CALIFORNIA CRIMINAL LAW

PROCEDURE AND PRACTICE

Sixth Edition

Library of Congress Catalog Card No. 94–70697

Printed in the United States of America
ISBN 0-7626-0640-1

CR–32114

48

REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

KATHERINE A. BRADY
HON. DANA MARKS KEENER
NORTON TOOBY

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

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 co-authored this chapter for the second edition and updated it for the fourth, fifth, and sixth editions.

NORTON TOOBY, B.A., 1967, Harvard University; J.D., 1970, Stanford University. Mr. Tooby is in private practice in Oakland, representing immigrants in criminal matters. He updated this chapter for the fourth, fifth, and sixth editions.

◇ §48.1 I. OVERVIEW

▶ **Note:** The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104–132, 110 Stat 1214) became law on April 24, 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub L 104–208, Div C, 110 Stat 3009–546) became law on September 30, 1996. Together, they have dramatically altered the structure of immigration law in general, and have had particular effect regarding who is barred from admission or rendered removable due to the commission of or conviction for crimes. Strategic decisions made by an immigrant's criminal defense attorney are becoming increasingly crucial, because it appears that strategic plea bargaining or amelioration of criminal convictions may soon be the only avenues that remain for many noncitizen defendants to avoid removal or permanent bars to immigration.

For a noncitizen, the immigration consequences of a conviction can be far worse than the criminal penalties. Consequences can include removal, permanent ineligibility for lawful immigration status, extended or even indefinite 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 the law, convicted noncitizens can be ordered deported and will sometimes be 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 avoids serious immigration consequences.

▶ **Note:** Practitioners should not rely exclusively on this chapter as written but should seek guidance from experienced immigration attorneys or from the Immigrant Legal Resource Center, 1663 Mission Street, Suite 602, San Francisco, CA 94103, (415) 255–9499, www.ilrc.org, which provides consultation and materials for a fee.

Reentry doctrine. Certain legal concepts in immigration law may greatly surprise attorneys who are not familiar with that law. Of extreme importance in the context of criminal convictions is the "reentry doctrine," applicable to

all noncitizens. All noncitizens, whether or not legally admitted to the United States on either a temporary or permanent basis, are subject to the Immigration and Naturalization Service's (INS) grounds of inadmissibility. Any trip outside the United States has the potential of bringing the existence of one or more of these grounds to the attention of the INS, thereby subjecting the individual to removal proceedings. In addition, corollary (but not identical) grounds of deportability exist and can render removable any noncitizen, regardless of the legality of his or her latest admission to the United States. Moreover, generally speaking, there are no statute of limitations or laches defenses applicable in immigration law.

Defense counsel's duty to noncitizen client. Due to the structure of immigration law, a defense attorney's goal is always to seek a result that avoids creating a ground of inadmissibility or deportability, or an outcome that could result in a bar to potential future immigration relief. 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 effects of a disposition. Counsel must investigate the client's immigration status, research the immigration law, and inform the client very specifically about potential consequences. In addition, counsel must actively attempt to avoid unfavorable consequences if possible. Anything less constitutes ineffective assistance of counsel.

Because even relatively minor offenses (*e.g.,* possession of a small amount of a controlled substance) can carry drastic immigration consequences, an especially vigorous 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 essence, the defense may have to be conducted completely differently from the typical criminal defense of a United States citizen.

The court must advise a defendant pleading guilty or no contest that, if he or she is a noncitizen, 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, however, and advise his or her client of the specific potential 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 Judicial Recommendations Against Deportation (JRADs) discussed in *Barocio* and *Soriano* are no longer available; see discussion in §48.11.) In fact, defense counsel's incorrect advice to the client concerning immigration consequences of a criminal case can constitute ineffective assistance of counsel, requiring reversal if prejudice is shown. *In re Resendiz* (2001) 25 C4th 230, 105 CR2d 431.

Prosecutors may request that a defendant stipulate to deportation as part of a plea bargain. A stipulation to deportation made by a defendant in state or federal criminal proceedings will be considered a deportation for purposes of enhancing his or her sentence following a subsequent conviction for the federal offense of illegal re-entry after conviction of an aggravated felony and deportation. 8 USC §1326(b)(4). See discussion in §48.8.

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 made profound and encompassing changes in the Immigration Act, and it will almost certainly do so again within the next few years.

Resources. This chapter is an overview rather than an exhaustive discussion. It is advisable for counsel to obtain expert advice on individual cases. For referrals to immigration attorneys, contact the American Immigration Lawyers Association, 918 F Street NW, Washington, DC 20004, (202) 216–2400 (www.aila.org); the local bar association; or the National Immigration Project of the National Lawyers Guild, 1400 Beacon Street, Suite 602, Boston, MA 02108, (617) 227–9727 (www.nlg.org). For a national directory of community agencies offering free or low-cost immigration assistance, write to the National Immigration Law Center, 3435 Wilshire Blvd. Suite 2850, Los Angeles, CA 90010, (213) 639–3900 ($12.00) (www.nilc.org). 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 after the criminal issues have been resolved. The Immigrant Legal Resource Center (www.ilrc.org) in San Francisco will provide consultation to attorneys and agencies on the immigration consequences of conviction, for a fee. For information, call (415) 255–9499, ext. *. 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 (2002), available from the Immigrant Legal Resource Center in San Francisco at the above address ($165, or $130 for the update only), or Kesselbrenner & Rosenberg, Immigration Law and Crimes (1984), available from West Group, COP, 610 Opperman Drive, Eagan, MN 55123, (800) 344–5009; or Tooby, Criminal Defense of Immigrants (2002); and Tooby, California Post-Conviction Relief for Immigrants (2002), available from Law Offices Of Norton Tooby, 6333 Telegraph Avenue, Suite 200, Oakland, CA 94609, (510) 601–1300. Other research guides are listed in §2.22.

▶ **Note:** Legislation has changed much of the familiar terminology of immigration law, often gratuitously. The new term for "deportation" is "removal." The process of excluding someone from the United States now occurs during a "removal" hearing. The new term for "excludable" is "inadmissible." See Pub L 104–208, 110 Stat 3009.

II. UNIQUE ASPECTS OF NONCITIZEN DEFENDANT CASES

§48.2 A. Checklist: Basic Procedure for Criminal Defense of Immigrants

The starting point for criminal defense of immigrants is always to ascertain and verify the client's nationality. This can be done by obtaining a reliable answer to the question, "Are you a citizen of the United States?" This must be done in every single criminal case, because the nationality of the defendant is often not obvious. He or she may be Canadian or may have immigrated to the United States as a child and grown up here, and thus be visually indistinguishable from a native-born "American." About 20 percent of the time, a Califor-

nia criminal defendant will not be a citizen of the United States, and will need the special defense outlined in this chapter.

It is critical to obtain reliable evidence of nationality. Many clients may give an incorrect answer to the question because they misunderstand it (*e.g.*, they may believe that their green cards make them "citizens" or believe they have a green card when in reality they possess only a preliminary work document). They may believe they are safer saying they are citizens even if they are not. It is crucial to verify that the defendant's view of his or her immigration status is accurate. Counsel should explain the importance of obtaining a correct answer and ask where the client was born and how he or she obtained United States citizenship. If the defendant has any immigration documents, counsel should photocopy them and check with immigration counsel if necessary.

Counsel must be satisfied that he or she has accurate information on the client's nationality. It is important to determine whether both of the defendant's parents (or the sole custodial parent) were naturalized while the defendant was an unmarried lawful permanent resident under 18. If so, the defendant automatically became a United States citizen even without filing any application or any official government action. A child may also under certain circumstances acquire United States citizenship from his or her parents, even if born abroad. See Brady, California Criminal Law and Immigration, chap 9, Appendix 9-B (2002).

❒ **Obtain from the client the information necessary to formulate a strategy to avoid unnecessary immigration consequences.**

The client can provide initial information concerning immigration status that counsel will need to determine what immigration effect various possible convictions and sentences will have. For a suggested "Basic Immigration Status Questionnaire," see §48.3. Counsel will also need the client's rap sheet, as well as information on the current charges, likely plea bargains, and likely sentences.

❒ **Call an immigration expert or research the exact immigration consequences of any proposed plea or option.**

Calling an expert is the easiest way to obtain up-to-date information on the immigration consequences of the various possible alternative dispositions and sentences. Unless counsel has researched the specific immigration questions facing the individual client, using up-to-date resource material, expert immigration advice is absolutely necessary. It is very dangerous simply to send the client to an immigration lawyer, because the best strategy for the defense of the criminal case must be determined by criminal and immigration counsel conferring together.

Potential adverse immigration consequences may be eliminated or ameliorated through a variety of techniques, often without sacrificing traditional criminal defense goals. Ample resources exist to assist counsel in obtaining answers to the immigration questions that arise during the course of the case. See §48.1.

It is advisable for criminal defense counsel to establish an ongoing relationship with an office such as the Immigrant Legal Resource Center (see §48.1) or a specific immigration attorney in order to receive consistent advice in this area as needed.

❒ **Explain the specific immigration consequences to the client.**

Counsel must find out the specific potential immigration consequences—*e.g.*, disqualification from political asylum or naturalization, loss of lawful permanent

resident status, deportation, permanent ineligibility for lawful status, disqualification from waivers—and clearly explain them to the client. A general or uninformed presentation is insufficient. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (client given general Pen C §1016.5 advice; conviction vacated for failure to warn about *actual* consequences).

❒ **Find out how high a priority the immigration consequences are to the client.**

Once the client understands what the actual immigration consequences can be, he or she may or may not make them a defense priority. Some clients are not willing to risk more time in jail in an effort to safeguard their immigration status. Others place the right to remain with their families in the United States as their highest priority and will sacrifice almost any other consideration. The latter clients may be willing to plead to additional counts, or serve an extra six months in custody, for example, in order to alter the conviction to one that will not trigger deportation. These difficult choices must be made by the client, once he or she is fully informed.

❒ **Attempt to avoid the adverse immigration consequences.**

Placing a high priority on immigration consequences may cause a drastic change in defense strategy. First, counsel must determine precisely what disposition will minimize or eliminate immigration consequences. This requires a good knowledge of the immigration law or expert advice. Some ideas for safe disposition are discussed in this chapter. They can include diversion without a guilty plea (see §§48.12–48.15), dismissal, acquittal, delay of a conviction, a carefully-framed sentencing disposition, or a plea to some other "safe" offense, even one only tenuously connected, or not connected at all, to the offense charged.

▶ **Note:** Drug diversion under Pen C §1000 constitutes a conviction under immigration law even after dismissal if a guilty plea has been entered at any time. See *In re Punu* (BIA 1998) Int Dec 3364; 8 USC §1101(a)(48)(A). See discussion of diversion in §§48.14, 48.29.

Vigorous criminal defense work—including strategies not normally used in defense of a minor charge—may be required. For example, clients may choose to take minor cases to trial, even if there is only a slim possibility of acquittal, if the alternative is certain deportation, or to delay the finality of the conviction by appeal and thus spend more time with their families before removal.

❒ **Advise client not to talk about noncitizen status.**

Counsel 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 (juvenile court found that minor was noncitizen based on his mother's statements to probation officer; minor transferred to Mexican juvenile authorities).

☑ §48.3 B. 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 United States after deportation for criminal convictions should especially 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 can carry a potential 20-year federal prison sentence (see §48.8).

• The right not to reveal the defendant's immigration status to a judge. Pen C §1016.5(d).

BASIC IMMIGRATION STATUS QUESTIONNAIRE

Purpose: To obtain the facts necessary for an immigration lawyer to determine immigration consequences of a criminal conviction.

Documents: Photocopy any immigration documents or passport. [See §48.2]

Criminal History: Information concerning rap sheets, current charges, and possible dispositions should be in hand before calling immigration counsel.

_____ _____ _____

Client's name Date of interview Date of birth

_____ _____

Client's immigration attorney Attorney's phone no.

Immigration hold? YES ___ NO ___ [See §4.42.]

1. *Entry*: Date first entered U.S.: _____ Visa Type: _____

Significant departures: Date: _____ Length: _____

Purpose: _____

Date last entered U.S.: _____ Visa Type: _____

2. *Nationality*: Country of birth: _____ Would client have any fear about returning? YES ___ NO ___ If yes, why? _____

_____

What language (and dialect) does client speak? _____

Is an interpreter needed? YES ___ NO ___ [See §48.7.] (Often, defendants who do not need an interpreter for office or jail interviews will need one for formal court sessions.)

3. *Immigration Status*: Lawful permanent resident? YES ___ NO ___ If yes, date client obtained green card: _____

Other special immigration status: (refugee) (asylee) (temp. resident) (work permit) (TPS) (Family Unity) (ABC) (undocumented) (visa type: _____).
Date obtained: _____

Did anyone ever file a visa petition for client? YES ___ NO ___
Name and number: _____ Date: _____.

Type of visa petition: _____ Was it granted? YES ____ NO ____

Has the INS been involved with client in this case or earlier?
YES ___ NO ___
Does client have a pending immigration case or application?
YES ___ NO ___

4. *Deportations*: Has client ever been deported?
YES ___ NO ___ Date: _____

Reason: _____

Has client ever been excluded? YES ___ NO ___ Date: _____

Reason: _____

Does client have an immigration court date pending? YES ____ NO ____

Reason: _____ Date: _____

5. *Prior Immigration Relief*: Has client ever before received a waiver of deportability (§212(c) relief or cancellation of removal) or suspension of deportation?
YES ___ NO ___ Which: _____ Date: _____

6. *Relatives With Status*: Does client have a U.S. citizen: (parent) (spouse) (child(ren) (DOB(s) _____)), (brother) or (sister)?
YES ___ NO ___

Does client have a lawful permanent resident (spouse) or (parent)?
YES ___ NO ___

7. *Employment*: Would client's employer help client immigrate? YES ___ NO ___

Occupation: _____

Employer's name and number: _____

8. *Possible Unknown U.S. Citizenship*: Was client's or spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES ___ NO ___

Was client a permanent resident under age 18 when both parents (or the sole custodial parent) naturalized to U.S. citizenship? YES ___ NO ___

9. *Abuse:* Has client been abused by his or her spouse or parents?
YES ___ NO ___

10. *Criminal Record*: What prior convictions does client have in California or in other jurisdictions or countries?

[Date Committed] [Date of Plea] [Exact Statute of Conviction] [Date and Sentence]

_____

_____

(Counsel should consider whether each prior conviction will have an impact on the client's immigration status.)

§48.4 C. Main Defense Goals in Representing Juveniles

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

Family Unity benefits. In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, however, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104–208, 110 Stat 3009) denies Family Unity benefits to persons who commit an act of juvenile delinquency that if committed by an adult would be a violent felony involving the use or attempted use of physical force against another or a felony involving a substantial risk that physical force against another will be used in its commission. IIRIRA §383.

The Family Unity benefits of the Immigration Act of 1990 (Pub L 101–649, §301(b), 104 Stat 4978) (see 8 USC §1255a Note) provide temporary lawful status and work authorization to the unmarried child under age 21 of an amnesty recipient as of May 5, 1988. See §48.62 for further discussion.

The 1996 statute applies the new Family Unity rule to benefits "granted or extended" after September 30, 1996. See IIRIRA §383. Arguably the new rule applies only to acts of juvenile delinquency *committed* after September 30, 1996, because there is a general presumption against retroactive application of laws. See *INS v St. Cyr* (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271.

In the future, Congress may well single out drug trafficking as a juvenile offense that triggers special immigration penalties and apply that provision retroactively. Consequently, whenever possible, juvenile defenders should, as with crimes involving violence, avoid dispositions finding trafficking.

Juvenile dispositions might be held to bring a noncitizen within a conduct-based *ground* of inadmissibility or deportability, *i.e.*, one that does not depend on a conviction. See §48.50 for discussion of these grounds. For example, one ground for deportation and inadmissibility is persons who are or have been drug addicts or drug abusers. 8 USC §§1182(a)(1)(A)(iv), 1227(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 any drug offense. If an admission is inevitable, it is better to admit possession than sale or possession for sale. Admissions of drug addiction might be held to be a basis for inadmissibility or deportation.

A finding in juvenile court of a moral-turpitude offense would bar the immigrant from later receiving the benefit of the petty-offense exception to inadmissibility, based on a later adult moral-turpitude conviction, because the petty-offense exception is available only to those who have *committed* only one crime (*i.e.*, the current adult conviction) involving moral turpitude. 8 USC §1182(a)(2)(A)(ii)(II). See §§48.38–48.40.

Juveniles bound over after a hearing under Welf & I C §707 and tried in

adult court will suffer convictions under immigration law, although there are new arguments that the federal standard (*i.e.*, 21 years of age) should apply. See Brady, California Criminal Law and Immigration §2.3(B) (2002).

▶ **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. The INS may, however, have 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. An expungement, under Welf & I C §§1179, 1772, of a first-offense simple possession conviction will eliminate it for all immigration purposes. See *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728. Sealing the records may eliminate evidence that the defendant has suffered a conviction of a drug offense as well as a crime involving moral turpitude. *In re Lima* (BIA 1976) 15 I&N 661; *In re Andrade* (BIA 1974) 14 I&N 651. See *In re Ozkok* (BIA 1988) 19 I&N 546. See also §48.14.

▶ **Note:** Juveniles in dependency proceedings and, possibly, delinquency proceedings may be eligible for permanent residency as "special immigrant juveniles." 8 USC §1101(a)(27)(J). Juveniles who have been abused by a permanent-resident or United-States-citizen parent may be eligible for permanent residency under the Violence Against Women Act (1994, 2000) (8 USC §§1154(a)(1)(A)(iv), (B)(iii), 1254(a)(3)), even if they are not in dependency proceedings. See §48.63.

D. Noncitizen Status

§48.5 1. 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 §1228(a). See also §4.42.

§48.6 2. Noncitizen Status as Affecting Other Issues

Denial of probation. Trial courts may properly consider a defendant to be an undocumented 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 undocumented 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 and inadmissible. See §48.50.

Illegal detention. Border stops are deemed reasonable. *U.S. v Ramsey* (1977)

431 US 606, 619, 52 L Ed 2d 617, 628, 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, 1131, 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, 618, 95 S Ct 2574; *U.S. v Gardia-Camacho* (9th Cir 1995) 53 F3d 244; *People v Valenzuela* (1994) 28 CA4th 817, 33 CR2d 802 (stop at agricultural station must be supported by probable cause; single factor of Mexican appearance insufficient to support belief that person is illegal alien).

§48.7 E. 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 (conviction reversed; trial court "borrowed" interpreter to translate state witnesses' testimony); *People v Baez* (1987) 195 CA3d 1431, 241 CR 435 (conviction 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. *In re Raymundo B.* (1988) 203 CA3d 1447, 250 CR 812.

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, contemporaneous with the violation if possible, but at least with counsel's discovery of the violation. 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.*

§48.8 F. Requirements Concerning Immigration Status When Pleading Guilty or No Contest

Consequences of guilty plea. Before a defendant pleads guilty or no contest to a misdemeanor or felony offense, the court taking the plea must ensure that the defendant is warned that conviction may result in deportation, exclusion

from admission to the United States, or denial of naturalization. Pen C §1016.5(a). Failure to warn of any of the three required potential consequences is grounds to vacate the judgment if prejudice is shown (*People v Superior Court* (Zamudio) (2000) 23 C4th 183, 96 CR2d 463), and failure to maintain a record that the required warning has been given creates a presumption that the warning was in fact not given. Pen C §1016.5(b); *People v Gontiz* (1997) 58 CA4th 1309, 68 CR2d 786; *People v Ramirez* (1999) 71 CA4th 519, 83 CR2d 882 (warning need not be verbal; signing of printed waiver form sufficient).

A similar general warning, however, is not sufficient advice by counsel. Defense counsel must also advise a client of the specific immigration consequences that will be triggered 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 §48.11). 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. *People v Soriano, supra.*

Counsel renders ineffective assistance by affirmatively misadvising the defendant of the immigration effects of a plea. *In re Resendiz* (2001) 25 C4th 230, 105 CR2d 431. To obtain a reversal of the conviction, prejudice must be shown, *i.e.,* a reasonable probability that the client would not have entered the plea if the client had been told the truth about its immigration consequences. *In re Resendiz, supra.*

▶ **Note:** Prosecutors should also become familiar with the immigration consequences of a plea or conviction to better deal with the prosecution of noncitizens. On the one hand, the prosecution may be convinced that the defendant should be deported, and may wish to become aware of the nature of the conviction and sentence necessary to achieve this result. On the other hand, prosecutorial discretion is very broad. Because immigration laws now trigger drastic and mandatory immigration consequences for an increasing number of minor convictions and sentences, the interests of the community and innocent family members in retaining certain immigrants should be reflected in the discretion exercised by prosecutors. As an example, a second offense misdemeanor simple possession of any drug is considered an "aggravated felony" and would trigger mandatory deportation, even for an immigrant who has lived lawfully in this country for 30 years, is married to a United States citizen, and has many children and numerous other family members who are all United States citizens. Prosecutorial discretion is legally broad enough to allow a nondeportable result via a plea bargain or postconviction relief under these circumstances. See §7.12.

There is as yet 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), but counsel must of course do so.

Stipulation to deportation. 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. The definition of "deportation" for criminal penalties for reentry of certain deported aliens includes "any agreement in which an alien stipulates to deportation during (or not during) a criminal

trial under either Federal or State law." 8 USC §1326(b). United States Attorneys sometimes request stipulations to deportation, and there are plans for state prosecutors to begin doing so as well. Criminal defense counsel will be in the position of advising clients whether to accept such a condition. This requires an accurate 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 contest deportation and apply for or maintain lawful status.

Federal district court judges are permitted to decide at sentencing whether or not a defendant is deportable and to order removal. 8 USC §1228(c). The person must be deportable under 8 USC §1227(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 removal only if the United States Attorney requests it with the concurrence of the INS. 8 USC §1228(c)(1). The Commissioner of the INS wrote a memorandum, including sample forms, to INS District Directors on the subject of judicial removals on February 22, 1995, reprinted in 72 Interpreter Releases 462 (Mar. 31, 1995).

Illegal reentry. If the defendant is pleading guilty or no contest to an "aggravated felony," the plea will trigger negative and possibly surprising consequences if the client is deported and thereafter reenters the country illegally. In former years, if a noncitizen returned to the United States under these circumstances and was arrested by the INS, he or she would merely have been deported again, and that is what many immigrants expect. After recent changes in immigration law, however, illegal reentry after conviction and removal occurring after an aggravated felony conviction triggers federal criminal prosecution carrying a maximum sentence of 20 years in federal prison. 8 USC §1326(b)(2). Under the Federal Sentencing Guidelines, the minimum may be six or seven years, depending on criminal history. U.S.S.G. §2L1.2 (West 1998). See also 8 USC §1325(a). Federal prosecutors usually demand at least 30 months in prison as part of plea negotiations. The defendant pleading to an aggravated felony, or with a prior conviction for an aggravated felony, must therefore be informed that he or she will be required to serve between 30 months and 20 years in federal prison if apprehended in the United States after his or her removal.

▶ **Note:** It has become almost certain that a criminal noncitizen will be detected and apprehended by the INS after conviction and a sentence involving any incarceration, because the INS now has expensive systems that support its efforts to identify the immigration status of every single person admitted to county jail or state prison.

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 deportable. 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 United States Attorney General. Pen C §5025(c). The departments must also make their case files available to the INS for purposes of investigation. Pen C §5025(a).

§48.9 G. 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. See *People v Fauber* (1992) 2 C4th 792, 829, 9 CR2d 24 (assuming but not deciding that federal standard applies to destruction of evidence cases).

Conflicting authority exists on which federal standard to apply. *People v Lopez, supra*, held that the standard to apply is that of *California v Trombetta* (1984) 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528. 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 dictum) and *Valencia* said that the standard to apply is that of *U.S. v Valenzuela-Bernal* (1982) 458 US 858, 73 L Ed 2d 1193, 102 S Ct 3440. 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, because *Valenzuela-Bernal* did not intend to announce a separate standard for loss of testimonial evidence as distinguished from 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, it may be impossible to obtain the presence of the witness at trial 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.

§48.10 H. Consequences of Sentence in Criminal Case

The sentence received in a criminal case can have very significant immigration consequences, and counsel can sometimes exert a great influence over the immigration process by controlling the length and nature of the sentence received. Obtaining a certain sentence may be sufficient to avoid adverse immigration results for the client. It is important to identify whether or not the sentence is important, and, if so, exactly what the sentence requirements are for the

client's particular situation. Sentences can be especially important for aggravated felonies and crimes involving moral turpitude.

General definition of "sentence" for immigration purposes. For immigration purposes, "sentence" includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution . . . in whole or in part." 8 USC §1101(a)(48)(B).

Thus, "sentence" includes a state prison sentence that has been imposed with execution suspended. *In re Castro* (BIA 1988) 19 I&N 692.

It includes court-ordered confinement as a condition of probation.

It does *not* include potential state prison or county jail sentences when imposition of sentence has been suspended, because the court has not ordered any specific term to be served. See *In re F.* (BIA 1942) 1 I&N 343.

It does *not* include any noncustody period of probation, because that does not qualify as "incarceration or confinement." 8 USC §1101(a)(48)(B). See discussion of suspending imposition and execution of sentence in §§36.5, 45.25–45.27.

▶ **Note:** For immigration purposes, all sentences refer to the nominal sentences ordered by the court, rather than the actual time spent incarcerated, except for (1) the 180-day bar to establishing good moral character referred to below, and (2) eligibility for former INA §212(c) waiver of deportability, which is lost if the person actually serves five years or more as a result of aggravated felony convictions. See *In re Ramirez-Somera* (BIA 1992) 20 I&N 564. See §48.42 for discussion. These bars refer to actual days spent in custody.

Examples: If the client receives imposition of sentence suspended and no custody as a condition of probation, that counts as zero sentence for immigration purposes. If the client receives imposition of sentence suspended and six months' custody as a condition of probation, that counts as six months. If the client receives a five-year sentence, execution of which is suspended, and is placed on probation with no custody time as a condition of probation, that counts as a five-year sentence.

Concurrent sentences are evaluated as the length of the longest sentence, and consecutive sentences are added together. *In re Fernandez* (BIA 1972) 14 I&N 24.

Deportability for sentence imposed of one year. If the client is here legally, he or she wishes to avoid becoming deportable. Many common offenses become aggravated felonies and trigger removal only if a court orders one year or more of custody, either as part of the judgment and sentence or as a condition of probation. These are:

- A "crime of violence" as defined in 18 USC §16 (see §48.47);
- A theft offense (including receipt of stolen property) (see §48.46);
- Burglary;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered;
- Offenses relating to obstruction of justice (including accessory after the fact under Pen C §32), perjury or subornation of perjury, or bribery of a witness; and
- Using fraudulent documents to obtain an immigration benefit (except for

a first offense to help an immediate family member). 8 USC §1101(a)(43)(F)–(G), (P), (R)–(S).

All other aggravated felony convictions trigger deportation regardless of the sentence imposed.

Strategy. For these offenses, a sentence of 364 days or less (either as part of a judgment or condition of probation) will prevent the offense from becoming an aggravated felony. Conviction of three counts of theft, with a 364-day sentence for each to run consecutively, for example, would not result in any aggravated felony conviction, because each count is assessed separately to determine whether it carries a one-year sentence imposed. It is necessary to obtain imposition of sentence suspended, because a state prison sentence, with execution suspended, counts as a sentence for most immigration purposes, including deportability. By waiving past credits and future credits, counsel can obtain an official sentence of 364 days (and avoid an aggravated felony) even though the defendant actually serves all the presentence time and the full 364 days ordered as a condition of probation, which is equivalent to the same number of actual days in custody he or she would serve on a sentence of two years plus 1.5 times the actual presentence time served. Similarly, on a probation violation, it is sometimes possible for the defendant to waive past credits and receive a new sentence that, added to the former sentence, falls short of a total of one year or more and thus avoid an aggravated felony sentence.

Inadmissibility. If the client is not here legally, he or she wishes to avoid becoming inadmissible, *i.e.*, becoming ineligible to immigrate lawfully through a United-States-citizen spouse or otherwise. Two grounds of inadmissibility depend on the sentence:

- A noncitizen is inadmissible under 8 USC §1182(a)(2)(B) if he or she is convicted of two or more offenses of any kind for which the aggregate sentences actually imposed equal five or more years; and
- A noncitizen who is inadmissible because of one conviction of a crime involving moral turpitude is *not* inadmissible if the offense qualifies under the "petty offense exception." To qualify, the sentence actually imposed must be six months or less and the maximum possible sentence for the offense must be 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. If the defendant has *committed* a second moral turpitude offense, he or she is disqualified from receiving the petty offense exception, even if no conviction occurred, the charges were dismissed, or no charges were filed. A previous conviction, even if expunged, will destroy eligibility for the benefit of this exception. *In re S.R.* (BIA 1957) 7 I&N 495. In order to qualify for the petty offense exception, the maximum possible sentence must be one year or less, and the actual sentence imposed must be six months or less. A defendant may be found eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17. See §48.39.

Bar to establishing good moral character. In order to obtain many immigration benefits, including naturalized citizenship, voluntary departure, cancellation of removal for nonpermanent residents, suspension of deportation, and registry,

a noncitizen must establish "good moral character." The immigration law bars certain persons from establishing good moral character, and this concept sometimes depends on sentence:

- Physically serving more than 180 actual days in jail, as a total from all convictions, precludes the defendant from establishing good moral character under 8 USC §1101(f). *In re Valdovinos* (BIA 1982) 18 I&N 343. See §48.7.
- If the person is held in custody for a few days and the charges are dismissed or the person is acquitted, the time in jail does not count as part of the 180 days, because it was not served "as a result of conviction." 8 USC §1101(f)(7). In fact, anyone trying to avoid the 180 days who has served significant pretrial time might waive credit for that time as time served in an attempt to lower the total below 180 days actual custody "as a result of conviction." A pardon should erase the effect of time served for that conviction. *In re H.* (BIA 1956) 7 I&N 249. For further discussion of showing good moral character, see §48.8. Pardons are discussed in §§39.19–39.20. Expungements are discussed in §§39.13, 39.18. Their immigration effects are discussed in §§48.14, 48.29.

Bar to restriction of removal. Restriction of removal, like political asylum, is available to some noncitizens who face death threats and similar perils if deported to their home countries. However, an applicant who has been convicted of a particularly serious crime or who the INS has reason to believe committed a serious nonpolitical crime outside the United States is ineligible. 8 USC §1231(b)(3)(B). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides that every conviction for an aggravated felony for which a sentence of at least five years imprisonment was imposed is a particularly serious crime that bars relief. 8 USC §1231(b)(3)(B); 8 CFR §208.16; *In re S-S-* (BIA 1999) Int Dec 3374. If the sentence for an aggravated felony is less than five years, discretion must be exercised to determine if the crime is particularly serious, based on a review of the nature of the conviction, the sentence imposed, and the individual facts and circumstances surrounding the actual offense. 8 CFR §208.16.

§48.11 I. 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 a discretionary 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). Now that JRADs have been abolished, it is an open question what the proper remedy would be for a defendant whose counsel rendered ineffective assistance by failing to request a JRAD at sentencing. One possibility is for

the court to grant a JRAD nunc pro tunc dated before November 29, 1990. Another possibility would be to vacate the conviction entirely. See *People v Barocio* (1989) 216 CA3d 99, 264 CR 573. The constitutional right to effective assistance of counsel requires that the defendant should be placed in the same position he or she would have occupied if the error had not been committed. See *Castillo-Perez v INS* (9th Cir 2000) 212 F3d 518.

§48.12 J. 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 persons 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"; see §48.14);
- Pen C §1203.4a (vacation of judgment and dismissal of accusation for misdemeanant not granted probation, often referred to as "expungement"; see §48.14);
- 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); and
- 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 varies. (State relief is discussed in chap 39.)

An executive pardon will eliminate a conviction of one or more crimes involving moral turpitude, an aggravated felony conviction, or a conviction of high speed flight from an immigration checkpoint as grounds of deportation, but not any controlled substances conviction. 8 USC §1227(a)(2)(A)(v).

§48.13 1. Vacating the Conviction

Vacating the conviction on a ground of legal invalidity will eliminate all immigration effects that flow from the conviction itself. See, *e.g., Wiedersperg v INS* (9th Cir 1990) 896 F2d 1179 (postconviction writ vacating criminal conviction entitled alien to reopen deportation proceeding even after he had been deported). Direct appeal, habeas corpus, coram nobis, and motions to withdraw the plea or vacate the conviction will have this effect. *In re Sirhan* (BIA 1970) 13 I&N 592; *In re Kaneda* (BIA 1979) 16 I&N 677.

Vacating the judgment will also eliminate the effect of any sentence or imprisonment resulting from the conviction. Moreover, a petition for extraordinary writ may be brought simply for purposes of vacating the original sentencing

and obtaining a fresh sentencing hearing. A new sentence imposed by the judge will be the one considered by the immigration authorities, even if the defendant has already completed serving the original sentence. *In re Martin* (BIA 1982) 18 I&N 226 (correction of illegal sentence); *In re H.* (BIA 1961) 9 I&N 380 (new trial and sentence); *In re J.* (BIA 1956) 6 I&N 562 (commutation).

In order to be effective, however, the court must vacate the conviction on some ground of legal invalidity—constitutional or statutory. If the court vacates the conviction purely on humanitarian or discretionary grounds, the INS will not regard the conviction as eliminated for immigration purposes. See *Beltran-Leon v INS* (9th Cir 1998) 134 F3d 1379. On the other hand, a sentence vacated on any ground at all, even on discretionary grounds, is eliminated for immigration purposes. *In re Song* (BIA 2001) 23 Int Dec 173.

§48.14 2. Expungement (Pen C §1203.4) and Other Forms of State Rehabilitative Relief

Diversion under Pen C §§1000–1000.5, now called "deferred entry of judgment," requires entry of a guilty plea, and thus constitutes a conviction under current immigration law. 8 USC §1101(a)(48)(A); *In re Punu* (BIA 1998) Int Dec 3364. Expungements under state rehabilitative statutes such as Pen C §1203.4 no longer eliminate the immigration consequences of most criminal convictions. *In re Roldan* (BIA 1999) Int Dec 3377; *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771.

A state drug conviction of the type that would be amenable to expungement under the Federal First Offender Act (FFOA) (18 USC §3607) 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. *Garberding v INS* (9th Cir 1994) 30 F3d 1187, followed by the Board of Immigration Appeals (BIA) in *In re Manrique* (BIA 1995) Int Dec 3250. A conviction for a first offense of simple possession of any controlled substance is not a "conviction" for immigration purposes if it has been subject to rehabilitative treatment, such as successful completion of diversion under Pen C §1000 or dismissal of charges under Pen C §1203.4. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 (state offense that could have been treated under FFOA if the case had been brought in federal court does not trigger adverse immigration consequences if same kind of state relief was granted) (partially overruling *In re Roldan* (BIA 1999) Int Dec 3377). This rule also applies to conviction of a first offense less serious than simple possession of a drug. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132 (conviction of possession of paraphernalia eliminated by expungement).

The court's reasoning in *Cardenas-Uriarte, supra,* could be applied to any first drug offense that is (a) more minor than simple possession, and (b) not forbidden under federal law. This would include using or being under the influence of a controlled substance (Health & S C §11550), driving under the influence of drugs (Veh C §23152(a)), being under the influence of drugs in public (Pen C §647(f)— drugs), visiting a place where drugs are being used (Health & S C §11365), possession of a hypodermic needle (Bus & P C §4140), and various prescription violations so long as they do not involve trafficking.

▶ **Note:** Since various forms of state rehabilitative relief are basically similar to

FFOA treatment under 18 USC §3607, any of the following types of postconviction relief will have the same beneficial effects as an expungement under Pen C §1203.4(a) to eliminate convictions of this limited list of minor first-offense controlled substances offenses: deferred entry of judgment under Pen C §1000; Proposition 36 dismissal under Pen C §1210.1(d); and expungements of youthful offenders' convictions for honorable CYA completion under Welf & I C §§1179, 1772. See *Dillingham v INS* (9th Cir 2001) 267 F3d 996.

§48.15 3. Other Postconviction Relief

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., In re 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)), it may still be able to use the records. See *In re 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 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. *In re Martin* (BIA 1982) 18 I&N 226 (correction); *In re 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, *e.g.*, an applicant for an amnesty or Family Unity program, or Temporary Protected Status. See §§48.58, 48.62. Also, a noncitizen is eligible for the petty-offense exception to the moral turpitude ground of inadmissibility only if the conviction is a misdemeanor. See §48.39.

When judgment is vacated, *e.g.*, on a writ of error coram nobis (see §35.38) or habeas corpus (see §35.38), even a drug conviction has been held erased. *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); *In re 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 Superior Court* (Zamudio) (2000) 23 C4th 183, 96 CR2d 463 (failure to advise defendant of potential exclusion consequence requires vacation of plea where prejudice is shown). For extensive discussion of obtaining California postconviction relief for immigrants, see Tooby, California Post-Convic-

tion Relief for Immigrants (2001); Brady, California Criminal Law and Immigration, chap 8 (2002).

§48.16 4. Responsibilities of Original Counsel When Client Seeks Postconviction Relief

Original counsel is free to assist the client in obtaining postconviction relief absent an active conflict of interest. For example, counsel may assist the client to obtain an expungement, writ of coram nobis, order vacating the conviction, pardon, and similar relief as long as the grounds for relief do not include an allegation that the original counsel rendered ineffective assistance of counsel.

If a potential ineffective assistance claim is present, however, counsel should declare a conflict of interest and refer the client to independent counsel, *i.e.*, counsel who is not employed by the same law office as the original counsel. *Cuyler v Sullivan* (1980) 446 US 335, 64 L Ed 2d 333, 100 S Ct 1708; *U.S. v Miskinis* (9th Cir 1992) 966 F2d 1263; *People v Bailey* (1992) 9 CA4th 1252, 12 CR2d 339.

New and old counsel share a common professional obligation to act in their mutual client's best interests. Original counsel has a legal duty to cooperate with successor counsel and promptly return the client's papers (*i.e.*, the entire case file) on termination of the representation. The original client file, including every piece of paper, investigative report, and item of work product, physically belongs to the client and must be turned over to the client on request. Cal Rules of Prof Cond 3–700(A)(2); *Finch v State Bar* (1981) 28 C3d 659, 665, 170 CR 629 (duty to forward file to client or successor counsel); *Kallen v Delug* (1984) 157 CA3d 940, 950, 203 CR 879; California State Bar Formal Opinion No. 1992–127 (original counsel must turn over entire file (which belongs to client), including attorney's notes, and must answer all oral questions if failure to do so would prejudice client). Absent contrary instructions from the client, counsel must retain the file indefinitely. LA County Bar Ass'n Legal Ethics Committee Formal Opinion No. 420.

Although it is certainly difficult to balance the desire to protect oneself against a finding of ineffective assistance of counsel against the obligation to ensure that the client does not suffer from counsel's mistakes, the better view is that professional integrity and enlightened self-interest combine to motivate counsel to aid the client as much as the truth will allow. Nothing counsel says to aid the client can be used against him or her in a malpractice action. *Smith v Lewis* (1975) 13 C3d 349, 118 CR 621. It is also wise for counsel to attempt to mitigate any damage suffered by the client. Finally, the State Bar has never taken, and presumably never will take, disciplinary action against counsel solely on the basis of a mistake. It is simply not an ethical violation. A candid admission of a mistake, if one has been made, is professionally less damaging, and personally less distasteful, than being cross-examined and having one's credibility assailed by new counsel for a former client.

III. APPLICABLE IMMIGRATION LAW

§48.17 A. Effect of Criminal Record on Immigration

▶ **Note:** See the chart in §48.24 for grounds for deportation, inadmissibility, and preclusion from establishing good moral character.

American immigration law is based on the premise that certain individuals are "undesirables" and should therefore not be admitted or should be expelled from the United States. Under the Immigration and Nationality Act (INA) (8 USC §§1101–1537), certain criminal convictions or criminal behavior result in immigration penalties by constituting a ground of inadmissibility, a ground of deportability, or a bar to establishing good moral character.

Aggravated felony. Conviction of an aggravated felony brings the harshest immigration penalties. See §§48.21, 48.41–48.47 for discussion of penalties. In almost all cases, the noncitizen will be removable from the United States and, significantly, barred from applying for any discretionary waiver of the removal regardless of the equities involved. 8 USC §1228(b)(5). See §48.44 . The person is barred from ever returning legally to the United States, although a waiver is available. An illegal reentry into the United States following conviction of an aggravated felony and removal is a serious and commonly prosecuted federal felony with a potential 20-year prison sentence, under 8 USC §1326(b)(2). Aggravated felony offenses are listed at 8 USC §1101(a)(43) and are discussed at §§48.41–48.47.

▶ **Note:** Since April 1, 1997, removal proceedings provide the mechanism both to keep inadmissible noncitizens out of the United States and to remove those who are deportable. This combines what previously was encompassed by two separate proceedings: exclusion and deportation. 8 USC §1229a.

§48.18 1. Grounds for Inadmissibility

Admission of a noncitizen means the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 USC §1101(a)(13). If a noncitizen is inadmissible, that person cannot enter the United States unless he or she is granted a waiver of the inadmissibility ground. See 8 USC §1182 for grounds of inadmissibility. The grounds for inadmissibility (called grounds of exclusion under pre-1996 law) create a bar to both initial and later admissions to the United States. Even a lawful permanent resident ("green card" holder) attempting to reenter after a trip abroad may be considered inadmissible in some circumstances, *e.g.*, a criminal offense. A noncitizen who manages to enter the United States despite being inadmissible may be charged in removal proceedings as being deportable for having been inadmissible at his or her last admission. 8 USC §1227(a)(1).

Further, a noncitizen who is inadmissible is not eligible for most means of immigration, *i.e.*, acquiring lawful permanent resident status. For example, a noncitizen who marries a United States citizen normally would be able to become a permanent resident based on the marriage. If the noncitizen is inadmissible, however, he or she is barred from permanent residency despite the marriage, unless a waiver of the ground of inadmissibility is legally available and is granted in the INS's discretion. A noncitizen who is inadmissible based on a criminal problem generally is also ineligible to establish good moral character, which is a requirement for naturalized United States citizenship, cancellation of removal for nonpermanent residents, registry, or some forms of voluntary departure in lieu of deportation. See 8 USC §1101(f) and discussion of those forms of relief in §§48.52–48.64.

In sum, one can view the grounds for inadmissibility as the standard for a person attempting to obtain some benefit from immigration authorities. An undocumented person who applies for permanent residency, a person with lawful immigration status who leaves the United States and needs to reenter, and a permanent resident who wishes to become a United States citizen all can be barred by being inadmissible under the crimes-related grounds. However, a noncitizen who has been lawfully admitted to the United States at some point cannot be deported merely for being inadmissible; the person must come within a ground of deportability.

§48.19 2. Grounds for Deportability

The grounds for deportability are the legal basis to remove individuals after they have been admitted into the United States, *i.e.,* the noncitizen was inspected by immigration authorities at a border or border equivalent before entering the country. 8 USC §1101(a)(13) (admission defined). The grounds for deportation (8 USC §1227) are similar but not identical to those for admissibility (8 USC §1182). For example, a noncitizen with one conviction for a crime involving moral turpitude is inadmissible if the sentence was more than six months or carried a potential sentence of more than a year, and is deportable if the maximum sentence was one year or more and the offense occurred within five years after the date of admission. See §48.39. Furthermore, if the noncitizen was not admissible at the time of entry or adjustment of status, based on the grounds of inadmissibility applicable at the time of entry, that noncitizen is deportable. 8 USC §1227(a)(1)(A).

Once noncitizens have been admitted, they can be removed only if they come within one or more grounds of deportability. In contrast, a noncitizen who avoided checkpoints and surreptitiously crossed the border will be removed based on the grounds of inadmissibility. "Admission" for this purpose includes entry based on fraudulent documents if the noncitizen was officially inspected and admitted, as well as the "adjustment of status to permanent residency" (obtaining a green card through processing at an INS office within the United States). Thus noncitizens entering the United States on a valid document, someone else's border crossing card, or a tourist visa obtained through fraud, and noncitizens who became permanent residents through adjustment of status, have all been admitted.

3. Procedures for Determining Admissibility or Deportability

§48.20 a. Removal Proceedings

Removal is the procedure for determining whether an alien who has been admitted to the United States may be removed, or for contesting a denial of admission at the border. 8 USC §1229a. A noncitizen with a criminal record may be brought to a removal proceeding from jail via an immigration hold or detainer; others come under removal proceedings after being caught up in INS raids or denied an affirmative application for lawful status. Once before an immigration judge, a noncitizen may accept removal, contest the charge

of removability, or concede removability but apply for some form of relief from removal.

With two exceptions, only an immigration judge can order removal. The exceptions are:

(1) A federal district court judge can order removal of a noncitizen convicted of certain crimes (8 USC §1228(c)(1); see discussion in §48.8); and

(2) The INS can order removal of a nonpermanent resident who is convicted of an aggravated felony; most forms of relief from removal are not available in this procedure. (8 USC §1228(b)).

Otherwise, a noncitizen who the INS has cause to believe is removable may be brought before an immigration judge for removal proceedings. The INS can, however, pressure the noncitizen to accept "voluntary departure" instead of removal from the United States before the institution of removal proceedings, or the judge may grant voluntary departure after proceedings begin. See 8 USC §1229c.

▶ **Note:** Even a stipulation to deportation or removal as part of a plea bargain in federal or state court is a deportation or removal for purposes of federal prosecution for illegal reentry after conviction of an aggravated felony and deportation or removal. 8 USC §1326(b)(2). See discussion in §48.8.

§48.21 b. Administrative Proceedings for Aggravated Felonies

If convicted of an aggravated felony, a noncitizen who is not a lawful permanent resident is subject to administrative removal proceedings (8 USC §1228), is conclusively presumed to be deportable (8 USC §1228), and is presumed not to have a good moral character. 8 USC §1101(f)(8). The procedures to remove a non-permanent resident convicted of an aggravated felony are meant to be completed, including any administrative appeals, before the non-permanent resident's release from incarceration for the underlying aggravated felony. 8 USC §1228(a)(3)(A).

§48.22 c. Waiver of Deportability and Inadmissibility

Some grounds of inadmissibility and deportability may be waived in certain circumstances at the discretion of an immigration judge or INS 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 ground of inadmissibility. A noncitizen who has been a permanent resident for five years and who has continuously resided in the United States for at least seven years following lawful admission may apply for the discretionary waiver "cancellation of removal" under 8 USC §1229b(a). While this waiver potentially can cure any and all grounds of inadmissibility and deportability, it is not available to a permanent resident convicted of an aggravated felony. See §48.42.

§48.23 4. Bar to 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 United States citizenship and is ineligible for some means of immigration or relief from removal, including cancellation of removal for certain nonpermanent residents, registry, and voluntary departure. See §§48.52–48.64. Good moral character need only be established for a specific amount of time for each benefit, *e.g.*, the five years preceding an application for naturalization to United States citizenship, ten years preceding an application for cancellation of removal on a ground of inadmissibility, and a reasonable period of time for registry. Conviction of an aggravated felony on or after November 29, 1990, or of murder at any time, is a permanent bar to establishing good moral character. Immigration Act of 1990 (Pub L 101–649, §509, 104 Stat 4978).

The bar to establishing good moral character overlaps several grounds for inadmissibility. A noncitizen may not establish good moral character if he or she is inadmissible on grounds, *e.g.*, relating to crimes involving moral turpitude, controlled substances, prostitution, a five-year sentence for two or more convictions, or smuggling of aliens. 8 USC §1101(f).

Other grounds are unique to the good moral character bar and are not grounds of inadmissibility. 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, or nominal sentence that includes good time or work time or other conduct credits that were not actually served. 8 USC §1101(f)(7). (Contrast this with measurement of "sentence imposed" for moral turpitude or some aggravated felony convictions, which depends on the nominal custody ordered by the court and not on time actually spent in jail. See §§48.38–48.40.)

Finally, a noncitizen who is a habitual drunkard, has been convicted 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).

§48.24 B. Chart: Comparing Grounds for Inadmissibility, Deportability, and Bar to Establishing Good Moral Character

This chart, prepared by the Immigrant Legal Resource Center and reproduced with permission, has been updated by the authors.

For explanation of inadmissibility, see §48.18; for deportability, see §48.19; for the bar to establishing good moral character, see §48.23. 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 §48.50.

Offense	*Deportability (8 USC §1227(a))*	*Inadmissibility (8 USC §1182(a))*	*Preclusion From Establishing Good Moral Character (8 USC §1101(f))*
Controlled substances	1 conviction (unless 30 gms. or less of marijuana). 8 USC §1227(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)(B).	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 Inadmissibility. 8 USC §1101(f)(3).
Moral turpitude	2 convictions, not single scheme; or 1 conviction within 5 years after admission with sentence of 1 year or more. 8 USC §1227(a)(2)(A)(i)–(ii).[1]	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 offense with 1-year maximum possible sentence. 8 USC §1182(a)(2)(A)(i)(I)–(II).	Same as Inadmissibility. 8 USC §1101(f)(3).
Prostitution	None.	Engaging in, procuring, supported by prostitution (not customers) within last 10 years. 8 USC §1182(a)(2)(D).	Same as Inadmissibility. 8 USC §1101(f)(3).
Firearms offenses	1 conviction of any offense related to firearm or destructive device. 8 USC §1227(a)(2)(C).[2]	None.	Some can be aggravated felonies.[2]
Sentences	1-year sentence for violent crime, theft, receiving, burglary, document fraud, forgery, perjury, and a few less common offenses is aggravated felony.[1]	5-year total sentence for 2 or more convictions of any kind. 8 USC §1182(a)(2)(B).	Same as Inadmissibility, or physically confined 180 days. 8 USC §1101(f)(3).
Noncitizen smuggling	Before, at time of, or within five years after admission, aiding or encouraging alien to enter U.S. illegally; waiver for some noncitizens. 8 USC §1227(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 Inadmissibility. 8 USC §1101(f)(3).

Offense	*Deportability (8 USC §1227(a))*	*Inadmissibility (8 USC §1182(a))*	*Preclusion From Establishing Good Moral Character (8 USC §1101(f))*
Drug addiction and abuse; Alcoholism	Is or has been after admission a drug addict or abuser. 8 USC §1227(a)(2)(B)(ii).	Is drug addict or abuser 8 USC §1182(a)(1)(A)(iv); is an alcoholic and therefore person with mental or physical defect who poses threat. 8 USC §1182(a)(1)(A)(iii). See requirements for waiver in 8 USC §1182(g).	Habitual drunkard ineligible. 8 USC §1101(f)(1).
Gambling	Gambling offense with 1-year sentence of imprisonment is an aggravated felony. 8 USC §1101(a)(43)(J).	Gambling offense with 1-year sentence of imprisonment is an aggravated felony. 8 USC §1101(a)(43)(J).	Conviction of 2 or more gambling offenses or deriving income from gambling. 8 USC §1101(f)(4)–(5).
False testimony in immigration matter	Falsification of documents or falsely claiming citizenship. 8 USC §1227(a)(3).	Misrepresentation of facts or falsely claiming citizenship. 8 USC §1182(a)(6)(C).	Giving false testimony to obtain benefits under Immigration Act of 1990. 8 USC §1101(f)(6).
Violation of domestic violence order	Enjoined noncitizen who violates temporary restraining order. 8 USC §1227(a)(2)(E).	None.	None.
Aggravated felony	Conviction. 8 USC §1101(a)(43) (definition of aggravated felony), §1227(a)(2)(A)(iii) (deportation ground). See §§48.10, 48.12–48.16, 48.41–48.47.	Aggravated felons are permanently inadmissible; waiver available. 8 USC §1182(a)(9)(A)(ii).	Aggravated felony conviction after November 29, 1990 is permanent bar. 8 USC §1101(f)(8).

[1] Some moral turpitude offenses (*e.g.*, murder and certain offenses with a one-year sentence imposed) are also aggravated felonies. See 8 USC §1101(a)(43)(F)–(G), (P), (R)–(S).

[2] Conviction of trafficking in firearms and certain federal firearms offenses (*e.g.*, ex-felon in possession) are aggravated felonies. 8 USC §1101(a)(43)(C), (E).

C. Convictions and Sentences With Adverse Immigration Consequences

1. Definition of "Conviction" for Immigration Purposes; Record of Conviction

§48.25 a. Definition of Conviction

In many cases, a person must be convicted of an offense to suffer immigration penalties. The Immigration and Nationality Act (INA) defines "conviction" as a formal judgment of guilt, or, when adjudication has been withheld, when an alien has been found or has pleaded guilty or no contest and some form of punishment has been imposed. 8 USC §1101(a)(48)(A). See Brady, California Criminal Law and Immigration, §2.1 (2002). Some dispositions do not constitute convictions for immigration purposes and thereby avoid adverse immigration consequences that flow from convictions. Juvenile dispositions, convictions on direct appeal, and dispositions with no guilty plea do not constitute convictions for immigration purposes. See §§48.27–48.29.

▶ **Note:** Some activities have adverse immigration consequences whether or not a conviction occurs, particularly prostitution, alien smuggling, using false documents (under state or federal law), and drug addiction, abuse, or trafficking. See §48.50. Avoiding or eliminating a conviction may not avert those consequences that do not require a conviction.

§48.26 b. Divisible Statute and the Record of Conviction

A "divisible statute" is a code section whose terms encompass both offenses that have immigration consequences and offenses that do not. For example, Health & S C §11360(a) prohibits both sale and offering to sell controlled substances. Sale of a controlled substance is an aggravated felony, while offering to sell is not. See *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905. See discussion of controlled substances in §§48.30–48.34. Similarly, Pen C §245 includes both assault without a firearm, which is not a basis for deportation on the firearms ground, and assault with a firearm, which is. See discussion of the firearms ground in §§48.35–48.36.

When a conviction under a divisible statute is ambiguous as to whether or not the noncitizen was convicted for violating the section having immigration consequences, immigration and other reviewing authorities will resolve the question using only information contained in the record of conviction. If the record of conviction does not indicate that the offense was one carrying immigration penalties, the authority must decide in favor of the defendant. For discussion of this principle, see *Taylor v U.S.* (1990) 495 US 575, 109 L Ed 2d 607, 110 S Ct 2143 (burglary under federal definition may exclude certain state burglary convictions for federal sentence enhancement purposes; courts look only to the record of conviction to determine elements of conviction). The record of conviction consists of:

- The charging papers (indictment, complaint, information);
- The plea or judgment; and

- Sentencing.

See, *e.g., In re Madrigal-Calvo* (BIA 1996) Int Dec 3274 (transcript of defendant's plea and sentence hearing including admission by defendant is part of record of conviction); *In re Mena* (BIA 1979) 17 I&N 38; *Wadman v INS* (9th Cir 1964) 329 F2d 812, 814 n3.

The record of conviction does not include the:

- Trial record;
- Presentence report;
- Prosecutor's sentencing remarks; or
- Trial judge's opinion about immigration consequences.

See, *e.g., In re Teixeira* (BIA 1996) Int Dec 3273 (police report); *In re Pichardo-Sufren* (BIA 1996) Int Dec 3275; *In re Short* (BIA 1989) 20 I&N 136; *In re Mena, supra; In re Goodalle* (BIA 1967) 12 I&N 106, 107–8; *In re Cassisi* (BIA 1963) 10 I&N 136. Neither does the record of conviction include subsequent testimony by the noncitizen; *e.g.,* deportability on the firearms ground was not shown even when the noncitizen testified in immigration proceedings that the unnamed weapon of which he had possession was a gun. *In re Pichardo, supra.*

▶ **Note:** In some cases, defense attorneys will bargain to substitute a charging document that does not reveal which subsection of the offense was violated. For example, if a complaint charges the entire criminal section, and neither the judgment nor the sentencing record indicates which subsection was violated, a divisible statute will have no immigration consequence.

Some INS offices have asserted that they can go beyond the record of conviction to determine deportability under the domestic violence ground in 8 USC §1227(a)(2)(E). They assert that due to the unusual wording of the deportation ground, the required relationship to the victim, *e.g.,* current or ex-spouse or co-habitant, can be proven by information outside the record. See §§48.48–48.49.

2. Dispositions That May Not Constitute Conviction

§48.27 a. Juvenile Court Dispositions

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

§48.28 b. Appeal of Conviction Not Exhausted

A conviction is not final for immigration purposes unless direct appeals have been waived or exhausted or the appeal period has lapsed. *Pino v Landon* (1955) 349 US 901, 99 L Ed 1239, 75 S Ct 576 (per curiam); *Morales-Alvarado v INS* (9th Cir 1981) 655 F2d 172; *Will v INS* (7th Cir 1971) 447 F2d 529. 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.

Although there is no published precedent, presenting proof that a late appeal was filed by an appellate court has been accepted as evidence that no final conviction exists. But see *In re Polanco* (BIA 1994) Int Dec 3232 (court did

not accept late-filed appeal because of failure to present paperwork and other problems).

§48.29 c. Disposition Without Guilty Plea

A conviction for immigration purposes must have a plea or finding of guilt and some imposition of punishment or restraint. 8 USC §1101(a)(48)(A). Diversions granted in 1996 and earlier involved no plea of guilty or no contest, and thus do not constitute "convictions" for immigration purposes. After January 1, 1997, drug diversion under Pen C §1000 requires a guilty or no contest plea and therefore *does* constitute a conviction for immigration purposes, even after dismissal. 8 USC §1101(a)(48)(A); *In re Punu* (BIA 1998) Int Dec 3364. In most cases, expungement, *e.g.*, under Pen C §1203.4, will *not* eliminate the conviction for immigration purposes. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771.

Even after 1996, however, courts continue to grant diversions with no plea in four circumstances:

(1) When courts are slow to learn of or implement the new procedure;

(2) When the offense occurred in 1996 or earlier, the ex post facto clause requires granting old-style diversion with no guilty plea (see *Collins v Youngblood* (1990) 497 US 37, 111 L Ed 2d 30, 110 S Ct 2715);

(3) When counties exercise their authority under the new diversion law to establish drug courts that can continue to grant old-style diversions with no plea (Pen C §1000.5); and

(4) When diversion programs that pertain to other types of cases, *e.g.*, mentally retarded defendants under Pen C §1001.20, do not require a plea.

▶ **Note:** For diversions granted in 1997 and later, counsel should check the record. If there was a plea, the diversion is a conviction for INS purposes. But if there was no plea, it is not. Dispositions under diversion, deferred adjudication, or first-offender programs in other states must be carefully analyzed to ascertain whether a conviction has occurred.

If the defendant would have been eligible for Federal First Offender Act (FFOA) treatment if prosecuted in federal court, diversion or expungement with a guilty plea does *not* constitute a conviction for immigration purposes. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 (first conviction of simple possession of any drug). See §48.32 for further discussion of this exception.

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; *In re Ozkok* (BIA 1988) 19 I&N 546.

§48.30 3. Offenses Involving Controlled Substances

This section discusses *conviction* of controlled substance offenses. Drug addicts and abusers are deportable and inadmissible, and those who the INS has reason to believe are or were drug traffickers or their assistants are inadmissible, even without a conviction. See §48.50.

▶ **Note:** Arresting agencies must notify the appropriate United States agency when-

ever 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.

§48.31 a. Controlled Substances Grounds of Deportability, Inadmissibility, and Bar to Good Moral Character

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 "relating to" controlled substances, or of attempt or conspiracy to commit such an offense, is inadmissible under 8 USC §1182(a)(2)(A)(i)(II), deportable under 8 USC §1227(a)(2)(B), and barred from establishing good moral character under 8 USC §1101(f). Even conviction of the most minor drug offense, such as presence in a place where drugs are used, will make a person deportable and inadmissible. *In re Hernandez-Ponce* (BIA 1988) 19 I&N 613. Convictions under state or federal law as well as laws of other countries incur these penalties.

Moreover, many drug offenses are classed as aggravated felonies under 8 USC §1101(a)(43)(B), although there are important exceptions. See §48.32 for exceptions. Conviction of an aggravated felony brings additional severe penalties beyond making the person deportable and inadmissible, including subjecting an aggravated felon who reenters the United States after deportation to severe federal criminal sanctions. See §48.33.

§48.32 b. Exceptions: Offenses That Are Not Classed as Controlled Substance Offenses for Immigration Purposes

Some dispositions either are not classed as controlled substance convictions at all for immigration purposes, or are not classed as aggravated felonies.

Specific controlled substance not identified. Controlled substances are defined in 21 USC §802 to include most illegal drugs as well as precursor and "essential" chemicals. The federal and state lists are not the same. California's list prohibits certain drugs that are not on the federal list. Unless the record of conviction specifies a drug that is prohibited by the federal law, the conviction will not trigger deportation. For example, if the record of conviction (consisting of the charging papers, plea or judgment, sentence, and legally defined elements of the offense) refers only to "a controlled substance" without specifying which substance, the conviction does not come within the grounds of deportability or inadmissibility relating to controlled substance convictions, and is not a controlled substance aggravated felony. *In re Paulus* (BIA 1965) 11 I&N 274. For discussion of the record of conviction, see §§48.10, 48.26. Some counsel have bargained for substitute charging papers that do not identify the controlled substance.

Conviction of driving under the influence of drugs, or alcohol and drugs, should not be ruled an offense "relating to a controlled substance" unless a specific controlled substance (that is on the federal list) is identified in the record of conviction, because the charge of driving while impaired may also arise as the result of legal or prescribed drugs. Veh C §23152; *People v Keith*

(1960) 184 CA2d Supp 884, 7 CR 613 (insulin). See Veh C §312 (definition of drug).

Accessory after the fact. A conviction of being an "accessory after the fact" (see 18 USC §3) to a controlled substances offense does not itself constitute a controlled substances offense. *In re Batista-Hernandez* (BIA 1997) Int Dec 3321. The federal offense consists of aiding a criminal to escape arrest, trial, or punishment, and is so similar to the California offense defined in Pen C §32 that the same result should follow for the California offense. In some cases, vigorous negotiation can result in a plea bargain to being an accessory even when the original charge did not involve this act.

A plea to accessory after the fact must carry a sentence of confinement no greater than 364 days of custody, either in state prison or in jail as a condition of probation, in order to avoid being considered an aggravated felony under the obstruction of justice provision. 8 USC §1101(a)(43)(S); *In re Batista-Hernandez* (BIA 1997) Int Dec 3321 (18 USC §3). The Board of Immigration Appeals (BIA) held that conviction of federal misprision of felony is not obstruction of justice. *In re Espinoza* (BIA 1999) Int Dec 3402.

First offense simple possession (or less serious offense) that has received any rehabilitative treatment. Conviction of a first offense of simple possession of any controlled substance is not a "conviction" for immigration purposes if the offense has received any kind of rehabilitative treatment such as deferred adjudication under Pen C §1000 or dismissal of charges under Pen C §1203.4. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728. A first offense that is less serious than simple possession and that is not analogous to a federal felony also comes within this rule. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132 (expungement of conviction for possession of paraphernalia). The court in *Lujan-Armendariz* found that the law "strongly suggests" that no conviction exists during the probationary period before the expungement order is obtained or diversion is successfully completed. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, 746 n28.

Soliciting or offering to commit any drug offense. There is a strong argument, but no case on point, that a conviction of *offering* to sell, transport, or deliver a drug is not an offense "relating to" controlled substances under the reasoning of *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, which held that offering to commit an offense is not an aggravated felony. See §48.33. Under current authority, a conviction of offering to sell, transport, or distribute, while not an aggravated felony, will be held a deportable offense, but immigration practitioners at least have an opportunity to argue the contrary. Offering to commit an offense, including a drug offense, is not an aggravated felony, under *U.S. v Rivera-Sanchez, supra*. A conviction for offering to commit a drug transaction, however, will establish inadmissibility under the grounds that the noncitizen is a person who authorities have reason to believe is or has assisted a drug trafficker. See 8 USC 1182(a)(2)(C) and discussion in §48.50.

Exception for one conviction of simple possession of 30 grams or less of marijuana. Conviction for this offense is not a basis for deportability or a bar to establishing good moral character, and is subject to discretionary waiver of inadmissibility under 8 USC §1182(h) if the person otherwise qualifies for

the waiver. The plea or sentence transcript should contain a stipulation or finding that the quantity was 30 grams or less.

§48.33 c. Which Drug Offenses Are Aggravated Felonies

▶ **Note:** The strategies outlined in §§48.32 and 48.34 to prevent classification as a controlled substance offense also prevent classification as a controlled substance aggravated felony.

The definition of aggravated felonies includes "illicit trafficking in a controlled substance. . . including a drug trafficking crime [defined under federal statute]." 8 USC §1101(a)(43)(B). An aggravated felony subjects the person convicted of it to the penalties and restricted rights discussed in §48.44. A drug-trafficking offense, or attempt or conspiracy to commit such an offense (8 USC §1101(a)(43)(U)), will be considered an aggravated felony if it meets either of the following two tests:

- Any felony offense that is generally considered to be trafficking (*e.g.,* sale or possession for sale) is a drug trafficking aggravated felony; or
- Conviction of any offense that is "punishable" under major federal drug statutes listed in 18 USC §924(c)(2), with qualifications regarding felony/misdemeanor distinction discussed below.

The more complex test is the second, *i.e.,* whether a state offense is directly analogous to one listed in three major federal drug statutes cited in 18 USC §924(c)(2), which include the Controlled Substances Import and Export Act (21 USC §§801–904), the Controlled Substances Import and Export Act (21 USC §§951–971), and the Maritime Drug Law Enforcement Act (46 USC App §§1901–1904).

As discussed below, although attempt or conspiracy to commit a drug-trafficking offense is an aggravated felony, solicitation or offering to commit the offense is not included.

Offer to commit an offense: the *Rivera-Sanchez* rule. In a highly significant unanimous en banc decision, the Ninth Circuit ruled that *offering* to commit an offense is not an aggravated felony, and that therefore parts of Health & S C §11360(a) and similar offenses do not constitute a controlled-substance aggravated felony under 8 USC §1101(a)(43)(B). *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, 909. The court held that offering to commit an offense was not included in the statutory definition of aggravated felony, which cites only the principal offense, conspiracy, and attempt. 8 USC §1101(a)(48)(B). A noncitizen who is convicted of offering to sell, transport, or distribute a drug under Health & S C §11360(a), or who has a "record of conviction" (charging papers, plea or judgment, sentence, legally defined elements of the offense) that does not indicate whether the plea was to the principal act or to offering, has not been convicted of an aggravated felony. For further discussion of the record of conviction, see §§48.10, 48.26. The *Rivera-Sanchez* court's reasoning applies equally to Health & S C §11352(a); the court noted that the two statutes were nearly identical and overruled prior cases finding that conviction under §11352(a) necessarily constitutes an aggravated felony. See also Health & S C §11379(a). Note that offenses such as possession for sale under Health &

S C §11351 do not also penalize offering, and therefore would not come within the *Rivera-Sanchez* rule.

▶ **Note:** The reasoning and underlying precedent cited in *Rivera-Sanchez* strongly support a finding that conviction of offering to commit a drug offense should not even be a basis for deportability or inadmissibility for a drug conviction. See *Coronado-Durazo v INS* (9th Cir 1997) 123 F3d 1322, cited in *Rivera-Sanchez,* holding that solicitation of a controlled substance offense does not cause deportability as a drug conviction. See §48.32. A conviction for offering to commit a drug transaction, however, will establish inadmissibility on the grounds that the noncitizen is a person who authorities have reason to believe is or has assisted a drug trafficker. See 8 USC 1182(a)(2)(C) and discussion in §48.50.

Simple possession offenses and felony/misdemeanor distinction. An existing state *felony* conviction for a first offense of simple possession of a controlled substance is considered a drug-trafficking aggravated felony in federal criminal prosecutions for illegal reentry after deportation under 8 USC §1326(b)(2). *U.S. v Ibarra-Galindo* (9th Cir 2000) 206 F3d 1337 (even though such an offense would be a misdemeanor under federal law, the fact that it is a state felony makes it an aggravated felony conviction when the noncitizen is being tried for illegal reentry). But the current rule is that the same offense is *not* an aggravated felony in immigration proceedings, as long as the substance involved was not crack cocaine or flunitrazepam (a date-rape drug). *In re K-V-D-* (BIA 1999) Int Dec 3422; *In re L-G* (BIA 1994) Int Dec 3234 (because first offense simple possession of any substance but cocaine base and flunitrazepam is a misdemeanor under federal law, it will not be considered an aggravated felony in immigration proceedings, despite the state felony classification). Note, however, that the Ninth Circuit could conceivably overturn the Board of Immigration Appeals's (BIA) more liberal rule on immigration proceedings and hold that a state felony conviction for first offense simple possession is an aggravated felony even in immigration proceedings.

▶ **Note:** Any state rehabilitative treatment will eliminate for all purposes a first conviction for simple possession under state law. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 (state offense that could have been treated under 18 USC §3607, the Federal First Offender Act, if the case had been brought in federal court has no legal effect if same kind of state relief was granted). See §48.13. Thus, for example, if a noncitizen expunges his first conviction for possession of heroin and then receives a second felony conviction for simple possession of heroin, the latter should become his "first" simple possession conviction in the aggravated felony analysis. That conviction is treated as an aggravated felony in federal criminal proceedings but not in immigration court.

A second conviction for possession has been held to be an aggravated felony even though it might be a state-law misdemeanor, because it can be punished as a felony under federal law. 21 USC §844(a); *U.S. v Garcia-Olmedo* (9th Cir 1997) 112 F3d 399; *U.S. v Zarate-Martinez* (9th Cir 1998) 133 F3d 1194.

Minor drug offenses without federal analogues; transportation. Many minor drug offenses, *e.g.,* Health & S C §11550 (under the influence) and Pen C §647(f) (under the influence), do not involve trafficking and also have

no federal analogue, and thus should not be held to be aggravated felonies. Further, conviction of a first offense less serious than simple possession can be eliminated by any state rehabilitative relief. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132. Transportation for personal use (*e.g.*, Health & S C §11352(a)) has no exact federal analogue and would not generally be considered to be trafficking, so there is a strong argument that it should not be a controlled substance aggravated felony. See, *e.g.*, *U.S. v Casarez-Bravo* (9th Cir 1999) 181 F3d 1074. While transportation for personal use is not a guaranteed "safe" plea, it is far better than a plea to straight sale or possession for sale. Transportation is, however, a basis for deportation as an offense "relating to" drugs under 8 USC §1227(a)(2)(B). See §48.31. Offering to transport is not an aggravated felony and arguably is not a basis for deportation, under *Rivera-Sanchez*.

§48.34 d. Strategy

Counsel should avoid conviction of any offense—even a minor one—related to controlled substances. If that is not possible, the following strategies provide some protection under current law, but this area of law changes rapidly and often against the interests of the noncitizen.

Counsel should obtain deferred adjudication, an expungement, or other rehabilitative relief for a first conviction for simple possession of any controlled substance, or a first conviction for a drug offense less serious than simple possession. The conviction will be eliminated for all immigration purposes. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728; *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132. Make sure this actually is the first conviction, in any jurisdiction.

Counsel should negotiate a conviction of accessory after the fact for a controlled substance offense, with less than a one-year sentence imposed. *In re Batista-Hernandez* (BIA 1997) Int Dec 3321. Alternatively, ensure that the record of conviction (charging papers, plea or judgment, sentence, definition of the offense) does not indicate the specific controlled substance involved. *In re Paulus* (BIA 1965) 11 I&N 274. Either strategy will avoid deportability, inadmissibility, and aggravated felon status under the controlled substance provisions.

Conviction under Health & S C §11352(a), §11360(a), or §11379(a) is not an aggravated felony if the conviction is for offering to commit the act, or if the record of conviction fails to establish whether the offense involved offering to commit the act versus committing the act itself. *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905. Arguably, this is not a controlled substance conviction that will cause deportation.

Some dispositions do not constitute a conviction for immigration purposes. See §§48.27–48.29. A conviction that is up on direct appeal is not a conviction for immigration purposes. Removal proceedings based on the conviction cannot be brought until direct appeal is waived or exhausted. A disposition in juvenile proceedings is not a conviction for immigration purposes.

In juvenile court, counsel should seek to obtain a finding of possession only, not of sale or possession for sale, because sale or possession for sale might give rise to a "reason to believe" that the juvenile is or was a drug trafficker even though no conviction exists for immigration purpose, thereby making the juvenile inadmissible. Old-style diversion (with no guilty plea) is not a conviction, but a deferred adjudication where a guilty plea was taken

is a conviction for immigration purposes (unless it involves the person's first-ever conviction for simple possession of a controlled substance).

If a small amount of marijuana is involved, counsel should obtain a stipulation on the record that it was less than 30 grams.

4. Offenses Involving Firearms or Destructive Devices

§48.35 a. Firearms Ground of Deportability; Definition of Firearm and Destructive Device

Conviction of almost any offense containing an element relating to firearms is a basis for deportability. 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 §1227(a)(2)(C). There is no corresponding ground of inadmissibility.

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. Conviction of conspiracy or attempt to commit a firearms offense triggers deportability under 8 USC §1227(a)(2), regardless of the date of the conviction. *In re Saint John* (BIA 1996) Int Dec 3295.

Thus conviction of even minor firearms offenses that do not involve violent behavior, such as possessing an unregistered firearm, are a basis for deportability. Firearms offenses that do involve violence may have immigration consequences beyond the firearms ground of deportability. For example, an assault with intent to commit great bodily harm is a crime involving moral turpitude. See discussion in §§48.38–48.40. A "crime of violence" with a one-year sentence imposed is an aggravated felony. See discussion in §48.47.

Finally, some firearms offenses, notably trafficking in firearms and ex-felon in possession of a firearm, are also firearms aggravated felonies. See discussion in §48.36. Alternative pleas that avoid immigration consequences are discussed in §48.37.

§48.36 b. Firearms Offenses That 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), a host of specific federal offenses concerning firearms and destructive devices are aggravated felonies:

- 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 United States 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) (possession of firearms or ammunition by felon, fugitive, addict, mental defective, committee, alien unlawfully in United States, dishonorable dischargee, or person who renounced United States citizenship);
- 18 USC §922(j) (receiving stolen arms or ammunition);
- 18 USC §922(n) (shipping or receipt of 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) (shipping or receipt of firearm or ammunition with intent to use in commission of felony); and
- 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 (*e.g.,* failure to pay firearms tax, possession of unregistered firearm or one with serial number altered).

For a state offense to be held analogous to one of the listed federal offenses and therefore to be held to be an aggravated felony, the offense must have exactly the same substantive elements as the federal offense (or, if the state offense is broader, the official record of conviction must demonstrate that the conviction at issue was for an offense described in the federal law). *U.S. v Sandoval-Barajas* (9th Cir 2000) 206 F3d 853 (Washington state offense, possession of a firearm by a noncitizen, is not an aggravated felony because it is broader than cited federal offense, possession of a firearm by noncitizen in unlawful status). See discussion of record of conviction in §§48.10–48.26. The state offense, however, need not include federal jurisdictional elements in the analogous federal offense, *e.g.,* crossing state lines. *U.S. v Castillo-Rivera* (9th Cir 2001) 244 F3d 1020 (despite lack of interstate commerce element, felon in possession of a firearm under Pen C §12021 is sufficiently similar to 18 USC §922(g)(1) to be an aggravated felony under U.S. Sentencing Guidelines); *In re Vasquez-Muniz* (BIA 2002) Int Dec 3461 (following *Castillo-Rivera*).

Other than ex-felon in possession of a firearm, most common California firearms offenses do not appear to have an exact federal substantative analogue. Some less common California offenses, such as possession of a machine gun, may have a federal analogue. See discussion in Brady, California Criminal Law and Immigration §9.18 (2002). Counsel should review the listed federal offenses to identify whether the state offense charged may be an aggravated felony.

§48.37 c. Strategy

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.

In re Rodriguez-Cortes (BIA 1992) Int Dec 3189 (defendant convicted of second degree attempted murder under Pen C §§187(a) and 664 with sentence enhancement under Pen C §12022(a) for use of firearm found not deportable under firearms ground).

▶ **Note:** A crime of violence with a one-year sentence imposed is an aggravated felony under 8 USC §1101(a)(43)(F). See §48.47. Offenses involving intent to cause great bodily harm will be held to be crimes involving moral turpitude, which have their own immigration effect (see §§48.38–48.40), but generally have less harmful immigration consequences than do 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. *In re Perez-Contreras* (BIA 1992) Int Dec 3194 (conviction under Washington statute of "criminal negligence causing. . . substantial. . . pain" not firearms offense, although record showed that defendant shot victim). 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 (charge, plea, verdict, sentence) is cleared of any reference to firearm use. *In re Madrigal-Calvo* (BIA 1996) Int Dec 3274; *In re Teixeira* (BIA 1996) Int Dec 3273; *In re Pichardo-Sufren* (BIA 1996) Int Dec 3275.

Expungement under Pen C §1203.4 does not eliminate a firearms conviction for immigration purposes. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. Vacation of judgment for cause does.

Conviction for accessory after the fact or solicitation to commit a firearm offense should not be considered a firearms offense. See §48.34.

Some relief from removal is available to qualified persons despite being deportable under the firearms ground. A person who could immigrate through a relative's or employer's visa petition is still eligible to apply for an adjustment of status or, possibly, immigration through consular processing. *In re Gabryelsky* (BIA 1993) Int Dec 3213; *In re Rainford* (BIA 1992) Int Dec 3191.

For removal proceedings filed on or after April 1, 1997, the immigration court has discretionary power to grant cancellation of removal to permanent residents under 8 USC §1229b if the conditions are met. See §48.55. Cancellation is barred if there is an aggravated felony conviction. For more information on firearms convictions and strategies, see Brady, California Criminal Law and Immigration §§6.1, 9.18, 11.10 (2002).

5. Crime Involving Moral Turpitude

§48.38 a. Definition

Many offenses, both minor and serious, are held to be crimes involving moral turpitude and carry serious immigration consequences concerning inadmissibility (8 USC §1182(a)(2)(A)), deportability (8 USC §1227(a)(2)(A)(i)), and establishing good moral character (8 USC §1101(f)(3)). See §48.39. The term "crime of moral turpitude" (sometimes called a "turpitudinous" crime) is defined by federal immigration law, and is different from the same term as used in California

criminal law to determine whether a witness may be impeached with a prior conviction.

▶ **Note:** This section discusses how to determine whether an offense involves moral turpitude. Whether a moral turpitude conviction will cause deportability or inadmissibility depends on the number of moral turpitude convictions, the actual and potential sentence, and the date of commission or conviction of the offense relative to the person's admission to the United States. See §48.39.

The term "crime involving moral turpitude" is commonly described in case law by vague terms such as "an act of baseness, vileness, or depravity in the private and social duties owed to society." The definition does not depend on whether the offense is classified as a misdemeanor or felony or on the severity of the punishment. (However, whether a moral turpitude conviction will bring immigration consequences may depend on such factors; see §48.39.) Murder, rape, voluntary manslaughter, robbery, burglary, theft (grand or petty), arson, aggravated forms of assault, and forgery have consistently been held to involve moral turpitude. On the other hand, involuntary manslaughter, simple assault or battery, 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 (2002).

A crime is decided to be one of moral turpitude by case law of the Board of Immigration Appeals (BIA) and United States Courts of Appeals. Counsel should consult immigration texts to ascertain whether a particular crime constitutes a crime of moral turpitude. See §48.40 for a list of publications.

Divisible statutes. Whether an offense is considered turpitudinous depends on the statutory 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 the turpitudinous portion of the divisible statute, immigration and reviewing courts must rule in favor of the noncitizen. *Hamdan v INS* (5th Cir 1996) 98 F3d 183 (Louisiana simple kidnap not crime involving moral turpitude because it covered parental nonransom kidnaps, was broader than federal kidnap definition, and record of conviction did not show federal elements); *In re 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 the conviction was under the portion of the statute involving moral turpitude. See §48.26 for more information on divisible statutes. See §48.40 for strategy.

§48.39 b. Consequences of Conviction or Admission of Crime Involving Moral Turpitude; Remedies

Deportability. A noncitizen is deportable under 8 USC §1227(a)(2)(A) if after admission to the United States he or she is convicted of:

- Two crimes involving moral turpitude (CMT) not arising from a single scheme of misconduct (8 USC §1227(a)(2)(A)(ii)) (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 "admission" (defined in 8 USC §1101(a)(13)(A)) into the United States and the possible sentence was one year or more. 8 USC §1227(a)(2)(A)(i).

▶ **Note:** The definition of the one-CMT deportation ground is more favorable for deportation proceedings begun before April 1, 1997. See Brady, California Criminal Law and Immigation, Update §4.5 (2002).

Because the one CMT must have been committed after admission to trigger deportability, a person who committed the CMT before admission (and was admitted because the offense was waived or was not a basis for inadmissibility at the time) is not deportable.

Inadmissibility; petty-offense exception. A noncitizen is inadmissible if convicted either before or after admission to the United States of one crime involving moral turpitude (8 USC §1182(a)(2)(A)(i)), unless the event comes within the petty-offense or youthful-offender exception. 8 USC §1182(a)(2)(A)(ii).

Under the petty-offense exception, a noncitizen is not inadmissible if he or she committed only one crime involving moral turpitude, the sentence actually imposed was six months or less, and the maximum possible sentence for the offense was no more than one year. 8 USC §1182(a)(2)(A)(ii)(II). A previous moral turpitude conviction, even if vacated, will destroy eligibility for the exception. *In re S.R.* (BIA 1957) 7 I&N 495. Because the offense cannot have a maximum penalty of more than one year, a person convicted of a felony, with imposition of sentence suspended, is *not* eligible for the petty-offense exception and will be found inadmissible. That person will be eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17, because the offense then has a maximum sentence of only one year. *La Farga v INS* (9th Cir 1999) 170 F3d 1213. To qualify for the petty offense exception, the sentence imposed must be no greater than six months' incarceration, either as part of a judgment (even if execution is suspended) or as a condition of probation. This refers to the nominal sentence ordered by the court, rather than the actual time spent incarcerated. See §48.10.

The youthful-offender exception to the CMT ground of inadmissibility benefits youths who were tried as adults. (Because a juvenile delinquency disposition is not a conviction of a crime, youths in delinquency proceedings do not need this exception.) It provides that a person who committed one moral turpitude offense while under the age of 18 is not inadmissible if the act and 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; admission; expungement. A plea of guilty or no contest results in a conviction, which triggers inadmissibility. A formal admission of a crime involving moral turpitude, even without a conviction, is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I). It might appear that a plea of guilty, as an admission, would make a defendant inadmissible even if the conviction were eliminated. However, if a court has disposed of charges in a way that does not amount to a conviction (*e.g.*, dismissing the charges or vacating the conviction), the INS generally will accept this order as binding both on the admission (plea) and the conviction. See *In re E.V.*

(BIA 1953) 5 I&N 194. Moreover, the INS faces a host of technical difficulties in attempting to remove someone on the basis of an admission as opposed to a conviction. See Kesselbrenner & Rosenberg, Immigration Law and Crimes §3.2 (1984).

An expungement under Pen C §1203.4 will not eliminate the immigration effects of a conviction of a moral turpitude offense. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. Vacation of judgment for cause will.

§48.40 c. Strategy

Counsel should consult immigration texts to ascertain whether or not 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* (2002) (annotated chart of 70 common violations of the California Penal Code). For federal and out-of-state convictions, see Kesselbrenner & Rosenberg, Immigration Law and Crimes, App E (1984); Tooby, Criminal Defense of Immigrants, Appendix C (2001) (comprehensive list including federal and out-of-state convictions) and Tooby, Crimes of Moral Turpitude (2002). See also 23 ALR Fed 480 (what constitutes "crime involving moral turpitude").

Counsel must gather and review a defendant's entire criminal history in the United States and other countries before setting a disposition goal. A prior conviction of a crime involving moral turpitude (CMT) from another jurisdiction will be joined with the instant conviction by the INS when it is calculating whether the person is deportable or inadmissible. Counsel should gather and review information concerning the number of moral turpitude convictions, the actual and potential sentences, and the dates of commission or conviction of the offense.

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 portion of the statute involving moral turpitude. In some cases, bargaining for a substitute charge may be necessary.

Counsel should remember that a formal admission of a crime involving moral turpitude, even without a conviction, is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I).

When considering a plea to a moral turpitude offense, counsel should carefully review 8 USC §1101(a)(43) and the discussion in §§48.41–48.47 to determine whether the offense might also be an aggravated felony. For example, conviction for theft, burglary, a crime of violence, perjury, bribery, or forgery is an aggravated felony *if* a one-year sentence is imposed. See §48.46. Conviction for rape, murder, or sexual abuse of a minor is an aggravated felony regardless of sentence.

6. Aggravated Felonies

§48.41 a. Definition of Aggravated Felony: Overview

Congress continues to expand the list of offenses that qualify as "aggravated felonies," some of which are neither "aggravated" nor "felonies." The current

definition comprises 21 paragraphs, some containing many offenses, in 8 USC §1101(a)(43). The statutory definition of aggravated felony includes:

- "Murder" (in the authors' opinion, this includes first and second degree murder, but not manslaughter) (8 USC §1101(a)(43)(A));
- Rape (8 USC §1101(a)(43)(A));
- Sexual abuse of a minor (8 USC §1101(a)(43)(A); note that statutory rape may be included in this definition, see discussion in §48.45);
- Trafficking in drugs (any offense) plus certain federal drug offenses and state statutes that punish exactly the same act (state "analogues") (8 USC §1101(a)(43)(B); see discussion in §§48.30–48.34);
- Trafficking in firearms, plus several federal crimes relating to firearms or destructive devices (*e.g.*, bombs, grenades), including felon in possession of a firearm (8 USC §1101(a)(43)(C), (E); see §§48.35–48.37);
- 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 $10,000, or an offense that involves fraud or deceit, or certain tax offenses, where the loss to the victim or government exceeded $10,000 (8 USC §1101(a)(43)(D));
- A "crime of violence" resulting in a sentence imposed of one year or more (counsel should obtain suspended imposition of sentence, and a sentence or custody as a condition of probation of 364 days or less) (8 USC §1101(a)(43)(F); see §48.47);
- Theft, receipt of stolen property, or burglary if the sentence imposed is one year or more (8 USC §1101(a)(43)(G); see §48.46);
- Alien smuggling, transporting, or harboring, except for immediate family (failure to appear to serve a sentence if the underlying offense is punishable by a term of five years or more, or to face charges if the underlying sentence is punishable by a term of two years or more (8 USC §1101(a)(43)(N));
- Trafficking in false documents if the sentence imposed is at least one year (note that Proposition 187 (Pen C §113) made document fraud a state criminal offense with a mandatory sentence of five years) (8 USC §1101(a)(43)(P));
- Perjury, bribery, forgery, or obstruction of justice if the sentence imposed is one year or more (8 USC §1101(a)(43)(S));
- Failure to appear to serve a sentence if the underlying offense is punishable by a term of five years or more, or to face charges if the underlying sentence is punishable by a term of two years or more (8 USC §1101(a)(43)(Q), (T)); and
- Various offenses, such as demand for ransom, child pornography, and RICO offenses punishable with a one-year sentence; running a prostitution business; slavery; offenses relating to national defense, sabotage, or treason; failure to appear to serve a sentence if the underlying offense is punishable by a term of five years or more; and failure to appear to answer a felony charge with a maximum sentence of two years or more. 8 USC §1101(a)(43).

These types of offenses are included whether in violation of federal or state law (*In re Barrett* (BIA 1990) Int Dec 3131), or in violation of foreign law

if release from the resulting imprisonment occurred within the previous 15 years. See 8 USC §1101(a)(43) (paragraph following (U)).

▶ **Note:** The definition of aggravated felonies is a complex and quickly changing area of the law with harsh consequences. For more detailed discussion, see texts such as Brady, California Criminal Law and Immigration, Chapter 9 (2002); Kesselbrenner & Rosenberg, Immigration Law and Crimes (1984); Tooby, Criminal Defense of Immigrants (2002).

§48.42 b. Sentence Requirements for Some Aggravated Felonies

Many generic aggravated felony offenses require that a sentence of one year or more must be imposed before the offense will be considered an aggravated felony: a crime of violence (8 USC §1101(a)(43)(F)); theft, receiving stolen property, or burglary (8 USC §1101(a)(43)(G)); passport or document forgery (8 USC §1101(a)(43)(P)); commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered (8 USC §1101(a)(43)(R)); and obstruction of justice, perjury, subornation of perjury, or bribery of a witness (8 USC §1101(a)(43)(S)). For this purpose, the offense is an aggravated felony if (a) a sentence of one year or more is imposed, even if execution is suspended, or (b) the court ordered 365 days or more of custody as a condition of probation. 8 USC §1101(a)(48)(B).

Strategy. To avoid an aggravated felony in this context, counsel should obtain "imposition of sentence suspended" and a maximum custody, as a condition of probation, of no more than 364 days. Even if several consecutive 364-day terms of custody as a condition of probation are imposed, no single offense is punished by one year or more, and therefore none of the offenses constitutes an aggravated felony. See further discussion of sentencing in §4.10.

§48.43 c. Analysis of State Offenses as Aggravated Felonies

The aggravated felony definition provides in the unnumbered paragraph immediately following 8 USC §1101(a)(43)(U) that "[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law." Courts employ federal definitions of aggravated felony offenses, and a state offense that does not sufficiently match the federal definition of the offense will not be held to be an aggravated felony.

▶ **Note:** Criminal counsel should stay as far away as possible from any offense that might be an aggravated felony. Failing that, counsel should consider that some state offenses might not constitute aggravated felonies under the federal definition. The aggravated felony analysis is best done in conjunction with expert immigration counsel.

The aggravated felony statute contains two classes of definition:

(1) Plain-language definitions (*e.g.*, 8 USC §1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor")), and

(2) Definitions framed in terms of specific federal statutes (*e.g.*, 8 USC §1101(a)(43)(D) ("an offense described in section 1956 of title 18, United States Code" (money-laundering)).

Plain-language definitions. Courts will construct a "generic" or plain language federal definition of the offense, gleaned from sources such as common law, the Model Penal Code, the laws of several states, and federal statutes. If the state offense does not meet the generic federal definition (or if the state offense is broader than the federal, and the official record of conviction does not identify that the offense actually involved was one included in the federal definition), the state offense is not an aggravated felony. See, *e.g., Ye v INS* (9th Cir 2000) 214 F3d 1128 (burglary of an automobile under California law is not "burglary" for aggravated felony purposes because the federal generic definition includes only burglary of a building); *U.S. v Anderson* (9th Cir 1993) 989 F2d 310 (defining extortion under the Armed Career Criminal Act sentence enhancement provision, 18 USC §924(e)). See discussion in Brady, California Criminal Law and Immigration §9.5, Part A (2002).

Specific statute definitions. Regarding offenses defined in relation to specific federal statutes, the substantive elements of the state offense must match *exactly* in order for the state offense to be an aggravated felony. *U.S. v Sandoval-Barajas* (9th Cir 2000) 206 F3d 853. The offense, however, need not include the federal jurisdictional element in the listed federal offense, *e.g.,* a requirement that the offense was carried out across state lines. *U.S. v Castillo-Rivera* (9th Cir 2001) 244 F3d 1020 (despite lack of interstate commerce element, Pen C §12021 is sufficiently similar to 18 USC §922(g)(1) to be an aggravated felony under U.S. Sentencing Guidelines); *In re Vasquez-Muniz* (BIA 2002) Int Dec 3461 (following *Castillo-Rivera*). See further discussion in §48.36 relating to firearms aggravated felonies, and in Brady, California Criminal Law and Immigration §9.5, Part C (2002).

§48.44 d. Consequences of Conviction of Aggravated Felony

Conviction of an aggravated felony under 8 USC §1101(a)(43) after the noncitizen is admitted to the United States is a basis for deportability. 8 USC §1227(a)(2)(A)(iii). Other penalties from this type of conviction, whether it occurs before or after admission to the United States, include:

- Ineligibility for political asylum. 8 USC §1158(b).
- Ineligibility for cancellation of removal. 8 USC §1229b.
- Permanent ineligibility to establish good moral character (8 USC §1101(f)), a requirement for cancellation of removal for certain nonpermanent residents, suspension of deportation, voluntary departure, and United States citizenship, if the conviction occurred after November 29, 1990. See §48.1.
- Permanent ineligibility for immigration after deportation. 8 USC §1182(a)(9)(A)(ii); discretionary waiver is available.
- Barring of permanent residents from applying for a waiver of inadmissibility for crimes involving moral turpitude and other offenses. 8 USC §1182(h).
- No eligibility for release on bond from immigration detention (8 USC §1226(c)), at least for noncitizens passing from criminal custody on or after October 9, 1998. A person who cannot secure an immigration bond will 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. The Ninth Circuit found this provision unconstitutional, at least as applied to permanent residents. *Kim v Ziglar* (9th Cir 2002) 276 F3d 523.

• Being subject to a speeded-up schedule for removal hearings and appeals. 8 USC §1228(a)(3).

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

A nonpermanent resident can be removed by an INS officer in an administrative procedure without a hearing before an immigration judge if, in the officer's opinion, the nonpermanent resident has been convicted of an aggravated felony and is not eligible for immigration relief. 8 USC §1228(b). As an apparent nod to due process, the noncitizen is entitled to notice of the proceedings, to be represented by counsel, and to inspect the evidence. In addition, the same INS officer who enters the charges cannot be the officer who signs the deportation order. The Attorney General cannot execute the removal order until 14 calendar days have passed from the date the order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under 8 USC §1252. See Brady, California Criminal Law and Immigration §9.19 (2002).

e. Specific Aggravated Felonies and Exceptions

§48.45 (1) Rape, Sexual Abuse of a Minor

Conviction of rape is an aggravated felony under 8 USC §1101(a)(43)(A). This includes rape by means of intoxication under Pen C §261. *Castro-Baez v Reno* (9th Cir 2000) 217 F3d 1057.

Conviction of sexual abuse of a minor is an aggravated felony under 8 USC §1101(a)(43)(A). This includes conviction under Pen C §288(a). *U.S. v Baron-Medina* (9th Cir 1999) 187 F3d 1144. See generally *In re Rodriguez-Rodriguez* (BIA 1999) Int Dec 3411. Moreover, while there is no existing Board of Immigration Appeals (BIA) or Ninth Circuit precedent on point, it is possible that statutory rape, and perhaps even misdemeanor statutory rape, under Pen C §261.5 will be held an aggravated felony. A divided BIA held early in 2001 that a conviction under Pen C §261.5 is *not* an aggravated felony if the conviction is a misdemeanor. *In re Crammond* (BIA 2001) 23 I&N 9, vacated for unrelated jurisdictional reasons in *In re Crammond* (BIA 2001) 23 I&N 179. In the meantime, another circuit court of appeal held that statutory rape is an aggravated felony. *Mugalli v Ashcroft* (2d Cir 2001) 258 F3d 52. It is not clear that if and when the BIA next addresses the issue, it will again rule that misdemeanor statutory rape is not an aggravated felony. Thus, a felony conviction under Pen C §261.5 will be ruled an aggravated felony, and a misdemeanor conviction may well be. Defendants searching for alternative pleas may be forced to choose between a strike and an aggravated felony, depending on whether immigration or criminal consequences are most important to them. Alternative pleas could include battery, false imprisonment under Pen C §§236–237, nonviolent attempt to dissuade a victim from filing a police report under Pen C §136.1(b), or less onerous pleas supported by the facts.

§48.46 (2) Burglary, Theft, Receipt of Stolen Property

A conviction of burglary, theft, or receipt of stolen property is an aggravated felony if a sentence of one year is imposed. 8 USC §1101(a)(43)(G). Aggravated felon status can be prevented in all cases by avoiding the one-year sentence. See §§48.10, 48.42 for discussion of sentence.

Burglary with a one-year sentence imposed has the potential to be an aggravated felony in three ways: as burglary, as a crime of violence (8 USC §1101(a)(43)(F); see §48.47 for discussion), or possibly as attempted theft. For this purpose, the Ninth Circuit adopted the Supreme Court's generic definition of burglary as unlawful entry into a building to commit a crime. It therefore held that burglary of an automobile under Pen C §360(b) was not an aggravated felony as a burglary. It further found that felony burglary of a car is not an aggravated felony as a crime of violence. *Ye v INS* (9th Cir 2000) 214 F3d 1128, citing to *Taylor v U.S.* (1990) 495 US 575, 109 L Ed 2d 607, 110 S Ct 2143 (burglary under federal definition may exclude certain state burglary convictions for federal sentence enhancement purposes; the generic definition is unlawful entry into a building with intent to commit a crime). California Pen C §460(b) is a divisible statute, including the offenses of burgling a building, car, and other structures. If the record of conviction (the charging documents, plea or verdict, and sentence) is vague as to whether or not the §460(b) conviction is for entry into a building, the offense will not constitute "burglary" or a "crime of violence" for this purpose and will not be an aggravated felony. For further discussion of record of conviction, see §48.26. In contrast, Pen C §460(a), burglary of a dwelling, will be held to be burglary under the generic definition. For further discussion of burglary, see Brady, California Criminal Law and Immigration §9.10 (2002).

A "theft offense (including receipt of stolen property)" is an aggravated felony if a one-year sentence is imposed. 8 USC §1101(a)(43)(G). Returning to burglary, for example, if the record of conviction shows that burglary of a car was with intent to commit theft, immigration authorities may argue that this is analogous to an attempted theft and is therefore an aggravated felony if a one-year sentence is imposed. (In *Ye v INS* (9th Cir 2000) 214 F3d 1128, however, the Ninth Circuit did not discuss this theory, but did hold generally that defendant, convicted of entering an auto with intent to commit theft, was not an aggravated felon.) A safer record of conviction would be phrased in the disjunctive, indicating entry with intent to commit theft or any felony.

The Board of Immigration Appeals (BIA) has held that attempted possession of stolen property is sufficiently like attempted receipt of stolen property to be an aggravated felony. *In re Bahta* (BIA 2000) Int Dec 3437.

§48.47 (3) Crimes of Violence

A person convicted of a crime of violence and sentenced to at least one year's imprisonment is an aggravated felon (8 USC §1101(a)(43)(F)), subject to the penalties and restricted rights discussed in §48.44. A crime of violence is broadly defined in 18 USC §16(a) 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 under 18 USC §16(b) as any felony that by

its nature involves risk of such force. Assault with a deadly weapon, vehicular manslaughter, and burglary are crimes of violence (see *U.S. v O'Neal* (9th Cir 1990) 910 F2d 663), whereas possession of a firearm (see U.S. Sentencing Guidelines (18 USC §4B1.2 Application Note 1); see also *U.S. v Sahakian* (9th Cir 1992) 965 F2d 740, 742) and drug trafficking (*U.S. v Cruz* (11th Cir 1986) 805 F2d 1464) are not.

To avoid aggravated felon status for the client, defense counsel should obtain a sentence of less than one year—meaning suspended imposition of sentence or a sentence of 364 days or less (either directly imposed or ordered as a condition of probation)—for any offense that might be classified as a crime of violence.

The Board of Immigration Appeals (BIA) had held that a felony conviction for driving under the influence is a crime of violence, but this holding has been reversed. Driving under the influence is not a crime of violence. *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140 (DUI with a one-year sentence imposed is not a crime of violence aggravated felony).

7. Domestic Violence and Crimes Against Children

§48.48 a. Definition

Persons convicted of offenses related to domestic violence can suffer immigration consequences in several ways.

- A crime such as assault, battery, or vandalism is a "crime of violence." If a one-year sentence is imposed, the offense will be an aggravated felony under 8 USC §1101(a)(43)(F). See discussion in §48.47.
- While simple assault or battery is not a crime involving moral turpitude, spousal abuse under Pen C §273.5 is such a crime. Depending on the number of offenses, sentence, and other factors, such convictions may be a basis for deportability or inadmissibility. See §§48.38–48.40 for discussion of crimes of moral turpitude.
- There is a broadly defined ground of deportability specifically based on domestic violence offenses. 8 USC §1227(a)(2)(E).

Deportability under 8 USC §1227(a)(2)(E). Conviction of a state or federal crime of domestic violence, stalking, or child abuse, neglect, or abandonment is a basis for deportation if the conviction occurred on or after September 30, 1996. 8 USC §1227(a)(2)(E). There is no analogous basis for inadmissibility. The term "crime of domestic violence" is specifically defined in the immigration statute to include:

> [A]ny crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Thus, to be a domestic violence offense, the offense must (1) be a crime of violence defined under 18 USC §16, and (2) be committed against a victim with a certain relationship to the accused. Neither felony/misdemeanor classification nor sentence is determinative. Because the definition incorporates state domestic violence law, the dating relationships that are included under California domestic violence law are also included in this definition.

In some areas, the INS asserts that due to the particular wording of the domestic violence deportation ground, reviewing authorities may look outside the record of conviction (charging papers, verdict or judgment, sentencing) to prove that the victim had one of the required relationships. For example, the INS might attempt to bring in documents or testimony to show that the victim of a simple assault was actually an ex-wife or former cohabiter. While immigration counsel contest this in immigration court, criminal counsel should be aware of this practice. Further, a requirement of domestic violence counseling as a condition of probation, rather than conviction for spousal abuse, may or may not protect the defendant. The only real protection against deportability may be to charge an alternate victim, or an offense that is not a crime of violence. See §48.49 for strategies.

A separate basis for deportability under this ground is a civil or criminal court finding, on or after September 30, 1996, that the individual has violated portions of a protection order relating to violence or stalking. 8 USC §1227(a)(2)(E)(ii).

§48.49 b. Strategy

This is an area in which the defense and the prosecution may have important interests in common. Depending on the individual situation, the victim may have urgent, objective reasons to avoid the defendant's deportation. For example, the defendant may provide needed child support; it may be against the children's interests to permanently lose their parent; or the victim may wish to attempt reconciliation after counseling. It is often possible to structure an alternate plea in which the same requirements, *e.g.,* jail time, protective orders, and counseling, are imposed, but the defendant does not become deportable. Domestic violence advocates may play an important role in these deliberations.

The surest way to avoid deportability under this ground is to plead to an offense that is not a crime of violence, *e.g.,* trespass, theft, burglary of a car, or dissuading with no threats of violence an individual from filing a complaint under Pen C §136.1(b). Misdemeanor false imprisonment under Pen C §§236–237 is not a crime of violence, and the felony offense appears to be divisible (false imprisonment by violence or threat is a crime of violence, but by use of fraud or deceit is not). See discussion of crimes of violence at §48.47. Conviction under Pen C §136.1(b) can fulfill many requirements of the prosecution: It is a strike punishable as a felony or as a misdemeanor.

If the plea is not to a crime of violence, there is no harm in imposing domestic violence counseling or anger management as a condition of probation, or otherwise signaling that the event was in fact a domestic violence incident.

Pleading to a crime of violence against a victim not described in the statute (*e.g.,* the ex-wife's new boyfriend, not the ex-wife) is the other sure method of avoiding a deportable domestic violence offense.

There is an argument, although no precedent, that a crime of violence against property is not included in the definition of domestic violence.

If the plea is to a crime of violence against a person, defense counsel will want to keep the record of conviction free of information that identifies the victim as a former or current spouse, co-parent of a child, co-habiter, or co-participant in a dating relationship. Spousal abuse under Pen C §273.5 is a domestic violence offense. Assault against an individual, where the record of conviction does not identify the required relationship, may not be so held. While some INS offices are asserting that the relationship information does not need to appear in the record of conviction (based on unusual wording in the domestic violence deportation ground), the weight of authority is against this and immigration counsel will contest it. Because the record of conviction includes the sentence, a simple assault with a requirement of domestic violence counseling as a condition of probation will provide more evidence of domestic violence.

§48.50 D. Conduct-Based Immigration Consequences

Noncitizens may be held deportable, inadmissible, or barred from establishing good moral character for reasons other than convictions and sentences in criminal cases. See the chart in §48.24 for grounds for these actions. The most common forms of conduct that can trigger adverse immigration consequences without a conviction are prostitution, alien smuggling, document fraud, and drug trafficking, abuse, and addiction. This section discusses grounds not requiring a conviction or sentence.

▶ **Note:** When a ground for inadmissibility, deportation, or preclusion from establishing good moral character does not require a conviction, the conduct triggering it may be established by a juvenile court finding (see §48.9) or by police reports or other evidence. See *In re Rico* (BIA 1979) 16 I&N 181 (criminal charges dismissed, but other evidence demonstrated trafficking and triggered inadmissibility).

Drug traffickers. A noncitizen is inadmissible and barred from establishing good moral character if the INS has "reason to believe" that he or she is or has ever been or has assisted a drug trafficker. The noncitizen's spouse and children are also inadmissible if they have benefited from the trafficking in the previous five years. 8 USC §§1101(f), 1182(a)(2)(C). No conviction is necessary, and one incident is sufficient. There is no analogous deportation ground. Trafficking includes not only sale or possession for sale, but also giving drugs away and maintaining a place where drugs are distributed. *In re Martinez-Gomez* (BIA 1972) 14 I&N 104. Importation or possession for one's own use is not trafficking. See *In re McDonald & Brewster* (BIA 1975) 15 I&N 203. Similarly, transportation for personal use should not be considered trafficking. See discussion at §48.33.

Even after a conviction is vacated, the INS can use a guilty plea or any evidence or information from the event to attempt to establish its "reason to believe" drug trafficking. However, individuals who have plausibly asserted that they did not intend to traffick have overcome this.

Drug addicts and abusers. A noncitizen is inadmissible 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 admission to the United States. 8 USC §§1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii). Drug "addiction" and "abuse" are medical determinations. See *In re 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, whereas 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 inadmissibility by consulates abroad, however, are virtually impossible because no judicial review is available. Persons with consular appointments abroad should be warned of the interviews and, if necessary, should 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. Counsel should advise the defendant not to discuss his or her history of illegal drug use with police or the probation department, to avoid triggering deportation or inadmissibility under these grounds.

Prostitutes. A noncitizen is inadmissible 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 §§1101(f), 1182(a)(2)(D). This definition includes prostitutes, procurers, and persons who receive proceeds, but not customers. No conviction is required. See *In re 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., In re Lambert* (BIA 1965) 11 I&N 340.

Persons convicted of drunk driving. Alcoholics can be found inadmissible under a ground relating to physical and mental disorders and associated behavior that poses a threat to property or persons. 8 USC §1182(a)(1)(A)(iii). At least one United States consulate has excluded persons on this ground, based on a conviction of driving under the influence within the previous two years. A conviction for driving under the influence is not, as was previously held, an aggravated felony as a crime of violence. *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140. See §48.47 for discussion.

Homosexuals. Homosexuality has not been a basis for inadmissibility since 1990.

Persons who test HIV-positive. Persons who test HIV-positive are inadmissible under 8 USC §1182(a)(1)(A)(i), a medically based ground of inadmissibility.

In most cases, they may apply for a discretionary waiver of inadmissibility 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, terrorists, Nazis, "other unlawful activity," and crimes relating to transfer of technology. Several groups are inadmissible under 8 USC §1182(a)(3) and deportable under 8 USC §1227(a)(4). The section relating to Communists and terrorists is quite extensive and includes a section referring to "any other unlawful activity." With new anti-terrorism provisions in effect, persons—especially those of Middle Eastern descent—arrested for participating in political demonstrations or suspected of having links with terrorists 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 inadmissible and deportable. 8 USC §§1182(a)(3)(A)(i), 1227(a)(4)(A)(i). Although a literal reading of the statute would include all 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.

Noncitizens smuggling, trafficking, or harboring other noncitizens. Any noncitizen 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 inadmissible. 8 USC §1182(a)(6)(E). A person who committed such an act within five years after his or her last entry into the United States is deportable. 8 USC §1227(a)(1)(E). Note that only smuggling, and not harboring or transporting, is punished under these grounds, and that no conviction is required to prove smuggling. Some waivers are available if the person smuggled was a parent, spouse, son, or daughter. 8 USC §§1182(d)(11), 1227(a)(1)(E)(iii). The waiver "cancellation of removal" under 8 USC §1229b (see §48.55) is available even if persons outside that group were smuggled, unless the offense constitutes an aggravated felony.

Conviction under 8 USC §1324(a)(1)(A) and (a)(2) for alien smuggling, trafficking, or harboring will be held to be an aggravated felony under 8 USC §1101(a)(43)(N), unless it is a first offense and the noncitizen shows that the conduct was for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent. A potentially safe alternate plea would be to plea to aiding and abetting another person's illegal entry under 8 USC §1325, since the aggravated felony definition specifically references §1324.

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 inadmissible. 8 USC §§1182(a)(6)(F), 1227(a)(3)(C). Although a conviction is not required for these immigration penalties, conviction under Pen C §113 or 18 USC §1546(a) can be a basis for the civil finding. Conviction also may be an aggravated felony. 8 USC §1101(a)(43)(P).

Civil court finding of violation of domestic violence temporary restrain-

ing order. Another ground of deportation, but not inadmissibility, is a civil court finding that the alien has violated a domestic violence temporary restraining order (on or after September 30, 1996). See 8 USC §1227(a)(2)(E) and §§48.48–48.49. This does not require a criminal conviction to trigger deportability. Cancellation of removal under 8 USC §1229b (INA §240A) may be available for long-term lawful permanent residents.

Serious nonpolitical crime. A noncitizen who the INS has serious reason to believe committed a serious nonpolitical crime outside the United States is ineligible for restriction of removal under 8 USC §1231(b)(3)(B)(iii). *McMullen v INS* (9th Cir 1986) 788 F2d 591. To be classified as a political offense, the common-law character must be outweighed by the political element. *In re McMullen* (BIA 1994) 19 I&N 90.

§48.51 E. 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 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 future immigration relief.

The following checklist may assist in analyzing counsel's case. It is intended as a brief overview of the most commonly encountered statuses and factual situations. This overview is far from exhaustive and should be used only as a guide and starting point for counsel's case analysis. For more diagnostic aids, see Brady, California Criminal Law and Immigration, chap 10 (2002). 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 to file an application. Similarly, people who have received employment authorization based on filing an application of some kind with the INS may mistakenly 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. Counsel should complete the immigration intake form provided at §48.3.

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

A United States citizen cannot be deported, excluded, or removed for any reason. All persons born in the United States or Puerto Rico are citizens (except for children of foreign diplomats); others may have acquired United States 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. See §48.54 for further discussion.

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

Such persons include lawful permanent residents ("green card" holders) and persons holding lawful nonimmigrant visas, *e.g.*, students, tourists, temporary workers, or business visitors. In this case, it is important to keep in mind

the distinction between removal due to deportability (expulsion from the United States as well as loss of any present lawful immigration status) and inadmissibility (which bars future admissions to the United States and acquisition of lawful immigration status). Noncitizens with lawful immigration status can lose that status and be removed from the United States if they become deportable. 8 USC §1227. Inadmissible noncitizens who leave the United States may be denied permission to reenter, even if they are lawful residents. Inadmissible noncitizens may also be ineligible to establish good moral character. See §48.1.

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 §1186a(d)(2). Although there is at present no formal FBI check of criminal record at the time of the two-year interview, the person might be asked questions under oath about grounds for deportation.

❒ **Has the defendant been a lawful permanent resident for five years, with a total of seven years' continuous residence after any lawful admission?**

Lawful permanent residents who have held that status for at least five years and who have resided continuously in the United States for seven years after having been admitted in any status are eligible to apply for a special waiver of most grounds of deportability and inadmissibility under 8 USC §1229a. This form of immigration relief is called "cancellation of removal." It will excuse any conviction except an aggravated felony. 8 USC §1229b. Cancellation cuts off the accrual of seven years at the time of issuance of a Notice to Appear or commission of an act rendering a person deportable or inadmissible, but the accrual of five years as a permanent resident is not similarly cut off. Cancellation of removal for lawful permanent residents is discussed in §48.53.

▶ **Note:** Although the statute indicates that lawful residence terminates on the commission of the criminal act, this matter may be subject to litigation on the ground that residence terminates only on the date of conviction. See Brady, California Criminal Law and Immigration, Update §11.10 (2002). Thus, this may be a factor that favors going to trial and filing an appeal to postpone any conviction date. The defendant may acquire the seven years of domicile while the appeal is pending and before the conviction is final.

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

A defendant without lawful immigration status may be eligible to apply for cancellation of removal for nonpermanent residents if he or she has ten years' residence, good moral character (see §48.1), and can establish that removal would cause the defendant's United States citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship. See §48.55 on cancellation of removal.

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

The defendant may be eligible to apply for registry as a permanent resident (see §48.60). He or she must not be inadmissible and must establish good moral character (see §48.1).

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

Although the amnesty programs ended years ago, some cases have not been

adjudicated. See §48.61. 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 §48.62). Amnesty applicants may possess a laminated card marked I-688 (lawful temporary residence) or I-688A (employment authorization preliminary to grant of temporary residency).

Participants in the amnesty and Family Unity programs will be disqualified and denied if they become inadmissible or are convicted of three misdemeanors or one felony. See §§48.61–48.62. This rule applies only to Family Unity and other kinds of applications for amnesty applicants; it does not apply generally to all permanent residency applicants.

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

Undocumented persons include those who entered the United States surreptitiously or fraudulently, or who hold an expired visa; all are removable for lack of lawful immigration status. 8 USC §1227(a)(1). As long as they do not become inadmissible or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from removal or permanent residency if they qualify for a particular benefit such as family immigration or cancellation for non-permanent residents. Alternatively, they may qualify for voluntary departure.

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

The defendant may be eligible to immigrate through a visa petition at some point (see §48.56). The defendant must not be inadmissible and may also need to qualify for voluntary departure, which requires good moral character.

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

A defendant fearing persecution or torture may apply for political asylum, withholding of removal, or relief under the United Nations Convention Against Torture (CAT) (see §48.57). Conviction of an aggravated felony is a bar to asylum and a severe disadvantage to gaining withholding or relief under the CAT.

The United States designates some countries for Temporary Protected Status (TPS) due to recent civil strife or natural disaster. To qualify, the defendant must be a national of a TPS country and must meet other requirements, must be admissible, and must not have been convicted of two misdemeanors or one felony. See §48.58. Special relief under Nicaraguan Adjustment and Central American Relief Act (NACARA) legislation has been extended to Salvadorans, Guatemalans, and nationals of the former Soviet bloc countries. See §48.55.

As an alternative, the defendant may wish to apply for voluntary departure (see §48.59), which requires a showing of good moral character.

❒ **Is the defendant under juvenile court jurisdiction or an abused spouse or child?**

A child who is a dependent of a juvenile court, or who is in delinquency but cannot be returned to the parent due to abuse, neglect, or abandonment, may be eligible for permanent residency as a special immigrant juvenile under 8 USC §1101(A)(27)(J). See §48.63.

A noncitizen who has been abused by a United States citizen or permanent resident spouse or parent can apply for permanent residency under provisions of the 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), (a)(1)(B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only three years of good moral character and physical presence in the United States. 8 USC §1229b.

❒ **Can the defendant provide valuable information to law enforcement authorities about criminal or terrorist activity, and/or is the defendant a victim of crime or alien trafficking?**

Congress has created temporary visas, which can lead to permanent residency, for persons who are victims of and/or have information about certain crimes. An applicant's own criminal record is potentially waivable: Only persons inadmissible under the terrorist grounds cannot apply for these visas. These include visas under 8 USC §1101(a)(15)(S) for persons who have "critical reliable information" about terrorism or criminal activity (125 visas/year); under 8 USC §1101(a)(15)(T) for victims of severe forms of alien trafficking (10,000 visas/year); and under 8 USC §1101(a)(15)(U) for victims of serious crimes who assist in investigation or prosecution efforts (10,000 visas/year). See §48.64.

§48.52 F. Forms of Immigration Relief Available From Immigration and Naturalization Service (INS) and Federal Courts

Even if a noncitizen is undocumented or inadmissible or deportable (or all of these), he or she may nevertheless qualify for certain waivers or immigration benefits that will allow him or her to gain or retain legal status. In order to safeguard a defendant's opportunity to apply for such benefits, certain outcomes must be avoided. Criminal counsel's strategy will depend on his or her client's documented or undocumented status and the potential eligibility for affirmative immigration benefits. To assist counsel in prioritizing and setting goals, §§48.53–48.64 provide a general overview of the most commonly encountered forms of relief in removal proceedings and explain the most widely available immigration benefits.

§48.53 1. Lawful Permanent Residents: Cancellation of Removal

❒ **Is the defendant a permanent resident of five years, with seven years of continuous residence?**

Cancellation of removal under 8 USC §1229b(a) permits certain permanent residents to apply for a discretionary waiver of any ground of deportability or inadmissibility. Conviction of an aggravated felony is a bar to this application (8 USC §1229b(a)(3)), and the applicant must not have been granted cancellation or similar relief in the past. 8 USC §1229b(c)(6).

The cancellation applicant must have been a permanent resident for five years (8 USC §1229b(a)(1)) and must have resided in the United States continuously for seven years after having been admitted in any status (*e.g.*, as a permanent resident, tourist, or student). 8 USC §1229b(a)(2). The five years will continue

to accrue throughout the resident's removal proceedings and, if the resident contests deportability, into federal review of a removal order. The seven-year continuous residence requirement is deemed to have ended on the occurrence of either of the following events: (a) the issuance of the Notice to Appear, the charging paper beginning removal proceedings under 8 USC §1229, or (b) the applicant's commission of certain offenses referenced in 8 USC §1182(a)(2) that render him or her inadmissible or deportable. 8 USC §1229b(d)(1). These offenses that "stop the clock" on the seven years are crimes involving moral turpitude, prostitution, drug offenses, and conviction of two or more offenses with an aggregate five-year sentence.

▶ **Note:** An immigration attorney's assistance may be needed to determine if charges would come within the "clock-stopping" category. Further, an argument may exist that the clock should stop on conviction, not commission, of the offense (under 8 USC §1182(a)(2), a noncitizen is usually not deportable until conviction). See Brady, California Criminal Law and Immigration §11.10 (2002). In that case, the date of conviction is critical, and the possibility of delaying conviction until the seven years accrue might be a factor in defense strategy.

In an important development, the Supreme Court ruled that permanent residents with older convictions may be eligible to apply for an older form of relief from deportation, referred to as "section 212(c) relief." *INS v St. Cyr* (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271. The former 8 USC §212(c) relief (found in former 8 USC §1182(c)) could waive even conviction of an aggravated felony, although it was not sufficient to waive a firearms conviction. The Court held that the abolition of 8 USC §212(c) on April 24, 1996 was not retroactive, and that qualifying permanent residents can apply to waive convictions received before April 24, 1996.

Under a complex analysis, some aggravated felonies received between April 24, 1996 and September 30, 1996 also may be waived.

Counsel with any questions regarding former 8 USC §212(c) should contact an immigration attorney. More information is available at the websites of the National Immigration Project of the National Lawyers Guild at www.nlg.org/nip, and of the American Immigration Law Foundation at www.ailf.org.

§48.54 2. United States Citizenship

❒ **Is the defendant a permanent resident of three (or five) years who wishes to apply for United States citizenship?**

Lawful permanent residents may apply for citizenship after residing in the United States and demonstrating good moral character (see §48.1) for five years. 8 USC §1427. Special procedures apply to spouses and minor children of United States citizens (who need show only three years of permanent residency), military personnel, and religious workers. 8 USC §1430.

❒ **Does or did the defendant have a parent or grandparent who is or was a United States citizen?**

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

Some defendants may be unaware that they are United States citizens. If the answer to any of the above threshold questions is yes, the defendant

should be referred for immigration counseling. Did the defendant have a parent who was a United States citizen at the time of defendant's birth? Did the defendant have a grandparent who may have been a United States citizen at the time of the parent's birth? Was the defendant a permanent resident under age 18 when a parent naturalized to United States citizenship?

§48.55 3. Certain Nonpermanent Residents: Suspension of Deportation or Cancellation of Removal; Special Rules for Nonpermanent Residents From Certain Countries

- ☐ **Has the defendant lived in the United States for at least ten continuous years?**
- ☐ **Does the defendant meet the requirements for any of the special rules regarding adjustment of status found in the notes following 8 USC §1255?**

The attorney general may "cancel the removal" of certain aliens who have resided in the United States for at least ten years. 8 USC §229b(b) (INA §240A(b)). The grant of this relief bestows lawful permanent resident status. To be eligible, an applicant must have been physically present in the United States for a "continuous" period (which is not broken by statutorily specified brief absences) of not less than ten years immediately preceding the date of application, have been of good moral character during that period, not have been convicted of any crimes that would render him or her inadmissible or deportable, and not be deportable for failure to register as an alien, falsification of documents, or a false claim to United States citizenship. Finally, an extremely restrictive requirement is that the applicant must demonstrate that deportation would cause a United States citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship.

As with 8 USC §1229b(a), the accrual of residence is cut off at the time of issuance of the charging document for removal proceedings or commission of an act rendering the respondent removable. 8 USC §1229b(d). See §48.53.

Certain countries of origin. At various times, Congress has provided relief to nationals of several countries concerning the rules for adjustment of status and cancellation of removal. These special provisions are found as an additional provision following 8 USC §1255 and cover nationals from El Salvador, Guatemala, the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia and their spouses and children. The most recent special provisions are the Nicaraguan Adjustment and Central American Relief Act (NACARA) (Pub L 105–100, 111 Stat 2193), the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) (Pub L 105–277, 112 Stat 2681–538), and acts concerning Indochinese parolees (2000) (Pub L 106–429, 114 Stat 1900), and Syrian nationals (2000) (Pub L 106–378, 114 Stat 1442). These special rules contain authority for adjustment to lawful permanent resident status for nationals who, among other requirements, have been physically present in the United States on a certain date or for a certain amount of time. See, *e.g.*, 8 CFR §245.13 (Nicaraguan, Cuban); 8 CFR §245.15 (Haitian); 8 CFR §245.20 (Syrian). In most cases the rules do not relax the good moral character requirement nor provide any amelioration of the criminal bars to eligibility for suspension of deportation or cancellation for nonlawful residents.

For updated information, consult an immigration practitioner or the INS website at www.ins.gov (click "How do I . . ." and search for the appropriate relief).

▶ **Note:** Review the latest enactments concerning special treatment for certain nationals and obtain expert immigration advice concerning these issues. These special rules contain deadlines for application for adjustment of status, cancellation of removal, and motions to reopen.

Noncitizens who have been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident may apply for cancellation of removal under 8 USC §1229b(b)(2). See §48.55.

§48.56 4. Immigration Through Visa Petition Based on Relationship With Citizen or Permanent Resident Relative; Waiver of Certain Crimes-Based Grounds of Inadmissibilty

❒ **Does the defendant have a close relative who is a permanent resident or United States citizen?**

A noncitizen who is not inadmissible (see §48.1) may obtain permanent resident status through a visa petition based on a relationship with a qualifying United States citizen or permanent resident. 8 USC §1154.

Persons classified under 8 USC §1151(b) as immediate relatives of United States citizens (spouse, parent of a child over age 21, or unmarried child under age 21) 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 ranging from a few months to several years.

▶ **Note:** 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 inadmissible but can apply for a waiver of certain crime-related grounds of inadmissibility under 8 USC §1182(h). Discussion of waiver under 8 USC §1182(h) follows.

❒ **Is the defendant inadmissible under certain crimes-based provisions?**

A defendant may become admissible by a discretionary waiver of inadmissibility under 8 USC §1182(h) for the following convictions:

- Conviction relating to moral turpitude (8 USC §1182(a)(2)(A)(i)(I));
- One conviction for simple possession of 30 grams or less of marijuana (8 USC §1182(a)(2)(A)(i)(II));
- Two convictions with a five-year sentence (8 USC §1182(a)(2)(B)); or
- Prostitution (8 USC §1182(a)(2)(D)).

This waiver is only available under the following conditions:

- Conviction occurred more than 15 years before applying for the immigration

benefit, and the person has been rehabilitated and is not a threat to national security (8 USC §1182(h)(1)(A));

• Conviction was for prostitution, and the person has been rehabilitated and is not a threat to national security (8 USC §1182(h)(1)(A));

• The defendant has a United States citizen or lawful permanent resident spouse, parent, or son or daughter, and denial of benefit would result in extreme hardship (8 USC §1182(h)(1)(B)); or

• The defendant qualifies for classification under provisions of the Violence Against Women Act (8 USC §1154(a)(1)(A)(iii) or (iv) or 8 USC §1154(a)(1)(B)(ii) or (iii)). 8 USC §1182(h)(1)(C). See discussion at §48.63.

Permanent residents are barred from applying for this waiver if, after obtaining permanent resident status, they (a) have been convicted of an aggravated felony, or (b) have not accrued seven years before the issuance of the Notice to Appear (the charging document beginning removal proceedings). A federal district court, however, ruled that this restriction was unconstitutional. *Song v INS* (CD Cal 2000) 82 F Supp2d 1121.

§48.57 5. Political Asylum, Restricting/Withholding of Removal, and U.N. Convention Against Torture

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

Under current law, there are three immigration benefits that may provide relief to a noncitizen who asserts that he or she might be subjected to persecution or torture if returned to his or her home country:

(1) Asylum (8 USC §1158 (INA §208)) provides temporary and potentially permanent resident status to a noncitizen who establishes a possibility that he or she will be persecuted on account of, *e.g.*, race, religion, or political opinion, if removed to the home country.

(2) Withholding of removal (also known as "restriction on removal" under 8 USC §1231(b)(3) (INA §241(b)(3)) provides protection from removal, but not permanent status, to a noncitizen who establishes a clear probability that he or she will be persecuted on account of the above grounds if removed.

(3) Relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT") provides protection from removal but no permanent status to noncitizens who can establish a probability that they will be subjected to torture by the government of their home country if removed there. It is not necessary to establish that the torture will be on account of the grounds described above. See 8 CFR §§208, 240–241, 507. See also 64 Fed Reg 8477–8496 (1999).

Bars to asylum and withholding of removal. Under 8 USC §1158(b)(2)(A) and §1231(b)(3)(B), the Attorney General may deny asylum or withholding to an applicant if the Attorney General decides that:

• The applicant ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

• The applicant, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

- There are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;
- There are reasonable grounds to believe that the alien is a danger to the security of the United States; or
- The applicant is inadmissible or removable for terrorist activities. 8 USC §§1182(a)(3)(B)(i), 1227(a)(4)(B).

The Board has determined that once an alien's crime is determined to be "particularly serious," it necessarily follows that the alien "constitutes a danger to the community." *In re S-S-* (BIA 1999) Int Dec 3374. Conviction for a "particularly serious crime" for purposes of asylum includes conviction of an aggravated felony (8 USC §1158(b)(2)(B)), and for purposes of restriction on removal includes one or more aggravated felonies for which the alien has been sentenced to an aggregate term of imprisonment of at least five years (8 USC §1231(b)(3)). See also 8 CFR §§208.13, 208.16. The Attorney General has discretionary authority to determine whether an aggravated felony conviction resulting in a sentence of less than five years is a particularly serious crime for purposes of withholding. In *In re Y-L-*, the Attorney General determined that, except in very rare instances, any conviction of drug trafficking will be a bar to withholding as a particularly serious crime. *In re Y-L-* (AG 2002) 23 I&N 270. See also *In re Frentescu* (BIA 1982) 18 I&N 244. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *In re Juarez* (BIA 1988) 19 I&N 664.

The argument remains that not all aggravated felonies should be found to be particularly serious crimes. See, *e.g.*, *In re L-S-* (BIA 1999) Int Dec 3386 (conviction for smuggling in violation of 8 USC §1324(a)(2)(B)(iii) with 3–1/2-month sentence was not particularly serious crime). Because of the high probability that an aggravated felony conviction will eliminate even the most compelling asylum applicant's claim for protection, criminal defense counsel should immediately involve immigration counsel and present the most vigorous case possible to avoid an aggravated felony conviction. Even a first-time sale of a small amount of drugs is an aggravated felony, which could result in ineligibility for asylum.

§48.58 6. Temporary Protected Status (TPS)

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

The Attorney General may grant temporary protected status (TPS) for any national of a foreign country designated under 8 USC §1254a, countries encountering catastrophic events, *e.g.*, ongoing armed conflict, earthquake, flood, or other disasters, or other extraordinary and temporary conditions. Countries that have received TPS in the past (many of which still receive it) include El Salvador, Bosnia-Herzegovina, Burundi, Guinea-Bissau, Honduras, Kosovo, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia, and Sudan. To check for the most accurate list of what countries are still listed and the requirements, go to the INS website at http://www.ins.gov/graphics/services/tps_inter.htm (or go to www.ins.gov and click "how do I?" and "tps").

Persons are ineligible for TPS if they are inadmissible (see §48.1) 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)(i). In addition, the person must not come within the bars to asylum under 8 USC §1158(b)(2)(A) discussed in §48.57. 8 USC §1254a(c)(2)(B)(ii).

§48.59 7. Voluntary Departure

A noncitizen may apply to leave the United States voluntarily at his or her own expense in lieu of being subject to removal proceedings under 8 USC §1229a or before removal proceedings are completed if the alien is not deportable under 8 USC §1227(a)(2)(A)(iii) (aggravated felony) or 8 USC §1227(a)(4)(B) (terrorist activities). 8 USC §1229c(a). A person who has not been admitted because he or she entered without inspection should not be held "deportable" under the aggravated felony provision, and therefore should be eligible for voluntary departure before removal proceedings are completed. The noncitizen may be allowed to voluntarily depart *after* removal proceedings if he or she can demonstrate good moral character and is not being removed because of an aggravated felony conviction. 8 USC §1229c(b).

This relief is valuable because the period of voluntary departure allows the noncitizen to wrap up his or her personal affairs and leave the United States without the stigma of deportation. In contrast, persons who have been deported may not lawfully reenter the United States for ten years unless a special waiver is obtained (8 USC §1182(a)(2)), and can be criminally charged for illegal reentry. Further, illegal reentry after being deported exposes the noncitizen to greater sentence enhancement than does reentry after voluntary departure.

§48.60 8. Registry

☐ Has the defendant lived in the United States continuously 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 §48.1) for a reasonable period;
- Not inadmissible (although this requirement is called into question by *In re Sanchez-Linn* (BIA 1991) Int Dec 3156); and
- Not ineligible for United States citizenship (through convictions for draft evasion or desertion; see 8 USC §1425).

§48.61 9. Legalization (Amnesty Programs)

☐ Is or was the defendant an applicant for temporary residency 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 before June 1, 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. Because of INS backlog, there may still 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 §1160(c)(2) (SAW), §1255a(d)(2) (legalization).

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.

§48.62 10. 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 §48.61 have divided many families. For example, many parents have qualified for amnesty but have children who came to the United States too late to do so. The Family Unity program established by the Immigration Act of 1990 §301 (Pub L 101–649, §301(e)(3), 104 Stat 4978) (see 8 USC §1255a Note) 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 §48.56) but rely on this program for lawful status and work authorization during their years of waiting. New provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104–208, Div C, 110 Stat 3009–546) make family unity eligibility even more important than before. IIRIRA partially exempts such eligible persons from new provisions that bar adjustment to lawful permanent resident status for three, or ten, years if the applicant has been unlawfully present in the United States for 180 days or more, or 365 days or more, respectively.

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. Immigration Act of 1990 §301. In addition, IIRIRA added a significant new bar denying Family Unity benefits to persons who "commit an act of juvenile delinquency which if committed by an adult" would be a felony involving violence or the threat of physical force. IIRIRA §383, amending the Immigration Act of 1990 (Pub L 101–649, §301(e)(3), 104 Stat 4978) (see 8 USC §1255a Note: Family Unity (e)). This change applies only to benefits

granted or extended after September 30, 1996, and it can be argued that it should apply only to acts of juvenile delinquency committed after September 30, 1996, because there is a general presumption against retroactive application of the laws.

▶ **Note:** See §48.4 for discussion of defense of noncitizens in juvenile court.

§48.63 11. Relief for Abused Spouses and Children

❒ **Is defendant a victim of spousal or child abuse?**

Special immigrant juvenile status. A child who is in dependency or delinquency court proceedings and cannot be returned to the parent due to abuse, neglect, or abandonment may be eligible for permanent residency as a special immigrant juvenile under 8 USC §1101(a)(27)(J). The juvenile court judge must make a written finding that the noncitizen is under court jurisdiction and is deemed eligible for long-term foster care (meaning that the court has found family reunification is not a viable option and that the child is in or will proceed to foster care, guardianship, or adoption) and that it would not be in the child's best interest to return to the home country. See 8 CFR §204.11. The parent's immigration status is not relevant. Although this has been applied most commonly to children and young people in dependency proceedings, it also should be applicable to youth in delinquency proceedings who meet the above criteria. For more information, see Immigration Legal Resources Center, Special Immigrant Status for Children in Foster Care (2000) ($15), also available for free at the Immigration Legal Resources Center website (www.ilrc.org; click "programs" and "advocating for children").

Violence Against Women Act ("VAWA") immigration provisions. A noncitizen who has been abused by a United States citizen or permanent resident spouse or parent can apply for permanent residency under provisions of the Violence Against Women Act (1994, 2000). 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), (a)(1)(B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only three years of good moral character and physical presence in the United States. 8 USC §1229b. While most grounds of inadmissibility apply, special waivers for VAWA applicants are provided even without qualifying relatives if the act or conviction would have been waivable under 8 USC §1182(a) or §1227(a) and if the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty. 8 USC §1154(a)(1)(B). For more information and a manual, go to the National Immigration Project of the National Lawyers Guild at www.nlg.org/nip (click on "Domestic Violence").

§48.64 12. Status for Victims, Witnesses, and Informants Regarding Crime

❒ **Is defendant a victim of or does defendant have information about a crime?**

Congress has created temporary visas, which can lead to permanent residency,

for persons who are victims of and/or have information about crime. An applicant's own criminal record is potentially waivable; only persons inadmissible under the terrorist grounds cannot apply for these visas.

In 2000, Congress created two new visas to assist victims of crimes. Under 8 USC §1101(a)(15)(U), noncitizens who are victims of serious crime and are likely to be helpful to authorities investigating or prosecuting the crime can apply for temporary, or perhaps permanent, status. Several examples of offenses are listed in the statute. The spouse, child, or in the case of a child, parent of the victim also can apply. A representative from the District Attorney, police, or similar office must state that the person is helpful in prosecuting or investigating the crime. A total of 10,000 such visas can be awarded each year. Under 8 USC §1101(a)(15)(T), persons who were victims of a "severe form of trafficking in persons" can apply for temporary and perhaps permanent lawful status. Severe trafficking includes sex trafficking of persons under age 18 and persons subjected to involuntary servitude. A total of 5000 temporary "T" visas and 5000 adjustments to permanent residency can be granted each year. Further information on the U and T visas can be found at the website of the National Immigration Project of the National Lawyers Guild at www.nlg.org/nip (click on "Domestic Violence") and at the INS website at www.ins.gov.

The 1995 Crime Bill created the "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.