



**PRACTICE ADVISORY<sup>1</sup>**  
April 2017

**AGGRAVATED FELONIES**  
By Kathy Brady, ILRC

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The immigration statute designates certain types of crimes as “aggravated felonies.” See INA § 101(a)(43), 8 USC § 1101(a)(43). These are the most dangerous type of convictions for a noncitizen. Despite the name, this definition reaches offenses that are neither felonies nor aggravated. It can include selling \$10 worth of marijuana, a misdemeanor shoplifting offense with a one-year suspended sentence, or failure to appear at a criminal hearing. The person must be convicted of the offense, not merely commit it, for aggravated felony penalties to apply.

Because so many offenses are unexpectedly classed as aggravated felonies, advocates need to examine each offense carefully to make sure that it is not an aggravated felony. See the alphabetical list of offenses at the end of this Advisory, and look up individual offenses on the California Crim/Imm Chart at [www.ilrc.org/chart](http://www.ilrc.org/chart).

**A. Penalties for an Aggravated Felony Conviction: Barred from Immigration Applications**

Conviction of an aggravated felony is a ground of deportation, but that is just the beginning. It acts as a bar to eligibility for most kinds of relief that would stop the deportation. For example, it is a bar to eligibility for LPR cancellation of removal, non-LPR cancellation of removal, and asylum. For some but not all permanent residents, it is a bar to eligibility for a § 212(h) waiver.

In contrast, a noncitizen who is “merely” deportable or inadmissible might qualify for a waiver or application that would preserve current lawful status or permit the person to obtain new status.

**Example:** Marco has been a permanent resident for 20 years and has six U.S. citizen children. He is convicted of an aggravated felony, possession for sale of marijuana. He will in all likelihood be deported. The aggravated felony conviction bars him from applying for the basic waiver “cancellation of removal” for long-time permanent residents who are merely deportable.

There are some immigration remedies for persons convicted of an aggravated felony, but they are limited and determining eligibility can be complex. The following are key options. For more information on these forms of relief, see the ILRC online resource, *Relief Toolkit*.<sup>2</sup>

**Adjustment of status and INA § 212(h).** In some cases, a person convicted of an aggravated felony that does not relate to drugs<sup>3</sup> will be able to apply for a § 212(h) waiver, for example in conjunction with an application for adjustment of status, or to gain admission at the border. For these applications the person must prove that she is admissible. Conviction of an aggravated felony is not itself a ground of inadmissibility, and so it is not an automatic a bar to family immigration or

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<sup>1</sup> The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit [www.ilrc.org](http://www.ilrc.org). For questions regarding the content of this advisory, please contact Kathy Brady at [kbrady@ilrc.org](mailto:kbrady@ilrc.org).

<sup>2</sup> See the *Relief Toolkit* at [www.ilrc.org/sites/default/files/resources/n.17\\_questionnaire\\_jan\\_2016\\_final.pdf](http://www.ilrc.org/sites/default/files/resources/n.17_questionnaire_jan_2016_final.pdf).

<sup>3</sup> Section 212(h) is not available to waive any drug conviction other than a single incident involving 30 grams or less marijuana.

admission. But in many cases the aggravated felony offense also makes the person inadmissible under other grounds, mainly the moral turpitude or controlled substances grounds. If the issue is moral turpitude, the person may be able to cure it with a § 212(h) waiver.

**Example:** Estelle was convicted of a theft offense and sentenced to one year in jail. Assume that this conviction is an aggravated felony and also makes her inadmissible under the moral turpitude ground. She wants to apply to adjust status to permanent residency through her U.S. citizen husband. She can submit an adjustment application and a § 212(h) waiver, to waive the moral turpitude inadmissibility ground. If she adjusts, she will no longer be deportable.

Note that some, but not all, permanent residents are barred from applying for § 212(h) if they are convicted of an aggravated felony.<sup>4</sup>

**Withholding of removal, CAT.** Conviction of an aggravated felony is a bar to eligibility for asylum. However, the person might not be barred from applying for withholding of removal under INA § 243(b)(3), 8 USC § 1231(b)(3). An aggravated felony conviction will act as a bar to withholding if (a) it is classed as a “particularly serious crime” (which includes nearly any drug trafficking offense, among other crimes) or (b) one or more convictions of an aggravated felony resulted in a total sentence of at least five years. 8 CFR 208.16(d)(3). Conviction of an aggravated felony is not a bar to relief under the Convention Against Torture. Asylees and refugees who are convicted of an aggravated felony still can apply for adjustment of status with a waiver under INA § 209(c); the waiver is not available if the government has “reason to believe” the asylee or refugee trafficked in drugs, and will very likely be denied if the conviction was of a “dangerous or violent” offense.

**T and U Visa.** An aggravated felony conviction is not an automatic bar to applying for the “T” or “U” visas for persons who are victims of human trafficking or a serious crime and who cooperate with authorities in investigating or prosecuting the crime. See 8 USC § 1101(a)(15)(T) and (U). However, in practice it may be hard to obtain a waiver for an aggravated felony conviction.

**Section 212(c) relief for older convictions.** Permanent residents who before April 24, 1996 pled guilty to an aggravated felony may be able to obtain a waiver of deportability under § 212(c) relief. If the issue is admissibility, this may extend to convictions received up to April 1, 1997.

**Naturalization and Good Moral Character.** Conviction of an aggravated felony is a permanent bar to establishing good moral character if the conviction occurred on or after November 29, 1990.<sup>5</sup> The bar is based on conviction of the offense, not on being inadmissible or deportable. Even if inadmissibility or deportability for the aggravated felony conviction after that date is waived (for example under INA §§ 212(h) or 212(c)), the person never can establish good moral character.

## **B. Which Offenses Are Aggravated Felonies?**

Aggravated felonies are defined at INA § 101(a)(43), 8 USC § 1101(a)(43). This is a list of dozens of common-law terms (burglary, perjury, etc.) as well as references to federal statutes.

Both federal and state offenses can be aggravated felonies. A foreign conviction may constitute an aggravated felony unless the conviction and resulting imprisonment ended more than 15 years in the past. Attempt or conspiracy to commit an aggravated felony is an aggravated felony.

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<sup>4</sup> A person who was admitted at a border or border equivalent as a permanent resident, and subsequently was convicted of an aggravated felony, is barred from § 212(h) relief. See INA § 212(h)(2).

<sup>5</sup> See INA § 101(f)(8), 8 USC § 1101(f)(8); 8 CFR § 316.10(b)(1)(ii).

Some offenses become aggravated felonies only if a sentence of at least a year is imposed, including a suspended sentence. A good rule is that whenever a sentence of a year or more has been imposed, the offense must be very closely examined to see if it is an aggravated felony. This includes both felonies and misdemeanors with a year's sentence. Offenses in this category include theft, receipt of stolen property, crimes of violence, burglary, perjury, counterfeiting, use of false documents, obstruction of justice (which in some jurisdictions includes offenses like accessory after the fact), and trafficking in vehicles with altered VIN numbers.

Other offenses are aggravated felonies regardless of the sentence. Commonly encountered aggravated felonies in this category include conviction of any drug trafficking offense, being a felon in possession of a firearm, sexual abuse of a minor, failure to appear for a felony trial or sentence, and an offense involving deceit or fraud where the loss to victim/s exceeds \$10,000.

It is very important to remember that immigrants have a critical legal defense, called the categorical analysis. The Supreme Court has held that each aggravated felony category – e.g., burglary – must have a technical, federal, “generic,” definition. To be an aggravated felony, the elements of the criminal statute at issue must exactly meet the elements of the corresponding “generic” offense. In many cases there are technical differences between the two, and the person can escape aggravated felony classification. **Never** assume that just because an offense is titled “burglary” or “theft,” it will meet the aggravated felony definition of those terms. In case of any doubt, refer the case to an expert. See ILRC Advisory online.<sup>6</sup>

The following is a list of the aggravated felony offenses listed in INA § 101(a)(43), arranged in alphabetical order. The capital letter following the offense refers to the subsection of § 101(a)(43) where the offense appears.

***Aggravated Felonies under INA §101(a)(43)***  
***(displayed alphabetically; statute subsection noted after category)***

- **alien smuggling**- smuggling, harboring, or transporting of aliens except for a first offense in which the person smuggled was the parent, spouse or child. (N)
- **attempt** to commit an aggravated felony (U)
- **bribery** of a witness- if the term of imprisonment is at least one year. (S)
- **burglary**- if the term of imprisonment is at least one year. (G)
- **child pornography**- (I)
- **commercial bribery**- if the term of imprisonment is at least one year. (R)
- **conspiracy** to commit an aggravated felony (U)
- **counterfeiting**- if the term of imprisonment is at least one year. (R)
- **crime of violence** as defined under 18 USC 16 resulting in a term of at least one year imprisonment, if it was not a “purely political offense.” (F)
- **destructive devices**- trafficking in destructive devices such as bombs or grenades. (C)

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<sup>6</sup> See “How to Use the Categorical Approach Now” (2017) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

- **drug offenses**- any offense generally considered to be “drug trafficking,” plus cited federal drug offenses and analogous felony state offenses. (B)
- **failure to appear**- to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years. (Q and T)
- **false documents**- using or creating false documents, if the term of imprisonment is at least twelve months, except for the first offense which was committed for the purpose of aiding the person’s spouse, child or parent. (P)
- **firearms**- trafficking in firearms, plus several federal crimes relating to firearms and state analogues. (C)
- **forgery**- if the term of imprisonment is at least one year. (R)
- **fraud or deceit** offense if the loss to the victim exceeds \$10,000. (M)
- **illegal re-entry** after deportation or removal for conviction of an aggravated felony (O)
- **money laundering**- money laundering and monetary transactions from illegally derived funds if the amount of funds exceeds \$10,000, and offenses such as fraud and tax evasion if the amount exceeds \$10,000. (D)
- **murder**- (A)
- **national defense**- offenses relating to the national defense, such as gathering or transmitting national defense information or disclosure of classified information. (L)(i)
- **obstruction of justice** if the term of imprisonment is at least one year. (S)
- **perjury or subornation of perjury**- if the term of imprisonment is at least one year. (S)
- **prostitution**- offenses such as running a prostitution business. (K)
- **ransom demand**- offense relating to the demand for or receipt of ransom. (H)
- **rape**- (A)
- **receipt of stolen property** if the term of imprisonment is at least one year (G)
- **revealing identity of undercover agent**- (L)(ii)
- **RICO** offenses- if the offense is punishable with a one-year sentence. (J)
- **sabotage**- (L)(i)
- **sexual abuse of a minor**- (A)
- **slavery**- offenses relating to peonage, slavery and involuntary servitude. (K)(iii)
- **tax evasion** if the loss to the government exceeds \$10,000 (M)
- **theft**- if the term of imprisonment is at least one year. (G)
- **trafficking in vehicles** with altered identification numbers if the term of imprisonment is at least one year. (R)
- **treason**- federal offenses relating to national defense, treason (L)