

# **Defending Non-Citizens in Illinois, Indiana, and Wisconsin**

**by Maria Theresa Baldini-Potermin**

**with Heartland Alliance's National Immigrant Justice Center,  
Scott D. Pollock & Associates, P.C.  
and Maria Baldini-Potermin & Associates, P.C.**



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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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“[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”

*Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

## DISCLAIMER

**This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.**

## Introduction & Acknowledgments

*Defending Non-Citizens in Illinois, Indiana, and Wisconsin* is intended to provide public defenders and criminal defense attorneys with a basic overview of the immigration provisions that may have consequences for their non-citizen clients in state and federal criminal and civil courts. Where possible, rulings by the Seventh Circuit Court of Appeals and the Board of Immigration Appeals directly relating to Illinois, Indiana, and Wisconsin statutes have been noted. While this manual focuses on the immigration consequences of convictions under Illinois, Indiana, and Wisconsin law, it may also be helpful to legal advocates for immigrants, immigration attorneys, and community organizations in the tri-state area as well as other states.

This manual focuses on the changes in immigration law effected by the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and other major pieces of immigration legislation since September 11, 2001. Based on changes in federal law, pre-plea advisals, motions to vacate guilty pleas, motions to reduce sentences, post-conviction relief, and gubernatorial pardons will make the difference for many non-citizens who want to remain in the United States with their families or avoid possible persecution (including torture and death) in their countries of origin or nationality.

It has been eight years since *Defending Non-Citizens in Illinois Courts* was published. Since then, the interpretation of the Immigration and Nationality Act addressing the immigration consequences of criminal dispositions can be described as a rollercoaster ride, with the U.S. Supreme Court stepping in several times to overturn decisions issued by the federal circuit courts of appeals and the Board of Immigration Appeals. Since August 2007, the Seventh Circuit's case law has dramatically changed as well, particularly regarding the interpretation of crimes involving moral turpitude and evidence outside of the criminal record that can be used to establish deportability of a non-citizen. In a case arising out of Kentucky involving a state petition for post-conviction relief, the Supreme Court is expected to hold oral argument in the fall of 2009 to directly address the issue regarding whether defense attorneys have an obligation to advise their noncitizens about the immigration consequences of criminal pleas and if not, whether counsel's gross misadvice about those consequences can constitute grounds to set aside a guilty plea induced by the misadvice.<sup>1</sup>

This manual would not have been possible without the generosity of Scott D. Pollock and Scott D. Pollock & Associates, P.C. which provided support for legal research, legal assistant Laura Litwiller, and technical support. I am grateful to Scott and the law firm for having allowed me to take on this project through August 2007. Following my departure from that firm, Greta Hendricks, Natasha Ruser, and Nandini Saldanha assisted with ongoing research to update the manual. Funding for their assistance came from my salary at another firm. Since June 2008, Maria Baldini-Potermin & Associates, P.C., has continued to underwrite the ongoing research and updating of this publication, a certain challenge in the economic downturn faced around the U.S.

Between September 2007 and May 2008, Anna Marie Gallagher and I co-authored *Immigration Trial Handbook*, published by Thomson Reuters/West. It is a step-by-step book for immigration practitioners, and it includes strategies about how to challenge the immigration consequences of criminal convictions in removal proceedings as well as forms of relief from removal. As I prepare annual updates every spring for the *Immigration Trial*

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<sup>1</sup> *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), cert. granted., 129 S.Ct. 1317 (U.S. Feb. 23, 2009) (No. 08-651).

*Handbook*, I will update this manual for defense attorneys in Illinois, Indiana, and Wisconsin to have access to a current publication as they advise noncitizens with cases pending before the state criminal courts. National Immigrant Justice Center will be responsible for announcing and publishing the updated versions. Any comments and suggestions for future editions are welcome and will be much appreciated

Many thanks are due to the following attorneys who contributed their time and talents to review the 2007 draft of the manual: Scott D. Pollock, Marta Delgado, Anne Relias, and Kathryn Weber with Scott D. Pollock & Associates, P.C.; Professor Sioban Albiol, DePaul College of Law; Susan Compornolle, Rubman and Compornolle; Robert Gevirtz, Gevirtz and Born; Andrew Krull, Indiana Public Defender Council; Bill Marsh, Chief Federal Defender, Federal Defender's Office, Indianapolis, Indiana; Maria Gloria Najera, Gaylan and Najera; Lee O'Connor, Indiana Legal Services; Lisa Palumbo, Legal Assistance Foundation of Chicago, Inc.; Charles Roth, National Immigrant Justice Center (NIJC); Thomas Ruge, Lewis & Kappes, P.C.; Susan Schreiber, Catholic Legal Immigration Network Inc. (CLINIC); Fred Tsao, Illinois Coalition for Immigrant and Refugee Rights (ICIRR); Erich C. Straub, Erich C. Straub Immigration Attorney LLC; and Professor Ellen Yee, Drake Law School. Thanks are due to Scott D. Pollock, Anne Relias, Kathryn Weber, Charles Roth, and Mary Meg McCarthy who reviewed the 2009 revised draft.

Special thanks are due to Dan Kesselbrenner, Director of the National Immigration Project of the National Lawyers Guild. Dan reviewed the prior versions of the Minnesota and Illinois manuals, encouraged me to strive for a manual covering all three states in the jurisdiction of the Seventh Circuit Court of Appeals, and reviewed this manual in detail, particularly the sections on aggravated felonies and federal sentencing. Dan has always been willing to discuss the intricacies of criminal immigration issues with attorneys around the country and come up with creative strategies. Andy Krull, Thomas Ruge, and Lee O'Connor assisted with their expertise on Indiana criminal law. Erich C. Straub lent his expertise on Wisconsin criminal law. Chief Federal Defender Bill Marsh gave his expertise to the sections on federal offenses, procedure, and sentencing. Nancy Nemeth assisted with initial legal research.

On a personal note, I wrote the first Illinois manual during my pregnancy and maternity leave after giving birth to my daughter, Christine Marie Potermin. She was seven months old when the events of September 11, 2001 rocked the world and the state of immigration law. Now eight years old, Christine patiently endured the many weekends and evenings when I worked to draft and complete this manual. Answering her numerous questions about what the manual was about, how it could help to get people out of jail, and how it could help other parents stay in this country and not be sent away from their children permanently to other countries helped me to persevere to complete this manual, despite other obligations and events in the past two years.

For the last 19 years I have been involved with immigration law and the defense of non-citizens, and it never ceases to surprise or amaze me. As attorneys and advocates, we stand on the shoulders of those who have preceded us as well as those around us. I dedicate this book to those who have gone before us, to those advocating for due process, fundamental fairness, and human rights, and to those who will come after us to continue this struggle. May the world become a better and more just place on account of all of our individual and collective efforts.

Maria Theresa Baldini-Potermin  
June 26, 2009

### About the Author:

Maria Baldini-Potermin is the founder of Maria Baldini-Potermin & Associates, P.C. in Chicago, Illinois. The firm focuses on removal/deportation defense, federal litigation and appeals, waivers, naturalization, consular processing, family-based applications and immigration consequences of criminal dispositions. She is the co-author of *Immigration Trial Handbook*, published by Thomson Reuters/West. She serves as an expert author-consultant for Thomson Reuters/West's *Interpreter Releases*, the leading weekly immigration law periodical. She is the author of Chapter 4: The Meaning of Conviction for Immigration Purposes, Advisements, Pleas and Sentences in the *A Judge's Guide to Immigration Law in Criminal Proceedings*, published by American Bar Association in 2004. She authored *Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios* in 1998 and 2000. An active member of the American Immigration Lawyers Association (AILA), she serves currently as the vice-chair of the national AILA-Executive Office for Immigration Review Liaison Committee. In 2004, she received the Chicago AILA Chapter's Joseph Minsky Mentor Award. Since 2004, she has been recognized as an Illinois *Leading Lawyer* in immigration law.

Ms. Baldini-Potermin has worked with asylum seekers since 1990, beginning on the South Texas-Mexico border at the former INS' Port Isabel Service Processing Center. She was the recipient of two National Association for Public Interest Law (now Equal Justice Works) fellowships, including one at the National Immigrant Justice Center from 1999-2001. She previously taught as an adjunct professor at the University of Minnesota Law School's Immigration Clinic. Ms. Baldini-Potermin has written extensively on the intersection of criminal and immigration law as well as other litigation-related topics and is a regular speaker at national and local CLE programs. She is a member of the National Immigration Project of the National Lawyers Guild, Detention Watch Network, Chicago Bar Association, Illinois State Bar Association, and Federal Bar Association. She is fluent in Spanish.

### About Scott D. Pollock & Associates, P.C.:

Scott D. Pollock & Associates, P.C. is a full-service immigration and nationality law firm in Chicago. Its attorneys provide legal services in the areas of immigrant and nonimmigrant visas, employment and family based immigration, deportation defense, immigration detention representation, political asylum, waivers of inadmissibility, employment authorization, employer immigration compliance, naturalization, federal litigation and appeals.

Scott D. Pollock, the firm's founder, has practiced immigration law since 1985. The firm has received Martindale Hubbell's AV rating (very high to preeminent), and several of its attorneys are recognized by Law and Politics and included in its Illinois Super Lawyer and Illinois Rising Star lists. The firm values scholarship, pro bono representation and service to the immigration bar, so as to protect individual rights and due process, and promote the progressive advancement of U.S. immigration law. All attorneys in the firm are active members of the American Immigration Lawyers Association

About National Immigrant Justice Center:

Heartland Alliance's National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding nearly 30 years ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. In partnership with pro bono attorneys, NIJC provides legal services to more than 7,500 individuals each year and maintains a success rate of 90 percent in obtaining asylum for those fleeing persecution in their home countries. NIJC and its pro bono attorneys have been on the vanguard of federal impact litigation and advocacy, winning cases that set positive precedents to preserve human rights protections within our borders and achieving life-saving victories for hundreds of vulnerable immigrants, refugees and asylum seekers.

With the generous support of the Chicago Bar Foundation and the Chicago Area Foundation for Legal Services, NIJC initiated the Defenders Initiative, which provides legal consultations, trainings, and materials to criminal defense attorneys to understand the consequences of criminal convictions on immigration status.

## PREFACE

*Defending Non-Citizens in Illinois, Indiana, and Wisconsin* addresses the immigration consequences of criminal dispositions for non-citizens. It provides federal statutes, federal definitions, interpretations of federal statutes, and analysis of the state laws as they are affected by federal immigration law.

This manual is written to provide guidance to attorneys representing non-citizens in Illinois, Indiana, and Wisconsin and others who work with non-citizens in these states. To understand how the federal court decisions and the Executive Branch administrative law decisions control immigration cases within Illinois, Indiana, and Wisconsin, the following should be observed:

- The U.S. Attorney General oversees the Executive Office for Immigration Review (EOIR), which includes the Board of Immigration Appeals and the immigration courts. They are all part of the U.S. Department of Justice, under the Executive Branch of the federal government. Both the Attorney General and the Board of Immigration Appeals issue precedent decisions.
- Rulings by the U.S. Supreme Court are controlling precedent for the interpretation of specific statutory provisions, regulations, and the U.S. Constitution and its amendments over the decisions of the Seventh Circuit Court of Appeals, the U.S. Attorney General, and the Board of Immigration Appeals.
- Where the Seventh Circuit Court of Appeals has ruled on a specific statutory provision or issue, that ruling generally trumps any decision by the Board of Immigration Appeals or the U.S. Attorney General.
- Where neither the U.S. Supreme Court nor the Seventh Circuit Court of Appeals has ruled on a statutory provision or a specific legal issue, then precedent decisions of the Board of Immigration Appeals and the U.S. Attorney General control.
- Where the U.S. Supreme Court, the Seventh Circuit Court of Appeals, the Board of Immigration Appeals, or the U.S. Attorney General has not addressed a statutory provision or a specific legal issue, then creative arguments may be made in both criminal and immigration proceedings.
  - One cannot predict, however, how the Board, the Seventh Circuit, or the U.S. Supreme Court will come down on an issue.
  - Criminal attorneys may be best advised to err on the side of caution in crafting pleas, alternative charges, sentences, and motions to vacate convictions or reduce sentences based on the precedent that is available on closely-related legal issues.



Chapter 2 through Chapter 8 provides the state of the interpretation of the statutory provisions, client case examples, and practice tips. Appendices appear at the end of the chapter for which they are listed.

- **Chapter 1** provides an overview of who is a U.S. citizen, who is a non-citizen, from where non-citizens in the tri-state area have come, and special issues to consider in working with non-citizen defendants who have suffered trauma, persecution, and/or torture. Appendix 1B contains the naturalization and citizenship charts. Appendix 1D is a “Red Flags” checklist for defense attorneys to use when working with non-citizen defendants. Appendix 1E contains a Questionnaire that defense attorneys should complete as best they can under the circumstances before calling an immigration attorney to discuss their non-citizen clients’ cases.
- **Chapter 2** discusses the federal definition of a conviction and compares it to the state definitions of a conviction and other alternatives, such as supervision and first offender probation for controlled substance offenses. A chart outlines the different dispositions available in Illinois, Indiana, and Wisconsin. Suggestions for sentencing strategies are also provided.
- **Chapter 3** reviews the grounds of deportability or basis for which non-citizens may be deported. These include crimes involving moral turpitude, firearms offenses, controlled substance offenses, domestic violence and related crimes, and aggravated felonies. Appendix 3A is a chart of crimes involving moral turpitude with case law citations. Appendix 3B contains the statutory provisions for the grounds of deportability and the definition of an aggravated felony.
- **Chapter 4** reviews the grounds of inadmissibility and broader definition of a conviction for immigration purposes. Special Registration for non-citizens of designated countries of interest is also discussed. The section on the Adam Walsh Child Protection Act of 2006 is of importance not only to non-citizen defendants but also to U.S. citizens who may be prohibited based on their prior criminal offenses from being able to successfully petition for and bring non-citizen spouses and children to the U.S. to live with them.
- **Chapter 5** is dedicated to particular issues involving juveniles, delinquency proceedings, extended juvenile jurisdiction proceedings (Illinois), certification as an adult in criminal court, and Special Immigrant Juvenile Status.
- **Chapter 6** provides an overview of the different forms of immigration proceedings to deport or remove a non-citizen from the U.S. The chapter then discusses “good moral character”, a requirement for many immigration benefits, including naturalization to become a U.S. citizen. The more prevalent forms of relief from removal are discussed in detail. Immigration attorneys will often ask defense counsel whether the non-citizen defendants have received certain immigration documents, and sample immigration documents are contained in Appendices 6C through 6G, including a Notice to Appear issued by the Department of Homeland Security. A flow chart of removal proceedings is

contained in Appendix 6A, and the relevant statutory sections of the Immigration and Nationality Act for immigration benefits are in Appendix 6I.

- **Chapter 7** addresses mandatory detention under the Immigration and Nationality Act, bond hearings, and parole. A list of the county jail facilities used by the Chicago ICE Office is contained in Appendix 7A to assist defense counsel to find their non-citizen clients who may be moved from one county jail to another without notice. The expansion of immigration enforcement programs, including workplace raids and criminal prosecutions of both employers and employees, is discussed as enforcement actions will continue to increase, with a result of more non-citizens being held in DHS custody and subject to removal from the U.S. Lawful permanent resident cards are valid for 10 years. To renew lawful permanent resident cards, non-citizens must submit to having their fingerprints taken at a CIS application support center, and the resulting background check can trigger mandatory detention by the DHS and removal proceedings where non-citizens have been convicted of deportable offenses.
- **Chapter 8** addresses pre-plea advisals for non-citizens in state and federal criminal proceedings, motions to withdraw guilty pleas, motions to reconsider or reduce sentences, and specific pleading requirements for petitions for post-conviction relief for non-citizens. The effect of pardons on the grounds of deportability is reviewed as an option to eliminating the immigration consequences of criminal dispositions. Finally, illegal reentry prosecutions are on the rise throughout the Midwest, and challenges to these prosecutions and sentencing issues are discussed.
- **Additional Appendices** include resource lists, contact information for the Immigration Court system and DHS, and sample immigration documents. Finally, a subject-matter index for reference to specific topics is included.

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## Glossary of Immigration Terms and Abbreviations

### A

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**A-file (Alien file):** Record of a non-citizen who is currently under investigation by the DHS, has had contact with the DHS or the former INS in the past, or is an informant or witness assisting the DHS. The record contains copies of documents and information for all transactions related to the non-citizen throughout the U.S. immigration and inspection process. This is different than the Record of Proceeding (“ROP”) maintained by the Executive Office for Immigration Review for non-citizens placed in removal, deportation, or exclusion proceedings before the immigration courts.

**Adjustment of Status:** The process by which a non-citizen becomes a lawful permanent resident in the U.S. Adjustment of status may be granted by the CIS or an immigration judge.

**Admissibility:** To be admissible, a non-citizen must demonstrate that he or she is not barred by one of the grounds of inadmissibility in order to enter the U.S. temporarily with a non-immigrant visa, to enter the U.S. as a lawful permanent resident, to adjust his or her immigration status to become a lawful permanent resident, or to return as a lawful permanent resident to the U.S. after a trip abroad. Grounds of inadmissibility include, but are not limited to, lack of proof of vaccinations, unlawful presence in the U.S., and certain criminal convictions.

**Admission/Admitted:** Defined at 8 U.S.C. § 1101(a)(13), it means the lawful entry of a non-citizen into the U.S. after inspection and authorization by an immigration officer.

**Advance Parole:** Travel document that allows a non-citizen applying for adjustment of status to leave and reenter the U.S. while the adjustment application is pending.

**Aggravated Felony:** The term “aggravated felony” is defined at 8 U.S.C. § 1101(a)(43). The definition of an aggravated felony is expansive and includes certain misdemeanor offenses as well as felony offenses. A conviction for an aggravated felony disqualifies a non-citizen from almost all forms of relief from removal.

**Alien:** A person who is not a U.S. citizen or national.

**Amnesty Program:** Program created in the Immigration Reform and Control Act of 1996 for non-citizens who were physically present in the U.S. on or before January 1, 1982. Amnesty applicants whose applications were approved became lawful permanent residents.

**Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA):** Legislation enacted on April 24, 1996 that restricted the availability of waivers of deportation for lawful permanent residents convicted of certain crimes, including controlled substance violations, and created new immigration provisions relating to domestic and international terrorism. Waivers under 8 U.S.C. § 1182(c) may still be available to lawful permanent residents who pled guilty to certain offenses prior to April 24, 1996.

**Application Support Center (ASC):** Center run by CIS where applicants for certain immigration benefits have their biometrics (fingerprints and photograph) taken as part of the processing of their applications (i.e. adjustment of status and employment authorization document (EAD)).

**Asylee:** A non-citizen who has been granted asylum within the U.S. by an immigration judge or a CIS asylum officer. An asylee is automatically authorized to work within the U.S. and may apply for lawful permanent residence after having been an asylee for one year.

**Asylum:** A form of relief from removal, deportation, or exclusion for a non-citizen who has suffered past persecution or has a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. The CIS Asylum Office or an immigration judge may grant a non-citizen asylum.

**Asylum Applicant:** A non-citizen who has applied for asylum with the CIS Asylum Office or with the immigration court. This non-citizen may have entered the country legally with inspection (i.e. with a tourist or student visa) or without inspection by an immigration officer.

## B

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**Bag & Baggage Notice:** Notice issued by ICE (and former INS in cases before March 1, 2003) to a non-citizen after a final order of removal has been entered, stating when and where the non-citizen must appear for his removal from the U.S.

**Board of Immigration Appeals (BIA):** The federal administrative law appellate board located in Falls Church, Virginia which reviews appeals from decisions of the immigration judges and CIS denials of I-130 immigrant visa petitions. The BIA is an administrative agency within the Executive Office for Immigration Review. Published BIA decisions are binding on immigration judges who preside in Illinois unless the Seventh Circuit Court of Appeals or the U.S. Supreme Court has ruled on the particular issue in question.

## C

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**Cancellation of Removal for Certain Permanent Residents (“LPR cancellation”):** Cancellation of removal is a form of discretionary relief that may be granted by an immigration judge to a long-term lawful permanent resident. An applicant must be a lawful permanent resident for at least five years, have resided continuously in the U.S. for at least seven years after having been admitted in any status, and not have been convicted of an aggravated felony. Continuous residence is terminated for eligibility purposes upon the commission of certain criminal offenses as well as the issuance of the Notice to Appear by the DHS.

**Cancellation of Removal and Adjustment of Status for Nonpermanent Residents (“non-LPR cancellation”):** Cancellation of removal is a form of discretionary relief that may be granted by an immigration judge to a non-citizen who is not a lawful permanent resident. In general, a non-citizen must have been continuously physically present in the U.S. for a period of not less than ten years before being placed in removal proceedings, been a person of good moral character during such period, and not have been convicted of certain offenses. In addition, she must demonstrate that her removal would result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. Different requirements exist for battered immigrants and children (“VAWA cancellation”) as well as for eligible non-citizens from El Salvador, Guatemala, the former Soviet Union, and Eastern European countries (“NACARA cancellation or suspension”).

**Citizenship (U.S.):** In general, a person who was born in the United States or who has naturalized to become a U.S. citizen. Persons born in Guam, Puerto Rico, Panama, the Panama Canal Zone, and the U.S. Virgin Islands may be U.S. citizens, depending upon when they were born. United States citizenship may also be acquired or derived from one or both parents who are or were U.S. citizens.

**Citizenship and Immigration Service (CIS):** Branch within the Department of Homeland Security (DHS) that processes and adjudicates immigrant visa petitions and certain applications for immigration benefits, including adjustment of status, employment authorization, asylum, and naturalization.

**Conditional Resident:** A non-citizen who has been married for less than two years to a U.S. citizen when applying for lawful permanent residency is granted conditional residency (a conditional green card) for two years. Prior to the end of the two year period, the non-citizen must apply to have the conditions removed, and once the conditions are removed, the non-citizen is a lawful permanent resident.

**Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”):** This treaty prohibits removal of an individual to a country where he faces probable torture by that country’s government officials or persons acting with the acquiescence of the government officials. The U.S. is a party to the CAT. A non-citizen who has been convicted of an aggravated felony and fears probable torture in the country designated for removal may apply for withholding of removal and/or deferral of removal before the immigration court.

**Conviction:** For immigration purposes, a conviction is defined as a formal judgment of guilt entered by a court. Where an adjudication of guilt has been withheld, a conviction also exists where a judge or jury has found the non-citizen guilty, the non-citizen entered a plea of guilty or nolo contendere, or the non-citizen admitted sufficient facts to warrant a finding of guilt and the judge ordered a form of punishment, penalty or restraint on liberty imposed on the non-citizen. Thus, under 8 U.S.C. § 1101(a)(48)(A), a non-citizen may have a conviction for purposes of federal immigration law even though he may not have a conviction under state law.

**Crime Involving Moral Turpitude (CIMT):** As defined by the BIA, “Conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff’d* 72 F.3d 571 (8<sup>th</sup> Cir. 1995). CIMTs are determined by reviewing the elements of the statutes defining the offenses and, in some cases, other evidence. They are generally offenses involving fraud, theft, shoplifting, evil intent, intent to cause serious bodily harm, and malice.

**Customs and Border Protection (CBP):** Agency that patrols the U.S. borders and carries out inspections of goods and persons at air, land, and sea ports.

## D

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**Declaratory Action:** A lawsuit filed in federal district court, requesting that the court render a declaratory judgment in favor of the non-citizen regarding an application for an immigration benefit (i.e. naturalization, a visa petition, or adjustment of status) when the CIS has delayed its adjudication or denied the application.

**Deferred Action:** If this temporary form of relief is granted by CIS or ICE, the DHS will refrain from placing a non-citizen in removal proceedings or to executing a deportation, exclusion or removal order. It is also a form of interim relief granted by the DHS for non-citizens who, prior to the promulgation of the U visa regulations, demonstrated prima facie eligibility for a U visa. Deferred action is commonly issued for non-citizens who have approved battered spouse/child self-petitions but who do not have a current immigrant visa available to be able to apply for adjustment of status. The non-citizen is eligible for certain benefits, including employment authorization. The non-citizen must apply to renew deferred action status and employment authorization each year.

**Deferred Inspection:** If a CBP officer at a port of entry questions the admissibility of the non-citizen during the customs/entry procedure, the officer may temporarily parole him into the U.S. to attend an appointment with CBP for a determination of his admissibility.

**Department of Homeland Security (DHS):** The federal agency created on March 1, 2003 whose overall mission is to protect the nation against future terrorist threats and attacks. The DHS

replaced the INS after the enactment of the Homeland Security Act of 2002. The agency is comprised of the CIS, ICE, and CBP and is responsible for adjudicating immigration relief applications, enforcing the Immigration and Nationality Act (INA), and securing the U.S. borders.

**Department of State:** A federal department under the Secretary of State responsible for foreign relations and policies. It is responsible for processing and issuing all nonimmigrant visas, such as visitor, student, and temporary worker visas, and immigrant visas filed at U.S. Embassies and Consulates abroad. It also issues waivers of the grounds of inadmissibility for nonimmigrant visas with the approval of the DHS.

**Deportability:** Also called “removability.” A non-citizen is deportable for having violated a section of the INA, such as overstaying the time permitted by the DHS on his visa or having been convicted of certain crimes. ICE serves a charging document with allegations of deportability on a non-citizen and then files it with the Immigration Court to initiate proceedings to remove him from the U.S. An immigration judge determines whether a non-citizen is deportable and has a defense to removal from the U.S. In expedited removal proceedings for certain non-citizens who are not lawful permanent residents under 8 U.S.C. § 1228(b), ICE will make the determination whether a non-citizen is deportable and enter a final order of removal.

**Deportation:** The physical removal or expulsion of a non-citizen from the United States.

## E

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**Employment Authorization Document (EAD):** Also known as a work permit, an EAD provides evidence of eligibility to work in the U.S. A non-citizen with an EAD does not have lawful permanent resident status in the U.S. Non-citizens with certain pending applications and some temporary non-citizens in the U.S. may be eligible for an EAD. Asylees and refugees are authorized to accept employment pursuant to their status without having an EAD.

**Exclusion:** The physical removal of a non-citizen from the United States based on one of the grounds of excludability (currently known as grounds of inadmissibility). An excluded non-citizen who was stopped at the border, at a seaport, or in an airport may have been physically present in the U.S. but did not legally enter the U.S.

**Executive Office for Immigration Review (EOIR):** Federal administrative agency in the Department of Justice which includes the following entities: 1) the Office of the Chief Immigration Judge which oversees the immigration courts; 2) the Board of Immigration Appeals which reviews appeals of immigration court decisions; and 3) the Office of the Chief Administrative Hearing Officer which adjudicates employment-related immigration cases.

**Expungement:** A criminal court order which seals a criminal record so that it does not appear for criminal background checks. An expungement does not eliminate a conviction for immigration purposes, although it may do so for certain state law purposes.

**Extreme Hardship:** One of several standards for certain waivers of inadmissibility and deportability, requiring that the applicant demonstrate that qualifying LPR or US citizen family members will suffer extreme hardship if the applicant is removed from the U.S. The BIA has found that it encompasses both present and future hardship. In order to meet the extreme hardship standard, the applicant must prove that removal would result in more than just the usual emotional or economic hardship of separation; there must be additional factors present, such as but not limited to illness, clinical depression, or severe conditions in the country of removal. Certain statutory and regulatory provisions require similar or heightened standards, such as “exceptional hardship,” and “exceptional and extremely unusual hardship.” Once the extreme hardship has been demonstrated,

the applicant must also show that he or she merits a favorable exercise of discretion in the

## F

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**Final Order of Deportation/Removal:** An administrative order that exists where: 1. the BIA either reverses or upholds a grant of discretionary relief, the 30 day period for seeking BIA review of a decision by the Immigration Court has expired, or an alien has waived his or her right to appeal; and 2. where the ICE has issued a final administrative order of removal under 8 U.S.C. § 1228(b).

## G

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**Good Moral Character:** Statutory requirement for certain immigration benefits, including naturalization, cancellation of removal, and voluntary departure. It is also considered in applications for discretionary relief, such as asylum and waivers. Certain conduct bars applicants from establishing good moral character, including being convicted of an aggravated felony on or after November 29, 1990, participating in prostitution (whether or not convicted), smuggling aliens, and trafficking in a controlled substance.

**Green Card:** Also known as an I-551 card, it is the alien registration card issued to lawful permanent residents and conditional residents. The card contains the non-citizen's alien registration number which begins with the letter "A" and is followed by seven, eight, or nine digits. Where a lawful permanent resident or conditional resident loses his card, he can request an I-551 stamp be placed in it from the CIS as temporary evidence of his immigration status.

## H

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**Hardship:** See Extreme Hardship.

**Humanitarian Parole:** Temporary parole into the U.S. of an otherwise inadmissible non-citizen based on emergency or humanitarian reasons.

## I

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**Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA):** Enacted on September 30, 1996, this legislation overhauled the immigration laws, greatly expanding the definition of aggravated felony, creating removal proceedings in lieu of deportation/exclusion proceedings with different and yet similar forms of relief from removal (deportation), and adding new grounds of deportability and inadmissibility.

**Immediate Relative:** The spouse, parent, or unmarried child under age 21 of a U.S. citizen.

**Immigrant:** A non-citizen who has the intention to reside permanently in the United States.

**Immigrant Visa:** Visa issued by the Department of State at a U.S. Embassy or Consulate abroad, allowing the immigrant to enter the U.S. as a lawful permanent resident.

**Immigration and Customs Enforcement (ICE):** As the enforcement branch of the DHS, it issues warrants, arrest orders, and Notices to Appear for Immigration Court for non-citizens who it alleges have violated U.S. immigration law. It is also responsible for initially reviewing and deciding the custody status of non-citizens. It removes non-citizens from the U.S.

**Immigration and Nationality Act (INA):** The federal immigration law enacted in 1952 which has since been amended more than 50 times.

**Immigration and Nationality Act of 1990 (IMMACT 1990):** Enacted in December 1990, this legislation expanded the definition of aggravated felony, created Temporary Protected Status (TPS), and implemented other major changes in immigration law.

**Immigration and Naturalization Service (INS):** Abolished on March 1, 2003 by the Homeland Security Act of 2002, it was a federal administrative agency within the Department of Justice charged with enforcing the Immigration and Nationality Act (INA).

**Inadmissibility:** This term includes numerous grounds for which the admission of a non-citizen to the U.S. may be precluded, such as being unlawfully present in the U.S. or having committed certain crimes. The DHS or an immigration judge may make the determination that a non-citizen is inadmissible and whether he is eligible to apply for a waiver of that ground of inadmissibility. For non-citizens physically outside of the U.S., this determination is initially made by the U.S. Department of State and requests for waivers are decided by the designated CIS office abroad.

**Individual (Merits) Hearing:** Often the final hearing in removal proceedings, it is the hearing where all of the evidence and testimony in a case are presented to the immigration judge and the judge enters a decision either ordering removal or granting relief.

**International Marriage Broker Regulation Act (IMBRA):** This statute was designed to regulate the international marriage broker market and protect beneficiaries of the fiancé(e) visa petition from USC or LPR petitioners who have been convicted of certain domestic violence related crimes.

## L

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**Laser visa:** Serving both as what was previously known as a border crossing card and a non-immigrant visitor/business visa, this visa allows a non-citizen residing in Mexico to cross into the U.S. as a temporary visitor. If the visa was issued as a border crossing card, the non-citizen must remain within 25 miles of the border for 72 hours or less. This document is most commonly issued to non-citizens who live in Mexico and work in the U.S. If the visa was issued as a non-immigrant visitor/business visa, the non-citizen can travel anywhere within the U.S. for the period of time permitted by the DHS upon admission to the U.S.

**Lawful permanent resident (LPR):** A non-citizen who has been granted lawful permanent residence (a “green card”). A lawful permanent resident may be subject to removal from the U.S. for certain convictions and other violations of immigration law.

## M

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**Mandamus:** A writ by which a federal district court orders the CIS to perform a certain ministerial (non-discretionary) act as required by law. A non-citizen may request that the district court issue a mandamus order to the CIS when the CIS has not timely adjudicated an application for immigration relief (i.e. adjustment of status), despite repeated requests to do so.

**Master Calendar Hearing:** Initial hearing(s) where the immigration judge reviews the DHS charges of inadmissibility or deportability against the non-citizen and determines eligibility for immigration relief.

## N

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**National Security Entry/Exit Registration System (NSEERS):** System established in 2002 to meet the terms of the Congressionally-mandated requirement for a comprehensive entry-exit program by 2005. A national registry was created for non-immigrants from certain countries or those who meet a combination of intelligence-based criteria and are identified as presenting an elevated national security concern. Non-citizens from the designated countries had to comply with certain registration and re-registration requirements. In December 2006, the DHS officially withdrew the original NSEERS regulations regarding re-registration. Currently, the system is only in effect at certain ports of entry.

**Naturalization:** The process by which a non-citizen becomes a U.S. citizen.

**Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA):** Legislation enacted in November 1997 which allows Nicaraguans and Cubans present in the U.S. on or before December 1, 1995 to apply for adjustment of status to become lawful permanent residents. The NACARA also allows Salvadorans and Guatemalans who entered the U.S. in 1990 (and meet other requirements) as well as persons from the former Soviet Union and Eastern Bloc countries who entered the U.S. on or before 1990 and applied for asylum prior to December 1991 to apply for cancellation of removal under the former standards of suspension of deportation.

**Non-citizen:** A person who is not a U.S. citizen. A non-citizen is referred to as an “alien” in the Immigration and Nationality Act (INA).

**Nonimmigrant:** A non-citizen who intends to come to the U.S. for a temporary period, such as a tourist (B-1/B-2), an exchange student (F-1), or for a specified period of employment in certain fields (i.e. H-1B).

**“Notario” (Notary Public):** In the U.S., this is a person who can administer oaths, witness and authenticate documents, and perform various other acts defined differently by jurisdiction. Being a notary public by itself does not authorize a person to perform any acts that require the provision of legal advice or counsel. In the U.S., a notary public need not be a licensed attorney. In other countries, notaries public (known as “notarios” in Spanish-speaking countries) may be granted powers that are similar or equal to that of an attorney. As a result, many notaries public or “notarios” have taken advantage of non-citizens who have immigrated to the U.S. and believe that notary publics have the power of an attorney to assist them in their immigration legal matters. Such services may constitute the unauthorized practice of law where the notary public is not a licensed attorney or accredited by the DHS or Board of Immigration Appeals.

**Notice to Appear (NTA):** The charging document (Form I-862) served by ICE on non-citizens to initiate removal proceedings for alleged immigration law violations. The notice may either state a date at which to appear before an immigration judge or may state that notice of a hearing will be sent later.

## O

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**Order of Deportation/Deportation Order:** An order issued by an immigration judge to deport a non-citizen from the U.S. at government expense where the charging document (Order to Show Cause) was issued by the former INS prior to April 1, 1997.



**Order of Removal/Removal Order:** An order issued by an immigration judge to remove (deport) a non-citizen from the U.S. at government expense where the charging document (Notice to Appear) was issued by the DHS or former INS on or after April 1, 1997.

**Order of Release on Own Recognizance (OR):** An order entered by an ICE (or former INS) officer or an immigration judge releasing a non-citizen from immigration custody without a bond.

**Order to Show Cause (OSC):** The charging document (Form I-221) that the former INS issued and served on non-citizens prior to April 1, 1997 to initiate deportation proceedings.

**Order of Supervision:** A detained non-citizen may be granted release from ICE custody where ICE cannot carry out a removal order, such as where ICE cannot obtain travel documentation or permission from a receiving country to remove a non-citizen, a federal court has ordered a stay of removal, or a provision of law provides for a stay of removal. After reviewing a non-citizen's custody file and considering factors such as her U.S. citizen or lawful permanent resident family members, employment, community involvement, flight risk and any danger to the community, ICE may release the non-citizen from custody and place her under an order of supervision. Release is usually granted 90-180 days after a removal order has become final. As part of the requirements of supervision, the non-citizen must comply with regular check-in requirements and/or be subject to electronic monitoring ("ankle bracelet").

**Overstay:** Non-citizen who was admitted to the U.S. for a temporary period of time after being inspected by a DHS official or former INS official but has stayed beyond the period authorized.

## P

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**Pardon:** Use of executive power, either by a governor or the president, to nullify punishment or other legal consequences of a crime and restore civil liberties. A pardon is an important option for inadmissible and deportable non-citizens who are ineligible for other forms of immigration relief or waivers based on certain convictions. A full and unconditional pardon does not, however, eliminate grounds of inadmissibility or deportability for controlled substance offenses, crimes of domestic violence, stalking, child abuse, child neglect, and child abandonment.

**Petition for Writ of Habeas Corpus:** This petition is filed with the federal district court to request that the court order the entity or agency where the non-citizen is detained to appear before the court and defend the legal basis for the non-citizen's detention. The district court may order the release of the non-citizen where his continued detention is unlawful.

**Petition for Review:** This petition is filed with the federal circuit court of appeals having jurisdiction over the immigration court where the deportation, exclusion, or removal proceedings were completed or where the final administrative removal order was issued by ICE or former ICE. The Seventh Circuit Court of Appeals reviews a final order of removal through a petition for review where such proceedings took place in Indiana, Illinois, or Wisconsin.

**Priority Date:** The date on which a family visa petition (Form I-130) is filed with the CIS, labor certification is filed with the U.S. Department of Labor, an immigrant petition for an alien worker (Form I-140) is filed with the CIS, VAWA/special juvenile immigrant status/widow(er) self-petition (Form I-360) is filed with the CIS, or religious worker petition (Form I-360) is filed with the CIS. Each month the U.S. Department of State publishes its Visa Bulletin which lists the cutoff dates for different immigration categories and countries. An application for adjustment of status or consular processing for an immigrant visa may be filed only when the Visa Bulletin reflects the priority date

as being current.

## R

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**Refugee:** A non-citizen who has been recognized overseas by the DHS or a U.S. Embassy or Consulate as having suffered persecution or having a well-founded fear of future persecution on account of his/her race, religion, nationality, membership in a particular social group, or political opinion. A refugee is authorized to be employed as part of his status. One year after admission to the U.S. as a refugee, the refugee may apply for lawful permanent residence.

**Removal:** The physical removal or expulsion of a non-citizen from the United States.

**Request for Evidence (RFE):** A notice from the CIS requesting further documentation to support eligibility for certain immigrant visa petitions or applications after the original application and documents have been filed (i.e. requesting a marriage certificate that was not originally filed in order to determine eligibility for a family visa petition).

## S

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**S Visa:** Nonimmigrant visa granted to non-citizens who provide testimony or information to law enforcement authorities. The non-citizen must be physically present in the U.S. and cooperate with law enforcement authorities in the investigation or prosecution of a crime. Status is granted for a maximum period of 3 years with no extension possible. The non-citizen is granted employment authorization and may be eligible to apply for adjustment of status.

**Service Center:** The following five CIS centers accept and process certain petitions and applications, generally (but not always) depending on the individual's physical place of residence:

**California Service Center (CSC):** California, Arizona, Nevada, Hawaii. Also accepts and processes certain applications and petitions from locations across the country.

**Nebraska Service Center (NSC):** Alaska, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming.

**Texas Service Center (TSC):** Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Oklahoma, Tennessee, and Texas.

**Vermont Service Center (VSC):** Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington D.C., and West Virginia.

**National Benefits Center (NBC):** Initially processes certain types of immigration benefit applications sent to the Chicago Lockbox. The applications may then be transferred for adjudication to one of the other four service centers or to a local CIS office for an interview.

**SEVIS (Student and Exchange Visitor Information System):** An ICE program and database to track and monitor international students and others in the U.S. on non-immigrant F, J, and M visa status. Access to the database is given to ICE, DOS, and participating schools and programs that are authorized to accept students and others in these visa categories.

**Special Agricultural Workers Program (SAW):** Program created by the Immigration Reform and Control Act of 1986 for non-citizens who had worked in agriculture (i.e. farm workers) for 90 days between May 1985 and May 1986. Most SAW applicants became lawful permanent residents in December 1990.

**Stay of Removal (Deportation):** A stay of removal is a formal decision by ICE, an immigration judge, the Board of Immigration Appeals, or an order by a federal circuit court of appeals or the U.S. Supreme Court which prevents the removal of a non-citizen from the U.S. A stay of removal may be granted by the BIA or an immigration judge where a motion to reopen or reconsider a final order is pending before the BIA. When a motion to reopen proceedings has been filed before an immigration judge, the judge may also order that the removal be stayed.

**Suspension of Deportation (7 years):** This form of relief from deportation for non-citizens in deportation proceedings is only available for certain Salvadorans, Guatemalans, Eastern Europeans, and non-citizens who were applicants for the relief prior to April 1, 1997. A non-citizen may also be retroactively eligible. In order to be eligible, the non-citizen must have resided continuously in the U.S. for at least seven years, have been a person of good moral character, and be able to demonstrate that extreme hardship would result to himself or his U.S. citizen or lawful permanent resident spouse, parent, or child. Special rules exist for qualifying battered non-citizen adults and children.

**Suspension of Deportation (10 years):** A form of relief similar to seven year suspension of deportation except for several differences: 1) the non-citizen must have physical presence in the U.S. for a period of at least ten years; 2) he must demonstrate that exceptional and extremely unusual hardship would result to himself or his U.S. citizen or lawful permanent resident spouse, children, or parents if ordered deported. This is a much higher standard than extreme hardship, as required with seven year suspension; and 3) deportation can be suspended for more serious crimes, including crimes involving moral turpitude and narcotics. Special rules exist for qualifying battered non-citizen adults and children.

## T

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**Temporary Protected Status (TPS):** Temporary permission may be granted by the CIS or an immigration judge to remain and work in the United States. The Attorney General has the authority to designate the countries from which nationals or citizens are eligible for TPS based on a natural disaster or civil chaos. Such designations are made initially for 12 months and may be renewed by the Attorney General. Some countries for which TPS status has been designated in the past include Bosnia-Herzegovina, Burundi, El Salvador, Honduras, Kosovo, Lebanon, Liberia, Montserrat, Nicaragua, Rwanda, Sierra Leone, Somalia, and Sudan. As of May 2009, the following countries are designated for TPS: Burundi, El Salvador, Honduras, Liberia, Nicaragua, Sudan, and Somalia.

**T (Trafficking) Visa:** This nonimmigrant visa is available to non-citizen victims of trafficking who have been forced or coerced into the sex trade, involuntary servitude, peonage, debt bondage, or slavery. The non-citizen must be physically present in the U.S. and, unless she is 18 years old or younger, she must cooperate with law enforcement authorities in the investigation or prosecution of

the traffickers. Status is granted for a maximum period of 4 years and is not renewable unless law enforcement authorities determine that the non-citizen's assistance is still necessary in the investigation or prosecution of the crime. The non-citizen may be granted employment authorization and is eligible to apply for adjustment of status after three years of physical presence in the U.S. as a T visa holder or until the completion of the investigation or prosecution of the trafficking case, whichever time period is less.

## U

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**Undocumented Immigrant:** A non-citizen who either entered the U.S. without inspection (illegally) or entered the U.S. lawfully on a temporary visa which she has overstayed or violated and has not obtained legal authorization to remain in the U.S. A non-citizen who entered without inspection is often referred to as an "EWI".

**United States Border Patrol:** Federal administrative agency within Customs and Border Protection of the DHS along the borders of the U.S. The agency is responsible for arresting non-citizens suspected of having violated the immigration law and initiating the process of removing them from the U.S.

**United States National:** A person who is a citizen of the United States or who, though not a citizen of the United States, owes permanent allegiance to the United States. *See* I.N.A. § 101(a)(22), 8 U.S.C. § 1101(a)(22); I.N.A. § 308, 8 U.S.C. § 1408; *In re Navas-Acosta*, 23 I&N Dec. 586 (BIA Apr. 29, 2003) (holding that a non-citizen who takes an oath of allegiance during an interview for naturalization does not acquire U.S. nationality; where a person is born abroad and does not acquire United States nationality by birth, naturalization, or congressional action, he is not a U.S. national).

**U Visa:** This nonimmigrant visa may be granted to non-citizens who have suffered from physical, sexual, or mental abuse as a victim of certain types of crimes, including rape, trafficking, domestic violence, torture etc., and who assist law enforcement authorities in the investigation or prosecution of the crime. Prior to the implementation of the U regulations in 2007, the CIS granted deferred action status, along with employment authorization, for 12 month periods. Broad waivers for the grounds of inadmissibility may be granted in the national or public interest. A non-citizen who has been granted a U visa or deferred action status by the CIS may apply for adjustment of status three years after being granted the U visa or deferred action status.

## V

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**Visa Waiver Program:** This program allows nationals from certain countries to enter the U.S. temporarily without first obtaining a visa from a U.S. Embassy or Consulate. As of May 2009, the 35 participating countries are: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

**Violence Against Women Act (VAWA):** Enacted first in 1994 and reauthorized in 2000 and 2005, this legislation provides immigration relief to non-citizen victims of domestic battery or extreme cruelty. It allows victims of physical, sexual, or mental abuse by a lawful permanent resident spouse or parent or by a U.S. citizen spouse, parent, son or daughter to file an immigrant visa self-petition without the cooperation of the abuser. If the immigrant visa self-petition is granted by the CIS, the

non-citizen victim may be eligible to file for adjustment of status. She may also be eligible to apply for VAWA cancellation of removal if ICE initiates removal proceedings against her.

**Voluntary Departure:** A form of relief granted by an immigration judge, the DHS, or the Board of Immigration Appeals to a non-citizen to leave the U.S. at his or her own expense in lieu of a deportation or removal order. Failure to depart by the specified date may lead to a 5 or 10 year bar, depending on the date of the order of voluntary departure, from being able to apply to adjust his or her status to become a lawful permanent resident as well as other forms of discretionary relief.

**Voluntary Deportation/Removal:** Order issued by the DHS or former INS in which a non-citizen has agreed to be deported or removed by ICE and waives his rights to a hearing before an immigration judge.

**Voluntary Return:** A non-citizen agrees to voluntarily return to Mexico or Canada at his or her own expense after being arrested by the U.S. Border Patrol, ICE, or the former INS and waiving her right to a hearing before an immigration judge.

## W

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**Waiver:** A form of discretionary relief that waives prior violations of criminal or immigration law, thereby allowing a non-citizen to apply for and be granted certain immigration benefits by the CIS or an immigration judge in removal proceedings. Common waivers include: §212(c) (long-term permanent residents with old convictions), §212(h) waiver (crimes), §212(i) waiver (fraud/misrepresentation), §212(a)(9)(B) (unlawful presence), §212(d)(3) (nonimmigrant waiver), and cancellation of removal for lawful permanent residents.

**CHAPTER**

**1**

**Defending Non-citizens in Illinois,  
Indiana, and Wisconsin: An Overview**

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**The Importance of Understanding Immigration Law**

Since 1995, Congress has enacted more than 25 major bills which have amended the Immigration and Nationality Act (INA).<sup>1</sup> In 1996, Congress overhauled the INA to greatly expand the grounds for which non-citizens could be deported for criminal offenses and created a new immigration court process called removal proceedings.<sup>2</sup> The Homeland Security Act of 2002 abolished the former Immigration and Naturalization Service (INS) in the U.S. Department of Justice and created the U.S. Department of Homeland Security (DHS), effective March 1, 2003.<sup>3</sup> The DHS is responsible for enforcing the immigration

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<sup>1</sup> See Appendix 1A, Brief History of Immigration Laws: 1996-Present.

<sup>2</sup> For general discussions about changes in immigration law, see Helen Morris, “Zero Tolerance: The Increasing Criminalization of Immigration Law,” 74 *Interpreter Releases* 1317, 1317-26 (1997); Juan P. Osuna, “The 1996 Immigration Act: Criminal Aliens and Terrorists,” 73 *Interpreter Releases* 1713, 1713-22 (1996).

<sup>3</sup> See Appendix 1C. The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the INS and transferred its responsibilities to the new Department of Homeland Security (DHS) with its Secretary. The DHS is a Department headed by a cabinet level Secretary under the President of the United States. The Board of Immigration Appeals (BIA) and the Immigration Courts remain under the direction of the Attorney General of the Department of Justice, also a federal executive agency under the President. See I.N.A. § 103, 8 U.S.C §1103; 8 C.F.R. §§ 1001.1, 1003, 1003.1, 1003.9. The INA also contains provisions of criminal law, for which prosecutions occur before the federal district courts. See, e.g., I.N.A. § 276, 8 U.S.C. § 1326 (illegal reentry prosecutions); I.N.A. § 274A, 8 U.S.C. § 1324a (prosecutions of U.S. employers for hiring of unauthorized workers); I.N.A. § 266, 8 U.S.C. § 1306 (failure to register changes of address), I.N.A. § 274C, 8 U.S.C. § 1324c (document fraud); I.N.A. § 274(a)(1)(A)(i), 8 U.S.C. § 1324(a)(1)(A)(i) (alien smuggling). The federal circuit courts of appeals review decisions of the district courts and, where jurisdiction is available, final orders of removal entered by the DHS or the BIA. See I.N.A. § 242, 8 U.S.C. § 1252; 28 U.S.C. § 1291; 28 U.S.C. § 2253; 28 U.S.C. § 2107(b).

laws as well as adjudicating applications for immigration benefits and U.S. citizenship.<sup>4</sup> The REAL ID Act of 2005 contains many provisions that affect the ways in which state and local governments may provide certain basic services to the public, such as the documentation required of non-citizens and U.S. citizens alike for the issuance of driver's licenses.<sup>5</sup>

The impact of the 1996 laws continues to be experienced by non-citizens and their family members throughout the U.S. More than 30,000 individuals are detained daily in DHS custody in approximately 260 facilities across the country; for Fiscal Year 2009, the DHS has a budget to detain up to 33,400 individuals per day.<sup>6</sup> This constitutes more than three times the number of detainees in 1996. Detention of individuals by the DHS can last for months and even years.<sup>7</sup> In Fiscal Year 2008, the DHS averaged 977 removals per day, for an annual total of 356,739 individuals removed from the U.S.<sup>8</sup>

For many non-citizens facing the possibility of removal (deportation) from the U.S., the statistics regarding relief from removal granted by the immigration courts are somewhat startling: of the 339,071 cases completed in Fiscal Year 2008, immigration judges ordered 17,015 proceedings terminated (7.4%), granted relief in 28,304 cases (12.3%), ordered removal in 182,646 cases (79.6%),<sup>9</sup> and entered 1,351 cases "other" dispositions.<sup>10</sup> Mexicans comprised the largest number of individuals in proceedings, being approximately

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<sup>4</sup> The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the INS and transferred its responsibilities to the Department of Homeland Security (DHS) with its Secretary. The Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and the Customs and Border Protection (CBP) are part of the DHS. See HSA, Title 4, Subtitle E, 451(b); 8 C.F.R. §§ 103.1-103.7. See Appendix 9-B, Contact information for DHS, ICE, CBP, CIS, and EOIR.

<sup>5</sup> See REAL ID Act of 2005, Title II §§ 202-208, Div. B of Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005, PL 109-13, 119 Stat. 231, 310 (May 11, 2005); For more information on the REAL ID Act of 2005, see also <http://www.ncsl.org/realid/> and [www.realnightmare.org](http://www.realnightmare.org).

<sup>6</sup> See M. Roberts, "Immigrants face lengthy detention with few rights," *The Associated Press*, Mar. 10, 2009 (citing information received from a Freedom of Information Act request that showed 32,000 detainees in DHS custody on January 25, 2009 and an additional 2,700 per day are on electronic monitoring programs as an alternative to detention); See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 6, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>

<sup>7</sup> See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 6, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>.

<sup>8</sup> ICE Fiscal Year 2008 Annual Report, Executive Summary at pages iv and viii, available at [http://www.ice.gov/doclib/pi/reports/ice\\_annual\\_report/pdf/ice08ar\\_final.pdf](http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf).

<sup>9</sup> See EOIR Office of Planning, Analysis & Technology, Figure 5—IJ Decisions by Disposition, at D2, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>. EOIR included grants of voluntary departure under removal orders. See *id.* Voluntary departure grants constituted 26,656 of the 182,646 removal orders. See EOIR Office of Planning, Analysis & Technology, Figure 14—IJ Removal Decisions Compared to Voluntary Departure Decisions, at Q1, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

<sup>10</sup> See *id.*

40% of the completed cases.<sup>11</sup> In the same time period, the Board of Immigration Appeals received 32,432 cases and completed 38,369 cases, of which 48% involved detained individuals.<sup>12</sup> Thousands of other non-citizens are ordered removed from the U.S. by the DHS, without the right to a hearing before an Immigration Judge.<sup>13</sup>

Non-citizens and their attorneys must become aware of changing immigration laws and the resulting immigration consequences of criminal convictions. For non-citizens, minor criminal charges can result in mandatory detention of non-citizens, deportation or removal, and lifetime bars to returning to the United States to seek safety or be with family. This means that the role of criminal defense counsel is not only critical to the ultimate outcome of a non-citizen's criminal case, but also to that of his immigration case and future in the U.S.<sup>14</sup> This manual is intended to assist public defenders and criminal defense attorneys to become aware of the issues that may affect their non-citizen clients. The more an attorney learns about immigration consequences of criminal conduct, the better he will be able to advise his non-citizen clients and their families and to work with prosecutors and courts to prevent adverse outcomes for non-citizens under immigration law. This manual also provides resources for obtaining individual case evaluations and advice from immigration attorneys.<sup>15</sup>

## Is Your Client a United States Citizen?

As the stakes for a non-citizen with a criminal conviction are high, it is essential to identify whether your client is a United States citizen as soon as possible. U.S. citizenship should not be assumed. For example, many non-citizens entered the United States as infants or young children. They dress, speak, and appear to be U.S. citizens. It is not unusual for long-term lawful permanent residents to speak only English, have never naturalized and thus remain at risk of deportation. Neither the length of a non-citizen's residence in the United States or degree of assimilation is indicative of U.S. citizenship.

By first asking every defendant about his citizenship status and then consulting with immigration counsel regarding possible immigration consequences for the non-citizen clients, defense counsel may be able to avoid adverse immigration consequences for his non-citizen client. In addition, asking the citizenship questions may avoid motions to withdraw guilty pleas, motions to reduce sentences, motions for post-conviction relief, applications for presidential or gubernatorial pardons, and detention of non-citizens by DHS.

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<sup>11</sup> See EOIR Office of Planning, Analysis & Technology, Figure 6—FY 2008 Court Proceedings Completed by Nationality, at E1, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

<sup>12</sup> See EOIR Office of Planning, Analysis & Technology, Figure 25—Total BIA Cases Received and Completed, at S1, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

<sup>13</sup> See Final Administrative Removal Orders, *infra* at 6-3.

<sup>14</sup> See “Deportation Dilemmas, Criminal Bar Needs Immigration Info,” *Connecticut Law Tribune*, Nov. 14, 2005. The question of the role of a defense attorney regarding the immigration consequences of criminal dispositions will be decided by the U.S. Supreme Court in its 2009-2010 term. See *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 2009 U.S. LEXIS 1453 (U.S. Feb. 23, 2009) (No. 08-651).

<sup>15</sup> See Appendix 9C, Resources.



## QUESTIONS TO ASK A CLIENT TO DETERMINE U.S. CITIZENSHIP

To begin to determine whether a criminal defendant may be a United States citizen, ask him the following questions:

1. Where were you born?
2. In what countries have you ever lived since you were born?
  - a. How long did you live in each country?
  - b. When did you first come to the U.S.?
  - c. If you have a green card (a lawful permanent resident), when did you first become a lawful permanent resident?
3. Of what country or countries do you think you are a citizen?
4. If you believe that you are a U.S. citizen, how did you become a U.S. citizen?
5. Were either of your parents U.S. citizens when you were born?
  - a. Which parent?
  - b. How do you know that your parent was a U.S. citizen at the time that you were born?
6. Where were your parents born?
7. Are either of your parents a U.S. citizen today?
  - a. How do you know that your parent is a U.S. citizen?
  - b. If your parent was not born in the U.S., when did your parent become a U.S. citizen?
  - c. If you were legally adopted, how old were you when you were adopted?
    - i. At the time that you were adopted, were your parents married to each other?
    - ii. If your parents were not married and one of your parents was a step-parent, did your step-parent adopt you?
8. Did your parents ever live in the U.S. at any time in their lives?
9. Were any of your grandparents ever U.S. citizens?
10. If one of your grandparents was a U.S. citizen, when did he or she live in the U.S.?

A criminal defendant may not know that he is a U.S. citizen. In general, a U.S. citizen is a person who was born in the United States, a person born outside the United States who gains citizenship through one or both parents, or a person who has naturalized.<sup>16</sup> Persons

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<sup>16</sup> See I.N.A. § 301, 8 U.S.C. § 1401, for the law of acquired citizenship for a person born outside of the United States who has one parent who is a U.S. citizen. It should be noted that whether an individual acquired citizenship from a U.S. citizen parent depends on such factors as: whether the mother or father was the U.S. citizen at the time of the individual's birth; whether the parents were married at the time of birth; and the date that the individual was born. In some cases, the length of time spent in the U.S. by the U.S. citizen (or in certain instances, the U.S. citizen grandparent) may also need to be reviewed. This is a highly technical field of immigration law; if one parent was a U.S.

born in Puerto Rico on or after January 13, 1941 and subject to the jurisdiction of the United States are U.S. citizens at birth.<sup>17</sup>

A child who was born to non-citizen parents may derive U.S. citizenship when his parent naturalizes to become a U.S. citizen, depending upon his age and the law in effect when his parent naturalized.<sup>18</sup> In a major amendment to the citizenship laws through the Child Citizenship Act of 2000, a child derives U.S. citizenship when he: 1. was born outside of the U.S. to a parent who is a U.S. citizen; 2. is residing in the U.S. in the legal and physical custody of his citizen parent pursuant to a lawful admission for permanent residence; and 3. is under the age of 18 years old on or after February 27, 2001.<sup>19</sup> State law may be consulted to determine whether a naturalized U.S. citizen has “legal custody” of a child.<sup>20</sup> A determination about whether there has been a judicial determination or judicial statutory grant of custody is reviewed. Where a parent has been granted custody through a judicial determination or operation of law, that parent has legal custody for purposes of immigration law.<sup>21</sup> If no such determination or judicial grant exists, then the parent who has “actual uncontested custody” is deemed to have legal custody.<sup>22</sup> A child may not derive U.S. citizenship through a step-parent who has not adopted him.<sup>23</sup> To derive U.S. citizenship, the child must have acquired lawful permanent residence in the U.S. prior to

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citizen, immigration counsel and/or immigration handbooks should be consulted to determine whether an individual is a U.S. citizen.

<sup>17</sup> See I.N.A. § 302, 8 U.S.C. § 1402; I.N.A. § 303, 8 U.S.C. § 1403 (persons born in the Canal Zone or Republic of Panama on or after February 26, 1904); I.N.A. § 304, 8 U.S.C. § 1404 (persons born in Alaska on or after March 30, 1867); I.N.A. § 305, 8 U.S.C. § 1405 (persons born in Hawaii on or after August 12, 1898); I.N.A. § 306, 8 U.S.C. § 1406 (persons living in and born in the Virgin Islands subsequent to January 17, 1917); I.N.A. § 307, 8 U.S.C. § 1407 (persons living in and born in Guam on or after April 11, 1899).

<sup>18</sup> See I.N.A. §§ 320, 301A, 302-307, 309, 8 U.S.C. §§ 1431, 1401a, 1402-1407, 1409; *see also*, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), sections 101-104, amending I.N.A. §§ 320, 322, 8 U.S.C. §§ 1431, 1433 (effective 120 days after the date of enactment; amending the I.N.A. to provide for acquisition of U.S. citizenship by a child who is under 18 years of age, a lawful permanent resident, and residing permanently in the U.S. in the legal and physical custody of the U.S. parent). For an individual who became a lawful permanent resident and turned age 18 before February 27, 2001, both parents had to naturalize before he turned age 18 or if the individual was born out of wedlock, he was not legitimated at the time that his parent with custody of him became a naturalized U.S. citizen. See I.N.A. § 321(a)(3) (2000), 8 U.S.C. § 1432(a)(3); *In re Hines*, 24 I&N Dec. 544 (BIA Jun. 4, 2008); *In re Baires*, 24 I&N Dec. 467 (Mar. 10, 2008) (custody by naturalized parent must have occurred before child turned age 18).

<sup>19</sup> See Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), sections 101-104, amending I.N.A. §§ 320, 322, 8 U.S.C. §§ 1431, 1433; *Ali v. Ashcroft*, 395 F.3d 722, 726 (7<sup>th</sup> Cir. Jan. 11, 2005) (holding that the Child Citizenship Act (CCA) is not retroactive and finding that although the first two conditions under the CCA had been met, the non-citizen had not derived U.S. citizenship from his mother because he was over the age of 18 on February 27, 2001); *Gomez-Diaz v. Ashcroft*, 324 F.3d 913, 916 (7<sup>th</sup> Cir. Apr. 7, 2003); *In re Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA Jul. 24, 2001).

<sup>20</sup> See *Wedderburn v. I.N.S.*, 215 F.3d 795, 799 (7<sup>th</sup> Cir. Jun. 1, 2000) (holding that the terms legal custody and legal separation of the parents take their meaning from federal law but that federal law may point to state or foreign law as a rule of decision).

<sup>21</sup> See *In re M-*, 3 I&N Dec. 850 (BIA Jan. 24, 1950).

<sup>22</sup> See *id.*; *Wedderburn v. I.N.S.*, 215 F.3d 795, 797 (7<sup>th</sup> Cir. Jun. 1, 2000) (citing with approval *In re M-*, 3 I&N Dec. 850 (BIA Jan. 24, 1950)).

<sup>23</sup> See *In re Guzman-Gomez*, 24 I&N Dec. 824 (BIA May 8, 2009).

turning 18 years old.<sup>24</sup> Where the citizen parent has died within the preceding five years, a citizen grandparent or citizen guardian may apply for naturalization of a child born outside of the U.S. where the other requirements under the Child Citizenship Act are met.<sup>25</sup>

United States nationality is acquired by birth or by naturalization.<sup>26</sup> A national of the United States is person who is a citizen of the United States or who, though not a citizen of the United States, owes permanent allegiance to the United States.<sup>27</sup> Persons born in outlying United States possessions are U.S. nationals but not U.S. citizens at birth.<sup>28</sup>

A non-citizen can apply to naturalize to become a United States citizen if she is a U.S. national or a non-citizen who meets the requirements for naturalization. In general, a non-citizen must be a lawful permanent resident for five years (or three years if she has been married to a U.S. citizen for three years since becoming a lawful permanent resident), have good moral character, speak, read, and write English, pass an examination on United States government and civics (waivers available for elderly and disabled), be willing to take an oath of allegiance, pass a criminal investigation, and pay the application and fingerprint fee to the DHS Citizenship and Immigration Services (CIS).<sup>29</sup> A non-citizen who has applied for naturalization and passed the interview is not a U.S. citizen until she takes the oath of citizenship before a CIS officer or a federal district court, typically at an oath ceremony.<sup>30</sup>

Persons who served in the U.S. Armed Forces for three years or who served in active-duty status in World War I, World War II, the Korean hostilities, Vietnam hostilities, or other periods of military hostilities and who were honorably discharged may be eligible for naturalization under slightly different requirements.<sup>31</sup> In addition, non-citizens who hold non-immigrant visas, Temporary Protected Status (TPS), refugee status, or asylee status may be able to apply directly for citizenship without becoming lawful permanent residents through enlisting in a new military pilot program to serve as a health care professional or with certain strategic language skills.<sup>32</sup> A person who voluntarily renounces his U.S.

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<sup>24</sup> See *In re Nwozuzu*, 24 I&N Dec. 609 (BIA Sept. 10, 2008).

<sup>25</sup> See I.N.A. § 322(a), 8 U.S.C. § 1433(a).

<sup>26</sup> See I.N.A. § 101(a)(22), 8 U.S.C. § 1101(a)(22); *In re Navas-Acosta*, 23 I&N Dec. 586 (BIA Apr. 29, 2003) (holding that a non-citizen who takes an oath of allegiance during an interview for naturalization does not acquire U.S. nationality; where a person is born abroad and does not acquire United States nationality by birth, naturalization, or congressional action, he is not a U.S. national).

<sup>27</sup> See I.N.A. § 101(a)(22), 8 U.S.C. § 1101(a)(22).

<sup>28</sup> See I.N.A. § 308, 8 U.S.C. § 1408.

<sup>29</sup> See generally I.N.A. §§ 310-344, 8 U.S.C. §§ 1421-1455.

<sup>30</sup> See I.N.A. § 337, 8 U.S.C. § 1448.

<sup>31</sup> See Appendix 6B, Forms of Immigration Relief Chart; I.N.A. §§ 328, 329, 8 U.S.C. §§ 1439, 1440.

<sup>32</sup> See under I.N.A. § 329, 8 U.S.C. § 1440. For more information about the Military Accessions Vital to the National Interest (MAVNI) program and the requirements, see 74 Fed. Reg. 7993 (Feb. 23, 2009); M. Stock, "Ten Things that Immigration Attorneys Should Know About the Army's New Non-citizen Recruiting Program," available at *Bender's Immigration Bulletin*, Feb. 2009, <http://drop.io/hf4xwak/asset/stock-mavni-2-22-09-pdf>; J. Preston, "U.S. Military Will Offer Path to Citizenship," *The New York Times*, Feb. 14, 2009, available at [http://www.nytimes.com/2009/02/15/us/15immig.html?\\_r=1&scp=3&sq=immigrants&st=cse](http://www.nytimes.com/2009/02/15/us/15immig.html?_r=1&scp=3&sq=immigrants&st=cse).

citizenship is no longer a U.S. citizen.<sup>33</sup>

### **Who is a Non-citizen?**<sup>34</sup>

A non-citizen is a person who is not a U.S. citizen. He can fall under any one of the following categories:

- Lawful permanent resident (“green card” holder)
- Refugee
- Asylee
- Asylum Applicant
- Parolee
- Visitor with a B-1 or B-2 visa
- Visitor who was admitted under the Visa Waiver Program
- Visitor who was admitted with a border crossing card
- Foreign student with a F-1, M-1, or J-1 visa
- Dependent of individual with a foreign student visa, including holders of F-2, M-2, or J-2 visas
- Undocumented individual who entered the U.S. without inspection by a U.S. official (entered illegally) or who entered legally but overstayed or violated his status
- Individual with a non-immigrant employment visa, including A, E, H, I, L, O, P, Q, and R visas
- Dependents of non-immigrant employment visa holders, including holders of A-2, E-2, H-4, L-2, R-2 visas
- Individual with another type of non-immigrant visa, such as a diplomat and crewman
- Individual with Temporary Protected Status (TPS)
- Individual with a temporary visa based on being the victim of a crime or human trafficking and/or assisting in the prosecution or investigation of a crime: T, U, and S visas
- Individual born in the U.S. to a parent with a diplomatic visa
- Individual with deferred action status
- Amnesty/Family Unity Applicant

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<sup>33</sup> See *Bensky v. Powell*, 391 F.3d 894 (7<sup>th</sup> Cir. Dec. 13, 2004) (discussing renunciation of citizenship and nationality under the procedures for expatriation under 8 U.S.C. § 1501).

<sup>34</sup> The Immigration and Nationality Act uses the term “alien” to refer to persons who are not U.S. citizens. See I.N.A. § 101(a)(3), 8 U.S.C. § 1101(a)(3). For purposes of this manual, the term non-citizen will be used.

## Non-citizen Populations in Illinois, Indiana, and Wisconsin

Illinois is home to 1,773,600 immigrants, an estimated 14 percent of the entire state's population, which numbers 12,831,971.<sup>35</sup> Illinois has the fifth largest foreign born population<sup>36</sup> in the U.S.<sup>37</sup> Six percent of the foreign born population are naturalized U.S. citizens and eight percent are not U.S. citizens.<sup>38</sup> Of these non-citizens in Illinois, approximately 550,000 are undocumented.<sup>39</sup> Almost half of those born outside of the U.S. come from Latin America, and the top three countries from which foreign born arrive are Mexico, Poland, and India.<sup>40</sup>

With foreign born residents comprising four percent of its population of 6,313,520, Indiana does not have near the number of foreign born residents as Illinois.<sup>41</sup> It has, however, seen a tremendous increase in its foreign born population in recent years due to the availability of jobs in the service and production/manufacturing industries.<sup>42</sup> Indiana has witnessed the tenth largest immigrant migration with a 40 percent increase in the foreign born population from 2000 to 2006.<sup>43</sup> Specifically among non-citizens there was a 30 percent increase, bringing the percentage of non-citizens to four percent of the entire state population.<sup>44</sup> An estimated 55,000-85,000 of non-citizens in Indiana are undocumented.<sup>45</sup> Similar to Illinois, almost half of the foreign born come from Latin America.<sup>46</sup> The leading countries from which foreign born arrive in Indiana are Mexico, India, and China.<sup>47</sup>

Wisconsin has also seen growth in its foreign born population in recent years. From 2000 to 2006, the foreign born population increased by 27 percent, and more specifically,

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<sup>35</sup> See "States Ranked by Number of Foreign Born: 1990, 2000, and 2006," *Migration Information Source: 2006 Population Estimates*, U.S. Census Bureau.

<sup>36</sup> Foreign born refers to all people born outside of the U.S. This term includes naturalized U.S. citizens and non-citizens. Non-citizens include legal immigrants, legal non-immigrants (i.e. temporarily working or studying in the U.S.), and undocumented persons.

<sup>37</sup> See "States Ranked by Number of Foreign Born: 1990, 2000, and 2005," *Migration Information Source; 2005 Population Estimates*, U.S. Census Bureau.

<sup>38</sup> See *2005 Population Estimates*, U.S. Census Bureau.

<sup>39</sup> See *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006*, DHS Office of Immigration Statistics, <http://www.dhs.gov/ximgtn/statistics/>, Aug. 2007, p. 4. An estimated 400,000 reside in the Chicago area. See Karina Fortuny, Randy Capps & Jeffrey Passel, *The Characteristics of Unauthorized Immigrants in California, Los Angeles County, and the United States*, The Urban Institute, Mar. 2007, p. 6;

<sup>40</sup> See *Census 2000*, U.S. Census Bureau; *2006 Population Estimates*, U.S. Census Bureau.

<sup>41</sup> See *id.*; "States Ranked by Number of Foreign Born: 1990, 2000, and 2006," *Migration Information Source: 2006 Population Estimates*, U.S. Census Bureau.

<sup>42</sup> See *InContext*, Indiana Bureau Research Center.

<sup>43</sup> See "States Ranked by Number of Foreign Born: 1990, 2000, and 2006," *Migration Information Source; 2006 Population Estimates*, U.S. Census Bureau.

<sup>44</sup> See "Persons Naturalized by State of Residence: Fiscal Years 1997 to 2006," *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007; "States Ranked by Percent Change in the Foreign-Born Population: 1990, 2000, and 2006," *Migration Information Source; 2006 Population Estimates*, U.S. Census Bureau.

<sup>45</sup> See Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Pew Hispanic Center, [www.pewhispanic.org](http://www.pewhispanic.org), Mar. 21, 2005.

<sup>46</sup> See *2006 Population Estimates*, U.S. Census Bureau.

<sup>47</sup> See *2006 Population Estimates*, U.S. Census Bureau.

the non-citizen population increased by 18 percent.<sup>48</sup> Overall, foreign born residents represent approximately four percent of the Wisconsin population of 5,556,506.<sup>49</sup> Approximately 43 percent are U.S. citizens and 57 percent are non-citizens.<sup>50</sup> Of the non-citizens, it is estimated that 100,000 to 150,000 are undocumented.<sup>51</sup> Thirty-nine percent of the foreign born population is Latin American and, due to the resettlement of many Hmong refugees from Laos in the 1980s and early 1990s, thirty-one percent of the foreign born population is of Asian origin. Wisconsin has the third largest Hmong population in the U.S., with the largest population in the metropolitan areas of Milwaukee and Racine. The other two leading countries from which foreign born arrive in Wisconsin are Mexico and Germany.<sup>52</sup>

ILLINOIS	
Foreign Born Country of Birth (2006)	
Mexico	40.9%
Poland	8.8%
India	6.5%
Philippines	4.8%
China	2.9%
Korea	2.4%
Germany	1.7%
Guatemala	1.3%
Pakistan	1.2%

INDIANA	
Foreign Born Country of Birth (2006)	
Mexico	39.0%
India	5.3%
China	4.3%
Germany	2.8%
Canada	2.3%
Korea	2.7%
Philippines	2.6%
United Kingdom	2.59%
El Salvador	2.2%

WISCONSIN	
Foreign Born Country of Birth (2006)	
Mexico	32.9%
Laos	7.7%
Germany	5.5%
India	5.2%
Thailand	3.5%
China	3.3%
Canada	3.1%
Philippines	2.6%
Korea	2.4%

Foreign Born Population in Comparison with Total Population												
	Illinois				Indiana				Wisconsin			
	2000		2006		2000		2006		2000		2006	
	#	%	#	%	#	%	#	%	#	%	#	%
Total State Population	12,419,293	100	12,831,970	100	6,080,485	100	6,313,520	100	5,363,675	100	5,556,506	100
Foreign Born	1,529,058	12	1,773,600	13.8	186,534	3	263,607	4.2	193,751	3.6	245,006	4.4
Naturalized U.S. Citizens	603,521	4.8	780,039	6	70,983	1.1	92,773	1.5	76,223	1.4	104,451	1.9
Non-U.S. Citizens	925,537	7.4	993,561	7.7	115,551	2	170,834	2.7	117,528	2.2	140,591	2.5

<sup>48</sup> See “States Ranked by Number of Foreign Born: 1990, 2000, and 2006,” *Migration Information Source; 2006 Population Estimates*, U.S. Census Bureau; *2006 Population Estimates*, U.S. Census Bureau.

<sup>49</sup> See “States Ranked by Number of Foreign Born: 1990, 2000, and 2006,” *Migration Information Source; 2006 Population Estimates*, U.S. Census Bureau.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

Non-citizens come to these three Midwestern states for a variety of reasons. Foreign exchange students come from many countries to learn about life in the U.S. and to obtain high school and advanced degrees. Mexican farm workers have settled in these states since the early 1920s seeking better lives for themselves and their children. U.S. companies legally hire foreign workers in the areas of business, scientific and medical research, and industry where there are not enough U.S. citizens or other authorized workers, such as in the computer technology industry and the nursing field.

Non-citizens also come to the U.S. to join their family members already here. Some non-citizens initially settle in other parts of the U.S. and later move to the Midwest to reunite with family members, to find better employment, and to live in safe communities. Many families are comprised of persons with different types of immigration status, such as lawful permanent residents, U.S. citizens, and undocumented non-citizens. Non-citizens have become a part of communities in schools, churches, neighborhoods and workplaces throughout Illinois, Indiana, and Wisconsin.

Non-citizens also come to the U.S. to seek relief from persecution, terrorism, war, extreme poverty, famines, or natural disasters. Those who flee persecution may be granted refugee status by the DHS or a U.S. Embassy or Consulate in their home country and allowed to enter the U.S. as a refugee. Although refugees come from all over the world, the majority have come from Africa in recent years. In 2006, forty-four percent of the 41,150 refugees admitted to the U.S. were from countries throughout the African continent, with the largest number being from Somalia.<sup>53</sup>

Non-citizens seeking relief from past or future persecution in their home country may apply for asylum once they arrive in the U.S. In 2006, the DHS and Immigration Courts granted asylum to 26,113 individuals with the majority having come from Asia and Latin America and primarily representing the countries of Haiti, Colombia, and China.<sup>54</sup>

Illinois is home to a large number of refugees, asylees, and asylum applicants from around the world. In the 1980s and early 1990s, Central Americans arrived after escaping the civil wars and conflicts in their home countries of El Salvador, Guatemala, Nicaragua and Honduras. Since the late 1980s and early 1990s, refugees from Africa and the former Yugoslavia have resettled in the Chicago area. Jewish refugees from the former Soviet Union and Eastern Bloc countries have also resettled in the metro Chicago area. In 2006, 1,227 refugees were resettled throughout Illinois. The top countries from which refugees came were the former U.S.S.R., Somalia, Iran, Liberia, Ethiopia, and Cuba.<sup>55</sup>

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<sup>53</sup> See "Refugee Arrivals by Region and Country of Origin: Fiscal Years 1996-2006," *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table14D.xls>.

<sup>54</sup> See "Individuals Granted Asylum Affirmatively By Region and Country of Origin: Fiscal Years 1990-2006," *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table17D.xls>; "Individuals Granted Asylum Defensively By Region and Country of Origin: Fiscal Years 1990-2006", *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table19D.xls>.

<sup>55</sup> See "Fiscal Year 2006 Refugee Arrivals: By Country of Origin and State of Initial Resettlement for FY 2006," Office of Refugee Resettlement, Administration for Children and Families, U.S.

Due to the growing Hmong population in Wisconsin, the state resettled 397 refugees in 2006. Notably, almost half of the refugee population is from Laos.<sup>56</sup> Other leading countries from which refugees came were Somalia, the former U.S.S.R., and Burma.<sup>57</sup>

Indiana has a relatively small refugee population, comparable to Wisconsin. In 2006, 367 refugees were resettled in Indiana. The leading countries from which they came were Burma, Somalia, Liberia, Thailand, and the former U.S.S.R.<sup>58</sup>

### **Determining a Course of Action for Non-Citizen Client's Defense**

Once it has been determined that a client is a non-citizen, counsel should find out his immigration status by asking to see his immigration documents and passport, if he has one. There are three main categories of non-citizens: 1. lawful permanent residents; 2. non-immigrants who have temporary visas or other lawful status; and 3. undocumented non-citizens, who have either overstayed the time permitted or who entered the U.S. illegally.

Common immigration documents which a client may have include: a permanent resident alien card, also known as a "green card" (I-551 or I-151) or I-551 stamp in a foreign passport, temporary resident card (I-688), I-94 Arrival/Departure Record, an employment authorization document or work permit (I-688B), Mexican border crossing identification card (now called a laser visa), or parole authorization (I-512).<sup>59</sup> If a non-citizen claims to be a lawful permanent resident or a conditional resident but cannot find his actual resident alien card, ask him or his family for copies of application receipt notices or any other notices from the former INS or the CIS as these documents can be helpful to immigration counsel in determining his immigration status.<sup>60</sup>

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Department of Health and Human Services,  
<http://www.acf.hhs.gov/programs/orr/data/fy2006RA.htm>.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See* Appendix 9D, Sample Immigration Documents and How to Read a Green Card.

<sup>60</sup> *See* Appendix 1G, Form I-797, Notice of Action (CIS application receipt notice). With the receipt number, a non-citizen can check the status of an immigration application on the CIS website, [www.uscis.gov](http://www.uscis.gov); Appendix 1G, CIS online case status printout.



### **Weighing the Options**

After determining a non-citizen client's immigration status, several questions must be considered:

1. Is your non-citizen client currently deportable or inadmissible based on a past criminal history and/or current immigration status?
2. Will a proposed disposition of your non-citizen client's case render her deportable or inadmissible?
  - If yes, are there other options that will not render him deportable or inadmissible?
  - How do the risks of the outcome of a trial compare with the immigration consequences of a guilty plea?
3. If your non-citizen client is deportable or inadmissible, is he eligible for relief from deportation or removal?
4. For final convictions, would post-conviction relief or a full and unconditional pardon affect deportability or inadmissibility and possible relief from deportation or removal?

Where possible, a non-citizen's case should be discussed by defense counsel with an immigration attorney who works on criminal immigration issues before a plea is entered.<sup>61</sup> Plea bargains and admissions of facts under different sections of the Illinois, Indiana or Wisconsin statutes will have distinct consequences for immigration purposes. For example, a conviction for domestic battery entered on or after September 30, 1996 may render a non-citizen deportable whereas a conviction for disorderly conduct may not. Creative strategies may ultimately protect your non-citizen client's future (as well as that of his family) in the United States.

### **Other Factors to Consider When Working with Non-Citizen Clients**

A non-citizen's immigration status may become a factor during a criminal trial. Where a non-citizen witness has overstayed his visa or does not have current immigration status in the U.S., his unlawful presence in the U.S. may be used to argue bias on the part

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<sup>61</sup> A list of agencies and attorneys who focus on criminal immigration issues in Illinois, Indiana, and Wisconsin is contained in Appendix 9C. In addition, numerous published resources and information are available on the Internet to begin research about the immigration consequences of criminal convictions. See Appendix 9C, Resources.

of the witness.<sup>62</sup> The Seventh Circuit Court of Appeals has held that a state court's refusal to allow questions about the immigration status during a trial was harmless error.<sup>63</sup>

There are additional challenges to working with non-citizens in the state criminal justice systems. Many non-citizens have a different frame of reference with respect to judicial systems and the world around them.<sup>64</sup> For example, certain foreign judicial systems do not have a jury system and non-citizens from such countries may not understand the term "jury." Often non-citizens have come from countries where the justice system exists or existed in the form of a brutal police or military force. For example, the Khmer Rouge regime in Cambodia systematically killed attorneys and judges after taking over the country in the 1970s and interned thousands of people in "re-education" camps. The police in Vietnam were in charge of registering births and deaths as well as issuing certificates for marriage and divorce. Bribery was a way of life in dealing with the Vietnamese police to get certificates issued or to report crimes. In Mexico, the police often work with drug traffickers; consequently they do not protect the general population from harm by the drug cartels. As a result, criminal defense attorneys in Illinois, Indiana, and Wisconsin may be seen by non-citizen clients as working for or with the police and against their interests.

In addition, many non-citizens were previously arrested in their home countries, imprisoned, and tortured for political reasons by government officials or non-governmental forces. They may have been denied the right to a trial in front of a judge and held incommunicado in detention for weeks, months, or even years. As a result, they may suffer from post-traumatic stress disorder, depression, and/or other mental illness.<sup>65</sup>

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<sup>62</sup> See *People v. Calmuextle*, 255 Ill. App. 3d 504, 626 N.E.2d 741 (Ill. App. 3d Jan. 6, 1994); *People v. Turcios*, 228 Ill. App. 3d 583, 593 N.E.2d 907 (Ill. App. 3d May 3, 1992); *People v. Austin*, 123 Ill. App. 3d 788, 463 N.E.2d 444 (Ill App. 3d Apr. 24, 1984).

<sup>63</sup> See *Toliver v. Hulick*, 470 F.3d 1204 (7<sup>th</sup> Cir. Dec. 4, 2006) (also commenting on the different possibilities for a person not to have immigration status, including being a U.S. citizen and the lack of recordkeeping by the former INS).

<sup>64</sup> For a discussion regarding differences in perception and understanding about the judicial system and cultural considerations for motion to suppress confessions given by non-citizens, see "Guarding *Miranda* and Waivers *Rancheros*: Cultural Considerations in Suppressing Confessions," Francisco "Frank" Morales, Assistant Federal Defender, Western District of Texas, available at [http://www.fd.org/pdf\\_lib/CulturalIssues\\_FMorales.pdf](http://www.fd.org/pdf_lib/CulturalIssues_FMorales.pdf); see also, March-April 2009 issue of *Judicature*, (Journal of American Judicature Society), which has articles addressing cross-cultural considerations in criminal cases, including immigrants and their understanding of the U.S. judicial system.

<sup>65</sup> See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>; Appendix 1I, Materials from Kovler Center; Appendix 1H, Materials from Center for Victims of Torture; L. Piwowarczyk, "Seeking Asylum: A Mental Health Perspective," 16 *Geo. Immigr. L.J.* 155 (Fall 2001); Michelle R. Piston & John J. Hoeffner, "Rules are Made to be Broken: How the Process of Removal Fails Asylum Seekers," 20 *Geo. Immigr. L.J.* 167, 177 (Winter 2006). Mental health courts may be an option for non-citizen clients. See, e.g., Brandon Coutre, "Mental-health Court Launches," *Northwest Herald*, Apr. 13, 2007 (discussing the initiation of a mental health court in McHenry County, Illinois in which a defendant is selected for an 18 to 24 month program to work with specialists to address mental health issues and if successfully completed, the pending criminal charges are dropped).

Non-citizen youth may also face numerous challenges in the juvenile justice or adult criminal system due to the lack of stability in their lives. Many have fled civil war or chaos with their families or traveled alone from one country to another in search of safety. Some have grown up in refugee camps. Others were forcibly recruited to fight with rebel forces in civil wars from which they later deserted. Post-traumatic stress disorder is common among non-citizen youth who have come to the United States seeking refuge.<sup>66</sup>

As defense counsel, you may need to assist non-citizen clients in overcoming obstacles that could impede effective representation. Non-citizens may inform their defense counsel that they will take any deal that will get them out of jail or prison as quickly as possible or will keep them out of jail, without knowing or understanding what the immigration consequences will be for a particular criminal plea.<sup>67</sup> Thus, non-citizens who lack an understanding of U.S. law and the legal system may not be fully cognizant of the rights that they are waiving or how their immigration status may be affected. Although states may have mandatory advisals to non-citizens, the advisals may be meaningless if a non-citizen defendant and defense counsel are not aware, knowledgeable, or informed about the actual immigration consequences for a conviction.<sup>68</sup>

In working with non-citizens from other countries, you need to explain to your clients exactly what your role is and how the criminal justice system works in the particular state or federal court. Non-citizens need to understand the basics of the criminal justice system, including their responsibility to go to court, what will happen at each court appearance, what rights they will give up in exchange for a plea of guilty or nolo contendere, the right to go to trial, how plea bargaining works, the right to a jury trial, the right to appeal a decision or verdict, and the range of sentencing possibilities. You should be aware that others related or associated with the accused non-citizen may be as important in resolving the charges as the non-citizen. For example, a non-citizen client may not ask many questions based on his past experiences with other justice systems in which she could not ask questions out of fear for her life; instead, friends or family members may act on his behalf to ask the questions and obtain the information for him.

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<sup>66</sup> See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>; L. Lamberg, "Children of Immigrants May Face Stresses, Challenges That Affect Mental Health," 300 *JAMA* 780-81 (2008); *United States of America: Unaccompanied Children in Immigration Detention*, Amnesty International Publications, Jun. 18, 2003, pp. 7, 60-72 (discussing the trauma that non-citizen children may have experienced and the Immigration Court experience for unaccompanied minor non-citizens), available at [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf).

<sup>67</sup> For example, a non-citizen may be more concerned initially about her ability to return to her parents, spouse, or children than to consider the long-term immigration consequences of a criminal disposition. However, the long-term consequences may be detrimental to U.S. citizen children who may be forced to move to a foreign country that does not have the same educational or employment opportunities or to remain in the U.S. without their parent(s). See L. Lamberg, "Children of Immigrants May Face Stresses, Challenges That Affect Mental Health," 300 *JAMA* 780-81 (2008); Dorsey & Whitney LLC, "Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement," © 2009, available at [http://www.dorsey.com/severing\\_a\\_lifeline/](http://www.dorsey.com/severing_a_lifeline/).

<sup>68</sup> See Chapter 8, Pre-Plea Advisals About Immigration Consequences, Motions to Withdraw Guilty Pleas, and Post-Conviction Relief, *infra* at 8-1, et. seq.

Communication with non-citizen clients may pose challenges for defense counsel. Non-citizen clients may tell their attorneys “yes” to avoid possible confrontation or conflict even when they want to say “no”. In addition, some words in English may not exist in an indigenous language. For example, the word “attorney” does not exist in the Hmong language. The inability of an attorney to communicate with his non-citizen client may render his assistance constitutionally ineffective.<sup>69</sup>

In addition, gender roles and differences may influence what information a non-citizen reveals to her defense counsel. For example, a man from Afghanistan may not directly answer the questions from a female defense attorney based on his perception that she could not be qualified to represent him as women there generally do not have the same opportunities to receive an education as women in the United States.<sup>70</sup> Similarly, an indigenous Guatemalan woman who was raped in a Guatemalan police station in retaliation for her political activities may not want to discuss her fear of continued detention in an Illinois county jail with a male defense attorney.<sup>71</sup>

Resources are available to assist non-citizens who suffer from post-traumatic stress disorder and other mental illnesses and their attorneys. There are two main centers serving the non-citizen population that resides in Illinois, Indiana, and Wisconsin. In Chicago, the Marjorie Kovler Center for the Treatment of Survivors of Torture works with persons who have suffered torture.<sup>72</sup> The licensed Kovler psychiatrists, psychologists, and social workers work with non-citizens to help them rebuild their lives. The staff can also provide evaluations that can be used in court proceedings and on-going treatment. These evaluations can be instrumental in plea bargaining, trial and sentencing issues. The Center also provides referrals to similar treatment providers in other areas of Illinois and the United States. The Kovler Center can be contacted at:

1331 West Albion Avenue  
Chicago IL 60626  
Phone: (773) 381-4070 (for general information)  
(773) 751-4035 or 4036 (for appointments)  
Fax: (773) 381-4073  
Email: [kovler@heartlandalliance.org](mailto:kovler@heartlandalliance.org)  
[www.heartlandalliance.org](http://www.heartlandalliance.org)

In Minneapolis, Minnesota, the Center for Victims of Torture offers services to persons living in Minnesota and western Wisconsin who have suffered torture. The CVT can be contacted at one of two locations:

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<sup>69</sup> See *Granada v. U.S.*, 51 F.3d 82, 85 (7<sup>th</sup> Cir. Mar. 23, 1995).

<sup>70</sup> See *Afghanistan: Country Reports on Human Rights Practices 2006*, U.S. Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>, Mar. 6, 2007, p. 16.

<sup>71</sup> See *Guatemala: Country Reports on Human Rights Practices 2006*, U.S. Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2006/78893.htm>, Mar. 6, 2007, pp. 9-10.

<sup>72</sup> See Appendix 1I, Representing Non-Citizens Who Have Suffered Torture or Trauma.

Minneapolis Healing Center  
717 East River Parkway  
Minneapolis, MN 55455  
Tel. 612.436.4800  
Fax 612.436.2600

St. Paul Healing Center  
649 Dayton Avenue  
St. Paul, MN 55104  
Tel. 612.436.4800  
Fax 612.436.2604

Toll-free: 1-877-265-8775  
[www.cvt.org](http://www.cvt.org)

Juveniles with disabilities include youth with conduct disorders, depression, post-traumatic stress disorder, attention deficit/hyperactivity disorder, oppositional defiant disorder, learning and developmental disabilities, and mental retardation.<sup>73</sup> Five centers in Illinois provide consultation services about special education law for attorneys representing youth with disabilities.<sup>74</sup> There are also organizations and services in Indiana and Wisconsin that work with such youth.<sup>75</sup> Under the Individuals with Disabilities Education Act,<sup>76</sup> it may be possible for a public defender to move for dismissal of a juvenile court petition where the non-citizen youth's behavior in an educational setting is based on a disability.

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<sup>73</sup> The Pacer Center, Inc., a non-profit parent training center in Minneapolis, Minnesota has a special project entitled the Juvenile Justice Project which works with juveniles with disabilities in the juvenile justice system. The staff can provide training and assistance to public defenders as well as coordinate with other agencies. The Juvenile Justice Project has published a useful resource entitled *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System*, 1999, 2nd edition, updated 2003. The Pacer Center, Inc. is located at 8161 Normandale Blvd., Minneapolis, MN 55437, (952) 838-9000. To contact the Juvenile Justice Project, call (952) 838-9000 or visit <http://www.pacer.org/jj/index.asp>.

<sup>74</sup> The Family Resource Center on Disabilities is located at 20 E. Jackson Boulevard, Suite 300, Chicago, IL 60604. For a consultation, call (800) 952-4199. Designs for Change is located at 814 S. Western, Chicago, IL 60612, (312) 236-7252. Equip for Equality is located at 20 N. Michigan, Suite 300, Chicago, IL (312) 341-0022. The National Center for Latinos with Disabilities is located at 1921 S. Blue Island Avenue, Chicago, IL 60608, (312) 666-3393. The Family Ties Network is located at 830 S. Spring Street, Springfield, IL 62704, (800) 865-7842.

<sup>75</sup> The Indiana Institute on Disability and Community is located at 2853 E. 10<sup>th</sup> St., Bloomington, IN 47408, (812) 855-6508. The Wisconsin Coalition for Advocacy has three locations: 1) 131 W. Wilson St., Suite 700, Madison, WI 53703, (608) 267-0214; 2) Summit Place, 6737 W. Washington St., #3230, Milwaukee, WI 53214, (414) 773-4646; and 3) 217 W. Knapp Street, Rice Lake, WI 54868, (715) 736-1232.

<sup>76</sup> See 20 U.S.C. § 1400 et seq. (1997).

## Notary and Immigration Consultant Fraud

Thousands of non-citizens prematurely file applications for adjustment of status with the assistance of notary publics or other persons, such as travel agents and “immigration consultants.” Many of these persons act in unscrupulous manners to defraud non-citizens and their families. For example, they have promised to help non-citizens obtain employment authorization documents from the legacy INS and the DHS, knowing that these non-citizens did not meet the minimum legal requirements for such benefits. The DHS has taken action to place non-citizens in removal proceedings upon learning of their illegal presence in the United States from their application. The DHS has issued thousands of Notices to Appear or charging documents and placed some of these non-citizens in removal proceedings before the Immigration Court while it has reinstated prior orders of deportation or removal against other non-citizens.

On February 20, 2003, a class action lawsuit was filed in the U.S. District Court for the Northern District of Illinois.<sup>77</sup> The lawsuit alleged that the INS Chicago District Office instituted a project specifically targeting individuals who filed applications for adjustment of status based on the unqualified and unscrupulous advice of individuals not entitled to practice law, improperly accepting the applications and using the information to open investigations against them, and eventually instituting removal proceedings against them.<sup>78</sup> The District Court denied the DHS’ Motion to Dismiss on September 29, 2003.<sup>79</sup> A settlement agreement was approved by the District Court on August 11, 2005.<sup>80</sup> In the settlement agreement, the DHS, among other things: (1) stipulated to the certification of the classes; (2) agreed to review the files of all class members who had not received any notification of a deportation hearing against them; (3) agreed to conduct a review of the class members cases where removal proceedings had already been initiated and determine whether prosecutorial discretion can be used to terminate proceedings against the class members; and (4) agreed to consider class membership for class members who have already been deported and are applying for a waiver of inadmissibility in their applications to return to the United States through approved visa petitions.<sup>81</sup>

Notary fraud continues to be a major concern as Congress debates proposed immigration legislation.<sup>82</sup> Unfortunately, many non-citizens are unable to easily distinguish between proposed and enacted legislation, thus making themselves vulnerable to fraud. Illinois, Indiana, and Wisconsin prohibit notary publics, who are not attorneys or accredited representatives under federal immigration regulations, from holding themselves out as attorneys, from giving advice about immigration law, and from accepting fees for

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<sup>77</sup> See Ramos v. Ashcroft, 2003 U.S. Dist. LEXIS 17426 (N.D.IL Sept. 29, 2003).

<sup>78</sup> See *id.*

<sup>79</sup> See Ramos v. Ashcroft, 2003 U.S. Dist. LEXIS 17426 (N.D.IL Sept. 29, 2003).

<sup>80</sup> See Ramos v. Ashcroft, Case No. 02-8266, Settlement Agreement at 46-47 (N.D.IL. Aug. 11, 2005).

<sup>81</sup> See *id.* at 31-32.

<sup>82</sup> In Indiana, the Attorney General posted a press release warning non-citizens of notary fraud. See “Indiana Attorney General Warns Immigrants about Scam Artists,” *Office of Attorney General Steve Carter*, <http://www.in.gov/attorneygeneral/>, Jun.1, 2006. Notary fraud in any state can be reported to the appropriate state Office of the Attorney General. In Chicago, it may also be reported to the City of Chicago’s Department of Consumer Services by calling 311 or contacting the office at 50 West Washington, Room 208, Chicago, IL 60602, (312) 744-4006.

legal advice.<sup>83</sup> Efforts continue to be made to combat notary fraud, particularly as the current presidential administration considers possible legislation for immigration benefits for non-citizens without status in the U.S.

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<sup>83</sup> See 5 ILCS 312/3-103; IC 33-42-2-10; Wis. Stat. § 137.01(1)(i).

## 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 Stat. 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).

## APPENDIX B

### NATURALIZATION CHARTS

#### AUTOMATIC ACQUISITION OF CITIZENSHIP UNDER THE CHILD CITIZENSHIP ACT OF 2000

Effective Date of Act*	Eligibility Requirements**	Age Limit	Date of Automatic Acquisition	Law Applicable
2/27/01	At least one parent is U.S. citizen by birth or naturalization. Child residing in U.S. in the legal and physical custody of citizen parent pursuant to a lawful admission for permanent residence.	Under 18	Date last condition fulfilled	INA §320, as amended by P.L. 106-395

\* Law is not retroactive, *i.e.*, acquisition can only occur on or after 2/27/01 and only for children under 18 after 2/27/01.

\*\* Applies to adopted child if child has met requirements applicable to adopted children under INA §101(b)(1)(E) or (F).

#### EXPEDITED NATURALIZATION OF CHILDREN

Effective Date of Act*	Eligibility Requirements	Age Limit	Date of Acquisition	Law Applicable
2/27/01	At least one parent is U.S. citizen by birth or naturalization at time of filing N-600K. If citizen parent deceased during preceding 5 years, citizen grandparent or citizen legal guardian may file N-600K. Prior to filing, citizen parent has been physically present in U.S. for at least 5 years, at least 2 after age 14, or citizen parent has a citizen parent who has been physically present in U.S. for 5 years, at least 2 after age 14. Child is currently residing outside U.S. in legal and physical custody of citizen parent, or if citizen parent deceased, an individual who does not object to the application. Child is temporarily present in U.S. pursuant to a lawful admission and maintaining lawful status.	Under 18	Date of Issuance of Certificate	INA §322, as amended by P.L. 106-395 & by P. L. 107-273

\* Applies to adopted children under 18 if child has met requirements applicable to adopted children under INA §101(b)(1)(E) or (F)

These charts and tables are intended for use only as a helpful generalized reference guide, and not to make determinations or to be cited in any case. Information current as of May 2006.

*Courtesy of Mr. Carmen DiPlacido, of Arlington, Virginia*

**AUTOMATIC ACQUISITION OF CITIZENSHIP  
THROUGH NATURALIZATION OF PARENT(S)**

Date Parent(s) Naturalized	Who Naturalized	Age Limit*	Date of Automatic Acquisition		Law Applicable
			If Residing in U.S.	If Residing Abroad	
Prior to 3/2/07	Either parent	Under 21	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§2172, R.S. (Act 4/14/1802)
3/2/07 to noon EST, 5/24/34	Either parent	Under 21	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§2172, R.S. Sec. 5, Act 3/2/07
noon EST, 5/24/34, to 1/13/41	One parent, other remaining alien	Under 21 when admitted U.S.	Upon completion 5 yrs. residence in U.S. including residence completed after age 21 and after 1/13/41		§5, Act 3/2/07, as amended by Sec. 2 Act 5/24/34
	Alien parent (other being citizen); surviving parent; or parent having custody in divorce	Under 21	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§2172, R.S.
1/13/41 to 12/24/52	Alien parent other being citizen from child's birth	Under 18	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§313, 1940 Act
	Both parents; surviving parent; or parent having custody in legal separation	Under 18	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§314, 1940 Act
Subsequent to 12/24/52 but before 2/27/01	**Alien parent, other being citizen from child's birth	Under 18	Date last condition fulfilled	Date child lawfully admitted U.S. for permanent residence	INA §320, as amended by P.L. 95-417. Repealed by P.L. 106-395
	**Both parents; surviving parent; parent having custody in legal separation; or mother of child out of wedlock	Under 18	Date last condition fulfilled	Date child lawfully admitted U.S. for permanent residence	INA §321, as amended by P.L. 95-417. Repealed by P.L. 106-395

\* The date of the parent(s) naturalization and the date of the lawful admittance of the child must occur before the age shown in the age limit column.

\*\* Applies to an adopted child if the child is residing in the U.S. at the time of naturalization of such adopted parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

**ADJUDICATING CITIZENSHIP BASED ON  
BIRTH OUT OF WEDLOCK TO A U.S. FATHER**

**Determining Whether to Use "New" or "Old" INA §309(a)**

<b>Date of Birth</b>	<b>Applicable Statute</b>	<b>Age Before Which "Legitimation" Must Occur*</b>	<b>Date Before Which "Legitimation" Must Occur*</b>	<b>Statement of Support Required?</b>
<i>Before Nov. 14, 1968</i>	Old Section 309(a)	21	11/14/89	No
<i>On or after Nov. 14, 1968 but before Nov. 14, 1971</i>	Old Section 309(a)	21	11/14/92	No
	New Section 309(a)	18	11/14/89	Yes
<i>On or after Nov. 14, 1971 but before Nov. 14, 1986</i>	Old Section 309(a)	15	11/14/86	No
	New Section 309(a)	18	11/14/04	Yes
<i>On or after Nov. 14, 1986</i>	New Section 309(a)	18	None	Yes

\* Note that under New Section 309(a), the citizen father can, in lieu of legitimation, acknowledge paternity in writing and under oath, or paternity of the child can be established by adjudication of a competent court. Any one of the three methods of establishing paternity must occur before the child's 18th birthday.

## Tables of Transmission Requirements Over Time for Citizenship for Certain Individuals Born Abroad

*Note—Governing Statute:* Acquisition of U.S. citizenship at birth abroad to a U.S. citizen parent(s) is governed by federal statute. The governing law in the case of a person born abroad who claims U.S. citizenship through a U.S. citizen parent(s) is the law in effect on the date of the claimant's birth, unless a subsequent law specifically by its language in the statute applies retroactively to persons who had not already become citizens by the provisions of the prior law. At times, a new law will merely renumber an old law without changing the requirements or provisions. As such, it will read, e.g., “§301(a)(7), now §301(g) INA.”

When pertinent law requires specific conditions on the part of the U.S. citizen parent(s), the conditions must be met prior to the child's birth unless otherwise stated in the statute.

Residence or physical presence transmission requirements can be met while the transmitting parent is not a citizen.

Birth Abroad to U.S. Citizen Parent and Alien Parent

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<i>Before</i> May 24, 1934 (noon EST)*	Either U.S. citizen father or mother could transmit. U.S. citizen parent resided in U.S. before child's birth.	§1993, Revised Statutes (RS); 7 FAM 1135; §301(h) INA; P.L. 103-416.	None	§324(G)(1) Immigration and Nationality Act of 1952 (INA), §101 P.L. 103-416; 7 FAM 1133.5-15.
<i>On or after</i> May 24, 1934 (noon EST),* <i>but before</i> Jan. 13, 1941	Either U.S. citizen father or mother could transmit. U.S. citizen parent resided in U.S. before child's birth.	§1993, RS as amended in 1934; 7 FAM 1135.1, 1135.2.	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 5 years residence between the ages 13-21 if begun before 12/24/52; or (2) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (3) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup> (4) None if parent employed certain occupation. <sup>3</sup> (5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	(1) §201(e) and (h) Nationality Act of 1940 (INA), 54 Stat. 1137; 7 FAM 1134.6-3 (2) Former §301(b), (c) INA; 7 FAM 1133.5-7, 5-8 (3) Former §301(b), (4) INA; 7 FAM 1133.5-2, 1133.5-9 (4) §201(e) INA; 7 FAM 1134.6-2 (5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11

\* *Sic.* The statute refers to “Eastern Standard Time”, however, Daylight Savings Time was in effect on May 24, 1934.

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. Government, American education, scientific, philanthropic, religious, commercial, or financial organization or an International Agency in which the U.S. takes part. Note: residence or physical presence of parent must take place *before* child's birth.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<p>On or after Jan. 13, 1941, but before Dec. 24, 1952</p>	<p>Citizen parent resided in U.S. or possession 10 years prior to child's birth, five of which after the age of 16.</p>	<p>§201(g) NA; 7 FAM 1134.2, 1134.3</p>	<p>Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance.</p> <p>(1) 2 years continuous physical presence between ages 14-28;<sup>1</sup> or</p> <p>(2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72.<sup>2</sup></p> <p>(3) None if parent employed in certain occupation.<sup>3</sup></p> <p>(4) None if child born on or after 10/10/52;</p> <p>(5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.</p>	<p>§324(d)(1) INA, §101 P.L. 103-416; 7 FAM 1133.5-15</p> <p>(1) Former §301(b), (c) INA; 7 FAM 1133.5-7, 5-8</p> <p>(2) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9</p> <p>(3) §201(g) NA; 7 FAM 1134.6-2</p> <p>(4) P.L. 95-432; 7 FAM 1133.5-13</p> <p>(5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11</p>
<p>On or after Jan. 13, 1941, but before Dec. 24, 1952</p>	<p>Citizen parent in U.S. military 12/7/41 to 12/31/46 and resided in U.S. or possession 10 years prior to child's birth, five of which after age 12.</p>	<p>§201(i) NA; 7 FAM 1134.2, 1134.4</p>	<p>Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance.</p> <p>(1) 2 years continuous physical presence between ages 14-28;<sup>1</sup> or</p> <p>(2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72.<sup>2</sup></p> <p>(3) None if child born on or after 10/10/52.</p> <p>(4) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.</p>	<p>§324(d)(1) INA, §101 P.L. 103-416; 7 FAM 1133.5-15</p> <p>(1) Former §301(b) INA; 7 FAM 1134.4e, 1133.5</p> <p>(2) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9</p> <p>(3) P.L. 95-432; 7 FAM 1133.5-15</p> <p>(4) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11</p>

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. Government, American education, scientific, philanthropic, religious, commercial, or financial organization or an International Agency in which the U.S. takes part. Note: residence or physical presence of parent must take place before child's birth.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<i>(on or after Jan. 13, 1941, but before Dec. 24, 1952—cont. d)</i>	Citizen parent in U.S. military 1/1/47 to 12/24/52 and physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14, and who did not qualify under either provision above.	§301(a)(7), now §301(g) INA; 7 FAM 1134.4f	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup> (3) None if child born on or after 10/10/52. (4) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	§324(d)(1) INA; P.L. 103-416; 7 FAM 1133.5-15 (1) Former §301(b) INA; 7 FAM 1133.5-7, 5-8 (2) Former §301(b), (c) INA; 7 FAM 1133.5-2, 1133.5-9 (3) P.L. 95-432; 7 FAM 1133.5-13 (4) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11
<i>On or after Dec. 24, 1952, but before Nov. 14, 1986</i>	Citizen parent physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included.	§301(a)(7), now §301(g) INA; 7 FAM 1133.2-2, 1133.3-3	None	
<i>On or after Nov. 14, 1986</i>	Citizen parent physically present in U.S. or possession 5 years prior to child's birth, two of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included.	§301(g) INA; P.L. 99-653, P.L. 100-525; 7 FAM 1133.2-1	None	

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.  
<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.  
<sup>3</sup> U.S. Government, American education, scientific, philanthropic, religious, commercial, or financial organization or an International Agency in which the U.S. takes part. Note: residence or physical presence of parent must take place before child's birth.



**Birth Abroad to Two U.S. Citizen Parents**

Date of Birth	Transmission Requirements (Parents' Residence)	Applicable Laws	Reference
<i>Before</i> May 24, 1934 (noon, EST)*	One parent resided in the U.S.	\$1993, Revised Statutes (RS); §301(h) INA; §101 P.L. 103-416	7 FAM 1135.1
<i>On or after</i> May 24, 1934 (noon, EST)* <i>but before</i> Jan. 13, 1941	One parent resided in the U.S.	\$1993, RS as amended by Act of 5/24/34	7 FAM 1135.6-1
<i>On or after</i> Jan. 13, 1941, <i>but before</i> Dec. 24, 1952	One parent resided in the U.S. or possession.	§201(c) NA	7 FAM 1134.2, 1134.3-1, 1134.3-2
<i>On or after</i> Dec. 24, 1952	One parent resided in the U.S. or possession.	§301(e)(3), now §301(c) INA	7 FAM 1133.2-1a, 1133.3-1a

Notes: (1) In all cases, residence must take place prior to the child's birth; (2) the law does not define how long residence must be; and (3) children born to two U.S. citizen parents never had retention requirements.

**Child Born Out of Wedlock to U.S. Citizen Mother**

Date of Birth	Transmission Requirements (Parents' Residence)	Applicable Laws	Reference
<i>Before</i> May 24, 1934 (noon, EST)*	Mother resided in the U.S. or possession prior to child's birth; child not legitimated by alien father before 1/13/41.	§205, paragraph 2, NA	7 FAM 1135.3-2
<i>On or after</i> May 24, 1934 (noon, EST)* <i>but before</i> Jan. 13, 1941	Mother resided in U.S. or possession prior to child's birth.	\$1993, RS as amended by Act of 5/24/34; §205, paragraph 2, NA	7 FAM 1135.7-2
<i>On or after</i> Jan. 13, 1941, <i>but before</i> Dec. 24, 1952	Mother resided in U.S. or possession prior to child's birth.	§205, paragraph 2, NA	7 FAM 1134.5-4
<i>On or after</i> Dec. 24, 1952	Mother physically present in U.S. or possession continuously 12 months prior to child's birth.	§309(c) INA	7 FAM 1133.4-3

Note: Children born out of wedlock to a U.S. citizen mother never had retention requirements.

**Child Born Out of Wedlock to U.S. Citizen Father and Alien Mother**

Date of Birth	Transmission and Legal Relationship Requirements	Reference	Retention Requirements	Reference
Before May 24, 1934 (noon, EST)*	Legitimated under law of father's U.S. or foreign domicile. Father resided in U.S. before child's birth.	§1993, RS; 7 FAM 1135.3-1	None	
On or after May 24, 1934 (noon EST),* but before Jan. 13, 1941	Legitimated under law of father's U.S. or foreign domicile. Father resided in U.S. before child's birth.	§1993, RS as amended in 1934; 7 FAM 1135.7-1	<p>Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance.</p> <p>(1) 5 years residence between ages 13-21 if begun before 12/24/52, or</p> <p>(2) 2 years continuous physical presence between ages 14-28,<sup>1</sup> or</p> <p>(3) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72.<sup>2</sup></p> <p>(4) None if parent employed certain occupation.<sup>3</sup></p> <p>(5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.</p>	<p>§324(d)(1) INA; §101 P.L. 103-416 1133.5-15</p> <p>(1) §201(g) and (h) INA; 7 FAM 1133.6-3</p> <p>(2) Former §301(b), (c) INA; 7 FAM 1133.5-7, 1133.5-8</p> <p>(3) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9</p> <p>(4) §201(g) INA; 7 FAM 1134.6-2</p> <p>(5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11</p>

\* Sic. The statute refers to "Eastern Standard Time"; however, Daylight Savings Time was in effect on May 24, 1934.

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part.

Note: Residence or physical presences of parent must take place before child's birth. Section 301(h) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(d) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<i>On or after Jan. 13, 1941, but before Dec. 24, 1952</i>	(1a) Father physically present in U.S. or possession 10 years prior to child's birth, 5 of which after the age of 14. Honor-able U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment may be included, and  (1b) Paternity established fore age 21 by the legitimation law of father's or child's residence/domicile, or  (2a) Father resided in U.S. or possession 10 years prior to child's birth, five of which after the age of 16 years; and  (2b) Paternity established during minority by legitimation or court adjudication before 12/24/52.	\$301(a)(7) INA; 7 FAM 1133.3-3  \$309(b) INA  \$201(e) NA  \$205 NA; 7 FAM 1134.5-2	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance.  (1) 2 years continuous physical presence between ages 14-18; <sup>1</sup>  (2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup>  (3) None if parent employed in certain occupation; <sup>3</sup>  (4) None if child born on or after 10/10/52.  (5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	\$324(d)(1) INA; §101 P.L. 103-416; 7 FAM 1133.5-15  (1) Former §301(b), (c) INA; 7 FAM 1133.5-7, 5-8  (2) Former §301(b), (c) INA; 7 FAM 1133.5-2, 1133.5-9  (3) 201(g) NA; 7 FAM 1134.6-2  (4) P.L. 95-432; 7 FAM 1133.5-13  (5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11
<i>On or after Dec. 24, 1952, but before Nov. 14, 1968</i>	(1) Father physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment may be included, and  (2) Paternity established under age 21 by legitimation law of father's or child's residence/domicile.	\$301(a)(7) INA  \$309(a) INA as originally enacted	None	

Note: INA §301(b) took effect 10/25/94 and is retroactive to 1790. INA §324(d) took effect 3/1/95 and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part.

Note: Residence or physical presences of parent must take place before child's birth. Section 301(f) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(d) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<p>After Nov. 14, 1968. through Nov. 14, 1971</p>	<p>(1) Father physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included; and</p> <p>(2a) Blood relationship established between father and child, father a U.S. citizen at time of child's birth, father (unless deceased) agrees in writing to support child until 18 years, and while child is under 18 years: (i) child is legitimated, (ii) father acknowledges paternity, or (iii) paternity established by court adjudication, or</p> <p>(2b) Paternity is established under age 21 by the legitimation law of father's or child's residence/domicile.</p>	<p>§301(a)(7) INA</p> <p>§309(a) INA as amended 11/14/86, 102 Stat 2619, 7 FAM 1133.4-2</p> <p>§309(e) INA, as originally enacted</p>	<p>None</p>	

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.  
<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.  
<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part.  
 Note: Residence or physical presences of parent must take place before child's birth. Section 301(h) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(g) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<p><i>after</i> Nov. 11, 1971, <i>but before</i> Nov. 11, 1986</p>	<p>(1) Father physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included; and</p> <p>(2) Blood relationship established between father and child, father a U.S. citizen at time of child's birth, father (unless deceased) agrees in writing to support child until 18 years, and while child is under 18 years (i) child is legitimated, (ii) father acknowledges paternity, or (iii) paternity established by court adjudication.</p>	<p>§301(a)(7) INA  §309(e) INA, as amended 11/14/86; 102 Stat. 2619; 7 FAM 1133.4-2</p>	None	
<p><i>On or after</i> Nov. 11, 1986</p>	<p>(1) Father physically present in U.S. or possession five years prior to child's birth, two of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included; and</p> <p>(2) Blood relationship established between father and child, father a U.S. citizen at time of child's birth, father (unless deceased) agrees in writing to support child until 18 years, and while child is under 18 years: (i) child is legitimated, (ii) father acknowledges paternity, or (iii) paternity established by court adjudication.</p>	<p>§301(g) INA; 7 FAM 1133.3-3  §309(e) INA as amended 11/14/86; 102 Stat. 2619; 7 FAM 1133.4-2</p>		

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part.

Note: Residence or physical presences of parent must take place before child's birth. Section 301(h) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(d) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

**FEDERAL IMMIGRATION SYSTEM BEFORE  
THE HOMELAND SECURITY ACT OF 2002**

**CURRENT FEDERAL IMMIGRATION SYSTEM  
POST-HOMELAND SECURITY ACT OF 2002**

After September 11, 2001, Congress abolished the INS. The Department of Homeland Security (DHS) was created as a separate entity from the Department of Justice and assumed the responsibilities of the former INS on March 1, 2003.

<b>Department of Justice</b>	
<p><b>Executive Office for Immigration Review (EOIR)</b> Administrative court system for immigration cases.</p> <p><b>Board of Immigration Appeals (BIA)</b> Appellate court which reviewed decisions of the Immigration Court.</p> <p><b>Immigration Court</b> Court system in which judges were appointed by the Attorney General to review deportation and exclusion cases. Also reviewed initial custody decisions of the INS.</p>	<p><b>Immigration and Naturalization Service (INS)</b></p> <p><b>Inspections and Border Protection</b> Investigations Intelligence Detention and Removal.</p> <p><b>Administrative Appeals Office (AAO)</b> Reviewed appeals from District Director decisions</p> <p><b>District Director</b> Adjudicated applications for immigration benefits, including adjustment of status, waivers, asylum, and naturalization.</p>

<b>Department of Homeland Security (DHS)</b>		
<p><b>Customs and Border Protection (CBP)</b> Border protection and customs for inspection of goods and persons at air, land, and sea ports of entry. Refers cases for removal processing to ICE.</p>	<p><b>Immigration and Customs Enforcement (ICE)</b> Issues warrants, Notices to Appear before the Immigration Court, and final removal orders for persons with certain criminal convictions and/or immigration violations. Initially decides custody of non-citizens. Removes non-citizens from the U.S. to other countries. Conducts investigations and carries out enforcement activities. Office of Chief Counsel represents DHS before the Immigration Court and Board of Immigration Appeals.</p>	<p><b>Citizenship and Immigration Services (CIS)</b> Adjudicates applications for immigration benefits, including adjustment of status, waivers, asylum, and naturalization. Refers cases for removal proceedings to ICE.</p>

<b>Department of Justice</b>	
<p><b>Executive Office for Immigration Review (EOIR)</b> Administrative law court system for immigration cases under the U.S. Attorney General.</p>	<p><b>Board of Immigration Appeals (BIA)</b> Appellate court which reviews decisions of the Immigration Court.</p> <p><b>Immigration Court</b> Court system in which judges appointed by the Attorney General decide removal cases and review initial custody decisions made by ICE.</p>

## RED FLAGS FOR NON-CITIZEN CLIENTS

- Entered U.S. without inspection by an immigration officer and does not have a "green card"
- Obtained green card less than 5 years ago and has resided in the U.S. for less than 7 continuous years
- Has been arrested and/or deported by the former Immigration and Naturalization Service or the Department of Homeland Security
- Has prior misdemeanor arrests, charges, and/or convictions for crimes involving moral turpitude (shoplifting, theft, forgery, burglary, fraud, etc.)
- Has prior criminal sexual conduct arrests, charges, and/or convictions
- Has prior DUI related arrests, charges, and/or convictions
- Has prior controlled substance offense or drug paraphernalia arrests, charges, and/or convictions
- Has prior domestic assault arrests, charges, and/or convictions or has violated any order of protection or no-contact order
- Has prior felony arrests, charges, and/or convictions for any other type of offense
- Is charged with or faces potential charges for:
  - Controlled substance violation(s)
  - Crime involving moral turpitude
  - Criminal sexual conduct
  - Assault, battery, or a crime of violence
  - Domestic assault or battery, stalking, child abuse, child neglect, child abandonment, or violation of a protection order
  - Prostitution or soliciting a prostitute
  - DUI or related offense(s)
  - Firearms offense
- Is a juvenile charged with a controlled substance violation, prostitution, or a crime of violence in delinquency or EJJ proceedings
- Is a juvenile facing prosecution as an adult for any of the offenses listed above

**QUESTIONNAIRE  
FOR NON-CITIZENS IN CRIMINAL PROCEEDINGS**

Fill out this questionnaire before consulting with an immigration attorney to determine your non-citizen client's current immigration status and possible immigration consequences of any criminal convictions. If possible, you should also photocopy any immigration documentation for your client. Add pages as needed.

**DEFENSE ATTORNEY'S CONTACT INFORMATION**

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Name: \_\_\_\_\_ Phone number: \_\_\_\_\_  
Email: \_\_\_\_\_

**DEFENDANT'S IMMIGRATION INFORMATION**

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Name: \_\_\_\_\_  
Country of Citizenship: \_\_\_\_\_ Country of Birth: \_\_\_\_\_  
Date of Birth: \_\_\_\_\_

**Immigration Status:**

Lawful Permanent Resident	Refugee	Visa Overstay
Adjustment of Status Applicant	Temporary Protected Status (TPS)	H1-B, L-1, O-1, R-1 (or a dependent)
Asylee (asylum granted)	Undocumented	Amnesty/Family Unity
Asylum Applicant	Visitor (B-1 or B-2)	Other: _____
Naturalization Applicant	J-1/F-1/M-1 Student (or a dependent)	

Date of first entry into U.S.: \_\_\_\_\_ Date of last entry into U.S.: \_\_\_\_\_  
Place of first entry into U.S.: \_\_\_\_\_ Place of last entry into U.S.: \_\_\_\_\_  
Manner of entries (Inspected or NOT inspected by U.S. officials; visa type, etc.):  
\_\_\_\_\_  
\_\_\_\_\_

Prior deportations or appearances before an Immigration Judge (circumstances and date(s)):  
\_\_\_\_\_  
\_\_\_\_\_

Relatives (spouse, parent(s), child(ren), sibling(s)) with U.S. citizenship immigration status:

Name: \_\_\_\_\_ Relationship: \_\_\_\_\_ Status: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CRIMINAL INFORMATION**

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Date of most recent arrest: \_\_\_\_\_

Pending charges:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Prior arrests, charges, and outcomes (including juvenile history) and corresponding sentences:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_



# THE CRIMINAL DEFENDER'S QUICK OVERVIEW FOR REPRESENTATION OF A NON-CITIZEN

Is your client a U.S. citizen?

YES

Go forward advising client.

Non-profit attorneys available for consultation regarding immigration consequences for pleas and convictions.

- \* **National Immigrant Justice Center**  
312-660-1370  
[defenders@heartlandalliance.org](mailto:defenders@heartlandalliance.org)
- \* **Legal Assistance Foundation**  
312-941-9617

NO



Fill out Red Flags list and Questionnaire and call an immigration attorney BEFORE advising your non-citizen client about pleas.

Is an immigration attorney available?

YES



Get advice regarding plea bargains, trial, and possible defenses from removal/deportation:

- Will the proposed disposition of the case render your non-citizen client deportable or inadmissible to the U.S.?
- If the proposed disposition of an immigration case will render your client deportable, will she be eligible for any relief under immigration law to avoid and/or minimize immigration consequences?

NO



Get a CONTINUANCE and call an immigration attorney later.

Is your client eligible for relief?

NO



The best option may be to GO TO TRIAL.

YES



Advise your client of the immigration consequences and refer them to an immigration attorney for immigration case assistance.



Receipt Number: MSC 1234567		Case Type: I-485 - Application to Register Permanent Residence or Adjust Status	
Received Date: January 31, 2007	Priority Date:	Applicant: A99 999 999 Name	
Notice Date: February 02, 2007	Page 1 OF 1	ASC Code: 3	

Attorney Name Address	Notice Type: Receipt Notice
	Amount Received: \$395.00

The above application has been received. Please notify us immediately if any of the above information is incorrect. If you find it necessary to contact this office in writing, you must include a copy of this receipt notice with your inquiry.

**BIOMETRICS-**

The next step is to have your biometrics taken, if required, at a US Citizenship and Immigration Services (USCIS) Application Support Center (ASC).

**PLEASE NOTE-**

USCIS WILL SCHEDULE YOUR BIOMETRICS APPOINTMENT. You will be receiving an appointment notice with a specific time, date and place where you will have your fingerprints and/or photos taken.

**WHAT TO BRING TO Your appointment -**

Please bring this letter and your photo identification to your appointment. Acceptable kinds of photo identification are:

- a passport or national photo identification issued by your country,
- a driver's license,
- a military photo identification, or
- a state-issued photo identification card.

If you do not bring this letter and photo identification, we cannot process you.

Please bring a copy of all receipt notices received from USCIS in relation to your current application for benefits.

**CASE STATUS -**

Information about your local office processing times may be obtained by calling the NCSC at 1-800-375-5283.

If you have Internet access, you can visit the United States Citizenship and Immigration Services website at [www.USCIS.gov](http://www.USCIS.gov) where you can find valuable information about forms, filing instructions, and immigration services and benefits.

U. S. Citizenship and Immigration Services  
P.O. Box 648005  
Lee's Summit, MO 64064  
National Customer Service Center: 1-800-375-5283

Appendix I-G





[Change Of Address](#)

Receipt Number: msc0712412926

[Services While Your Case is Pending](#)

Application Type: I485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR TO ADJUST STATUS

[Civil Surgeons](#)

Current Status: Fingerprint fee accepted; receipt notice mailed and case pending.

[Processing Times](#)

On February 2, 2007, your fingerprint fee was accepted and we have mailed you a notice describing how we will process your case. Your case is now pending. Please follow any instructions on this notice. You will be notified by mail when a decision is made, or if the office needs something from you. If you move while this case is pending, call customer service. We process each kind of case in the order we receive them. You can use our processing dates to estimate when this case will be done. This case is at our MISSOURI SERVICE CENTER location. Follow the link below for current processing dates. You can also receive automatic e-mail updates as we process your case. Just follow the link below to register.

[Case Status Online](#)

[Case Status Search](#)

[Register](#)

[Login](#)

You can choose to receive automatic case status updates, which will be sent via email. Please click here to create an account online.

If you would like to see our current Processing Dates for Applications and Petitions, click here.

Note: Case Status is available for Applications and Petitions which were filed at USCIS Service Centers. If you filed at a USCIS Local Office, your case status may not be reviewable online but for processing times on forms filed at that Office please, click here.

If you have a question about case status information provided via this site, or if you have not received a decision from USCIS within the current processing time listed, please contact Customer Service at (800) 375 – 5283 or 1-800-767-1833 (TTY).

[New Search](#)

[Printer Friendly Case Status](#)



02-07-2007 12:11 PM EST

Providing Legal Services to Survivors of Torture, Persecution and War Violence:  
Considerations for Public Defenders and Criminal Defense Attorneys<sup>1</sup>

By Michele Garnett McKenzie<sup>2</sup>

Attorneys encounter survivors of torture, persecution and war trauma with a variety of legal needs, including the need for criminal defense. For those attorneys representing clients from countries in which the use of torture is widespread, it may be expected that some clients will be victims of such atrocities.

Most survivors of torture are newcomers to the United States. They share with other newcomers the challenges of unfamiliarity with the United States' legal system and lack of fluency in the English language. Survivors of torture may face specific trauma-related challenges—depression, post-traumatic stress disorder, anxiety, and fear of authority, including lawyers and the judicial system. These issues may interfere substantially with the client's ability to effectively participate in their representation.

### *Identifying Torture*

The United Nations Convention Against Torture defines torture as

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>3</sup>

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<sup>1</sup> This article is adapted from Chapter 7: Legal Services, by Michele Garnett McKenzie and Mary Ellison, which appeared in *Healing the Hurt: A Guide to Developing Services for Torture Survivors*, published by the Center for Victims of Torture, 2005.

<sup>2</sup> Michele Garnett McKenzie is the director of Minnesota Advocates for Human Rights' Refugee & Immigrant Program, where she manages the *pro bono* asylum project, detained and clinical client services, and advocacy on legal issues affecting refugees and immigrants. She received her J.D. from the University of Minnesota Law School, and her B.A. from Macalester College in Saint Paul. Prior to her work at Minnesota Advocates, Ms. McKenzie practiced general immigration law in Saint Paul, Minnesota, and served as a Judicial Law Clerk for the Executive Office for Immigration Review in Arizona and Nevada. She has served as an adjunct faculty member of William Mitchell College of Law and currently serves as an adjunct clinical professor at the University of Minnesota Law School Immigration Clinic. She is admitted to practice in the State of Minnesota and the U.S. District Court for the District of Minnesota.

<sup>3</sup> Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 [hereinafter CAT].

Torture may be physical or psychological. The methods of torture are limited only by the imagination,<sup>4</sup> including:

- Beatings
- Mutilations
- Asphyxiation and submersion
- Mock executions
- Electric shock
- Over- or under-sensory stimulation
- Rape
- Humiliation
- Witnessing the torture or murder of others
- Denial of food, medical care, and sanitary surroundings<sup>5</sup>

The use of torture is widespread, with Amnesty International documenting the use of torture in more than 100 countries around the world.<sup>6</sup> The Center for Victims of Torture in Minneapolis estimates that between 400,000 and 500,000 survivors of torture live in the United States.<sup>7</sup> The prevalence of torture in selected samples of refugees varies from 5 - 70% depending on the composition of the sample in relation to nationality, sex, age, and point in time.<sup>8</sup> According to Amnesty International, police officers are the agents of the state most likely to use torture. Torture or ill-treatment by police officers has been reported in more than 140 countries since 1997.<sup>9</sup>

### *Impact of Torture, Persecution and War Violence*

The purpose of torture is to terrorize entire communities into silence and submission by making examples of individuals and their families.<sup>10</sup> Repressive societies have a profound impact upon everyone living within them, shaping the worldview of those who escaped torture as well as the direct victims. Persons living in the midst of armed conflict suffer both targeted and random violence. Many of these conflicts witnessed levels of

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<sup>4</sup> For a useful, although not exhaustive, glossary of methods of torture, see Ken Pope, "Torture," *Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender* ed. Judith Worell, Academic Press, October, 2001, available at <http://kspope.com/torvic/torture-abst.php#copy>.

<sup>5</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 7.

<sup>6</sup> See Berliner P., Nikkelsen E.M., Bovbjerg, A., Wiking, M. (2004). *Psychotherapy treatment of torture survivors*, International Journal of Psychosocial Rehabilitation. 8, 85-96. See also Survivors of Torture, International at [http://www.notorture.org/torture\\_defined.html](http://www.notorture.org/torture_defined.html).

<sup>7</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 7.

<sup>8</sup> Lavik, N.J., Haiff, E., Skrondal, A., Solberg, O. (1996). *Mental Disorder Among Refugees and the Impact of Persecution and Exile: Some findings from an outpatient population*, British Journal of Psychiatry, 169:726-732.

<sup>9</sup> Amnesty International, *Campaign Against Torture*, at [http://web.amnesty.org/apro/stoptortureinchina.nsf/torture\\_context\\_page\\_eng](http://web.amnesty.org/apro/stoptortureinchina.nsf/torture_context_page_eng)

<sup>10</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 10.

aggression, targeting of civilian populations, and unmitigated brutality on a massive scale. While not every victim of torture, persecution or war violence suffers from mental health problems, prevalence rates of depression, Post-Traumatic Stress Disorder (PTSD), and physical symptoms are elevated in populations of survivors.<sup>11</sup>

The psychological and physical disorders prevalent among survivors of torture, persecution and war trauma may interfere with the client's ability to participate in the case. For example, people suffering from PTSD may experience flashbacks when reminded of the torture. Depression may affect the person's ability to concentrate and to make decisions. Physical complaints may make it difficult for the client to keep appointments.<sup>12</sup> Identifying these problems and working with the client and their therapist, social worker or psychologist, if they have one, will help to alleviate miscommunication and stress between the attorney and client.

*A young woman seeking asylum retained an attorney to prepare for the asylum interview. At each meeting with the attorney, however, the client spent the first hour complaining about various unrelated issues – poor housing, lack of a good job, pain and illness – leaving little time to prepare for the upcoming interview. The client was avoiding confronting the horrors she had undergone as a bush wife to rebels in Sierra Leone while a young girl.*

The experience of those who have fled torture, persecution and war violence is often encapsulated in a description known as the Triple Trauma Paradigm.<sup>13</sup> This paradigm helps service providers understand the stages of the life of many refugees – pre-flight, flight, and post-flight – and the attendant issues of each stage. Pre-flight experiences may include the torture, harassment, chaos, hiding, and fear that drove the person from their country. While in flight from the persecution, experiences of detention, loss, violence, and uncertainty pervade. Upon arrival in the country of refuge, in the post-flight stage, people may experience low social and economic status, racial discrimination, inadequate housing, challenges posed by language barriers, and unrealistic expectations from home.<sup>14</sup> All of these experiences are brought to bear upon the attorney/client relationship.

### *Avoiding assumptions*

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<sup>11</sup> Berliner P., Nikkelsen E.M., Bovbjerg, A., Wiking, M. (2004). *Psychotherapy treatment of torture survivors*, International Journal of Psychosocial Rehabilitation. 8, 85-96.

<sup>12</sup> This list of symptoms is taken from the "Handout for Survivors and Their Families: Common Effects of Torture," found in the Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 25.

<sup>13</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 23.

<sup>14</sup> See Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 23. See also Berliner P., Nikkelsen E.M., Bovbjerg, A., Wiking, M. (2004). *Psychotherapy treatment of torture survivors*, International Journal of Psychosocial Rehabilitation. 8, 85-96.

The lawyer cannot assume a torture survivor is familiar with basic United States' legal concepts—often learned by those who grow up in this country through high school civics classes and television courtroom dramas. While the lawyer must clarify the client/attorney relationship with all clients, it is especially important in representing torture survivors that the attorney foregoes assumptions and takes time to begin at the beginning.

Clients may be unfamiliar with the most basic concepts of the United States' legal system. Their understanding of the legal system necessarily will be informed by their own experience in their home country. Notions such as the adversarial process and the independence of the judiciary may be unfamiliar. Confidentiality of communications and the client/attorney privilege—the foundation of the client/attorney relationship—must be carefully explained.

While some clients may not know the United States' legal system, it is a mistake to assume clients are unfamiliar with legal concepts or lack of sophistication or education. Clients come from all backgrounds and may be attorneys, judges, physicians, government officials, scientists, professors, journalists, or business owners. In short, it is critical that the attorney take time to ask questions about the client's background, explain basic concepts, and remain open to questions by the client.

#### *The torture survivor's response to the legal system*

In some cases, members of the home country's legal system may have been involved in the repression and torture. Fear of authority figures, including the client's own attorney, immigration officials, police, prosecutors, and judges may interfere with the client/attorney relationship or with the client's ability to go forward with their legal case.

*A uniformed police officer passed by a client and attorney in the law office's building. The attorney's response was one of mild curiosity about where the officer was going. The torture survivor, on the other hand, froze, became silent, and began sweating. His assumption, based on his experience, was that someone—perhaps he—would be taken away by the police without charge or explanation.<sup>15</sup>*

The client's fears may be exacerbated by incarceration or the threat of incarceration. Police stations, jails and prisons are often the site of torture. Often conditions of detention mirror those which the torture survivor fled.

*When sought as a witness in a criminal investigation, an asylum seeker and her attorney met with the criminal defense attorney. The defense attorney carefully laid out the client's options: to talk to the police without assurances the conversation would be used against them in later criminal charges; to seek assurances the conversation would not be used*

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<sup>15</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 79.

*against them later; or to refuse to talk to the police. When the client asked what would happen if she refused to speak to the police, the attorney replied "the government might try to make things difficult." The client, a survivor of torture, went pale, believing the attorney meant she would face the same torture – prolonged incommunicado detention, electric shock, and severe beatings resulting in loss of teeth – she had suffered in her home country. The immigration attorney, aware of the torture, explained she would absolutely not be tortured or otherwise physically harmed by the police for exercising her constitutional right against self-incrimination. The defense attorney then detailed what sort of pressure the police might bring against her in that situation. Had the miscommunication not been caught, the client would have been unable to make an informed decision because she would have based her decision on a critical misunderstanding.<sup>16</sup>*

Symptoms suffered by survivors—depression, anxiety, and post-traumatic stress disorder—and side effects of medication for these disorders may interfere with the client's ability to participate in their case. Clients may have difficulty remembering details of events. Their emotional reactions when recounting traumatic events may seem inappropriate. They may avoid discussion of the torture or other traumatic events.

Traditional indicators of credibility in U.S. courts—demeanor, eye contact, consistent recall of events—may be inaccurate. Both attorneys and adjudicators may jump to the conclusion that a torture survivor is lying. Counsel must understand the sequelae of symptoms that result from torture. The attorney also must develop evidence to present to the adjudicator that offsets a negative credibility finding.

There is no substitute for the work of a care team trained in working with torture survivors to help meet the client's medical, psychological, and social needs. Where such expertise is not available, attorneys may need to research providers who have sufficient training to assist their clients.

As Professor Angela McCaffrey discusses in her article, "Don't Get Lost in Translation: Teaching Students to Work With Interpreters," taking time to learn the basics of the home country's legal system and the social and political background of the client helps avoid misunderstandings, saves time and frustration, and more accurately conveys the client's story.<sup>17</sup>

Ensure that you and your client are using the same definition of a term. For example, a client maintained he had been arrested three times, but in the course of discussion with the attorney preparing his asylum application, he mentioned many other times when he

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<sup>16</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 82.

<sup>17</sup> Angela McCaffrey, "Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters," 6 *Clinical Law Review* 347, Spring 2000.



was held by the police. Eventually the client explained that when the attorney asked about “arrests,” he thought only of the three times he was held in prison for extended periods of time. The dozens of other times he was stopped by the police and detained for a few hours or days he regarded as “routine” and not worthy of mention.

### *Practice Tips for Representing Torture Survivors*

- Be prepared to hear your client’s story. Do background research about the country. Learn about the types of torture, repressive tactics, and persecution employed there.
- Build trust. Torture systematically destroys the ability to form trusting relationships.
- Do not judge the client. Shame and humiliation are hallmarks of torture. Be supportive. Own your emotions to your client if you react with disbelief or horror.
- Remain alert for signs of distress –PTSD, flashbacks, dissociation – and be ready to refer clients to supportive or emergency services.
- Understand that many symptoms of PTSD, depression, or physical complaints arising out of torture may interfere with the work of preparing the legal case. If possible, work with the client’s therapist, social worker, or psychologist to help the client cope with the necessary work.
- Remain alert for signs of secondary (vicarious) trauma to yourself. Understand that some emotional impact is a normal part of exposure to stories of trauma. Know when to limit exposure to stories of torture.

### *Summary*

Legal work on behalf of torture survivors provides both enormous professional satisfaction and great challenge. The basic tenets of professional responsibility go far toward building a successful working relationship with clients who have survived torture. In addition, by tailoring legal representation programs for torture survivors, structural barriers can be reduced to provide survivors with the greatest access to legal services. For those attorneys providing even occasional services to torture survivors, careful consideration of the particular needs of the survivor can enhance client-attorney communication, strengthen the record, and ultimately contribute to the success of the case.

### *Resources*

#### *Services for Survivors of Torture and War Trauma*

To locate services for victims of torture and war trauma, contact the National Consortium of Torture Treatment Programs at <http://ncttp.westside.com/default.view>: The National Consortium of Torture Treatment Programs website provides links to mental health services for torture victims in the United States.

The Center for Victims of Torture provides comprehensive services to residents of the Twin Cities Metro area in Minnesota. The Center serves approximately 250 clients each year. For intake information, clients should contact the Center directly at 612-436-4800 for intake or referral. For more information go to [www.cvt.org](http://www.cvt.org).

#### *Additional Resources*

Healing the Hurt: A Guide for Developing Services for Torture Survivors, is available online at [www.cvt.org](http://www.cvt.org). This article was adapted from Chapter 7: Legal Services, which addressed particular concerns when developing legal services for torture survivors seeking asylum.

The Lutheran Immigrant and Refugee Service's Detained Torture Survivor Legal Support Network is a nationwide network of legal service hubs for torture survivors held in immigration detention. They have produced a series of booklets, *Pocket Knowledge*, a 40-page booklet with practical information for individuals released from immigration detention. Available on-line in French, English, Spanish, and Arabic. [www.lirs.org/What/programs/torturesurvivor.htm](http://www.lirs.org/What/programs/torturesurvivor.htm).

[www.state.gov/g/drl/rls/hrrpt/](http://www.state.gov/g/drl/rls/hrrpt/): The U.S. Department of State issues annual reports on human rights practices around the world.

[www.amnesty.org](http://www.amnesty.org). Amnesty International documents human rights abuses, including the use of torture, in most countries.

[www.asylumlaw.org](http://www.asylumlaw.org): Free website run by an international consortium of agencies that help asylum seekers in Australia, Canada, the United States, and several countries in Europe. Provides links to legal and human rights resources, experts, and other information valuable for asylum seekers.

[www.law.northwestern.edu/cfjc/catresources/](http://www.law.northwestern.edu/cfjc/catresources/) Northwestern University School of Law, Bluhm Legal Clinic, Children and Family Justice Center, Convention Against Torture Resources. This site contains specific information about the effects of torture on children, child soldiers, children involved in gangs, and street children.

## REPRESENTING NON-CITIZENS WHO HAVE SUFFERED TORTURE OR TRAUMA

### Introduction

At some point in their careers, public defenders stand a good chance of working with immigrants who have suffered torture, severe human rights abuses, or war trauma prior to arriving in the United States. Such experiences can have profound implications for a client's interaction with law enforcement and the courts. In some circumstances, traumatized immigrants may be at greater risk of arrest, and experiences with law enforcement can exacerbate mental health problems related to traumatic stress. Unfortunately these problems often remain hidden, as many clients never talk about their past, and many legal professionals never ask.

The prevalence of traumatic stress from torture or severe human rights abuses is far more frequent than one might imagine. A survey of immigrant patients conducted at a public hospital in New York demonstrated that 5% of all foreign-born patients suffered from long-term medical or mental health problems related to torture or war. Immigrants in other major US cities are likely to be similarly affected. Chicago is home to many immigrants who fled wars and civil instability; our city hosts the largest Bosnian community outside of Europe, a very large Central American community, and a rapidly growing African immigrant population. In total, more than 200,000 Chicagoans fled wars or immigrated from countries with widespread human rights abuses, and there are probably at least 5,000 torture survivors in Chicago.

### Recognizing victims of torture or severe human rights abuses

People rarely volunteer information about torture, detention or war trauma. Many World War II veterans are only now talking about their experiences; it is far less likely that a recently arrived immigrant will discuss traumatic experiences with a public defender. During interactions with a client, public defenders should pay attention to the client's pre-immigration history and note psychological signs that may indicate a past history of trauma. Once trust is established, a client may talk about his or her personal history, or may talk about medical or mental health problems indicating a history of politically-motivated violence. The following signs and symptoms are warning signs that the client may have a traumatic past that is affecting current health or social functioning.

#### Personal history

- ☞ Immigrated from a country or region with a history of civil strife / human rights abuses. (Central America; the Balkans; Southeast Asia; West or Central Africa; Ethiopia, Sudan and Somalia; Turkey, Iran or Afghanistan, etc.)
- ☞ Exhibits reluctance to divulge experiences or personal history prior to arrival to the United States.
- ☞ Experienced imprisonment or detention, or cannot account for a period of time while living in a country with a poor human rights record.

- ☞ Was politically active or previously employed as a teacher, civil official, attorney, union organizer, or other high-profile position in society (although not all victims of abuses are prominent citizens).
- ☞ Lost family members, friends or neighbors due to conflict or political repression.

### Medical signs & symptoms

- ☞ Scarring to the head and/or extremities, small circular scars from cigarette burns, or limited range of motion from unhealed injuries. Occasionally scarring is a product of traditional practices and is not evidence of abuse.
- ☞ Persistent headaches; may complain of head injuries
- ☞ Neurological problems - numbness, weakness on one side or in a limb, damage to facial nerves.

### Psychological signs and symptoms

- ☞ Sleep disorders: Many clients find it especially difficult to sleep due to nightmares, or because they spontaneously wake up from stress.
- ☞ Depression: The client may complain of feeling “numb”, be socially isolated, and be unable to experience pleasure or visualize a more positive future. Clients may be tearful but more often present with a “flat affect” - monotone speech, lack of normal eye contact, lack of expression or expressiveness. This is usually accentuated when the client talks about traumatic events or the past.
- ☞ Anxiety: Clients often become noticeably anxious in response to one or more of a number of different stimuli - being in confined spaces, walking alone, seeing uniformed police, etc. Clients often complain of difficulty concentrating, and sometimes also exhibit an exaggerated startle response to loud noises or other unexpected events.
- ☞ Re-experiencing the event: Clients often experience flashbacks or intrusive memories of the abuse they endured. This may occur spontaneously but is also frequently triggered by having to talk about the past. Clients may become suddenly tearful, frightened or even mute, unable to explain what is wrong.
- ☞ Memory problems: Traumatic memories are overwhelmingly vivid and immediate; some clients fear these memories so much that they consciously or unconsciously block out parts of their past and will simply not talk about certain events or periods of time.

### **Implications for legal defense**

Torture and other severe human rights abuses can place an immigrant at greater risk of arrest, and can severely complicate the immigrant’s ability to act on his or her own behalf or cooperate with a defense attorney.

Post-traumatic stress disorder (PTSD) is the psychiatric diagnosis that most accurately encompasses the range of symptoms experienced by survivors of torture, human rights violations and war trauma. Although a diagnosis of PTSD has useful applications for defense attorneys, each person’s response to trauma and process of recovery is unique. PTSD should be understood

as a general diagnostic construct encompassing a very wide range of symptoms, not a well-defined mental illness like bipolar disorder or major depression.

The five key diagnostic criteria of PTSD are:

- ☞ depression
- ☞ anxiety
- ☞ avoidance of stimuli related to the traumatic event
- ☞ persistent psychological arousal (such as nightmares or exaggerated startle response)
- ☞ persistent re-experiencing of the traumatic event (such as intrusive memories or flashbacks)

Interaction with law enforcement can prompt several symptoms of PTSD. Torture survivors and war trauma survivors nearly always experience anxiety and try to avoid policemen, military personnel, or security officers. If confronted by law enforcement, even during a routine traffic stop, some may experience extreme anxiety or even a full-scale flashback. There is a risk that such an interaction could provoke “fight or flight” behavior, resulting in the client’s injury or arrest - regardless of guilt or innocence in a crime.

Memories may be distorted by trauma and clients may have difficulty describing a chronological sequence of events. A person may have a vivid memory of one specific event, but the details surrounding the event may change from interview to interview, undermining credibility. Clients may experience memory problems when recounting traumas that occurred prior to immigration, as well as subsequent traumas or flashbacks that occurred here in the United States.

Mental health problems related to trauma clearly affect a person’s ability to function in society and may be mitigating or explanatory factors that need to be taken into account during legal proceedings. Clients may fail to fulfill basic legal obligations due to depression or fear of the legal system. In particular, a past history of trauma is relevant in cases where an immigrant fails to appear in court. Trauma survivors sometimes have difficulty managing anger, or may be impulsive and take unnecessary risks. Although a history of trauma does not necessarily cause alcohol or drug abuse, survivors of torture or war trauma often have more severe substance abuse problems than non-affected immigrants.

Public defenders should anticipate difficulties establishing trust with traumatized clients, above and beyond the cultural difficulties inherent in working with immigrants. It will take time and good communication skills to effectively represent a traumatized immigrant, especially if the client is in detention.

- ☞ Victims of torture and other severe human rights abuses left countries in which there was either no judicial system at all, or a judiciary that failed to provide them with the most basic legal protections. They may not recognize any separation between defense and prosecution, not fully believe attorney-client privilege, and assume that the public defender will act on the state’s behalf rather than their own.

- ☞ In particular, torture survivors have especially great difficulty trusting others. Torture is used to silence and intimidate more often than to obtain information, so torture survivors find themselves isolated from their family, community and friends. Shame is also a central component of torture. People become ashamed of having lost control of themselves due to fear or pain, no matter how understandable their reaction may seem to an observer. If interrogation was part of the torture, the client may be ashamed of having provided information under duress about friends, relatives or co-workers to authorities. Torture very often involves rape and other sexual abuse - of men as well as women - which is always accompanied by some degree of shame. As a result, torture survivors are often very reluctant to discuss their experiences even after trust is established.

### **Interviewing victims of torture or human rights violations**

It is always stressful for the client to talk about experiences of torture or other violent events. The stress of recounting the experience is called “re-traumatization”, and an interview can provoke reactions ranging from discomfort to depression to full-scale flashbacks or suicidal behavior. It is important to pay attention to the reactions of the person you are interviewing and to know when to take a break and stop asking questions. Listening to accounts of torture or human rights violations can be stressful for the interviewer as well.

- ☞ Public defenders should be prepared to extend proceedings or ask for delays if it appears that the client is severely traumatized.
- ☞ Carefully explain attorney-client privilege and reinforce confidentiality frequently.
- ☞ Avoid using relatives as interpreters. If the client arrives with relatives and wishes them to be present during the interview, try to meet at least briefly with the client to check if he or she has anything to talk about without family members present.
- ☞ Interviews usually require privacy - but sometimes clients are more comfortable talking in a public place such as a coffee shop.
- ☞ The objective is not to interrogate the client, but help the client talk freely. Avoid situations that demonstrate an inequality of power - i.e. sitting behind a big desk, or using any sort of intimidating body language or speech. Try to sit in chairs facing each other, and take into consideration client’s preference for having the door open or closed, or adjusting other variables in the physical environment. Ask if he or she is comfortable.
- ☞ You may face legal deadlines and need information quickly. Even if you think it is in the client’s interest, or if you are frustrated, don’t try to force the client to talk or raise your voice. Better to explain why you need information and try to delay proceedings until you have established sufficient trust.
- ☞ Be aware that some clients may suspect others in the same immigrant group and the client may not be comfortable with the interpreter. Try to discuss this with the interpreter and the client separately.
- ☞ Try not to keep the client waiting as this often provokes anxiety and additional discomfort. Survivors of torture frequently report being forced to wait long periods of time during their detention and abuse.

### **For more help**

The effects of torture and other human rights abuses can be overwhelming, and the defense attorney may feel unable to effectively address the clients legal, emotional or emergency needs. Helping a client access services can improve the partnership between a defense attorney and the client. There are several mental health and social support providers in Chicago that specialize in services for immigrants and refugees:

#### **The Marjorie Kovler Center for the Treatment of Survivors of Torture**

1331 West Albion Avenue

Chicago, IL 60626

Phone: (773) 381-4070 (for general information)  
(773) 751-4035 or 4036 (for appointments)

Fax: (773) 381-4073

Email: [kovler@heartlandalliance.org](mailto:kovler@heartlandalliance.org)

Mission: Mental health, medical and case management services for torture survivors

#### Appropriate referrals:

- ☞ Persons who experienced torture or other exceptionally cruel punishment carried out by foreign governments, rebel movements or others acting in an official capacity, because of their political opinion, ethnicity, nationality, religious belief or membership in a social group.
- ☞ Immediate family members of torture survivors
- ☞ Immigration status is no bar to services

#### Inappropriate referrals:

- ☞ Survivors of torture inflicted by police or other officials in the US
- ☞ Clients with schizophrenia or other serious mental illnesses
- ☞ Perpetrators of torture or war crimes

#### **Refugee Mental Health Program**

4750 North Sheridan, Suite 300

Chicago, IL

773 271 1073 x 238 (to schedule an intake)

773 271 0601 (fax)

Contact: Buni Cocar

Mission: Mental health and case management services for refugees

#### Appropriate referrals:

- ☞ Refugees who have been in the United States less than 5 years who are suffering from war-related trauma, depression, or adjustment difficulties.
- ☞ Refugees with mental illnesses
- ☞ Age 18 and older

Inappropriate referrals:

- ☞ Undocumented or non-refugee immigrants
- ☞ US citizens

**FACES**

4750 North Sheridan, Suite 300  
Chicago, IL  
773 271 1073 x 235 (to schedule an intake)  
773 271 0601 (fax)  
Contact: Joan Liautaud or Nela Krasnjar

Mission: Mental health services for refugee and asylee children

Appropriate referrals:

- ☞ Children and teenagers who are refugees, asylees or political asylum applicants and are experiencing mental health problems or adjustment difficulties due to traumatic stress
- ☞ Minor children of refugee parents
- ☞ Children who meet the other criteria and have mental illnesses are eligible

Inappropriate referrals:

- ☞ Immigrant children or children of immigrant parents who have no history of war trauma, torture or other human rights abuses committed outside the United States.

**Community Counseling Centers of Chicago (C-4)**

4740 N. Clark St.  
Chicago, IL  
773 769 0205

Mission: Mental health services for Chicago residents

Appropriate referrals:

- ☞ Persons suffering from mental illness, traumatic stress or other mental health problems that do not fit in other listed programs

Inappropriate referrals:

- ☞ None



**CHAPTER**  
**2**

**Definition of “Conviction” for  
Immigration Purposes**

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**How is “Conviction” Defined by Immigration Law?**

Immigration law relating to non-citizens with criminal behavior has changed dramatically since 1996, with the most far-reaching changes in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>84</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).<sup>85</sup> Congress amended the definition of a “conviction” for immigration purposes through IIRAIRA.

Certain felony convictions and misdemeanor convictions can now permanently bar long-term permanent residents from remaining in the United States, even though they may have never served any time in jail, are married to U.S. citizens, and have U.S. citizen children.<sup>86</sup> The definition of conviction is also retroactive, and certain dispositions that did not render a non-citizen deportable at the time that they were entered may now be

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<sup>84</sup> See Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>85</sup> See Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>86</sup> See Michelle Chen, “Immigrants’ Stories Expose Murkiness of Deportation Laws,” *The New Standard*, [www.newstandardnews.net](http://www.newstandardnews.net), Feb. 1, 2007; Anthony Lewis, “Cruelty Without Mercy,” *The New York Times*, May 13, 2000, p. A19; Letter to Senator Max Cleveland from the Georgia State Board of Pardons and Paroles, Mar. 4, 2000, 77 *Interpreter Releases* 1078 (2000); Mike Dorning, “Petty Acts Now Haunt Immigrants; Deportations Soar Under 1996 Law,” *Chicago Tribune*, Feb. 20, 2000, p. 1.

deportable offenses. Much of the discretion that Immigration Judges previously had to grant relief from deportation for minor offenses was stripped away by the expansion of the retroactive definition of a conviction and the number of crimes now considered to be “aggravated felonies” for immigration purposes.<sup>87</sup>

The term “conviction” is defined for purposes of immigration law in I.N.A. § 101(a)(48), 8 U.S.C. § 1101(a)(48). This definition differs from the definition of a conviction under state and federal criminal statutes, and it impacts non-citizens in Illinois, Indiana, and Wisconsin criminal proceedings. Some dispositions not considered to be “convictions” under state law may be found to be convictions for immigration purposes, resulting in non-citizens being found deportable or inadmissible.<sup>88</sup>

To prove that a non-citizen has a “conviction” for immigration purposes, the DHS may offer the following: an official record of judgment and conviction; an official record of plea, verdict, and sentence; a docket entry from court records that indicates the existence of the conviction; official minutes of a court proceeding; a transcript of a court hearing in which the court takes notice of the existence of the conviction; or record of conviction or an abstract submitted by electronic means to ICE by a State or a court where the appropriate State official or by the court in which the conviction was entered certifies it as an official record and ICE certifies its electronic receipt.<sup>89</sup> If an FBI rap sheet reasonably indicates that a non-citizen has been convicted of a crime, the rap sheet may also be used as evidence of a conviction.<sup>90</sup> Different strategies and plea bargains may lead to or avoid deportation

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<sup>87</sup> See Anne J. Greer & Teresa L. Donovan, “Conviction as Defined Under the Immigration and Nationality Act: An Evolving Meaning,” 06-03 *Immigration Briefings* 1, Mar. 2006; Stacie Williams, “One Strike, You’re Out: Immigration Law in the U.S.A.,” *Extra*, [www.extranews.net](http://www.extranews.net), Sept. 1, 2005, p. 13.

<sup>88</sup> See e.g., 730 ILCS 5/5-6-1(c) (disposition of supervision); 720 ILCS 550/10 (first offender probation for cannabis), 720 ILCS 570/410 (first offender probation for controlled substance); IC 35-48-4-12 (first offender probation for possession of marijuana); Wis. Stat. § 961.47 (first offender probation for controlled substance and marijuana); see also, *Gill v. Ashcroft*, 335 F.3d 574 (7<sup>th</sup> Cir. Jul. 8, 2003) (holding that a first offender probation under 720 ILCS 570/410 is a conviction for immigration purposes).

<sup>89</sup> See I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B). Other evidence to prove a criminal conviction that may be offered by the DHS includes:

[a]n abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State’s repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence[;] [a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction[;] [or] [a]ny document or record attesting to the conviction that is maintained by an official of a State or Federal penal Institution, which is the basis for that Institution’s authority to assume custody of the individual named in the record.

See *id*; see also, *Dashto v. I.N.S.*, 59 F.3d 697 (7<sup>th</sup> 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). For a discussion regarding documentation that may be used by DHS to prove that a crime involves moral turpitude, see *Crimes Involving Moral Turpitude*, *infra* at 3-3.

<sup>90</sup> See *Rosales-Pineda v. Gonzales*, 452 F.3d 627, 631-32 (7<sup>th</sup> Cir. Jun. 19, 2006) (relying on 8 C.F.R. § 1003.41(d) to find that a rap sheet could be used where there was sufficient evidence to link the

consequences.

**Note: Police reports and the record of conviction.**

Police reports should not be admitted into the criminal court record. In some areas, police reports are routinely attached to complaints or “informations” that are filed with the criminal court. Often defendants will be asked to stipulate to the admission of facts in police reports which are then entered into the court record.

Once police reports are admitted into the criminal court record, they can be used by the DHS in immigration proceedings to establish facts supporting deportability or inadmissibility, such as the relationship of a victim to an offender for an assault conviction which has been pled down from domestic battery to an assault.<sup>91</sup> Although it is advantageous for defense counsel to obtain a copy of the police report that may be attached to a criminal complaint or information, defense counsel should move to strike the police report from the state court record.<sup>92</sup>

## Definition of “Conviction” and State Law

Where a formal judgment of guilt has been entered by a court as a result of a guilty plea or trial, it is clear that a non-citizen has a conviction for immigration purposes. However, where adjudication of guilt has been withheld, prongs (i) and (ii) of the definition must be carefully reviewed to determine whether the particular disposition meets the immigration definition of conviction. Prong (i) requires that: 1. a court find a non-citizen guilty; or 2. a non-citizen enter a plea of guilty, enter a plea of *nolo contendere*, or admit sufficient facts to warrant a finding of guilt.<sup>93</sup> Prong (ii) has been broadly defined. The Board of Immigration Appeals has defined the terms “punishment, penalty, or restraint on liberty” to include “incarceration, probation, a fine or restitution, a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver’s license,

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information regarding the offense to the non-citizen as evidence of a conviction to bar discretionary relief of adjustment of status and waivers under I.N.A. § 212(h), (i), 8 U.S.C. § 1182(h), (i) and stating that rap sheets may not always constitute sufficient evidence; also finding that because the non-citizen conceded deportability based on his two prior theft convictions, the Court of Appeals did not need to determine whether the rap sheet constituted clear and convincing evidence of a criminal conviction for a drug offense as required under I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B)).

<sup>91</sup> See *In re Sanudo*, 23 I&N Dec. 968 (BIA Aug. 1, 2006) (where narrative of police report not incorporated into the charging document or plea, it could not be considered in determining if noncitizen convicted of aggravated felony).

<sup>92</sup> See *Flores v. Ashcroft*, 350 F.3d 666, 671 (7<sup>th</sup> 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. *Tokatly v. Ashcroft*, 371 F.3d 613, 622-24 (9<sup>th</sup> Cir. Jun. 10, 2004) (rejecting the Seventh Circuit’s analysis in *Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> Cir. Nov. 26, 2003) and holding that to determine the “domestic” requirement of the conviction to establish deportability, the Immigration Judge cannot look at the facts behind the conviction other than the record of conviction as allowed by the modified categorical approach or to consider testimony of a non-citizen before the Immigration Judge); see also *In re Babaisakov*, 24 I. & N. Dec. 306 (BIA Sept. 28, 2007).

<sup>93</sup> See I.N.A. § 101(a)(48)(A)(i), 8 U.S.C. § 1101(a)(48)(A)(i).

deprivation of nonessential activities or privileges, or community service.”<sup>94</sup> Costs, surcharges and other assessments, which constitute a "penalty" or "punishment" within the criminal proceedings, are sufficient to meet the “punishment or penalty” prong of the immigration definition of conviction.<sup>95</sup>

<b>Definition of a Conviction</b> <b>I.N.A. § 101(a)(48), 8 U.S.C. § 1101(a)(48)<sup>96</sup></b>	
<b>(A)</b>	The term “conviction” means, with respect to an alien, a <b>formal judgment of guilt</b> of the alien entered by a court <b>or, if adjudication of guilt has been withheld</b> , where— <ul style="list-style-type: none"><li>(i) <b>a judge or jury has found the alien guilty</b> <i>or</i> the alien has entered a <b>plea of guilty</b> <i>or</i> <b>nolo contendere</b> <i>or</i> <b>has admitted sufficient facts to warrant a finding of guilt</b>,</li><li style="text-align: center;"><i>and</i></li><li>(ii) the judge has ordered some form of <b>punishment, penalty, or restraint on the alien’s liberty</b> to be imposed.</li></ul>
<b>(B)</b>	Any reference to a <b>term of imprisonment</b> of a sentence with respect to an offense <b>is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment</b> or sentence in whole or in part.

Illinois and Indiana law generally require that a defendant enter a plea of guilty, guilty but mentally ill, or not guilty at the arraignment.<sup>97</sup> Similarly, Wisconsin law requires a plea of not guilty, guilty, nolo contendere (no contest), or not guilty by reason of mental disease or defect.<sup>98</sup>

<sup>94</sup> See *In re Ozkok*, 19 I&N Dec. 546, 551 (BIA Apr. 26, 1988); see also, *Molina v. I.N.S.*, 981 F.2d 14, 18 (1st Cir. Dec. 4, 1992) (sustaining the INS interpretation of “conviction” to include probation ordered by a judge in a deferred adjudication).

<sup>95</sup> See *In re Cabrera*, 24 I&N Dec. 459 (BIA Feb. 27, 2008).

<sup>96</sup> [Emphasis in bold and italics added by the author.]

<sup>97</sup> See 725 ILCS 5/113-4(a); 725 ILCS 5/113-4.1 (allowing plea of nolo contendere in addition to a plea of guilty or not guilty for a violation of the Illinois Income Tax Act); 720 ILCS 570/410 (requiring a guilty plea or a finding of guilt without entry of a judgment before placing a defendant on first offender probation for a controlled substance violation); 720 ILCS 550/10 (first offender probation for a cannabis violation); IC 35-35-1-1; IC 35-35-2-1; IC 35-48-4-12 (first offender probation for controlled substances).

<sup>98</sup> See Wis. Stat. § 971.06; Wis. Stat. § 961.47 (first offender probation for controlled substance and marijuana).

The Board of Immigration Appeals has interpreted the statutory definition of “conviction” to mean that no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.<sup>99</sup> The Seventh Circuit Court of Appeals affirmed the Board’s interpretation and held that a state disposition for first offender probation for a controlled substance offense constituted a conviction for immigration purposes, even though it was not a conviction under Illinois law as the charge was dismissed upon completion of probation.<sup>100</sup>

Thus, in a proceeding where a defendant has pled guilty or a finding of guilt has been made but a judgment of guilt has not been entered and the defendant successfully completes probation, the plea will be discharged and dismissed, with the result that he will not have a conviction under state law.<sup>101</sup> For a non-citizen defendant, however, where a judgment of guilt has not been entered but both prongs (i) and (ii) of the immigration definition of conviction have been met, a non-citizen will have a conviction for immigration purposes even though he does not have a conviction under state law.<sup>102</sup> An Alford plea will be treated as a guilty plea or admission of sufficient facts to fit the immigration definition of conviction because an Alford plea in essence means that the non-citizen maintains his innocence but admits that he could be found guilty of the alleged crime.<sup>103</sup> Where a general court-martial of the U.S. Armed Forces has entered a judgment of guilt against a non-citizen, the non-citizen will have a conviction for immigration purposes.<sup>104</sup>

An exception to a conviction for immigration purposes may exist for violations under county or municipal ordinances. For example, where a non-citizen has been found guilty of

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<sup>99</sup> See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999) (overruling *In re Luviano*, 21 I&N Dec. 235 (BIA Feb. 29, 1996); *In re Ibarra-Obando*, 12 I&N Dec. 576 (A.G. Dec. 28, 1967); *In re G-*, 9 I&N Dec. 159 (A.G. Jan. 17, 1961)). Juvenile dispositions of delinquency are generally not considered convictions for immigration purposes. See *Juveniles and Immigration Consequences*, *infra* at 5-1; *In re Devison* 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001); *In re De La Nues*, 18 I&N Dec. 140 (BIA Oct. 5, 1981); *In re Ramirez-Rivero*, 18 I&N Dec. 135 (BIA Oct. 5, 1981); 22 C.F.R. § 40.21(a)(2) (1998).

<sup>100</sup> See *Gill v. Ashcroft*, 335 F.3d 574 (7<sup>th</sup> Cir. Jul. 8, 2003) (finding that an Illinois disposition under 270 ILCS 470/410 which was dismissed pursuant to the state rehabilitative statutory scheme, and not because of any procedural or substantive defect in the conviction, remained a conviction for immigration purposes); see also, *Ramos v. Gonzales*, 414 F.3d 800, 803-6 (7<sup>th</sup> Cir. Jul. 12, 2005) (holding that a *nunc pro tunc* order of expungement did not eliminate a conviction for controlled substance offense for immigration purposes, even where the state court indicated in its order that the expungement was not being granted based on rehabilitative efforts of the non-citizen).

<sup>101</sup> See 730 ILCS 5/5-6-1(c); 730 ILCS 5/5-6-3.1(f); see also, 720 ILCS 570/410; 720 ILCS 550/10; IC 35-48-4-12; Wis. Stat. § 961.47.

<sup>102</sup> See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999); *In re Punu*, 22 I&N Dec. 224 (BIA Aug. 18, 1998).

<sup>103</sup> See *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (Nov. 23, 1970) (holding that a defendant may plead guilty while continuing to proclaim his innocence if he intelligently concludes that his innocence requires the entry of a guilty plea and the record before the judge contains strong evidence of actual guilt); *People v. Church*, 778 N.E.2d 251, 256 (Ill.App.3d Oct. 2, 2002) (finding that an Alford plea as understood in federal criminal practice is not available to a criminal defendant in Illinois other than in cases involving violation of the Illinois Income Tax Act, but holding that the criminal plea was properly accepted as a guilty plea).

<sup>104</sup> See *In re Rivera-Valencia*, 24 I&N Dec. 484 (BIA Apr. 2, 2008).

a “violation” under state law in which the state need only prove guilt by “a preponderance of the evidence instead of ‘beyond a reasonable doubt,’” he is not entitled to a jury trial and need not be provided an attorney at no expense, he has not been “convicted” for purposes of immigration law.<sup>105</sup> Where a petty offense does not carry the right to a jury trial and if no term of imprisonment will or may be imposed, then a defendant does not have the right to appointed counsel in the proceedings.<sup>106</sup>

**Note:** Where a non-citizen has been charged with a local ordinance violation, review the ordinance in effect and other applicable ordinances and law to determine whether:

1. The state must prove guilt beyond a reasonable doubt;
2. The non-citizen is entitled to a jury trial; and
3. The non-citizen has a right to an attorney to represent him at no expense.

If the answer to all of the above questions is “yes”, then he will have a “conviction” for immigration purposes.

In addition, court orders granting post-conviction motions based on statutory and/or constitutional defects in the underlying criminal court proceedings have been deemed effective to eliminate the grounds of inadmissibility and deportability.<sup>107</sup> However, where

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<sup>105</sup> See *In re Eslamizar*, 23 I&N Dec. 684, 687-688 (BIA Oct. 19, 2004) (citing case law that each element of an offense or crime must be proved beyond a reasonable doubt). See e.g., *Lewis v. U.S.*, 518 U.S. 322 (Jun. 24, 1996); *Scott v. Illinois*, 440 U.S. 367 (Mar. 5, 1979).

<sup>106</sup> See e.g., *Lewis v. U.S.*, 518 U.S. 322 (Jun. 24, 1996); *Scott v. Illinois*, 440 U.S. 367 (Mar. 5, 1979).

<sup>107</sup> See *Sandoval v. I.N.S.*, 240 F.3d 577, 580 (7<sup>th</sup> Cir. Feb. 12, 2001); *In re Adamiak*, 23 I&N Dec. 878 (BIA Feb. 8, 2006) (holding that a motion to vacate a conviction granted based on the failure of the state court to advise a non-citizen defendant of the possible immigration consequences of a guilty plea as required by Ohio statute was valid for immigration purposes). See also, *Segura v. State*, 749 N.E.2d 496 (Ind. Jun. 26, 2001) (holding that the failure of defense counsel to advise a defendant that deportation may follow as a consequence of a conviction may constitute deficient performance sufficient to support a claim of ineffective assistance of counsel under the Indiana Constitution and the Sixth Amendment to the U.S. Constitution and listing out the factors to be considered, including counsel’s knowledge of defendant’s status as an alien, defendant’s familiarity with the consequences of conviction, severity of criminal penal consequences, and the likely subsequent effects of deportation); *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. Oct. 11, 1994) (holding that the failure to advise a non-citizen defendant about the deportation consequences of a guilty plea constitutes ineffective assistance of counsel); *People v. Correa*, 108 Ill. 2d 541 (Sept. 20, 1985) (granting motion for post-conviction relief based on affirmative misadvice by defense counsel which was found to be ineffective assistance of counsel); 725 ILCS 5/113-8 (guilty plea advisory for IL); Wis. Stat. 971.08(1)-(2); *State v. Dawson*, 2004 WI App. 173 (Wis.App. Aug. 19, 2004) (holding that a trial court does not have authority to “reopen and amend” a prior conviction); *State v. Lagundoye*, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004) (holding the rule announced in *State v. Douangmala*, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002), finding that the harmless error rule in Wis. Stat. § 971.26 did not apply to Wis. Stat. § 971.08(1)(c) and Wis. Stat. § 971.08(2), does not apply retroactively to a non-citizen defendant who had exhausted his direct appeal rights prior to the date of the Doungmala decision); *State v. Douangmala*, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002) (overruling the harmless error requirement announced in *State v. Chavez*, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) for motions to withdraw pleas where the requisite pre-plea advisory under Wis. Stat. § 971.08(1)(c) was not given by the state court); *State v. Chavez*, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) (holding that a non-citizen defendant had to demonstrate the absence of

post-conviction relief has been granted by a state court solely to eliminate the immigration consequences of a conviction without an underlying statutory or constitutional defect, the state court order has not been given full faith and credit for purposes of federal immigration law, which deems the non-citizen as convicted of the offense vacated by the state court.<sup>108</sup>

<b>Non-Citizen Pleas and Sentencing Dispositions: Are They Considered Convictions under Immigration Law?</b>			
<b>Type of Plea, Admission, or Finding</b>  (*Dispositions that only apply to particular states are noted)	<b>Guilty Plea, Admission of Facts, or Finding Of Guilt</b>	<b>+ Punishment, Penalty or Restraint on Liberty<sup>109</sup></b>	<b>= Immigration Conviction?</b>
Guilty plea with a sentence of probation	Yes	Yes	Yes
Guilty plea with a sentence of conditional discharge	Yes	Yes	Yes
Guilty plea with a sentence of supervision (Illinois)	Yes	Yes	Yes
Guilty plea with a sentence of a term of imprisonment	Yes	Yes	Yes
Guilty but mentally ill plea with a sentence of probation	Yes	Yes	Yes
Guilty but mentally ill plea with a sentence of conditional discharge	Yes	Yes	Yes
Guilty but mentally ill plea with a sentence of supervision (Illinois)	Yes	Yes	Yes

the advisal by the state court, the likelihood of immigration consequences, and the fact that he was actually unaware of the immigration consequences of his plea); *State v. Issa*, 186 Wis.2d 199, 519 N.W.2d 741 (Wis. Ct. App. Jun. 28, 1994) (holding that the presence of immigration consequences in a plea questionnaire alone is not sufficient to show that a defendant was aware of the immigration consequences if the non-citizen defendant did not speak English); *State v. Chavez*, 175 Wis.2d 366, 498 N.W.2d 887 (Wis. Ct. App. Mar. 16, 1993) (holding that a non-citizen defendant must demonstrate that he was unaware of the risk of deportation based on his plea under the harmless error rule).

<sup>108</sup> See *Ali v. Ashcroft*, 395 F.3d 722 (7<sup>th</sup> Cir. Jan. 11, 2005) (finding that where a Wisconsin conviction for drug trafficking was vacated solely for immigration purposes, the non-citizen remained convicted of drug trafficking for immigration purposes); *In re Pickering*, 23 I&N Dec. 621 (BIA Jun. 11, 2003).

<sup>109</sup> The form of punishment, penalty or restraint on liberty must be ordered by a judge. A “penalty” includes fines and court costs. “Restraint on liberty” includes supervision, probation and any term of imprisonment.

**Non-Citizen Pleas and Sentencing Dispositions:  
Are They Considered Convictions under Immigration Law?**

<b>Type of Plea, Admission, or Finding</b>  <b>(*Dispositions that only apply to particular states are noted)</b>	<b>Guilty Plea, Admission of Facts, or Finding Of Guilt</b>	<b>+ Punishment, Penalty or Restraint on Liberty<sup>109</sup></b>	<b>= Immigration Conviction?</b>
Guilty but mentally ill plea with a sentence to a term of imprisonment	Yes	Yes	Yes
Not guilty by reason of insanity	No	No	No
Finding of not guilty by a jury or court	No	No	No
Nolo contendere (no contest) with a sentence of probation (Wisconsin)	Yes	Yes	Yes
Nolo contendere with a sentence of a term of imprisonment (Wisconsin)	Yes	Yes	Yes
Stipulation to Facts with a sentence of probation	Yes	Yes	Yes
Stipulation to facts with a sentence of conditional discharge	Yes	Yes	Yes
Stipulation to facts with a sentence of supervision (Illinois)	Yes	Yes	Yes
Stipulation to facts with a sentence to a term of imprisonment	Yes	Yes	Yes
Finding of guilt with a sentence of probation	Yes	Yes	Yes
Finding of guilt with a sentence of conditional discharge	Yes	Yes	Yes
Finding of guilt with a sentence of supervision (Illinois)	Yes	Yes	Yes
Finding of guilty with a sentence to a term of imprisonment	Yes	Yes	Yes



**Non-Citizen Pleas and Sentencing Dispositions:  
Are They Considered Convictions under Immigration Law?**

<b>Type of Plea, Admission, or Finding</b>  (*Dispositions that only apply to particular states are noted)	<b>Guilty Plea, Admission of Facts, or Finding Of Guilt</b>	<b>+ Punishment, Penalty or Restraint on Liberty<sup>109</sup></b>	<b>= Immigration Conviction?</b>
Finding of guilt but mentally ill plea with a sentence of probation	Yes	Yes	Yes
Finding of guilt but mentally ill plea with a sentence of conditional discharge	Yes	Yes	Yes
Finding of guilt but mentally ill plea with a sentence of supervision (Illinois)	Yes	Yes	Yes
Finding of guilty but mentally ill plea with a sentence to a term of imprisonment	Yes	Yes	Yes
Nolo contendere plea (violations of Illinois Income Tax Act, 725 ILCS 5/113-4.1)	Yes (taken as guilty plea)	Yes	Yes
Alford plea with probation or a term of imprisonment	Yes (taken as guilty plea)	Yes	Yes
Guilty Plea OR Finding of Guilt with a sentence of first offender probation for a controlled substance offense pursuant to 720 ILCS 570/410 or Wis. Stat. § 961.47	Yes	Yes	Yes
Guilty Plea OR Finding of Guilt with a sentence of first offender probation for possession of marijuana pursuant to 720 ILCS 550/10, IC 35-48-4-12, or Wis. Stat. § 961.47	Yes	Yes	Yes
Case is pending and no plea has been entered	No	No	No

**Non-Citizen Pleas and Sentencing Dispositions:  
Are They Considered Convictions under Immigration Law?**

<b>Type of Plea, Admission, or Finding</b>  (*Dispositions that only apply to particular states are noted)	<b>Guilty Plea, Admission of Facts, or Finding Of Guilt</b>	<b>+ Punishment, Penalty or Restraint on Liberty<sup>109</sup></b>	<b>= Immigration Conviction?</b>
Withdrawal of a guilty plea, an Alford plea, or a plea of nolo contendere within the statutorily permitted period	No	No	No
Pre-trial diversion for a misdemeanor offense other than a DUI or motor vehicle offense. IC 33-39-1-8. (Indiana)	No	Yes	No
Deferred prosecution with plea of guilty or no contest and conditions for a specified period (Wisconsin)	Yes	Yes	Yes

**Impact of the Immigration Definition of “Conviction” on State Dispositions**

If a defendant is charged with a crime other than a Class A misdemeanor or a felony, an Illinois circuit court may defer proceedings and enter an order for supervision of the defendant upon a plea of guilty or a stipulation by the defendant to facts supporting the charge or a finding of guilt.<sup>110</sup> A disposition of supervision under Illinois statute meets the definition of conviction for immigration purposes because the non-citizen enters a plea of guilty (or stipulates to facts supporting the charge or a finding of guilt) and a judge has imposed a period of supervision. Likewise, where a plea of guilty, a stipulation by the defendant to the facts supporting the charge, or a finding of guilt has been entered and a sentence of probation or conditional discharge has been imposed, a non-citizen will have a conviction for immigration purposes.<sup>111</sup>

In Indiana, pre-trial diversion may be a viable alternative for non-citizens charged with certain misdemeanor offenses. Pre-trial diversion does not involve or require an admission of guilt, admission of the elements or facts of the offense, or adjudication of

<sup>110</sup> See 730 ILCS 5/5-6-1(c).

<sup>111</sup> See 730 ILCS 5/5-6-1(a)-(b); Wis. Stat. § 973.09; IC 35-38-2-1; IC 35-38-2-1.8; IC 35-38-2-2.3; IC 35-38-2-3.

guilt.<sup>112</sup> Rather, the defendant agrees to the conditions of a pretrial diversion program offered by the prosecutor and signs an agreement with the prosecutor, which is then filed with the state court.<sup>113</sup> Prosecution of the defendant is withheld and, if the non-citizen completes the agreement, then the charge is dismissed.<sup>114</sup>

A deferred prosecution agreement under Wisconsin law may constitute a conviction under I.N.A. §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A). For a non-citizen to be placed into a volunteer probation program, he must plead guilty or nolo contendere to the charge and will be subject to conditions imposed by the court while the sentence or judgment of conviction is withheld.<sup>115</sup> Similar requirements exist for other deferred prosecution programs.<sup>116</sup> The requirements for each county's program must be evaluated against the immigration definition of a conviction.

In addition, state first offender probation for controlled substance offenses will also result in a conviction for immigration purposes. For example, in order to qualify for 410 first offender probation in Illinois, a plea of guilty or a finding of guilt is required before the court places the defendant on probation.<sup>117</sup> When a defendant successfully completes 410 probation, the court discharges him and dismisses the criminal proceedings; thus, a defendant will not have a conviction under Illinois law.<sup>118</sup> Wisconsin has a similar first offender provision known as conditional discharge for possession of a controlled substance as a first offense.<sup>119</sup> However, both the Illinois and Wisconsin statutes are considered to be rehabilitative statutes and a non-citizen defendant who is placed on first offender probation will have a conviction for immigration purposes.<sup>120</sup> Similarly, a non-citizen defendant who receives first offender probation for a cannabis violation under 720 ILCS 550/10, IC 35-48-4-12, or Wis. Stat. § 961.47 will have a conviction for immigration purposes.<sup>121</sup> Indiana does not have a first offender provision for controlled substance offenses other than marijuana.<sup>122</sup>

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<sup>112</sup> See IC 33-39-1-8.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See Wis. Stat. § 973.11.

<sup>116</sup> See Wis. Stat. § 971.37; Wis. Stat. § 971.38; Wis. Stat. § 971.39.

<sup>117</sup> See 720 ILCS 570/410(a); see also, 720 ILCS 550/10 (possession of cannabis); IC 35-48-4-12 (possession of cannabis); Wis. Stat. § 961.47 (possession of cannabis and other controlled substances).

<sup>118</sup> See 720 ILCS 570/410(f)-(g).

<sup>119</sup> See Wis. Stat. § 961.47 (requiring a plea or finding of guilty to defer proceedings and place an offender on probation; upon completion of the probationary period, the court shall discharge the offender and dismiss the charge).

<sup>120</sup> See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999); *Gill v. Ashcroft*, 335 F.3d 574 (7<sup>th</sup> Cir. Jul. 8, 2003) (holding that a first offender probation under 720 ILCS 570/410 is a conviction for immigration purposes).

<sup>121</sup> See 720 ILCS 550/10; I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (grounds of deportability and an exception for simple possession of 30 grams or less of marijuana); 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) (grounds of inadmissibility and a limited waiver for simple possession of 30 grams or less of marijuana).

<sup>122</sup> Whether a disposition for first offender status under the Federal First Offender Act (FFOA) in federal district court constitutes a conviction for immigration purposes has not been decided by the Seventh Circuit or the BIA. See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999). The Seventh Circuit has, however, indicated that a disposition under the FFOA may still count as a conviction for

Contrary to the immigration consequences for dispositions under the first offender probation provisions of state law, an order to complete “drug school” should not result in a conviction for immigration purposes as long as a non-citizen does not enter a guilty plea, nolo contendere plea, or admit to facts regarding the offense before the court. Some localities also have “drug courts”, including 23 such county court programs in Illinois<sup>123</sup> and 28 drug courts in Indiana.<sup>124</sup> Each county or local program’s requirements must be compared to the immigration definition of conviction under I.N.A. §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A) to determine whether a non-citizen will be deemed to have a “conviction” for immigration purposes.<sup>125</sup>

## Sentencing under State Law

Immigration consequences may differ for state convictions depending upon whether an indeterminate or a determinate sentencing scheme was in effect at the time of sentencing.<sup>126</sup> In *In re S-S*,<sup>127</sup> the Board of Immigration Appeals interpreted I.N.A. § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48), by clarifying that a criminal sentence includes a suspended sentence. The Board applied the new definition and held that a suspended sentence for an indeterminate term not to exceed five years under an Iowa statute was a five year sentence.<sup>128</sup> The sentencing scheme in this case was an indeterminate sentencing scheme.<sup>129</sup>

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immigration purposes. See *Gill v. Ashcroft*, 335 F.3d 574, 578-79 (7<sup>th</sup> Cir. Jul. 8, 2003); *Ramos v. Gonzales*, 414 F.3d 800, 806 (7<sup>th</sup> Cir. Jul. 12, 2005). The Ninth Circuit Court of Appeals has ruled that a disposition under the FFOA and state equivalents of the FFOA are not convictions under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). See *Lujan-Armendarez v. I.N.S.*, 222 F.3d 728 (9<sup>th</sup> Cir. Aug. 1, 2000).

<sup>123</sup> See, e.g., Tona Kunz, “Drug court comes out from under the veil,” *Daily Herald*, May 14, 2007 (describing the drug court system in Kane County, Illinois); Illinois Association of Drug Court Professionals, [www.iadcp.org/Courts.asp](http://www.iadcp.org/Courts.asp), listing drug courts and their contact information in the Illinois counties of Champaign, Coles, Cook (adult and juvenile), Dekalb, DuPage, Effingham, Grundy, Jersey, Kane (adult and juvenile), Kankakee, Knox, Lake, Lee, Macon, Madison, Mclean, Morgan, Peoria (adult and juvenile), Pike, Rock Island, Saline, St. Clair, Vermilion, Will (adult and juvenile), and Winnebago.

<sup>124</sup> See Indiana Judicial Center, “Drug Court Background,” available at <http://www.in.gov/judiciary/pscourts/drugcourts/background.html>.

<sup>125</sup> See Definition of Conviction, *supra* at 2-3.

<sup>126</sup> In an indeterminate sentencing scheme, the state court imposes a sentence by ordering that the defendant be committed to the Department of Corrections or a similar agency for an indeterminate period, i.e. zero to five years. The Department of Corrections then determines the length of the sentence that the defendant will serve. In a determinate sentencing scheme, the state court will follow the sentencing guidelines mandated by the legislature and established by the sentencing commission to impose a sentence of a specific period of time. The state court has the discretion to depart durationally and/or dispositionally from the guidelines based on aggravating or mitigating factors but will impose a determinate sentence, i.e. two years.

<sup>127</sup> See *In re S-S*, 21 I&N Dec. 900 (BIA May 6, 1997).

<sup>128</sup> See *id.* at 5; see also, *In re D-*, 20 I&N Dec. 827 (BIA Jun. 24, 1994).

<sup>129</sup> See *id.*

Wisconsin uses both determinate and indeterminate sentencing.<sup>130</sup> Illinois convictions entered prior to 1978 were sentenced under an indeterminate sentencing scheme.<sup>131</sup> Therefore, the Board's decision in *In re S-S*, *supra*, will apply to Wisconsin convictions for which indeterminate sentences are imposed and Illinois convictions entered prior to the 1978.

Indiana uses determinate sentencing.<sup>132</sup> Since 1978, Illinois has had a determinate sentencing scheme.<sup>133</sup> Under the present sentencing provisions, a state circuit court shall place a defendant on probation or conditional discharge unless the court determines that imprisonment or periodic imprisonment is necessary to protect the public, probation or conditional discharge would deprecate the seriousness of the conduct and be inconsistent with the ends of justice, or such action is specifically prohibited by statute.<sup>134</sup>

Where the circuit court does not impose a term of imprisonment, the court reserves the right to later impose or pronounce a term of imprisonment should the defendant violate the terms of probation, including a sentence to the statutory maximum.<sup>135</sup> If a court determines that the defendant has violated a condition of probation, conditional discharge,

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<sup>130</sup> See Wis. Stat. § 973.01 (bifurcated sentence of imprisonment and extended supervision); Wis. Stat. § 973.013 (indeterminate sentence); Wis. Stat. § 973.03 (determinate jail sentence).

<sup>131</sup> See The Unified Code of Corrections, Pub. Act No. 77-2097, 192 Ill. Laws 758-838 (codified at Ill. Rev. Stat. Ch. 38 §§ 1001-1-1 to 1008-6-1 (1973); Criminal Code of 1961, 1961 Ill. Laws 1983-2049 (codified at Ill. Rev. Stat. Ch. 38 §§ 1-1 to 35-1 (1961); H.B. 103, 62d Ill. Gen. Assem., 1<sup>st</sup> Sess., 1941 Ill. Laws. 560 (amending Ill. Rev. Stat. Ch. 38 § 802 (1941)); Sentence, Commitment, and Parole Act of 1917, H.B. 1029, 1917 Ill. Laws. 353; Ill. Rev. Stat. Ch. 38 § 498(1) (1920); 1895 Ill. Laws 158 (codified at Ill. Rev. Stat. Ch. 38 §§ 498-509 (1895)). For additional history about indeterminate sentencing in Illinois in the 1800s, see Gregory W. O'Reilly, "Truth-in-Sentencing: Illinois Adds Yet Another Layer of "Reform" to Its Complicated Code of Corrections," 27 *Loy. U. Chi. L.J.* 985, 989-990 (Summ. 1996).

<sup>132</sup> See IC 35-50-1-1.

<sup>133</sup> See Pub. Act No. 80-1099, 1977 Ill. Laws 3264-3368 (codified as amended in different sections of Ill. Rev. Stat. Ch. 38 (1979)); 730 ILCS 5/5-8-1; 730 ILCS 5/5-8-3. For a discussion about amendments to sentencing laws subsequent to 1978, see Gregory W. O'Reilly, "Truth-in-Sentencing: Illinois Adds Yet Another Layer of "Reform" to Its Complicated Code of Corrections," 27 *Loy. U. Chi. L.J.* 985, 993-1023 (Summ. 1996).

<sup>134</sup> See 730 ILCS 5/5-6-1(a). Periodic imprisonment is an alternative to a traditional term of imprisonment and can consist of 48 hour periods of custody on weekends or during the week. See 730 ILCS 5/5-3(b)(2).

<sup>135</sup> See 730 ILCS 5/5-6-4(e); 730 ILCS 5/5-5-3(b); 730 ILCS 5/5-6-4.1. It is important to note that the term "sentence" has a different meaning under Illinois law than it does under the Immigration and Nationality Act. For example, a sentence is defined under 730 ILCS 5/5-1-20 as "the disposition imposed by the court on a convicted defendant." Under 730 ILCS 5/5-5-3(b), a disposition may include a period of probation, a term of periodic imprisonment, a term of conditional discharge, a term of imprisonment, a fine, an order for restitution, a sentence of participation in "boot camp," or an order to clean up and repair damage. A period of probation is thus defined as a disposition and a sentence under Illinois statute. However, a term of imprisonment of sentence has been defined by the Board of Immigration Appeals as a term of imprisonment which has been imposed upon a defendant. See *In re S-S*, 21 I&N Dec. 900 (BIA May 6, 1997). Therefore, a sentence of probation for one year where a term of imprisonment has not been imposed will not be deemed to be a sentence of one year for purposes of immigration law relating to the definition of aggravated felony or grounds of inadmissibility. See *Aggravated Felonies and case law, infra* at 3-34; *Grounds of Inadmissibility, infra* at 4-1.

or supervision, the court can continue the existing order or impose any other sentence that was available at the time of the initial sentencing under 730 ILCS 5/5-5-3.<sup>136</sup>

Where a defendant has been convicted of a felony or a misdemeanor offense, is an alien as defined by the Immigration and Nationality Act, and has a final order of deportation entered against him, a circuit court may hold the sentence in abeyance upon motion of the State's Attorney and remand the defendant to the custody of the U.S. Attorney General for deportation where his deportation would not deprecate the seriousness of the conduct nor be inconsistent with the ends of justice.<sup>137</sup> Similarly, where a defendant sentenced for a felony, a misdemeanor, or 410 probation for a controlled substance offense, the circuit court may, upon motion by the State's Attorney to suspend the sentence imposed, commit the defendant to the custody of the U.S. Attorney General for deportation.<sup>138</sup> If the non-citizen returns to the U.S. after being deported, the circuit court may impose any sentence that was available under 730 ILCS 5/5-5-3 at the time of the initial sentencing.<sup>139</sup>

### ***Boot Camp and Non-Citizens***

An Illinois state court may sentence a defendant to the "impact incarceration program," an alternative to prison which is based on the concept of a military basic training program or "boot camp."<sup>140</sup> Wisconsin has a similar program called the "challenge incarceration program."<sup>141</sup> Indiana does not have a boot camp program.

In order to recommend that a defendant be placed in boot camp, the Illinois state court must first impose a definite term of imprisonment. A sentence to "boot camp" is not, however, a viable option for non-citizen defendants. Once a non-citizen defendant is transferred to the Illinois Department of Corrections' booking center in Joliet, Illinois, or reports to serve his sentence at the booking center, the Illinois Department of Corrections will screen him for placement in the program.<sup>142</sup> Part of the process includes a review of a prisoner's place of birth and immigration status where he is not a U.S. citizen; if he is not a U.S. citizen, then contact with the DHS will be made, if a detainer has not already been placed on him. At that point, the Illinois Department of Corrections may consider additional factors beyond those listed in the statute, such as whether there is a DHS detainer or other outstanding warrant against the non-citizen.<sup>143</sup>

Once the DHS has placed a detainer on the non-citizen, he will be deemed ineligible by the Illinois Department of Corrections to participate in boot camp and will be subject to serve the entire term of imprisonment or sentence as imposed upon him by the sentencing

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<sup>136</sup> See 730 ILCS 5/5-5-3.

<sup>137</sup> See 730 ILCS 5/5-5-3(l)(A).

<sup>138</sup> See 730 ILCS 5/5-5-3(l)(B).

<sup>139</sup> See 730 ILCS 5/5-5-3(l)(D).

<sup>140</sup> See 730 ILCS 5/5-8-1.

<sup>141</sup> See Wis. Stat. § 302.045.

<sup>142</sup> See Ill. ADMIN. CODE § 460.30(a).

<sup>143</sup> See 730 ILCS 5/5-8-1.1(b)(2); see also *Solorzano-Patlan v. INS*, 207 F.3d 869, 871 & n.4 (7<sup>th</sup> Cir. Mar. 10, 2000) (noting that the Illinois Department of Corrections has rejected non-citizen offenders recommended for boot camp by the sentencing court).

court. The term of imprisonment considered for immigration purposes is the entire term of imprisonment initially ordered, not the boot camp period ordered. This sentence to a term of imprisonment may also have dramatic immigration consequences because the conviction may be found to be an aggravated felony based on the length of the sentence.<sup>144</sup>

Thus, it is not in the interest of a non-citizen to agree to accept a sentence to boot camp when he will not be eligible to participate in it once he arrives at the Department of Corrections facility. In addition, counsel may face an ineffective assistance of counsel claim by his non-citizen client in a post-conviction petition to vacate a guilty plea with severe immigration consequences.

### Classification and Sentencing Ranges for State Offenses

Classification of Offense	Possible Term of Imprisonment	Fines	Probation/ Conditional Discharge
<b>ILLINOIS</b>			
<b>FELONY</b>	730 ILCS 5/5-8-1(a)(1)-(7)	730 ILCS 5/5-9-1(a)(1)	730 ILCS 5/5-6-2(b)(1)-(2)
First degree murder	Not less than 20 years and not more than 60 years.	\$25,000 or the amount specified in the offense, whichever is greater. Where the offender is a corporation, \$50,000 or the amount specified in the offense, whichever is greater.	Not available.
Second degree murder	Not less than 4 years and not more than 20 years.	Same as above.	Not available.
Class X	Not less than 6 years and not more than 30 years.	Same as above.	Not available.
Class 1 (other than second degree murder)	Not less than 4 years and not more than 15 years.	Same as above.	Probation or conditional discharge not to exceed 4 years.
Class 2	Not less than 3 years and not more than 7 years.	Same as above.	Probation or conditional discharge not to exceed 4 years.
Class 3	Not less than 2 years and not more than 5 years.	Same as above.	Probation or conditional discharge not to exceed 30 months.
Class 4	Not less than 1 year and not more than 3 years.	Same as above.	Probation or conditional discharge not to exceed 30 months.

<sup>144</sup> See Aggravated Felonies, *infra* at 3-34.

Classification of Offense	Possible Term of Imprisonment	Fines	Probation/ Conditional Discharge
<b>MISDEMEANOR</b>	730 ILCS 5/5-8-3(a)	730 ILCS 5/5-9-1(a)(1)-(3)	730 ILCS 5/5-6-2(b)(3)
Class A	Less than 1 year (364 days or less).	\$2,500 or the amount specified in the offense, whichever is greater.	Not to exceed 2 years.
Class B	Not to exceed 6 months.	\$1,500	Not to exceed 2 years.
Class C	Not to exceed 30 days.	\$1,500	Not to exceed 2 years.
<b>PETTY OFFENSE</b>	N/A	730 ILCS 5/5-9-1(a)(4)	730 ILCS 5/5-6-1(b)(4)
Petty offense	None.	\$1,000 or the amount specified in the offense, whichever is less.	Not to exceed 6 months.
<b>INDIANA</b>			
<b>FELONY</b>	IC 35-50-2-3, 4, 5, 6, 7	IC 35-50-2-3, 4, 5, 6, 7	IC 35-50-2-2(c)
Murder	Between 45 and 65 years. If 18 years of age or older, a person may be sentenced to life imprisonment.	Not more than \$10,000.	Not available.
Class A	Between 20 and 50 years.	Not more than \$10,000.	If the court suspends a sentence of imprisonment, it may place a person on probation for a period to end no later than the date that the maximum felony sentence will expire.
Class B	Between 6 and 20 years.	Not more than \$10,000.	Same as above.
Class C	Between 2 and 8 years.	Not more than \$10,000.	Same as above.
Class D	Between 6 months and 3 years.	Not more than \$10,000.	Same as above.
<b>MISDEMEANOR</b>	IC 35-50-3-2, 3, 4	IC 35-50-3-2, 3, 4	IC 35-50-3-1
Class A	Not more than 1 year.	Not more than \$5,000.	Not more than 1 year of probation, notwithstanding the maximum term of imprisonment for the misdemeanor.
Class B	Not more than 180 days.	Not more than \$1,000.	Same as above.
Class C	Not more than 60 days.	Not more than \$500.	Same as above.
<b>INFRACTION</b>	IC 34-28-5-4		
Class A	None.	Up to \$10,000.	None.



<b>Classification of Offense</b>	<b>Possible Term of Imprisonment</b>	<b>Fines</b>	<b>Probation/ Conditional Discharge</b>
Class B	None.	Up to \$1,000.	None.
Class C	None.	Up to \$500	None.
Class D	None.	Up to \$25	None.
<b>WISCONSIN</b>			
<b>FELONY</b>	Wis. Stat. 939.50	Wis. Stat. 939.50	Wis. Stat. 973.09
Class A	Life	None.	Probation depends on the violation and number of prior convictions.
Class B	Not to exceed 60 years.	None.	Same as above.
Class C	Not to exceed 40 years.	Not to exceed \$100,000.	Same as above.
Class D	Not to exceed 25 years.	Not to exceed \$100,000.	Same as above.
Class E	Not to exceed 15 years.	Not to exceed \$50,000.	Same as above.
Class F	Not to exceed 12 years and 6 months.	Not to exceed \$25,000.	Same as above.
Class G	Not to exceed 10 years.	Not to exceed \$25,000.	Same as above.
Class H	Not to exceed 6 years.	Not to exceed \$10,000.	Same as above.
Class I	Not to exceed 3 years and 6 months.	Not to exceed \$10,000.	Same as above.
<b>MISDEMEANOR</b>	Wis. Stat. 939.51	Wis. Stat. 939.51	Wis. Stat. 973.09
Class A	Not to exceed 9 months.	Not to exceed \$10,000.	Probation depends on the violation and number of prior convictions.
Class B	Not to exceed 90 days.	Not to exceed \$1,000.	Same as above.
Class C	Not to exceed 30 days.	Not to exceed \$500.	Same as above.
<b>FORFEITURE</b>	Wis. Stat. 939.52		
Class A	N/A	Not to exceed \$10,000.	N/A
Class B	N/A	Not to exceed \$1,000.	N/A
Class C	N/A	Not to exceed \$500.	N/A
Class D	N/A	Not to exceed \$200.	N/A
Class E	N/A	Not to exceed \$25.	N/A

### Sentencing Factors and Immigrants

The following factors are areas for arguments which may support a motion for a sentencing departure for non-citizen defendants:

Factors	Arguments
Nature of Charge	Pretext arrest/racial incident? Similar to act of self-defense? Post-traumatic stress disorder?
Degree of Aggravation of Offense	Post-traumatic stress disorder? Other mental or emotional issues?
Mitigating Factors regarding Defendant's Behavior	Post-traumatic stress disorder? Lack of understanding of U.S. laws? Lived in situation of anarchy? Lived in country without a functioning judicial system? Lack of understanding regarding the U.S. judicial system? Cultural differences/behavior sanctioned in the non-citizen's culture/country? Strong provocation by another?
Prior Conviction Record of Defendant	Juvenile record?
Personal Characteristics of Defendant	<p style="text-align: center;"><u>Mental/psychological stability</u></p> Difficulties with adjustment to the U.S.? Post-traumatic stress disorder? Refugee? Living conditions prior to coming to U.S.? Tortured by governmental or other agent? Imprisoned in another country? Length of time and conditions? Possibility/Probability of persecution or torture in home country if deported?
	<p style="text-align: center;"><u>Employment</u></p> Recently cut off welfare and/or food stamps? Possible effect on current employment? Sole provider for family?
	<p style="text-align: center;"><u>Family ties</u></p> Married to U.S. citizen or immigrant? Ages of children, if any? Extended family in U.S.? Psychological impact on U.S. citizen/LPR spouse, children, or parents if defendant is deported?
	<p style="text-align: center;"><u>Community Ties</u></p> Position within local ethnic community (i.e. clan leader, shaman, community leader)?

### Sentencing Factors and Immigrants

The following factors are areas for arguments which may support a motion for a sentencing departure for non-citizen defendants:

Factors	Arguments
	<p>Length of time in community?</p> <p>Volunteer in community, ethnic, religious, or educational organization(s)?</p>
Treatment Needs and Desires of Defendant	<p>Post-traumatic stress disorder?</p> <p>Chemical dependency treatment?</p> <p>Culturally appropriate treatment?</p>
Economic Situation of Defendant	<p>Number of persons supported by defendant? Current employment or possibility?</p> <p>Economic impact or excessive hardship on U.S. citizen/LPR spouse, children, or parents if defendant is deported?</p> <p>Economic impact or excessive hardship on U.S. citizen/LPR spouse, children, or parents if defendant is held in indefinite detention by the DHS as a result of the criminal conviction (in the case of a person who cannot be deported due to a lack of foreign diplomatic relations)?</p>
Defendant's Attitude Toward Criminal Behavior	<p>Acceptance of guilt?</p> <p>Reason for criminal act?</p>
Victim's Attitude toward Defendant	<p>Victim wants prosecution of defendant?</p> <p>Victim wants charges dropped?</p> <p>Victim was the primary aggressor?</p> <p>Victim's immigration status will be negatively impacted?</p> <p>Immigration status of victim's family members will be negatively impacted?</p>
Immigration Status of Defendant	<p>Status as a deportable alien and conditions of confinement?<sup>145</sup></p>

<sup>145</sup> For a discussion about whether cultural heritage and deportable status as a non-citizen can be considered under the U.S. Sentencing Guidelines, see *U.S. v. Guzman*, 236 F.3d 830 (7<sup>th</sup> Cir. Jan. 3, 2001) (holding that deportable status as a non-citizen can be considered where alienage results in a harsher sentence for a non-citizen than for a U.S. citizen and that cultural heritage cannot be

### Sentencing Factors and Immigrants

The following factors are areas for arguments which may support a motion for a sentencing departure for non-citizen defendants:

Factors	Arguments
Dividing Lines Regarding Immigration Consequences	<p style="text-align: center;"><u>Aggravated felony</u></p> <p>Category v. sentence crimes For sentence crimes: 365 v. 364 days term of imprisonment</p> <p style="text-align: center;"><u>Crimes Involving Moral Turpitude</u></p> <p>Possible maximum term of imprisonment</p> <p style="text-align: center;"><u>Mandatory detention without bond</u></p> <p>Custody by the DHS under I.N.A. § 236(c), 8 U.S.C. § 1226(c)</p>

### Finality of a Conviction

Prior to the 1996 legislation, the Supreme Court held that a conviction must be final under state or federal court procedure in order to be a conviction for immigration purposes.<sup>146</sup> Generally, a conviction is not final until all direct appeals are exhausted; however, a conviction is final where a discretionary appeal has been taken. In light of the change in the definition of conviction under IIRAIRA, the issue of whether a judgment from which a timely direct appeal has been taken can be considered to be a final conviction for immigration purposes has not been directly addressed by the Board of Immigration Appeals.<sup>147</sup>

Whether a conviction is final for immigration purposes was discussed recently by the Board of Immigration Appeals. In a sharply divided *en banc* opinion, the majority held that a pending late-reinstated appeal of a conviction does not undermine the finality of the

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considered because it is the joinder of gender and national origin which are expressly forbidden considerations in sentencing); *U.S. v. Farouil*, 124 F.3d 838, 847 (7<sup>th</sup> Cir. Aug. 26, 1997) (holding that the federal district court could consider whether the non-citizen's status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement for purposes of the sentencing guidelines).

<sup>146</sup> See *Pino v. Landon*, 349 U.S. 901 (Apr. 11, 1955) (*per curiam*). See also, *Mansoori v. I.N.S.*, 32 F.3d 1020, 1024 (7<sup>th</sup> Cir. Aug. 8, 1994) (holding that a state conviction is final for immigration purposes where a direct appeal is not pending); *Will v. I.N.S.*, 447 F.2d 529, 533 (7<sup>th</sup> Cir. Aug. 25, 1971); *In re Thomas*, 21 I&N Dec. 20 (BIA Apr. 28, 1995) (holding that direct appeal must be exhausted or waived for a conviction to be considered final for immigration purposes); *In re Polanco*, 20 I&N Dec. 894 (BIA Oct. 21, 1994) (holding that a conviction is final for immigration purposes where a non-citizen failed to timely file a direct appeal and did not show that his request for a nunc pro tunc appeal had been granted by the state appellate court).

<sup>147</sup> See *In re Roldan*, 22 I&N Dec. 512, 526 (BIA Mar. 3, 1999); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7<sup>th</sup> Cir. Jan. 22, 2004) (stating in dicta that a conviction need not be final under state law to constitute a conviction for immigration purposes).

conviction for immigration purposes.<sup>148</sup> It specifically noted the split among the circuit courts of appeals regarding finality of a conviction for immigration purposes.<sup>149</sup>

The Board specifically declined to address whether a direct appeal timely filed constitutes a final conviction for immigration purposes.<sup>150</sup> At this point, there are viable arguments that the following state dispositions should not be deemed “convictions” for immigration purposes: (1) a state conviction reversed on direct appeal on the merits; and (2) a state conviction reversed on direct appeal relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings (*not* as the result of the operation of a state rehabilitative statute).<sup>151</sup>

**Note:** Where a non-citizen will likely plead guilty or lose at trial, efforts should be made to preserve the criminal record for use in the immigration proceedings. Defense counsel should review the majority, concurrences, and dissent opinions of *Cardenas Abreu* carefully, as well as the applicable state and circuit precedent, to raise and preserve all issues for judicial review regarding direct appeals of convictions and the applicable state procedures and rights of direct appeals. For an excellent summary of *Matter of Cardenas-Abreu* and strategies regarding the finality of a conviction for immigration purposes, see “Practice Advisory: Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*,” Immigrant Defense Project, May 11, 2009, available at <http://immigrantdefenseproject.org/webPages/deportation.htm>.

## Restorative Justice Programs

Several counties in Illinois have begun alternative sentencing/restorative justice programs.<sup>152</sup> For example, in one restorative justice program in central eastern Illinois, the offender meets with the victim and community members to work out an agreement; the offender does not attend a criminal court hearing or have a judgment of conviction entered against him unless he fails to abide by the terms of the agreement. A non-citizen who completes the program will not have a conviction for immigration purposes. Attorneys and community members are encouraged to develop and implement similar programs in their communities.<sup>153</sup>

In Wisconsin, the “Community Conferencing Program” is based upon the principles of restorative justice. The Milwaukee County District Attorney’s Office runs the program which has held over 350 conferences between victims, the offenders, and affected

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<sup>148</sup> *In re Cardenas Abreu*, 24 I&N Dec. 795 (BIA May 4, 2009).

<sup>149</sup> *See id.* at 797, n. 3.

<sup>150</sup> *See id.* at 798-99.

<sup>151</sup> *See In re Roldan*, 22 I&N Dec. 512, 524 n.9 (BIA Mar. 3, 1999) (declining to decide the effect to be given a federal disposition under 18 U.S.C. § 3607 until that issue is directly presented to the BIA).

<sup>152</sup> The Illinois Balanced and Restorative Justice Initiative has information about restorative justice programs throughout Illinois with links to information for each program, available at <http://www.ibarji.org/>.

<sup>153</sup> For more information about developing restorative justice programs, *see* Illinois Balanced and Restorative Justice Initiative at <http://www.ibarji.org/>.

community members since May 2000.<sup>154</sup>

In Indiana, the Indianapolis Restorative Justice Program works with first time youth offenders under the age of 14 facing charges of assault, criminal mischief, disorderly conduct, shoplifting and theft.<sup>155</sup> For adults, Indiana has begun to develop “problem-solving” courts.<sup>156</sup>

For any restorative justice or problem-solving court program, the requirements for participation in the program must be reviewed against the immigration definition of a conviction. In some circumstances, a non-citizen may decide to take a case to trial or to plead to an alternative charge rather than face a conviction for immigration purposes if he completes a restorative justice or problem-solving court program.

## Application to Cases

### *Case of Epherem from Sudan*

Epherem entered the U.S. as a lawful permanent resident on December 3, 1994 based on a visa petition filed by his lawful permanent resident mother. He is single and does not have any children.

On June 1, 1999, he was arrested by the Chicago police department for allegedly shoplifting a \$2000 diamond ring from a local department store. He was charged with retail theft, a Class 3 felony under 720 ILCS 5/16A-3(a) and 720 ILCS 5/16A-10(3). Since this was his first offense, the judge placed him on probation for two years after Epherem entered a plea of guilty.

Analysis: Under the definition of conviction, Epherem has a conviction for immigration purposes. First, he pled guilty to the offense. Second, he was placed on probation, which has been found to be a form of restraint on liberty. Because his theft conviction is a conviction for a crime involving moral turpitude within his first five years after becoming a lawful permanent resident and a sentence of one year or longer could have been imposed, he is deportable under the Immigration and Nationality Act (I.N.A.) § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). He is eligible to apply for asylum, withholding of removal, and relief under the Convention against Torture if he believes that he will be persecuted or tortured upon his return to Sudan.

Epherem, however, cannot defend his “green card” or lawful permanent resident status because he had only resided in the United States as a lawful permanent resident for

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<sup>154</sup> For more information, contact David M. Lerman, Assistant District Attorney and Program Director, Milwaukee County District Attorney’s Office, 821 W. State Street, Room 406, Milwaukee, WI 53233, tel. 414-278-46555, [Lerman.David@mail.da.state.wi.us](mailto:Lerman.David@mail.da.state.wi.us). See also, Wisconsin Legislative Audit Bureau Report on Restorative Justice Programs, available at <http://www.legis.state.wi.us/lab/Reports/04-6highlights.pdf>.

<sup>155</sup> For more information, see Indianapolis Restorative Justice Program at [http://www.findyouthinfo.gov/cf\\_pages/programdetail.cfm?id=27](http://www.findyouthinfo.gov/cf_pages/programdetail.cfm?id=27).

<sup>156</sup> For more information, see Indiana Judicial Center, “Problem-Solving Courts,” available at <http://www.in.gov/judiciary/pscourts/about.html>.

three years at the time he committed his offense, a crime involving moral turpitude. A person who has resided in the United States for seven years, including at least five years as a lawful permanent resident and two years in another legal status, such as refugee status, is eligible to defend his or her green card by requesting cancellation of removal from the Immigration Judge, provided that none of his convictions are aggravated felonies.<sup>157</sup> If he were married to a U.S. citizen or had a U.S. child age 21 or older, he would be eligible for an immigrant visa and to apply for adjustment of status with a waiver under INA § 212(h) to obtain his lawful permanent residence again.

### ***Case of Patryk from Ireland***

Patryk, an Irish citizen and a lawful permanent resident, works as a bartender in Kenosha, Wisconsin. In January 2006, he had a physical altercation with his wife after a long night at the bar, and she called her best friend's husband who is a local police officer to arrest him. He was arrested and charged with domestic battery under Kenosha City Ordinance No. 9.947.01. The Kenosha City Ordinance references Wis. Stat. § 947.01, disorderly conduct, to define an offense of domestic battery. Under the ordinance, a defendant does not have the right to a jury trial. Thus, even though Patryk pled guilty as charged for hitting his wife, he is not deportable from the U.S. under I.N.A. § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) for having been convicted of a crime of domestic violence. If he had been charged with and convicted for violating Wis. Stat. § 947.01 in Milwaukee, however, then he would be deportable for having been convicted of a crime of domestic violence.

### **Practice Tips**

In a removal proceeding, both prongs of I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48), must be met in order to establish that a non-citizen has a conviction for immigration purposes. The first prong addresses admissions of guilt or sufficient facts by the non-citizen to warrant a finding of guilt. State statutes require the entry of a guilty plea, a stipulation to facts, or a finding of guilt in order to qualify for an deferred prosecution, supervision, probation, or conditional discharge.

The courts and prosecutors must be educated as to why a non-citizen should qualify for supervision without pleading guilty or stipulating to or admitting facts that could lead to a finding of guilt on the record. They should be encouraged to continue a case informally for a period of time to allow a non-citizen to complete specified requirements (i.e. community service, payment of restitution) without the entry of a plea of guilt, stipulation to facts, admission of facts that would allow for a finding of guilt or the entry of an order for a period of supervision, probation, or conditional discharge. After the non-citizen completes the specified requirement, the charge could be dismissed and the non-citizen will not have a conviction for immigration purposes.

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<sup>157</sup> See Cancellation of Removal, *infra* at 6-23; Aggravated Felonies, *infra* at 3-34.

The second prong addresses deprivation of a non-citizen's liberty. Probation is a deprivation of liberty sufficient to meet the second prong. The issue then becomes how to avoid any restraint or deprivation of liberty. Creativity and educating the courts by defense counsel is key. Some strategies to consider: a continuance for dismissal with no admissions and no restraints; the defendant is responsible to the court (not a probation officer); restitution/community service through alternative sentencing procedures (outside of court) and in lieu of costs and fines. Some clients may be more likely than others to violate the terms of their probation, conditional discharge, or supervision. In such cases, defense counsel can request that the state court impose a definite but suspended term of imprisonment designed to avoid an aggravated felony or another conviction that falls under the grounds of inadmissibility or deportability.



**CHAPTER**

**3**

**Grounds of Deportability for  
Non-citizens**

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## 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.<sup>158</sup> 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.<sup>159</sup>

“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

<sup>158</sup> 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).

<sup>159</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> Cir. Feb. 28, 1973).

the United States.<sup>160</sup> 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.<sup>161</sup>

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.<sup>162</sup> 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.<sup>163</sup>

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.<sup>164</sup> 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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<sup>160</sup> See I.N.A. § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

<sup>161</sup> See I.N.A. § 237(a)(3)(B), 8 U.S.C. § 1227(a)(3)(B).

<sup>162</sup> 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).

<sup>163</sup> 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.

<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup> 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.<sup>167</sup>

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.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup>

### ***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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<sup>165</sup> See Chart: Classification and Sentencing Ranges for State Offenses, *supra* at 2-15.

<sup>166</sup> See *Abdelqadar v. Gonzales*, 413 F.3d 668, 673-74 (7<sup>th</sup> 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).

<sup>167</sup> See *id.*

<sup>168</sup> See I.N.A. § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

<sup>169</sup> See *Abdelqadar v. Gonzales*, 413 F.3d 668, 675 (7<sup>th</sup> 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).

<sup>170</sup> See *id.*; see also, *Knutsen v. Gonzales*, 429 F.3d 733 (7<sup>th</sup> 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 (7<sup>th</sup> 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).

<sup>171</sup> See *Abdelqadar v. Gonzales*, 413 F.3d 668, 674-75 (7<sup>th</sup> 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.<sup>172</sup>

(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.<sup>173</sup>

### **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 . . . .”<sup>174</sup> 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.”<sup>175</sup> The U.S. Supreme Court held that crimes in which fraud is an ingredient have always been regarded as involving moral turpitude.<sup>176</sup>

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<sup>172</sup> [Emphasis added].

<sup>173</sup> [Emphasis added] [includes misdemeanors and felonies in any state or federal jurisdiction].

<sup>174</sup> See *Ng Sui Wing v. United States*, 46 F.2d 755 (7<sup>th</sup> Cir. Jan. 20, 1931) (quoting *In re Henry*, 99 P. 1054, 1055 (Idaho 1909)).

<sup>175</sup> See *In re D*, 1 I&N Dec. 190, 194 (BIA Feb. 13, 1942).

<sup>176</sup> 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

<b>Examples of Crimes Involving Moral Turpitude</b>	
<ul style="list-style-type: none"> <li>▪ Fraud offenses</li> <li>▪ Theft</li> <li>▪ Retail theft (with an intent to permanently deprive another of property)</li> <li>▪ Robbery</li> <li>▪ Bribery</li> <li>▪ Giving false information to a law enforcement official</li> </ul>	<ul style="list-style-type: none"> <li>▪ Tax evasion</li> <li>▪ Perjury</li> <li>▪ Obstruction of justice</li> <li>▪ Forgery</li> <li>▪ Conversion of funds</li> </ul>

The classification of a crime as a felony is not determinative of whether it constitutes a crime involving moral turpitude.<sup>177</sup> 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.<sup>178</sup> On the other hand, trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320 is a crime involving moral turpitude.<sup>179</sup>

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.<sup>180</sup> In general, regulatory offenses are not crimes involving moral turpitude.<sup>181</sup> Possessory crimes may not necessarily involve an element of fraud or deceit and therefore are not necessarily crimes involving moral turpitude.<sup>182</sup>

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).

<sup>177</sup> 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)).

<sup>178</sup> 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)).

<sup>179</sup> 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).

<sup>180</sup> See *In re* R-, 6 I&N Dec. 444, 452-53 (BIA Dec. 14, 1954).

<sup>181</sup> 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).

<sup>182</sup> 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.<sup>183</sup>

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.<sup>184</sup>
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.<sup>185</sup>
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.<sup>186</sup>
  - a. The court did not look at the circumstances surrounding the offense.<sup>187</sup>
  - 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.<sup>188</sup>

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.<sup>189</sup> 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.<sup>190</sup>

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<sup>183</sup> 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 (7<sup>th</sup> Cir. Jun. 6, 2006) (affirming the categorical approach); *Padilla v. Gonzales*, 397 F.3d 1016 (7<sup>th</sup> Cir. Feb. 22, 2005).

<sup>184</sup> See *id.*

<sup>185</sup> See *In re Short*, 20 I&N Dec. 136, 137 (BIA Nov. 16, 1989).

<sup>186</sup> 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).

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

<sup>188</sup> See *Abdelqadar v. Gonzales*, 413 F.3d 668, 671-72 (7<sup>th</sup> 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).

<sup>189</sup> 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)).

<sup>190</sup> 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*,<sup>191</sup> 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.<sup>192</sup> 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."<sup>193</sup> 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.<sup>194</sup>

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*,<sup>195</sup> 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.<sup>196</sup>

- \* 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.<sup>197</sup>

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

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<sup>191</sup> See *Ali v. Mukasey*, 521 F.3d 737 (7<sup>th</sup> Cir. Apr. 4, 2008).

<sup>192</sup> See *id.* at 738.

<sup>193</sup> See *id.* at 743.

<sup>194</sup> See *id.*

<sup>195</sup> See *In re Silva-Trevino*, 24 I&N Dec. 687, 704, n. 4 (A.G. Nov. 7, 2008).

<sup>196</sup> See *In re Silva-Trevino*, 24 I&N Dec. 687, 704, n. 4 (A.G. Nov. 7, 2008).

<sup>197</sup> 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*.<sup>198</sup>
  - **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.<sup>199</sup>
    - 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.<sup>200</sup>
    - 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,<sup>201</sup> in reality such relitigation will take place before the immigration court.

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<sup>198</sup> 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).

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

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

<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> Aggravated

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<sup>202</sup> *See Ali v. Mukasey*, 521 F.3d 737 (7<sup>th</sup> 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).

<sup>203</sup> *See Padilla v. Gonzales*, 397 F.3d 1016, 1019-21 (7<sup>th</sup> 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.<sup>204</sup>

### ***DUI Offenses and Driving on a Suspended/Revoked License***

In general, a simple DUI offense is not a crime involving moral turpitude.<sup>205</sup> 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.<sup>206</sup>

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.<sup>207</sup> 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.<sup>208</sup>

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.<sup>209</sup> 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.<sup>210</sup> The intent of the motorist to move the vehicle is not relevant to determining whether he is in actual physical control.<sup>211</sup> 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.<sup>212</sup> 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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<sup>204</sup> See 625 ILCS 5/11-204.1(a)(1); *Mei v. Ashcroft*, 393 F.3d 737, 741-42 (7<sup>th</sup> 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).

<sup>205</sup> See *id.*

<sup>206</sup> 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)).

<sup>207</sup> See *In re Lopez-Meza*, 22 I&N Dec. 1188 (BIA Dec. 21, 1999).

<sup>208</sup> See *id.*

<sup>209</sup> See 625 ILCS 5/11-501(a).

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

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

<sup>212</sup> 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.<sup>213</sup> An assault on a peace officer may be a crime involving moral turpitude, depending on the section of law violated and whether injury results.<sup>214</sup> 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.<sup>215</sup> Similarly, assault with a deadly weapon is a conviction for a crime involving moral turpitude.<sup>216</sup>

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.<sup>217</sup> 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.<sup>218</sup>

An offense of aggravated stalking under section 750.411I of the Michigan Compiled Laws Annotated is a crime involving moral turpitude.<sup>219</sup> 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.<sup>220</sup>

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<sup>213</sup> 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 (2<sup>nd</sup> 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).

<sup>214</sup> See *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7<sup>th</sup> 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).

<sup>215</sup> 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 (7<sup>th</sup> Cir. Jan. 13, 1977) (Illinois aggravated assault conviction).

<sup>216</sup> See *In re Logan*, 17 I&N Dec. 367 (BIA May 2, 1980).

<sup>217</sup> 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).

<sup>218</sup> See *In re Tran*, 21 I&N Dec. 291 (BIA Mar. 28, 1996).

<sup>219</sup> See *In re Ajami*, 22 I&N Dec. 949 (BIA Jul. 13, 1999).

<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> A conviction for the failure to register also constitutes a separate ground of deportability.<sup>224</sup>

### ***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.<sup>225</sup>
- Giving a false statement to a government official in violation of 18 U.S.C. § 1001.<sup>226</sup>
- Visa fraud under 18 U.S.C. § 1546.<sup>227</sup>
- 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).<sup>228</sup>
- Obstruction of justice for knowingly furnishing false information “with intent to prevent the apprehension or obstruct the prosecution or defense of any person.”<sup>229</sup>
- WIC (Women, Infant, and Children) fraud related to food stamps.<sup>230</sup>
- Use of an alias with the intent to defraud and obtain control over another's property under the Illinois deceptive practices statute.<sup>231</sup>
- Aggravated battery.<sup>232</sup>

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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 (7<sup>th</sup> Cir. Mar. 11, 2005).

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

<sup>222</sup> *See id.* 146.

<sup>223</sup> *See id.* at 145-47.

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

<sup>225</sup> *See id.* at 738.

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

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

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

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

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

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

<sup>232</sup> *See Guillen-Garcia v. I.N.S.*, 60 F.3d 340 (7<sup>th</sup> 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.<sup>233</sup>
- Murder and voluntary manslaughter.<sup>234</sup>
- Assault with the intent to commit murder.<sup>235</sup>
- Contributing to the delinquency of a female minor.<sup>236</sup>
- Statutory rape.<sup>237</sup>
- Contributing to the sexual delinquency of a minor.<sup>238</sup>
- 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).<sup>239</sup>
- Conspiracy to defraud the U.S. of taxes on distilled spirits.<sup>240</sup>
- 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).<sup>241</sup>
- Making, possessing, and passing counterfeit stamps and for conspiracy to do so.<sup>242</sup>
- Possession of counterfeit obligations with the intent to defraud.<sup>243</sup>
- Passing counterfeit money.<sup>244</sup>
- 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.<sup>245</sup>
- Attempting to defeat and evade income taxes in violation of 26 U.S.C. § 145(b) and Revenue Act (1928) § 146(b).<sup>246</sup>
- Conspiracy to violate the Internal Revenue Act.<sup>247</sup>

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of Immigration Appeals which affirmed the Immigration Judge's finding. *See* *Dashto v. I.N.S.*, 59 F.3d 697 (7<sup>th</sup> Cir. Jul. 11, 1995) (Illinois conviction for armed robbery); *Guillen-Garcia v. I.N.S.*, 999 F.2d 199 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. Oct. 10, 1951) (Illinois convictions for robbery and robbery with a dangerous weapon).

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

<sup>234</sup> *See* *De Lucia v. Flagg*, 297 F.2d 58 (7<sup>th</sup> Cir. Dec. 4, 1961), *cert. denied*, 369 U.S. 837 (Apr. 2, 1962); *U.S. ex rel. Marino v. Holton*, 227 F.2d 886 (7<sup>th</sup> 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

- Obtaining money by means of the confidence game (involving an act of cheating or swindling).<sup>248</sup>
- 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.<sup>249</sup>
- Larceny.<sup>250</sup>

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.<sup>251</sup>
- Conviction for counterfeiting pennies or nickels or passing the same.<sup>252</sup>

### ***Foreign Convictions***

Foreign convictions can constitute crimes involving moral turpitude for purposes of deportability and inadmissibility.<sup>253</sup> 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.<sup>254</sup> A foreign conviction may be the basis of a finding of inadmissibility where it is a conviction under U.S. standards.<sup>255</sup> United States standards govern in determining whether or not the foreign offense is classified as a felony or misdemeanor.<sup>256</sup> 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.<sup>257</sup>

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<sup>248</sup> See *Rukavina v. I.N.S.*, 303 F.2d 645 (7<sup>th</sup> 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).

<sup>249</sup> See *U.S. ex rel. Circella v. Sahli*, 216 F.2d 33 (7<sup>th</sup> Cir. Oct. 12, 1954).

<sup>250</sup> See *Orlando v. Robinson*, 262 F.2d 850 (7<sup>th</sup> Cir. Jan. 5, 1959) (holding that larceny under California statute is a crime *malum in se* and therefore a crime involving moral turpitude).

<sup>251</sup> See *Yang v. I.N.S.*, 109 F.3d 1185 (7<sup>th</sup> Cir. Mar. 18, 1997).

<sup>252</sup> 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 (7<sup>th</sup> Cir. Nov. 13, 1953) (finding that these offenses were merely statutory violations).

<sup>253</sup> 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).

<sup>254</sup> 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.

<sup>255</sup> See *Lennon v. I.N.S.*, 527 F.2d 187 (2<sup>nd</sup> Cir. Oct. 7, 1975).

<sup>256</sup> See *Soetarto v. I.N.S.*, 516 F.2d 778, 780 (7<sup>th</sup> Cir. May 28, 1975) (finding that “theft has always been found to involve moral turpitude regardless of the sentence imposed or the amount stolen”).

<sup>257</sup> 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.<sup>258</sup>
- Netherlands conviction for theft.<sup>259</sup>
- Jordan conviction for theft.<sup>260</sup>
- Foreign conviction for first degree burglary.<sup>261</sup>
- Greek murder conviction.<sup>262</sup>
- Hungarian conviction for manslaughter.<sup>263</sup>

### ***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.<sup>264</sup> 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.<sup>265</sup>
- 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.”<sup>266</sup>
- 1980 conviction for burglary.<sup>267</sup>
- 1963 conviction for voluntary manslaughter.<sup>268</sup>
- 1971 conviction for aggravated assault.<sup>269</sup>
- 1977 conviction for receiving stolen property.<sup>270</sup>
- 1906 misdemeanor conviction for petit larceny.<sup>271</sup>
- 1916 conviction for felonious assault with the intent to murder.<sup>272</sup>

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<sup>258</sup> See *Palmer v. I.N.S.*, 4 F.3d 482 (7<sup>th</sup> Cir. Jan. 28, 1993).

<sup>259</sup> See *Soetarto v. I.N.S.*, 516 F.2d 778 (7<sup>th</sup> Cir. May 28, 1975).

<sup>260</sup> See *Khalaf v. I.N.S.*, 361 F.2d 208 (7<sup>th</sup> Cir. May 19, 1966).

<sup>261</sup> See *Lattig v. Pilliod*, 289 F.2d 478 (7<sup>th</sup> Cir. Apr. 26, 1961).

<sup>262</sup> See *Prentis v. Stathakos*, 192 F. 469 (7<sup>th</sup> Cir. Jul. 27, 1911).

<sup>263</sup> See *Pillisz v. Smith*, 46 F.2d 769 (7<sup>th</sup> Cir. Feb. 7, 1931).

<sup>264</sup> 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).

<sup>265</sup> 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).

<sup>266</sup> 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).

<sup>267</sup> See Illinois Revised Statute, Ch. 38 § 19-1; *In re Frentescu*, 18 I&N Dec. 244 (BIA Jun. 23, 1982).

<sup>268</sup> See Illinois Revised Statutes, Ch. 38 § 9-2; *In re Abi-Rached*, 10 I&N Dec. 551 (BIA May 13, 1964).

<sup>269</sup> 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 (7<sup>th</sup> Cir. Jan. 31, 1977) (assault with a deadly weapon).

<sup>270</sup> See Illinois Revised Statutes of 1945, Ch. 38 § 492; *In re Mendoza*, 11 I&N Dec. 239 (BIA Jun. 22, 1965).

<sup>271</sup> 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.<sup>273</sup>
- Money laundering.<sup>274</sup>
- Child abandonment.<sup>275</sup>
- Check fraud.<sup>276</sup>
- Carnal abuse of female minor.<sup>277</sup>

### ***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).<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup>

#### ***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

<sup>272</sup> See *In re C-*, 5 I&N Dec. 370 (BIA Aug. 3, 1953).

<sup>273</sup> See Illinois Criminal Code § 37.089; *Matter of F-*, 2 I&N Dec. 610 (BIA Jun. 7, 1946) (involving facts constituting statutory rape).

<sup>274</sup> 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).

<sup>275</sup> See Wis. Stat. § 351.30; *In re R-*, 4 I&N Dec. 192 (BIA Dec. 11, 1950).

<sup>276</sup> See IC 10-2105; *In re B-*, 4 I&N Dec. 297 (BIA Mar. 12, 1951).

<sup>277</sup> See Wis. Stat. § 340.47; *In re M-*, 9 I&N Dec. 452 (BIA Aug. 2, 1961).

<sup>278</sup> 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.

<sup>279</sup> See *Asylum and Refugees*, *infra* at 6-31; *Withholding of Removal*, *infra* at 6-40; *Convention Against Torture*, *infra* at 6-45.

<sup>280</sup> 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.<sup>281</sup> Bin does not have any defense to removal as he does not have a claim of persecution or torture by the Chinese government.<sup>282</sup> Successful post-conviction relief may be his only chance to remain in the U.S.<sup>283</sup>

### ***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.<sup>284</sup>

### **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.<sup>285</sup> A non-citizen who is convicted of almost any violation related to a firearms offense is deportable.

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<sup>281</sup> See Aggravated Felonies, *infra* at 3-34.

<sup>282</sup> See Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45.

<sup>283</sup> See Post-conviction relief, *infra* at 8-12 to 8-20.

<sup>284</sup> See Mandatory Detention, *infra* at 7-3.

<sup>285</sup> 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<sup>286</sup> or destructive device<sup>287</sup> (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.<sup>288</sup> 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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<sup>286</sup> 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).

<sup>287</sup> 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).

<sup>288</sup> 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.<sup>289</sup> A conviction under a divisible statute is not a firearms offense unless the record of conviction establishes that the offense committed involved firearms.<sup>290</sup> 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.<sup>291</sup>

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.<sup>292</sup> 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.<sup>293</sup>

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.<sup>294</sup> Many of the offenses listed in the firearms grounds of deportability also overlap with the aggravated felony ground of deportability.<sup>295</sup>

## 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.<sup>296</sup> In addition, many controlled substance convictions also constitute aggravated felonies for which there are few forms of immigration relief.

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<sup>289</sup> 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).

<sup>290</sup> 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).

<sup>291</sup> 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.

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

<sup>293</sup> 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)).

<sup>294</sup> See *In re St. John*, 21 I&N Dec. 593 (BIA Sept. 23, 1996); see 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).

<sup>295</sup> See *Aggravated Felonies and case law*, *infra* at 3-34.

<sup>296</sup> 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):<sup>297</sup>**

#### (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.<sup>298</sup>

In addition, a conviction for any offense “relating to” a controlled substance constitutes a ground of deportability,<sup>299</sup> including a conviction for being under the influence of a controlled substance<sup>300</sup> 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.<sup>301</sup> A conviction for possession of drug paraphernalia constitutes an offense relating to a controlled substance<sup>302</sup> 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.<sup>303</sup>

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.<sup>304</sup> The

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<sup>297</sup> [Emphasis in italics added by the author.]

<sup>298</sup> See *U.S. v. Gonzalez*, 582 F.2d 1162 (7<sup>th</sup> Cir. Sept. 8, 1978).

<sup>299</sup> See I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).

<sup>300</sup> See *In re Esqueda*, 20 I&N Dec. 850 (BIA Aug. 15, 1994).

<sup>301</sup> 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).

<sup>302</sup> See *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7<sup>th</sup> Cir. Mar. 13, 2008); *Luu-Le v. I.N.S.*, 224 F.3d 911 (9<sup>th</sup> Cir. Aug. 3, 2000).

<sup>303</sup> See *Desai v. Mukasey*, 520 F.3d 762 (7<sup>th</sup> Cir. Mar. 28, 2008).

<sup>304</sup> 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.<sup>305</sup> 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.<sup>306</sup> 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.<sup>307</sup>

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

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.<sup>311</sup> 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).<sup>312</sup>

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(7<sup>th</sup> 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.

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

<sup>306</sup> *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.

<sup>307</sup> *See Moncada-Servellon*, 24 I&N Dec. 62, 65 (BIA Jan. 25, 2007).

<sup>308</sup> *See* I.N.A. § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

<sup>309</sup> *See* Definition of Aggravated Felonies and case aw, *infra* at 3-34.

<sup>310</sup> *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 (7<sup>th</sup> 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)).

<sup>311</sup> *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).

<sup>312</sup> *See Lopez v. Gonzales*, 549 U.S. 47 (Dec. 5, 2006); *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7<sup>th</sup> 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 not a deportable 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 is a ground of inadmissibility 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).<sup>313</sup>**

Where a record of conviction does not identify the controlled substance, the record cannot support a charge of deportability.<sup>314</sup> 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).<sup>315</sup>

<sup>313</sup> See *Custody Determinations: Bond or Mandatory Detention?*, *infra* at 7-3.

<sup>314</sup> 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).

<sup>315</sup> 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.<sup>316</sup> The exculpatory provisions of the Immigration and Nationality Act relate only to pardons for domestic convictions.<sup>317</sup>

### ***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.<sup>318</sup> 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.<sup>319</sup> He is subject to mandatory detention for the duration of his removal proceedings.<sup>320</sup>

#### ***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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<sup>316</sup> See *In re Dillingham*, 21 I&N Dec. 1001 (BIA Aug. 20, 1997).

<sup>317</sup> See *id.*; see also, *Aggravated Felonies*, *infra* at 3-34 (discussing case law regarding controlled substances).

<sup>318</sup> See *Lopez v. Gonzales*, 549 U.S. 47 (Dec. 5, 2006).

<sup>319</sup> See *Cancellation of Removal*, *infra* at 6-23.

<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup>

### ***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.<sup>323</sup> 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.<sup>324</sup>

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<sup>321</sup> See Grounds of Inadmissibility, *infra* at 4-1; 212(h) Waivers, *infra* at 6-58.

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

<sup>323</sup> 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.

<sup>324</sup> 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.<sup>325</sup>

(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.<sup>326</sup>

### *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.<sup>327</sup> The Seventh

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

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

<sup>327</sup> See *Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> 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.<sup>328</sup> 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.”<sup>329</sup> 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).<sup>330</sup> 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.<sup>331</sup> 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.<sup>332</sup>

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.<sup>333</sup> 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.<sup>334</sup>

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.<sup>335</sup> 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.<sup>336</sup> 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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<sup>328</sup> See *id.* at 669-671.

<sup>329</sup> 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 (7<sup>th</sup> 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)).

<sup>330</sup> See *Flores v. Ashcroft*, 350 F.3d at 669-72.

<sup>331</sup> See *id.* at 671-72.

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

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

<sup>334</sup> See *e.g.*, *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7<sup>th</sup> 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).

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

<sup>336</sup> See *id.*; see also *Olowo v. Ashcroft*, 368 F.3d 692, 702-05 (7<sup>th</sup> 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.<sup>337</sup> 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.”<sup>338</sup> 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.<sup>339</sup>

### ***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.<sup>340</sup> 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.<sup>341</sup> These include offenses of:

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<sup>337</sup> 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 (7<sup>th</sup> Cir. Sept. 8, 2006).

<sup>338</sup> See *Kijowska v. Haines*, 463 F.3d 583, 586 (7<sup>th</sup> Cir. Sept. 8, 2006).

<sup>339</sup> See *Kijowska v. Haines*, 463 F.3d 583, 586-90 (7<sup>th</sup> 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).

<sup>340</sup> 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).

<sup>341</sup> See USCIS Form I-129F, Petition for Alien Fiancé(e), available at [www.uscis.gov](http://www.uscis.gov).

- Domestic violence,<sup>342</sup> sexual assault,<sup>343</sup> child abuse and neglect,<sup>344</sup> dating violence,<sup>345</sup> elder abuse,<sup>346</sup> and stalking.<sup>347</sup>
- 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.<sup>348</sup>

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.<sup>349</sup>

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<sup>342</sup> 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.

<sup>343</sup> 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.*

<sup>344</sup> 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.*

<sup>345</sup> 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.*

<sup>346</sup> 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.*

<sup>347</sup> 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.*

<sup>348</sup> *See id.*

<sup>349</sup> *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.<sup>350</sup> The records are required even if they were sealed or otherwise cleared.<sup>351</sup>

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.<sup>352</sup> 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.<sup>353</sup> 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.<sup>354</sup>

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.<sup>355</sup> Evidence of rehabilitation, combined with evidence of other compelling factors, may be considered "extraordinary circumstances" that warrant a grant of the waiver.<sup>356</sup> 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.<sup>357</sup>

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.<sup>358</sup> 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.<sup>359</sup>

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<sup>350</sup> See Memorandum from Michael Aytes, Associate Director Domestic Operations, "International Marriage Broker Regulation Act Implementation Guidance," Jul. 21, 2006.

<sup>351</sup> See *id.*

<sup>352</sup> See *id.*

<sup>353</sup> See *id.*

<sup>354</sup> See *id.*

<sup>355</sup> See *id.*

<sup>356</sup> See *id.*

<sup>357</sup> See *id.*

<sup>358</sup> See *id.*

<sup>359</sup> 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.<sup>360</sup> 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.<sup>361</sup> 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,<sup>362</sup> 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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<sup>360</sup> 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.

<sup>361</sup> 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.

<sup>362</sup> See *Aggravated Felonies*, *infra* at 3-34.

from removal.<sup>363</sup>

### 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).<sup>364</sup> 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.<sup>365</sup>

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.<sup>366</sup> 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.<sup>367</sup> 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.<sup>368</sup>

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<sup>363</sup> See Cancellation of Removal, *infra* at 6-23.

<sup>364</sup> See Grounds of Inadmissibility, *infra* 4-1; Adjustment of Status, *infra* at 6-18.

<sup>365</sup> See IC 35-42-2-1.5.

<sup>366</sup> See *Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> Cir. Nov. 26, 2003).

<sup>367</sup> 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.

<sup>368</sup> 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.<sup>369</sup> 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.<sup>370</sup> 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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<sup>369</sup> See *Flores v. Ashcroft*, 350 F.3d 666, 671 (7<sup>th</sup> 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 (9<sup>th</sup> Cir. Apr. 21, 2006) (limiting the examination of documentation regarding the relationship of the victim to the offender to the record of conviction).

<sup>370</sup> 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<sup>371</sup> 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.<sup>372</sup> 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.<sup>373</sup> 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.<sup>374</sup>

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

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

<sup>371</sup> See Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (Nov. 18, 1988).

<sup>372</sup> See Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 501(b), 104 Stat. 4978 (Nov. 29, 1990).

<sup>373</sup> See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(b), 108 Stat. 4305 (Oct. 25, 1994).

<sup>374</sup> 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).

<sup>375</sup> See “Immigrants’ Stories Expose Murkiness of Deportation Laws,” *The New Standard*, [www.newstandardnews.net](http://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.<sup>376</sup>

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.<sup>377</sup>

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.<sup>378</sup> 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.<sup>379</sup>

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.<sup>380</sup> 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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<sup>376</sup> 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).

<sup>377</sup> See Withholding of Removal, *infra* at 6-40; Convention against Torture, *infra* at 6-45.

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

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

<sup>380</sup> See *Alvear-Velez v. Mukasey*, 540 F.3d 672 (7<sup>th</sup> Cir. Sept. 2, 2008); *Flores-Leon v. I.N.S.*, 272 F.3d 433, 438-39 (7<sup>th</sup> 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.<sup>381</sup> Concurrent sentences are evaluated as the length of the longest sentence whereas consecutive sentences are added together.<sup>382</sup> 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.<sup>383</sup> 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.<sup>384</sup>

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.<sup>385</sup> 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.<sup>386</sup>

**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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<sup>381</sup> 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).

<sup>382</sup> 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).

<sup>383</sup> 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.

<sup>384</sup> See, e.g., I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

<sup>385</sup> See I.N.A. § 276(a), 8 U.S.C. § 1326(a).

<sup>386</sup> 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.<sup>387</sup> 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.<sup>388</sup> 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.<sup>389</sup> Similarly, the Seventh Circuit Court of Appeals has upheld the retroactive application of the aggravated felony definition.<sup>390</sup>

The aggravated felony ground of deportability applies to non-citizens who have been “admitted” to the United States.<sup>391</sup> 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.<sup>392</sup> 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.<sup>393</sup> 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.<sup>394</sup>

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<sup>387</sup> 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).

<sup>388</sup> See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (Jul. 5, 1984).

<sup>389</sup> See *In re Truong*, 22 I&N Dec. 1090 (BIA Oct. 20, 1999).

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

<sup>391</sup> 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).

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

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

<sup>394</sup> 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.<sup>395</sup> 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).<sup>396</sup> The Seventh Circuit found that Congress intended to include misdemeanor offenses in the amended definition of aggravated felony under the immigration laws.<sup>397</sup> 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.<sup>398</sup>

Statutory rape constitutes sexual abuse of a minor.<sup>399</sup> 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.<sup>400</sup> 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;<sup>401</sup> in Wisconsin, it is 16 years old;<sup>402</sup> and in Indiana, it is 16 years old.<sup>403</sup> Under a 2007 amendment to the Indiana Code, it is now a defense to a prosecution

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<sup>395</sup> See *Guerrero-Perez v. I.N.S.*, 242 F.3d 727, 737 (7<sup>th</sup> 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).

<sup>396</sup> *Cf. Xiong v. I.N.S.*, 173 F.3d 601 (7<sup>th</sup> 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).

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

<sup>398</sup> See *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7<sup>th</sup> 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)).

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

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

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

<sup>402</sup> See Wis. Stat. 948.02.

<sup>403</sup> 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.<sup>404</sup> This defense applies to offenses committed after June 30, 2007.<sup>405</sup> 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.<sup>406</sup> However, if he is convicted for sexual misconduct under IC 35-42-4-9(b), his conviction constitutes an aggravated felony.<sup>407</sup>

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).<sup>408</sup> 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.<sup>409</sup> Physical contact between the offender and a child is not required for sexual abuse of a minor to occur.<sup>410</sup>

Solicitation of a sexual act has been found to also constitute sexual abuse of a minor.<sup>411</sup> The Seventh Circuit has interpreted the definition of sexual abuse of a minor very broadly.<sup>412</sup> 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.<sup>413</sup>

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).<sup>414</sup> 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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<sup>404</sup> See IC 35-42-4-9(e).

<sup>405</sup> See P.L. 216-2007, SEC. 45, 57.

<sup>406</sup> See “New law eases up on teen sex”, Joe Gerrety, *Lafayette Journal & Courier*, Jul. 9, 2007.

<sup>407</sup> See *Gaiskov v. Holder*, 2009 U.S. App. LEXIS 11578 (7<sup>th</sup> Cir. May 28, 2009).

<sup>408</sup> See *In re Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA Sept. 16, 1999).

<sup>409</sup> 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).

<sup>410</sup> See *id.* at 7-8.

<sup>411</sup> See *Gattem v. Gonzales*, 412 F.3d 758, 765 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. Mar. 16, 2007).

<sup>412</sup> See *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7<sup>th</sup> Cir. Dec. 28, 2005).

<sup>413</sup> See *Gattem v. Gonzales*, 412 F.3d 758, 766 (7<sup>th</sup> Cir. Jun. 20, 2005); see also *Sharashidze v. Gonzales*, 480 F.3d 566 (7<sup>th</sup> Cir. Mar. 16, 2007).

<sup>414</sup> See *Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7<sup>th</sup> Cir. Mar. 6, 2001) [note: the current statute is 720 ILCS 5/12-13].

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

**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.”<sup>417</sup> 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 offense of conspiracy to distribute marijuana under 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846.<sup>418</sup> 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.<sup>419</sup> Conspiracy to possess with the intent to distribute heroin<sup>420</sup> and importation of a controlled substance<sup>421</sup> 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.<sup>422</sup>

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.<sup>423</sup> 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.<sup>424</sup> Whether an offense is a felony for purposes of the aggravated felony controlled substance provision depends on the federal classification of the offense.<sup>425</sup> 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).<sup>426</sup> 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.<sup>427</sup> 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

<sup>415</sup> See *U.S. v. Martinez-Carillo*, 250 F.3d 1101 (7<sup>th</sup> Cir. May 17, 2001).

<sup>416</sup> See *Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465-66 (7<sup>th</sup> Cir. Jan. 3, 2005).

<sup>417</sup> See *In re Davis*, 20 I&N Dec. 536 (BIA May 28, 1992).

<sup>418</sup> See *In re Aruna*, 24 I&N Dec. 452 (BIA Feb. 26, 2008).

<sup>419</sup> See *id.*; see also, *In re L-G-*, 21 I&N Dec. 89 (BIA Sept. 27, 1995).

<sup>420</sup> See *Jideonwo v. I.N.S.*, 224 F.3d 692 (7<sup>th</sup> Cir. Aug. 23, 2000) (conviction under 21 U.S.C. § 846).

<sup>421</sup> See *Morales-Ramirez v. Reno*, 209 F.3d 977, 978 (7<sup>th</sup> Cir. Apr. 13, 2000).

<sup>422</sup> 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.

<sup>423</sup> See Crimes Involving Controlled Substances, *supra* at 3-20.

<sup>424</sup> See *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7<sup>th</sup> Cir. Mar. 13, 2008).

<sup>425</sup> See *Lopez v. Gonzales*, 549 U.S. 47 (Dec. 5, 2006).

<sup>426</sup> See *id.*

<sup>427</sup> 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.<sup>428</sup> 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.<sup>429</sup> 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.

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<sup>428</sup> *Fernandez v. Mukasey*, 544 F.3d 862 (7<sup>th</sup> Cir. Sept. 15, 2008), *pet. for reh'g denied* (7<sup>th</sup> 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 (7<sup>th</sup> Cir. Jan. 29, 2008); *United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5<sup>th</sup> Cir. Jun. 5, 2005); *cf. Rashid v. Mukasey*, 531 F.3d 438 (6<sup>th</sup> 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 (2<sup>nd</sup> 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 (1<sup>st</sup> Cir. Sept. 26, 2006); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3<sup>rd</sup> Cir. Jan. 2, 2001).

<sup>429</sup> *See e.g., Gerbier v. Holmes*, 280 F.3d 297, 300, 317 (3<sup>rd</sup> Cir. Feb. 8, 2002); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9<sup>th</sup> Cir. Aug. 24, 2004); *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9<sup>th</sup> Cir. Sept. 9, 2004); *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir. Jul. 22, 2005); *Tostado v. Carlson*, 481 F.3d 1012 (8<sup>th</sup> 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.<sup>430</sup> 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.<sup>431</sup> 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).<sup>432</sup> It found that the term “described in” clearly referred to something specifically set forth elsewhere in the statute or regulation.<sup>433</sup> 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).<sup>434</sup>

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 (9<sup>th</sup> 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

<sup>430</sup> 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*”).

<sup>431</sup> See *In re Vasquez-Muniz I*, 22 I&N Dec. 1415, 1418, 1421.

<sup>432</sup> See *id.* at 1421-22.

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

<sup>434</sup> See *id.* at 1424.

whether it contains the federal jurisdictional element of affecting interstate commerce contained in 18 U.S.C. § 922(g)(1).<sup>435</sup> 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.”<sup>436</sup> 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.<sup>437</sup>

## **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.<sup>438</sup> 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.”<sup>439</sup> 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.<sup>440</sup>

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

<sup>436</sup> See *id.* at 211-213.

<sup>437</sup> 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 (7<sup>th</sup> Cir. Apr. 17, 2008).

<sup>438</sup> See 18 U.S.C. § 16(a); *Bovkun v. Ashcroft*, 283 F.3d 166, 170-71 (3<sup>rd</sup> 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)).

<sup>439</sup> See *Szucz-Toldy v. Gonzales*, 400 F.3d 978, 981 (7<sup>th</sup> Cir. Mar. 11, 2005) (citing *Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> Cir. 2003)); *Leocal v. Ashcroft*, 543 U.S. at 6-7; see also, *U.S. v. Sperberg*, 432 F.3d 706 (7<sup>th</sup> 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).

<sup>440</sup> See *In re Martin*, 23 I&N Dec. 491 (BIA Sept. 26, 2002); see also, *Flores v. Ashcroft*, 350 F.3d 666, 671-72 (7<sup>th</sup> 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.”<sup>441</sup> A causal link between the potential for harm and the substantial risk of physical force being used must be present.<sup>442</sup>

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).<sup>443</sup>
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.<sup>444</sup>
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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<sup>441</sup> 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).

<sup>442</sup> See *id.*

<sup>443</sup> See *Solorzano-Patlan v. I.N.S.*, 207 F.3d 869, 875-76 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (Mar. 7, 2005) to determine whether a crime constitutes a crime of violence).

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

required to resolve the issue, the Immigration Judge may be able to look behind the record of conviction.<sup>445</sup>

### ***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.<sup>446</sup> 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.<sup>447</sup> 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.<sup>448</sup> 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.<sup>449</sup> 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).<sup>450</sup>

### ***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).<sup>451</sup> 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.<sup>452</sup> In contrast, the Seventh Circuit found that criminal recklessness for

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<sup>445</sup> See *Xiong v. I.N.S.*, 173 F.3d 601 (7<sup>th</sup> 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).

<sup>446</sup> 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).

<sup>447</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (Nov. 9, 2004).

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

<sup>449</sup> See *Leocal v. Ashcroft*, 543 U.S. at 6-7 (Nov. 9, 2004).

<sup>450</sup> See *Bazan-Reyes v. I.N.S.*, 256 F.3d 600 (7<sup>th</sup> Cir. Jul. 5, 2001) (addressing DUI offenses under Illinois, Indiana, and Wisconsin); *cf. U.S. v. Chapa-Garza* 243 F.3d 921 (5<sup>th</sup> 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).

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

<sup>452</sup> 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.<sup>453</sup>

A conviction for criminal confinement under IC 35-42-3-3(a)(1) is not a crime of violence.<sup>454</sup> A conviction for criminal confinement under other subsections of the Indiana statute may, however, be considered crimes of violence.<sup>455</sup> 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.<sup>456</sup>

Wisconsin's false imprisonment statute, Wis. Stat. § 940.30 is not a crime of violence.<sup>457</sup> 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.<sup>458</sup>

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.<sup>459</sup>

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).<sup>460</sup> 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.<sup>461</sup>

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).<sup>462</sup> 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.<sup>463</sup> 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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<sup>453</sup> See *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557 (7<sup>th</sup> Cir. Nov. 21, 2008).

<sup>454</sup> See *U.S. v. Hagenow*, 423 F.3d 638, 644 (7<sup>th</sup> Cir. Aug. 31, 2005).

<sup>455</sup> See *Hernandez-Mancilla v. I.N.S.*, 246 F.3d 1002, 1009 (7<sup>th</sup> Cir. Apr. 11, 2001).

<sup>456</sup> See *U.S. v. Wallace*, 326 F.3d 881 (7<sup>th</sup> Cir. Apr. 16, 2003).

<sup>457</sup> See *U.S. v. Sanner*, 565 F.3d 400 (7<sup>th</sup> Cir. May 14, 2009).

<sup>458</sup> See *U.S. v. Franco-Fernandez*, 511 F.3d 768 (7<sup>th</sup> Cir. Jan. 2, 2008).

<sup>459</sup> See *LaGuerre v. Mukasey*, 526 F.3d 1037 (7<sup>th</sup> Cir. May 20, 2008); *U.S. v. Sanner*, 565 F.3d 400 (7<sup>th</sup> Cir. May 14, 2009).

<sup>460</sup> 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)).

<sup>461</sup> See *In re Sweetser*, 22 I&N Dec. 709 (BIA May 19, 1999).

<sup>462</sup> See *In re Aldabesheh*, 22 I&N Dec. 983 (BIA Aug. 30, 1999).

<sup>463</sup> See *id.*

sentenced to term of imprisonment of one year or more, the conviction is a crime of violence and an aggravated felony.<sup>464</sup>

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.<sup>465</sup> 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.<sup>466</sup>

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.<sup>467</sup> 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.<sup>468</sup> 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).<sup>469</sup>

**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,<sup>470</sup> 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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<sup>464</sup> See *In re Malta-Espinoza*, 23 I&N Dec. 656, 659-660 (BIA Mar. 11, 2004).

<sup>465</sup> See *In re L-S-J*, 21 I&N Dec. 973 (BIA Jul. 29, 1997).

<sup>466</sup> See *In re Palacios*, 22 I&N Dec. 434 (BIA Dec. 18, 1998).

<sup>467</sup> See *In re B-*, 21 I&N Dec. 287 (BIA Mar. 28, 1996).

<sup>468</sup> See *Xiong v. I.N.S.*, 173 F.3d 601, 605 (7<sup>th</sup> 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 (7<sup>th</sup> 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).

<sup>469</sup> See *U.S. v. Martinez-Jimenez*, 294 F.3d 921 (7<sup>th</sup> Cir. Jun. 27, 2002).

<sup>470</sup> 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.<sup>471</sup>

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).<sup>472</sup> 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).<sup>473</sup> 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).<sup>474</sup>

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.<sup>475</sup> 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).<sup>476</sup> 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.<sup>477</sup>

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.<sup>478</sup> The Board also concluded that

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<sup>471</sup> 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).

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

<sup>473</sup> See *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (Jan. 17, 2007).

<sup>474</sup> See *Vaca-Tellez v. Mukasey*, 540 F.3d 665 (7<sup>th</sup> Cir. Sept. 2, 2008).

<sup>475</sup> 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).

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

<sup>477</sup> See *id.* at 17-19.

<sup>478</sup> 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.<sup>479</sup>

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.<sup>480</sup> 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.<sup>481</sup> 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.<sup>482</sup> 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.<sup>483</sup>

### ***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).<sup>484</sup> 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.<sup>485</sup> Residential entry under IC 35-43-2-1.5 is a lesser included offense of burglary and a crime of violence.<sup>486</sup>

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(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)).

<sup>479</sup> *See id.* at 15-17.

<sup>480</sup> *See In re Bahta*, 22 I&N Dec. 1381 (BIA Oct. 4, 2000).

<sup>481</sup> *See id.* at 3.

<sup>482</sup> *See id.* at 5.

<sup>483</sup> *See id.* at 10.

<sup>484</sup> *See Solorzano-Patlan v. I.N.S.*, 207 F.3d 869 (7<sup>th</sup> 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)).

<sup>485</sup> *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)).

<sup>486</sup> *See U.S. v. Gardner*, 397 F.3d 1021, 1024 (7<sup>th</sup> 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).<sup>487</sup> 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.<sup>488</sup> 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.<sup>489</sup>

### **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”.<sup>490</sup> The victim may be a natural person, government, or private entity.<sup>491</sup> 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.<sup>492</sup>

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.<sup>493</sup> 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).<sup>494</sup>

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<sup>487</sup> See *In re Gertsenshteyn*, 24 I&N Dec. 111 (BIA Mar. 14, 2007).

<sup>488</sup> See *id.*

<sup>489</sup> 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).

<sup>490</sup> I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

<sup>491</sup> 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).

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

<sup>493</sup> See *Knutsen v. Gonzales*, 429 F.3d 733, 736-37 (7<sup>th</sup> 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).

<sup>494</sup> 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.<sup>495</sup>

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.<sup>496</sup> 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.<sup>497</sup>

On June 15, 2009, the U.S. Supreme Court issued its unanimous opinion in *Nijhawan v. Holder*.<sup>498</sup> 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";<sup>499</sup>
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;<sup>500</sup> 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.<sup>501</sup>
  - 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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<sup>495</sup> See *Iysheh v. Gonzales*, 437 F.3d 613, 615 (7<sup>th</sup> 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).

<sup>496</sup> See *In re Babaisakov*, 24 I. & N. Dec. 306 (BIA Sept. 28, 2007).

<sup>497</sup> See *id.*

<sup>498</sup> See *Nijhawan v. Holder*, case no. 08-495, 2009 U.S. LEXIS 4320 (Jun. 15, 2009).

<sup>499</sup> See *id.* at \*21.

<sup>500</sup> See *id.*

<sup>501</sup> 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.<sup>502</sup>

**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.<sup>503</sup> 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).<sup>504</sup>

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.<sup>505</sup> 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.<sup>506</sup> Intended loss constitutes loss for purposes of I.N.A. § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).<sup>507</sup>

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<sup>502</sup> See *id.* at \*24.

<sup>503</sup> See I.N.A. § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

<sup>504</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. Dec. 28, 2005); *Sharashidze v. Gonzales*, 480 F.3d 566 (7<sup>th</sup> Cir. Mar. 16, 2007).

<sup>505</sup> See *Akkaraju v. Ashcroft*, 118 Fed. Appx. 90, 92-93 (7<sup>th</sup> Cir. Nov. 30, 2004).

<sup>506</sup> See *id.* at 93.

<sup>507</sup> See *Eke v. Mukasey*, 512 F.3d 372, 380-81 (7<sup>th</sup> 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).<sup>508</sup> 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).<sup>509</sup>

### **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.<sup>510</sup> 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).<sup>511</sup> 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.<sup>512</sup> 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.<sup>513</sup>

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).<sup>514</sup> 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.<sup>515</sup> 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.<sup>516</sup>

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<sup>508</sup> See *In re Ruiz-Romero*, 22 I&N Dec. 486 (BIA Feb. 1, 1999).

<sup>509</sup> See *In re Alvarado-Alvino*, 22 I&N Dec. 718 (BIA May 24, 1999).

<sup>510</sup> See *In re Batista-Hernandez*, 21 I&N Dec. 955 (BIA Jul. 15, 1997).

<sup>511</sup> See *In re Espinoza*, 22 I&N Dec. 889 (BIA Jun. 11, 1999).

<sup>512</sup> See *id.*

<sup>513</sup> See *id.*

<sup>514</sup> See *In re Martinez-Recinos*, 23 I&N Dec. 175 (BIA Oct. 15, 2002).

<sup>515</sup> See *id.* at 176-177.

<sup>516</sup> 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.<sup>517</sup> 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.”<sup>518</sup> 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).<sup>519</sup>

***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<sup>520</sup> Court for a hearing on whether Francisco should be removed (deported) from the United States for his 1974 conviction.

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<sup>517</sup> See U.S. v. Martinez-Garcia, 268 F.3d 460, 465-66 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. Dec. 28, 2005); Sharashidze v. Gonzales, 480 F.3d 566 (7<sup>th</sup> Cir. Mar. 16, 2007).

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

<sup>519</sup> See Vaca-Tellez v. Mukasey, 540 F.3d 665 (7<sup>th</sup> Cir. Sept. 2, 2008).

<sup>520</sup> See *In re Lettman*, 22 I&N Dec. 365 (BIA Nov. 5, 1998), *aff’d*, Lettman v. Reno, 207 F.3d 1368 (11<sup>th</sup> 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.<sup>521</sup> 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.<sup>522</sup>

### **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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<sup>521</sup> See *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 690 (7<sup>th</sup> Cir. 2008); *Valere v. Gonzales*, 473 F.3d 757 (7<sup>th</sup> 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)).

<sup>522</sup> 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.<sup>523</sup>

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).<sup>524</sup> 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.<sup>525</sup>

The second is to negotiate a plea agreement for contributing to the delinquency of a child.<sup>526</sup> 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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<sup>523</sup> See Cancellation of Removal, *infra* at 6-23; Crimes Involving Moral Turpitude, *supra* at 3-3.

<sup>524</sup> See Grounds of Inadmissibility and Adjustment of Status, *infra* at 4-1.

<sup>525</sup> See *e.g.*, 720 ILCS 5/26-1.

<sup>526</sup> See *e.g.*, 720 ILCS 130/2a.



eligible for relief from removal.<sup>527</sup>

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.<sup>528</sup> 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.<sup>529</sup>

### **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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<sup>527</sup> 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.

<sup>528</sup> See *Tostado v. Carlson*, 481 F.3d 1012 (8<sup>th</sup> 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).

<sup>529</sup> 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.<sup>530</sup> 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.<sup>531</sup>

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.<sup>532</sup> 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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<sup>530</sup> See 730 ILCS 5/5-8-3(a)(1) - (3).

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

<sup>532</sup> 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.<sup>533</sup>

## 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.<sup>534</sup> 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.<sup>535</sup> Indiana and Wisconsin have similar requirements.<sup>536</sup> 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.<sup>537</sup>

### *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.<sup>538</sup> 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).<sup>539</sup> 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.<sup>540</sup>

A non-citizen may also be deportable for having engaged in “any other criminal activity which endangers public safety or national security”.<sup>541</sup> A non-citizen may also be

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

<sup>534</sup> See I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v).

<sup>535</sup> See 730 ILCS 150/10.

<sup>536</sup> See Wis. Stat. §§ 301.45 through 301.48, 973.048; IC 5-2-12-4 through 5-2-12-9.

<sup>537</sup> 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.

<sup>538</sup> See I.N.A. § 237(a)(4)(A)(i), 8 U.S.C. § 1227(a)(4)(A)(i).

<sup>539</sup> See *In re Luis*, 22 I&N Dec. 747 (BIA May 26, 1999) (Cuban espionage case).

<sup>540</sup> See *id.*

<sup>541</sup> 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.<sup>542</sup> 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.<sup>543</sup>

### ***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.<sup>544</sup> 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.<sup>545</sup>

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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<sup>542</sup> See I.N.A. § 237(a)(4)(A)(iii), 8 U.S.C. § 1227(a)(4)(A)(iii).

<sup>543</sup> 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.

<sup>544</sup> 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.

<sup>545</sup> 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.<sup>546</sup>

### ***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.<sup>547</sup> 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.<sup>548</sup>

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.<sup>549</sup>

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<sup>546</sup> I.N.A. § 237(a)(3)(D)(ii), 8 U.S.C. § 1227(a)(3)(D)(ii).

<sup>547</sup> 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.

<sup>548</sup> For more information regarding SEVIS, go to <http://www.ice.gov/sevis/>.

<sup>549</sup> See 8 C.F.R. § 214.2(f)(16).

**PRACTICE ADVISORY**

**The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach  
to Aggravated Felony Determinations<sup>1</sup>**

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

<sup>1</sup> 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.

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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,<sup>2</sup> 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

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<sup>2</sup> 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 statutes 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 (9<sup>th</sup> 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](http://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 <i>Nijhawan</i> for Determination on Likely Analytical Approach
(A) murder, rape, or sexual abuse of a minor	Categorical <sup>o</sup>	“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.’ <i>Estrada-Espinoza v. Mukasey</i> , 546 F.3d 1147 (CA9 2008); <i>Singh v. Ashcroft</i> , 383 F.3d 144 (CA3 2004); <i>Santos v. Gonzales</i> , 436 F.3d 323 (CA2 2005)” ( <i>Nijhawan</i> , 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 <sup>o</sup>	“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.’ <i>Gousse v. Ashcroft</i> , 339 F.3d 91 (CA2 2003); <i>Fernandez v. Mukasey</i> , 544 F.3d 862 (CA7 2008); <i>Steele v. Blackman</i> , 236 F.3d 130 (CA3 2001).” ( <i>Nijhawan</i> , 2009 WL 1650187, at *6) – <i>See also Lopez v. Gonzales</i> , 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 <sup>o</sup>	“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.” ( <i>Nijhawan</i> , 2009 WL 1650187, at *6).

<sup>o</sup> 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.

<p>(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) ...</p>	<p>Categorical</p>	<p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>...if the amount of the funds exceeded \$10,000</p>	<p>Uncertain</p>	<p>Reasoning:</p> <ol style="list-style-type: none"> <li>1. The provision at issue somewhat parallels the (M)(i) provision at issue in <i>Nijhawan</i>.</li> <li>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. <i>See</i> 18 U.S.C. § 1957; <i>see also</i> 18 U.S.C. § 1956(b)(1) (providing for civil penalty greater than \$10,000 if value involved in the transaction exceeded \$10,000).</li> <li>3. State money laundering statutes in 1996 varied on whether they identified \$10,000 as an element. <i>Compare</i> N.Y. Penal Law § 470.05 (West 1995) (\$10,000 threshold); IL ST CH 38 ¶ 29B/1 (West 1996)(\$10,000 threshold), <i>with</i> 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).</li> </ol>
<p>(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).</p>	<p>Categorical<sup>o</sup></p>	<p>“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. <i>See, e.g.</i>, subparagraph (E)” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>

<p>(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)...</p>	<p>Categorical</p>	<p>Reasoning:</p> <ol style="list-style-type: none"> <li>1. Refers to a category of offenses generically defined in the Federal Criminal Code at 18 U.S.C. § 16. <i>Cf. Nijhawan</i> 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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *4).</li> <li>2. No language in this provision calls for a circumstance-specific approach.</li> <li>3. Its position within § 101(a)(43) does not point to a circumstance-specific approach.</li> <li>4. No problems applying the very clearly identified elements that appear in 18 U.S.C. § 16.</li> <li>5. <i>See also Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (without naming its approach, essentially applied categorical approach to this aggravated felony ground).</li> </ol>
<p>...for which the term of imprisonment at least one year [sic]</p>	<p>Refer to Sentence Imposed</p>	
<p>(G) a theft offense (including receipt of stolen property) or burglary offense...</p>	<p>Categorical</p>	<p>Reasoning:</p> <ol style="list-style-type: none"> <li>1. Refers to generic crimes of “theft offense” (including “receipt of stolen property”) and “burglary offense.”</li> <li>2. No language in this provision calls for a circumstance-specific approach.</li> <li>3. Its position within § 101(a)(43) does not point to a circumstance-specific approach.</li> <li>4. <i>See also Gonzales v. Duenas-Alvarez</i> 549 U.S. 183 (2007) (understanding ‘theft’ to be used in the generic sense and expressly applying categorical approach).</li> </ol>
<p>...for which the term of imprisonment at least one year [sic]</p>	<p>Refer to Sentence Imposed</p>	
<p>(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)</p>	<p>Categorical<sup>o</sup></p>	<p>“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)” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)</p>	<p>Categorical<sup>o</sup></p>	<p>“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)” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>

<p>(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),...</p>	<p>Categorical<sup>o</sup></p>	<p>“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)” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>...for which a sentence of one year imprisonment or more may be imposed</p>	<p>Refer to Potential Sentence</p>	
<p>(K) an offense that - (i) relates to the owning, controlling, managing, or supervising of a prostitution business</p>	<p>Categorical</p>	<p>Reasoning: Refers to generic offenses with no qualifying language.</p>
<p>(K) an offense that... (ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution)...</p>	<p>Categorical</p>	<p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>... if committed for commercial advantage</p>	<p>Circumstance-Specific<sup>o</sup></p>	<p>“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: “<i>But see Gertsenshteyn v. United States Dept. of Justice</i>, 544 F.3d 137, 144-145 (CA2 2008).” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>(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)</p>	<p>Categorical</p>	<p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>



<p>(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)</p>	<p>Categorical<sup>o</sup></p>	<p>“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)” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>(M) an offense that -  (i) involves fraud or deceit...        ...in which the loss to the victim or victims exceeds \$10,000</p>	<p>Categorical<sup>o</sup></p> <hr/> <p>Circumstance Specific<sup>o</sup></p>	<p>Reasoning: <i>Nijhawan</i> 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’ ...” (<i>Nijhawan</i>, 2009 WL 1650187, at *3).</p> <hr/> <p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *8).</p>
<p>(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</p>	<p>Categorical</p> <hr/> <p>Circumstance-Specific<sup>o</sup></p>	<p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p> <hr/> <p>“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...” (<i>Nijhawan</i>, 2009 WL 1650187, at *6-7).</p>

<p>(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),...</p>	<p>Categorical</p>	<p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *6). That reasoning should apply with equal force in the context of INA criminal provisions.</p>
<p>...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</p>	<p>Circumstance-Specific°</p>	<p>“[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)” (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>(O) an offense described in section 275(a) [8 U.S.C.A. § 1325(a)] or 276 [8 U.S.C.A. § 1326]...</p>	<p>Categorical</p>	<p>“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.” (<i>Nijhawan</i>, 2009 WL 1650187, at *6). That reasoning should apply with equal or force in the context of INA criminal provisions.</p>
<p>...committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph</p>	<p>Circumstance-Specific with respect to INA § 275(a)  Uncertain with respect to INA § 276.</p>	<p>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. <i>See</i> 8 U.S.C. § 1326(b)(2).</p>

<p>(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)...</p> <hr/> <p>...for which the term of imprisonment is at least 12 months,...</p> <hr/> <p>...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</p>	<p>Categorical</p> <hr/> <p>Refer to Sentence Imposed</p> <hr/> <p>Circumstance-Specific<sup>o</sup></p>	<p>"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." (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p> <hr/> <p>"[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)..." (<i>Nijhawan</i>, 2009 WL 1650187, at *6).</p>
<p>(Q) an offense relating to a failure to appear by a defendant for service of sentence...</p> <hr/> <p>...if the underlying offense is punishable by imprisonment for a term of 5 years or more</p>	<p>Categorical</p> <hr/> <p>Circumstance-Specific</p>	<p>Reasoning:</p> <ol style="list-style-type: none"> <li>1. The language suggests a generic offense.</li> <li>2. No applicability problems as this offense was criminalized across the country in 1996. <i>See e.g.</i> 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).</li> </ol> <hr/> <p>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." <i>See e.g.</i> Tex. Penal Code Ann. § 38.10 (West 1996).</p>

<p>(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered...</p> <hr/> <p>...for which the term of imprisonment is at least one year</p>	<p>Categorical</p> <hr/> <p>Refer to Sentence Imposed</p>	<p>Reasoning: The language suggests generic offenses. Such an interpretation would have posed no applicability problems in 1996.</p>
<p>(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness,...</p> <hr/> <p>...for which the term of imprisonment is at least one year</p>	<p>Categorical</p> <hr/> <p>Refer to Sentence Imposed</p>	<p>Reasoning: The language suggests generic offenses. Such an interpretation would have posed no applicability problems in 1996.</p>
<p>(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...</p> <hr/> <p>...for which a sentence of 2 years imprisonment or more may be imposed</p>	<p>Categorical</p> <hr/> <p>Circumstance-Specific</p>	<p>Reasoning: The language suggests a generic offense. Such an interpretation would have posed no applicability problems in 1996. <i>See e.g.</i> N.Y. Penal Law Ann. § 215.56 (bail jumping in the second degree) (West 1995).</p> <hr/> <p>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." <i>See e.g.</i> N.Y. Penal Law § 215.56 (bail jumping in the second degree) (West 1995).</p>
<p>(U) an attempt or conspiracy...</p> <hr/> <p>...to commit an offense described in this paragraph.</p>	<p>Categorical</p> <hr/> <p>SEE ABOVE FOR ANALYSIS OF UNDERLYING OFFENSE</p>	<p>Reasoning: These are accessory or preparatory offenses with elements generally defined by statute or case law.</p> <hr/> <p>SEE ABOVE FOR ANALYSIS OF UNDERLYING OFFENSE</p>

## 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 Stat. 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).

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### Inadmissibility

An applicant for admission to the United States, including an applicant for adjustment of status, must overcome the grounds of inadmissibility in order to be granted lawful permanent residence. The grounds of inadmissibility are enumerated under I.N.A. § 212, 8 U.S.C. § 1182 and include the presentation of a false alien registration (“green”) card to a U.S. official at a U.S. border, which may be considered to be the fraudulent or willful misrepresentation of a material fact to obtain an immigration benefit.<sup>550</sup> With the passage of IIRAIRA, grounds of inadmissibility were added, including lack of proof of vaccinations, unlawful presence, and a permanent bar for false claims to United States citizenship made on or after September 30, 1996.<sup>551</sup> Certain grounds of inadmissibility also correspond to the grounds of deportability, such as false claims to U.S. citizenship.

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<sup>550</sup> See, e.g., *Kalejs v. I.N.S.*, 10 F.3d 441 (7<sup>th</sup> Cir. Nov. 17, 1993), *rehearing denied* Dec. 30, 1993, *cert. denied* 510 U.S. 1196, 127 L. Ed. 2d 656, 114 S. Ct. 1305 (1994) (holding that the non-citizen gave false and material statements regarding involvement with Nazis in his application for a visa); *Esposito v. I.N.S.*, 936 F.2d 911 (7<sup>th</sup> Cir. Jul. 3, 1991), *rehearing and rehearing en banc denied* Aug. 8, 1991 (holding that a non-citizen who used false documents to enter the U.S. was not admissible and not entitled to a waiver to obtain the status of lawful permanent residency); *Patel v. I.N.S.*, 811 F.2d 377 (7<sup>th</sup> Cir. Feb. 3, 1987); see also, 212(i) Waivers, *infra* at 6-62 (discussing a discretionary waiver for fraud or willful misrepresentations of material facts).

<sup>551</sup> See *Kechkar v. Gonzales*, 500 F.3d 1080 (10<sup>th</sup> 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 (5<sup>th</sup> Cir. Jun. 25, 2007); *Ateka v. Ashcroft*, 384 F.3d 954 (8<sup>th</sup> Cir. Sept. 24, 2004); *U.S. v. Karaouni*, 379 F.3d 1139 (9<sup>th</sup> Cir. Aug. 24, 2004); see also, *False Claims to U.S. Citizenship*, *supra* at 3-60. Note: a refugee or asylee who falsely claims to be a U.S. citizenship may have this ground of inadmissibility waived under INA §209(c), 8 U.S.C. §1159(c) in the conjunction with an application for adjustment of status under INA §209, 8 U.S.C. §1159.



Where a non-citizen made a false claim to United States citizenship prior to September 30, 1996, he may be eligible for a waiver.<sup>552</sup> A limited exception to the ground of inadmissibility for false claims to U.S. citizenship exists where:

4. each natural parent of the non-citizen (or each adopted parent) is or was a U.S. citizen;
5. the non-citizen permanently resided in the U.S. before age 16; and
6. the non-citizen reasonably believed at the time that he made the representation that he was a U.S. citizen.<sup>553</sup>

Whether a ground of inadmissibility may be waived depends upon the circumstances of an individual non-citizen. For example, almost every ground of inadmissibility may be waived for a non-citizen who is applying for a non-immigrant visa or admission to the U.S. for a temporary period.<sup>554</sup>

In comparison to waivers available for non-immigrants, there are limited waivers available for lawful permanent residents and non-citizens applying for adjustment of status or an immigrant visa who have qualifying U.S. citizen or lawful permanent resident relatives. Certain grounds of inadmissibility, including visa fraud, unlawful presence, prostitution, and crimes involving moral turpitude, may be waived under I.N.A. § 212(h), 8 U.S.C. § 1182(h) or I.N.A. § 212(i), 8 U.S.C. § 1182(i). Permanent bars, which cannot be waived for an applicant for adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255 or for an applicant for an immigrant visa at a U.S. Embassy or Consulate, include any conviction or admission for violation of a controlled substance law (other than where a non-citizen qualifies for a waiver for a single simple possession offense for less than thirty grams of marijuana) and any conviction or admission of facts related to murder or torture. S visa holders, U visa holders, T visa holders, and VAWA applicants for adjustment of status may be eligible for waivers of certain permanent bars to inadmissibility.<sup>555</sup>

Unlike other non-citizens who apply for adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255, refugees and asylees apply for adjustment of status under I.N.A. § 209, 8 U.S.C. § 1159. This section of the Immigration and Nationality Act provides refugees and asylees with the opportunity to apply for a very broad waiver of almost all of the grounds of inadmissibility, including possession of a controlled substance and false claims to U.S. citizenship.<sup>556</sup>

Unlike the grounds of deportability, which require a conviction as defined under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) to sustain a finding of deportability, a conviction is not required to sustain a finding that a non-citizen is inadmissible for certain criminal activity. A non-citizen is inadmissible if he has been convicted of, admits having

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<sup>552</sup> I.N.A. §212(i), 8 U.S.C. §1182(i); see §212(i) Waivers, *infra* at 6-62.

<sup>553</sup> I.N.A. § 212(a)(6)(c)(ii)(II), 8 U.S.C. § 1182(a)(6)(c)(ii)(II).

<sup>554</sup> See I.N.A. § 212(d), 8 U.S.C. § 1182(d).

<sup>555</sup> See S Visas, *infra* at 6-76; U visas, *infra* at 6-72; T visas, *infra* at 6-74; VAWA Adjustment of Status, *infra* at 6-67.

<sup>556</sup> See Termination of Asylum and Adjustment of Status for Refugees and Asylees, *infra* at 6-36.

committed, or admits having committed acts which constitute the essential elements of a crime involving moral turpitude or a controlled substance offense.<sup>557</sup> To constitute a valid admission, the interviewing DHS officer, U.S. Department of State official, or Immigration Judge must explain the offense in plain terms and the non-citizen must voluntarily admit to the elements of the offense.<sup>558</sup>

**A non-citizen does not have to be *convicted* of an offense to be found inadmissible. The voluntary sworn admission of facts related to a crime involving moral turpitude or a controlled substance offense before a CIS officer, a U.S. Department of State official, or an Immigration Judge is sufficient to render the non-citizen inadmissible.**

Non-citizens who have not previously adjusted their status to become lawful permanent residents and who are inadmissible on account of their criminal activities or convictions may be eligible for a § 212(h) waiver in conjunction with their applications for adjustment of status, even if they have been convicted of an aggravated felony.<sup>559</sup> A non-citizen who is not a lawful permanent resident, including a conditional permanent resident, and who has been convicted of an aggravated felony may be expeditiously removed by the DHS without a hearing before the Immigration Court or before his applications for adjustment of status and a § 212(h) waiver are adjudicated by the CIS.<sup>560</sup>

Convictions for most crimes involving moral turpitude can be waived, depending upon the immigration status of the non-citizen at the time of her application for adjustment of status. Discretionary waivers for criminal grounds of inadmissibility are available under I.N.A. § 212(h), 8 U.S.C. § 1255(h), to non-citizens present in the United States and abroad.<sup>561</sup> Waivers are not available to non-citizens with convictions involving controlled substances other than for one conviction for simple possession of thirty grams or less of marijuana.<sup>562</sup> A conviction for a firearms violation does not preclude a showing of admissibility under I.N.A. § 245(a), 8 U.S.C. § 1255(a), because it is not a ground of

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<sup>557</sup> See I.N.A. § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i); “LSD as Therapy? Write About it, Get Barred from U.S.: BC Psychotherapist Denied Entry After Border Guard Googled His Work,” *The Tyee*, <http://thetyee.ca/News>, Apr. 25, 2007.

<sup>558</sup> See, e.g., *In re G.M.*, 7 I&N Dec. 40 (A.G. Apr. 2, 1956).

<sup>559</sup> See I.N.A. § 245(i), 8 U.S.C. § 1255(i); I.N.A. § 212(h), 8 U.S.C. § 1182(h); *In re Michel*, 21 I&N Dec. 1101 (BIA Jan. 30, 1998); see also, *In re Ayala-Arevalo*, 22 I&N Dec. 398 (BIA Nov. 30, 1998).

<sup>560</sup> See I.N.A. § 238(b), 8 U.S.C. § 1228(b); see also *U.S. v. Hernandez-Vermudez*, 356 F.3d 1011, 1012 (9<sup>th</sup> Cir. Jan. 26, 2004) (holding that a non-citizen who illegally enters the U.S. and commits an aggravated felony is subject to administrative removal pursuant to I.N.A. § 238(b), 8 U.S.C. § 1228(b)).

<sup>561</sup> See *De Lucia v. I.N.S.*, 370 F.2d 305, 308, n.2 (7<sup>th</sup> Cir. Nov. 17, 1966), cert. denied, 386 U.S. 912, 87 S.Ct. 861, 17 L.Ed.2d 784 (1967); *In re Alarcon*, 20 I&N Dec. 557 (BIA Jul. 13, 1992); *In re Parodi*, 17 I&N Dec. 608, 611-12 (BIA Dec. 23, 1980).

<sup>562</sup> See I.N.A. § 212(h), 8 U.S.C. § 1182(h). For a broader waiver available only to refugees and asylees for possession of controlled substances other than 30 grams or less of marijuana, see *Termination of Asylum and Adjustment of Status for Asylees and Refugees*, *infra* at 6-36.

inadmissibility under I.N.A. § 212(a)(2)(A), 8 U.S.C. § 1282(a)(2)(A).<sup>563</sup> Certain firearms convictions may, however, be found to be aggravated felonies and preclude the favorable exercise of discretion in applications for adjustment of status for non-citizens who are not lawful permanent residents; such non-citizens may also be subject to receiving final administrative removal orders issued by the DHS and removal from the U.S. without review by the Immigration Court.<sup>564</sup>

In a significant departure from past law, lawful permanent residents who have committed certain crimes and have not been granted a waiver under I.N.A. § 212(h)<sup>565</sup> or cancellation of removal<sup>566</sup> are subject to the grounds of inadmissibility upon their return to the United States.<sup>567</sup> This includes permanent residents who fly to another country for business or vacation as well as those who cross the Canadian or Mexican border to shop or visit family members for only a few hours and then return to the United States. When a lawful permanent resident presents herself at the border, she will have to answer questions from a federal officer, including whether she has ever been convicted of any crimes. If a lawful permanent resident has been convicted for a crime which is a ground of inadmissibility but has not previously been granted a waiver in the past, she may be detained without bond by ICE and placed in removal proceedings.

A lawful permanent resident who is deportable for having been convicted of a crime not deemed to be an aggravated felony or a controlled substance offense (other than one simple possession conviction of 30 grams or less of marijuana) may be eligible to apply for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a). In comparison, a lawful permanent resident who has been convicted of an aggravated felony which falls within the grounds of inadmissibility is statutorily barred from applying for a waiver under I.N.A. § 212(h), 8 U.S.C. § 1182(h), in conjunction with an application for adjustment of status.<sup>568</sup> In very limited situations where a lawful permanent resident has been convicted of an aggravated felony which does not fall within one of the grounds of inadmissibility and she has not been aggregately sentenced for criminal offenses to 5 years or more of imprisonment, she may be eligible to adjust her status to become a lawful permanent

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<sup>563</sup> See, e.g., *In re Rainford*, 20 I&N Dec. 598 (BIA Sept. 9, 1992); *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); *In re Gabryelsky*, 20 I&N Dec. 750 (BIA Nov. 3, 1993) (holding that a non-citizen could simultaneously apply for a waiver of deportability under I.N.A. § 212(c), 8 U.S.C. § 1182(c) in conjunction with an application for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a)); see also, *Snajder v. I.N.S.* 29 F.3d 1203, 1208 (7th Cir. Jul. 21, 1994).

<sup>564</sup> See I.N.A. § 238(b), 8 U.S.C. § 1228(b); Final Administrative Removal Orders, *infra* at 6-3.

<sup>565</sup> See § 212(h) Waivers, *infra* at 6-58.

<sup>566</sup> See Cancellation of Removal, *infra* at 6-23.

<sup>567</sup> In *In re Collado*, 21 I&N Dec. 1061 (BIA Feb. 28, 1998) (en banc), the Board of Immigration Appeals held that the language of I.N.A. § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v), compelled the finding that when a lawful permanent resident who has committed an offense identified under I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2) and who has not since such time been granted relief under 8 U.S.C. §§ 1182(h) and 1229b(a) departs the United States and returns, he shall be regarded as seeking an admission into the United States despite his lawful permanent resident status. The Board stated that the permanent resident is seeking an admission and that the *Fleuti* doctrine regarding entry and a “brief, casual, and innocent departure” does not apply under the clear change in the law. *Id.*

<sup>568</sup> See I.N.A. § 212(h), 8 U.S.C. § 1182(h); see also, § 212(h) Waivers, *infra* at 6-58.

resident again as a § 212(h) waiver will not be required.<sup>569</sup> A returning lawful permanent resident may be eligible for a “stand-alone” §212(h) waiver.<sup>570</sup>

Smuggling, broadly defined, can constitute a permanent bar to adjustment of status. A non-citizen who knowingly aids another non-citizen to enter the U.S. illegally is inadmissible under I.N.A. § 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i).<sup>571</sup> A waiver may be available under I.N.A. § 212(d)(11), 8 U.S.C. § 1182(d)(11) where the person who the non-citizen encouraged, aided, assisted or abetted was his spouse, parent, son, or daughter at the time of illegal entry.

### ***Foreign Offenses***

A foreign conviction may also constitute a ground of inadmissibility. A foreign conviction will still have immigration consequences if it is recognized as involving a criminal offense by U.S. standards.<sup>572</sup> Thus, a foreign proceeding must be criminal in nature under the governing laws of the prosecuting jurisdiction at a minimum.<sup>573</sup> Where, however, a foreign conviction is not “purely political” and there is substantial evidence that the offense was not fabricated or trumped-up, then it will not fall within the “purely political offense” exception to the grounds of inadmissibility for a crime involving moral turpitude.<sup>574</sup>

## **Application to Cases**

### ***Case of Herbert from France***

Herbert came to the United States as an F-1 student in August 2003. In March 2006, he pled guilty to possession of 6 grams of cocaine and was placed on first offender probation under 720 ILCS 570/410. In January 2007, he married a United States citizen, Harriet. Harriet and Herbert went to file applications for a family visa and lawful permanent residency for him at the CIS office. At the filing window, the clerk reviewed his application

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<sup>569</sup> See *In re Torres-Varela*, 23 I&N Dec. 78 (BIA May 9, 2001) (upholding a grant of adjustment of status to a lawful permanent resident with a DUI conviction found to be an aggravated felony but not a crime involving moral turpitude or other ground of inadmissibility). Note: A DUI conviction with a one year sentence imposed is no longer considered an aggravated felony. See *Leocal v. Ashcroft*, 543 U.S. 1 (Nov. 9, 2004).

<sup>570</sup> See *In re Abosi*, 24 I&N Dec. 204, 207 (BIA Jun. 19, 2007) (holding that a returning lawful permanent resident seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with an application for a § 212(h) waiver).

<sup>571</sup> See *Olowo v. Ashcroft*, 368 F.3d 692 (7<sup>th</sup> Cir. May 11, 2004); *Sanchez-Marquez v. I.N.S.*, 725 F.2d 61, 63 (7<sup>th</sup> Cir. Jan. 10, 1984) (allowing proof by circumstantial evidence that a non-citizen knowingly assisted several other non-citizens to enter the U.S. illegally).

<sup>572</sup> See *In re De La Nues*, 18 I&N Dec. 140 (BIA Oct. 5, 1981); *In re McNaughton*, 16 I&N Dec. 569 (BIA Jul. 26, 1978) *aff'd*, 612 F.2d 457 (9<sup>th</sup> Cir. Jan. 2, 1980).

<sup>573</sup> See *In re Eslamizar*, 23 I&N Dec. 684, 688 (BIA Oct. 19, 2004).

<sup>574</sup> See *In re O’Cealleagh*, 23 I&N Dec. 976, 980 (BIA Aug. 30, 2006) (discussing three recognized types of political offenses: 1. a fabricated, baseless or trumped-up charge; 2. act(s) directed against the state, such as treason, sedition, or espionage that contain none of the elements of ordinary crimes; and 3. a common offense so connected with a political act that it is regarded as a “political offense”).

and noted that he had checked the box for having been arrested, with an explanation about his conviction for cocaine possession on a separate page. She called an ICE officer who came to the counter and arrested him.

Analysis: Herbert is permanently inadmissible (as well as deportable) for having violated a controlled substance law.<sup>575</sup> No waivers are available for controlled substance violations unless it is for one simple possession of thirty grams or less of marijuana and the non-citizen qualifies for a § 212(h) waiver.<sup>576</sup> Herbert may be placed in removal proceedings by the DHS immediately after his arrest. He has no defense from removal unless a petition for post-conviction relief is successful.<sup>577</sup> If Herbert were to try to return to the U.S. with a non-immigrant visa, a waiver may be available to him under I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3).

### ***Case of Pamela from Guinea***

Pamela came to the United States as a lawful permanent resident in 1989 based on the family visa petition filed in 1983 by her lawful permanent resident father. In October 1991, she pled guilty to charges for theft of a camcorder valued at \$1200, a Class 3 felony, under 720 ILCS 5/16-1(a)(5)(A) and 720 ILCS 5/16-1(b)(4). The court placed her on probation for 3 years. In December 2006, she went to Toronto, Canada to visit her sister who was studying at a university in Toronto. When she presented herself to CBP officers in Detroit upon her attempted return to the United States in January 2007, she was questioned by the officers. They asked her how long she had been out of the country, why she had gone to Canada, and if she had committed any crimes in the United States before she went to visit her sister in Toronto. She told them that she had been convicted for theft but did not serve any jail time. The officers arrested her and detained her at the local DHS detention facility.

Analysis: Pamela is inadmissible. As a lawful permanent resident, she is subject to the grounds of inadmissibility upon her return to the United States. Pamela has been convicted of a crime involving moral turpitude which does not meet the petty offense exception under I.N.A. § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii), since the maximum penalty possible for the crime for which she was convicted exceeds one year of imprisonment. In addition, she did not apply for or receive a grant under § 212(h) or cancellation of removal prior to going to Canada. She will have a hearing with an Immigration Judge under removal proceedings to determine whether she is eligible for and merits either a § 212(h) waiver or a § 212(c) waiver to avoid removal from the United States.<sup>578</sup> She is ineligible for cancellation of removal as she committed her theft offense within two years of being a lawful permanent resident.<sup>579</sup>

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<sup>575</sup> See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999); see also, Definition of Conviction, *supra* at 2-3.

<sup>576</sup> See § 212(h) Waivers, *infra* at 6-58.

<sup>577</sup> See Post-Conviction Relief, *infra* at 8-12 to 8-24.

<sup>578</sup> See § 212(h) waivers, *infra* at 6-58; § 212(c) waivers, *infra* at 6-48.

<sup>579</sup> See Cancellation of Removal for Lawful Permanent Residents, *infra* at 6-23.

## NSEERS

After September 11, 2001, the U.S. government took aggressive steps to end terrorist acts in the U.S. Congress mandated a requirement for a comprehensive entry-exit program, and the U.S. Department of Justice responded with the National Security Entry-Exit Registration System (NSEERS).<sup>580</sup> Implemented on September 11, 2002, NSEERS was designed to track certain non-immigrants entering, exiting, and remaining in the U.S.

The classification of non-immigrants includes persons who are not lawful permanent residents or U.S. citizens and are admitted into the U.S. for a temporary period. Efforts focused on non-citizens from many Middle Eastern countries and other countries suspected of having high numbers of terrorists or terrorist organizations. Nationals or citizens of these designated countries were called to re-register their presence in the U.S. within 30 days of initial registration at a port of entry and annually if they remained in the U.S. beyond one year.<sup>581</sup>

<b>Countries Currently Designated for NSEERS Registration<sup>582</sup></b>
<ul style="list-style-type: none"><li>▪ All citizens or nationals from Iran, Iraq, Libya, Sudan or Syria.</li><li>▪ Male citizens or nationals between ages 16-45 from Pakistan, Saudi Arabia, and Yemen.</li><li>▪ Non-citizens with unexplained travel to the above countries and others such as North Korea, Cuba, Afghanistan, Egypt, Indonesia, and Malaysia may also be required to comply.</li></ul>



The DHS is now responsible for carrying out NSEERS and has suspended several of the requirements. For example, designated non-immigrants no longer need to re-register their presence after entry during their stay. However, as a matter of discretion, the DHS may call in a non-immigrant for an interview to verify that he is complying with the requirements of his stay.<sup>583</sup> Some of the original requirements remain, however, and designated non-immigrants are still required to register their entry upon arrival to the U.S. If a DHS official requires the non-immigrant to register his entry, he must always register his exit from the U.S. as well.<sup>584</sup> Only certain ports of entry and exit have the capability of executing NSEERS requirements.<sup>585</sup>

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<sup>580</sup> See U.S. Immigration and Customs Enforcement, [www.ice.gov](http://www.ice.gov).

<sup>581</sup> See "Changes to NSEERS," [www.ice.gov](http://www.ice.gov), Dec. 1, 2003.

<sup>582</sup> See *Immigration & Nationality Law Handbook*, American Immigration Lawyers Association 2006-2007 Ed., "National Security Entry-Exit Registration System (NSEERS) (Special Registration)," pp. 711-13.

<sup>583</sup> See "Changes to NSEERS," [www.ice.gov](http://www.ice.gov), 12/01/03.

<sup>584</sup> See 8 C.F.R. § 264.1(f).

<sup>585</sup> A listing of ports can be found at [www.dhs.gov](http://www.dhs.gov). See *Immigration & Nationality Law Handbook*, American Immigration Lawyers Association 2006-2007 Ed., "Actions at the Time of Departure May Affect the Ability to Return," p. 713.

NSEERS should not be confused with US-VISIT, another security enhancement program using biometrics that required all non-immigrants to register entry and departure from the U.S. US-VISIT was a three year pilot program that ended on May 6, 2007. Non-citizens exiting the U.S. are no longer required to comply with US-VISIT. However, the DHS is working to make biometrics part of the existing international departure process, a strategy that is based on the lessons learned from the US-VISIT program.<sup>586</sup> Until regulations are established, all non-immigrants subject to the requirements of NSEERS must continue to register with NSEERS.<sup>587</sup>

If a designated non-immigrant does not comply with NSEERS requirements, he will be considered out of status and subject to arrest, detention, fines and/or removal from the country.<sup>588</sup> He may also be considered inadmissible upon his next attempt to be admitted to the U.S., including in the context of an application for a change of status or adjustment of status.<sup>589</sup> If a non-immigrant fails to register his exit when required and seeks subsequent reentry, the DHS may presume that he seeks entry in order to engage in unlawful activity, a ground of inadmissibility under I.N.A. § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii).<sup>590</sup> A non-immigrant is also required to notify the DHS of any address change within 10 days if he is in the U.S. for more than 30 days.<sup>591</sup> If he fails to register his changes of address, he may be subject to criminal prosecution under I.N.A. § 266(b), 8 U.S.C. § 1306(b) and deportable under I.N.A. § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A).

### **Adam Walsh Child Protection Act of 2006**

The Adam Walsh Child Protection and Safety Act of 2006 was signed into law on July 27, 2006 with the aim of countering violent and sexual crimes against children.<sup>592</sup> It is named after Adam Walsh, a six year old boy who was abducted and later found murdered in 1981.<sup>593</sup>

#### ***What does the Adam Walsh Child Protection Act do?***

- Establishes the National Sex Offender Registry, for which convicted sex offenders are required to register and appear for check-in appointments. The number of years for which a sex offender is required to register and the number of times for which he is required to appear for check-ins depends on the severity of the offense.

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<sup>586</sup> See “US-VISIT Moves Out of Biometric Exit Pilot Phase,” *Department of Homeland Security*, [www.dhs.gov](http://www.dhs.gov), May 4, 2007.

<sup>587</sup> See *Kurzbans: Immigration Law Sourcebook*, 11<sup>th</sup> Ed. 2008-2009, “Special Registration – NSEERS,” pp. 148-51.

<sup>588</sup> See U.S. Immigration and Customs Enforcement, [www.ice.gov](http://www.ice.gov); *Hadayat v. Gonzales*, 458 F.3d 659, 665 (7<sup>th</sup> Cir. Aug. 15, 2006) (holding that it did not have jurisdiction to review a constitutional challenge to the NSEERS registration program).

<sup>589</sup> See 8 C.F.R. § 264.1(f)(8)(ii).

<sup>590</sup> See *id.*

<sup>591</sup> Form AR-11 and instructions can be found on the CIS website at [www.uscis.gov](http://www.uscis.gov).

<sup>592</sup> See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (Jul. 27, 2006).

<sup>593</sup> See “Legislative Notice: H.R. 4472 – Adam Walsh Child Protection and Safety Act of 2006,” *U.S. Senate and Republican Policy Committee*, Jul. 20, 2006.

- Increases penalties for a variety of sex offenses and violence against children.
- Expands funding for local law enforcement authorities to track Internet sexual exploitation of minors.
- Instructs the U.S. Department of Health and Human Services to create a national registry of persons who have been found to abuse or neglect children. This database will protect children from being adopted or taken in by foster parents who are known child abusers.<sup>594</sup>

***How does the Adam Walsh Child Protection Act Affect Non-citizens and U.S. Citizens?***

The Adam Walsh Child Protection Act can affect non-citizens and U.S. citizens. First, any non-citizen who fails to register for the National Sex Offender Registry is deportable.<sup>595</sup>

Second, unless a waiver is granted by the CIS, a U.S. citizen or lawful permanent resident who has been convicted of a certain offense related to sexual or physical violence against a child is not eligible to file a petition for an immigrant visa for a qualifying family member (either an adult or a minor) or for a non-immigrant visa for a fiancée. This means that the intended beneficiary will be ineligible for adjustment of status or, if abroad, to enter the U.S. on an immigrant visa or a fiancée visa. The petitioner is also ineligible to file an immigrant visa petition to classify a non-citizen orphan, who he has adopted or will be adopting, as an immediate relative for purposes of bringing the child into the U.S.<sup>596</sup>

Note: An individual who was a U.S. citizen at the time of his plea and imposition of sentence to first offender probation or court supervision can argue that he is not barred from having his visa petition granted because the immigration definition of a conviction at I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) only applies to non-citizens, not U.S. citizens.

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<sup>594</sup> See *id.*

<sup>595</sup> See Appendix 3A, I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v).

<sup>596</sup> See I.N.A. §§ 204(a)(1), 101(a)(15)(k), 8 U.S.C. §§ 1154(a)(1), 1101(a)(15)(k).



**Offenses against children that render a U.S. citizen or lawful permanent resident ineligible to petition for a family member or fiancée<sup>597</sup>**

- An offense involving kidnapping (unless committed by a parent or guardian).
- An offense involving false imprisonment (unless committed by a parent or guardian).
- Solicitation to engage in sexual conduct.
- Use in a sexual performance.
- Solicitation to practice prostitution.
- Video voyeurism as described in 18 U.S.C. § 1801.
- Possession, production, or distribution of child pornography.
- Criminal sexual conduct involving a minor or use of the Internet to facilitate or attempt such conduct.
- Any conduct that by its nature is a sex offense against a minor.

These restrictions on petitioners may be waived by the Secretary of the Department of Homeland Security if he determines that the petitioner poses no threat to the family member for whom the petitioner wishes to file the visa petition.<sup>598</sup> The factors that should be considered include but are not limited to:

- The nature and severity of the petitioner's specified offense(s) against the minor, including all facts and circumstances underlying the offense(s);
- The petitioner's criminal history;
- The nature, severity, and mitigating circumstances of any arrest(s), conviction(s), or history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other violent or criminal behavior that may pose a risk to the safety or well-being of the principal beneficiary or any derivative beneficiary;
- The relationship of the petitioner to the principal beneficiary and any derivative beneficiary;
- The age and, if relevant, the gender of the beneficiary;
- Whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another; and
- The degree of rehabilitation or behavior modification that may alleviate any risk posed by the petitioner to the beneficiary, evidenced by the successful completion of appropriate counseling or rehabilitation programs and the significant passage of time between incidence of violent, criminal, or abusive behavior and the submission of the petition.<sup>599</sup>

<sup>597</sup> For a complete list of applicable offenses, *see* Pub. L. No. 111. *See* I.N.A. §§ 204(a)(1), 101(a)(15)(k), 8 U.S.C. §§ 1154(a)(1), 1101(a)(15)(k); Pub. L. §§ 401-02; "State Department Issues Cable on Referral of All I-130 Petitions to USCIS Service Offices for Adjudication," Vol. 84 *Interpreter Releases* 288, Feb. 5, 2007.

<sup>598</sup> *See* I.N.A. § 204(a)(1), 8 U.S.C. § 1154(a)(1).

<sup>599</sup> *See* Memorandum from Michael Aytes, Associate Director, Domestic Operations, "Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiance(e) under the Adam Walsh Child Protection and Safety Act of 2006," Feb. 8, 2007, available at [www.uscis.gov](http://www.uscis.gov).

The CIS will automatically presume that a risk of harm exists to an intended child beneficiary, irrespective of the nature and severity of the petitioner's specified offense and other past criminal acts and whether the petitioner and child beneficiary will be residing in the same household or within close proximity.<sup>600</sup> The burden is upon the petitioner to rebut and overcome the presumption of risk by providing credible and persuasive evidence of rehabilitation and other relevant evidence that beyond any reasonable doubt proves that he does not pose any risk to the child.

In adjudicating the waiver related to an adult beneficiary, prior acts of spousal abuse and other acts of violence will be considered. The fact that a petitioner's past criminal acts may have been perpetrated only against children or that the petitioner and beneficiary will not be residing either in the same household or within close proximity to one another may not, standing alone, be sufficient to persuade the CIS that the petitioner poses no risk to an adult beneficiary.

The provisions of the Adam Walsh Child Protection Act will impact both non-citizens and U.S. citizens rather harshly, particularly where the offense involved is essentially statutory rape with consensual relations. The processing of the waiver will also result in delays for the processing of the visa petition. If the waiver is not granted, the visa petition will be denied and the family member will be unable to immigrate to the U.S. based on the visa petition.

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<sup>600</sup> *See id.*

## General Classes of Aliens Ineligible to Receive Visas and Ineligible for Admission; Waivers of Inadmissibility

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I.N.A. § 212, 8 U.S.C. § 1182<sup>1</sup>

### (a) Classes of Aliens Ineligible for Visas or Admission

Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-Related Grounds . . . .

(2) Criminal and Related Grounds

(A) Conviction of Certain Crimes

(i) In General

Except as provided in clause (ii), any alien convicted of, *or* who admits having committed, *or* who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802), is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for visa or other documentation and the date of application for admission to the United States, [juvenile offense exception] or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). [petty offense exception]

(B) Multiple Criminal Convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is inadmissible.

(C) Controlled Substance Traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the

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<sup>1</sup> [Emphasis in bold and abbreviated information in brackets added by the author.]

illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.<sup>2</sup>

**(D) Prostitution and Commercialized Vice**

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10 year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain Aliens Involved in Serious Criminal Activity Who Have Asserted Immunity from Prosecution . . . .

(F) Waiver Authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have engaged in particularly severe violations of religious freedom<sup>3</sup> . . . .

**(3) Security and Related Grounds**

(A) In General

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in [espionage, sabotage, export of technology, overthrow of the United States government by force or other unlawful means, and “any other unlawful activity.”]

**(B) Terrorist Activities**

(i) In General . . . [Relates to past terrorist acts, likelihood to engage in future terroristic activity, past incitement of terrorism, being a representative of a terrorist organization, and being a member of a terrorist organization.]

**(ii) Terrorist Activity Defined**

[This section generally refers to actions such as hijacking, sabotage, kidnapping, attacks upon diplomats, assassination, and the use of weapons of mass destruction. However, its terms can be read broadly, and include “any activity which is unlawful under the laws of the place where it is committed . . . and which involves . . . the

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<sup>2</sup> Intelligence Authorization Act for Fiscal Year 2000, § 809, Pub. L. No. 106-120 (Dec. 3, 1999).

<sup>3</sup> Par. (G) added by Sec. 604(a), International Religious Freedom Act of 1998, Act of Oct. 27, 1998, Pub. L. No. 105-292, 112 Stat. 2787; effective date [as provided in section 604(a) of the Act]: “(B) Effective Date. – The amendment made by subsection (a) shall apply to aliens seeking to enter the United States on or after the date of the enactment of this Act.”

seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.”]

(iii) **Engage in Terrorist Activity Defined . . .**

(C) Foreign Policy . . . .

(D) Immigrant Membership in [Communist or other] Totalitarian Party . . . .

(E) Participants in Nazi Persecutions or Genocide . . . .

(4) [Possibility of becoming a “Public Charge”]

(5) Labor Certification and Qualifications for Certain Immigrants . . . .

**(6) Illegal Entrants and Immigration Violators**

(A) Aliens Present Without Permission or Parole

(i) In General

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for Certain Battered Women and Children . . . .

(B) Failure to Attend Removal Proceeding . . . .

**(C) Misrepresentation**

(i) In General

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) Falsely Claiming Citizenship

(I) In general—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.<sup>4</sup>

(II) Exception—In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.<sup>5</sup>

(iii) Waiver Authorized

For provision authorizing waiver of clause (i), see subsection (i).

(D) Stowaways . . . .

**(E) Smugglers**

<sup>4</sup> This subsection is effective for claims made on or after September 30, 1996.

<sup>5</sup> As amended by section 201(b)(2), (3) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000): “Effective dates—The amendment made by paragraph (2) shall be effective as if included in section 344 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009-637) and shall apply to representations made on or after September 30, 1996. Such amendments shall apply to individuals in proceedings under the Immigration and Nationality Act on or after September 30, 1996.”

(i) In General

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

**(F) Subject of Civil Penalty [document fraud]**

(i) In General

An alien who is the subject of a final order for violation of section 274C is inadmissible.

(ii) Waiver Authorized

For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) Student Visa Abusers . . . .

**(7) Documentation Requirements**

**(A) Immigrants** [Must be in possession of valid, unexpired document.]

**(B) Nonimmigrants** [Must be in possession of valid, unexpired document.]

**(8) Ineligible for Citizenship** [Relating to draft-dodging and renunciation of citizenship.]

**(9) Aliens Previously Removed**

**(A) Certain Aliens Previously Removed**

(i) Arriving Aliens

Any alien who has been ordered removed under section 235(b)(1) [summary removal at port of entry] or at the end of proceedings under section 240 [removal proceedings] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other Aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 240 or any other provision of law,

or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

**(B) Aliens Unlawfully Present**

(i) In General

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of Unlawful Presence

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees

No period of time in which an alien has a bone fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family Unity

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered Women and Children

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if 'violation of the terms of the alien's nonimmigrant visa' were substituted for 'unlawful entry into the United States' in subclause (III) of that paragraph.

(iv) Tolling for Good Cause

In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No

court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

**(C) Aliens Unlawfully Present After Previous Immigration Violations**

**(i) In General**

Any alien who—(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

**(ii) Exception**

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(4), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's—

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.<sup>6</sup>

**(10) Miscellaneous**

(A) Practicing Polygamists . . . .

(B) Guardian Required to Accompany Helpless Alien . . . .

**(C) International Child Abduction**

**(D) Unlawful Voters<sup>7</sup>**

(i) In general—Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) Exception—In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien

<sup>6</sup> As amended by section 1505(a) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-406, 114 Stat. 1464 (Nov. 1, 2000).

<sup>7</sup> As amended by sections 201(b)(1), (3) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000): "Effective dates—The amendment made by paragraph (1) shall be effective as if included in section 347 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009-546) and shall apply to voting occurring before, on, or after September 30, 1996. . . Such amendments shall apply to individuals in proceedings under the Immigration and Nationality Act on or after September 30, 1996."



shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former Citizens who Renounced Citizenship to Avoid Taxation . . . .

(b) through (r) . . . .

## Petitioning Procedure as Affected by Adam Walsh Child Protection Act

### **I.N.A. § 204(a), 8 U.S.C. § 1154(a)<sup>8</sup>**

(a)(1)(A)(i) *Except as provided in clause (viii), any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 1153(a) of this title may file a petition with the Attorney General for such classification.*

(viii)(I) *Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.*

(II) *For purposes of subclause (I), the term specified offense against a minor is defined as in section 111 of the Adam Walsh Child Protection and Safety Act of 2006.*

(B)(i)(I) *Except as provided in subclause (II), any alien lawfully admitted for permanent residence claiming that an alien is entitled to a classification by reason of the relationship described in section 1153(a)(2) of this title may file a petition with the Attorney General for such classification. Subclause (I) shall not apply in the case of an alien lawfully admitted for permanent residence who has been convicted of a specified offense against a minor (as defined in subparagraph (A)(viii)(II), unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that such person poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.*

### **I.N.A. § 101(a)(15)(k), 8 U.S.C. § 1101(a)(15)(k)**

(K)(i) is the fiancée or fiancé of a citizen of the United States, *other than a citizen described in section 1154(a)(1)(A)(viii)(I)*, and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States, *other than a citizen described in section 1154(a)(1)(A)(viii)(I)*, who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa, or...

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<sup>8</sup> Changes in statute are italicized by the author.

## Juveniles and Immigration Consequences

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### Immigration Consequences for Juveniles

Non-citizen juveniles may face immigration consequences for criminal acts. Such consequences include being placed in removal proceedings, being ordered removed, and removed from the United States, regardless of age.<sup>601</sup> The immigration consequences depend on the nature of the acts and whether the juvenile non-citizens are in juvenile delinquency proceedings, extended juvenile jurisdiction proceedings (Illinois), or have been certified to stand trial as an adult.

Under Illinois law, persons ages 17 and older may be prosecuted as adults rather than adjudicated delinquent.<sup>602</sup> Concurrent jurisdiction between the delinquency court and adult criminal court exists for traffic, boating, fish and game law, and city or county ordinance violations for juveniles.<sup>603</sup> Juveniles ages 15 and older who are charged with murder, certain other crimes of violence, or aggravated criminal sexual assault will be prosecuted as adults.<sup>604</sup>

In Wisconsin, juveniles ages 10 to 17 may be adjudicated delinquent.<sup>605</sup> Juveniles ages 16 and older will be prosecuted as adults for traffic, boating, snowmobile and all-terrain vehicle violations.<sup>606</sup> Juveniles ages 14 and older may be prosecuted as adults for crimes of violence, such as homicide and robbery, and for controlled substance trafficking

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<sup>601</sup> See *In re Mejia-Andino*, 23 I&N Dec. 533, 535-37 (BIA Dec. 4, 2002) (discussing the requirements for proper service of a Notice to Appear in the case of a minor); *In re Gomez-Gomez*, 23 I&N Dec. 522 (BIA Dec. 4, 2002) (regarding *in absentia* removal proceedings and removal orders for minors).

<sup>602</sup> See 705 ILCS 405/5-120.

<sup>603</sup> See 705 ILCS 405/5-125.

<sup>604</sup> See 705 ILCS 405/5-130.

<sup>605</sup> See Wis. Stat. § 938.12(1); Wis. Stat. § 938.12(2).

<sup>606</sup> See Wis. Stat. § 938.17(1).

offenses.<sup>607</sup> In certain circumstances, juveniles ages 10 and older will be prosecuted as adults for homicide charges and other specified offenses and where they have been previously adjudicated delinquent or guilty for criminal offenses.<sup>608</sup>

Indiana law is similar to Wisconsin law. A juvenile age 14 or older who has been charged with a heinous or aggravated act or an act that is part of a repetitive pattern of delinquent acts may be charged as an adult.<sup>609</sup> The juvenile delinquency court may also waive its jurisdiction to allow any juvenile to be charged as an adult if he is charged with an act that would be a felony if committed by an adult and he has been previously convicted of a felony or a non-traffic misdemeanor.<sup>610</sup> A juvenile age 16 or older may be charged as an adult for a controlled substance offense or for other specified felony offenses.<sup>611</sup> A juvenile age 10 and older may be prosecuted as an adult for murder.<sup>612</sup> Under the Individuals with Disabilities Education Act,<sup>613</sup> it may be possible for defense counsel to move for dismissal of a juvenile court petition where the non-citizen youth's behavior on school premises or a school bus is based on a disability and his special education needs have not been sufficiently addressed by the school.<sup>614</sup>

## Juvenile Delinquency Proceedings

### *Case Law*

Non-citizens placed in juvenile delinquency proceedings who have been found to have committed an act of juvenile delinquency are generally *not* subject to deportation, exclusion or removal proceedings. An act of juvenile delinquency is not considered a crime and a finding of juvenile delinquency is not a conviction for immigration purposes.<sup>615</sup> Since an act of juvenile delinquency is not considered to be a crime for deportation purposes, non-citizens placed in juvenile delinquency proceedings will not be deportable for their acts of delinquency.

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<sup>607</sup> See Wis. Stat. § 938.18 (regarding process for prosecutor to seek a waiver of juvenile court jurisdiction and reference to offenses qualifying under the waiver).

<sup>608</sup> See Wis. Stat. § 938.183.

<sup>609</sup> See IC 31-30-3-2.

<sup>610</sup> See IC 31-30-3-6.

<sup>611</sup> See IC 31-30-3-3; IC 31-30-3-5.

<sup>612</sup> See IC 31-30-3-4.

<sup>613</sup> See 20 U.S.C. § 1400 et seq. (1997).

<sup>614</sup> The Pacer Center, Inc., a non-profit parent training center in Minneapolis, Minnesota has a special project entitled the Juvenile Justice Project which works with juveniles with disabilities in the juvenile justice system. The staff can provide training and assistance to public defenders as well as coordinate with other agencies. The Juvenile Justice Project has published a useful resource entitled *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System*, 1999, 2nd edition, updated 2003. The Pacer Center, Inc. is located at 8161 Normandale Blvd., Minneapolis, MN 55437, (952) 838-9000. To contact the Juvenile Justice Project, call (952) 838-9000 or visit <http://www.pacer.org/jj/index.asp>.

<sup>615</sup> See *In re Devison*, 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001); *In re De La Nues*, 18 I&N Dec. 140 (BIA Oct. 5, 1981); *In re Ramirez-Rivero*, 18 I&N Dec. 135 (BIA Oct. 5, 1981); 22 C.F.R. § 40.21(a)(2) (1998).

Non-citizens in juvenile delinquency proceedings may, however, be found to be inadmissible based on their conduct and consequently deportable. A non-citizen juvenile is inadmissible:

- 1) For an adjudication or admission involving controlled substances other than minor drug offenses relating to simple possession or use of controlled substances which occurred under age eighteen;<sup>616</sup>
- 2) If the DHS has “reason to believe” that he is or has been a drug trafficker, drug abuser, or drug addict;<sup>617</sup> or
- 3) If he was involved in prostitution within 10 years of the date of his or her application for adjustment of status to become a lawful permanent resident.<sup>618</sup>

A non-citizen juvenile may also be inadmissible under I.N.A. § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E) and deportable under I.N.A. § 237(a)(1)(E), 8 U.S.C. § 1127(a)(1)(E) for having knowingly encouraged, induced, assisted, abetted, or aided another non-citizen to enter the United States.

In addition, certain dispositions for juvenile delinquency bar applicants from adjusting to become lawful permanent residents through Family Unity under the 1986 Amnesty and 1988 Special Agricultural Worker (SAW) Programs. If an act of juvenile delinquency which if committed by an adult would be a felony involving violence or the threat of physical force against another person, then the juvenile disposition is a bar to Family Unity benefits granted or extended after September 30, 1996 under IMMACT 1990 § 301(e) as amended by IIRAIRA § 383.<sup>619</sup> In such a case, the DHS can deny the application of the juvenile for Family Unity and place the juvenile in removal proceedings based on the juvenile’s unlawful entry into the U.S. or time in the U.S. beyond any period authorized by the DHS.

### ***Practice Tips***

In cases involving the trafficking or manufacturing of controlled substances, smuggling of non-citizens, or prostitution, the juvenile court records should be sealed to avoid immigration consequences. Even though the juvenile disposition is not a “conviction” for immigration purposes, a juvenile non-citizen may still be found to be inadmissible in these cases which may result in the juvenile being found deportable and subsequently deported or removed from the United States.

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<sup>616</sup> See 9 FOREIGN AFF. MAN. 40.21(b) N2.1 (1996).

<sup>617</sup> See *id.*; I.N.A. § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).

<sup>618</sup> See I.N.A. § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

<sup>619</sup> See “Implementation of Hernandez v. Reno Settlement Agreement; Certain Aliens Eligible for Family Unit Benefits after Sponsoring Family Member’s Naturalization; Additional Class of Aliens Ineligible for Family Unity Benefits,” 65 Fed. Reg. 43677 (2000) (amending 8 C.F.R. § 236.13).

## Extended Juvenile Jurisdiction (EJJ) Proceedings

Effective January 1, 1999, the state of Illinois implemented provisions for extended jurisdiction juvenile prosecutions (EJJ), habitual juvenile offenders, and violent juvenile offenders.<sup>620</sup> Unless otherwise provided, the extended jurisdiction juvenile statute enables a juvenile court judge to place a juvenile offender on probation for up to five years or until he or she turns 21 years old, whichever is less.<sup>621</sup> Since the statute was enacted, it is unclear whether a juvenile has a “conviction” for immigration purposes. As of May 15, 2007, neither the Board of Immigration Appeals nor the Seventh Circuit Court of Appeals has decided any case involving hybrid statutes, including cases resulting under the Illinois EJJ statute, or the issue of inadmissibility and deportability for adjudications or executed sentences under these statutes.

### *State Statutes*

In the absence of Board of Immigration Appeals and Seventh Circuit Court of Appeals case law regarding extended juvenile jurisdiction, defense counsel representing juveniles in extended juvenile jurisdiction (EJJ) proceedings should treat the juvenile’s case as though the juvenile were an adult for purposes of evaluating whether the juvenile may face subsequent immigration consequences.<sup>622</sup> Under Illinois statute, a juvenile alleged to have committed a felony offense may be placed in EJJ proceedings by the court after a petition or motion by the prosecutor and hearing by the court.<sup>623</sup> If the EJJ prosecution results in a guilty plea, verdict of guilty, or a finding of guilt, the court shall impose one or more juvenile sentences *and* an adult criminal sentence with a stay of execution.<sup>624</sup> If the juvenile then violates the conditions of the juvenile sentence, the court may order the execution of the adult criminal sentence OR continue the juvenile on the existing juvenile sentence, with or without modifying or enlarging the conditions.<sup>625</sup> If the juvenile commits a new offense, the court shall order the execution of the adult criminal sentence.<sup>626</sup> Once the stay of execution is revoked and the adult criminal sentence is executed, then the juvenile’s extended jurisdiction status and juvenile court jurisdiction are terminated.<sup>627</sup> Ongoing jurisdiction for adult sanctions is with the adult court.<sup>628</sup>

Adjudication under the Illinois EJJ statute differs from the New York youthful offender statute considered by the Board of Immigration Appeals.<sup>629</sup> Under the New York statute, a conviction is entered and immediately vacated, a youthful offender adjudication is substituted for the conviction, and a youthful offender sentence is imposed.<sup>630</sup> The Board of Immigration Appeals found that adjudication under the New York youthful offender

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<sup>620</sup> See 705 ILCS 405/5-801.

<sup>621</sup> See 705 ILCS 405/5-810(4); 705 ILCS 405/5-710(a); 705 ILCS 405/5-715(1).

<sup>622</sup> Wisconsin and Indiana do not have EJJ proceedings.

<sup>623</sup> See 705 ILCS 405/5-810(1)-(2).

<sup>624</sup> See 705 ILCS 405/5-810(4).

<sup>625</sup> See 705 ILCS 405/5-801(6).

<sup>626</sup> See *id.*

<sup>627</sup> See *id.*

<sup>628</sup> See *id.*

<sup>629</sup> See *In re Devison*, 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001).

<sup>630</sup> See *id.* at 4.

statute does not constitute a conviction for immigration purposes.<sup>631</sup> It is unclear whether the Board of Immigration Appeals will consider adjudication under the Illinois EJJ statute to be a conviction for immigration purposes due to the statutory requirement that a guilty plea, a verdict of guilt, or a finding of guilt be entered in conjunction with the imposition of a juvenile sentence and an adult criminal sentence.<sup>632</sup> Only upon successful completion of the juvenile sentence does the Illinois court vacate the adult sentence.<sup>633</sup>

Since immigration consequences may attach where the EJJ juvenile violates probation and the adult sentence is executed, an attorney should assume that the EJJ juvenile may violate probation. Therefore, the felony charges must be evaluated for possible grounds of deportation and inadmissibility, including whether the conviction will be considered to be a crime involving moral turpitude and/or an aggravated felony. In this situation, the analysis regarding immigration consequences will be the same for juvenile non-citizens as for adult non-citizens.

### ***Application to Cases***

#### **Case of Marlo from Italy**

In 2005, Marlo entered the United States at age sixteen as a lawful permanent resident with his parents who opened a chain of bakeries to obtain their lawful permanent residence. He got into a fight on the soccer field eight months later and punched another player in the face, breaking the player's nose. The prosecutor filed a petition to place him in EJJ proceedings under 705 ILCS 405/5-810(1) which the court granted. Marlo was adjudicated guilty of aggravated battery. The court imposed a juvenile sentence and suspended the execution of an adult sentence of two years. Two months later, Marlo was arrested for allegedly stealing a can of Freon from the local gas station. His probation was revoked and his adult sentence was executed.

Analysis: Marlo may be deportable for having been convicted of an aggravated felony. He has been adjudicated under the EJJ statute for a crime of violence for which an adult term of imprisonment of one year and one day has been imposed and executed. Unless he has a claim of persecution for withholding of removal to Italy (which is unlikely in his case), he may be found to be deportable for having been convicted of an aggravated felony and will be removed from the United States. No waivers are available to Marlo.

### ***Practice Tips***

In EJJ proceedings, a juvenile is technically supposed to admit to a felony offense and receive an adult felony sentence of a year or more in addition to a juvenile sentence.<sup>634</sup> To

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<sup>631</sup> See *In re Devison*, 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001).

<sup>632</sup> See 705 ILCS 405/5-810(4); see also, Definition of Conviction, *supra* at 2-3.

<sup>633</sup> See 705 ILCS 405/5-810(4). Furthermore, the vacatur of the adult sentence is likely to be considered rehabilitative and therefore, the state court order of vacatur will not eliminate immigration consequences under *In re Pickering*, 23 I&N Dec. 621 (BIA Jun. 11, 2003). See also, Post-conviction Relief, *infra* at 8-12 to 8-24.

<sup>634</sup> See 705 ILCS 405/5-810(4); see also, 730 ILCS 5/5-1 *et seq.*

avoid an aggravated felony conviction for immigration purposes, defense counsel should petition or motion the court to transfer the juvenile's case from EJJ proceedings to juvenile proceedings. If this is not possible, negotiate for a period of probation or an adult sentence for 364 days or less with the prosecution.<sup>635</sup>

## Alternatives to the Court System

Defense counsel may want to consider restorative justice and court diversion programs when evaluating the immigration consequences of offenses by juvenile non-citizens. Due to a decrease in recidivism for youth who participate in these programs, they are becoming a much more common alternative to entering the criminal court system. One such program based in Chicago is called the Community Panels for Youth and is coordinated by the Community Justice for Youth Institute.<sup>636</sup> There are similar community panel programs in Racine, Burlington, and Waterford, Wisconsin.<sup>637</sup> In Indiana, the Indianapolis Restorative Justice Program works with first time youth offenders under the age of 14 facing charges of assault, criminal mischief, disorderly conduct, shoplifting and theft.<sup>638</sup>

In an alternative program, youth offenders go before a panel of trained community volunteers who help come to a resolution instead of appearing before a judge within the court system. These resolutions aim to repair the harm caused to the community by the offense while stressing accountability and skill-building for the youth offender. Actions to be taken by the youth offender may involve community service, written apologies, face-to-face interaction with the victim of the offense, and other activities or products that demonstrate accountability and restitution.<sup>639</sup>

Not only do these alternative justice programs help youth understand the full extent of their criminal actions and connect with their community, they also may help avoid convictions that could be detrimental, especially in the case of non-citizen youth. For example, possession of marijuana on school grounds is a serious offense in Illinois and qualifies for automatic transfer from juvenile court to criminal court. However, in the case of the 14 year old offender who committed this offense, he participated in the Community Panels for Youth program and never appeared in any court. He accepted responsibility for his actions and made restitution to the community in a way that built on his skills and interests by making a video about the consequences of drug dealing which he then viewed and discussed with youth at a local community center.<sup>640</sup> If his case had been transferred to a criminal court, he could have been tried as an adult and convicted of drug trafficking which is an aggravated felony offense.

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<sup>635</sup> For a list of aggravated felonies, see *Aggravated Felonies, supra* at 3-34.

<sup>636</sup> See "Responding to Young Offenders," *MacArthur Newsletter*, [www.macfound.org](http://www.macfound.org), Fall 2005.

<sup>637</sup> See Amanda Farr Marrazzo, "Community Panel on Youth Offenders Considered," *The Milwaukee Journal Sentinel*, [www.findarticles.com](http://www.findarticles.com), Feb. 27, 2000.

<sup>638</sup> For more information, see Indianapolis Restorative Justice Program at [http://www.findyouthinfo.gov/cf\\_pages/programdetail.cfm?id=27](http://www.findyouthinfo.gov/cf_pages/programdetail.cfm?id=27).

<sup>639</sup> See *id.*; Stephanie Potter, "Juvenile Program More than Token Gesture," *Chicago Daily Law Bulletin*, Dec. 8, 2006, p. 1; "Responding to Young Offenders," *MacArthur Newsletter*, Fall 2005, [www.macfound.org](http://www.macfound.org); Amanda Farr Marrazzo, "Community Panel on Youth Offenders Considered," *The Milwaukee Journal Sentinel*, [www.findarticles.com](http://www.findarticles.com), Feb. 27, 2000.

<sup>640</sup> See "Responding to Young Offenders," *MacArthur Newsletter*, Fall 2005, [www.macfound.org](http://www.macfound.org).



## Certification as an Adult

Where the possibility exists that a juvenile non-citizen may be certified to stand trial as an adult, then the case must be analyzed as if the juvenile were an adult. For example, a juvenile court may transfer the case of a juvenile offender for prosecution under the criminal laws of Illinois under 705 ILCS 405/5-805 (mandatory and discretionary transfers), 705 ILCS 405/5-815(a) (habitual juvenile offender) or 705 ILCS 405/5-820(g) (violent juvenile offender). A juvenile non-citizen with an adult conviction and sentence will be treated as having been convicted for immigration purposes.

## Special Immigrant Juvenile Status (SIJS)

Unaccompanied non-citizen children who have been abused, neglected, or abandoned may be eligible for a form of immigration relief called Special Immigrant Juvenile Status (SIJS). This status allows a non-citizen child to become a lawful permanent resident and gain employment authorization if it is determined not to be in his best interest to return to his country of nationality or last habitual residence. Children who are eligible for SIJS are generally identified through social workers, teachers, police officers, and caretakers. They may also be identified by attorneys working on their abuse or neglect proceedings, dependency actions, and delinquency proceedings. As such, it is important that defense counsel is aware of this option for relief.

<b>In order to be eligible for SIJS, a non-citizen must:</b>
<ul style="list-style-type: none"><li>▪ Be unmarried and under 21 years of age;</li><li>▪ Be declared a dependent of a juvenile court;</li><li>▪ Be considered eligible by the court for long-term foster care, meaning that parental reunification is not possible due to past abuse, neglect, or abandonment;</li><li>▪ Continue to be dependent on a juvenile court and eligible for or currently under long-term foster care; and</li><li>▪ Have been the subject of administrative or judicial proceedings through which it has been determined that it is not in his best interest to returned to the country of his nationality or last habitual residence.<sup>641</sup></li></ul>



Where a non-citizen is under age 21 and may be eligible for SIJS, contact an immigration attorney immediately to determine the child's options.<sup>642</sup> A child who has been

<sup>641</sup> See 8 C.F.R. § 204.11.

<sup>642</sup> The National Immigrant Justice Center (NIJC) has an Immigrant Children's Project which may be able to provide assistance. Contact the NIJC at (312) 660-1370 or [nijc@heartlandalliance.org](mailto:nijc@heartlandalliance.org). The manual entitled *Midwest Immigrant & Human Rights Center's (currently NIJC) Guide for Pro Bono Attorneys Representing Children Seeking Special Immigrant Juvenile Status in Illinois* may also be downloaded at <http://www.immigrantjustice.org/probonoinfo.asp>. The Immigrant Legal Resource Center (ILRC) also has a manual covering SIJS that can be purchased at [www.ilrc.org](http://www.ilrc.org). Additional information about SIJS and non-citizen children is available through the U.S. Committee for

abused or neglected by parents or a legal guardian may be eligible for a T or U visa, asylum, and/or relief under the Violence Against Women Act (VAWA).<sup>643</sup>

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Refugees and Immigrants National Center for Refugee and Immigrant Children at <http://www.refugees.org/article.aspx?id=1559#Manuals>.

<sup>643</sup> See “U Visa/Deferred Action,” *infra* at 6-72; “T “Trafficking Visa,”” *infra* at 6-74; “VAWA Visa Self-petition,” *infra* at 6-67; “VAWA Cancellation of Removal,” *infra* at 6-70; “Asylum and Refugees,” *infra* at 6-31.

**CHAPTER****6**

**Immigration Remedies and Defenses  
under the Immigration and Nationality  
Act for Non-Citizens**

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### **Immigration Proceedings: Past and Present**

Through provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>644</sup> which became effective April 1, 1997, Congress created a new system of removal proceedings to deport or remove non-citizens from the United States. Deportation and exclusion proceedings were combined into a single proceeding called a removal proceeding. A removal order has the same result as a deportation or exclusion order: the non-citizen is ordered to be physically removed from the United States.

<sup>644</sup> See Pub. L. No. 104-208, 110 Stat. 3009 (1996).

The charging document issued by the former INS or the DHS control whether a non-citizen is in deportation, exclusion, or removal proceedings. A non-citizen who was issued an “Order to Show Cause” by the former INS that was filed with the Immigration Court prior to April 1, 1997 remains in deportation proceedings; a non-citizen issued another charging document for exclusion proceedings by the former INS that was filed with the Immigration Court prior to April 1, 1997 remains in exclusion proceedings.<sup>645</sup> A non-citizen who was granted advance parole and paroled into the U.S. before April 1, 1997 could be properly placed into exclusion rather than deportation proceedings.<sup>646</sup> Since April 1, 1997, the former INS and the DHS have issued a “Notice to Appear” to place a non-citizen into “removal” proceedings. The distinction is critical because different forms of relief are available to non-citizens depending on whether they have been placed in deportation, exclusion or removal proceedings.

The DHS has issued memorandums regarding its authority to exercise prosecutorial discretion in its enforcement of the immigration laws.<sup>647</sup> Favorable exercises of discretion may include decisions not to issue a charging document and not to place a non-citizen in removal proceedings.<sup>648</sup> The DHS has clearly stated, however, that any favorable exercise of its prosecutorial discretion will not grant any immigration status to a non-citizen, immunity from future removal proceedings, or any enforceable right or benefit upon the

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<sup>645</sup> See *Morales-Ramirez v. Reno*, 209 F.3d 977, 982-83 (7<sup>th</sup> Cir. Apr. 13, 2000) (holding that proceedings begin when the I.N.S. files the appropriate charging document with the Immigration Court, not when the charging document is served on the non-citizen); see also, *In re G-N-C-*, 22 I&N Dec. 281 (BIA Sept. 17, 1998) (holding that the I.N.S. can exercise its prosecutorial discretion to institute removal or other proceedings or to cancel a Notice to Appear or other charging document before it is filed with the Immigration Judge; once the charging document is filed with the Immigration Court, the INS may move to terminate proceedings, a motion which the Immigration Judge then adjudicates on the merits but is not required to grant based on the INS’ invocation of prosecutorial discretion); 8 C.F.R. § 1240.16; Memo, Bo Cooper, General Counsel, (HQCOU 90/16.1-P) (Dec. 7, 1999), reprinted in 77 *Interpreter Releases* 39, 55-56 (Jan. 10, 2000). See also, Proposed rule: Delegation of authority to the Immigration and Naturalization Service to terminate deportation proceedings and initiate removal proceedings, 65 Fed. Reg. 71273-71277 (2000) (proposing rules to allow the INS at its discretion to move the Immigration Court or the Board of Immigration Appeals to terminate pending deportation proceedings for lawful permanent residents rendered ineligible for section 212(c) relief by the AEDPA and to “repaper” or initiate removal proceedings to allow those eligible to apply for cancellation of removal as well as to “repaper” or initiate removal proceedings for non-citizens who were previously eligible for suspension of deportation prior to the enactment of IIRAIRA to apply for cancellation of removal).

<sup>646</sup> See 8 C.F.R. § 245.2(a)(4)(ii); *Landon v. Plasencia*, 459 U.S. 21, 25-27 (Nov. 15, 1982); *Dimenski v. I.N.S.*, 275 F.3d 574, 576-78 (7<sup>th</sup> Cir. Dec. 19, 2001) (holding that the INS was not required to advise a non-citizen that he would be placed in exclusion rather than deportation proceedings upon his return with advance parole); *Morales-Ramirez v. Reno*, 209 F.3d 977, 983 (7<sup>th</sup> Cir. Apr. 13, 2000) (holding that exclusion proceedings commence when the INS files the charging document with the Immigration Court). Persons in deportation proceedings have made an “entry” for immigration purposes and, as a result, have more rights and constitutional protections than those in exclusion proceedings who have not made an “entry” for immigration purposes. For a thorough discussion regarding advance parole, see *Samirah v. O’Connell*, 335 F.3d 545, 549-51 (7<sup>th</sup> Cir. Jul. 2 2003).

<sup>647</sup> See Memorandum from William Howard, Principal Legal Advisor, DHS, Oct. 24, 2005 (“Howard Memo”); Memorandum from Doris Meissner, Commissioner, INS, Nov. 17, 2000, 77 *Interpreter Releases* 1661.

<sup>648</sup> See Howard Memo at 2.

non-citizen.<sup>649</sup> Despite the ability of the DHS to consider requests for a favorable exercise of prosecutorial discretion, immigration consequences for criminal convictions still need to be avoided for non-citizens.

### **Final Administrative Removal Orders under I.N.A. § 238(b), 8 U.S.C. § 1228(b)**

Where a non-citizen is not a permanent resident, the DHS may administratively order him removed with the issuance of a Final Administrative Removal Order (FARO) without a hearing before the Immigration Court. The DHS has greatly increased the use of the issuance of FAROs since 2002. In 2002, the DHS issued 10,005 FAROs under I.N.A. § 238(b), 8 U.S.C. § 1228(b), totaling 43 percent of all removal orders. The other 57 percent of removal orders were issued by the Immigration Court. In 2006, the numbers reversed, with 55 percent of FAROs issued by the DHS and only 45 percent of final removal orders issued by the Immigration Courts. In Fiscal Year 2008, ICE obtained 6,514 FAROs and 30,707 stipulated orders of removal (reviewed and signed by an immigration judge without a court hearing).<sup>650</sup>

To invoke the procedures under I.N.A. § 238(b), 8 U.S.C. § 1228(b), ICE issues a Notice of Intent to Issue a Final Administrative Removal Order (“Notice of Intent”), alleging that the non-citizen is not a lawful permanent resident and that he has been convicted of a crime and charging that he is deportable for having been convicted of an aggravated felony as defined under 8 U.S.C. § 1101(a)(43).<sup>651</sup> A non-citizen who has been served a Notice of Intent has ten calendar days to respond to the charges in writing to ICE and rebut the charges.<sup>652</sup> A non-citizen who is placed in a final administrative removal proceeding is not eligible to be granted any form of discretionary relief.<sup>653</sup> If the non-citizen does not timely respond to the charges in writing, then an ICE supervisory officer shall issue the FARO and remove her 14 days after the issuance of the order.<sup>654</sup> Where a non-citizen does not fear persecution or torture in the designated country of removal, a petition

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<sup>649</sup> See *id.* at 11-12.

<sup>650</sup> ICE Fiscal Year 2008 Annual Report, at 28, available at [http://www.ice.gov/doclib/pi/reports/ice\\_annual\\_report/pdf/ice08ar\\_final.pdf](http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf).

<sup>651</sup> Such non-citizens include those who are not lawfully admitted for permanent residence when the proceedings commence or who have conditional permanent residence status. See I.N.A. § 238(b)(2), 8 U.S.C. § 1228(b)(2). Asylees and refugees are not lawful permanent residents; however, they are placed in removal proceedings under I.N.A. § 240, 8 U.S.C. 1229a and charged accordingly with having been admitted and inadmissible.

<sup>652</sup> See 8 C.F.R. §§ 238.1(b)(2), 238.1(c)(1).

<sup>653</sup> See I.N.A. § 238(b)(5), 8 U.S.C. § 1228(b)(5). In comparison, where a non-lawful permanent resident who has been convicted of an aggravated felony is placed in removal proceedings before the Immigration Court, he may still be eligible for discretionary relief before the Immigration Judge, such as a § 212(h) waiver or, in the case of an asylee or refugee, a § 209(c) waiver in conjunction with adjustment of status. See I.N.A. § 240, 8 U.S.C. § 1229a.

<sup>654</sup> See I.N.A. § 238(c), 8 U.S.C. § 1228(c); 8 C.F.R. § 238.1(d); see also, *U.S. v. Santiago-Ochoa*, 447 F.3d 1015 (7<sup>th</sup> Cir. May 19, 2006) (holding that where a non-citizen waived his right to contest the Notice of Intent to Issue a Final Administrative Removal Order issued by the DHS, he failed to exhaust his administrative remedies and did not meet his duty to exhaust under I.N.A. § 276(d)(1), 8 U.S.C. § 1326(d)(1) in a prosecution for illegal entry); *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439 (7<sup>th</sup> Cir. Apr. 13, 2007).

for review to challenge the DHS' FARO must be filed with the Seventh Circuit Court of Appeals within 14 days of the issuance of the FARO.<sup>655</sup>

Where a non-citizen contests the charges contained in the Notice of Intent and responds in writing within the ten day period, ICE may then either issue the FARO or issue a Notice to Appear and place her in regular removal proceedings before the Immigration Court. If ICE places a non-citizen in removal proceedings by issuing a Notice to Appear, the non-citizen may apply for all forms of relief for which she is eligible, including discretionary relief.

If ICE issues a FARO, a non-citizen who fears persecution or torture in his home country may still be eligible to appear before the Immigration Court to apply for withholding of removal or relief under Convention against Torture. In order to determine whether or not the DHS will allow the non-citizen to appear before the Immigration Judge for these forms of relief, a CIS asylum officer will conduct an interview to determine whether the non-citizen's fear of persecution or torture is reasonable.<sup>656</sup> If the non-citizen is then referred to the Immigration Judge to allow him to apply for withholding of removal or relief under CAT, he may not apply for any other form of relief.<sup>657</sup> If an asylum officer finds that a non-citizen does not have a reasonable fear of persecution or torture, the non-citizen may request that an Immigration Judge review the decision. An appeal from the Immigration Judge's decision regarding the asylum officer's finding and/or the merits of the withholding of removal or torture claim must be filed with the Board of Immigration Appeals within 30 days of the Immigration Judge's decision. The Board's decision may be appealed by filing a petition for review with the Seventh Circuit Court of Appeals within 30 days of issuance of the Board's decision.<sup>658</sup>

Typically, a DHS officer will serve a Notice of Intent to Issue a FARO on a non-citizen who is detained at a local county jail or a department of corrections facility. Thus, it is critical that defense counsel advise their non-citizens clients who are not permanent residents that they should contact an immigration attorney immediately upon receiving the Notice of Intent to Issue a FARO as there is only a ten day window in which to respond to the charges. The response must be in writing to the DHS. By advising non-citizens who are not lawful permanent residents but who have been convicted of what may be deemed aggravated felonies, non-citizens can attempt to challenge the final administrative removal orders. Where a non-citizen is removed from the U.S. pursuant to a FARO issued by DHS based on an aggravated felony conviction, he will be barred from returning to the U.S. for a minimum of 20 years, unless a waiver under I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3) is

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<sup>655</sup> See I.N.A. § 238(b)(3), 8 U.S.C. § 1228(b)(3).

<sup>656</sup> See 8 C.F.R. § 208.31(b)-(c).

<sup>657</sup> A non-citizen who has been convicted of an aggravated felony is statutorily barred from applying for asylum. See I.N.A. §§ 208(b)(2)(A)(ii), (B)(i), 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i).

<sup>658</sup> See I.N.A. § 242(b)(1), 8 U.S.C. § 1252(b)(1). However, review of the underlying facts involving a claim of persecution or torture by the Seventh Circuit Court of Appeals is unlikely where the non-citizen is not successful in challenging the aggravated felony finding of the Board. See *Petrov v. Gonzales*, 464 F.3d 800 (7<sup>th</sup> Cir. Oct. 6, 2006) (holding that the court of appeals does not have the jurisdiction to review claims of withholding of removal or relief under the Convention Against Torture (CAT) where the non-citizen has been convicted of an aggravated felony).

granted in conjunction with a nonimmigrant visa to allow him to return to the U.S. for a temporary period.<sup>659</sup>

## Reinstatement of Prior Orders

Where a non-citizen was ordered removed under the expedited removal statute, illegally reentered the U.S. and then married a U.S. citizen after September 1996 which rendered him eligible to apply for a waiver and lawful permanent residence, the DHS can reinstate the prior order of removal.<sup>660</sup> A non-citizen is ineligible for a waiver of the permanent bar under I.N.A. § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii) unless more than 10 years have elapsed since the date of his last departure from the U.S.<sup>661</sup> The Seventh Circuit has held that reinstatement of removal orders under I.N.A. § 241(a)(5), 8 U.S.C. § 1231(a)(5) trumps eligibility for adjustment of status under I.N.A. § 245(i), 8 U.S.C. § 1255(i).<sup>662</sup> Within the jurisdiction of the Seventh Circuit, an exception to reinstatement of removal is available to non-citizens who both illegally reentered and applied for adjustment of status prior to September 30, 1996.<sup>663</sup>

When the DHS intends to reinstate a prior order of removal, the DHS must determine the identity of the non-citizen, whether he was subject to a prior removal order, and whether he left and reentered the country. The DHS then issues a notice of intent to reinstate and serves it on the non-citizen. If the non-citizen does not challenge the DHS's intent to reinstate the removal order or the DHS decides that any response does not affect the DHS's intent to reinstate the removal order, the DHS will issue a final order reinstating the prior removal order. Unless the non-citizen has a credible fear of persecution or torture in the home country, the DHS can then remove the non-citizen immediately or as soon as

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<sup>659</sup> See I.N.A. § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A); I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3).

<sup>660</sup> See *Gomez-Chavez v. Perryman*, 308 F.3d 796 (7<sup>th</sup> Cir. Oct. 24, 2002); see also *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (Jun. 22, 2006) (finding that the conduct of remaining unlawfully in the U.S. after entry is an indefinitely continuing violation that a non-citizen can end by voluntarily leaving the U.S., that the non-citizen had ample warning of the change in immigration law that went into effect on April 1, 1997 and could have left the U.S. to avoid the effects of the change in law, and that his 2001 marriage to a U.S. citizen did not render the presumption against retroactive application of the law applicable to his case as he could have married her between 1989 and 2001 and applied for adjustment of status before April 1, 1997).

<sup>661</sup> See *In re Torres-Garcia*, 23 I&N Dec. 866 (BIA Jan. 26, 2006) (also holding that even where an alien obtained the Attorney General's permission to reapply for admission before reentering unlawfully, the alien is inadmissible under I.N.A. § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II) where 10 years had not elapsed between his date of departure and application for permission to return to the U.S.); cf. *In re Rodarte*, 23 I&N Dec. 905 (BIA Apr. 6, 2006) (holding that the 10 year unlawful presence bar of inadmissibility under I.N.A. § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) was triggered only where the departure was preceded by at least one year of unlawful presence which began to accrue on or after April 1, 1997).

<sup>662</sup> See *Lino v. Gonzales*, 467 F.3d 1077, 1080-81 (7<sup>th</sup> Cir. Nov. 6, 2006); *Guijosa De Sandoval v. United States AG*, 440 F.3d 1276, 1284-85 (11<sup>th</sup> Cir. Feb. 27, 2006); *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1163 (10<sup>th</sup> Cir. Nov. 23, 2004); *Lattab v. Ashcroft*, 384 F.3d 8, 21 (1<sup>st</sup> Cir. Sept. 14, 2004); *Warner v. Ashcroft*, 381 F.3d 534, 540 (6<sup>th</sup> Cir. Apr. 16, 2004); *Flores v. Ashcroft*, 354 F.3d 727, 731 (8<sup>th</sup> Cir. Dec. 31, 2003); *Padilla v. Ashcroft*, 334 F.3d 921, 925 (9<sup>th</sup> Cir. Jul. 1, 2003) (applicant did not file I-212 prior to reinstatement of removal order).

<sup>663</sup> See *Faiz-Mohamed v. Ashcroft*, 395 F.3d 799 (7<sup>th</sup> Cir. Jan. 26, 2005).

practically possible.<sup>664</sup> A non-citizen who is subject to reinstatement of a prior order of deportation or removal under I.N.A. § 241(a)(5), 8 U.S.C. § 1231(a)(5) has no right to a hearing before an Immigration Judge.<sup>665</sup> In the Seventh Circuit, prior removal orders are routinely reinstated by the DHS and these non-citizens are removed or deported without the opportunity to apply for immigrations benefits, even when they are married to U.S. citizens.<sup>666</sup>

For more information regarding possible waivers for certain grounds of inadmissibility, see Waivers under I.N.A. § 212(h), 8 U.S.C. § 1182(h) and Waivers under I.N.A. § 212(i), 8 U.S.C. § 1182(i), *infra* at 6-58 and 6-62. For additional information about other classes of non-citizens who may be eligible for adjustment of status, such as non-citizens who filed late for adjustment of status under the 1986 Amnesty program, contact an immigration attorney.

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<sup>664</sup> See 8 U.S.C. § 1231(a)(5).

<sup>665</sup> See *In re W-C-B-*, 24 I&N Dec. 118 (BIA Mar. 19, 2007) (holding that the Immigration Judge did not error in terminating removal proceedings as improvidently begun by the DHS where the non-citizen was subject to reinstatement of his prior order of deportation).

<sup>666</sup> See *Lino v. Gonzales*, 467 F.3d 1077 (7<sup>th</sup> Cir. Nov. 6, 2006). The interpretation of the law has varied elsewhere. The Ninth and Tenth Circuit Courts of Appeals have held that persons who were unlawfully present in the U.S. for more than one year, leave the U.S., unlawfully reenter and are subject to the 10 year permanent bar under I.N.A. § 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I) may apply to adjust their status if they are covered by I.N.A. § 245(i), 8 U.S.C. § 1255(i). See *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir. Feb. 23, 2006); *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, *amended on reh'g* by 453 F.3d 1237 (10<sup>th</sup> Cir. Oct. 18, 2005). Litigation on the issue remains ongoing. See *Duran Gonzales v. DHS*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), *pet. for reh'g and reh'g en banc denied* (9<sup>th</sup> Cir. Jan. 16, 2009) (overruling *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. Aug. 13, 2004) in which the court had held that non-citizens ordered removed or deported were eligible to apply for adjustment of status under INA §245(i) with a concurrent I-212 waiver application); *Mora v. Mukasey*, 550 F.3d at 236-238 (2<sup>nd</sup> Cir. Dec. 16, 2008) (finding that the Tenth Circuit's decision in *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10<sup>th</sup> Cir. 2006) and the Ninth Circuit's decision in *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir. 2006) appear to no longer be good law or persuasive authority in light of the deference owed to the BIA's subsequent precedent decisions in *In re Briones*, 24 I. & N. Dec. 355 (B.I.A. Nov. 29, 2007) and *In re Torres-Garcia*, 23 I. & N. Dec. 866 (B.I.A. Jan. 26, 2006)). Subsequent to the 2007 *Duran Gonzales* decision, a class action lawsuit was filed challenging the USCIS's interpretation of *Perez-Gonzalez* decision; the district court denied relief and an appeal is pending before the Ninth Circuit. See *Duran Gonzalez v. U.S. Department of Homeland Security and Napolitano*, 2009 U.S. Dist. LEXIS 18753 (W.D.WA Feb. 27, 2009), appeal case no. 09-35174 (9<sup>th</sup> Cir.). For additional information regarding the *Duran Gonzales* litigation, see American Immigration Law Foundation, "Lawsuit to Challenge DHS' Refusal to Follow *Perez-Gonzalez*, Ninth Circuit I-212 Decision," available at [http://www.aifl.org/lac/lac\\_lit\\_92806.shtml](http://www.aifl.org/lac/lac_lit_92806.shtml). The USCIS recently issued another memo that it will not follow the *Acosta* or *Padilla-Caldera* decisions. See Neufield, Scialabba, and Chang, "Memorandum: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," USCIS, May 6, 2009.



## Removal Proceedings

Where a non-citizen files an application with the CIS for an immigration benefit for which he is not eligible at that time, the DHS may use the information in the application to place that person in removal proceedings or otherwise carry out its enforcement authority.<sup>667</sup> In certain instances, it may also issue a final administrative removal order where the non-citizen has been convicted of an aggravated felony.<sup>668</sup>

Where a non-citizen has not been ordered removed by the DHS under I.N.A. § 238(b), 8 U.S.C. § 1228(b), the DHS may begin removal proceedings by issuing and serving upon him a Notice to Appear (NTA).<sup>669</sup> Once the NTA has been filed with the Immigration Court, the Immigration Judge has jurisdiction over a non-citizen's immigration case.<sup>670</sup>

NTAs can be issued by ICE, CBP or CIS. Many applications for immigration benefits are now filed with the different CIS service centers around the country. Where a CIS Service Center denies an application for an immigration benefit, it may issue an NTA and serve it upon the non-citizen by regular mail.<sup>671</sup> The issuance of an NTA by the CIS operates by the same manner as that issued by ICE or CBP. The non-citizen may challenge the NTA once she is before the Immigration Court in removal proceedings.

After serving the NTA upon the non-citizen, the DHS will file it with the Immigration Court with jurisdiction over the location of the non-citizen's residence. For detained cases in the Chicago Immigration Court, it takes approximately one to three weeks for the initial master calendar hearing to be scheduled. This initial hearing may be scheduled more quickly through the filing of a motion for a bond hearing, even where a non-citizen is not technically eligible for bond or release from DHS custody.<sup>672</sup> Generally, the Immigration Court must schedule a bond hearing within three business days of receiving the motion. For non-detained cases, it may take two weeks to three months for the initial master calendar hearing to be scheduled.

At the initial master calendar hearing, the Immigration Court will inform a non-citizen of her rights in removal proceedings, similar to advisals provided in a criminal court arraignment. At the hearing, a non-citizen has the right to request one continuance to

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<sup>667</sup> See *Gutierrez v. Gonzales*, 458 F.3d 688 (7<sup>th</sup> Cir. Aug. 16, 2006) (holding that even where an attorney who has subsequently been found to have engaged in a pattern of misconduct in immigration cases, the DHS may still use the evidence provided in the application to place the non-citizen in removal proceeding).

<sup>668</sup> See *Final Administrative Removal Orders*, *supra* at 6-3.

<sup>669</sup> See 8 C.F.R. § 1003.14(a); *Dandan v. Ashcroft*, 339 F.3d 567, 575-76 (7<sup>th</sup> Cir. Aug. 11, 2003) (holding that removal proceedings commence with the filing of the Notice to Appear with the Immigration Court and finding that because a non-citizen had not been physically present for ten years prior to being served with the NTA, he was ineligible for cancellation of removal as a non-lawful permanent resident).

<sup>670</sup> See 8 C.F.R. § 1003.14. For a quick overview of the deportation/removal process, see Appendix 6A, Flow Chart: Non-Citizen Removal (Deportation) Proceedings.

<sup>671</sup> See Memorandum from Michael Aytes, Associate Director, Domestic Operations, "Disposition of Cases Involving Removable Aliens," Jul. 11, 2006, available at <http://www.uscis.gov>.

<sup>672</sup> See 8 C.F.R. § 1003.19.

obtain legal counsel to represent her before the Immigration Court.<sup>673</sup> If the non-citizen appears with an attorney at the initial hearing, the attorney may request one continuance for attorney preparation. Either the non-citizen or the attorney may also decide to plead to the factual allegations and charge(s) of deportability/inadmissibility at the hearing. To plead to the factual allegations or charge(s), she will either admit or deny each of the allegations and charge(s) of deportability/inadmissibility.<sup>674</sup> Where a non-citizen has been admitted to the U.S., the burden of proving deportability lies with the DHS; in comparison, if the non-citizen is charged as an arriving alien and is not a lawful permanent resident, the burden of proving admissibility to the U.S. lies with her.<sup>675</sup>

After pleadings are taken at either the first or second master calendar hearing, the Immigration Judge will ask the non-citizen whether she wishes to designate the country for removal, should it become necessary. The Immigration Judge will also request information regarding the non-citizen's eligibility for any forms of immigration relief. If eligible, the Immigration Judge will then order the non-citizen to pay the requisite filing fee to the DHS, obtain a biometrics (fingerprint) appointment, and file the application(s) for relief and supporting documentation by a certain date.<sup>676</sup> The Immigration Judge will also advise the non-citizen (and her attorney) of the final date for a hearing on the merits of the application for relief. If the non-citizen does not file the application for relief by the chosen date or fails to comply with biometrics processing, the Immigration Judge may deem the application for relief as abandoned and may order the non-citizen removed from the U.S.<sup>677</sup>

At the final merits hearing (also known as an individual hearing), the non-citizen and other witnesses present their testimony.<sup>678</sup> The DHS may also present witnesses and

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<sup>673</sup> See 8 C.F.R. § 1003.29. Non-citizens may be represented before the Immigration Court or Board of Immigration Appeals by attorneys, law students in a law school clinical program or working with an accredited non-profit agency, or accredited representatives. See 8 C.F.R. § 1292.1. For purposes of discussion herein, the term "attorney" will be used to denote a legal representative before the Immigration Court and the Board.

<sup>674</sup> In the Notice to Appear, the DHS must include factual allegations that a person is not a U.S. citizen and that she is native and citizen of one or more countries other than the U.S. Due to the many changes in the composition and geography of nation states during the 1930s, 1940s, 1950s, 1960s, and 1990s, it may be necessary to ask the non-citizen about the name of the country at the time that she and/or her parents were born. For example, the geographical boundaries of Ethiopia, Eritrea, Ukraine, Poland, and Germany changed during World War II and the immediate period thereafter. Israel was created following World War II. The former U.S.S.R. was dissolved in December 1991. The former Yugoslavia also dissolved in the early 1990s. The analysis regarding place of birth and possible citizenship is relevant to determining whether a non-citizen may be stateless, in which case the DHS may not be able to obtain travel documents to remove him if he is deportable and ineligible for relief from a removal order. See *Orders of Supervision, infra* at 7-8.

<sup>675</sup> See I.N.A. § 240, 8 U.S.C. § 1229a.

<sup>676</sup> See 8 C.F.R. §§ 1003.31, 1003.32. Pursuant to the Immigration Court Practice Manual, any documentation in support of the application's relief must be filed at least 15 days prior to the date of the merits hearing. See Immigration Court Practice Manual, Chapter 3.1(b), available at [http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij\\_page1.htm](http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm). Several Immigration Judges use pre-hearing statement orders and often will require the supporting documentation to be filed three to four weeks before the date of the merits hearing, particularly for the cases of non-citizens who are not in DHS custody.

<sup>677</sup> See 8 C.F.R. §§ 1003.47(c)-(d).

<sup>678</sup> See 8 C.F.R. § 1003.34.

documentary evidence to the Immigration Court. The Immigration Judge will either render an oral decision on the day of the hearing or wait until a later date to issue an oral or written decision. The Immigration Judge cannot grant an application for relief until the DHS has obtained the results of the biometrics and background check.<sup>679</sup>

If the Immigration Judge denies an application for relief, the non-citizen must reserve appeal and file a Notice of Appeal with the Board of Immigration Appeals within 30 calendar days of the date of the Immigration Judge's decision.<sup>680</sup> If a Notice of Appeal is not received by the Board within 30 days, the order of removal by the Immigration Judge is final.<sup>681</sup> If the DHS chooses to appeal the decision of the Immigration Judge, it must also file a Notice of Appeal within 30 days.

After the Board receives a Notice of Appeal, the Board will order a transcription of the tapes recorded during the master calendar and merits hearings.<sup>682</sup> Upon receipt of the transcript, the Board will issue a briefing schedule and will send it, along with a transcript copy, to the non-citizen and the DHS. In the cases of detained non-citizens, the appeal process generally lasts from 1-4 months. For non-citizens who are not in DHS custody, the appeal process generally lasts from four to twelve months, depending on the complexity of the case and the issues presented in the appeal.

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<sup>679</sup> See 8 C.F.R. § 1003.47. Where a case has been remanded to an Immigration Judge for completion of the appropriate background checks, he is required to enter a final order granting or denying the requested relief from removal. See *In re M-D-*, 24 I&N Dec. 138 (BIA Apr. 12, 2007). The Immigration Judge may not reconsider the prior decision of the Board, but he reacquires jurisdiction over the removal proceedings and may consider additional evidence regarding new or previously considered relief if the evidence meets the requirements for reopening the removal proceedings. See *id.* The Immigration Judge may, in the exercise of discretion, determine whether to conduct an additional hearing to consider new evidence that may affect a non-citizen's eligibility for relief before he enters an order granting or denying relief. See *In re Alcantara-Perez*, 23 I&N Dec. 882 (BIA Feb. 23, 2006); 8 C.F.R. § 1004.47(h).

<sup>680</sup> The Notice of Appeal must be received by the Board within 30 days. See 8 C.F.R. § 1003.38; see also, *In re Liadov*, 23 I&N Dec. 990 (BIA Sept. 12, 2006) (holding that the failure of an overnight delivery service to deliver the Notice of Appeal on time did not constitute an exceptional circumstance to warrant the consideration of an untimely notice of appeal by the Board under 8 C.F.R. § 1003.1); *In re Jean*, 23 I&N Dec. 373 (A.G. May 2, 2002). The filing fee for a non-citizen to appeal the Immigration Judge's decision is \$110 which must be paid to the Department of Justice unless a fee waiver is requested by the non-citizen and granted by the Board. To challenge the validity of an appeal waiver, a non-citizen may file a motion to reconsider with the Immigration Judge or an appeal directly with the BIA. See *In re Patino*, 23 I&N Dec. 74 (BIA May 9, 2001).

<sup>681</sup> See 8 C.F.R. § 1003.39. See also, I.N.A. § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A) (defining an order of removal as final when the Board of Immigration Appeals affirms the order on appeal or the period for seeking Board review has expired); *Guevara v. Gonzales*, 472 F.3d 972 (7<sup>th</sup> Cir. Jan. 8, 2007) (holding that where an Immigration Judge has found a non-citizen deportable but granted relief and the Board of Immigration Appeals reverses the decision granting relief, the Immigration Judge's initial determination of deportability is sufficient to meet the definition of a removal order under I.N.A. § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A) which becomes final upon the Board's reversal of the grant of relief from removal); 8 C.F.R. § 1.1(l).

<sup>682</sup> See 8 C.F.R. § 1003.5.

If the Board sustains or grants a non-citizen's appeal, it may return the case to the Immigration Court for further proceedings or may grant the relief requested.<sup>683</sup> If the Board denies the appeal, the order of removal becomes final. Where relief is granted by the Immigration Court or the Board, then the non-citizen will be processed by the CIS for the issuance of the proof of the relief granted, such as a lawful permanent resident card.

In general, a non-citizen may file one motion to reopen or reconsider in removal proceedings with the Board of Immigration Appeals or the Immigration Court, whichever last rendered a decision in his case.<sup>684</sup> If a non-citizen files a motion to reopen with the Board and the Board grants the motion, the grant vacates the prior order of removal and reinstates the previous immigration proceedings.<sup>685</sup>

To obtain review of the Board's denial of an appeal, a non-citizen must file a petition for review, along with a \$450 filing fee or an affidavit *in forma pauperis*, within 30 calendar days of the Board's order with the federal Circuit Court of Appeals having jurisdiction over the Immigration Court where the removal proceedings took place.<sup>686</sup> For immigration cases where the removal proceedings were conducted by the Chicago Immigration Court, petitions for review are filed with the Seventh Circuit Court of Appeals.<sup>687</sup> If the petition for review is not filed within the 30 day period, the Court of Appeals will not have the jurisdiction to review the Board's order. If the non-citizen is in DHS custody or has received a notice to appear for deportation ("bag and baggage notice") with the DHS, an emergency motion for a stay of removal may be filed with the Court of Appeals to request that her removal from the U.S. be stayed while the petition for review is pending before the Court of Appeals.<sup>688</sup>

After the petition for review is filed with the Court of Appeals, the U.S. Department of Justice has 40 days to file the administrative record with the Court of Appeals. The administrative record includes the hearing transcripts, all documents previously filed with the Immigration Court and Board, and decisions by the Immigration Court and Board.

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<sup>683</sup> See 8 C.F.R. § 1003.1(d)(7).

<sup>684</sup> See I.N.A. §§ 240(c)(6)-(7), 8 U.S.C. § 1229a(c)(6)-(7).

<sup>685</sup> See *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7<sup>th</sup> Cir. Aug. 5, 2004).

<sup>686</sup> See I.N.A. § 242(b)(1), 8 U.S.C. § 1252(b)(1); *Sankarapillai v. Ashcroft*, 330 F.3d 1004, 1006 (7<sup>th</sup> Cir. Jun. 4, 2003) (holding that the thirty-day statutory period for filing appeals from final orders of the BIA is a jurisdictional requirement).

<sup>687</sup> See *Ramos v. Ashcroft*, 371 F.3d 948 (7<sup>th</sup> Cir. Jun. 15, 2004) (holding that where the Immigration Judge is located controls as the place that proceedings were conducted, rather than the location where the non-citizen appeared via televideo for his final removal hearing); see also, *Ramos v. Gonzales*, 414 F.3d 800, 803 (7<sup>th</sup> Cir. Jul. 12, 2005) (reaffirming *Ramos v. Ashcroft*, 371 F.3d 948 (7<sup>th</sup> Cir. Jun. 15, 2004) regarding venue for a petition for review).

<sup>688</sup> See *Nken v. Holder*, 129 S.Ct. 1749, 1760-61 (Apr. 22, 2009) (holding that the traditional test applies to motions for stays of removal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."). Where a non-citizen fails to report to the DHS and then faces a motion to dismiss his petition for review under the fugitive disentitlement doctrine, he may still surrender to the DHS and preserve his appeal. See *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7<sup>th</sup> Cir. Jul. 17, 2006); see also *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 729 (7<sup>th</sup> Cir. Jul. 22, 2004).

Once the administrative record is filed, the briefing process begins. The appeal process before the Court of Appeals may take from two to twelve months.<sup>689</sup> If a non-citizen cannot be removed from the U.S. within six months following a final order of removal by the BIA, she may be eligible for release from DHS custody under an order of supervision.<sup>690</sup>

If the Court of Appeals grants the petition for review, it will return the case to the BIA for further proceedings. If the Court of Appeals denies the petition for review, the non-citizen has the right to file a petition for rehearing with the panel who reviewed the petition, a petition for rehearing with all the judges in the Court of Appeals (*en banc*), or a petition for a writ of certiorari with the U.S. Supreme Court. Within the Seventh Circuit Court of Appeals, it is very rare that a petition for rehearing either by the panel or *en banc* will be granted. Furthermore, it is extremely rare for the U.S. Supreme Court to accept a petition for a writ of certiorari, unless the federal circuit courts of appeals have split on the legal issue(s) in previously issued opinions.

Once a non-citizen has exhausted her rights before the Board and the Court of Appeals, the DHS will take steps to physically remove her from the U.S. These include requiring the non-citizen to sign an application for a travel document if she does not have a current passport or other form of identification to enter the country designated for removal. The DHS will then contact the embassy or consulate of the country to which the DHS seeks to remove her to process the travel document application or otherwise obtain permission from that country to remove her there.<sup>691</sup>

If the non-citizen is not in DHS custody, ICE will send a “bag and baggage” notice to the non-citizen’s last address. If she does not appear at the ICE Office on the date indicated on the bag and baggage notice, then her file will be transferred to the Fugitive Operations Unit within the local ICE Office. Officers from the Fugitive Operations Unit may appear at her home or work place at any time to detain her, pending her physical removal from the U.S.<sup>692</sup> A warrant will also be issued and notice will be placed in a National Crime Information Center (NCIC) database. Any law enforcement official in the country will then have access to the fact that a warrant for arrest and a final removal order have been entered against the non-citizen.<sup>693</sup> A local law enforcement officer who encounters the non-citizen may arrest her and detain her until she is transferred to DHS custody which will then take the necessary steps to remove her from the U.S.

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<sup>689</sup> For more information regarding the timing and processing of a petition for review before the Seventh Circuit Court of Appeals or any other federal court of appeals, see I.N.A. § 242, 8 U.S.C. § 1252.

<sup>690</sup> See Orders of Supervision, *infra* at 7-8.

<sup>691</sup> See *Lian v. Ashcroft*, 379 F.3d 457, 458-459 (7<sup>th</sup> Cir. Aug. 12, 2004).

<sup>692</sup> See National Fugitive Operations Program at <http://www.ice.gov/pi/dro/nfop.htm>. Fugitive operations teams will increase from 52 to 75 by the end of 2007 with the goal of arresting 75,000 non-citizens who have been convicted of crimes or ordered removed. See Michael Martinez, “Deportations Strand Young U.S. Citizens,” *Chicago Tribune*, Apr. 29, 2007.

<sup>693</sup> See, e.g., *Ramirez-Vicario v. Achim*, 2004 U.S. Dist. LEXIS 2798 at \*3-4 (N.D.IL Feb. 20, 2004).

## Good Moral Character – A Requirement for Many Forms of Relief

Good Moral Character (GMC) is a statutory requirement under the INA for certain forms of immigration relief in removal, deportation, and exclusion proceedings. Relief for which a showing of good moral character is required includes registry,<sup>694</sup> voluntary departure,<sup>695</sup> suspension of deportation,<sup>696</sup> naturalization,<sup>697</sup> and cancellation of removal for certain nonpermanent residents.<sup>698</sup> An assessment of good moral character may also affect the exercise of discretion in the adjudication of applications for discretionary relief, including asylum<sup>699</sup> and adjustment of status to lawful permanent residence.<sup>700</sup>

A finding of good moral character is both a statutory and discretionary matter. Certain statutory bars to demonstrating good moral character have been enumerated in the immigration statute under I.N.A. § 101(f), 8 U.S.C. § 1101(f) and include:

- Engaging in prostitution.
- Assisting or encouraging any undocumented non-citizen to enter the U.S.
- Practicing polygamy.
- Having committed a crime involving moral turpitude.
- Having committed a violation related to a controlled substance.
- Having been convicted of two or more offenses for which the aggregate sentences to confinement were five years.
- Being a drug trafficker or having obtained a financial benefit from illicit activity.
- Having been convicted of two or more gambling offenses.
- Having been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more.
- Having been convicted of an aggravated felony.<sup>701</sup>

The statutory list, however, is not exhaustive. Courts have created two tests to determine whether an applicant has shown good moral character in the exercise of discretion. In *Postusta v. United States*, Judge Learned Hand stated that good moral character should be defined based on the ethical standards current at the time.<sup>702</sup> Other courts have defined good moral character as “conduct which measures up as good among the average citizens of the community in which the applicant lives, or that it is conduct which conforms to the ‘generally accepted moral conventions current at the time.’”<sup>703</sup> The Board of Immigration Appeals held that good moral character “does not mean moral

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<sup>694</sup> See I.N.A. § 249, 8 U.S.C. § 1259.

<sup>695</sup> See I.N.A. § 240B, 8 U.S.C. § 1229c.

<sup>696</sup> See I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1995).

<sup>697</sup> See I.N.A. § 310, 8 U.S.C. § 1421; I.N.A. § 316, 8 U.S.C. § 1427.

<sup>698</sup> See I.N.A. § 240A(b), 8 U.S.C. § 1229b(b).

<sup>699</sup> See *Asylum and Refugees*, *infra* at 6-31.

<sup>700</sup> See *Grounds of Inadmissibility*, *supra* at 4-1; *Adjustment of Status*, *infra* at 6-18.

<sup>701</sup> A conviction for an aggravated felony entered on or after November 29, 1990 bars a finding of good moral character. See I.N.A. § 101(f), 8 U.S.C. § 1101(f); *Gorenjuk v. DHS*, 2007 U.S. Dist. LEXIS 82951 (Nov. 8, 2007).

<sup>702</sup> See *Postusta v. U.S.*, 285 F.2d 533, 535 (2<sup>nd</sup> Cir. Jan. 6, 1961).

<sup>703</sup> See *In re Denssy*, 200 F. Supp. 354, 358 (D. Del. Dec. 8, 1961); see also, *In re Paoli*, 49 F. Supp. 128, 130 (N.D. Cal. Mar. 11, 1943).

excellence and that it is not destroyed by ‘a single incident.’”<sup>704</sup> Rather, a non-citizen’s general conduct may be a factor to be considered in determining whether a non-citizen has good moral character.<sup>705</sup>

### ***Exceptions to Statutory Bars and Other Case Law involving Good Moral Character***

Two exceptions exist to the statutory bars for crimes involving moral turpitude.<sup>706</sup> First, a crime classifiable as a petty offense under I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) is not subject to the bar. Second, a Presidential or gubernatorial pardon for a conviction for a crime involving moral turpitude will not trigger the mandatory bar.<sup>707</sup>

A non-citizen’s application for an immigration benefit can be denied on account of bad moral character if she provides false testimony with an intent to deceive a U.S. official for the purpose of obtaining U.S. citizenship or other benefits under immigration law.<sup>708</sup> A conviction for willfully and knowingly transporting an alien in violation of U.S. law precludes a finding of good moral character.<sup>709</sup> Association with a gangster will not preclude a finding of good moral character.<sup>710</sup>

The failure to disclose arrests and convictions for crimes involving moral turpitude or controlled substance offenses in an application for adjustment of status may later lead to the loss of lawful permanent residence where the convictions constituted grounds of

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<sup>704</sup> See *In re Sanchez-Linn*, 20 I&N Dec. 362 (BIA Jul. 30, 1991).

<sup>705</sup> See *In re Carbajal*, 17 I&N Dec. 272 (Comm. Oct. 26, 1978); *In re T-*, 1 I&N Dec. 158 (BIA Sept. 4, 1941).

<sup>706</sup> Expungements for convictions for crimes involving moral turpitude under state rehabilitative statutes are no longer given effect in immigration proceedings. See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999); see also, Definition of Conviction, *supra* at 2-3.

<sup>707</sup> Pardons forgive convictions under moral turpitude deportation grounds only. See I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v); see also, *In re Lindner*, 15 I&N Dec. 170 (BIA Jan. 31, 1975). In an application for naturalization, a pardon for murder will not erase the basis for a finding of a lack of good moral character since the fact of murder still exists. See, e.g., *In re Salani*, 196 F. Supp. 513 (D.C. Cal. June 27, 1961); *In re Armando de Angelis*, 139 F. Supp. 779 (E.D.N.Y. Apr. 11, 1956).

<sup>708</sup> See *Kungys v. U.S.*, 485 U.S. 759, 779, 108 S.Ct. 1537, 1551, 99 L.Ed.2d 839 (May 2, 1988) (also noting and distinguishing that willful misrepresentations because of embarrassment, fear, or a desire for privacy are not sufficiently culpable to brand an applicant as someone who lacks good moral character); *Fedorenko v. U.S.*, 449 U.S. 490, 66 L.Ed.2d 686, 101 S.Ct. 737 (Jan. 21, 1981); *U.S. v. Schellong*, 547 F.Supp. 569 (N.D. Ill. Sept. 9, 1982); *Application of Murra*, 178 F.2d 670, 674-677 (7<sup>th</sup> Cir. Dec. 14, 1949) (considering the totality of the circumstances, including a longitudinal analysis of the applicant’s life and the credentials of those giving testimony on her behalf); *Plewa v. I.N.S.*, 77 F.Supp.2d 905, 910 (N.D.IL Dec. 21, 1999) (holding that the applicant did not lack good moral character where she gave false testimony by failing to disclose a prior arrest based on the advice of an experienced immigration counselor); *In re R-S-J-*, 22 I&N Dec. 863 (BIA Jun. 10, 1999) (holding that false oral statements given knowingly under oath to an asylum officer constituted false testimony for purposes of good moral character under I.N.A. § 101(f)(6), 8 U.S.C. § 1101(f)(6) which is required for suspension of deportation and voluntary departure).

<sup>709</sup> See *Lopez-Blanco v. I.N.S.*, 302 F.2d 553 (7<sup>th</sup> Cir. May 10, 1962).

<sup>710</sup> See *Rassano v. I.N.S.*, 492 F.2d 220, 226-27 (7<sup>th</sup> Cir. Feb. 21, 1974).

inadmissibility at the time of the granting of adjustment of status.<sup>711</sup> Where a non-citizen was not eligible for adjustment of status and remains ineligible for adjustment of status at the time of his removal proceeding, his lawful permanent residence can be revoked and he can be ordered removed.<sup>712</sup> In some instances, he may be eligible for adjustment of status and/or other relief from removal.<sup>713</sup>

The date of a conviction for an aggravated felony impacts upon whether good moral character can be demonstrated. Whether good moral character may be found for non-citizens with convictions entered prior to November 29, 1990 that are deemed to be aggravated felonies depends on the immigration benefit sought. For example, a conviction on or after November 18, 1988 for a crime deemed to be an aggravated felony is a statutory bar to voluntary departure.<sup>714</sup> A non-citizen who was convicted prior to November 29, 1990 of a crime subsequently deemed to be an aggravated felony is generally not statutorily barred from demonstrating good moral character for suspension of deportation under I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1995) or naturalization, but he may still be subject to grounds of deportability.<sup>715</sup> In contrast, a conviction for an aggravated felony on or after November 29, 1990 is a permanent bar to naturalization, even for wartime veterans.<sup>716</sup>

Once a Notice to Appear has been issued against a non-citizen, the DHS cannot adjudicate an application for naturalization.<sup>717</sup> In order for the Board or an Immigration Judge to terminate pending removal proceedings against a lawful permanent resident, the DHS must affirmatively communicate that the non-citizen is *prima facie* eligible for

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<sup>711</sup> See *Rosales-Pineda v. Gonzales*, 452 F.3d 627 (7<sup>th</sup> Cir. Jun. 19, 2006) (discussing removal proceedings initiated where the former INS discovered the non-citizen's two theft convictions and a controlled substance offense during a background check for his application for naturalization).

<sup>712</sup> See *id.*

<sup>713</sup> See I.N.A. § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H); *In re Fu*, 23 I&N Dec. 985 (BIA Sept. 6, 2006) (holding that a waiver under I.N.A. § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H) explicitly provides for a waiver of the ground of inadmissibility for fraud or willful misrepresentation of a material fact under I.N.A. § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), whether innocent or not, and additional grounds of inadmissibility which directly result from the fraud or misrepresentation, such as I.N.A. § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for lack of a valid immigrant visa or entry document); I.N.A. § 212(k), 8 U.S.C. § 1182(k); Adjustment of Status, *infra* at 6-18; Asylees and Refugees, *infra* at 6-31; Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36.

<sup>714</sup> See I.N.A. § 240B(a)-(b), 8 U.S.C. § 1229c(a)-(b).

<sup>715</sup> See *In re Reyes*, 20 I&N Dec. 789 (BIA Apr. 28, 1994) (holding that a conviction for murder is a statutory bar to demonstrating good moral character).

<sup>716</sup> See *O'Sullivan v. USCIS*, 453 F.3d 809, 816-17 (7<sup>th</sup> Cir. Jul. 6, 2006) (upholding 8 C.F.R. § 329.2 which requires that wartime veterans demonstrate good moral character for one year prior to filing their application for naturalization and finding that the aggravated felony bar under I.N.A. § 101(f)(8), 8 U.S.C. § 1101(f)(8) applies to wartime veterans, even where they apply under I.N.A. § 316, 8 U.S.C. § 1427 and I.N.A. § 329, 8 U.S.C. § 1440); see also, 8 C.F.R. § 316.10 (a conviction for murder at any time and a conviction for an aggravated felony on or after November 29, 1990 are bars good moral character). One district court has suggested that a non-citizen may first obtain a gubernatorial pardon to eliminate the aggravated felony bar to good moral character and then apply for naturalization. See *Polizzi v. U.S.D.H.S.*, 2006 U.S. Dist. LEXIS 37958 (Jun. 8, 2006). For more information about the effect of pardons on immigration consequences, see Pardons, *infra* at 8-25.

<sup>717</sup> See I.N.A. § 318, 8 U.S.C. § 1429; *In re Acosta-Hidalgo*, 24 I&N Dec. 103, 106-07 (BIA Mar. 8, 2007) (finding that the DHS's adjudication of the non-citizen's application for naturalization is not an affirmative communication of the *prima facie* eligibility for naturalization).



naturalization.<sup>718</sup> Neither the Immigration Judge nor the Board has the authority to compel the DHS to acknowledge that a non-citizen is eligible for naturalization.<sup>719</sup> If the DHS refuses to convey such communication, the Immigration Judge does not have the authority to terminate removal proceedings. If the Immigration Judge grants relief to a non-citizen, the non-citizen may pursue a pending naturalization application with the CIS or file a new naturalization application.

A person may be denaturalized if he did not disclose material facts in an application for an immigrant visa, adjustment of status, or naturalization.<sup>720</sup> A non-citizen who fails to disclose an arrest, charge, or conviction for a crime that falls within one of the statutory bars to demonstrating good moral character as required under I.N.A. § 101(f)(8), 8 U.S.C. § 1101(f)(8) may also be subject to denaturalization.<sup>721</sup>

## ***Application to Cases***

### **Good Moral Character and Naturalization**

#### ***Case of Xia from Laos***

Xia came to the United States as a refugee in 1999 and adjusted his status to become a lawful permanent resident in 2000. He was convicted for fifth degree felony possession of opium in Wisconsin in 2005.

Analysis: An applicant for citizenship must demonstrate his good moral character for five years as a lawful permanent resident prior to application. Xia's opium conviction statutorily precludes him from establishing good moral character. In addition, the DHS can place him in removal proceedings based on his drug conviction if he applies for naturalization or otherwise comes to the attention of the DHS.

#### ***Case of John from Finland***

John entered the United States as a university student in 1970. In 1975, he married a United States citizen and became a lawful permanent resident. In 2005, he was convicted for felony credit card fraud and served 150 days in jail. In 2006, he was convicted for welfare fraud for which he served 100 days in jail.

Analysis: John is statutorily ineligible for citizenship because he has served an aggregate of 250 days in jail within the five year period required for good moral character. In addition, he is deportable for having been convicted of two crimes involving moral

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<sup>718</sup> See *In re Acosta-Hidalgo*, 24 I&N Dec. 103, 104 (BIA Mar. 8, 2007) (holding that 8 C.F.R. § 1239.2(f) and *In re Cruz*, 15 I&N Dec. 236 (BIA Apr. 3, 1975) control).

<sup>719</sup> See *In re Acosta-Hidalgo*, 24 I&N Dec. 103, 107 (BIA Mar. 8, 2007).

<sup>720</sup> See *Fedorenko v. U.S.*, 449 U.S. 490, 505 (Jan. 21, 1981); *Naujalis v. I.N.S.*, 240 F.3d 642, 646 (7<sup>th</sup> Cir. Feb. 15, 2001); *U.S. v. Firishchak*, 468 F.3d 1015 (7<sup>th</sup> Cir. Nov. 20, 2006); *U.S. v. Wittje*, 422 F.3d 479 (7<sup>th</sup> Cir. Sept. 1, 2005); *U.S. v. Kumpf*, 438 F.3d 785 (7<sup>th</sup> Cir. Feb. 23, 2006).

<sup>721</sup> See *U.S. v. Vlamakis*, 2002 U.S. Dist. LEXIS 2409 (N.D.IL Feb. 15, 2002); *U.S. v. Santillan-Garcia*, 2001 U.S. Dist. LEXIS 20779 (N.D.IL Nov. 14, 2001).

turpitude since he became a lawful permanent resident.

## **Good Moral Character and Non-Immigrant Visas**

### ***Case of Marla from Argentina***

Marla entered the United States in 2004 on a student visa to attend a technical college. In 2006, she stopped attending the technical college and began working as a waitress. She married John, a U.S. citizen in June 2008 and they filed a visa petition and adjustment of status application for her with the USCIS.

In December 2008, Marla was driving home from work when the police pulled her over for failing to come to a complete stop at a red light in Indianapolis. As Marla got out of the car to follow the officer to his squad car, a baggie containing two grams of cocaine fell out of her coat pocket. She was charged with and pled guilty to felony possession of two grams of cocaine in violation of IC 35-48-4-6. The court sentenced her to first offender probation. The state's attorney called the DHS which detained Marla without bond.

In removal proceedings in May 2009, the Immigration Judge found that Marla was deportable for having violated her F-1 visa status on account of her separation from the college and based on her controlled substance conviction. Marla requested adjustment of status, which the judge denied based on her heroin disposition after lengthy legal argument was presented by her attorney regarding her eligibility for adjustment of status. She then requested the immigration relief of voluntary departure. An applicant for voluntary departure must show good moral character for at least five years immediately preceding the application unless she requests voluntary departure prior to the completion of removal proceedings.<sup>722</sup> The Immigration Judge found Marla statutorily ineligible for voluntary departure based on her cocaine conviction and ordered her removed from the United States.

Analysis: Under the removal order, Marla is barred from returning to the United States for ten years. Based on her controlled substance conviction, however, she is permanently inadmissible based for an immigrant visa. She may be eligible for a temporary non-immigrant visa with a discretionary waiver from the Attorney General to return to the United States.<sup>723</sup>

## **Good Moral Character and Suspension of Deportation and Non-Permanent Resident Cancellation of Removal**

### ***Case of Jose from Guatemala***

Jose entered the United States illegally in 1989, fleeing forced recruitment by the Guatemalan Army. In 1991, he filed for immigration status as part of the *American Baptist Churches* settlement, which permitted Salvadorans and Guatemalans to have their claims for asylum adjudicated under fair terms. In January 1997, he was convicted for

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<sup>722</sup> See I.N.A. § 240B(a), 8 U.S.C. § 1229c(a); cf. I.N.A. § 240B(b), 8 U.S.C. § 1229c(b); see also, *In re* Arguelles, 22 I&N Dec. 811 (BIA Jun. 7, 1999); *In re* Ocampo, 22 I&N Dec. 1301 (BIA Mar. 24, 2000); *In re* Cordova, 22 I&N Dec. 966 (BIA Aug. 6, 1999).

<sup>723</sup> See I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3).

misdemeanor assault for a bar fight in which Jose defended himself against racially biased comments by another patron. Based on arguments by his public defender, the judge ordered Jose to serve 100 days in jail and agreed to suspend the remainder of the six month sentence.

Analysis: Jose has not been convicted of an aggravated felony and remains *prima facie* eligible for suspension of deportation. Misdemeanor assault is generally not a crime involving moral turpitude.

### ***Case of Sylvia from Sierra Leone***

Sylvia entered the United States illegally in 1982. In 1985, she gave birth to a United States citizen son. In 1988, she pled guilty to misdemeanor driving under the influence and was placed on probation. In June 2008, ICE officers arrested her during a workplace raid and began removal proceedings against her.

Analysis: Sylvia is statutorily eligible for cancellation of removal as her conviction for driving under the influence is not a statutory bar to good moral character.<sup>724</sup> To be eligible for cancellation of removal, Sylvia must show that she has been physically present in the United States for at least ten years, that she has had good moral character for the past ten years, and that her removal from the United States would result in exceptional and extremely unusual hardship to her United States citizen son.<sup>725</sup>

### ***Practice Tips***

Where a non-citizen would otherwise be eligible for relief from deportation or removal and has been charged with a crime triggering one of the mandatory bars to good moral character, an attempt should be made to have the non-citizen charged under another provision of law which will not trigger such bars. In addition, the immigration definition of “conviction” must be considered where the non-citizen is required to plead guilty, plead *nolo contendere* or to admit facts on the record in order to be eligible for pretrial diversion or a restorative justice program.<sup>726</sup>

## **Forms of Immigration Relief in Removal Proceedings**

Non-citizens in removal proceedings may be eligible for certain forms of immigration relief. Lawful permanent residents with criminal convictions may be eligible for several forms of relief, including cancellation of removal for certain lawful permanent residents, § 212(h) waiver for an adjustment of status, asylum, withholding of removal, and relief under the Convention against Torture. The granting of an immigration waiver offers relief from removal but not from the underlying criminal conviction which remains part of a non-citizen’s immigration record for consideration at any time.<sup>727</sup> Undocumented persons, asylees, and refugees may be eligible for non-permanent cancellation of removal,

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<sup>724</sup> See *In re Lopez-Meza*, 22 I&N Dec. 1188 (BIA Dec. 21, 1999).

<sup>725</sup> See Cancellation of Removal for Non-Permanent Residents, *infra* at 6-28.

<sup>726</sup> See Definition of Conviction, *supra* at 2-3.

<sup>727</sup> See *In re Balderas*, 20 I&N Dec. 389 (BIA Aug. 20, 1991).

adjustment of status, voluntary departure, asylum, withholding of removal, and relief under the Convention against Torture.

### ***Adjustment of Status***

The grounds of inadmissibility apply to non-citizens seeking admission to the U.S. In general, a non-citizen must prove that he is admissible to the U.S. when he presents himself at a border or international airport. He must also prove that he is admissible when he presents himself to an Immigration Judge or DHS official and requests admission to the U.S. through an application for an immigration benefit, such as adjustment of status for lawful permanent residence. A non-citizen may become a lawful permanent resident through adjustment of status within the U.S. or through consular processing at a U.S. Embassy or Consulate abroad.

There are certain categories of non-citizens who are eligible to adjust their status to become lawful permanent residents under I.N.A. § 245, 8 U.S.C. § 1255. An immediate family member of a U.S. citizen or lawful permanent resident who wants to immigrate based on his family relationship must first have his family member file a visa petition with the CIS, which must either approve or deny the application.<sup>728</sup> As part of the visa petition process, backgrounds checks are conducted by the CIS regarding the petitioner as well as the non-citizen beneficiary.<sup>729</sup> Once the visa petition is approved, the non-citizen may have to wait from several months to years until an immigrant visa becomes available in order to apply to adjust status to a lawful permanent resident.<sup>730</sup> Non-citizens who are the beneficiaries of approved employment-based visa petitions are also eligible to apply for adjustment of status, provided that certain other conditions are met.<sup>731</sup>

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<sup>728</sup> See I.N.A. § 204(b), 8 U.S.C. § 1154(b). Non-citizens as well as U.S. citizens may be prosecuted for knowingly entering into a marriage for the purpose of evading a provision of the immigration law and imprisoned for up to five years. See I.N.A. § 275(c), 8 U.S.C. § 1325(c); *U.S. v. Darif*, 446 F.3d 701 (7<sup>th</sup> Cir. May 3, 2006). A non-citizen who is found to have entered into a marriage to a U.S. citizen solely to obtain lawful permanent residence will be permanently barred from adjustment of status.

<sup>729</sup> See 71 Fed. Reg. 70413-92 (Dec. 4, 2006) (discussing the new Background Check Service (BCS) system of record checks which include a FBI fingerprint check, a FBI name check, and a CBP Treasury Enforcement Communication System/Interagency Border Inspection System (TECS-IBIS) name check and the forwarding of information regarding fraudulent or criminal activity to federal and/or local law enforcement agencies).

<sup>730</sup> An exception may be available to non-citizens for whom visa petitions were filed as the children of lawful permanent residents or U.S. citizens under the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002). The formula for calculating the age of a non-citizen in relationship to the priority date can be confusing. For discussions regarding the history of the CSPA and its application to visa petitions, see *In re Wang*, 25 I&N Dec. 28 (BIA Jun. 16, 2009) (holding that the automatic conversion and priority date retention of the CSPA do not apply to an alien who ages out of eligibility for an immigrant visa as the derivate beneficiary of a fourth-preference visa petition and on whose behalf a second-preference visa petition is later filed by a different petitioner); *In re Avila-Perez*, 24 I&N Dec. 78 (BIA Feb. 9, 2007); *Baruelo v. Comfort*, 2006 U.S. Dist. LEXIS 94309 (N.D.IL Dec. 29, 2006); see also, “2006 Update on Child Status Protection Act: New Administrative Interpretations,” Practice Advisory, *American Immigration Law Foundation*, [http://www.aifl.org/lac/admin\\_interpretation\\_90606.pdf](http://www.aifl.org/lac/admin_interpretation_90606.pdf), Sept. 26, 2006.

<sup>731</sup> See I.N.A. §§ 204(b), 245, 8 U.S.C. §§ 1154(b), 1255; see also, *In re Perez Vargas*, 23 I&N Dec. 829 (BIA Oct. 28, 2005) (holding that an IJ has no authority to determine whether the validity of a non-

The availability of family-based and employment-based immigrant visas is subject to a priority date system based on the relationship of the petitioner to the beneficiary and the filing date of the visa petition. Unless the non-citizen is in the U.S. under a form of temporary status or a non-immigrant visa that allows for it, he may not have a legal right to remain or work in the U.S. until an immigrant visa becomes available.<sup>732</sup> Once the priority date of the petition is current, an immigrant visa is available and the non-citizen can apply for adjustment of status.<sup>733</sup> Eligible immediate relatives of U.S. citizens can file the visa petition and adjustment of status application simultaneously with the CIS where the non-citizen is not in removal proceedings.

Other non-citizens can apply to adjust their status without having a visa petition filed on their behalf or being subject to the priority date system. For example, asylees and refugees must apply to adjust their status to become lawful permanent residents after being in the United States as refugees or asylees for one year and do not need an approved visa petition.<sup>734</sup> Cubans who enter the United States with or without inspection may also apply for adjustment of status one year after their arrival.<sup>735</sup>

An exception to the possibility of being subject to removal from the U.S. while waiting for the immigrant visa to become available exists where the non-citizen is eligible for a “V”

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citizen’s approved employment-based visa petition is preserved under 8 U.S.C. § 1154(j) after the non-citizen changes jobs or employers).

<sup>732</sup> See *Hadayat v. Gonzales*, 458 F.3d 659, 662 (7<sup>th</sup> Cir. Aug. 15, 2006) (discussing the affect of I.N.A. § 245(i)(1), 8 U.S.C. § 1255(i)(1) and the effect that an approved immigrant visa petition has when the non-citizen falls within the preference categories and is not an immediate relative, meaning that he is not a spouse or child under age 21 of a U.S. citizen); *Subhan v. Ashcroft*, 383 F.3d 591 (7<sup>th</sup> Cir. Sept. 7, 2004) (discussing the right to a continuance in removal proceedings and eligibility for adjustment of status through an employment-based labor certification and visa petition). For a discussion about “V” visas available to spouses and unmarried children of lawful permanent residents whose I-130 visa petitions have been pending for years for the priority date to become current, see *Baruelo v. Comfort*, 2006 U.S. Dist. LEXIS 94309 (N.D.IL Dec. 29, 2006).

<sup>733</sup> See *In re Villareal-Zuniga*, 23 I&N Dec. 886 (BIA Mar. 9, 2006) (holding that once an approved immigrant visa petition has been used by the beneficiary to obtain adjustment of status or admission as an immigrant, it cannot be used again to obtain adjustment of status).

<sup>734</sup> See *Termination of Asylum and Adjustment of Status for Asylees and Refugees*, *infra* at 6-36; I.N.A. § 209, 8 U.S.C. § 1159 (adjustment of status for refugees and asylees); I.N.A. § 245A, 8 U.S.C. § 1255a (adjustment of status under legalization or amnesty program).

<sup>735</sup> See Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (Nov. 2, 1966). Whether the non-citizen can adjust before the immigration court or the U.S. Citizenship & Immigration Service (USCIS) has recently changed. Only where a non-citizen eligible for adjustment of status under the Cuban Adjustment Act departed the U.S., returned to the U.S. pursuant to a grant of advance parole to pursue an already filed adjustment of status application, and is placed in removal proceedings will the immigration judge have jurisdiction to adjudicate the adjustment of status application. See *In re Martinez-Montalvo*, 24 I&N Dec. 778 (BIA Apr. 20, 2009), *In re Artigas*, 23 I&N Dec. 99 (BIA May 11, 2001), superseded. Non-citizens who qualify for adjustment of status under the Cuban Adjustment Act but who are not in removal proceedings may apply for adjustment of status with the appropriate USCIS district director. See 8 C.F.R. § 245.2(a)(1). Those non-citizens who have not departed the U.S. and returned pursuant to advance parole but who are in removal proceedings may apply to the USCIS district director based on the amended federal regulations. See *In re Martinez-Montalvo*, 24 I&N Dec. at 783; 8 C.F.R. §245.2(a)(1) (2006); 8 C.F.R. §1245.2(a)(1) (2006).

visa, a non-immigrant visa created by Congress in December 2000.<sup>736</sup> Where a lawful permanent resident filed a visa petition on or before December 21, 2000 for his or her spouse or child under the age 21 and the visa petition has been pending for three years or more, the non-citizen spouse or child may be eligible for a non-immigrant “V” visa.<sup>737</sup> A “V” visa will allow her to remain in the United States with employment authorization until an immigrant visa is available and she is eligible to apply for adjustment of status within the United States.<sup>738</sup>

In order to be granted adjustment of status, a non-citizen must file the application for adjustment of status, demonstrate that an immigrant visa is immediately available to him, show that he is not inadmissible to the U.S. based on one of the grounds of inadmissibility, and demonstrate that he merits lawful permanent residence in the exercise of discretion.<sup>739</sup> If he is inadmissible, he may be eligible to submit an application for a waiver of the ground of inadmissibility.<sup>740</sup>

Adjustment of status is a discretionary form of relief. In addition to having an approved visa petition, an available visa (current priority date), and meeting the above requirements, a non-citizen must demonstrate that he merits the grant of adjustment of status in the exercise of discretion.<sup>741</sup> The CIS and/or the Immigration Judge can consider a non-citizen’s immigration history, any fraud committed, criminal offenses, non-payment of child support, contributions to the community, filing of tax returns, and other evidence relating to positive equities and negative factors.<sup>742</sup>

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<sup>736</sup> See Title XI, Encouraging Immigrant Family Reunification, “Family Legal Immigration Family Equity Act (LIFE Act),” §§ 1101, 1102(a)-(b), Title XI of H.R. 5548, enacted by reference in H.R. 4942, 106 Pub. L. No. 553, 114 Stat. 2762 (Dec. 21, 2000).

<sup>737</sup> See *id.*

<sup>738</sup> See *id.*

<sup>739</sup> See I.N.A. § 245(a), 8 U.S.C. § 1255(a); *Palmer v. I.N.S.*, 4 F.3d 482 (7<sup>th</sup> Cir. Aug. 26, 1993); see also, *Fornalik v. Perryman*, 223 F.3d 523 (7<sup>th</sup> Cir. Aug. 8, 2000) (ordering the enforcement of a grant of deferred action by one I.N.S. office for a child whose visa petition as an abused child of a lawful permanent resident under the Violence Against Women Act (VAWA) had been approved but for whom a visa was not yet available based on the priority date of the petition); *Hassan v. I.N.S.*, 110 F.3d 490, n.5 (7<sup>th</sup> Cir. Apr. 1, 1997) (discussing that the availability of a section 212(h) waiver does not necessarily bear upon the prima facie approvability of an application for adjustment of status).

<sup>740</sup> See § 212(h) waivers, *infra* at 6-58; § 212(i) waivers, *infra* at 6-62; § 209(c) waivers, *infra* at 6-36.

<sup>741</sup> See I.N.A. § 245(a); 8 U.S.C. § 1255(a); *Singh v. Gonzales*, 404 F.3d 1024, 1027-29 (7<sup>th</sup> Cir. Apr. 15, 2005); *Sokolov v. Gonzales*, 442 F.3d 566, 569-70 (7<sup>th</sup> Cir. Mar. 24, 2006).

<sup>742</sup> See *Pede v. Gonzales*, 442 F.3d 570-71 (7<sup>th</sup> Cir. Mar. 24, 2006) (finding that said convictions for conspiracy to commit visa fraud and visa fraud for causing women in Latvia to use false visas for entry into the U.S. to work as “dancers” in Chicago nightclubs was sufficient to justify the Immigration Judge’s denial of a continuance for adjudication of her application of adjustment of status in light of the “ultimate hopelessness” of that application based on said convictions); *Singh v. Gonzales*, 404 F.3d 1024, 1027-29 (7<sup>th</sup> Cir. Apr. 15, 2005); *Hamdan v. Gonzales*, 425 F.3d 1051, 1059-60 (7<sup>th</sup> Cir. Oct. 13, 2005); *Dashto v. I.N.S.*, 59 F.3d 697 (7<sup>th</sup> Cir. Jul. 11, 1995); *Snajder v. I.N.S.*, 29 F.3d 1203 (7<sup>th</sup> Cir. Jul. 21, 1994); *Patel v. I.N.S.*, 738 F.2d 239 (7<sup>th</sup> Cir. Jul. 5, 1984) (discussing adverse factors to include an absence of good faith entry to the U.S. and lack of close family ties in the U.S.); *In re Rainford*, 20 I&N Dec. 598 (BIA Sept. 9, 1992).

**Main categories of non-citizens who may be eligible to apply for adjustment of status to a lawful permanent resident**

- Certain relatives of U.S. citizens who have an approved family visa petition:
  - Spouses and unmarried children under age 21 of U.S. citizens.
  - Married children, unmarried children over age 21, and siblings of U.S. citizens who have a current priority date.
  - Parents of U.S. citizens.
- Spouses and unmarried children of lawful permanent residents who have an approved family visa petition with a current priority date.
- Non-citizens who have been battered or have suffered extreme cruelty by their U.S. citizen spouse, parent, son, or daughter and who have an approved VAWA self-petition.
- Non-citizens who have been battered or have suffered extreme cruelty by their lawful permanent resident spouse, parent, or child and who have an approved VAWA self-petition with a current priority date.
- Asylees.
- Refugees.
- Non-citizens who have been physically present in the U.S. for four years in U visa status.
- Employees who have been sponsored by an employer and have an approved labor certification and/or immigrant worker visa petition or religious worker's visa petition.
- Non-citizens who have been physically present in the U.S. for three years in T visa status or until the completion of the investigation or prosecution of the trafficking case, whichever time period is less.
- Non-citizens who have had an S visa for three years and have substantially contributed to the success of a criminal or terrorism investigation or prosecution.
- Non-citizens selected in an annual diversity visa lottery.

There are two types of adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255.<sup>743</sup> First, a non-citizen who was inspected and admitted or paroled into the U.S. may be eligible to adjust his status under I.N.A. § 245(a), 8 U.S.C. § 1255(a) when an immigrant visa is available.<sup>744</sup> For adjustment of status applications under I.N.A. § 245(c)(2), 8 U.S.C. § 1255(c)(2), a non-citizen who has failed to maintain his lawful status since entry into the U.S., other than through no fault of his own or for technical reasons, is ineligible for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a).<sup>745</sup> For example, a failure to maintain lawful status is not “for technical reasons” where the non-citizen filed an application for asylum while in lawful nonimmigrant status, the nonimmigrant status then expired, and the asylum application was referred to the Immigration Court for a hearing with the issuance of a Notice to Appear before the time at which the non-citizen applied for adjustment of status.<sup>746</sup> Where the DHS refers an asylum application to the Immigration

<sup>743</sup> For adjustment of status based on asylee or refugee status, *see* Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36.

<sup>744</sup> *See* I.N.A. § 245(a), 8 U.S.C. § 1255(a).

<sup>745</sup> *See In re L-K-*, 23 I&N Dec. 677 (BIA Sept. 30, 2004).

<sup>746</sup> *See id.*

Court, it has acted on the application other than favorably and this action ends the “technical reasons” for being out of lawful status.<sup>747</sup>

A non-citizen who entered with inspection and overstayed her visa is not subject to the requirement of having maintained lawful status in order to apply for adjustment of status where she is eligible for an immigrant visa as an immediate relative (i.e. a spouse, parent, or an unmarried child under age 21 of a U.S. citizen), qualifies under VAWA based on abuse by a U.S. citizen spouse, child, or parent, or qualifies under I.N.A. § 245(i), 8 U.S.C. § 1255(i).<sup>748</sup> A non-citizen who has been selected in the diversity visa lottery is not “grandfathered” on the basis of a diversity visa alone but may pursue an application for adjustment of status if he is considered grandfathered on another basis, such as the filing of a labor certification or a family visa petition prior to April 30, 2001.<sup>749</sup>

Second, a non-citizen who entered the U.S. without being inspected and admitted or has been paroled into the U.S. may be eligible to adjust her status in the U.S. under I.N.A. § 245(i), 8 U.S.C. § 1255(i) depending upon the date that the visa petition was originally filed with the former INS or CIS. Where a petitioner filed a visa petition for a non-citizen on or before January 14, 1998, the non-citizen may apply for adjustment of status in the U.S. when a visa becomes available and pay a \$1,000 fine in lieu of having to return to her country of origin.<sup>750</sup> In addition, where a petitioner filed a visa petition for a non-citizen after January 14, 1998 but before April 30, 2001, and the non-citizen was physically present in the United States on December 21, 2000, the non-citizen may apply for adjustment of status in the U.S. when a visa becomes available and pay a \$1,000 fine in lieu of having to return to her country of origin.<sup>751</sup> Such non-citizens may be placed in removal proceedings by the DHS prior to visa petitions being adjudicated or visas becoming available in their cases.

The Immigration Judge, as well as the Board of Immigration Appeals, has the authority to determine whether a non-citizen has established evidence of a bona fide marriage in order to continue removal proceedings until the DHS adjudicates the I-130 visa petition filed by the non-citizen’s spouse.<sup>752</sup> Where the CIS has unreasonably delayed the adjudication of an immigrant visa petition or an application for adjustment of status, a non-

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<sup>747</sup> See *id.* at 680.

<sup>748</sup> See *id.* at 682; I.N.A. § 245(c), 8 U.S.C. § 1255(c); I.N.A. § 245(i), 8 U.S.C. § 1255(i).

<sup>749</sup> See *In re L-K-*, 23 I&N Dec. 677, 678-79 (BIA Sept. 30, 2004) (discussing the interplay of I.N.A. § 245(i), 8 U.S.C. § 1255(i) and the regulations at 8 C.F.R. §§ 1245.10(h), 1245.1(d)(1)(ii), 1245.1(d)(2)(ii).

<sup>750</sup> See I.N.A. § 245(i), 8 U.S.C. § 1255(i).

<sup>751</sup> See Consolidated Appropriations Act, 2001, Title XV, “LIFE Act Amendments of 2000,” §§ 1502, 1506, H.R. 5666 enacted by reference in H.R. 4577, 106 Pub. L. No. 554, 114 Stat. 2763 (Dec. 21, 2000); see also, *In re Wang*, 23 I&N Dec. 924 (BIA May 25, 2006) (holding that a non-citizen who entered without inspection is not eligible for adjustment of status under the Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 in conjunction with I.N.A. § 245(i), 8 U.S.C. § 1255(i) because the adjustment of status application is not based on an immigrant visa petition).

<sup>752</sup> See *Ahmed v. Gonzales*, 465 F.3d 806 (7<sup>th</sup> Cir. Oct. 16, 2006); *Benslimane v. Gonzales*, 430 F.3d 828 (7<sup>th</sup> Cir. Nov. 30, 2005); *Ssali v. Gonzales*, 424 F.3d 556 (7<sup>th</sup> Cir. Sept. 14, 2005); *In re Velarde*, 23 I&N Dec. 253 (BIA Mar. 6, 2002); *In re Aurelio*, 19 I&N Dec. 458, 460 (BIA Sept. 1, 1987) (holding that an IJ does not have jurisdiction over visa petitions).



citizen and his petitioning relative may file for mandamus relief in federal district court. A district court may grant mandamus relief and order the CIS to adjudicate a visa petition or conduct an act that it has a legal obligation to carry out.<sup>753</sup>

### ***Cancellation of Removal: Lawful Permanent Residents***

In IIRAIRA,<sup>754</sup> Congress created a new form of relief for long-term permanent residents who have been convicted of crimes not constituting aggravated felonies and are placed in removal proceedings. Cancellation of Removal for Certain Permanent Residents, I.N.A. § 240A, 8 U.S.C. § 1229b, replaces § 212(c) relief which had been available to non-citizens convicted of crimes for which they could be deported. In limited cases, section 212(c) relief remains available to eligible non-citizens.<sup>755</sup>

Cancellation of removal for lawful permanent residents is available to long-term LPRs placed in removal proceedings on or after April 1, 1997 who have been convicted of certain crimes which are not aggravated felonies. An Immigration Judge has the discretion to weigh positive and negative equities in determining whether the ground for deportability which has arisen since the non-citizen became a permanent resident will be waived. Non-citizens who have previously been granted § 212(c) waivers, suspension of deportation, or cancellation of removal for certain permanent residents are ineligible for this relief.<sup>756</sup> In addition, a non-citizen cannot be granted a §212(c) waiver and cancellation of removal simultaneously where he has been convicted of an aggravated felony.<sup>757</sup>

### **Case Law**

In order to be eligible for cancellation of removal, a non-citizen must be lawfully admitted for permanent residence for not less than five years, have resided in the U.S. continuously for seven years after having been admitted in any status, and have not been convicted of an aggravated felony.<sup>758</sup> Where a non-citizen acquired permanent resident status through fraud or misrepresentation, he has never been “lawfully admitted for permanent residence” and is statutorily ineligible for cancellation of removal.<sup>759</sup>

The period of continuous residence required to be eligible for cancellation of removal commences when the non-citizen has been admitted in any status, including admission as a temporary resident or as a nonimmigrant.<sup>760</sup> Continuous residence or physical presence is deemed to end on the *date that a qualifying offense has been committed*, not the date of

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<sup>753</sup> See *Iddir v. I.N.S.*, 301 F.3d 492, 499 (7<sup>th</sup> Cir. Aug. 6, 2002).

<sup>754</sup> See Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>755</sup> See *Waivers*, *infra* at 6-48; IIRAIRA § 347 (noting that replacement of § 212(c) applies prospectively from the date of the IIRAIRA enactment).

<sup>756</sup> See I.N.A. § 240A(c)(6), 8 U.S.C. § 1229b(c)(6).

<sup>757</sup> See *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 504 (7<sup>th</sup> Cir. 2008); *Esquivel v. Mukasey*, 543 F.3d 919 (7<sup>th</sup> Cir. Sept. 11, 2008).

<sup>758</sup> See INA § 240A(a), 8 U.S.C. § 1229b(a).

<sup>759</sup> See *In re Koloamatangi*, 23 I&N dec. 548 (BIA Jan. 8, 2003).

<sup>760</sup> See *In re Perez*, 22 I&N Dec. 689 (BIA May 12, 1999) (temporary resident); *In re Blancas-Lara*, 23 I&N Dec. 458 (BIA Jun. 10, 2002) (nonimmigrant admission with a border crossing card).

conviction.<sup>761</sup> A qualifying offense that terminates the period of continuous physical presence or continuous residence is one that is referred to in I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2) that renders the alien inadmissible under I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2) or removable under I.N.A. § 237(a)(2), 8 U.S.C. § 1227(a)(2).<sup>762</sup> In addition, a non-citizen need not be charged and found inadmissible or removable on a ground specified in I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) in order for the alleged criminal conduct to terminate his continuous residence.<sup>763</sup>

Where a non-citizen has been convicted of two misdemeanor crimes involving moral turpitude, the timing of the commission of the offenses will affect whether he has accrued the requisite seven years of continuous residence following his admission to the U.S. as required for cancellation of removal. Where a lawful permanent resident commits his first misdemeanor offense for a crime involving moral turpitude within the seven year period and is sentenced to a term of imprisonment of six months or less, this offense will fall under the petty offense exception of I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II).<sup>764</sup> Where he accrues seven years of continuous residence prior to the commission of the second crime involving moral turpitude, he will have met the 7 years of continuous residence.<sup>765</sup> However, where he commits both misdemeanor crimes involving moral turpitude within seven years after the date of his admission to the U.S., he will be statutorily ineligible for cancellation of removal, even if he is convicted for the second offense after the 7 year period.<sup>766</sup>

A conviction for a firearms offense, while a deportable offense under I.N.A. § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) does not qualify as an offense to stop the accrual of time for the requirement of continuous residence as it is not an offense contained in I.N.A. § 212(a)(2), 8 U.S.C. § 1227(a)(2).<sup>767</sup> In *In re Campos-Torres, supra*, a lawful permanent resident was convicted of a single offense of unlawful use of a weapon in violation of Ch. 38 § 24-1(a)(7) of the Illinois Compiled Statutes Annotated, and sentenced to 18 months of probation.<sup>768</sup> He was convicted of the offense within 7 years of his admission to the United States.<sup>769</sup> More than 7 years after his admission to the United States, the Notice to Appear

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<sup>761</sup> See *In re Perez*, 22 I&N Dec. 689 (BIA May 12, 1999) (holding that the date of the commission of the qualifying offense terminates continuous residence even where the offense was committed prior to the enactment of IIRAIRA). The commission of a qualifying offense terminates a non-citizen's continuous residence on the date of the commission, even if the offense was committed prior to the enactment of IIRAIRA. See *In re Robles-Urrea*, 24 I&N Dec. 22 (BIA Sept. 27, 2006); see also, *Bakarian v. Mukasey*, 541 F.3d 775 (7<sup>th</sup> Cir. Sept. 4, 2008).

<sup>762</sup> See *In re Campos-Torres*, 22 I&N Dec. 1289 (BIA Mar. 21, 2000).

<sup>763</sup> See *In re Jurado-Delgado*, 24 I&N Dec. 29, 31 (BIA Sept. 28, 2006); *In re Bautista Gomez*, 23 I&N Dec. 893 (BIA Mar. 23, 2006) (holding that an application for cancellation of removal is a continuing one and the provision in 8 C.F.R. § 1003.23(b)(3) regarding the demonstration of eligibility for relief prior to the service of a Notice to Appear only applies to the continuous residence or physical presence requirement).

<sup>764</sup> See *In re Deanda-Romo*, 23 I&N Dec. 597 (BIA May 8, 2003).

<sup>765</sup> See *id.*

<sup>766</sup> See *id.*

<sup>767</sup> See *In re Campos-Torres*, 22 I&N Dec. 1289 (BIA Mar. 21, 2000).

<sup>768</sup> See *id.* footnote 1 (noting that the provision is now designated as 720 ILCS 5/24-1(a)(7)).

<sup>769</sup> See *id.*

was served and stopped the accrual of his continuous residence or physical presence.<sup>770</sup> Based on the facts of the case and its interpretation of the statute that a firearms offense did not stop the accrual of continuous residence or physical presence, the Board found that he was eligible for cancellation of removal.<sup>771</sup> However, a non-citizen convicted of two or more offenses, of which one constitutes a firearms offense, may be found ineligible for cancellation of removal as a result of the termination of the accrual of 7 years continuous residence where the aggregate sentences to confinement actually imposed were 5 years or more and the non-citizen is found to be inadmissible under I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2).<sup>772</sup>

Once a lawful permanent resident meets the statutory requirements for cancellation of removal, she must also establish that she warrants such relief as a matter of discretion.<sup>773</sup> The general standards set forth in *In re Marin*<sup>774</sup> regarding the exercise of discretion for § 212(c) relief apply to the exercise of discretion for cancellation.<sup>775</sup> The Immigration Judge must balance the favorable factors against the negative factors to determine whether on balance the “totality of the evidence” demonstrates that he warrants a favorable exercise of discretion.<sup>776</sup> The positive factors include: 1. family ties in the U.S.; 2. residency of long duration in the U.S.; 3. evidence of hardship to the lawful permanent resident and his family if deportation were to occur; 4. service in the U.S. armed forces; 5. history of employment; 6. existence of business or property ties; 7. existence of value and service to the community; 8. proof of genuine rehabilitation if a criminal record exists; and 9. evidence attesting to his good character.<sup>777</sup> The negative factors include: 1. the nature and underlying circumstances of the grounds of exclusion; 2. additional significant violations of the U.S. immigration laws; 3. existence of a criminal record; and 4. other evidence of bad character or undesirability.<sup>778</sup> Rehabilitation is a factor to be considered, but it is not an absolute prerequisite where a non-citizen has a criminal record.<sup>779</sup>

## Application to Cases

### *Case of Joshua from England*

Joshua entered the United States in January 1989 with a B-2 visitor’s visa. He became a lawful permanent resident in May 1989 as the step-son of a United States citizen. He has four United States citizen children under the age of eight from a relationship with a U.S. citizen.

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<sup>770</sup> *See id.*

<sup>771</sup> *See id.*

<sup>772</sup> *See* I.N.A. § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (multiple criminal convictions).

<sup>773</sup> *See In re C-V-T-*, 22 I&N Dec. 7 (BIA Feb. 12, 1998).

<sup>774</sup> *See In re Marin*, 16 I&N Dec. 581 (BIA Aug. 4, 1978); *see also*, § 212(c) and case law, *infra*, at 6-48.

<sup>775</sup> *See In re Perez*, 22 I&N Dec. 689 (BIA May 12, 1999); § 212(c) and case law, *infra* at 6-48.

<sup>776</sup> *See In re Sotelo-Sotelo*, 23 I&N Dec. 201 (BIA Oct. 25, 2001) (abandoning the outstanding equities requirement under *In re Marin*, *supra*).

<sup>777</sup> *See In re C-V-T-*, 22 I&N Dec. 7 (BIA Feb. 12, 1998).

<sup>778</sup> *See id.*

<sup>779</sup> *See id.*

In January 1995, he was convicted for misdemeanor domestic assault. On December 15, 2008, he and his girlfriend had an argument during which he threw a snowbrush at her. He was arrested and charged with one count of misdemeanor domestic battery under 720 ILCS 5/12-3.2(a)(1). Joshua pled guilty to the charge on January 10, 2009. The state court ordered him to participate in anger management classes and placed him on probation for one year. In May 2009, the DHS served him with a Notice to Appear.

Analysis: Joshua is deportable due to his 2009 Illinois misdemeanor domestic battery conviction but not for the prior 1995 domestic assault conviction since that conviction was entered prior to the passage of IIRAIRA on September 30, 1996. He is statutorily eligible for cancellation of removal as he has been a lawful permanent resident for more than five years, has resided continually in the U.S. for more than seven years, and has not been convicted of an aggravated felony.

### ***Case of Paul from Liberia***

Paul came to the United States as a lawful permanent resident in January 1973 when he was 11 years old as the son of a lawful permanent resident. In 1976, he pled guilty to petty theft under a local city ordinance for stealing \$5 worth of batteries from a gas station and was placed on probation for five months, which he completed. Under the city ordinance, the maximum penalty was six months probation and a \$500 fine. In 2002, he pled guilty to possession of cocaine under Wis. Stat. § 961.41(3g) and was placed on probation for one year which he successfully completed.

In May 2009, Paul was arrested on suspicion of possession of crack, which turned out to be drywall plaster. Charges were never filed by the county attorney. Upon his arrest, however, the county jail called the DHS to report him. The DHS placed an immigration hold on him and he was transferred to DHS custody. ICE served a Notice to Appear on him, charging him with being deportable for his 1992 cocaine conviction.

Analysis: Paul is deportable as he has a conviction for immigration purposes based on his plea and period of probation for his cocaine offense. Even though his theft offense is a crime involving moral turpitude, it does not stop the accrual of his continuous residence nor make him deportable because it falls within the petty offense exception. Rather, his continuous residence period terminated in 2002 when he committed his offense for cocaine possession. At that time, he had accrued more than seven years of continuous residence. Paul has been a permanent resident for more than twenty-six years and has not been convicted of an aggravated felony. Therefore, he is eligible for cancellation of removal.

### ***Case of Marcos from Mexico***

Marcos entered the U.S. in March 1991 without inspection by an immigration officer. He became a lawful permanent resident on July 1, 1992, based on his marriage to a U.S. citizen. On December 15, 1996, he was arrested by the police for carrying a firearm without a license and charged with unlawful use of a firearm under 720 ILCS 5/24-1(4). He pled guilty and was sentenced to 30 days in the county jail on January 10, 1997. The state court judge placed him on probation for two years. On March 20, 2005, the DHS served him with a Notice to Appear.

Analysis: Marcos has not been convicted of an aggravated felony as his conviction was for an offense which in essence constitutes a conviction for unlawful possession of a weapon without intent to use it against another person or property. Although he committed the firearms offense within seven years of being admitted as a lawful permanent resident, his firearms offense does not stop the accrual of his physical presence or continuous residence under *In re Campos-Torres, supra*. In addition, the DHS served the Notice to Appear more than 7 years after Marcos was admitted to the U.S. as a lawful permanent resident. Marcos is eligible for cancellation of removal.

### ***Cancellation of Removal: Nonpermanent Residents***

Cancellation of removal for nonpermanent residents is a discretionary waiver for non-citizens who are not lawful permanent residents and have been physically present in the United States without being detected or arrested by the former INS or the DHS for at least ten years before applying for cancellation. These non-citizens must also demonstrate 10 years of good moral character and exceptional and extremely unusual hardship to a qualifying relative. Cancellation of removal is available as a defense to removal (deportation) in removal proceedings before the Immigration Judge. Prior to IIRAIRA, a similar form of relief called suspension of deportation was available to non-citizens who had been present in the U.S. for at least seven years and could show extreme hardship to themselves or a qualifying family member if the non-citizens were ordered deported.<sup>780</sup> Special rules apply to non-citizen spouses and children who have been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident spouse, parent, or child.<sup>781</sup>

A non-citizen who is granted the relief will be a lawful permanent resident as of the date that a visa number becomes available. Immigration Judges may only grant 4,000 cases per year, although certain nationalities are exempt from the yearly cap and the new standard of hardship under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).<sup>782</sup>

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<sup>780</sup> See Suspension of Deportation, *infra* at 6-63. Suspension of deportation was also available to non-citizens with criminal convictions who had been in the U.S. for at least 10 years and could show exceptional and extremely unusual hardship to themselves or a qualifying family member. See I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1996). For a discussion of the exceptional and extremely unusual hardship standard under Former I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1996), for suspension of deportation involving criminal convictions, see *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199 (7<sup>th</sup> Cir. Jun. 23, 1993); *Rassano v. I.N.S.*, 492 F.2d 220, 226-27 (7<sup>th</sup> Cir. Feb. 21, 1974).

<sup>781</sup> See I.N.A. § 240A(b), 8 U.S.C. § 1229b(b); VAWA, *infra* at 6-67 to 6-72.

<sup>782</sup> For statutory eligibility requirements for Nicaraguans and Cubans who entered the United States on or before December 1, 1995, as well as Salvadorans, Guatemalans, and persons from the former Soviet Union and eastern block countries who entered the United States prior to the end of 1990 seeking refuge, see the NACARA, Pub. L. No. 105-100, 111 Stat. 2160 (1997), or contact an immigration attorney.

## Case Law

In order to qualify for cancellation of removal, a non-citizen must be physically present in the U.S. for at least 10 years prior to the issuance and service of a Notice to Appear by the DHS or the former INS.<sup>783</sup> Under the stop-time rule, the issuance and service of the Notice to Appear terminates the accrual of the required 10 years of physical presence.<sup>784</sup> The demonstration of statutory eligibility prior to the service of the Notice to Appear applies only to the continuous physical presence requirement and does not bear on the issue of qualifying relatives, good moral character, or hardship.<sup>785</sup>

For purposes of the accrual of continuous physical presence for non-lawful permanent resident cancellation of removal, any absence outside of the U.S. for more than 90 days at a time or 180 days in total within the ten years prior to the issuance of the Notice to Appear terminates a non-citizen's physical presence.<sup>786</sup> The difference in immigration consequences for departures depends on whether a departure was voluntary or was compelled under the threat of deportation or removal proceedings. Where a non-citizen departed the U.S. under threat of deportation or removal proceedings, then the voluntary departure of the non-citizen constitutes a break in the accrual of continuous physical presence.<sup>787</sup> Where a non-citizen departed the U.S. without being under threat of deportation or removal proceedings, i.e. an arrest along the border where she was merely escorted back to the border and she subsequently reentered the U.S., the accrual of her continuous physical presence is not deemed to have been terminated by her voluntary departure.<sup>788</sup>

Good moral character for 10 years is required for this form of cancellation of removal. The period for which good moral character must be established ends with the entry of a final order by the Immigration Judge or the Board of Immigration Appeals.<sup>789</sup> Thus, the 10 year period is calculated backward from the date on which the application for non-LPR cancellation of removal is finally decided by the Immigration Judge or the Board.<sup>790</sup> In

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<sup>783</sup> See I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1); *Angel-Ramos v. Reno*, 227 F.3d 942, 947-48 (7<sup>th</sup> Cir. Sept. 19, 2000).

<sup>784</sup> See I.N.A. § 240A(d), 8 U.S.C. § 1229b(d); *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7<sup>th</sup> Cir. Dec. 19, 2006); *In re Cisneros-Gonzalez*, 23 I&N Dec. 668 (BIA Sept. 1, 2004) (distinguishing *In re Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA Feb. 23, 2000) and holding that service of a charging document in a prior proceeding does not end the non-citizen's period of continuous physical presence with respect to an application for cancellation of removal filed in the current proceeding).

<sup>785</sup> See *In re Bautista Gomez*, 23 I&N Dec. 893 (BIA Mar. 23, 2006).

<sup>786</sup> See I.N.A. § 240A(d)(2), 8 U.S.C. § 1229b(d)(2); *Tapia v. Ashcroft*, 351 F.3d 795, 799 (7<sup>th</sup> Cir. Dec. 16, 2003).

<sup>787</sup> See *In re Romalez-Alcaide*, 23 I&N Dec. 423 (BIA May 29, 2002).

<sup>788</sup> See *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7<sup>th</sup> Cir. Sept. 15, 2004) (distinguishing situations where a non-citizen agrees to voluntary depart in lieu of deportation or removal proceedings and those where a non-citizen is simply taken back to the border but is not threatened with deportation or removal proceedings); *Lopez v. Gonzales*, 427 F.3d 492, 498 (7<sup>th</sup> Cir. Oct. 26, 2005).

<sup>789</sup> See *In re Ortega-Cabrera*, 23 I&N Dec. 793 (BIA Jul. 21, 2005).

<sup>790</sup> See *id.*

addition, a non-citizen must establish statutory eligibility for cancellation of removal at the time an application is finally decided.<sup>791</sup>

The case law regarding eligibility for cancellation of removal under I.N.A. § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) where a non-citizen has been convicted of a crime involving moral turpitude that falls within the petty offense exception under I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) is currently unclear. The commission of one petty offense that is a crime involving moral turpitude does not bar a non-citizen from establishing the required good moral character under I.N.A. § 101(f)(3), 8 U.S.C. § 1101(f)(3).<sup>792</sup> In 2003, the Board held that a non-citizen who has been convicted of a crime involving moral turpitude that falls within the petty offense exception is not statutorily ineligible for cancellation of removal.<sup>793</sup> Then, in April 2009, the Board changed course and without discussing its prior precedent, it held that such an offense renders a non-citizen ineligible for cancellation of removal.<sup>794</sup>

**Note:** A motion to reconsider the *Almanza-Arenas* decision is pending with the Board of Immigration Appeals, and challenges to the decision will be ongoing. For an excellent practice advisory, see K. Brady, “Defense Arguments against *Matter of Almanza-Arenas*, 24 I&N Dec. 772 (BIA 2009),” Immigrant Legal Resource Center, available at <http://www.ilrc.org/immigration-law/criminal-and-immigration-law.php>.

The IIRAIRA changed the standard of hardship for cases initiated since April 1, 1997, requiring a non-citizen to show “exceptional and extremely unusual hardship” to a U.S. citizen or permanent resident spouse, parent, or child. This new standard covers all cases initiated by the filing of a Notice to Appear in Removal Proceedings on or after April 1, 1997, except for the cases which fall under the NACARA for which the extreme hardship standard will be applied.

The Board of Immigration Appeals has interpreted the term “exceptional and extremely unusual hardship” to mean hardship to a qualifying family member that is substantially beyond that which would ordinarily be expected to result from the deportation of a non-citizen but need not be unconscionable.<sup>795</sup> The Board held that the hardship must

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<sup>791</sup> See *In re* Bautista Gomez, 23 I&N Dec. 893 (BIA Mar. 23, 2006) (holding that an application for cancellation of removal is a continuing one and the provision in 8 C.F.R. § 1003.23(b)(3) regarding the demonstration of eligibility for relief prior to the service of a Notice to Appear only applies to the continuous residence or physical presence requirement).

<sup>792</sup> See Good Moral Character, *supra* at 6-12.

<sup>793</sup> See *In re* Garcia-Hernandez, 23 I&N Dec. 590 (BIA May 8, 2003) (also holding that even where a non-citizen has more than one petty offense (meaning more than one misdemeanor offense), he remains eligible for non-permanent resident cancellation of removal if only one of those crimes is a crime involving moral turpitude). In addition, where a non-citizen was convicted before September 30, 1996 of an offense that would otherwise fall within I.N.A. § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E), he is not barred from establishing eligibility for cancellation of removal because his conviction predates the effective date of the provision enacted under IIRAIRA. See *In re* Gonzalez-Silva, 23 I&N Dec. 218 (BIA Jun. 27, 2007).

<sup>794</sup> See *In re* Almanza-Arenas, 24 I&N Dec. 771 (BIA Apr. 13, 2009).

<sup>795</sup> See *In re* Monreal, 23 I&N Dec. 56 (BIA May 4, 2001).

be beyond that required historically for suspension of deportation.<sup>796</sup> Factors to be considered include the ages, health, and circumstances of the qualifying family members.<sup>797</sup> Poor economic conditions and diminished educational opportunities in the home country, marital status of the non-citizen, lack of familiarity of the qualifying family members to communicate in the language of the non-citizen's home country, family ties in the U.S. and the home country, and the unavailability of an alternative means of immigration to the U.S. may also be considered.<sup>798</sup> Hardship factors relating to the non-citizen applicant may be considered only to the extent that they may affect the hardship to the qualifying family member, such as a lower standard of living or adverse country conditions in the home country.<sup>799</sup>

## Application to Cases

### *Case of Margarita from Panama*

Margarita entered the United States as an F-1 student in January 1987 to study English for one year. In November 1997, she married Pablo, a lawful permanent resident from Panama. Pablo was the only child of his parents who died when he was 22 years old. Pablo did not file a marriage visa petition for Margarita because he said that she did not need a green card since she was going to remain at home to care for their U.S. citizen son with cerebral palsy.

In May 2006, Pablo fell from a scaffold at a construction site and died from internal hemorrhaging. After his funeral, Margarita asked a neighbor to watch her son. She went to apply for a job at the mall where a store owner called the DHS after discovering that she did not have a green card. Margarita was arrested and then released to continue caring for her son. Margarita has a 2001 misdemeanor retail theft conviction for which she was completed 20 hours of community service as ordered by the state court.

Analysis: Margarita is eligible for cancellation of removal. She has been physically present in the United States for more than ten years, and she can demonstrate good moral character as her misdemeanor theft conviction falls within the "petty offense" exception under I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) as a crime involving moral turpitude. She must show that her United States citizen son would suffer exceptional and extremely unusual hardship if she were removed or deported to Panama. Such hardship can be shown through evidence of lack of medical facilities and support for her son in Panama, as well as the fact that if she is deported, her son does not have any other family in the United States who can care for him.

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<sup>796</sup> See *id.* (citing *In re Anderson*, 16 I&N Dec. 596 (BIA Aug. 31, 1978)); see also, Suspension of Deportation, *infra* at 6-63.

<sup>797</sup> See *id.* at 63.

<sup>798</sup> See *In re Andazola-Rivas*, 23 I&N Dec. 319 (BIA Apr. 3, 2002); *In re Recinas*, 23 I&N Dec. 467 (BIA Sept. 19, 2002).

<sup>799</sup> See *id.*; see also *Leyva v. Ashcroft*, 380 F.3d 303 (7<sup>th</sup> Cir. Aug. 13, 2004) (holding that the court of appeals does not have jurisdiction to review whether the non-citizen has demonstrated exceptional and extremely unusual hardship).



### ***Case of Enrique from Spain***

Enrique entered the United States as a B-2 tourist in 2001 and was informed by the INS that he could remain in the U.S. as a visitor for 60 days. He overstayed his sixty-day visit and started working for his uncle. In 2005, he married Sonia from Spain who was living in the U.S. unlawfully. Their U.S. citizen daughter was born in January 2007.

In November 2006, Enrique was stopped by the local police for running a red light. The police officer asked him for his license and his green card. Enrique told the officer that he did not have a green card. The officer called the DHS who arrested Enrique and issued him a Notice to Appear before an Immigration Judge. Enrique does not have any family member in the United States who can file a family visa petition for him which would give him an immediate relative visa.

Analysis: Enrique is not eligible for cancellation of removal. He has not been in the United States for the statutory minimum period of ten years. In addition, it is unlikely that he can demonstrate exceptional and extremely unusual hardship to his United States citizen daughter who is an infant. Enrique's only defense to removal is voluntary departure.<sup>800</sup>

### **Practice Tips**

Since good moral character and the absence of certain criminal convictions is required for a non-citizen to establish eligibility for this form of cancellation of removal, it is essential to try to get a charge for a crime involving moral turpitude (such as fraud or theft) against the non-citizen dismissed. In the alternative, try to plead a non-citizen to a crime that will not bar her from eligibility for cancellation of removal. For cases involving criminal charges against a battered, mentally abused, or emotionally abused non-citizen who has been admitted to the U.S. and may otherwise qualify for cancellation of removal, a limited waiver may be available.<sup>801</sup>

### ***Asylum and Refugees***

Non-citizens may arrive in the United States after being forced to flee their home countries due to political threats on their lives. In certain countries, membership in a union, student group, religious organization, or political party which peacefully and politically opposes an elected or military government can put a person's life at risk. Many non-citizens have been arrested, imprisoned, and tortured or suffered other forms of persecution before arriving in the United States. They may have family members and friends who have been disappeared by governmental or non-governmental forces. They fear for their safety and their family's safety if forced to return to their home country.

Such non-citizens are eligible to apply for asylum unless they are statutorily barred based on certain criminal convictions, including aggravated felonies and particularly serious crimes, or other actions, such as material support to a terrorist organization (willful

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<sup>800</sup> See Voluntary Departure, *infra* at 6-78.

<sup>801</sup> See I.N.A. § 237(a)(7), 8 U.S.C. § 1227(a)(7).

or coerced), terrorist activity, presenting a danger to the security of the United States, persecution of other persons on enumerated grounds, or foreign convictions for serious non-political crimes.<sup>802</sup> Criminal convictions rendered by foreign courts may be subject to scrutiny in the U.S. asylum application process to determine the legitimacy of the conviction based on procedures followed and international reaction to the trial and conviction.<sup>803</sup>

Asylum applicants must meet the definition of “refugee” which is an international standard<sup>804</sup> adopted by the United States in the enactment of the Refugee Act of 1980.<sup>805</sup> A refugee is a person outside of his or her country of nationality or country of last habitual residence where he or she has no nationality who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>806</sup> A non-citizen must file his application for asylum within one year of arrival in the United States unless he can establish that extraordinary circumstances apply to his case or that country conditions have changed since his arrival.<sup>807</sup>

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<sup>802</sup> See I.N.A. § 208(b); 8 U.S.C. § 1158(b); *see also*, U.S. v. Kumpf, 483 F.3d 785 (7<sup>th</sup> Cir. Feb. 23, 2006) (finding that the person’s actions as an armed guard at a Nazi concentration camp constituted personal assistance in persecution under the Refugee Relief Act and holding that denaturalization was warranted); U.S. v. Fedorenko, 449 U.S. 490, 505, 512 (Jan. 21, 1981) (discussing the Refugee Relief Act of 1953 and assistance or advocacy of persecution of another person or persons and holding that an armed guard with orders to shoot persons who attempted to escape from a camp assisted in the persecution of civilians); U.S. v. Ciurinkas, 148 F.3d 729, 734 (7<sup>th</sup> Cir. Jun. 19, 1998); Doe v. Gonzales, 484 F.3d 445 (7<sup>th</sup> Cir. Apr. 17, 2007) (discussion regarding participation in persecution and membership in the Salvadoran armed forces following the murder of six Jesuit priests); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (May 3, 1999) (serious non-political crime); Comollari v. Ashcroft, 378 F.3d 694 (7<sup>th</sup> Cir. Aug. 10, 2004) (discussing country conditions to give context to whether acts constitute the commission of a serious non-political crime). In an exceptional case, the Seventh Circuit Court of Appeals allowed a non-citizen who had been convicted of an aggravated felony to apply for asylum nunc pro tunc where he was found deportable by the Immigration Judge at a hearing at which he was denied the right to counsel, the Board of Immigration Appeals reversed the decision of the Immigration Judge and remanded the case for a new hearing, and Congress in the interim enacted a law which rendered him ineligible for asylum. *See* Batanic v. I.N.S., 12 F.3d 662 (7<sup>th</sup> Cir. Dec. 17, 1993). In certain circumstances, material support to a terrorist organization may be waived by the DHS. *See* “Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act,” Michael Chertoff, Secretary of Homeland Security, USDHS, April 27, 2007, available at [www.dhs.gov](http://www.dhs.gov) and 72 Fed. Reg. 26138 (May 8, 2007); *see also*, *In re* S-K-, 23 I&N Dec. 936 (BIA Jun. 8, 2006) (holding that the Board did not have authority to grant a waiver to a non-citizen who provided “material support” to a terrorist organization and that no exception existed for cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime); *In re* U-H-, 23 I&N Dec. 355 (BIA Apr. 5, 2002).

<sup>803</sup> *See* Doe v. Gonzales, 484 F.3d 445 (7<sup>th</sup> Cir. Apr. 17, 2007).

<sup>804</sup> *See* Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, T.I.A.S. No. 6577 (1951); Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, T.I.A.S. No. 6577 (1967).

<sup>805</sup> *See* Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980).

<sup>806</sup> *See* I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

<sup>807</sup> *See, e.g.* *In re* Y-C-, 23 I&N Dec. 286 (BIA Mar. 11, 2002).

An asylum applicant must prove that a possibility of persecution exists (10% chance)<sup>808</sup> which differs from the probability of persecution standard required for withholding of deportation/removal (51% or more likely than not).<sup>809</sup> An applicant for asylum can establish a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act.<sup>810</sup> An applicant may be granted asylum based on past persecution on account of one or more of the five grounds without showing a well-founded fear of future persecution.<sup>811</sup> However, if an applicant demonstrates past persecution, a rebuttable presumption of future persecution applies.<sup>812</sup> The DHS may rebut the presumption of future persecution by demonstrating that there has been a fundamental change in country conditions or circumstances or that the applicant could avoid persecution by relocating to another part of the proposed country for removal.<sup>813</sup> Case law regarding asylum is extensive and continually developing.

The CIS or an Immigration Judge may exercise her discretion in deciding whether to grant a non-citizen asylum. While most misdemeanor convictions and traffic violations will not statutorily bar a non-citizen from applying for asylum, such convictions and violations may be used to deny asylum in the exercise of discretion. A non-citizen who is granted asylum within the territory of the United States has the immigration status of an asylee and is eligible for certain benefits, including employment authorization.<sup>814</sup> One year after having been granted asylum, an asylee may apply for adjustment of status to become a lawful permanent resident.<sup>815</sup> An asylee's status is considered indefinite until he becomes a lawful permanent resident or his status is terminated by the DHS or an Immigration Judge.<sup>816</sup>

Refugees are non-citizens who have been determined by representatives of the United States government to meet the definition of refugee while overseas. Often they are recognized as refugees while in a refugee camp run by the United Nations High Commissioner for Refugees (U.N.H.C.R.). Non-citizens may also apply for refugee status at a United States Consulate or Embassy. Refugees are admitted to the United States under I.N.A. § 207, 8 U.S.C. § 1157. A non-citizen who is a refugee has the immigration status of

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<sup>808</sup> See *Cardoza-Fonseca v. I.N.S.*, 480 U.S. 421, 469 (Mar. 9, 1987).

<sup>809</sup> See *Stevic v. I.N.S.*, 467 U.S. 407, 430 (Jun. 5, 1984); *Carvajal-Munoz v. I.N.S.*, 743 F.2d 562 (7<sup>th</sup> Cir. Sept. 12, 1984).

<sup>810</sup> See *In re Mogharrabi*, 19 I&N Dec. 439 (BIA June 12, 1987). The Seventh Circuit has rejected derivative claims for asylum by non-citizen parents of U.S. citizen children based on potential hardship to the child in the event of the parent's removal from the U.S. See, e.g., *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7<sup>th</sup> Cir. Dec. 31, 2003).

<sup>811</sup> See 8 C.F.R. § 208.13(b); see also, *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7<sup>th</sup> Cir. Aug. 28, 2008); *In re H-*, 21 I&N Dec. 337 (BIA May 30, 1996); *In re D-V-*, 21 I&N Dec. 77 (BIA May 25, 1993); *In re Chen*, 20 I&N Dec. 16, 18-19 (BIA Apr. 25, 1989).

<sup>812</sup> See 8 C.F.R. § 208.13(b)(1)(i)(B); *Lhansom v. Gonzales*, 430 F.3d 833, 848-49 (7<sup>th</sup> Cir. Dec. 5, 2005); *Ghebremedhin v. Ashcroft*, 385 F.3d 1116, 1120 (7<sup>th</sup> Cir. Oct. 13, 2004); *Bace v. Ashcroft*, 352 F.3d 1133, 1140 (7<sup>th</sup> Cir. Dec. 18, 2003).

<sup>813</sup> See *id.*

<sup>814</sup> See *Asylee Eligibility for Resettlement Assistance: A Short Guide*, The National Asylee Information and Referral Line, CLINIC, January 2007.

<sup>815</sup> See *Termination of Asylum and Adjustment of Status for Asylees and Refugees*, *infra* at 6-36.

<sup>816</sup> See *id.*

a refugee indefinitely and may apply one year later for adjustment of status to become a lawful permanent resident.<sup>817</sup> A refugee who travels abroad and returns to the U.S. with a refugee travel document is subject to the grounds of inadmissibility.<sup>818</sup>

A non-citizen who is ineligible for asylum due to criminal acts or statutory bars may be eligible for withholding of removal, a mandatory form of relief. If she demonstrates that it is more likely than not that she will suffer persecution if returned to her country of nationality (or country of last habitual residence where an applicant has no nationality), the CIS or Immigration Judge must grant her withholding of removal/deportation unless she is statutorily ineligible on account of having been convicted of a “particularly serious crime” or other statutory bar.<sup>819</sup> A non-citizen who has been granted withholding may remain and work in the U.S. but cannot adjust her status to become a lawful permanent resident based on the grant of withholding.

A non-citizen may also be eligible for relief under the Convention against Torture if she can prove by substantial evidence that she will probably be tortured upon return to her country.<sup>820</sup> Similar to withholding of removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1251(b)(3), a non-citizen whose removal has been withheld or deferred under the Convention against Torture may remain and work in the U.S. but cannot adjust her status to become a lawful permanent resident based on the grant of relief under the Convention against Torture. Where a non-citizen is ineligible for asylum, withholding of removal or relief under the Convention against Torture, analyzing the possibility of withdrawal of guilty pleas, sentence reductions, pardons, and post-conviction relief is critical.<sup>821</sup>

### Case Law

Unlike withholding of deportation or removal and relief under the Convention against Torture which must be granted if the non-citizen proves her statutory eligibility, asylum may be denied in the exercise of discretion to a non-citizen who establishes statutory eligibility for the relief.<sup>822</sup> An asylum officer or Immigration Judge will consider the totality of the non-citizen’s circumstances in the exercise of discretion.<sup>823</sup> Factors to be considered include: whether the non-citizen passed through any other countries or arrived in the United States directly from the country of persecution; whether orderly refugee procedures were in fact available to help him in any country he passed through and whether he made any attempts to seek asylum or refugee status before coming to the United States; the length of time he remained in a third country and the living conditions, safety, and potential for long-term residency there; personal ties to the United States; whether he

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<sup>817</sup> *See id.*

<sup>818</sup> *See Shamoun v. District Director, I.N.S.*, 967 F.Supp. 1051, 1054-55 (N.D.IL Jun. 19, 1997) (holding that a non-citizen who was previously admitted to the U.S. as a refugee and who returned to the U.S. with a valid refugee travel document was properly excluded by the Immigration Judge based on his 1983 Illinois conviction for delivery of a controlled substance).

<sup>819</sup> For the statutory bars to withholding of removal and a discussion on particularly serious crimes, see *Withholding of Removal*, *infra* at 6-40.

<sup>820</sup> *See Convention Against Torture*, *infra* at 6-45.

<sup>821</sup> *See Post-Conviction Relief*, *infra* at 8-12.

<sup>822</sup> *See id.*; *Cardoza-Fonseca v. I.N.S.*, 480 U.S. 421 (Mar. 9, 1987).

<sup>823</sup> *See In re Pula*, 19 I&N Dec. 467 (BIA Sept. 22, 1987).

engaged in fraud to circumvent orderly refugee procedures and the seriousness of any fraud; age or health; immigration violations in the United States; and criminal history in the United States.<sup>824</sup> The danger of persecution should generally outweigh all but the most egregious of adverse factors in his case.<sup>825</sup>

## **Application to Cases**

### ***Case of Ivan from Bulgaria***

Ivan was expelled from Bulgaria by Communist government officials for his political organizing activities in March 1988. He lived in Austria for three years where he applied for asylum, but his asylum claim was never adjudicated by the government. He came to the United States as a tourist in July 1991 and immediately applied for asylum with the former INS. His application was misplaced by the INS for several years.

In December 2004, Ivan was arrested for misdemeanor driving under the influence. He pled guilty and received fifteen days in the county jail.

Analysis: Ivan is eligible for asylum. He has not been convicted of an aggravated felony. His conviction will be considered in the totality of the circumstances and should not bar a favorable exercise of discretion if the Immigration Judge finds him credible and to have a well-founded fear of future persecution. In light of the changed country conditions and democracy now in Bulgaria, he may be denied asylum.<sup>826</sup> As a former citizen of an Eastern Bloc country, he may be eligible for cancellation of removal under the NACARA.<sup>827</sup>

### ***Case of Michael from Sudan***

Michael was forcibly recruited into a guerrilla force at age twelve to fight against the Muslim government in southern Sudan. Three years later, he defected and fled to a refugee camp in Kenya. In 2004, he was recognized by the United States Government as a refugee and brought to the United States, where he resettled in Wisconsin. In July 2005, he adjusted his status to become a lawful permanent resident.

In December 2005, he went with a friend to Indiana to visit friends. Outside of a grocery store, he was assaulted by some local teenagers looking for money. His friends called the police who arrived at the store. One of the officers grabbed Michael from behind and Michael kicked him, believing that the officer was one of the teens. He was arrested and later pled guilty to felony battery against a police officer under IC 35-42-2-1(a)(2)(A). He received a suspended sentence of nine months in jail and was placed on probation. In

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<sup>824</sup> See *id.*; see also, I.N.A. § 208(d), 8 U.S.C. § 1158(d); 8 C.F.R. § 1208.20; *In re Y-L-*, 24 I&N Dec. 151 (BIA Apr. 25, 2007) (holding that an Immigration Judge must allow an asylum applicant to account for any discrepancies or implausible aspects of the claim and then address the issue of frivolousness in an asylum application and make specific findings that an applicant deliberately fabricated material elements of an asylum claim before a non-citizen may be rendered permanently ineligible for any immigration benefits).

<sup>825</sup> See *id.*

<sup>826</sup> See 8 C.F.R. § 208.13(b)(1), "Asylum Procedures," 65 Fed. Reg. 76161 (2000).

<sup>827</sup> See Cancellation of Removal for Nonpermanent Residents, *supra* at 6-28.

May 2006, his probation officer told him to come to his office. Michael was surprised to see two ICE officers at the probation office. They arrested him for having committed a crime involving moral turpitude within five years of admission and placed him in removal proceedings.

Analysis: Michael is eligible to apply for asylum because he has not been convicted of an aggravated felony. The Immigration Judge will consider the seriousness of his conviction against the persecution that Michael would face if returned to Sudan. The Immigration Judge will also consider whether he has violated his probation and has support from the community where he now lives.

### **Practice Tips**

Where a non-citizen fears persecution in her country of origin or last habitual residence and is charged with an aggravated felony, work with the prosecutor and the court to reduce the charge to a crime not considered to be an aggravated felony. This will allow the non-citizen to maintain her eligibility for asylum unless the resulting conviction is found to involve a particularly serious crime. In situations where the non-citizen may have committed the crime as a result of post-traumatic stress disorder, major depression, or other mental disorder, document the disorder through a psychiatric evaluation and move to continue the case to allow her to obtain appropriate professional treatment and to dismiss the charge against the non-citizen.<sup>828</sup>

### ***Termination of Asylum and Adjustment of Status for Asylees and Refugees***

The issues involving criminal offenses and convictions for asylees and refugees are relevant until after they become U.S. citizens. Refugees and asylees are eligible to apply to adjust their status to become lawful permanent residents after residing in the United States for one year.<sup>829</sup> At the time of their applications for adjustment, they are subject to all of the grounds of inadmissibility. Although a waiver of the grounds of inadmissibility under I.N.A. § 209(c), 8 U.S.C. § 1159 may be possible for their certain convictions, refugees and asylees may also be subject to the grounds of deportability for convictions.<sup>830</sup> Refugees and asylees may be placed in removal proceedings based on criminal convictions and/or other violations of the immigration laws without having had their asylee or refugee status terminated, even where they adjusted their status to become lawful permanent residents.<sup>831</sup>

The waiver of the grounds of inadmissibility for a refugee and an asylee is very broad. For humanitarian purposes, family unity, or when it is otherwise in the public interest, the

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<sup>828</sup> For assistance to obtain an evaluation and possible treatment for your client, see Appendices 1H and 1I for information about Marjorie Kovler Center and the Center for Victims of Torture.

<sup>829</sup> See I.N.A. § 209(a)-(b), 8 U.S.C. § 1159(a)-(b).

<sup>830</sup> See Grounds of Inadmissibility and Adjustment of Status, *supra* at 4-1; Grounds of Deportability, *supra* at 3-1.

<sup>831</sup> See *Gutnik v. Gonzales*, 469 F.3d 683 (7<sup>th</sup> Cir. Nov. 29, 2006); *In re Smriko*, 23 I&N Dec. 836, 839-42 (BIA Nov. 10, 2005) (holding held that an alien who was admitted as a refugee and then adjusted status to become a lawful permanent resident could be subject to removal proceedings based on a criminal conviction without his refugee status first being terminated).

DHS or the Attorney General may waive the majority of the grounds of inadmissibility, including public charge, most criminal convictions, unlawful presence, and false claims to U.S. citizenship.<sup>832</sup> Grounds of inadmissibility which cannot be waived include those related to drug traffickers, persons deemed to constitute a security threat, terrorist activities, activities which would have potentially adverse foreign policy consequences, Nazi persecution, and participation in genocide.<sup>833</sup> Where an alien has been convicted of a violent or dangerous crime, a waiver and adjustment of status will not be granted “except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of such status adjustment would result in exceptional and extremely unusual hardship.”<sup>834</sup>

A non-citizen who entered the U.S. as a refugee, adjusted his status to become a lawful permanent resident, and then became deportable based on criminal convictions is not eligible to readjust his status under I.N.A. § 209(a), 8 U.S.C. § 1159(a) based on his prior entry as a refugee.<sup>835</sup> If he is granted asylum by the Immigration Judge or the Board of Immigration Appeals in removal proceedings, then he may be eligible to adjust his status under I.N.A. § 209(b), 8 U.S.C. § 1159(b) as an asylee one year after being granted asylum.<sup>836</sup>

Relevant to the ability of a refugee or an asylee to remain in the U.S. and pursue an application for adjustment of status and, where required a waiver, is whether his status may be terminated. A refugee’s status may be terminated by the CIS or an Immigration Judge where it is proven that the refugee committed fraud or was not a refugee within the meaning of I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) at the time that he was admitted to the U.S.<sup>837</sup> In comparison, an asylee’s status may be terminated by the DHS or an Immigration Judge if he is convicted of a crime constituting an aggravated felony or a particularly serious crime, among other reasons.<sup>838</sup>

Termination of asylee status based on a criminal conviction is not, however, mandatory.<sup>839</sup> Rather, an asylee who qualifies for and merits adjustment of status under I.N.A. § 209(b), 8 U.S.C. § 1159(b) along with a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c) may be granted such benefits by the CIS or by the Immigration Judge or the Board of Immigration Appeals after he is placed in removal proceedings.<sup>840</sup> A balancing of the

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<sup>832</sup> See I.N.A. § 209(c), 8 U.S.C. § 1159(c).

<sup>833</sup> See *id.*; see also, *In re H-N-*, 22 I&N Dec. 1039 (BIA Oct. 13, 1999).

<sup>834</sup> See *In re Jean*, 23 I&N Dec. 373 (A.G. May 2, 2002); *Ali v. Achim*, 468 F.3d 462, 466-67 (7<sup>th</sup> Cir. Nov. 6, 2006) (affirming the Board’s ruling regarding the heightened standard for a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c) for violent or dangerous crimes in *In re Jean*, 23 I&N Dec. 373 (A.G. May 2, 2002)).

<sup>835</sup> See *Gutnik v. Gonzales*, 469 F.3d 683, 688-92 (7<sup>th</sup> Cir. Nov. 29, 2006).

<sup>836</sup> See I.N.A. § 209(b), 8 U.S.C. § 1159(b).

<sup>837</sup> See I.N.A. § 207(c)(4), 8 U.S.C. § 1157(c)(4) (providing for termination of refugee status where alien was not a refugee within I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) at time of admission).

<sup>838</sup> See I.N.A. § 208(c)(2), 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 208.23; *cf.* I.N.A. § 207(c)(4), 8 U.S.C. § 1157(c)(4) (providing for termination of refugee status where the Attorney General determines that the non-citizen was not a refugee as defined at I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) at the time of admission); 8 C.F.R. § 207.9.

<sup>839</sup> See *In re K-A-*, 23 I&N Dec. 661 (BIA Jun. 23, 2004).

<sup>840</sup> See *id.* at 664-67.

equities of the asylee, including family ties, length of residence in the U.S., community ties, and other evidence indicating that the conviction is not indicative of her character and describing her as an asset to society, against any negative factors, such as prior immigration law violations and criminal history, should take place prior to the entry of a decision to terminate asylum.<sup>841</sup> Evidence of an asylee's equities should be presented in response to the DHS' Notice of Intent to Terminate Asylum.<sup>842</sup>

Once an asylee's status is terminated, he is no longer eligible for adjustment of status in conjunction with a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c). Depending upon the reason for the termination of asylum, he may be eligible for withholding of removal and/or relief under the Convention against Torture.<sup>843</sup>

On account of the delays in adjudicating asylee adjustment applications as well as the possibility that the CIS can terminate an asylee's status for certain criminal convictions, particular attention must be paid to situations where asylees are facing criminal charges which may constitute particularly serious crimes or aggravated felonies. Care must be taken in advising refugees, asylees, and other non-citizens who fear persecution and/or torture abroad about the immigration consequences of their pleas to criminal charges as an order of removal may result in the realistic possibility of persecution, torture, or even death.

## **Application to Cases**

### ***Case of Soua from Laos***

Soua is a 75 year old man from Laos. He fought with General Vang Pao and other Hmong who assisted the United States government during the Vietnam War. In 1975, he and his family fled to Thailand where they lived in a refugee camp for 15 years. In 1998, he entered the United States as a refugee with his wife and they joined their son and his family in Rockford, Illinois. He never applied to adjust his status to become a lawful permanent resident.

In August 2008, Soua was arrested and charged with possession of 15 grams of morphine. He was released on his own recognizance by the sheriff the same day on account of his advanced age and health condition. In November 2008, he pled guilty and the court placed him on probation for two years under 720 ILCS 570/410 for possession of morphine. The court also ordered him to participate in a controlled substance treatment program which he completed. In January 2009, the DHS served him with a Notice to Appear, charging him as being deportable for having been convicted of a controlled substance offense after being admitted to the U.S. as a refugee.

Analysis: Soua is statutorily eligible to apply for adjustment of status and a § 209(c) waiver before the Immigration Court. If he had been convicted for sale of morphine or

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<sup>841</sup> See *id.*; see also, *In re H-N-*, 22 I&N Dec. 1039, 1045 (BIA Oct. 13, 1999).

<sup>842</sup> See *In re K-A-*, 23 I&N Dec. 661 (BIA Jun. 23, 2004) (discussing the process by which ICE or CIS can move to terminate an asylee's status and the balancing of positive and negative factors).

<sup>843</sup> See *Withholding of Removal, infra* at 6-40; *Convention Against Torture, infra* at 6-45.



possession with the intent to deliver morphine, he would have been ineligible because the ground of drug trafficking could not be waived. It is likely that the Immigration Court would grant the request for the § 209(c) waiver in light of Soua's family ties in the U.S., his past military history assisting the U.S. forces in Laos during the Vietnam War, and his advanced age.

### ***Case of Jean from the Democratic Republic of Congo***

Jean entered the U.S. in January 1998. He applied for asylum in March 1998. In September 1998, the Chicago INS Asylum Office granted him asylum. In September 1999, he filed an asylee application for adjustment of status with the INS.

Jean became involved with a credit card fraud ring in Gary, Indiana. In February 2008, Jean was arrested for using the social security number and credit card of another person to credit and to purchase goods on-line which totaled \$20,000. In November 2008, he was convicted of fraud under IC-35-43-5-4(1)(C), a Class D felony. In his plea, he admitted to having caused a loss of \$15,000 to the victim. He was sentenced to 11 months in jail and placed on probation for 5 years.

Upon completion of his jail term, he was transferred to DHS custody. The DHS detained him under the mandatory detention provisions of I.N.A. § 236(c), 8 U.S.C. § 1226(c), charging him with having been convicted of an aggravated felony under I.N.A. § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M).<sup>844</sup> The DHS terminated his asylum status and then placed him in removal proceedings.

Analysis: Jean is ineligible for a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c) because he is no longer an asylee. He is also ineligible to request asylum on account of his aggravated felony conviction. He is eligible for withholding of removal as his conviction will most likely not be found to constitute a particularly serious crime. In addition, he is eligible for relief under the Convention against Torture. Jean will remain in DHS custody under the mandatory detention provisions unless his application for relief is granted or unless his application is denied and he is removed from the United States.<sup>845</sup>

### ***Case of Marcos from Guatemala***

In 1989 Marcos fled persecution by a guerrilla group during the civil war in Guatemala. He entered the U.S. in 1993 and was granted asylum by the Immigration Judge in Texas. He has never applied for adjustment of status but instead has renewed his employment authorization document annually. The guerrilla group has since disbanded after the arrest, conviction, and imprisonment of its leader. The civil war also ended several years ago.

In November 2008, Marcos was arrested for drunk driving. He pled guilty to one misdemeanor count of operating a motor vehicle while intoxicated ("OWI") in violation of Wis. Stat. § 346.63(1)(b) and received one year of probation. When he applied to renew his

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<sup>844</sup> See Mandatory Detention, *infra* at 7-3.

<sup>845</sup> See *id.*

employment authorization card, the CIS sent him a notice to appear for a biometrics appointment. At the appointment, he was informed that he needed to appear at the Chicago CIS Asylum Office to discuss his immigration status.

Analysis: Marcos's asylee status should not be terminated based on his OWI conviction as it should be found not to constitute a particularly serious crime. However, he will need to prove that he remains a refugee as defined by I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) in order to avoid termination of his asylum based on changed conditions and to be eligible for adjustment of status as an asylee. Even if his asylee status is terminated, he may be eligible to apply for adjustment of status pursuant to the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).<sup>846</sup>

### ***Withholding of Removal (formerly known as Withholding of Deportation)***

The expansion and retroactivity of the definition of aggravated felony has greatly impacted non-citizens in Illinois, Indiana, and Wisconsin. Illinois is the home to refugees and asylees from many countries, including El Salvador, Ethiopia, Cuba, Guatemala, Laos, Liberia, Nicaragua, Somalia, the former Soviet Union, Sudan and Vietnam. Many refugees and asylees have become permanent residents but not United States citizens for various reasons, including difficulty in learning English.

Withholding of removal/deportation is a critical form of relief for asylees, refugees, and lawful permanent residents who face a probability of persecution, including torture and death, if they are forced to return to their home countries. If an Immigration Judge finds that a non-citizen has not been convicted of an aggravated felony but denies asylum in the exercise of discretion, then the Immigration Judge must grant withholding of removal/deportation where the non-citizen has proven that he or she would probably be persecuted if deported to his or her country of nationality or last habitual residence. A grant of withholding of removal will not lead to adjustment of status to become a lawful permanent resident ("green" card) for the non-citizen. A grant of withholding does, however, withhold the removal or deportation of the non-citizen to the country where she will face probable persecution. The Attorney General can revoke a grant of withholding upon a finding that she no longer faces a probability of persecution due to a change in country conditions.

Even where a non-citizen can prove that she will be harmed or killed upon her return, she is statutorily barred from withholding if an Immigration Judge determines that she has been convicted of a "particularly serious crime" or has been sentenced to an aggregate term of imprisonment of five years or more for an aggravated felony. Other statutory bars, including conviction of a serious non-political crime and persecution of others, may apply to render a non-citizen statutorily ineligible for withholding of removal.<sup>847</sup> A non-citizen will be removed after the order of removal is final and the government of the country to which she will be removed agrees to accept her.

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<sup>846</sup> See Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).

<sup>847</sup> See I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3); see also, Asylum and Refugees, *supra* at 6-31.

## Particularly Serious Crimes

A non-citizen may be found to be convicted of a particularly serious crime for an aggravated felony as well as a crime which is not an aggravated felony.<sup>848</sup> A non-citizen convicted of one or more aggravated felonies for which the aggregate sentence is at least five years is considered to have committed a particularly serious crime, rendering him statutorily ineligible for withholding of deportation.<sup>849</sup> Where a non-citizen has been convicted of two or more convictions deemed to be aggravated felonies and has received concurrent sentences to imprisonment, the aggregate term of imprisonment is equal to the length of the longest concurrent sentence for purposes of determining eligibility for withholding of removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3).<sup>850</sup>

For a non-citizen convicted of an aggravated felony and sentenced to less than five years imprisonment, the burden of proof and standard to determine whether he has been convicted of a particularly serious crime depends on whether the non-citizen is in deportation or removal proceedings. Where a non-citizen has been convicted of an aggravated felony or felonies, sentenced to less than five years imprisonment, and placed in removal proceedings, the Immigration Judge must conduct an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction to determine whether he has been convicted of a particularly serious crime.<sup>851</sup> The DHS has the burden of proving that he has been convicted of a particularly serious crime in removal proceedings.<sup>852</sup>

For a non-citizen in deportation proceedings, however, a different standard is applied and the burden of proof is on the non-citizen. In deportation proceedings, a non-citizen convicted of an aggravated felony or felonies and sentenced to less than five years must rebut the presumption that she has been convicted of a particularly serious crime.<sup>853</sup> If an

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<sup>848</sup> See I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3); *Ali v. Achim*, 468 F.3d 462, 468-70 (7<sup>th</sup> Cir. Nov. 6, 2006); see also, Appendix 6H, Chart: Particularly Serious Crime Bars to Removal.

<sup>849</sup> See *In re H-M-V-*, 22 I&N Dec. 256 (BIA Aug. 25, 1998); See *In re S-S-*, 22 I&N Dec. 458 (BIA Jan. 21, 1999), 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).

<sup>850</sup> See *In re Aldabeshah*, 22 I&N Dec. 983 (BIA Aug. 30, 1999).

<sup>851</sup> See *In re S-S-*, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in *In re Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (following *In re Frentescu*, 18 I&N Dec. 244, 247 (BIA June 23, 1982), which held that whether a crime is a “particularly serious crime” depends on the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community). See also, *In re L-S-*, 22 I&N Dec. 645 (BIA Apr. 16, 1999) (holding that a non-citizen convicted of bringing an illegal non-citizen into the U.S. in violation of I.N.A. § 274(a)(2)(B)(iii), 8 U.S.C. § 1324(a)(2)(B)(iii) and sentenced to 32 months’ imprisonment had not been convicted of a particularly serious crime and was eligible to apply for withholding of removal).

<sup>852</sup> See *In re S-S-*, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in part by *In re Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002).

<sup>853</sup> See *In re Q-T-M-T-*, 21 I&N Dec. 639 (BIA Dec. 23, 1996). Prior to the 1996 statutory changes regarding withholding of deportation, a non-citizen in deportation proceedings who was convicted of an aggravated felony was statutorily ineligible for withholding of deportation under I.N.A. § 243(h)(2), 8 U.S.C. § 1253(h)(2) as amended by the Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978 (1990). See *Mansoori v. I.N.S.*, 32 F.3d 1020, 1022-1023 (7<sup>th</sup> Cir. Aug. 8, 1994); *Groza v.*

evaluation of the nature and circumstances of the offense indicates that the particular aggravated felony cannot be rationally deemed “particularly serious” in light of United States treaty obligations under the United Nations Protocol Relating to the Status of Refugees,<sup>854</sup> the presumption can be overcome.<sup>855</sup>

Prior to the 1996 statutory changes, certain crimes had been held to be inherently particularly serious crimes, including all aggravated felonies.<sup>856</sup> These categories or types of inherently particularly serious crimes no longer exist.<sup>857</sup>

Other crimes may be found to be “particularly serious crimes” based upon an analysis of the facts and the *Frentescu* test.<sup>858</sup> Such convictions include drug trafficking,<sup>859</sup>

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I.N.S., 30 F.3d 814, 820 (7<sup>th</sup> Cir. Jul. 14, 1994); *Garcia v. I.N.S.*, 7 F.3d 1320, 1323 (7<sup>th</sup> Cir. Oct. 21, 1993).

<sup>854</sup> See Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268, T.I.A.S. No. 6577 (1967).

<sup>855</sup> See *In re Q-T-M-T*, 21 I&N Dec. 639 (BIA Dec. 23, 1996) (holding that robbery with a deadly weapon was a particularly serious crime where lives were threatened and endangered); see also, *In re L-S-J*, 21 I&N Dec. 973 (BIA July 29, 1997) (holding that robbery with a deadly weapon was a particularly serious crime).

<sup>856</sup> See *Mansoori v. I.N.S.*, 32 F.3d 1020 (7<sup>th</sup> Cir. Aug. 8, 1994) (attempted possession of cocaine with intent to deliver); *Groza v. I.N.S.*, 30 F.3d 814, 822-23 (7<sup>th</sup> Cir. Jul. 14, 1994) (rape, aggravated battery, and aggravated kidnapping); *Garcia v. I.N.S.*, 7 F.3d 1320, 1324-26 (7<sup>th</sup> Cir. Oct. 21, 1993) (conspiracy to deliver cocaine; also holding that once a non-citizen is found to have been convicted of an aggravated felony and therefore a particularly serious crime, he is automatically barred from withholding of deportation without a separate determination of whether he constitutes a danger to the community); *Hernandez-Gonzalez v. Moyer*, 907 F.Supp. 1224, 1227 (N.D.IL Dec. 12, 1995) (Illinois conviction for armed robbery). See also, *Ahmetovic v. I.N.S.*, 62 F.3d 48 (2<sup>nd</sup> Cir. July 27, 1995) (first degree manslaughter); *Dor v. I.N.S.*, 891 F.2d 997 (2<sup>d</sup> Cir. Dec. 8, 1989) (first degree manslaughter); *Abascal-Montalvo*, 901 F. Supp. 309 (D. Kan. Sept. 29, 1995) (armed criminal assault); *Cepero v. I.N.S.*, 882 F. Supp. 1575 (D. Kan. Mar. 31, 1995) (aiding and abetting armed bank robbery); *In re H-M-V*, 22 I&N Dec. 256 (BIA Aug. 25, 1998) (conspiracy to possession with intent to distribute heroin and possession with intent to distribute heroin); *In re C*, 20 I&N Dec. 529 (BIA May 28, 1992) (murder); *In re B*, 20 I&N Dec. 427 (BIA Nov. 19, 1991) (aggravated battery); *In re Carballo*, 19 I&N Dec. 357 (BIA Feb. 13, 1986) (armed robbery with a deadly weapon); *In re Garcia-Garrocho*, 19 I&N Dec. 423 (BIA Dec. 5, 1986) (first degree residential burglary).

<sup>857</sup> See *In re S-S*, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in *In re Y-L*, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002) (explaining and distinguishing *In re Gonzalez*, 19 I&N Dec. 682 (BIA July 27, 1988)).

<sup>858</sup> See, e.g., *Hamma v. I.N.S.*, 78 F.3d 233 (6<sup>th</sup> Cir. Mar. 7, 1996) (an alien convicted of felonious assault, possession of firearm in commission of a felony, and carrying a pistol in a vehicle was found to pose a substantial risk of violence toward another person and thus was found to have been convicted of a particularly serious crime); *Maashio v. I.N.S.*, 45 F.3d 1235 (8<sup>th</sup> Cir. Jan. 26, 1995) (two misdemeanor convictions for third degree sexual misconduct and repeated misdemeanor convictions for driving under the influence evidenced serious criminal misconduct and a danger to the community); cf. *In re L-S*, 22 I&N Dec. 645 (BIA Apr. 16, 1999) (holding that a conviction for bringing an illegal alien into the U.S. in violation of I.N.A. § 274(a)(2)(B)(iii), 8 U.S.C. § 1324(a)(2)(B)(iii) was not a particularly serious crime).

<sup>859</sup> See *Al-Salehi v. I.N.S.*, 47 F.3d 390 (10<sup>th</sup> Cir. Feb. 8, 1995) (guilty plea and conviction for possession with intent to distribute at least 500 grams of cocaine); *Mosquera-Perez v. I.N.S.*, 3 F.3d 553 (1<sup>st</sup> Cir. Sept. 10, 1993) (conviction for possession of cocaine with intent to distribute); *In re K*, 20 I&N Dec. 418 (BIA Nov. 5, 1991) (conviction for distribution and possession with intent to distribute); *In re U-M*, 20 I&N Dec. 327 (BIA June 5, 1991) (conviction for sale of marijuana and

concealing stolen weapons,<sup>860</sup> and robbery.<sup>861</sup> Although drug trafficking crimes are presumed to be particularly serious crimes, a non-citizen may rebut that presumption by demonstrating the circumstances of the offense, minimally including: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.<sup>862</sup> Once all six criteria have been met, then other extenuating circumstances may be considered to determine that the offense is not particularly serious.<sup>863</sup> Cooperation with law enforcement authorities, prior limited criminal histories, downward sentencing departures, and post-arrest claims of innocence will not support a finding that the offense is not a particularly serious crime.<sup>864</sup>

In comparison, simple possession of a controlled substance is not an aggravated felony<sup>865</sup> and generally is not a particularly serious crime.<sup>866</sup> Two convictions for simple possession of a controlled substance, while a drug trafficking crime under Seventh Circuit precedent, may not be a particularly serious crime.<sup>867</sup> Where the initial charging document alleges a drug trafficking offense, such as possession with intent to deliver or delivery, attention and care must be taken to move to strike any police reports or other evidence from the state court record, to be specific in amending the charge to simple possession of a controlled substance and the amount, and to stating the factual basis for the plea allocution

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LSD); *In re Gonzalez*, 19 I&N Dec. 682 (BIA Jul. 27, 1988) (guilty plea and conviction for two counts of trafficking in heroin). A drug trafficking crime as defined in 18 U.S.C. § 924(c) is an aggravated felony. See I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). For a drug offense to be an aggravated felony, it must fall under 18 U.S.C. § 924(c)(2) as a felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substance Import and Export Act (21 U.S.C. § 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. § App. 1901, *et seq.*). See I.N.A. § 101(a)(43), 8 U.S.C. § 1101(a)(43); *Lopez v. Gonzales*, 549 U.S. 47 (Dec. 5, 2006). A drug offense falls within 18 U.S.C. § 924(c)(2) where the offense is punishable under the Controlled Substance Act, the Controlled Substance Import and Export Act, or the Maritime Drug Law Enforcement Act and the offense is a felony. See 21 U.S.C. § 802(13). An offense is a felony if the maximum term of imprisonment authorized for the offense is more than one year. See 18 U.S.C. § 3559(a)(1)(5). An offense is a misdemeanor if the maximum term of imprisonment is five days to one year. See 18 U.S.C. §§ 3559(a)(6)-(8).

<sup>860</sup> See *Yang v. I.N.S.*, 109 F.3d 1185, 1189-90 (7<sup>th</sup> Cir. Mar. 18, 1997).

<sup>861</sup> See *In re S-V-*, 22 I&N Dec. 1306 (BIA May 5, 2000) (robbery); *In re L-S-J-*, 21 I&N Dec. 973 (BIA July 29, 1997) (robbery with a deadly weapon); *Hernandez-Gonzalez v. A.D. Moyer*, 907 F. Supp. 1224, 1227 (N.D.IL Dec. 12, 1995) (armed robbery); *In re Carballe*, 19 I&N Dec. 357, 360-61 (BIA Feb. 13, 1986) (armed robbery).

<sup>862</sup> See *In re Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270, 276-77 (A.G. Mar. 5, 2002).

<sup>863</sup> See *id.* at 277; see also, *Tunis v. Gonzales*, 447 F.3d 547, 548-50 (7<sup>th</sup> Cir. May 15, 2006).

<sup>864</sup> See *id.*

<sup>865</sup> See *Lopez v. Gonzales*, 549 U.S. 47 (Dec. 5, 2006); but see *In re Moncada-Servellon*, 24 I&N Dec. 62 (BIA Jan. 25, 2007); *In re Davis*, 20 I&N Dec. 536 (BIA May 28, 1992).

<sup>866</sup> See *In re Toboso-Alfonso*, 20 I&N Dec. 819 (BIA Mar. 12, 1990) (designated by Attorney General Janet Reno as precedent on June 19, 1994) (holding that simple possession of a controlled substance is not a particularly serious crime).

<sup>867</sup> See *Bosede v. Mukasey*, 512 F.3d 946 (7<sup>th</sup> Cir. Jan. 14, 2008).

and sentencing factors as the transcripts of the plea hearing and sentencing hearing may all be considered initially by the Immigration Judge to determine whether the offense of simple possession of a controlled substance is a particularly serious crime.

## Application to Cases

### *Case of Cheng from Laos*

Cheng is Hmong. He fought with the U.S. CIA in Laos from 1960 to 1975 under the direction of General Pao. In 1975, he fled to Thailand where he lived with his family in a refugee camp. In September 1980, he came to the United States as a refugee and later adjusted his status to become a lawful permanent resident.

Cheng was arrested in St. Paul on August 31, 1990, and charged with possession with intent to distribute 800 grams of opium and with fourth degree assault. In two jury trials in 1991, he was convicted and then sentenced to serve 47 months for the opium possession and twelve months for the assault. Cheng moved to Chicago in 1997 and applied for naturalization. At his naturalization interview in October 2008, the DHS served him with a Notice to Appear and placed him in removal proceedings.

Analysis: Cheng is deportable for his controlled substance conviction and for his assault conviction. His controlled substance offense constitutes drug trafficking as an aggravated felony under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), and his assault conviction is an aggravated felony as a crime of violence under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). Cheng has been sentenced to 59 months in prison for his aggravated felony convictions, one month less than the five year aggregate imprisonment bar.

In removal proceedings, the DHS will have the burden to prove that he has been convicted of a particularly serious crime, and Cheng may attempt to demonstrate that he has not.<sup>868</sup> If the Immigration Judge finds that he has not been convicted of a particularly serious crime, he will then be allowed to apply for withholding of removal based on his fear that he will probably be killed by the Communist Laotian government on account of his participation with the CIA and political opposition to the Communist government. If the Immigration Judge finds that he has been convicted of a particularly serious crime, Cheng may be granted deferred removal under the Convention Against Torture if he can prove a probability of torture by the Laotian government in Laos.

Since Cheng's convictions constitute convictions for aggravated felonies, Cheng cannot defend his "green card" or lawful permanent residence through cancellation of removal, even though he has been a lawful permanent resident for more than 20 years.<sup>869</sup> He is also ineligible for a § 212(c) waiver as he was convicted at trial, not by guilty plea.<sup>870</sup>

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<sup>868</sup> See *In re Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270, 276-77 (A.G. Mar. 5, 2002).

<sup>869</sup> See I.N.A. § 240A(a), 8 U.S.C. § 1229b(a); Cancellation of Removal, *supra* at 6-23.

<sup>870</sup> See § 212(c) Waivers, *infra* at 6-48.

Post-conviction relief, however, may provide relief for Cheng if he is able to obtain both a reduction in his sentence for the assault and a vacatur of the controlled substance conviction. If he is successful in state court on both convictions, he will be able to move to terminate his removal proceedings because he will no longer be deportable. A judgment that is vacated eliminates the conviction *ab initio*, as having been illegal from the time it was imposed.<sup>871</sup>

### Practice Tips

To avoid the effect of the retroactive expanded definition of aggravated felony, seek to have a non-citizen who was originally convicted of a single crime (which is now defined as an aggravated felony) and sentenced to a term of imprisonment of more than five years to be re-sentenced to a term of imprisonment of less than five years (i.e. 59 months) in order to preserve eligibility for withholding of removal/deportation.<sup>872</sup> Defense counsel may try to have a non-citizen convicted of a single aggravated felony for which he was originally sentenced to a term of imprisonment of more than one year to be re-sentenced to less than one year (i.e. 11 months or 364 days), thus preserving eligibility for other forms of relief, such as cancellation of removal for certain permanent residents and asylum. Reducing a sentence by one day (from 365 to 364 days) for a sentence-based aggravated felony will still result in a conviction for the prosecution but will allow an otherwise eligible non-citizen the opportunity to apply for relief from immigration consequences.

In addition, “good” facts should be entered into the record when a non-citizen client pleads guilty to a crime. Such facts may include where an unloaded gun or toy gun was used in the case of a burglary offense or where a victim consented when a non-citizen is charged with criminal sexual conduct involving his underage girlfriend.

### *Convention Against Torture*

For non-citizens who face probable torture if returned to their country of origin, another form of relief from removal may be available to them.<sup>873</sup> The United States is a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>874</sup> Under Article 3 of the CAT, the United States is prohibited from removing a non-citizen to a country where there are substantial grounds for believing that she would be in danger of being subjected to torture.<sup>875</sup>

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<sup>871</sup> See *In re Kaneda*, 16 I&N Dec. 677 (BIA Feb. 28, 1979); *In re Sirhan*, 13 I&N Dec. 592 (BIA Jun. 19, 1970).

<sup>872</sup> See Post-Conviction Relief, *supra* at 8-12 to 8-24.

<sup>873</sup> For a discussion regarding the time frames for filing a motion to reopen to apply for relief under the Convention against Torture, see *Kay v. Ashcroft*, 387 F.3d 664 (7<sup>th</sup> Cir. Oct. 29, 2004).

<sup>874</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (entered into force for the United States Nov. 20, 1994). See also, 136 Cong. Rec. S17486-92 (daily ed. Oct. 27, 1990).

<sup>875</sup> See Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a)-(b), Pub. L. 105-277, Div. G, Oct. 21, 1998, reprinted in 144 Cong. Rec. H11265 (daily ed. Oct. 19, 1998) (incorporating Article 3 of the Convention Against Torture into U.S. law and enacting implementing legislation for the Convention Against Torture); 64 Fed. Reg. 8478 (1999) (amending Title 8 of the Code of Federal

## Treaty

Article 3, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>876</sup>

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

## Case Law

The torture faced by a non-citizen in her country of origin or country to which she may be removed includes physical or mental torture.<sup>877</sup> A non-citizen must prove that the torture would be inflicted by or with the acquiescence of a public official or another person acting in an official capacity.<sup>878</sup> All evidence relevant to the possibility of torture of a non-citizen within the country of removal must be considered.<sup>879</sup> An individual may establish

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Regulations to allow non-citizens to apply for relief under the Convention Against Torture). Prior to the passage of implementing legislation and the promulgation of regulations pertaining to the Convention Against Torture, the federal courts and the Executive Office for Immigration Review did not have jurisdiction over claims brought under the Convention Against Torture. *See* Calderon v. Reno, 39 F.Supp.2d 943 (N.D.IL Dec. 3, 1998); *In re H-M-V-*, 22 I&N Dec. 256 (BIA Aug. 25, 1998).

<sup>876</sup> *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (entered into force for the United States Nov. 20, 1994).

<sup>877</sup> Torture has been defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a). *See also*, Comollari v. Ashcroft, 378 F.3d 692, 697 (7<sup>th</sup> Cir. Aug. 10, 2004) (stating that assassination is a form of torture and rejecting the government’s “clean kill” philosophy that assassination is not torture).

<sup>878</sup> *See In re J-E-*, 23 I&N Dec. 291 (BIA Mar. 22, 2002); *In re S-V-*, 22 I&N Dec. 1306 (BIA May 5, 2000) (holding that protection under the Convention Against Torture extends to persons who fear that torture would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity and that protection does not extend to persons who fear entities that a government is unable to control); *see also*, Mansour v. I.N.S., 230 F.3d 902 (7<sup>th</sup> Cir. Oct. 16, 2000) (holding that a non-citizen’s claim under the Convention Against Torture must be considered apart from his claim for asylum).

<sup>879</sup> *See* 8 C.F.R. §208.16(c)(3); *see also*, Lian v. Ashcroft, 379 F.3d 457 (7<sup>th</sup> Cir. Aug. 12, 2004); Doe v. Gonzales, 484 F.3d 445 (7<sup>th</sup> Cir. Apr. 17, 2007) (discussing evidence of country conditions, including reports by national and international commissions and expert witness testimony, that the



that he will be tortured based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the United States, and the fact that he is a criminal deportee.<sup>880</sup> Female genital mutilation has been found to constitute torture.<sup>881</sup>

Thus, a non-citizen who is ineligible for asylum or withholding of removal may be eligible to have his removal deferred until a time when he does not face the probability of torture in that country upon his return. Similar to withholding of removal, a grant of deferral of removal will not lead to lawful permanent residency. Moreover, a grant of deferral of removal does not guarantee release from ICE custody and the grant may be reconsidered when conditions in the country for removal change.

Whether a non-citizen is entitled to relief under the Convention against Torture for his prior cooperation with local, state, or federal authorities in the investigation and prosecution of criminal offenses is a matter which may be considered.<sup>882</sup> Where a non-citizen has been convicted of an aggravated felony, however, the Seventh Circuit Court of Appeals has held that it does not have jurisdiction to consider whether an Immigration Judge or the Board of Immigration Appeals correctly considered, interpreted, and weighed the evidence presented in denying a claim for relief under the Convention against Torture.<sup>883</sup>

## Application to Cases

### *Case of Michael from Sudan*

Michael entered the U.S. in June 1998 on a tourist visa. In December 1998, he married a U.S. citizen. He was granted lawful permanent residency in April 1999 by the INS in Bloomington, Minnesota. He and his wife moved to Illinois in June 1999.

Prior to coming to the United States, Michael was arrested by government forces in Sudan in October 1997 and held in prison for eight months during which time soldiers interrogated him about his political activities. The soldiers beat him daily with pieces of barbed wire and electrically shocked him in various parts of his body. He was released and told to report daily to his local police station and not to have any contact with persons involved in politics or the rebels. The same government forces which tortured Michael remain in control of the majority of the country and the war between the government and the rebel forces continues.

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Immigration Judge overlooked in his decision and remanding the case to the Board of Immigration Appeals for further proceedings); *In re J-F-F.*, 23 I&N Dec. 912 (A.G. May 1, 2006) (holding that the evidence must establish each step in the hypothetical chain of events regarding the claim that torture is more likely than not to happen).

<sup>880</sup> See *In re G-A*, 23 I&N Dec. 366 (BIA May 2, 2002).

<sup>881</sup> See *Tunis v. Gonzales*, 447 F.3d 547, 550-52 (7<sup>th</sup> Cir. May 15, 2006).

<sup>882</sup> See *Enwonwu v. Gonzales*, 438 F.3d 22, 35 (1<sup>st</sup> Cir. Feb. 13, 2006) (remanding to the BIA for further consideration where the non-citizen provided evidence that the Nigerian military would take retribution against him because of his cooperation with the U.S. drug enforcement administration); cf. *In re M-B-A.*, 23 I&N Dec. 474 (BIA Sept. 24, 2002).

<sup>883</sup> See *Petrov v. Gonzales*, 464 F.3d 800 (7<sup>th</sup> Cir. Oct. 6, 2006); *Hamid v. Gonzales*, 417 F.3d 642, 647-48 (7<sup>th</sup> Cir. Jan. 31, 2005); cf. *Tunis v. Gonzales*, 447 F.3d 547 (7<sup>th</sup> Cir. May 15, 2006).

In August 2008, Michael suffered a severe flashback regarding his torture by government soldiers. When a man approached him late at night on a sidewalk in front of the local public library, Michael believed that the man was one of the government soldiers. Fearing that the man was going to hit him with barbed wire, Michael punched the man in the face, breaking his nose. Michael continued to beat him until he lost consciousness. He was arrested by the police two blocks away.

Michael pled guilty to aggravated battery under 720 ILCS 5/12-4(a). The court sentenced him to two years in prison and three years of probation. Upon completion of his prison sentence, he was transferred to the custody of the DHS and detained under the mandatory detention provisions. The DHS served him with a Notice to Appear and filed the charging document with the Immigration Court.

Analysis: Michael is eligible to apply for withholding of removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) and relief under the Convention against Torture. He is not, however, eligible for asylum or adjustment of status with a § 212(h) waiver.<sup>884</sup> Aggravated battery with great bodily injury is 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).

If the Immigration Judge finds that his conviction is a particularly serious crime, then he will be eligible only for deferral of removal under the Convention against Torture based on his claim that he faces probable torture by government officials in Sudan. His past experiences of torture and the fact that the government which tortured him remains in power will be considered by the Immigration Judge. If the Immigration Judge grants him the relief of deferral of removal under the Convention against Torture, then the DHS may consider his release from custody under the procedures for an order of supervision.<sup>885</sup>

### ***Waivers under I.N.A. § 212(c), 8 U.S.C. § 1182(c)***

Section 212(c) relief is a discretionary waiver of the grounds of exclusion (inadmissibility) that an Immigration Judge can grant to a lawful permanent resident convicted of certain crimes. Originally only available to returning residents in exclusion proceedings, it was made available to lawful permanent residents who had not departed the United States but were in deportation proceedings.<sup>886</sup> In essence, it allows a lawful permanent resident a second chance to keep his or her legal residency in the United States.<sup>887</sup> Before changes made by the AEDPA and IIRAIRA, section 212(c) relief was often granted to non-citizens with convictions such as misdemeanor possession of a controlled substance, theft and assault. Non-citizens in the United States who were placed in deportation proceedings prior to the enactment of the AEDPA but found statutorily

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<sup>884</sup> See *Asylum and Refugees, supra* at 6-31; 212(h) Waivers, *infra* at 6-58.

<sup>885</sup> See *Mandatory Detention, infra* at 7-3.

<sup>886</sup> See *Francis v. I.N.S.*, 532 F.2d 268 (2d Cir. Mar. 9, 1976); see also, *Leal-Rodriguez v. I.N.S.*, 990 F.2d 939, 949 (7th Cir. Apr. 6, 1993), as amended Apr. 19, 1993.

<sup>887</sup> See *I.N.S. v. St. Cyr*, 533 U.S. 289, 296, n. 5 (Jun. 25, 2001) (citing statistics that indicate that 51.5% of the 212(c) applications in which a final decision was reached between 1989 and 1995 were granted).

ineligible for relief under section 212(c) due to the enactment of the AEDPA may be eligible to apply for relief under section 212(c).<sup>888</sup> A lawful permanent resident who committed an offense before AEDPA § 440(d) but was convicted after the enactment of AEDPA is not eligible for a § 212(c) waiver.<sup>889</sup>

In the landmark case of *I.N.S. v. St. Cyr*, the Supreme Court held that a § 212(c) waiver “remains available for aliens. . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for the § 212(c) relief at the time of their plea under the law then in effect.”<sup>890</sup> Thus, a lawful permanent resident who pled guilty prior to April 24, 1996 to controlled substance offenses, multiple crimes involving moral turpitude, or certain aggravated felony offenses for which he served less than five years of imprisonment remains eligible for a § 212(c) waiver in exclusion, deportation, or removal proceedings.

### 1996 Amendments to I.N.A. § 212(c) and the Subsequent Litigation

The history of the 1996 amendments to I.N.A. § 212(c), 8 U.S.C. § 1182(c), and subsequent 11 years of litigation remain relevant to the analysis of eligibility for § 212(c) relief for lawful permanent residents with old convictions. It is also relevant to former lawful permanent residents who were deported between 1996 and 2001 and who may be facing illegal reentry charges. Furthermore, the litigation at the federal courts of appeals continues today regarding the 1996 amendments and availability of relief for lawful permanent residents who went to trial rather than pleading guilty to criminal charges.

Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) eliminated the availability of § 212(c) for non-citizens convicted of any controlled substance offense (including misdemeanor possession offenses), any aggravated felony, any firearms offense, or more than one felony offense for a crime involving moral turpitude. On February 21, 1997, the Attorney General issued a decision on certification in *In re Soriano*,<sup>891</sup> following her previous vacatur of the Board’s published opinion on September 12, 1996. Attorney General Reno determined that the application of AEDPA § 440(d) to I.N.A. § 212(c) does not impair a right, increase a liability, or impose new duties on criminal aliens and concluded that AEDPA § 440(d) could be applied retroactively to applications under I.N.A. § 212(c) involving controlled substance or firearms offenses pending before the Immigration Court on April 24, 1996.

*In re Soriano, supra*, led to the filing of more than 800 cases in federal court.<sup>892</sup> Eight circuit courts of appeals overturned the Attorney General’s decision in *In re Soriano, supra*.<sup>893</sup> The Seventh Circuit Court of Appeals was the only circuit to uphold the Attorney

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<sup>888</sup> See Executive Office for Immigration Review: Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436 (2001).

<sup>889</sup> See *Domond v. I.N.S.*, 244 F.3d 81, 84-85 (2<sup>nd</sup> Cir. Mar. 23, 2001).

<sup>890</sup> See *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (Jun. 25, 2001).

<sup>891</sup> See *In re Soriano*, 21 I&N Dec. 516 (A.G. Feb. 21, 1997).

<sup>892</sup> See Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436, 6438 (2001).

<sup>893</sup> Constitutional challenges were brought in federal courts on whether AEDPA § 440(d) applies retroactively to 212(c) cases filed with the Immigration Court on or before April 24, 1996 in light of

General's decision that the AEDPA § 440(d) applied retroactively to non-citizens in deportation proceedings at the time of enactment.<sup>894</sup>

In light of the favorable precedent decisions by federal circuit courts of appeal other than the Seventh Circuit Court of Appeals and the need for uniform application of the immigration law nationwide, the Attorney General provided, by regulation, that AEDPA § 440(d) does not apply to the cases of lawful permanent residents whose deportation proceedings began prior to the enactment of the AEDPA on April 24, 1996.<sup>895</sup> Known as the *Soriano* regulations, they permit those lawful permanent residents to apply for relief under § 212(c) if they were statutorily eligible and placed in deportation proceedings prior to the enactment of the AEDPA. Such eligible lawful permanent residents with final

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the United States Supreme Court decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (Apr. 26, 1994) (holding that a presumption against retroactivity applies when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive because “settled expectations should not be lightly disrupted”). The federal courts that have decided the issue on statutory interpretation grounds held that AEDPA section 440(d) does *not* apply retroactively to lawful permanent residents who filed applications for section 212(c) relief prior to the enactment of the AEDPA. *See* *Goncalves v. Reno*, 144 F.3d 110, (1st Cir. May 15, 1998), *cert. denied*, *Reno v. Goncalves*, No. 98-835, 119 S. Ct. 1140 (Mar. 8, 1999); *Henderson v. Reno*, 157 F.3d 106 (2nd Cir. Sept. 18, 1998), *cert. denied sub nom.* *Reno v. Navas*, No. 98-996, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (Mar. 8, 1999); *Sandoval v. Reno*, 166 F.3d 225, 239-42 (3rd Cir. Jan. 26, 1999); *Tasios v. Reno*, 204 F.3d 544, 547-52 (4th Cir. Feb. 28, 2000); *Shah v. Reno*, 184 F.3d 719 (8th Cir. Jul. 1, 1999); *Magana-Pizano v. I.N.S.*, 200 F.3d 603 (9th Cir. Dec. 27, 1999); *Mayers v. I.N.S.*, 175 F.3d 1289, 1301-04 (11th Cir. May 20, 1999). The First Circuit Court of Appeals held that the AEDPA section 440(d) does not apply to lawful permanent residents placed in deportation proceedings prior to the passage of AEDPA, even if they had not requested relief under section 212(c) until after the enactment of the AEDPA. *See* *Wallace v. Reno*, 194 F.3d 279, 285-88 (1st Cir. Oct. 26, 1999). Three circuit courts of appeals held that the AEDPA section 440(d) bars eligibility for section 212(c) relief for lawful permanent residents placed in proceedings after the enactment of the AEDPA, even where their criminal offenses were committed prior to the enactment of the AEDPA. *See* *DeSousa v. Reno*, 190 F.3d 175, 185-87 (3rd Cir. Aug. 25, 1999); *Requena-Rodriguez v. Pasquaraell*, 190 F.3d 299, 306-8 (5th Cir. Sept. 15, 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1147-52 (10th Cir. Aug. 19, 1999), *cert. denied sub nom.* *Palaganas-Suarez v. Greene*, No. 99-7964, 120 S.Ct. 1539 (Mar. 27, 2000). Four circuit courts of appeals held that the AEDPA section 440(d) does not apply to non-citizens who pled guilty and were convicted of a qualifying offense if the non-citizen could show reliance on the availability of relief under section 212(c) at the time of the plea. *See* *Jideonwo v. I.N.S.*, 224 F.3d 692, 700 (7th Cir. Aug. 23, 2000); *Tasios v. Reno*, 204 F.3d 544 (4th Cir. Feb. 28, 2000); *Mattis v. Reno*, 212 F.3d 31 (1st Cir. May 8, 2000); *Magana-Pizano v. I.N.S.*, 200 F.3d 603 (9th Cir. Dec. 27, 1999). Two circuit courts of appeals held that the AEDPA section 440(d) does not apply to non-citizens who pled guilty prior to the enactment of the AEDPA. *See* *St. Cyr v. I.N.S.*, 229 F.3d 406 (2nd Cir. Sept. 1, 2000) *cert. granted*, *I.N.S. v. St. Cyr*, 121 S.Ct. 848, 148 L.Ed.2d 733 (Jan. 12, 2001), *affirmed*, *I.N.S. v. St. Cyr*, 533 U.S. 289 (Jun. 25, 2001); *Tasios v. Reno*, 204 F.3d 544 (4th Cir. Feb. 28, 2000).

<sup>894</sup> *See* *LaGuerre v. I.N.S.*, 164 F.3d 1035, 1041 (7th Cir. Dec. 22, 1998), *cert. denied*, No. 99-148, 120 S.Ct. 1157 (Feb. 22, 2000) (holding that the AEDPA § 440(d) applies retroactively to aliens convicted of crimes that were committed before the date of enactment of the AEDPA); *Musto v. Perryman*, 193 F.3d 888 (7th Cir. Sept. 20, 1999); *Chow v. Reno*, 193 F.3d 892 (7th Cir. Sept. 20, 1999); *Turkhan v. I.N.S.*, 188 F.3d 814, 824-28 (7th Cir. Aug. 16, 1999), rehearing and rehearing en banc denied (7th Cir. Oct. 12, 1999).

<sup>895</sup> *See* 8 C.F.R. § 212.3(g); Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436-6446 (2001).

administrative deportation orders from the Board of Immigration Appeals or an Immigration Judge who are presently in the United States without having departed or been deported from the U.S. had to file motions to reopen their deportation cases by July 23, 2001.<sup>896</sup> However, these regulations do not apply to non-citizens who have been physically deported from the U.S.<sup>897</sup> or to those non-citizens whose applications were denied on substantive grounds or in the exercise of discretion.<sup>898</sup>

The Seventh Circuit has recognized three situations where there may still exist 212(c) relief in deportation proceedings. First, where a non-citizen had a colorable defense to deportation but conceded deportability in reliance on the possibility of receiving a waiver under § 212(c), then AEDPA § 440(d) cannot be applied to his deportation case.<sup>899</sup> Second, where a non-citizen can demonstrate through specific facts that he relied, at least in part, upon the availability of § 212(c) relief when deciding whether to plead guilty to a criminal charge considered to be an aggravated felony for immigration purposes, the AEDPA § 440(d) cannot be applied retroactively to bar him from receiving a discretionary waiver under § 212(c).<sup>900</sup> Third, where the INS issued and filed the charging document with the Immigration Court prior to the enactment of the AEDPA and years of delay on the part of the INS and the Immigration Court eliminated the non-citizen's ability to file for a waiver under I.N.A. § 212(c), the non-citizen who persistently tried to have his case resolved before the Immigration Court prior to the passage of AEDPA § 440(d) may apply for a waiver under I.N.A. § 212(c).<sup>901</sup>

After more than five years of litigation and the split among the federal circuit courts of appeals, the U.S. Supreme Court stepped in, and on June 30, 2001, it held that the 1996 restrictions on the availability of § 212(c) relief do not apply to lawful permanent residents

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<sup>896</sup> See 8 C.F.R. § 3.44(f) as amended by Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436, 6445-6446 (2001); Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, Correction, 66 Fed. Reg. 8149 (2001).

<sup>897</sup> See *id.* at 6439.

<sup>898</sup> See *id.*

<sup>899</sup> See *Reyes-Hernandez v. I.N.S.*, 89 F.3d 490, 492-93 (7<sup>th</sup> Cir. Jul. 17, 1996); *cf.* *Yang v. I.N.S.*, 109 F.3d 1185 (7<sup>th</sup> Cir. Mar. 18, 1997) (holding that where a non-citizen conceded the lack of a colorable defense to deportation, judicial review of the BIA's denial of a discretionary § 212(c) waiver was precluded by AEDPA § 440(a)); *Arevalo-Lopez v. I.N.S.*, 104 F.3d 100, 101 (7<sup>th</sup> Cir. Jan. 3, 1997), rehearing, suggestion for rehearing en banc, and suggestion for consolidation denied Jan. 30, 1997.

<sup>900</sup> See *Jideonwo v. I.N.S.*, 224 F.3d 692, 700 (7<sup>th</sup> Cir. Aug. 23, 2000); *cf.* *Morales-Ramirez v. Reno*, 209 F.3d 977, 982-983 (7<sup>th</sup> Cir. Apr. 13, 2000) (holding that where the INS served the charging exclusion document on the non-citizen but failed to file it with the Immigration Court for more than four years to commence exclusion proceedings and then served a charging document on the non-citizen and filed it with the Immigration Court to commence removal proceedings against the non-citizen, thereby eliminating the possibility of a § 212(c) waiver for the non-citizen convicted of an aggravated felony, actual reliance on the availability of § 212(c) could not be demonstrated and the non-citizen was ineligible for cancellation of removal in removal proceedings on account of his aggravated felony conviction).

<sup>901</sup> See *Singh v. Reno*, 182 F.3d 504, 510-511 (7<sup>th</sup> Cir. Aug. 10, 1999) (finding that the non-citizen had a "Homeric odyssey through the administrative and judicial process" in a highly unusual case and holding that the non-citizen could proceed before the Immigration Court with his claim that the foot-dragging of the I.N.S. led to a denial of his due process rights under the U.S. Constitution).

who pled guilty prior to April 24, 1996, the effective date of the AEDPA.<sup>902</sup> It also held that lawful permanent residents who are placed in removal or deportation proceedings may apply for a § 212(c) waiver.<sup>903</sup>

Subsequent to the U.S. Supreme Court's decision, the Department of Justice issued regulations which provide that the date on which the plea was agreed to by the prosecution and the non-citizen controls to determine § 212(c) eligibility.<sup>904</sup> The agreement for the plea must have been reached prior to April 1, 1997 and the non-citizen must have been otherwise eligible for a § 212(c) waiver at the time that the agreement was reached.<sup>905</sup> For non-citizens who were previously issued deportation or removal orders and who were eligible under the *St. Cyr* decision for a § 212(c) waiver, they had to file a *St. Cyr* motion to reopen on or before April 26, 2005.<sup>906</sup>

The U.S. Supreme Court did not address whether a § 212(c) waiver is available to lawful permanent residents who elected to go to trial and were subsequently convicted instead of pleading guilty to criminal charges. This issue has been an area of ongoing litigation around the U.S. Some courts of appeals have held that § 212(c) waivers are available to lawful permanent residents who lost at trial in certain circumstances while other circuit courts of appeals have found that § 212(c) waivers are not available.<sup>907</sup>

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<sup>902</sup> See *I.N.S. v. St. Cyr*, 533 U.S. 289 (Jun. 5, 2001).

<sup>903</sup> See *id.*

<sup>904</sup> See Executive Office for Immigration Review: Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, final rule, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240); 8 C.F.R. § 1003.44(h) (2004).

<sup>905</sup> See *id.* For an excellent outline and discussion of the *Soriano* regulations and the 2004 regulations, see Beth Werlin, "St. Cyr Regulations and Strategies for Applicants Who Are Barred From Section 212(c) Relief Under the Regulations," American Immigration Law Foundation, Oct. 19, 2004, [http://www.aifl.org/lac/lac\\_pa\\_101904.pdf](http://www.aifl.org/lac/lac_pa_101904.pdf).

<sup>906</sup> See 8 C.F.R. § 1003.44(h) (2004); *Johnson v. Gonzales*, 478 F.3d 795 (7<sup>th</sup> Cir. Feb. 28, 2007) (holding that the regulation requiring a non-citizen to file a special *St. Cyr* motion to reopen for § 212(c) relief by the deadline is procedural and within the authority of the Attorney General and therefore did not violate his due process rights and that the Board of Immigration Appeals did not abuse its discretion by refusing to reopen his immigration proceedings *sua sponte*). The validity of the time limitations of this regulation may be subject to future litigation in other federal circuit courts of appeals and possibly the U.S. Supreme Court.

<sup>907</sup> See *Restrepo v. McElroy*, 369 F.3d 627, 638-39 (2<sup>nd</sup> Cir. Apr. 1, 2004) (remanding case to the district court to determine whether a lawful permanent resident must make an individualized showing that he decided to forego an opportunity to file for 212(c) relief in reliance on his ability to file it later or whether there is a categorical presumption of reliance by a LPR who might have applied for 212(c) relief when it was available but did not do so, in light of *In re Gordon*, 17 I&N Dec. 389 (BIA Jun. 6, 1980), other case law and regulations); *Wilson v. Gonzales*, 471 F.3d 111 (2<sup>nd</sup> Cir. Dec. 7, 2006) (following *Restrepo*); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3<sup>rd</sup> Cir. Jun. 28, 2004) (section 212(c) available if individual turned down plea agreement); *Atkinson v. Atty. Gen.*, 479 F.3d 222 (3<sup>rd</sup> Cir. Mar. 8, 2007) (section 212(c) available to individuals convicted after a trial); *Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5<sup>th</sup> Cir. Jan. 23, 2007) (section 212(c) available if individual can make an individualized showing of reliance on availability of relief); *Thaqi v. Jenifer*, 377 F.3d 500 (6<sup>th</sup> Cir. Jul. 23, 2004) (section 212(c) available to individual convicted of two CIMTs, the first of which was a trial conviction and the second of which was a plea agreement); *Hem v. Maurer*, 458 F.3d 1185 (10<sup>th</sup> Cir. Aug. 18, 2006) (section 212(c) available to a lawful permanent resident who waived his right to appeal his conviction following a trial); *cf. Dias v. I.N.S.*, 311 F.3d 456 (1<sup>st</sup> Cir.

The Seventh Circuit Court of Appeals has held that a lawful permanent resident who was convicted following a trial prior to April 24, 1996 is not eligible for a § 212(c) waiver.<sup>908</sup> However, in that case, the Seventh Circuit did not address other legal arguments, such as: 1. a lawful permanent resident is eligible for a § 212(c) waiver where an INS attorney appeared at the sentencing hearing to inform the state court that a motion for a Judicial Recommendation against Deportation (J.R.A.D.) should be denied because the lawful permanent resident would have a § 212(c) hearing before an Immigration Judge; or 2. that a lawful permanent resident forewent his right to appeal his conviction based on availability of § 212(c) at the time of his conviction. Thus, areas for litigation regarding eligibility for § 212(c) waivers for lawful permanent residents convicted at trial remain to be litigated at the Seventh Circuit.

### Current Law Regarding Eligibility for Relief under I.N.A. § 212(c)

To be eligible for relief under I.N.A. § 212(c), a non-citizen must be lawfully domiciled in the U.S. for 7 years.<sup>909</sup> Lawful domicile includes time from the date that a non-citizen becomes a temporary lawful permanent resident<sup>910</sup> and ends upon the entry of a final administrative order of deportation or removal.<sup>911</sup>

Lawful permanent residents who have served five years or more in prison for one or more aggravated felony convictions entered after November 29, 1990 are ineligible for a waiver under § 212(c).<sup>912</sup> A lawful permanent resident who pled guilty to an aggravated felony or felonies prior to November 29, 1990 for which he served more than 5 years of imprisonment remains eligible for a § 212(c) waiver.<sup>913</sup>

To determine whether a lawful permanent resident who has served five years or more of imprisonment remains eligible for § 212(c) relief, the date of the application for 212(c)

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Nov. 27, 2002) (section 212(c) not available); Rankine v. Reno, 319 F.3d 93 (2<sup>nd</sup> Cir. Jan. 28, 2003) (no per se right to apply for 212(c) relief); Thom v. Ashcroft, 369 F.3d 158 (2<sup>nd</sup> Cir. May 27, 2004) (following Rankine); Chambers v. Reno, 307 F.3d 284 (4<sup>th</sup> Cir. Oct. 15, 2002) (section 212(c) not available); Hernandez-Castillo v. Moe, 436 F.3d 516 (5<sup>th</sup> Cir. Jan. 12, 2006) (no per se right to apply for 212(c) relief); Montenegro v. Ashcroft, 355 F.3d 1035 (7<sup>th</sup> Cir. Jan. 22, 2004) (section 212(c) not available); Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9<sup>th</sup> Cir. May 30, 2002) (section 212(c) not available); Brooks v. Ashcroft, 283 F.3d 1268 (11<sup>th</sup> Cir. Mar. 1, 2002) (section 212(c) not available).

<sup>908</sup> See Montenegro v. I.N.S., 245 F. Supp.2d 936 (C.D. Ill. 2003), *aff'd sub nom.* Montenegro v. Ashcroft, 355 F.3d 1035 (7<sup>th</sup> Cir. Jan. 22, 2004).

<sup>909</sup> See I.N.A. § 212(c), 8 U.S.C. § 1182(c).

<sup>910</sup> See Avelar-Cruz v. I.N.S., 58 F.3d 338, 341 (7<sup>th</sup> Cir. Jun. 27, 1995); Castellon-Contreras v. I.N.S., 45 F.3d 149 (7<sup>th</sup> Cir. Jan. 10, 1995).

<sup>911</sup> See *In re Cerna*, 20 I&N Dec. 399 (BIA Oct. 7, 1991).

<sup>912</sup> See I.N.A. § 212(c), 8 U.S.C. § 1182(c); see, e.g., *In re Davis*, 22 I&N Dec. 1411 (Nov. 2, 2000); *In re Cazares*, 21 I&N Dec. 188 (BIA Jan. 3, 1996); Executive Office for Immigration Review: Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, final rule, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240).

<sup>913</sup> See Executive Office for Immigration Review: Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, final rule, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240).

relief controls, not the date of the guilty plea.<sup>914</sup> Time served in pre-trial detention counts as part of the term of imprisonment for an aggravated felony to determine eligibility for a § 212(c) waiver where the criminal court included the time as being served for the term of imprisonment imposed.<sup>915</sup> Thus, where a lawful permanent resident served five years or more in pre-trial custody and post-trial custody, he is ineligible for a § 212(c) waiver.<sup>916</sup> Where a lawful permanent resident's application for 212(c) relief was erroneously denied based on the BIA's and Seventh Circuit's precedent decisions between 1996 and 2001, a request for *nunc pro tunc* relief may be the appropriate remedy where the lawful permanent resident accrued more than five years in prison subsequent to the legally erroneous denial of his § 212(c) application.<sup>917</sup>

Although I.N.A. § 212(c) applies on its face only to lawful permanent residents who departed from the United States and subsequently attempt to return, this section has been extended by court decisions to permanent residents who have not left the United States but are in deportation proceedings for certain criminal convictions. In *Francis v. I.N.S.*,<sup>918</sup> the Second Circuit Court of Appeals held that section 212(c) relief is available to lawful permanent residents in deportation proceedings under the equal protection component of the Fifth Amendment's due process clause which requires extension of the exclusion waiver to similarly situated lawful permanent residents in deportation hearings. The Seventh Circuit Court of Appeals also adopted this reasoning.<sup>919</sup> A § 212(c) waiver continues to be available to lawful permanent residents in exclusion proceedings.<sup>920</sup>

A waiver under I.N.A. § 212(c) may be granted to a lawful permanent resident facing deportation only when there is a ground of exclusion comparable to the deportation charge.<sup>921</sup> Since the U.S. Supreme Court's *St. Cyr* decision, the Board of Immigration

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<sup>914</sup> See *Velez-Lotero v. Achim*, 414 F.3d 776 (7<sup>th</sup> Cir. Jul. 11, 2005) (finding that where a lawful permanent resident pled guilty to an aggravated felony offense prior to April 24, 1996 and was sentenced to more than five years in prison, appeared before the IJ before he had served five years but did not argue eligibility, apply for §212(c) relief, or appeal the IJ's decision, he was not eligible for §212(c) relief where he filed a motion to reopen based on *St. Cyr* after he had served five years in prison for the aggravated felony offense). The controlling date differs in other circuits. See e.g., *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2<sup>nd</sup> Cir. Oct. 13, 1993) (holding that the five year period for time served is to be determined at the time of the IJ's decision).

<sup>915</sup> See *Moreno-Cebrero v. Gonzales*, 485 F.3d 395 (7<sup>th</sup> Cir. May 10, 2007).

<sup>916</sup> See *id.*

<sup>917</sup> See *Edwards v. I.N.S.*, 393 F.3d 299, 312 (2<sup>nd</sup> Cir. Dec. 17, 2004); *I.N.S. v. St. Cyr*, 533 U.S. at 296 n. 5 (citing statistics that indicate that 51.5% of the 212(c) applications in which a final decision was reached between 1989 and 1995 were granted).

<sup>918</sup> See *Francis v. I.N.S.*, 532 F.2d 268, 273 (2<sup>nd</sup> Cir. Mar. 9, 1976); see also, *In re Silva*, 16 I&N Dec. 26 (BIA Sept. 10, 1976).

<sup>919</sup> See *Guillen-Garcia v. I.N.S.*, 60 F.3d 340, 341 (7<sup>th</sup> Cir. Jul 17, 1995), rehearing and suggestion for rehearing en banc denied Aug. 16, 1995; *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199, 1202 (7<sup>th</sup> Cir. Jun. 23, 1993); *Cordoba-Chaves v. I.N.S.*, 946 F.2d 1244, 1247 (7<sup>th</sup> Cir. Oct. 22, 1991).

<sup>920</sup> See *In re Fuentes-Campos*, 21 I&N Dec. 905 (BIA May 14, 1997) (holding that the bars to § 212(c) relief enacted in the AEDPA do not apply to aliens in exclusion proceedings); 8 C.F.R. §§ 212.3(g), 1213.3(g).

<sup>921</sup> See *Leal-Rodriguez v. I.N.S.*, 990 F.2d 939, 948-52 (7<sup>th</sup> Cir. Apr. 6, 1993), as amended Apr. 19, 1993 (holding that a lawful permanent resident who illegally reenters the U.S. is not eligible for a 212(c) waiver). See also, *Dashto v. I.N.S.*, 59 F.3d 697 (7<sup>th</sup> 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



Appeals has issued two decisions (*Blake/Brieva*) which narrow the scope of availability of a § 212(c) waiver for lawful permanent residents involving comparable grounds of deportability and excludability (or inadmissibility). The Board has held that where a lawful permanent resident is deportable for an aggravated felony for sexual abuse of a minor under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), he is ineligible for a § 212(c) waiver because that aggravated felony does not have a statutory counterpart in the grounds of inadmissibility under I.N.A. § 212(a), 8 U.S.C. § 1182(a).<sup>922</sup> Similarly, the Board has held that a lawful permanent resident who is deportable for an aggravated felony for a crime of violence under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), is ineligible for a § 212(c) waiver because that aggravated felony does not have a statutory counterpart in the grounds of inadmissibility under I.N.A. § 212(a), 8 U.S.C. § 1182(a).<sup>923</sup>

The Seventh Circuit Court of Appeals has repeatedly affirmed the Board's *Blake* decision.<sup>924</sup> Thus, a lawful permanent resident who pled guilty prior to April 24, 1996 to an offense constituting an aggravated felony that is not a controlled substance offense, a crime involving moral turpitude, or prostitution will be ineligible for a § 212(c) waiver.

An exception to the *Blake/Brieva* rule continues to exist for lawful permanent residents who have been convicted of a firearms offense and either a controlled substance offense or one or more crimes involving moral turpitude. Where a lawful permanent resident pled guilty to an offense prior to the 1996 amendments that renders him inadmissible for a crime involving moral turpitude as well as removable for an aggravated felony or a firearms offense, he may seek a waiver of the ground of inadmissibility under

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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 and did not bar eligibility for relief under I.N.A. § 212(c), 8 U.S.C. § 1182(c); *Variamparambil v. I.N.S.*, 831 F.2d 1362, 1364, n.1 (7<sup>th</sup> Cir. Oct. 15, 1987); *In re Gabryelsky*, 20 I&N Dec. 750 (BIA Nov. 3, 1993) (holding that a non-citizen could simultaneously apply for a waiver of deportability under I.N.A. § 212(c), 8 U.S.C. § 1182(c) in conjunction with an application for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a) under which a firearms conviction was not a ground of exclusion).

<sup>922</sup> See *In re Blake*, 23 I&N Dec. 722, 728 (BIA Apr. 6, 2005) (holding that while there need not be a "perfect match" in order to satisfy the "statutory counterpart" requirement for the grounds of deportability, the grounds must be substantially equivalent to those grounds of inadmissibility in order for a lawful permanent resident to be eligible for a § 212(c) waiver and finding that the ground of deportability for sexual abuse of a minor was distinctly different and narrower than the ground of excludability for crimes involving moral turpitude); 8 C.F.R. § 1212.3(f)(5).

<sup>923</sup> See *In re Brieva*, 23 I&N Dec. 766 (BIA Jun. 7, 2005).

<sup>924</sup> See *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 690 (7<sup>th</sup> Cir. 2008); *Valere v. Gonzales*, 473 F.3d 757, 760-61 (7<sup>th</sup> Cir. Jan. 11, 2007) (finding that the Board did not err in its *Blake* decision because a lawful permanent resident who pled guilty to indecent assault of a minor (constituting an aggravated felony for sexual abuse of a minor) was not eligible for a § 212(c) waiver at the time of his plea as his offense had no statutory counterpart in I.N.A. § 212(a), 8 U.S.C. § 1182(a)); see also, *Esquivel v. Mukasey*, 543 F.3d 919 (7<sup>th</sup> Cir. Sept. 11, 2008) (holding that even where a non-citizen was previously granted a §212(c) waiver before 1996 for an attempted murder conviction, his conviction constituted an aggravated felony and therefore he was ineligible to apply for a second §212(c) waiver to waive his two subsequent misdemeanor retail theft convictions).

I.N.A. § 212(c) in conjunction with an application for adjustment of status.<sup>925</sup> Similarly, where a lawful permanent resident pled guilty to a controlled substance offense and a firearms offense prior to April 24, 1996, he may seek a waiver of the ground of inadmissibility for the controlled substance offense under I.N.A. § 212(c) in conjunction with an application for adjustment of status.<sup>926</sup>

An applicant for § 212(c) relief must establish that he or she warrants the favorable exercise of discretion.<sup>927</sup> The court must consider and balance favorable and unfavorable factors that demonstrate his undesirability as a permanent resident in the U.S.<sup>928</sup> Relevant favorable factors for the exercise of discretion include family ties in the United States, length of residence in the United States, U.S. military service, employment history, property ownership, business ties, community service, rehabilitation after criminal convictions, and good moral character references.<sup>929</sup> The likelihood of persecution in the country to which the non-citizen could be ordered deported should also be considered.<sup>930</sup> Unfavorable factors include adverse immigration history, reports of general bad moral character, and the nature, seriousness and recency of criminal convictions.<sup>931</sup> Where a criminal conviction is involved, the court will look to the nature and seriousness of the offense, the length of sentence, frequency or recency of convictions and the presence or absence of rehabilitation.<sup>932</sup> In cases involving a serious drug crime, a grave crime or a pattern of serious criminal misconduct, the applicant must show outstanding and unusual countervailing equities to obtain relief.<sup>933</sup>

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<sup>925</sup> See *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)); *In re Rainford*, 20 I&N Dec. 598 (BIA Sept. 9, 1992); see also, *Snajder v. I.N.S.*, 29 F.3d 1203, 1208 (7<sup>th</sup> Cir. Jul. 21, 1994).

<sup>926</sup> See *In re Gabryelsky*, 20 I&N Dec. 750 (BIA Nov. 3, 1993).

<sup>927</sup> See *Palmer v. I.N.S.*, 4 F.3d 482, 487 (7<sup>th</sup> Cir. Aug. 26, 1993).

<sup>928</sup> See *Henry v. I.N.S.*, 8 F.3d 426, 432 (7<sup>th</sup> Cir. Oct. 15, 1993); *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199, 1202 (7<sup>th</sup> Cir. Jun. 23, 1993).

<sup>929</sup> See *In re Marin*, 16 I&N Dec. 581 (BIA Aug. 4, 1978); *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199, 1202 (7<sup>th</sup> Cir. Jun. 23, 1993); *Akinyemi v. I.N.S.*, 969 F.2d 285, 288 (7<sup>th</sup> Cir. Jul. 16, 1992) (holding that rehabilitation must be considered); *In re Edwards*, 20 I&N Dec. 191 (BIA May 2, 1990); *In re Arreguin*, 21 I&N Dec. 38, 40 (BIA May 11, 1995) (holding that while rehabilitation is an important factor for § 212(c) relief, it is not a prerequisite); *Drobny v. I.N.S.*, 947 F.2d 241, 246 (7<sup>th</sup> Cir. Oct. 21, 1991), rehearing den'd Jan. 9, 1991 (holding that the applicant's possible paternity regarding a yet unborn U.S. citizen child must be considered as an equity); *Guillen-Garcia*, 999 F.2d 199 (7<sup>th</sup> Cir. Jul. 2, 1993) (holding that acknowledgment of guilt is only one factor to be considered regarding rehabilitation).

<sup>930</sup> See *Bastanipour v. I.N.S.*, 980 F.2d 1129 (7<sup>th</sup> Cir. Dec. 2, 1992).

<sup>931</sup> See *id.*

<sup>932</sup> See *In re Edwards*, 20 I&N Dec. 191 (BIA May 2, 1990); *Guillen-Garcia v. I.N.S.*, 60 F.3d 340, 343-344 (7<sup>th</sup> Cir. Jul. 17, 1995), rehearing and suggestion for rehearing en banc denied (7<sup>th</sup> Cir. Aug. 16, 1995); *Groza v. I.N.S.*, 30 F.3d 814, 820 (7<sup>th</sup> Cir. Jul. 14, 1994); *Palacios-Torres v. I.N.S.*, 995 F.2d 96, 99 (7<sup>th</sup> Cir. May 18, 1993); see also, *Guevara v. I.N.S.*, 52 F.3d 714, 715 (7<sup>th</sup> Cir. Apr. 19, 1995); *Henry v. I.N.S.*, 8 F.3d 426, 432 (7<sup>th</sup> Cir. Oct. 15, 1993).

<sup>933</sup> See *In re Edwards*, 20 I&N Dec. 191 (BIA May 2, 1990) (holding that the applicant must show outstanding and unusual equities for a serious drug offense, especially one relating to trafficking or sale of drugs); *In re Buscemi*, 19 I&N Dec. 628 (BIA Apr. 13, 1988); *Groza v. I.N.S.*, 30 F.3d 814 (7<sup>th</sup> Cir. Jul. 14, 1994) (holding that a single criminal episode that gave rise to convictions for rape, aggravated battery and aggravated assault required a showing of unusual or outstanding equities); *Espinoza v. I.N.S.*, 991 F.2d 1294, 1297 (7<sup>th</sup> Cir. Apr. 22, 1993); *Cordoba-Chaves v. I.N.S.*, 946 F.2d

## Repapering

Certain lawful permanent residents who are barred from relief under I.N.A. § 212(c), 9 U.S.C. § 1182(c) in deportation proceedings may be eligible for cancellation of removal if they were to be placed in removal proceedings by the DHS. Cancellation of removal is a discretionary waiver in removal proceedings, similar to a waiver under I.N.A. § 212(c), 8 U.S.C. § 1182(c) for lawful permanent residents in deportation proceedings. Non-citizens are eligible for cancellation of removal if they have been lawful permanent residents for at least 5 years, resided continuously in the U.S. for 7 years before committing the offense or being served with a Notice to Appear, and have been convicted for deportable offenses which do not constitute aggravated felonies.<sup>934</sup>

Under IIRAIRA § 309(c), the Attorney General has the discretion to terminate deportation or exclusion proceedings and initiate removal proceedings where an evidentiary hearing has not yet taken place.<sup>935</sup> In December 1998, the Department of Justice decided that lawful permanent residents with cases pending before the Immigration Court or the Board of Immigration Appeals who would be eligible for Cancellation of Removal for Permanent Residents could be “repapered” at the discretion of the INS; these lawful permanent residents can request the DHS to have their cases in deportation proceedings terminated and to be placed in removal proceedings in order to apply for cancellation of removal.<sup>936</sup>

For example, Mario has been a permanent resident for eight years and has only one conviction, a misdemeanor conviction for possession of a controlled substance following a trial in 1992. The former INS placed him in deportation proceedings in December 1996. Mario’s case is what is known as a “gap case”: he is a long-term permanent resident who would be eligible for § 212(c) relief but for AEDPA § 440(d), which the DHS argues retroactively eliminated such relief for any non-citizen convicted of *any* controlled substance crime, including misdemeanor simple possession. Mario would be eligible for cancellation of removal if the DHS would move to terminate deportation proceedings and initiate removal proceedings.

For those lawful permanent residents who have exhausted their appeal rights to the Board of Immigration Appeals, the process of “repapering” is not available.<sup>937</sup> Post-conviction relief and pardons are important options for non-citizens with gap cases who would not be eligible for cancellation of removal and who do not fall within the defined class

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1244, 1247 (7<sup>th</sup> Cir. Oct. 22, 1991); *Palacios-Torres v. I.N.S.*, 995 F.2d 96, 99 (7<sup>th</sup> Cir. May 18, 1993); *Akrup v. I.N.S.*, 966 F.2d 267, 272 (7<sup>th</sup> Cir. Jun. 26, 1992).

<sup>934</sup> See I.N.A. § 240A(a), 8 U.S.C. § 1229b(a); Cancellation of Removal, *supra* at 6-23.

<sup>935</sup> See IIRAIRA § 304(b) repealed section 212(c) effective on the Title III-A effective date, April 1, 1997. However, section 306(d) of IIRAIRA amends AEDPA section 440(d), which in turn amends former I.N.A. § 212(c), 8 U.S.C. § 1251(c), which is in effect during the transition period and for cases that fall within IIRAIRA § 309(c)’s sweep, that is, cases where the I.N.S. issued an Order to Show Cause on or before March 31, 1997 for deportation or exclusion proceedings and an evidentiary hearing had not yet taken place.

<sup>936</sup> See Memorandum from Michael J. Creppy, Chief Immigration Judge, Dec. 9, 1998; Memorandum from Paul W. Virtue, General Counsel for the INS, Dec. 7, 1998.

<sup>937</sup> See *id.*

of non-citizens in the 2001 or 2004 regulations as promulgated by the Department of Justice.

### ***Waivers under I.N.A. § 212(h), 8 U.S.C. § 1182(h)***

A § 212(h) waiver allows the CIS or an Immigration Judge to waive grounds of inadmissibility for non-citizens who have committed certain criminal convictions: one crime involving moral turpitude, prostitution, commercialized vice, multiple criminal convictions, a single offense of possession of thirty grams or less of marijuana, or a single offense for possession of drug paraphernalia related to the use of thirty grams or less of marijuana.<sup>938</sup> A non-citizen must show extreme hardship to a qualifying relative who is statutorily defined as a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. If the non-citizen has been convicted of or otherwise found to be inadmissible for prostitution and does not have a qualifying relative, then she must show that she committed the act of inadmissibility more than fifteen years before applying for the waiver, has been rehabilitated, and is not a danger to the United States.<sup>939</sup>

Non-citizens who previously adjusted their status to become lawful permanent residents or who are first applying to adjust their status to become lawful permanent residents may be eligible to apply for the waiver, with some exceptions. For example, a § 212(h) waiver is not available to a non-citizen who has committed murder or a criminal act involving torture. In addition, a lawful permanent resident who has been convicted of an aggravated felony or who has not resided lawfully in the United States for seven years before initiation of removal proceedings is statutorily ineligible for a § 212(h) waiver. If the CIS or an Immigration Judge grants the § 212(h) waiver to an eligible non-citizen in conjunction with an application for adjustment of status, then he will be a lawful permanent resident.

A lawful permanent resident who departs from the U.S. and is found to be inadmissible upon his return may be eligible for a “stand-alone” § 212(h) waiver.<sup>940</sup> However, a lawful permanent resident who has not departed the U.S. is not eligible for a “stand-alone” § 212(h) waiver; he must otherwise be eligible for adjustment of status in conjunction with a § 212(h) waiver in order to be granted such relief where he is charged as deportable.<sup>941</sup>

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<sup>938</sup> See I.N.A. § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A); *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7<sup>th</sup> Cir. Mar. 13, 2008) (drug paraphernalia).

<sup>939</sup> See I.N.A. § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A).

<sup>940</sup> See *In re Abosi*, 24 I&N Dec. 204, 207 (BIA Jun. 19, 2007) (holding that a returning lawful permanent resident seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with an application for a § 212(h) waiver).

<sup>941</sup> See *Klemntanovsky v. Gonzales*, 501 F.3d 788 (7<sup>th</sup> Cir. Aug. 28, 2007).

## Case Law

### *Eligibility Issues*

Eligibility for a § 212(h) waiver for a non-citizen who has been convicted of an aggravated felony currently depends on the offense(s) and whether he has been admitted to the U.S. as a lawful permanent resident. A non-citizen who has not been previously admitted as a lawful permanent resident is statutorily eligible for a § 212(h) waiver, despite a conviction for an aggravated felony.<sup>942</sup> He must also be eligible to adjust his status at the time of his application for a § 212(h) waiver. In contrast, a lawful permanent resident who has been convicted of an aggravated felony is ineligible for a § 212(h) waiver.<sup>943</sup> The IIRAIRA amended definition of aggravated felony applies retroactively to a lawful permanent resident in deportation proceedings who filed a § 212(h) waiver prior to the enactment of IIRAIRA.<sup>944</sup>

The Board of Immigration Appeals denied a motion to reopen deportation proceedings for a former lawful permanent resident to apply for a § 212(h) waiver in conjunction with an application for adjustment of status.<sup>945</sup> The Board held that he would be ineligible for a § 212(h) waiver because his conviction would be considered an aggravated felony under the IIRAIRA amended definition of aggravated felony if deportation proceedings were reopened.<sup>946</sup>

### *Extreme Hardship Standard*

The Board of Immigration Appeals has stated that “extreme hardship” encompasses both present and future hardship and necessarily depends on all of the facts and circumstances of each case.<sup>947</sup> Extreme hardship means more than common results of exclusion, such as separation and financial difficulties.<sup>948</sup> An applicant for the waiver must demonstrate some additional significant or potential injury that the denial of the waiver would cause to the relevant citizen or lawful permanent resident family member in order for extreme hardship to be found.<sup>949</sup> For example, in *In re Pao*, the Administrative Appeals

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<sup>942</sup> See *In re Michel*, 21 I&N Dec. 1101 (BIA Jan. 30, 1998); see also, *In re Kanga*, 22 I&N Dec. 1206 (BIA Jan. 7, 2000) (holding that an alien convicted of an aggravated felony is not inadmissible under I.N.A. § 212(a)(8)(A), 8 U.S.C. § 1182(a)(8)(A) as an alien permanently “ineligible to citizenship” because such section refers only to those aliens who are barred from naturalization by virtue of their evasion of military service); *In re Ayala-Arevalo*, 22 I&N Dec. 398 (BIA Nov. 30, 1998).

<sup>943</sup> See *Lara-Ruiz v. I.N.S.*, 241 F.3d 934, 947-48 (7<sup>th</sup> Cir. Mar. 6, 2001); *In re Martinez-Recinos*, 23 I&N Dec. 175 (BIA Oct. 15, 2002); *In re Yeung*, 21 I&N Dec. 610 (BIA Oct. 7, 1997); see also, *In re Pineda*, 21 I&N Dec. 1017 (BIA Aug. 26, 1997).

<sup>944</sup> See *id.*

<sup>945</sup> See *In re Pineda*, 21 I&N Dec. 1017 (BIA Aug. 26, 1997).

<sup>946</sup> See *id.*

<sup>947</sup> See *In re Shaughnessy*, 12 I&N Dec. 810 (BIA July 29, 1968).

<sup>948</sup> See *id.*

<sup>949</sup> See *Palmer v. I.N.S.*, 4 F.3d 482,487-88 (7<sup>th</sup> Cir. Aug. 26, 1993) (holding that the extreme hardship standard under I.N.A. § 212(h), 8 U.S.C. § 1182(h) is the same as the extreme hardship standard required for suspension of deportation under Former I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995)) (citations to other cases omitted). See also, *Marquez-Medina v. I.N.S.*, 765 F.2d 673, 676 (7<sup>th</sup> Cir. Jun. 19, 1985) (finding that emotional hardship caused by the severance of family

Unit held that where an applicant's wife suffered from clinical depression due to the applicant's exclusion from the United States, a finding of hardship was warranted.<sup>950</sup> Where an offense is considered to be violent or dangerous, a heightened standard of hardship will apply.<sup>951</sup>

Once extreme hardship is shown, the CIS or an Immigration Judge will determine whether the non-citizen deserves a favorable exercise of discretion to grant the waiver. The factors to be considered include the nature of the offense, the circumstances leading to the offense, whether the offense is isolated or is part of a pattern of criminal behavior, evidence of rehabilitation, the extent of hardship to her qualifying U.S. citizen or lawful permanent resident family members, and the stability of her marriage, if she is married to a U.S. citizen or lawful permanent resident.<sup>952</sup>

## **Application to Cases**

### ***Case of Kim from Korea***

Kim entered the United States in January 1990 on an F-1 student visa and attended college. In November 1995, he married a United States citizen. Their daughter was born in Chicago on August 20, 1996. In September 1996, he adjusted his immigration status to become a lawful permanent resident based on marriage to his U.S. citizen wife. In January 1997, he was arrested for paying for a \$300 lawnmower with a forged check at a hardware store. He pled guilty to the charges and was placed on one year probation with a stay of imposition of sentence. In August 2008, the DHS arrested him and placed him in removal proceedings.

Analysis: Kim is deportable for having committed a crime involving moral turpitude within five years of becoming a lawful permanent resident. He is eligible, however, for a § 212(h) waiver. His wife can file another visa petition for him with the CIS based on their marriage. If the CIS approves the visa petition, Kim will be able to file an adjustment of status application, along with Form I-601 for the § 212(h) waiver, with the Immigration Judge. Kim will need to show the Immigration Judge that his United States citizen wife and daughter will suffer extreme hardship if he is deported. If the Immigration Judge grants Kim's § 212(h) waiver application, then the Immigration Judge will adjudicate, and should grant, his adjustment of status application for lawful permanent residence.

### ***Case of Michael from Nigeria***

Michael entered the United States in July 2003 as a B-2 tourist to visit his grandmother. He overstayed his visa and began working at a local nursery.

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and community ties is a common result of deportation); *Hernandez-Patino v. I.N.S.*, 831 F.2d 750, 752 (7<sup>th</sup> Cir. Oct. 6, 1987); Suspension of Deportation, *infra* at 6-63.

<sup>950</sup> See *In re Pao*, A70 270 864 (Comm'r [AAU] Apr. 23, 1992).

<sup>951</sup> See 8 C.F.R § 212.7(d).

<sup>952</sup> See *id.*; see also, *In re Mendez*, 21 I&N Dec. 296 (BIA Apr. 12, 1996); *Dashto v. I.N.S.*, 59 F.3d 697 (7<sup>th</sup> Cir. Jul. 11, 1995); *Palmer v. I.N.S.*, 4 F.3d 482 (7<sup>th</sup> Cir. Aug. 26, 1993).

In November 2005, his grandmother asked him to pick up her mail at her box at the post office. Her younger neighbor, Tom, asked him for a ride to the post office and Michael agreed. At the post office, they both retrieved mail from the respective boxes and walked out. They drove a block away when the local police stopped them. The police arrested Tom for receiving stolen property (stolen checks) and Michael for aiding and abetting the receipt of stolen property because he drove the car. Michael pled guilty to the charge and was placed on probation for five years. After the sentencing hearing in January 2009, Michael was transferred to DHS custody.

Analysis: Michael is deportable for having violated the terms of his visitor's visa by committing a crime involving moral turpitude and overstaying his visa. He is *not* eligible for a § 212(h) waiver because he does not have any means by which he can adjust his status to become a lawful permanent resident. He is eligible for voluntary departure if he requests it at his initial master calendar hearing.<sup>953</sup>

### ***Case of Fernandes from the Philippines***

Fernandes met and married his U.S. citizen wife in the Philippines in 2003. They moved to the U.S. in September 2005 and he was admitted as a lawful permanent resident based on his marriage to his U.S. citizen wife

On April 1, 2006, he was arrested and charged with possession of .1 grams of cocaine in Wisconsin. He received first offender probation under Wis. Stat. § 961.47. He completed his probation and the charge was dismissed.

In February 2009, Fernandes went back to the Philippines to visit his mother. When he returned to the U.S., he was arrested by the DHS at the airport and placed in removal proceedings. The DHS charged him with being inadmissible under I.N.A. § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a controlled substance violation.

Analysis: Fernandes is inadmissible and ineligible for relief from removal. His disposition for first offender probation required that he enter a plea of guilty and he was placed on probation, which he successfully completed. However, he has a conviction under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). He is not eligible for cancellation of removal under I.N.A. § 240A(a), 8 U.S.C. § 1229b(a) as he has not resided continuously in the U.S. for at least seven years and has not been a lawful permanent resident for at least 5 years.<sup>954</sup> He is also ineligible for a § 212(h) waiver or for re-adjustment of status with a § 212(h) waiver because his controlled substance offense involved cocaine, not marijuana.<sup>955</sup> Fernandes's only hope to retain his lawful permanent resident status is post-conviction relief.<sup>956</sup>

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<sup>953</sup> See Voluntary Departure, *infra* at 6-78.

<sup>954</sup> See Cancellation of Removal, *supra* at 6-23.

<sup>955</sup> See I.N.A. § 212(h), 8 U.S.C. § 1182(h).

<sup>956</sup> See Post-Conviction Relief, *infra* at 8-12 to 8-24.

### ***Waivers under I.N.A. § 212(i), 8 U.S.C. § 1182(i)***

The CIS and the Immigration Judge have the power to waive the ground of inadmissibility relating to fraud or willful misrepresentations made by a non-citizen where she has a qualifying relative and can prove extreme hardship to the relative if she were to be refused admission for lawful permanent residence. Qualifying relatives include a U.S. citizen or lawful permanent resident spouse or parent.<sup>957</sup> Fraud or willful misrepresentations that can be waived include use of a false green card in order to obtain employment or to cross the United States border from Canada or Mexico. With limited exceptions, falsely representing oneself to be a U.S. citizen *cannot* be waived for such misrepresentations made on or after September 30, 1996 and such misrepresentation constitutes grounds of inadmissibility and deportability.<sup>958</sup>

#### **Case Law**

A willful misrepresentation of fact refers to the misrepresentation of such facts as would have justified the refusal of a visa or admission had they been disclosed.<sup>959</sup> A non-citizen who knowingly enters the U.S. on a false passport has engaged in willful fraud and misrepresentation of a material fact.<sup>960</sup>

In 1996, Congress amended the standard to require extreme hardship for § 212(i) waivers. The factors to be considered in determining whether a non-citizen has established extreme hardship to a qualifying relative include, but are not limited to: the presence of lawful permanent resident or U.S. citizen family ties; her qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to those countries; the financial impact of the departure from the United States and significant conditions of health and lack of availability of suitable medical care in the country where the qualifying relative would relocate.<sup>961</sup> In addition to demonstrating extreme hardship, a non-citizen must also show that she merits a grant of the § 212(i) waiver in the exercise of discretion.<sup>962</sup> Further, the underlying fraud or misrepresentation for which the non-citizen seeks a

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<sup>957</sup> Where a non-citizen qualifies for adjustment of status under VAWA, extreme hardship may be demonstrated to the non-citizen or her U.S. citizen, lawful permanent resident, or qualified non-citizen parent or child. See I.N.A. § 212(i), 8 U.S.C. § 1182(i).

<sup>958</sup> See Grounds of Deportability, *supra* at 3-3; Grounds of Inadmissibility and Adjustment of Status, *supra* at 4-1.

<sup>959</sup> See *Garcia v. I.N.S.*, 31 F.3d 441 (7th Cir. Jul. 27, 1994) (willful misrepresentation regarding marital status); *Calvillo v. Robinson*, 271 F.2d 249 (7th Cir. Nov. 3, 1959) (holding that failure to disclose previous residence in the U.S. was not a willful misrepresentation of fact).

<sup>960</sup> See *Esposito v. I.N.S.*, 936 F.2d 911 (7th Cir. Jul. 3, 1991), rehearing and rehearing en banc denied Aug. 8, 1991 (holding also that foreign *in absentia* convictions for criminal association, forgery, and unlawful possession of firearms as well as pending foreign murder charges can be considered by a court to determine whether to favorably exercise discretion and grant a request for a waiver under § 212(i)).

<sup>961</sup> See *In re Cervantes*, 22 I&N Dec. 560 (BIA Mar. 11, 1999); see also, *In re Kao*, *In re Lin*, 23 I&N Dec. 45 (BIA May 4, 2001) (holding that the standard for extreme hardship for suspension of deportation applies to waivers of inadmissibility under I.N.A. §212(i), 8 U.S.C. § 1182(i)).

<sup>962</sup> See I.N.A. § 212(i), 8 U.S.C. § 1182(i); *Cervantes de Hernandez v. Chertoff*, 2007 U.S. App. LEXIS 2353 (7th Cir. Jan. 25, 2007).



waiver of inadmissibility may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion.<sup>963</sup>

## **Application to Cases**

### ***Case of Dominique from Haiti***

Dominique fled political turmoil in Haiti in December 1990 and entered the United States, using her twin sister's green card which she presented to a United States immigration officer at the Miami Airport. In February 1991, she used her sister's green card again to obtain employment as a nursery school janitor. In March 1997, she married a United States citizen. In July 1997, she gave birth to twin daughters who are United States citizens. Dominique and her husband filed a marriage petition, application for adjustment of status and a § 212(i) waiver application with the CIS in January 2009.

Analysis: Dominique is eligible for a § 212(i) waiver and adjustment of status. She misrepresented herself as being a permanent resident to an immigration officer. She must demonstrate extreme hardship to her U.S. citizen husband as well as other evidence that she merits a favorable exercise of discretion for both applications.

### ***Suspension of Deportation***

Suspension of deportation is a form of relief available to non-citizens in deportation proceedings, not exclusion proceedings.<sup>964</sup> There are two forms of suspension of deportation: a.) 7 year suspension for non-citizens who have not been convicted of a deportable offense; and b.) 10 year suspension for non-citizens who have been convicted of a deportable offense, including an aggravated felony, among other grounds. The difference lies in the period of good moral character that must be demonstrated. For 7 year suspension, a non-citizen must have resided in the United States for at least seven years,<sup>965</sup> demonstrate that his deportation will result in extreme hardship to themselves or a qualifying relative, and demonstrate good moral character.<sup>966</sup> For 10 year suspension, a non-citizen must demonstrate residence in the United States for an additional 10 years following the date of the commission of the deportable offense, 10 years of good moral character following the date of the commission of the deportable offense, and exceptional and extremely hardship to himself and/or a qualifying family member.<sup>967</sup> Where a non-

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<sup>963</sup> See *In re Cervantes*, 22 I&N Dec. 560 (BIA Mar. 11, 1999) (following *In re Tijam*, 22 I&N Dec. 408 (BIA Dec. 10, 1998)).

<sup>964</sup> See *Sherifi v. I.N.S.*, 260 F.3d 737, 740-41 (7<sup>th</sup> Cir. Aug. 1, 2001) (finding that NACARA did not amend the I.N.A. to allow non-citizens for whom evidentiary hearings were conducted prior to April 1, 1997 and final administrative decisions rendered in exclusion proceedings to apply for suspension of deportation); *In re Torres*, 19 I&N Dec. 371 (BIA Apr. 18, 1986).

<sup>965</sup> Suspension of deportation is only available to non-citizens in deportation proceedings, not exclusion proceedings. See *Hernandez-Gonzalez v. Moyer*, 907 F.Supp. 1224 (N.D.IL Dec. 8, 1995).

<sup>966</sup> See *Good Moral Character*, *supra* at 6-12.

<sup>967</sup> See I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1995); *Hernandez v. Gonzales*, 437 F.3d 341, 350-01 (3<sup>rd</sup> Cir. Feb. 14, 2006) (holding that the repeal of I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1995) did not violate due process because a non-citizen does not have a right to continue to conceal his illegal status in order to accrue the necessary time to be eligible for 10 year suspension of deportation).

citizen has been convicted of a crime involving moral turpitude which renders him deportable, the 10 year period begins with the date of conviction for the crime involving moral turpitude, not the date of the commission of the offense.<sup>968</sup>

Amendments by the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) apply retroactively under the “stop-time rule” to terminate the amount of time that a non-citizen has accumulated for purposes of the seven year physical presence requirement. The service of the Order to Show Cause by the INS upon the non-citizen ends the accrual of the requisite 7 years of continuous physical presence. In addition, certain nationalities will be treated more favorably based on the NACARA, including the exemption of certain groups from the stop-time rule.

### Case Law

Extreme hardship may only be demonstrated with respect to the non-citizen or his U.S. citizen or lawful permanent resident spouse, parent, or child.<sup>969</sup> The standard for extreme hardship for suspension of deportation under I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995) was defined by the Board of Immigration Appeals to include the age of the non-citizen, his family ties in the U.S. and abroad, his length of residence in the U.S., his health, conditions in the country to which he is deportable (including economic and political conditions), his financial status (including employment and occupation), the possibility of other means of adjustment of status, whether he is of special assistance to the U.S. or his community, his immigration history in the U.S. (including immigration violations) and his ties to the U.S. community, including community service.<sup>970</sup> Economic hardship alone and the emotional hardship caused by a severing family and community ties are a common result of deportation and do not rise to the level of extreme hardship.<sup>971</sup>

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<sup>968</sup> See *In re Lozada*, 19 I&N Dec. 637, 640 (BIA Apr. 13, 1988).

<sup>969</sup> See I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995); see, e.g., *Kuciemba v. I.N.S.*, 92 F.3d 496 (7<sup>th</sup> Cir. Aug. 7, 1996) (holding that hardship to cousins and community members cannot be considered in the analysis of extreme hardship).

<sup>970</sup> See *In re Anderson*, 16 I&N Dec. 596 (BIA Aug. 31, 1978); *In re Kao*, *In re Lin*, 23 I&N Dec. 45 (BIA May 4, 2001). See also, *Salameda v. I.N.S.*, 70 F.3d 447 (7<sup>th</sup> Cir. Nov. 9, 1995) (holding that community service by the non-citizen must be considered as well as hardship to the non-citizen child of the deportees who would effectively be deported upon the deportation of his parents); cf. *Kam Ng v. Pilliod*, 279 F.2d 207 (7<sup>th</sup> Cir. Jun. 16, 1960), (holding that the lack of family ties and failure to establish other roots after residing for 17 years in the U.S. were sufficient grounds to find an insufficient showing of hardship), *rehearing denied* Jul. 22, 1960, *cert. denied* 365 U.S. 860, 381 S.Ct. 828, 5 L.Ed.2d 82 (1961). Hardship may only be considered as to the statutorily mentioned relationships of the applicant’s spouse, parent or child. See *I.N.S. v. Hector*, 479 U.S. 85, 107 S.Ct. 379, 93 L.Ed.2d 326 (Nov. 17, 1986); *Drobny v. I.N.S.*, 947 F.2d 241 (7<sup>th</sup> Cir. Oct. 21, 1991), *rehearing den’d* Jan. 9, 1991. For a discussion of the exceptional and extremely unusual hardship standard under I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1995) for suspension of deportation involving criminal convictions, see *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199 (7<sup>th</sup> Cir. Jun. 23, 1993); *Rassano v. I.N.S.*, 492 F.2d 220, 226-27 (7<sup>th</sup> Cir. Feb. 21, 1974).

<sup>971</sup> See *Urban v. I.N.S.*, 123 F.3d 644 (7<sup>th</sup> Cir. Aug. 21, 1997); *Cortes-Castillo v. I.N.S.*, 997 F.2d 1199, 1204 (7<sup>th</sup> Cir. Jun. 23, 1993); *Hernandez-Patino v. I.N.S.*, 831 F.2d 750, 752 (7<sup>th</sup> Cir. Oct. 6, 1987); *Marquez-Medina v. I.N.S.*, 765 F.2d 673, 677 (7<sup>th</sup> Cir. Jun. 19, 1985); *Diaz-Salazar v. I.N.S.*, 700 F.2d 1156 (7<sup>th</sup> Cir. Mar. 1, 1983), *cert. denied*, 462 U.S. 1132, 103 S.Ct. 3112, 77 L.Ed.2d 1367 (1983); *Mendoza-Hernandez v. I.N.S.*, 664 F.2d 635 (7<sup>th</sup> Cir. Nov. 4, 1981); *I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (Mar. 2, 1981).

The stop-time rule enacted in IIRAIRA applies to Orders to Show Cause and suspension of deportation proceedings pending at the time that IIRAIRA became effective.<sup>972</sup> The stop time rule ends the accrual of the period of continuous presence upon the issuance of the Order to Show Cause by the former INS; the seven years of continuous presence must be shown by the non-citizen to be statutorily eligible for suspension of deportation.<sup>973</sup>

An exception to the stop-time rule exists for certain non-citizens under the Nicaraguan Adjustment and Central American Relief Act (NACARA).<sup>974</sup> The deadline for filing relief under NACARA was September 11, 1998.<sup>975</sup>

## **Application to Cases**

### ***Case of Ian from Ireland***

Ian entered the United States without inspection by canoe through the Boundary Waters in northern Minnesota in August 1985. He used a false green card to obtain employment on a construction crew. In January 1997, he was arrested by the former INS during a raid on a construction site and was issued an Order to Show Cause.

Analysis: Ian is statutorily eligible for suspension of deportation. He does not have a criminal record, has good moral character for the seven year statutory period, and has been in the United States for more than seven years. He will have to demonstrate extreme hardship to himself beyond the normal consequences of deportation.

### ***Temporary Protected Status***

Temporary Protected Status (TPS) is a form of temporary immigration relief for nationals and citizens of certain countries who cannot return home because of armed conflict, natural disasters, or other temporary factors. The Secretary of the DHS designates countries for TPS based on consultation with other government agencies.

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<sup>972</sup> See *Angel-Ramos v. Reno*, 227 F.3d 942 (7<sup>th</sup> Cir. Sept. 19, 2000).

<sup>973</sup> See *id.* See also, I.N.A. § 203(a)(1), 8 U.S.C. § 1153(a)(1); *In re Nolasco*, 22 I&N Dec. 632 (BIA Apr. 15, 1999); *In re N-J-B-*, 22 I&N Dec. 1057 (BIA Feb. 20, 1997), *vacated by* Att’y Gen. Order No. 2093-97 (Jul. 10, 1997); *Angel-Ramos v. Reno*, 227 F.3d 942 (7<sup>th</sup> Cir. Sept. 19, 2000); *In re Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA Feb. 23, 2000) (holding that a non-citizen cannot accrue the 7 years of continuous physical presence required for suspension of deportation after the Order to Show Cause and Notice of Hearing have been served by the I.N.S. on the non-citizen because the service of the Order to Show Cause ends her continuous physical presence under I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1)).

<sup>974</sup> See Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, Title II, § 201 *et seq* (1997); *Useinovic v. I.N.S.*, 313 F.3d 1025, 1034-35 (7<sup>th</sup> Cir. Dec. 27, 2002) (discussing motion to reopen deadline for NACARA applicants).

<sup>975</sup> See 8 C.F.R. § 1003.43(e)(1); *Useinovic v. I.N.S.*, 313 F.3d 1025, 1035 (7<sup>th</sup> Cir. Dec. 27, 2002); See also, *Buzdygan v. I.N.S.*, 259 F.3d 891 (7<sup>th</sup> Cir. Aug. 9, 2001) (holding that where an IJ already denied a suspension application for lack of extreme hardship, the Board of Immigration Appeals properly denied his motion to remand based on NACARA).

The Secretary of the DHS reviews TPS designations every 6 – 18 months to determine whether the conditions in a country continue to merit immigration relief for its nationals. Depending on the conditions within the country, the DHS Secretary may extend or terminate a TPS designation. Each time that the TPS designation is extended, TPS beneficiaries must re-register within the designated re-registration period.<sup>976</sup> As long as a non-citizen is a TPS beneficiary, she cannot be removed from the U.S. and can obtain employment authorization to lawfully work in the U.S.<sup>977</sup> If TPS is terminated, the beneficiary returns to the status she had prior to being granted TPS and, if appropriate, may be placed in removal proceedings and/or deported from the U.S. TPS does not lead to lawful permanent residence.

<b>Countries currently designated for TPS<sup>978</sup></b>
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Sudan, Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia
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In order to be eligible for TPS, a non-citizen must meet the following requirements:

- Establish her nationality of a country designated for TPS.
- Be physically present and continuously residing in the U.S. since the date the country was designated.
- Register for TPS within the initial registration period (when the country was first designated for TPS) or fall within one of the limited exceptions to file a late application for initial registration.<sup>979</sup>

Currently, an eligible non-citizen may also initially register for TPS with the CIS. She may also apply for TPS before the Immigration Judge in removal proceedings, even if her TPS application had been previously denied by the CIS.<sup>980</sup>

A non-citizen is ineligible for TPS if she falls under any of the following criminal bars:

- Has been convicted of any felony.<sup>981</sup>
- Has been convicted of two or more misdemeanors.<sup>982</sup>
- Is considered to be a person who:
  - Participated in the persecution of others;
  - Was convicted of a particularly serious crime;

<sup>976</sup> See 8 C.F.R. §§ 244.17, 1244.17.

<sup>977</sup> See I.N.A. §§ 244(f)(3), (a)(1)(B), 8 U.S.C. §§ 1254a(f)(3), (a)(1)(B).

<sup>978</sup> See “Temporary Protected Status,” CIS, [www.uscis.gov](http://www.uscis.gov).

<sup>979</sup> Late filing is permitted if the non-citizen did not initially register because of a pending application for other immigration relief or because of having been granted another immigration status. In that case, she must apply for TPS within 60 days of the denial of an application or of the expiration or termination of another status. See 8 C.F.R. § 244.2(g).

<sup>980</sup> See *In re Barrientos*, 24 I&N Dec. 100 (BIA Mar. 1, 2007).

<sup>981</sup> Defined as a crime committed in the United States that is punishable by imprisonment of more than a year. See 8 C.F.R. § 244.1.

<sup>982</sup> Defined as a crime punishable by one year or less. Any crime punishable by a maximum of five days or less is not considered a misdemeanor. See 8 C.F.R. § 244.1.

- Committed a non-political crime outside the U.S. before arrival to the U.S.; or
- Is a danger to the security of the U.S. under any other reasonable ground.<sup>983</sup>

If a non-citizen is ineligible for TPS based on one of the above bars, she may be eligible for other immigration relief, including asylum and non-LPR cancellation of removal, depending on the gravity and nature of her offenses.<sup>984</sup> Where an otherwise eligible non-citizen has been convicted of a minor felony or two misdemeanor offenses, post-conviction relief may be an area to explore to eliminate one of the misdemeanor offenses. Where a non-citizen has been convicted of one misdemeanor and is charged with a second misdemeanor, a disposition for a city or county ordinance violation may prevent her from being convicted of a second misdemeanor for immigration purposes.<sup>985</sup>

### ***Additional Forms of Relief***

Immigration relief for non-citizens who are subjected to battery and extreme cruelty or who can be of assistance to law enforcement authorities in criminal investigations or prosecutions became available in 1994 through the Violent Crime Control and Law Enforcement Act.<sup>986</sup> It has since evolved through the Victims of Trafficking and Violence Protection Act of 2000<sup>987</sup> and the Violence Against Women and Department of Justice Reauthorization Act of 2005.<sup>988</sup>

As a result of the legislation, five avenues of immigration relief are available to qualifying non-citizens:

- Violence Against Women Act (VAWA) Visa Self-petition
- VAWA Cancellation of Removal
- T (Trafficking) Visa
- U Visa
- S Visa

### **VAWA Visa Self-petition**

In order for a non-citizen to become an LPR based on a family relationship, the CIS must first approve an immigrant visa petition. Normally, the non-citizen must have a family member to submit the petition on her behalf. The family member is known as the “petitioner.” However, the following non-citizens may file a self-petition without the assistance of a petitioner:

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<sup>983</sup> See I.N.A. § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B); I.N.A. § 244(c), 8 U.S.C. § 1254a(c).

<sup>984</sup> See Appendix 6B, Immigration Relief from Deportability and Inadmissibility.

<sup>985</sup> See Definition of Conviction, *supra* at 2-3; *In re Eslamizar*, 23 I&N Dec. 684 (BIA Oct. 19, 2004).

<sup>986</sup> See Pub. L. No. 103-322, 108 Stat. 1795 (Sept. 13, 1994).

<sup>987</sup> See Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000).

<sup>988</sup> See Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on the cross-section of immigration law and domestic violence, see <http://www.asistaonline.org/>.

- A spouse who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen spouse. The non-citizen does not have to be currently married to the abuser; however, a petition must be filed within two years of the entry of a divorce decree from the LPR or U.S. citizen spouse. Although women are typically the victims of domestic abuse, men are also eligible to file self-petitions under VAWA.
- A child who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen parent.
- A parent of a child who has been battered or subjected to extreme cruelty by the parent's LPR or U.S. citizen spouse.
- A parent who has been battered or subjected to extreme cruelty by a current U.S. citizen child or a U.S. citizen child who died or lost or renounced U.S. citizenship (related to a domestic violence incident) within the past two years.<sup>989</sup>

By removing the abusive petitioner from the visa petition process, a battered non-citizen may pursue her immigration status independently.<sup>990</sup> A non-citizen can include her children as derivative beneficiaries in her self-petition. There is no annual limit to the number of immigrant visa self-petitions that the CIS can approve.<sup>991</sup>

Battery or extreme cruelty includes a variety of forms of abuse: hitting, pushing, throwing things, bringing prostitutes into the home, public humiliation, cursing, isolation or restricting freedom, threatening deportation, withholding household money, forced sexual intercourse, reproductive coercion, stalking, and threatening to do any of the above.<sup>992</sup> It may be difficult to determine whether your non-citizen client suffers from one of these forms of abuse. Many victims may be afraid of reporting such abuses because of possible repercussions, including separation of family, further abuse, deportation, or embarrassment. A victim may also fail to communicate the abuse if she does not feel comfortable sharing such information with an attorney (especially of the opposite sex), if a family member is translating for her, if the abusive partner is accompanying her, or if she does not consider certain acts as abuse.<sup>993</sup>

If defense counsel suspects that a non-citizen client suffers from physical, mental, or emotional abuse, meeting with her apart from any family members may elicit information regarding the abuse. If an interpreter is required, a person who is not related to her should be used to interpret with an explanation to both the non-citizen and the interpreter that the information discussed cannot be disclosed to anyone else without the non-citizen's consent.<sup>994</sup> As the idea of what is considered abuse may differ among persons and cultures, it is important to frame questions around "behavior" and not "abuse." This choice of words will result in a better understanding of the nature of the relationship in question.<sup>995</sup> If you

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<sup>989</sup> A child includes a son or daughter 21 years or older.

<sup>990</sup> Although both men and women can be victims of abuse and both are eligible for relief under VAWA, victims are generally women and will be referred to as such throughout the remainder of this section.

<sup>991</sup> See I.N.A. § 204(a), 8 U.S.C. § 1154(a).

<sup>992</sup> See Sana Loue, J.D., Ph.D., M.P.H., "Family Violence in the Context of Immigration: Sources and Solutions," *Immigration Briefings* No. 06-12, Dec. 2006, p. 2.

<sup>993</sup> See *id.* at p. 6.

<sup>994</sup> See *id.*

<sup>995</sup> See *id.* at 7.

believe your non-citizen client may be eligible to file a VAWA visa self-petition or one of the other immigration remedies under VAWA, consult an immigration attorney. If counsel is defending the alleged abuser, the alleged abusive non-citizen may face immigration consequences for offenses related to domestic violence.<sup>996</sup>

**In order to be eligible to file a VAWA self-petition, the non-citizen must demonstrate that:**

- She has resided with the LPR or USC spouse, parent, or child;
- She was subjected to battery or extreme cruelty by the LPR or USC spouse, parent, or child;
- If the self-petitioner is a spouse or child, the marriage was entered into in good faith and not for the sole purpose of obtaining an immigration benefit; and
- She is a person of good moral character. A battered child does not need to meet this requirement.

If a self-petitioner falls under one of the bars to good moral character defined by I.N.A. § 101(f), 8 U.S.C. § 1101(f), she must demonstrate that the act or conviction was related to being battered or subjected to extreme cruelty.<sup>997</sup> Even if a non-citizen does not fall under any of these statutory bars, the CIS may still find that she does not demonstrate good moral character based on her conduct within the U.S. or abroad.<sup>998</sup>

Once a visa self-petition is approved, the non-citizen may also be eligible to apply to adjust her status to become a lawful permanent resident under I.N.A. § 245, 8 U.S.C § 1255. This eligibility depends on various factors, including the immigration status of the abuser. If the abuser is a U.S. citizen, the non-citizen may apply for adjustment of status immediately upon approval of the visa self-petition. If the abuser is an LPR, the non-citizen must wait to apply for adjustment of status until an immigrant visa is available.

Availability of an immigrant visa is determined by the family-based priority categories in the U.S. Department of State's Visa Bulletin, published monthly. Within those categories, the availability of an immigrant visa is based on the "priority date" of a visa petition. This priority date is the date upon which the CIS received the visa petition from the self-petitioning non-citizen. This essentially means that non-citizens with approved visa self-petitions are waiting in a line behind other beneficiaries of visa petitions who filed their visa petitions at an earlier date. According to recent visa bulletins, non-citizens whose qualifying family members are LPRs are waiting between five and seven years, depending on the non-citizen's country of nationality or citizenship, for an immigrant visa to be available in order to apply for adjustment of status.<sup>999</sup> Non-citizens who must wait for

<sup>996</sup> See Crimes Involving Domestic Violence, Stalking, Child Abuse, Child Neglect, and Child Abandonment, *supra* at 3-26.

<sup>997</sup> See I.N.A. § 204(a)(1)(C), 8 U.S.C § 1154(a)(1)(C).

<sup>998</sup> See Good Moral Character, *supra* at 6-12.

<sup>999</sup> For example, a non-citizen from Mexico who filed her visa self-petition on January 1, 2006 based on the battery or extreme cruelty she suffered by her LPR husband will have a priority date of January 1, 2006 in the 2A family preference category. For the month of July 2009, visa numbers for the 2A category are currently available for visa petitions filed on or before June 22, 2002. The Visa

a visa to become available are granted deferred action and are eligible for employment authorization and public benefits.<sup>1000</sup>

Eligibility for adjustment of status also depends on whether the non-citizen falls under any of the grounds of inadmissibility listed in I.N.A. § 212, 8 U.S.C. § 1182. If so, she may not adjust her status unless she is also eligible to apply for a waiver of inadmissibility. Under I.N.A. § 212(h), 8 U.S.C. 1182(h), a non-citizen with an approved visa self-petition can apply for a waiver of crimes involving moral turpitude, simple possession of 30 grams or less of marijuana, two or more offenses for which aggregate sentences to confinement were five years or more, or prostitution.<sup>1001</sup> In order to be granted the waiver, she must demonstrate that her removal from the U.S. would cause extreme hardship to her U.S. citizen or LPR spouse, child, or parent. She may apply for a waiver of inadmissibility for fraud or willful misrepresentation under I.N.A. § 212(i), 8 U.S.C. 1182(i) if she can demonstrate that her removal from the U.S. would cause extreme hardship to herself or her U.S. citizen or LPR child or parent.<sup>1002</sup>

### VAWA Cancellation of Removal

If a non-citizen who has been subjected to domestic battery or extreme cruelty is in removal proceedings before an Immigration Judge, she may be eligible to apply for VAWA Cancellation of Removal under I.N.A. § 240A(b)(2), 8 U.S.C. § 1229b(b)(2).<sup>1003</sup> If granted cancellation of removal, she will become a lawful permanent resident.

Non-citizens who may be eligible to apply for VAWA cancellation of removal are:

- A spouse who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen spouse. Unless they have also been battered or subjected to extreme cruelty, non-citizen children of the abused spouse cannot be included in the application for cancellation of removal as derivatives;
- A non-citizen who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen whom she intended to marry but whose marriage is not legitimate because of his bigamy;
- A child who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen parent; or
- A parent of a child who has been battered or subjected to extreme cruelty by the parent's LPR or U.S. citizen spouse.

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Bulletin is updated each month and is available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html).

<sup>1000</sup> See I.N.A. § 204(a)(1)(K), 8 U.S.C. § 1154(a)(1)(K); 74 Interpreter Releases 971, (Jun. 16, 1997); 77 Interpreter Releases 1413 (Oct. 2, 2000).

<sup>1001</sup> For additional information regarding waivers under I.N.A. § 212(h), 8 U.S.C. § 1182(h), see 212(h) waivers, *supra* at 6-58.

<sup>1002</sup> For additional information regarding waivers under I.N.A. § 212(i), 8 U.S.C. § 1182(i), see 212(i) waivers, *supra* at 6-62.

<sup>1003</sup> The Immigration Court may only cancel the removal of 4,000 non-citizens nationally each year, including cancellation of removal for other categories under I.N.A. § 240A(b), 8 U.S.C. 1229b(b).



Unlike the VAWA visa self-petition, a non-citizen parent who has been battered or subjected to extreme cruelty by a child who is or was a U.S. citizen is not eligible for cancellation of removal.

In addition, where a non-citizen has been convicted or committed an act that would otherwise bar the Attorney General from finding good moral character, it may be waived by the Attorney General if he finds that the act or conviction was connected to the non-citizen's having been battered or subjected to extreme cruelty and that a waiver is warranted.<sup>1004</sup> Finally, a non-citizen who has been ordered deported or removed may file a motion to reopen to apply for VAWA cancellation or a VAWA self-petition up to a year, or even longer, after the order becomes final where the Attorney General finds that the non-citizen demonstrates extraordinary circumstances or extreme hardship to her child.<sup>1005</sup>

**In order to be eligible for VAWA Cancellation of Removal, the applicant must demonstrate that:**

- She was subjected to battery or extreme cruelty by the LPR or USC spouse or parent;
- She has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of the application;
- She has been a person of good moral character for the 3 years preceding the date of the application;<sup>1006</sup> and
- Her removal would result in extreme hardship to herself, her child, or her parent.

A non-citizen is ineligible to apply for VAWA cancellation of removal if she has been convicted of an aggravated felony. She is also ineligible if she falls under the criminal and national security related grounds of inadmissibility.<sup>1007</sup> The grounds of deportability rendering a non-citizen ineligible for VAWA cancellation of removal are related to criminal activity, threats to national security, marriage fraud, failure to register a change of address, and document fraud.<sup>1008</sup> There are no waivers available for these grounds of inadmissibility and deportability.

<sup>1004</sup> INA § 240A(b)(2)(C), 8 U.S.C. § 1229b(b)(2)(C).

<sup>1005</sup> INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv); *see also*, *Sanchez v. Keisler*, 505 F.3d 641 (7<sup>th</sup> Cir. Oct. 4, 2007).

<sup>1006</sup> *See In re Ortega-Cabrera*, 23 I&N Dec. 793 (BIA Jul. 21, 2005) (calculating the good moral character period backward from the date on which the application is finally resolved by the Immigration Judge or BIA); *Good Moral Character*, *supra* at 6-12.

<sup>1007</sup> *See* I.N.A. §§ 212(a)(2), (a)(3), 8 U.S.C. §§ 1182(a)(2), (a)(3).

<sup>1008</sup> *See* I.N.A. §§ 237(a)(1)(G), (a)(2)-(a)(4), 8 U.S.C. §§ 1227(a)(1)(G), (a)(2)-(a)(4).

## U Visa and Deferred Action

### *U Visa*

Congress created the U visa through the Victims of Trafficking and Violence Protection Act of 2000<sup>1009</sup> for non-citizens who have suffered physical or mental abuse as a victim of or being solicited to commit certain types of crimes, including:

- Rape
- Abusive sexual conduct
- Sexual exploitation
- Sexual assault
- Incest
- Felonious assault
- Domestic violence
- Manslaughter
- Murder
- Prostitution
- Female genital mutilation
- Being held hostage
- Torture
- Trafficking
- Peonage
- Involuntary servitude
- Slave trade
- Kidnapping
- Abduction
- Perjury
- Witness tampering
- Obstruction of justice
- Unlawful criminal restraint
- False imprisonment
- Blackmail
- Extortion

The U visa is a viable alternative to filing a VAWA visa self-petition for a non-citizen victim of domestic battery or extreme cruelty if the perpetrator is not an LPR or USC family member. Further, the non-citizen victim does not need to be related to the offender.

#### **In order to be eligible for a U visa, the non-citizen must:**

- Demonstrate that she has suffered substantial physical or mental abuse as a victim of a certain crime;
- Establish that the crime violated the laws of the U.S. or occurred in the U.S.;
- Possess information related to the crime; and
- Obtain a certification verifying her assistance in the investigation or prosecution of the crime from law enforcement authorities, a judge, or any federal agency including the DHS.

The benefits of the U visa are broad. If the non-citizen victim is under 21 years old, her spouse, children, unmarried siblings under the age of 18, and parents may also be granted a U visa, whether they are also in the U.S. or abroad. If the non-citizen victim is 21 years old or older, only her spouse and children are eligible for a U visa. The CIS may grant 10,000 U visas each year, not including derivatives of the principal applicant.<sup>1010</sup> A non-citizen who has been granted a U visa may apply for adjustment of status after she has

<sup>1009</sup> See Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000); I.N.A. §§ 101(a)(15)(U), 214(p), 245(m), 8 U.S.C. §§ 1101(a)(15)(U), 1184(p), 1255(m).

<sup>1010</sup> See I.N.A. § 214(p)(2), 8 U.S.C. § 1184(p)(2).

been physically present in the U.S. for three years after being admitted in U visa status and meets the other requirements.<sup>1011</sup>

### *Deferred Action*

Deferred action status allows a non-citizen to remain in the U.S., although the DHS can initiate removal proceedings at any time through the issuance of a Notice to Appear. Prior to the issuance of the U regulations, CIS issued deferred action status to non-citizens who were the victims of the enumerated crimes.<sup>1012</sup> Where a non-citizen has been convicted of an aggravated felony, the CIS was able to deny her request for deferred action status under its memoranda.<sup>1013</sup> In the interim, a non-citizen with deferred action status has been eligible for certain benefits, including employment authorization. A non-citizen had to apply to renew deferred action and employment authorization each year.<sup>1014</sup> ICE may also issue a final administrative removal order where a non-citizen is not a lawful permanent resident and has been convicted of an aggravated felony.<sup>1015</sup>

If a non-citizen is eligible to apply for the U visa but is inadmissible under I.N.A. § 212, 8 U.S.C. § 1182, she may file a waiver for the ground of inadmissibility demonstrating that it is in the public or national interest that she be granted the visa.<sup>1016</sup> The only ground for which the CIS cannot grant a waiver is that related to Nazi persecution.

A non-citizen with deferred action status is eligible under regulations for the U visa to apply to adjust her status if:

- She has been in the U.S. for a continuous period of three years;
- Her continued presence in the U.S. is justified on humanitarian grounds to ensure family unity or is otherwise in the public interest; and
- She has cooperated with law enforcement authorities in the criminal investigation and prosecution.<sup>1017</sup>

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<sup>1011</sup> See 8 C.F.R. § 245.24(b).

<sup>1012</sup> See Memorandum, Michael D. Cronin, Acting Exec. Assoc. Comm'r, Victims of Trafficking and Violence Protection Act of 2000 (VAWA II), Policy Memorandum #2 -- T and U Nonimmigrant Visas (Aug. 30, 2001), available in Gallagher, Immigration Law Service 2d, Selected Presidential and Agency Documents, Vol. 8; Memorandum, William R. Yates, Assoc. Director of Operations, Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003), available in Gallagher, Immigration Law Service 2d, Selected Presidential and Agency Documents, Vol. 8.

<sup>1013</sup> See *id.* (citing CIS Memoranda dated Aug. 30, 2001 and Oct. 8, 2003); see also, Final Administrative Removal Orders, *supra* at 6-3.

<sup>1014</sup> Memorandum from William R. Yates, Associate Director of Operations, to Director of Vermont Service Center, "Centralization of Interim Relief for U Nonimmigrant Status Applicants," Oct. 8, 2003.

<sup>1015</sup> See *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439 (7<sup>th</sup> Cir. Apr. 13, 2007) (discussing the issuance of final administrative removal orders by DHS and adjudication of requests for deferred action in light of the absence of regulations for the issuance of U visas and finding that the non-citizen had not exhausted her administrative remedies regarding the CIS' denial of her request for deferred action).

<sup>1016</sup> See I.N.A. § 212(d)(14), 8 U.S.C. § 1182(d)(14); 72 Fed. Reg. 53021-22; 8 C.F.R. § 214.14(c)(2)(iv).

<sup>1017</sup> See I.N.A. § 245(m), 8 U.S.C. § 1255(m). For a summary of the U visa adjustment of status regulations, see "Summary of U Adjustment Regulations," National Network to End Violence against Immigrant Women, Dec. 2008, available at

Non-citizens who requested or were granted U visa interim relief on or before October 17, 2007, were required to file an application for the U nonimmigrant visa by April 14, 2008.<sup>1018</sup> Once the non-citizen granted a U visa has been granted lawful permanent residence, her spouse and children may also apply to adjust their status. If the non-citizen is a child, the CIS may grant lawful permanent residence to the parent if it is determined that the child would face extreme hardship if the parent was removed from the U.S.<sup>1019</sup>

### T (Trafficking) Visa

In addition to the U visa, the Victims of Trafficking and Violence Protection Act of 2000 established the T visa for victims of severe human trafficking.<sup>1020</sup> “Severe trafficking” is defined as the use of force, fraud, or coercion for sex trafficking and/or involuntary servitude, peonage, debt bondage, or slavery.<sup>1021</sup> If a non-citizen under 21 years old is granted a T visa, his spouse, parents, unmarried siblings under the age of 18, and children can also be granted a visa, whether they are in the U.S. or abroad. If the non-citizen is 21 years old or older, only his spouse and children may also be granted T visas.

Few non-citizens eligible for a T visa identify themselves as victims of trafficking, perhaps seeing their situation as a necessary price to pay for coming to the U.S. Most trafficking victims are not identified until they are discovered by social service organizations or police related to other issues, such as domestic violence or prostitution. Due to threats of deportation or abuse by traffickers, victims who would like to seek help may fear the consequences for themselves or their family members. Some victims are isolated or confined, making seeking help impossible.<sup>1022</sup>

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<http://asistahelp.org/U%20Adjustment%20Fact%20Sheet.pdf>. The Immigrant Legal Resource Center has also published *The U Visa: Obtaining Status for Immigrant Victims of Crimes*, 1<sup>st</sup> ed. by Sally Kinoshita, 2009, available at <https://www.ilrc.org/publications/detail.php?id=64>.

<sup>1018</sup> See 72 Fed. Reg. 53014 (Sept. 17, 2007).

<sup>1019</sup> For more information about U Visas and deferred action, see Sherizaan Minwalla, “The U Non-immigrant Visa: A Practitioner’s Guide,” *Immigration Briefings* 06-7, July 2006; Sally Kinoshita, *How to Obtain U Interim Relief: A Brief Manual for Advocates Assisting Immigrant Victims of Crime*, Immigrant Legal Resource Center,

<http://www.ilrc.org/resources/U%20Visa/2006%20U%20Manual%20Complete.pdf>, Aug. 2006.

<sup>1020</sup> See Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000); I.N.A. §§ 101(a)(15)(T), 214(o), 245(l), 8 U.S.C. §§ 1101(a)(15)(T), 1184(o), 1255(l); 8 C.F.R. § 214.11.

<sup>1021</sup> See 22 U.S.C. § 7102.

<sup>1022</sup> See “Connecticut Human Trafficking Suit Filed: Guatemalan Workers Subjected to Forced Labor in Granby, Connecticut,” *Bender’s Immigration Bulletin*, Feb. 8, 2007; *Immigration and Nationality Law Handbook*, American Immigration Lawyers Association, 2006-2007 Ed., “Obtaining “T” status and Other Relief for Human Trafficking Survivors,” pp. 698-700; Cynthia L. Cooper, “Trafficking Victims: Helping to Stop Abuse,” *Legal Services Corporation Equal Justice Magazine*, [www.ejm.lsc.gov](http://www.ejm.lsc.gov), Winter 2005.

**In order to be eligible for a T visa, the non-citizen must demonstrate that:**

- He is or has been the victim of a severe form of trafficking;
- He is physically present in the U.S.;
- He has complied with reasonable requests for assistance by law enforcement authorities in the investigation and prosecution of the traffickers. This requirement is waived for victims under the age of 18; and
- He would suffer extreme hardship or harm upon removal from the U.S.

The T visa is a non-immigrant visa that is valid for a maximum of four years.<sup>1023</sup> It can only be renewed if law enforcement authorities still require his assistance for ongoing criminal investigation or prosecution. The only bar to eligibility for a T visa is if there is reason to believe that the victim has also committed an act of severe trafficking.<sup>1024</sup>

If eligible, a non-citizen granted a T visa may apply to adjust his status to a lawful permanent resident. Spouses, siblings, parents or children who were also granted T visas may apply to adjust their status as well. In order to be eligible for adjustment of status, a non-citizen must:

- Be physically present in the U.S. for three years in T visa status or physically present in the U.S. until the completion of the investigation or prosecution of the trafficking case, whichever time period is less;
- Comply with reasonable requests for assistance in the criminal investigation or prosecution of the trafficking case or demonstrate that he would suffer extreme hardship involving unusual and severe harm if removed from the U.S.; and
- Maintain good moral character through the duration of T visa status.

A non-citizen granted a T visa is ineligible to adjust his status if he falls under one of the grounds of inadmissibility listed in I.N.A. § 212(a), 8 U.S.C. § 1182(a).<sup>1025</sup> However, the applicant may apply for a waiver of inadmissibility for health-related and public charge grounds if the offense was caused by the severe trafficking.<sup>1026</sup> The grounds of inadmissibility for security related grounds, international child abduction, and former renunciation of U.S. citizenship to avoid taxation cannot be waived.<sup>1027</sup>

<sup>1023</sup> See I.N.A. § 214(o)(7)(A), 8 U.S.C. § 1884(o)(7)(A).

<sup>1024</sup> See I.N.A. § 214(o)(1), 8 U.S.C. § 1184(o)(1).

<sup>1025</sup> See Grounds of Inadmissibility, *supra* at 4-1; Adjustment of Status, to 6-18.

<sup>1026</sup> See I.N.A. § 212(d)(13), 8 U.S.C. § 1182(d)(13).

<sup>1027</sup> See I.N.A. § 245(l), 8 U.S.C. § 1255(l).

## S Visa

For non-citizens who are arrested and charged with crimes, including drug crimes, cooperating with and informing the government about the activities of their cohorts in crime may be an opportunity to avoid immigration consequences through the “S” visa. Congress created the S visa as part of the Violent Crime Control and Law Enforcement Act of 1994 to allow the lawful admission and adjustment of status to lawful permanent residence for non-citizens who provide testimony or information about criminal activities to law enforcement authorities.<sup>1028</sup> The spouse, children, and parents of an S visa applicant may also be granted S visas in the U.S. or abroad.

### **In order to be eligible for an S visa, the non-citizen must:**

- Possess information concerning a criminal organization or enterprise;
- Willingly share this information with federal or state courts; and
- Be essential to the success of the investigation or prosecution of the criminal organization or enterprise.

Under I.N.A. § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S), two types of S visas are available. First, for non-citizens whose presence is required for the investigation or prosecution of criminal organizations, up to 200 visas may be issued each year. Second, for non-citizens who have reliable information about terrorist groups or organizations, up to 50 visas may be issued each year.<sup>1029</sup>

The S visa is a non-immigrant visa valid for three years with no possible extension. During this period, the non-citizen granted the S visa must make quarterly reports to the Attorney General.<sup>1030</sup> Unlike the T visa and the U visa (presently deferred action), non-citizens and their attorneys cannot apply for S visas. Rather, only federal or state law enforcement agencies can file applications with the Assistant Attorney General of the Criminal Division of the U.S. Department of Justice to obtain the S visas. The law enforcement agency must agree to conditions relating to the non-citizen and certify the need for the S visa for the particular non-citizen. The Assistant Attorney General then has seven days to respond to the request.<sup>1031</sup> The DHS can still arrest a non-citizen to initiate removal proceedings against him if the request to the Assistant Attorney General is denied or the non-citizen commits another crime at any time.

At the end of the three year S visa period, the state or federal agency with which the non-citizen has cooperated must decide whether the non-citizen has substantially contributed to the success of the investigation or prosecution. If so, the agency must file a

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<sup>1028</sup> See Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994); 8 C.F.R. §§ 212.4(i), 212.1, 214.2, 245.11, 248.3(h), 1212.1, 1212.4(i), 1245.1; see also, Wang v. Gonzales, 445 F.3d 993, 999, n.2 (7<sup>th</sup> Cir. Apr. 28, 2006); U.S. v. Zedeli, 180 F.3d 879, 881 (7<sup>th</sup> Cir. Jun. 17, 1999).

<sup>1029</sup> See I.N.A. § 214(k), 8 U.S.C. § 1184(k).

<sup>1030</sup> See *Immigration: S visas for Criminal and Terrorist Informants*, CRS Report for Congress, Congressional Research Service, <http://www.fas.org/sgp/crs/terror/RS21043.pdf>, Jan. 23, 2007, p. 4.

<sup>1031</sup> See 8 C.F.R. § 214.2(t).

form to allow the non-citizen to apply for adjustment of status.<sup>1032</sup> The non-citizen's spouse, married and unmarried sons and daughters, and parents may also apply. In the case of a non-citizen who has supplied information regarding terrorist organizations, the non-citizen must have substantially contributed to the prevention or frustration of an act of terrorism against a United States person or property or have contributed to the success of an investigation or prosecution of a person involved in an act of terrorism. The DHS may waive any ground of inadmissibility under I.N.A. § 212, 8 U.S.C. § 1182 except that related to participation in Nazi persecution for S visa holders who apply for adjustment of status.<sup>1033</sup>

A non-citizen who has cooperated with local, state or federal law enforcement authorities may still be subject to removal from the U.S. based on the commission of his own offenses. Although the Seventh Circuit has not yet ruled on whether a non-citizen may avoid removal from the U.S. based on the state-created danger theory, other circuits have rejected such theory and found that non-citizens are still subject to removal.<sup>1034</sup> A non-citizen may also be eligible for asylum, withholding of removal, and relief under the Convention against Torture where a non-citizen fears that he may be persecuted or tortured by a foreign government or persons that the foreign government is unable to control.<sup>1035</sup>

There may be physical and personal risks for a non-citizen who agrees to cooperate with law enforcement. If a non-citizen client is interested in working with a law enforcement agency, contact an immigration attorney who can assist the local law enforcement agency to prepare the application for the S visa.

### ***Voluntary Departure***

If a non-citizen is not eligible for any of the above forms of immigration relief, she may be eligible for voluntary departure. Under a grant of voluntary departure, she must leave the U.S. within the time period ordered, therefore avoiding a deportation or removal order. Whereas an order of removal bars a non-citizen from applying for either a non-immigrant or immigrant visa in the future for 10 years from the date of departure (unless a waiver is granted), a grant of voluntary departure maintains a non-citizen's eligibility for certain visas in the future without having to wait or be granted a waiver at a U.S. consulate or embassy. A non-citizen granted voluntary departure may be detained by the DHS until she departs.<sup>1036</sup>

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<sup>1032</sup> See *Immigration: S visas for Criminal and Terrorist Informants*, CRS Report for Congress, Congressional Research Service, Jan. 23, 2007, p. 4.

<sup>1033</sup> See I.N.A. § 245(j), 8 U.S.C. § 1255(j).

<sup>1034</sup> See *Enwonwu v. Gonzales*, 438 F.3d 22, 31 (1<sup>st</sup> Cir. Feb. 13, 2006); *Kamara v. A.G. of the U.S.*, 420 F.3d 202, 218 (3<sup>rd</sup> Cir. Aug. 29, 2005).

<sup>1035</sup> See *Pronsvakulchai v. Gonzales*, 461 F.3d 903 (7<sup>th</sup> Cir. Aug. 29, 2006); *Wang v. Gonzales*, 445 F.3d 993 (7<sup>th</sup> Cir. Apr. 28, 2006) (discussing evidentiary and nexus issues for asylum versus a fear of retribution based on personal animosity where a non-citizen cooperated with U.S. authorities to investigate and prosecute a crime ring in exchange for a reduction in her own sentence).

<sup>1036</sup> *Al-Saddiqi v. Achim*, 531 F.3d 490 (7<sup>th</sup> Cir. Jun. 27, 2008); *In re M-A-S-*, 24 I&N Dec. 762 (BIA Mar. 19, 2009) (regarding voluntary departure "under safeguards").

A non-citizen may be granted voluntary departure by the DHS in lieu of being subject to removal proceedings. She may also be granted voluntary departure by an Immigration Judge after removal proceedings have begun. There are two sections of law under which a non-citizen can be granted voluntary departure during removal proceedings: at the beginning of the proceedings and at the conclusion of proceedings after consideration of all forms of relief.<sup>1037</sup> Under either section of the law, she must establish that she merits a favorable exercise of discretion to be granted voluntary departure.<sup>1038</sup> For either form of voluntary departure, a non-citizen must be given written notice in English and Spanish and also oral notice in a language he understands about the consequences of failing to depart within the time granted under voluntary departure.<sup>1039</sup> For a non-citizen in removal proceedings, the Immigration Judge must inform the non-citizen of the penalties for failing to voluntarily depart on time in his order granting voluntary departure.<sup>1040</sup>

To be granted voluntary departure by the DHS prior to removal proceedings or at a master calendar hearing prior to the completion of the removal proceedings, a non-citizen must demonstrate that she has not been convicted of an aggravated felony and is not a security threat to the U.S.<sup>1041</sup> Under this section of the law, a non-citizen may have a prior criminal record and other undesirable characteristics and still be granted voluntary departure in the exercise of discretion. Prior to the completion of the removal proceedings and the grant of voluntary departure by an Immigration Judge, the non-citizen must expressly waive her right to appeal the Immigration Judge's decision.<sup>1042</sup> In return, she may be granted voluntary departure for up to 120 days.<sup>1043</sup>

A non-citizen may also be granted voluntary departure at the end of proceedings, after the Immigration Judge has denied other applications for relief from removal and issued a removal order. To be granted voluntary departure at the final hearing, a non-citizen is subject to different requirements. The non-citizen must: 1) have been physically present in the U.S. for at least one year prior to the date that the Notice to Appear was served on her; 2) demonstrate that she is a person of good moral character for at least five years immediately before requesting voluntary departure; 3) not have been convicted of an aggravated felony; 5) not constitute a security risk to the U.S.; and 4) establish by clear and

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<sup>1037</sup> See I.N.A. § 240B, 8 U.S.C. § 1229c.

<sup>1038</sup> See *In re Arguelles*, 22 I&N Dec. 811 (BIA Jun. 7, 1999) (citing the factors set forth in *In re Gamboa*, 14 I&N Dec. 244 (BIA Dec. 7, 1972)); see also, *In re R-S-H- et al.*, 23 I&N Dec. 629 (BIA Aug. 4, 2003) (holding that where an Immigration Judge has issued a protective order regarding disclosure of protected information during removal proceedings, the mandatory consequence of a violation of that order is ineligibility for any form of discretionary relief, except for bond, unless the non-citizen fully cooperates with the U.S. government relating to the noncompliance and establishes by clear and convincing evidence either that extraordinary and extremely unusual circumstances exist or that failure to comply with the order was beyond the control of the non-citizen and his attorney).

<sup>1039</sup> See I.N.A. § 242B(f)(2), (d)(3) (1995), 8 U.S.C. § 1252b(f)(2), (d)(3) (1995).

<sup>1040</sup> See I.N.A. § 240B(d), 8 U.S.C. § 1229c(d).

<sup>1041</sup> See I.N.A. § 240B(a), 8 U.S.C. § 1229c(a).

<sup>1042</sup> See *In re Ocampo*, 22 I&N Dec. 1301 (BIA Mar. 24, 2000) (discussing the differences between voluntary departure available at the outset of the removal proceedings and at the conclusion of proceedings).

<sup>1043</sup> See I.N.A. § 240B(a)(2), 8 U.S.C. § 1229c(a)(2).



convincing evidence that she has the means to depart the U.S. and intends to do so.<sup>1044</sup> If the Immigration Judge (or the Board of Immigration Appeals) grants her voluntary departure, the period of voluntary departure cannot exceed 60 days.<sup>1045</sup>

A voluntary departure bond may be required by the Immigration Judge where it is granted at the beginning and must be required where it is granted at the conclusion of proceedings.<sup>1046</sup> The voluntary departure regulations that became effective on January 22, 2009 are extremely technical and complicated.<sup>1047</sup> The failure to post a voluntary departure bond results in the automatic vacatur of the departure order and other consequences.<sup>1048</sup>

A non-citizen may be granted voluntary departure only once in removal proceedings under I.N.A. § 240B, 8 U.S.C. § 1229c.<sup>1049</sup> In comparison, a non-citizen used to be eligible for a voluntary departure grant numerous times in deportation proceedings under I.N.A. § 244(e), 8 U.S.C. § 1254(e) (1995). Thus, if a non-citizen was granted voluntary departure under the old law, departed the U.S., and reentered the U.S., she may be eligible to apply for voluntary departure again in removal proceedings.<sup>1050</sup>

When a non-citizen requests and receives voluntary departure, she must depart within the voluntary departure period. If a non-citizen is granted voluntary departure under the provisions for removal proceedings and fails to depart the U.S. within the time allowed, he is subject to a civil penalty of not less than \$1,000 and not more than \$5,000 and he is also ineligible for a period of ten years for discretionary relief, including cancellation of removal, adjustment of status, change of non-immigrant status classification, and registry.<sup>1051</sup> Neither the BIA nor an Immigration Judge has the authority to recognize an equitable exception to the bar to discretionary relief beyond that specified in the statute.<sup>1052</sup>

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<sup>1044</sup> See I.N.A. § 240B(b)(1), 8 U.S.C. § 1229c(b)(1).

<sup>1045</sup> See I.N.A. § 240B(b)(2)-(3), 8 U.S.C. § 1229c(b)(2)-(3).

<sup>1046</sup> See I.N.A. §§ 240B(a)(3), (b)(3), 8 U.S.C. §§ 1229c(a)(3), (b)(3).

<sup>1047</sup> See Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927 (Dec. 18, 2008); Voluntary Departure Rule Q&A”, American Immigration Law Foundation, Dec. 22, 2008, available at [http://www.aifl.org/lac/lac\\_pa\\_topics.shtml#section12](http://www.aifl.org/lac/lac_pa_topics.shtml#section12).

<sup>1048</sup> See *id.* One exception that may still exist under the new regulations: where a non-citizen, through no fault of her own, was unaware of the grant of voluntary departure until after the period expired, she cannot be said to have “voluntarily” failed to depart within the voluntary departure period. *In re Zmijewska*, 24 I&N Dec. 87 at 94-95 (BIA Feb. 21, 2007) (finding that a non-citizen’s failure to depart due to ineffective assistance of counsel by a representative not informing the non-citizen of the voluntary departure period until after it began was involuntary and that situations in which departure within the period would involve exceptional hardship to the non-citizens or close family members or lack of funds to be able to depart would not constitute an involuntarily failure to depart).

<sup>1049</sup> See *In re Arguelles*, 22 I&N Dec. 811 (BIA Jun. 7, 1999).

<sup>1050</sup> See *id.*

<sup>1051</sup> See I.N.A. § 240B(d), 8 U.S.C. § 1229b(d).

<sup>1052</sup> See *In re Zmijewska*, 24 I&N Dec. 87, 91 (BIA Feb. 21, 2007) (finding that a voluntary departure agreement is an exchange of benefits between a non-citizen and the government in which a non-citizen avoids certain adverse consequences of a removal order, such as a 10 year bar under I.N.A. § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii)).

One exception exists for failing to depart under voluntary departure. Where a non-citizen can demonstrate in her application for non-permanent resident cancellation of removal, adjustment of status based on a self-petition by a non-citizen under the Violence Against Women Act (VAWA), or suspension of deportation that extreme cruelty or battery was at least one central reason for overstaying the grant of voluntary departure, then she will not be barred from eligibility for these forms of relief.<sup>1053</sup>

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<sup>1053</sup> *See id.*

## FLOW CHART: NON-CITIZEN REMOVAL (DEPORTATION) PROCEEDINGS

What happens to non-citizens who are removable from the U.S.?

**Department of Homeland Security  
Immigration and Customs Enforcement**

Initiates removal proceeding by issuing a Notice to Appear (NTA) which charges a non-citizen with immigration law violations. If the non-citizen is already detained in local, state, or federal custody, he will generally be transferred to ICE custody when his criminal sentence is completed. If he is not already detained, ICE decides whether to detain for removal proceedings. If he is not an asylee, refugee, or LPR and has been convicted of an aggravated felony, DHS may issue a final administrative removal order under 8 U.S.C. §1228(b).



**Department of Justice  
Executive Office for Immigration Review**

*Immigration Court (Immigration Judge)*

<p><b>Bond Hearing</b></p> <p>Reviews ICE's initial custody and bond determination and may set bond amount unless non-citizen is subject to mandatory detention under 8 U.S.C. § 1226(c).</p>	<p>→</p>	<p><b>Master Calendar Hearing(s)</b></p> <p>Reviews factual allegations and legal charges in the NTA and determines initial eligibility for relief from removal.</p>	<p>→</p>	<p><b>Individual Hearing</b></p> <p>Adjudicates applications for relief from removal. Grants relief or denies relief and orders removal.</p>
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**Board of Immigration Appeals (BIA)**  
 A single member or a panel of members reviews appeals from bond and individual hearing decisions of the Immigration Judge. Affirms, reverses, and/or remands case back to Immigration Judge for further proceedings. If the BIA does not remand the case, the order of the BIA is the final administrative removal order.



**Judicial Branch (Article III Courts)**

<p><b><i>U.S. District Court</i></b></p> <p>Reviews habeas corpus petitions challenging detention, mandamus actions and declaratory actions related to immigrant visa petitions, and affirmative applications for immigration benefits. Does <i>not</i> review appeals of removal orders issued by the BIA.</p>	<p>↔</p>	<p><b><i>U.S. Circuit Court of Appeals</i></b></p> <p>Reviews appeals of final orders issued by the DHS or BIA. Also reviews appeals from federal district court decisions regarding petitions for writs of habeas corpus challenging detention, mandamus actions, and declaratory actions.</p>
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***Supreme Court***  
 Reviews appeals of decisions by Circuit Court of Appeals that it chooses to accept by granting petitions for writs of certiorari.

*Defending Non-Citizens in Illinois, Indiana, and Wisconsin. June 26, 2009.*

## Forms of Immigration Relief

Form of Relief	Eligibility	Bars to Eligibility
<p><b>Acquired and derived U.S. citizenship:</b> 8 U.S.C. §§ 1431, 1401a, 1402-1407, 1409</p>	<p>An individual may not be aware that he is already a citizen based on a relationship to a U.S. citizen parent or grandparent. Acquired citizenship depends on one or both of the individual's parents having been a U.S. citizen before the individual's birth. Derived citizenship depends on one or both of the individual's parents having naturalized as a U.S. citizen after the individual became an LPR and before he turned 18 years old.</p> <p>The rules surrounding eligibility for these two forms of citizenship are highly technical and depend on a number of factors, including but not limited to the date of birth of the individual, when and whether his parents married, when his U.S. citizen parent(s) resided in the United States, and when one or both parents naturalized as citizens.</p> <p><b>**Posthumous citizenship through death while on active-duty service in the armed forces may result in a parent or child of the soldier being eligible for immigration benefits or derivative citizenship. For more information, see 8 U.S.C. § 1440-1.**</b></p>	<p>None.</p>
<p><b>U.S. citizenship – military service:</b> 8 U.S.C. §§ 1439, 1440</p>	<p>An individual who has served in the U.S. Armed Forces for a period or periods aggregating one year may file an application for naturalization while still in the Armed Forces or within six months of the honorable termination of such service. He does not need to meet the naturalization requirement of 5 years of continuous residence in the U.S. but does need to demonstrate good moral character.</p> <p>For provisions regarding military service during World War I, World War II, the Korean conflict, the Vietnam conflict, or other recognized period of hostilities, see 8 U.S.C. § 1440.</p>	<p>Conviction of an aggravated felony on or after 11/29/90.</p>
<p><b>Cancellation of removal:</b> 8 U.S.C. § 1229b(a)</p> <p><b>**This is the simplest and best relief available to an LPR convicted of a crime.**</b></p>	<p>Must have been LPR for at least 7 years or for at least 5 years with additional 2 years of residence in the U.S. after having been admitted into the U.S. Applicant must have met these requirements <i>before</i> committing the crime rendering him inadmissible or deportable. He must also establish with positive equities that he warrants a favorable exercise of discretion under the totality of circumstances.</p>	<p>Conviction of an aggravated felony.</p>
<p><b>Waiver of exclusion (inadmissibility) known as “212(c) waiver”:</b> 8 U.S.C. § 1182(c)</p>	<p>Available to LPRs who:</p> <ul style="list-style-type: none"> <li>• were placed in deportation proceedings prior to April 1, 1997 or are in removal proceedings;</li> <li>• pled guilty to an aggravated felony or other crime which falls within the grounds of</li> </ul>	<p>Confinement of 5 years or more for one or more aggravated felonies, conviction of a firearms offense under 241(a)(2)(C), conviction of an aggravated</p>

Form of Relief	Eligibility	Bars to Eligibility
	<p>inadmissibility, depending on the availability of relief under § 1182(c) at the time of the plea;</p> <ul style="list-style-type: none"> <li>• had a defense to deportation but conceded deportability, relying on the availability of relief under § 1182(c);</li> <li>• has been domiciled in the U.S. for at least 7 years; and</li> <li>• merits a favorable exercise of discretion.</li> </ul>	<p>felony that does not have a comparable ground of inadmissibility. For conviction entered on or after 4/24/1996 for 2 or more crimes involving moral turpitude if more than one conviction resulted in a sentence or confinement of 1 year or longer.</p>
<p><b>Cancellation of removal for certain nonpermanent residents:</b> 8 U.S.C. § 1229b(b)</p>	<p>Non-citizen must have been physically present in the U.S. for a continuous period of at least 10 years prior to application, must demonstrate good moral character, and must establish that his removal from the U.S. would cause exceptional and extremely unusual hardship to his LPR or U.S. citizen spouse, parent or child.</p>	<p>Conviction of a crime involving moral turpitude, controlled substance offense, aggravated felony, or other immigration offense (including document fraud).</p>
<p><b>VAWA Cancellation of Removal:</b> 8 U.S.C. § 1229b(b)(2)</p>	<p>Non-citizen who has been subjected to battery or extreme cruelty by an LPR/USC spouse or parent or who is the parent of a child who has been battered or subjected to extreme cruelty by a LPR or former LPR parent, has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of the application, has been a person of good moral character for 3 years, and has demonstrated that her removal would result in extreme hardship to her, her USC or LPR child, or her parent. Noncitizen who was subject to a bigamous marriage due to her spouse's bigamy and otherwise qualifies may also apply.</p>	<p>Conviction of an aggravated felony. Inadmissibility under the criminal and national security related grounds or deportability under grounds related to criminal activity, threats to national security, marriage fraud, failure to register a change of address, and document fraud. There are no waivers available for these grounds of inadmissibility and deportability.</p>
<p><b>Waiver of inadmissibility known as a "212(h) waiver":</b> 8 U.S.C. § 1182(h)</p>	<p>Available to LPR or applicant for adjustment of status for certain felony and misdemeanor convictions. Applicant must demonstrate that her U.S. citizen or LPR spouse, child, or parent would suffer extreme hardship in the case of her removal from the U.S. A waiver may also be available if the conviction(s) were entered 15 years before the application for admission to the U.S.</p>	<p>Conviction of an aggravated felony for an LPR and drug offenses with an exception for one simple possession offense for 30 grams or less of marijuana.</p>
<p><b>Waiver of inadmissibility known as a "212(i) waiver":</b> 8 U.S.C. § 1182(i)</p>	<p>Available to an LPR or applicant for adjustment of status for certain felony convictions related to immigration fraud or misrepresentation. Applicant must demonstrate that her U.S. citizen or LPR spouse or parent (a child is not a qualifying relative) would suffer extreme hardship in the case of her deportation.</p>	<p>False claim to U.S. citizenship on or after 9/30/96 (unless LPR meets one of the limited exceptions).</p>
<p><b>Readjustment of status for an LPR:</b> 8 U.S.C. § 1255</p>	<p>An LPR who is deportable or inadmissible may apply to readjust her status as an LPR if she has a qualifying family member (spouse, child over the age of 21, or parent who can file a petition for her and an immigrant visa would be immediately</p>	<p>Conviction of an aggravated felony, unless the applicant is simultaneously eligible for a waiver under 8 U.S.C. § 1182(c).</p>

Form of Relief	Eligibility	Bars to Eligibility
	available to her.	If not eligible for a waiver under 8 U.S.C. § 1182(c), a controlled substance offense other than simple possession of 30 grams or less of marijuana.
<b>Asylum:</b> 8 U.S.C. § 1158	Non-citizen fears persecution in his country of birth, nationality, citizenship, or last habitual residence on account of her race, religion, nationality, membership in a particular social group, or political opinion. Application must be filed within one year of entry to the U.S. unless he meets a listed exception, such as a material change of circumstances in the country of removal.	Conviction for an aggravated felony or a crime deemed to be particularly serious, reason to believe the non-citizen committed a serious crime outside the U.S., or reason to believe he is a danger to U.S. security.
<b>Withholding of removal:</b> 8 U.S.C. § 1231(b)(3)	Non-citizen fears that his life or freedom in his country of removal will be threatened based on persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Unlike asylum, there is no filing deadline and a grant of withholding does not allow him to apply for lawful permanent residence.	Conviction of an aggravated felony for which the non-citizen has been sentenced to a term of imprisonment of 5 years or longer, conviction of a particularly serious crime, reason to believe he committed a serious crime outside the U.S., or reason to believe he is a danger to U.S. security.
<b>Relief under the Convention Against Torture:</b> 8 C.F.R. § 1208.16	Non-citizen fears that she will be subjected to torture by government officials or persons acting with the acquiescence of government officials in her country of removal.	None.
<b>Special adjustment of refugee or asylee status to lawful permanent resident:</b> 8 U.S.C. § 1159	Refugee or asylee must have been physically present in the U.S. for at least 1 year. For certain criminal convictions, a waiver of inadmissibility must be filed and may be granted for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.	Reason to believe that the refugee or asylee has been convicted of murder or drug trafficking, that he is or has been a controlled substance trafficker, that he is a threat to U.S. security, that he has been involved in genocide, or that he has been a Nazi persecutor.
<b>Adjustment of status to lawful permanent resident:</b> 8 U.S.C. § 1255(a)	Non-citizen who entered the U.S. on a temporary visa and stayed beyond the time allotted by the DHS may apply for adjustment of status if he is physically present in the U.S., is the spouse, parent, or child of a U.S. citizen who has filed a family visa petition on his behalf, and there is an immigrant visa available.	Non-citizen falls under one of the grounds of inadmissibility listed in 8 U.S.C. § 1182. He may, however, be eligible for a waiver under 8 U.S.C. § 1182(h) or (i), depending on the ground of inadmissibility.

Form of Relief	Eligibility	Bars to Eligibility
<b>Adjustment of status to lawful permanent resident under "245(i)":</b> 8 U.S.C. § 1255(i)	Non-citizen who entered the U.S. without inspection (illegally) may apply for adjustment of status if he is physically present in the U.S., has a qualifying relative or employer who filed a visa petition on her behalf on or before 4/30/01, and there is an immigrant visa available. If the petition was filed after 1/14/98, the non-citizen must have been physically present in the U.S. on 12/21/00.	Non-citizen falls under one of the grounds of inadmissibility listed in 8 U.S.C. § 1182. She may, however, be eligible for a waiver under 8 U.S.C. § 1182(h) or (i) depending on the violation.
<b>T visa:</b> 8 U.S.C. §§ 1101(a)(15)(T), 1184(o)	Non-citizen who is or has been a victim of a severe form of human trafficking, is physically present in the U.S., has complied with reasonable requests for assistance by law enforcement authorities in investigating and prosecution of the traffickers, and would suffer extreme hardship or harm upon removal from the U.S. A non-citizen granted a T visa may apply for adjustment of status under 8 U.S.C. § 1255(l).	Reason to believe that the victim has also committed an act of severe human trafficking.
<b>U Visa:</b> 8 U.S.C. §§ 1101(a)(15)(U), 1184(p)	Non-citizen who has suffered substantial physical or mental abuse as a victim of an enumerated crime that violated the laws of the U.S. or occurred in the U.S. The non-citizen must possess information related to the crime and obtain a certification from law enforcement authorities, a judge, or any federal agency including the DHS, verifying her assistance in the investigation or prosecution of the crime. A noncitizen who is granted a U visa may apply for adjustment of status under 8 U.S.C. § 1255(m) after having U visa nonimmigrant status for 3 years.	The DHS may waive any ground of inadmissibility under 8 U.S.C. § 1182 except that related to participation in Nazi persecution.
<b>S visa:</b> 8 U.S.C. § 1101(a)(15)(S)	Non-citizen must possess information concerning a criminal organization or enterprise, willingly share this information with federal or state courts, and be essential to the success of the investigation or prosecution. A non-citizen granted an S visa may apply for adjustment of status under 8 U.S.C. § 1255(j).  <b>**Only federal or state law enforcement agencies can file applications for a non-citizen to obtain an S visa.**</b>	The DHS may waive any ground of inadmissibility under 8 U.S.C. § 1182 except that related to participation in Nazi persecution.
<b>VAWA visa self-petition:</b> 8 U.S.C. § 1154(a)	Non-citizen must have resided with an LPR or USC spouse, parent, or child who has subjected her to battery or extreme cruelty. In the case of a self-petition based on battery by a spouse or parent, the victim must demonstrate that her marriage with the abuser was entered into in good faith and not for the sole purpose of obtaining an immigration benefit. She must also demonstrate that she is a person of good moral character. If her self-petition is approved, she may apply for adjustment of status under 8 U.S.C. § 1255(a).	Failure to demonstrate good moral character. Bars to good moral character are listed under 8 U.S.C. § 1101(f). Good moral character may also be determined by other factors in the CIS's discretion.

Form of Relief	Eligibility	Bars to Eligibility
<p><b>Voluntary Departure (VD) prior to or at an initial master calendar hearing before the Immigration Court:</b> 8 U.S.C. § 1229c(a)</p> <p>Non-citizen may be granted up to 120 days to depart the U.S. at her own expense. A grant of VD may maintain her eligibility for immigrant and nonimmigrant visa applications in the future.</p>	<p>Non-citizen must admit the factual allegations, concede to the charges of removability, and request VD before removal proceedings are initiated or at the first hearing before the Immigration Judge. In addition, she must waive her right to appeal the decision of the Immigration Judge. VD may be granted or denied in the exercise of discretion.</p>	<p>Conviction of an aggravated felony and participation in terrorist activities.</p>
<p><b>VD at conclusion of removal proceedings:</b> 8 U.S.C. § 1229c(b):</p> <p>Non-citizen may be granted up to 60 days of VD at the conclusion of removal proceedings or in the BIA's appeal decision.</p>	<p>Non-citizen must be physically present in the U.S. for at least 1 year prior to initiation of removal proceedings, must be able to prove good moral character for at least 5 years prior to the request for VD, must clearly establish financial ability to leave at her own expense, and must not have previously been granted VD in removal proceedings. VD may be granted or denied in the exercise of discretion. A voluntary departure bond is required and must be posted within 5 days; if not, the grant of VD turns into a removal order.</p>	<p>Conviction of an aggravated felony, lack of good moral character for 5 years prior to requesting VD, participation in terrorist activities.</p>



In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A

Case No:

In the Matter of:

Respondent: \_\_\_\_\_ currently residing at:

C/O ILLINOIS RIVER CORR., CEN./B57524 ROUTE 9 WEST, P.O. BOX 999  
CANTON ILLINOIS 61520

(309) 647-7030

(Number, street, city state and ZIP code)

(Area code and phone number)

- 1. You are an arriving alien.
- 2. You are an alien present in the United States who has not been admitted or paroled.
- 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

DEPARTMENT OF JUSTICE  
 EXECUTIVE OFFICE FOR  
 IMMIGRATION REVIEW  
 2004 SEP -7 AM 8:54  
 CHICAGO, ILLINOIS

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:


See Continuation Page Made a Part Hereof

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to:  8 CFR 208.30(f)(2)  8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: \_\_\_\_\_  
55 East Monroe Street Suite 1900 Chicago ILLINOIS US 60603

(Complete Address of Immigration Court, including Room Number, if any)

On a date to be set \_\_\_\_\_ at a time to be set \_\_\_\_\_ to show why you should not be removed from the United States based on the  
(Date) (Time)  
charge(s) set forth above.

  
 \_\_\_\_\_  
 ACTING RESIDENT AGENT IN CHARGE  
 (Signature and Title of Issuing Officer)

Date: June 28, 2004

\_\_\_\_\_  
 (City and State)

See reverse for important information

EXHIBIT  
 20  
 SEP 13 2004

00035

# 1

## Notice to Respondent

**Warning:** Any statement you make may be used against you in removal proceedings.

**Alien Registration:** This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

**Representation:** If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

**Conduct of the hearing:** At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

**Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

### Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

\_\_\_\_\_  
(Signature of Respondent)

Before:

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature and Title of INS Officer)

### Certificate of Service

This Notice to Appear was served on the respondent by me on June 28, 2004, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

(Date)

- in person                       by certified mail, return receipt requested                       by regular mail
- Attached is a credible fear worksheet.
- Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the \_\_\_\_\_ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

\_\_\_\_\_  
(Signature of Respondent if Personally Served)

\_\_\_\_\_  
SPECIAL AGENT

\_\_\_\_\_  
(Signature and Title of Officer)


Alien's Name	File Number Case No: A.	Date June 28, 2004
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The Service alleges that you:

- 1) You are not a citizen or national of the United States;
- 2) You are a native of AFGHANISTAN and a citizen of AFGHANISTAN;
- 3) You were admitted to the United States at Seattle, Washington on or about September 29, 1983 as a REFUGEE;
- 4) Your status was adjusted to that of lawful permanent resident on October 2, 1984 under section 249 of the Act;
- 5) You were, on September 19, 2002, convicted in the Circuit Court Cook County Illinois for the offense of Retail Theft, in violation of 720 I.L.C.S., Section 5/16A-3(A);
- 6) You were sentenced to a two year term of imprisonment.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year was imposed.

Signature 	Title ACTING RESIDENT AGENT IN CHARGE
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**Notice of Custody Determination**

Case No: \_\_\_\_\_  
File No: A \_\_\_\_\_  
Date: 11/01/2004

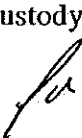

INDIANAPOLIS, IN 46225

FIN #:

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

- detained in the custody of this Service.
- released under bond in the amount of \$ 2,500.00
- released on your own recognizance.

- You may request a review of this determination by an immigration judge.
- You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

   
\_\_\_\_\_  
(Signature of authorized officer)

SUPERVISORY SPECIAL AGENT  
\_\_\_\_\_  
(Title of authorized officer)

INDIANAPOLIS, IN  
\_\_\_\_\_  
(INS office location)

- I do  do not request a redetermination of this custody decision by an immigration judge.
- I acknowledge receipt of this notification.

\_\_\_\_\_  
(Signature of respondent) (Date)

**RESULT OF CUSTODY REDETERMINATION**

On \_\_\_\_\_, custody status/conditions for release were reconsidered by:  
 Immigration Judge     District Director     Board of Immigration Appeals

The results of the redetermination/reconsideration are:  
 No change - Original determination upheld.     Release-Order of Recognizance  
 Detain in custody of this Service.     Release-Personal Recognizance  
 Bond amount reset to \_\_\_\_\_     Other: \_\_\_\_\_

\_\_\_\_\_  
(Signature of officer)

# Warrant for Arrest of Alien

Case No: \_\_\_\_\_  
File No. A \_\_\_\_\_  
Date: June 28, 2004

To any officer of the Immigration and Naturalization Service delegated authority pursuant to section 287 of the Immigration and Nationality Act:

From evidence submitted to me, it appears that:


\_\_\_\_\_  
(Full name of alien)

an alien who entered the United States at or near Seattle, Washington on \_\_\_\_\_  
(Port)  
September 29, 1983 is within the country in violation of the immigration laws and is  
(Date)

therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act.

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.

  
\_\_\_\_\_  
(Signature of authorized INS official)

*for*  
  
\_\_\_\_\_  
(Print name of official)

ACTING RESIDENT AGENT IN CHARGE  
\_\_\_\_\_  
(Title)

## Certificate of Service

Served by me at \_\_\_\_\_ on \_\_\_\_\_ at \_\_\_\_\_  
I certify that following such service, the alien was advised concerning his or her right to counsel and was furnished a copy of this warrant.

\_\_\_\_\_  
(Signature of officer serving warrant)

\_\_\_\_\_  
(Title of officer serving warrant)

00038

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE  
CHICAGO, ILLINOIS

IN THE MATTER OF:  
EN EL ASUNTO DE:

[REDACTED]

IN REMOVAL PROCEEDINGS  
EN LOS TRAMITES DE REMOVIMIENTO  
FILE NO: [REDACTED]  
NUMERO DE REGISTRO: A:

RESPONDENT:  
DEMANDADO

STIPULATED REQUEST FOR REMOVAL ORDER  
AND WAIVER OF HEARING  
DEMANDADO DE ESTIPULADO POR UN ORDEN DE REMOVIMIENTO  
Y RENUNCIA DE AUDIENCIA

I, [REDACTED], Respondent herein make the following requests, statements, admissions and stipulations:

Yo, [REDACTED], Demandado en esto demando, declaro, admito, y estipulo lo siguiente.

1. I have received a copy of the Notice to Appear (NTA) dated August 5, 2003, and my full, true and correct name is as indicated therein. See attached NTA. I have also received a legal aid list. I (do not have) an attorney who will represent me in this matter. See attached Form EOIR-28.

Yo he recibido una copia de la notificacion a paracer (NTA) con la fecha [REDACTED], y mi nombre es completo, veradero, y correcto como indicado alli dentro. Mire la notificacion(NTA). Yo tambien he recibido una lista de ayuda legal. Yo (tengo/no tengo) un abogado lo quien va a representarme en este asunto. Mire la forma EOIR-28.

2. I request that my deportation proceedings be conducted completely on a written record, without a hearing. I waive all my rights and advisals contained in 8 C.F.R. §§ 240.10 and 240.11, including my right to have a hearing, to be advised by the Immigration Judge of any apparent eligibility of relief from deportation, to present witnesses and evidence on my behalf, and to require the government to prove my deportability.

Yo solicito que mi precedimientos de deportacion sea conducido completamente en un registro escrito, sin una audiencia. Yo renuncio a todos mis derechos y avisos contenido en 8 CFR § 240.10 y 240.11, incluyendo mi derecho a tener una audiencia, ser aconsejado del juez de inmigracion por alguna eligibilidad aparente para aliviar de deportacion, presentar testigos y evidencia para mi, y requerir que el gobierno prueba mi deportabilidad.

3. I admit all the allegations contained in the NTA, and concede that I am deportable as charged.

Yo admito todos los alegatos contenido en el NTA y concedio que yo soy deportable como acusado.

4. I agree that I am not eligible, or if eligible, I waive by right to apply for relief from deportation. I am not seeking voluntary departure, asylum, adjustment of status, registry, de novo review of a termination of conditional resident status, de novo review of a denial or revocation of temporary protected status, cancellation of removal, or any other possible relief under the Immigration and Nationality Act.

Yo estoy de acuerdo que no soy elegible o si elegible, yo renuncio mi derecho para solicitar por remedio de deportacion. No estoy buscando a salido voluntaria, asilo, cambio de estado migratorio, registro, nueva revision de terminacion de estado de residente condicional, nueva revision de negacion or revocacion de estado de protegido temporal, cancelacion de removimiento, or alguno otro remedio posible bajo el acto de inmigracion y nacionalidad.

5. I consent to the introduction of this "Stipulated Request" as an exhibit to the record of proceedings.

Yo consiento a la introduccion de este "Demandado de Estipulado" como un exhibido al archivo de procedimientos.

6. I designate ETHIOPIA as my country of choice for removal.

designo como el pais de mi eleccion por removimiento.

Yo

7. I will accept a written order for my removal to the above country as a final disposition of these Removal proceedings, and I waive appeal of the written order for my Removal from the United States.

Yo aceptare una orden escrita por mi removimiento al pais arriba como una disposicion final de estos procedimientos de removimientos, y renuncio apelado de la orden escrita por mi removimiento de los estados unidos.

8. I understand that by accepting an order of removal, I give up my right to apply for any relief for which I might have been eligible. I understand that I (am/am not) a permanent resident immigrant and that accepting an order of Removal terminates my permanent resident status. I also understand that I cannot return to the United States legally for a period of five (5) years if found inadmissible under section 212; a period of ten (10) years if found deportable under section 237; a period of twenty (20) years after having been previously excluded, deported, or removed and found inadmissible under section 212, or deportable under section 237; or at any time because I have been found inadmissible or excludable under section 212, or deportable under section 237 of the Act, and have been convicted of a crime designated as an aggravated felony.


Yo comprendo que al aceptar una orden de removimiento, abandono mi derecho para solicitar por alguno remedio para es posible que yo he sido elegible. Yo comprendo que (soy/no soy) un residente permanente y que para aceptando una orden de removimiento, mi estado como un residente permanente va a terminar. Tambien, yo entiendo que no puedo regresar a los estados unidos legalmente por un periodo de cinco (5) anos si funda inadmissible bajo seccion 212; un periodo de diez (10) anos si deportable bajo seccion 237; un periodo de veinte (20) anos despues de habia sido excluido, deportado, o removado y funda inadmissible bajo seccion 212, or deportable bajo seccion 237; o en alguno tiempo porque yo he sido fundado inadmissible o excuible bajo seccion 212, o deportable bajo seccion 237 del acto, y he sido convictado del crimen designado una felonía agrezada.

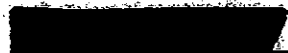
9. In the event that my Removal proceedings are scheduled for a hearing. I waive any right to notice of such a hearing. Additionally, I waive my right to be present in person and, I also waive the presence of my attorney.  
En caso de que mi procedimientos de removimientos esta programado por una audiencia. Yo renuncio alguno derecho para notificacion de la audiencia. Tambien, yo renuncio mi derecho para presentarme y presentar mi abogado.

10. I, or my attorney (if any), have read, (or have read to me in a language I understand), this entire "Stipulated Request". I fully understand its consequences. I can unequivocally state that I have submitted this "Stipulated Request" voluntarily, knowingly and intelligently.  
Yo o mi abogado (si tengo), he leído (o he habia leído a mi en una lengua lo que comprendo), este demando de estipulado entero. Yo entiendo todas de las consecuencias de estos. Yo puedo declarar inequivoco que he presentado este "Demando de Estipulado" voluntariamente, de modo instruido, y inteligente.

I certify that all the information I have given in the "Stipulated Request" is true and correct.  
Yo certifico que toda la informacion lo que he dado en el "Demando de Estipulado" es verdadera y correcta.

08/05/03  
(Date)  
(Fecha)

  
(Signature of Respondent)  
(Firma del Demandado)


  
(Printed name of Respondent)  
(Letra de molde de Demandado)


\_\_\_\_\_  
(Date)  
(Fecha)

\_\_\_\_\_  
(Signature of attorney, if any)  
(Firma del Abogado)

\_\_\_\_\_  
(Printed name of attorney, if any)  
(Letra de molde del Abogado)

8/14/2003  
(Date)  
(Fecha)

  
(Signature of District Counsel or Deputy District Counsel)  
(Firma del Consejero de Distrito o Asistente)

  
(Printed name of District Counsel or Deputy District Counsel)  
(Letra de molde del Consejero de Distrito o Asistente)



UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
CHICAGO, ILLINOIS

File #: [REDACTED]

In the Matter of: )  
[REDACTED] )  
Respondent ) IN REMOVAL PROCEEDINGS

Charge(s): Section 237(a)(1)(B)

Application: None

On Behalf of Respondent:

Pro Se

On Behalf of the Service:

[REDACTED]  
[REDACTED]  
Omaha, NE

DECISION OF THE IMMIGRATION JUDGE

On 08/05/03 the Immigration & Naturalization Service issued a Notice to Appear alleging that the respondent was deportable/inadmissible from the United States as charged above. The respondent has executed a stipulation waiving a personal hearing before the Immigration Judge, admitting the truthfulness of the factual allegations and charges contained in the Notice to Appear, conceding that he/she is deportable/inadmissible on the charge(s) set forth above, designating ETHIOPIA as the country of removal, conceding that he/she is ineligible for or has made no application for relief from removal, and requesting issuance by this Court of an order of removal to ETHIOPIA. The respondent has further stipulated that he/she would waive his right to appeal from this order. The Service has concurred in this stipulation.

These stipulations constitute a conclusive determination of the alien's removability from the United States. Based upon the foregoing, the following Order shall therefore be entered:

ORDER: IT IS HEREBY ORDERED that the respondent be removed from the United States to ETHIOPIA on the charge(s) contained in the Notice to Appear.

Entered: August 15, 2003

[REDACTED]  
Immigration Judge

00032

Appendix 6-G

## PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

OFFENSE	PARTICULARLY SERIOUS CRIME (PSC)?	STATUTE/CASE LAW/ NOTES
<b>IN GENERAL</b>		
Felony or misdemeanor which constitutes an aggravated felony under 8 U.S.C. § 1101 (a)(43)	<p>For asylum:</p> <p>Yes, regardless of sentence.</p> <hr/> <p>For withholding of removal under 8 U.S.C. §1251(b)(3):</p> <p>Yes, if sentenced to 5 or more years in prison.</p> <p>Yes, if conviction involves unlawful trafficking in controlled substances.</p> <p>Possibly, if sentenced to less than 5 years and conviction does not involve unlawful trafficking in a controlled substance.</p>	<p>For asylum purposes, an aggravated felony is deemed to be a PSC by statute. 8 U.S.C. 1158(b)(2)(B)(i).</p> <hr/> <p>Rebuttable presumption of particularly serious crime for drug trafficking in limited circumstances. <i>In re Y-L-, A-G-, R-S-R-</i>, 23 I&amp;N Dec. 270, 276-77 (A.G. Mar. 5, 2002)</p> <p>Requires a closer examination of the nature of the offense, the circumstances underlying the facts of the conviction, the sentence imposed, and whether the non-citizen is a danger to the U.S. community. <i>Matter of Frentescu</i>, 18 I&amp;N Dec. 244 (BIA 1982), <i>modified</i>, <i>Matter of C-</i>, 20 I&amp;N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i>, 19 I&amp;N Dec. 682 (BIA 1988). However there is a rebuttable presumption that a conviction for an aggravated felony is a particularly serious crime in deportation proceedings. <i>Matter of Q-T-M-T-</i>, 21 I&amp;N Dec. 639 (BIA 1996). In addition, the Board of Immigration Appeals has generally held that crimes of violence against the person constitute particularly serious crimes whereas crimes against the property do not.</p>
Misdemeanor (single) that is not an aggravated felony	Usually not.	Without unusual circumstances, a single conviction of a misdemeanor offense is not a PSC. <i>Matter of Juarez</i> , 19 I&N Dec. 664 (BIA 1988).
<p>Felony that is not an aggravated felony</p> <p>OR</p> <p>Misdemeanor (second or subsequent) that is not an aggravated felony</p>	Possibly.	Requires a closer examination of the nature of the offense, the circumstances underlying the facts of the conviction, the sentence imposed, and whether the non-citizen is a danger to the U.S. community. <i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982), <i>modified</i> , <i>Matter of C-</i> , 20 I&N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i> , 19 I&N Dec. 682 (BIA 1988); <i>Matter of L-S-</i> , 22 I&N Dec. 645 (BIA 1999); <i>In re S-S-</i> , Int. Dec. 3374 (BIA 1999) (following <i>Matter of Frentescu</i> , <i>supra</i> ).

**PARTICULARLY SERIOUS CRIME BARS TO  
WITHHOLDING OF REMOVAL**

<b>TRAFFIC OFFENSES</b>		
Driving Under the Influence (DUI) with a Suspended/Revoked License <i>625 ILCS 5/11-501</i> <i>IC 9-24-19-X</i> <i>Wis. Stat. 346.63</i>	Probably not.	
Aggravated Driving Under the Influence (DUI) <i>625 ILCS 5/11-501(d)(1)(A)</i>	Probably not.	Possibly where conviction involved injury to person or property or where multiple convictions as non-citizen may be seen as a danger to the community.
<b>SEX CRIMES</b>		
Indecent Solicitation of a Child <i>720 ILCS 5/11-6</i> Child Solicitation <i>IC 35-42-4-6</i> Child Enticement <i>Wis. Stat. 948.07</i>	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A).  Probably for withholding of removal.	
Sexual Exploitation of a Child <i>720 ILCS 5/11-9.1(a)(1) or (2)</i> Child Exploitation <i>IC 35-42-4-4</i> Sexual Exploitation of a Child <i>Wis. Stat. 948.05</i>	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A).  Probably for withholding of removal.	
Unlawful Sexual Intercourse with a minor <i>720 ILCS 5/12-15, 16</i> <i>IC 35-42-4-9</i> <i>Wis. Stat. 948.02</i>	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A).  Probably for withholding of removal.	<i>Bogle-Martinez v. INS</i> , 52 F.3d 332 (9 <sup>th</sup> Cir. 1995).  May be able to argue it is not a particularly serious crime for withholding if non-citizen is now married to the person who was a minor at the time.
Soliciting a Juvenile Prostitute <i>720 ILCS 5/11-15(a)(1), (a)(2), (a)(3)</i> Soliciting a Child for Prostitution <i>Wis. Stat. 948.08</i>	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A).  Probably for withholding of removal.	
Prostitution <i>720 ILCS 5/11-14</i> <i>IC 35-45-4-2</i> <i>Wis. Stat. 944.30</i>	Probably not.	
Soliciting for a Prostitute <i>720 ILCS 5/11-15(a)(1), (a)(2), and (a)(3)</i>	IL: No under (a)(1). Possibly under (a)(2), and yes where a minor is involved under (a)(3).	

**PARTICULARLY SERIOUS CRIME BARS TO  
WITHHOLDING OF REMOVAL**

<i>Wis. Stat. 944.32</i>		
Patronizing a Prostitute <i>720 ILCS 5/11-18</i> <i>IC 35-45-4-3</i> <i>Wis. Stat. 944.31</i>	Probably not.	
<b>CRIMES AGAINST THE PERSON</b>		
First Degree Murder <i>720 ILCS 5/9-1(a)(1)-(3)</i> Murder <i>IC 35-42-1-1</i> First Degree Intentional Homicide <i>Wis. Stat. 940.01</i>	Yes.	<i>Ahmetovic v. INS</i> , 62 F.3d 38 (2 <sup>nd</sup> Cir. 1995).
Shooting with Intent to Kill	Yes.	<i>Nguyen v. INS</i> , 991 F.2d 621 (10 <sup>th</sup> Cir. 1993).
Second Degree Murder <i>720 ILCS 5/9-2(a)</i> <i>IC 35-42-1-?</i> Second Degree Intentional Homicide <i>Wis. Stat. 940.05</i>	Yes.	<i>Matter of Jean</i> , 23 I&N Dec. 373 (AG 2002).
Reckless Homicide <i>720 ILCS 5/9-3(a)</i> <i>IC 35-42-1-5</i> First Degree Reckless Homicide <i>Wis. Stat. 940.02</i>	Yes.	
Involuntary Manslaughter <i>720 ILCS 5/9-3(a)</i> <i>IC 35-42-1-4</i>	Probably.	<i>Franklin v. INS</i> , 72 F.3d 571 (8 <sup>th</sup> Cir. 1996).
Assault <i>720 ILCS 5/12-1</i> Criminal Recklessness <i>IC 35-42-2-2</i>	No.	<i>Matter of Juarez</i> , 19 I&N Dec. 664 (BIA 1988).
Aggravated Assault <i>720 ILCS 5/12-2</i>	Possibly.	<i>Hamana v. INS</i> , 78 F.3d 233 (6 <sup>th</sup> Cir. 1996); <i>Yousefi v. INS</i> , 260 F.3d 318 (4 <sup>th</sup> Cir. 2001); <i>Matter of Juarez</i> , 19 I&N Dec. 664 (BIA 1988).
Battery <i>720 ILCS 5/12-3</i> <i>IC 35-42-2-1</i> <i>Wis. Stat. 940.19</i>	No unless record of conviction indicates sexual abuse of a minor.	
Aggravated Battery <i>720 ILCS 5/12-4</i> <i>IC 35-42-2-1.5</i>	Probably.	<i>Matter of B-</i> , 20 I&N Dec. 427 (BIA 1991).
Domestic Battery <i>720 ILCS 5/12-3.2</i> <i>IC35-42-2-1.3</i> <i>Wis. Stat. 940.19</i>	Possibly.	

**PARTICULARLY SERIOUS CRIME BARS TO  
WITHHOLDING OF REMOVAL**

Aggravated Domestic Battery 720 ILCS 5/12-3.3	Probably.	
Aggravated Battery of a Child 720 ILCS 5/12-4.3	Probably.	
Criminal Sexual Assault 720 ILCS 5/12-13 Rape IC 35-42-4-1 Sexual Assault Wis. Stat. 940.225	Probably.	<i>Smith v. USDOJ</i> , 218 F. Supp. 2d 357 (W.D.N.Y. 2002); <i>Gatalski v. INS</i> , 72 F.3d 135 (9 <sup>th</sup> Cir. 1995)[attempted rape].
Criminal Sexual Abuse of an Adult 720 ILCS 5/12-15 Sexual battery of an Adult IC 35-42-4-8	Probably.	
Stalking 720 ILCS 5/12-7.3 IC 35-45-10-1 Wis. Stat. 940.32	Possibly.	
Child Abandonment 720 ILCS 5/12-21.5 IC 35-46-1-4 Wis. Stat. 948.20	Possibly.	
Violation of Order of Protection 720 ILCS 5/12-30 Invasion of Privacy IC 35-46-1-15.1 Violation of Court Orders Wis. Stat. 940.48	Possibly.	

**CRIMES AGAINST PROPERTY**

Home Invasion 720 ILCS 5/11 Residential Entry IC 35-43-2-1.5 Criminal Trespass to Dwellings Wis. Stat. 943.14	Probably.	<i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982).
Theft 720 ILCS 15/16-1 IC 35-43-4-2 Theft; Receiving Stolen Property Wis. Stat. 943.20	Possibly.	
Robbery 720 ILCS 5/18-1 IC 35-42-5-1 Wis. Stat. 943.32	Probably.	<i>Matter of Carballe</i> , 19 I&N Dec. 357 (BIA 1986); <i>Cepero v. BIA</i> , 882 F.Supp. 1575, 1580 (D.Kan. 1995); <i>Matter of L-S-J</i> , 21 I&N Dec. 973 (BIA 1997); <i>Matter of S-V</i> , 22 I&N Dec. 1306 (BIA 200).

**PARTICULARLY SERIOUS CRIME BARS TO  
WITHHOLDING OF REMOVAL**

Armed Robbery 720 ILCS 5/18-2 IC 35-42-5-1 Wis. Stat. 943.32	Probably.	<i>Matter of S-S-</i> , 22 I&N Dec. 458 (BIA 1999), <i>overruled in part, Matter of Y-L</i> , 23 I&N Dec. 270 (A.G. 2002); <i>Matter of L-S-J</i> , 21 I&N Dec. 973 (BIA 1999); <i>Matter of Toboso-Alfonso</i> , 20 I. & N. Dec. 819 (BIA 1990)
Retail Theft 720 ILCS 5/16A-3 IC 35-43-4-2 (theft) Wis. Stat. 943.50	Possibly.	
Burglary 720 ILCS 5/19-1 IC 35-43-2-1 Wis. Stat. 943.10	Possibly.	<i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982); <i>Matter of Garcia-Garrocho</i> , 19 I&N Dec. 423 (BIA 1986)[burglary of a dwelling which included aggravated circumstances]; <i>Matter of Gonzalez</i> , 19 I&N Dec. 683 (BIA 1988); <i>Matter of Toboso-Alfonso</i> , 20 I&N Dec. 819 (A.G. 1994)
Arson 720 ILCS 5/20-1.1 IC 35-43-1-1 Wis. Stat. 943.02-.04	Probably.	
Acts taken against property based on race, religion, nationality, and membership in a particular social group Wis. Stat. 943.012	Yes.	
<b>CRIMES INVOLVING CONTROLLED SUBSTANCES</b>		
Possession of Cannabis 720 ILCS 550/4 IC 35-48-4-11 Wis. Stat. 961.41(3g)	No, for small amounts. Possibly for larger amounts, particularly if the original charge involved trafficking or an intent to traffic marijuana.	
Possession of Controlled Substance Wis. Stat. 961.41(3g) 720 ILCS 570/402(c) IC 35-48-4-6	No, for small amounts. Possibly for larger amounts, particularly if the original charge involved trafficking or an intent to traffic marijuana.	<i>Matter of Toboso-Alfonso</i> , 20 I&N Dec. 819 (A.G. 1994)
Manufacture/Delivery of Cannabis (drug trafficking) 720 ILCS 550/5 Dealing in Marijuana 35-48-4-10 Manufacture, Distribution or Delivery Wis. Stat. 961.41(1)	Yes.	<i>Matter of Y-L, A-G, R-S-R</i> , 23 I&N Dec. 270 (A.G. 2002); <i>Chong v. Dist. Dir.</i> , 264 F.3d 378 (3 <sup>rd</sup> Cir. 2001); <i>Al-Salehi v. I.N.S.</i> , 47 F.3d 390 (10 <sup>th</sup> Cir. Feb. 8, 1995); <i>Mosquera-Perez v. INS</i> , 3 F.3d 553 (1 <sup>st</sup> Cir. 1993); <i>Matter of U-M-</i> , 20 I&N Dec.327 (BIA 1991); <i>In re K-</i> , 20 I&N Dec. 418 (BIA Nov. 5, 1991); <i>Beltran-Zavala v. INS</i> , 912 F.2d 1027 (9 <sup>th</sup> Cir. 1990); <i>Arauz v. Rivkind</i> , 845 F.2d 271 (11 <sup>th</sup> Cir. 1988); <i>Matter of Gonzalez</i> , 19 I&N 682 (BIA 1988); <i>Crespo-Gomez v. Richard</i> , 780 F.2d 932 (11 <sup>th</sup> Cir. 1986).
First Offender Probation for Cannabis, Simple Possession 720 ILCS 550/10 IC 35-48-4-12 Wis. Stat. 961.47	No	<i>Matter of Toboso-Alfonso</i> , 20 I&N Dec. 819 (AG 1994).

**PARTICULARLY SERIOUS CRIME BARS TO  
WITHHOLDING OF REMOVAL**

First Offender Probation for Controlled Substances, 720 ILCS 570/410 Wis. Stat. 961.47	No	<i>Matter of Toboso-Alfonso</i> , 20 I&N Dec. 819 (AG 1994).
<b>MISCELLANEOUS</b>		
Alien Smuggling 8 U.S.C. 1324(a)(1)(A)(i)	Yes for asylum as an aggravated felony.  Possibly for withholding of removal.	<i>Matter of L-S-</i> , 22 I&N Dec. 645 (BIA 1999).
Unlawful Use of Possession of Weapons by Felons 720 ILCS 5/24-1.1 IC 35-47-4-5 Wis. Stat. 941.29	Possibly.	<i>Hamama v. INS</i> , 78 F.3d 233 (6 <sup>th</sup> Cir. 1996).
Firearm Trafficking	Yes.	<i>Matter of Q-T-M-T-</i> , 21 I&N Dec. 639 (BIA 1996).

## Good Moral Character

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### I.N.A. § 101(f), 8 U.S.C. § 1101(f) <sup>1</sup>

For the purposes of this Act— No person shall be regarded as, or found to be a person of good moral character who, during the period for which good moral character is required to be established, is, or was

- (1) a habitual drunkard;
- (2) [Removed] [referred to adulterers]
- (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D) [prostitution and commercialized vice], (6)(E) [smuggling aliens], and (9)(A) [certain aliens previously removed] of section 212(a) of this Act; or subparagraphs (A) [crimes involving moral turpitude or controlled substances] and (B) [multiple criminal convictions] of section 212(a)(2) and subparagraph (C ) [controlled substance traffickers] thereof such section (except as such paragraph relates to a single offense of simple possession of thirty grams or less of marijuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
- (4) one whose income is derived principally from illegal gambling activities;
- (5) one who has been convicted of two or more gambling offenses committed during such period;
- (6) one who has given false testimony for the purpose of obtaining any benefits under this Act;
- (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
- (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be based on it.<sup>2</sup>

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<sup>1</sup> [Emphasis in bold and information in brackets added by the author.]

<sup>2</sup> As amended by sections 201(a)(1)-(2) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000): "Effective date—The amendment made by paragraph (1) shall be effective as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009-546) and shall apply to individuals having an application for a benefit under the Immigration and Nationality Act pending on or after September 30, 1996."



## Cancellation of Removal for Certain Permanent Residents

### **I.N.A. § 240A, 8 U.S.C. § 1229b<sup>3</sup>**

#### **(a) Cancellation of Removal for Certain Permanent Residents**

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

. . . .

#### **(c) Aliens Ineligible for Relief**

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) – (5) [Ineligible aliens include crewmen; exchange students, particularly medical exchange students; threats to national security under 212(a)(2) or 237(a)(4); and those barred from withholding of removal on account of their past persecution of others.]

(6) An alien whose removal has been previously cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

#### **(d) Special Rules Relating to Continuous Residence or Physical Presence**

##### **(1) Termination of Continuous Period**

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a) that renders the alien inadmissible to the United States under section 212(a)(2) [convictions of certain crimes] or removable from the United States under section 237(a)(2) [criminal offenses] or 237(a)(4) [security and related grounds], whichever is earliest.

##### **(2) Treatment of Certain Breaks in Presence**

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity Not Required Because of Honorable Service in Armed Forces ...

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<sup>3</sup> [Emphasis in bold added by the author.]

## **Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents**

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### **I.N.A. § 240A, 8 U.S.C. § 1229b<sup>4</sup>**

#### **(b) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents**

##### **(1) In General**

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2) [conviction of certain crimes], 237(a)(2) [criminal offenses], or 237(a)(3) [security and related grounds]; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

##### **(2) Special Rule for Battered Spouse or Child<sup>5</sup>**

(A) The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a

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<sup>4</sup> [Emphasis in bold added by the author.]

<sup>5</sup> As amended by section 1504 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-406, 114 Stat. 1464 (Nov. 1, 2000). "Effective Date—Any individual who becomes eligible for relief by reason of the enactment of the amendments made by subsections (a) and (b), shall be eligible to file a motion to reopen pursuant to section 240(c)(6)(C)(iv). The amendments made by subsections (a) and (b) shall take effect as if included in the enactment of section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009). Such portions of the amendments made by subsection (b) that relate to section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) shall take effect as if included in subtitle G of title IV of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322, 108 Stat. 1953 et. seq.)."

continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of paragraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraph (1)(G) or (2) through (4) of section 237(a) (except in a case described in section 237(a)(7) where the Attorney General exercises discretion to grant a waiver), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

**(B) Physical Presence**—Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(i)(II) or for purposes of section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in section 240A(b)(2)(B) and section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

**(C) Good Moral Character**—Notwithstanding section 101(f), an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(I)(III) or section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

**(D) Credible Evidence Considered**—In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General. . . .

**(c) Aliens Ineligible for Relief**

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) – (5) [Ineligible aliens include crewmen; exchange students, particularly medical exchange students; threats to national security under 212(a)(2) or 237(a)(4); and those barred from withholding of removal on account of their past persecution of others.]

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

**(d) Special Rules Relating to Continuous Residence or Physical Presence**

**(1) Termination of Continuous Period**

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

**(2) Treatment of Certain Breaks in Presence**

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity Not Required Because of Honorable Service in Armed Forces. . . .

**(e) Annual Limitation**

The Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment and whether such an alien had previously applied for suspension of deportation under such section 244(a).

## Authority to Apply for Asylum

### **I.N.A. § 208, 8 U.S.C. § 1158<sup>6</sup>**

#### **(a) Authority To Apply for Asylum**

##### **(1) In general**

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 235(b).

##### **(2) Exceptions**

**(A)** [An immigrant who could go to safe third country may not apply]

**(B)** Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

**(C)** [An immigrant who has previously applied for asylum may not apply again]

**(D)** Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

##### **(3) Limitation on judicial review . . . .**

#### **(b) Conditions for Granting Asylum**

##### **(1) In general**

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

##### **(2) Exceptions**

##### **(A) In general**

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

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<sup>6</sup> [Emphasis in bold added by the author.]

(v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activities), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

**(B) Special rules**

**(i) Conviction of aggravated felony**

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

**(ii) Offenses**

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

**(C) Additional limitations**

The Attorney General may by regulations establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

**(D) No judicial review . . . .**

**(3) Treatment of spouse and children . . . .**

**(c) Asylum Status**

**(1) In general**

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

**(2) Termination of asylum**

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances [in the country of nationality or last habitual residence from which the alien fled persecution];

**(B) the alien meets a condition described in subsection (b)(2);**

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and

obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

**(3) Removal when asylum is terminated**

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 212(a) and 237(a), and the alien's removal or return shall be directed by the Attorney General in accordance with sections 240 and 241.

## **Termination of Asylum for Asylees and Refugees**

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**I.N.A. § 209(c), 8 U.S.C. § 1159(c)<sup>7</sup>**

### **Applicability of Other Federal Statutory Requirements**

The provisions of paragraphs (4) [public charge], (5) [labor certification], and (7)(A) [documentation requirements] of section 212(a) shall not be applicable to any alien seeking adjustment of status under this section, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) [controlled substance traffickers] or subparagraph (A), (B), (C), or (E) of paragraph (3) [security and related grounds]) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

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<sup>7</sup> [Emphasis in bold and information in brackets added by the author.]

## Restriction on Removal to a Country Where Alien's Life or Freedom Would be Threatened

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### I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3)<sup>8</sup>

#### (A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

#### (B) Exception

Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that—

(i) the alien ordered, incited, assisted or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an *aggregate* term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) [terrorist activity] shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

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<sup>8</sup> [Emphasis in bold and italics added by the author.]



## Waiver<sup>9</sup> under I.N.A. § 212(c), 8 U.S.C. § 1184(c)<sup>10</sup>

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### Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii) [aggravated felony], (B) [controlled substances], (C) [firearm offenses], (D) [miscellaneous crimes, i.e. espionage, treason], or any offense covered by section 241(a)(2)(A)(ii) [two or more convictions for crimes involving moral turpitude] for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) [crime involving moral turpitude].<sup>11</sup>

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<sup>9</sup> Information added in brackets by the author.

<sup>10</sup> In cases initiated prior to the AEDPA amendments on April 24, 1996, the AEDPA amendments do not apply to I.N.A. § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1951(a)(2)(A)(i)(II) according to AEDPA section 435(a) and the following statutory language applies:

(i) Crimes of moral turpitude.

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within 5 years after the date of entry, *and*

(II) either is *sentenced* to confinement or is *confined* therefor in a prison or correctional institution for one year or longer, is deportable.

I.N.A. § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1951(a)(2)(A)(i)(II) (1995) [emphasis added]

In cases initiated on or after April 24, 1996 and prior to April 1, 1997, the AEDPA amendments do apply to I.N.A. § 241(a)(2)(A)(i), 8 U.S.C. § 1241(a)(2)(A)(i) and the following statutory language is in effect:

(i) Crimes of moral turpitude.

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within 5 years or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) [snitch visa adjustment] of this title after the date of entry, *and*

(II) is convicted of a crime for which a *sentence of one year or longer may be imposed*, is deportable. [emphasis added]

I.N.A. § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1951(a)(2)(A)(i)(II) as amended by AEDPA.

<sup>11</sup> I.N.A. § 212(c), 8 U.S.C. § 1182(c) prior to AEDPA and IIRAIRA amendments:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, *may* be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). *The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.*

I.N.A. § 212(c), 8 U.S.C. § 1182(c) (1995) [emphasis added].

## Waivers for Certain Criminal Offenses under I.N.A. § 212(h)

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### I.N.A. § 212(h), 8 U.S.C. § 1182(h)<sup>12</sup>

Waiver of Subsection (a)(2)(A)(i)(I), (II), (B), (D) and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) [crime involving moral turpitude], (B) [multiple criminal convictions with aggregate sentences to confinement imposed for 5 years or more], (D) [prostitution and commercialized vice], and (E) [certain aliens involved in serious criminal activity who have asserted immunity from prosecution] of subsection (a)(2) and subparagraph (A)(i)(II) [violation of controlled substance laws] of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1) (A) [Relates to prostitution offenses which occurred more than 15 years in the past, where rehabilitation is shown.]

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B); and<sup>13</sup>

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

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<sup>12</sup> [Emphasis in bold and information in brackets added by the author.]

<sup>13</sup> As amended by section 1505(e) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-406, 114 Stat. 1464 (Nov. 1, 2000).

## Waivers for Fraud and Misrepresentations under I.N.A. § 212(i)

### **I.N.A. § 212(i), 8 U.S.C. § 1182(i)**

#### **Admission of Immigrant Inadmissible for Fraud or Willful Misrepresentation of Material Fact**

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

## Temporary Protected Status

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### I.N.A. § 244, 8 U.S.C. § 1254a

#### (a) Granting of status

##### (1) In general

In the case of an alien who is a national of a foreign state designated under subsection (b) of this section (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c) of this section, the Attorney General, in accordance with this section—

- (A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect, and
- (B) shall authorize the alien to engage in employment in the United States and provide the alien with an “employment authorized” endorsement or other appropriate work permit.

##### (2) Duration of work authorization

Work authorization provided under this section shall be effective throughout the period the alien is in temporary protected status under this section.

##### (3) Notice

- (A) Upon the granting of temporary protected status under this section, the Attorney General shall provide the alien with information concerning such status under this section.
- (B) If, at the time of initiation of a removal proceeding against an alien, the foreign state (of which the alien is a national) is designated under subsection (b) of this section, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.
- (C) If, at the time of designation of a foreign state under subsection (b) of this section, an alien (who is a national of such state) is in a removal proceeding under this subchapter, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.
- (D) Notices under this paragraph shall be provided in a form and language that the alien can understand.

##### (4) Temporary treatment for eligible aliens...

##### (5) Clarification

Nothing in this section shall be construed as authorizing the Attorney General to deny

temporary protected status to an alien based on the alien’s immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of other rights under this chapter. The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this chapter.

#### (b) Designations

##### (1) In general

The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if—

- (A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;
- (B) the Attorney General finds that—
  - (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
  - (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
  - (iii) the foreign state officially has requested designation under this subparagraph; or
- (C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are (or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.

- (2) Effective period of designation for foreign states...
- (3) Periodic review, terminations, and extensions of designations...
- (4) Information concerning protected status at time of designations...
- (5) Review...

(c) Aliens eligible for temporary protected status

(1) In general

(A) Nationals of designated foreign states

Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(1) of this section (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state), meets the requirements of this paragraph only if—

- (i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state;
- (ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;
- (iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B); and
- (iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

- (B) Registration fee...
- (2) Eligibility standards
  - (A) Waiver of certain grounds for inadmissibility
    - In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1)—
      - (i) the provisions of paragraphs (5) and (7)(A) of section 1182(a) of this title shall not apply;
      - (ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but
      - (iii) the Attorney General may not waive—
        - (I) paragraphs (2)(A) and (2)(B) (relating to criminals ) of such section,
        - (II) paragraph (2)(C) of such section (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana, or
        - (III) paragraphs (3)(A), (3)(B), (3)(C), and (3)(E) of such section (relating to the national security and participation in the Nazi persecutions or those who have engaged in genocide).
  - (B) Aliens ineligible
    - An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that—
      - (i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or
      - (ii) the alien is described in section 1158(b)(2)(A) of this title.
- (3) Withdrawal of temporary protected status...
- (4) Treatment of brief, casual, and innocent departures and certain other absences...
- (5) Construction...
- (6) Confidentiality information...
- (d) Documentation...
- (e) Relation of period of temporary protected status to cancellation of removal...
- (f) Benefits and status during period of temporary protected status...
- (g) Exclusive remedy...
- (h) Limitation on consideration in Senate of legislation adjusting status...
- (i) Annual report and review...

## T Visa

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### I.N.A. § 101(15)(T), 8 U.S.C. § 1101(15)(T)

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security and the Attorney General jointly;[sic] determines—

- (I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22,
- (II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,
- (III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime; or
  - (bb) has not attained 18 years of age, and
- (IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal;
  - (ii) if accompanying, or following to join, the alien described in clause (i)—
    - (I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or
    - (II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and
  - (iii) if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.

### I.N.A. § 214(o), 8 U.S.C. § 1184(o) Requirements

- (o) Trafficking in persons; conditions of nonimmigrant status
  - (1) No alien shall be eligible for admission to the United States under section 1101(a)(15)(T) of this title if there is substantial reason to believe that the alien has committed an act of a severed form of trafficking in persons (as defined in section 7102 of Title 22).
  - (2) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 1101(a)(15)(T) of this title may not exceed 5,000.
  - (3) The numerical limitation of paragraph (2) shall only apply to principal aliens and not to the spouses, sons, daughters, siblings, or parents of such aliens.
  - (4) An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 1101(a)(15)(T)(i) of this title, and who was under 21 years of age on the date on which such parent applied for such status, shall continue to be

classified as a child for purposes of section 1101(a)(15)(T)(ii) of this title, if the alien attains 21 years of age after such parent's application was filed but while it was pending.

- (5) An alien described in clause (i) of section 1101(a)(15)(T) of this title shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's application for status under such clause (i) is filed but while it is pending.
- (6) In making a determination under section 1101(a)(15)(T)(i)(III)(aa) of this title with respect to an alien, statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons (as defined in section 7102 of Title 22) appear to have been involved, shall be considered.
- (7)(A) Except as provided in subparagraph (B), an alien who is issued a visa or otherwise provided non-immigrant status under section 1101(a)(15)(T) of this title may be granted such status for a period of not more than 4 years.
- (B) An alien who is issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(T) of this title may extend the period of such status beyond the period described in subparagraph (A) if a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking or certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity.



## U visa

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### I.N.A. § 101(15)(U), 8 U.S.C. § 1101(15)(U)

- (U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that—
- (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause(iii);
  - (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);
  - (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and
  - (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;
- (ii) if accompanying, or following to join, the alien described in clause (i)—
- (I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or
  - (II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and
- (iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

### I.N.A. § 214(p), 8 U.S.C. § 1184(p) Requirements

#### (p) Requirements applicable to section 1101(a)(15)(U) visas

##### (1) Petitioning procedures for section 1101(a)(15)(U)

The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title. This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii)

of this title.

(2) Numerical limitations

(A) The number of aliens who may be issued visas or otherwise provided status as nonimmigrants under section 1101(a)(15)(U) of this title in any fiscal year shall not exceed 10,000.

(B) The numerical limitations in subparagraph (A) shall only apply to principal aliens described in section 1101(a)(15)(U)(i) of this title, and not to spouses, children, or, in the case of alien children, the alien parents of such children.

(3) Duties of the Attorney General with respect to "U" visa nonimmigrants

With respect to nonimmigrant aliens described in subsection (a)(15)(U)[sic]—

(A) the Attorney General and other government officials, where appropriate, shall provide those aliens with referrals to nongovernmental organizations to advise the aliens regarding their options while in the United States and the resources available to them; and

(B) the Attorney General shall, during the period those aliens are in lawful temporary resident status under that subsection, provide the aliens with employment authorization.

(4) Credible evidence considered...

(5) Nonexclusive relief

Nothing in this subsection limits the ability of aliens who qualify for status under section 1101(a)(15)(U) of this title to seek any other immigration benefit or status for which the alien may be eligible.

(6) Duration of status

The authorized period of status of an alien as a nonimmigrant under section 1101(a)(15)(U) of this title shall be for a period of not more than 4 years, but shall be extended upon certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating or prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title that the alien's presence in the United States is required to assist in the investigation or prosecution of such criminal activity.

**CHAPTER**

**7**

**Enforcement and Detention**

**by Immigration and Customs Enforcement**

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**Expansion of Immigration Enforcement Programs**

Since the creation of the Department of Homeland Security in 2003, increased funding for immigration enforcement has continued, demonstrating that the prior and current administrations' dedication to increasing border security and interior enforcement of immigration laws. More than 30,000 non-citizens are in custody under DHS authority in 260 facilities across the country, with a budget to detain 33,400 on any given day; this constitutes, more than three times the number detained in 1996, prior to the enactment of IIRAIRA.<sup>1054</sup> This constitutes more than three times the number of detainees in 1996. As a result of the increased funding over the past several years, ICE and CBP have been expanding current programs to apprehend non-citizens present in the U.S. in violation of immigration law. Evidence of this focus on enforcement is present in prisons, in the workplace, and in communities across the United States.

ICE's Criminal Alien Program ("CAP") is structured to ensure that non-citizens serving time for criminal convictions in local, state, and federal facilities are not released into the community by completing removal proceedings while they are incarcerated.<sup>1055</sup> In Fiscal Year 2008, ICE issued 221,085 charging documents to non-citizens in such facilities.<sup>1056</sup> Through its Detention Enforcement and Processing Offenders Through

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<sup>1054</sup> See M. Roberts, "Immigrants face lengthy detention with few rights," *The Associated Press*, Mar. 10, 2009 (citing information received from a Freedom of Information Act request evidencing 32,000 detainees in DHS custody on January 25, 2009 and an additional 2,700 per day on electronic monitoring programs); Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 6, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>.

<sup>1055</sup> See "Fact Sheet: Criminal Alien Program," ICE, Nov. 19, 2008, available at [www.ice.gov/doclib/pi/news/factsheets/criminal\\_alien\\_program.pdf](http://www.ice.gov/doclib/pi/news/factsheets/criminal_alien_program.pdf).

<sup>1056</sup> See *id.*

Remote Technology (“DEPORT”) Center located in Chicago, ICE interviews inmates at the 114 federal Bureau of Prisons (“BOP”) facilities.<sup>1057</sup> In Fiscal Year 2008, DEPORT officers issued 5,933 charging documents to non-citizens in the BOP facilities.<sup>1058</sup>

The increase in funding for the Criminal Alien Program has not stretched far enough to place ICE agents in all local and state jails. Therefore, ICE has sought the assistance of local law enforcement under section 287(g) of Immigration and Nationality Act.<sup>1059</sup> The U.S. General Accounting Office recently released a report critical of §287(g) agreements and programs between ICE and local law enforcement and found a lack of ICE oversight of the local law enforcement officers.<sup>1060</sup>

ICE has also begun its “Secure Communities” program with local law enforcement agencies. As part of the program, ICE distributes technology that links local law enforcement agencies with the FBI and DHS biometrics systems.<sup>1061</sup>

Local law enforcement agencies, state agencies involved with the issuance of driver’s licenses, and ICE are also in partnership by sharing information.<sup>1062</sup> Begun in 2003 with eight team, ICE’s Fugitive Operation’s Program uses information provided by local agencies to track down and arrest non-citizen fugitives, including those who do not have criminal convictions but who are subject to a final order of removal or deportation.<sup>1063</sup> In Fiscal Year 2008, the teams arrested 34,155 fugitives.<sup>1064</sup>

Although the program targets non-citizen terrorism suspects and convicted criminals, more than half of the non-citizens apprehended are those who previously applied for immigration relief, had their applications denied, and remained in the U.S. without legal authorization.<sup>1065</sup> ICE has made a special effort to remove these non-citizens as laid out in the strategic plan for detention and removal entitled Endgame. This plan strives for a 100 percent removal rate of all non-citizens who have been ordered removed by 2012.<sup>1066</sup>

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<sup>1057</sup> See *id.*

<sup>1058</sup> See *id.*

<sup>1059</sup> See “Section 287(g) of the Immigration and Nationality Act,” *Immigration and Customs Enforcement*, [www.ice.gov](http://www.ice.gov).

<sup>1060</sup> See U.S. General Accounting Office, “Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws,” Jan. 30, 2009, available at <http://www.gao.gov/products/GAO-09-109>.

<sup>1061</sup> See ICE, “New ICE Program Enhances Identifying and Removing Criminal Aliens in Fairfax County,” Mar. 9, 2009, available at <http://www.ice.gov/pi/nr/0903/090309fairfax.htm>.

<sup>1062</sup> See “Teams track fugitive immigrants for deportation,” *National Public Radio*, [www.npr.org](http://www.npr.org), Sept. 3, 2006.

<sup>1063</sup> See Ruth Morris, “U.S. Adding Fugitive Squads That Target Immigrants Who Ignore Expulsion Orders,” *South Florida Sun-Sentinel*, Feb. 26, 2007.

<sup>1064</sup> ICE Annual Report Fiscal Year 2008, p. 3, available at [http://www.ice.gov/pi/reports/annual\\_report/2008/ar\\_2008\\_page3.htm](http://www.ice.gov/pi/reports/annual_report/2008/ar_2008_page3.htm).

<sup>1065</sup> See *id.*

<sup>1066</sup> See *Endgame: Office and Detention and Removal Strategic Plan, 2003-2012: Detention and Removal Strategy for a Secure Homeland*, Department of Homeland Security, Bureau of Immigration and Customs Enforcement, Jun. 27, 2003; *An Assessment of the United States Immigration and Customs Enforcement’s Fugitive Operations Teams*, Department of Homeland Security, Office of Inspector General, Mar. 2007, pp. 5, 17.

As an amendment to the January 2006 renewal and update of the Violence Against Women Act (VAWA), Congress authorized forensic DNA sampling for most persons arrested or detained by federal authorities, including ICE.<sup>1067</sup> Only two categories of non-citizens will be exempt: 1) legal non-citizens who are stopped briefly by authorities; and 2) lawful permanent residents who are detained on non-criminal immigration violations.<sup>1068</sup> After the FBI analyzes the DNA, it will become a computer-readable profile that is loaded into the National DNA Index System database.<sup>1069</sup>

## Custody Determinations: Bond, Parole, or Mandatory Detention?

As of October 9, 1998, ICE must detain many categories of non-citizens without bond, regardless of whether they are a flight risk or pose a danger to the local community. Where a non-citizen has been sentenced to serve time for a state offense, the state authorities are not obligated to release him from prison to the DHS for execution of a removal order prior to the completion of his sentence.<sup>1070</sup>

<b>Who is Subject to Mandatory Detention?</b>	
1.	Any non-citizen who has been arrested and convicted for: <sup>1071</sup> <ul style="list-style-type: none"><li>▪ A crime involving moral turpitude for which he has been sentenced to a term of imprisonment of one year or more;</li><li>▪ Two or more crimes involving moral turpitude, regardless of the length of the sentence, if any.</li><li>▪ An aggravated felony;</li><li>▪ A firearms offense;</li><li>▪ Possession of a controlled substance other than simple possession of thirty grams or less of marijuana</li><li>▪ Possession of drug paraphernalia; or</li><li>▪ Sale of a controlled substance</li></ul>
AND	
2.	Released from local, state, or federal custody on or after October 9, 1998, regardless of the reason for the release.

<sup>1067</sup> See Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

<sup>1068</sup> See Julia Preston, "U.S. Set to Begin a Vast Expansion of DNA Sampling," *New York Times*, [www.nytimes.com](http://www.nytimes.com), Feb. 5, 2007.

<sup>1069</sup> See *id.*

<sup>1070</sup> See *Elias-Nieves v. Wallace*, 2006 U.S. Dist. LEXIS 42670 (E.D.WI Jun. 23, 2006) (citing *Duamutef v. INS*, 386 F.3d 172, 182 (2<sup>nd</sup> Cir. Sept. 23, 2004)). If a bond is posted for release from state custody and the non-citizen is transferred to DHS custody instead, it may be difficult to obtain a refund of the bond money posted. See K. Rivas, "Program Hard on Hispanics Wallets," *The Times News*, [www.thetimesnews.com](http://www.thetimesnews.com), May 6, 2007.

<sup>1071</sup> See I.N.A. § 236(c), 8 U.S.C. § 1226(c); *In re Saysana*, 24 I&N Dec. 602 (BIA Aug. 27, 2008); *In re Kotliar*, 24 I&N Dec. 124 (BIA Mar. 21, 2007).

Where a non-citizen has been convicted of one of the above qualifying crimes, his date of release from criminal custody controls whether he will be subject to mandatory detention by the ICE. Mandatory detention means that he will not be eligible for release from DHS custody under bond or on his own recognizance until the removal proceedings have been finally completed, either resulting in a grant of relief from removal or a final removal order.<sup>1072</sup>

**NOTE:** It is critical to investigate a non-citizen client's past history, including any cases involving supervision, a stay of adjudication of guilt or deferred adjudication. A non-citizen who has been convicted for one misdemeanor crime involving moral turpitude and pleads guilty to a second misdemeanor crime involving moral turpitude may find himself subject to mandatory detention by ICE.

For non-citizens detained in Indiana, Illinois, and Wisconsin, the Immigration Court in Chicago conducts custody redetermination hearings (known as bond hearings) to consider whether non-citizens who were released from federal, state, county, or local police custody prior to October 9, 1998 should be released on bond pending the outcome of their removal proceedings. The Chicago Immigration Court also conducts "Joseph" bond hearings to determine whether non-citizens are subject to mandatory detention under I.N.A. § 236(c), 8 U.S.C. § 1226(c).<sup>1073</sup> In a Joseph hearing, an individual may demonstrate that he is a U.S. citizen or U.S. national, that he was not convicted of the predicate crime, or that the DHS is substantially unlikely to establish that he is subject to I.N.A. § 236(c), 8 U.S.C. § 1226(c).<sup>1074</sup> If the Immigration Judge finds that a non-citizen is subject to mandatory detention and enters an order of "no bond" or "no jurisdiction over the bond request", then the non-citizen may file an appeal with the Board of Immigration Appeals.<sup>1075</sup> A non-citizen may also file a petition for a writ of habeas corpus to challenge his ongoing detention by the DHS in the federal district court with jurisdiction over the warden of the facility where he is being held<sup>1076</sup> while removal proceedings take place before

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<sup>1072</sup> See *In re Rojas*, 23 I&N Dec. 117 (BIA May 18, 2001) (holding that an Immigration Judge does not have jurisdiction to redetermine custody status of a non-citizen subject to the mandatory detention provisions where they were released from state custody after October 8, 1998, even if he is not taken into custody immediately by the INS (or current DHS) upon his release from incarceration); *In re Adeniji*, 22 I&N Dec. 1102 (BIA Nov. 3, 1999); *In re West*, 22 I&N Dec. 1405 (BIA Oct. 26, 2000); see also, *Kahn v. Perryman*, 2000 U.S. Dist. LEXIS 11091 (N.D. Ill. July 31, 2000); cf. *Olatunji v. Ashcroft*, 387 F.3d 383 (4<sup>th</sup> Cir. Oct. 19, 2004) (holding that where a non-citizen pled guilty to an offense rendering him subject to mandatory custody under I.N.A. § 236(c)(1), 8 U.S.C. § 1226(c)(1) prior to the enactment of IIRAIRA, he is eligible to be released under bond even where he is charged as an arriving alien by the DHS).

<sup>1073</sup> See *In re Joseph*, 22 I&N Dec. 660 & 799 (BIA May 28, 1999) (holding that a lawful permanent resident will not be considered "properly included" in a mandatory detention category where an Immigration Judge finds, on the basis of the bond record as a whole, that it is substantially unlikely that the INS will prevail on a charge of removability specified in I.N.A. § 236(c)(1), 8 U.S.C. § 1226(c)(1)).

<sup>1074</sup> See *id.*

<sup>1075</sup> See 8 C.F.R. §§ 1003.19(f), 1003.38.

<sup>1076</sup> See *Kholyavskiy v. Achim*, 443 F.3d 946 (7<sup>th</sup> Cir. Apr. 17, 2006) (holding that the proper respondent is the warden of the facility where the non-citizen is being held, not the DHS Director of Detention and Removal).

the Immigration Court and the Board of Immigration Appeals.<sup>1077</sup>

Where a non-citizen has been convicted of a specified offense and released from criminal custody *on or after October 9, 1998*, he will be subject to mandatory detention by ICE pending the completion of removal proceedings before the Immigration Court and any appeals before the Board of Immigration Appeals.<sup>1078</sup> Even where a noncitizen was arrested by law enforcement on or after October 9, 1998 and the arrest did not result in a criminal conviction, but the noncitizen is deportable or inadmissible for a conviction which occurred prior to October 9, 1998, mandatory detention under INA §236(c), 8 U.S.C. §1226(c).<sup>1079</sup> Challenges to mandatory detention may be brought in federal district court through a petition for a writ of habeas corpus

A non-citizen need not be charged in a Notice to Appear by the DHS with or found deportable for the ground of deportability that is the basis for mandatory detention under 8 U.S.C. § 1226(c)(1) to be considered as a non-citizen who “is deportable” on that ground.<sup>1080</sup> Admissions during a bond hearing by a non-citizen that he committed and was convicted of crimes that fall within 8 U.S.C. § 1226(c) is sufficient evidence to find that the DHS would be likely to establish removability under a ground not formally charged to sustain an order that the non-citizen is subject to mandatory detention.<sup>1081</sup> Furthermore, a non-citizen’s most recent release from custody on or after October 9, 1998 need not have been related to the ground of deportability that is the basis for mandatory detention.<sup>1082</sup> Thus, a non-citizen who was convicted of misdemeanor shoplifting in 1995 and then arrested and convicted of a second misdemeanor shoplifting offense in May 2000 will be considered to have been convicted of two crimes involving moral turpitude. She can be held in mandatory detention by ICE without bond.

Where a non-citizen was last released from the custody of an authority other than ICE *before* October 9, 1998, he will be eligible for consideration for bond and not subject to mandatory detention under I.N.A. § 236(c), 8 U.S.C. § 1226(c),<sup>1083</sup> even if he is convicted of a

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<sup>1077</sup> See *Al-Saddiqi v. Achim*, 531 F.3d 490 (7<sup>th</sup> Cir. Jun. 27, 2008); *Aceves-Santos v. Sedlock*, 2008 U.S. Dist. LEXIS 101717 (Dec. 2, 2008).

<sup>1078</sup> See *Demore v. Kim*, 538 U.S. 510, 528-29 (Apr. 29, 2003) (holding that detention of a lawful permanent resident pending completion of removal proceedings is constitutionally permissible).

<sup>1079</sup> See *In re Saysana*, 24 I&N Dec. 602 (BIA 2008).

<sup>1080</sup> See *In re Kotliar*, 24 I&N Dec. 124, 126 (BIA Mar. 21, 2007).

<sup>1081</sup> See *id.* at 126-27 (BIA Mar. 21, 2007).

<sup>1082</sup> See *id.* at 124; *In re Saysana*, 24 I&N Dec. 602 (BIA 2008); see also, *In re Rojas*, 23 I&N Dec. 117 (BIA May 18, 2001) (holding that a non-citizen who is released from criminal custody after October 8, 1998 is subject to mandatory detention under 8 U.S.C. § 1226(c), even if he is not taken into DHS custody immediately upon release from incarceration).

<sup>1083</sup> See *In re Adeniji*, 22 I&N Dec. 1102 (BIA Nov. 3, 1999) (holding that I.N.A. § 236(c), 8 U.S.C. § 1226(c) does not apply to persons whose most recent release from custody by an authority other than the INS occurred prior to the expiration of the Transitional Period Custody Rules); see also, *In re Joseph*, 22 I&N Dec. 660 & 799 (BIA May 28, 1999); *Saucedo-Tellez v. Perryman*, 55 F. Supp. 2d 882 (N.D. Ill. July 2, 1999) (holding that I.N.A. § 236(c), 8 U.S.C. § 1226(c), only applied prospectively to aliens released from custody after October 1998 and did not apply to the petitioner who was released from custody in 1996). Prior to the implementation of IIRAIRA, mandatory detention of lawful permanent residents in exclusion proceedings was held to be unconstitutional. See *Ekekhov v. Aljets*, 979 F.Supp. 640 (N.D.IL Sept. 17, 1997) (holding that former I.N.A. § 236(e), 8 U.S.C. §

qualifying crime after October 8, 1998.<sup>1084</sup> To be granted a bond, he will need to establish that he is not a flight risk and does not present a danger to property or to persons.<sup>1085</sup>

Where a non-citizen is not subject to I.N.A. § 236(c), 8 U.S.C. § 1226(c), then an Immigration Judge may order him released on bond where he establishes “to the satisfaction of the Immigration Judge that he or she does not present a danger to others, a threat to the national security, or a flight risk.”<sup>1086</sup> A non-citizen who presents a danger to persons or property should not be released during the pendency of removal proceedings.<sup>1087</sup> The burden is on the non-citizen to demonstrate to the satisfaction of the Immigration Judge that she merits release on bond.<sup>1088</sup>

Bond proceedings are separate and apart from the removal hearing.<sup>1089</sup> The factors that an Immigration Judge may consider in a bond hearing may include any or all of the following: 1) whether the non-citizen has a fixed address in the U.S.; 2) the non-citizen’s length of residence in the U.S.; 3) the non-citizen’s family ties in the U.S.; 4) the non-citizen’s employment history; 5) the non-citizen’s record of appearance in court; 6) the non-citizen’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; 7) the non-citizen’s history of immigration violations; 8) any attempts by the non-citizen to flee prosecution or otherwise escape from authorities; and 9) the non-citizen’s manner of entry to the U.S.<sup>1090</sup> An Immigration Judge is not limited to considering only criminal convictions in assessing whether a non-citizen is a danger to the community.<sup>1091</sup> Any evidence in the record that is probative and specific can be considered.

There are two exceptions to mandatory detention under I.N.A. § 236(c), 8 U.S.C. § 1236(c). First, where a non-citizen who has been admitted into the Witness Protection Program and whom the DHS has determined is not a danger to the community and is likely to appear for future removal proceedings, she may be released from custody.<sup>1092</sup> Second, a non-citizen who is charged as an arriving alien may be paroled into the U.S. in the

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1226(e) is unconstitutional as applied to lawful permanent residents in exclusion proceedings and that Immigration Judges have authority to make parole determinations).

<sup>1084</sup> See *In re West*, 22 I&N Dec. 1405 (BIA Oct. 26, 2000) (holding that I.N.A. § 236(c), 8 U.S.C. § 1226(c) does not apply to an alien last released from the physical custody of state authorities prior to October 8, 1998 but convicted after October 8, 1998 where he was not physically confined or restrained as a result of that conviction).

<sup>1085</sup> See *id.*

<sup>1086</sup> See I.N.A. § 236(a), 8 U.S.C. § 1226(a); *In re D-J-*, 23 I&N Dec. 572 (A.G. Apr. 17, 2003) (holding that neither the I.N.A. nor applicable regulations confer on a non-citizen the right to be released on bond); *In re Guerra*, 24 I&N Dec. 37 (BIA Sept. 28, 2006).

<sup>1087</sup> See *In re Drysdale*, 20 I&N Dec. 815 (BIA May 25, 1994).

<sup>1088</sup> See *In re Guerra*, 24 I&N Dec. 37 (BIA Sept. 28, 2006).

<sup>1089</sup> See 8 C.F.R. § 1003.19(d); see also, *In re Chirinos*, 16 I&N Dec. 276 (BIA Jul. 14, 1977).

<sup>1090</sup> See *In re Saelee*, 22 I&N Dec. 1258 (BIA Feb. 25, 2000); *In re Drysdale*, 20 I&N Dec. 815 (BIA May 25, 1994).

<sup>1091</sup> See *In re Guerra*, 24 I&N Dec. 37, 40-41 (BIA Sept. 28, 2006).

<sup>1092</sup> See I.N.A. § 236(c), 8 U.S.C. § 1226(c); *Velez-Lotero v. Achim*, 414 F.3d 776, 782 (7<sup>th</sup> Cir. Jul. 11, 2005).



discretion of ICE to attend deferred inspection interviews with the CBP and to appear for removal proceedings.<sup>1093</sup>

**A non-citizen who has pled guilty and been placed on “first offender probation” may be subject to mandatory detention by the DHS if he was arrested and convicted on or after October 9, 1998.**<sup>1094</sup>

Where the DHS initially decided to hold a non-citizen without the possibility of release under bond or set the bond at \$10,000 or more, the DHS has the ability to override an Immigration Judge’s decision to grant release under bond. If the Immigration Judge finds that the non-citizen is not subject to I.N.A. § 236(c), 8 U.S.C. § 1236(c) and issues an order granting him release under bond, then the DHS may file Form EOIR-43, Notice of DHS to Appeal Custody Redetermination, known as an automatic stay, within one business day.<sup>1095</sup> The DHS then must file Form EOIR-26, Notice of Appeal, with the Board of Immigration Appeals within ten business days or else the automatic stay is dissolved.<sup>1096</sup> The filing of an automatic stay and a notice of appeal by the DHS means the non-citizen will remain in DHS custody, pending the resolution of the bond appeal, unless he is success in obtaining relief from removal and/or a writ of habeas corpus in federal district court. Where the DHS initially set a bond in an amount under \$10,000, the automatic stay provision is not applicable.

### ***Practice Tips***

ICE will not normally transport a non-citizen to criminal court for hearings regarding criminal charges. Counsel may need to request that the state court issue a writ in order to have a non-citizen transferred back to county custody to resolve criminal charges. Counsel may also need to inform the state court and prosecutor that the non-citizen is in ICE custody to avoid the issuance of a warrant for arrest due to failure to appear, the forfeiture of a criminal bond, and/or a charge for a violation of probation, supervision, or conditional discharge.

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<sup>1093</sup> See I.N.A. § 212(d); 8 U.S.C. § 1182(d).

<sup>1094</sup> See *Gonzalez v. O’Connell*, 355 F.3d 1010, 1020 (7<sup>th</sup> Cir. Jan. 21, 2004) (finding that mandatory detention under I.N.A. § 236(c), 8 U.S.C. § 1226(c) applies to a non-citizen who pled guilty and was sentenced to first offender probation under 720 ILCS 570/410).

<sup>1095</sup> See 8 C.F.R. § 1003.19(i)(2); *Galarza-Solis v. Ashcroft*, 2004 U.S. Dist. LEXIS 5289 (N.D.IL Mar. 30, 2004).

<sup>1096</sup> See 8 C.F.R. § 1003.19(i)(2); see also, “Interim Operating Policies and Procedures Memorandum 06-03: Procedures for Automatic Stay Cases,” David L. Neal, Acting Chief Immigration Judge, Oct. 31, 2006, reprinted in 83 Interpreter Releases 2487 (Nov. 13, 2006).

## ***Parole***

While removal proceedings are pending, the DHS may “parole” non-citizens for urgent humanitarian reasons or significant public benefit.<sup>1097</sup> Once a non-citizen has been paroled, she may be released from DHS custody; however, she is not deemed to have made a legal entry to the country. Neither an Immigration Judge nor a federal district court has jurisdiction to review the DHS’s decision to deny a request for parole.<sup>1098</sup>

A non-citizen who is paroled from DHS custody is issued a Form I-94 which evidences that he has been paroled into the U.S. to appear for a deferred inspection appointment with CBP or ICE. He may be required to appear periodically at the Chicago ICE Office to request extensions of his parole status and I-94 card, similar to probation. If he violates the terms and conditions of his parole status, ICE may revoke his parole and detain him pending the completion of his removal proceedings. If relief from removal is ultimately denied, ICE may detain him until his removal from the U.S.

Mariel Cubans are Cuban nationals who entered the U.S. during the 1980 Mariel boatlifts and never adjusted their status to become lawful permanent residents. Mariel Cubans are subject to the ICE Cuban Review Panel process.<sup>1099</sup> Cubans who came to the United States during the 1980 Mariel boatlifts and adjusted their status to become lawful permanent residents are subject to the review process for orders of supervision. All other non-citizens whom ICE cannot deport are subject to ICE’s review process for orders of supervision.

## ***Orders of Supervision***

Under I.N.A. § 241, 8 U.S.C. § 1231, the DHS has 90 days to remove a non-citizen from the U.S. after his order of removal has become final.<sup>1100</sup> During this initial 90 day period, the detention of a non-citizen is mandatory.<sup>1101</sup> Following the initial 90 day period,

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<sup>1097</sup> See I.N.A. § 212(d)(5), 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5.

<sup>1098</sup> See 8 C.F.R. § 1003.19(h)(1)(i)(B); I.N.A. § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) However, a circuit court of appeals may review a decision denying parole if the decision raises a constitutional or legal issue. See I.N.A. § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D); *Bolante v. Achim*, 457 F. Supp. 2d 898 (E.D.WI Oct. 18, 2006) (holding that the federal district court has no jurisdiction to review the DHS’s denial of a request for parole for the detained petitioner and dismissing the petition for a writ of habeas corpus for lack of subject matter jurisdiction).

<sup>1099</sup> See 8 C.F.R. § 212.12.

<sup>1100</sup> For purposes of the 90 day removal period, an order of removal is final on: 1) the date the DHS issues a FARO under I.N.A. § 238(b), 8 U.S.C. § 1228(b); 2) the date that the Immigration Judge issues an order of removal and both the DHS and the non-citizen waive their right to appeal that decision; 3) the date the Board of Immigration Appeals issues its final decision; 4) the date of the Court of Appeal’s final order where the Board affirmed a removal order and the Court of Appeals has ordered a stay of removal pending resolution of the petition for review; 5) the date the non-citizen is released from detention or confinement by local, state, or federal department of corrections or a federal authority, other than an immigration authority, where a final order of removal has already been issued. See I.N.A. § 241(a)(1)(B), 8 U.S.C. § 1231(a)(1)(B); 8 C.F.R. § 1241.1; *Hussain v. Mukasey*, 510 F.3d 739 (7<sup>th</sup> Cir. Dec. 18, 2007); *Al-Bareh v. Chertoff*, 552 F.Supp.2d 794 (N.D.IL May 7, 2008).

<sup>1101</sup> See I.N.A. §§ 241(a)(3), (6), 8 U.S.C. §§ 1231(a)(3), (6).

a non-citizen may be held in continued detention or may be released under an order of supervision.<sup>1102</sup> At the end of the 180 day period, the burden of proving the reasonable foreseeability of a non-citizen's removal from the U.S. shifts to the DHS which must provide evidence to rebut the showing that there is no significant likelihood of removal in the reasonably foreseeable future.<sup>1103</sup>

Prior to the expiration of the initial 90 day removal period, the ICE field office director of the Detention and Removal Office which has jurisdiction over the facility where the non-citizen is being detained shall conduct a custody review.<sup>1104</sup> The ICE director may either order the non-citizen released under an order of supervision or continue his detention.<sup>1105</sup> If ICE decides to continue detention, then ICE may retain responsibility to review the non-citizen's custody again up until the 180<sup>th</sup> day or may refer the non-citizen's case to the ICE headquarters (known as HQPDU) for further review.<sup>1106</sup>

Where a non-citizen has been released under an order of supervision, he must report and comply with all of the conditions contained in the order of supervision.<sup>1107</sup> Basically, being under an order of supervision means that a non-citizen is indefinitely under DHS supervision. Terms and conditions of supervision can include monthly in-person reporting to the Chicago ICE Office which may later be modified to include periodic reporting and/or telephonic reporting. A non-citizen under an order of supervision is eligible for an employment authorization document (work permit) which must be renewed annually.<sup>1108</sup> If a non-citizen does not comply with the conditions of his supervision or commits any other offenses, ICE may revoke his order of supervision and take him back into custody pending further attempts to deport him and further review of his custody situation.<sup>1109</sup>

### *Alternatives to Detention*

ICE may also release a non-citizen under one of its "Alternatives to Detention" programs that remotely monitor non-citizens.<sup>1110</sup> In Fiscal Year 2008, more than 15,000 non-citizens were released under an alternative to detention program.<sup>1111</sup>

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<sup>1102</sup> See *id.*; For a detailed outline of the steps and timeline for post-order custody reviews, see *Kazarov v. Achim*, 2007 U.S. Dist. LEXIS 14001 (N.D.IL Feb. 27, 2007).

<sup>1103</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 701 (Jun. 28, 2001) (holding that a non-citizen who has been ordered removed based on the grounds of deportability may be detained for six months as a period reasonably necessary to bring about his removal from the U.S.; also holding that the indefinite detention of a non-citizen beyond six months is unconstitutional unless it is likely that his removal will be carried out within a reasonably foreseeable period); see also *Clark v. Martinez*, 543 U.S. 371 (Jan. 12, 2005) (holding that *Zadvydas v. Davis*, 533 U.S. 678 (Jun. 28, 2001) also applies to non-citizens who have been found to be inadmissible to the U.S. and who have final orders of removal).

<sup>1104</sup> See 8 C.F.R. § 241.4(k)(1)(i).

<sup>1105</sup> See *id.*

<sup>1106</sup> See 8 C.F.R. § 241.4(k)(1)(ii).

<sup>1107</sup> See 8 C.F.R. § 241.5.

<sup>1108</sup> See 8 C.F.R. § 241.5(c).

<sup>1109</sup> See 8 C.F.R. § 241.4(l).

<sup>1110</sup> See Eleanor Stables, "ICE Official Wants to Expand 'Alternatives to Detention' Programs," *CQ Homeland Security*, [www.cq.com](http://www.cq.com), Mar. 16, 2007.

The first program is known as the Electronic Monitoring Program which requires non-citizens to call into a reporting system from a designated phone and wear ankle bracelets that can be monitored.<sup>1112</sup> This program is available nationwide to non-citizens awaiting immigration court hearings or removal from the U.S. For non-citizens subject to wearing an ankle bracelet, they are deemed to not be “in custody” for purposes of a bond redetermination hearing request before the Immigration Court.<sup>1113</sup>

The second program is a pilot program known as Intense Supervision Appearance Program (ISAP).<sup>1114</sup> This form of supervision is marked by three phases with varying levels of ankle monitoring, office and home visits, and check-in reporting.<sup>1115</sup> It is only available to non-citizens awaiting immigration court hearings or removal who are not subject to mandatory detention and who reside in one of designated pilot program cities.<sup>1116</sup>

### **Workplace Enforcement Actions and Resulting Criminal Prosecutions of Employers and Employees**

The DHS is also stepping up efforts to enforce immigration laws within the workplace through the Worksite Enforcement Initiative. Raids of companies where undocumented non-citizens are employed have resulted in charges against undocumented employees for immigration violations and criminal violations, such as identity theft. The DHS has also prosecuted owners, managers, supervisors, and independent contractors for criminal law violations, such as harboring, recruiting and hiring, or smuggling undocumented non-citizens.

The tightening of workplace enforcement has been felt throughout the country and is expected to continue under the Obama administration as announced by DHS Secretary Napolitano in April 2009.<sup>1117</sup> Investigations and enforcement actions may involve different federal agencies, including the U.S. Department of Labor, the FBI, the IRS, the Social Security Administration, and the U.S. Attorney’s Office in the Department of Justice. They may also involve state and local law enforcement.

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<sup>1111</sup> See ICE Annual Report Fiscal Year 2008, available at [http://www.ice.gov/pi/reports/annual\\_report/2008/ar\\_2008\\_page9.htm](http://www.ice.gov/pi/reports/annual_report/2008/ar_2008_page9.htm).

<sup>1112</sup> See ICE, “Alternatives to Detention,” available at <http://www.ice.gov/partners/dro/details.htm>.

<sup>1113</sup> See *In re Aguilar-Aquino*, 24 I&N Dec. 747 (BIA Mar. 12, 2009).

<sup>1114</sup> See ICE, “Alternatives to Detention,” available at <http://www.ice.gov/partners/dro/details.htm>.

<sup>1115</sup> See *id.*

<sup>1116</sup> See ICE Annual Report Fiscal Year 2008, available at [http://www.ice.gov/pi/reports/annual\\_report/2008/ar\\_2008\\_page9.htm](http://www.ice.gov/pi/reports/annual_report/2008/ar_2008_page9.htm).

<sup>1117</sup> See ICE, “Worksite Enforcement Overview,” Apr. 30, 2009, available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

### ICE Workplace Enforcement as a Top Priority<sup>1118</sup>

- In Fiscal Year 2008, ICE arrested more than 5,100 non-citizens for immigration violations at worksites.
- In that same time period, ICE made more than 1,100 criminal arrests, including 135 owners, managers, supervisors or human resources employees who were charged with knowingly hiring or harboring illegal aliens and the rest being workers charged with aggravated identity theft and Social Security Fraud.

In one of the most controversial worksite enforcement actions in U.S. history, ICE arrested 389 workers at the Agriprocessors Inc. meatpacking plant in Postville, Iowa on May 12, 2008.<sup>1119</sup> Workers were held at the National Cattle Congress grounds where their criminal cases went forward before a federal judge in proceedings that were later the subject of Congressional hearings.<sup>1120</sup>

Subsequent to the Postville and other raids with ensuing criminal charges against non-citizen workers, the U.S. Supreme Court issued a major decision about the prosecutions under the federal aggravated identity theft statute.<sup>1121</sup> In its *Flores-Figueroa* opinion, the Supreme Court held that the government must prove that the criminal defendant *knew* that the means of identification at issue belonged to another person.<sup>1122</sup>

Despite the fact that Chicago remains one of the top gateway cities for non-citizens, since 1990 non-citizens have been settling in many rural areas to work at meatpacking

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<sup>1118</sup> See ICE, "Worksite Enforcement Overview," Apr. 30, 2009, available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

<sup>1119</sup> See ICE, "297 Convicted and Sentenced Following ICE Worksite Operation in Iowa," May 15, 2008, available at <http://www.ice.gov/pi/news/newsreleases/articles/080515waterloo.htm>; A. Olivo, "Immigration Raid Leaves Damaging Mark on Postville, Iowa," *Los Angeles Times*, May 12, 2009, available at <http://articles.latimes.com/2009/may/12/nation/na-postville-iowa12>; E. Camayd-Freixas, Ph.D., "Interpreting After the Largest ICE Raid in U.S. History: A Personal Account," Jun. 13, 2008, available at <http://graphics8.nytimes.com/packages/pdf/national/20080711IMMIG.pdf>.

<sup>1120</sup> See *id.*; American Civil Liberties Union, "Immigration Raids: Postville and Beyond," Jul. 24, 2008, available at <http://www.aclu.org/immigrants/gen/36231leg20080731.html>; U.S. Congress, House Judiciary Committee, *Immigration raids: Postville and beyond*, hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, 110th Congress, 2nd session, July 24, 2008. 2009. 296 pages, <http://purl.access.gpo.gov/GPO/LPS112381>. The American Immigration Law Foundation (AILF) maintains a webpage on ICE raids and resulting litigation; for more information, visit [http://www.ailf.org/lac/clearinghouse\\_122106\\_ICE.shtml](http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml). A full-length documentary about the raid entitled "The Abused" has been produced; for more information, see <http://www.abusedthepostvilleraid.com/>.

<sup>1121</sup> See *Flores-Figueroa v. Holder*, no. 08-108, 129 S.Ct. 1886 (May 4, 2009).

<sup>1122</sup> See *id.* For a further discussion, see Considerations in Federal Criminal Proceedings, *infra* at 8-12 to 8-24.

plants, other agricultural occupations, manufacturing, and construction.<sup>1123</sup> The majority of these non-citizens living in rural areas are Latino.<sup>1124</sup> For example, 35 percent of Cargill's 2,300 workers at its hog processing plant in Cass County, Illinois are Latino.<sup>1125</sup> The non-citizen population in Cass County grew from 41 to 1,049 in the 1990s.<sup>1126</sup> Cass County's employers also include a pallet plant and hardwood drying company where non-citizens work.<sup>1127</sup> On April 4, 2007, 62 sanitation workers employed by Quality Service Integrity, Inc. were arrested at Cargill Inc.'s pork plant in Beardstown, Illinois.<sup>1128</sup>

As almost half of all foreign-born individuals work in the agricultural industry in the U.S., ICE has targeted that industry for enforcement.<sup>1129</sup> The single largest ICE operation, Operation Wagon Train, took place on December 12, 2006 when ICE arrested 1,282 undocumented workers at six Swift & Company meat packing plants in Colorado, Nebraska, Texas, Utah, Iowa, and Minnesota.<sup>1130</sup> Recent reports indicate that 120 were arrested and charged with criminal offenses such as identity theft, and others were arrested and charged with civil immigration law violations.<sup>1131</sup>

ICE has also been targeting smaller businesses in the Midwest, resulting in fines and imprisonment for the owners who harbor or employ undocumented non-citizens or deportation for the non-citizens who work illegally. On October 4, 2006, sixteen employees from a Springfield, Illinois restaurant were taken into ICE custody and faced deportation. The two owners of the restaurant were arrested and indicted in federal and district court for harboring and employing illegal aliens and money laundering.<sup>1132</sup> ICE also raided a restaurant in Chicago's Greektown on January 9, 2007, arresting 10 employees suspected of being undocumented and using false social security numbers and green cards.<sup>1133</sup> Eleven Polish non-citizens working for a cleaning service in the Chicago area were arrested on January 23, 2007 for overstaying visas granted to temporarily visit the U.S.<sup>1134</sup> Seventeen

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<sup>1123</sup> See Leif Jensen, *New Immigrant Settlements in Rural America: Problems, Prospects, and Policies*, Carsey Institute, University of New Hampshire, 2006, Vol. 1, No. 3, pp. 7, 12; Karina Fortuny, Randy Capps & Jeffrey Passel, *The Characteristics of Unauthorized Immigrants in California, Los Angeles County, and the United States*, The Urban Institute, Mar. 2007, p. 20.

<sup>1124</sup> See Leif Jensen, *New Immigrant Settlements in Rural America: Problems, Prospects, and Policies*, Carsey Institute, University of New Hampshire, 2006, Vol. 1, No. 3, p. 12.

<sup>1125</sup> See *id.* at 19.

<sup>1126</sup> See *id.*

<sup>1127</sup> See *id.*

<sup>1128</sup> See Bob Burgdorfer, "Immigration Officials Arrest 62 at Pork Plant," *Reuters*, [www.reuters.com](http://www.reuters.com), Apr. 4, 2007.

<sup>1129</sup> See Randolph Capps, Karina Fortuny & Michael E. Fix, *Trends in the Low-wage Immigrant Labor Force, 2000-2005*, The Urban Institute, Mar. 2007.

<sup>1130</sup> See "U.S. Uncovers Large-Scale Identity Theft Scheme Used by Illegal Aliens to Gain Employment at Nationwide Meat Processor," *ICE News Release*, [www.ice.gov](http://www.ice.gov), Dec. 13, 2006.

<sup>1131</sup> See "Criminal Charges Mount After Immigration Raids at Swift," *Pioneer Press*, [www.twincities.com](http://www.twincities.com), Jan. 5, 2007.

<sup>1132</sup> See Sarah Antonacci, "Second Buffet City Defendant in Court," *The State Journal-Register Online*, [www.sj-r.com](http://www.sj-r.com), Sept. 30, 2006.

<sup>1133</sup> See "ICE Arrests 10 Illegal Aliens Working at Chicago Restaurant," *ICE News Release*, [www.ice.gov](http://www.ice.gov), Jan. 10, 2007.

<sup>1134</sup> See "ICE Arrests 11 Illegal Aliens Working at Cleaning Service," *ICE News Release*, [www.ice.gov](http://www.ice.gov), Jan. 24, 2007.

non-citizen workers hired by SCI, a temporary staffing agency, to work at Cano Packaging Corporation in Arlington Heights, Illinois were arrested on February 27, 2007.<sup>1135</sup>

- **Harboring non-citizens unlawfully present in the U.S. is a federal felony and punishable by up to 10 years in prison per non-citizen.**<sup>1136</sup>
- **Hiring or recruiting unauthorized non-citizens for employment is a misdemeanor punishable by up to six months in prison and a fine of \$3,000 for each non-citizen.**<sup>1137</sup>

Some of the arrested non-citizens have signed voluntary departure or removal orders which may have adverse effects for applications for future immigration benefits. Other non-citizen workers have been placed in removal proceedings where they may be eligible to apply for immigration relief before the Immigration Court.

The charges against company owners, managers, supervisors, and their employees often arise from the DHS's review of Form I-9, an employment verification form which employers are required to have completed and to maintain for each employee (U.S. citizens and non-citizens alike) for a specified period.<sup>1138</sup> They can also result from tips from local law enforcement or anonymous tips from the public to the ICE hotline for suspicious activity.<sup>1139</sup>

### ***Defense of Non-Citizens***

Federal criminal charges against undocumented non-citizens may include providing false information on a government form, falsely claiming to be a U.S. citizen, possession of a fraudulent alien registration document, possession of a false social security number, or use or possession of the social security number of another person.<sup>1140</sup> On September 18, 2008, ICE arrested 21 people for involvement in a fraudulent ID operation that allegedly produced fraudulent identification documents.<sup>1141</sup>

<sup>1135</sup> See Kari Lydersen, "Abuses Alleged During Immigration Raid," *In These Times*, [www.inthesetimes.com](http://www.inthesetimes.com), Apr. 23, 2007.

<sup>1136</sup> See I.N.A. §§ 274(a)(1)(A)(iii), (a)(2)(B)(ii)-(iii), 8 U.S.C. §§ 1324(a)(1)(A)(iii), (a)(2)(B)(ii)-(iii).

<sup>1137</sup> See I.N.A. §§ 274A(a)(1), (f)(1), 8 U.S.C. §§ 1324a(a)(1), (f)(1); *see also*, "Two Owners of a Springfield Restaurant Indicted," *ICE News Release*, [www.ice.gov](http://www.ice.gov), Oct. 5, 2006.

<sup>1138</sup> See 8 C.F.R. §§ 274a.2(b)(1)(i), (ii), 1274a.2(b)(1)(i), (ii) (regarding completion of Form I-9 within three days for jobs lasting longer than three days), 8 C.F.R. §§ 274a.2(b)(1)(iii), 1274a.2(b)(1)(iii) (regarding completion on day of hire for jobs lasting three days or less).

<sup>1139</sup> See "Immigration Raids Target Meat Plants: Interview with Julie Meyers, Assistant Secretary of Homeland Security for ICE," *NPR All Things Considered*, [www.npr.org](http://www.npr.org), Dec. 16, 2006.

<sup>1140</sup> See 18 U.S.C. § 1001(a) (regarding providing false material information); 18 U.S.C. § 1015 (regarding false claim to U.S. citizenship and possession of fraudulent alien registration card); 18 U.S.C. § 1028(a)-(b) (regarding possession or use of false social security number).

<sup>1141</sup> See ICE, "U.S. Charges 21 Defendants in Allegedly Fraudulent Document Ring Based in Chicago's Little Village Community," Sept. 19, 2008, available at

As with the ICE operation in Whitewater, Wisconsin, ICE may conduct a joint operation with local law enforcement and/or bring undocumented non-citizens to the attention of local police for prosecution under state criminal laws. State criminal offenses can include possession of a fraudulent driver's license or state identity document, counterfeiting, perjury related to forms completed with false information to obtain a driver's license or state identification card, identity theft, and failure to file state tax returns.<sup>1142</sup> If convicted, non-citizens may be deportable and/or inadmissible.<sup>1143</sup>

While federal and/or state charges are pending against non-citizens in criminal courts, ICE may file detainers against the non-citizens with the jails where they are being held.<sup>1144</sup> Non-citizens who are deportable and/or inadmissible to the U.S. will be transferred to ICE for processing upon completion of the criminal proceedings and service of any prison term ordered by the criminal court. As a result of criminal convictions, non-citizens may not be eligible for release from ICE custody, pending the completion of removal proceedings, reinstatement of a prior deportation or removal order, or execution of a deportation or removal order.<sup>1145</sup>

### ***Defense of Employers***

To comply with the federal laws, a company can participate in ICE Mutual Agreement between Government and Employers (IMAGE).<sup>1146</sup> Through IMAGE, ICE provides trainings on proper hiring procedures and fraudulent document detection so that a company can effectively verify the eligibility of all potential employees to work in the U.S. USCIS runs the E-Verify Program which allows participating employers to match the names and social security numbers of their employees, thereby checking for potentially false and stolen numbers and identities.<sup>1147</sup>

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<http://www.ice.gov/pi/nr/0809/080919chicago.htm>. For a report about the prior arrests, see M. Tarm, "Feds Announce Arrests in False ID Documents Case," *Chicago Tribune*, Apr. 25, 2007.

<sup>1142</sup> See e.g., Wis. Stat. § 943.201 (regarding identity theft), Wis. Stat. § 943.38 (regarding counterfeiting/forgery), Wis. Stat. § 343.50 (regarding use of false identification document)

<sup>1143</sup> For more information about the immigration consequences of criminal dispositions, see *Grounds of Deportability for Non-citizens*, *supra* at 3-1, *Grounds of Inadmissibility and Adjustment of Status*, *supra* at 4-1 to 4-11, and *Immigration Remedies and Defenses under the I.N.A. for Non-citizens*, *supra* at 6-1.

<sup>1144</sup> If ICE files an immigration detainer with the prosecuting authorities, then the non-citizen will not be released on bond while the criminal proceedings are pending.

<sup>1145</sup> For family and friends to find out the custody status of a non-citizen arrested in an ICE workplace raid, information may be available through the ICE Family and Friends hotline at (866) 341-3858. The hotline may, however, only have information available for the most recent ICE raid. For more information about custody by ICE, see *Mandatory Detention*, *infra* at 7-3; Appendix 7A for ICE Broadview Center and county jail contact information; see also, *Final Administrative Removal Orders*, *supra* at 6-3; *Reinstatement of Removal Orders*, *supra* at 6-5.

<sup>1146</sup> See "IMAGE," last modified Mar. 2, 2009, available at <http://www.ice.gov/partners/opaimage/>.

<sup>1147</sup> See USCIS, "About Form I-9 and E-Verify, with links to information about E-verify and employer compliance," <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1914c9676d006110VgnVCM1000004718190aRCRD&vgnnextchannel=1847c9ee2f82b010VgnVCM10000045f3d6a1RCRD>.



If a company decides to comply with IMAGE's requirements, employers should take care to avoid claims of employment discrimination. After the December 12, 2006 raid, no charges were brought against Swift & Company because of its compliance with the IMAGE's Basic Pilot Employment Verification Program. However, a complaint was brought against the company in 2001 for document-based discrimination against job applicants, and the lawsuit was later settled for \$200,000 awarded to the plaintiffs.<sup>1148</sup> The Equal Employment Opportunity Commission (EEOC) also filed a complaint against the City of Joliet, alleging that it began requiring all employees to complete the I-9 form as a form of retaliation for complaints involving harassment and a hostile work environment.<sup>1149</sup>

If an employer or non-citizen who is facing or is likely to face charges for criminal law violations or civil immigration law violations, contact an immigration attorney for advice. This should be done as soon as possible, such as immediately after a raid and before criminal or civil charges are filed.

## Renewals of Lawful Permanent Resident Cards

Alien registration cards ("green cards") for lawful permanent residents are valid for ten years and every ten years a lawful permanent resident is required to renew his card. As part of the process, he files Form I-90 with the CIS and must appear to have his fingerprints and biometric information taken.<sup>1150</sup> The CIS reviews his criminal history in the U.S. and if he has criminal or driving offenses which may render him deportable, ICE officers may arrest and detain him, issue him a Notice to Appear, and place him in removal proceedings. Non-citizens who have deportable offenses should consult an immigration attorney prior to filing Form I-90 with the CIS.

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<sup>1148</sup> See "U.S. Immigration Officials Commence Employee Interviews at Six Swift & Company Facilities," *Market Wire News*, [www.marketwire.com](http://www.marketwire.com), Dec. 12, 2006.

<sup>1149</sup> See *EEOC v. City of Joliet*, 239 F.R.D. 490, 2006 U.S. Dist. LEXIS 88979 (N.D.IL May 5, 2006) (granting a motion for a protective order barring the City of Joliet from seeking any further information about their employees' immigration status until the termination of the cause of action or subsequent court order as the City did not require evidence of immigration status from any employees from 1989 until after the complaint had been filed in the district court).

<sup>1150</sup> To review Form I-90, see Immigration Forms at [www.uscis.gov](http://www.uscis.gov). For CIS processing times for Form I-90, see <https://egov.immigration.gov/cris/jsps/ptimes.jsp>.

**IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)  
CHICAGO ICE DETENTION FACILITIES FOR  
ILLINOIS, INDIANA, AND WISCONSIN**

**McHenry County Detention Center**

2200 North Seminary  
Woodstock, IL 60098  
Phone: (815) 334-4093  
(815) 334-4741  
Fax: (815) 338-7902

Note: houses detained female non-citizens

**Tri-County Detention Center**

1026 Shawnee College Road  
Ullin, IL 62992  
Phone: (618) 845-3512  
Fax: (618) 854-3533

**Jefferson County Jail**

911 Casey Avenue  
Mount Vernon, IL 62864  
Phone: (618) 244-8015  
(618) 246-2183  
Fax: (618) 244-8999

**Boone County Jail**

3020 Conrad Lane  
Burlington, KY 41005  
Phone: (859) 334-2143  
Fax: (859) 334-3613

**Dodge County Detention Center**

216 West Center Street  
Juneau, WI 53039  
Phone: (920) 386-3219  
Fax: (920) 386-3917

**Kenosha County Detention Center**

4777 88<sup>th</sup> Avenue  
Kenosha, WI 53144  
Phone: (262) 605-5800 (KCDC)  
(262) 605-0511 (downtown)  
Fax: (262) 605-5902

All facilities will schedule attorney-detainee conference calls upon request with 24 hours notice. Contact the individual facility for its current policy as the need arises. Requests for faxed documents to be received and signed by detained non-citizens should only be made in emergencies. Mail sent to detained non-citizens by counsel should be marked "Legal Mail".

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A non-citizen will be transferred and processed by ICE at the Broadview Processing Center several times during the course of his detention, including after being taken into custody by ICE, before being transferred to a different detention facility, for video teleconference hearings conducted by the Chicago Immigration Court, and before being deported from the U.S. Non-citizens detained at the McHenry County Detention Center will appear for their Immigration Court hearings via video teleconference. Officers at the Broadview Processing Center have the information for the location of detained non-citizens.

**Broadview Processing Center**

1930 Beach Street  
Broadview, IL 60155  
Phone: (708) 449-2985  
(708) 449-6722/23  
Fax: (708) 343-8832

## Unlawful Employment of Aliens

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### I.N.A. § 274A, 8 U.S.C. § 1324a

#### (a) Making employment of unauthorized aliens unlawful

##### (1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

##### (2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

##### (3) Defense

##### (4) Use of labor through contract...

##### (5) Use of State employment agency documentation...

##### (6) Treatment of documentation for certain employees...

#### (b) Employment verification

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

##### (1) Attestation after examination of documentation

##### (A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining—

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document

or as requiring the individual to produce another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's—

- (i) United States passport;[sic]
- (ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—
  - (I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,
  - (II) is evidence of authorization of employment in the United States, and
  - (III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's—

- (i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or
- (ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's—

- (i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or
- (ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

## Criminal Proceedings, Post-Conviction Relief, Illegal Reentry Cases, and Pardons

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### Pre-Plea Advisals about Immigration Consequences

The issue of whether a non-citizen must be advised prior to entering a plea in a criminal case has been hotly debated and litigated around the United States, particularly since the 1996 expansion of the aggravated felony definition and the restriction in remedies available to non-citizens who are the subject of criminal dispositions. As a result, legislatures and courts have been grappling with: 1. whether a non-citizen must be advised that he could face immigration consequences as a result of a plea in a criminal proceeding; 2. if a pre-plea advisal is required, whether the state court or defense counsel should give the non-citizen the advisal; 3. the form and content of the advisal; and 4. the remedy, if any, that should exist where an advisal was not provided or where affirmative misadvice was provided.

The question of the role of a defense attorney regarding the immigration consequences of criminal dispositions will be decided by the U.S. Supreme Court in its 2009-2010 term.<sup>1151</sup> In the *Padilla* case, two main questions are presented:

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<sup>1151</sup> See *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 129 S. Ct. 1317 (U.S. Feb. 23, 2009) (No. 08-651). The petition for a writ of certiorari is available at *Padilla v.*

1. Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise; and
2. Assuming immigration consequences are "collateral", whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.<sup>1152</sup>

In the *Padilla* case, the non-citizen defendant pled guilty to trafficking in more than five pounds of marijuana, possession of marijuana, and possession of drug paraphernalia, for which he was sentenced to serve five of ten years in prison and five years on probation on October 4, 2002.<sup>1153</sup> He relied on his defense attorney's advice that he "did not have to worry about immigration status since he had been in the country so long," being that he had lived in the U.S. for decades as a lawful permanent resident and even served in the U.S. armed forces in Vietnam.<sup>1154</sup>

Following the lodging of a detainer by ICE, the non-citizen filed a motion for post-conviction relief under Kentucky law, arguing that his attorney rendered ineffective assistance of counsel by misadvising him about the immigration consequences of his guilty plea.<sup>1155</sup> The state circuit court denied the petition and then Kentucky Court of Appeals reversed; it found that such misadvice could constitute ineffective assistance of counsel and remanded the case for an evidentiary hearing on the post-conviction motion.<sup>1156</sup> The state then requested discretionary review by the Kentucky Supreme Court, which granted the request.<sup>1157</sup> The Kentucky Supreme Court held that immigration consequences are collateral consequences outside the scope of the Sixth Amendment right to counsel and therefore neither failure by defense counsel to advise a non-citizen of such consequences nor affirmative misadvice by defense counsel can constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).<sup>1158</sup> The petition for a writ of certiorari to the U.S. Supreme Court then followed.

With the above overview of the current issue before the U.S. Supreme Court, it is recommended that counsel carefully review the case law and statutes cited in the following sections. While Indiana has seen the development of case law on the affirmative duty of

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Commonwealth of Kentucky, 2008 WL 4933628 (Appellate Petition, Motion and Filing) (U.S. Nov. 14, 2008). *Padilla v. Commonwealth of Kentucky*, 2008 WL 4933628 (Appellate Petition, Motion and Filing) (U.S. Nov. 14, 2008). An amicus brief in support of the petition for a writ of certiorari was submitted by Brief of Amici Curiae Criminal and Immigration Law Professors, Capital Area Immigrants' Rights Coalition, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Western Kentucky Refugee Mutual Assistance Society, Inc. and is available at 2009 WL 164242 (Appellate Petition, Motion and Filing) (U.S. Jan. 21, 2009).

<sup>1152</sup> The "Questions Presented" is available on the U.S. Supreme Court's website at <http://origin.www.supremecourtus.gov/docket/08-651.htm>.

<sup>1153</sup> See *Commonwealth v. Padilla*, 253 S.W.3d at 483.

<sup>1154</sup> See *Commonwealth v. Padilla*, 253 S.W.3d at 483.

<sup>1155</sup> See *Commonwealth v. Padilla*, 253 S.W.3d at 483.

<sup>1156</sup> See *Commonwealth v. Padilla*, 253 S.W.3d at 483-84.

<sup>1157</sup> See *Commonwealth v. Padilla*, 253 S.W.3d at 483.

<sup>1158</sup> See *Commonwealth v. Padilla*, 253 S.W.3d at 484-85.

counsel to provide accurate advice regarding immigration consequences of criminal dispositions as discussed below, the days of “don’t ask about immigration status, don’t tell about any potential immigration consequences” for counsel in Wisconsin and Illinois may soon be over with a decision in the *Padilla* case.

Following the grant of the petition for a writ of certiorari in *Padilla*, the U.S. Supreme Court ruled that military courts, despite being Article I courts, have jurisdiction to grant a writ of coram nobis to a former service member who pled guilty as a lawful permanent resident in a special court-martial but who claimed that he was not advised about the immigration consequences of his guilty plea because his counsel rendered ineffective assistance of counsel.<sup>1159</sup> The Court remanded the case for consideration of the merits of the non-citizen’s claim of ineffective assistance of counsel, among other issues.<sup>1160</sup>

### ***State Criminal Proceedings***

Although not all states require that non-citizens be advised about the immigration consequences of pleas in criminal cases, the trend is increasing to require such advisals, particularly in light of the draconian consequences for non-citizens on account of the 1996 amendments to the immigration law. As of May 2009, twenty-seven states (including Illinois and Wisconsin) as well as the District of Columbia and Puerto Rico have enacted statutes requiring that a non-citizen defendant be advised that he or she may suffer immigration consequences as a result of a plea bargain or a conviction,<sup>1161</sup> and others have developed case law allowing post-conviction relief for immigrants where they were not so advised.<sup>1162</sup> The other twenty-three states, however, do not require that the defendant be advised of potential immigration consequences prior to entering a plea.

Some state courts have held that no duty is owed by the criminal defense counsel to advise the non-citizen defendant that there could be immigration consequences, holding

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<sup>1159</sup> See U.S. v. Denedo, no. 08-267, 2009 U.S. LEXIS 4160 (Jun. 8, 2009).

<sup>1160</sup> See *id.* at \*23-24.

<sup>1161</sup> See *Ariz. R. Crim. P.* 17.2(f); *Cal. Penal Code* § 1016.5; *Conn. Gen. Stat.* 54-1j; *D.C. Code Ann.* § 16-713; *Fla. R. Crim. P.* 3.172(c)(8); *In re Amendments to Florida Rules*, 536 So.2d 992 (Fl. Nov. 3, 1988); *O.C.G.A.* § 17-7-93(c); *Haw. Rev. Stat.* §§ 802E-1, 802 E-2, 802E-3; *Idaho R. Crim. P.* 11(d)(1) (2007); 725 ILCS 5/113-8; *Iowa R. Crim. P.* 2.8(2)(b); *Md. Rules of Court* § 4-242(e); *Mass. Gen. L. Ch.* 278, § 29D; *Me. R. Crim. P.* 11(B)(5); *Minn. R. Crim. P.* § 15.01, (10)(d) for felonies and § 15.02, (2) for misdemeanors; *Mont. Code Ann.* § 46-12-210(f); *Neb. Rev. Stat.* § 29-1819.02 (2002); *N.J. Directive #13-05* (9/19/2005); *N.M. Dist. Ct. R. Crim. P.* 5-303(F)(5); *N.Y. Crim. Proc. Law* § 220.50; *N.C. Gen. Stat.* § 15A-1022(a)(7); *Ohio Rev. Code Ann.* § 2943.031 (2003); *Or. Rev. Stat.* § 135.385(2)(d); *P.R. Rules Crim. P.* 70 (Puerto Rico); *R.I. Gen. Law* § 12-12-22; *Tex. Code Crim. Pro. Ann. Art.* § 26.13(a)(4); *Wash. Rev. Code* § 10.40.200; *Wis. Stat.* § 971.08(1)(c); *Vt. Stat. Ann. Tit. 13* § 6565; see also, *U.S. Dist. Ct. for the Dist. Of Colo. Local Rules* §3, App. K (form guilty plea notification requiring acknowledgement of possible deportation); *Machado v. State*, 839 A.2d 509 (R.I. Nov. 26, 2003) (where R.I. statute requires judge to inform defendant of three potential immigration consequences of his plea and he provides only one, conviction was vacated); *Commonwealth v. Hilaire*, 777 N.E.2d 804 (Mass. Oct. 18, 2002) (ordering new trial where judge failed to orally advise defendant during plea colloquy of possible immigration consequences); *DeAbreu v. State*, 593 So.2d 233 (Fla. 1<sup>st</sup> DCA Dec. 26, 1991) (reversing plea where judge failed to advise defendant pursuant to Florida regulation).

<sup>1162</sup> See, e.g., *Segura v. State*, 749 N.E.2d 496 (Ind. Jun. 26, 2001); *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); *State v. Green*, 944 So. 2d 208 (Fla. Oct. 26, 2006).

immigration consequences to be merely collateral consequences for which a lack of an advisal does not prejudice the non-citizen defendant.<sup>1163</sup> Other state courts have found that failure to advise a non-citizen or affirmative misadvice by defense counsel regarding the immigration consequences constitutes ineffective assistance of counsel.<sup>1164</sup>

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<sup>1163</sup> See e.g., *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 129 S. Ct. 1317 (U.S. Feb. 23, 2009) (No. 08-651); *United States v. Del Rosario*, 920 F.2d 55, 59 (D.C. Cir. 1990); *United States v. Gonzalez*, 202 F.3d 20, 25 (1<sup>st</sup> Cir. 2000); *Yong Wong Park v. United States*, 222 F.d App'x 82 (2<sup>nd</sup> Cir. 2007); *United States v. Yearwood*, 863 F.2d 6 (4<sup>th</sup> Cir. 1988); *Santos-Sanchez v. United States*, 548 F.3d 327, 334 (5<sup>th</sup> Cir. 2008); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7<sup>th</sup> Cir. 1989), *superseded by statute*, P.L. No. 101-649, tit. V, §505(b), 104 Stat. 5050, *cert. den.*, 493 U.S. 1059 (1990); *Gumangan v. United States*, 254 F.3d 701, 706 (8<sup>th</sup> Cir. 2001); *United States v. Fry*, 322 F.3d 1198 (9<sup>th</sup> cir. 2003); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10<sup>th</sup> Cir. 2004), *cert. den.*, 543 U.S. 1034 (2004); *United States v. Campbell*, 778 F.2d 764 (11<sup>th</sup> Cir. 1985); *United States v. Sambro*, 454 F.2d 918 (D.C. Cir. 1971); *Oyekoya v. State*, 558 So.2d 990 (Ala. Crim. App. 1989); *Tafoya v. State*, 500 P.2d 247, 251 (Alaska 1972), *cert. den.*, 410 U.S. 935 (1973); *State v. Rosas*, 904 P.2d 1245 (Ariz. Ct. App. 1995); *Major v. State*, 814 So.2d 424 (Fla. 2002); *Williams v. Duffy*, 513 S.E.2d 212 (Ga. 1999); *People v. Huante*, 571 N.E.2d 736 (Ill. Apr. 18, 1991) (holding that the failure of defense counsel to advise a non-citizen of the immigration consequences of a guilty plea did not render his plea involuntary and did not constitute ineffective assistance of counsel); *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987); *State v. Muriithi*, 46 P.3d 1145, 1152 (Kan. 2002); *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. Aug. 25, 2005); *State . Montalban*, 810 So.2d 1106 (La. 2002); *Alanis v. Minnesota*, 583 N.W. 2d 573 (Minn. Aug. 6, 1998); *Berkow v. Minnesota*, 583 N.W.2d 562 (Minn. Aug. 6, 1998); *State v. Zarate*, 651 N.W.2d 215 (Neb. 2002); *Barajas v. State*, 991 P.2d 474 (Nev. 1999); *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994); *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. Mar. 6, 1989); *Nokolaev v. Weber*, 705 N.W.2d 72 (S.D. 2005); *State v. McFadden*, 884 P.2d 1303 (Utah Ct. App. 1994); *Carson v. State*, 755 P.2d 242 (Wyo. Jun. 2, 1988); *State v. Santos*, 401 N.W.2d 856 (Wis. App. Jan. 27, 1987) (failure to inform of JRAD); *Lyons v. Pearce (Lyons II)*, 694 P.2d 969, 978 (Or. Jan. 29, 1985); *State v. Ginebra*, 511 So.2d 960 (Fla. Jul. 2, 1987) (disapproving of *Edwards v. State*, 393 So.2d 597 (3<sup>rd</sup> DCA Jan. 21, 1981) and holding that failure to advise is insufficient to invalidate plea); *Bermudez v. State*, 603 So.2d 657 (Fla. App. 3 Dist. Aug. 11, 1992) (finding that even where counsel gives misadvice to client, judge's colloquy informing person of immigration consequences vitiates any misadvice); *In re Fortis*, 14 I&N Dec. 576 (BIA Jan. 29, 1974).

<sup>1164</sup> See *State v. Carlos*, 147 P.3d 897 (N.M.Ct.App. Oct. 3, 2006) (holding that defense counsel must advise a non-citizen defendant of the specific federal immigration statutes that apply to the specific state charges contained in a proposed plea agreement and the immigration consequences as demonstrated in the federal statutes that will result from a plea of guilty); *Patterson v. State*, 879 So.2d 1208, 1210 (Ala. Crim. App. 2003); *State v. Paredez*, 101 P.3d 799 (Ariz. Aug. 31, 2004) (holding that criminal defense attorneys are obligated to determine the immigration status of their clients and to advise them of the immigration consequences of a guilty plea and that failure to do so is ineffective assistance of counsel); *People v. Garcia*, 815 P.2d 937 (Colo. 1991); *Hernandez v. Commissioner of Correction*, 846 A.2d 889 (Conn. Ct. App. 2004); *Roberti v. State*, 782, 782 So.2d 919, 920 (Fla. Dist. Ct. App. 2001); *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983); *Aldus v. State*, 748 A.3d 463 (Me. 2000); *Yoswick v. State*, 700 A.2d 251, 256, 347 Md. 228, 240 (Md. 1997); *Bronson v. State*, 786 S.2d 1083 (Miss. Ct. App. 2001); *Pettis v. State*, 212 S.W.3d 189, 194 (Mo. Ct. app. 2007); *State v. Sharkey*, 155 N.H. 638, 927 A.2d 519 (N.H. 2007); *State v. Viera*, 760 A.2d 840 (N.J. Super. Ct. 2000); *People v. Ping Cheung*, 186 Misc. 2d 507, 718 N.Y.2d 578 (N.Y. Sup. 2000); *State v. Goforth*, 503 S.E.2d 676, 678, 130 N.C.App. 603, 604 (N.C.App. 1998); *Gonzalez v. Oregon*, 83 P.3d 921 (Or. 2004); *Hison v. State*, 297 S.C. 456, 377 S.E.2d 338 (S.C. 1989); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. App. 1994) (holding that defense counsel must advise non-citizen defendants of immigration consequences of their guilty pleas); *State v. Sallato*, 519 So.2d 605 (Fla. Jan. 28, 1988) (finding that where an attorney gave "positive misadvice" to a non-citizen, it could render plea involuntary); *In re Resendiz*, 19 P.3d 1171, 105 Cal. Rptr.2d 431 (Cal. Apr. 2, 2001) (finding that



A conviction that is vacated due to the failure of a state court or defense counsel to advise a non-citizen of immigration consequences for a plea may eliminate or reduce the immigration consequences. In *In re Adamiak*, the Board held that a non-citizen was not convicted for immigration purposes where a state court granted a motion to vacate a plea based on the failure of the state court to advise a non-citizen defendant of the immigration consequences of his plea as required by state statute.<sup>1165</sup> The Board found that the vacatur was granted as a result of a “defect in the underlying criminal proceedings.”<sup>1166</sup>

Illinois and Wisconsin require by statute that a state court advise a non-citizen defendant prior to entering a plea that he could be subject to immigration consequences based on his plea to a criminal offense.<sup>1167</sup> For Illinois pleas entered prior to January 1, 2004, the state courts were not required to advise non-citizen defendants about the immigration consequences.<sup>1168</sup> Where a non-citizen has pled guilty on or after January 1, 2004 and did not receive the requisite advisal from the Illinois court, he may file a motion to withdraw his plea within 30 days of the entry of the plea or, if it is later than 30 days, he may file a petition for post-conviction relief.<sup>1169</sup>

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affirmative misrepresentations or erroneous advice can, in certain circumstances, constitute ineffective assistance of counsel if defendant can demonstrate he would not have otherwise pled guilty); *People v. Soriano*, 240 Cal. Rptr. 328 (Sept. 24, 1987); *Commonwealth v. Mahedo*, 397 Mass. 314 (Apr. 15, 1986); *People v. Guzman*, 172 Cal. Rptr. 34 (Ct. App. Feb. 24, 1981); *People v. Correa*, 485 N.E.2d 307 (Ill. Sept. 20, 1985) (holding that affirmative misadvice about immigration consequences of a guilty plea by defense counsel rendered his plea involuntary as it was not made intelligently and knowingly and upholding the order granting his petition for post-conviction relief to withdraw his guilty plea); *Lyons v. Pearce*, 694 P.2d 969, 977 (Or. 1985); *Gonzalez v. State*, 134 P.3d 955, 958-59 (Or. 2006) (reinterpreting *Lyons v. Pearce* 694 P.2d 969, 977 (Or. 1985) as based on Oregon’s state constitution); *State v. Malik*, 680 P.2d 770 (Wash. Apr. 30, 1984); *People v. Pozo*, 746 P.2d 523 (Colo. Nov. 9, 1987) (finding that defense counsel has the duty to investigate relevant immigration law where he is aware that the client is a non-citizen); *State v. Creary*, No. 82767, 2004 WL 351878 at \*2 (Ohio Ct. App. Feb. 26, 2004) (holding that counsel’s failure to advise non-citizen defendant whom he knew to be interested in deportation consequences can constitute ineffective assistance of counsel); *see also*, *United States v. Couto*, 311 F.3d 179, 187-88 (2<sup>nd</sup> Cir. 2002), *cert. den.*, 544 U.S. 1034 (2005); *Strader v. Garrison*, 611 F.2d 61 (4<sup>th</sup> Cir. 1979); *United States v. Kwan*, 407 F.3d 1005, 1016018 (9<sup>th</sup> Cir. 2005); *Beavers v. Saffle*, 216 F.3d 918 (10<sup>th</sup> Cir. 2000); *Meyers v. Gillis*, 142 F.3d 664 (3<sup>rd</sup> Cir. 1998); *Czere v. Butler*, 833 F.2d 59, 63 n. 6 (5<sup>th</sup> Cir. 1987); *Sparks v. Sowders*, 852 F.2d 882, 885 (6<sup>th</sup> Cir. 1988); *Hill v. Lckhart*, 894 F.2d 1009 (8<sup>th</sup> Cir. 1990); *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11<sup>th</sup> Cir. 1985); *Alguno v. State*, 892 So.2d 1200 (Fla. Dist. Ct. App. 2005); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *Rubio v. State*, 194 P.3d 1224, 1230-31 (Nev. 2008); *State v. Garcia*, 727 A.2d 97 (N.J. Super. Ct. App. Div. 1999); *King v. State*, No. M2006-02745-CCA-R3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); *State v. Rojas-Martinez*, 125 P.3d 930 (Utah 2005); *Commonwealth v. Tahmas*, No. 105254 & 105255, 2005 WL 2249587 (Va. Cir. Ct. Jul. 26, 2005); *Valle v. State*, 132 P.3d 181, 184 (Wyo. 2006); *People v. McDonald*, 745 N.Y.S.2d 276 (N.Y. Ct. App. 2002), *aff’d*, 802 N.E.2d 13 (N.Y. 2003).

<sup>1165</sup> *See In re Adamiak*, 23 I&N Dec. 878 (BIA Feb. 8, 2006).

<sup>1166</sup> *See id.*

<sup>1167</sup> *See* Wis. Stat. § 971.08(1)(c); 725 ILCS 5/113-8 (advisal required for pleas of guilty, guilty but mentally ill, or nolo contendere for misdemeanor or felony offenses).

<sup>1168</sup> *See* 725 ILCS 5/113-8 (effective for pleas of guilty, guilty but mentally ill, or nolo contendere entered on or after January 1, 2004 for misdemeanor or felony offenses).

<sup>1169</sup> *See* 725 ILCS 5/122-1.

Where a non-citizen was not advised by the Illinois court as required by statute, the Appellate Court of Illinois has considered whether he can withdraw his plea. Two districts of the Appellate Courts which have thus far decided the issue have reached opposite conclusions. The First and Second Districts have found that because the statutory advisal is directory and not mandatory, a trial court can deny a motion to withdraw a guilty plea.<sup>1170</sup> In a separate decision, the First District has held that it is mandatory.<sup>1171</sup> The Illinois Supreme Court heard oral argument in this case on May 13, 2009 and a decision is expected.<sup>1172</sup>

In addition, affirmative misadvice by defense counsel regarding the immigration consequences of a plea may render the plea unintelligent and unknowing to support a granting of post-conviction relief.<sup>1173</sup> In contrast, the failure of defense counsel to advise a non-citizen about immigration consequences does not constitute a claim for ineffective assistance of counsel and a motion to withdraw the plea will not be granted.<sup>1174</sup>

Where a Wisconsin court failed to provide the requisite advisal about the immigration consequences under Wis. Stat. § 971.08(1)(c) and a non-citizen later demonstrates that his plea is likely to result in his deportation, exclusion from admission, or denial of naturalization, a non-citizen defendant may file a motion to vacate the judgment and withdraw his plea, which the court must grant.<sup>1175</sup> The motion to withdraw a plea may be brought by a non-citizen at any time.<sup>1176</sup> The presence of immigration warnings in a plea questionnaire alone is not sufficient to show that a non-citizen defendant was aware of the immigration consequences if he did not speak English at the time of his plea.<sup>1177</sup>

The requirements for the motion to withdraw a plea based on the failure of the state court to give the required pre-plea advisal under Wis. Stat. § 971.08(1)(c) depend upon the date of the plea and exhaustion of his direct appeal rights. In all motions to withdraw a plea based on Wis. Stat. § 971.08(1)(c), a non-citizen must demonstrate that: 1. the court did not give him the advisal required under Wis. Stat. § 971.08(1)(c) during the plea colloquy and 2. the plea is likely to have immigration consequences of deportation,

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<sup>1170</sup> See *People v. De Leon*, 387 Ill. App. 3d 1035, 901 N.E.2d 997, 327 Ill. Dec. 264 (Ill. App. Ct. 2d Dist. Jan. 15, 2009); *People v. Bilegne*, 381 Ill. App. 3d 292, 887 N.E.2d 564, 320 Ill. Dec. 420 (Ill. App. Ct. 1st Dist. 2008), *appeal den.* by 229 Ill. 2d 632, 897 N.E.2d 255, 325 Ill. Dec. 7 (2008).

<sup>1171</sup> See *People v. DelVillar*, 383 Ill. App. 3d 80, 890 N.E.2d 680, 321 Ill. Dec. 958 (Ill. App. Ct. 1st Dist. Jun. 11, 2008).

<sup>1172</sup> See *People v. DelVillar*, No. 106909 (Ill.).

<sup>1173</sup> See *People v. Correa*, 485 N.E.2d 307 (Ill. Sept. 20, 1985) (holding that affirmative misadvice about immigration consequences of a guilty plea by defense counsel rendered his plea involuntary as it was not made intelligently and knowingly and upholding the order granting his petition for post-conviction relief to withdraw his guilty plea).

<sup>1174</sup> See *People v. Huante*, 571 N.E.2d 736 (Ill. Apr. 18, 1991) (holding that the failure of defense counsel to advise a non-citizen of the immigration consequences of a guilty plea did not render his plea involuntary and did not constitute ineffective assistance of counsel).

<sup>1175</sup> See Wis. Stat. § 971.08(2). In addition to the statutory violation, a non-citizen may also be able to argue that his plea was not knowing, voluntary or intelligent and was taken in violation of Wis. Stat. § 971.08(1) and (2), the Fifth Amendment of the U.S. Constitution, and Section 8, Article 1 of the Wisconsin State Constitution.

<sup>1176</sup> See Wis. Stat. § 971.08(2).

<sup>1177</sup> See *State v. Issa*, 186 Wis.2d, 519 N.W.2d 741 (Wis.Ct.App. Jun. 28, 1994).

exclusion or denial of naturalization.<sup>1178</sup> Where a non-citizen entered his plea and he exhausted his direct appeal rights before June 19, 2002, he must additionally demonstrate that the lack of the immigration consequences advisal by the court was not harmless error because he was actually unaware of the likely immigration consequences of his guilty plea.<sup>1179</sup> Where a non-citizen entered his plea and his right to file a direct appeal had not yet been exhausted before June 19, 2002, then the harmless error rule does not apply and he does not have to demonstrate that he was in fact unaware of the immigration consequences of his plea.<sup>1180</sup> Similarly, where a non-citizen pled guilty to an offense on or after June 19, 2002, he need only demonstrate that the state court did not give the requisite advisal and that he is likely to suffer immigration consequences as a result of his plea.<sup>1181</sup>

Indiana does not have a statute requiring that the state court advise non-citizen defendants about the immigration consequences of their pleas. The failure of defense counsel to advise a defendant that deportation may follow as a consequence of a conviction can constitute deficient performance sufficient to support an ineffective assistance of counsel claim under the Indiana Constitution and the Sixth Amendment to the U.S. Constitution.<sup>1182</sup> Whether defense counsel's performance was deficient depends on a number of factors, including counsel's knowledge of the defendant's status as a non-citizen, the defendant's familiarity with consequences of conviction, the severity of criminal penal consequences, the likely subsequent effects of deportation, and any other factors relevant in a particular circumstance.<sup>1183</sup> Relief is proper in such a claim of ineffective assistance of counsel. The Indiana Supreme Court further held that when ineffective assistance is

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<sup>1178</sup> *See id.*

<sup>1179</sup> *See State v. Lagundoye*, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004) (holding the rule announced in *State v. Douangmala*, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002), finding that the harmless error rule in Wis. Stat. § 971.26 did not apply to Wis. Stat. § 971.08(1)(c) and Wis. Stat. § 971.08(2), does not apply retroactively to a non-citizen defendant who had exhausted his direct appeal rights prior to the date of the Doungmala decision); *State v. Douangmala*, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002) (overruling the harmless error requirement announced in *State v. Chavez*, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) for motions to withdraw pleas where the requisite pre-plea advisal under Wis. Stat. § 971.08(1)(c) was not given by the state court); *State v. Chavez*, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) (holding that a non-citizen defendant had to demonstrate the absence of the advisal by the state court, the likelihood of immigration consequences, and the fact that he was actually unaware of the immigration consequences of his plea). A conviction is deemed final where a prosecution is no longer pending, a judgment or conviction has been entered, the right to a state court appeal from a final judgment has been exhausted and the period in which to file a petition for a writ of certiorari in the U.S. Supreme Court has expired. *See State v. Koch*, 175 Wis.2d 684, 499 N.W.2d 152 (Wis. May 10, 1993).

<sup>1180</sup> *See State v. Lagundoye*, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004).

<sup>1181</sup> *See Wis. Stat. § 971.08(2)*; *State v. Lagundoye*, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004).

<sup>1182</sup> *See Segura v. State*, 749 N.E.2d 496 (Ind. Jun. 26, 2001); *see also, Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007) (holding that a non-citizen's residence of 20 years in the U.S. and presence of his wife and child in his life constituted sufficient special circumstances to establish a reasonable probability that he would have proceeded to trial if his defense attorney had properly advised him of the immigration consequences of his guilty plea to a felony theft offense) .

<sup>1183</sup> *See id.* at 500 (agreeing with the decision of the Indiana Court of Appeals, *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. Oct. 11, 1994) which held that the failure of an attorney to advise a non-citizen defendant about the deportation consequences of a guilty plea constitutes ineffective assistance of counsel).

derived from a failure to advise as to a penal consequence (deportation), it should be inferred that the decision to plead guilty was driven by the ineffective advice of the attorney and that a hypothetical defendant in a similar situation would have elected to go to trial if properly advised.<sup>1184</sup>

Strategies used in other state jurisdictions may be useful to develop approaches for post-plea motions and petitions to assist non-citizens in Illinois, Indiana, and Wisconsin. Additional resources are available from other jurisdictions regarding withdrawal of guilty pleas, motions to reduce sentences, and post-conviction petitions.<sup>1185</sup>

### ***Federal Criminal Proceedings***

The Seventh Circuit Court of Appeals has held that non-citizens do not have a right to be advised of immigration consequences prior to entering a plea in a criminal case and that the lack of such an advisal does not give rise to a claim of ineffective assistance of counsel.<sup>1186</sup> The Seventh Circuit may, however, be persuaded to change its opinion. It recognized that states within its jurisdiction have found that it is a breach of the code of professional responsibility for a defense attorney to fail to discuss the immigration

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<sup>1184</sup> See *id.*

<sup>1185</sup> See Norton Tooby, *Post-Conviction Relief for Immigrants* (Law Offices of Norton Tooby, Oakland, CA 2004); *Criminal Defense of Immigrants, National Edition*, (Law Offices of Norton Tooby, Oakland, CA 2003) Ch. 10, “Post-Conviction Relief”; Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes*, (West Group), Ch. 4, “Amelioration of Criminal Activity: Post-Conviction Remedies”; *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Law* (Immigrant Legal Resource Center 2007); Manuel D. Vargas, *Representing Noncitizen Criminal Defendants in New York State*, 3d Ed. (New York State Defenders Association, Albany, New York 2003) Ch. 5, “Strategies for Avoiding the Potential Negative Immigration Consequences of a New York Criminal Case”; Donald E. Wilkes, Jr., *State Postconviction Remedies & Relief Handbook* (2007), Ch. 16, “Illinois,” Ch. 17, “Indiana,” Ch. 52, “Wisconsin.”

<sup>1186</sup> See *Santos v. Kolb*, 880 F.2d 941 (7th Cir. Jul. 26, 1989) (holding that the trial attorney’s failure to advise petitioner of immigration consequences to guilty plea is not ineffective assistance of counsel as such consequences are collateral), *cert. denied* 439 U.S. 1059, 110 S.Ct. 873, 107 L.Ed.2d 956 (1990); *U.S. v. George*, 869 F.2d 333 (7th Cir. Feb. 15, 1989) (same); *U.S. ex rel. Durante v. Holton*, 228 F.2d 827 (7th Cir. Jan. 11, 1956) (holding that a criminal court does not have a duty to inform a defendant about deportation consequences of a guilty plea and that the lack of an advisal regarding the immigration consequences is not a violation of due process under the Fourteenth Amendment), *cert. denied* 351 U.S. 963, 76 S.Ct. 1027, 100 L.Ed. 1484 (1956); see also, *Resendiz v. Kovensky*, 416 F.3d 952, 956-58 (9th Cir. Jun. 27, 2005) (holding that immigration consequences post-AEDPA and post-IIRIRA remain collateral and failure of counsel to properly advise respondent of immigration consequences is not a Sixth Amendment violation); *Broomes v. Ashcroft*, 358 F.3d 1251, 1247 (10th Cir. Feb. 17, 2004); *U.S. v. Gonzales*, 202 F.3d 20, 25 (1st Cir. Jan. 24, 2000); *U.S. v. Del Rosario*, 902 F.2d 55 (D.C. Cir. Apr. 24, 1990) (not vacating plea because information regarding immigration consequences is collateral); *U.S. v. George*, 869 F.2d 333 (7th Cir. Feb. 15, 1989) (same); *U.S. v. Yearwood*, 863 F.2d 6 (4th Cir. Dec. 19, 1988) (same); *U.S. v. Campbell*, 778 F.2d 764 (11th Cir. Dec. 23, 1985); *Garcia-Trigo v. U.S.*, 671 F.2d 147 (5th Cir. Mar. 22, 1982); *Fruchtman v. Kenton*, 531 F.2d 946 (9th Cir. Feb. 27, 1976); *U.S. v. Santelises*, 509 F.2d 703 (2nd Cir. Jan. 9, 1975); *U.S. v. Nagaro-Garbin*, 653 F.Supp. 586 (E.D.MI Jan. 21, 1987).

consequences of a plea agreement with a non-citizen defendant.<sup>1187</sup>

The U.S. District Court for the Northern District of Illinois held that affirmative misadvice about immigration consequences by defense counsel constituted ineffective assistance of counsel and granted a petition for a writ of coram nobis, vacated the conviction, and ordered a new trial.<sup>1188</sup> Several federal circuit courts of appeals have also granted petitions for writs of habeas corpus or coram nobis, vacated convictions, and ordered further proceedings in the criminal cases.<sup>1189</sup>

## Considerations in Federal Criminal Proceedings

### *Procedural Issues*

A federal district court judge is not required to advise a non-citizen defendant during the plea colloquy that a prior conviction will be an important sentencing factor.<sup>1190</sup> Furthermore, the court is not required to make an explicit finding during the plea colloquy that a non-citizen defendant was previously convicted of an aggravated felony.<sup>1191</sup>

Where a non-citizen defendant was released on bond and then the DHS removed him from the U.S. prior to completion of the criminal proceedings, the district court may find that DHS's actions rendered his appearance for the criminal proceedings impossible and find that the bond has not been breached.<sup>1192</sup> Finally, deportation does not terminate a sentence of supervised release.<sup>1193</sup>

### *Aggravated Identity Theft*

In a show of force, ICE conducted a mass worksite enforcement action in Postville, Iowa at the Agriprocessors on May 12, 2008, arresting 389 workers who constituted more than one-third of the meatpacker's workforce and nearly one-fifth of the town's population.<sup>1194</sup> After that raid, prosecutors used the threat of mandatory two-year

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<sup>1187</sup> See *Jideonwo v. I.N.S.*, 224 F.3d 692, 700 (7<sup>th</sup> Cir. Aug. 23, 2000) (citing *Williams v. State*, 641 N.E.2d 44, 48-49 (Ind. App. Oct. 11, 1994); *People v. Mehmedoski*, 207 Ill.App.3d 275, 152 Ill. Dec. 202, 565 N.E.2d 735 (Ill.App.2d Dec. 31, 1990); Wis. Stat. § 971.08(1)(c) (requiring that state trial courts inform criminal defendants of the federal immigration consequences of a guilty plea)).

<sup>1188</sup> See *U.S. v. Pascual*, 2007 U.S. Dist. LEXIS 757 (N.D.IL Jan. 5, 2007) (discussing the requirements for a petition for a writ of coram nobis versus a petition for a writ of habeas corpus).

<sup>1189</sup> See *Downs-Morgan v. U.S.*, 765 F.2d 1534 (11<sup>th</sup> Cir. Jul. 23, 1985); *U.S. v. Couto*, 311 F.3d 179, 183 (2<sup>nd</sup> Cir. Nov. 15, 2002); *U.S. v. Kwan*, 407 F.3d 1005, 1015 (9<sup>th</sup> Cir. May 12, 2005); *U.S. v. Esogbue*, 357 F.3d 532 (5<sup>th</sup> Cir. Jan. 16, 2004).

<sup>1190</sup> See *U.S. v. Villareal-Tamayo*, 467 F.3d 630, 633 (7<sup>th</sup> Cir. Oct. 30, 2006).

<sup>1191</sup> See *id.*

<sup>1192</sup> See *U.S. v. Urquiza*, 2006 U.S. Dist. LEXIS 67519 (E.D.WI Sept. 19, 2006).

<sup>1193</sup> See *U.S. v. Akinyemi*, 108 F. 3d 777, 780 (7<sup>th</sup> Cir. Mar. 7, 1997).

<sup>1194</sup> See M. Sherman, "Supreme Court Hears Immigrant's ID Theft Case," *Associated Press*, Feb. 22, 2009. Numerous articles have been written about the Postville and subsequent mass raid and arrests of non-citizens in Mississippi in August 2008; a congressional inquiry has also taken place into the raids. The American Immigration Law Foundation (AILF) maintains a webpage on ICE raids and resulting litigation; for more information, visit

sentences for aggravated identity theft under 18 U.S.C. § 1028A(a)(1) to pressure immigrant workers into signing plea agreements that reduced their jail sentences but required them to agree to immediate deportation without the opportunity to meet with a immigration lawyer or to go before an immigration judge. The aggravated identity theft statute, codified at 18 U.S.C. § 1028A(a)(1), imposes a mandatory two-year sentence on individuals convicted of certain crimes if, during the commission of those crimes, the individual “*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification of another person.” Of those charged with aggravated identity theft, 270 accepted plea agreements with removal from the U.S. in exchange for a lesser charge than aggravated identity theft. This raid arose within the jurisdiction of the Eighth Circuit Court of Appeals.

On May 4, 2009, the U.S. Supreme Court overruled the Eighth Circuit’s decision.<sup>1195</sup> In its *Flores-Figueroa* opinion, the Supreme Court held that the government must prove that the criminal defendant *knew* that the means of identification at issue belonged to another person.<sup>1196</sup>

This decision is an important one as many states have enacted identity theft statutes similar to the federal statute and ICE continues enforcement actions to close down unlawful operations selling documents to non-citizens.<sup>1197</sup> Counsel should review the *Flores-Figueroa* decision carefully and use it to challenge state laws where the non-citizen did not know that an identity document belonged to an actual person.<sup>1198</sup>

### ***Federal Sentencing Issues***

In general, a sentencing court is not required to grant a downward departure for a non-citizen defendant who is deportable.<sup>1199</sup> Where a lawful permanent resident agrees to waive his rights to an administrative removal proceeding, the federal district court has the authority to downward depart on that basis.<sup>1200</sup>

Minor differences in confinement conditions at the end of sentences for non-citizens do not support the grant of a downward departure, and departures from the correct guideline range based merely on a defendant’s status as a deportable non-citizen are not

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[http://www.aifl.org/lac/clearinghouse\\_122106\\_ICE.shtml](http://www.aifl.org/lac/clearinghouse_122106_ICE.shtml). A full-length documentary about the raid entitled “The Abused” has been produced; for more information, see <http://www.abusedthepostvilleraid.com/>.

<sup>1195</sup> See *Flores-Figueroa v. Holder*, no. 08-108, 129 S.Ct. 1886 (May 4, 2009).

<sup>1196</sup> See *id.*

<sup>1197</sup> See, e.g., “U.S. Charges 21 defendants in alleged fraudulent identification document ring based in Chicago’s Little Village Community,” ICE, Sept. 19, 2008, available at <http://www.ice.gov/pi/nr/0809/080919chicago.htm>.

<sup>1198</sup> For additional discussion and arguments, see the Brief of Amici, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-108\\_PetitionerAmCu21Orgs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-108_PetitionerAmCu21Orgs.pdf).

<sup>1199</sup> See *U.S. v. Gallo-Vasquez*, 284 F.3d 780, 784 (7<sup>th</sup> Cir. Mar. 27, 2002).

<sup>1200</sup> See *U.S. v. Jauregui*, 314 F.3d 961, 963-64 (8<sup>th</sup> Cir. Jan. 3, 2003).

authorized.<sup>1201</sup> Rather, a downward departure is permissible only in exceptional circumstances and “a defendant’s status as a deportable alien is relevant only insofar as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous than the framers of the guidelines contemplated in fixing the punishment range for the defendant’s offense.”<sup>1202</sup> A downward departure based solely on a non-citizen’s loss of “end-of-sentence modifications” (i.e. a halfway house) “cannot be viewed as a term of imprisonment ‘substantially more onerous’ than the guidelines contemplated in fixing a punishment for a crime.”<sup>1203</sup> Thus, the order of a district court to grant a downward departure based on alien status and the placement of non-citizens in certain Bureau of Prison facilities alone is not permissible.<sup>1204</sup>

However, non-citizens sentenced to terms of imprisonment in the U.S. may be eligible to be transferred to their home countries to serve their sentence, such as citizens of the United Kingdom may be transferred under the Convention on the Transfer of Sentenced Persons.<sup>1205</sup> Where a non-citizen is not eligible to be transferred to serve his sentence in his home country, then his status as a deportable non-citizen may support a downward departure based on ineligibility for transitional release, additional time in DHS custody pending removal from the U.S., and separation from family.<sup>1206</sup>

The fact that a defendant suffered abuse as a child and has resulting psychological damage are discouraged factors under the U.S. Sentencing Guidelines that would justify a departure only in extraordinary circumstances.<sup>1207</sup> To justify a downward departure, discouraged factors such as child abuse and psychological damage must be “present to an exceptional degree or in some other way [that] makes the case different from the ordinary case where the factor is present.”<sup>1208</sup>

The Seventh Circuit has held that where a factor is not mentioned in the U.S. Sentencing Guidelines, it may be a basis for departure only if the factor places the case

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<sup>1201</sup> See *U.S. v. Meza-Urtado*, 351 F.3d 301, 305 (7<sup>th</sup> Cir. Dec. 8, 2003) (discussing that shortening the term of imprisonment for non-citizens based solely on deportation consequences but not for U.S. citizens will result in reverse discrimination).

<sup>1202</sup> See *id.* (quoting *U.S. v. Guzman*, 236 F.3d 830, 834 (7<sup>th</sup> Cir. Jan. 3, 2001)); see also, U.S.S.G. § 5K2.0.

<sup>1203</sup> See *U.S. v. Meza-Urtado*, 351 F.3d 301, 305 (7<sup>th</sup> Cir. Dec. 8, 2003).

<sup>1204</sup> See *U.S. v. Macedo*, 406 F.3d 778, 794-95 (7<sup>th</sup> Cir. Apr. 14, 2005) (reversing the district court’s grant of a downward departure and remanding for resentencing). For a discussion regarding sentencing for convictions under 8 U.S.C. § 1326, see *Illegal Reentry Prosecution*, *infra* at 8-25.

<sup>1205</sup> See *U.S. v. Mallon*, 345 F.3d 943, 949 (7<sup>th</sup> Cir. Oct. 6, 2003) (discussing that citizens covered under the Strausburg Convention cannot complain about a denial of a downward departure based on their non-citizen status in the U.S. as a transfer to their home countries will locate them closer to their relatives and eliminate additional time in detention pending removal and also recognizing that those who are not eligible to be transferred to serve their sentences in their home countries may still request a downward departure).

<sup>1206</sup> See *id.*

<sup>1207</sup> See *U.S. v. Pullen*, 89 F.3d 368, 370-72 (7<sup>th</sup> Cir. Jul. 10, 1996).

<sup>1208</sup> See *U.S. v. Pullen*, 89 F.3d 368, 371 (quoting *Koon v. U.S.*, 518 U.S. 81, 96 (Jul. 10, 1996)); *U.S. v. Bautista*, 258 F.3d 602, 608 (7<sup>th</sup> Cir. Jul. 12, 2001) (finding that the non-citizen’s physical and emotional abuse suffered in childhood and the resulting personality disorders were not extraordinary compared to other cases to warrant a downward departure).

“outside the heartland of cases contemplated by both a specific, relevant guideline(s) and the Guidelines as a whole.”<sup>1209</sup> Deportation of a non-citizen parent is not a factor ordinarily relevant to take the family ties and responsibilities and community ties out of the applicable sentencing guideline range.<sup>1210</sup> Risk of foreign prosecution has been held to be a discretionary factor for a district court to review in a motion for a downward departure.<sup>1211</sup>

### ***Removal from the U.S. Following a Plea of Guilty and Conviction***

Related to plea bargains, the Immigration and Nationality Act does not create a right for a non-citizen to be removed or deported from the U.S. after a final order of exclusion, deportation, or removal has been entered, unless another country agrees to accept his deportation.<sup>1212</sup> A non-citizen does not have any private right of action under the Immigration and Nationality Act to seek deportation before completing his sentence of incarceration.<sup>1213</sup> Where a non-citizen is serving a state sentence and already has a final administrative order of removal entered against him, he cannot obtain enforcement of the removal order through a petition for a writ of habeas corpus in federal district court.<sup>1214</sup>

### **Circumventing Immigration Consequences in Criminal Proceedings**

A conviction which is invalid under state law is illegal *ab initio* and cannot sustain a deportation order.<sup>1215</sup> A judgment that is vacated eliminates the conviction *ab initio*, as having been illegal from the time it was imposed.<sup>1216</sup> However, under the 1996 changes in the law, special attention must be given to rehabilitative statutes as a non-citizen may not collaterally attack a conviction in a removal proceeding.

In light of the Board of Immigration Appeal’s decision in *In re Roldan*,<sup>1217</sup> orders

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<sup>1209</sup> See *U.S. v. Schulte*, 144 F.3d 1107, 1109 (7<sup>th</sup> Cir. May 28, 1998).

<sup>1210</sup> See *U.S. v. Hernandez*, 325 F.3d 811 (7<sup>th</sup> Cir. Mar. 28, 2003) (“Although it is a sad fact that families are often separated by deportation, the situation in which one parent may remain in the country legally with children who are natural born American citizens, while the other parent is ordered deported, is by no means unique.”).

<sup>1211</sup> See *U.S. v. Abimbola-Amoo*, 390 F.3d 937, 941 (7<sup>th</sup> Cir. Nov. 23, 2004) (holding that where the district court decided that foreign incarceration for an act committed in the U.S. was a matter for the foreign jurisdiction, the court of appeals lacked jurisdiction to review that discretionary decision); cf. *U.S. v. Abimbola-Amoo*, 390 F.3d 937, 943-44 (7<sup>th</sup> Cir. Nov. 23, 2004) (J. Wood, dissenting) (would hold that the risk of foreign prosecution is not a forbidden ground of departure but instead a discouraged ground).

<sup>1212</sup> See *Leyva v. Meissner*, 996 F.Supp. 831 (C.D.IL Feb. 9, 1998).

<sup>1213</sup> See *U.S. v. Lopez*, 938 F.Supp. 481 (N.D.IL Jun. 27, 1996).

<sup>1214</sup> See *Aceves-Moreno v. DHS*, 2006 U.S. Dist. LEXIS 42682 (E.D.WI Jun. 14, 2006) (finding no subject-matter jurisdiction to review the Attorney General’s decision to execute a final removal order).

<sup>1215</sup> See *U.S. v. Smith*, 41 F.2d 707 (7<sup>th</sup> Cir. May 28, 1930), rehearing denied Jul. 3, 1930.

<sup>1216</sup> See *Cruz-Sanchez v. I.N.S.*, 438 F.2d 1087 (7<sup>th</sup> Cir. Jan. 13, 1971), on reconsideration and rehearing, Mar. 19, 1971 (holding that where a conviction has been vacated, the order of deportation must be reconsidered); *In re Kaneda*, 16 I&N Dec. 677 (BIA Feb. 28, 1979); *In re Sirhan*, 13 I&N Dec. 592 (BIA June 19, 1970)

<sup>1217</sup> See *In re Roldan*, 22 I&N Dec. 512 (BIA Mar. 3, 1999), *reversed in part*, *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9<sup>th</sup> Cir. Aug. 1, 2000) (reversing the Board’s decision as it relates to the Federal



entered under state rehabilitative statutes, including orders of expungements for crimes involving moral turpitude, will no longer be given effect in immigration proceedings. Thus, an expungement for a misdemeanor offense based on completion of the terms imposed by the court under Wis. Stat. § 973.015 remains a conviction for immigration purposes.<sup>1218</sup> Similarly, an automatic conversion of a Class D felony to a Class A misdemeanor based on rehabilitation under IC 35-38-1-1.5 will remain a conviction as a Class D felony for immigration purposes.<sup>1219</sup> However, a successful direct appeal of a conviction based on the merits, an underlying statutory defect, or a constitutional defect will be given effect in immigration proceedings.<sup>1220</sup>

Therefore, motions to vacate pleas and convictions and to reduce sentences as well as petitions for post-conviction relief and gubernatorial pardons are extremely important.<sup>1221</sup> States have different time limitations for applying for relief from the entry of a plea, a sentence, and/or a conviction.

A conviction that has been vacated by a state court on grounds other than under a rehabilitative statute or for immigration hardship will be given effect.<sup>1222</sup> In *In re Pickering*, the Board of Immigration Appeals held that where a non-citizen's conviction is vacated for reasons solely related to rehabilitation or immigration hardship, rather than on the basis of a procedural or substantive effect in the underlying criminal proceedings, then the conviction is not eliminated for immigration purposes.<sup>1223</sup> Thus, for a vacatur of a plea to be valid for immigration purposes, the plea must be vacated for a procedural or substantive defect in the underlying criminal proceedings, not for reasons related solely to post-conviction events, such as rehabilitation or immigration hardships. Ineffective assistance of counsel

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First Offenders Act or state counterparts). Note: The Board of Immigration Appeals and the Immigration Judges must follow circuit court precedent arising in cases in the circuit. *See In re Anselmo*, 20 I&N Dec. 25 (BIA May 11, 1989). Where a circuit court has not reversed the Board, the decision of the Board is precedent. Thus, the Board's decision in *In re Roldan*, *supra*, is binding in cases arising in the Seventh Circuit.

<sup>1218</sup> *See* Wis. Stat. § 973.015.

<sup>1219</sup> *See* IC 35-38-1-1.5.

<sup>1220</sup> *See id.* *See also, In re Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA Sept. 22, 2000) (holding that the New York statute under which the conviction was vacated was not an expungement statute or rehabilitative statute); *In re Sirhan*, 13 I&N Dec. 592 (BIA Jun. 19, 1970). An underlying defect in the criminal proceeding may include the failure of the trial court to properly admonish a defendant who pled guilty about his right to appeal and the procedures to perfect the appeal. *See, e.g., People v. Breedlove*, 821 N.E.2d 1176, 1183-84 (IL Dec. 16, 2004) (holding that failure of the trial court to properly admonish a defendant under Illinois Supreme Court Rule 605(b) prohibits the dismissal of a defendant's appeal and requires remand for the proper admonishments).

<sup>1221</sup> *See Mansoori v. I.N.S.*, 32 F.3d 1020, 1024 (7<sup>th</sup> Cir. Aug. 8, 1994); *Palmer v. I.N.S.*, 4 F.3d 482, 289 (7<sup>th</sup> Cir. Aug. 26, 1993); *Guillen-Garcia v. I.N.S.*, 999 F.2d 199, 204 (7<sup>th</sup> Cir. Jul. 2, 1993); *Rassano v. I.N.S.*, 377 F.2d 971, 974 (7<sup>th</sup> Cir. Dec. 13, 1966).

<sup>1222</sup> *See In re C-*, 8 I&N Dec. 611 (BIA Mar. 28, 1960).

<sup>1223</sup> *See In re Pickering*, 23 I&N Dec. 621 (BIA Jun. 11, 2003); *see also, Ali v. Ashcroft*, 395 F.3d 722 (7<sup>th</sup> Cir. Jan. 11, 2005) (affirming the holding in *In re Pickering* and finding that the conviction was vacated for immigration purposes, not based on a procedural or substantive defect in the underlying proceedings); *Sandoval v. I.N.S.*, 240 F.3d 577 (7<sup>th</sup> Cir. Feb. 12, 2001) (finding that the conviction had been vacated on constitutional grounds).

may constitute a violation of statutory and/or state or federal constitutional rights, for which the vacatur of a plea will be valid for immigration purposes.<sup>1224</sup>

Different standards apply to motions for post-conviction relief related to vacatur of a conviction based on a plea and a change in the sentence imposed. Sentence modifications granted for any reason, including for immigration purposes, will be valid and respected for immigration purposes.<sup>1225</sup> In many states, it may be easier to ask a court to reduce a non-citizen probationer's sentence by one or two days for a conviction while the non-citizen is still on probation without having to state that the reduction is for immigration purposes. For example, through a motion by counsel or the prosecution, a criminal court could reduce a sentence for a year and a day (366 days) to 364 days with a stay or suspension of execution of sentence. With a 364 day sentence, a non-citizen will no longer be convicted of an aggravated felony (such as theft) although he may still be deportable if the crime involves moral turpitude or another ground of deportation.<sup>1226</sup> This action may render him eligible for relief from removal.

Where a criminal court has vacated a conviction and a non-citizen who has been ordered removed by an Immigration Judge is still physically present in the U.S., he must file a motion to reopen with the Immigration Judge, or if the Board of Immigration Appeals denied his appeal, with the Board.<sup>1227</sup> An Immigration Judge and the Board have the authority to *sua sponte* reopen removal proceedings if the newly vacated conviction renders the removal order invalid.<sup>1228</sup>

### ***State Laws and Procedures***

States have different time limits for filing motions to withdraw guilty pleas, motions to reduce sentences, and petitions for post-conviction relief. It is important to evaluate the posture of each non-citizen defendant's case with respect to current as well as previous charges, pleas, and any resulting convictions for immigration purposes, including traffic

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<sup>1224</sup> See e.g. *Segura v. State of Indiana*, 749 N.E.2d 496 (Ind. Jun. 26, 2001); *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); *People v. Correa*, 108 Ill.2d 541, 485 N.E.2d 307 (Ill. Sept. 20, 1985) (holding post-conviction relief may be granted where affirmative misadvice regarding the immigration consequences of a criminal conviction by defense counsel constitutes ineffective assistance of counsel and renders a guilty plea by an alien to not be knowing, intelligent, or voluntary as required by the U.S. Constitution); cf. *People v. Huante*, 571 N.E.2d 736 (Ill. Apr. 18, 1991) (holding that defense counsel has no affirmative duty to advise a non-citizen defendant of immigration consequences for a plea to a criminal offense).

<sup>1225</sup> See *In re Cota*, 23 I&N Dec. 849 (BIA Nov. 18, 2005) (holding that where a sentence was modified *nunc pro tunc* expressly to avoid deportation for an aggravated felony, the Immigration Court and the Board must recognize the modified sentence); *In re Pickering*, 23 I&N Dec. 621 (BIA Jun. 11, 2003) distinguished); *In re Song*, 23 I&N Dec. 173 (BIA Sept. 5, 2001) (same); *In re Martin*, 18 I&N Dec. 226 (BIA Jun. 9, 1982) (sentence of confinement was reduced to sentence of probation). cf. *State v. Dawson*, 2004 WI App. 173 (Wis. App. Aug. 19, 2004) (holding that that a trial court does not have the authority to "re-open and amend" a prior conviction).

<sup>1226</sup> See *Aggravated Felonies*, *supra* at 3-34.

<sup>1227</sup> See *Padilla v. Gonzales*, 470 F.3d 1209 (7<sup>th</sup> Cir. Dec. 7, 2006) (holding that because the non-citizen did not exhaust his administrative remedies by filing a motion to reopen removal proceedings with the Board of Immigration Appeals, it did not have jurisdiction over the petition for review).

<sup>1228</sup> See *id.* at 1213-1215; 8 C.F.R. § 1003.2(a); 8 C.F.R. § 1003.23(b)(1).

offenses.

### ***Motions to Withdraw Guilty Pleas***

In analyzing the options to reduce or alleviate the immigration consequences for non-citizens with convictions meeting the immigration definition of conviction, a motion to withdraw a guilty plea may need to be considered. To bring a motion to withdraw a guilty plea, a legal or constitutional defect will need to be stated.

The time frame for filing a motion to withdraw a guilty plea, guilty but mentally ill, or nolo contendere varies by state. For example, in Illinois, a defendant must file a motion to vacate a plea of guilty or guilty but mentally ill within 30 days of the entry of the plea.<sup>1229</sup> In Indiana, a motion to withdraw a plea of guilty or guilty but mentally ill filed at any time prior to sentencing will be granted for any fair and just reason unless the state has been substantially prejudiced by reliance on the plea.<sup>1230</sup> The court can also grant a motion to withdraw a plea and vacate the judgment at any time (even after sentencing) where the defendant proves manifest injustice.<sup>1231</sup> In Wisconsin, a motion to withdraw a plea must be filed within 20 days of the date of sentencing or final adjudication of the case.<sup>1232</sup> Otherwise, a petition for post-conviction may be brought to attack the judgment or sentence imposed.<sup>1233</sup>

### ***Motions to Reconsider or Reduce Sentences***

To avoid certain aggravated felony convictions and certain convictions for crimes involving moral turpitude that bar admissibility, a motion to reduce a sentence by a few days or even a few months may need to be brought. For example, a non-citizen who is sentenced to a year and a day (366 days) for theft has an aggravated felony conviction. A successful motion to reduce the sentence to 364 days will mean that the non-citizen has been convicted of a crime involving moral turpitude but not of an aggravated felony, thus possibly rendering the non-citizen eligible for different forms of relief.<sup>1234</sup>

The last sentence imposed by a criminal court is the sentence that the DHS, the Immigration Court, or the Board of Immigration Appeals will deem to be the sentence imposed.<sup>1235</sup> Unlike a motion to vacate a plea or petition for post-conviction relief, a motion to reduce a sentence may be based on immigration consequences as well as a statutory or constitutional defect in the prior sentencing hearing or procedures.<sup>1236</sup> A state court may

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<sup>1229</sup> See Ill. S.Ct. R. 604(d).

<sup>1230</sup> See IC 35-35-1-4(b).

<sup>1231</sup> See IC 35-35-1-4(c) (stating that the motion will be considered as a post-conviction petition).

<sup>1232</sup> See Wis. Stat. § 974.02; Wis. Stat. § 809.30(2)(b).

<sup>1233</sup> See Wis. Stat. § 974.06; Wis. Stat. § 974.07.

<sup>1234</sup> See, e.g., *In re Martin*, 18 I&N Dec. 226 (BIA Jun. 9, 1982) (holding that the sentence imposed upon resentencing is the sentence to be considered for immigration purposes).

<sup>1235</sup> See *In re Martin*, 18 I&N Dec. 226 (BIA Jun. 9, 1982); *In re H-*, 9 I&N Dec. 380 (BIA Jul. 26, 1961); *In re Corso*, No. A18 079 714 (BIA Dec. 29, 1999).

<sup>1236</sup> See *In re Song*, 23 I&N Dec. 173 (BIA Sept. 5, 2001); *In re Cota*, 23 I&N Dec. 849 (BIA Nov. 18, 2005) (holding that where a sentence was modified nunc pro tunc expressly to avoid deportation as for an aggravated felony, the Immigration Judge and Board of Immigration Appeals must recognize

vacate or set aside the previous sentence and impose a new sentence for clarity.<sup>1237</sup>

Under Illinois law, a motion to reconsider a sentence must be brought within 30 days of sentencing.<sup>1238</sup> A motion to withdraw a guilty plea may, however, be necessary in addition to a motion to reconsider or reduce a sentence. Where a plea has been fully negotiated, a non-citizen must file a motion to withdraw the guilty plea and vacate the judgment and show that the granting of the motion is necessary to correct a manifest injustice.<sup>1239</sup> Similarly, where the sentencing cap or range of sentence was negotiated in a partially negotiated plea, the non-citizen must move to withdraw the guilty plea.<sup>1240</sup> Where a non-citizen pleads guilty in sole exchange for the state's promise to dismiss additional charges, he can move the court to reconsider or reduce his sentence without filing a motion to withdraw his guilty plea.<sup>1241</sup>

Under Indiana law, a court may modify a sentence with notice to the prosecutor within 365 days of the date that an inmate begins to serve his sentence.<sup>1242</sup> If more than 365 days have passed since an inmate began serving his sentence, then the court may modify a sentence with the approval of the prosecutor or, if the person convicted is eligible, the court may place the person convicted in a community corrections program without the approval of the prosecutor.<sup>1243</sup>

Under Wisconsin law, a motion to modify a sentence must be brought within 90 days after the date of sentencing or an order is entered.<sup>1244</sup> Where an inmate has served the "applicable percentage" of a term of imprisonment in the Wisconsin Department of Corrections for certain classes of felonies, he may file a petition for a sentence adjustment

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the newly imposed sentence); *In re Pickering*, 23 I&N Dec. 621 (BIA Jun. 11, 2003) distinguished; *In re Martin*, 18 I&N Dec. 226 (BIA Jun. 9, 1982).

<sup>1237</sup> See *Sandoval v. I.N.S.*, 240 F.3d 577, 582-83 (7<sup>th</sup> Cir. Feb. 12, 2001) (discussing the difference between a state rehabilitative statute and a modification of a sentence by a state court under the I.N.A.).

<sup>1238</sup> See 730 ILCS 5/5-8-1(c).

<sup>1239</sup> See *People v. Evans*, 174 Ill.2d 320, 673 N.E.2d 244, 220 Ill.Dec. 332 (Ill. Sept. 19, 1996), rehearing denied Dec. 2, 1996; *People v. Meeks*, 249 Ill.App.3d 152, 618 N.E.2d 1000, 188 Ill.Dec. 430 (Ill.App.3d Jun. 30, 1996); Ill.S.Ct. R. 604(d).

<sup>1240</sup> See *People v. Linder*, 186 Ill.2d 67, 708 N.E.2d 1169, 237 Ill.Dec. 129 (Ill.App.2d, Feb. 19, 1999), rehearing denied Mar. 29, 1999; *People v. Didier*, 306 Ill.App.3d 803, 715 N.E.2d 321 (Ill.App.3d Aug. 5, 1999), rehearing denied Aug. 30, 1999, appeal denied 186 Ill. 2d 575, 723 N.E.2d 1165, 243 Ill. Dec. 564 (1999); *People v. Doguet*, 307 Ill.App.3d 1, 716 N.E.2d 818 (Ill.App.3d Aug. 25, 1999), rehearing denied Sept. 24, 1999, appeal denied 191 Ill.2d 541, 738 N.E.2d 930, 250 Ill.Dec. 461 (Sept. 1, 2000).

<sup>1241</sup> See *People v. Zarka-Nevling*, 308 Ill.App.3d 516, 720 N.E.2d 334, 241 Ill.Dec. 879 (Ill.App.3d Nov. 8, 1999), appeal denied 189 Ill.2d 680, 731 N.E.2d 771, 246 Ill.Dec. 922 (May 31, 2000); *People v. Lumzy*, 191 Ill.2d 182, 730 N.E.2d 20, 246 Ill.Dec. 340 (Ill.App.2d Mar. 23, 1999), rehearing denied May 30, 2000; *People v. Rogers*, 846 N.E.2d 184, 194-95 (Ill.App.2d Mar. 31, 2006).

<sup>1242</sup> See IC 35-38-1-17(a). A notice of appeal to challenge the judgment or sentence imposed must be filed within 30 days of a final judgment or, where a motion to correct error is timely filed, within 30 days after the ruling on the motion. See Ind. Appellate Rule 9A(1).

<sup>1243</sup> See IC 35-38-1-17(b).

<sup>1244</sup> See Wis. Stat. § 973.19(1)(a). Unlike Illinois, there is no requirement in Wisconsin that a motion to reconsider be filed before filing an appeal to challenge either the finding of guilt or the sentence imposed where there are other appeal issues raised in the notice of appeal.

to modify his sentence.<sup>1245</sup>

### *Post-Conviction Relief*

Whereas a motion to vacate pleas or reduce a sentence is decided by the criminal court, a post-conviction petition is a civil action in which a criminal defendant may collaterally attack his prior conviction and sentence.<sup>1246</sup> A non-citizen who files a petition for post-conviction relief must allege that there was a substantial denial of his rights under the U.S. Constitution, a state Constitution, or both in the criminal proceedings.<sup>1247</sup> For example, in Illinois, a post-conviction petition may be filed by a non-citizen who can assert that his conviction was a result of a substantial denial of his rights under the United States constitution or the Illinois constitution or both.<sup>1248</sup> Such claims may include the failure of the state court to fully admonish a defendant of his rights.<sup>1249</sup> Timing of the filing of a petition for post-conviction relief may be an issue in cases where a non-citizen has completed his term of imprisonment or probation.<sup>1250</sup>

In Illinois, there is a three stage process for a state court to adjudicate a petition for post-conviction relief. At the first stage of the proceedings and where a non-citizen has been sentenced to a term of imprisonment, the court must determine within 90 days of the filing and docketing of the petition and without any responsive pleading by the state,

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<sup>1245</sup> See Wis. Stat. § 973.195 (applicable percentage means 85% for a Class C to Class E felony and 75% for a Class F to Class I felony).

<sup>1246</sup> See *People v. Johnson*, 793 N.E.2d 591 (Ill. Apr. 18, 2002).

<sup>1247</sup> See 725 ILCS 5/122-1.

<sup>1248</sup> See 725 ILCS 5/122-1; *People v. Coleman*, 183 Ill. 2d 366, 378-79, 701 N.E. 2d 1063, 1070-71, 233 Ill. Dec. 789 (Oct. 1, 1998).

<sup>1249</sup> See *People v. Whitfield*, 217 Ill.2d 177, 840 N.E.2d 658 (Ill. Oct. 6, 2005) (discussing admonishments required under Illinois statute, voluntariness of pleas, differences between “open” guilty pleas and negotiated guilty pleas for a specific sentence, and the “benefit of the bargain” grounds for post-conviction relief and finding that the failure of the state court to advise a defendant about the period of mandatory supervised release to be added to the sentence following completion of a term of imprisonment in the Illinois Department of Corrections did not constitute substantial compliance with Illinois Supreme Court Rule 402, was an unfair breach of the plea agreement and violated due process).

<sup>1250</sup> See *People v. Pack*, 224 Ill.2d 144, 862 N.E. 2d 938 (Ill. Jan. 19, 2007) (holding that where a person is serving time for concurrent sentences in the Illinois Department of Corrections, he may proceed with a post-conviction to challenge the first sentence which he has completed while serving the second sentence); *People v. Mrugalla*, 371 Ill.App.3d 544, 868 N.E.2d 303 (Ill.Ct.App. 4<sup>th</sup> Feb. 20, 2007) (holding that a non-citizen who filed his petition for post-conviction relief after he finished serving his Illinois sentence and then was detained in DHS custody was not “imprisoned in the penitentiary” for purposes of the Post-Conviction Hearing Act, 725 ILCS 5/122-1 through 122-8 and dismissing his petition for post-conviction relief based on a claim of ineffective assistance of counsel where counsel allegedly affirmatively misinformed him about the immigration consequences of his guilty plea); *People v. Tostado*, 362 Ill.App.3d 949, 951-52, 841 N.E.2d 980, 982-83 (Ill.Ct.App.5<sup>th</sup> Aug. 30, 2005) (holding that the dismissal of a non-citizen defendant’s post-conviction petition alleging affirmative misadvice about the immigration consequences of a guilty plea was proper where the petition was filed after completion of probation); *People v. Thurman*, 334 Ill.App.3d 286, 288-89, 777 N.E.2d 971, 972-73 (Ill.Ct.App.3d May 15, 2002) (post-conviction relief not available when the underlying sentence has already been fully served); *People v. Collins*, 161 Ill.App.3d 285, 288, 514 N.E.2d 499, 501, (Ill.Ct.App. Sept. 24, 1987).

whether the petition is frivolous or patently without merit.<sup>1251</sup> If the court does not dismiss the petition, then a court must determine in the second stage whether the petition and any accompanying documentation demonstrate a substantial showing of a constitutional violation.<sup>1252</sup> At this second stage, the state may answer the petition or may file a motion to dismiss it.<sup>1253</sup> If the court finds that a substantial showing of a constitutional violation has been made, then the court will conduct an evidentiary hearing in the third stage of the case.<sup>1254</sup>

In order for a non-citizen defendant to reach the third stage of an evidentiary hearing, the allegations set forth in the post-conviction petition as supported by the trial record and/or accompanying affidavits must make a substantial showing of a constitutional violation.<sup>1255</sup> The failure of defense counsel or the state court to advise a non-citizen of the immigration consequences of his plea will have different impacts on the possibility of post-conviction relief, depending upon the state law and the date of the plea. In Illinois, where a non-citizen defendant never asked for and defense counsel never gave advice about the immigration consequences for a plea of guilty to the charge, a claim of ineffective assistance of counsel will be denied and the post-conviction petition will also be denied unless other grounds for a claim of ineffective assistance of counsel support the claim.<sup>1256</sup> Irregularity in an arraignment shall not affect the validity of any proceeding in the case if the non-citizen pleads to the charge or proceeds to trial without objecting to such irregularity.<sup>1257</sup> Two Illinois Court of Appeals have held that immigration consequences of a criminal conviction are collateral consequences and therefore not “imprisonment” under 725 ILCS 5/122-1(a) for purposes of post-conviction relief.<sup>1258</sup>

For immigration purposes, state court orders granting post-conviction motions based on statutory and/or constitutional defects in the underlying criminal court proceedings have been deemed effective to eliminate the grounds of inadmissibility and deportability.<sup>1259</sup>

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<sup>1251</sup> See *People v. Coleman* 183 Ill. 2d at 379; 725 ILCS 122/2.1(a)(2).

<sup>1252</sup> See *People v. Smith*, 326 Ill. App. 3d 831, 839, 856, 761 N.E.2d 306, 315, 327, 260 Ill. Dec. 462 (Dec. 7, 2001).

<sup>1253</sup> See 725 ILCS 5/122.

<sup>1254</sup> See *People v. Smith*, 326 Ill. App. 3d at 856, 761 N.E.2d at 327.

<sup>1255</sup> See *People v. West*, 187 Ill. 2d 418, 425, 719 N.E.2d 664, 670, 241 Ill. Dec. 535 (Sept. 23, 1999).

<sup>1256</sup> See *People v. Bouzidi*, 332 Ill. App. 3d 87, 95-96, 773 N.E.2d 699, 265 Ill. Dec. 935 (Ill. App. 3d Jun. 28, 2002) (finding that defense counsel’s failure to advise a non-citizen defendant of the collateral consequences of his guilty plea did not rise to the level of ineffective assistance of counsel under the Strickland test and citing *People v. Huante*, 143 Ill. 2d 61, 68, 571 N.E.2d 736, 739, 156 Ill. Dec. 756 (Apr. 19, 1991).

<sup>1257</sup> See 725 ILCS 5/113-6.

<sup>1258</sup> See *People v. Rajagopal*, 381 Ill. App. 3d 326; 885 N.E.2d 1152 (Ill.Ct.App.1<sup>st</sup> Mar. 26, 3008) (denying non-citizen’s petition for post-conviction relief filed eight years after his guilty plea and alleging ineffective assistance of counsel for failure to accurately advise about the immigration consequences of a guilty plea); *People v. Tostado*, 362 Ill. App. 3d 949, 841 N.E.2d 980, 299 Ill. Dec. 248 (Ill. App. Ct. 5th Dist. 2005).

<sup>1259</sup> See *Sandoval v. I.N.S.*, 240 F.3d 577, 580 (7<sup>th</sup> Cir. Feb. 12, 2001); *In re Adamiak*, 23 I&N Dec. 878 (BIA Feb. 8, 2006) (holding that a motion to vacate a conviction granted based on the failure of the state court to advise a non-citizen defendant of the possible immigration consequences of a guilty plea as required by Ohio statute was valid for immigration purposes). See also, *Segura v. State*, 749 N.E.2d 496 (Ind. Jun. 26, 2001); *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); *People v. Correa*, 108 Ill. 2d 541 (1985) (granting motion for post-conviction relief based on affirmative

Where post-conviction relief has been granted by a state court solely to eliminate the immigration consequences of a conviction without an underlying statutory or constitutional defect, the state court order has not been given full faith and credit for purposes of federal immigration law which deems the non-citizen as convicted of the offense vacated by the state court.<sup>1260</sup>

Thus, the pleadings of a motion for post-conviction relief and any discussion before the criminal court must be very clearly related to the statutory or constitutional procedural or substantive defect in the underlying criminal case for the state court order to be respected in the immigration context. All motions and attached evidence, affidavits, transcripts from the post-conviction proceedings, and orders of the state court are subject to review by the Immigration Court, Board of Immigration Appeals, and the Seventh Circuit Court of Appeals to determine whether the state court order eliminates the ground of deportability or inadmissibility. For example, where a stipulated motion to amend a conviction was presented by the state prosecutor and the defense attorney with the purpose of averting the deportation of a non-citizen from the U.S. during a hearing before the state court, the Seventh Circuit held that the non-citizen remained convicted of an aggravated felony, despite the state court's order granting the motion to amend the conviction to one which did not constitute an aggravated felony.<sup>1261</sup>

It may be possible to attack a conviction for which a juvenile pled guilty in a court other than a juvenile delinquency court based on a statutory defect. A person under the age of 18 years is not permitted to plead guilty or to waive the right to a trial by jury except where the penalty is only by fine unless she is represented by counsel in open court.<sup>1262</sup>

For illegal reentry cases prosecuted under I.N.A. § 276, 8 U.S.C. §1326, post-conviction relief may not be effective. Where a Wisconsin conviction was vacated following a non-citizen's deportation due to the failure of the state court to give the mandatory statutory advisals about immigration consequences for a guilty plea, the Seventh Circuit held that the non-citizen remained subject to the sentencing enhancement under §2L1.2(b) of the U.S. Sentencing Guidelines for an illegal reentry prosecution under I.N.A. § 276, 8 U.S.C. §1326.<sup>1263</sup> The Seventh Circuit found that the enhancement applied because the

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misadvice by defense counsel which was found to be ineffective assistance of counsel); 725 ILCS § 5/113-8; *State v. Dawson*, 2004 WI App. 173 (Wis.App. Aug. 19, 2004).

<sup>1260</sup> See *Ali v. Ashcroft*, 395 F.3d 722 (7<sup>th</sup> Cir. Jan. 11, 2005) (finding that where a Wisconsin conviction for drug trafficking was vacated solely for immigration purposes, non-citizen remained convicted of drug trafficking for immigration purposes).

<sup>1261</sup> See *id.* (distinguishing *Sandoval v. I.N.S.*, *supra*, which presented a cognizable claim of ineffective assistance of counsel which related to the voluntariness of the non-citizen's guilty plea).

<sup>1262</sup> See 725 ILCS 5/113-5.

<sup>1263</sup> See *U.S. v. Garcia-Lopez*, 375 F.3d 586 (7<sup>th</sup> Cir. Jul. 12, 2004) (leaving open the question regarding whether the enhancement can be constitutionally applied when the conviction that resulted in the non-citizen defendant's deportation/removal was vacated on account of a constitutional defect). See also, *U.S. v. Alcantara-Hernandez*, 2006 U.S. Dist. LEXIS 48100 (E.D.WI Jul. 3, 2006) (holding that a conviction under Wis. Stat. § 948.07(3) for child enticement for which the state court failed to provide the immigration advisals prior to the guilty plea but which was not vacated prior to the non-citizen's deportation was an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. §1101(a)(43)(A) and served as a basis for sentencing enhancement, even if it is later vacated based on an underlying constitutional defect in the state criminal proceeding).

non-citizen was convicted of an aggravated felony at the time of his deportation.<sup>1264</sup> Thus, to determine the level of offense severity, the sentencing court will look at the status of the non-citizen defendant's conviction at the time of his deportation.<sup>1265</sup> The question regarding whether the enhancement can be constitutionally applied when the conviction that resulted in the non-citizen defendant's deportation/removal was vacated on account of a constitutional defect remains to be decided by the Seventh Circuit.<sup>1266</sup>

### ***Vienna Convention on Consular Relations***

The United States is a party to the Vienna Convention on Consular Relations.<sup>1267</sup> As a treaty entered into under the authority of the United States Constitution, the Vienna Convention on Consular Relations is a federal law and supreme law of the land.<sup>1268</sup> Under the Vienna Convention on Consular Relations, a non-citizen who is detained and/or charged with a crime must be informed by the authorities of his or her right to speak with a consular officer from his or her country.<sup>1269</sup> Consulates of foreign countries can appear in criminal cases as *amicus curiae*. Consulates have an interest in ensuring that the rights of their citizens are respected and can assist by bridging the cultural and language barriers faced by non-citizens in criminal proceedings in the U.S.<sup>1270</sup>

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<sup>1264</sup> See *U.S. v. Garcia-Lopez*, 375 F.3d 586 (7<sup>th</sup> Cir. Jul. 12, 2004).

<sup>1265</sup> See *id.*

<sup>1266</sup> See *id.*

<sup>1267</sup> See Vienna Convention on Consular Relations and Optional Protocols, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262-512, ratified by the United States on Nov. 21, 1969.

<sup>1268</sup> See U.S. CONST. art. VI.

<sup>1269</sup> Article 36(1)(b) provides:

If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Vienna Convention on Consular Relations and Optional Protocols, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262-512; 8 C.F.R. § 236.1(e); 8 C.F.R. § 1236.1(e); *Breard v. Greene*, 523 U.S. 371 (Apr. 14, 1998) (stating that Article 36 “arguably confers on an individual the right to consular assistance following arrest). For an excellent discussion of Article 36, see M. Kadish & C. Olson, “Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation,” 27 *Mich. J. Int'l L.* 1185, 1218 (2006); M. Kadish, Article 36 of the Vienna Convention on Consular Relations, “A Search for the Right to Consul,” 18 *Mich. J. Int'l L.* 565 (Summ. 1997). See also, “The Right to Information about Consular Assistance within the Framework of the Guarantees of Due Process of Law,” *Adv. Opn. OC-16/99*, Inter-Amer. Ct. Human Rights, Oct. 1, 1999; L. Springrose, “Strangers in a Strange Land: The Rights of Non-citizens under Article 36 of the Vienna Convention on Consular Relations,” 14 *Geo. Immigr. L.J.* 185 (1999).

<sup>1270</sup> See L. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 *Wm. & Mary Bill Rts. J.* 363, 392-93 (2004); L. Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 *Geo. Immigr. L. J.* 185, 195 (1999); W. Aceves, *Murphy v. Netherland*, 92 *Am. J. Int'l L.* 87, 89-90 (1998).



Arresting authorities are required to give the appropriate advisals to non-citizens regarding their rights under the Vienna Convention in a language they understand. Awareness of this obligation is increasing. In September 2000, the Chicago Police Department posted notices in the lockups and area detective headquarters in English, Polish, and Spanish.<sup>1271</sup> The Cook County state's attorney's office also began informing defendants they believed to be non-citizens of their right to notify their consulates.<sup>1272</sup>

The DHS and the U.S. Department of Justice (DOJ) both have implemented regulations which require their law enforcement officers to advise non-citizens of their right under Article 36 to have their consulate contacted upon their arrest.<sup>1273</sup> The DOJ regulation also provides that a non-citizen has a right to request that authorities in the U.S. not notify his home country, unless another treaty takes that right away from him.<sup>1274</sup>

In 2006, the U.S. Supreme Court held that the Vienna Convention does not require suppression of statements given by a non-citizen where law enforcement failed to advise him of his rights under the Vienna Convention.<sup>1275</sup> However, the Supreme Court specifically stated that a non-citizen could vindicate his rights under the Convention in by other means, such as part of a broader challenge to the voluntariness of a statement given under the Fifth Amendment of the U.S. Constitution and a claim of ineffective assistance of counsel under the Sixth Amendment.<sup>1276</sup>

Thus, the lack of an advisory or a delay in the advisory regarding the right to contact a consular officer may be a ground under which a motion to suppress statements given in violation of the Vienna Convention, to vacate a conviction, or to expunge a conviction can be brought. In the context of a motion to suppress statements given and evidence obtained, some courts have held that a non-citizen who alleges a violation of the Vienna Convention has the burden to establish prejudice resulting from the alleged violation.<sup>1277</sup> Other courts have held that the failure of a state authority to inform a non-citizen about his rights under the Vienna Convention does not warrant a suppression of evidence.<sup>1278</sup>

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<sup>1271</sup> See Frank Main, "Police to Tell Foreigners They Can Call Consul," *Chicago Sun-Times*, Sept. 26, 2000, p. 10.

<sup>1272</sup> See *id.*

<sup>1273</sup> See 8 C.F.R. § 236.1(e); 28 C.F.R. § 50.5; U.S. Department of State, Pub. No. 10518, Consular Notification And Access: Instruction For Federal, State And Local Enforcement And Other Officials Regarding Foreign Nationals In The United States 13-15 (Jan. 1998) ("when foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified").

<sup>1274</sup> See 28 C.F.R. § 50.5; *Jogi v. Voges*, 480 F.3d 822, 835 (7<sup>th</sup> Cir. Mar. 12, 2007).

<sup>1275</sup> See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (Jun. 28, 2006).

<sup>1276</sup> See *id.* at 336, 363-64.

<sup>1277</sup> See *e.g.*, *United States v. Miranda*, 65 F.Supp. 2d 1002 (D. Minn. Aug. 27, 1999) (holding that even though the government violated the non-citizen defendant's rights under the Vienna Convention, he failed to establish prejudice because he did not contact the Consulate after he was notified about his right to do so); see also, *United States v. Kevin*, 1999 U.S. Dist. LEXIS 5728, 1999 WL 194749 (S.D.N.Y. Apr. 7, 1999); *United States v. Rodrigues*, 68 F.Supp.2d 178 (E.D.N.Y. Sept. 28, 1999); *United States v. Esparza-Ponce*, 7 F.Supp.2d 1084 (S.D. Cal. May 18, 1998), *aff'd* 193 F.3d 1133 (9<sup>th</sup> Cir. Oct. 19, 1999), *cert. denied* *Esparza-Ponce v. U.S.*, 121 S.Ct. 107, 148 L.Ed.2d 64 (2000); *Zavala v. State*, 739 N.E.2d 135 (Ind.Ct.App.2d Oct. 31, 2000).

<sup>1278</sup> See *U.S. v. Lombera-Camorlinga*, 206 F.3d 882 (9<sup>th</sup> Cir. Mar. 6, 2000); (holding that suppression of evidence is not an appropriate remedy for a violation of the Vienna Convention on Consular

To gain relief where the Vienna Convention on Consular Affairs has been violated, a non-citizen must demonstrate that his rights under the Convention were violated and that the violation had a “material effect on the outcome of the trial or sentencing procedure.”<sup>1279</sup> In the context of a motion to suppress evidence in federal district court, the Seventh Circuit Court of Appeals has held that the exclusionary rule does not apply to violations of Article 36.<sup>1280</sup> Thus, the exclusion of evidence obtained in violation of a non-citizen’s consular access rights under the Vienna Convention is not a proper remedy.<sup>1281</sup> The Seventh Circuit has also noted that the court has no obligation to inform a non-citizen defendant of his rights under the Vienna Convention.<sup>1282</sup>

Arguments may be made that a violation of Article 36 of the Vienna Convention is a *per se* violation of due process rights under the Fifth Amendment or the Fourteenth Amendment because the Vienna Convention establishes due process of law and procedural safeguards for non-citizens arrested in the U.S. A violation of the Vienna Convention may also be a ground under which a direct appeal, a motion to vacate a guilty plea, or a petition

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Relations); *People v. Martinez*, 372 Ill. App. 3d 750, 867 N.E.2d 24, 310 Ill. Dec. 711 (Ill.Ct.App.1<sup>st</sup> Feb. 22, 2007); *People v. Villagomez*, 313 Ill. App. 3d 799, 730 N.E.2d 1173 (Ill. App. 1<sup>st</sup> Dist., 5<sup>th</sup> Div. May 26, 2000) (holding that a non-citizen defendant must establish prejudice by showing that he did not know of his right to contact the consulate for assistance, that he would have availed himself of the right, and that there was a likelihood that the consulate would have assisted the defendant; even if the non-citizen defendant demonstrates prejudice, the exclusionary rule does not apply to violations of the Vienna Convention), appeal denied 191 Ill.2d 557, 738 N.E.2d, 250 Ill. Dec. 466 (Ill. Sept. 1, 2000); *People v. Griffith*, 334 Ill. App. 3d 98, 111, 777 N.E.2d 459 (Ill. App. 1<sup>st</sup> Dist. Sept. 11, 2002); *People v. Hernandez*, 319 Ill. App. 3d 520, 531, 745 N.E.2d 673 (Ill. App. 3<sup>rd</sup> Dist. Mar. 8, 2001).

<sup>1279</sup> See *Madej v. Schomig*, 223 F.Supp. 2d 968, \*29-37 (N.D.IL Sept. 24, 2002) (discussing the interplay of the decisions by the International Court of Justice in the LaGrand Case (Germany v. U.S.), 2001 I.C.J. 104 (I.C.J. Jun. 27, 2001) and *Breard v. Greene*, 523 U.S. 371, 375 (Apr. 14, 1998)), *reconsideration den. by U.S. ex rel. Madej v. Schomig*, 2002 U.S. Distr. LEXIS 20170 (N.D.IL Oct. 21, 2002), *aff’d by Madej v. Briley*, 365 F.3d 568 (7<sup>th</sup> Cir. Apr. 21, 2004), opinion withdrawn, substituted opinion at *Madej v. Briley*, 370 F.3d 665 (7<sup>th</sup> Cir. May 28, 2004).

<sup>1280</sup> See *U.S. v. Chaparro-Alcantara*, 226 F.3d 616 (7<sup>th</sup> Cir. Aug. 21, 2000) (holding that because the Vienna Convention does not require application of the exclusionary rule to violations of Article 36 and that only the legislature can require that the exclusionary rule be applied to protect a statutory or treaty-based right, suppression is not an appropriate remedy for Article 36 violations), *aff’d U.S. v. Chaparro-Alcantara*, 37 F.Supp. 2d 1122 (C.D. Ill. Mar. 4, 1999), *cert. denied Chaparro-Alcantara v. U.S.*, 121 S.Ct. 599, 148 L.Ed.2d 513 (2000); see also, *Jogi v. Voges*, 480 F.3d 822 (7<sup>th</sup> Cir. Mar. 12, 2007) (re-affirming *U.S. v. Chaparro-Alcantara*, 226 F.3d 616 (7<sup>th</sup> Cir. Aug. 21, 2000)); *U.S. v. Lawal*, 231 F.3d 1045 (7<sup>th</sup> Cir. Nov. 1, 2000); *U.S. v. Felix-Felix*, 275 F.3d 627, 635 (7<sup>th</sup> Cir. 2001); *U.S. v. Carrillo*, 269 F.3d 761, 771 (7<sup>th</sup> Cir. Oct. 18, 2001); *U.S. v. Lawal*, 231 F.3d 1045, 1048 (7<sup>th</sup> Cir. Nov. 1, 2000); *U.S. v. Pagan*, 196 F.3d 884 (7<sup>th</sup> Cir. Nov. 18, 1999); *U.S. v. Arguijo*, 2000 U.S. Dist. LEXIS 10209 (N.D. Ill. Jul. 7, 2000); *U.S. v. Carrillo*, 70 F.Supp. 2d 854 (N.D. Ill. Oct. 14, 1999) (holding that rights under the Vienna Convention are less substantive than rights under the Fourth and Fifth Amendments of the U.S. Constitution, that defendants did not suffer prejudice from the violation of Article 36 of the Vienna Convention, and that the exclusionary rule was not the appropriate remedy for treaty violations).

<sup>1281</sup> See *Jogi v. Voges*, 480 F.3d 822 (7<sup>th</sup> Cir. Mar. 12, 2007); *U.S. v. Felix-Felix*, 275 F.3d 627, 636 (7<sup>th</sup> Cir. Dec. 27, 2001); *U.S. v. Carrillo*, 269 F.3d 761 (7<sup>th</sup> Cir. Oct. 18, 2001); *U.S. v. Lawal*, 231 F.3d 1045 (7<sup>th</sup> Cir. Nov. 1, 2000) *cert. denied*, 531 U.S. 1182 (Feb. 20, 2001); *U.S. v. Chaparro-Alcantara*, 226 F.3d 616, 624-25 (7<sup>th</sup> Cir. Aug. 21, 2000).

<sup>1282</sup> See *U.S. v. Barrios-Lopez*, 2009 U.S. App. LEXIS 6132 at \*3 (7<sup>th</sup> Cir. Mar. 26, 2009).

for post-conviction relief may be brought. In Illinois courts, arguments regarding violations of the Vienna Convention should be raised at the trial court level to preserve the issues for appellate review and within the statutory time limits in a post-conviction petition.<sup>1283</sup> Two Illinois appellate courts have ruled that the exclusionary rule does not apply to violations of the Vienna Convention, finding that suppression of evidence obtained by authorities is not an appropriate remedy where a non-citizen's right under Article 36 was violated.<sup>1284</sup>

Beyond the suppression issue, the Seventh Circuit has held that the failure of defense counsel to raise the lack of advisals under the Vienna Convention may constitute ineffective assistance of counsel under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 558 (1984).<sup>1285</sup> A non-citizen must show that: "(1) his counsel's performance fell below an objective standard of reasonableness when measured against 'prevailing professional norms,' and (2) but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different."<sup>1286</sup>

Under the first prong, the Seventh Circuit found that a reasonable lawyer practicing in Illinois would have known that the Seventh Circuit has always assumed that Article 36 of the Vienna Convention created individual rights and that the lawyer would have known to raise the Article 36 violations in the criminal proceeding in 2003.<sup>1287</sup> Thus, where counsel fails to raise the Article 36 violation before the district court, her performance falls below the required professional norm.<sup>1288</sup> Under the second prong of demonstrating prejudice, a non-citizen must explain the nature of the assistance that he could have received and demonstrate that his consulate would have provided it to him.<sup>1289</sup>

The Illinois state courts have differed in their approach to the Vienna Convention. Some courts have held that the issue must be raised at the trial court or else it is deemed waived, that a new trial is not the remedy for a violation of Article 36, and that a claim of

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<sup>1283</sup> See *People v. Madej*, 193 Ill.2d 395, 739 N.E.2d 423, 250 Ill.Dec. 660 (Ill. May 8, 2000) (holding that the non-citizen's petition for post-conviction relief based on a violation of the Vienna Convention must be denied because he failed to file his post-conviction petition within two years of the entry of conviction as required by the Illinois statute, that there was no basis to find that the reasonable limitation period imposed by Illinois statute 2-1401 violated international law, and that he could have also raised the claim at trial and on direct appeal).

<sup>1284</sup> See *People v. Griffith*, 334 Ill. App. 3d 98, 111 (1<sup>st</sup> Sept. 11, 2002) (citing *People v. Hernandez*, 319 Ill. App. 3d 520, 531, 745 N.E.2d 763 (Mar. 8, 2001); *People v. Villagomez*, 313 Ill. App. 3d 799, 809-12, 730 N.E.2d 1173 (2000)); *People v. Kim*, 743 N.E.2d 656 (Ill.App.5<sup>th</sup> Jan. 19, 2001).

<sup>1285</sup> See *Osagiede v. U.S.*, 543 F.3d 399 (7<sup>th</sup> Cir. Sept. 9, 2008).

<sup>1286</sup> See *id.* at 408 (citing *Strickland*).

<sup>1287</sup> See *id.* at 409-12 (citing numerous decisions and its issuance of the *Madej* decision only months before the non-citizen was sentenced as well as continuing legal education materials for attorneys).

<sup>1288</sup> See *id.*

<sup>1289</sup> See *id.* at 413. In the context of challenging removal proceedings, the Board of Immigration Appeals has held that where a non-citizen has had a judgment of guilt entered against him in a general court-martial of the U.S. Armed Forces, he has been convicted as defined by 8 U.S.C. § 1101(a)(48)(A) and the lack of advisals under Article 36 of the Vienna Convention has no effect on the existence of the conviction or its use in removal proceedings. *In re Rivera-Valencia*, 24 I&N Dec. 484 (BIA Apr. 2, 2008).

ineffective assistance fails.<sup>1290</sup> However, these decisions do not discuss the Seventh Circuit's *Osagiede* decision, and counsel should review and consider whether a claim of ineffective assistance of counsel can be raised before the Illinois state courts.

Where a non-citizen claims in a habeas petition that his rights under the Vienna Convention were violated, care should be taken that the claim is timely raised. In 2008, the U.S. Supreme Court held that neither an order from the International Court of Justice ("ICJ") nor a Presidential Memorandum determining that the ICJ's decision should be enforced in a state court constitutes directly enforceable federal law that preempts a state's limitation on the filing of successive petitions for a writ of habeas corpus.<sup>1291</sup>

In the civil context, a violation of a non-citizen's rights under Article 36 may give rise to a civil action against the state or federal officers who failed to advise him as required by the Vienna Convention.<sup>1292</sup> The Seventh Circuit Court of Appeals held that Article 36 of the Vienna Convention does confer individual rights on detained non-citizens.<sup>1293</sup> It further found that a non-citizen may pursue a private right of action under 42 U.S.C. § 1983 against state law enforcement officers who violated his rights under Article 36.<sup>1294</sup> Such a claim will be subject to a statute of limitations and the issue of qualified immunity of the officials must also be addressed.<sup>1295</sup>

Two issues involving civil claims have not been resolved by the Seventh Circuit. The first is whether the Vienna Convention directly supports a private remedy.<sup>1296</sup> The second is whether the failure of police officers to notify a non-citizen of his rights under Article 36 is a type of tort covered by the Alien Tort Claim Act, 28 U.S.C. § 1350.<sup>1297</sup>

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<sup>1290</sup> See *People v. Montano*, 365 Ill. App. 3d 195, 848 N.E.2d 616, 302 Ill. Dec. 317 (2006); *People v. Najera*, 371 Ill. App. 3d 1144, 864 N.E.2d 324, 309 Ill. Dec. 458 (Ill.Ct.App.2d Mar. 6, 2007); *People v. Vasquez*, 356 Ill. App. 3d 420, 824 N.E.2d 1071, 291 Ill. Dec. 821 (Ill.Ct.App.2d Dist. Jan. 28, 2005), (holding that trial counsel did not render ineffective assistance of counsel for failing to file a motion to suppress defendant's confession based upon a violation of the Vienna Convention) *reh'g den.* by *People v. Vasquez*, 2005 Ill. App. LEXIS 332 (Ill. App. Ct. 2d Dist., Apr. 8, 2005), *appeal den.* by *People v. Vasquez*, 216 Ill. 2d 729, 839 N.E.2d 1036, 298 Ill. Dec. 389 (2005), *pet. for a writ of cert. den.* by *Vasquez v. Ill.*, 548 U.S. 908 (Jun. 26, 2006).

<sup>1291</sup> See *Medellin v. Texas*, 128 S.Ct. 1346 (Mar. 25, 2008), application to recall and stay mandate and application for stay of execution of death *denied*, 129 S.Ct. 360 (U.S. Aug. 28, 2008).

<sup>1292</sup> See, e.g., *United States v. Torres del Muro*, 58 F.Supp. 2d 931 (C.D. Ill. Jul. 20, 1999) (holding that although suppression of evidence is not available as a remedy for a violation of the consular notification provision of the Vienna Convention, a defendant may be able to claim damages for a violation of his rights under the Vienna Convention through a Bivens action);

<sup>1293</sup> See *Jogi v. Voges*, 480 F.3d 822, 834-35 (7<sup>th</sup> Cir. Mar. 12, 2007).

<sup>1294</sup> See *id.* at 835-36.

<sup>1295</sup> See *id.* at 836 (also discussing that the additional issues of when a claim is deemed to have arisen, whether the discovery rule applies, and whether any tolling rules may apply will need to be addressed upon remand to the federal district court).

<sup>1296</sup> See *id.* at 825.

<sup>1297</sup> See *id.* at 826.

## Pardons

A full and unconditional pardon by the President of the United States or the Governor of a state will eliminate the ground of deportability for a conviction for a crime involving moral turpitude, an aggravated felony, or high-speed flight near a border.<sup>1298</sup> Pardons will not eliminate immigration consequences for controlled substance, firearms, or domestic violence convictions.<sup>1299</sup> Pardons for convictions within the U.S. may also eliminate certain grounds of inadmissibility.<sup>1300</sup> Foreign pardons do not, however, eliminate either the ground of inadmissibility or deportability.<sup>1301</sup>

The possibility of a gubernatorial pardon may be the last resort for non-citizens in Illinois, Indiana, and Wisconsin and should be considered as pardons have been granted based on immigration consequences.<sup>1302</sup> Each state has its own procedures and deadlines for filing and hearings.<sup>1303</sup>

## Illegal Reentry Prosecutions

Prosecutions of non-citizens who illegally reenter the U.S. following a prior deportation or removal order have increased.<sup>1304</sup> Section 276 of the I.N.A., 8 U.S.C. § 1326 applies to any non-citizen who illegally reenters the U.S. without permission after a deportation or removal order has been issued, regardless whether he self-executed the order by leaving the U.S. on his own accord or was physically removed from the U.S. by U.S.

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<sup>1298</sup> See I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v)

<sup>1299</sup> See *id.*; *In re* Suh, 23 I&N Dec. 626 (BIA Jul. 1, 2003) (holding that a pardon for a child abuse conviction did not pardon the domestic violence ground of deportability).

<sup>1300</sup> See I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v); *In re* B-, 7 I&N Dec. 166 (BIA 1956)

<sup>1301</sup> See *In re* F-y-G-, 4 I&N Dec. 717 (BIA Aug. 1, 1952); 22 C.F.R. § 40.21(a)(5). See also, Effects of a Presidential Pardon, Memo. Office of Legal Counsel (Jun. 19, 1995), at

[www.usdoj.gov/olc/pardon3.19.htm](http://www.usdoj.gov/olc/pardon3.19.htm) (opining that a full and unconditional pardon precludes the exercise of the authority to deport a convicted non-citizen under criminal deportation grounds).

<sup>1302</sup> See K. Semple, "Hip-hopper is Pardoned by Governor," *The New York Times*, May 24, 2008, available at <http://www.nytimes.com/2008/05/24/nyregion/24pardon.html>; "Va. Governor Pardons British Mother Who Faces Deportation for 1997 Credit Card Theft Offense," *FOXNews.com*, Aug. 13, 2008, available at <http://www.foxnews.com/politics/2008/08/13/va-governor-pardons-british-mother-faces-deportation-credit-card-theft/>; M. Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction," *The Sentencing Project*, Mar. 12, 2007,

[http://www.sentencingproject.org/tmp/File/Collateral%20Consequences/Washington\(2\).pdf](http://www.sentencingproject.org/tmp/File/Collateral%20Consequences/Washington(2).pdf), p. WA3 (reporting that at least one of the pardons granted in 2004 was in order to avoid deportation).

<sup>1303</sup> For more information, contact: the Illinois Prisoner Review Board, 319 East Madison Street, Suite A, Springfield, Illinois 62703, (217) 782-7273, fax: (217) 524-0012, <http://www.state.il.us/prb/>; the Wisconsin Pardon Advisory Board, Room 115 East, State Capitol, P.O. Box 7863, Madison, WI 53707, (608) 266-1212, [http://www.wisgov.state.wi.us/appointments\\_detail.asp?boardid=114](http://www.wisgov.state.wi.us/appointments_detail.asp?boardid=114); the Indiana Parole Board, Indiana Government Center South, 302 W. Washington St., Indianapolis, IN 46204, (317) 232-5737, <http://www.in.gov/indcorrection/paroleboard.htm>. For an overview of private bills and pardons, see A. Gallagher, *AILA's Focus on Private Bills and Pardons in Immigration*, © AILA 2008, available at <http://www.ailapubs.org/privatebills.html>.

<sup>1304</sup> For statistics on the increase in prosecutions of non-citizens, visit the website of TRAC, the Transactional Records Access Clearinghouse, which provides detailed reports and analysis of prosecution trends, at <http://trac.syr.edu/>.

authorities.<sup>1305</sup> A non-citizen who was ordered deported or removed without having been convicted of an aggravated felony, left the U.S., and then reentered the U.S. without first obtaining permission from U.S. authorities faces a sentence of up to two years in the U.S. Bureau of Prisons.<sup>1306</sup> A non-citizen who was deported or removed after having been convicted of an aggravated felony, left the U.S., and then reenters the U.S. without permission faces a sentence of up to 20 years in the U.S. Bureau of Prisons.<sup>1307</sup>

### ***Elements of an Offense under I.N.A. § 276, 8 U.S.C. § 1326***

The offense of illegal reentry by a deported non-citizen under I.N.A. § 276, 8 U.S.C. § 1326 does not include a specific intent element but rather an implied mental state requirement; the affirmative defense is limited to a showing of reasonable belief on the part of the non-citizen defendant that he had received the prior permission of the Attorney General, not a state authority, to reenter the United States.<sup>1308</sup> A non-citizen's mistaken belief regarding his ability to reenter the U.S. after a certain time period following his deportation is not a defense to a prosecution under I.N.A. § 276, 8 U.S.C. § 1326.<sup>1309</sup> The Seventh Circuit has held that A-file records (including prior orders of deportation, exclusion, and removal) as well as certificates of nonexistence of record ("CNR") are non-testimonial business records and not subject to the requirements of the Sixth Amendment Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006).<sup>1310</sup>

A non-citizen is "found" within the meaning of I.N.A. § 276 when the DHS both discovers his presence in the United States and knows that his presence is illegal based on his identity and immigration status.<sup>1311</sup> A prosecution under I.N.A. § 276, 8 U.S.C. § 1326 may be brought wherever a non-citizen who has been removed by the former INS or the DHS and illegally reentered the United States is "found."<sup>1312</sup> The offense of an illegal reentry is a continuing one, and venue for the prosecution exists wherever he is "located in fact".<sup>1313</sup>

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<sup>1305</sup> See Appendix 8A, I.N.A. § 276, 8 U.S.C. § 1326.

<sup>1306</sup> See I.N.A. § 276(a), 8 U.S.C. § 1326(a).

<sup>1307</sup> See I.N.A. § 276(b), 8 U.S.C. § 1326(b).

<sup>1308</sup> See *U.S. v. Grieveson*, 110 F.Supp.2d 880, 885 (S.D.Ind. Aug. 28, 2000) (citing and discussing *U.S. v. Barrera-Paniangua*, No. 98-CR-648, 2000 WL 246241 (N.D.IL Feb. 24, 2000), *U.S. v. Gomez-Orozco*, 188 F.3d 422, 425 (7<sup>th</sup> Cir. Aug. 5, 1999), *U.S. v. Anton*, 888 F.2d 53, 54 (7<sup>th</sup> Cir. Oct. 26, 1989), and *U.S. v. Anderson*, 64 F. Supp. 2d 870, 874 n.1 (S.D.Ind. Sept. 24, 1999), *aff'd*, 221 F.3d 1339 (7<sup>th</sup> Cir. June. 27, 2000) (table text)).

<sup>1309</sup> See *U.S. v. Rea-Beltran*, 457 F.3d 695, 702 (7<sup>th</sup> Cir. Aug. 10, 2006).

<sup>1310</sup> See *U.S. v. Burgos*, 539 F.3d 641 (7<sup>th</sup> Cir. Aug. 22, 2008). CNRs relate to the lack of evidence in the A-file demonstrating that the Attorney General has granted permission for a non-citizen to reenter the U.S. See *id.*

<sup>1311</sup> See *U.S. v. Herrera-Ordonez*, 190 F.3d 504 (7<sup>th</sup> Cir. Aug. 19, 1999).

<sup>1312</sup> See *U.S. v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7<sup>th</sup> Cir. Jul. 6, 2006).

<sup>1313</sup> See *id.* at 460-462 (holding that where a non-citizen was encountered by law enforcement in the Southern District of Texas but was not prosecuted under 8 U.S.C. § 1326 until he was again encountered by law enforcement authorities in Wisconsin, the lack of a fast-track program in Wisconsin did not entitle him to a reduction in his sentence for his conviction under 8 U.S.C. § 1326); see also, *U.S. v. Contreras-Hernandez*, 277 F.Supp.2d 952 (E.D.WI Aug. 7, 2003) (holding that where a non-citizen is "found" in prison for a conviction unrelated to his illegal reentry, he may be

Challenges to the underlying immigration proceedings can be brought in a prosecution under I.N.A. § 276, 8 U.S.C. § 1326 to collaterally attack the validity of a prior deportation (removal) order and the proceedings because the prior deportation (removal) order is a necessary element of the illegal reentry offense.<sup>1314</sup> A deportation order may not be used to establish the element of the criminal offense of illegal reentry after deportation where a non-citizen can show that the deportation hearing effectively foreclosed his right to direct judicial review of the deportation order, did not provide the non-citizen with due process of law, or was fundamentally unfair.<sup>1315</sup>

In *United States v. Mendoza-Lopez*, the U.S. Supreme Court held that “where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding.”<sup>1316</sup> Thus, where a non-citizen was not represented by counsel at his immigration hearing and the Immigration Judge failed to adequately advise him of his eligibility to apply for relief from removal, the non-citizen’s waiver of his right to appeal is not considered to be voluntary or intelligent and the non-citizen was deprived of judicial review of the immigration proceeding.<sup>1317</sup> Some Courts of Appeals have held that the denial of the opportunity to apply for discretionary relief in the prior removal proceeding is a fundamental procedural error.<sup>1318</sup>

To challenge an illegal reentry charge may require close coordination with an immigration attorney who is well versed in immigration consequences for criminal convictions and removal defense.<sup>1319</sup> A person who believes that he is a non-citizen may actually be a U.S. citizen, having derived U.S. citizenship through one or both parents or

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sentenced to a term of imprisonment for a conviction under 8 U.S.C. § 1236 to run concurrently with the sentence for the other offense).

<sup>1314</sup> See 8 U.S.C. § 1326(d).

<sup>1315</sup> See *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 837-39 (May 26, 1987); *U.S. v. Espinoza-Farlo*, 34 F.3d 469 (7<sup>th</sup> Cir. Sept. 1, 1994) (adopting the analysis of the U.S. Supreme Court in *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 837-40, n.17 (May 26, 1987) (holding that a non-citizen defendant may collaterally attack the prior deportation order upon which a criminal charge under I.N.A. § 276, 8 U.S.C. § 1326 is predicated if procedural errors in the prior deportation hearing deprived him of judicial review)); *U.S. v. Anderson*, 64 F.Supp.2d 870 (S.D.Ind. Sept. 24, 1999); *U.S. v. Santiago-Ochoa*, 447 F.3d 1015 (7<sup>th</sup> Cir. May 19, 2006) (holding that where a non-citizen waived his right to contest the Notice of Intent to Issue a Final Administrative Removal Order issued by the DHS, he failed to exhaust his administrative remedies and did not meet his duty to exhaust under I.N.A. § 276(d)(1), 8 U.S.C. § 1326(d)(1) in a prosecution for illegal entry).

<sup>1316</sup> See *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (May 26, 1987).

<sup>1317</sup> See *id* at 840.

<sup>1318</sup> See, e.g., *U.S. v. Arrieta*, 224 F.3d 1076, 1079 (9<sup>th</sup> Cir. Sept. 25, 2000); *U.S. v. Calderon*, 2003 U.S. Dist. LEXIS 224, at \*6 (E.D.NY Jan. 9, 2003); *U.S. v. Aguirre-Tello*, 181 F.Supp.2d 1298, 1304 (D.N.M. Jan. 22, 2002); cf. *U.S. v. Fernandez-Antonia*, 278 F.3d 150 (2<sup>nd</sup> Cir. Jan. 29, 2002); *U.S. v. Cottone*, 244 F.Supp.2d 126, 130 (E.D.NY Feb. 14, 2003). Some courts have required that the non-citizen must demonstrate prejudice which means a showing that absent the procedural error that occurred in the underlying deportation proceeding, the result of that proceeding might have been different. See *U.S. v. Fernandez-Antonia*, 278 F.3d 150, 157-59 (2<sup>nd</sup> Cir. Jan. 29, 2002); *U.S. v. Sanchez-Peralta*, 1998 U.S. Dist. LEXIS 1660, at \*12 (S.D.NY Feb. 13, 1998); *U.S. v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9<sup>th</sup> Cir. Nov. 15, 1996) (requiring a showing of “plausible grounds for relief”).

<sup>1319</sup> For a list of immigration attorneys, see Appendix 9C, Resources.

even a grandparent, thus rendering the prior removal or deportation order invalid.<sup>1320</sup> A non-citizen may have been eligible for either discretionary or mandatory relief about which he was not informed or was misinformed by the Immigration Judge or the DHS. The Seventh Circuit has found that it is mandatory for an IJ to inform a non-citizen facing removal of his right to discretionary relief.<sup>1321</sup> Thus, a defense to a charge of illegal reentry under I.N.A. § 276, 8 U.S.C. § 1326 may be made where a non-citizen was incorrectly advised by the Immigration Judge and the Board of Immigration Appeals regarding his eligibility for relief from deportation or removal.<sup>1322</sup> The Immigration Judge or the DHS may also have failed to advise him of his statutory, regulatory, and Constitutional rights for his defense in the immigration proceeding, such as the right to obtain, inspect, and present evidence in his own behalf, to cross-examine witnesses, to apply for relief, and to appeal the decision of an Immigration Judge to the Board of Immigration Appeals<sup>1323</sup> Where a non-citizen was represented by counsel before the Immigration Court and/or the Board of Immigration Appeals, a claim of ineffective assistance of counsel against his former immigration counsel may be a viable basis to challenge a prior order of removal or deportation.<sup>1324</sup> Removal or deportation orders entered *in absentia* may also be challenged where the non-citizen did not receive a Notice to Appear due to INS or DHS error or did not receive notice of the removal hearing.<sup>1325</sup>

Thus, the underlying immigration proceeding should be reviewed carefully for arguments to collaterally attack the prior deportation, exclusion, and/or removal order(s). Through the discovery process and also a request under the Freedom of Information Act (FOIA), a copy of the underlying removal proceeding and copies of the tapes (if the

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<sup>1320</sup> See Appendix 1B, Naturalization/Citizenship Charts.

<sup>1321</sup> See *Asani v. I.N.S.*, 154 F.3d 719, 727-28 (7<sup>th</sup> Cir. Sept. 3, 1998); see also, *Matter of Cordova*, 22 I&N Dec. 966, 970-71 (BIA Aug. 6, 1999); *Matter of Ulloa*, 22 I&N Dec. 725, 726 (BIA May 24, 1999).

<sup>1322</sup> See *U.S. v. Lopez*, 445 F.3d 90 (7<sup>th</sup> Cir. Apr. 4, 2006) (vacating his conviction and remanding to the district court for a determination whether the incorrect information provided by the Immigration Judge and the BIA rendered his deportation order fundamentally unfair under I.N.A. § 276(d)(3), 8 U.S.C. § 1326(d)(3)).

<sup>1323</sup> See e.g., I.N.A. § 240(b)(4), 8 U.S.C. §1229a(b)(4); 8 C.F.R. § 1240.10(a)(4); 8 C.F.R. §§ 103.8, 103.10, 103.20, 103.21, 103.22(a); 8 C.F.R. § 1003.39 (“Except when certified to the [BIA], the decision of the [IJ] becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever occurs first.”); 8 C.F.R. § 242.27(a) and 8 C.F.R. § 212.3(e)(1) (212(c) relief, removed 1998); *Kerciku v. I.N.S.*, 314 F.3d 913 (7<sup>th</sup> Cir. Jan. 3, 2003); *Podio v. I.N.S.*, 153 F.3d 506 (7<sup>th</sup> Cir. Aug. 25, 1998); *Reno v. Flores*, 507 U.S. 292, 306, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (Mar. 23, 1993) (Fifth Amendment entitles foreign persons in the United States to due process of law in deportation proceedings); *Kerciku v. INS*, 314 F.3d 913, 917 (7<sup>th</sup> Cir. Jan. 3, 2003); *Pieniazek v. Gonzales*, 449 F.3d 792 (7<sup>th</sup> Cir. Jun. 5, 2006) (holding that a non-citizen has a right to a continuance before the Immigration Court in order to obtain a copy of his file from DHS to review evidence in support of a motion to suppress); *U.S. v. Ubaldo-Figueroa*, 364 F.3d 1042 (9<sup>th</sup> Cir. Oct. 17, 2003) (finding that the underlying removal proceedings were constitutionally defective which resulted in a due process violation and reversing his conviction for illegal reentry under I.N.A. § 276, 8 U.S.C. § 1326).

<sup>1324</sup> See *In re Compean*, 25 I&N Dec. 1 (A.G. Jun. 3, 2009); *In re Assaad*, 23 I&N Dec. 553 (BIA Feb. 12, 2003) (reaffirming *In re Lozada*, 19 I&N Dec. 637 (BIA Apr. 13, 1988) and distinguishing U.S. Supreme Court precedent in the criminal context regarding deprivation of effective assistance of counsel from a non-citizen’s right to due process under the Fifth Amendment of the U.S. Constitution in immigration proceedings); *Stroe v. INS*, 256 F.3d 498, 501 (7<sup>th</sup> Cir. Jun. 26, 2001).

<sup>1325</sup> See, e.g., *In re G-Y-R-*, 23 I&N Dec. 181 (BIA Oct. 19, 2001).



proceedings were not transcribed for an appeal to the Board of Immigration Appeals) may be obtained from the Executive Office for Immigration Review (EOIR).<sup>1326</sup>

The Seventh Circuit has commented that where a non-citizen was erroneously informed about his eligibility to apply for a §212(c) waiver, was ordered removed, did not file an appeal of the Immigration Judge's decision or seek judicial review, and then was removed from the U.S., no due process violation in the underlying immigration proceeding arises as § 212(c) relief is a discretionary form of relief in which he did not have any property or liberty interest in being considered for such relief.<sup>1327</sup> This runs contrary to the U.S. Supreme Court's *St. Cyr* decisions:

Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. Eligibility that was "governed by specific statutory standards" provided "a right to a ruling on an applicant's eligibility," even though the actual granting of relief was "not a matter of right under any circumstances, but rather is in all cases a matter of grace."<sup>1328</sup>

As the U.S. Supreme Court noted in *St. Cyr*, over half of all § 212(c) applications had been granted.<sup>1329</sup> Based on the current split among the federal circuit courts of appeals in the context of non-citizens who were erroneously denied the opportunity to apply for discretionary relief, this issue involving § 212(c) waivers should be preserved for future litigation.<sup>1330</sup>

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<sup>1326</sup> For information regarding the processing of a FOIA request with the DHS, see 8 C.F.R. §§ 103.8(a-d), 103.10, 103.20, 103.21, and 103.22(a). For information regarding the filing and processing of a FOIA request with the EOIR, see 5 U.S.C. § 522; 5 C.F.R. § 10310(s)(2); [http://www.usdoj.gov/oip/04\\_1.html](http://www.usdoj.gov/oip/04_1.html).

<sup>1327</sup> See *U.S. v. Roque-Espinoza*, 338 F.3d 724, 729 (7<sup>th</sup> Cir. Jul. 30, 2003) (finding that there was no due process violation in the underlying removal proceeding where the Immigration Judge erroneously informed him that he was not eligible for a §212(c) waiver); see also, *Lara-Unzueta v. Monica*, 2004 U.S. Dist. LEXIS 6860 (N.D.IL Apr. 20, 2004).

<sup>1328</sup> See 533 U.S. at 307-308 (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54, 100 L. ed. 1242, 76 S. Ct. 919 (Jun. 11, 1956) (internal citation omitted)).

<sup>1329</sup> See *I.N.S v. St. Cyr*, 533 U.S. at 296 n.5.

<sup>1330</sup> See *Roque-Espinoza*, 338 F.3d 724, 729 (7<sup>th</sup> Cir. Jul. 30, 2003); cf. *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9<sup>th</sup> Cir. Feb. 20, 2004) (finding that the Immigration Judge's decision that the non-citizen had been convicted of an aggravated felony and ineligible for cancellation of removal was erroneous and that the non-citizen's waiver of his right to appeal was not considered and intelligent and remanding the case to the district court for consideration of prejudice and dismissal of the indictment of illegal reentry) with *U.S. v. Torres*, 383 F.3d 92, 105-06 (3<sup>rd</sup> Cir. Sept. 7, 2004) (holding that because a non-citizen does not have a due process liberty interest in applying for a discretionary 212(c) waiver, there was no fundamental unfairness in the underlying proceeding for failure to consider a non-citizen for such relief); *U.S. v. Copeland*, 376 F.3d 61 (2<sup>nd</sup> Cir. Jul. 16, 2004) (collateral attack on prior proceedings related to eligibility for § 212(c) waiver allowed and remanding to the district court for an evidentiary hearing regarding prejudice to the non-citizen); *U.S. v. Calderon*, 391 F.3d 370 (2<sup>nd</sup> Dec. 1, 2004) (finding that misinformation by an Immigration Judge regarding a non-citizen's eligibility for a §212(c) waiver and affirmative misadvice by immigration counsel regarding the process by which to seek review of the Immigration Judge's decision rendered the underlying immigration proceedings fundamentally unfair for which the non-citizen suffered resulting prejudice and holding that the non-citizen's waiver of his administrative review was not knowing and

The Seventh Circuit upheld a district court's decision denying a motion to quash his arrest and suppress evidence where the DHS did not have an arrest warrant or consent to enter private property to arrest a non-citizen suspected of having illegally reentered the U.S.<sup>1331</sup> The Seventh Circuit relied on *New York v. Harris*, 495 U.S. 14, 18 (Apr. 18, 1990) in which the U.S. Supreme Court held that an unlawful entry by police into the home of a defendant does not make his subsequent detention unlawful if probable cause existed to arrest him. In a subsequent case, the Seventh Circuit held that the exclusionary rule does not apply where officers arrest a non-citizen believed to have unlawfully reentered the U.S. in the common hallway of a secured duplex building where the tenants are unrelated to each other.<sup>1332</sup> These broad rulings by the Seventh Circuit will make it difficult to move to quash an arrest and suppress evidence obtained where probable cause exists that a person is a non-citizen who has been deported and illegally reentered the U.S. It also provides no protection to the person (U.S. citizen or other status) whose property is entered by DHS agents without a warrant or consent.

### ***Sentencing under I.N.A. § 276, 8 U.S.C. § 1326***

In *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998), the Supreme Court considered the illegal reentry provisions under 8 U.S.C. § 1326(a) which prohibits a non-citizen who has been deported from the U.S. from returning again without special permission and carries a prison term of up to two years. However, if the deportation was for the commission of an aggravated felony, then 8 U.S.C. § 1326(b)(2) authorizes a prison term of up to 20 years. As 8 U.S.C. § 1326(b)(2) was found to be a penalty provision, and not an element of the offense, the Supreme Court held there was no need to charge that factor in the indictment.<sup>1333</sup> Thus, a non-citizen defendant does not have the right to a jury trial to determine whether he should receive an enhanced sentence as a recidivist.<sup>1334</sup>

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the U.S. Supreme Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” The U.S. Supreme Court clarified its holding in *U.S. v. Booker*,

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intelligent and therefore excused the requirement to exhaust all available administrative remedies in a prosecution under 8 U.S.C. § 1326); *U.S. v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049 (9<sup>th</sup> Cir. Oct. 17, 2003) (finding that a non-citizen's waiver of his right to appeal was not considered and intelligent where the IJ failed to advise him of his eligibility for relief from removal); *Oguejiofor v. A.G. of the United States*, 277 F.3d 1305, 1309 (11<sup>th</sup> Cir. Jan. 2, 2002); *Smith v. Ashcroft*, 295 F.3d 425, 429-30 (4<sup>th</sup> Cir. Jul. 1, 2002).

<sup>1331</sup> See *U.S. v. Roche-Martinez*, 467 F.3d 591 (7<sup>th</sup> Cir. Oct. 19, 2006) (stating that “our holding in no way sanctions Agent DeTolve's or Officer Poulakis' decision not to seek a search or arrest warrant” as there were no exigent circumstances and “ample opportunity to obtain either a search or arrest warrant”).

<sup>1332</sup> See *United States v. Villegas*, 495 F.3d 761 (7<sup>th</sup> Cir. 2007). See also, *United States v. Villegas*, 495 F.3d 761 (7<sup>th</sup> Cir. 2007) (J. Rovner, concurring but stating that the court of appeals did not need to reach the issue of a cognizable expectation of privacy in the hallway of the duplex because the officers had probable cause to arrest the non-citizen).

<sup>1333</sup> See *Almendarez-Torres v. U.S.*, 523 U.S. 224 (Mar. 24, 1998).

<sup>1334</sup> See *Almendarez-Torres v. U.S.*, *supra*; *U.S. v. Williams*, 410 F.3d 397, 401-02 (7<sup>th</sup> Cir. Jun. 9, 2005); *U.S. v. Palomino-Rivera*, 258 F.3d 656, 659 (7<sup>th</sup> Cir. Jul. 20, 2001).

543 U.S. 220 (Jan. 12, 2005). In that case, it held that a defendant has a right to a jury trial and to the reasonable-doubt standard in a sentencing proceeding if the judge's findings dictate an increase in the maximum penalty.<sup>1335</sup>

In *Shepard v. U.S.*, 544 U.S. 13 (2005), the U.S. Supreme Court held that “any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury.”<sup>1336</sup> Sentencing courts considering factual issues related to prior convictions are “generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy and any explicit factual finding by the trial judge to which the defendant has assented.”<sup>1337</sup> In reconciling the holdings in *Almendarez-Torres*, *supra*, and *Shepard*, *supra*, where a prior conviction is being used to enhance a defendant's sentence, the Seventh Circuit has held that where there is any doubt that the prior conviction does not relate to the defendant, then the district court will resolve it, not a jury.<sup>1338</sup>

In determining sentencing enhancement for illegal reentry into the United States after deportation for an aggravated felony in violation of I.N.A. § 276, 8 U.S.C. § 1326, the Seventh Circuit Court of Appeals has upheld sentencing enhancements.<sup>1339</sup> To determine

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<sup>1335</sup> See *U.S. v. Booker*, 543 U.S. 220, 244 (Jan. 12, 2005) (holding that “any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt.”); *Blakeley v. Washington*, 542 U.S. 296 (Jun. 24, 2004).

<sup>1336</sup> See *Shepard v. U.S.*, 544 U.S. 13, 21 (Mar. 7, 2005) (holding that police reports could not be reviewed to determine the nature of prior convictions; rather only “conclusive records made or used in adjudicating guilt” could be considered).

<sup>1337</sup> See *Shepard v. U.S.*, 544 U.S. 13, 16 (Mar. 7, 2005).

<sup>1338</sup> See *U.S. v. Browning*, 436 F.3d 780, 782 (7<sup>th</sup> Cir. Feb. 6, 2006) (reconciling *Almendarez-Torres v. U.S.*, *supra*, with *Shepard v. U.S.*, *supra*).

<sup>1339</sup> See *Almendarez-Torres v. U.S.*, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (Mar. 24, 1998); *U.S. v. Chavez-Chavez*, 213 F.3d 420 (7<sup>th</sup> Cir. May 23, 2000) (holding that court's discretionary decision not to further downward depart in sentencing the defendant based on the seriousness of prior felony offense of aggravated criminal sexual abuse of a minor was not reviewable); *U.S. v. Cruz-Guevara*, 209 F.3d 644 (7<sup>th</sup> Cir. Mar. 23, 2000) (vacating the sentence and remanding to the district court for an explanation of the downward departure in sentencing in relation to the U.S. Sentencing Guidelines based on the defendant non-citizen's family circumstances); *U.S. v. Gonzalez-Portillo*, 121 F.3d 1122 (7<sup>th</sup> Cir. Aug. 19, 1997) (holding that deportable alien status is an inappropriate basis for departure from the Sentencing Guidelines range); *U.S. v. Munoz-Cerna*, 47 F.3d 207 (7<sup>th</sup> Cir. Feb. 7, 1995) (holding that the sentencing enhancement applies retroactively to crimes not considered aggravated felonies at the time of commission; thus, the guideline enhancement may be applied in cases to which the statutory enhancement is inapplicable); *U.S. v. Gonzalez*, 112 F.3d 1325 (7<sup>th</sup> Cir. May 6, 1997) (holding that the Sentencing Guidelines did not impose any age limit on domestic aggravated felonies that could be considered for sentencing enhancement); *U.S. v. Jackson*, 93 F.3d 335 (7<sup>th</sup> Cir. Aug. 15, 1996) (holding that the court lacks jurisdiction to review a district court's discretionary refusal to depart from the sentencing range in the guidelines unless the district court erroneously believed that it did not have discretion to do so), citing *U.S. v. Blackwell*, 49 F.3d 1232 (7<sup>th</sup> Cir. Mar. 1, 1995)); *U.S. v. Samaniego-Rodriguez*, 32 F.3d 242, 244 (7<sup>th</sup> Cir. Aug. 4, 1994) *rehearing and suggestion for rehearing en banc denied* Sept. 30, 1994 (holding that inaccurate information by the INS regarding sentencing penalties for unauthorized reentry does not violate due process); *U.S. v. Shaw*, 26 F.3d 700, 701-2 (7<sup>th</sup> Cir. Jun. 7, 1994); *U.S. v. Korno*, 986 F.2d 166 (7<sup>th</sup> Cir. Feb. 1, 1993) (affirming the upward departure for sentencing based on foreign convictions where Canadian justice system was found to be sufficiently close to the U.S. system to make the convictions

whether a prior conviction constitutes an aggravated felony for the purpose of sentencing enhancement, the sentencing court will look at the status of the non-citizen defendant's conviction at the time of his deportation.<sup>1340</sup> The sentence imposed for the prior conviction is what controls -- not time actually served.<sup>1341</sup> Two separate acts of illegal entry into the U.S. should not be grouped as a single course of conduct representing one composite harm under the U.S. Sentencing Guidelines § 3D1.2.<sup>1342</sup>

Where a conviction has been vacated following a non-citizen's deportation or removal from the U.S., the non-citizen is still subject to the sentencing enhancement under §2L1.2(b) of the U.S. Sentencing Guidelines for an illegal reentry prosecution under I.N.A. § 276, 8 U.S.C. § 1326 because he was convicted of an aggravated felony at the time of his deportation.<sup>1343</sup> The Seventh Circuit has not yet decided the possible due process concerns where a conviction is vacated based on an error of law, subsequently discovered evidence, actual innocence, a constitutional defect in the underlying criminal proceeding, or other areas of law.<sup>1344</sup>

In determining the sentence to be imposed, a district court must consider the following relevant sentencing factors under 18 U.S.C. §3553(a)(2), including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed --(a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (b) to afford adequate deterrence to criminal conduct; (c) the need to protect the public from further crimes of the defendant; and (d) to provide for the defendant's rehabilitative needs; (3) the kinds of sentences available; (4) any pertinent policy statement issued by the Sentencing Commission; (5) the need to avoid unwarranted sentence disparities; and (6) the need to provide restitution to the victims of the offense. After a court has accepted all relevant evidence under 18 U.S.C.

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reliable); *cf.* U.S. v. Galvan-Zermeno, 52 F.Supp.2d 922, 924-25 (C.D.IL May 21, 1999) (holding that a downward departure was warranted when the sentence was enhanced because the non-citizen was "found" to be an alien while in custody for another offense committed after his illegal reentry into the U.S.).

<sup>1340</sup> See U.S. v. Garcia-Lopez, 375 F.3d 586 (7<sup>th</sup> Cir. Jul. 12, 2004).

<sup>1341</sup> See U.S. v. Cordova-Beraud, 90 F.3d 215 (7<sup>th</sup> Cir. Jul. 19, 1996) (holding that the maximum potential term of imprisonment imposed by the sentencing judge for an indeterminate sentence controls, not the time actually served).

<sup>1342</sup> See U.S. v. Bahena-Guifarro, 324 F.3d 560, 563-565 (7<sup>th</sup> Cir. Apr. 1, 2003) (finding that a non-citizen who had been deported several times and then convicted for additional state crimes upon each illegal reentry had not demonstrated that the offenses were part of a single course of conduct or that the illegal reentries were not separate and distinctive sentences that could not be grouped together and likening the two illegal reentries to two counts of escape from prison and finding that no evidence had been demonstrated to show that the motives for returning to the U.S. each time illegally were part of a common scheme or plan where it was the non-citizen's burden to prove such common scheme or plan).

<sup>1343</sup> See U.S. v. Garcia-Lopez, 375 F.3d 586 (7<sup>th</sup> Cir. Jul. 12, 2004). See also, U.S. v. Alcantara-Hernandez, 2006 U.S. Dist. LEXIS 48100 (E.D.WI Jul. 3, 2006) (holding that a conviction under Wis. Stat. §948.07(3) for child enticement for which the state court failed to provide the immigration advisals prior to the guilty plea but which was not vacated prior to the non-citizen's deportation was an aggravated felony under I.N.A. § 101(a)(43)(A), 8 U.S.C. §1101(a)(43)(A) and served as a basis for sentencing enhancement, even if it is later vacated based on an underlying constitutional defect in the state criminal proceeding).

<sup>1344</sup> See U.S. v. Garcia-Lopez, 375 F.3d 586, 589 (7<sup>th</sup> Cir. Jul. 12, 2004).

§3553(a), the court must explain its sentencing decision.<sup>1345</sup> A sentence which falls within the properly calculated guidelines range is presumed reasonable.<sup>1346</sup> The presumption may be rebutted by a showing that the factors outlines in 18 U.S.C. § 3553 compelled a lower sentence.<sup>1347</sup>

The Seventh Circuit Court of Appeals has rejected the contention that deportation itself is a form of punishment that justifies a departure.<sup>1348</sup> Although deportation itself does not provide a basis for departure, a defendant may be able to “point to individualized circumstances that...make deportation extraordinarily harsh for him...forbids consideration of extralegal consequences that follow a sentence as grounds for departure.”<sup>1349</sup> As long as the defendant’s alien status is not accounted for in the applicable guideline (as where the offense is one of unlawful reentry following deportation)<sup>1350</sup> district courts are free to consider whether this factor causes “unusual or exceptional hardship in his conditions of confinement,” justifying a departure.<sup>1351</sup> A departure may not be based on conditions of confinement that would be present if the defendant were a U.S. citizen.<sup>1352</sup>

The non-citizen defendant must then establish hardship aside from the fact of his removal. First, he can show that his conditions of confinement will be substantially more onerous than the commission intended in setting the applicable sentence.<sup>1353</sup> However, the

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<sup>1345</sup> See *U.S. v. Garner*, 454 F.3d 743, 751 (7<sup>th</sup> Cir. Jul. 26, 2006).

<sup>1346</sup> See *U.S. v. Mykytiuk*, 415 F.3d 606, 608 (7<sup>th</sup> Cir. Jul. 7, 2005); *U.S. v. Castro-Suarez*, 425 F.3d 430 (7<sup>th</sup> Cir. Oct. 3, 2005) (remanding to the district court for further explanation where the sentence imposed was above the advisory guideline range); *U.S. v. Arzola-Casas*, 207 Fed. Appx. 667 (7<sup>th</sup> Cir. Nov. 29, 2006) (noting that the U.S. Supreme Court has granted a petition for writ of certiorari in a Fourth Circuit case (*U.S. v. Rita*, 177 Fed. Appx. 357 (4<sup>th</sup> Cir. May 1, 2006), *cert granted*, 127 S.Ct. 551 (U.S. Jan. 5, 2007)) to determine whether according a presumption of reasonableness to a sentence within the guidelines range is consistent with *U.S. v. Booker*, 543 U.S. 220 (Jan. 12, 2005)).

<sup>1347</sup> See *U.S. v. Lange*, 445 F.3d 983, 987 (7<sup>th</sup> Cir. Apr. 28, 2006). A “Paladino remand” is for the district court to inform the Seventh Circuit whether the “sentence would have been different had the Guidelines been applied as advisory rather than mandatory.” *U.S. v. Santiago*, 428 F.3d 699, 705-06 (7<sup>th</sup> Cir. Nov. 3, 2005); *U.S. v. Paladino*, 401 F.3d 471 (7<sup>th</sup> Cir. Feb. 25, 2005). In the remand, the district court considers the sentencing factors in 18 U.S.C. §3553(a), which include the nature and circumstances of the offense, the history and characteristics of the defendant, the need to promote respect for the law, the need to provide just punishment for the offense, the need to afford adequate deterrence to criminal conduct, and the need to protect the public from further crimes of the defendant. See 18 U.S.C. §3553(a); *U.S. v. Alburay*, 415 F.3d 782, 786 (7<sup>th</sup> Cir. Jul. 29, 2005).

<sup>1348</sup> See *U.S. v. Guzman*, 236 F.3d 830, 834 (7<sup>th</sup> Cir. Jan. 3, 2001).

<sup>1349</sup> See *U.S. v. Bautista*, 258 F.3d 602, 606, 852 (7<sup>th</sup> Cir. Jul. 12, 2001).

<sup>1350</sup> See *U.S. v. Gonzalez-Portillo*, 121 F.3d 1122, 1125 (7<sup>th</sup> Cir. 1997) (holding that status as a deportable alien is not a proper basis for departure when the crime of conviction is one involving illegal presence in the U.S.); *U.S. v. Martinez-Carillo*, 250 F.3d 1101, 1106-07 (7<sup>th</sup> Cir. May 17, 2001), *cert. denied*, 122 S. Ct. 285 (Oct. 1, 2001) (re-affirming *Gonzalez-Portillo* in light of *Farouil* and *Koon*).

<sup>1351</sup> See *U.S. v. Farouil*, 124 F.3d 838, 847 (7<sup>th</sup> Cir. Aug. 26, 1997); See also *U.S. v. Gallo-Vasquez*, 284 F.3d 780, 784 (7<sup>th</sup> Cir. Mar. 27, 2002) (reiterating reiterated that “Farouil contains no language that mandates sentencing courts to enter downward departures every time a defendant is a deportable alien” and declining to overrule *United States v. Farouil*, 124 F.3d 838 (7<sup>th</sup> Cir. Aug. 26, 1997)).

<sup>1352</sup> See *U.S. v. Gallo-Vasquez*, 284 F.3d at 784-85.

<sup>1353</sup> See *U.S. v. Ferreria*, 239 F. Supp. 2d 849 (Nov. 6, 2002).

court should not depart if the defendant would be ineligible for more favorable prison conditions notwithstanding his deportable status. Second, the non-citizen can show that his individual circumstances make removal extraordinarily harsh, as, for example, where he will be sent to a country he does not know and/or will be separated from his family and friends. For example, cultural assimilation, which may speak to a non-citizen defendant's offense of illegal reentry and his character, may be a basis for a downward departure.<sup>1354</sup> Factors to be considered include the length of time that he lived in the U.S., his level of familiarity with his country of origin, his family ties in the U.S. and abroad, his motive for returning to the U.S., and what he did and where he lived upon reentry.<sup>1355</sup> Finally, the district court must make specific findings justifying the departure.<sup>1356</sup>

Fast-track programs allow the U.S. Attorney to request a downward departure in the offense level for convictions under I.N.A. § 276, 8 U.S.C. § 1326 cases in districts where the program is authorized by the U.S. Attorney General and the U.S. Attorney.<sup>1357</sup> Fast-track programs do not exist in the federal district courts within the jurisdiction of the Seventh Circuit. The absence of a fast-track program for prosecutions under 8 U.S.C. § 1326 does not result in an unfair sentencing discrepancy.<sup>1358</sup> The Seventh Circuit has held that the district court may not depart below the guidelines range to compensate for disparities created by the selective use of fast-track programs.<sup>1359</sup>

There are restrictions on where non-citizens may be placed to serve their federal sentences. First, deportable non-citizens<sup>1360</sup> must be housed in at least a low security level

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<sup>1354</sup> See *U.S. v. Martinez-Alvarez*, 256 F.Supp.2d 917 (E.D.WI Apr. 14, 2003).

<sup>1355</sup> See *id.* at 920; see also, *U.S. v. Arguijo-Cervantes*, 551 F.Supp.2d 762 (E.D.WI Mar. 6, 2008); *U.S. v. Campos-Cervantes*, 2007 U.S. Dist. LEXIS 62998 (E.D.WI Aug. 27, 2007); *U.S. v. Salazar-Hernandez*, 431 F.Supp.2d 931, 935 (E.D.WI 2006); *U.S. v. Peralta-Espinoza*, 383 F.Supp.2d 1107, 1112 (E.D.WI 2005); *U.S. v. Galvez-Barrios*, 355 F.Supp.2d 958, 964 (E.D.WI 2005).

<sup>1356</sup> See *U.S. v. Ferreria*, 239 F. Supp. 2d 849 (Nov. 6, 2002).

<sup>1357</sup> See U.S.S.G. § 5K3.1; *U.S. v. Martinez-Martinez*, 442 F.3d 539, 542 (7<sup>th</sup> Cir. Mar. 23, 2006); see generally Jane L. McClellan and Jon M. Sands, "Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on 'Fast-Track' Sentences," 38 *Ariz. St. L.J.* 517 (Summer 2006); Erin T. Middleton, "Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border are Undermining the Sentencing Guidelines and Violating Equal Protection," 2004 *Utah L. Rev.* 827 (#3).

<sup>1358</sup> See *U.S. v. Galicia-Cardenas*, 443 F.3d 553, 555 (7<sup>th</sup> Cir. Feb. 8, 2006) (holding that a sentence in a district without a fast-track program must not be reduced); *U.S. v. Martinez-Martinez*, 442 F.3d 539, 542 (7<sup>th</sup> Cir. Mar. 23, 2006) (holding that a sentence in a district without a fast-track program need not be reduced).

<sup>1359</sup> See *U.S. v. Rodriguez-Rodriguez*, 453 F.3d 458, 462 (7<sup>th</sup> Cir. Jul. 6, 2006) (clarifying its ruling in *U.S. v. Martinez-Martinez*, 442 F.3d 539 (7<sup>th</sup> Cir. Mar. 23, 2006)); *U.S. v. Galicia-Cardenas*, 443 F.3d 553, 555 (7<sup>th</sup> Cir. Mar. 24, 2006) (holding that a downward departure is not authorized where a non-citizen has been convicted in a district court where the fast-track program is not available); *U.S. v. Martinez-Martinez*, 442 F.3d 539 (7<sup>th</sup> Cir. Mar. 23, 2006). For a discussion regarding why the Seventh Circuit's precedent regarding sentencing and the fast-track programs should be revisited, see *United States v. Sanchez-Gonzalez*, 2009 U.S. Dist. LEXIS 9160 (N.D.IL Feb. 9, 2009).

<sup>1360</sup> The BOP defines a "deportable alien" as an "inmate who is a citizen of a foreign country, rather than the U.S." See Federal Bureau of Prisons, Security Designation and Custody Clarification Manual, Program Statement 5100.07, ch. 7, (1999) [hereinafter "PS 5100.07"], available at [www.bop.gov](http://www.bop.gov).

institution.<sup>1361</sup> Second, they are usually precluded from serving the final portion of their sentences in a halfway house or community correctional center. Title 18, U.S. Code § 3624(c) provides that, to the extent practicable, the BOP shall assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10% of his term in such a facility or in home confinement. A deportable non-citizen may participate in such a prerelease program only if he can establish: (1) a verifiable history of stable, full-time employment for at least five years prior to incarceration; (2) a verified history of domicile in the United States for at least five years prior to incarceration; and (3) verified strong family ties in the United States.<sup>1362</sup> These requirements may make it difficult for many non-citizens to qualify for prerelease programs.<sup>1363</sup> Moreover, if the non-citizen has been ordered deported or removed following incarceration, then he will be denied access to community confinement even if he meets the above three requirements.”<sup>1364</sup>

## Petition for a Writ of Habeas Corpus

A non-citizen who is “in custody in violation of the Constitution or laws or treaties of the United States” may file a petition for a writ of habeas corpus with the federal district court.<sup>1365</sup> Two types of petitions for writs of habeas corpus may be filed in the federal district courts. In the first type, a non-citizen challenges his custody by the DHS. Where an action is taken which has the effect of “holding” a prisoner for a future custodian at the end of his current confinement, such as the filing of a detainer by the DHS with the Bureau of Prisons, this action serves to establish custody for purposes of habeas corpus.<sup>1366</sup>

In the second type of petition for a writ of habeas corpus, a non-citizen who has been convicted of a federal crime may file a petition for post-conviction relief to vacate, set aside, or correct a sentence imposed where the sentence imposed was allegedly in violation of the U.S. Constitution or laws of the United States.<sup>1367</sup> Such relief is available, however, only where there was “an error of law that was jurisdictional, constitutional, or constitutes a

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<sup>1361</sup> See PS 5100.07, ch. 7, at 3. The shock incarceration or “boot camp” program is available only to those defendants sentenced to between twelve and thirty months imprisonment, 18 U.S.C. § 4046(a), below defendant’s range, and the BOP also possesses considerable discretion in making placement decisions under this program. See *Gissendanner v. Menifee*, 975 F. Supp. 249, 251 (W.D.N.Y. Aug. 27, 1997).

<sup>1362</sup> See PS 5100.07, ch. 7, at 3.

<sup>1363</sup> See *id.* at n.13 (citing *U.S. v. Smith*, 307 U.S. App. D.C. 199, 27 F.3d 649, 651 n.2 (D.C. Cir. 1994)).

<sup>1364</sup> See *id.* (citing PS 5100.07, ch. 7, at 4).

<sup>1365</sup> See 28 U.S.C. § 2241(c)(3); *Maleng v. Cook*, 490 U.S. 488, 490-91 (May 15, 1989); see also, *Samirah v. O’Connell*, 335 F.3d 545, 549-51 (7<sup>th</sup> Cir. Jul. 2, 2003) (finding that because the non-citizen petitioner was outside of the U.S. when the petition was filed, the district court did not have jurisdiction over the petition for a writ of habeas corpus).

<sup>1366</sup> See *Vargas v. Swan*, 854 F.2d 1028, 1031 (7<sup>th</sup> Cir. Aug. 12, 1988); see also *Setharatsomphou v. Reno*, 1999 U.S. Dist. LEXIS 14839 at \*10-14 (N.D.IL Sept. 2, 1999) (finding that the existence of a final order of deportation plus a detainer filed by the former INS was sufficient to evidence intent of the INS to take custody).

<sup>1367</sup> See 28 U.S.C. § 2255.

‘fundamental defect which inherently results in a complete miscarriage of justice.’<sup>1368</sup> In reviewing a petition for post-conviction relief, the district court must review the record and draw all reasonable inferences in favor of the government.<sup>1369</sup> Thus, the burden is on the non-citizen to show that he is entitled to release under 28 U.S.C. § 2255.<sup>1370</sup>

For purposes of a petition for a writ of habeas corpus, a final judgment upon which a preclusive effect could be based is deemed to have been entered once a non-citizen defendant has been sentenced and the judgment has been entered on the court’s docket.<sup>1371</sup> Where the state court reaches the merits of an issue, the issue will not be considered waived for a habeas petition under 28 U.S.C. § 2254 even though the defendant may have failed to adequately argue it in his briefs before that court.<sup>1372</sup>

Ineffective assistance of counsel may be found to constitute “cause” for a procedural default.<sup>1373</sup> To establish such a claim, the defendant must demonstrate that counsel’s conduct fell below an objective standard of reasonableness, that “but for counsel’s unprofessional error, the result of the proceeding would have been different”, and that counsel’s deficient performance rendered the proceedings fundamentally unfair or unreliable.<sup>1374</sup>

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<sup>1368</sup> See *Bischel v. United States*, 32 F.3d 259, 263 (7<sup>th</sup> Cir. Aug. 8, 1994); *Boyer v. U.S.*, 55 F.3d 296, 298 (7<sup>th</sup> Cir. May 24, 1995).

<sup>1369</sup> See *Carnine v. United States*, 974 F.2d 924, 928 (7<sup>th</sup> Cir. Jul. 24, 1992).

<sup>1370</sup> See *Haines v. Kerner*, 404 U.S. 519, 520 (Jan. 13, 1972).

<sup>1371</sup> See *Clay v. U.S.*, 537 U.S. 522 (Mar. 4, 2003); see also *U.S. v. Jimenez-DeGarcia*, 2007 U.S. Dist. LEXIS 25376 (E.D.WI Apr. 4, 2007) (denying request for a downward departure and a non-guidelines sentence based on the lost opportunity to serve a sentence for illegal reentry concurrently with a state sentence and on the disparity between fast-track districts and the Eastern District of Wisconsin on account of the non-citizen defendant’s numerous illegal reentries, lengthy criminal history, prior deportations, and the need the promote deterrence and respect for the law).

<sup>1372</sup> See *Robertson v. Hanks*, 140 F.3d 707, 709 (7<sup>th</sup> Cir. Mar. 30, 1998), *cert. denied*, 525 U.S. 881 (Oct. 5, 1998).

<sup>1373</sup> See *Murray v. Carrier*, 477 U.S. 478, 488 (Jun. 26, 1986).

<sup>1374</sup> See *Rodriguez v. Young*, 906 F.2d 1153, 1159 (7<sup>th</sup> Cir. 1990); *Strickland v. Washington* 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). For a discussion regarding the parameters of claims of ineffective assistance of counsel and the legal means by which such a claim may be pursued for a federal conviction, see *U.S. v. Rezin*, 322 F.3d 443 (7<sup>th</sup> Cir. Mar. 4, 2003).



## Illegal Reentry

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### I.N.A. § 276, 8 U.S.C. § 1326

#### (a) In general

Subject to subsection (b) of this section, any alien who –

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

#### (b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [sic] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

#### (c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[sic] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other

penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

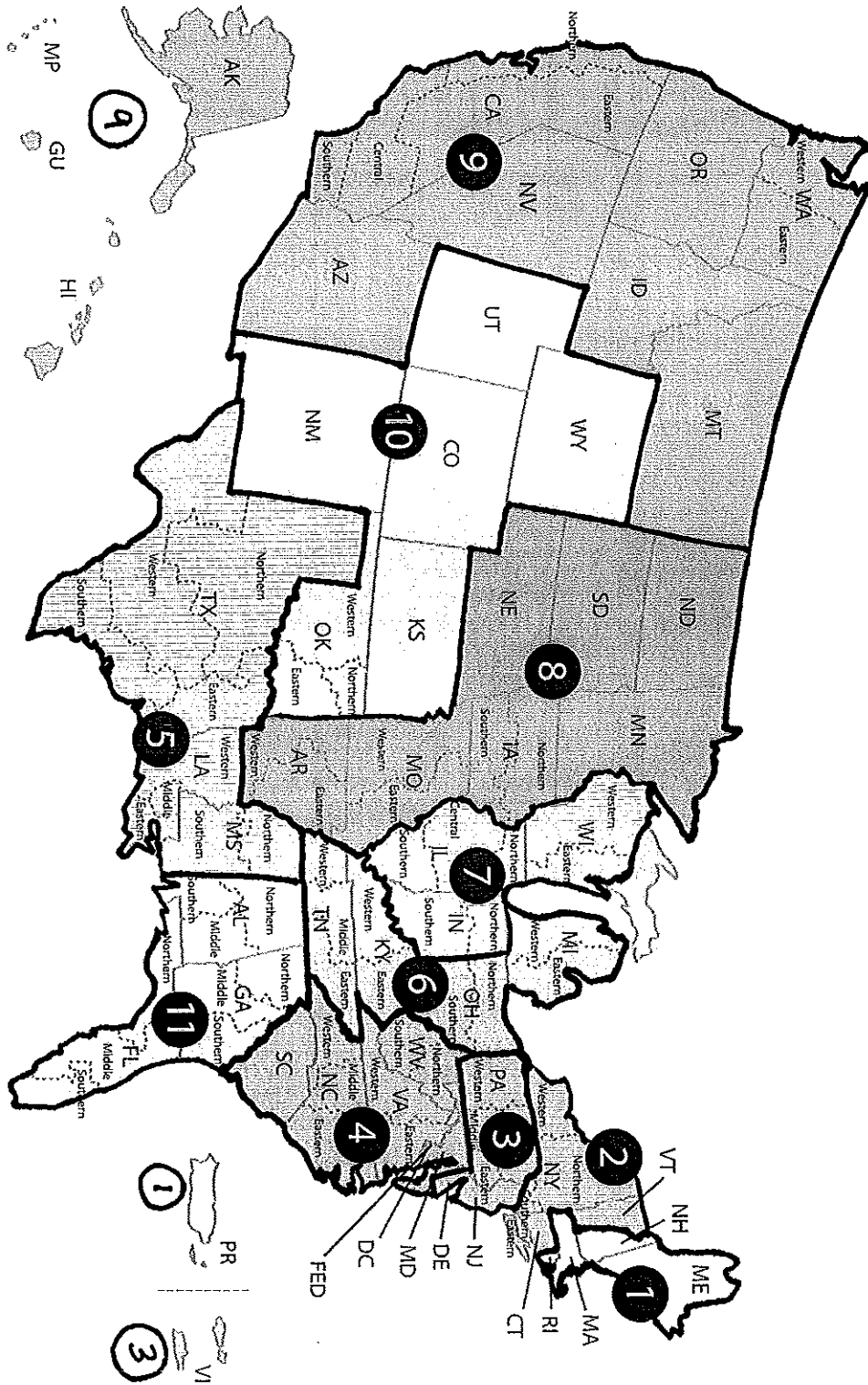
(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that –

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

# Geographic Boundaries

of United States Courts of Appeals and United States District Courts



**CONTACT INFORMATION**  
**DEPARTMENT OF HOMELAND SECURITY AND**  
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**Department of Homeland Security**

<http://www.dhs.gov/>

The DHS is comprised of three branches: U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection.

**U.S. Citizenship and Immigration Services**

To obtain information about a pending immigration application before the CIS, go to the CIS website at <http://www.uscis.gov/portal/site/uscis> or call 1-800-375-5283. In either case, you must have the application receipt number, beginning with three letters such as "LIN" and followed by a series of 10 numbers. This receipt number is contained on Form I-757, Notice of Action, which the CIS generates upon receipt of an application for an immigration benefit.

The local CIS office where the application for an immigration benefit is pending:

Chicago Field Office  
101 W. Congress Parkway  
Chicago, Illinois 60605  
T: (312) 239-5900

Indianapolis Sub-Office  
950 N. Meridian St., Room 400  
Indianapolis, IN 46204  
T: (317) 226-6181

Milwaukee Sub-Office  
310 E. Knapp St.  
Milwaukee, WI 53202  
T: (414) 287-6362

**U.S. Immigration and Customs Enforcement (ICE)**

<http://www.ice.gov>

For questions about a non-citizen client's detention or removal, contact the Detention and Removal Operations Office:

**Illinois**

Chicago Detention and Removal Office  
101 W. Congress Parkway, 4<sup>th</sup> Floor  
Chicago, IL 60605  
T: (312) 347-2400  
Field Office Director: Richard Wong  
T: (312) 347-2221

Springfield General Office  
T: (217) 585-9868

**Indiana**

Indianapolis General Office  
950 N. Meridian St., Room 400  
Indianapolis, IN 46204  
T: (317) 226-6009  
(317) 248-4151

**Wisconsin**

Milwaukee General Office  
T: (414) 297-1571  
Supervisory Special Agent: John Neinhart  
T: (414) 287-6356

## U.S. Customs and Border Protection (CBP)

<http://www.cbp.gov>

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### *Ports of Entry*

The CBP at a port of entry may need to be contacted if a non-citizen is being held for questioning in secondary inspection.

#### Illinois

O'Hare International Airport

T: (773) 894-2940, 2900

Midway International Airport

T: (773) 948-6330

Moline/Quad City International Airport

T: (309) 762-6300

#### Indiana

Indianapolis International Airport

T: (317) 248-4060

Fort Wayne International Airport

T: (260) 747-7276

#### Wisconsin

General Mitchell International Airport, Milwaukee

Port Director: Mike King

T: (414) 486-7826, 7790

Austin Straubel International Airport, Green Bay

Port Director: Chad Shuffler

T: (920) 496-0606

(414) 486-7826

For additional port of entry contact information go to  
<http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/>

### *Deferred Inspections*

If a non-citizen has been referred to a Deferred Inspections Office for further review for admission to the U.S., she will have to report to one of the following offices:

Customs and Border Patrol

101 W. Congress Parkway

Chicago, IL 60634

T: (312) 834-0908

Customs and Border Patrol

6801 Pierson Dr.

Indianapolis, IN 46241

T: (317) 248-4060

Customs and Border Patrol

310 E. Knapp St.

Milwaukee, WI 53202

T: (414) 287-6346

**Executive Office for Immigration Review (EOIR)**

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<http://www.usdoj.gov/eoir/>

For information about prior exclusion, deportation, or removal proceedings or the status of current proceedings before the Immigration Court or the Board of Immigration Appeals, call the EOIR automated information number at 1-800-898-7180. The non-citizen's alien ("A") number is located on almost all immigration documents and is needed to obtain the information. For more specific information, contact the Chicago Immigration Court and/or the Board of Immigration Appeals (BIA).

***Chicago Immigration Court***

Office of the Immigration Judge  
55 E. Monroe Street, Suite 1900  
Chicago, IL 60603  
T: (312) 353-7313  
<http://www.usdoj.gov/eoir/sibpages/chi/chimain.htm>

The Chicago Immigration Court hears the cases of non-citizens living in Indiana, Illinois, and Wisconsin. Non-citizens must travel physically to the Chicago Immigration Court for their hearings.

***Board of Immigration Appeals***

Clerk's Office  
5107 Leesburg Pike, Suite 2000  
Falls Church, VA 22041  
T: (703) 605-1007  
<http://www.usdoj.gov/eoir/biainfo.htm>

**Selected Resources  
Related to Immigration and Criminal Law**

**Primary Sources: Statutes and Case Law**

**Illinois Compiled Statutes**

**Illinois General Assembly**

<http://www.ilga.gov/legislation/ilcs/ilcs.asp>

Current version of Illinois criminal and motor vehicle statutes available.

**Indiana Code**

**Indiana General Assembly**

<http://www.ai.org/legislative/ic/code/>

Current version of Indiana criminal and motor vehicle statutes available.

**Wisconsin Statutes**

**Wisconsin State Legislature**

<http://www.legis.state.wi.us/rsb/stats.html>

Current version of Wisconsin criminal and motor vehicle statutes available.

**Executive Office for Immigration Review**

**Board of Immigration Appeals (BIA)**

<http://www.usdoj.gov/eoir/>

The BIA offers free on-line access to its published decisions and those published by the U.S. Attorney General. The decisions are indexed by volume number. Click on "Virtual Law Library" and then "BIA/AG Administrative Decisions".

**U.S. Court of Appeals for the Seventh Circuit**

<http://www.ca7.uscourts.gov/>

Federal circuit court of appeals whose decisions are binding in Illinois, Indiana, and Wisconsin. Decisions, briefs, and oral arguments available on the website.

**Organizations and Publications**

**American Immigration Lawyers Association**

<http://www.ailapubs.org/>

Largest bar association for attorneys practicing immigration law. Offers seminars, conferences, and teleconferences to practitioners as well as local and national meetings.

- *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants, 3<sup>rd</sup> Ed.*, by Mary Kramer, 2008.
- *Kurzban's Immigration Law Sourcebook, 11<sup>th</sup> Ed*, by Ira Kurzban, 2008.
- *AILA's Focus on Private Bills and Pardons in Immigration*, by Anna Gallagher, 2008.

**American Immigration Legal Foundation (AILF) Legal Action Center**

<http://www.ailf.org/lac>

Publishes practice advisories about immigration law and litigation. Provides updates regarding proposed and pending litigation.

**ASISTA**

<http://www.asistaonline.org/>

Provides assistance on the intersection of immigration and domestic violence law. For a comprehensive list of legal resources and training materials related to VAWA, U visas for victims of

violence and other crimes, and T visas for victims of trafficking and other crimes, visit the ASISTA website.

**Catholic Legal Immigration Network, Inc. (CLINIC)**

<http://www.cliniclegal.org/>

Publishes a variety of introductory manuals and practice advisories on immigration law, with some available for free downloading on the Resources webpage.

**Immigrant Defense Project, New York State Defender's Association**

<http://www.nysda.org/idp/index.htm>

Offers materials on understanding deportation and other resources about working with non-citizens in the criminal justice system. Includes quick reference charts for immigration consequences for offenses in Vermont, New Jersey, New York, and Connecticut and practice tips on understanding and avoiding aggravated felony convictions.

**Immigrant Legal Resource Center**

<http://www.ilrc.org>

Offers trainings, publications, and technical assistance to practitioners. Materials available include:

- *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws, 10<sup>th</sup> Ed.*, by Katherine Brady with Norton Tooby, Michael K. Mehr, and Angie Junck
- "Defense Arguments Against *Matter of Almanza-Arenas*, 24 I&N Dec. 722 (BIA 2009)," by Kathy Brady, June 2009, available for free downloading at [http://www.ilrc.org/immigration\\_law/criminal\\_and\\_immigration\\_law.php](http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php).
- *Immigration Benchbook for Juvenile and Family Court Judges*, by Sally Kinoshita and Katherine Brady, 2005, available for free downloading at [http://www.ilrc.org/immigration\\_law/pdf/2005\\_SIJS\\_benchbook.pdf](http://www.ilrc.org/immigration_law/pdf/2005_SIJS_benchbook.pdf).
- *Living in the United States: A Guide for Immigrant Youth*, by ILRC, 2007, available in English, Spanish and Korean for free downloading at [http://www.ilrc.org/immigration\\_law/remedies\\_for\\_immigrant\\_children\\_and\\_youth.php](http://www.ilrc.org/immigration_law/remedies_for_immigrant_children_and_youth.php).
- *Special Immigrant Juvenile Status for Children Under Juvenile Court Jurisdiction*, by ILRC, 2005 and updates from 2009, available for free downloading at [http://www.ilrc.org/immigration\\_law/remedies\\_for\\_immigrant\\_children\\_and\\_youth.php](http://www.ilrc.org/immigration_law/remedies_for_immigrant_children_and_youth.php).
- *The U Visa: Obtaining Status for Immigrant Victims of Crimes*, 1<sup>st</sup> Ed., by Sally Kinoshita, 2009

**Indiana Public Defender Council**

<http://www.in.gov/ipdc/>

Offers training to defense attorneys and links to other websites on defense and human rights issues. The *Immigration Consequences of Criminal Convictions Manual* (January 2007) is available.

**Law Offices of Norton Tooby**

<http://www.criminalandimmigrationlaw.com>

Offers a collection of charts, sample pleadings, archived articles, and a free e-newsletter "Criminal and Immigration Law Update". Books available for purchase include:

- *Categorical Analysis Tool Kit*, 2009 ed.
- *Tooby's Crimes of Moral Turpitude*, 2008 ed.
- *Tooby's Guide to Criminal Immigration Law*, 2008 ed.
- *Criminal Defense of Immigrants*, 2007, 4<sup>th</sup> ed.
- *Aggravated Felonies*, 2006 ed.
- *Safe Havens: How to Identify and Construct Non-Deportable Convictions*, 2005 ed.
- *Post-Conviction Relief for Immigrants*, 2004 ed.



### **National Immigrant Justice Center**

<http://www.immigrantjustice.org/litigationupdate>

Maintains a daily digest of immigration-related decisions by the federal circuit court of appeals and the U.S. Supreme Court. Provides assistance to criminal defense attorneys and noncitizens through its Defenders Initiative.

### **National Defending Immigrants Partnership**

#### **National Legal Aid and Defender Association**

[http://www.nlada.org/Defender/Defender\\_Immigrants](http://www.nlada.org/Defender/Defender_Immigrants)

Offers quick reference charts for immigration consequences for federal offenses and offenses in certain states, training resources, selected sample briefs, relevant case updates, law change alerts, and practice tips.

### **National Immigration Project of the National Lawyers Guild, Inc.**

<http://nationalimmigrationproject.org/>

The NIP offers in-person seminars for criminal defense attorneys as well as immigration practitioners. The NIP maintains a "Crim-Imm" list serve for NIP members. Members can also access a legal brief bank. Dan Kesselbrenner, director, is an invaluable resource for defense attorneys and immigration attorneys alike on the immigration consequences of criminal dispositions. Materials available include:

- "Criminal and Deportation Defense" website with charts, articles, practice advisories, decisions, and links on criminal and immigration issues, available at [http://nationalimmigrationproject.org/CrimPage/CrimPage.html#removal\\_defense\\_checklist](http://nationalimmigrationproject.org/CrimPage/CrimPage.html#removal_defense_checklist).
- *Immigration Law and Crimes*, by Dan Kesselbrenner and Lory D. Rosenberg, available through Thomson Reuters/West at <http://west.thomson.com/>.

### **Thomson West**

<http://west.thomson.com/>

The leading publisher of immigration law publications. Titles relating to immigration consequences of criminal dispositions include:

- *Immigration Law and Crimes*, by Dan Kesselbrenner and Lory D. Rosenberg.
- *Immigration Trial Handbook*, by Anna Marie Gallagher and Maria Baldini-Potermin.
- *Immigration Law Service 2d.*, by Anna Marie Gallagher, an 8 comprehensive volume publication covering all aspects of immigration law.
- *Immigration Pleading and Practice Manual*, by Anna Marie Gallagher and Thomas Hutchins.
- *Immigration Law and Defense*, by National Immigration Project of the National Lawyers Guild.
- *Interpreter Releases*, a weekly periodical.

### **Other On-Line Research Websites:**

#### **Indiana Legal Services**

<http://www.indianajustice.org/Home/PublicWeb/Links>

Non-citizens - Immigration

(provides other immigration related internet links)

#### **Cornell Law School**

<http://www.law.cornell.edu/wex/index.php/Immigration>

Legal Information Institute - Immigration

## **TRAC**

<http://trac.syr.edu/tracdhs/> or <http://trac.syr.edu/immigration/library/>

Online library of government oversight reports on immigration topics, including data on ICE enforcement of immigration laws, aggravated felonies, relief under the Convention Against Torture, and immigration consequences of criminal convictions.

## **U.S. Court of Appeals for the Ninth Circuit Court**

<http://www.ca9.uscourts.gov/>

Created the manual *Immigration Law in the Ninth Circuit: Selected Topics* that provides a comprehensive review of the following topics: Jurisdiction over Immigration Petitions; Asylum, Withholding of Removal, and Relief under CAT; Cancellation of Removal, Suspension of Deportation, and Former Section 212(c) Relief; Motions to Reopen or Reconsider Immigration Proceedings; and Criminal Issues in Immigration Law. For more information or to download the manual, click on Downloads and then click on Immigration Outline.

## **Consultation**

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If you have questions about the possible consequences of certain crimes for your non-citizen client, you can contact the following resources:

### **Law Offices of Norton Tooby, Oakland, CA**

Email an Intake/Questionnaire Form or case evaluation questions to [consult@CriminalAndImmigrationLaw.com](mailto:consult@CriminalAndImmigrationLaw.com).

### **The Immigrant Legal Resource Center, San Francisco, CA**

Go to <http://www.ilrc.org/contract.php> for information about the consultation services. You can email ILRC for a one time consultation or sign up to have ongoing consultation access.

**New York State Defender's Association, Immigrant Defense Project, New York, NY**  
(718) 858-9658, ext. 201.

**National Immigration Project of the National Lawyers Guild, Boston, MA**  
Dan Kesselbrenner, (617) 227-9727, or [dan@nationalimmigrationproject.org](mailto:dan@nationalimmigrationproject.org).

### **Legal Assistance Foundation of Metropolitan Chicago, Chicago, IL**

Contact either Lisa Palumbo at (312) 347-8374 or Geoffrey Heeren at (312) 347-8398.

### **National Immigrant Justice Center, Chicago, IL**

Email [defenders@heartlandalliance.org](mailto:defenders@heartlandalliance.org).

If you have questions about asylum or benefits for asylees, call the National Asylee Information & Referral Line at (800) 354-0365.

### **Catholic Immigration Legal Network, Inc. (CLINIC)**

Provides frequent trainings on many areas of immigration law and has a toll-free help line for CLINIC affiliates who have questions related to immigration law.

<http://www.cliniclegal.org/Programs/AttorneyoftheDayTollFree.html>

## Agencies to Assist Survivors of Torture

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**Marjorie Kovler Center for the Treatment of Survivors of Torture, Chicago, IL**  
<http://www.heartlandalliance.org/kovler/>  
(773) 381-4070

**The Center for Victims of Torture, Minneapolis/St. Paul, MN**  
<http://www.cvt.org/main.php>  
(612) 436-4800

## IMMIGRATION ATTORNEY REFERRALS

The following attorneys represent non-citizens and their families and have considerable experience in the cross-section of immigration and criminal law:

### ILLINOIS

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**National Immigrant Justice Center**  
208 S. LaSalle Street Suite 1818  
Chicago, Illinois 60604  
(312) 660-1370  
[defenders@heartlandalliance.org](mailto:defenders@heartlandalliance.org)

**CLINIC**  
Susan Schreiber  
Catholic Charities  
651 W. Lake  
Chicago, IL 60661  
(312) 612-6712

**Maria Baldini-Potermin & Associates, P.C.**  
Maria Baldini-Potermin  
One N. LaSalle Street, Suite 3040  
Chicago, IL 60602  
(312) 368-8200

**Scott D. Pollock & Associates, P.C.**  
105 W. Madison St., Suite 2200  
Chicago, IL 60602  
(312) 444-1940

**Law Offices of Robert D. Ahlgren & Associates, P.C.**  
105 W. Madison St., Suite 508  
Chicago, IL 60602  
(312) 782-1804

**Royal Berg**  
33 N. LaSalle, Suite 2300  
Chicago, IL 60602  
(312) 855-1118

**DePaul College of Law, Legal Clinic**  
O'Malley Building, Room 1050  
25 E. Jackson  
Chicago, IL 60604  
(312) 362-8292

**Legal Assistance Foundation of Metropolitan Chicago**  
111 W. Jackson St.  
3<sup>rd</sup> Floor  
Chicago, IL 60604  
(312) 347-1070

**Kriezelman Burton & Assoc., LLC**  
20 N. Clark, Suite 725  
Chicago, IL 60602  
(312) 332-2550

**Najera & Associates, Inc.**  
15 Spinning Wheel Road Suite 21  
Hinsdale, IL 60521-2967  
(630) 325-1010  
\*\*Also a resource for post-conviction relief

**Law Office of Mary O'Leary**  
621 Madison St  
Evanston, IL 60202  
(847) 424-1300

**Rubman & Compennolle**  
53 W. Jackson Blvd., Suite 750  
Chicago, IL 60604  
(312) 341-1907

**Davidson & Schiller, LLC**  
One N. LaSalle, Suite 2400  
Chicago, IL 60602  
(312) 499-9000

**Law Offices of Shirley Sadjadi**  
169 E. Chicago St., Suite 200  
Elgin, IL 60120  
(847) 741-6180

**Kempster, Keller & Lenz-Calvo, Ltd**  
332 S. Michigan Ave., Suite 1428  
Chicago, IL 60604  
(312) 341-9730

**Tapia-Ruano & Gunn, P.C.**  
53 W. Jackson Blvd., Suite 852  
Chicago, IL 60604  
(312) 281-4867

## INDIANA

---

**Thomas Ruge**  
Lewis and Kappes, P.C.  
One American Square, Suite 2500  
Indianapolis, IN 46282  
(317) 639-1210  
\*\*Also a resource for post-conviction relief.

**Lee O'Connor**  
Indiana Legal Services, Inc.  
105 E. Jefferson Blvd., Suite 600  
Indianapolis, IN 46601  
(574) 234-8121

**Andy Krull**  
IN Public Defender Council  
309 W. Washington St., Suite 401  
Indianapolis, IN 46204  
(317) 232-2490

## WISCONSIN

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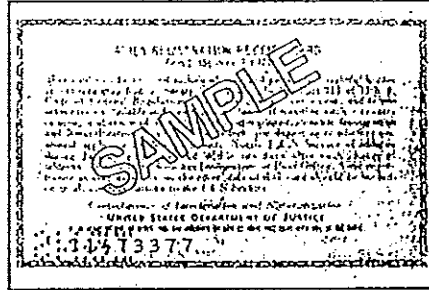
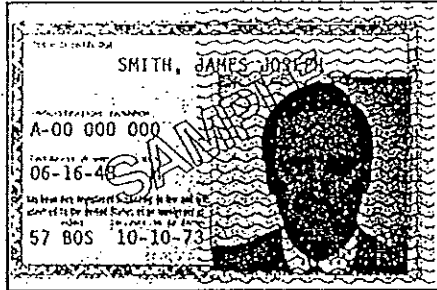
**Erich C. Straub, LLC**  
260 E. Highland Ave., Suite 400  
Milwaukee, WI 53202  
(414) 224-8472  
\*\*Also a resource for post-conviction relief.

**Hochstatter, McCarthy & Rivas**  
5555 N. Port Washington Rd.  
Milwaukee, WI 53217  
(414) 962-7440



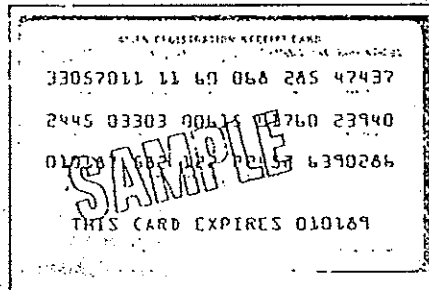
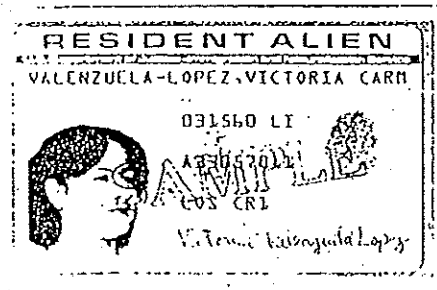
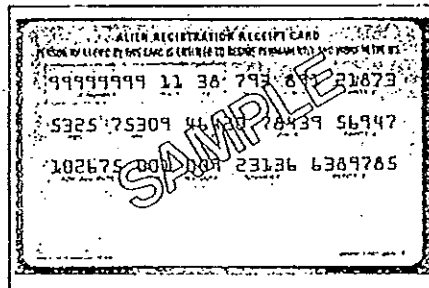
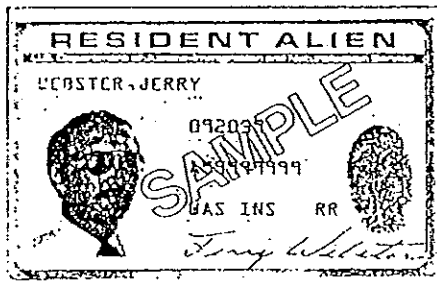
**APPENDIX 1-C. Lawful Permanent Resident Cards**

**LAWFUL PERMANENT RESIDENT ALIEN CARDS**



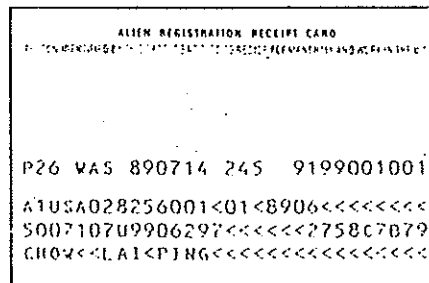
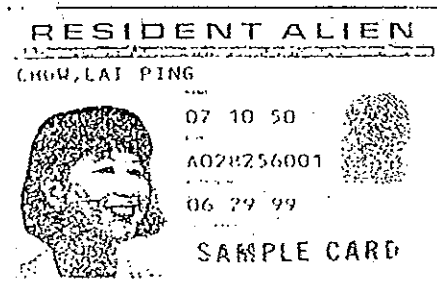
**ABOVE: Alien Registration Receipt Card I-151 (before 6/78)**

**BELOW: Alien Registration Receipt Card (Resident Alien Card) (after 3/77)**



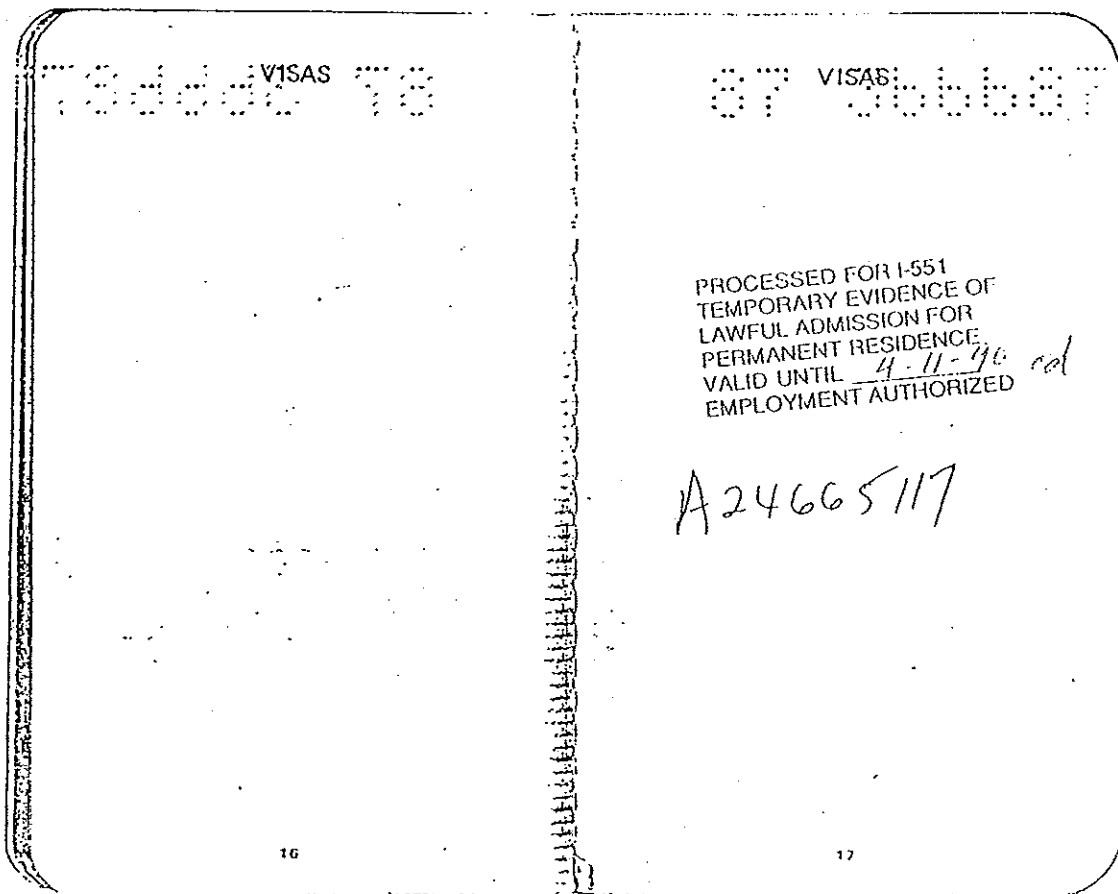
**ABOVE: Alien Registration Receipt Card (Conditional Resident Alien Card) I-551 (after 1/87)**

**BELOW: Alien Registration Receipt Card (Resident Alien Card) I-551 (after 1989)**



**APPENDIX 1-D. I-551 Stamp in Passport**

**STAMP IN FOREIGN PASSPORT  
INDICATING EVIDENCE OF PERMANENT RESIDENCE**



APPENDIX 1-G. *Employment Authorization Documents*

EMPLOYMENT AUTHORIZATION DOCUMENTS

**EMPLOYMENT AUTHORIZATION**

A 95624123 Name MICHAEL H. LANDON, JR.

Michael H. Landon Jr

09/28/87 09/28/23 583  
ISSUE DATE DOB COB

**SAMPLE**

HEARD INMATE TO BE  
 NOT THE PROPERTY OF THE  
 U.S. DEPT. OF JUSTICE  
 THIS EMPLOYMENT AUTHORITY  
 IS NOT VALID FOR  
 RE-ENTRY TO THE U.S.  
 THIS EMPLOYMENT AUTHORITY  
 IS NOT VALID FOR  
 RE-ENTRY TO THE U.S.

The person identified on the reverse of this card is an applicant for Temporary Resident status under a provision of the Immigration and Nationality Act as amended by P.L. 99-603. This document, presented during its validity period by the person to whom it was issued is a document of identity and employment eligibility required to be examined by an employer under Section 274A of the Act.

This document is evidence of alien registration and must be carried at all times and is VOID if altered.

**EMPLOYMENT AUTHORIZATION**

U.S. DEPARTMENT OF JUSTICE

11000000007 Name WANCEY M. OTERI

**SAMPLE** Signature Wancey M. Oteri

Valid from 10/23/90

Provision of Law  
 Terms & Conditions

11 MAR 16 1990 JAN 89

The person identified on the reverse of this card is authorized to engage in employment in the United States pursuant to Section 274A of the Immigration and Nationality Act as amended, during the period of validity of the card and in accordance with the restricting terms stated on the reverse of the card.

This document is VOID if altered and may be revoked pursuant to 8 CFR 274a. This document is not evidence of citizenship or permanent residence in the United States. If this card is found, please return to the nearest office of the Immigration and Naturalization Service.

TOP: I-688A

BOTTOM: I-688B



APPENDIX 1-F. *Refugee Travel Document*

REFUGEE TRAVEL DOCUMENT

**UNITED STATES  
OF AMERICA**

**ESTADOS UNIDOS  
DE AMÉRICA**

**REFUGEE TRAVEL  
DOCUMENT**  
(UN Convention of July 28, 1951)

**DOCUMENTO  
DE VIAJE PARA  
REFUGIADOS**  
(Convención del 28 de Julio  
de 1951 de las Naciones Unidas)

**4**

**A**

**VALIDITY VALIDez**

**RESTRICTIONS RESTRICCIONES**

**PHOTOGRAPH FOTOGRAFIA**

**SIGNATURE OF HOLDER FIRMATA DEL TITULAR**

**5**

*SAMPLE*

APPENDIX 1-E. *I-94 with Employment Authorization*

I-94 WITH EMPLOYMENT AUTHORIZATION STAMP

Departure Number  
601683547 00

U.S. IMMIGRATION  
256 HAS NO  
EMPLOYMENT AUTHORIZED  
CLASS: K-1  
DATE: AUG 26, 1987

14 Last Name  
GRIFFIN  
15 First Name  
MARVIN  
16 Country of Citizenship  
U.S.

18. Apellido  
GRIFFIN  
19. Primer nombre  
MARVIN  
17 Ciudad de  
U.S.A.

Warning - A nonimmigrant who accepts unauthorized employment is subject to deportation.  
Important - Retain this permit in your possession, you must surrender it when you leave the U.S. Failure to do so may delay your entry into the U.S. in the future.  
You are authorized to stay in the U.S. only until the date written on this form. To remain past this date, without permission from immigration authorities, is a violation of the law.  
Surrender this permit when you leave the U.S.  
- By sea or air, to the transportation line.  
- Across the Canadian border, to a Canadian Official.  
- Across the Mexican border, to a U.S. Official.  
Students planning to reenter the U.S. after a temporary absence to the same school, see "Arrival-Departure" on page 2 of Form I-20 Report to overridering this permit.  
Record of Changes

Post: \_\_\_\_\_  
Date: \_\_\_\_\_  
Carrier: \_\_\_\_\_  
Flight #/Ship Name: \_\_\_\_\_

Número de salida  
041673390 00

SERVICIO DE INMIGRACION Y NATURALIZACION  
1-94  
Registro de salida

EMPLOYMENT AUTHORIZED  
Date: JUL 23 1990 LOS  
Signature: B. A. Johnson  
A-29-156-353  
VALID TO JAN 22 1991

14. Apellido  
GRIFFIN  
15. Primer nombre  
MARVIN  
17. Ciudad de  
U.S.A.

16. Fecha de exp. (dd/mm/aa)  
1, 9, 0, 3, 6, 9

Aviso - Si la persona que no es inmigrante acepta empleo sin autorización está sujeta a deportación.  
Nota importante - Retenga Ud. este permiso que debe presentar al salir de E.U. Al no hacerlo prolongaría su entrada a E.U. en el futuro.  
Ud. está autorizado a quedarse en E.U. solamente hasta la fecha indicada en esta planilla. Al pasar la fecha indicada sin el permiso de las autoridades de Inmigración sería violar la ley.  
Entregue este permiso al salir de E.U.  
- A la línea de transporación, ya sea por mar o por aire;  
- al oficial canadiense, al cruzar la frontera canadiense;  
- al oficial estadounidense, al cruzar la frontera mejicana.  
Estudiantes que planean volver a entrar a los E.U. con plazo de 30 días para asistir a la misma escuela, lean "Llegada y salida" en página 2, Formulario I-20 antes de entregar este permiso.  
Record of Changes

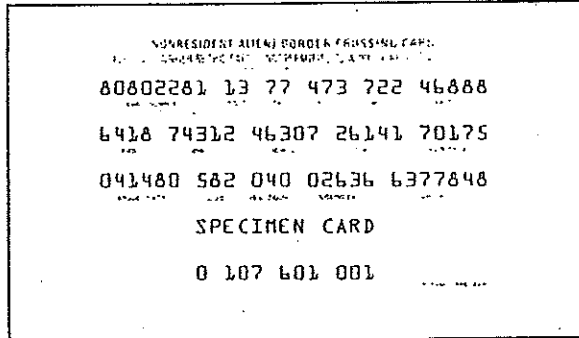
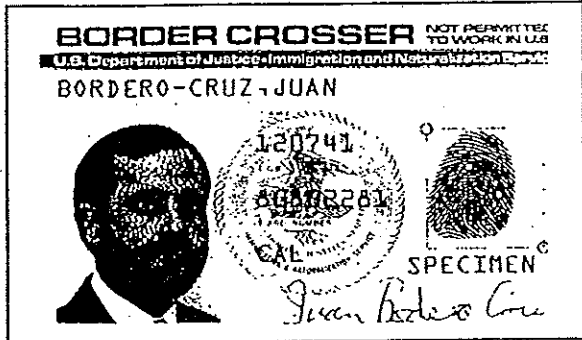
Post: \_\_\_\_\_  
Date: \_\_\_\_\_  
Carrier: \_\_\_\_\_  
Flight #/Ship Name: \_\_\_\_\_

TOP: English sample

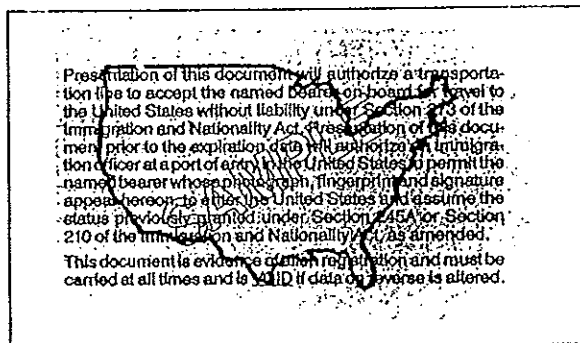
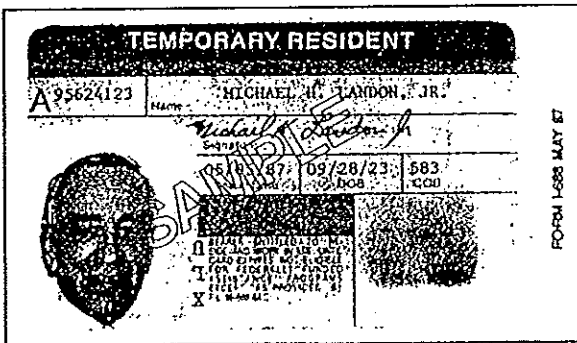
BOTTOM: Spanish sample

**APPENDIX 1-H. Border-Crossing & Temporary Resident Cards**

**BORDER-CROSSING CARD**



**TEMPORARY RESIDENT CARD**



APPENDIX 1-I. *Social Security Cards*

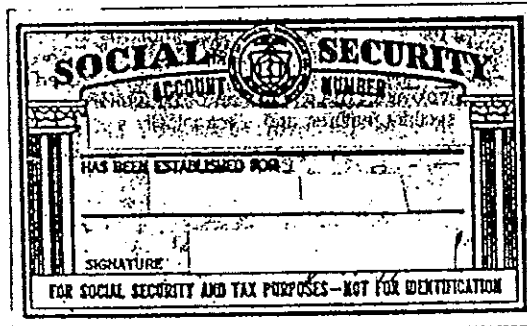
SOCIAL SECURITY CARDS



This card is invalid if laminated.  
This card is invalid if not signed by the number holder unless health or age prevents signature.  
Improper use of this card and/or number by the number holder or any other person is punishable by fine, imprisonment or both.  
This card is the property of the Social Security Administration and must be returned upon request. If found, return to:  
SSA - PO Box 408  
Baltimore, MD 21203  
ATTN: FOUND SSN CARD (Return postage guaranteed)

Department of Health and Human Services  
Social Security Administration  
Form OA-702 ( 10-83 )

**805193176**



# **Immigrants' Rights Manual**

**THIRD EDITION**

*National Immigration Law Center*  
*with*  
*Catholic Legal Immigration Network, Inc.*

**NATIONAL IMMIGRATION LAW CENTER (NILC)**

Founded in 1979, NILC is a national support center whose mission is to protect and promote the rights of low-income immigrants and their family members. NILC staff specialize in immigration law and the employment and public benefits rights of immigrants. A broad constituency of legal aid agencies, community groups, and pro bono attorneys throughout the U.S. rely on NILC for technical advice, litigation assistance, advocacy support, training, and publications. NILC maintains offices in Los Angeles and Washington, D.C.

To find out how to become a NILC sustainer, subscribe to the monthly *Immigrants' Rights Update* newsletter, receive NILC's Immigrants and Public Benefits e-mail updates, or order a NILC publication, call, fax, or write NILC's Los Angeles office:

NATIONAL IMMIGRATION LAW CENTER  
1102 S. Crenshaw Blvd., Suite 101  
Los Angeles, CA 90019  
213-938-6452 • fax 213-964-7940

**CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC)**

CLINIC, a subsidiary of the United States Catholic Conference (USCC), is a public interest legal corporation that serves low-income immigrants. Its services fall into four categories: (1) support to a national network of more than 100 Catholic legal immigration programs; (2) administration of national projects in which local agencies participate; (3) management of local diocesan immigration programs; and (4) representation of the foreign-born religious.

As a supporting organization, CLINIC trains and mentors local programs, produces a monthly newsletter, assists in management issues, provides guidance on accreditation of nonattorneys, organizes funding proposals, and updates local programs on the law. As an administrator of national projects, CLINIC represents emergency refugee flows and detainees, naturalizes legal permanent residents, and engages in federal litigation.

CLINIC has offices in 13 cities around the U.S. For more information, contact our national office:

CATHOLIC LEGAL IMMIGRATION NETWORK, INC.  
401 Michigan Avenue, N.E.  
Washington, DC 20017  
202-635-2556 • fax 202-635-2649

Cover design by Roger Merrill, adapted from the original cover designed by Jackie Stewart

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Published 1990. Third edition 1997  
Printed in the United States of America

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