



ALIEN SMUGGLING: WHAT IT IS AND HOW IT CAN AFFECT IMMIGRANTS

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I. Introduction to Alien Smuggling

“Alien smuggling” is the term given to the act of assisting anyone in any way and at any time to enter the United States unlawfully, regardless of whether that person is a family member, or whether it was done for monetary gain. Alien smuggling can affect an immigrant in several different ways: Alien smuggling is a ground of inadmissibility, a ground of deportability, a bar to good moral character, and a conviction for alien smuggling is an aggravated felony. This practice advisory will walk through what “alien smuggling” is, how it can affect an immigrant client in each of these contexts, and practice tips for when alien smuggling might come up in your client’s case.

Screening for alien smuggling is particularly important in light of Secretary of U.S. Department of Homeland Security (DHS) John Kelly’s memoranda directing DHS to prioritize immigration enforcement against alien smugglers, and U.S. Attorney General Jefferson Sessions’ directive to federal prosecutors to prioritize prosecution of alien smuggling.¹ Because the law and policies regarding alien smuggling are evolving, it is important to check the law in your circuit and consult local practitioners in any case involving potential alien smuggling.

A. Definition of “Alien Smuggling”

The Immigration & Nationality Act (INA) defines an alien smuggler as “[a]ny person who *knowingly* has encouraged, induced, assisted, abetted, or aided” any other person to enter or try to enter the United States illegally.² These provisions are worded very broadly and have been interpreted to include sending money to someone to pay a smuggler, as well as merely encouraging someone to enter the United States illegally. The person must know she is helping someone enter illegally. If she was not aware that the other person did not have legal status to enter, she has not committed alien smuggling. Alien smuggling does not just cover professional smugglers; it also applies to people who bring in their family members.

Example: Suzanna went to Mexico and physically helped her younger brother cross the border without inspection. This could constitute alien smuggling.

Example: Amelia arranged for her elderly mother to enter the United States illegally. Amelia contacted a coyote to bring her and helped pay for the expenses, although Amelia was not there herself. This could constitute alien smuggling.

1. Alien Smuggling Requires Affirmative and Knowing Conduct

Despite the broad reach of the alien smuggling definition, some limitations do exist. The courts have clarified that the person must have made 1) an affirmative and 2) knowing act to constitute alien smuggling.³ In any case in which there

are facts that could potentially constitute alien smuggling, it is crucial to review the case law in your circuit to see if it is possible to argue that the person in fact did not know or did not make an affirmative act required to trigger this ground. We have outlined a few cases below that could be helpful in making this argument:

In *Altamirano v. Gonzales*, the Ninth Circuit reversed a finding of inadmissibility for alien smuggling where the petitioner knew that someone was hiding in the trunk of the vehicle she was riding in as a passenger, but where she made no affirmative act to help.⁴ The Court held:

The plain meaning of this statutory provision requires an affirmative act of help, assistance, or encouragement. Here, because Altamirano did not affirmatively act to assist Martinez-Marin, she did not engage in alien smuggling. That she was present in the vehicle and knew that Martinez-Marin was in the trunk does not amount to a violation of § 212(a)(6)(E)(i).⁵

In *Aguilar-Gonzales v. Mukasey*, the Ninth Circuit also held that knowledge is not enough. The Court found that the petitioner was merely present and acquiesced to another's fraudulent use of a document, and therefore did not commit an affirmative act to constitute alien smuggling.⁶ In that case, after refusing multiple times to allow her father to borrow her son's U.S. birth certificate to smuggle two infants into the United States, the petitioner finally agreed to accompany and allow him to use and present the birth certificate to immigration authorities because she feared that he would stop paying the mortgage on her house if she did not do so. The Ninth Circuit found that she had not committed alien smuggling.

Similarly, the Sixth Circuit reversed a finding of inadmissibility for alien smuggling for a lawful permanent resident (LPR) who shared driving responsibilities with three friends, one of whom was an undocumented immigrant, where the LPR mistakenly believed the undocumented immigrant could travel back and forth across the border because he was in the process of applying for a green card.⁷

These cases support the proposition that the statutory definition of alien smuggling requires an *affirmative act* of help, assistance, or encouragement, such as paying alien smugglers, making the arrangements to get undocumented immigrants across the border, or providing false information and documents to immigration authorities. Mere presence during the actual act of alien smuggling with knowledge that it is being committed should not be sufficient.

2. Alien Smuggling Can Include Prearranged Plans and Sending Money

Courts have provided guidance that knowing and affirmative acts of assistance, even if they do not include physically bringing the person over or being present at the border, are sufficient to constitute alien smuggling. A common alien smuggling charge is for planning and funding the trip of a relative or friend to come to the United States unlawfully. The following cases illustrate a few ways that this scenario can arise:

The Fourth Circuit has held that sending financial assistance directly to a child at a hotel on the border constituted alien smuggling, where the parents knew that the funds would be used for the child to cross the border illegally.⁸ In this case, the parents sent money separately to four different children over the years, and each time right after the money was sent, the child immediately crossed the border illegally and joined his or her parents in the United States. This pattern, together with the father's admission that he believed he was doing "something illegal" contributed to this finding.⁹

The Ninth Circuit has also found that smuggling includes knowingly participating in a prearranged plan to bring people to the border and then meeting them on the U.S. side of the border to transport them within the United States.¹⁰ In that case, the petitioner picked up seven individuals in Mexico, drove them to a town near the border where they made arrangements with a smuggler to cross, and then met up with them again once they were within the United States to drive them from Arizona to Washington.¹¹

Remember, however, that to constitute alien smuggling, the assistance must have been given *knowing* that the person was entering unlawfully.

Example: Juana, an LPR, wanted to help her family reunite in the United States. Soon after she entered, she sent money to El Salvador to help her sister pay to come to the United States illegally. She did not bring her

sister herself; she just greeted her when she arrived safely. Juana nevertheless could be charged with being deportable for alien smuggling because she knowingly assisted someone to enter the United States unlawfully.

Example: Carlos sent his cousins in Honduras some money every month to help with bills. Without his knowing it, they saved the money and used it to cross into the United States unlawfully. Carlos should not be charged with alien smuggling because he did not knowingly fund their trip.

3. Alien Smuggling Can Include Assistance on the U.S. Side of the Border

Some courts have held that affirmative assistance provided shortly after the person who was smuggled entered the United States constitutes alien smuggling, even though the assistor had no intention to help the person enter in the first place.

The Ninth Circuit held that alien smuggling includes an agreement by a family member to pay a smuggler after the person was already in the United States, but before the smuggler released and ceased to transport the person.¹² In that case, the petitioner knew that his brother planned to cross the border illegally, but he did not agree to help him until after he had crossed the border. He collected money from his other siblings and arranged payment to the smuggler. The court emphasized that he helped his brother before the smuggler released and ceased to transport him.¹³

Similarly, the First Circuit found that an LPR petitioner was removable for alien smuggling even though the petitioner, after discovering that her friends intended to enter illegally, initially refused to assist them and entered the United States on her own.¹⁴ The petitioner, however, had a change of heart due to concern for the safety of the friends' small child and returned to a designated meeting point on the U.S. side of the border to pick them up. The Court held that because the petitioner went back to the border within hours of the friends' having walked across, an "entry" had not yet been completed by the friends at the point she picked them up. As a result, petitioner was an "alien smuggler" because she assisted in her friends' attempted entry by facilitating their travel. The Court held that there is no exception for alien smuggling committed out of humanitarian concern.¹⁵

4. Alien Smuggling Is Distinct From Harboring or Transporting

Courts have also clarified, however, that the act of harboring or transporting undocumented immigrants is a separate offense that does not in and of itself trigger the inadmissibility or deportability ground for alien smuggling (although it may carry criminal penalties, and a conviction for harboring or transportation may trigger the aggravated felony ground, see Section V below).

In *United States v. Lopez*, the Ninth Circuit reversed a conviction for alien smuggling under 8 USC § 1324(a)(2) because the evidence showed that the defendant did not aid and abet the undocumented immigrants' initial transportation into the United States but instead transported them within the United States only after they had already entered.¹⁶ This finding is consistent with the Fifth Circuit, which stated, in *Rodriguez-Gutierrez v. INS*, that a conviction for illegally transporting undocumented immigrants does not trigger inadmissibility for smuggling because the statute only refers to aiding and abetting, not transporting.¹⁷ Similarly, the Third Circuit found that a guilty plea for "bringing and harboring" pursuant to 8 USC § 1324(a)(B)(ii) and 18 USC § 2 did not constitute alien smuggling. In this case, the LPR was being paid by an "employer" to pick up people in an upstate New York town and transport them elsewhere. However, the Third Circuit held he was not inadmissible as an "alien smuggler."¹⁸

The BIA has also found that transporting undocumented persons within the United States does not necessarily create inadmissibility for alien smuggling.¹⁹

Warning: This distinction is limited to the definition of alien smuggling for the inadmissibility and deportability grounds for alien smuggling under INA § 212(a)(6)(E)(i) and INA § 237(a)(1)(E)(i), respectively; a conviction for harboring or transporting may be an aggravated felony, as described below in Section V.

II. Alien Smuggling Inadmissibility Ground

Noncitizens who in any way and at any time help bring other noncitizens illegally into the United States are inadmissible.²⁰ Before 1990, only people who smuggled noncitizens *in exchange for money* were inadmissible. The post-1990 ground harshly imposes inadmissibility more broadly, including on people who have sympathetic reasons for helping family members enter the United States. You must inform your clients of the consequences of telling the Department of Homeland Security (DHS) that they helped family members or others to come in illegally. That person could be barred from relief and referred to criminal prosecution.

A. Alien Smuggling Inadmissibility Waivers and Exemption

1. Alien Smuggling Inadmissibility Waiver

A limited waiver exists for the alien smuggling ground of inadmissibility. There are two basic requirements for this discretionary waiver:

- a) The person applying for the waiver must be EITHER:
 - a. A lawful permanent resident who temporarily traveled abroad voluntarily (not under an order of deportation or removal), and is otherwise admissible;²¹ OR
 - b. A person applying for a green card based on a family-based petition (including immediate relatives or through a first, second, or third preference visa petition—but not through a fourth preference visa petition for brothers and sisters of U.S. citizens).²²

AND

- b) The person must have smuggled only her spouse, parent, son, or daughter (and no other individual).

These are the basic eligibility criteria for the inadmissibility waiver. Once a person has met these requirements, she then must convince the adjudicator to grant the waiver because of one or more of the following grounds:

- a) For “humanitarian purposes.” For example, the person might be ill and unable to get good medical care in the home country;
- b) To “assure family unity.” For example, the person might be leaving behind a U.S. citizen spouse and child in the United States; or
- c) When it is “otherwise in the public interest.” For example, the person might be an active church member or a valued employee whom the community would miss.

Example: Sofia arranged for someone to smuggle her baby into the United States. Now she has married a U.S. citizen and wants to immigrate through her husband as an immediate relative. When she goes to her visa appointment, she will need to submit a waiver application to the official. She will need to demonstrate that she smuggled only her child, and that USCIS should grant the waiver based on humanitarian, family unity, or public interest grounds.

Many noncitizens will not fall within the narrow requirements for this waiver. Note that this waiver does not apply to anyone who:

- assisted someone other than, or in addition to, her own son/daughter, parent, or spouse;
- must establish good moral character;²³
- seeks to immigrate through the fourth preference category (siblings of U.S. citizens);
- seeks to immigrate through a work visa; or
- applies for some other form of relief (although certain forms of relief have general waivers that may apply, see Section II(A)(2) below).

Example: Mary smuggled her fiancé Harry across the border. Although they later married, Mary is not eligible for this waiver because, at the time she smuggled him, Harry was not her husband.

Example: Stefan smuggled his children into the United States. They were all granted asylum, and Stefan is now applying to adjust status. Stefan will not qualify for the alien smuggling inadmissibility waiver because it does not apply to asylum adjustment. However, he can apply to waive alien smuggling under the general asylum adjustment waiver at INA § 209(c).

2. General Inadmissibility Waivers

Although the alien smuggling inadmissibility waiver is limited, as described in Section II(A)(1) above, certain forms of humanitarian relief have general waivers that can apply to alien smuggling. These include:

- U nonimmigrant status, under INA § 212(d)(14);
- T nonimmigrant status, under INA § 212(d)(13);
- Special immigrant juveniles seeking adjustment of status, under INA § 245(h); and
- Asylees and refugees seeking adjustment of status, under INA § 209(c).²⁴

3. Family Unity Exemption

A person is automatically exempt from the alien smuggling ground of inadmissibility if she is eligible for the “Family Unity” program as originally enacted in 1990. Family Unity was a program to allow admission of spouses and children of people granted legalization, or “amnesty,” under the Immigration Reform and Control Act of 1986.²⁵ This exemption only applies if the person *before May 5, 1988*, smuggled only a spouse, parent, son or daughter. Someone who qualifies for this exemption is automatically **not** inadmissible, under INA § 212(a)(6)(E)(ii). She does not have to apply for a waiver for inadmissibility.

III. Alien Smuggling Deportability Ground

This discussion is limited to the alien smuggling deportation ground and does not include the aggravated felony deportation ground covered in Section V, which requires a conviction and is defined differently. The deportation ground is for someone who *commits* alien smuggling—even if there is no conviction—if it occurred at the time of any entry, prior to any entry, or within five years after any entry.²⁶

The deportation ground is more lenient than the ground of inadmissibility, because it has a time limit. The person must have committed alien smuggling before, during, or within five years of any entry into the United States to be deportable.²⁷ The word “entry” means coming into the United States legally or illegally, with or without inspection and authorization by an immigration officer. Advocates should not concede deportability unless they have confirmed that 1) the client knew that the person whom they helped enter the United States did not have the legal right to enter, 2) the act itself meets the definition of alien smuggling, and 3) the act occurred during the time periods described above.

Example: Domingo was admitted to the United States in 2007 as an LPR, and has never left the United States since then. In 2015 he paid someone to help bring his father up from Mexico. Domingo’s actions could fit within the definition of smuggling, because he helped his father enter illegally. But he is not deportable, because he did it more than five years since his last entry into the United States in 2007.

A. Alien Smuggling Deportability Waivers and Exemptions

A waiver also exists for the alien smuggling ground of deportation. In order to qualify for the waiver, the LPR must have smuggled only his or her parent, spouse, son or daughter (and no other individual), and that person must have had that family status at the time the smuggling occurred.²⁸ Furthermore, the same exemption applies for noncitizens eligible for Family Unity with regards to deportability under INA § 237(a)(1)(E)(ii), as to inadmissibility under INA § 212(a)(6)(E)(ii).²⁹ See Section II(A)(3).

IV. Alien Smuggling Bar to Good Moral Character

Alien smuggling is a bar to establishing good moral character under INA § 101(f). The only exception to the statutory bar for alien smuggling is if the person could have qualified for Family Unity under the 1990 Act and, before May 5, 1988, encouraged, induced, assisted, abetted, or aided only his or her spouse, parent, son, or daughter to enter the United States illegally. See Section II(A)(3) on Family Unity above. A discretionary waiver of inadmissibility or deportability for alien smuggling will not help an applicant establish good moral character.³⁰

Good moral character is a requirement for naturalization, non-LPR cancellation of removal, self-petitioning and cancellation of removal under the Violence Against Women Act (VAWA), registry, and one of the forms of voluntary departure. Alien smuggling for purposes of good moral character is defined as in the grounds of inadmissibility and deportability described in Section I above, and does not require an admission or conviction. It is a statutory bar to good moral character, which means that anyone who is found to have committed alien smuggling within the good moral character time period required for that form of relief is barred from establishing good moral character.

Interestingly, however, alien smuggling is not an absolute bar to many forms of relief that require good moral character, including naturalization, non-LPR cancellation of removal, and relief under VAWA. This means that if someone committed alien smuggling *before* the good moral character period, she could still be granted relief – although applying for relief in this context could be risky, as the adjudicator could find that the alien smuggling is an independent ground of inadmissibility and/or deportability.

Example: Bai paid a “snakehead” in 2005 to smuggle his wife into the United States from China. They have been living here ever since, and have had two U.S. citizen children. Bai was apprehended in 2017 and placed in removal proceedings. He is applying for non-LPR cancellation of removal based on hardship to his two U.S. citizen children. The alien smuggling will not bar him from establishing good moral character because it occurred before the ten-year good moral character time period began.

Example: Alicia, an LPR, helped her son cross the border illegally into the United States ten years ago. Alicia went to Mexico, obtained a false green card for her son, and tried to re-enter the United States with him. Immigration authorities stopped Alicia and her son at the border. Alicia’s car was confiscated, and her son was returned to Mexico. Immigration authorities released Alicia and eventually returned her car. Alicia applied for naturalization. In reviewing Alicia’s file, the USCIS naturalization adjudicator saw that Alicia attempted to smuggle her son into the United States. Although Alicia is not statutorily ineligible to establish good moral character (the smuggling took place more than five years ago and thus outside the good moral character time period for naturalization), she is deportable for committing alien smuggling at the time of an entry. Instead of granting the naturalization application, the officer placed Alicia in removal proceedings. Alicia will need to ask the judge to grant her a waiver for having smuggled her son.

USCIS has some discretion in deciding whether or not to place a person in removal proceedings. In sympathetic cases such as Alicia’s, USCIS often may choose to exercise its discretion to deny naturalization, but not to place the person in removal proceedings. It is also possible that the deportable person might be naturalized even without being put into removal proceedings because the naturalization officer thinks the person has a strong waiver case and would be granted relief by an immigration judge anyway. However, individuals who have smuggled relatives in the past need to be aware of the risks of applying for naturalization, including denial and/or deportation.

V. Alien Smuggling Can Be an Aggravated Felony

In addition to being a ground of inadmissibility, deportability, and a bar to good moral character, a *conviction* for alien smuggling can be an aggravated felony.³¹ An aggravated felony is a ground of deportability,³² a bar to many forms of relief, and a permanent bar to good moral character if the conviction occurred on or after November 29, 1990. A conviction of alien smuggling as defined in INA § 274(a)(1)(A) or § 274(a)(2) is an aggravated felony, even if the “smuggler” was not paid and was helping a friend or relative, and even if no sentence was imposed. The only exception is for a first offense smuggling of a spouse, child, or parent.³³

The inadmissibility and deportability grounds for alien smuggling discussed in Sections I, II, and III are different from the aggravated felony based on alien smuggling in two ways. First, the inadmissibility and deportability grounds can be triggered by conduct, while an alien smuggling aggravated felony requires a criminal conviction. Second, the definition of alien smuggling is different for purposes of an aggravated felony. The alien smuggling inadmissibility and deportability grounds only apply to people who have knowingly assisted, abetted, etc. the *entry* of an unauthorized person into the United States. The federal criminal offense of alien smuggling, which is an aggravated felony, includes convictions for smuggling *or harboring or transporting* undocumented immigrants.³⁴

Example: Maria was convicted for the crime of smuggling her brother. She has an aggravated felony conviction. Even if this is a first offense, she does not fall within the exception because she did not smuggle her parent, spouse, or child.

V. Screening for Alien Smuggling

Because alien smuggling can arise in many different contexts in an immigration case, it is critical to inform clients about alien smuggling and how it could potentially affect them. USCIS adjudicators, consulate officials, and immigration judges may ask clients pointed questions about alien smuggling, especially when the applicant has undocumented children in the United States. Remember, however, that even if the applicant does not admit to alien smuggling, if the adjudicator has evidence that the applicant was an alien smuggler, she could find the applicant inadmissible, deportable, or barred from establishing good moral character on this ground.

Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) officers may also ask people they arrest questions about alien smuggling. This is particularly true in the context of unaccompanied minors, as discussed below. In addition, the Office of Refugee Resettlement (ORR) – the agency responsible for detaining children classified as unaccompanied minors (UCs) – interviews children when they come into ORR custody and regularly questions youth about their travel to the United States and the involvement of their family or friends in the United States in that travel.

A. Special Concerns for Sponsors of Unaccompanied Minors

Although alien smuggling has been a longstanding concern for immigrant clients, President Donald Trump's administration has prioritized enforcement based on alien smuggling, particularly for sponsors of unaccompanied minors. On February 20, 2017, the current administration released a memorandum directing DHS to take action against parents, family members, and any other individual who “directly or indirectly . . . facilitates the illegal smuggling or trafficking of an alien child into the United States”³⁵ This provision is so broad that it could include persons who help to arrange the child's travel to the United States, help pay for a guide for the child's journey to the United States, or otherwise encourage the child to enter the United States. The memorandum directs that enforcement against parents, family members, or other individuals involved in the child's unlawful entry into the United States could include (but is not limited to) placing such person in removal proceedings if they are removable, or referring them for criminal prosecution.³⁶

As of June 29, 2017, ICE confirmed that it has begun targeting individuals in the United States who may have paid a guide to smuggle children into the United States. Although ICE has failed to disclose any details regarding the scope or length of this enforcement action, the apparent focus has been on “sponsors” (individuals, often parents or other close family members, who agree to sponsor a child out of immigration detention).³⁷ This means that individuals who have or will sponsor a child out of immigration detention may currently be at increased risk. While it still remains to be seen how this enforcement action will play out, the impact for sponsors who have been involved in facilitating the child's travel to the United States could include the following:

- Placement of undocumented sponsors into removal proceedings, based on their lack of immigration status (for example, for being present without admission or parole³⁸), or based on the alien smuggling ground of inadmissibility,³⁹ discussed in Section II above;
- Placement of sponsors with some type of immigration status (for example, a green card) into removal proceedings, based on the alien smuggling ground of deportation, discussed in Section III above;

- Referral of sponsors regardless of immigration status, including U.S. citizens, for criminal prosecution. Criminal charges could potentially be brought under federal law, such as for smuggling/harboring under 8 USC § 1324, visa fraud under 18 USC § 1546, or conspiracy under 18 USC § 371,⁴⁰ or under state criminal provisions that may criminalize alien smuggling or harboring. As discussed in Section V above, the federal criminal offense for alien smuggling at 8 USC § 1324 is an aggravated felony. Whether a given state criminal provision of alien smuggling would constitute an aggravated felony or other removable offense would require analyzing the provision under the categorial approach.⁴¹

Warning: Some of the recent ICE interview notices for sponsors of unaccompanied minors state that the purpose of the interview with ICE is regarding criminal charges. Any one who receives such a notice should consult with both immigration and criminal experts as soon as possible.

It is important for individuals to be aware of these risks, and for advocates to prepare to defend against potential alien smuggling charges. For additional information about the Trump Administration's enforcement actions against sponsors, as well as tips for mitigating risks to family members as a result of their participation in a child's immigration case, see Catholic Legal Immigration Network, Inc. & Public Counsel, *Practice Advisory: Working with Child Clients and Their Family Members in Light of the Trump Administration's Focus on "Smugglers"* (July 2017), available at <https://cliniclegal.org/resources/working-child-clients-and-their-family-members-light-trump-administrations-focus-smugglers>.

End Notes

¹ Attorney General Jefferson Sessions, *Memorandum for All Federal Prosecutors regarding Renewed Commitment to Criminal Immigration Enforcement* (Apr. 11, 2017), available at www.justice.gov/opa/speech/file/956856/download.

² INA § 212(a)(6)(E)(i); INA § 237(a)(1)(E)(i).

³ This means that “belief that the alien was entitled to enter legally, although mistaken, would be a defense to inadmissibility for a suspected ‘smuggler.’” 9 FAM 302.9-7(B)(3).

⁴ 427 F.3d 586, 591-96 (9th Cir. 2005).

⁵ *Id.* at 592.

⁶ 534 F.3d 1204 (9th Cir. 2008).

⁷ *Tapucu v. Gonzales*, 399 F.3d 736 (6th Cir. 2005).

⁸ *Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011).

⁹ *Id.*

¹⁰ *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 679 (9th Cir. 2005).

¹¹ *Id.*

¹² *Covarrubias v. Gonzales*, 487 F.3d 742 (9th Cir. 2007); see also *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (“We hold that although all of the elements of the “bringing to” offense [under 8 USC § 1324(a)(2)] are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the United States ceases to transport them—in other words, the offense continues until the initial transporter drops off the aliens on the U.S. side of the border.”).

¹³ *Covarrubias*, 487 F.3d at 742.

¹⁴ *Dimova v. Holder*, 783 F.3d 30 (1st Cir. 2015).

¹⁵ *Id.* at 41.

¹⁶ See *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007).

¹⁷ 59 F.3d 504, 509 n. 3 (5th Cir. 1995).

¹⁸ *Parra-Rojas v. Att’y Gen.*, 747 F.2d 164 (3rd Cir. 2014).

¹⁹ *Matter of M-*, 7 I&N Dec. 389 (BIA 1957).

²⁰ See INA § 212(a)(6)(E).

²¹ This waiver applies to LPRs only if the LPRs are subject to the grounds of inadmissibility. For example, the LPR might have been found deportable and is seeking relief from deportation, or the LPR might fall into one of the categories in INA § 101(a)(13)(C) that causes an LPR to be “seeking admission” after a trip outside the United States, such as being absent for over 180 days, or being inadmissible under the criminal grounds of inadmissibility at INA § 212(a)(2).

²² See INA § 212(d)(11).

²³ *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009). Unlike other good moral character determinations, however, the good moral character bars for VAWA self-petitioners may be waived if 1) a waiver would be available for this offense for adjustment of status, and 2) the offense is connected to the battering or extreme cruelty. See INA § 204(a)(1)(C).

According to a USCIS memo, a VAWA self-petitioner may thus be able to waive alien smuggling as a bar to good moral character. See USCIS, *Determinations of Good Moral Character in VAWA-Based Self-Petitions*, App’x 1 (Jan. 19, 2005), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/gmc_011905.pdf. The good moral character bars may also be waived for VAWA cancellation of removal applicants if they can show that the offense is connected to the battering or extreme cruelty and that they warrant a finding of good moral character in the exercise of discretion. INA § 240A(b)(2)(C).

²⁴ For more information, see the following ILRC’s publications: *The U Visa: Obtaining Status for Immigrant Victims of Crime; Representing Survivors of Human Trafficking; Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth*; and *Essentials of Asylum Law* (available for purchase at: www.ilrc.org/publications).

²⁵ In particular, the person must:

1. Be an “eligible immigrant” for Family Unity, which includes the spouse or child of a legalized alien (“child” is defined as less than 21 years of age as of one of two specific dates in 1988);
2. Have been physically present in the United States on May 5, 1988;
3. Be immigrating as a second preference beneficiary, or immediate relative, or as someone who is applying for Family Unity; and
4. Have, *before May 5, 1988*, smuggled only a spouse, parent, son or daughter.

²⁶ See INA § 237(a)(1)(E).

²⁷ *Id.*

²⁸ INA § 237(a)(1)(E)(iii).

²⁹ INA § 237(a)(1)(E)(ii).

³⁰ *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009). However, there are exceptions to the good moral character bars for VAWA self-petitions and VAWA cancellation of removal. See INA § 204(a)(1)(C); INA § 240A(b)(2)(C); see also note 23, *supra*.

³¹ See INA § 101(a)(43)(N).

³² The Seventh and Ninth Circuits have held that the aggravated felony definition ground of deportability does not apply retroactively to convictions entered before the enactment of the 1988 Anti-Drug Abuse Act. See *Zivkovic v. Holder*, 724 F.3d 894 (7th Cir. 2013); *Ledezma-Galicia v. Holder*, 599 F.3d 1055, 1062 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g en banc*, 636 F.3d 1059 (9th Cir. 2010).

³³ See *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999); INA § 101(a)(43)(N).

³⁴ See INA § 101(a)(43)(N), referencing INA § 274(a), which includes “transporting”; see also *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999); *United States v. Solis-Camposano*, 312 F.3d 164 (5th Cir. 2002).

³⁵ Sec. John Kelly, *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), Sec. M; see also Donald J. Trump, Exec. Order No. 13767, *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017).

³⁶ *Id.*

³⁷ “ICE aims to disrupt and dismantle end-to-end the illicit pathways used by transnational criminal organizations and human smuggling facilitators,” said Jennifer Elzea, deputy press secretary for ICE. “As such, we are currently conducting a surge initiative focused on the identification and arrest of individuals involved in illicit human smuggling operations, to include sponsors who have paid criminal organizations to smuggle children into the United States.” Franco Ordonez, McClatchy DC Bureau, *Trump Administration Targets Parents Who Paid to Smuggle Children Into U.S.* (June 29, 2017), available at <http://amp.mcclatchydc.com/news/nation-world/national/article158952939.html>.

³⁸ INA § 212(6)(A)(i).

³⁹ It is likely in this instance that ICE would charge the individual based on their lack of immigration status rather than alien smuggling, since that would be an easier burden for ICE to meet.

⁴⁰ These examples of possible federal criminal charges are based on a July 5, 2017, notice that a sponsor received requiring that they appear at an ICE Homeland Security Investigations office for a “non-custodial interview regarding Conspiracy (18 USC 371), Visa Fraud (18 USC § 1546), and Smuggling/Harboring Illegal Alien (8 USC § 1324).” This document is on file with the author.

⁴¹ For more information on determining whether a criminal conviction triggers a ground of removal, see ILRC, *How to Use the Categorical Approach Now* (Apr. 10, 2017), available at www.ilrc.org/how-use-categorical-approach-now.