 and 1941 convictions for conspiracy to violate 26 U.S.C. § 3321 to remove and conceal distilled spirits with the intent to defraud the U.S. of taxation are crimes involving moral turpitude. *See id.* *See also*, *In re* Correa-Garces, 20 I&N Dec. 451 (BIA Mar. 27, 1992) (false

Examples of Crimes Involving Moral Turpitude	
▪ Fraud offenses ▪ Theft ▪ Retail theft (with an intent to permanently deprive another of property) ▪ Robbery ▪ Bribery ▪ Giving false information to a law enforcement official	▪ Tax evasion ▪ Perjury ▪ Obstruction of justice ▪ Forgery ▪ Conversion of funds

The classification of a crime as a felony is not determinative of whether it constitutes a crime involving moral turpitude.[177] For example, causing a financial institution to fail to file currency transaction reports and of structuring currency transactions to evade reporting requirements in violation of 31 U.S.C. § 5324(1) and (3) (1998), an offense that does not include any morally reprehensible conduct, is not a crime involving moral turpitude.[178] On the other hand, trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320 is a crime involving moral turpitude.[179]

When making the determination of whether a particular crime involves moral turpitude, the Board of Immigration Appeals found it relevant that a particular act is not illegal in all states.[180] In general, regulatory offenses are not crimes involving moral turpitude.[181] Possessory crimes may not necessarily involve an element of fraud or deceit and therefore are not necessarily crimes involving moral turpitude.[182]

To determine whether a crime involves moral turpitude, the immigration court used what is known as the traditional "categorical approach":

1. The court reviewed the elements of the criminal statute and determined whether the violation of those elements in the statute, without reference to

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statement in a passport application); *In re* Chouinard, 11 I&N Dec. 839 (BIA Oct. 10, 1966) (illegal use of credit cards); *In re* Alarcon, 20 I&N Dec. 557 (BIA Jul 13, 1992) (income tax evasion); *In re* Lethbridge, 11 I&N Dec. 444 (BIA Dec. 13, 1965).

[177] *See In re* Short, 20 I&N Dec. 136, 139 (BIA Nov. 16, 1989) (citing Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. Feb. 18, 1929)).

[178] *See In re* L-V-C-, 22 I&N Dec. 594 (BIA Mar. 25, 1999) (overruling *In re* Goldeshtein, 20 I&N Dec. 382 (BIA Aug. 26, 1991), *rev'd*, 8 F.3d 645 (9th Cir. Oct. 13, 1993)).

[179] *See In re* Kochlani, 24 I&N Dec. 128, 130-131 (BIA Apr. 2, 2007) (finding that a conviction under 18 U.S.C. § 2320 involves proof beyond a reasonable doubt that the defendant knowingly used a "spurious" trademark that was likely to confuse or deceive others, which constituted a crime involving moral turpitude).

[180] *See In re* R-, 6 I&N Dec. 444, 452-53 (BIA Dec. 14, 1954).

[181] *See In re* Tiwari, 19 I&N Dec. 875 (BIA Mar. 10, 1989), *modified, In re* Tiwari, 20 I&N Dec. 254 (BIA Mar. 27, 1991).

[182] *See, e.g.*, *In re* Serna, 20 I&N Dec. 579 (BIA Oct. 14, 1992) (holding that the possession of altered immigration documents does not involve fraud).

the non-citizen's particular acts, inherently involved moral turpitude.[183]

2. If the court found that the statute punishes acts which do not inherently involve moral turpitude, then the court ruled that no conviction under the statute involved moral turpitude even though the particular conduct of the alien may have been immoral.[184]

3. If the statute defined a crime in which turpitude necessarily inheres, then the conviction was for a crime involving moral turpitude for immigration purposes.[185]

4. Where a statute encompassed some offenses involving moral turpitude and others that do not (a "divisible statute"), then the court looked to the record of conviction, including the indictment, plea, verdict, and sentence, to determine whether the offense for which the alien was convicted was a crime involving moral turpitude.[186]

   a. The court did not look at the circumstances surrounding the offense.[187]

   b. Where the elements of a statute did not include fraud as an element, the court could look at the charging papers and admissions made as part of a guilty plea to determine what the non-citizen was convicted of, not what he actually did.[188]

In addition, where an underlying or substantive crime involves moral turpitude, then a conviction for aiding in the commission of the crime or for otherwise acting as an accessory before the fact is also a conviction for a crime involving moral turpitude.[189] Where knowledge or intent is an element of the offense, a conviction for distribution of cocaine under 21 U.S.C. § 841(a)(1) is a conviction for a crime involving moral turpitude.[190]

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[183] *See In re* R-, 6 I&N Dec. at 448; *In re* Short, 20 I&N Dec. 136, 137 (BIA Nov. 16, 1989); Hashish v. Gonzales, 442 F.3d 572, 575-76 (7th Cir. Jun. 6, 2006) (affirming the categorical approach); Padilla v. Gonzales, 397 F.3d 1016 (7th Cir. Feb. 22, 2005).

[184] *See id.*

[185] *See In re* Short, 20 I&N Dec. 136, 137 (BIA Nov. 16, 1989).

[186] *See id.* at 137-38 (citing *In re* Esfandiary, 16 I&N Dec. 659 (BIA Jan. 17, 1979)); *In re* Ghunaim, 15 I&N Dec. 269 (BIA Apr. 17, 1975); *In re* Lopez, 13 I&N Dec. 725 (BIA July 19, 1971); *In re* S-, 2 I&N Dec. 353 (A.G. Aug. 18, 1945); *see also*, *In re* Beckford, 22 I&N Dec. 1216 (BIA Jan. 19, 2000) (holding that where a criminal statute is divisible, the IJ may look to the record of conviction to ascertain the nature of the offense).

[187] *See* Hashish v. Gonzales, 442 F.3d 572, 575 (7th Cir. Mar. 24, 2006); Padilla v. Gonzales, 397 F.3d 1016 (7th Cir. Feb. 22, 2005).

[188] *See* Abdelqadar v. Gonzales, 413 F.3d 668, 671-72 (7th Cir. Jul. 1, 2005) (discussing and distinguishing the analysis for crimes involving moral turpitude and aggravated felonies and holding that even though the Illinois statute did not contain an element of fraud, the court could consider the indictment and plea to find that the non-citizen's offense involved purchasing food stamps for cash and making a profit from them and that his offense was a crime involving moral turpitude).

[189] *See In re* Short, 20 I&N Dec. 136 (BIA Nov. 16, 1989) (following *In re* F-, 6 I&N Dec. 783 (BIA Nov. 2, 1955)).

[190] *See In re* Khourn, 21 I&N Dec. 1041 (BIA Oct. 31, 1997).

Change in Categorical Approach Precedent

In April 2008, the Seventh Circuit issued a precedent decision, *Ali v. Mukasey*,[191] which reversed decades of precedent for determining whether a crime involves moral turpitude. In that case, a lawful permanent resident was convicted of conspiracy "to commit any offense against the United States, or to defraud the United States", in violation of 18 U.S.C. § 371 for selling firearms without a license or necessary paperwork to persons not authorized to own them.[192] The Seventh Circuit held that "when deciding how to classify convictions under criteria that go beyond the criminal charge--such as the amount of the victim's loss, or whether the crime is one of "moral turpitude", the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction."[193] It upheld the Board's consideration of the pre-sentencing report to classify the conviction as one involving moral turpitude and found that such a classification is an inquiry apart from the elements of the offense.[194]

Following the Seventh Circuit's *Ali* decision, then U.S. Attorney General Mukasey issued a precedent decision on November 7, 2008. In *In re Silva-Trevino*,[195] the Attorney General noted that in order for a crime to constitute moral turpitude, it must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. The Attorney General followed the Seventh Circuit's approach in *Ali* and modified the categorical approach to require the following:

- ***Step One - traditional categorical approach**:*

  1. The immigration judge looks to the criminal statute under which the noncitizen was convicted to determine if the conviction falls within the definition of a crime of moral turpitude based only on the elements of the offense.

  2. The noncitizen must establish a "realistic probability" that the criminal statute of conviction has been applied to a factual situation which does not constitute a crime of moral turpitude.

     * In his decision, the Attorney General indicates that the noncitizen must "point to his own case or other cases" in which a person was convicted without proof of the statutory element that establishes moral turpitude.[196]

     * In a removal proceeding, immigration counsel can argue that the government always bears the burden of proving all facts necessary to establish the ground of removal under relevant statutory and case law.[197]

     * This is a critical issue for which defense counsel and immigration

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191 *See Ali v. Mukasey*, 521 F.3d 737 (7th Cir. Apr. 4, 2008).
192 *See id.* at 738.
193 *See id.* at 743.
194 *See id.*
195 *See In re* Silva-Trevino, 24 I&N Dec. 687, 704, n. 4 (A.G. Nov. 7, 2008).
196 *See In re* Silva-Trevino, 24 I&N Dec. 687, 704, n. 4 (A.G. Nov. 7, 2008).
197 INA 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A); Woodby v. INS, 385 U.S. 276 (Dec. 12, 1966).

counsel should work together to prove that there exists a reasonable probability of prosecution of non-turpitudinous conduct in a number of ways:

1) reported and unreported decisions under the statute which establish punishment for non-turpitudinous conduct;

2) the noncitizen's own case;

3) other cases established by a declaration of counsel or other defense counsel;

4) form jury instructions which include instructions addressing non-turpitudinous conduct under the statute in question.

- Note: This categorical analysis has been used by courts over the years to determine whether a conviction is a crime of moral turpitude, with the addition of the "reasonable probability" requirement from the Supreme Court's 2007 decision in *Gonzales v. Duenas-Alvarez.*[198]

- ***Step Two - modified categorical approach****:* If a review under the traditional categorical approach does not resolve the issue, then the immigration judge engages in a modified categorical approach to examine the record of conviction, including documents such as the indictment, judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript, to determine if the conviction is a crime of moral turpitude.[199]

  - If the issue remains unresolved after using this modified categorical approach, the immigration judge turns to Step Three.

- ***Step Three - consideration of other evidence****:* If the issue is not resolved under either approach, then the immigration judge may consider any additional evidence deemed necessary or appropriate to resolve whether the conviction is for a crime of moral turpitude.[200]

  - Although the Attorney General stated that the sole purpose of such an inquiry is to ascertain the nature of the prior conviction and not to relitigate the conviction itself,[201] in reality such relitigation will take place before the immigration court.

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198 *See Gonzalez v. Duenas Alvarez,* 549 U.S. 183 (Jan. 17, 2007); *Matter of Louissant*, 24 I&N Dec. 754 (BIA Mar. 18, 2009) (mandating that the categorical approach requires the consideration whether there exists a realistic probability that the statute under which the non-citizen was convicted would be applied to reach conduct that does not involve moral turpitude).

199 *See In re* Silva-Trevino, 24 I&N Dec. 687, 698 (A.G. Nov. 7, 2008).

200 *See In re* Silva-Trevino, 24 I&N Dec. 687, 699 (A.G. Nov. 7, 2008).

201 *See In re* Silva-Trevino, 24 I&N Dec. 687, 703 (A.G. Nov. 7, 2008).

- In light of this new approach regarding admissible evidence to determine whether an offense involves moral turpitude, it is extremely important that defense counsel:

  - Work to obtain a disposition under a statute that does not involve moral turpitude at all; or

  - Alternatively, take care regarding what is made part of the court record, including:

    - statements by the defendant non-citizen during the preparation of the pre-sentence investigation/pre-sentence report (PSI/PSR),
    - statements during the plea colloquy,
    - statements given during the sentencing hearing, and
    - evidence proffered regarding mitigating and aggravating factors to be considered for imposition of any sentence (i.e. supervision, probation, conditional discharge, work-release, imprisonment, or a suspended term of imprisonment).

- In addition, counsel should carefully review the PSI/PSR with the non-citizen and immigration counsel. "Good" facts can be included in the PSI/PSR as well.

- For an excellent overview of the Attorney General's decision and strategies to address it, *see* D. Kesselbrenner and N. Tooby, "Living Under *Silva-Trevino*," National Immigration Project of the National Lawyers Guild (Feb. 26, 2009), available in PDF format at http://nationalimmigrationproject.org/.

NOTE: The U.S. Supreme Court denied a petition for a writ of certiorari in the Seventh Circuit's *Ali* decision on June 22, 2009.[202] This leaves the Attorney General's framework as outline in *Silva-Trevino* in place at this time. Thus, it is very important for defense counsel to remain current on the state of the law and to work closely with immigration counsel whenever there is the possibility that a charged offense may involve moral turpitude, either statutorily or factually.

Traffic Offenses

Traffic-related offenses may also constitute crimes involving moral turpitude. For example, a conviction for obstruction of justice where a non-citizen gives a false name to a police officer during a traffic stop is a crime involving moral turpitude.[203] Aggravated

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[202] *See Ali v. Mukasey,* 521 F.3d 737 (7th Cir. Apr. 4, 2008), *reh'g and reh'g en banc denied* (May 28, 2008), *petition for certiorari denied*, *Ali v. Holder,* no. 08-552, 2009 U.S. LEXIS 4641 (Jun. 22, 2009).
[203] *See* Padilla v. Gonzales, 397 F.3d 1016, 1019-21 (7th Cir. Feb. 22, 2005) (holding that a conviction under 720 ILCS 5/31-4(a) constitutes a crime involving moral turpitude as the deliberate act of furnishing false information with the specific intent to conceal criminal activity evidences an "evil intent" associated with crimes involving moral turpitude).

fleeing from a police officer is also a crime involving moral turpitude.[204]

DUI Offenses and Driving on a Suspended/Revoked License

In general, a simple DUI offense is not a crime involving moral turpitude.[205] Further, an offense of aggravated driving under the influence with two or more prior DUI convictions under Arizona statute is not a crime involving moral turpitude where a conviction for aggravated DUI is based on an aggregation of prior simple DUI convictions under a recidivist statute.[206]

There are certain instances, however, where a DUI conviction may be a crime involving moral turpitude. For example, under Arizona statutes § 28-697(A)(1) and § 28-1383(A)(1), a person may be found guilty of aggravated DUI by committing a DUI offense while knowingly driving on a suspended, canceled, or revoked license or by committing a DUI offense while on a restricted license due to a prior DUI.[207] The Board held that a person who drives under the influence while knowing that he is prohibited from driving commits a crime "so base and so contrary to the currently accepted duties that persons owe to one another and to society in general" that it is a crime involving moral turpitude.[208]

Where possible, care must be taken in the pleading of DUI offenses to avoid a conviction for a crime involving moral turpitude under *In re* Lopez-Meza, 22 I&N Dec. 1188 (BIA Dec. 21, 1999). For example, under Illinois law, a person may be convicted for driving under the influence which is defined as driving or being in actual physical control of a vehicle. [209] Actual physical control includes sitting in the driver's seat with possession of the ignition key and the capability of starting the engine and moving the vehicle.[210] The intent of the motorist to move the vehicle is not relevant to determining whether he is in actual physical control.[211] The location of the motorist in the vehicle is not necessarily relevant as actual physical control was established where the motorist was asleep alone in a sleeping bag in the backseat, the doors were locked, and the motorist had the physical ability to start the engine and move the vehicle.[212] Where a non-citizen is convicted for driving under the influence while his driver's license is suspended or revoked for a prior DUI offense, even where he was asleep in the backseat of a vehicle, he could be found to

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[204] *See* 625 ILCS 5/11-204.1(a)(1); Mei v. Ashcroft, 393 F.3d 737, 741-42 (7th Cir. Dec. 29, 2004) (discussing that the "aggravation" under Illinois law was fleeing at 21 or more miles per hour above the speed limit and relying on Illinois Pattern Jury Instructions to find that the requirement of proving the willfulness of the failure to stop at the order of a police officer is implicit in the aggravated offense).

[205] *See id.*

[206] *See In re* Torres-Varela, 23 I&N Dec. 78 (BIA May 9, 2001) (distinguishing *In re* Lopez-Meza, 22 I&N Dec. 1188 (BIA Dec. 21, 1999)).

[207] *See In re* Lopez-Meza, 22 I&N Dec. 1188 (BIA Dec. 21, 1999).

[208] *See id.*

[209] *See* 625 ILCS 5/11-501(a).

[210] *See* People v. Eyen, 291 Ill.App.3d 38, 683 N.E.2d 193, 225 Ill. Dec. 249 (Ill.App.2d Jul. 24, 1997).

[211] *See* People v. Scapes, 247 Ill.App.3d 848, 617 N.E.2d 1366 (Ill.App.4th Aug. 12, 1993), *appeal denied*, 153 Ill.2d 567, 624 N.E.2d 815, 191 Ill.Dec. 627.

[212] *See* People v. Davis, 205 Ill.App.3d 431, 562 N.E.2d 1152, 150 Ill.Dec. 349 (Ill.App.1st Oct. 23, 1990), *appeal denied*, 136 Ill.2d 547, 567 N.E.2d 335, 136 Ill.Dec. 349.

have been convicted of a crime involving moral turpitude by the Immigration Court or a DHS official.

Assault, Battery, and Stalking

In general, simple assault is not a crime involving moral turpitude.[213] An assault on a peace officer may be a crime involving moral turpitude, depending on the section of law violated and whether injury results.[214] An assault is also a crime involving moral turpitude where criminally reckless conduct is coupled with an offense involving the infliction of serious bodily injury.[215] Similarly, assault with a deadly weapon is a conviction for a crime involving moral turpitude.[216]

Where the elements of a domestic battery offense do not require either actual infliction of serious harm or specific intent and physical injury to the victim, the offense is not categorically a crime involving moral turpitude.[217] The willful infliction of corporal injury on a spouse, cohabitant, or parent of the offender's child in violation of California Penal Code § 273.5(a) has been found to be a crime involving moral turpitude.[218]

An offense of aggravated stalking under section 750.411I of the Michigan Compiled Laws Annotated is a crime involving moral turpitude.[219] A conviction for aggravated stalking requires a willful course of conduct, including the intentional transmission of threats, which causes another to feel fear is evidence of an act accompanied by a vicious motive or corrupt mind and therefore constitutes a crime involving moral turpitude.[220]

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[213] *See* Ciambelli ex rel. Maranci v. Johnson, 12 F.2d 465 (D. Mass. Apr. 9, 1926); *In re* Fualaau, 21 I&N Dec. 475 (BIA Jun. 14, 1996); *In re* Perez-Contreras, 20 I&N Dec. 615 (BIA Nov. 20, 1992) (withdrawing from *In re* Baker, 15 I&N Dec. 50 (BIA Aug. 8, 1974), to the extent that it holds that third degree assault resulting in great bodily harm is a crime involving moral turpitude without regard to the existence of intentional or reckless conduct); *In re* Short, 20 I&N Dec. 136 (BIA Nov. 16, 1989) (citing United States ex rel. Zaffarano v. Corsi, 63 F.2d 757 (2nd Cir. Mar. 30, 1933)); *In re* Danesh, 19 I&N Dec. 669 (BIA June 20, 1988); *In re* Logan, 17 I&N Dec. 367 (BIA May 2, 1980).

[214] *See* Garcia-Meza v. Mukasey, 516 F.3d 535 (7th Cir. Feb. 5, 2008) (finding that a conviction for aggravated battery of a peace officer under 720 ILCS 5/12-4(b)(6) for grabbing the officer's finger without resulting injury may not constitute a crime involving moral turpitude and remanding the case to the Board for further proceedings); *In re* Danesh, 19 I&N Dec. 669 (BIA June 20, 1988).

[215] *See In re* Fualaau, 21 I&N Dec. 475 (BIA Jun. 14, 1996) (modifying *In re* Franklin, 20 I&N Dec. 867 (BIA Sept. 13, 1994) (Missouri involuntary manslaughter conviction)); *In re* Wojtkow, 18 I&N Dec. 111, 112-13 (BIA Sept. 10, 1981) (second degree manslaughter in New York); *In re* Medina, 15 I&N Dec. 611, 613-14 (BIA Mar. 19, 1976), *aff'd sub nom.* Medina-Luna v. I.N.S., 547 F.2d 1171 (7th Cir. Jan. 13, 1977) (Illinois aggravated assault conviction).

[216] *See In re* Logan, 17 I&N Dec. 367 (BIA May 2, 1980).

[217] *See In re Sejas*, 24 I&N Dec. 236 (BIA Jul. 25, 2007); *In re Solon*, 24 I&N Dec. 239 (BIA Jul. 25, 2007); *In re* Sanudo, 23 I&N Dec. 968 (BIA Aug. 1, 2006) (also holding that the offense was not a crime of violence under 18 U.S.C. § 16 and therefore not a crime of domestic violence under I.N.A. § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) pursuant to precedent of the Ninth Circuit Court of Appeals).

[218] *See In re* Tran, 21 I&N Dec. 291 (BIA Mar. 28, 1996).

[219] *See In re* Ajami, 22 I&N Dec. 949 (BIA Jul. 13, 1999).

[220] *See id.* Note: Although not charged as a stalking offense, the Seventh Circuit addressed a conviction for telephone harassment under 720 ILCS 135/1-1(2) and found that it was not a crime of

Willful Failure to Register as a Sex Offender

The failure to register as a sex offender is a regulatory offense.[221] Where a non-citizen has previously been apprised of his obligation to register as a sex offender, a conviction for a willful failure to register constitutes a crime involving moral turpitude.[222] The Board of Immigration Appeals found that a failure to comply with one's obligation to register as a sex offender is an inherently base or vile crime with an implicitly evil intent based on current societal mores and the serious risk involved in a violation of the duty owed by sex offenders to society, even where a conviction for a willful failure to register arises as a result of forgetfulness.[223] A conviction for the failure to register also constitutes a separate ground of deportability.[224]

Seventh Circuit and Crimes Involving Moral Turpitude

The Seventh Circuit Court of Appeals has specifically ruled that the following crimes involve moral turpitude:

- Conspiracy under 18 U.S.C. § 371 for selling firearms without a license or necessary paperwork to persons not authorized to own them.[225]
- Giving a false statement to a government official in violation of 18 U.S.C. § 1001.[226]
- Visa fraud under 18 U.S.C. § 1546.[227]
- Knowingly obtaining or exerting unauthorized control over property of another person – theft of a recordable sound in violation of 720 ILCS 5/16-1 and theft under 720 ILCS 5/16-1(a)).[228]
- Obstruction of justice for knowingly furnishing false information "with intent to prevent the apprehension or obstruct the prosecution or defense of any person."[229]
- WIC (Women, Infant, and Children) fraud related to food stamps.[230]
- Use of an alias with the intent to defraud and obtain control over another's property under the Illinois deceptive practices statute.[231]
- Aggravated battery.[232]

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violence and therefore not an aggravated felony based on state court interpretation of the elements of the offense. *See* Szucz-Toldy v. Gonzales, 400 F.3d 978, 981 (7th Cir. Mar. 11, 2005).

221 *See In re* Tobar-Lobo, 24 I&N Dec. 143, 147 (BIA Apr. 23, 2007).

222 *See id.* 146.

223 *See id.* at 145-47.

224 *See* Failure to Comply with Sex Offender Registration Requirements, *infra* at 3-59.

225 *See id.* at 738.

226 *See Ghani v. Holder*, 557 F.3d 836, 840-41 (7th Cir. Mar. 9, 2009).

227 *See Obi v. Mukasey*, 558 F.3d 609 (7th Cir. Mar. 9, 2009).

228 *See* Hashish v. Gonzales, 442 F.3d 572, 575 (7th Cir. Mar. 24, 2006).

229 *See* 720 ILCS 5/31-4(a); Padilla v. Gonzales, 397 F.3d 1016 (7th Cir. Feb. 22, 2005).

230 *See* 720 ILCS 5/17B-5; Abdelqadar v. Gonzales, 413 F.3d 668 (7th Cir. Jul. 1, 2005).

231 *See* Hassan v. I.N.S., 110 F.3d 490 (7th Cir. Apr. 1, 1997).

232 *See* Guillen-Garcia v. I.N.S., 60 F.3d 340 (7th Cir. Jul. 17, 1995). Where a non-citizen conceded deportability for a crime involving moral turpitude and the Immigration Judge found that he was deportable as charged, the Seventh Circuit Court of Appeals did not reverse the decision of the Board

- Murder and aggravated battery.[233]
- Murder and voluntary manslaughter.[234]
- Assault with the intent to commit murder.[235]
- Contributing to the delinquency of a female minor.[236]
- Statutory rape.[237]
- Contributing to the sexual delinquency of a minor.[238]
- Mail fraud under 18 U.S.C. § 1341 (1982) and knowingly and fraudulently claiming to be a U.S. citizen under 18 U.S.C. § 1001 (1982).[239]
- Conspiracy to defraud the U.S. of taxes on distilled spirits.[240]
- Conspiracy for and counterfeiting securities, uttering forged obligations of the U.S. and connecting parts of different bills under 18 U.S.C. §88, 262, 265, and 276 (1932).[241]
- Making, possessing, and passing counterfeit stamps and for conspiracy to do so.[242]
- Possession of counterfeit obligations with the intent to defraud.[243]
- Passing counterfeit money.[244]
- Admission to having committed perjury where false statements were given to obtain a U.S. passport and to an officer at the U.S. Consulate.[245]
- Attempting to defeat and evade income taxes in violation of 26 U.S.C. § 145(b) and Revenue Act (1928) § 146(b).[246]
- Conspiracy to violate the Internal Revenue Act.[247]

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of Immigration Appeals which affirmed the Immigration Judge's finding. *See* Dashto v. I.N.S., 59 F.3d 697 (7th Cir. Jul. 11, 1995) (Illinois conviction for armed robbery); Guillen-Garcia v. I.N.S., 999 F.2d 199 (7th Cir. Jul. 2, 1993) (convictions for aggravated battery causing great bodily harm to another, aggravated battery through the use of a deadly weapon, and attempted murder); U.S. ex rel. Adamantides v. Neelly, 191 F.2d 997 (7th Cir. Oct. 10, 1951) (Illinois convictions for robbery and robbery with a dangerous weapon).

233 *See* Cordoba-Chaves v. I.N.S., 946 F.2d 1244 (7th Cir. Oct. 22, 1991).

234 *See* De Lucia v. Flagg, 297 F.2d 58 (7th Cir. Dec. 4, 1961), *cert. denied,* 369 U.S. 837 (Apr. 2, 1962); U.S. ex rel. Marino v. Holton, 227 F.2d 886 (7th Cir. Dec. 6, 1955) (holding that a conviction for murder is a crime involving moral turpitude even where the conviction was vacated by the U.S. Supreme Court for due process violations under the Fourteenth Amendment). (Note: in 1949, the Illinois post-conviction statute took effect; this case addressed the issue of the arresting officer who acted as the interpreter).

235 *See* U.S. ex rel. Circella v. Sahli, 216 F.2d 33 (7th Cir. Oct. 12, 1954).

236 *See* Orlando v. Robinson, 262 F.2d 850 (7th Cir. Jan. 5, 1959).

237 *See* Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. Jan. 20, 1931).

238 *See* Ill. Rev. Stat. Ch. 38 § 11-5; Palmer v. I.N.S., 4 F.3d 482 (7th Cir. Aug. 26, 1993).

239 *See* Oviawe v. I.N.S., 853 F.2d 1428 (7th Cir. Aug. 10, 1988).

240 *See* 18 U.S.C. § 88; Morgano v. Pilliod, 299 F.2d 217 (7th Cir. Feb. 5, 1962).

241 *See* U.S. ex rel. Giglio v. Neelly, 208 F.2d 337 (7th Cir. Nov. 13, 1953).

242 *See* United States ex rel. Volpe v. Smith, 62 F.2d 808 (7th Cir. Jan. 11, 1933).

243 *See* Lozano-Giron v. I.N.S., 506 F.2d 1073 (7th Cir. Dec. 4, 1974).

244 *See* U.S. ex rel. Schlimmgen v. Jordan, 164 F.2d 633 (7th Cir. Dec. 9, 1954).

245 *See* Tandaric v. Robinson, 257 F.2d 895 (7th Cir. Aug. 12, 1958); see also, United States ex rel. Boraca v. Schlotfeldt, 109 F.2d 106 (7th Cir. Jan. 2, 1940); United States ex rel. Majka v. Palmer, 67 F.2d 146 (7th Cir. Oct. 16, 1933).

246 *See* Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir. Jan. 7, 1965).

247 *See* Morgano v. Pilliod, 299 F.2d 217 (7th Cir. Feb. 5, 1962).

- Obtaining money by means of the confidence game (involving an act of cheating or swindling).[248]
- Conspiracy to interfere with trade and commerce by violence, threat and coercion in violation of 18 U.S.C.A. §420a, the Anti-Racketeering Act.[249]
- Larceny.[250]

In comparison, the Seventh Circuit Court of Appeals has found that the following crimes do not involve moral turpitude:

- Concealing stolen property (firearms) under Wisconsin statute.[251]
- Conviction for counterfeiting pennies or nickels or passing the same.[252]

Foreign Convictions

Foreign convictions can constitute crimes involving moral turpitude for purposes of deportability and inadmissibility.[253] A non-citizen who is convicted of a crime involving moral turpitude abroad after having been admitted to the U.S. may be deportable; similarly, a non-citizen who has a foreign conviction for a crime involving moral turpitude and applies for admission to the U.S. or an immigration benefit may be found to be inadmissible and subsequently deportable and placed in removal proceedings.[254] A foreign conviction may be the basis of a finding of inadmissibility where it is a conviction under U.S. standards.[255] United States standards govern in determining whether or not the foreign offense is classified as a felony or misdemeanor.[256] In defining the crime and its elements, a review must be conducted of the foreign offense's counterpart in the U.S. Federal Code or, if it is not a federal offense, Title 22 of the District of Columbia Code.[257]

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[248] *See* Rukavina v. I.N.S., 303 F.2d 645 (7th Cir. May 24, 1962) (holding that the offense was a crime involving moral turpitude even if the crime were based on acceptable moral standards of 1933).
[249] *See* U.S. ex rel. Circella v. Sahli, 216 F.2d 33 (7th Cir. Oct. 12, 1954).
[250] *See* Orlando v. Robinson, 262 F.2d 850 (7th Cir. Jan. 5, 1959) (holding that larceny under California statute is a crime malum in se and therefore a crime involving moral turpitude).
[251] *See* Yang v. I.N.S., 109 F.3d 1185 (7th Cir. Mar. 18, 1997).
[252] *See* 18 U.S.C. § 282 (1946) and 18 U.S.C.A. § 282 (1927), criminal code 168, 35 Stat.1120 (1909); U.S. ex rel. Giglio v. Neelly, 208 F.2d 337 (7th Cir. Nov. 13, 1953) (finding that these offenses were merely statutory violations).
[253] *See, e.g.*, *In re* Bader, 17 I&N Dec. 525 (BIA Sept. 24, 1980) (holding that a conviction to defraud the public of money or valuable security under Canadian Criminal Code § 338(a), which required proof of intent to defraud as a necessary element of the offense, is a crime involving moral turpitude); *see also In re* Ramirez-Rivero, 18 I&N Dec. 135 (BIA Oct. 5, 1981); *In re* Scarpulla, 15 I&N Dec. 139 (BIA Nov. 21, 1974).
[254] *See* I.N.A. §§ 237(a)(2)(A)(i), (ii), 8 U.S.C. §§ 1227(a)(2)(A)(i), (ii); I.N.A. § 212(a)(2)(A)(i), 8 U.S.C. § 1182((a)(2)(A)(i); *see also*, Final Administrative Removal Orders, *infra* at 6-3; Removal Proceedings, *infra* at 6-7.
[255] *See* Lennon v. I.N.S., 527 F.2d 187 (2nd Cir. Oct. 7, 1975).
[256] *See* Soetarto v. I.N.S., 516 F.2d 778, 780 (7th Cir. May 28, 1975) (finding that "theft has always been found to involve moral turpitude regardless of the sentence imposed or the amount stolen").
[257] *See In re* Adamo, 10 I&N Dec. 593 (BIA Jun. 4, 1964).

The Seventh Circuit Court of Appeals has held that the following foreign convictions are crimes involving moral turpitude:

- Canadian fraud conviction.[258]
- Netherlands conviction for theft.[259]
- Jordan conviction for theft.[260]
- Foreign conviction for first degree burglary.[261]
- Greek murder conviction.[262]
- Hungarian conviction for manslaughter.[263]

Board of Immigration Appeals and State Offenses

Where the Seventh Circuit Court of Appeals has not ruled that a particular crime involves moral turpitude, the decisions of the Board of Immigration Appeals control.[264] The following are examples of decisions of the Board of Immigration Appeals involving Illinois, Indiana, and Wisconsin statutes found to be crimes involving moral turpitude:

- Misprision of a felony in violation of 18 U.S.C. § 4.[265]
- Possession of child pornography where the statute makes it unlawful for a person to "knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child."[266]
- 1980 conviction for burglary.[267]
- 1963 conviction for voluntary manslaughter.[268]
- 1971 conviction for aggravated assault.[269]
- 1977 conviction for receiving stolen property.[270]
- 1906 misdemeanor conviction for petit larceny.[271]
- 1916 conviction for felonious assault with the intent to murder.[272]

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[258] *See* Palmer v. I.N.S., 4 F.3d 482 (7th Cir. Jan. 28, 1993).
[259] *See* Soetarto v. I.N.S., 516 F.2d 778 (7th Cir. May 28, 1975).
[260] *See* Khalaf v. I.N.S., 361 F.2d 208 (7th Cir. May 19, 1966).
[261] *See* Lattig v. Pilliod, 289 F.2d 478 (7th Cir. Apr. 26, 1961).
[262] *See* Prentis v. Stathakos, 192 F. 469 (7th Cir. Jul. 27, 1911).
[263] *See* Pillisz v. Smith, 46 F.2d 769 (7th Cir. Feb. 7, 1931).
[264] *See In re* E-L-H-, 23 I&N Dec. 814 (BIA Aug. 18, 2005) (reaffirming that a precedent decision by the BIA applies to all proceedings involving the same issue unless and until it is modified or overruled by the U.S. Attorney General, BIA, Congress, or a federal court.
[265] *See In re* Robles-Urrea, 24 I&N Dec. 22 (BIA Sept. 27, 2006), overruling in part *In re* Sloan, 12 I&N Dec. 840 (A.G. Aug. 30, 1968; BIA Aug. 18 and Dec. 21, 1966).
[266] *See In re* Olquin, 23 I&N Dec. 896 (BIA Mar. 23, 2006) (discussing that possession of child pornography is morally reprehensible and intrinsically wrong).
[267] *See* Illinois Revised Statute, Ch. 38 § 19-1; *In re* Frentescu, 18 I&N Dec. 244 (BIA Jun. 23, 1982).
[268] *See* Illinois Revised Statutes, Ch. 38 § 9-2; *In re* Abi-Rached, 10 I&N Dec. 551 (BIA May 13, 1964).
[269] *See* Illinois Revised Statutes, Ch. 38 § 12-2(a)(1); *In re* Medina, 15 I&N Dec. 611 (BIA Mar. 19, 1976), *aff'd sub nom*. Medina-Luna v. INS, 547 F.2d 1171 (7th Cir. Jan. 31, 1977) (assault with a deadly weapon).
[270] *See* Illinois Revised Statutes of 1945, Ch. 38 § 492; *In re* Mendoza, 11 I&N Dec. 239 (BIA Jun. 22, 1965).
[271] *See* Illinois Criminal Code §§ 37.328, 37.330; *In re* C-, 6 I&N Dec. 331 (BIA Oct. 8, 1954).

- 1931 conviction for contributing to the delinquency of a 15 year old child by encouraging a child to be guilty of indecent or lascivious conduct.[273]
- Money laundering.[274]
- Child abandonment.[275]
- Check fraud.[276]
- Carnal abuse of female minor.[277]

Application to Cases

Case of Roman from Ukraine

Roman entered the United States in April 1992 as a refugee. In February 1994, he adjusted his status to become a lawful permanent resident under I.N.A. § 209(a), 8 U.S.C. § 1159(a).[278] In June 1995, he pled guilty to shoplifting three packs of cigarettes under 720 ILCS 5/16A and paid a $50 fine. In December 1996, he was arrested and charged with receiving stolen property, a camera valued at $250, under 720 ILCS 5/16-1(a)(5)(A) and 720 ILCS 5/16-1(b)(1). He pled guilty to the Class A misdemeanor charge for which he was ordered to pay a $300 fine and placed on probation for 6 months. In January 2006, he was placed in removal proceedings by the DHS and charged with being deportable for having been convicted of two crimes involving moral turpitude after admission to the U.S.

Analysis: Roman is deportable under I.N.A. § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) for having been convicted of multiple crimes involving moral turpitude after admission to the U.S. He can apply for asylum, withholding of deportation, and relief under the Convention against Torture if he fears persecution or torture in Ukraine.[279] He is not, however, eligible for cancellation of removal because he had been in the United States for less than seven years when he received the stolen camera.[280]

Case of Bin from China

As the son of a Chinese party official, Bin received permission from the Chinese government to study in the United States. At age 17 in August 2002, he entered the United

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[272] *See In re* C-, 5 I&N Dec. 370 (BIA Aug. 3, 1953).
[273] *See* Illinois Criminal Code § 37.089; Matter of F-, 2 I&N Dec. 610 (BIA Jun. 7, 1946) (involving facts constituting statutory rape).
[274] *See In re* Tejwani, 24 I&N Dec. 97 (BIA Feb. 22, 2007) (holding that the crime of money laundering which involves the element of an exchange of monetary instruments that are known to be the proceeds of "any criminal conduct" with the intent to conceal those proceeds constitutes a crime of moral turpitude).
[275] *See* Wis. Stat. § 351.30; *In re* R-, 4 I&N Dec. 192 (BIA Dec. 11, 1950).
[276] *See* IC 10-2105; *In re* B-, 4 I&N Dec. 297 (BIA Mar. 12, 1951).
[277] *See* Wis. Stat. § 340.47; *In re M-,* 9 I&N Dec. 452 (BIA Aug. 2, 1961).
[278] Refugees apply for adjustment of status under I.N.A. § 209(a), 8 U.S.C. § 1159(a) and asylees apply for adjustment of status under I.N.A. § 209(b), 8 U.S.C. § 1159(b). *See* Adjustment of Status for Asylees and Refugees, *infra* at 6-31.
[279] *See* Asylum and Refugees, *infra* at 6-31; Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45.
[280] *See* Cancellation of Removal, *infra* at 6-23.

States as a F-1 student to complete a bachelor's degree in electrical engineering. In January 2005, he was hired by a computer corporation which filed a labor certification application on his behalf and then an immigrant visa petition. In June 2005, the CIS granted his application for adjustment of status and Bin received his green card. In January 2007, Bin was arrested and charged with fourth degree sexual assault under Wis. Stat. 940.225(3)(m) with his sixteen year old girlfriend whose mother wanted to end their relationship. He pled guilty and was sentenced to two years of probation.

Analysis: Bin is deportable for having been convicted of a crime involving moral turpitude within the first five years after admission because the maximum possible sentence was seven years. Criminal sexual conduct with a minor, including statutory rape, is considered to be a crime involving moral turpitude. In addition, he has been convicted of an aggravated felony for sexual abuse of a minor and possibly a crime of violence.[281] Bin does not have any defense to removal as he does not have a claim of persecution or torture by the Chinese government.[282] Successful post-conviction relief may be his only chance to remain in the U.S.[283]

Practice Tips

Where a non-citizen has had a green card for less than five years and has resided in the United States legally for less than seven years, work with the judge and prosecutor to plead the non-citizen under a provision that does not involve moral turpitude, such as misdemeanor assault under 720 ILCS 5/12-1. If that is not possible, try to plead the non-citizen to a misdemeanor crime involving moral turpitude, not a felony crime involving moral turpitude. If the non-citizen is convicted for a single misdemeanor involving moral turpitude for which the maximum term of imprisonment is 364 days or less, then he or she will not be deportable because the crime involving moral turpitude must have a maximum term of imprisonment of 365 days and be committed within five years of admission.

If the non-citizen has a prior conviction for a crime involving moral turpitude (even a misdemeanor) and is convicted for a second misdemeanor crime involving moral turpitude after having been admitted to the U.S., then he or she will be deportable even though both convictions occurred more than five years after the non-citizen legally entered the country or became a lawful permanent resident. Due to the second conviction for a crime involving moral turpitude, the non-citizen may be subject to mandatory detention without bond, depending upon the date of his arrest for the offense.[284]

Crimes Involving Firearms and Destructive Devices

The ground of deportability for firearms and destructive devices is very broad and often overlaps with the definition of an aggravated felony.[285] A non-citizen who is convicted of almost any violation related to a firearms offense is deportable.

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[281] *See* Aggravated Felonies, *infra* at 3-34.
[282] *See* Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45.
[283] *See* Post-conviction relief, *infra* at 8-12 to 8-20.
[284] *See* Mandatory Detention, *infra* at 7-3.
[285] *See* Aggravated Felonies and case law, *infra* at 3-34.

Statute

I.N.A. § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C):

Certain firearm offenses

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm[286] or destructive device[287] (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

Case Law

Where the use of a firearm is an essential element of a crime, a non-citizen will be considered to have been convicted of and deportable for a firearms offense.[288] Where the statutory definition of an offense does not involve a weapon, then a conviction is not a firearms offense, even if the record of conviction shows that the defendant actually used a

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[286] The term "firearm" is defined as: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C. § 921(a)(3).

[287] The term "destructive device" is defined as: "(A) any explosive, incendiary, or poison gas-- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordinance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes." *See* 18 U.S.C. § 921(a)(4).

[288] *See In re* P-F-, 20 I&N Dec. 661 (BIA Jun. 9, 1993); *In re* K-L-, 20 I&N Dec. 654 (BIA Jun. 3, 1993) (holding that a conviction under 18 U.S.C. § 924(c)(1) (Supp. II 1990) for use of a firearm during a drug trafficking crime or a crime of violence is a conviction for a firearms offense and an aggravated felony because it is a distinct offense rather than a sentencing enhancement); *cf. In re* Rodriguez-Cortes, 20 I&N Dec. 587 (BIA Oct. 19, 1992) (holding that a sentencing enhancement for using a firearm during the commission of an offense is not a conviction for a firearms offense); I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (proof of record of conviction).

firearm.[289] A conviction under a divisible statute is not a firearms offense unless the record of conviction establishes that the offense committed involved firearms.[290] The firearms ground of deportability does not apply to an alien where the alien was convicted under Wisconsin statute for having concealed stolen property, the property being firearms, in a garage.[291]

A firearm is also defined as a destructive device unless it is a rifle used for an approved purpose enumerated under 18 U.S.C. § 924(a)(4), such as the use solely for sporting, recreational, or cultural purposes.[292] As shooting a rifle into the air to celebrate a holiday is not part of American culture, a conviction for attempted reckless discharge of a firearm on New Year's Eve constitutes a deportable offense as it does not have a cultural purpose.[293]

The 1994 amendment to I.N.A. § 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C) (1995), which added attempt and conspiracy to the deportation grounds relating to firearms offenses, applies retroactively to convictions entered before, on, or after October 25, 1994.[294] Many of the offenses listed in the firearms grounds of deportability also overlap with the aggravated felony ground of deportability.[295]

Crimes Involving Controlled Substances

A non-citizen who has been convicted of any offense related to a controlled substance is deportable. The only exception is a single offense involving possession of 30 grams or less of marijuana, unless it involves possession in a prison or correctional setting.[296] In addition, many controlled substance convictions also constitute aggravated felonies for which there are few forms of immigration relief.

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[289] *See In re* Perez-Contreras, 20 I&N Dec. 615 (BIA Nov. 20, 1992); *see also*, Dashto v. I.N.S., 59 F.3d 697 (7th Cir. Jul. 11, 1995) (holding that a certificate of statement of conviction by the court clerk stating that the alien had used a handgun is not satisfactory proof to sustain a finding of deportability for a conviction for a firearms offense where the court records did not confirm that the alien in fact used a handgun in connection with an armed robbery).

[290] *See In re* Pichardo, 21 I&N Dec. 330 (BIA Apr. 23, 1996); *In re* Teixeira, 21 I&N Dec. 316 (BIA Apr. 23, 1996); *In re* Madrigal, 21 I&N Dec. 323 (BIA Apr. 23, 1996).

[291] *See* Yang v. I.N.S., 109 F.3d 1185 (7th Cir. Mar. 18, 1997); *see also*, Aggravated Felonies and case law, *infra* at 3-34.

[292] *See* Lemus-Rodriguez v. Ashcroft, 350 F.3d 652, 655 (7th Cir. Nov. 26, 2003).

[293] *See id.* at 655-56 (holding that a conviction for attempted reckless discharge of a firearm in violation of 720 ILCS 5/24-1.5 is a deportable offense and also renders the non-citizen ineligible for cancellation of removal under I.N.A. § 240A(b)(1), 8 U.S.C. §1229b(b)(1)).

[294] *See In re* St. John, 21 I&N Dec. 593 (BIA Sept. 23, 1996); s*ee also*, *In re* P-F-, 20 I&N Dec. 661 (BIA June 9, 1993) (holding that convictions for first degree armed burglary and robbery with a firearm under Florida statute constitute a firearms offense under I.N.A. § 241(a)(2)(c), 8 U.S.C. § 1251(a)(2)(c) where the use of a firearm was an essential element of the crimes).

[295] *See* Aggravated Felonies and case law, *infra* at 3-34.

[296] *See In re* Moncada-Servellon, 24 I&N Dec. 62 (BIA Jan. 25, 2007).

Statute

I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B):[297]

(i) Conviction
Any alien who *at any time after admission* has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in the Controlled Substances Act, 21 U.S.C. § 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts
Any alien who *is, or at any time after admission has been*, a drug abuser or addict is deportable.

Case Law

Deportability for a conviction involving a controlled substance encompasses most state drug offenses. In general, convictions relating to controlled substances are clearly defined by statute and case law for immigration purposes. For example, a conviction for aiding and abetting the unlawful distribution of heroin constitutes an illicit drug trafficking offense and a deportable offense.[298]

In addition, a conviction for any offense "relating to" a controlled substance constitutes a ground of deportability,[299] including a conviction for being under the influence of a controlled substance[300] and a conviction for criminal solicitation under a state's general purpose solicitation statute where the record of conviction reflects that the crime solicited is an offense relating to a controlled substance.[301] A conviction for possession of drug paraphernalia constitutes an offense relating to a controlled substance[302] as does a conviction for unlawful delivery of a "look-alike" substance where the substance resembles a controlled substance listed in the federal Controlled Substances Act.[303]

A single conviction for simple possession of 30 grams or less of marijuana is generally not a deportable offense, although it may constitute a ground of inadmissibility.[304] The

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297 [Emphasis in italics added by the author.]
298 *See* U.S. v. Gonzalez, 582 F.2d 1162 (7th Cir. Sept. 8, 1978).
299 *See* I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).
300 *See In re* Esqueda, 20 I&N Dec. 850 (BIA Aug. 15, 1994).
301 *See In re* Zorilla-Vidal, 24 I&N Dec. 768 (BIA Mar. 20, 2009) (holding that its interpretation of the law regarding solicitation applies to cases arising outside of the jurisdiction of the Ninth Circuit Court of Appeals).
302 *See* Escobar Barraza v. Mukasey, 519 F.3d 388 (7th Cir. Mar. 13, 2008); Luu-Le v. I.N.S., 224 F.3d 911 (9th Cir. Aug. 3, 2000).
303 *See* Desai v. Mukasey, 520 F.3d 762 (7th Cir. Mar. 28, 2008).
304 *See* I.N.A. § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i); 720 ILCS 550/10 (first offender probation for a cannabis violation); 720 ILCS 550/4 (possession of marijuana); Sandoval v. I.N.S., 240 F.3d 577

simple possession exception to deportability for marijuana does not apply to possession of marijuana in a prison or other correctional setting.[305] The Board reasoned that because there is the "inherent potential for violence and the threat of disorder that attends the presence of drugs in a correctional setting", the offense was not merely a "simple possession" offense.[306] The Board also noted that a conviction for possession of a small amount of marijuana in or near a school could raise similar issues as possession of marijuana in a prison or correctional setting.[307]

A single conviction for possession of more than 30 grams of marijuana is a deportable offense.[308] For controlled substances other than marijuana, a single conviction for simple possession is a deportable offense.[309] A disposition for first offender probation for a controlled substance violation constitutes a conviction for a controlled substance offense for immigration purposes.[310]

As possession of any amount of flunitrazepam or possession of five grams or more of crack cocaine constitutes a federal felony under 21 U.S.C. § 844(a), a conviction for either of these offenses is an aggravated felony.[311] Thus, a non-citizen who has been convicted under a state statute for felony possession of any other controlled substance is deportable for a controlled substance offense but has not been convicted of an aggravated felony under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).[312]

(7th Cir. Feb. 12, 2001); *cf.* I.N.A. § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); I.N.A. § 212(h), 8 U.S.C. § 1182(h). *See also*, Grounds of Inadmissibility and Adjustment of Status, *infra* at 4-1.

[305] *See In re* Moncada-Servellon, 24 I&N Dec. 62, 64-67 (BIA Jan. 25, 2007).

[306] *See id.* at 65. This case raises a concern that similar convictions may be charged by the DHS in the future as aggravated felonies for drug trafficking under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). The Board noted that the same offense is a federal felony under 18 U.S.C. § 1791. Although the U.S. Supreme Court addressed the issue of simple possession as a misdemeanor with limited exceptions under 21 U.S.C. § 844(a) in Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006), care should be taken to avoid a state or federal conviction involving possession of any controlled substance in or near a prison, correctional setting, or school.

[307] *See* Moncada-Servellon, 24 I&N Dec. 62, 65 (BIA Jan. 25, 2007).

[308] *See* I.N.A. § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[309] *See* Definition of Aggravated Felonies and case aw, *infra* at 3-34.

[310] *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999) (overruling *In re* Manrique, 21 I&N Dec. 58 (BIA May 19, 1995)); Gill v. Ashcroft, 335 F.3d 574 (7th Cir. Jul. 8, 2003) (finding that the treatment of first-time drug offenses under Federal First Offender Act, 18 U.S.C. § 3607, does not affect the characterization of state first offender dispositions as convictions for purposes of the definition of a conviction for immigration law under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A)).

[311] *See* 21 U.S.C. § 844(a); I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B); Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006).

[312] *See* Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006); Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. Mar. 22, 2006) (overruling *In re* Yanez, 23 I&N Dec. 390 (BIA May 13, 2002) and holding that a conviction under 720 ILCS 570/402(c) is not a drug trafficking crime and therefore not an aggravated felony under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B)); *see also*, U.S. v. Peralta-Espinoza, 413 F.Supp.2d 972 (E.D.WI Feb. 3, 2006) (finding that a state felony conviction for possession of a controlled substance is a misdemeanor for purposes of the federal Sentencing Guidelines).

A disposition involving a plea of guilty or finding of guilty for one simple possession offense involving 30 grams or less of marijuana under:

- **720 ILCS 550/10 (first offender probation) or**
- **IC 35-48-4-12 (first offender probation) or**
- **Wis. Stat. § 961.47 (first offender probation) or**
- **720 ILCS 550/4 (possession of marijuana) or**
- **IC 35-48-4-11 (possession of marijuana) or**
- **Wis. Stat. § 961.41(3g)(e) (possession of marijuana)**

is <u>not</u> a <u>deportable</u> offense.

If a lawful permanent resident, a refugee, or an asylee has only this single possession disposition (and no other convictions which could trigger removal proceedings) and he does not depart from the U.S., then removal proceedings against him will not be sustained. Other non-citizens with this disposition, however, may be subject to removal proceedings for having violated their status or being in the U.S. unlawfully.

Such a disposition <u>is</u> a ground of <u>inadmissibility</u> under I.N.A. § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). It will subject a non-citizen (including a lawful permanent resident, asylee, or refugee) who either leaves the U.S. and attempts to be admitted or who applies for certain immigration benefits (such as adjustment of status) to removal proceedings and possibly mandatory detention by the DHS under I.N.A. § 236(c), 8 U.S.C. § 1226(c).[313]

Where a record of conviction does not identify the controlled substance, the record cannot support a charge of deportability.[314] In addition, a conviction for accessory after the fact is not sufficiently related to a controlled substance violation to support a finding of deportability under I.N.A. § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i) (1995).[315]

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[313] *See* Custody Determinations: Bond or Mandatory Detention?, *infra* at 7-3.

[314] *See In re* Paulus, 11 I&N Dec. 274 (BIA May 25, 1965); *see also*, I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (proof of a conviction).

[315] *See In re* Batista-Hernandez, 21 I&N Dec. 955 (BIA July 15, 1997) (holding, however, that the offense of accessory after the fact does constitute a crime of obstruction of justice and therefore an aggravated felony under I.N.A. § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S)).

Regarding foreign convictions, the expungement of a foreign drug-related conviction pursuant to a foreign rehabilitative statute does not eliminate the conviction for immigration purposes even where the non-citizen would have been eligible for federal first offender treatment if prosecuted in the United States.[316] The exculpatory provisions of the Immigration and Nationality Act relate only to pardons for domestic convictions.[317]

Application to Cases

Case of Joseph from England

Joseph entered the United States as a lawful permanent resident in June 1987 at age seventeen with his mother who was married to a United States citizen. In December 1995, he was arrested and convicted for possession of sixteen grams of heroin. After leaving a bar late one night in January 2005, a local police officer stopped him, gave him a breathalyzer test, arrested him and took him to the county jail for seventy-two hours. He was charged with driving while intoxicated. While in the county jail, the jail guard asked him if he was a United States citizen based on his British accent. He told the guard that he had a green card. The guard called the DHS which placed a detainer on Joseph.

Joseph pled guilty to one count of DWI and was sentenced to 30 days in the county jail and one year of probation. Upon completion of his jail sentence, the DHS took him into custody, served Joseph with a Notice to Appear in Immigration Court, and detained him without bond.

Analysis: Joseph is deportable for having been convicted of a controlled substance violation. He has not been convicted of an aggravated felony because he has only one simple possession conviction.[318] He is eligible to apply for cancellation of removal because he has been a lawful permanent resident for more than five years, has resided in the United States lawfully for at least seven years continuously, and has not been convicted of an aggravated felony.[319] He is subject to mandatory detention for the duration of his removal proceedings.[320]

Case of Maria from Mexico

Maria entered the United States without inspection in 1981 to work as an in-home day care provider. She later became a lawful permanent resident in 1990, through the 1986 Legalization Program (also colloquially known as "amnesty").

In January 2004, she was stopped by the local sheriff for allegedly failing to come to a complete stop at a stop sign. Seeing that she was having difficulty finding her driver's

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316 *See In re* Dillingham, 21 I&N Dec. 1001 (BIA Aug. 20, 1997).
317 *See id.*; *see also*, Aggravated Felonies, *infra* at 3-34 (discussing case law regarding controlled substances).
318 *See* Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006).
319 *See* Cancellation of Removal, *infra* at 6-23.
320 *See* Mandatory Detention, *infra* at 7-3.

license, the sheriff asked to look in her purse. Being afraid, she gave the officer her purse where he found a small bag of marijuana. He arrested her and impounded her car. Maria was charged with possession of a small amount of marijuana under 720 ILCS 550/4(c) for having at least 10 grams but not more than 30 grams of marijuana. The DHS placed a detainer on Maria. She pled guilty to the charge. Her defense attorney asked the state court to note for the record that the amount of marijuana found by the police officer was only twenty-two grams. The court placed her on first offender probation under 720 ILCS 550/10. Upon receiving a certified copy of her conviction record, the DHS released its hold on Maria.

Analysis: Although Maria's plea and term of probation constitute a conviction for immigration purposes under I.N.A. § 101(a)(48), 8 U.S.C. § 1101(a)(48), Maria is not deportable for her marijuana conviction because she qualifies for the exception for possession of 30 grams or less of marijuana under I.N.A. § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). She is, however, inadmissible to the U.S. and should not travel outside of the U.S.[321] If she is convicted of another controlled substance violation, then she will be deportable for having been convicted of a controlled substance offense and an aggravated felony.[322]

Practice Tips

Where your non-citizen client is being charged with possession of a small amount of marijuana constituting less than thirty grams and it is the client's first controlled substance violation, work with the prosecutor to have her plead to another charge which is not a controlled substance offense or otherwise deportable offense and to dismiss the marijuana charge. Alternative charges may include disorderly conduct or a violation of a local ordinance, such as disturbing the peace.

If it is not possible to have the marijuana possession charge stricken and to have your client plead to a non-deportable offense, then ask the court to state on the record the exact amount of marijuana. Such a statement in the record will protect your non-citizen client from deportation consequences because one conviction for simple possession of an amount of marijuana of thirty grams or less is the only exception to the ground of deportability for controlled substances.[323] If your client is convicted for simple possession of 30 grams or less of marijuana, you should advise your client that she may be detained when she attempts to return to the U.S. and may not be re-admitted following a trip abroad. Counsel should refer her to an immigration attorney for specific advice about her eligibility for a waiver of the ground of inadmissibility or other relief.[324]

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[321] *See* Grounds of Inadmissibility, *infra* at 4-1; 212(h) Waivers, *infra* at 6-58.

[322] *See* Aggravated Felonies, *infra* at 3-40, (defining aggravated felony and discussing case law of crimes involving controlled substances).

[323] *See* I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B). For discussion regarding 30 grams or less of marijuana and the grounds of inadmissibility, *see* Grounds of Inadmissibility, *infra* at 4-1, and 212(h) Waivers, *infra* at 6-58.

[324] For a list of immigration attorneys who practice criminal immigration, see Appendix 9C.

Crimes Involving Domestic Violence

A non-citizen who has been convicted after admission for an offense related to domestic violence, including simple assault or battery, is deportable. Additional deportable offenses include convictions for stalking, child abuse, child neglect, and child abandonment, as well as a finding of violation of a protection order. This ground of deportability applies to convictions and findings of violations of protection orders entered on or after September 30, 1996.

Statute

I.N.A. § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E)

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.[325]

(ii) **Violators of protection orders**

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term 'protection order' means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.[326]

Case Law

The Seventh Circuit Court of Appeals has analyzed the ground of domestic violence deportability for a "crime of violence" as defined under 18 U.S.C. § 16.[327] The Seventh

[325] [This subsection is effective for convictions on or after September 30, 1996.]

[326] [This subsection is effective for violations on or after September 30, 1996.]

[327] *See* Flores v. Ashcroft, 350 F.3d 666 (7th Cir. Nov. 26, 2003) (declining to follow *In re* Martin, 23 I& N Dec. 491 (BIA Sept. 26, 2002) in the context of an analysis under 18 U.S.C. § 16(a) for a misdemeanor offense).

Circuit held that the elements of a state misdemeanor offense must be analyzed against the elements of 18 U.S.C. § 16(a), the definition of a crime of violence directly referenced in the ground of deportability.[328] In a discussion involving the dynes of force for paper airplanes and snowballs, the Seventh Circuit found that elements of a misdemeanor battery conviction under IC § 35-42-2-1 do not meet the definition of a crime of violence under 18 U.S.C. § 16(a) which requires as "as an element the use, attempted use, or threatened use of physical force against the person or property of another." [329] It held that the non-citizen had not been convicted of a crime of domestic violence for purposes of deportability under I.N.A. § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).[330] The Seventh Circuit noted that where an offense is a felony, then it may be a crime of violence under 18 U.S.C. § 16(b) if there is a substantial risk of physical force being used in the commission of the offense to constitute a crime of domestic violence.[331] This includes a conviction for domestic battery under 720 ILCS 5/12-3.2(a)(1) ("causes bodily harm") or under Wis. Stat. § 940.19(1) where a felony sentence of one year or longer is imposed.[332]

The ground of deportability for "child abuse" has been interpreted by the Board in the context of the aggravated felony ground to have a relatively broad construction to include "any form of cruelty to a child's physical, moral, or mental well-being." Whether a non-citizen is deportable on the basis of a conviction for a "crime of child abuse" is to be determined by a review of the elements of the offense in the statutory definition of the crime or admissible portions of the conviction record under the categorical approach.[333] The Seventh Circuit has held that convictions for sexual abuse of a minor are also crimes of child abuse, even where no minor was a victim of the offense.[334]

Female genital mutilation is both a federal crime as well as a state crime and may be found to constitute child abuse as well as persecution and torture.[335] A non-citizen who knowingly decides to take a U.S. citizen child or a lawful permanent resident child to a country where the child will face female genital mutilation may face prosecution under federal and state law.[336] The non-citizen, if a parent of the U.S. citizen or lawful permanent resident child, may also face other sanctions, including the removal of the child from the

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[328] *See id.* at 669-671.

[329] *See id.* at 669-72 (distinguishing the "intent to cause injury" with "injury that happens to occur", the "intent to touch" with the "intent to injure", and "physical force against" with "physical contact with" and citing to Indiana case law regarding the interpretation of a "touching", an element of a battery offense under IC § 35-42-2-1(a)(1)(A)); *cf.* U.S. v. Alvarenga-Silva, 324 F.3d 884 (7th Cir. Apr. 3, 2003) (holding that a felony conviction for domestic battery under 720 ILCS 5/12-3.2 qualified as a crime of violence for purposes of the U.S. Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)).

[330] *See* Flores v. Ashcroft, 350 F.3d at 669-72.

[331] *See id.* at 671-72.

[332] *See* LaGuerre v. Mukasey, 526 F.3d 1037 (7th Cir. May 20, 2008); U.S. v. Sanner, 565 F.3d 400 (7th Cir. May 14, 2009).

[333] *See* Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 515–517 (BIA May 20, 2008).

[334] *See e.g.*, Hernandez-Alvarez v. Gonzales, 432 F.3d 763 (7th Cir. Dec. 28, 2005) (involving indecent solicitation of a child under 720 ILCS 5/11-6(a) where an undercover officer posed as a minor).

[335] *See* 18 U.S.C. § 116; 720 ILCS 5/12-34; *In re* Kasinga, 21 I&N Dec. 357, 358 (BIA Jun. 13, 1996).

[336] *See id*; *see also* Olowo v. Ashcroft, 368 F.3d 692, 702-05 (7th Cir. May 11, 2004) (directing the clerk of the Seventh Circuit Court of Appeals to send a copy of its opinion to the Illinois Department of Children and Family Services and the Illinois State's Attorney for Cook County).

custody of the parents in order to protect the child from female genital mutilation, an act considered to be torture against a child.

Child custody issues often arise where one parent is a U.S. citizen or a non-citizen in the U.S. with lawful status and the other parent is either removed to a home country or voluntarily returns to her home country. Where a child has been wrongfully removed to the U.S. from another country, a parent may file a petition with the federal district to request that the court order the child returned to her under the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act.[337] A determination of whether the removal of the child was wrongful is made under the law of the country in which the child has her "habitual residence."[338] Habitual residence for a child is not the same as domicile, and the determination of a child's habitual residence will depend upon the facts of the case and the laws of the countries involved in the case.[339]

Obligations and Consequences under the International Marriage Broker Regulation Act (IMBRA)

The International Marriage Broker Regulation Act (IMBRA) is part of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005) and was designed to regulate the international marriage broker market.[340] The Act was introduced in response to several cases in which individuals from other countries met U.S. citizens through a marriage broker, came to the U.S. on a K-1 fiancé(e) visa, and became the victims of domestic abuse or violence at the hands of the U.S. citizen.

Through IMBRA, new sections have been added to the fiancé(e) visa petition. First, U.S. citizen petitioners are required to state whether they met their fiancé(e) through a marriage broker and if so, to explain the circumstances. Second, they are required to disclose charges and dispositions for certain prior offenses even if the records relating to these offenses have been expunged and/or sealed.[341] These include offenses of:

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[337] *See* Hague Convention on the Civil Aspects of International Child Abduction, 343 U.N.T.S. 89 (Oct. 25, 1980); International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.*; Kijowska v. Haines, 463 F.3d 583 (7th Cir. Sept. 8, 2006).

[338] *See* Kijowska v. Haines, 463 F.3d 583, 586 (7th Cir. Sept. 8, 2006).

[339] *See* Kijowska v. Haines, 463 F.3d 583, 586-90 (7th Cir. Sept. 8, 2006) (finding that the habitual residence of the U.S. citizen child was Poland, the country to which her mother removed her in infancy and in light of the U.S. citizen father's threat to have the mother deported and holding that Illinois law did not control the process to determine habitual residence; also finding that because the U.S. citizen father failed to pursue his legal remedies under the Hague Convention, he enabled the child to obtain a habitual residence in the country to which the child's mother removed her, even where the initial taking of the child out of the U.S. by the mother was wrongful).

[340] *See* The Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006) (codified at 8 U.S.C.A. § 1375a).

[341] *See* USCIS Form I-129F, Petition for Alien Fiancé(e), available at www.uscis.gov.

- Domestic violence,[342] sexual assault,[343] child abuse and neglect,[344] dating violence,[345] elder abuse,[346] and stalking.[347]

- Homicide, murder, manslaughter, rape, abusive sexual conduct, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or an attempt to commit any of these crimes.

- Crimes relating to a controlled substance or alcohol where the petitioner has been convicted on at least three occasions and where such crimes did not arise from a single act.[348]

The DHS conducts background checks of U.S. citizen petitioners. If the Department of State approves the immigrant visa, it releases the U.S. citizen's criminal history to the fiancé(e) before he or she enters the U.S. and marries the U.S. citizen.[349]

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[342] The term domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic family violence laws of the jurisdiction. *See* Memorandum from Michael Aytes, Associate Director, Domestic Operations, "International Marriage Broker Regulation Act Implementation Guidance," Jul. 21, 2006.

[343] The term sexual assault means any conduct prescribed by chapter 109A of title 18 U.S.C. Code, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison and includes both assaults committed by offenders who are strangers to the victim and assaults committed by offenders who are known or related by blood or marriage to the victim. *See id*.

[344] The term child abuse and neglect means any recent act or failure to act on the part of a parent or caregiver with intent to cause death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm. This definition shall not be construed to mean that failure to leave an abusive relationship, in the absence of other action constituting abuse or neglect, is itself abuse or neglect. *See id*.

[345] The term dating violence means violence committed by a person: 1. who is or has been in a social relationship of a romantic or intimate nature with the victim; and 2. where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, type of relationship, and frequency of interaction between the person involved in the relationship. *See id*.

[346] The term elder abuse means any action against a person who is 50 years of age or older that constitutes willful: 1. infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or 2. deprivation by a person, including a caregiver of goods or services with intent to cause physical harm, mental anguish, or mental illness. *See id*.

[347] The term stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. *See id*.

[348] *See id*.

[349] *See* "USCIS Revises Form I-129F," 84 *Interpreter Releases* 293-94, 335-43 Appendix II, USCIS Form I-129F, Petition for Alien Fiancé(e), Feb. 5, 2007.

If a U.S. citizen petitioner indicates on Form I-129F that he or she has been convicted by a court or a military tribunal for one of the specified crimes or the USCIS discovers the information through background checks, then he will be required to submit certified copies of all court and police records showing the charges and dispositions for every conviction.[350] The records are required even if they were sealed or otherwise cleared.[351]

If the petitioner has a history of violent offenses, the adjudicator may waive the filing limitations where extraordinary circumstances exist in the petitioner's case.[352] A violent offense is defined as an offense that has as an element of the crime the use, attempted use, or threatened use of physical force against the person or property of another.[353] This includes any of the above specified crimes, including crimes involving a controlled substance or alcohol if the offense included an element of intentional conduct that resulted in serious bodily injury or death.[354]

If a petitioner with a history of violent offenses seeks a waiver, he must attach a signed and dated letter to request the waiver, along with evidence of his extraordinary circumstances.[355] Evidence of rehabilitation, combined with evidence of other compelling factors, may be considered "extraordinary circumstances" that warrant a grant of the waiver.[356] Examples of such evidence may include: police reports, court records, news articles, and trial transcripts reflecting the nature and circumstances surrounding the violent offense(s), rehabilitation, ties to the community, or records demonstrating good conduct and exemplary service in the uniformed services.[357]

The IMBRA requires the CIS to approve a waiver request where the petitioner establishes that he was battered or subjected to extreme cruelty by his spouse, parent, or adult child at the time he committed the violent offense(s) and: 1. was not the primary perpetrator of the violence in the relationship; 2. was acting in self-defense; 3. violated a protection order intended for his or her protection; or 4. committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and there was a connection between the crime committed and the battery or extreme cruelty.[358] For a crime to be considered sufficiently connected to the battery or extreme cruelty suffered by the petitioner, the evidence must establish the circumstances surrounding the crime committed, including the relationship of the abuser to the petitioner and petitioner's role in it, and the causal relationship between the battery or extreme cruelty and the crime committed.[359]

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[350] *See* Memorandum from Michael Aytes, Associate Director Domestic Operations, "International Marriage Broker Regulation Act Implementation Guidance," Jul. 21, 2006.
[351] *See id.*
[352] *See id.*
[353] *See id.*
[354] *See id.*
[355] *See id.*
[356] *See id.*
[357] *See id.*
[358] *See id.*
[359] *See id.*

While protecting a non-citizen fiancé(e) from entering blindly into a potentially abusive relationship, IMBRA also exposes naturalized U.S. citizen petitioners to further scrutiny of their criminal records by the DHS. If a naturalized U.S. citizen had not previously disclosed certain criminal information and the DHS did not previously uncover this information independently, the status of the naturalized U.S. citizen could be in jeopardy. For example, a naturalized U.S. citizen could face revocation of his citizenship if he failed to disclose a prior conviction when applying for naturalization, or if the disposition for the offense now constitutes a conviction or an aggravated felony.[360] If a non-citizen was naturalized soon after the enactment of IIRAIRA, he should consult an immigration attorney before filing a fiancé(e) petition.

Application to Cases

Case of Mohamed from Sudan

Mohamed became a lawful permanent resident in January 1990. He married Rebka, a lawful permanent resident, in 1994. In May 2003, they began having difficulties. On June 14, 2003, they got into a shouting match about money. Mohamed pushed Rebka and she fell to the floor. He kicked her a couple of times and left the apartment. The neighbors who lived underneath them called the police to report domestic violence. As Mohamed was leaving the apartment, the police arrested him and took him to jail for domestic battery.

In criminal court, a no-contact order was issued to protect Rebka from threats of violence made by Mohamed and he pled guilty to misdemeanor domestic battery under 720 ILCS 5/12-3.2(a)(1) which includes intentionally causing injury.[361] The judge imposed and suspended a ninety day county jail sentence and placed him on probation for one year. Three days later, Mohamed saw Rebka in the grocery store where he walked toward her and insulted her. Then, he quickly left the store. Based on the incident in the grocery store, Rebka filed an application for an Order for Protection (OFP) with the civil county court. The civil court judge granted the OFP and also found that Mohamed had violated the no-contact order issued by the criminal court. The district attorney called the DHS to report Mohamed. The DHS served Mohamed with a Notice to Appear on August 1, 2004.

Analysis: Mohamed is deportable on two grounds. First, he is deportable because he was convicted for a crime of domestic violence after September 30, 1996. Second, he is deportable because the judge found that Mohamed had violated the no-contact order after September 30, 1996. Since he has not been convicted of an aggravated felony,[362] has been a permanent resident for more than five years, and has resided continuously in the U.S. for more than seven years before he committed the offense and the DHS initiated removal proceedings, he is eligible to apply for cancellation of removal, a form of discretionary relief

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[360] For example, a non-citizen who pled guilty and completed a term of supervision under Illinois law for felony domestic battery would not have faced deportation prior to 1996 as a supervision disposition would not have constituted a conviction under *In re* Ozkok, 19 I&N Dec. 546 (BIA Apr. 26, 1988). Under the present definition of conviction at I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), it is a conviction for immigration purposes.

[361] Had he been convicted under 720 ILCS 5/12-3.2(a)(2), he would not be deportable for having committed a touching of an insulting or provoking nature.

[362] *See* Aggravated Felonies, *infra* at 3-34.

from removal.[363]

Case of Marcos from Guatemala

Marcos entered the United States without inspection in 1990, looking for work to help support his elderly parents in Guatemala. In October 1992, he married Esmeralda, a United States citizen, who filed applications for Marcos to obtain an immigrant visa and lawful permanent resident status (his green card).[364] Marcos became a lawful permanent resident in February 1993. They have two United States citizen children, born in December 1995 and January 1997.

On August 28, 2006, Marcos and Esmeralda got into a fight when she discovered that Marcos had been selling small amounts of marijuana to earn extra cash for the family. Marcos punched Esmeralda in the face, severely bruising her cheek and eye and breaking her nose. She called the police, who came to the house and arrested Marcos for aggravated battery under IC 35-42-2-1.5, a Class B felony. Aggravated battery under Indiana law involves knowing and intentional infliction of injury that causes serious permanent disfigurement.[365]

On September 20, 2006, Marcos pled guilty to aggravated battery as charged. During his plea, he admitted to the facts as contained in the complaint. The court sentenced him to 120 days in the county jail and suspended the sentence. He served ten days in the workhouse and went into a drug treatment program which he successfully completed. This is his only conviction in the U.S.

Analysis: Marcos is deportable based on the conviction for a crime of domestic violence for which he was convicted after September 30, 1996.[366] He is eligible for cancellation of removal because he has been a permanent resident more than 5 years, lawfully resided in the U.S. for more than 7 years prior to the commission of his offense, and has not been convicted of an aggravated felony.[367] If he fears persecution on account of race, religion, nationality, political opinion, or membership in a particular social group or torture in Guatemala, then Marcos may also be eligible for asylum, withholding of removal, or relief under the Convention against Torture.[368]

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[363] *See* Cancellation of Removal, *infra* at 6-23.

[364] *See* Grounds of Inadmissibility, *infra* 4-1; Adjustment of Status, *infra* at 6-18.

[365] *See* IC 35-42-2-1.5.

[366] *See* Flores v. Ashcroft, 350 F.3d 666 (7th Cir. Nov. 26, 2003).

[367] His sale of marijuana is a negative factor in the balancing of equities and exercise of discretion by the Immigration Court. *See* Cancellation of Removal, *infra* at 6-23. He is not eligible to re-adjust his status based on his marriage to his U.S. citizen wife because he is inadmissible for having been a controlled substance trafficker. *See* I.N.A. § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C); § 212(h) Waivers, *infra* at 6-58; Adjustment of Status, *infra* at 6-18.

[368] *See* Asylum and Refugees, *infra* at 6-31; Withholding of Removal, *infra* at 6-40; and Convention Against Torture, *infra* at 6-45.

Practice Tips

To avoid the risk of removal proceedings for a non-citizen for domestic issues, negotiate a lesser charge that does not involve a crime that falls under the categories of an aggravated felony, a crime involving moral turpitude, or a crime of domestic violence, stalking, child abuse, child neglect, child abandonment, or a violation of a protection order. An admission of facts on the record relating to domestic violence or the relationship of the defendant and the victim as defined by the state statutes can be sufficient for the DHS to sustain a charge of deportability for a crime of domestic violence where the conviction is for disorderly conduct, misdemeanor assault, or misdemeanor battery.[369] Where possible, the original complaint should be dismissed, a new complaint alleging facts constituting disorderly conduct, misdemeanor assault, or misdemeanor battery without mention of the relationship between the offender and alleged victim should be issued, and the client should plead to the minimum facts in order to avoid any admissions of facts in the record which could result in a determination that he has been convicted of a crime of domestic violence. Police records should also be kept out of the state court record, and the relationship between the non-citizen defendant and the alleged victim should not be admitted on the record.[370] For example, a client could admit that he was speaking loudly with a woman and that they had a verbal disagreement, but not that he pushed his wife to try to get her to agree with him.

You may need to educate the prosecutor and the court about the ramifications of the changes in the immigration law for convictions involving crimes of domestic violence and the effect on the offender's immediate family, including a United States citizen or lawful permanent resident spouse and/or any children. Domestic violence is a serious issue, but one spouse may not want to have the other deported over what may be seen by both parties as a "misunderstanding." In addition to the possible deportation of the offender, there may be consequences to the victim's immigration status. Deportation may not be the best solution for the children where the deported parent is the sole wage earner for the family, particularly since the federal welfare and immigration legislation enacted in 1996 place strict limitations on the receipt of public benefits by U.S. citizens and non-citizens. Finally, child support is not easily collected from a deported parent in another country where wages are much lower than in the United States.

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[369] *See* Flores v. Ashcroft, 350 F.3d 666, 671 (7th Cir. Nov. 26, 2003) (finding that the "domestic partner" element of the ground of deportability may be proved without regard to the elements of the state crime and finding that the police reports established that the battery victim was the non-citizen's wife); *cf.*, Alvarado v. Gonzales, 176 Fed. Appx. 887, 2006 U.S. App. LEXIS 10255 (9th Cir. Apr. 21, 2006) (limiting the examination of documentation regarding the relationship of the victim to the offender to the record of conviction).

[370] *See id.*

Aggravated Felonies

Convictions for crimes deemed to be aggravated felonies under immigration law have devastating effects for non-citizens and their families. The term "aggravated felony" was statutorily defined by Congress in the 1988 Anti-Abuse Drug Act[371] and included three crimes: murder, controlled substance or drug trafficking, and weapons trafficking.

Since 1988, Congressional amendments have greatly broadened the aggravated felony definition. In 1990, Congress amended the definition to include crimes of violence for which the term of imprisonment was at least five years.[372] In 1994, Congress again amended the definition of aggravated felony, adding twenty new offenses, including money laundering, child pornography, prostitution, and theft offenses where the term of imprisonment was five years or more.[373] In the 1996 AEDPA and IIRAIRA, Congress expanded the definition of aggravated felony to include more than fifty offenses and reduced the imposed term of imprisonment for many crimes from five years to one year.[374]

- **Fifteen years was the average length of residence in the U.S. for non-citizens ordered removed in 2005 based on aggravated felony convictions.[375]**

It is critical to note that, in general, an Immigration Judge does not have any authority to grant any form of discretionary relief from deportation or removal once she finds that the non-citizen has been convicted of an aggravated felony. The only forms of discretionary relief that an Immigration Judge may grant to a non-citizen convicted of an aggravated felony are:

- Adjustment of status for refugees and asylees under I.N.A. § 209, 8 U.S.C. § 1159;
- Adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255, with a §212(h) waiver for non-citizens with approved visa petitions who have never been lawful permanent residents;
- Adjustment of status under I.N.A. §245, 8 U.S.C. §1255 for lawful permanent residents whose aggravated felony convictions do not fall within a ground of inadmissibility and who have not been sentenced to an aggregate term of

[371] *See* Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (Nov. 18, 1988).
[372] *See* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 501(b), 104 Stat. 4978 (Nov. 29, 1990).
[373] *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(b), 108 Stat. 4305 (Oct. 25, 1994).
[374] For a list of the offenses defined as aggravated felonies by the I.N.A., *see* Appendix 3A, I.N.A. § 101(a)(43), 8 U.S.C. § 1101(a)(43).
[375] *See* "Immigrants' Stories Expose Murkiness of Deportation Laws," *The New Standard*, www.newstandardnews.net, Feb. 2, 2007.

imprisonment of 5 years or more for all convictions;

- A simultaneous § 212(c) waiver and adjustment of status for lawful permanent residents who pled guilty to aggravated felony offenses involving a firearm before April 24, 1996; and
- A § 212(c) waiver for lawful permanent residents who pled guilty to certain aggravated felony offenses before April 24, 1996.[376]

The Immigration Judge shall grant the mandatory forms of relief, being withholding of removal and relief under the Convention against Torture, where a non-citizen qualifies and can demonstrate the probability that he will be either persecuted or tortured abroad.[377]

For convictions following a bench or jury trial prior to the passage of AEDPA (April 24, 1996) and now deemed to be aggravated felonies, post-conviction relief or a pardon may be the only means by which to avoid an aggravated felony conviction and the resulting immigration consequences for a non-citizen.[378] Furthermore, a non-citizen who has been convicted of an aggravated felony on or after November 29, 1990 is permanently barred from eligibility for naturalization.[379]

The impact of the 1996 amendment of the definition of an aggravated felony has been great, particularly in light of the retroactive application of the definition of aggravated felony to convictions that are ten, twenty, or even thirty or more years old, including convictions for which a non-citizen never served any prison or jail time, successfully completed probation and has been a productive and contributing member in his community.[380] In addition, many of these convictions did not carry any immigration consequences when the non-citizens committed the acts or were convicted for the acts. For example, a non-citizen who was convicted for a felony theft offense, received a one year suspended sentence in the county jail more than five years after being admitted to the U.S. as a lawful permanent resident, and was placed on probation prior to September 30, 1996 was not deportable. He is now, however, deportable and will be found to have been convicted of an aggravated felony for purposes of immigration law. Similarly, non-citizens convicted of criminal sexual abuse, such as statutory rape, and placed on probation will be found to have been convicted of aggravated felonies for immigration purposes.

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[376] *See* Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36; Grounds of Inadmissibility and Adjustment of Status, *infra* at 4-1; § 212(h) Waivers, *infra* at 6-58; § 212(c) Waivers, *infra* at 6-48. Non-citizens who are not lawful permanent residents may also be subject to final administrative removal orders issued by the DHS without review by an Immigration Judge and, therefore, unable to adjust their status with a §212(h) waiver to become lawful permanent residents. *See* I.N.A. § 238(b), 8 U.S.C. § 1228(b).

[377] *See* Withholding of Removal, *infra* at 6-40; Convention against Torture, *infra* at 6-45.

[378] *See* §212(c) Waivers, *infra* at 6-48; Post-Conviction Relief, *infra* at 8-12; Pardons, *infra* at 8-25.

[379] *See* Good Moral Character, *infra* at 6-12; I.N.A. § 101(f), 8 U.S.C. § 1101(f).

[380] *See* Alvear-Velez v. Mukasey, 540 F.3d 672 (7th Cir. Sept. 2, 2008); Flores-Leon v. I.N.S., 272 F.3d 433, 438-39 (7th Cir. Nov. 14, 2001) (Congress intended the amended definition of aggravated felony to apply retroactively and the retroactive application does not violate the Ex Post Facto Clause).

Case Law

Analyzing the length of sentences is critical to avoiding convictions for certain types of aggravated felonies and to determining the consequences for convictions defined as aggravated felonies. A sentence to probation is not considered to be a sentence to a term of imprisonment.[381] Concurrent sentences are evaluated as the length of the longest sentence whereas consecutive sentences are added together.[382] Where the sentence(s) for aggravated felony convictions are five years (60 months) or more, the non-citizen will be statutorily ineligible for withholding of deportation or removal.[383] Certain convictions, however, such as delivery of a controlled substance or sexual abuse of a minor, will be considered aggravated felonies regardless of the imposition of a term of imprisonment.[384]

In addition to the consequence of being deported or removed from the U.S. for a crime now deemed to be an aggravated felony, a non-citizen who reenters the U.S. without the permission of the U.S. Attorney General faces additional criminal penalties. Non-citizens deported on grounds other than having been convicted of an aggravated felony who later illegally reenter the United States face a maximum penalty of two years of incarceration.[385] In contrast, non-citizens who illegally reenter the United States after being deported for an aggravated felony face an enhanced term of imprisonment of up to twenty years.[386]

Non-citizens who are removed or deported for an aggravated felony and who subsequently illegally reenter the United States face an enhanced term of imprisonment of up to twenty years under I.N.A. § 276, 8 U.S.C. § 1326(b).

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[381] *See In re* Martin, 18 I&N Dec. 226, 227 (BIA Jun. 9, 1982); *In re* V-, 7 I&N Dec. 577 (BIA Sept. 5, 1957); *In re* Eden, 20 I&N Dec. 209 (BIA Jun. 4, 1990).

[382] *See In re* Fernandez, 14 I&N Dec. 24 (BIA Jan. 17, 1972). *See also*, People v. Carney, 196 Ill. 2d 518, 752 N.E.2d 1137 (Ill. Jun. 21, 2001) (reaffirming long-standing jurisprudence that consecutive sentences constitute separate sentences for each crime of which a defendant has been convicted).

[383] *See In re* S-S-, 22 I&N Dec. 458 (BIA Jan. 21, 1999) (removal proceedings), overruled in *In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002); *In re* Q-T-M-T-, 21 I&N Dec. 639 (BIA Dec. 23, 1996) (deportation proceedings); *see also*, Withholding of Removal, *infra* at 6-40.

[384] *See, e.g.*, I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

[385] *See* I.N.A. § 276(a), 8 U.S.C. § 1326(a).

[386] *See* I.N.A. § 276(a), 8 U.S.C. § 1326(a).

Retroactivity and Applicability of I.N.A. § 101(a)(43), 8 U.S.C. § 1101(a)(43)

The aggravated felony definition is applied without temporal limitations, regardless of the date of conviction.[387] Unlike amendments to criminal statutes as applicable to criminal court proceedings, the retroactive application of immigration law to prior convictions does not violate the *ex post facto* clause of the U.S. Constitution because the immigration statutes are civil, not criminal, in nature and therefore do not constitute criminal punishment for past acts.[388] The Board of Immigration Appeals held that a non-citizen's 1987 robbery conviction rendered him deportable upon the enactment of IIRAIRA § 321(b) on September 30, 1996 due to the retroactive application of the aggravated felony definition, even though the conviction was not an aggravated felony at the time that it was entered.[389] Similarly, the Seventh Circuit Court of Appeals has upheld the retroactive application of the aggravated felony definition.[390]

The aggravated felony ground of deportability applies to non-citizens who have been "admitted" to the United States.[391] For example, a non-citizen who is convicted of an aggravated felony after she adjusted her status to become a lawful permanent resident is deportable under I.N.A. § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), as having been convicted of an aggravated felony "after admission" to the United States.[392] A non-citizen who entered the U.S. illegally or is otherwise considered not to have been admitted to the U.S. and who has been convicted of a crime constituting an aggravated felony is subject to being placed in final administrative removal proceedings by the DHS and receiving a final administrative removal order without the right to a hearing before an Immigration Judge.[393] He can be ordered removed by the DHS even though he is married to a U.S. citizen or lawful permanent resident and/or has U.S. citizen or lawful permanent resident children. If he has a reasonable fear of probable persecution or torture, he may have a hearing before the Immigration Judge only to consider a claim for withholding of removal and/or relief under the Convention Against Torture.[394]

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[387] *See In re* Truong, 22 I&N Dec. 1090 (BIA Oct. 20, 1999) (holding that the amended definition of aggravated felony applies to actions taken by the Attorney General on or after September 26, 1996); *see also*, *In re* Lettman, 22 I&N Dec. 365 (BIA Nov. 5, 1998) (holding that a non-citizen convicted of an aggravated felony is subject to deportation or removal, regardless of the date of conviction, if he or she is placed in proceedings on or after March 1, 1991, and the crime qualifies as an aggravated felony); *see also*, Guardarrama v. Perryman, 48 F.Supp.2d 782, 785 n.3 (N.D.IL May 6, 1999).

[388] See I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (Jul. 5, 1984).

[389] *See In re* Truong, 22 I&N Dec. 1090 (BIA Oct. 20, 1999).

[390] *See* Lara-Ruiz v. I.N.S., 241 F.3d 934, 942-45 (7th Cir. Mar. 6, 2001).

[391] *See* I.N.A. § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); I.N.A. § 101(a)(13), 8 U.S.C. § 1101(a)(13).

[392] *See In re* Rosas, 22 I&N Dec. 616 (BIA Apr. 7, 1999); Abdelqadar v. Gonzales, 413 F.3d 668 (7th Cir. Jul. 1, 2005).

[393] *See* Final Administrative Removal Orders, *infra* at 6-3; I.N.A. § 238(b), 8 U.S.C. § 1228(b).

[394] *See* Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45.

Sexual Abuse of a Minor, I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A)

The term sexual abuse of a minor has been broadly interpreted by the Board and the Seventh Circuit Court of Appeals. The strict categorical approach to analyzing state statutes has been held to not apply to this category of aggravated felony crimes.

A state offense can be a misdemeanor or a felony under either state or federal law to fall under the definition of an aggravated felony.[395] A Class A misdemeanor conviction for criminal sexual abuse under 720 ILCS 5/12-15(c) constitutes sexual abuse of a minor and, therefore, an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).[396] The Seventh Circuit found that Congress intended to include misdemeanor offenses in the amended definition of aggravated felony under the immigration laws.[397] Moreover, a minor need not be involved as a victim of the offense. Rather, a victim who is believed to be a minor (i.e. undercover police officer posing as a minor) is sufficient to bring the offense within the definition of an aggravated felony for sexual abuse of a minor.[398]

Statutory rape constitutes sexual abuse of a minor.[399] The Board of Immigration Appeals has held that a victim of sexual abuse who is under the age of 18 is a "minor" for purposes of determining whether a non-citizen has been convicted of a crime constituting sexual abuse of a minor.[400] This means that a non-citizen who is convicted for having consensual sexual contact or relations with a person under the age of 18 years will be found to have been convicted of an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

The age of consent is relevant to prosecutions for sexual conduct. In Illinois, the age of consent is 17 years old;[401] in Wisconsin, it is 16 years old;[402] and in Indiana, it is 16 years old.[403] Under a 2007 amendment to the Indiana Code, it is now a defense to a prosecution

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395 *See* Guerrero-Perez v. I.N.S., 242 F.3d 727, 737 (7th Cir. Mar. 5, 2001), *rehearing denied*, Jul. 2, 2001, 2001 U.S. App. LEXIS 15037 (finding that the offense of criminal sexual abuse where the victim is at least 13 years of age but under 17 years of age and the accused was less than five years older than the victim is an aggravated felony even though it constitutes a class A misdemeanor conviction); *In re* Small, 23 I&N Dec. 448, 450 (BIA Jun. 4, 2002).

396 *Cf.* Xiong v. I.N.S., 173 F.3d 601 (7th Cir. Apr. 12, 1999) (remanding the case to the Immigration Judge to consider whether a Wisconsin conviction for statutory rape constitutes sexual abuse of a minor). *See also*, Guardarrama v. Perryman, 48 F.Supp.2d 782 (N.D.IL May 6, 1999) (holding that a conviction for aggravated sexual criminal abuse under 720 ILCS 5/12-16 generally constitutes sexual abuse of a minor and an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A)); Guardarrama v. Perryman, 48 F.Supp.2d 778 (N.D.IL Apr. 14, 1999).

397 *See* Guerrero-Perez v. I.N.S., 242 F.3d 727, 737 (7th Cir. Mar. 5, 2001).

398 *See* Hernandez-Alvarez v. Gonzales, 432 F.3d 763 (7th Cir. Dec. 28, 2005) (holding that attempted indecent solicitation of a child under 720 ILCS 5/11-6(a) where the person solicited was a police officer is sexual abuse of a minor under I.N.A. §101(a)(43)(A), 8 U.S.C. §1101(a)(43)(A) and an attempted aggravated felony under I.N.A. §101(a)(43)(U), 8 U.S.C. §1101(a)(43)(U)).

399 *See* U.S. v. Vargas-Garnica, 332 F.3d 471, 474 (7th Cir. Jun. 10, 2003).

400 *See In re* V-F-D-, 23 I&N Dec. 859 (BIA Jan. 23, 2006).

401 *See* 720 ILCS 5/12-15(b); Gattem v. Gonzales, 412 F.3d 758, 761 (7th Cir. Jun. 20, 2005).

402 *See* Wis. Stat. 948.02.

403 *See* IC 35-42-4-9.

for sexual misconduct with a minor where the charged offender is not more than four years older than the victim, the offender and the victim had a dating relationship or an ongoing personal relationship, the offender was under the age of 21, the conduct did not result in serious bodily injury, and there was no threat or use of force, drugs, or position of authority or substantial influence over the victim.[404] This defense is applies to offenses committed after June 30, 2007.[405] Under the amendment to the Indiana Code, a 19 year old who has sexual relations with his 15 year old girlfriend has a defense to a charge of sexual misconduct with a minor.[406] However, if he is convicted for sexual misconduct under IC 35-42-4-9(b), his conviction constitutes an aggravated felony.[407]

A conviction for the offense of indecency with a child by exposure constitutes sexual abuse of a minor and, therefore, an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).[408] Using as a guide the definition of sexual abuse of a child under 18 U.S.C. § 3509(a), which includes sexually explicit conduct such as the lascivious exhibition of genital or pubic area to a person, the Board found that a Texas statute defined the type of crime considered to be sexual abuse of a minor.[409] Physical contact between the offender and a child is not required for sexual abuse of a minor to occur.[410]

Solicitation of a sexual act has been found to also constitute sexual abuse of a minor.[411] The Seventh Circuit has interpreted the definition of sexual abuse of a minor very broadly.[412] The Seventh Circuit has been concerned that wherever there is an inherent risk of exploitation, if not coercion, such as when an adult solicits a minor to engage in sexual activity, the minor has a less well developed sense of judgment and is at greater risk of making choices not in his or her best interest.[413]

A conviction for criminal sexual assault involving sexual penetration by the use or threat of force under Ill. Rev. Stat. 1191, Ch. 38 § 12-13(a)(1) and involving penetration with a victim who is unable to understand the nature of the act or give knowing consent under Ill. Rev. Stat. 1191, Ch. 38 § 12-13(a)(2) constitutes sexual abuse of a minor and, therefore, an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).[414] Similarly, a conviction for criminal sexual assault involving sexual penetration of a minor by a family member under 720 ILCS 5/12-13(a)(3) constitutes an aggravated felony for

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404 *See* IC 35-42-4-9(e).
405 *See* P.L. 216-2007, SEC. 45, 57.
406 *See* "New law eases up on teen sex", Joe Gerrety, *Lafayette Journal & Courier*, Jul. 9, 2007.
407 *See* Gaiskov v. Holder, 2009 U.S. App. LEXIS 11578 (7th Cir. May 28, 2009).
408 *See In re* Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA Sept. 16, 1999).
409 *See id.* at 6-8 (rejecting the federal definition of sexual abuse and sexual abuse of a minor or ward found at 18 U.S.C. §§ 2242, 2243, and 2246 which require a sexual act involving contact).
410 *See id.* at 7-8.
411 *See* Gattem v. Gonzales, 412 F.3d 758, 765 (7th Cir. Jun. 20, 2005) (holding that misdemeanor solicitation of a sexual act under 720 ILCS 5/11-14.1(a) is sexual abuse of a minor under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A); Sharashidze v. Gonzales, 480 F.3d 566 (7th Cir. Mar. 16, 2007).
412 *See* Hernandez-Alvarez v. Gonzales, 432 F.3d 763 (7th Cir. Dec. 28, 2005).
413 *See* Gattem v. Gonzales, 412 F.3d 758, 766 (7th Cir. Jun. 20, 2005); *see also* Sharashidze v. Gonzales, 480 F.3d 566 (7th Cir. Mar. 16, 2007).
414 *See* Lara-Ruiz v. I.N.S., 241 F.3d 934 (7th Cir. Mar. 6, 2001) [note: the current statute is 720 ILCS 5/12-13].

sexual abuse of a minor.[415] Aggravated criminal sexual abuse under 720 ILCS 5/12-16(b) also constitutes an aggravated felony for sexual abuse of a minor.[416]

Crimes Involving Controlled Substances, I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B)

Certain state convictions involving controlled substances are considered to be convictions for illicit trafficking or drug trafficking and, therefore, aggravated felonies. A state felony offense involving a controlled substance is an aggravated felony if it has a sufficient nexus to unlawful trading or dealing to be considered "illicit trafficking."[417] A state law misdemeanor offense of conspiracy to distribute marijuana also constitutes a drug trafficking offense and aggravated felony where the elements of the state offense correspond to the elements of the federal felony office of conspiracy to distribute marijuana under 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846.[418] Thus, a state conviction for possession of a controlled substance with intent to deliver, sell or distribute is an aggravated felony as it constitutes a trafficking conviction within the common definition of trafficking.[419] Conspiracy to possess with the intent to distribute heroin[420] and importation of a controlled substance[421] are also illicit trafficking offenses and aggravated felonies. A state conviction for a crime analogous to an offense under the statutes enumerated in 18 U.S.C. § 924(c)(2) will be considered to be a crime of illicit trafficking and an aggravated felony.[422]

A non-citizen who is convicted of a crime of simple possession of a controlled substance is deportable under I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) with the exception of a single possession offense for 30 grams or less of marijuana.[423] Arguably, a non-citizen convicted for possession of drug paraphernalia related to the use of 30 grams or less of marijuana falls within the exception as well.[424] Whether an offense is a felony for purposes of the aggravated felony controlled substance provision depends on the federal classification of the offense.[425] A first conviction for simple possession of a controlled substance, which is a felony under state law but a misdemeanor under federal law, does not constitute an aggravated felony under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).[426] A single state felony offense for possession of a controlled substance which constitutes a federal misdemeanor under 21 U.S.C. § 844(a) is not an aggravated felony.[427] State felony offenses for possession of 5 grams or more of cocaine base ("crack cocaine") and flunitrazepam are federal felony offenses under 21 U.S.C. § 844(a) and therefore aggravated felonies for

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415 *See* U.S. v. Martinez-Carillo, 250 F.3d 1101 (7th Cir. May 17, 2001).
416 *See* Espinoza-Franco v. Ashcroft, 394 F.3d 461, 465-66 (7th Cir. Jan. 3, 2005).
417 *See In re* Davis, 20 I&N Dec. 536 (BIA May 28, 1992).
418 *See In re* Aruna, 24 I&N Dec. 452 (BIA Feb. 26, 2008).
419 *See id.*; *see also*, *In re L-G-*, 21 I&N Dec. 89 (BIA Sept. 27, 1995).
420 *See* Jideonwo v. I.N.S., 224 F.3d 692 (7th Cir. Aug. 23, 2000) (conviction under 21 U.S.C. § 846).
421 *See* Morales-Ramirez v. Reno, 209 F.3d 977, 978 (7th Cir. Apr. 13, 2000).
422 *See In re* Barrett, 20 I&N Dec. 171 (BIA Mar. 2, 1990); *see also* Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006); Crimes Involving Controlled Substances, *supra* at 3-20.
423 *See* Crimes Involving Controlled Substances, *supra* at 3-20.
424 *See* Escobar Barraza v. Mukasey, 519 F.3d 388 (7th Cir. Mar. 13, 2008).
425 *See* Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006).
426 *See id.*
427 *See id.*

purposes of immigration law. This means that a state felony conviction for possession of cocaine, heroin, or a controlled substance other than crack cocaine or flunitrazepam will not be an aggravated felony.

Whether a non-citizen may also be considered to have been convicted of an aggravated felony for drug trafficking based on two or more convictions for simple possession offenses has resulted in a circuit split and may likely be resolved ultimately by the U.S. Supreme Court.[428] Some federal circuit courts of appeals, however, have held that subsequent state convictions do not meet the federal definition of a felony for a controlled substance offense under 21 U.S.C. § 844(a) unless the state criminal proceeding has the procedural safeguard equivalent to those that would be present under 21 U.S.C. § 851.[429] For example, in order for a controlled substance offense to be prosecuted as a felony offense in federal court, the U.S. government must file an information under 21 U.S.C. § 851 and prove the fact of the prior conviction for a controlled substance offense.

[428] Fernandez v. Mukasey, 544 F.3d 862 (7th Cir. Sept. 15, 2008), *pet. for reh'g denied* (7th Cir. Apr. 16, 2009) (noncitizen's second state law conviction for simple possession of a controlled substance constitutes an aggravated felony because a controlled-substance possession conviction following any prior state law conviction for possession of a controlled substance is punishable as a felony under the Controlled Substance Act); U.S. v. Pacheco-Diaz, 513 F.3d 776 (7th Cir. Jan. 29, 2008); United States v. Sanchez-Villalobos, 412 F.3d 572, 577 (5th Cir. Jun. 5, 2005); *cf.* Rashid v. Mukasey, 531 F.3d 438 (6th Cir. Jun. 6, 2008) (subsequent state possession offenses did not constitute aggravated felonies because noncitizen had not been convicted under a state recidivist statute and the elements of the offense did not include a prior drug-possession conviction that had become final at the time of commission of the second offense.; Alsol v. Mukasey, 548 F.3d 207, 210-19 (2nd Cir. Nov. 14, 2008) (overruling the Board's interpretation of its prior precedent and holding that a second state conviction for possession of a controlled substance is not an aggravated felony unless meets the classification as a federal felony offense and the fact of recidivism was noticed in the second underlying state criminal proceeding); Berhe v. Gonzales, 464 F.3d 74, 85-86 (1st Cir. Sept. 26, 2006); Steele v. Blackman, 236 F.3d 130, 137-38 (3rd Cir. Jan. 2, 2001).

[429] *See* e.g., Gerbier v. Holmes, 280 F.3d 297, 300, 317 (3rd Cir. Feb. 8, 2002); Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. Aug. 24, 2004); Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. Sept. 9, 2004); U.S. v. Palacios-Suarez, 418 F.3d 692 (6th Cir. Jul. 22, 2005); Tostado v. Carlson, 481 F.3d 1012 (8th Cir. Apr. 2, 2007) (holding that under Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006) an alien convicted on the same day for Illinois controlled substance offenses had not been convicted of an aggravated felony under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B)).

Multiple State Controlled Substance Possession Offenses

Under the Seventh Circuit's *Fernandez* decision, a non-citizen will be convicted of an aggravated felony for drug trafficking for controlled substance possession offenses where: 1. he has been convicted under state law; and 2. the first conviction was final before he committed the second offense (or additional offenses):

- Two misdemeanor possession offenses;
- One misdemeanor offense and one state felony offense; or
- Two state felony offenses.

Crimes Involving Firearms, I.N.A. § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E)

The aggravated felony ground for crimes involving firearms specifically references 18 U.S.C. § 922(g)(1) to define a firearms offense for purposes of I.N.A. § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E). The Board of Immigration Appeals has considered the interplay of I.N.A. § 101(a)(43)(E) (ii), 8 U.S.C. § 1101(a)(43)(E)(ii) and 18 U.S.C. § 922(g)(1) on two occasions.[430] In *Vasquez-Muniz I*, the Board analyzed 18 U.S.C. § 922(g)(1) to require three elements to sustain a conviction: 1. defendant was previously convicted of a felony; 2. defendant thereafter knowingly possessed a firearm; and 3. the possession of the firearm was in or affecting interstate or foreign commerce.[431] Analyzing the express language of I.N.A. § 101(a)(43)(E) (ii), 8 U.S.C. § 1101(a)(43)(E)(ii) and the statute referenced therein, 18 U.S.C. § 922(g)(1), the Board held that the third element was required for a state conviction to be deemed an offense "described in" 18 U.S.C. § 922(g)(1).[432] It found that the term "described in" clearly referred to something specifically set forth elsewhere in the statute or regulation.[433] The Board held that because the alien's state conviction contained the first two elements but not the third element of possession of a firearm in or affecting interstate or foreign commerce, it did not constitute an offense described in 18 U.S.C. § 922(g)(1) and therefore was not an aggravated felony under I.N.A. § 101(a)(43)(E)(ii), 8 U.S.C. § 1101(a)(43)(E)(ii).[434]

In *Vasquez-Muniz II*, the Board reversed its first decision based on a precedent Ninth Circuit sentencing guidelines decision, *U.S. v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. Mar. 26, 2001), and adopted the reasoning of the dissent in *Vasquez-Muniz I*. The Board held that a state conviction for possession of a firearm by a felon is an offense "described in" I.N.A. § 101(a)(43)(E) (ii), 8 U.S.C. § 1101(a)(43)(E)(ii) and an aggravated felony regardless

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[430] See *In re* Vasquez-Muniz, 22 I&N Dec. 1415 (BIA Dec. 1, 2000) ("Vasquez-Muniz I"), rev'd by *In re* Vasquez-Muniz, 23 I&N Dec. 207 (BIA Jan. 15, 2002) ("Vasquez-Muniz II").

[431] *See In re* Vasquez-Muniz I, 22 I&N Dec. 1415, 1418, 1421.

[432] *See id.* at 1421-22.

[433] *See id.* and citations contained therein; *In re* Vasquez-Muniz II, 23 I&N Dec. at 220 (J. Rosenberg, dissenting).

[434] *See id.* at 1424.

whether it contains the federal jurisdictional element of affecting interstate commerce contained in 18 U.S.C. § 922(g)(1).[435] The Board reasoned that Congress meant to include all such state and foreign offenses for possession of a firearm by a felon and considered the third element to be "jurisdictional."[436] The Seventh Circuit affirmed the Board's second *Vasquez-Muniz* decision and held that a conviction under 720 ILCS 5/24-1.1(a) for unlawful possession of a weapon by a felon is an aggravated felony.[437]

Crimes of Violence, I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F)

Analysis to Determine Whether an Offense is Crime of Violence

Section 101(a)(43)(F) of the I.N.A., 8 U.S.C. § 1101(a)(43)(F), specifically references the definition of a crime of violence found at 18 U.S.C. § 16. To determine whether an offense underlying a state conviction constitutes a crime of violence, the criminal statute must first be analyzed to determine whether the crime is defined as a misdemeanor offense or a felony offense and whether the statute that defines the crime is divisible.

In order for an offense to be considered to be a crime of violence under 18 U.S.C. § 16(a), the misdemeanor or felony offense must contain as an element the use of force, attempted use of force, or threatened use of force against the person or property of another.[438] The inquiry regarding whether an offense constitutes a crime of violence under 18 U.S.C. § 16(a) "begins and ends with the elements of the crime."[439] Where an offense has as an element the intentional infliction of physical injury and the non-citizen is sentenced to one year of imprisonment, the offense is a crime of violence under 18 U.S.C. §16(a) and therefore an aggravated felony.[440]

In its interpretation of the categorical approach regarding 18 U.S.C. § 16(b), the Board of Immigration Appeals held that in order to determine whether an offense is a crime of violence as defined in 18 U.S.C. § 16(b), the Immigration Judge must examine the criminal conduct required for the felony conviction, rather than the consequence of the crime or whether physical force was actually used, to determine if the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used

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435 *See In re* Vasquez-Muniz II, 23 I&N Dec. 207, 214.

436 *See id.* at 211-213.

437 *See* Negrete-Rodriguez v. Mukasey, 518 F.3d 497 (Mar. 3, 2008), reh'g en banc den. by Negrete-Rodriguez v. Mukasey, 2008 U.S. App. LEXIS 9712 (7th Cir. Apr. 17, 2008).

438 *See* 18 U.S.C. § 16(a); Bovkun v. Ashcroft, 283 F.3d 166, 170-71 (3rd Cir. Mar. 8, 2002) (holding that a conviction for making terrorist threats under Pennsylvania law constitutes a crime of violence under 18 U.S.C. § 16(a)).

439 *See* Szucz-Toldy v. Gonzales, 400 F.3d 978, 981 (7th Cir. Mar. 11, 2005) (citing Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003)); Leocal v. Ashcroft, 543 U.S. at 6-7; *see also*, U.S. v. Sperberg, 432 F.3d 706 (7th Cir. Dec. 19, 2005) (discussing the difference between the 18 U.S.C. § 16 defining a crime of violence and 18 U.S.C. § 924(e)(2)(B) defining a violent felony).

440 *See In re* Martin, 23 I&N Dec. 491 (BIA Sept. 26, 2002); *see also*, Flores v. Ashcroft, 350 F.3d 666, 671-72 (7th Cir. Nov. 26, 2003) (criticizing the Board's approach in *In re* Martin, *supra* as applied to misdemeanor offenses).

in the course of committing the offense."[441] A causal link between the potential for harm and the substantial risk of physical force being used must be present.[442]

The Seventh Circuit has departed from the categorical approach utilized by the Board of Immigration Appeals for determining whether offenses fall within the definition of a crime of violence under 18 U.S.C. § 16(b):

1. Where a criminal statute is divisible (meaning that it includes offenses that constitute crimes of violence as defined under 18 U.S.C. § 16 and offenses that do not), the Immigration Judge must look to the record of conviction and other documents admissible as evidence in proving a criminal conviction, such as an indictment, to determine whether the specific offense for which a non-citizen was convicted constitutes an aggravated felony under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).[443]
2. Where a statute covers conduct that constitutes an aggravated felony and conduct that does not, the court will look beyond the statute of conviction to the complaint or indictment.[444]

3. In the limited and exceptional circumstance where the offense cannot be classified based on the record of conviction and an evidentiary hearing is not

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[441] *See In re* Sweetser, 22 I&N Dec. 709 (BIA May 19, 1999) (holding that criminally negligent child abuse under Colo. Rev. Stat. §§ 18-6-401(1) and (7) was not a crime of violence because there was not a substantial risk that physical force would be used in the commission of the crime); *In re* Alcantar, 20 I&N Dec. 801, 804, 813-14 (BIA May 25, 1994) (holding that involuntary manslaughter under Ill. Rev. Stat. Ch. 38 § 9-3(a) (1992) where the non-citizen was sentenced to 10 years in prison constituted a crime of violence and an aggravated felony); *In re* Vargas-Sarmiento, 23 I&N Dec. 651, 654 (BIA Feb. 5, 2004) (finding that "when a defendant who intends to cause death or serious physical injury to another person deliberately engages in conduct that results in death, the *inherent nature* of the crime is such that there is a *substantial risk* that the defendant *may* intentionally use force in committing the crime" and that first degree manslaughter under New York law is a crime of violence under 18 U.S.C. § 16(b)) (emphasis in original).

[442] *See id.*

[443] *See* Solorzano-Patlan v. I.N.S., 207 F.3d 869, 875-76 (7th Cir. Mar. 10, 2000) (finding the Illinois burglary statute, 720 ILCS 5/19(a), to be a divisible statute, encompassing conduct that includes the use of force and conduct that does not include the use of force; holding that the non-citizen was not convicted of a crime of violence based on the indictment and record of conviction which evidenced that he did not use force when he committed the offense and therefore was not deportable for having been convicted of an aggravated felony, a crime of violence, under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); also stating at footnote 10 that the force necessary to constitute a crime of violence must be actually violent in nature); U.S. v. Alvarez-Martinez, 286 F.3d 470, 474-76 (7th Cir. Apr. 12, 2002) (finding that defendant's acquiescence in the factual account in the pre-sentence report constituted the equivalent of a stipulation of facts and that the act of prying open the window of a locked vehicle constitutes the use of physical force against the property of another so that his Illinois burglary conviction constituted an aggravated felony as a crime of violence); U.S. v. Lewis, 405 F.3d 511 (7th Cir. Apr. 19, 2005) (applying the categorical approach and holding that police affidavits attached to an information as part of Indiana practice are not part of the charging document for review under Shephard v. U.S., 125 S.Ct. 1254, 1257 (Mar. 7, 2005) to determine whether a crime constitutes a crime of violence).

[444] *See* Bazan-Reyes v. I.N.S., 256 F.3d 600, 606 (7th Cir. Jul. 5, 2001).

required to resolve the issue, the Immigration Judge may be able to look behind the record of conviction.[445]

DUI as a Crime of Violence

In 2004, the U.S. Supreme Court reversed prior Board of Immigration Appeals decisions in which the BIA held that a DUI offense for which a one year term of imprisonment was imposed constituted an aggravated felony.[446] In reviewing whether a DUI offense constitutes a crime of violence under 18 U.S.C. § 16(b), the U.S. Supreme Court held that the elements and the nature of the offense of conviction must be reviewed, rather than the particular facts relating to the crime.[447] Thus, a court must look to the generic elements of the statute to determine if those elements, by their nature, give rise to a substantial risk that intentional force will be used in the course of committing the offense.[448] The Court held that because driving under the influence does not involve a substantial risk that intentional force will be used in the commission of the offense, it was not a crime of violence and therefore not an aggravated felony.[449] The Seventh Circuit Court of Appeals also held that Illinois, Indiana, and Wisconsin convictions for DUI where a sentence of one year or longer has been imposed are not crimes of violence or aggravated felonies under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).[450]

Other Case Law regarding Crimes of Violence

Aggravated discharge of a firearm in violation of 720 ILCS 5/24-1.2(a)(1) is a crime of violence under both 18 U.S.C. § 16(a) and (b).[451] In this case, the Seventh Circuit Court of Appeals reviewed Illinois case law which defined the "discharge" element of the offense to involve the use of physical force and found that intentional discharge of a firearm was a crime of violence.[452] In contrast, the Seventh Circuit found that criminal recklessness for

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[445] *See* Xiong v. I.N.S., 173 F.3d 601 (7th Cir. Apr. 12, 1999) (holding that a Wisconsin conviction for statutory rape was not a crime of violence based on the narrow age difference and consensual relations between the parties).

[446] *See* Leocal v. Ashcroft, 543 U.S. 1 (Nov. 9, 2004), overruling *In re* Magallenes, 22 I&N Dec. 1 (BIA Mar. 19, 1998), overruled in *In re* Ramos, 23 I&N Dec. 336 (BIA Apr. 4, 2002) (holding that a non-citizen convicted for the felony, "aggravated driving while under the influence," defined as driving under the influence while his driver's license was suspended, revoked, or in violation of a restriction under Arizona statute, had been convicted of an aggravated felony).

[447] *See* Leocal v. Ashcroft, 543 U.S. 1, 6-7 (Nov. 9, 2004).

[448] *See* Leocal v. Ashcroft, 543 U.S. at 6-7; Bazan-Reyes v. I.N.S., 256 F.3d 600, 612 (7th Cir. Jul. 5, 2001).

[449] *See* Leocal v. Ashcroft, 543 U.S. at 6-7 (Nov. 9, 2004).

[450] *See* Bazan-Reyes v. I.N.S., 256 F.3d 600 (7th Cir. Jul. 5, 2001) (addressing DUI offenses under Illinois, Indiana, and Wisconsin); *cf.* U.S. v. Chapa-Garza 243 F.3d 921 (5th Cir. Mar. 1, 2001) (holding, in the context of sentencing enhancement for illegal reentry after a prior deportation under I.N.A. § 276(a), 8 U.S.C. § 1326(a), that a Texas felony conviction for driving while intoxicated was not a crime of violence under 18 U.S.C. § 16(b) and, therefore, not an aggravated felony under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) because intentional force against a person or the property of another was seldom, if ever, employed to commit the offense).

[451] *See* Quezada-Luna v. Gonzales, 439 F.3d 403, 406-07 (7th Cir. Mar. 3, 2006).

[452] *See id.* at 406 (citing Illinois cases and commenting on the "common-sense notion that firing a gun is a use of physical force (indeed, deadly force)").

shooting a firearm into an inhabited dwelling in violation of IC §35-42-2-2(c)(3) was not a crime of violence because it did not involve intentional conduct.[453]

A conviction for criminal confinement under IC 35-42-3-3(a)(1) is not a crime of violence.[454] A conviction for criminal confinement under other subsections of the Indiana statute may, however, be considered crimes of violence.[455] Unlawful confinement under 720 ILCS 5/10-3(a) does constitute a crime of violence and therefore an aggravated felony because it involves the restraint of a person against his will.[456]

Wisconsin's false imprisonment statute, Wis. Stat. § 940.30 is not a crime of violence.[457] Likewise, the Illinois offense of "putative father" child abduction under 720 ILCS §5/10-5(b)(3) is not a crime of violence and therefore not an aggravated felony.[458]

Where a non-citizen has been convicted for domestic battery under 720 ILCS 5/12-3.2(a)(1) ("causes bodily harm") or under Wis. Stat. § 940.19(1) where a felony sentence of one year or longer is imposed, he has been convicted of an aggravated felony.[459]

A non-citizen convicted of criminally negligent child abuse under a Colorado statute has not been convicted of a crime of violence under 18 U.S.C. § 16(b).[460] The Board found that there was not a substantial risk that physical force would be used in the commission of the crime where the non-citizen's negligence of leaving his stepson alone in a bathtub resulted in the child's death.[461]

A conviction for criminal contempt in the first degree under New York Penal Law § 215.51(b)(i) with a sentence of imprisonment of at least one year is a conviction for a crime of violence under 18 U.S.C. § 16(b) and an aggravated felony under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).[462] The Board found that the non-citizen's crime, committed in violation of a duly served order of protection, involved a substantial risk that physical force may be used against another person.[463] Similarly, a conviction for a stalking offense for harassing conduct where there is a temporary restraining order, injunction, or any other court order in effect prohibiting the stalking behavior, and the non-citizen has been

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453 *See* Jimenez-Gonzalez v. Mukasey, 548 F.3d 557 (7th Cir. Nov. 21, 2008).
454 *See* U.S. v. Hagenow, 423 F.3d 638, 644 (7th Cir. Aug. 31, 2005).
455 *See* Hernandez-Mancilla v. I.N.S., 246 F.3d 1002, 1009 (7th Cir. Apr. 11, 2001).
456 *See* U.S. v. Wallace, 326 F.3d 881 (7th Cir. Apr. 16, 2003).
457 *See* U.S. v. Sanner, 565 F.3d 400 (7th Cir. May 14, 2009).
458 *See* U.S. v. Franco-Fernandez, 511 F.3d 768 (7th Cir. Jan. 2, 2008).
459 *See* LaGuerre v. Mukasey, 526 F.3d 1037 (7th Cir. May 20, 2008); U.S. v. Sanner, 565 F.3d 400 (7th Cir. May 14, 2009).
460 *See In re* Sweetser, 22 I&N Dec. 709 (BIA May 19, 1999); *see also*, *In re* Alcantar, 20 I&N Dec. 801 (BIA May 25, 1994) (requiring that the offense is a felony and the "nature of the crime—as elucidated by the generic elements of the offense – is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another" in order to constitute a crime of violence under 18 U.S.C. § 16(b)).
461 *See In re* Sweetser, 22 I&N Dec. 709 (BIA May 19, 1999).
462 *See In re* Aldabesheh, 22 I&N Dec. 983 (BIA Aug. 30, 1999).
463 *See id.*

sentenced to term of imprisonment of one year or more, the conviction is a crime of violence and an aggravated felony.[464]

In *In re L-S-J-*, the Board of Immigration Appeals held that a non-citizen convicted of robbery with a deadly weapon for which he was sentenced to two and a half years of imprisonment had been convicted of a crime of violence and an aggravated felony.[465] A conviction for arson in the first degree where a non-citizen was sentenced to seven years in prison is a crime of violence and an aggravated felony.[466]

The Board of Immigration Appeals held that statutory rape by its nature involves a substantial risk of the use of physical force against a child and, therefore, constitutes a crime of violence and an aggravated felony.[467] The Seventh Circuit Court of Appeals, however, has determined that statutory rape is not a crime of violence and, therefore, is not an aggravated felony for immigration purposes where the sexual conduct is consensual and there is not a significant age difference between the parties.[468] A conviction under 720 ILCS 5/10-5(10) for an attempt to lure a child into a motor vehicle for an unlawful purpose where a sentence of imprisonment for one year or longer is imposed is a crime of violence under 18 U.S.C. § 16(b).[469]

Burglary, Theft, and Stolen Property Offenses, I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G)

Theft

Broadening the definition of a theft offense for immigration purposes from the definition previously enunciated by the Board of Immigration Appeals,[470] the Seventh Circuit Court of Appeals defined a theft offense, including the receipt of stolen property, under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) as:

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464 *See In re* Malta-Espinoza, 23 I&N Dec. 656, 659-660 (BIA Mar. 11, 2004).
465 *See In re* L-S-J-, 21 I&N Dec. 973 (BIA Jul. 29, 1997).
466 *See In re* Palacios, 22 I&N Dec. 434 (BIA Dec. 18, 1998).
467 *See In re* B-, 21 I&N Dec. 287 (BIA Mar. 28, 1996).
468 *See* Xiong v. I.N.S., 173 F.3d 601, 605 (7th Cir. Apr. 12, 1999) (distinguishing *In re* B-, 21 I&N Dec. 287 (BIA Mar. 28, 1996), and remanding the case to the Immigration Judge for a determination regarding whether the conviction constitutes an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), sexual abuse of a minor); *see also*, U.S. v. Cruz-Guevara, 209 F.3d 644 (7th Cir. Mar. 23, 2000) (discussing that if the district court had determined under Seventh Circuit case law that a non-citizen's conviction for aggravated sexual abuse of a minor was not a crime of violence and analogized that it should be treated as an ordinary felony, not an aggravated felony, then an increase of only four-levels instead of sixteen levels would be merited).
469 *See* U.S. v. Martinez-Jimenez, 294 F.3d 921 (7th Cir. Jun. 27, 2002).
470 *See In re* V-Z-S-, 22 I&N Dec. 1338 (BIA Aug. 1, 2000); *In re* Bahta, 22 I&N Dec. 1381 (BIA Oct. 4, 2000).

> 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.[471]

A conviction for possession of a stolen motor vehicle under 625 ILCS 5/4-103(a)(1), where a sentence of more than one year was imposed, is a conviction for a theft offense and an aggravated felony under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).[472] Aiding and abetting a theft offense where a one year term of imprisonment is imposed is a theft offense and an aggravated felony I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).[473] Burglary to an automobile in violation of 720 ILCS 5/19-1(a) where a one year or longer sentence has been imposed is a theft offense under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) and an attempted theft offense under I.N.A. § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).[474]

Prior to the decision by the Seventh Circuit, the Board of Immigration Appeals defined a theft offense under I.N.A. § 101(a)(43)(G), 8 U.S.C. §1101(a)(43)(G), as a taking of property when there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent, where the non-citizen was sentenced to a term of imprisonment of one year or more.[475] Analyzing a California statute, the Board of Immigration Appeals found that the elements of a driving or taking and the specific intent to deprive the owner of title and/or possession, either temporarily or permanently, satisfy the definition of a "theft offense (including receipt of stolen property)" under I.N.A. § 101(a)(43)(G), 8 U.S.C. §1101(a)(43)(G).[476] The Board also found that the California statute was not a divisible statute requiring a factual analysis to determine whether the specific intent of the taking was permanent or temporary on account of precedent California case law holding that specific intent to permanently deprive another of his vehicle can be presumed whenever a person unlawfully takes, or attempts to take, the property of another.[477]

Thus, the Board defined theft as having a broad element of an intent to deprive another of property, rather than the common law definition of larceny which requires a permanent intent to deprive another of property.[478] The Board also concluded that

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[471] *See id.* at 20 (noting that 625 ILCS 5/4-103(a)(1) is a divisible statute and declining to decide whether the crimes other than possession of a stolen motor vehicle described in the statutory section constitute theft offenses for purposes of immigration law).

[472] *See* Hernandez-Mancilla v. I.N.S., 246 F.3d 1002, 1009 (7th Cir. Apr. 11, 2001).

[473] *See* Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (Jan. 17, 2007).

[474] *See* Vaca-Tellez v. Mukasey, 540 F.3d 665 (7th Cir. Sept. 2, 2008).

[475] *See In re* V-Z-S-, 22 I&N Dec. 1338 (BIA Aug. 1, 2000) (holding that a California conviction for unlawful driving and taking of a vehicle is a theft offense and an aggravated felony under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) as the non-citizen was sentenced to a term of imprisonment for more than one year).

[476] *See In re* V-Z-S-, 22 I&N Dec. 1338, at 1350, 1353 (BIA Aug. 1, 2000).

[477] *See id.* at 17-19.

[478] The definition of theft now differs between the context of crimes involving moral turpitude and crimes considered to be aggravated felonies. The Board of Immigration Appeals defined "theft" under the Immigration and Nationality Act (INA) for purposes of crimes involving moral turpitude to require that an offense contain the element of intent to permanently take or deprive a rightful owner of his property. See *In re* H-, 2 I&N Dec. 864 (BIA Apr. 23, 1947) (following *In re* W-, 56143/310

joyriding is not a theft offense where the statute does not contain an intent to deprive the owner of his or her vehicle but only contains an element of temporarily using or operating the vehicle.[479]

In a subsequent case, the Board of Immigration Appeals held that a Nevada conviction for attempted possession of stolen property is a conviction for an attempted theft offense (including receipt of stolen property) and an aggravated felony under I.N.A. § 101(a)(43)(G) and (U), 8 U.S.C. § 1101(a)(43)(G) and (U), where the term of imprisonment imposed is one year or more.[480] The Nevada statute included the element that the offender receives stolen property knowing that it is stolen or under circumstances that should have caused a reasonable person to know that it is stolen property.[481] The Board defined attempted possession of stolen property to be broader than the analogous federal statute found at 18 U.S.C. § 2315, which requires actual knowledge that the property is stolen.[482] Under the Board's definition, an offender need not have been involved in the actual taking of the property from another, as traditionally required, to be found to have been convicted of receipt of stolen property.[483]

Burglary

The Seventh Circuit Court of Appeals held that a conviction under 720 ILCS 5/19-1(a) for burglary of an auto is not a burglary offense within the definition of an aggravated felony under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).[484] The Court held that a burglary offense under the Immigration and Nationality Act must have the basic elements of unlawful entry into, or remaining in, a building or structure with the intent to commit a crime.[485] Residential entry under IC 35-43-2-1.5 is a lesser included offense of burglary and a crime of violence.[486]

(June 15, 1943); *In re* C-, 6016269 (BIA Feb. 21, 1945); *In re* P-, 6016250 (BIA Feb. 23, 1945); *In re* W-, 56130/185 (renumbered A-5624423) (BIA Mar. 17, 1945)).

[479] *See id.* at 15-17.

[480] *See In re* Bahta, 22 I&N Dec. 1381 (BIA Oct. 4, 2000).

[481] *See id.* at 3.

[482] *See id.* at 5.

[483] *See id.* at 10.

[484] *See* Solorzano-Patlan v. I.N.S., 207 F.3d 869 (7th Cir. Mar. 10, 2000) (also remanding the case to the Immigration Judge for a determination regarding whether his conviction constitutes a crime of violence under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) based on the analysis put forth by the Seventh Circuit Court of Appeals); *see also In re* Perez, 22 I&N Dec. 1325 (BIA Jun. 6, 2000) (holding that a conviction for burglary of a vehicle in violation of Texas Penal Code § 30.04(a) is not a "burglary" offense within the definition of an aggravated felony under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G)).

[485] *See id.* at 874 (following the U.S. Supreme Court's definition of burglary enunciated in Taylor v. U.S., 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (May 29, 1990)).

[486] *See* U.S. v. Gardner, 397 F.3d 1021, 1024 (7th Cir. Feb. 22, 2005) (citing Patterson v. State, 729 N.E. 2d 1035, 1043 (Ind. Ct. App. Jun. 14, 2000) and Taylor v. U.S., 495 U.S. 575 (May 29, 1990) and finding that it constitutes a crime of violence under the sentencing guidelines).

Prostitution, I.N.A. § 101(a)(43)(K)(ii), 8 U.S.C. § 1101(a)(43)(K)(ii)

The Board of Immigration Appeals has held that the categorical approach to determining whether a criminal offense meets the definition of an aggravated felony does not apply to I.N.A. § 101(a)(43)(K)(ii), 8 U.S.C. § 1101(a)(43)(K)(ii).[487] The Board held that a non-citizen committed an offense under 18 U.S.C. § 2422(a) "commercial advantage" where the record of proceeding evidenced that the non-citizen knew that his employment activity was designed to create a profit for the prostitution business for which he worked.[488] In its ruling, the Board went beyond the record of conviction and considered the non-citizen's testimony before the Immigration Judge as evidence to support its aggravated felony finding.[489]

Fraud or Deceit Offense Where the Loss Exceeds $10,000, I.N.A. § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M)

A non-citizen is deportable for having been convicted of an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000".[490] The victim may be a natural person, government, or private entity.[491] Much litigation ensued over whether the loss must be defined as an element of the offense and what could be considered as evidence to prove the amount of loss, resulting in a circuit split.[492]

To put the litigation in context within the jurisdiction of the Seventh Circuit, in 2005, Seventh Circuit held that to determine the amount of loss, only the loss for the offense for which the non-citizen was convicted was to be considered.[493] It had held that where a plea agreement distinguishes between losses related to the "offense of conviction" and losses related to "relevant conduct" for purposes of sentencing, only those related to the offense of the conviction are to be considered in determining whether the amount of loss is $10,000 or more to render the conviction an aggravated felony under I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).[494]

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[487] *See In re* Gertsenshteyn, 24 I&N Dec. 111 (BIA Mar. 14, 2007).

[488] *See id.*

[489] *See id* at 112, 115-16 (holding that the Immigration Judge may consider the presentence report from the criminal proceedings, the non-citizen's admissions, and any other relevant evidence regarding the aspects of the criminal conviction).

[490] I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

[491] *See* I.N.A. § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M); Iysheh v. Gonzales, *supra*; *In re* Onyido, 22 I&N Dec. 552 (BIA Mar. 4, 1999).

[492] *Cf.* Conteh v. Gonzales, 461 F.3d 45 (1st Cir. Aug. 22, 2006) (fact-based approach) and Arguelles-Olivares v. Mukasey, 526 F.3d 171 (5th Cir. Apr. 22, 2008) with Duala-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116 (2nd Cir. Sept. 19, 2007) (definitional approach), Kawashima v. Mukasey, 530 F.3d 1111 (9th Cir. Jul. 1, 2008), and Obasohan v. U.S. Atty. Gen., 479 F.3d 785 (11th Cir. Feb. 23, 2007); *Nijhawan v. Mukasey*, 523 F.3d 387 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 988 (Jan. 16, 2009) (No. 08-495).

[493] *See* Knutsen v. Gonzales, 429 F.3d 733, 736-37 (7th Cir. Nov. 22, 2005) (holding that the plain language of 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(M)(i) forecloses the consideration of losses stemming from offenses for which the non-citizen was not convicted).

[494] *See id.* at 740 (discussing that relevant conduct for sentencing need not be admitted, charged in an indictment or proven to a jury for imposing restitution or an enhanced sentence) (internal citation omitted).

In 2006, the Seventh Circuit held that to determine whether a conviction involves an offense for which the elements of fraud or deceit are involved and a loss of $10,000 or more to the victim, the statute under which the non-citizen was convicted, the plea agreement, any superseding indictment, the original indictment, and the judgment order may be reviewed to determine what the non-citizen was convicted of and the amount of loss.[495]

In 2008, the Board of Immigration Appeals expanded what can be considered as evidence to determine the amount of loss. The Board held that an immigration judge can look beyond the record of conviction for "nonelemental facts" of an offense.[496] The Board found that an immigration judge is not restricted to the record of conviction but instead may consider any evidence admissible in removal proceedings relating to the loss to the victim because the loss requirement is not an element of the fraud or deceit offense in question.[497]

On June 15, 2009, the U.S. Supreme Court issued its unanimous opinion in *Nijhawan v. Holder*.[498] In its decision, the Court held that:

1. the "$10,000 loss" provision requires a "circumstance-specific" interpretation and not a categorical interpretation; thus, the "monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion";[499]

2. the DHS must prove:

    a. evidence of the loss must be tied to the specific counts covered by the conviction;
    b. evidence of the loss under the "clear and convincing" standard, not the criminal "beyond a reasonable doubt" standard;[500] and

3. the "evidence" to be considered on the issue of loss is not limited to a jury verdict, court finding of guilt from a bench trial, guilty plea, plea documents, or plea colloquy but can also include stipulations of a defendant in sentencing-related materials and a court's restitution order can be considered to find whether the loss exceeds $10,000.[501]

    a. In so doing, the Court specifically discussed referencing loss as discussed and found during the criminal sentencing hearing. It noted that a criminal

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495 *See* Iysheh v. Gonzales, 437 F.3d 613, 615 (7th Cir. Feb.1, 2006) (finding that a conviction under 18 U.S.C. § 371 for conspiracy to defraud a financial institution constitutes an aggravated felony where the criminal scheme involved the buying and selling of stolen motor vehicles).
496 *See In re* Babaisakov, 24 I. & N. Dec. 306 (BIA Sept. 28, 2007).
497 *See id.*
498 *See* Nijhawan v. Holder, case no. 08-495, 2009 U.S. LEXIS 4320 (Jun. 15, 2009).
499 *See id.* at *21.
500 *See id.*
501 *See id.* at *22-25.

defendant can contest the amount of loss at the sentencing hearing itself and possibly again at the removal (deportation) hearing.[502]

Note: Practice Advisory
The *Nijhawan* decision is an important decision for defense counsel to carefully review, analyze, and strategize to best represent a non-citizen who may face removal for a conviction under I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i). Pre-sentence investigations/reports and potential stipulations should be reviewed with great care and objections entered into the criminal record on the issue of loss where applicable. For an excellent discussion of the *Nijhawan* decision and detailed practice advisory, see Appendix 3B, "The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach to Aggravated Felony Determinations," published by the Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild.

Caution: While the practice advisory points out arguments that are helpful to counsel for challenging prior decisions by the Seventh Circuit related to other aggravated felony grounds, counsel should note that the Seventh Circuit precedent is still binding until it is overruled by the Seventh Circuit or the U.S. Supreme Court.

Often the DHS charges a non-citizen as having been convicted of an aggravated felony for a substantive offense as well as under the attempt provision.[503] In such cases, the amount of attempted loss is considered to determine whether the offense involving fraud or deceit is an aggravated felony under I.N.A. § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M). A conviction under an attempt statute is not required. For example, a conviction for submitting a false claim with the intent to defraud arising from an unsuccessful scheme to obtain $15,000 from an insurance company is a conviction for an "attempt" to commit a fraud in which the loss to the victim exceeded $10,000 and, therefore, an aggravated felony under I.N.A. § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M).[504]

Conspiracy and bank fraud under 18 U.S.C. §§ 371 and 1344 do not include any elements of actual loss and are broader than the definition of an aggravated felony at I.N.A. §§ 101(a)(43)(M)(i) and (U), 8 U.S.C. §§ 1101(a)(43)(M)(i) and (U). Thus, the Seventh Circuit found that it could review the plea agreement and the pre-sentence report (PSR) which included a binding stipulation that the loss was greater than $10,000.[505] To be convicted of an aggravated felony for a conspiracy to commit an offense involving fraud or deceit and a loss of $10,000 or more, the co-conspirators must have contemplated an act or acts to cause a loss in excess of $10,000.[506] Intended loss constitutes loss for purposes of I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).[507]

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[502] *See id.* at *24.
[503] *See* I.N.A. § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).
[504] *See In re* Onyido, 22 I&N Dec. 552 (BIA Mar. 4, 1999); *see also,* U.S. v. Martinez-Garcia, 268 F.3d 460, 465-66 (7th Cir. Sept. 28, 2001) (holding that burglary of a motor vehicle with the intent to commit a theft under 720 ILCS 5/19 is an aggravated felony for attempt under 8 U.S.C. §1101(a)(43)(U)); Hernandez-Alvarez v. Gonzales, 432 F.3d 763 (7th Cir. Dec. 28, 2005); Sharashidze v. Gonzales, 480 F.3d 566 (7th Cir. Mar. 16, 2007).
[505] *See* Akkaraju v. Ashcroft, 118 Fed. Appx. 90, 92-93 (7th Cir. Nov. 30, 2004).
[506] *See id.* at 93.
[507] *See* Eke v. Mukasey, 512 F.3d 372, 380-81 (7th Cir. Jan. 7, 2008).

Alien Smuggling, I.N.A. § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N)

An aggravated felony offense for alien smuggling is statutorily defined as including offenses relating to alien smuggling described in I.N.A. § 274(a)(1)(A) and (2), 8 U.S.C. § 1324(a)(1)(A) and (2). Thus, a conviction under I.N.A. § 274(a)(1)(A)(ii), 8 U.S.C. § 1324(a)(1)(A)(ii) (1994) for transporting a non-citizen unlawfully present within the U.S. is an aggravated felony under I.N.A. § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).[508] In comparison, a conviction for an offense under I.N.A. § 275(a), 8 U.S.C. § 1325(a) is not an aggravated felony under I.N.A. § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).[509]

Offenses relating to the Obstruction of Justice, Perjury, Subornation of Perjury, or Bribery of a Witness, I.N.A. § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S)

A conviction for accessory after the fact is an aggravated felony under I.N.A. § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S) as an offense relating to the obstruction of justice where the term of imprisonment is at least one year.[510] In comparison, a conviction for misprision of a felony under 18 U.S.C. § 4 (1994) does not constitute a conviction for an aggravated felony as an offense relating to the obstruction of justice under I.N.A. § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S).[511] In that case, the non-citizen was convicted of misprision of a felony, being conspiracy to possess marijuana with the intent to distribute, and sentenced to a term of imprisonment of one year and a day.[512] The Board found that because the offense of misprision of a felony lacks the element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice, it does not fall within the set of offenses in the United States Code which constitute obstruction of justice offenses.[513]

A conviction for perjury under California statute where a term of imprisonment of one year or more is imposed constitutes an aggravated felony under I.N.A. § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S).[514] Applying the categorical approach, the Board compared the elements of the California statute to the elements of perjury as defined under the federal statute, 18 U.S.C. § 1621. [515] The Board concluded that the elements of both the state and federal statutes were essentially the same, rendering the state offense of perjury to be an aggravated felony.[516]

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[508] *See In re* Ruiz-Romero, 22 I&N Dec. 486 (BIA Feb. 1, 1999).
[509] *See In re* Alvarado-Alvino, 22 I&N Dec. 718 (BIA May 24, 1999).
[510] *See In re* Batista-Hernandez, 21 I&N Dec. 955 (BIA Jul. 15, 1997).
[511] *See In re* Espinoza, 22 I&N Dec. 889 (BIA Jun. 11, 1999).
[512] *See id.*
[513] *See id.*
[514] *See In re* Martinez-Recinos, 23 I&N Dec. 175 (BIA Oct. 15, 2002).
[515] *See id.* at 176-177.
[516] *See id.* (discussing how a comparison of each sub-section of the divisible California perjury statute encompassed the federal definition of perjury and therefore a conviction under any of the subsections of the California statute constituted a conviction for an aggravated felony).

Attempt or Conspiracy to Attempt an Aggravated Felony, I.N.A. § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U)

An "attempt" to commit an offense described as an aggravated felony for purposes of I.N.A. §101(a)(43)(U), 8 U.S.C. §1101(a)(43)(U) is defined as including the intent to commit a crime and a substantial step toward its commission.[517] Thus, a non-citizen need not have been convicted under a state or federal statute for attempt in order to be found to have been convicted of an "attempt."[518] Burglary to an automobile in violation of 720 ILCS 5/19-1(a) where a one year or longer sentence has been imposed is an attempted theft offense under I.N.A. § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).[519]

Application to Cases

Case of Francisco from Mexico

Francisco came to the United States in 1971 from Mexico as a lawful permanent resident because his mother had married a United States citizen. In 1974, Francisco was nineteen years old when he was charged with and pled guilty to one count of misdemeanor statutory rape for having sex with his fifteen year old girlfriend, a minor crime for which he could not be deported in 1974. The judge imposed on him a suspended sentence of sixty days. Francisco successfully completed one year of probation. Since 1974, Francisco has not been arrested for any other violations of the law.

In 1989, Francisco married a lawful permanent resident, Martha, and together they opened a small neighborhood grocery store. They have three young United States citizen children, ages two, three, and six. On July 2, 2006, Francisco was stopped by the local police for failing to signal a left-hand turn at an intersection while driving a friend's car to the gas station. The police officer gave Francisco a ticket and told him to go to traffic court on July 7, 2006.

Francisco went to traffic court and pled guilty to failing to signal for a turn, a misdemeanor. At court, the city attorney discovered that Francisco had been convicted in 1974 for statutory rape and called the DHS. The DHS placed a hold on Francisco, who was very surprised to be taken to jail because he was not arrested by the police officer who wrote him the traffic ticket. The DHS served Francisco with a Notice to Appear before the Immigration[520] Court for a hearing on whether Francisco should be removed (deported) from the United States for his 1974 conviction.

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[517] *See* U.S. v. Martinez-Garcia, 268 F.3d 460, 465-66 (7th Cir. Sept. 28, 2001) (holding that burglary of a motor vehicle with the intent to commit a theft under 720 ILCS 5/19 is an aggravated felony for attempt under 8 U.S.C. §1101(a)(43)(U)); Hernandez-Alvarez v. Gonzales, 432 F.3d (7th Cir. Dec. 28, 2005); Sharashidze v. Gonzales, 480 F.3d 566 (7th Cir. Mar. 16, 2007).

[518] *See id*; *see also In re* Onyido, 22 I&N Dec. 552 (BIA Mar. 4, 1999).

[519] *See* Vaca-Tellez v. Mukasey, 540 F.3d 665 (7th Cir. Sept. 2, 2008).

[520] *See In re* Lettman, 22 I&N Dec. 365 (BIA Nov. 5, 1998), *aff'd*, Lettman v. Reno, 207 F.3d 1368 (11th Cir. Mar. 31, 2000).

Analysis: Francisco's conviction is now an aggravated felony. It is a crime involving sexual abuse of a minor and the definition of aggravated felony applies retroactively. Unless Francisco can prove that he would suffer probable persecution or torture in Mexico, he will be barred from any form of relief, including cancellation of removal. Although he pled guilty to statutory rape prior to April 24, 1996, he is not eligible for a § 212(c) waiver because his conviction is characterized as sexual abuse of a minor for which there is no corresponding ground of inadmissibility.[521] Thus, a twenty-five year old minor conviction for which he was not deportable in 1974 now has the effect of barring Francisco from any immigration relief for at least twenty years after he is removed from the United States. Post-conviction relief or a gubernatorial pardon could provide relief from removal for Francisco.[522]

Case of Ezekiel from Jordan

Ezekiel entered the United States as a lawful permanent resident in 1985 based on his marriage to a United States citizen. In 1986, he pled guilty to driving under the influence and his license was suspended for three months. In 1990, he and his wife divorced. In January 1995, he pled guilty to a second charge of driving under the influence and received thirty days in the workhouse. On January 1, 1998, he was stopped by the police on his way to work at 8:00 a.m. A breathalyzer test showed that his blood alcohol content was 0.21. He was charged with aggravated driving under the influence under 625 ILCS 5/11-501(d)(1)(A) and 625 ILCS 5/11-501(d)(2). He pled guilty and was sentenced to one year in prison.

Analysis: Ezekiel is not deportable because his DUI convictions are not aggravated felonies.

Practice Tips

Category versus Sentence Crimes

To avoid a conviction for an aggravated felony, first analyze whether a charged crime falls within the definition of aggravated felony as a sentence or a category crime. Category crimes are aggravated felonies regardless of the length of the term of imprisonment imposed. Category crimes include murder, rape, sexual abuse of a minor, drug trafficking, weapons trafficking, and an offense involving fraud or deceit where the loss to the victim or victims exceeds $10,000. If the non-citizen has been charged with a category aggravated felony crime, work with the prosecutor to dismiss the original complaint and recharge the non-citizen under another statute for which the offense does not fall under an aggravated

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[521] *See* Zamora-Mallari v. Mukasey, 514 F.3d 679, 690 (7th Cir. 2008); Valere v. Gonzales, 473 F.3d 757 (7th Cir. Jan. 11, 2007); *In re* Blake, 23 I&N Dec. 722 (BIA Apr. 6, 2005); *In re* Brieva, 23 I&N Dec. 766 (BIA Jun. 7, 2005). However, if Francisco were married to a U.S. citizen or had a U.S. citizen son or daughter age 21 or older, then he would be eligible for a §212(c) waiver in conjunction with an adjustment of status application under *In re* Azurin, 23 I&N Dec. 695, 697-99 (BIA Mar. 9, 2005) (reaffirming *In re* Gabryelsky, 20 I&N Dec. 750 (BIA Nov. 3, 1993)).

[522] *See* Post-conviction Relief, *infra* at 8-12.

felony provision.

Sentence crimes are aggravated felonies that require an imposed sentence of imprisonment of at least one year. Sentence crimes include theft, burglary, crimes of violence, forgery, an offense relating to the obstruction of justice, and perjury. Work with the prosecutor to recharge the non-citizen under another statutory provision that does not constitute an aggravated felony or to impose a sentence for a term of imprisonment of 364 days or less to avoid a conviction for an aggravated felony. For example, a non-citizen could agree to waive pre-sentence credit or future good conduct credits in exchange for a sentence of 364 days or less. Such an agreement will give the prosecutor the desired actual custody time served by the non-citizen but will avoid an aggravated felony conviction based on the imposed sentence. In addition, where a long-term lawful permanent resident is charged with felony assault with an offer from the prosecutor for a two year sentence, a plea to two counts of assault with each count having a 364 day sentence will avoid convictions for aggravated felonies. Even though this plea may make the non-citizen deportable for two crimes involving moral turpitude, he or she may be eligible for cancellation of removal.[523]

In addition, many aggravated felonies are also crimes involving moral turpitude, including murder, rape, theft, and burglary. Non-citizens are deportable and/or inadmissible for convictions of crimes involving moral turpitude unless the offense meets the petty offense definition under I.N.A. § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii).[524] Depending on the non-citizen's immigration status and length of time in the United States, immigration relief may be available.

Sex Crimes

Many non-citizen youth face criminal sexual conduct charges for their sexual relations with girlfriends or boyfriends. Two possible plea bargains under the state statutes may prevent removal or deportation. In both instances, the original complaint should be dismissed and a new complaint issued with facts not constituting sexual relations to avoid a finding that the non-citizen has been convicted of an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), sexual abuse of a minor. The first is to negotiate a plea agreement for disorderly conduct, keeping admissions regarding the relationship of the non-citizen and the girlfriend and her age out of the court record.[525]

The second is to negotiate a plea agreement for contributing to the delinquency of a child.[526] A conviction under this provision may still lead to immigration consequences because it will be conviction for a crime involving moral turpitude. If the non-citizen is convicted of a crime involving moral turpitude within his or her first five years after admission, then he or she is deportable. If it is the non-citizen's second conviction involving moral turpitude at any time after admission, then the non-citizen will be deportable. A non-citizen who is deportable for one or more crimes involving moral turpitude may be

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[523] *See* Cancellation of Removal, *infra* at 6-23; Crimes Involving Moral Turpitude, *supra* at 3-3.
[524] *See* Grounds of Inadmissibility and Adjustment of Status, *infra* at 4-1.
[525] *See e.g.*, 720 ILCS 5/26-1.
[526] *See e.g.*, 720 ILCS 130/2a.

eligible for relief from removal.[527]

If the prosecutor is not willing to amend the charge to allow the non-citizen to plead to a statutory provision which does not involve criminal sexual conduct, then going to trial on the charge is an option which should be considered and discussed with the non-citizen. A conviction for an offense classified as sexual abuse of a minor will have immigration consequences as an aggravated felony, whether by plea or by trial.

Controlled Substance Offenses

It is in the interest of a non-citizen defendant to avoid multiple controlled substance convictions entered on different days. Where a non-citizen has been charged in the same court with multiple possession offenses, a plea to all offenses at the same hearing will not result in an aggravated felony.[528] Where a non-citizen client has been charged with a second possession offense after a first possession conviction has become final under state or federal law, work with the prosecutor to dismiss the charge for the second offense and charge him with a different criminal offense based on his conduct arising from the events of the offense which is not a deportable offense or, at a minimum, not an aggravated felony.[529]

Crimes of Violence

The term of imprisonment imposed for a crime of violence as defined under 18 U.S.C. § 16 controls whether an offense is an aggravated felony. For example, a sentence to a year and one day of imprisonment for aggravated battery is an aggravated felony as a crime of violence whereas a sentence to 364 days of imprisonment is not. It may be possible to get a sentence to incarceration or jail imposed for less than 365 days in exchange for increasing monetary fines and/or hours of community service, etc. Another option may be to have a non-citizen plead guilty to two offenses and be sentenced concurrently on both charges to terms of imprisonment of 364 days or less to avoid an aggravated felony under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

Theft and Stolen Property Crimes

Under the aggravated felony ground for theft, as defined by the Board of Immigration Appeals and the Seventh Circuit Court of Appeals, most convictions under state statutes involving theft or theft-like offenses where a sentence of one year or more is imposed will be

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[527] *See id.*; Cancellation of Removal, *infra* at 6-23; § 212(h) Waivers, *infra* at 6-58; Asylum and Refugees, *infra* at 6-31; Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36; Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45.

[528] *See* Tostado v. Carlson, 481 F.3d 1012 (8th Cir. Apr. 2, 2007) (following Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006) and holding that where a lawful permanent resident was convicted on the same day for unlawful possession of cocaine and unlawful possession of cannabis under Illinois statutes had not been convicted of an aggravated felony as his convictions constituted federal misdemeanor offenses).

[529] For updated practice advisories on the issue, see New York State Defender Association's Immigrant Defense Project, http://www.nysda.org/idp/webPages/LvGPressroom.htm.

considered to be theft offenses and aggravated felonies under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). Thus, it is critical to examine a non-citizen client's prior criminal records for theft and similar offenses to determine the length of any term of imprisonment. Non-citizens convicted of any class of misdemeanor theft offense under Illinois or Wisconsin law or of a Class B or C misdemeanor under Indiana law will not be found to have been convicted of an aggravated felony under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), as the maximum possible term of imprisonment is less than one year.[530] As Indiana Class A misdemeanors can be sentenced for up to one year of imprisonment, care must be taken that any sentence to a term of imprisonment be 364 days or less to avoid a conviction for an aggravated felony.[531]

Illinois statutes define terms involving theft offenses beginning at 720 ILCS 5/15. General theft provisions begin at 720 ILCS 5/16 and retail theft provisions begin at 720 ILCS 5/16A. Other subsections to consider include: library theft (720 ILCS 5/16B); unlawful sale of household appliances (720 ILCS 5/16C); computer crime (720 ILCS 5/16D); delivery container crime (720 ILCS 5/16E); wireless service theft (720 ILCS 5/16F); financial identity theft and asset forfeiture (720 ILCS 5/16G); deception (720 ILCS 5/17); WIC fraud (720 ILCS 5/17B); insurance fraud, fraud on the government and related offenses (720 ILCS 46 et. seq.); and theft-like offenses under the Illinois Vehicle Code (625 ILCS 5/1 et seq.), such as possession of a stolen motor vehicle.

Illinois statute 720 ILCS 5/16-1 defines theft in a manner similar to the Nevada statute for attempted possession of stolen property found by the Board of Immigration Appeals to involve a taking of property with the element of knowledge that property is stolen or that, under the circumstances, a reasonable person should know that the property is stolen.[532] Care should be taken regarding the length of sentence imposed for a crime that involves a theft offense that may be construed to involve attempted possession of stolen property, possession of stolen property, or receipt of stolen property to avoid a finding that the non-citizen has been convicted of an aggravated felony under I.N.A. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

Fraud or Deceit Offense Where Loss Exceeds $10,000

As pre-sentence investigation (PSI) reports and pre-sentence reports (PSR) are admissible into evidence to prove the amount of loss for an aggravated felony conviction

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[530] *See* 730 ILCS 5/5-8-3(a)(1) - (3).

[531] *See* IC-35-50-3-2; Chart: Classification and Sentencing Ranges for State Offenses, *supra* at 2-15.

[532] *See* 720 ILCS 5/16-1 (defining theft as "obtaining control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen"); 720 ILCS 5/16-6 (defining stolen property as "property over which control has been obtained by theft"); 720 ILCS 5/15-8 (defining "obtains or exerts control over property" as including but not limited to "the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property"); *cf. In re* Bahta, 22 I&N Dec. 1381 (BIA Oct. 4, 2000) (discussing Nev. Rev. Stat. 205.275(1) (1997) which defines a person buying or receiving stolen goods as "a person who commits an offense involving stolen property if the person, for his own gain or to prevent the owner from again possessing his property, buys, receives, possesses or withholds property: (a) knowing that it is stolen property; or (b) under such circumstances as should have caused a reasonable person to know that it is stolen property").

under I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), care should be taken in the plea and sentencing phases to distinguish between the amount of loss required for the convicted offense and to avoid any amount of $10,000 greater in the PSI/PSR or record of conviction to avoid an aggravated felony conviction.[533]

Other Grounds of Deportability

Failure to Comply with Sex Offender Registration Requirements

Under the Adam Walsh Child Protection Act enacted on July 27, 2006, a non-citizen who is convicted under 18 U.S.C. § 2250 for failure to register as a sex offender for the National Sex Offender Registry and to report his changes of address is deportable.[534] The registry requirement is also outlined under state law. Under 730 ILCS 150/6, registration with law enforcement is required within 10 days of a move and under 730 ILCS 150/7, all changes of residence must be reported for a 10 year period following release from confinement. Failure to report the change in address is a Class 3 felony and the trial court must sentence a defendant to a minimum jail sentence of 7 days and a fine of $500.[535] Indiana and Wisconsin have similar requirements.[536] Where a non-citizen has previously been apprised of his obligation to register as a sex offender, a conviction for a willful failure to register constitutes a crime involving moral turpitude.[537]

Espionage and Other National Security Grounds

A non-citizen may be deportable for national security reasons without having been convicted of an offense. A non-citizen who has engaged in, is engaged in, or at any time after admission engages in any activity related to espionage, sabotage or the violation or evasion of any law prohibiting the export of goods, technology, or sensitive information from the U.S. is deportable.[538] Evidence that a non-citizen has engaged in an act of espionage or been convicted of violating a law relating to espionage is not required to establish deportability under I.N.A. § 237(a)(4)(A)(i), 8 U.S.C. § 1227(a)(4)(A)(i)."[539] Where a non-citizen has knowledge of or has received instruction in the espionage or counter-espionage service or tactics of a foreign government in violation of 50 U.S.C. § 851, she is deportable.[540]

A non-citizen may also be deportable for having engaged in "any other criminal activity which endangers public safety or national security".[541] A non-citizen may also be

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[533] *See* Nijhawan v. Holder, case no. 08-495, 2009 U.S. LEXIS 4320 (Jun. 15, 2009); Ali v. Mukasey, 521 F.3d 737 (7th Cir. Apr. 4, 2008); *In re* Babaisakov, 24 I. & N. Dec. 306 (BIA Sept. 28, 2007).

[534] *See* I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v).

[535] *See* 730 ILCS 150/10.

[536] *See* Wis. Stat. §§ 301.45 through 301.48, 973.048; IC 5-2-12-4 through 5-2-12-9.

[537] *See In re* Tobar-Lobo, 24 I&N Dec. 143 (BIA Apr. 23, 2007); *see also*, Grounds of Deportability, Crimes Involving Moral Turpitude, *supra* at 3-3; Grounds of Inadmissibility, Crimes Involving Moral Turpitude, *infra* at 4-2.

[538] *See* I.N.A. § 237(a)(4)(A)(i), 8 U.S.C. § 1227(a)(4)(A)(i).

[539] *See In re* Luis, 22 I&N Dec. 747 (BIA May 26, 1999) (Cuban espionage case).

[540] *See id.*

[541] *See* I.N.A. § 237(a)(4)(A)(ii), 8 U.S.C. § 1227(a)(4)(A)(ii).

deportable for having engaged in any activity for which a purpose is the opposition, control, or overthrow of the U.S. government by force, violence, or other unlawful means.[542] Involvement in terrorist activity, as defined in I.N.A. §§ 212(a)(3)(B) and (F), 8 U.S.C. §§ 1182(a)(3)(B) also renders a non-citizen deportable.[543]

False Claims to U.S. Citizenship

False claims to U.S. citizenship made by a non-citizen on or after September 30, 1996 constitute a particularly problematic ground of deportability. Many non-citizens have been charged by the DHS with being deportable for such claims as a result of allegedly intentionally registering to vote while renewing their driver's licenses. With changes to the procedures to obtain driver's licenses from state agencies, non-citizens may claim to be U.S. citizens in order to obtain the licenses and avoid arrest for driving without a license. Other non-citizens will claim to be U.S. citizens on Form I-9, which they complete when they are hired for employment.[544] In addition, non-citizens may claim to be U.S. citizens when they are arrested and charged with a crime to avoid having a detainer or "hold" by the DHS placed on them at the local jail while others may tell a state court judge that they are U.S. citizens in order to be sentenced to "boot camp" or probation.

The ground of deportability for false claims to U.S. citizenship applies to non-citizens who have been admitted to the U.S. Often the DHS will reference the ground of deportability containing the applicable ground of inadmissibility for such claims. Where a non-citizen has been convicted in violation of 18 U.S.C. §1542 for falsely representing on a U.S. passport application that she was born in the U.S., she is deportable under INA §237(a)(1)(A), 8 U.S.C. §1227(a)(1)(A) for having been inadmissible under INA §212(a)(6)(C)(ii), 8 U.S.C. §1182(a)(6)(C)(ii) at the time she applied for adjustment of status.[545]

A limited exception to the ground of deportability for false claims to U.S. citizenship exists where:

1. each natural parent of the non-citizen (or each adopted parent) is or was a U.S. citizen;
2. the non-citizen permanently resided in the U.S. before age 16; and

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[542] *See* I.N.A. § 237(a)(4)(A)(iii), 8 U.S.C. § 1227(a)(4)(A)(iii).

[543] *See* I.N.A. § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B); *see also* I.N.A. §§ 237(a)(4)(C)-(E), 8 U.S.C. §§ 1227(a)(4)(C)-(E) for additional grounds of deportability related to violations of human rights and foreign policy concerns.

[544] *See* Kechkar v. Gonzales, 500 F.3d 1080 (10th Cir. Jul. 11, 2007) (finding that where a non-citizen has checked the box "U.S. citizen or national" on Form I-9 for employment after September 30, 1996, her action constitutes a claim for any purpose or benefit under state or federal law and thus falls within INA § 212(a)(6)(C)(ii), 8 U.S.C. §1182(a)(6)(C)(ii) for which a waiver is not available under INA § 212(i), 8 U.S.C. §1182(i)); Theodros v. Gonzales, 490 F.3d 396 (5th Cir. Jun. 25, 2007); Ateka v. Ashcroft, 384 F.3d 954 (8th Cir. Sept. 24, 2004); U.S. v. Karaouni, 379 F.3d 1139 (9th Cir. Aug. 24, 2004). For an example of Form I-9, visit http://www.uscis.gov and click on "Immigration Forms," and scroll down to find Form I-9 and the accompanying instructions.

[545] *See In re* Barcenas-Barrera, 25 I&N Dec. 40 (BIA Jun. 19, 2009).

3. the non-citizen reasonably believed at the time that he made the representation that he was a U.S. citizen.[546]

Non-Citizen Compliance with Foreign Student Status

Non-citizen students are generally admitted for an indeterminate period referred to as "duration of status" or "D/S," and they must maintain their status as students during their stay.[547] This includes carrying a certain number of credit hours and attending class as required by the terms of their student visas. Non-citizen students must also update any address changes with the school they are attending and with the DHS. Under the Student Exchange and Visitor Information System (SEVIS), schools are required to update any changes related to a non-citizen student's status and address information with the DHS.[548]

If a non-citizen student fails to maintain her status, the DHS may use the information from the SEVIS system to issue her a Notice to Appear (NTA) and place her in removal proceedings. She may be eligible for reinstatement of her student visa within the U.S., or she may have to leave the U.S. and apply for a new student visa in her home country.[549]

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[546] I.N.A. § 237(a)(3)(D)(ii), 8 U.S.C. § 1227(a)(3)(D)(ii).

[547] Non-citizen students may, at times, be admitted for a determinate period of time as noted on Form I-94 by the CBP officer during inspection at a port of entry.

[548] For more information regarding SEVIS, go to http://www.ice.gov/sevis/.

[549] *See* 8 C.F.R. § 214.2(f)(16).

national IMMIGRATION project of the National Lawyers Guild

Immigrant Defense Project

PRACTICE ADVISORY
The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach to Aggravated Felony Determinations[1]
June 24, 2009

Using the approach that sometimes some good can come of a bad decision, this advisory reviews the specific holding in the Supreme Court's recent decision in *Nijhawan v. Holder*, No. 08-495, 2009 WL 1650187 (U.S. June 15, 2009), analyzes the decision's impact on application of the categorical approach to aggravated felony determinations generally, and provides specific suggestions on how *Nijhawan* may be used affirmatively to overcome unfavorable case law in certain jurisdictions on certain aggravated felony issues, including the reach of the sexual abuse of a minor and drug trafficking grounds. The advisory also attaches an Appendix Chart summarizing the impact of the *Nijhawan* decision on the analytical approach to be applied to each of the various aggravated felony grounds.

Overview

On June 15, the Supreme Court issued its decision in *Nijhawan v. Holder*, 2009 WL 1650187 (June 15, 2009), a case challenging the government's abandonment of the categorical approach with respect to the $10,000 monetary loss required for a fraud offense to be deemed an "aggravated felony." Under the traditional categorical approach, the adjudicator is not permitted to look at the alleged conduct underlying the conviction, but instead to look only at the statute of conviction and what is established by the conviction itself. In *Nijhawan*, however, the Supreme Court allowed the adjudicator to consider and rely on factual admissions and findings made for sentencing purposes, once conviction had already occurred.

Nevertheless, while the Supreme Court's decision affirms the government's deviation from the categorical approach in the context of the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony (and may support deviations from the categorical approach in certain other contexts), there is also potential for the Court's opinion to be used to support strict application of the categorical approach in other contexts. Among the points that immigration practitioners should keep in mind are the following:

- The Court applied what it called the "circumstance-specific" approach instead of the categorical approach to the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony, but made clear that this approach applies only

[1] The Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild jointly prepared this advisory that Dan Kesselbrenner and Manuel D. Vargas wrote with assistance from Stephanie Kolmar and Patrick Taurel, who is primarily responsible for the Appendix chart.

where the factor at issue is found to refer to the specific way in which an offender committed a crime on a particular occasion.

- The Court made clear that the categorical approach applies to most aggravated felony removal grounds or provisions, which reference generic crimes rather than the particular factual circumstances surrounding commission of the crime on a specific occasion (see Appendix for impact of *Nijhawan* on analysis of other aggravated felony grounds).

- The Court also indicated that the categorical approach to be applied to generic crimes is the same strict categorical test applied in the criminal sentencing context in cases such as *Taylor v. United States*, 495 U.S. 575 (1990).

- Even where a circumstance-specific approach may be applied, the Court limited inquiry into the facts underlying a conviction to findings "tied to the specific counts covered by the conviction" and that are obtained under "fundamentally fair procedures" where the evidence that the government offers must meet a "clear and convincing" standard.

The *Nijhawan* decision and its impact

Q. What was the case about?

A. The Supreme Court granted certiorari to determine whether a noncitizen is deportable under the fraud or deceit aggravated felony for having a loss to the victim that exceeds $10,000 where the statute of conviction does not include an element of loss. The petitioner argued that the categorical approach, which the Court applies to determine enhancements under the Armed Career Criminal Act (ACCA), a federal sentencing enhancement statute,[2] precluded a finding of deportability where the elements of the statute of conviction do not match the elements of the ground of deportability.

Q. What is the background to the case?

A. In brief, a jury found Mr. Nijhawan guilty of conspiracy, fraud, and money laundering. The fraud statute under which Mr. Nijhawan was convicted did not include a loss element, nor was jury asked to make a loss finding. After conviction, Mr. Nijhawan stipulated for sentencing purposes that the loss exceeded $100 million. The court ordered defendant to pay $683 million in restitution and sentenced him to a forty-one month period of incarceration.

The Department of Homeland Security charged Mr. Nijhawan with being deportable under the aggravated felony ground for having a conviction for a crime involving fraud or deceit aggravated felony with a loss to the victim that exceeded $10,000. The Immigration Judge found that the conviction fell within the definition of "aggravated

[2] *See Taylor v. United States*, 495 U.S. 575 (1990); *Chambers v. United States*, 129 S.Ct. 687 (2009); *James v. United States*, 550 U.S. 192 (2007); 18 U.S.C. §924(e)

felony" under INA § 101(a)(43)(M)(i) based on evidence obtained from the sentencing records. The Board of Immigration Appeals (BIA) and Third Circuit affirmed the Immigration Judge's decision.

Q. What did the Court decide?

A. The Supreme Court held that a noncitizen is deportable under the fraud aggravated felony ground regardless of whether a loss amount is an element of the statute of conviction. The Court further held that a factfinder can rely on sentencing admissions and findings to demonstrate the amount of the loss.

Q. How did the Court reach its decision?

A. The Court examined the aggravated felony definition and found that not all its provisions require application of the categorical approach. First, it determined that certain sections refer to "a generic crime," which do require the factfinder to use the categorical approach. *See Nijhawan*, 2009 WL 1650187, at *6. The Court indicated that the categorical approach to be applied to deportability provisions based on such generic crimes is the same strict categorical test applied in the criminal sentencing context in cases such as *Taylor v. United States*, 495 U.S. 575 (1990). *See Nijhawan*, 2009 WL 1650187, at *3 (referencing *Taylor* categorical approach as applicable had the Court determined that the $10,000 loss requirement had to be an element of the statute under which Mr. Nijhawan was convicted). As the Court explained, under the strict *Taylor* categorical test, whether a conviction falls within a statutory description of a generic crime may be determined only "by examining 'the indictment or information and jury instructions,' *Taylor*, *supra,* at 602, or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy or 'some comparable judicial record' of the factual basis for the plea. *Shepard v. United States*, 544 U.S. 13, 26 (2005)." *See Nijhawan*, 2009 WL 1650187, at *5.

According to the Court, though, a second group of sections require a "circumstance-specific" inquiry, in which the decision maker may determine whether the offense constitutes an aggravated felony by examining the alleged facts and circumstances underlying a noncitizen's crime. The Court applied this approach to the $10,000 loss requirement finding that the loss requirement "refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." *Nijhawan*, 2009 WL 1650187, at *3. The Court reasoned that, because so few state or federal criminal fraud statues contain this monetary element, a categorical method of inquiry would render the $10,000 threshold meaningless.

Q. Does *Nijhawan* provide any guidance on whether other aggravated felony grounds or provisions are subject to the categorical approach?

A. The Court's decision differentiates between aggravated felony grounds that require a generic crime conviction and aggravated felony grounds that are "circumstance specific." For a generic aggravated felony ground, the traditional categorical approach applies. For a "circumstance specific" ground, the record of conviction is not the limit of the evidence

a factfinder can consider in deciding whether the respondent's conviction constitutes an aggravated felony. *See* Appendix chart below for a detailed provision by provision analysis of the various aggravated felony grounds, and provisions within each ground, that the Court stated or suggested were generic crimes subject to the categorical approach or to the circumstance-specific approach).

Q. Are there limits to the evidence a factfinder can consider in determining whether a respondent's conviction satisfies the definition of a "circumstance-specific" aggravated felony?

A. Yes. The Court permitted evidence of loss beyond what the conviction establishes only if the procedures were fundamentally fair, "including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims." *See Nijhawan*, 2009 WL 1650187, at *8. The Court specifically indicated that there must be a tether between the evidence of loss and the conviction, and that dismissed counts must not be the source of the evidence. *Nijhawan*, 2009 WL 1650187, at *8. Indeed, the opinion approvingly cites the Government's statement that the "sole purpose" of the aggravated felony inquiry "is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *See Nijhawan*, 2009 WL 1650187, at *9. Moreover, the evidence taken together must also constitute "clear and convincing" evidence that the loss exceeds $10,000.

Q. Is there an argument that *Nijhawan* limits the BIA's interpretation in *Matter of Babaisakov*, 24 I&N Dec. 306, 321 (BIA 2007) that an Immigration Judge could even consider evidence outside the record of conviction like a respondent's admissions in removal proceedings?

A. The BIA in *Babaisakov*, which also dealt with the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony, permitted an Immigration Judge to consider "reliable evidence," which goes beyond sentence-related evidence. The Supreme Court cited to *Babaisakov* only insofar as it dealt with sentencing findings. *Nijhawan* 2009 WL 1650187, at *9. Indeed, even with respect to sentencing-related evidence, the Court cites *Babaisakov* for the evidence-limiting proposition that the BIA itself has recognized that immigration judges must assess findings made at sentencing with an eye to what losses are covered and to the burden of proof employed. That the Court focused exclusively on sentencing related evidence, cited to *Babaisakov* solely for sentencing-related evidence, did not defer to *Babaisakov* (see next question), discussed the need for fairness, and required evidence tied to the conviction and not re-litigating the conviction, support the argument that, after *Nijhawan*, only sentence-related evidence is reliable. Thus, one can argue that the Court's narrowly tailored discussion of evidence in *Nijhawan* supersedes the BIA's expansive interpretation of what evidence a factfinder can hear to determine the amount of the loss or any other possible circumstance-specific factor.

Q. Did the Court defer to the BIA's holding in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007)?

A. In *Babaisakov*, the Board invoked *Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967 (2005), a Supreme Court case that allows an agency to ignore certain circuit cases that were decided when the agency had a different interpretation and which the agency now rejects. In the BIA's view, it did not have to follow circuit court decisions interpreting monetary loss because the circuits did not have the benefit of the BIA's decision in *Babaisakov* when the circuits addressed the fraud/deceit $10,000 loss issue. The reasoning underlying *Brand X* is the Supreme Court's decision in *Chevron v. NRDC*, 467 U.S. 837 (1984), which requires a reviewing court to defer to an agency's interpretation of an ambiguous statute that it administers unless the agency's interpretation is contrary to the statute or unreasonable. Nevertheless, despite vigorous invocation of *Chevron* and *Brand X* by the government, the Supreme Court did not mention *Chevron* once in *Nijhawan*. The Court's failure to address the *Chevron* issue in an administrative case like *Nijhawan* strongly suggests that the Court treated the issue as a strict question of statutory construction or determined that this issue concerning the reach of the aggravated felony definition, which is also applied in federal criminal contexts, is not subject to *Chevron* deference. *See also Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal* v. Ashcroft, 543 U.S. 1 (2004).

Using *Nijhawan* affirmatively to limit the reach of other aggravated felony categories in the immigration statute

Q. Can *Nijhawan* be used to support arguments to limit the reach of the sexual abuse of a minor section of the aggravated felony definition?

A. Yes, the Supreme Court identified sexual abuse of a minor defined under 8 USC 1101(a)(43)(A) as a generic offense, which requires a conviction to contain the elements of the ground of deportability. *See Nijhawan*, 2009 WL 1650187, at *6. This can be used, for example, to argue against government introduction of evidence to establish the alleged age of a victim when this fact was not required to be established by the elements of the statute of conviction. *See, e.g., Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*) (cited by the Supreme Court in *Nijhawan*). Prior to *Nijhawan*, the Seventh Circuit, reached a contrary result, holding that the age of the victim need not be an element of the offense for the conviction to constitute a sexual abuse of a minor aggravated felony. *Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7th Cir. 2001); *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005). Practitioners in the Seventh Circuit should argue that *Lara-Ruiz* and *Gattem* are no longer good law in light of *Nijhawan*.

Q. Can *Nijhawan* be used to support arguments to limit the reach of the illicit trafficking of a controlled substance section of the aggravated felony definition?

Yes, the Supreme Court also identified illicit trafficking in a controlled substance under 8 USC 1101(a)(43)(B) as a generic offense, which requires a conviction to be analyzed

under the traditional categorical approach. *See Nijhawan*, 2009 WL 1650187, at *6. This may be relevant to ongoing litigation regarding whether a second simple possession drug offense may be deemed a drug trafficking aggravated felony.

The Supreme Court's decision supports the position of the BIA, which has held that, unless circuit law had determined otherwise, an immigration factfinder should stay within the record of conviction of the second or subsequent conviction in determining whether a second or subsequent possession offense constituted recidivist possession of a controlled substance, which would make the offense an aggravated felony under 8 USC § 1101(a)(43)(B). *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (BIA. 2007). Under this view, only if a state prosecuted the defendant as a repeat offender would a state conviction qualify as illicit trafficking.

In reviewing whether a second conviction for possession of a controlled substance constituted "illicit trafficking, the Fifth Circuit has said to the contrary that "[u]nder this court's approach for successive state possession convictions, a court or an immigration official characterizes the conduct proscribed in the latest conviction, by referring back to the conduct proscribed by a prior conviction as well." *Carachuri-Rosendo v. Holder*, --- F.3d ----, 2009 WL 1492821 (5th Cir. May 29, 2009). In considering the petitioner's prior conviction, the Fifth Circuit examined evidence that was not part of the record of conviction at issue.

Similarly, the Seventh Circuit also considered evidence beyond the statute and record of conviction to determine that a second or subsequent conviction for possession of a controlled substance was an aggravated felony under the illicit trafficking section of aggravated felony definition. *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008); *U.S. v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008). While the Supreme Court cited *Fernandez*, it cited specifically to pages 871-72 of that decision, where the Seventh Circuit stated that it was following the *Taylor* categorical approach. In fact, the Supreme Court also cited to *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001), which reached the opposite conclusion from the Seventh Circuit on the merits of the two possession issue, indicating that the Court was citing these cases for their general adoption of a categorical approach, and not for how the circuits applied that approach to the issue of when a second or subsequent conviction for possession of a controlled substance is an aggravated felony. *See Nijhawan*, 2009 WL 1650187, at *6.

The Supreme Court in *Nijhawan* permitted a factfinder to examine evidence outside of the record of conviction only in "circumstance specific" sections of the aggravated felony definition. The Court classified illicit trafficking aggravated felony definition under 8 USC § 1101(a)(43)(B) as a generic offense, and not a "circumstance specific" offense. *Nijhawan*, 2009 WL 1650187, at *6. Therefore, the Fifth and Seventh Circuits' decisions permitting a factfinder to look at a separate conviction document that is not part of the record of conviction at issue is inconsistent with *Nijhawan*.

Advising criminal defense attorneys representing immigrants facing fraud charges in criminal proceedings

Q. Are there charge bargaining strategies a criminal defense attorney can use to avoid deportability for a fraud or deceit aggravated felony?

A. One strategy that may be of fairly broad applicability is to switch any potential plea from a fraud crime to a theft crime. In a case where the loss to the victim is likely to exceed $10,000, but the court is not likely to sentence the defendant to a year or more, it may be possible to avoid a fraud or deceit aggravated felony by pleading to a theft offense. In the BIA's view, theft and fraud crimes are generally distinct offenses. *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008). In *Garcia*, the BIA held that a Rhode Island conviction for welfare fraud was not a theft offense because the defendant took the victim's property with the owner's consent and theft is a taking without consent. However, if the plea were instead to a larceny offense, this would avoid the consequences of an aggravated felony conviction if any sentence of imprisonment imposed by the court is less than a year.

Q. Are there any strategies a criminal defense attorney can use to keep the government from meeting its burden that the loss exceeds $10,000 by clear and convincing evidence?

A. In *Nijhawan*, the Court, in concluding that the restitution order and stipulation constituted clear and convincing evidence, noted with significance the absence of any conflicting evidence as to the amount of the loss. *Nijhawan*, 2009 WL 1650187, at *9. One possibility would be for a defendant to enter a plea for a sum certain that is $10,000 or less. Another possibility would be for the criminal court to approve a plea agreement for a sum certain that is $10,000 or less. In both such cases, the existence of such conflicting evidence may mean that the government is unable to establish by clear and convincing evidence that the loss exceeds $10,000 even where there is evidence introduced later under the lesser burden of proof at sentencing that the loss exceeded $10,000.

For further information

For information regarding how *Nijhawan* affects criminal grounds of removal other than aggravated felonies, *see* Immigrant Legal Resource Center Preliminary Advisory on *Nijhawan* at www.nationalimmigrationproject.org. For the latest legal developments or litigation support on issues discussed in this advisory, or other future advisories further developing or expanding on the issues discussed here, contact the National Immigration Project at (617) 227-9727 or the Immigrant Defense Project at (212) 725-6422.

APPENDIX

Aggravated Felony Analytical Approach Post-*Nijhawan*

Aggravated Felony 101(a)(43)	Likely Analytical Approach (Categorical or Circumstance-Specific or Sentence-Based)	Basis in *Nijhawan* for Determination on Likely Analytical Approach
(A) murder, rape, or sexual abuse of a minor	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes. Subparagraph (A), for example, lists 'murder, rape, or sexual abuse of a minor.' *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (CA9 2008); *Singh v. Ashcroft*, 383 F.3d 144 (CA3 2004); *Santos v. Gonzales*, 436 F.3d 323 (CA2 2005)" (*Nijhawan*, 2009 WL 1650187, at*6).
(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 942(c) of Title 18)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Subparagraph (B) lists 'illicit trafficking in a controlled substance.' *Gousse v. Ashcroft*, 339 F.3d 91 (CA2 2003); *Fernandez v. Mukasey*, 544 F.3d 862 (CA7 2008); *Steele v. Blackman*, 236 F.3d 130 (CA3 2001)." (*Nijhawan*, 2009 WL 1650187, at *6) – *See also Lopez v. Gonzales*, 549 U.S. 47 (2006) (without naming its approach, essentially applied categorical approach to this aggravated felony ground).
(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)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…And subparagraph (C) lists "illicit trafficking in firearms or destructive devices." (*Nijhawan*, 2009 WL 1650187, at *6).

° Signifies that *Nijhawan* includes language expressly stating or suggesting that this approach should be used with respect to this provision of the aggravated felony definition.

(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) ...	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to an 'offense described in' a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).
...if the amount of the funds exceeded $10,000	Uncertain	Reasoning: 1. The provision at issue somewhat parallels the (M)(i) provision at issue in *Nijhawan*. 2. On the other hand, at least one of the referenced federal criminal statutes did in 1996 require findings that the amount of the funds exceeded $10,000. *See* 18 U.S.C. § 1957; *see also* 18 U.S.C. § 1956(b)(1) (providing for civil penalty greater than $10,000 if value involved in the transaction exceeded $10,000). 3. State money laundering statutes in 1996 varied on whether they identified $10,000 as an element. *Compare* N.Y. Penal Law § 470.05 (West 1995) ($10,000 threshold); IL ST CH 38 ¶ 29B/1 (West 1996)($10,000 threshold), *with* Cal.Penal Code §§ 186.10(a) (West 1996), 186.10(c)(1)(A) (West 1996)(amount other than $10,000 specified); Tex. Penal Code Ann. § 34.02 (West 1996)(same).
(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 offense); (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).	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph (E)" (*Nijhawan*, 2009 WL 1650187, at *6).

(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 at least one year [sic]	Categorical Refer to Sentence Imposed	Reasoning: 1. Refers to a category of offenses generically defined in the Federal Criminal Code at 18 U.S.C. § 16. *Cf. Nijhawan* discussion of requirement that courts use the "categorical method" to determine whether a conviction for attempted burglary was a conviction for a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii) definitional language covering a crime that "involved conduct that presents a serious potential risk of physical injury to another." (*Nijhawan*, 2009 WL 1650187, at *4). 2. No language in this provision calls for a circumstance-specific approach. 3. Its position within § 101(a)(43) does not point to a circumstance-specific approach. 4. No problems applying the very clearly identified elements that appear in 18 U.S.C. § 16. 5. *See also Leocal v. Ashcroft*, 543 U.S. 1 (2004) (without naming its approach, essentially applied categorical approach to this aggravated felony ground).
(G) a theft offense (including receipt of stolen property) or burglary offense… …for which the term of imprisonment at least one year [sic]	Categorical Refer to Sentence Imposed	Reasoning: 1. Refers to generic crimes of "theft offense" (including "receipt of stolen property") and "burglary offense." 2. No language in this provision calls for a circumstance-specific approach. 3. Its position within § 101(a)(43) does not point to a circumstance-specific approach. 4. *See also Gonzales v. Duenas-Alvarez* 549 U.S. 183 (2007) (understanding 'theft' to be used in the generic sense and expressly applying categorical approach).
(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(H)" (*Nijhawan*, 2009 WL 1650187, at *6).
(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(I)" (*Nijhawan*, 2009 WL 1650187, at *6).

(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 one year imprisonment or more may be imposed	Categorical° Refer to Potential Sentence	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph...(J)" (*Nijhawan*, 2009 WL 1650187, at *6).
(K) an offense that - (i) relates to the owning, controlling, managing, or supervising of a prostitution business	Categorical	Reasoning: Refers to generic offenses with no qualifying language.
(K) an offense that... (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	Categorical Circumstance-Specific°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6). "The statute has other provisions that contain qualifying language that certainly seems to call for circumstance-specific application. Subparagraph (K)(ii), for example..." - However, Supreme Court adds: "*But see Gertsenshteyn v. United States Dept. of Justice*, 544 F.3d 137, 144-145 (CA2 2008)." (*Nijhawan*, 2009 WL 1650187, at *6).
(K) an offense that... (iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons)	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).

(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); or (iii) section 421 of Title 50 (relating to protecting the identity of undercover agents)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(L)" (*Nijhawan*, 2009 WL 1650187, at *6).
(M) an offense that - (i) involves fraud or deceit… | | …in which the loss to the victim or victims exceeds $10,000	Categorical° Circumstance Specific°	Reasoning: *Nijhawan* distinguishes monetary threshold factor from the elements of a generic offense involving "fraud" or "deceit." -- "The question before us is whether the italicized language [in which the loss to the victim or victims exceeds $10,000] refers to an element of the fraud or deceit 'offense'…" (*Nijhawan*, 2009 WL 1650187, at *3). "We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically…Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." (*Nijhawan*, 2009 WL 1650187, at *8).
(M)(ii) an offense that – … (ii) is described in section 7201 of Title 26 (relating to tax evasion)… …in which the revenue loss to the Government exceeds $10,000	Categorical Circumstance-Specific°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6). "The statute [INA 101(a)(43)] has other provisions that contain qualifying language that certainly seems to call for circumstance-specific application…Subparagraph (M)(ii) provides yet another example…" (*Nijhawan*, 2009 WL 1650187, at *6-7).

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) [8 U.S.C.A. § 1324(a)] (relating to alien smuggling),...	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6). That reasoning should apply with equal force in the context of INA criminal provisions.
...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	Circumstance-Specific°	"[T]he 'aggravated felony' statute differs from ACCA in that it lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances...See also subparagraph (N)" (*Nijhawan*, 2009 WL 1650187, at *6).
(O) an offense described in section 275(a) [8 U.S.C.A. § 1325(a)] or 276 [8 U.S.C.A. § 1326]...	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6). That reasoning should apply with equal or force in the context of INA criminal provisions.
...committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph	Circumstance-Specific with respect to INA § 275(a) Uncertain with respect to INA § 276.	Reasoning: This qualifying language will probably be deemed to call for a circumstance-specific approach with respect to an offense under INA § 275 since this offense does not have as an element that the individual was "previously deported." Reasoning: Same qualifying language applies but INA § 276 can be said to have as an element that the individual was "previously deported," and imposes a greater penalty if the prior removal was subsequent to a conviction of an aggravated felony. *See* 8 U.S.C. § 1326(b)(2).

(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)...	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes...Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).
...for which the term of imprisonment is at least 12 months,...	Refer to Sentence Imposed	
...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	Circumstance-Specific°	"[T]he 'aggravated felony' statute differs from ACCA in that it lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances. For example, subparagraph (P)..." (*Nijhawan*, 2009 WL 1650187, at *6).
(Q) an offense relating to a failure to appear by a defendant for service of sentence...	Categorical	Reasoning: 1. The language suggests a generic offense. 2. No applicability problems as this offense was criminalized across the country in 1996. *See e.g.* Cal. Penal Code Ann. § 166(a)(4) (West 1996); N.Y. Penal Law Ann. § 215.55 (West 1995); Tex. Penal Code Ann. § 38.10 (West 1996).
...if the underlying offense is punishable by imprisonment for a term of 5 years or more	Circumstance-Specific	Reasoning: There are applicability problems if this language is treated as an element. In 1996, few state statutes that criminalized failure to appear had as an element that the underlying offense be punishable by a term of imprisonment of 5 years or more; more commonly, statutes would heighten the seriousness of the offense if the underlying offense was simply "a felony." *See e.g.* Tex. Penal Code Ann. § 38.10 (West 1996).

(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	Categorical Refer to Sentence Imposed	Reasoning: The language suggests generic offenses. Such an interpretation would have posed no applicability problems in 1996.
(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness,... ...for which the term of imprisonment is at least one year	Categorical Refer to Sentence Imposed	Reasoning: The language suggests generic offenses. Such an interpretation would have posed no applicability problems in 1996.
(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	Categorical Circumstance-Specific	Reasoning: The language suggests a generic offense. Such an interpretation would have posed no applicability problems in 1996. *See e.g.* N.Y. Penal Law Ann. § 215.56 (bail jumping in the second degree) (West 1995). Reasoning: There are applicability problems if this language is treated as an element. In 1996, few state statutes that criminalized failure to appear had as an element that the underlying offense be punishable by a term of imprisonment of 2 years or more; more commonly, statutes would heighten the seriousness of the offense if the underlying charge was simply "of a felony." *See e.g.* N.Y. Penal Law § 215.56 (bail jumping in the second degree) (West 1995).
(U) an attempt or conspiracy... ...to commit an offense described in this paragraph.	Categorical SEE ABOVE FOR ANALYSIS OF UNDERLYING OFFENSE	Reasoning: These are accessory or preparatory offenses with elements generally defined by statute or case law. SEE ABOVE FOR ANALYSIS OF UNDERLYING OFFENSE

Brief History of Immigration Laws: 1996-Present

Enacted laws relating to criminal immigration issues and benefits for noncitizens in removal proceedings are noted below:

1996

- Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, 110 Stat. 1214 (4/24/1996).
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, 110 Stat. 2105 (8/22/1996).
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, P.L. 104-208, 110 Stat. 3009 (9/30/1996).

1997

- INA § 245(i)/245(k) Legislation: Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, P.L. 105-119, 111 State. 2440, Sec. 11 (11/26/1997).
- Nicaraguan and Cuban Adjustment and Central American Relief Act (NACARA), P.L. 105-100, 111 Stat. 2160, Tit. II, Div. A (11/19/1997).

1998

- Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), P.L. 105-277, Div. A, §101(h), Title IX, 112 Stat. 2681 (10/21/1998).
- American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Div. C, title IV (10/21/1998).
- International Religious Freedom Act of 1998, P.L. 105-292, 112 Stat. 27871 (10/27/1998).

2000

- Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386, 114 Stat. 1464 (10/28/2000).
- Child Citizenship Act of 2000 P.L. 106-395, 114 Stat. 1631 (10/30/2000).
- Legal Immigration Family Equity Act (LIFE Act), P.L. 106-553, 114 Stat. 2762, Title XI (12/21/2000).

2001

- USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001) P.L. 107-56, 115 Stat. 272 (10/26/2001).

2002

- Enhanced Border Security and Visa Entry Reform Act of 2002, P.L. 107-173, 116 Stat. 543 (5/14/2002).
- Child Status Protection Act (CSPA), P.L. 107-208, 116 Stat. 927 (8/6/2002).
- Homeland Security Act of 2002, P.L. 107-296, Title IV, Subtitles C-F, 116 Stat. 2135 (11/25/2002).

2003

- National Defense Authorization Act for Fiscal Year 2004 (Naturalization and Other Immigration Benefits for Military Personnel and Families, P.L. 108-136, title XVII, 117 Stat. 1392, 1691-96 (11/22/2003).
- Trafficking Victims Protection Reauthorization Act of 2003, P.L. 108-193, 117 Stat. 2875 (12/19/2003).

2004

- Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, 118 Stat. 3638, 3732-42 (12/17/2004)

2005

- REAL ID Act of 2005, Div. B of Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005 P.L. 109-13, 119 Stat. 231, 310 (5/11/2005).

2006

- Violence against Women and Department of Justice Reauthorization Act of 2005, P.L. 109-162, 119 Stat. 2960 (1/5/2006).
- National Defense Authorization Act for FY 2006, P.L. 109-163, 119 Stat. 3136 (1/6/2006).
- Immigration Law Reforms to Prevent Sex Offenders from Abusing Children (Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248, title IV; 120 Stat. 587, 622-23 (7/27/2006).
- Military Commission Act of 2006, P.L. 109-366, 120 Stat. 2600 (10/17/2006).
- Secure Fence Act of 2006, P.L. 109-367, 120 Stat. 2638 (10/26/2006).

2007

- Consolidated Appropriations Act of 2008, P.L. 110-161, Div. J, Sec. 691, 121 Stat. 1844, 2364-65 (12/26/2007).

2008

- National Defense Authorization Act for FY 2008, P.L. 110-181, 122 Stat. 3 (1/28/2008).
- Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act, P.L. 110-293 (7/30/2008).
- Child Soldiers Accountability Act of 2008, P.L. 110-340 (10/3/2008).
- William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457, 122 Stat. 5044 (12/23/2008).