CALIFORNIA CRIMINAL LAW

PROCEDURE AND PRACTICE

Third Edition

Library of Congress Catalog Card No. 94-70697

Printed in the United States of America
ISBN 0-88124-975-0

CR-32111

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REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

KATHERINE A. BRADY
HON. DANA MARKS KEENER

KATHERINE A. BRADY, B.A., 1975, Stanford University; J.D., 1983, University of California (Berkeley). Ms. Brady is a staff attorney with the Immigrant Legal Resource Center in San Francisco. She coauthored this chapter in the second edition and updated it in the third edition

HON. DANA MARKS KEENER, A.B., 1974, University of California (Berkeley); J.D., 1977, Hastings College of the Law. Judge Keener is on the bench of the United States Immigration Court in San Francisco. She is also an adjunct professor of immigration law at the University of San Francisco School of Law. She coauthored this chapter in the second edition.

Note on Recent Legislation

On April 24, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996. Title IV of that law made significant changes in several sections of the immigration law that have nothing to do with terrorism or the death penalty. Under the statute, many of these provisions do not go into effect until at least August 1, 1996.

In the meantime, subsequent legislation might reverse some of these provisions. On May 1, 1996, the Leahy Summary Exclusion Amendment to the pending basic immigration bill (SB 1669) passed in the Senate; this would reverse much of the new law relating to asylum and exclusion. Still further changes might take place in conference committee on the pending immigration bill during May 1996. Other sections may be open to challenges in the courts.

Because of these changes and possible changes yet to come, *practitioners should not rely on this chapter as written.* Please seek guidance from experienced immigration attorneys, or contact the Immigrant Legal Resource Center (415–255–9499, ext. 427), which provides consultation and materials for a fee.

Examples of antiterrorist bill provisions that are law, but that might be reversed by pending legislation, include:

- Elimination of section 212(c) relief for deportation based on most criminal convictions (interpreted by immigration authorities as effective as of April 24, 1996) (8 USC §1182(c));
- Elimination of suspension of deportation as a relief for persons who entered without inspection, because all such persons "found" in the U.S. after a certain date will be placed in exclusion proceedings (8 USC §1251);
- Making conviction of a crime involving moral turpitude committed within five years of entry a basis for deportation if a sentence of a year or more *could have* been imposed (the law previously required such a sentence to have been imposed) (8 USC §1251(a)(2)(A)(i)(II));
- Requiring that persons coming to the U.S. to seek asylum who have false or no documents must put their case before an officer at the airport and, if denied, be returned to the country with no judicial review (8 USC §1225(b)(1)(B)).

Examples of the changes in the law that probably will not be corrected by legislation in the near future include:

- Expansion of the definition of "aggravated felony" (8 USC §1101(a)(43)) to include convictions received on or after April 24, 1996, for the following offenses:
  - Alien smuggling, *for gain or not,* for which term of imprisonment imposed is five years, regardless of suspension of imprisonment (effective retroactive to convictions occurring on or after October 24, 1994, Act);
  - FTA before a court pursuant to a court order to *answer to or dispose of a charge* of a felony, for which a sentence of two years *may* be imposed;

- Offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the ID numbers of which have been altered, for which a sentence of five years or more *may* be imposed;
- Offense relating to false passports, for which term of imprisonment is at least 18 months;
- Perjury, subornation of perjury, bribery of a witness, obstruction of justice, for which five years *may* be imposed;
- Transportation for purpose of prostitution;
- Speeded-up procedures with no judicial review for persons convicted of a crime (8 USC §1105(a)(10));
- Making certain alien smuggling and document fraud offenses RICO-predicate offenses (18 USC §1961(1));
- Expanding investigation powers of police in alien smuggling offenses (18 USC §2516(1));
- Permitting deportation of nonviolent offenders before the end of their prison sentence, with the condition that subsequent illegal reentry results in serving the entire original sentence plus any other punishment for the reentry (8 USC §§1252(h), 1326(c));
- Authorizing state and local police to arrest and detain certain aliens;
- In prosecutions for illegal reentry after deportation, the defendant has only limited grounds on which to challenge the validity of the deportation order (8 USC §1326).

◇ §48.1 I. OVERVIEW

For a noncitizen, the immigration consequences of a conviction can be far worse than the criminal penalties. Consequences can include deportation, permanent ineligibility for lawful immigration status, extended periods of immigration detention, and permanent separation from United States citizen family members. No matter how long one has lived in the United States and regardless of whether that residence has been in accordance with law, noncitizens can be ordered deported and sometimes remain permanently ineligible to return. With proper planning, however, defense counsel representing a noncitizen in a pending criminal case may be able to obtain a disposition that creates no serious immigration consequences.

Because even relatively minor offenses (*e.g.*, possession of a small amount of a controlled substance) can carry drastic immigration consequences, an extremely aggressive defense may be required for a noncitizen. Defense counsel may need to bargain for an unusual plea or sentencing agreement, or take the case to trial. Some defendants are willing to risk or sacrifice all other considerations to avoid adverse immigration consequences. In other words, the defense may have to be conducted completely differently from the "normal" criminal defense of a United States citizen.

The court must advise a defendant pleading guilty or no contest that the

plea could result in deportation, denial of naturalization, or exclusion from reentry. Pen C §1016.5. Defense counsel must go beyond this general warning and advise his or her client of the *specific* immigration consequences in the defendant's case. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328. (Note that the JRADs discussed in *Barocio* and *Soriano* are no longer available; see discussion in §48.32.) Prosecutors may request that a defendant stipulate to deportation as part of a plea bargain. 8 USC §1326(b)(2), as amended by the Violent Crime Control and Law Enforcement Act of 1994, §130001 (Sept. 13, 1994). A stipulation to agree to deportation made by a defendant in state or federal criminal proceedings is a deportation for the federal offense of illegal re-entry after conviction of an aggravated felony and deportation. See discussion in §48.37.

The first step in analyzing a case is to find out the defendant's current or potential immigration status; this information is necessary to identify the specific immigration effect of a disposition. If the defendant has any immigration documents, counsel should *make a photocopy* and check with immigration counsel if necessary. Sometimes people believe they have a green card when in reality they possess only a preliminary work document.

This chapter will point out common problems and the strategies for overcoming them. It cannot be overemphasized, however, that this area of the law changes very quickly and is very complex. In 1996 Congress is expected to make profound and encompassing changes in the Immigration Act, which may include changes in the immigration consequences of criminal acts and convictions. Virtually all proposed amendments would limit immigrants' rights or increase penalties for wrongdoing.

This chapter is an overview rather than an exhaustive discussion. It is preferable for counsel to obtain expert advice on individual cases. For references to immigration attorneys, contact the American Immigration Lawyers Association, 1400 I Street NW, Suite 1200, Washington, DC 20005, (202) 371–9377; the local bar association; or the National Immigration Project of the National Lawyers Guild, 1400 Beacon Street, Suite 506, Boston, MA 02108 (617) 227–9727. For a national directory of community agencies offering free or low-cost immigration assistance, write to the National Immigration Law Center, 1636 W. 8th Street, Suite 205, Los Angeles, CA 90017, (213) 487–2531 ($5.00). Although community agencies generally cannot advise criminal defense counsel on questions involving the adverse immigration consequences of convictions, they may be able to accept an indigent defendant's immigration case once the criminal issues have been resolved. The Immigrant Legal Resource Center in San Francisco will provide consultation to attorneys and agencies on the immigration consequences of conviction, for a fee. There is a lower fee for public defenders. For information, call (415) 255–9499. The address is 1663 Mission Street, Suite 602, San Francisco, CA 94103.

Defense counsel should also consult an in-depth research guide, such as Brady, California Criminal Law and Immigration (1995), available from the Immigrant Legal Resource Center, 1663 Mission Street, Suite 602, San Francisco, CA 94103, (415) 255–9499 ($75.00); or Kesselbrenner & Rosenberg, Immigration Law and Crimes (1995), available from Clark Boardman Callaghan, 375 Hudson Street, New York, NY 10014 (212) 645–0215 ($95). Other research guides are listed in §2.22.

§48.2 II. CHART: GROUNDS FOR DEPORTATION, EXCLUSION, AND PRECLUSION FROM ESTABLISHING GOOD MORAL CHARACTER

This chart was prepared by the Immigrant Legal Resource Center, 1995, and reproduced with permission.

See §48.7 for explanation of deportation, exclusion, and the bar to establishing good moral character. See also provisions relating to visa fraud, diplomatic immunity, child abduction in violation of a custody decree, AIDS, mental or physical defects, Communist and subversive beliefs, and gambling, discussed in §48.21.

Offense	*Deportation (8 USC §1251(a))*	*Exclusion (8 USC §1182(a))*	*Preclusion From Establishing Good Moral Character (8 USC §1101(f))*
Controlled substances	1 conviction (unless 30 gm. or less of marijuana). 8 USC §1251(a)(2)(B)(i). (Possible aggravated felony: conviction for most controlled substance offenses beyond first conviction of simple possession is aggravated felony. 8 USC §1101(a)(43).)[1]	1 conviction or admission of elements of one offense (single offense involving 30 gms. or less of marijuana for personal use can be waived). 8 USC §1182(a)(2)(A)(i). "Reason to believe" was or is drug trafficker. 8 USC §1182(a)(2)(C).	Same as Exclusion.
Moral turpitude	2 convictions, not single scheme; or 1 conviction within 5 years entry with sentence of 1 year or more. 8 USC §1251(a)(2)(A)(i)–(ii).[2]	1 conviction or admission; petty offense exception for 1 conviction, 6-month sentence or less, with 1-year maximum possible sentence, or admission of 1 conviction with 1-year maximum possible sentence. 8 USC §1182(a)(2)(A)(i)(I), (ii).	Same as Exclusion.
Prostitution	None.	Engaging in, procuring, supported by prostitution (not customers) within last 10 years. 8 USC §1182(a)(2)(D).	Same as Exclusion.
Firearms offenses	1 conviction of purchasing, selling, using, carrying, etc., firearm or destructive device. 8 USC §1251(a)(2)(C).[3]	None.	Can be aggravated felony.

Offense	*Deportation (8 USC §1251(a))*	*Exclusion (8 USC §1182(a))*	*Preclusion From Establishing Good Moral Character (8 USC §1101(f))*
Sentences	5-year sentence for violent crime is aggravated felony (also, person who actually served 5 years for one or more aggravated felonies is ineligible for INA §212(c) (8 USC §1182(c)) relief).	5-year sentence for 2 or more convictions of any kind. 8 USC §1182(a)(2)(B).	Same as Exclusion, or physically confined 180 days.
Noncitizen smuggling	Before, at time of, or within five years after entry, aid or encourage alien to enter U.S. illegally; waiver for some noncitizens. 8 USC §1251(a)(1)(E).	At any time has encouraged or aided alien to enter illegally; waiver for some noncitizens. 8 USC §1182(a)(6)(E).	Same as Exclusion.
Drug addiction and abuse; alcoholism	Is or has been after entry a drug addict or abuser. 8 USC §1251(a)(2)(B)(ii).	Is drug addict, or abuser; or is alcoholic, and therefore person with mental or physical defect who poses threat. 8 USC §1182(a)(1)(A)(ii)–(iii).	Habitual drunkard ineligible.
Aggravated felony	Conviction of aggravated felony is basis for deportation under 8 USC §1251(a)(2)(A)(iii) (certain drug offenses, crime of violence with 5-year year sentence, certain firearms offenses, murder, trafficking in false documents, alien smuggling for gain, and other offenses). See §§48.13–48.20.	Aggravated felons excludable for 20 years after deportation. 8 USC §1182(a)(6)(B).	Aggravated felons ineligible.

[1]Conviction for most narcotics offenses beyond first conviction of simple possession is an aggravated felony. 8 USC §1101(a)(43).
[2]Some moral turpitude offenses are also aggravated felonies, such as murder, violent crimes with five-year sentence imposed, and some serious theft and financial crimes. See 8 USC §1101(a)(43).
[3]Conviction of trafficking in firearms and certain federal firearms offenses are aggravated felonies. 8 USC §1101(a)(43).

§48.3 III. LIST: OVERVIEW OF CRIMES WITH SIGNIFICANT IMMIGRATION IMPACT

▶ **Note:** Counsel should determine what the defendant's immigration status is and review the defendant's entire criminal history before making an analysis. Counsel also should advise the defendant not to volunteer or admit to noncitizen status when speaking with anyone, particularly court personnel. See *In re Adolfo M.* (1990) 225 CA3d 1225, 1230, 275 CR 619, 622 (juvenile court found that minor was noncitizen based on his mother's statements to probation officer; minor transferred to Mexican juvenile authorities).

This section highlights crimes and dispositions that usually have a significant impact on a defendant's immigration status. Counsel must research each individual defendant's case to determine the best possible outcome.

- Obtaining diversion (see §48.8), and obtaining treatment as a juvenile (see §48.4) will avoid a conviction for immigration purposes. Pursuing a direct appeal will avoid a conviction while the appeal is pending (see §48.8)
- Conviction of an offense relating to firearms is a basis for deportation and also destroys a permanent resident's eligibility for the important "212(c)" immigration waiver. Conviction of attempt or conspiracy to commit the offense has the same effect, per 1994 amendments. See §48.10 for alternative strategies for resolving firearms charges.
- Conviction of even the most minor drug offense is a basis for deportation and permanent exclusion, with some exceptions for first conviction of simple possession of 30 grams or less of marijuana. See §48.9. Conviction of any drug-trafficking offense, or in some circumstances of a second possession offense, is an aggravated felony that brings additional severe penalties. See §§48.14–48.15. Conviction of accessory-after-the-fact to a drug offense may avoid bad immigration consequences. See §48.11.
- Admissions of prostitution, alien smuggling, using false documents to gain immigration benefits, or of drug use, trafficking, or addiction can incur immigration penalties even without a conviction. See §48.21.
- Conviction of a crime involving moral turpitude is a basis for deportation and exclusion, depending on the number of convictions and the sentence imposed. For the first such conviction only, a sentence of six months or less for a misdemeanor will prevent the defendant from becoming excludable, and a sentence of less than one year (*e.g.*, 364 days) will prevent the defendant from becoming deportable. Suspended imposition of sentence is deemed zero sentence, even if jail time is imposed as a condition of probation. See §48.12. Counsel should obtain a short probation period so that the conviction can be expunged or the plea withdrawn as quickly as possible. See Pen C §§1018, 1203.4, 1203.4a, 1203.45. See also §48.20. In some cases a defendant can plead to a related offense that does not involve moral turpitude. See §48.11. The judicial recommendation against deportation (JRAD), which used to be helpful, was eliminated in 1990. See §48.32.
- Conviction of an offense classified as an aggravated felony brings severe immigration penalties and the risk of severe federal criminal penalties. See §48.13. Congress has continued to expand the offenses that qualify as aggravated

felonies. See 8 USC §1101(a)(43). The current definition comprises 16 paragraphs with dozens of offenses, including murder; any drug trafficking offense, and some offenses that do not involve trafficking (see §48.16); trafficking in and several other offenses relating to firearms or destructive devices (see definition in §48.17 and related "safe" convictions in §48.10); a "crime of violence" resulting in a sentence imposed of at least five years (see §48.18); large-scale financial crimes and theft or burglary with a five-year sentence (see §48.13); alien smuggling; trafficking in false documents; and various other crimes such as ransom, child pornography, RICO offenses, running a prostitution business, offenses relating to national defense and treason, and failure to appear to serve a sentence if the underlying offense is punishable by a term of 15 years (see §48.13).

• Aggravated felons are ineligible for almost all forms of immigration relief, including political asylum. A permanent resident who actually serves five years for one or more aggravated felonies is ineligible for the important "212(c)" immigration waiver. See §48.15. In the near future, Congress may change the bar from five years actually served to a five-year sentence regardless of time served. Because this change could be applied retroactively, counsel should attempt to avoid the cumulative five-year sentence now.

• An aggravated felon's illegal reentry into the United States after deportation is punishable by up to 20 years in federal prison. 8 USC §1326(b)(2). Counsel must warn defendants of this possibility. For example, a noncitizen with a U.S. citizen wife and children who is offered a plea to sale of marijuana must understand that, if the plea is accepted, the defendant will be deportable and permanently barred from lawful status, and, if he reenters illegally after being deported, he could be sentenced to up to 20 years in federal prison for the re-entry. United States Attorneys *are* identifying and prosecuting such cases on a large scale.

• Counsel should try to obtain a disposition in which the defendant will not actually serve 180 days or more jail time, in order to preserve eligibility to establish good moral character. See §48.7.

• Conviction of accessory after the fact under Pen C §32 may avoid the adverse immigration consequences of a drug offense, a crime involving moral turpitude, or, potentially, any crime. See §48.11.

• In federal court, counsel should try to avoid conviction under 8 USC §1324(a)(1)(A) of alien smuggling or under 8 USC §1185(a) of using forged documents to obtain immigration benefits. In state court, counsel should try to avoid conviction under Pen C §113 (added in 1994 by Proposition 187) of using forged documents to obtain immigration benefits. Persons who are found by immigration authorities to have smuggled aliens or who are the subject of a civil finding that they used forged or borrowed documents face deportation and exclusion, even without a conviction.

• Counsel should try to avoid conviction of a felony or a third misdemeanor for lawful temporary residents or others still in process in the amnesty program, or for family members of amnesty recipients, who may be eligible for the Family Unity program (see §48.25). Conviction of a felony or two misdemeanors for persons applying for Temporary Protected Status (available at this writing

to nationals of Rwanda, Liberia, Bosnia, and Somalia; see §48.27) should also be avoided.

• Participation in illegal political demonstrations, having a mental disorder with associated behavior that poses a threat to self or others, lying under oath to gain immigration benefits, drunk driving convictions, and gambling convictions can carry immigration penalties. See §48.21.

§48.4 IV. MAIN DEFENSE GOALS IN REPRESENTING JUVENILES

Dispositions in juvenile proceedings do not constitute convictions for immigration purposes. *Matter of C.M.* (BIA 1953) 5 I&N 327; *Matter of Ramirez-Rivero* (BIA 1981) 18 I&N 135. Thus, admitting to a felony or misdemeanor involving moral turpitude or firearms will not make a juvenile deportable or excludable, and will not be a conviction for purposes of the three-misdemeanor/one-felony bar to amnesty and other programs.

Juvenile dispositions, however, might be held to bring a noncitizen within a ground of exclusion or deportation that does not depend on a conviction. A noncitizen whom the INS has reason to believe is a drug trafficker is excludable. 8 USC §1182(a)(2)(C). A noncitizen who has engaged in prostitution is excludable. 8 USC §1182(a)(2)(D). More troublesome is the new ground of deportation and exclusion for persons who are or have been drug addicts or drug abusers. 8 USC §§1182(a)(1)(A)(ii), 1251(a)(2)(B)(ii). The definition of drug abuser has not been firmly established, but some United States consulates currently define it as anything more than a one-time experimentation with an illegal drug. In juvenile proceedings, the best course is not to admit to any drug offense. If an admission is inevitable, it is better to admit to possession than to sale or possession for sale. Admissions of drug addiction might be held to be a basis for exclusion or deportation. Although no published decision has yet held that a juvenile court disposition is a basis for exclusion or deportation, INS attorneys have made that argument.

▶ **Note:** Review the defendant's entire criminal history before making a disposition.

It may be possible to avoid these immigration consequences by having the juvenile court record sealed, because the INS is thereby precluded from seeing the record. See Welf & I C §826. There may, however, be other sources of information on the case, in which event sealing the record may be ineffective. Juveniles who are tried as adults may also be eligible for sealing of records under Pen C §1203.45 or Welf & I C §§1772 and 1179. Sealing the records may eliminate conviction of a drug offense as well as a crime involving moral turpitude. *Matter of Lima* (BIA 1976) 15 I&N 661; *Matter of Andrade* (BIA 1974) 14 I&N 651. See *Matter of Ozkok* (BIA 1988) 19 I&N 546; 1 California Juvenile Court Practice §§13.7–13.20 (Cal CEB 1981). See also §48.20.

▶ **Note:** Juveniles in dependency proceedings and, possibly, delinquency proceedings, may be eligible for permanent residency as "special immigrant juveniles." Juveniles who have been abused by a permanent resident or U.S. citizen parent may be eligible for permanent residency under the 1994 Violence Against Women

Act (8 USC §§1154(a)(1)(A)(iv), (b)(iii), 1254(a)(3)) even if they are not in dependency proceedings. See §48.5.

☑ §48.5 V. CHECKLIST: DEFENDANT'S ELIGIBILITY FOR IMMIGRATION RELIEF

To establish specific goals in defending a noncitizen criminal defendant, defense counsel first must ascertain the defendant's current immigration status and/or potential for a change of status through future application. The goals of an immigration-minded defense are to avoid the loss of the defendant's current status and to avoid forfeiting his or her eligibility for possible immigration relief.

The following checklist may assist in analyzing counsel's case. For more diagnostic aids, see Brady, California Criminal Law and Immigration, chap 10 (1995). Often, the defendant does not know his or her exact status. For example, many people mistakenly think that marriage to a United States citizen brings automatic citizenship or permanent residency status, without the need for filing an application. Similarly, many people who have received employment authorization based on filing an application of some kind with the INS believe that their application has been granted and that they have permanent resident status, or asylum. Counsel should photocopy all immigration documents and check with immigration counsel if necessary to verify status.

❒ **Is defendant a United States citizen without knowing it?**

No United States citizen can be deported or excluded for any reason. All persons born in the United States are citizens (except for children of foreign diplomats); others may have acquired citizenship at birth in other countries. A defendant whose parent or grandparent was a citizen or who was a permanent resident under age 18 when a parent was naturalized should be referred for immigration counseling to learn whether citizenship was passed on.

❒ **Is defendant a currently undocumented person?**

Undocumented persons include those who entered the United States surreptitiously or fraudulently, or who hold an expired visa; they are deportable for lack of lawful immigration status. 8 USC §1251(a)(1). As long as they do not become excludable or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from deportation, and/or permanent residency, if they qualify for a particular application. Or, they may qualify for voluntary departure.

❒ **Has defendant lived in the United States since January 1, 1972?**

The defendant may be eligible to apply for registry as a permanent resident (see §48.28). He or she must not be excludable and must establish good moral character (see §48.7).

❒ **Does defendant have a parent or spouse of any age, or a sibling or child over age 21 who is a United States citizen, or a spouse or a parent (if defendant is unmarried) who is a permanent resident?**

The defendant may be eligible to immigrate through a visa petition at some point (see §48.29). The defendant must not be excludable and may also need to qualify for voluntary departure, which requires good moral character.

▶ **Note:** In 1996, Congress may eliminate all family immigration except for the spouses and children under 21 of citizens and permanent residents, and the parents of citizens. Under those changes, a citizen would not be able to immigrate his or her 21-year-old daughter or his or her brother.

❒ **Has defendant lived in the United States for at least seven years or ten years?**

The defendant may be eligible for suspension of deportation and permanent residency if he or she has lived in the U.S. for at least seven years and can show that deportation would cause extreme hardship. Good moral character is required. Under a separate provision, even a defendant convicted of a drug or other serious offense may be eligible to apply for suspension if he or she has maintained good moral character and presence in the United States for ten years since the conviction. See §48.23 on suspension of deportation.

❒ **Is the defendant an applicant (although not yet a lawful temporary resident) for or a lawful temporary resident under an amnesty program?**

Although the amnesty programs ended years ago, some cases have not yet been adjudicated. The defendant should be referred to a local immigration attorney or community agency to investigate the case. In addition, family members of amnesty recipients can apply for the Family Unity program (see §48.25). Amnesty applicants may possess a laminated card marked I-688 (lawful temporary residency) or I-688A (employment authorization preliminary to a grant of temporary residency).

Participants in the amnesty and Family Unity programs will be disqualified and denied if they become excludable or convicted of three misdemeanors or one felony. See §48.25. This rule applies only to family unity and other kinds of applications for amnesty applicants, *i.e.,* it does not apply generally to all permanent residency applicants.

❒ **Is defendant a permanent resident or does defendant have current lawful immigration status of some kind?**

Such persons include lawful permanent residents ("green card" holders) and persons holding lawful nonimmigrant visas, such as students, tourists, temporary workers, or business visitors. In this case, it is important to keep in mind the distinction between deportation (expulsion from the United States as well as loss of any lawful immigration status), and exclusion (bar to entering the United States and/or acquiring lawful immigration status). Noncitizens with lawful immigration status can lose that status and be expelled from the United States if they become deportable. 8 USC §1252. However, permanent residents and some persons with nonimmigrant status can lawfully remain in the United States even if they are excludable, as long as they are not deportable, because the government has no authority to deport noncitizens who are excludable but do not come within a ground for deportation under 18 USC §1252. Excludable noncitizens who leave the United States, however, may be denied permission to reenter. Also, excludable noncitizens may be ineligible to establish good moral character. See §48.7.

Some persons who immigrate through a spouse are conditional permanent residents who must report to the INS within two years after receiving residency. 8 USC §1186(d)(2). Although there is no formal FBI check of criminal record

at the two-year interview, the person might be asked questions about grounds for deportation.

❒ **Is the defendant a lawful permanent resident with less than seven years of lawful unrelinquished domicile?**

A permanent resident who comes within a ground of deportation can lose lawful status and be deported under 8 USC §1252. Thus, the defendant's first priority is not to become deportable.

The defendant's second priority is not to become excludable or ineligible for establishing good moral character (see §48.7). An excludable alien who leaves the United States may be barred from reentry under 8 USC §1182(a). A permanent resident who cannot establish good moral character is ineligible for citizenship. 8 USC §1427(a)(3).

▶ **Note:** If the defendant is a permanent resident with close to the seven years of lawful unrelinquished domicile required for the §212(c) waiver described below, the defendant should try to avoid a firearms conviction or aggravated felony conviction with the sentences described below, to preserve potential eligibility for §212(c) relief. In addition, that factor favors going to trial and filing an appeal, if appropriate. The person may acquire the seven years of domicile while the appeal is pending and before the conviction is final.

❒ **Is defendant a lawful permanent resident with seven years or more of unrelinquished domicile?**

Lawful permanent residents with seven years of qualifying domicile are eligible to apply for a special waiver of most grounds of deportation and exclusion. 8 USC §1182(c); INA §212(c). This device is called a "§212(c) waiver" or "§212(c) relief." It may excuse almost any conviction other than one relating to a firearm or destructive device, or one or more convictions of an aggravated felony resulting in a total period of imprisonment of five years. "Lawful unrelinquished domicile" includes time spent as a permanent resident, as well as time spent in certain other forms of lawful status, such as lawful temporary residency. *De Robles v INS* (9th Cir 1995) 58 F3d 1355. Waivers under §212(c) are discussed in §48.22.

▶ **Note:** Congress may change the aggravated felony bar to §212(c) relief to include a *sentence*, not imprisonment, of an aggregate five years. This change would be applied retroactively, so counsel should act in accordance now.

❒ **Does defendant come from a country of civil war or human rights abuses?**

The defendant may apply for political asylum or for withholding of deportation (see §48.26) as long as he or she has not been convicted of an aggravated felony or a "particularly serious crime."

As an alternative, the defendant may wish to apply for voluntary departure (see §48.30), which requires a showing of good moral character.

❒ **Is the defendant an abused or abandoned child or abused spouse?**

A noncitizen can apply for permanent residency as a Special Immigrant Juvenile if a juvenile court judge makes a written finding that the noncitizen is a dependent of the court and eligible for long-term foster care (meaning that the court has found family reunification not to be a viable option) and that it would

not be in the child's best interest to return to the home country. 8 USC §1101(a)(27)(J). While this has been applied most commonly to children and young people in dependency proceedings, it might be applicable to some persons in delinquency proceedings. For more information see Special Immigrant Status for Children in Foster Care (1992, 1993, ILRC, $15).

A spouse or child who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under provisions of the 1994 Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without the cooperation of the abusing citizen or permanent resident. 8 USC §§1154(a)(1)(A)(iv), 1154(a)(1)(B). Or, the abused spouse or child may be eligible for a special suspension of deportation that requires only three years of good moral character and physical presence in the United States. 8 USC §1254(a)(3).

❒ **Can the defendant provide valuable information to law enforcement authorities about criminal or terrorist activity?**

The 1995 Crime Bill created a new "S" nonimmigrant classification for certain witnesses who supply "critical reliable information" to law enforcement authorities relating to terrorism or criminal activity. 8 USC §1101(a)(15)(S). The person and his or her family may become eligible for permanent residency. Only 125 such visas will be distributed nationally each year.

☑ §48.6 VI. CHECKLIST: INTERVIEWING NONCITIZEN CRIMINAL DEFENDANTS

Defense counsel should inform the noncitizen criminal defendant of the following rights:

❒ The right to refuse to speak with INS officials or to answer any questions about country of birth, nationality, immigration status, or manner of entry into the United States. This right is based on the privilege against self-incrimination, because certain immigration violations also carry criminal penalties. See, *e.g., Bong Youn Choy v Barber* (9th Cir 1960) 279 F2d 642; *Estes v Potter* (5th Cir 1950) 183 F2d 865. Persons who have reentered the U.S. after deportation for criminal convictions especially should decline to speak with the INS, which may interview them in jail if they are incarcerated for another offense. The INS conducts interviews to identify detainees for federal criminal prosecution for unlawful reentry under 8 USC §1326(b)(2), which carries a 20-year federal prison sentence (see §48.15).

❒ The right not to reveal the defendant's immigration status to a judge. Pen C §1016.5.

Defense counsel should ask the following questions:

❒ What language (and dialect) does defendant speak? Is an interpreter needed? See §48.33. Often, defendants who do not need an interpreter for office or jail interviews will need one for formal court sessions.

❒ Where was defendant born?

❒ What is defendant's immigration status? (*E.g.,* Is or has he or she been a lawful permanent resident? Permanent resident with seven years or nearly seven years lawful domicile? Lawful temporary resident? Lived in U.S. for seven years illegally? Lived in U.S. since January 1, 1972? Undocumented?)

If defendant has any papers or documents from the INS, counsel should photocopy them. The copies may prove essential in analyzing the defendant's immigration status. See §48.5.

- ❒ Were any of defendant's parents or grandparents, spouse, child, brother, or sister U.S. citizens? Lawful permanent residents?
- ❒ Has defendant been deported or excluded before?
- ❒ Has the INS been involved with defendant in this case or earlier? Does defendant have a pending immigration case or application? Is there an "immigration hold" on the defendant (see §4.42)?
- ❒ What prior convictions does defendant have in California or in other jurisdictions or countries? Counsel should consider whether these convictions will have an impact on the defendant's immigration status.

§48.7 VII. DESCRIPTION OF DEPORTATION, EXCLUSION, AND BAR TO ESTABLISHING GOOD MORAL CHARACTER

▶ **Note:** See the chart in §48.2 for grounds for deportation and for exclusion and preclusion from establishing good moral character.

Under the Immigration and Nationality Act (INA), a noncitizen's criminal record may create adverse immigration consequences by bringing the noncitizen within a ground for deportation, exclusion from legal admission, or preclusion from establishing good moral character for citizenship or other purposes. As discussed in §48.21, not only convictions but other evidence of criminal acts may lead to dire immigration consequences.

Deportation. Deportation is the expulsion of a noncitizen from the United States. See 8 USC §1251(a). With two exceptions, only an immigration judge can order deportation. The exceptions are:

- A federal district court judge can order deportation of a noncitizen convicted of certain crimes. 8 USC §1252a(d); see discussion in §48.37.
- The INS can order deportation of a non-permanent resident convicted of an aggravated felony and with no form of relief. 8 USC §1252a(b) (1994).

Otherwise, a noncitizen whom the INS has cause to believe is deportable may be brought before an immigration judge for deportation proceedings or the INS can pressure a noncitizen to accept "voluntary departure."

▶ **Note:** A mere stipulation to deportation as part of a plea bargain in federal or state court is a deportation for purposes of federal prosecution for illegal reentry after conviction of an aggravated felony and deportation. 8 USC §1326(b)(2). See discussion in §48.37.

Many noncitizens with criminal records are brought directly from jail to immigration detention via an immigration hold or detainer. Once before an immigration judge, a noncitizen may accept deportation, contest the charge of deportability, or concede deportability but apply for some form of relief from deportation.

Exclusion. Exclusion means that a noncitizen cannot enter the United States. See 8 USC §1182(a). An excludable noncitizen who attempts to physically enter the United States can be refused admission or brought under exclusion proceedings, even if the person is a lawful permanent resident ("green card" holder)

or has other lawful status. A noncitizen who manages to enter the United States despite being excludable may be found deportable for having been excludable at last entry. In addition, a noncitizen who is excludable is not eligible for most means of immigrating (acquiring permanent resident status). Without obtaining a waiver of the ground of exclusion, an excludable noncitizen is ineligible to immigrate through the legalization (amnesty) programs, a relative's or employer's visa petition, registry, or adjustment of status. A noncitizen excludable for a criminal problem is also ineligible to establish good moral character, which is a requirement for suspension of deportation, registry, voluntary departure, and U.S. citizenship. See discussion of these forms of relief in §§48.22–48.31.

Crossover between deportation and exclusion. Several grounds for exclusion are similar but not identical to grounds for deportation, *e.g.,* a noncitizen with one conviction of a crime involving moral turpitude is excludable if the sentence was more than six months, and is excludable and deportable if the sentence was for a year or more. See §48.12. Some grounds for exclusion and deportation may be waived in certain circumstances at the discretion of an immigration judge or officer. For example, a noncitizen immigrating through a relative's visa petition may be able to apply, under 8 USC §1182(h), for a discretionary waiver of the moral turpitude exclusion ground. A permanent resident with seven years unrelinquished lawful domicile can apply for a discretionary waiver of almost any ground for deportation or exclusion (except for deportation based on incarceration for five years for one or more aggravated felonies) under 8 USC §1182(c).

Preclusion from establishing good moral character. A noncitizen's criminal record can result in statutory ineligibility to establish good moral character. See 8 USC §1101(f). A noncitizen who cannot establish good moral character is ineligible to apply for U.S. citizenship and is ineligible for some means of immigration or relief from deportation, including suspension of deportation, registry, and voluntary departure. See §§48.23, 48.28, 48.30–48.31.

Good moral character need only be established for a certain amount of time for each benefit, *e.g.,* the preceding five years for U.S. citizenship and for voluntary departure, the preceding seven years for suspension of deportation, and a reasonable time for registry. Conviction of an aggravated felony on or after November 29, 1990, is a permanent bar to establishing good moral character. Immigration Act of 1990, §509.

The bar to establishing good moral character incorporates several grounds for exclusion. A noncitizen may not establish good moral character if he or she is excludable under specified grounds, including those relating to crimes involving moral turpitude, controlled substances, prostitution, a five-year sentence for two convictions, or smuggling of aliens. 8 USC §1101(f).

Other requirements are unique to the good moral character bar and are not grounds for exclusion. To be able to establish good moral character, a noncitizen must not have been actually confined as a result of a conviction for 180 days or more during the period for which good moral character must be shown. The 180-day period is strictly calculated and depends on actual time in jail, not on suspended imposition or execution of sentence. (Contrast this with measurement of "sentence imposed" for moral turpitude convictions, which depends on sentencing and not on time actually spent in jail. See §48.12.)

Finally, a noncitizen who is a habitual drunkard, has been convicted of murder or of two or more gambling offenses, or has given false testimony under oath to receive immigration benefits is barred from showing good moral character. 8 USC §1101(f).

VIII. SENTENCES WITH ADVERSE IMMIGRATION CONSEQUENCES

§48.8 A. Definition of "Conviction" for Immigration Purposes

▶ **Note:** The best case resolution is usually one that does not constitute a conviction. This includes diversion, a juvenile adjudication, or appeal of a conviction.

In many cases, a person must be convicted of an offense to suffer immigration penalties. See §48.8. This section discusses alternative dispositions that do not constitute a conviction for immigration purposes and may thereby avoid adverse consequences.

▶ **Note:** Some activities have adverse immigration consequences whether or not a conviction occurs—particularly prostitution, alien smuggling, or using false documents (under state or federal law), and drug addiction, abuse, or trafficking. See §48.21.

In *Matter of Ozkok* (BIA 1988) 19 I&N 546, the Board of Immigration Appeals (BIA) defined conviction as a disposition in which (1) there is an entry of a plea of guilty or nolo contendere, or an admission of facts sufficient to warrant a finding of guilty; (2) the judge orders some form of punishment, penalty, or restraint on the person's liberty; and (3) a final judgment of guilt can be entered if the person violates the terms of the sentence or fails to meet the court's requirements, without further proceedings regarding the person's guilt or innocence. See Brady, California Criminal Law and Immigration §2.6 (1995).

Diversion under California law does not constitute a conviction, because there is no adjudication of guilt. See Pen C §1000.5. Dispositions under diversion, deferred adjudication, or first-offender programs in other states must be carefully analyzed under the test in *Ozkok* to ascertain whether a conviction has occurred.

Federal cases resolved under 18 USC §3607 (special probation and expungement procedures for drug possession) have been held not to constitute a conviction. *Matter of Deris* (BIA 1989) Int Dec 3102.

A plea of guilty or no contest with imposition of sentence suspended constitutes a conviction even though technically no judgment of conviction is entered. *Gutierrez v INS* (9th Cir 1963) 323 F2d 593; *Matter of Ozkok, supra.*

A disposition in juvenile proceedings does not constitute a conviction. *Matter of C.M.* (BIA 1953) 5 I&N 327. On representing juveniles, see §48.4.

A conviction is not final for immigration purposes unless direct appeals have been waived or exhausted or the appeal period has lapsed. *Matter of Ozkok, supra.* In some cases, the need to avoid adverse immigration consequences permanently or for some period of time is an important factor in deciding whether to take a case to trial, or to appeal a conviction.

§48.9 B. Offense Involving Controlled Substances

▶ **Note:** This section discusses conviction of controlled substance offenses. There are also immigration penalties for noncitizens who are or were drug addicts or abusers, or whom the INS has reason to believe are or were drug traffickers, even without a conviction. See §48.21.

With few exceptions, drug convictions permanently destroy current lawful immigration status and prevent the person from obtaining that status in the future. A noncitizen who is convicted of an offense related to controlled substances is excludable under 8 USC §1182(a)(2)(A)(i)(II), deportable under 8 USC §1251(a)(2)(B)(i), and barred from establishing good moral character under 8 USC §1101(f). Convictions under state or federal law as well as laws of other countries incur these penalties. Controlled substances are defined in 21 USC §802 to include almost all illegal drugs as well as precursor and "essential" chemicals.

Moreover, conviction of almost any drug offense other than a first conviction of simple possession is an aggravated felony under immigration law. Conviction of an aggravated felony brings additional severe penalties beyond making the person deportable and excludable, *e.g.*, it may prevent any release under immigration bond, destroy eligibility for political asylum, and subject an aggravated felon who reenters the United States after deportation to severe federal criminal sanctions. See §48.15.

Even conviction of the most minor drug offense, such as presence in a place where drugs are used, will make a person deportable and excludable. *Matter of Hernandez-Ponce* (BIA 1988) 19 I&N 613. Conviction of driving under the influence of drugs or alcohol, when the record reveals that a controlled substance was involved, would probably be ruled an offense "relating to" drugs.

There is an exception: one conviction of simple possession of 30 grams or less of marijuana is not a basis for deportation or preclusion from establishing good moral character, and is subject to discretionary waiver of exclusion under 8 USC §1182(h) if the person has certain citizen or permanent resident relatives. The record should state that the quantity was 30 grams or less. In addition, a lawful permanent resident with seven years or more lawful unrelinquished domicile who is convicted of a drug offense may apply for a discretionary waiver of deportability or excludability under 8 USC §1182(c) (as long as the person does not *serve* five years in prison for one or more aggravated felony convictions). See §48.22. A conviction that is ten years old or more may be excused in an application for suspension of deportation. See §48.23.

A strong argument can be made that conviction as an accessory after the fact to a drug offense under Pen C §32 should avoid the dire immigration consequences of a drug conviction. This follows the reasoning in such cases as *Castaneda de Esper v INS* (6th Cir 1977) 557 F2d 79 (when principal offense involved drugs, misprision of felony under 18 USC §4 was not drug offense for immigration purposes), and *Matter of Carrillo* (BIA 1978) 16 I&N 625, 626. See Brady, California Criminal Law and Immigration §2.7 (1995), discussed in §48.11.

▶ **Note:** Arresting agencies must notify the appropriate United States agency whenever they arrest a suspected noncitizen of violation of Health & S C §§11350, 11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368, or 11550. Health & S C §11369.

The immigration consequences of a first conviction for simple possession of a drug have been held to be eliminated by state expungement such as under Pen C §1203.4. See *Garberding v INS* (9th Cir 1994) 30 F3d 1187; *In re Manrique* (BIA 1995) Int Dec 3250. See §48.20.

Strategy:

• Make every conceivable attempt to avoid conviction of any offense related to controlled substances.

• Consider going to trial and appealing a conviction. This strategy is especially important for a permanent resident who has not yet acquired seven years' lawful domicile. Permanent residents with seven years' domicile who are convicted of a drug offense can apply for discretionary relief under INA §212(c). (Case law has extended §212(c) to cover deportability; see *Tapia-Acuna v INS* (9th Cir 1981) 640 F2d 223; *Francis v INS* (2d Cir 1976) 532 F2d 268.) See §48.22. While no published case supports the following, in practice, proof that a late-filed appeal was accepted by an appellate court has been accepted as evidence that no conviction exists. But see *Matter of Polanco* (BIA 1994) Int Dec 3232 (court did not accept late-filed conviction because no paper work was presented, and other problems).

• Seek juvenile status or diversion, because they do not result in "a conviction." See §48.8. In juvenile court, seek to obtain a finding of possession only, not of trafficking, because the juvenile conceivably could be held excludable as a drug trafficker even though no conviction exists for immigration purposes.

• Conviction as an accessory after the fact rather than as a principal may avoid adverse immigration consequences. See §48.11.

§48.10 C. Offense Involving Firearms or Destructive Devices

Conviction of any offense related to guns has severe immigration effects. A noncitizen is deportable if convicted in the United States "under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any weapon, part or accessory which is a firearm or destructive device" or for conspiracy or attempt to commit such an act. 8 USC §1251(a)(2)(C). Defined in 18 USC §921(a)(3)–(4), "firearm" generally includes all guns and firearms, frames and receivers, and mufflers and silencers; and "destructive device" includes bombs, grenades, rockets, missiles, mines, or similar items, and parts used to convert them. There is an exception for antique firearms and devices not intended to be used as weapons. (Alternative pleas that avoid immigration consequences are discussed under "Strategies" below.)

This deportation ground was significantly expanded under the Immigration Act of 1990 (Pub L 101–649, 104 Stat 4978). Persons who received notice of the initiation of deportation proceedings before March 1, 1991 for a gun conviction may face a narrower definition of that ground. See Brady, California Criminal Law and Immigration §6.1 (1995).

Conviction of a firearms offense can be even more damaging than a drug conviction because persons who are deportable under this section are not eligible for INA §212(c) relief (discretionary relief from deportation and exclusion available to lawful permanent residents with seven years' unrelinquished lawful domicile). See §48.22.

Conviction of trafficking in firearms is conviction of an "aggravated felony." Under 1994 amendments to 8 USC §1101(a)(43), several other federal firearms offenses also are aggravated felonies. See §48.17.

Strategy:

• After conviction of conspiracy or attempt to commit a firearms offense was held not to incur deportability under the firearms ground (*Matter of Hou* (BIA 1992) Int Dec 3178), Congress amended the statute (8 USC §1251(a)(2)) in 1994 to include attempt and conspiracy, and provided that the amendment apply retroactively.

• A conviction of a nonfirearms offense coupled with a sentence enhancement based on use of a firearm is not a firearms conviction for immigration purposes. *Matter of Rodriguez-Cortes* (BIA 1992) Int Dec 3189 (woman convicted of second-degree attempted murder under Pen C §§664 and 187(a) with sentence enhancement under Pen C §12022(a) for use of firearm was found not deportable under firearms ground).

▶ **Note:** Offenses involving intent to cause great bodily harm will be held to be crimes involving moral turpitude, which have their own immigration effect (see §48.12), but they generally have less harmful immigration consequences than firearms offenses.

• A conviction under a statute that does not explicitly involve a weapon does not incur deportability under the firearms ground even if the record reveals that a firearm was used. *Matter of Perez-Contreras* (BIA 1992) Int Dec 3194 (conviction under Washington statute of "criminal negligence causing . . . substantial . . . pain" was not firearms offense, although record showed that defendant shot victim). An argument can be made that conviction under a statute that has as an element use of a weapon, but not necessarily a firearm, is not a basis for deportation under the firearms ground—especially if the record of conviction (indictment, plea, verdict, sentence) is cleared of any reference to firearm use.

• Expungement under Pen C §1203.4 arguably eliminates a firearms conviction for immigration purposes. See discussion in §48.20. Thus, bargaining for a short probation period or early termination of probation in either a misdemeanor or a felony case may resolve the problem more quickly. It is not clear, however, whether the Board of Immigration Appeals will continue to honor expungements in firearms cases. Pending resolution of this question, vacation of judgment is the better strategy.

• A person who could immigrate through a relative or employer's visa petition but is deportable under the firearms ground is still eligible to apply for an adjustment of status or, possibly, immigration through consular processing. *Matter of Rainford* (BIA 1992) Int Dec 3191; *Matter of Gabryelsky* (BIA 1993) Int Dec 3213. For more information on firearms convictions and strategies, see Brady, California Criminal Law and Immigration §§6.1, 9.7, 11.10 (1995).

D. Crime Involving Moral Turpitude

§48.11 1. Definition of "Crime Involving Moral Turpitude"

Many minor and serious offenses are held to be crimes involving moral turpitude and carry serious immigration consequences. Counsel should review each noncitizen client's entire criminal record in all states and countries to learn whether the person has convictions and, if so, what they are for. If a noncitizen is charged with any crime, counsel should do the following:

- Ascertain whether the charged offense involves moral turpitude and, if so, whether it is possible to plead to an offense that does not involve moral turpitude.
- If it will be the defendant's first conviction of a crime involving moral turpitude, try to obtain a suspended imposition of sentence or a sentence of six months or less (to avoid exclusion, if the offense is a misdemeanor) or a suspended imposition of sentence or a sentence of 364 days or less (to avoid deportation). See §48.12.
- Keep in mind the possibility of postconviction relief, such as expungement under Pen C §1203.4, for persons completing probation. See §48.20.

The term "crime involving moral turpitude" is commonly defined by case law in vague terms as "an act of baseness, vileness, or depravity in the private and social duties owed to society." The definition does not depend on misdemeanor or felony classifications nor on the severity of the punishment. Murder, rape, voluntary manslaughter, robbery, burglary, theft (grand or petty), arson, aggravated forms of assault, and forgery consistently have been held to involve moral turpitude. On the other hand, involuntary manslaughter, simple assault, and driving under the influence (at least when no injury occurs) have not. For further discussion, see Brady, California Criminal Law and Immigration §4.9 (1995).

Whether a crime is one of moral turpitude (sometimes called a "turpitudinous" crime) is decided by case law of the Board of Immigration Appeals and United States Courts of Appeals. Counsel should consult immigration texts to ascertain whether a particular crime constitutes a crime of moral turpitude. For California convictions, see Brady, California Criminal Law and Immigration, *Table: Crimes Involving Moral Turpitude Under the California Penal Code* (1995), an annotated chart of 70 sections of the California Penal Code; for federal or out-of-state convictions, see Kesselbrenner & Rosenberg, Immigration Law and Crimes, App E (1995). See also 23 ALR Fed 480, "What Constitutes 'Crime Involving Moral Turpitude' . . . ."

Whether an offense is considered turpitudinous depends on the elements of the code section violated, not on the defendant's individual behavior. A code section is considered a "divisible statute" if its terms encompass both crimes of moral turpitude and crimes not involving moral turpitude. Unless the record of conviction (the indictment, complaint or information, plea or verdict, and the sentence) shows that the defendant was convicted under a turpitudinous section, immigration and reviewing courts must rule in favor of the noncitizen. *Matter of C.* (BIA 1953) 5 I&N 65, 71. When a defendant is convicted under a divisible statute, counsel should attempt to keep the record of conviction clear of information that indicates that the defendant was convicted

under the section involving moral turpitude. In some cases, bargaining for a substitute charge may be necessary.

▶ **Note:** Conviction under Pen C §32 as an accessory after the fact to a drug or moral turpitude offense may not incur the same immigration penalties as conviction of the principal offense. This possible rule follows the reasoning in cases such as *Castaneda de Esper v INS* (6th Cir 1977) 557 F2d 79 (when principal offense involved drugs, misprision of felony under 18 USC §4 was not drug offense for immigration purposes). See Brady, California Criminal Law and Immigration §2.7 (1995).

§48.12 2. Consequences of Conviction of Crime Involving Moral Turpitude; Remedies

Consider prior record. Counsel must review a defendant's entire criminal history in the United States and other countries before setting a disposition goal. A prior moral turpitude conviction from another jurisdiction will be joined with the instant conviction by the INS when it is calculating whether the person is deportable or excludable.

Deportation. A noncitizen is deportable under 8 USC §1251(a)(2)(A) if he or she is convicted of:

- Two crimes involving moral turpitude not arising from a single scheme of misconduct (see, *e.g., Gonzalez-Sandoval v INS* (9th Cir 1990) 910 F2d 614; see also 19 ALR Fed 598); or
- One crime involving moral turpitude when the person committed the offense within five years after the last entry into the United States and the sentence imposed was one year or more.

▶ **Note:** A suspended imposition of sentence, or a sentence of 364 days instead of one year, will prevent deportability under the second section. See below.

▶ **Note:** A permanent resident whose absence from the U.S. was "brief, casual and innocent" can be found not to have made an entry for exclusion or deportation purposes on return to the U.S. *Rosenberg v Fleuti* (1963) 374 US 449. Thus a permanent resident who commits a crime involving moral turpitude within five years of last physical entry into the U.S. may not be subject to deportation if a technical "entry" did not occur.

Exclusion. A noncitizen is excludable who is convicted of having committed a crime involving moral turpitude, unless the event comes within the petty offense or youthful offender exception. 8 USC §1182(a)(2)(A)(i). Under the petty offense exception, a noncitizen is not excludable who committed only one crime involving moral turpitude if the sentence actually imposed was six months or less and the maximum possible sentence for the offense was no more than a year. 8 USC §1182(a)(2)(A)(ii)(II).

▶ **Note:** The petty offense exception to the moral turpitude exclusion ground is available to noncitizens who have committed only one crime involving moral turpitude. A previous conviction, even if expunged, will destroy eligibility for the benefit of the exception. *Matter of S.R.* (BIA 1957) 7 I&N 495. Because

the offense cannot have a penalty of more than one year, a person convicted of a felony, with imposition of sentence suspended, is not eligible for the exception and will be found excludable. That person may, however, be found eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17.

The youth exception to the exclusion ground provides that a person who committed one such act while under the age of 18 is not excludable if the act or release from resulting imprisonment took place more than five years before the current application. 8 USC §1182(a)(2)(A)(ii)(I).

Effect of plea of guilty; expungement. A plea of guilty or of no contest results in a conviction, which triggers excludability. See §48.12.

A plea of guilty is also an admission, and an admission of a crime involving moral turpitude is a separate basis for exclusion 8 USC §1182(a)(2)(A)(i)(I). It might appear that a plea of guilty, as an admission, would make a defendant excludable even if the conviction were eliminated. The INS, however, will generally accept the criminal court's dismissal or expungement of a moral turpitude conviction as binding both on the admission (plea) and the conviction. See *Matter of E.V.* (BIA 1953) 5 I&N 194.

▶ **Note:** Noncitizens should also avoid unnecessary admissions of any uncharged turpitudinous offenses as part of a plea of guilty. It is conceivable that the INS might obtain a record of these admissions and, because the criminal court had not disposed of a case relating to them, use them as a basis for exclusion.

Effect of suspending imposition of sentence or suspending execution of sentence. Both the exclusion and deportation grounds for crimes involving moral turpitude base penalties partly on the sentence *imposed*. One section of the deportation ground penalizes noncitizens who have *received* a sentence of a year or more, and the petty offense exception to the exclusion ground is not available if the sentence received was more than six months. In cases of probation, counsel must seek suspended *imposition* of sentence, rather than suspended *execution* of sentence, for these offenses. Suspended imposition of sentence is equivalent to zero sentence, even if the noncitizen spends time in jail as a condition of probation. See *Matter of F.* (BIA 1942) 1 I&N 343. In contrast, when execution of sentence is suspended, the entire sentence is still counted, even if the noncitizen spends no time in jail. *Matter of Castro* (BIA 1988) 19 I&N 692.

When sentence is imposed for a *first offense* involving moral turpitude, counsel should seek one of the following as relevant:

- A sentence imposed of 364 days or less instead of a year to avoid deportability under 8 USC §1251(a)(2)(A)(i);
- A sentence imposed of six months or less to avoid exclusion if the maximum penalty for the offense was one year under 8 USC §1182(a)(2)(A)(ii); or
- Suspended *imposition* of sentence, with any jail time imposed as a condition of probation, which, as discussed above, constitutes zero sentence.

▶ **Note:** Physically serving more than 180 days in jail, even if imposition of sentence was suspended, precludes the defendant from establishing good moral character under 8 USC §1101(f). See §48.7.

See discussion of suspending imposition and execution of sentence in §§36.5, 45.25–45.27.

E. Aggravated Felonies

§48.13 1. What Constitutes Aggravated Felony

Congress continues to expand the list of offenses that qualify as aggravated felonies. The current definition comprises 16 paragraphs with dozens of offenses. 8 USC §1101(a)(43). The offenses include:

- Murder (in the author's opinion, this includes first and second degree murder, but not manslaughter);
- An offense generally considered to be "drug trafficking" or one of several enumerated federal drug offenses and state analogues (see §48.16);
- Trafficking in or specific federal offenses relating to firearms or destructive devices (*e.g.,* bombs, grenades) (see definition in §48.17 and related "safe" convictions in §48.10);
- Money laundering (as defined in 18 USC §1956 or a state analogue) or monetary transactions in property derived from unlawful activity (as defined in 18 USC §1957 or a state analogue), if the amount of the funds exceeded $100,000;
- A "crime of violence" resulting in a sentence imposed of at least five years, if it was not a "purely political offense" (counsel should obtain suspended imposition of sentence, or a sentence of four years and 364 days or less); see §48.18;
- Theft or burglary if the sentence imposed is at least five years;
- Alien smuggling for commercial gain;
- Trafficking in false documents if the sentence imposed is at least five years (note that Proposition 187 (Pen C §113) made document fraud a state criminal offense with a mandatory sentence of five years);
- Various offenses such as demand for ransom, child pornography, RICO offenses punishable with a five-year sentence, running a prostitution business, slavery, offenses relating to national defense, sabotage, or treason, and failure to appear to serve a sentence if the underlying offense is punishable by a term of 15 years.

▶ **Note:** Some of these offenses are aggravated felonies only if the commission of the offense or conviction occurred on or after a certain date. See §48.14.

These types of offenses are included whether in violation of federal or state law (*Paxton v INS* (ED Mich 1990) 745 F Supp 1261; *Matter of Barrett* (BIA 1990) Int Dec 3131), or in violation of foreign law if release from the resulting imprisonment occurred within the last 15 years. See 8 USC §1101(a)(43).

§48.14 2. Effective Dates of Aggravated Felonies

Not all convictions for the offenses discussed in §48.13 are aggravated felonies. Some older convictions may not qualify, depending on the effective date of

the law that made the offense an aggravated felony. For further discussion of this complex area see Brady, California Criminal Law and Immigration §9.2 (1995).

Murder, drug trafficking, and trafficking in firearms and destructive devices were made aggravated felonies by the Anti-Drug Abuse Act of 1988 (ADAA). The BIA and federal courts of appeal have held that these are aggravated felonies for many immigration purposes, regardless of the date of commission or conviction of the offense. See, *e.g., Arthurs v INS* (9th Cir 1992) 959 F2d 142.

Money laundering, a crime of violence resulting in a sentence of five years, and the inclusion of foreign convictions are aggravated felonies only if the offense was *committed on or after November 29, 1990.* Immigration Act of 1990 §501(b); see also *Matter of A-A* (BIA 1992) Int Dec 3176.

The Immigration and Nationality Technical Corrections Act of 1994 (INTCA) (Pub L 103–416, 108 Stat 4305; 8 USC §1101, note) added all of the other aggravated felony offenses described in §48.13, including various firearms offenses and many others. These are aggravated felonies if the *conviction* occurred on or after October 24, 1994. INTCA §222(b); 8 USC §1101, note.

With regard to the crime of reentry after conviction of an aggravated felony and deportation, the Ninth Circuit first refused to disturb a district court finding that the effective dates described above refer to the date of unlawful reentry and not to the date of commission or conviction of the aggravated felony. *U.S. v Ullyses-Salazar* (9th Cir 1994) 28 F3d 932 (crime of violence resulting in sentence of five years that was committed before November 29, 1990, was held aggravated felony for purposes of 8 USC §1326(b)(2) prosecution because unlawful reentry occurred after November 29, 1990). The Ninth Circuit since then has ruled that the effective dates apply to the date of conviction, not unlawful reentry. *U.S. v Gomez-Rodriguez* (9th Cir 1996) 77 F3d 1150.

§48.15 3. Consequences of Conviction of Aggravated Felony

Conviction of an aggravated felony under 8 USC §1101(a)(43) is a basis for deportation. 8 USC §1251(a)(2)(iii). Other penalties include:

- Ineligibility for political asylum (8 USC §1158(d));
- Ineligibility to establish good moral character (8 USC §1101(f)), a requirement for suspension of deportation, voluntary departure, and United States citizenship (see §48.7);
- Ineligibility for immigration within 20 years after deportation (8 USC §1182(a)(6)(B));
- Ineligibility for INA §212(c) relief for permanent residents with seven years unrelinquished domicile (8 USC §1182(c)) when they have served an aggregate five-year sentence for one or more aggravated felonies;

▶ **Note:** Defense counsel also should attempt to avoid an aggregate five-year sentence (as compared with a longer sentence that would result in actual time served of five years) for one or more aggravated felonies, because Congress likely will make this the new rule, to be applied retroactively.

- Restricted eligibility for release on bond from immigration detention (8 USC

§1252(a)(2)), with some exceptions for permanent residents and persons who were lawfully admitted to the United States, which means that the person may remain in INS jails during the pendency of the hearing and any appeals, with little access to counsel and almost no means of obtaining pro bono immigration counsel;

- Being subject to a speeded-up schedule for deportation hearings and appeals (8 USC §1252(i));
- Ineligibility for automatic stay of deportation pending review of deportation order by federal appeals court (8 USC §1105a(3)).

▶ **Note:** Aggravated felons who reenter the United States illegally after deportation face up to 20 years in prison if convicted under 8 USC §1326(b)(2). Counsel should advise defendants accordingly. See §48.15

An INS officer can deport a non-permanent resident without permitting the person a hearing before an immigration judge, if in the officer's opinion the person is a noncitizen who has been convicted of an aggravated felony and is not eligible for immigration relief. 8 USC §1252a(b). As an apparent nod to due process, the same INS officer who enters the charges cannot be the officer who signs the deportation order. Appeal of the order is limited to habeas corpus under 8 USC §1105a. See Brady, California Criminal Law and Immigration §9.19 (1995).

§48.16 4. Drug Offenses

Drug trafficking. An offense that meets either of the two tests that follow will be considered a drug-trafficking aggravated felony (8 USC §1101(a)(43)), which subjects the person convicted of it to the penalties and restricted rights discussed in §48.15 The two tests are:

- Any felony offense that is typically considered to be trafficking, *e.g.* sale or possession for sale, is an aggravated felony.
- Conviction of any state or federal felony that could be considered "punishable" under major federal drug statutes listed in 18 USC §924(c)(2) is considered to be trafficking.

The three major federal drug statutes listed in 18 USC §924(c)(2) include the Controlled Substances Act (21 USC §§801–904), the Controlled Substances Import and Export Act (21 USC §§951–970), and the Maritime Drug Law Enforcement Act (46 USC App §§1901–1904).

Determining which California drug offenses are "punishable" under major federal drug statutes listed in 18 USC §924(c)(2). The test to decide whether a California drug offense is punishable under a major federal drug statute is whether the California offense is exactly analogous to an offense punishable as a felony under one of the federal acts listed in the aggravated felony definition. Thus, the California offense must contain the same elements as an offense listed in the federal laws; and the corresponding federal offense must be punishable as a felony. See *Matter of Barrett* (BIA 1990) Int Dec 3131.

Counsel should be alert to differences in the federal and state offenses. For example, a defendant's first conviction of simple possession, generally a felony under California law, is not an aggravated felony because the correspond-

ing federal offense is only punishable as a misdemeanor. 21 USC §844. See *Matter of L-G* (BIA 1994) Int Dec 3234. A second conviction for possession may be an aggravated felony, however, because it can be punished as a felony under federal law. 21 USC §844(a).

▶ **Note:** For a second conviction of simple possession to be punishable as a felony, federal law requires the prosecutor to file an information stating the previous convictions to be relied on. 21 USC §851(a)(1). Therefore, if a state prosecutor does not file such a warning of sentence enhancement, defense counsel can argue that the conviction would not be punishable under federal law and should therefore not be an aggravated felony.

Manufacturing. Federal law punishes anyone who knowingly or intentionally manufactures drugs. The California statute proscribing manufacture, however, does not require knowledge. Compare Health & S C §11379.6 with 21 USC §841(a)(1). See also *People v Telfer* (1991) 233 CA3d 1194, 284 CR 913. Thus, it could be argued that a conviction for manufacturing under the California statute should not be considered an aggravated felony.

▶ **Note:** If immigration considerations are paramount, conviction of a trafficking offense inevitable, and conviction of being an accessory after the fact not available, pleading manufacture may be the best option to avoid aggravated felon status.

Being an accessory. Being an accessory after the fact under Pen C §32 may not be a drug-related offense at all, under the same reasoning that federal misprision of felony has been held not to be a drug-related offense. See §48.9. Conviction of being an accessory to an aggravated felony should not itself be held to be an aggravated felony. This is a better plea than to a drug conviction. In some cases, aggressive negotiation can result in a compromise plea to being an accessory even when the original charge did not involve this act.

Strategy. To analyze whether a state conviction may be punishable under federal law as a felony, carefully compare the elements of the state and federal offenses. Consider elements that have been added by case law. Any significant discrepancy that permits the state to punish behavior not punishable under federal law is a basis for argument that the state offense is not an aggravated felony. Remember that regardless of discrepancies between state and federal law, a state felony offense that meets the common definition of trafficking, such as sale or possession for sale, is also an aggravated felony. For further information in this complex area, see Brady, California Criminal Law and Immigration §9.6 (1995).

§48.17 5. Trafficking in and Other Offenses Involving Firearms or Destructive Devices

Persons convicted of any offense related to firearms or destructive devices can be found deportable under 8 USC §1251(a)(2)(C) and ineligible for INA §212(c) relief. See §§48.10, 48.22. In addition, certain offenses are aggravated felonies.

Any state or federal offense involving trafficking in firearms or destructive devices is an aggravated felony under 8 USC §1101(a)(43)(C). Under 8 USC §1101(a)(43)(E) (added in 1994), a host of specific federal offenses concerning firearms and destructive devices are aggravated felonies (*e.g.*, receiving stolen weapons, communication of threat to damage property by weapons, interstate shipment). Most of these do not appear to have an exact analogue under California law. See discussion in Brady, California Criminal Law and Immigration §9.7 (1995). The felonies added to 8 USC §1101(a)(43) in 1994 are aggravated felonies only if the conviction occurred on or after October 24, 1994. Immigration and Nationality Technical Corrections Act of 1994 §222(b).

The firearms and explosives offenses described in 8 USC §1101(a)(43)(E) are:

- 18 USC §842(h) (receiving stolen explosives),
- 18 USC §842(i) (shipping or receiving explosives in interstate or foreign commerce by indictee, felon, fugitive, addict, or mental defective or committee),
- 18 USC §844(d) (transportation or receipt of explosives in interstate or foreign commerce with intent to injure, intimidate, or damage property),
- 18 USC §844(e) (communication of threat or false information concerning attempt to injure, intimidate, or damage property by fire or explosive),
- 18 USC §844(f) (malicious damage by fire or explosive of property of U.S. or organization receiving federal funds),
- 18 USC §844(g) (illegal possession of explosive in airport),
- 18 USC §844(h) (use or carrying of explosive in commission of federal felony),
- 18 USC §844(i) (malicious destruction by fire or explosive of property used in or affecting commerce),
- 18 USC §922(g)(1)–(5) (shipping or receiving of firearms or ammunition by felon, fugitive, addict, mental defective or committee, alien unlawfully in U.S., dishonorable dischargee, or person who renounced U.S. citizenship),
- 18 USC §922(j) (receiving stolen arms or ammunition),
- 18 USC §922(n) (ship or receive arms or ammunition by felony indictee),
- 18 USC §922(o) (possession of machine-gun),
- 18 USC §922(p) (possession of undetectable firearm),
- 18 USC §922(r) (assembly of illegal rifle or shotgun from imported parts);
- 18 USC §924(b) (ship or receive firearm or ammunition with intent therewith to commit a felony;
- 18 USC §924(h) (transfer of firearm with knowledge it will be used to commit crime of violence or drug trafficking offense);

See also IRC §5861 (26 USC §5861) (failure to pay firearms tax, possession of unregistered firearm or one with serial number altered, etc.).

§48.18 6. Crimes of Violence

A person convicted of a crime of violence and sentenced to at least five years' imprisonment is an aggravated felon (8 USC §1101(a)(43)), subject to the penalties and restricted rights discussed in §48.15. A crime of violence

is broadly defined in 18 USC §16 as an offense that "has as an element the use, attempted use, or threatened use of physical force against" another person or person's property, or any other felony that by its nature involves risk of such force. Assault with a deadly weapon, vehicular manslaughter, and burglary are crimes of violence (*U.S. v O'Neal* (9th Cir 1990) 910 F2d 663), whereas possession of a firearm (*U.S. v O'Neal, supra,*) and drug trafficking (*U.S. v Cruz* (11th Cir 1986) 805 F2d 1464) are not.

To avoid aggravated felon status for a defendant, defense counsel should obtain a sentence of less than five years—meaning suspended imposition of sentence or a sentence of four years and 364 days or less—for any offense that might be classified as a crime of violence.

▶ **Note:** Crimes of violence committed before November 29, 1990, are not aggravated felonies. Immigration Act of 1990, §501(b).

§48.19 F. Consequences of Sentence in Criminal Case

The type of sentence received in a criminal case can have various immigration consequences. Noncitizens who are convicted of two or more offenses of any kind for which the aggregate sentences actually imposed equal five or more years are excludable under 8 USC §1182(a)(2)(B), and barred from establishing good moral character under 8 USC §1101(f).

Whether immigration penalties flow from a conviction of a crime involving moral turpitude may depend on the sentence. Suspended imposition of sentence equals no sentence with regard to a crime involving moral turpitude, even if the person spends time in jail as a condition of probation. If execution of sentence is suspended, however, the entire sentence is counted, even if the defendant spent no time in jail. See discussion of moral turpitude offenses in §48.11. See discussion of suspended imposition and suspended execution of sentence in §§36.5, 45.25–45.27, 48.12.

A person is ineligible to establish good moral character under 8 USC §1101(f) if he or she has been physically confined for 180 days or more as a result of a conviction. Here the count is time physically spent in jail, whether as a condition of probation or under sentence. *Matter of Valdovinos* (BIA 1982) 18 I&N 343. If the person is held for a few days and the charges are dismissed or the person is acquitted, the time in jail should not count as part of the 180 days. In fact, anyone trying to avoid the 180 days who has served significant pretrial time might waive that time from being counted as time served in an attempt to get fewer than 180 days "as a result of a conviction." A pardon or, probably, expungement should erase the effect of time served for that conviction. *Matter of H.* (BIA 1956) 7 I&N 249. For further discussion of showing good moral character, see §48.7. Pardons are discussed in §§39.19–39.20. Expungement is discussed in §§39.13, 39.18.

A noncitizen convicted of a crime of violence who receives a five-year sentence is an aggravated felon. A noncitizen who physically serves five years or more based on conviction of one or more aggravated felonies of any type is ineligible for INA §212(c) relief, which is available to permanent residents with seven years unrelinquished domicile. For further discussion, see §§48.13–48.18 (aggravated felonies), 48.22 (§212(c) relief).

§48.20 IX. EFFECT OF POSTCONVICTION RELIEF ON IMMIGRATION STATUS

California has several statutes providing postconviction relief in the form of pardons, certificates of rehabilitation, destruction or sealing of records, vacation of judgment, dismissal of accusation, and reduction of charge:

- Pen C §§4800–4854 (reprieves, pardons, commutations of sentence, certificates of rehabilitation);
- Pen C §1203.45 (sealing misdemeanor records for person under age 18 when crime committed);
- Health & S C §11361.5 (automatic destruction of certain marijuana conviction records);
- Pen C §1203.4 (vacation of judgment and dismissal of accusation for probationer who successfully completed probation, often referred to as "expungement");
- Pen C §1203.4a (vacation of judgment and dismissal of accusation for misdemeanant not granted probation, often referred to as "expungement");
- Welf & I. C §§1179, 1772 (dismissal of accusation for person honorably discharged from Youth Authority parole);
- Pen C §17 (reduction of felony to misdemeanor under various circumstances, including application of defendant after probation granted);
- Welf & I C §828 (destruction of juvenile records or their release to the person).

The effect of each type of postconviction relief on immigration status depends on the underlying conviction and the state relief granted. (State relief is discussed in chap 39.) Careful attention must be paid to the precise wording of the statute providing relief. For example, a statute destroying records may have a far different effect from one that vacates the judgment.

▶ **Note:** The rules in this area are subject to change; counsel cannot make firm preconviction predictions to a defendant on postconviction relief.

As a general rule, a favorable result is far more likely if the underlying conviction was for an offense of moral turpitude (8 USC §1251(a)(2)(A)), rather than for drugs (8 USC §1251(a)(2)(B)). An executive pardon, or expungement under Pen C §1203.4, will eliminate a conviction of a crime involving moral turpitude, and possibly a firearms conviction (see discussion below).

The Board of Immigration Appeals (BIA) and the Ninth Circuit held until recently that an expungement under Pen C §1203.4 did not remove the immigration consequences of a drug conviction. In *Garberding v INS* (9th Cir 1994) 30 F3d 1187, followed by the BIA in *In re Manrique* (BIA 1995) Int Dec 3250. The Ninth Circuit carved out an important exception. It held that, as a matter of equal protection, a state drug conviction of the type that would be amenable to expungement under the Federal First Offender Act (FFOA) if the case had been brought in federal court can be effectively expunged under a general state expungement statute, despite the fact that the state statute is not an exact counterpart of the FFOA. The FFOA permits the expungement of a federal conviction for simple possession of a controlled substance if the person has never before been convicted of a state or federal drug offense.

18 USC §3607. Unless and until these decisions are reconsidered, expungement of a first conviction for simple possession of a drug should eliminate the immigration consequences.

Special relief exists for youthful offenders under Welf & I C §1772 and Pen C §1203.45; those statutes will eliminate a drug offense. *Matter of Lima* (BIA 1976) 15 I&N 661; *Matter of Andrade* (BIA 1974) 14 I&N 651. But see *Hernandez-Valensuela v Rosenberg* (9th Cir 1962) 304 F2d 639 (contrary ruling).

The BIA has long held that expungement or dismissal of charges under Pen C §1203.4 eliminates the adverse immigration consequences stemming from conviction of a crime involving moral turpitude. See, *e.g., Matter of Ozkok* (BIA 1988) 19 I&N 546; *Matter of G.* (BIA 1961) 9 I&N 159.

Section 1203.4 relief will also eliminate a conviction for purposes of a one-felony/three-misdemeanor rule in applications for amnesty, family unity, and temporary protected status. See *Matter of A. F.* (BIA 1959) 8 I&N 429.

In an unpublished opinion, the BIA ruled that §1203.4 will eliminate a firearms conviction or, indeed, conviction of any offense not related to controlled substances. *Matter of Cabasug* (Sept. 16, 1991) BIA File A18 423, 537. See discussion and a copy of the opinion in Brady, California Criminal Law and Immigration §6.1 (1995). Other unpublished BIA opinions, however, have held the opposite. While an expungement does no harm, it is not wise to rely on it to clear a firearms conviction until the BIA resolves the issue.

If all records of a marijuana conviction have been destroyed under Health & S C §11361.5, the conviction probably cannot be proved by the INS. See, *e.g., Matter of Rodriguez-Perez* (Simonet, IJ, Dec. 12, 1989) No. 18–364–484, digested in Interpreter Releases, p 67 (Jan. 12, 1990) (INS could not prove conviction because records sealed under similar Florida statute). However, if the INS obtains records of conviction before they are destroyed, or obtains a transcript of court proceedings or an appellate opinion not subject to destruction (Health & S C §11361.5(d)), perhaps it can still be used. See *Matter of Moeller* (BIA 1976) 16 I&N 65. But see Health & S C §11361.7 (records subject to destruction under §11361.5 are not considered accurate after they should have been destroyed).

A successful motion to withdraw a plea of guilty for "good cause" before entry of judgment probably will eliminate any conviction. When entry of judgment is suspended and probation is granted, this motion must be made within six months after probation was granted. Pen C §1018. The defendant's lack of knowledge of immigration consequences can constitute good cause to withdraw a guilty plea. *People v Superior Court* (Giron) (1974) 11 C3d 793, 114 CR 596. Withdrawal of a guilty plea is discussed in §10.10.

When a sentence is corrected (see chap 34, §§38.5, 38.30–38.34) or commuted by a judge (see §38.5), the reduced sentence is the one considered by immigration authorities. *Matter of Martin* (BIA 1982) 18 I&N 226 (correction); *Matter of J.* (BIA 1956) 6 I&N 562 (commutation).

Reduction of a felony to a misdemeanor under Pen C §17 (see §22.40) may aid a noncitizen who would be disqualified from relief by having a felony conviction, such as an applicant for an amnesty or Family Unity program, or Temporary Protected Status. See §§48.25–48.27. Also, a noncitizen is eligible

for the petty offense exception to the moral turpitude ground of exclusion only if the conviction is a misdemeanor. See §48.12.

When judgment is vacated, *e.g.*, on a writ of error coram nobis (see §35.38) or of habeas corpus (see §35.38), even a drug conviction has been held erased. *Matter of Sirhan* (BIA 1970) 13 I&N 592. See also Pen C §1016.5 (judgment vacated on defense motion when record does not reflect that judge advised defendant that plea of guilty could result in deportation, exclusion, or denial of naturalization); *People v Wiedersperg* (1975) 44 CA3d 550, 118 CR 755 (writ can be granted when counsel did not know of defendant's noncitizen status when plea was entered). For extensive discussion of obtaining California postconviction relief for immigrants, see Brady, California Criminal Law and Immigration, chap 8 (1995).

§48.21 X. DRUG TRAFFICKING AND ABUSE; OTHER GROUNDS

Noncitizens may be held deportable, excludable, or barred from establishing good moral character for reasons other than convictions and sentences in criminal cases. See the chart in §48.2 for the grounds for these actions. The most common charges are prostitution, alien smuggling, document fraud, and drug trafficking, abuse, and addiction. This section discusses grounds not requiring a conviction or sentence, as well as miscellaneous grounds relating to convictions or status.

▶ **Note:** When a ground for exclusion, deportation, or preclusion from establishing good moral character does not require a conviction, it might be able to be supported by a juvenile court finding (see §48.8) or by police records or other evidence. See *Matter of Rico* (BIA 1979) 16 I&N 181 (criminal charges dismissed but other evidence demonstrated trafficking).

Drug traffickers. A noncitizen is excludable and barred from establishing good moral character if the INS has "reason to believe" that he or she is or has ever been a drug trafficker. 8 USC §§1182(a)(2)(C), 1101(f). No conviction is necessary, and one incident is sufficient. There is no analogous deportation ground. Not only sale or possession for sale, but giving drugs away, is considered trafficking, as is maintaining a place where drugs are distributed. *Matter of Martinez-Gomez* (BIA 1972) 14 I&N 104. The only waiver available is the INA §212(c) waiver for permanent residents of seven years (see §48.22). Importation or possession for one's own use is not "trafficking." See *Matter of McDonald & Brewster* (BIA 1975) 15 I&N 203.

Drug addicts and abusers. A noncitizen is excludable if he or she is currently a drug addict or abuser, and deportable if he or she has been a drug addict or abuser at any time since entry. 8 USC §§1182(a)(1)(A)(iii), 1251(a)(2)(B)(ii). The only waiver available is the INA §212(c) relief for permanent residents with seven years' unrelinquished lawful domicile (see §48.22). Drug "addiction" and "abuse" are medical determinations. See *Matter of F.S.C.* (BIA 1958) 8 I&N 108. The definition of "drug abuser" is a matter of controversy, and the definition may differ depending on which government agency makes the determination. United States consulates under the Department of State handle family visas and other cases processed abroad, while the INS, under the Department of Justice, handles immigration matters in the United States. Both consulates and

the INS obtain information about casual drug use from the interviews between noncitizens and government-approved physicians that are required in applications for permanent residency. Current instructions to these physicians, which are followed in at least some consulates abroad, interpret "current drug abuse" to include anyone who has used an unlawful drug beyond experimentation (one-time use) within the previous three years.

The current definition of "drug abuser" seems too strict under currently accepted medical standards; counsel may wish to challenge it in deportation proceedings in the United States. Challenges to exclusion by consulates abroad, however, are far more difficult. Persons with consular appointments abroad should be warned of the interviews and, if necessary, delay the application until three years after using any drugs.

▶ **Note:** This controversy illustrates the dire consequences of almost any drug offense and shows the consequences of admitting to *any* involvement with drugs.

Prostitutes. A noncitizen is excludable and barred from establishing good moral character if he or she has engaged in the business of prostitution within the previous ten years. 8 USC §§1182(a)(2)(D), 1101(f). This definition includes prostitutes, procurers, and persons who receive proceeds, but not customers. No conviction is required. See *Matter of R.M.* (BIA 1957) 7 I&N 392. In addition, persons who engage in prostitution and possibly customers can be found to have committed a crime involving moral turpitude. See, *e.g., Matter of Lambert* (BIA 1965) 11 I&N 340.

Persons convicted of drunk driving. As of 1990, chronic alcoholism is not a ground for exclusion. However, alcoholics can be found excludable under a ground relating to physical and mental disorders and associated behavior that pose a threat to property or persons. 8 USC §1182(a)(1)(A)(ii). At least one U.S. consulate has excluded persons on this ground, based on a conviction of driving under the influence within the previous two years.

Homosexuals and persons who test HIV-positive. Homosexuality has not been a basis for exclusion since 1990. Persons who test HIV-positive are excludable under 8 USC §1182(a)(1)(A)(i). They may apply for a discretionary waiver of exclusion only if they have certain citizen or permanent resident relatives. 8 USC §1182(g).

Gamblers. Persons who have been convicted of two or more gambling offenses or whose income is derived from illegal gambling are barred from establishing good moral character under 8 USC §1101(f)(5).

Communists, subversives, Nazis, "other unlawful activity," and crimes relating to transfer of technology. Several groups are excludable under 8 USC §1182(a)(3) and deportable under 8 USC §1251(a)(4). The section relating to Communists and subversives is quite extensive and includes a section referring to "any other unlawful activity." Noncitizens arrested for participating in political demonstrations or similar activity may need special immigration counseling. For advice on such cases, contact the Visa Denial Project of the National Immigration Project of the National Lawyers Guild at (617) 227–9727.

Persons who intend to engage or who have engaged in illegal export of technology or sensitive information are excludable and deportable. 8 USC

§§1182(a)(3)(A)(i), 1251(a)(4)(A)(i). Although a literal reading of the statute would include such offenses, legislative history shows that it should apply only to acts that might compromise national security. See HR Conf Rep No. 101-955, 101st Cong, 2d Sess 131, 132 (1990), reprinted in (1990) US Code Cong & Ad News 6784, 6796.

Noncitizen smugglers. Anyone who at any time has encouraged or helped any other noncitizen to enter the United States illegally—even if the person helped was a family member and paid nothing for the help—is excludable. A person who committed such an act within five years after his or her last entry into the U.S. is deportable. 8 USC §§1182(a)(6)(E), 1251(a)(1)(E). Some waivers are available if the person smuggled was a parent, spouse, son, or daughter. The INA §212(c) waiver for permanent residents of seven years' duration (see §48.22) is available even if persons outside that group were smuggled. Conviction under 8 USC §1324 for noncitizen smuggling thus provides a basis for exclusion and deportation, while conviction under that section for harboring should avoid the penalty.

Document fraud. A noncitizen who is the subject of a civil administrative court finding that he or she has possessed, used, or sold false documents for immigration benefits, is deportable and excludable. 8 USC §§1251(a)(3)(C), 1182(a)(6)(F). While a conviction is not required for these immigration penalties, conviction under Pen. C §113 or 18 USC §1546(a) is a basis for the civil finding.

XI. FORMS OF IMMIGRATION RELIEF AVAILABLE FROM IMMIGRATION AND NATURALIZATION SERVICE (INS) AND FROM FEDERAL COURTS

§48.22 A. INA §212(c) Relief

Is the defendant a lawful permanent resident with seven years (or almost seven years) of unrelinquished lawful domicile?

Anyone who has been a lawful permanent resident and maintained seven years of lawful unrelinquished domicile in the U.S. is eligible for an important discretionary waiver of exclusion and deportation under 8 USC §1182(c) (INA §212(c)). Whether the waiver will be granted depends on a showing of rehabilitation, the seriousness of the offenses, and other factors. The person must have completed seven years of unrelinquished domicile by the time he or she is brought before an immigration judge as a deportable noncitizen. Unrelinquished domicile includes time spent in permanent resident status, as well as time in some other forms of lawful immigration status, such as temporary permanent residency and asylee status. *De Robles v INS* (9th Cir 1995) 58 F3d 1355. Thus a person who applied for the immigration amnesty program of the 1980s and spent two years as a temporary resident and five years as a permanent resident would be eligible to apply. One factor in deciding whether to go to trial or to appeal a conviction may be whether the person already has completed the seven years or needs more time to become eligible for the waiver. In some cases, the deportation hearing may be held in prison while the person is serving the sentence.

With two exceptions, the waiver can excuse any ground of exclusion or deportation—including narcotics offenses.

The first exception is that a person deportable under 8 USC §1251(a)(2)(C) for conviction of an offense involving firearms or destructive devices is not eligible for §212(c) relief. *Cabasug v INS* (9th Cir 1988) 847 F2d 1321. See §48.10 for strategies to avoid this ground of deportation.

Second, a person who has served a total of five years for conviction of one or more aggravated felonies is ineligible for §212(c) relief under 8 USC §1182(c). See §48.13.

▶ **Note:** Counsel should attempt to keep the aggregate *sentence* for one or more aggravated felony convictions below five years, because Congress probably will make this the new rule, to be applied retroactively.

§48.23 B. Suspension of Deportation

Has the defendant lived in the U.S. for at least seven or ten years in lawful or unlawful immigration status?

A noncitizen who is in illegal status but has maintained "continuous" presence in the United States (which encompasses brief absences) for at least seven years may ask an immigration judge to suspend deportation proceedings if deportation would result in extreme hardship. The noncitizen must demonstrate good moral character for the last seven years. This relief is discretionary. 8 USC §1254(a)(1).

A noncitizen convicted in the distant past of a narcotics, moral turpitude, or firearm offense may qualify for a second type of suspension of deportation under 8 USC §1254(a)(2). The noncitizen must demonstrate ten years of continuous presence and good moral character immediately following commission of the deportable acts, or conviction. 8 USC §1254(a)(2).

§48.24 C. Legalization (Amnesty Programs)

Is or was the defendant an applicant for or a temporary resident under one of the amnesty programs of the 1980s?

The Immigration Reform and Control Act of 1986 (8 USC §§1160, 1255a) created two immigration amnesty programs. The general legalization program allowed undocumented persons residing in the United States since 1982 to apply for lawful status. 8 USC §1255a. The Special Agricultural Worker (SAW) program permitted persons who worked 90 days in agriculture in 1985–1986 to do the same. 8 USC §1160(a)(1)(B)(ii). Each program had two phases: the first phase, in which undocumented applicants applied for temporary residence, and the second, in which temporary residents applied for permanent residence.

With few exceptions, the application period is closed for both programs, and it is no longer possible for persons to apply for "phase one" of amnesty. Because of INS backlog, there still may be some persons who applied but have not completed both phases of the program. Such persons will be disqualified from amnesty and lose lawful immigration status if they become excludable or are convicted of three misdemeanors or one felony. For both programs, some exclusion grounds are waivable, but not the narcotics or moral turpitude grounds. See 8 USC §§1255a(d)(2) (legalization), 1160(c)(2) (SAW).

Persons who applied for amnesty may carry a preliminary employment authorization card marked "I-688A" or a temporary resident card marked "I-688."

Most Special Agricultural Workers with the I-688 card have automatically converted to permanent resident status, although they may not be aware of it. Defense counsel should contact immigration counsel or a community agency for assistance in ascertaining the status of a legalization case. See §48.1 for discussion of how to obtain referrals.

§48.25 D. Family Members of Amnesty Recipients: "Family Unity" Program

Is the defendant a spouse or child of someone who obtained permanent residency through amnesty?

The legalization programs discussed in §48.24 have divided many families. For example, many parents have qualified for amnesty but their children came to the United States too late to do so. The Family Unity program established by the Immigration Act of 1990 (IA '90, §301) provides temporary lawful status and work authorization to qualifying relatives of amnesty recipients. A person who, as of May 5, 1988, was the spouse or the unmarried child under age 21 of an amnesty recipient and who has resided in the United States since that date can apply. Many of these relatives will ultimately immigrate through family visa petitions (see §48.29), but they rely on this program for lawful status and work authorization during their years of waiting.

Persons who are deportable under any of the crime-related grounds or are convicted of three misdemeanors or one felony are not eligible for the Family Unity program. IA '90, §301.

§48.26 E. Political Asylum

Does the defendant fear returning to his or her home country, or come from a country of human rights abuses or civil war?

Noncitizens who fear returning to their country may apply for political asylum and withholding of deportation (relief similar to asylum). 8 USC §§1158, 1253(h). Conviction of a particularly serious crime can bar eligibility for both asylum and withholding of deportation. 8 USC §1253(h), 8 CFR 208.8(f)(1). The definition of "particularly serious crime" depends on several factors, such as whether the offense was against property rather than people, the type of sentence imposed, and the underlying circumstances of the crime. *Matter of Frentescu* (BIA 1982) 18 I&N 244, 247. Burglary of an unoccupied house has been held not to be a particularly serious crime (*Matter of Frentescu, supra*), while armed robbery (*Matter of Rodriguez-Coto* (BIA 1985) 19 I&N 208) and possession of heroin for sale (*Matter of Gonzalez* (BIA 1988) 19 I&N 682) have. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *Matter of Juarez* (BIA 1988) 19 I&N 664.

A person convicted of an aggravated felony is not eligible for political asylum or withholding. 8 USC §§1251(b), 1253(h)(2). Thus, conviction of any aggravated felony (including first-time sale of a small amount of drugs) will almost surely eliminate the most compelling asylum applicant's ability to avoid deportation

back to the country of persecution. Because the stakes are so high in this type of case, criminal defense counsel should immediately involve immigration counsel and should present the most aggressive case possible.

§48.27 F. Temporary Protected Status (TPS)

Does the defendant come from a country designated for special status because of ongoing catastrophe?

The Attorney General may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood, or other disasters, or other extraordinary and temporary conditions. Citizens of that country will not be forced to return there from the United States for a period of time. 8 USC §1254a.

Congress designated El Salvador as the first TPS recipient. The application period for Salvadorans is now closed. As of 1995, the Attorney General designated continuing TPS programs for nationals of Rwanda (60 Fed Reg 27790–91, May 25, 1995), Liberia (60 Fed Reg 16163–64, March 29, 1995), and Bosnia and Somalia (60 Fed Reg 39004–06, July 31, 1995).

Persons are ineligible for TPS if they are excludable (see §48.7) or have been convicted of *two* misdemeanors (as opposed to the three-misdemeanor rule in the amnesty programs) or one felony. 8 USC §1254a(c)(2)(B). In addition, the person must not come within the bars to withholding of deportation (persecution of others, conviction of a particularly serious crime, committing a serious nonpolitical crime outside the United States, constituting a security threat to the United States). 8 USC §1254a(c)(2)(B)(ii).

§48.28 G. Registry

Has the defendant lived in the U.S. since January 1, 1972?

A noncitizen who has resided continuously in the United States since January 1, 1972, can obtain permanent residence through registry. 8 USC §1259. Other requirements under 8 USC §1259 are:

- Good moral character (see §48.7) for a reasonable period,
- Not excludable (although this requirement is called into question by *Matter of Sanchez-Linn* (BIA 1991) Int Dec 3156), and
- Not ineligible for U.S. citizenship (through convictions for draft evasion or desertion; see 8 USC §1425).

§48.29 H. Immigration Through Visa Petition

Does the defendant have a close relative who is a permanent resident or U.S. citizen?

A person who is not excludable (see §48.7) may obtain permanent resident status through a visa petition filed by a qualifying U.S. citizen or permanent resident relative. 8 USC §1154. A person who is excludable under the grounds relating to moral turpitude, two convictions with a five-year sentence, or one conviction for simple possession of 30 grams or less of marijuana can apply for a discretionary waiver of exclusion if he or she has a U.S. citizen or permanent

resident spouse, parent, or son or daughter, or, lacking such relatives, if the offense occurred more than 15 years previously. Anyone excludable for prostitution can apply for a waiver. See 8 USC §1182(h).

Persons classified under 8 USC §1151(b) as immediate relatives of U.S. citizens (spouse, parent of a child over 21, or unmarried child under 21 years of age) may immigrate rapidly. Others, including adult or married children, siblings of citizens, and spouses and unmarried children of permanent residents, must immigrate through the preference system. 8 USC §1153(a). Depending on the relationship and country of origin, this system may involve a wait of from a few months to several years.

▶ **Note:** In 1996, Congress may eliminate the immigration of any family members except for spouses and minor children of permanent residents or U.S. citizens, and a limited number of parents of adult U.S. citizens.

Certain valued employees can immigrate through an employer's labor certification. See 8 USC §1153(b). Although this device is primarily available to professional workers, nonprofessionals such as in-home child monitors, health attendants, specialty chefs, and workers who must speak a foreign language may also qualify. The person must not be excludable but can apply for a waiver of certain crime-related grounds of exclusion under 8 USC §1182(h), as described above.

§48.30 I. Voluntary Departure

Is defendant currently an undocumented person?

Undocumented persons include those who entered the United States surreptitiously, fraudulently, or who hold an expired visa; they are deportable for lack of lawful immigration status. 8 USC §1251(a)(1). As long as they do not become excludable or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from deportation and/or permanent residency, if they qualify for a particular application, or they may qualify for voluntary departure.

A noncitizen with no other immigration relief may apply to leave the United States voluntarily instead of being deported. The noncitizen must demonstrate good moral character (see §48.7) for the preceding five years to qualify. This relief is valuable because the period of voluntary departure is sometimes extended for several months, giving the noncitizen temporary lawful status in the United States. Whereas persons who have been deported may not lawfully reenter the United States for five years unless a special waiver is obtained (8 USC §1182(a)(2)), voluntary departure carries no such penalty.

§48.31 J. United States Citizenship

Is the defendant a permanent resident of three or five years who wishes to apply for U.S. citizenship?

Did the defendant have a parent or grandparent who is or was a U.S. citizen?

Was the defendant a permanent resident under the age of 18 when a parent naturalized?

Lawful permanent residents may apply for citizenship after residing in the United States and demonstrating good moral character (see §48.7) for five years. 8 USC §1427. Special procedures apply to spouses and minor children of U.S. citizens (who need show only three years of permanent residency), military personnel, and religious workers. 8 USC §1430.

▶ **Note:** Some defendants may be unaware that they inherited U.S. citizenship from their parents or grandparents, or that they became U.S. citizens when their parents naturalized at a time when the defendant was a permanent resident under age 18.

§48.32 XII. FORMER JUDICIAL RECOMMENDATION AGAINST DEPORTATION (JRAD)

Until 1990, the judicial recommendation against deportation (JRAD) offered protection to persons convicted of a crime involving moral turpitude. The JRAD was an order, signed by a criminal court judge, requiring the INS to withhold immigration penalties based on conviction of a crime involving moral turpitude. The JRAD was eliminated by the Immigration Act of 1990 (IA '90) (Pub L 101-649, 104 Stat 4978). The Act stated that the change was retroactive, affecting even offenses committed before November 29, 1990 (the day the Act became law). IA '90, §505. See *U.S. v Murphey* (9th Cir 1991) 931 F2d 606. The INS has agreed to honor JRADs that were actually signed by a judge before November 29, 1990. Memorandum by INS Commissioner Gene McNary, Feb. 4, 1991, reprinted in Interpreter Releases, p 220 (Feb. 25, 1991).

§48.33 XIII. INTERPRETERS

Criminal defendants who do not understand English are entitled to have an interpreter throughout the criminal proceedings. Cal Const art I, §14. The interpreter must be available exclusively for the defendant; the defendant cannot be required to share an interpreter with others, *e.g.,* witnesses. *People v Aguilar* (1984) 35 C3d 785, 200 CR 908 (case reversed; trial court "borrowed" interpreter to translate state witnesses' testimony); *People v Baez* (1987) 195 CA3d 1431, 241 CR 435 (case reversed, because error not harmless beyond reasonable doubt). According to the court in *People v Rodriguez* (1986) 42 C3d 1005, 1013, 232 CR 132, 136, it is best for each defendant to have an interpreter assigned to him or her who remains with the defendant throughout the proceedings.

A mere request for an interpreter does not necessarily mean that the defendant is entitled to one. The burden is on the defendant to show that he or she does not understand English. *People v Loeun* (review granted July 13, 1995, S046514; superseded opinion at 38 CA4th 1125 (originally 33 CA4th 1509), 40 CR2d 160) (trial court has great discretion in determining whether interpreter required; record supported trial court's finding that defendant did not need interpreter).

There is no right to a certified interpreter, only to a competent one. *People v Estrada* (1986) 176 CA3d 410, 221 CR 922. See Evid C §§750–755.5 for special rules on interpreters and translators. See also CCP §§68560.5, 68566; Govt C §§65860.5, 68561–68562, 68565–68566 (requirements for court interpreters).

English-speaking defendants do not have the right to have their own interpreter, separate from the court interpreter, for witnesses who testify in another language. *People v Aranda* (1986) 186 CA3d 230, 230 CR 498. Counsel who believes that an interpreter has erred or is not interpreting correctly should request an evidentiary hearing and request appropriate relief, *e.g.*, a motion for mistrial or replacement of the interpreter with a new interpreter. See *People v Cabrera* (1991) 230 CA3d 300, 281 CR 238. The trial court also has the option of appointing a "check interpreter." See *People v Aranda, supra*.

§48.34 XIV. AVAILABILITY OF NONCITIZEN WITNESSES

If "state action has made a material witness unavailable (by deportation), dismissal is mandated." *People v Mejia* (1976) 57 CA3d 574, 579, 129 CR 192, 196. Today's courts generally hold that the *Mejia* standards for determining whether a witness was "material" have been superseded by federal standards. *People v Valencia* (1990) 218 CA3d 808, 819, 267 CR 257, 264; *People v Lopez* (1988) 198 CA3d 135, 243 CR 590; *People v Jenkins* (1987) 190 CA3d 200, 235 CR 268.

Conflicting authority exists on which federal standard to apply. *People v Lopez, supra*, held that the federal standard to apply is that of *California v Trombetta* (1984) 467 US 479, 104 S Ct 2528, 81 L Ed 2d 413. Under this standard, the lost evidence is material for purposes of sanctions if its exculpatory value was apparent before it was destroyed. But *Jenkins* (in what may be considered dicta) and *Valencia* said that the federal standard to apply is that of *U.S. v Valenzuela-Bernal* (1982) 458 US 858, 102 S Ct 3440, 73 L Ed 2d 1193. Under that standard, which specifically concerned deported witnesses, testimony is material for purposes of sanctions if a "plausible" showing is made that it was material, was favorable to the defendant, and was not cumulative.

The *Lopez* court declined to follow *Valenzuela-Bernal* because that case is older than *Trombetta,* and, according to the *Lopez* court, *Valenzuela-Bernal* did not intend to announce a separate standard for loss of testimonial evidence as opposed to loss of other evidence. The *Jenkins* court did not discuss *Trombetta* at all. At this writing, the question of which federal standard to follow must be considered unsettled.

A person arrested along with undocumented persons may be given a form advising him or her of the right to have the noncitizen witnesses detained. The form also advises that, if deported, the witness could not be required to return and that the person arrested has the right to consult with counsel before deciding whether detention of the noncitizen is desired. This form is based on *U.S. v Lujan-Castro* (9th Cir 1979) 602 F2d 877.

Mejia error is waived by a plea of guilty. *People v McNabb* (1991) 228 CA3d 462, 279 CR 11.

XV. NONCITIZEN STATUS

§48.35 A. Noncitizen Status as Affecting Bail

A defendant's lack of citizenship may be a factor justifying high postconviction bail. Bail on appeal of $200,000 was upheld in *People v Marghzar* (1987) 192 CA3d 1129, 239 CR 130, because, among other things, the defendant was not a citizen.

▶ **Note:** The INS has the authority to place immigration holds on certain noncitizens. See 8 USC §1252(a). See also §4.42.

§48.36 B. Noncitizen Status as Affecting Other Issues

Denial of probation. Trial courts may properly consider a defendant to be an illegal noncitizen when deciding whether to grant probation. *People v Sanchez* (1987) 190 CA3d 224, 235 CR 264 (probation denied).

California Rehabilitation Center (CRC). The California Rehabilitation Center may properly exclude an illegal noncitizen because he or she would probably not be available to complete the outpatient component of the program. *People v Arciga* (1986) 182 CA3d 991, 227 CR 611. For immigration purposes, such a commitment is adverse in any event because it defines the individual, in effect, as a "drug addict" and thus deportable. See §48.16.

Illegal detention. Border stops are deemed reasonable. *U.S. v Ramsey* (1977) 431 US 606, 619, 52 L Ed 2d 617, 97 S Ct 1972. Stops by border agents at reasonably located, fixed checkpoints are deemed reasonable. *U.S. v Martinez-Fuerte* (1976) 428 US 543, 562, 49 L Ed 2d 1116, 96 S Ct 3074. Other immigration detentions, however, *e.g.,* stops by roving patrols of border patrol agents, must be supported by specific, articulable facts giving rise to a reasonable suspicion. *U.S. v Brignoni-Ponce* (1975) 422 US 873, 884, 45 L Ed 2d 607, 95 S Ct 2574; *People v Valenzuela* (1994) 28 CA4th 817, 33 CR2d 802 (stop at agricultural station must be supported by probable cause).

§48.37 XVI. REQUIREMENTS CONCERNING IMMIGRATION STATUS WHEN PLEADING GUILTY OR NO CONTEST

Before a defendant pleads guilty or no contest to a misdemeanor or felony offense, he or she must be warned that conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization. Pen C §1016.5(a). A similar general warning, however, is not sufficient advice by counsel. Defense counsel must also advise a client of the specific immigration consequences in the defendant's own case. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (note that the JRADs discussed in *Barocio* and *Soriano* are no longer available; see §48.32). Defense counsel who fails to investigate and advise the defendant of the *specific* immigration consequences of a plea of guilty may be found to have provided ineffective assistance of counsel. See *People v Quesada* (1991) 230 CA3d 525, 281 CR 426.

▶ **Note:** Prosecutors should also become familiar with this material to better deal with the prosecution of undocumented persons.

There is no requirement that judges advise defendants of the possible immigration consequences of a "slow plea" (see §10.19). *People v Limones* (1991) 233 CA3d 338, 343, 284 CR 418, 421.

Attorneys in state as well as federal criminal proceedings soon may face having to advise their clients whether to stipulate to deportation before the criminal court judge. A noncitizen who is convicted of an aggravated felony, deported, and thereafter returns to the U.S. illegally is subject to up to 20 years in federal prison for violation of 8 USC §1326(b)(2). In 1994 Congress expanded the definition of deportation for this offense to include "any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law." 8 USC §1326(b)(2), as amended by the Violent Crime Control and Law Enforcement Act of 1994, §130001 (September 13, 1994). At this writing, U.S. Attorneys have begun requesting stipulations to deportation, and there are plans for state prosecutors to begin as well. Criminal defense counsel will be in the position of advising clients whether to accept this condition. This requires a real understanding of the defendant's immigration position: If the defendant truly has nothing to lose by conceding deportability, he or she may gain valuable concessions in the criminal sentence. On the other hand, if the defendant has family or an established life in the United States and some possible defense to deportation, the defendant may be gravely harmed by giving up the right to fight deportation and apply for or maintain lawful status. Federal district court judges are permitted to decide whether a defendant is deportable and to order deportation. 8 USC §1252a(d) (1994). The person must be deportable under 8 USC §1251(a)(2)(A) for conviction of crimes involving moral turpitude, aggravated felonies, controlled substance offenses, or offenses involving firearms and destructive devices. The judge may choose to exercise jurisdiction over the deportation only if the U.S. Attorney with the concurrence of the INS requests it. The Commissioner of the INS wrote a memorandum, including sample forms, to INS District Directors on the subject of judicial deportations on February 22, 1995, reprinted in 72 Interpreter Releases 462 (March 31, 1995).

California state courts are required to cooperate with the INS in identifying and placing a deportation hold on defendants convicted of felonies who are determined to be undocumented noncitizens subject to deportation. Govt C §68109. In addition, the Department of Corrections and the Department of the Youth Authority are required to identify undocumented noncitizens subject to deportation. Within 48 hours of identifying such a person, these Departments are to transfer the inmate to the custody of the U.S. Attorney General. The Departments also must make their case files available to the INS for purposes of investigation. Pen C §5025(a).