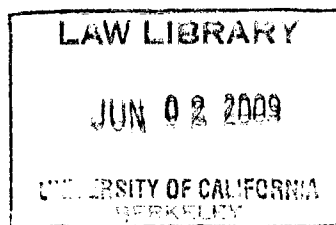
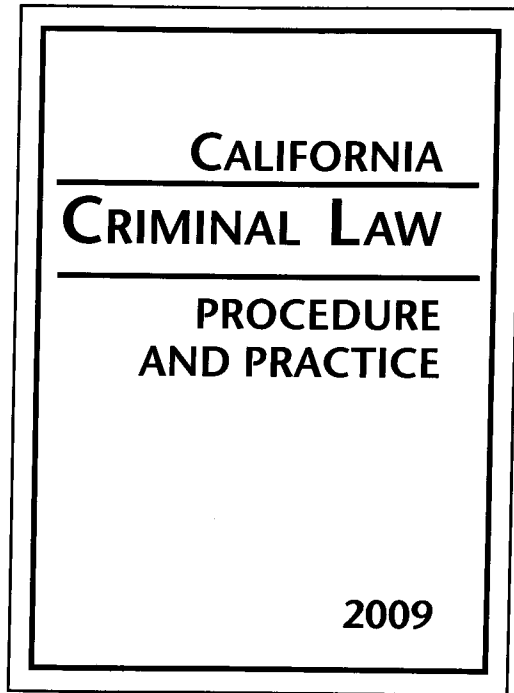


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# REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

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## ◇ §52.1 I. OVERVIEW

**Immigration consequences of criminal conviction.** Strategic decisions made by an immigrant's criminal defense attorney are becoming increasingly crucial, because 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, which can be far worse than the criminal penalties.

- ▶ **Note:** The new term for "deportation" is "removal." The process of excluding someone from the United States now also occurs during a "removal" hearing. The new term for "excludable" is "inadmissible." See Pub L 104-208, 110 Stat 3009.

Consequences can include removal, permanent ineligibility for lawful immigration status, extended or even indefinite periods of immigration detention, and permanent separation from family members who are U.S. citizens. 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 but should seek guidance from immigration attorneys experienced in crime-related issues or from the Immigrant Legal Resource Center, discussed in "Resources," below.

**Reentering the United States.** All noncitizens, even those legally admitted to the United States on a permanent basis, are subject to the grounds of inadmissibility when entering the United States. 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 Department of Homeland Security's Bureau of Citizenship and Immigration Services. This means that a lawful permanent resident who goes outside of the United States can be forever excluded and never allowed to return to home, job, and family if he or she is inadmissible. In addition, corollary (but not identical) grounds of deportability exist and can make any noncitizen removable, regardless of the legality of his or her latest admission to the United States. As a rule, there are no statute of limitations or laches defenses applicable in immigration law.

**Defense counsel's duty to noncitizen client.** Because of 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. Defense counsel must also avoid immigration consequences while pursuing the traditional goals of shorter sentences and less serious dispositions, since a noncitizen with a removable disposition will very likely have an immigration hold that will sabotage many standard criminal dispositions, such as drug treatment, domestic violence classes, work furlough, release to probation or parole, and the like. 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 the actual, not merely the possible, consequences. In addition, counsel must actively attempt to avoid unfavorable consequences if possible. Anything less constitutes ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 241, 8 CR3d 862.

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 arrange 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. The defense may have to be conducted completely differently from the typical criminal defense of a U.S. 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 the client of the *actual*, specific immigration consequences the plea will trigger in the defendant's case, and attempt to defend against them. 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 §52.11.) In fact, defense counsel's incorrect advice to the client on the 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 of the federal offense of illegal reentry after conviction of an aggravated felony and deportation. 8 USC §1326(b). See discussion in §52.8.

**Resources.** This chapter is an overview rather than an exhaustive discussion. Counsel should obtain expert advice on individual cases. The Immigrant Legal Resource Center (<http://www.ilrc.org>) in San Francisco will provide consultation to attorneys and agencies on the immigration consequences of criminal cases, for a fee. For information, call (415) 255-9499. The address is 1663 Mission Street, Suite 602, San Francisco, CA 94103. For referrals to immigration attorneys, contact the American Immigration Lawyers Association, 918 F Street NW, Washington, DC 20004, (202) 216-2400 (<http://www.aila.org>); the local bar association; or the National Immigration Project of the National Lawyers Guild, 14 Beacon Street, Suite 602, Boston, MA 02108, (617) 227-9727 (<http://www.nationalimmigrationproject.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.

A chart detailing the immigration consequences of common California offenses, together with notes describing plea strategies in criminal court for immigrants, is available without charge from the Immigrant Legal Resource Center at <http://www.ilrc.org/criminal.php>. This chart is frequently updated. A federal chart is available at the website of the National Immigration Project of the National Lawyers Guild (<http://www.nationalimmigrationproject.org>).

Defense counsel should also consult an in-depth research guide, such as Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (10th ed 2008), which contains advice for criminal counsel tailored to California law and is available from the Immigrant Legal Resource Center in San Francisco at the above address; Kesselbrenner & Rosenberg, *Immigration Law and Crimes* (2005), available from West Group, COP, 610 Opperman Drive, Eagan, MN 55123, (800) 344-5009 (<http://west.thomson.com/store>); or Tooby & Rollin, *Criminal Defense of Immigrants* (2007), and Tooby, *California Post-Conviction Relief for Immigrants* (2009), available from Law Offices of Norton Tooby, 6333 Telegraph Avenue, Suite 200, Oakland, CA 94609, (510) 601-1300; a brief summary is also available: Tooby's Guide to Criminal Immigration law (2008). Other research guides are listed in §1.22.

## II. UNIQUE ASPECTS OF NONCITIZEN DEFENDANT CASES

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

#### Ascertain client's nationality and immigration status.

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 superficially indistinguishable from a native-born "American." About 20 percent of the time, a California criminal defendant will not be a citizen of the United States and will need the special defense outlined in this chapter.

It is crucial to obtain reliable evidence of nationality. Many clients may give an incorrect answer to the citizenship question because they misunderstand it. For example, a client may believe the concept of "citizen" includes a lawful permanent resident with papers legalizing his or her immigration status in the United States (see *People v Castro-Vasquez* (2007) 148 CA4th 1240, 1246 n6, 56 CR3d 406) or a client may truly be unaware that he or she is not a U.S. citizen due to having been brought here as an infant and never being told of their citizen status. It is crucial to verify that the defendant's stated immigration status is accurate. Counsel should explain the importance of obtaining a correct answer and ask where the client was born and (if

born abroad) how he or she obtained U.S. citizenship. If the defendant has any immigration documents, counsel should photocopy them and check with immigration counsel if necessary to verify immigration status.

It is also important to learn whether one or 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 may have automatically become a U.S. citizen when the parent(s) naturalized, even without filing any application or any official government action. A child may also under certain circumstances acquire U.S. citizenship from his or her U.S. citizen parents, even if born abroad. See Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §11.20 (10th ed 2008).

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

The client can provide initial information on his or her immigration status that counsel will need to assess what immigration effect various possible convictions and sentences will have. For a suggested "Basic Immigration Status Questionnaire," see §52.3. Counsel will also need the client's rap sheet and charge of conviction, plea, and sentence for significant prior convictions, 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 personally 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. As a layperson, the client may be unable to understand and convey the complexities of immigration law from the immigration lawyer to the criminal lawyer, and certainly cannot relay information in the back-and-forth discussion necessary to formulate a joint strategy. It is therefore necessary for criminal and immigration counsel to speak directly to one another.

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 §52.1.

Criminal defense counsel should establish an ongoing relationship with an office such as the Immigrant Legal Resource Center (see §52.1) or a specific immigration attorney with experience of criminal problems of immigrants in order to receive consistent advice in this area as needed.

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

Counsel must discover the actual, specific 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



explain them clearly 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 nonetheless vacated on grounds of ineffective counsel for failure to warn about *actual* consequences).

**Ask the client how high a priority he or she places on the immigration consequences.**

Once the client understands what the actual immigration consequences will 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. Such clients may be willing to plead to additional counts or serve extra time 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.**

It is not enough simply to tell the client the problem: it is necessary to attempt to achieve a solution. See *People v Bautista* (2004) 115 CA4th 229, 241, 8 CR3d 862. 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. Doing so requires a good knowledge of the immigration law or expert advice. Some ideas for safe dispositions are discussed in this chapter. They can include diversion without a guilty plea (see §52.29), dismissal, acquittal, delay of a conviction, a carefully framed sentencing disposition, or a plea to another “safe” offense, even one only tenuously connected, or not connected at all, to the offense charged. For a comprehensive discussion of how to avoid all 52 grounds of deportation, see Tooby & Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005).

- **Note:** Deferred entry of judgment under Pen C §1000 or drug program probation under Proposition 36 constitutes a conviction under immigration law even after dismissal if a guilty plea has been entered at any time. See *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771; 8 USC §1101(a)(48)(A). Once dismissal occurs, the conviction has been eliminated for immigration purposes only if it is a conviction of first-offense simple possession or certain other minor first drug offenses. See §§52.14, 52.29. Preplea diversion for drug offenses is available in some counties under Pen C §1000.5. For discussion of diversion and deferred entry of judgment, see chap 27.

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 so the client can spend more time with his or her family 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).

**§52.3 B. Interviewing Noncitizen Criminal Defendants and Basic Immigration Status Questionnaire**

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

- The right to refuse to speak with immigration 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 DHS, which may interview them in jail if they are incarcerated for another offense. The DHS 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 §§52.8, 52.63), as well as to identify persons for removal.
- 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 §52.2.]

*Criminal History:* Information on rap sheets; charge of conviction, plea, and sentence for significant prior conviction(s); 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 §5.42.]		
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?		

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What language (and dialect) does client speak? \_\_\_\_\_

Is an interpreter needed? YES \_\_\_ NO \_\_\_ [See §52.7.] (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 or DHS 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 (former INA §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 one or both parents (or the sole custodial parent) naturalized to U.S. citizenship? YES \_\_\_ NO \_\_\_ Date(s) of naturalization: \_\_\_\_\_

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? Include all offenses to which a plea or verdict was entered, even if rehabilitative relief was later obtained.

Date Committed      Date of Plea      Exact Statute of Conviction      Date of Sentence

\_\_\_\_\_

(Counsel should examine the wording of the exact statute and charge of conviction, the plea transcript, and sentence to determine whether a prior conviction will affect client's immigration status.)

### §52.4 C. Main Defense Goals in Representing Juveniles

Dispositions in juvenile proceedings do not constitute convictions for immigration purposes. *Matter of Ramirez-Rivero* (BIA 1981) 18 I&N Dec 135; *Matter of C.M.* (BIA 1953) 5 I&N Dec 327. Thus, a finding of delinquency in juvenile court will not be considered a conviction to make a juvenile deportable or inadmissible, or for purposes of the three-misdemeanor/one-felony bar to amnesty and similar bars in other programs. A conviction in adult court, however, of a person who was under 18 at the time of the offense will constitute a conviction for immigration purposes. *Vargas-Hernandez v Gonzales* (9th Cir 2007) 497 F3d 919.

**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 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 §52.50 for discussion of these grounds. For example, one ground for deportation and inadmissibility applies to 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 U.S. 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 might 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 §§52.38-52.40.

Juveniles bound over to adult court after a hearing under Welf & I C §707 and

tried there will suffer convictions under immigration law, although there are new arguments that the federal standard (*i.e.*, age 21) should apply. See Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, chap 2A (10th ed 2008).

- ▶ **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 DHS is thereby precluded from seeing the record. See *Welf & I C* §826. The DHS may, however, have other sources of information, 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. *Matter of Lima* (BIA 1976) 15 I&N Dec 661; *Matter of Andrade* (BIA 1974) 14 I&N Dec 651. See §52.14.

- ▶ **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 parent who is either a permanent resident or a U.S. citizen may be eligible for permanent residency under the Violence Against Women Act (see 8 USC §§1154(a)(1)(A)(iv), (B)(iii), 1229b(b)(2)), even if they are not in dependency proceedings. See §52.61.

## D. Noncitizen Status

### §52.5 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 U.S. citizen.

- ▶ **Note:** The DHS has the authority to place immigration holds on certain noncitizens. See 8 CFR §§236.1, 287.7. See also §5.42.

### §52.6 2. Noncitizen Status as Affecting Other Issues

**Denial of probation.** Trial courts may properly consider a defendant's status as 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 CRC 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 §52.50.

**Proposition 36.** In *People v Espinoza* (2003) 107 CA4th 1069, 132 CR2d 670, the court of appeal held that Proposition 36 probation was not mandatory for a defendant

who was an undocumented noncitizen with a substantial criminal history, because it was impossible to condition probation on completion of a drug treatment program in view of the substantial likelihood that the defendant would be deported.

**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 Garcia-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).

### §52.7 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). The court in *People v Rodriguez* (1986) 42 C3d 1005, 1013, 232 CR 132, held that it is best that each defendant 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 Govt C §§68560.5, 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” to verify the first interpreter’s translation. See *People v Aranda, supra*.

See generally Friedman Ramirez, Cultural Issues in Criminal Defense (2d ed 2007).

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

**Court advisement to defendant of immigration consequences of guilty plea. Be-**

fore 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); *People v Akhile* (2008) 167 CA4th 558, 84 CR3d 236 (insufficient to give advisement at prior court hearing). Failure to make a record that the required warning was given creates a presumption that it was not given. Pen C §1016.5(b). Failure to warn of any of the three required potential consequences requires the reviewing court to vacate the judgment if prejudice is shown and there exists, at the time of the motion to vacate, more than a remote possibility that the conviction will have one or more of those adverse immigration consequences. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 199, 96 CR2d 463; *People v Castro-Vasquez* (2007) 148 CA4th 1240, 56 CR3d 406. The exact language of the statute need not be used; substantial compliance is all that is required. *People v Gutierrez* (2003) 106 CA4th 169, 130 CR2d 429. See also *People v Ramirez* (1999) 71 CA4th 519, 83 CR2d 882 (warning need not be verbal; signing of waiver form held sufficient). However, the advisement must occur during the actual taking of the plea; an advisement given earlier in the proceeding is inadequate. *People v Akhile* (2008) 167 CA4th 558, 564, 84 CR3d 236.

The proper way to raise a violation of this statute is by a statutory motion to vacate, rather than a petition for a writ of coram nobis. *People v Carty* (2003) 110 CA4th 1518, 2 CR3d 851. A direct appeal can be taken from the denial of such a motion. *People v Totari* (2002) 28 C4th 876, 123 CR2d 76. A defendant making the motion has the burden of establishing reasonable diligence in bringing it. *People v Totari* (2003) 111 CA4th 1202, 4 CR3d 613. The trial court's denial of the motion is reviewed for abuse of discretion. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 200, 96 CR2d 463.

**Counsel's advice to defendant concerning immigration consequences of guilty plea.** A general warning of the possible consequences similar to what the court is required to give (see Pen C §1016.5), however, is not sufficient advice by *defense counsel*, who must also advise a client of the specific immigration consequences that will be triggered in the defendant's particular 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 recommendation against deportation" (JRAD), discussed in *Barocio* and *Soriano*, is no longer available; see §52.11). Defense counsel who fails to investigate and advise the defendant of the specific immigration consequences of a guilty plea, and who fails to try to avoid those consequences by obtaining an alternative disposition, may be found to have provided ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 237, 8 CR3d 862; *People v Soriano, supra*. The Ninth Circuit held that counsel who gives affirmative erroneous advice concerning the immigration consequences of a disposition renders ineffective assistance, requiring reversal if the error deprives the defendant of the opportunity to have a decision-maker, such as the prosecutor or the court, make a discretionary decision in his or her favor. *U.S. v Kwan* (9th Cir 2005) 407 F3d 1005. This is the same prejudice standard employed by the court of appeal in *People v Barocio, supra*, in which counsel failed to make a motion for a nondeportable sentence.

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*; *People v Castro-Vasquez, supra*. Counsel also renders ineffective assistance by failing to attempt to obtain an alternative disposition that will avoid adverse immigration consequences. *People v Bautista* (2004) 115 CA4th 229, 241, 8 CR3d 862.

- **Note:** Prosecutors too should become familiar with the immigration consequences of a plea or conviction to better deal with the prosecution of noncitizens. On 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 avoiding deportation of certain immigrants should be reflected in the discretion exercised by prosecutors. For example, a misdemeanor domestic violence conviction with a 1-year suspended sentence 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 U.S. citizen, and has many children and numerous other family members who are all U.S. citizens. Prosecutorial discretion is legally broad enough to allow a nondeportable result through a plea bargain or postconviction relief under these circumstances. See §7.12. The Los Angeles County District Attorney’s office has a policy allowing prosecutors to take collateral immigration consequences into account in unusual circumstances when they have such a powerful impact that the punishment may not be proportionate to the crime. See <http://da.co.la.ca.us/sd03-04.htm>.

There is as yet no requirement that judges advise defendants of the possible immigration consequences of a “slow plea” (see §26.19; *People v Limones* (1991) 233 CA3d 338, 343, 284 CR 418), but counsel must of course do so.

**Stipulation to removal.** Attorneys in state as well as federal criminal proceedings may face having to advise clients whether to stipulate before the criminal court judge to removal. The definition of “removal” for criminal penalties for illegal reentry of certain previously deported or removed aliens includes “any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.” 8 USC §1326(b). United States Attorneys sometimes request stipulations to removal, and state prosecutors may begin doing so as well. Criminal defense counsel will be in the position of advising clients whether to accept such a condition. This situation requires an accurate understanding of the defendant’s immigration position. If the defendant truly has nothing to lose by conceding removability, he or she may gain valuable concessions in the criminal sentence. But if the defendant has family or an established life in the United States and some possible defense to removal, the defendant may be gravely harmed by giving up the right to contest removal and apply for or maintain lawful status.

**Judicial removal.** Federal district court judges are permitted in certain circumstances to decide at sentencing whether a defendant is removable and to order removal. 8



USC §1228(c). The person must be removable under 8 USC §1227(a)(2)(A) for crimes involving moral turpitude, aggravated felonies, controlled substance offenses, or offenses involving firearms and destructive devices. See 8 USC §1228(a). The judge may exercise jurisdiction over the removal only if the U.S. Attorney requests it with the concurrence of the DHS. 8 USC §1228(c)(1). The Commissioner of the INS wrote a memorandum, including sample forms, to 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 pleads 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 earlier years, if such a noncitizen returned to the United States and was arrested by the INS, he or she would merely have been deported again; this is what many immigrants expect. After 1996 changes in immigration law, however, illegal reentry after conviction and removal occurring after an aggravated felony conviction can trigger federal criminal prosecution carrying a sentence of up to 20 years in federal prison. 8 USC §1326(b)(2). See also 8 USC §1325(a). Federal prosecutors formerly demanded at least 30 months in prison as part of plea negotiations, but this may rise to 5 years or more, depending on the judge and the prior conviction and the removal record of the defendant. A defendant who pleads to an aggravated felony, or who has a prior conviction of an aggravated felony, must be informed that he or she will serve a substantial period in federal prison if apprehended in the United States after his or her removal.

- **Note:** It is becoming more and more likely that a criminal noncitizen will be detected and apprehended by the DHS after conviction and a sentence involving any incarceration, because the DHS now has extensive 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 immigration authorities in identifying and placing a deportation hold on defendants convicted of felonies who are held to be deportable. Govt C §68109. The California Department of Corrections and Rehabilitation (CDCR) and the Division of Juvenile Justice (DJJ) are also required to identify undocumented noncitizens subject to deportation. Within 48 hours after such a person’s release from criminal custody, these departments must transfer the inmate to the custody of the U.S. Attorney General. Pen C §5025(c). They must also make their case files available to the DHS for investigation purposes. Pen C §5025(a). If the DHS does not pick up the person within the time allotted (see 8 CFR §287.7(d)), continued detention under the DHS hold becomes illegal, and state habeas as well as false imprisonment remedies become available.

## §52.9

### 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. Today’s courts generally hold that the *Mejia* standards for determining whether a witness was “material” have been superseded by the federal standards. *People v Valencia* (1990) 218 CA3d 808, 819, 267 CR 257; *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 U.S. Supreme Court, however, now applies the *Trombetta* standard to the loss of both physical evidence and witnesses. See *Kyles v Whitley* (1995) 514 US 419, 433, 131 L Ed 2d 490, 505, 115 S Ct 1555.

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 Supreme Court has cited *Valenzuela-Bernal* with approval (see *People v Coffman* (2004) 34 C4th 1, 52, 17 CR3d 710), followed by a majority of the later cases on this question.

A person arrested along with undocumented persons may be given a form advising of the right to have the noncitizen witnesses detained. The form also advises that, if deported, it may be impossible to obtain the witness’s presence 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 guilty plea. *People v McNabb* (1991) 228 CA3d 462, 279 CR 11.

Sanctions other than dismissal may be available. For example, a federal court may exclude the former testimony of a witness deported with insufficient notice to the defense or with insufficient effort to make the witness available at retrial. *U.S. v Yida* (9th Cir 2007) 498 F3d 945.

## §52.10 H. Consequences of Sentence in Criminal Case

The sentence received in a criminal case can have significant immigration consequences, and counsel can sometimes exert a great influence over the immigration process by controlling the length and nature of the sentence imposed. Obtaining a certain sentence may be sufficient to avoid adverse immigration results for the client. Counsel must determine whether the sentence is important, and, if so, exactly what the sentence requirements are in the client’s particular situation. Sentences can be especially significant 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 even though execution of all or part of the sentence has been suspended. *Matter of Castro* (BIA 1988) 19 I&N Dec 692.

It also 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 of incarceration or confinement to be served. See *Matter of F.* (BIA 1942) 1 I&N Dec 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, 46.29-46.30.

- **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 5 years or more as a result of aggravated felony convictions. See *Matter of Ramirez-Somera* (BIA 1992) 20 I&N Dec 564. See §52.53 for discussion. Only these two latter bars refer to actual days spent in custody.

Pre-sentence time in custody in a criminal case, which is credited as time served in a sentence imposed after conviction, is considered confinement as a result of a conviction for immigration purposes. *Arreguin-Moreno v Mukasey* (9th Cir 2008) 511 F3d 1229.

- **Examples:** If the client receives imposition of sentence suspended and no custody as a condition of probation, it counts as zero sentence for immigration purposes. If the client receives imposition of sentence suspended and 6 months’ custody as a condition of probation, it counts as 6 months. If the client receives a 5-year sentence, execution of which is suspended, and is placed on probation with no custody time as a condition of probation, it counts as a 5-year sentence.

Concurrent sentences and indeterminate sentences (e.g., 5 years to life) are evaluated as the length of the longest sentence. *Matter of Fernandez* (BIA 1972) 14 I&N Dec 24.

**Recidivist sentence enhancements.** A sentence includes any recidivist sentence enhancement that may be imposed on the defendant. *U.S. v Rodriguez* (2008) \_\_\_ US \_\_\_, 170 L Ed 2d 719, 128 S Ct 1783 (determining maximum sentence under Armed Career Criminal Act).

**Deportability for sentence imposed of 1 year or more.** A client who is here legally will not want to become deportable. Many common offenses become aggravated felonies and trigger removal only if a court orders 1 year or more of custody, either as part of the judgment and sentence or as a condition of probation:

- A “crime of violence” as defined in 18 USC §16 (see §52.47);
- A theft offense (including receipt of stolen property) (see §52.46);
- Burglary;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles that have had their identification numbers 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 a listed 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 offenses depending on sentence, a sentence of 364 days or less (either as part of a judgment or condition of probation) will prevent the conviction from becoming an aggravated felony, so long as imposition of sentence has been imposed. Conviction of three counts of theft, with a 364-day sentence for each to run consecutively, for example, would not be considered an aggravated felony conviction, because each count is assessed separately to see whether it carries a 1-year sentence. It is necessary to avoid a state prison sentence, even if execution of sentence is suspended, because a suspended sentence would still be considered a sentence imposed for immigration purposes. Counsel may be able to negotiate an official sentence of 364 days (and thus avoid an aggravated felony) by waiving past and future credits. Such a waiver could result in the defendant's spending an amount of time in custody that is equivalent to the amount of time he or she would serve on a 2-year sentence if custody credits were awarded; more, if before the 364-day sentence is imposed, extra time is served and credits for that time are also waived. Similarly, on a probation violation, it is sometimes possible for the defendant to waive past credits, vacate the former sentence, and receive a new sentence that falls short of a total of 1 year or more, thus avoiding an aggravated felony sentence. If the original sentence is not vacated before the probation violation sentence is imposed, the original sentence will be added to the probation violation sentence. A total sentence of 1 year or more (*e.g.*, an original sentence of 9 months and a probation violation sentence of 3 months) will be considered a sentence of 12 months and trigger deportation as an aggravated felony.

**Inadmissibility.** A client who is not here legally will wish to avoid becoming inadmissible, *i.e.*, becoming ineligible to immigrate lawfully through a U.S. 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 imposed equal 5 or more years, regardless of the number of days actually served; and
- A noncitizen who would otherwise be 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 imposed must be 6 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 exclusion on grounds of moral turpitude is available only to noncitizens who have *committed* only one crime involving moral turpitude. A defendant who has *committed* a second moral turpitude offense is disqualified from receiving the petty offense exception, even if no second conviction occurred, because, for example, the charges were dismissed or no charges were filed. A previous conviction,

even if expunged, will destroy eligibility for the benefit of this exception. *Matter of S.R.* (BIA 1957) 7 I&N Dec 495. A defendant charged with a felony may be found eligible for the petty offense exception if the felony is reduced to a misdemeanor under Pen C §17. See §52.39.

**Bar to establishing good moral character.** A noncitizen must establish “good moral character” to obtain many immigration benefits, including naturalized citizenship, voluntary departure, cancellation of removal for nonpermanent residents, suspension of deportation, and registry. The immigration law bars certain persons from establishing good moral character, and this concept sometimes depends on sentence:

- Physically serving 180 or more actual days in jail during the period for which good moral character must be shown, as a total from all convictions, precludes the defendant from establishing good moral character under 8 USC §1101(f)(7). *Matter of Valdovinos* (BIA 1982) 18 I&N Dec 343.

- 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-day bar 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.” See *Arreguin-Moreno v Mukasey* (9th Cir 2008) 511 F3d 1229. A pardon should erase the effect of time served for that conviction. *Matter of H.* (BIA 1956) 7 I&N Dec 249. Pardons are discussed in §§41.19-41.20. Expungements are discussed in §§41.13, 41.18. Their immigration effects are discussed in §§52.14, 52.29.

**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 DHS has reason to believe committed a serious nonpolitical crime outside the United States is ineligible. 8 USC §1231(b)(3)(B). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provided that every conviction of an aggravated felony for which a sentence of at least 5 years of imprisonment was imposed is a particularly serious crime that bars this relief. 8 USC §1231(b)(3)(B); 8 CFR §208.16; *Matter of S-S-* (BIA 1999) 22 I&N Dec 458. Even if the sentence for an aggravated felony is less than 5 years, care must be taken to determine whether the crime is nonetheless particularly serious, by reviewing the nature of the conviction, the sentence imposed, and the individual facts and circumstances surrounding the actual offense. 8 CFR §208.16.

**Fees and restitution.** Even when no confinement has been imposed, a conviction exists under 8 USC §1101(a)(48)(A) when court fees or restitution has been ordered. *Matter of Cabrera* (BIA 2008) 24 I&N Dec 459 (costs and surcharges imposed in Florida deferred adjudication proceeding constituted form of “punishment” or “penalty” for purposes of establishing that noncitizen had suffered “conviction” for immigration purposes; court sought to establish national standard rather than relying on Florida state law in including amounts paid in restitution as a cost constituting “punishment”).

### §52.11 I. Former Judicial Recommendation Against Deportation (JRAD)

Until 1990, the judicial recommendation against deportation (JRAD) offered protection to persons convicted of a crime of moral turpitude or an aggravated felony that would ordinarily result in deportation. See *Nguyen v Chertoff* (2d Cir 2007) 501 F3d 107. The JRAD was a discretionary order, signed by the sentencing judge, requiring the INS to withhold immigration penalties based on conviction of a covered crime. The JRAD was eliminated by the Immigration Act of 1990 (IA 90) (Pub L 101-649, 104 Stat 4978). Although the Act was intended to be retroactive (see *U.S. v Murphey* (9th Cir 1991) 931 F2d 606), the INS 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 or sentence 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.

### §52.12 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 felony or misdemeanor probationer who successfully completed probation, often called "expungement"; see §52.14);
- Pen C §1203.4a (vacation of judgment and dismissal of accusation for misdemeanant not granted probation, often called "expungement"; see §52.14);
- Welf & I C §§1179, 1772 (dismissal of accusation for person honorably discharged from juvenile parole);
- Pen C §17 (reduction of felony to misdemeanor under various circumstances, including application of defendant at any time 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 41.)

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 probably not a controlled substances conviction, domestic violence conviction, firearms conviction, or any other conviction not listed in 8 USC §1227(a)(2)(A)(vi). *Matter of Suh* (BIA 2003) 23 I&N Dec 626 (pardon does not eliminate deportability of domestic violence conviction). Further, a pardon does not eliminate a listed conviction as a ground of inadmissibility. *Aguilera-Montero v Mukasey* (9th Cir 2008) 548 F3d 1248.

### §52.13 1. Vacating Conviction

Vacating the conviction on a ground of legal invalidity will eliminate all immigration effects that flow from the conviction itself. See, e.g., *Nath v Gonzales* (9th Cir 2006) 467 F3d 1185; *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. *Matter of Kaneda* (BIA 1979) 16 I&N Dec 677; *Matter of Sirhan* (BIA 1970) 13 I&N Dec 592.

Vacating the judgment will also eliminate the effect of any sentence or imprisonment resulting from the conviction. *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849. 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. *Matter of Cota-Vargas, supra*; *Matter of Martin* (BIA 1982) 18 I&N Dec 226 (correction of illegal sentence); *Matter of H.* (BIA 1961) 9 I&N Dec 380 (new trial and sentence); *Matter of J.* (BIA 1956) 6 I&N Dec 562 (commutation).

To be effective 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, immigration officials will not regard the conviction as eliminated for immigration purposes. See *Matter of Pickering* (BIA 2003) 23 I&N Dec 621, rev'd on other grounds, *Pickering v Gonzales* (6th Cir 2006) 465 F3d 263; *Beltran-Leon v INS* (9th Cir 1998) 134 F3d 1379. If it is not clear whether the conviction was vacated on a ground of legal invalidity or for rehabilitative reasons, the noncitizen cannot be deported, since the government bears the burden of proving deportability by clear and convincing evidence. *Nath v Gonzales* (9th Cir 2006) 467 F3d 1185. The BIA has held, however, that a noncitizen seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez-Martinez* (BIA 2007) 24 I&N Dec 272. A sentence vacated on any ground at all, even on discretionary grounds, is eliminated for immigration purposes. *Matter of Song* (BIA 2001) 23 I&N Dec 173; *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849.

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

Deferred entry of judgment under Pen C §§1000-1000.8 requires entry of a guilty

plea, and thus constitutes a conviction under current immigration law. 8 USC §1101(a)(48)(A); *Matter of Punu* (BIA 1998) 22 I&N Dec 224. An exception to the necessity for a guilty plea exists for counties that implement a preplea “drug court” program under Pen C §1000.5. Counsel should always investigate the possibility of preplea diversion in such a county. See §52.29.

Expungements under state rehabilitative statutes such as Pen C §1203.4 no longer eliminate the immigration consequences of most criminal convictions. *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. A possession conviction, however, is not considered a first conviction if it was preceded by a diversion dismissal of a prior case, even if no plea was ever entered in that case. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019.

- ▶ **Note:** The FFOA does not permit an expungement if the defendant has suffered, prior to the commission of the current offense, a controlled substances conviction under “federal or state” law. This provision does not include foreign convictions as a disqualification from relief.

A conviction of 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 dismissal of charges under Pen C §1203.4 or Proposition 36 (Pen C §1210.1). *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). This rule also applies to certain convictions of a first offense less serious than simple possession of a drug. *Cardenas-Urriarte v INS* (9th Cir 2000) 227 F3d 1132 (conviction of possession of paraphernalia eliminated by expungement).

The court’s reasoning in *Cardenas-Urriarte v INS*, *supra*, could be applied to any first drug conviction 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)), 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 as 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 DJJ completion under Welf & I C §§1179, 1772. The same is true of foreign expungements of qualifying offenses. *Dillingham v INS* (9th Cir 2001) 267 F3d 996.

### §52.15 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 government. See, e.g., *Matter of Rodriguez-Perez* (Simonet, IJ, Dec. 12, 1989) No. 18-364-484, digested in Interpreter Releases p 67 (Jan. 12, 1990) (INS could not prove conviction, because records sealed under similar Florida statute). However, if the DHS 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 prove the conviction exists. See *Matter of Moeller* (BIA 1976) 16 I&N Dec 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 6 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 §26.10.

When a sentence is corrected (see chap 34, §§35.5, 35.30-35.34) or commuted by a judge (see §35.5), the reduced sentence is the one considered by immigration authorities. *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849; *Matter of Song* (BIA 2001) 23 I&N Dec 173; *Matter of Martin* (BIA 1982) 18 I&N Dec 226 (correction); *Matter of J.* (BIA 1956) 6 I&N Dec 562 (commutation). A motion to modify the custody condition of probation from 365 to 364 days is effective to eliminate the immigration consequences of the original sentence, but it must be made while the defendant is still on probation. *People v Borja* (2002) 95 CA4th 481, 115 CR2d 728 (trial court lacked jurisdiction after probation had expired to order nunc pro tunc that defendant’s sentence, served 6 years earlier, be reduced from 365 days to 364 to avoid immigration consequences). Moreover, such a reduction must not violate the plea agreement or the court cannot order it. *People v Segura* (2008) 44 C4th 921, 80 CR3d 715.

Reduction of a felony to a misdemeanor under Pen C §17 (see §8.40) may aid a noncitizen who would be disqualified from relief by having a felony conviction, e.g., an applicant for Temporary Protected Status. See §52.58. Also, a noncitizen is eligible for the petty offense exception to the moral turpitude ground of inadmissibility only if the conviction has a maximum possible sentence of 1 year or less, which means it must be a misdemeanor. See §52.39. This relief can also protect a defendant against a conviction for an aggravated felony crime of violence under 18 USC §16(b), which requires the conviction to be a felony before it can be an aggravated felony.

When judgment is vacated, e.g., on a writ of error coram nobis (see §24.38) or habeas corpus (see §24.38), even a drug conviction has been held erased. See *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); *Matter of Sirhan*

(BIA 1970) 13 I&N Dec 592; Pen C §1016.5 (judgment vacated on defense motion when record does not reflect that judge advised defendant that guilty plea 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 when prejudice is shown; nonstatutory motion to vacate based on court's inherent power to correct constitutional error, such as ineffective assistance of counsel); *Matter of Adamiak* (BIA 2006) 23 I&N Dec 878 (Ohio drug conviction vacated because trial court failed to advise defendant of immigration consequences of guilty plea). For extensive discussion of obtaining California postconviction relief for immigrants, see Tooby, California Post-Conviction Relief for Immigrants (2009); Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, chap 8 (10th ed 2008).

#### §52.16 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), (D); *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 Formal Opinion No. 420 (1983).

Although it is certainly difficult to balance the desire to protect oneself from 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 counsel in a malpractice action. *Smith v Lewis* (1975) 13 C3d 349, 118 CR 621, disapproved on other grounds in *Marriage of Brown* (1976) 15 C3d 838, 851

n14, 126 CR 633. It is also wise for counsel to attempt to mitigate any damage suffered by the client. It is impossible for a criminal defendant to win a malpractice action unless he or she is actually innocent. *Lynch v Warwick* (2002) 95 CA4th 267, 270, 115 CR2d 391. 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. See Cal Rules of Prof Cond 3-110(A) (incompetence must be intentional, reckless, or repeated to warrant discipline). 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. In fact, a single isolated mistake is not grounds for discipline. See *Call v State Bar* (1955) 45 C2d 104, 109, 287 P2d 761.

### III. APPLICABLE IMMIGRATION LAW

#### §52.17 A. Effect of Criminal Record on Immigration

- **Note:** See the chart in §52.24 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 to 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 or other relief.

**Aggravated felony.** Conviction of an aggravated felony brings the harshest immigration penalties. See §§52.21, 52.41-52.47 for discussion of penalties. In almost all cases, the noncitizen will be removable from the United States and barred from applying for any discretionary waiver of removal regardless of the equities involved. 8 USC §1228(b)(5). See §52.44. The person is barred from ever returning legally to the United States, although a waiver is theoretically available. Illegal reentry into the United States following conviction of an aggravated felony and removal is a serious and commonly prosecuted federal felony under 8 USC §1326(b)(2) with a potential 20-year prison sentence. See §52.63. Aggravated felony offenses are listed in 8 USC §1101(a)(43) and are discussed in §§52.41-52.47.

#### §52.18 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., commission of a listed criminal offense. 8 USC §1101(a)(13)(C)(v) (crime of moral turpitude or

controlled substance 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).

Moreover, 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 U.S. citizen is normally able to become a permanent resident on the basis of 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 DHS's discretion. A noncitizen who is inadmissible because of a criminal problem is usually also ineligible to establish good moral character, which is a requirement for naturalized U.S. 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 §§52.52–52.62.

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 U.S. citizen can all be barred by being inadmissible on 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 (unless he or she was inadmissible at the time of the last admission); to be deported, the person must come within a ground of deportability.

## §52.19      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 6 months or carried a potential sentence of more than a year, and is deportable if the maximum sentence was 1 year or more and the offense occurred within 5 years after the date of admission. See §52.39. Furthermore, if the noncitizen was not admissible at the time of entry or adjustment of status, 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 lawfully 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 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 a DHS office in 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

#### §52.20 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 DHS 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 as follows:

(1) A federal district court judge can order removal of a noncitizen convicted of certain crimes (8 USC §1228(c)(1); see discussion in §52.8); and

(2) The DHS 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 DHS has cause to believe is removable may be brought before an immigration judge for removal proceedings. The DHS 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 §52.8.

#### §52.21 b. Expedited 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 nonpermanent resident convicted of an aggravated felony are meant to be completed, including any administrative appeals, before the nonpermanent resident’s release from incarceration for the underlying aggravated felony. 8 USC §1228(a)(3)(A).

#### §52.22 c. Waiver of Deportability and Inadmissibility

Some grounds of inadmissibility and deportability may be waived in certain circum-

stances at the discretion of an immigration judge or DHS 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 5 years and who has continuously resided in the United States for at least 7 years following lawful admission may apply for the discretionary waiver "cancellation of removal" under 8 USC §1229b(a). This waiver can potentially cure any of the grounds of inadmissibility and deportability, but it is not available to a permanent resident convicted of an aggravated felony. See §52.53.

#### §52.23 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 U.S. 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 §§52.52-52.62. Good moral character need only be established for a specific amount of time for each benefit, *e.g.*, the 5 years preceding an application for naturalization to U.S. citizenship, 10 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 relating to crimes involving moral turpitude, controlled substances, prostitution, a 5-year sentence for two or more convictions, or smuggling of aliens. 8 USC §1101(f). A crime of moral turpitude conviction that falls within the petty offense exception to inadmissibility (8 USC §1182(a)(2)(A)(ii)(II)) does not create a bar to good moral character. *Matter of Gonzalez-Zoquiapan* (BIA 2008) 24 I&N Dec 549.

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 §§52.10, 52.38-52.40, 52.42.)

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).

## ⇒ §52.24

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

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

For explanation of inadmissibility, see §52.18; for deportability, see §52.19; for the bar to establishing good moral character, see §52.23. 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 §52.50.

Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
Controlled substances.	One conviction (except possession of 30 grams or less of marijuana). 8 USC §1227(a)(2)(B)(i). First conviction simple possession is not aggravated felony (unless drug was flunitrazepam or more than 5 grams cocaine base), but second conviction may be so held. Under the influence, transportation, and offering to commit a drug crime are not aggravated felonies; any offense relating to trafficking is. 8 USC §1101(a)(43)(B).	One conviction or admission of elements of one offense (single offense involving 30 grams 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.	Two convictions after admission to U.S., not single scheme; or 1 conviction within 5 years after admission with possible sentence of 1 year or more. 8 USC §1227(a)(2)(A)(i)-(ii). <sup>1</sup>	One 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).

Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
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.	One conviction of any offense related to firearm or destructive device. 8 USC §1227(a)(2)(C). <sup>2</sup>  Sale of firearms or felon-in-possession offenses are aggravated felonies. 8 USC §1101(a)(43)(C), (E).	None (unless offense also is crime involving moral turpitude).	Some can be aggravated felonies. <sup>2</sup>
Sentences.	1-year sentence for violent crime, theft, receiving, burglary, document fraud, forgery, perjury, and a few less common offenses is aggravated felony. <sup>1</sup>  See also moral turpitude.	5-year total sentence for 2 or more convictions of any kind. 8 USC §1182(a)(2)(B).  See also moral turpitude.	Same 5-year total for 2 or more convictions as Inadmissibility, or physically confined 180 days. 8 USC §1101(f)(3).
Noncitizen smuggling.	Before, at time of, or within 5 years after admission, aiding or encouraging noncitizen 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).
Drug addiction and abuse; Alcoholism.	Is or has been after admission a drug addict or abuser. 8 USC §1227(a)(2)(B)(ii).	Is currently 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).



Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
Gambling.	Second gambling conviction with 1-year sentence of imprisonment is an aggravated felony. 8 USC §1101(a)(43)(J).	None.	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).
Domestic violence, stalking, child abuse.	Conviction after admission and after 9/30/96. 8 USC §1227(a)(2)(E)(i). Limited waiver possible. 8 USC §1227(a)(7)(A).	None (but see if the DV offense also is a crime involving moral turpitude; if so, complete that analysis).	Same as inadmissibility ground.
Court finds violation of domestic violence order.	Civil or criminal court finding that enjoined noncitizen who violated domestic violence protection order. 8 USC §1227(a)(2)(E)(ii). Limited waiver possible. 8 USC §1227(a)(7)(A).	None (unless offense is crime involving moral turpitude).	Same as inadmissibility ground.
Aggravated felony.	Conviction. 8 USC §1101(a)(43) (definition of aggravated felony), §1227(a)(2)(A)(iii) (deportation ground). See §§52.10, 52.12-52.16, 52.41-52.47.	Aggravated felons who have been deported are inadmissible for 20 years; waiver available. 8 USC §1182(a)(9)(A)(ii).	Aggravated felony conviction after November 29, 1990, is permanent bar. 8 USC §1101(f)(8).

<sup>1</sup> Some moral turpitude offenses, such as murder and certain common offenses (*e.g.*, crimes of violence, burglary, theft with a 1-year sentence imposed), are also aggravated felonies. See 8 USC §1101(a)(43)(F)-(G), (P), (R)-(S).

<sup>2</sup> 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

##### §52.25 a. Definition of Conviction

In many cases, a person must be convicted of an offense to suffer immigration penalties. Under the Immigration and Nationality Act (INA), a conviction occurs when there is a formal judgment of guilt or when an alien has been found or has pleaded guilty or no contest and some form of punishment or restraint has been imposed, even though adjudication has been withheld. 8 USC §1101(a)(48)(A). See Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §2.1 (10th ed 2008). Imposition of court fees or costs, or restitution, is a sufficient penalty to constitute a conviction. *Matter of Cabrera* (BIA 2008) 24 I&N Dec 459. 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 a not guilty or no contest plea do not constitute convictions for immigration purposes. See §§52.27–52.29. A conviction of an offense, such as an infraction (see Pen C §19.6), so minor that no custody may be imposed and there is no right to a jury trial, is not considered a conviction for immigration purposes. See *Matter of Eslamizar* (BIA 2004) 23 I&N Dec 684 (en banc).

► **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 §52.50. Avoiding or eliminating a conviction may not avert consequences that do not require a conviction.

##### §52.26 b. Divisible Statute and 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 §§52.30–52.34. Similarly, Pen C §12020(a) includes both possession of a dirk, dagger, or billy, which is not a basis for deportation on the firearms ground, and possession of a sawed-off shotgun, which is. See discussion of the firearms ground in §§52.35–52.36.

When a conviction under a divisible statute is ambiguous about whether the noncitizen was convicted of the offense with immigration consequences, immigration and other reviewing authorities will resolve the question using only information from the record of conviction. If that record does not indicate that the offense was one carrying immigration penalties, the authority must decide in the defendant’s favor. 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 record of conviction to determine elements of offense); *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080. The record of conviction consists of:

- The charging papers (indictment, complaint, information), specifically limited to the count(s) of conviction;
- The plea or judgment, including a stipulated factual basis; and
- Sentencing.

See, e.g., *Wadman v INS* (9th Cir 1964) 329 F2d 812, 814 n3; *Matter of Madrigal-Calvo* (BIA 1996) 21 I&N Dec 323 (transcript of defendant's plea and sentence hearing, including defendant's admission, is part of record of conviction); *Matter of Mena* (BIA 1979) 17 I&N Dec 38.

The record of conviction does not include:

- Dismissed counts (*Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072);
- The trial record;
- The presentence report (*Penuliar v Mukasey* (9th Cir 2008) 528 F3d 603, 611);
- The prosecutor's sentencing remarks; or
- The trial judge's opinion about immigration consequences.

See, e.g., *Matter of Teixeira* (BIA 1996) 21 I&N Dec 316 (police report not included); *Matter of Pichardo-Sufren* (BIA 1996) 21 I&N Dec 330; *Matter of Short* (BIA 1989) 20 I&N Dec 136; *Matter of Mena, supra*; *Matter of Goodalle* (BIA 1967) 12 I&N Dec 106; *Matter of Cassisi* (BIA 1963) 10 I&N Dec 136. Nor 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 he was convicted of possessing was a gun. *Matter of Pichardo-Sufren, supra*. See *Morales v Gonzales* (9th Cir 2007) 478 F3d 972; *Garcia-Lopez v Ashcroft* (9th Cir 2003) 334 F3d 840, 844 n4.

In determining what part of a divisible offense a defendant was convicted of, the U.S. Supreme Court has held that the record of conviction which may be considered only includes "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or ... some comparable judicial record of this information." *Shepard v U.S.* (2005) 544 US 13, 20, 161 L Ed 2d 205, 125 S Ct 1254. A "comparable judicial record" includes a minute order (*U.S. v Snellenberger* (9th Cir 2008) 548 F3d 699) and an abstract of judgment (*Anaya-Ortiz v Mukasey* (9th Cir 2009) 553 F3d 1266, 1273).

The Ninth Circuit had held that abstracts of judgment may only be used to establish the fact of a conviction, as opposed to the nature of a conviction. See *U.S. v Navidad-Marcos* (9th Cir 2004) 367 F3d 903, 908. A more recent decision relaxed this rule, holding that when the abstract of judgment "provides sufficient information to establish that [the defendant] was convicted of each element [of a removable offense], without reference to a charging document," the abstract alone can prove the nature of a conviction. *Anaya-Ortiz v Mukasey* (9th Cir 2009) 553 F3d 1266, 1273. When a minute order of the entry of plea and the information are considered together, the critical

phrase “as charged in the Information” must be used in the minute order to establish that the defendant necessarily pleaded guilty or no contest to the exact language of the complaint or information. *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072, 1087.

However, the Ninth Circuit held that a noncitizen’s decision to incorporate the police report into his guilty plea made the report an explicit statement “in which the factual basis for the plea was confirmed by the defendant” and, in that circumstance, relying on the police report to establish the elements of the crime did not undermine the purposes of the court’s limited modified categorical inquiry. *Suazo Perez v Mukasey* (9th Cir 2008) 512 F3d 1222, 1226. Defense counsel should therefore use a carefully worded factual admission by the defendant, which does not admit a fact bringing the conviction within a ground of deportation, instead of a stipulation to the police report, when the report contains facts that might bring a conviction within a ground of removal.

- **Note:** In some cases, defense attorneys will negotiate a plea to an amended charge that does not reveal which subsection of the statute 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 conviction of violating a divisible statute will have no immigration consequence when at least one part of the divisible statute does not fall within the grounds of deportability.

Some DHS 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)(i). They assert that, because of the unusual wording of the deportation ground, the required relationship to the victim, *e.g.*, current or ex-spouse or cohabitant, can be proved by information outside the record. See §§52.48–52.49; *U.S. v Belless* (9th Cir 2003) 338 F3d 1063. However, the Ninth Circuit has held that the court may look only at the record of conviction to determine whether a crime is one of “domestic violence.” See *Tokatly v Ashcroft* (9th Cir 2004) 371 F3d 613, 624 (testimonial evidence in immigration proceedings was outside record of conviction; therefore, inadmissible to show that convictions for burglary and kidnapping were convictions of crimes of domestic violence). Moreover, in a fraud aggravated felony case, the Ninth Circuit held that even the record of conviction cannot be used to bring a conviction within a ground of deportation unless the fact sought to be used is in fact an element of the offense of conviction. *Kawashima v Mukasey* (9th Cir 2008) 530 F3d 1111 (per curiam).

- **Note:** The Supreme Court granted certiorari in *Nijhawan v Attorney Gen.* (cert granted Jan. 16, 2009, No. 08-495; superseded opinion at (3d Cir 2008) 523 F3d 387, which deals with whether the categorical approach applies to the loss amount in a fraud/deceit aggravated felony case.

With respect to other grounds of deportation, the BIA has attempted to allow resorting to evidence outside the record of conviction. Compare *Matter of Babaisakov* (BIA 2007) 24 I&N Dec 306 (evidence outside the record can be used to establish domestic relationship for domestic violence offense); with *Matter of Gertsenshteyn* (BIA 2007) 24 I&N Dec 111, reversed and remanded by (2d Cir 2008) 544 F3d 137 (same to establish “commercial advantage” for 8 USC §1101(a)(43)(K) aggravated felony).

- **Note:** Although the BIA decision in *Gertsenshteyn* was reversed by the Second Circuit, the BIA decision remains operative within the Ninth Circuit unless overruled, and the Ninth Circuit has not done so.

The U.S. Supreme Court has suggested that immigration counsel must do more than apply “legal imagination” to a state statute’s language and must show

a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition [of the deportation ground]. To show that realistic probability, an offender . . . must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

*Gonzales v Duenas-Alvarez* (2007) 549 US 183, 166 L Ed 2d 683, 693, 127 S Ct 815. The Ninth Circuit, however, has limited this doctrine, stating that when

a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute’s greater breadth is evident from its text.

*U.S. v Grisel* (9th Cir 2007) 488 F3d 844, 850 (en banc) (citation omitted).

- **Note:** In *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, the Attorney General held that in determining whether a conviction constitutes a crime of moral turpitude, the immigration court may consider any facts, even those outside the elements of the statute of conviction and outside the record of conviction. The Attorney General explicitly claimed that he had discretion to interpret the immigration statutes in this fashion, regardless of prior inconsistent case law from the federal circuits. While this decision is limited to the moral turpitude removal grounds, and is being challenged, defense counsel should attempt to choose dispositions as to which there is no evidence that would bring it within the moral turpitude category.

A preponderance is insufficient to establish a fact by the “clear and convincing” evidence required for deportability. *Matter of Velazquez-Herrera* (BIA 2008) 24 I&N Dec 503.

## 2. Dispositions That May Not Constitute Convictions

### §52.27 a. Juvenile Court Dispositions

A disposition in juvenile proceedings does not constitute a conviction. *Matter of C.M.* (BIA 1953) 5 I&N Dec 327. On representing juveniles, see §52.4.

### §52.28 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; *Morales-Alvarado v INS* (9th Cir 1981) 655 F2d 172. 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 authorized by an appellate court has been accepted as evidence that no final conviction exists. But see *Matter of Polanco* (BIA 1994) 20 I&N Dec 894 (criminal court did not accept late-filed appeal, so there was no appeal in existence to delay finality of conviction for immigration purposes).

### §52.29 c. Disposition Without Guilty Plea

Before a conviction exists for immigration purposes, a plea or finding of guilt must be made and some punishment or restraint imposed. 8 USC §1101(a)(48)(A). Diversions granted in 1996 and earlier did not involve a plea of guilty or no contest, and thus do not constitute “convictions” for immigration purposes. See *Matter of Grullon* (BIA 1989) 20 I&N Dec 12. After January 1, 1997, drug diversion via deferred entry of judgment 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); *Matter of Punu* (BIA 1998) 22 I&N Dec 224. 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. However, there is a Ninth Circuit exception for a first conviction of simple possession and other minor drug offenses that are not forbidden under federal law; diversion dismissal or expungement *will* eliminate these convictions for immigration purposes. See §52.14.

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

- (1) When courts were 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 authorized 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., defendants with cognitive developmental disabilities 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 immigration purposes, at least until dismissal (depending on the offense of conviction). 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. For further discussion of diversion and deferred entry of judgment, see chap 27.

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 §52.14 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.

### §52.30 3. Offenses Involving Controlled Substances

Sections 52.30–52.34 discuss *conviction* of controlled substance offenses. Drug addicts and abusers are deportable and inadmissible, even without a conviction. Likewise, those who the government has reason to believe are or were drug traffickers or their assistants are inadmissible, even without a conviction. See §52.50.

- ▶ **Note:** For advice in pleading drug cases, see Note titled “Drug Offenses” accompanying the California Chart on Immigration Consequences at <http://www.ilrc.org/criminal.php>.
- ▶ **Note:** Arresting agencies must notify the appropriate U.S. agency whenever they arrest a suspected noncitizen of violating Health & S C §§11350–11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368, or 11550. Health & S C §11369. See *Fonseca v Fong* (2008) 167 CA4th 922, 936, 84 CR3d 567 (Section 11369 is not preempted by federal law and “does not require any state or local law enforcement agency to independently determine whether an arrestee is a citizen of the United States, let alone whether he or she is present in the United States lawfully or unlawfully”).

### §52.31 a. Controlled Substances Grounds of Deportability and 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. *Matter of Hernandez-Ponce* (BIA 1988) 19 I&N Dec 613. Convictions under state or federal law as well as laws of other countries incur these penalties.

Many drug offenses are classed as aggravated felonies under 8 USC §1101(a)(43)(B), although there are important exceptions. See §52.32. 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 §52.33.

### §52.32 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 at least 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 federal law, the conviction will not trigger any consequences as a conviction relating to a controlled substance. 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. *Matter of Paulus* (BIA 1965) 11 I&N Dec 274; *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072 (when record of conviction under Health & S C §11377(a) does not identify substance, there is no controlled substance conviction for immigration purposes). For discussion of the record of conviction, see §§52.10, 52.26. Some counsel have bargained to amend the charging papers to eliminate the identification of the controlled substance or to have their clients plead to the exact language of the statute when the statute specifies drugs not on the federal list.

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 as well as alcohol. Veh C §23152; *People v Keith* (1960) 184 CA2d Supp 884, 7 CR 613 (insulin). See Veh C §312 (definition of drug).

- **Note:** The Ninth Circuit has held that possession of paraphernalia under an Arizona statute was an offense relating to a controlled substance, despite the lack of proof of the specific substance. *Luu-Le v INS* (9th Cir 2000) 224 F3d 911. In *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072, the court distinguished *Luu-Le* by saying that, at least when the offense charged is possession, the substance must be identified. *Ruiz-Vidal v Gonzales*, *supra*.

**Accessory after the fact.** Being an “accessory after the fact” (see 18 USC §3) to a controlled substances offense does not itself constitute a controlled substances offense. *Matter of Batista-Hernandez* (BIA 1997) 21 I&N Dec 955. 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. Accessory after the fact under Pen C §32 also is not a crime of moral turpitude. *Navarro-Lopez v Gonzales* (9th Cir 2007) 503 F3d 1063. On crimes of moral turpitude, see §§52.38–52.40.

A plea to accessory after the fact can have other adverse consequences, however. It must result in a sentence of no more than 364 days of custody to avoid being considered an aggravated felony under the obstruction of justice provision. 8 USC §1101(a)(43)(S); *Matter of Batista-Hernandez*, *supra* (18 USC §3). The Board of Immigration Appeals (BIA) held that the federal crime of misprision of felony is not obstruction of justice and is not an aggravated felony even with a 1-year sentence. *Matter of Espinoza-Gonzalez* (BIA 1999) 22 I&N Dec 889.



**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 of possession of paraphernalia). Under federal statute, giving away a small amount of marijuana ought to receive the same treatment. See 21 USC §841(b)(4). However, if there was a preplea diversion under Pen C §1000 before its amendment as of January 1, 1997, then rehabilitative treatment under postplea diversion or Proposition 36, or dismissal under Pen C §1203.4, will constitute a “conviction” for immigration purposes. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. See §52.34.

**Soliciting or offering to commit any drug offense.** In *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, 909, the Ninth Circuit held that *offering* to sell, transport, or deliver a drug is not an aggravated felony. See additional advice at §52.33. There is a strong argument, but no case on point, that under the same reasoning, *offering* to sell, transport, or deliver a drug is not an offense “relating to” controlled substances. See *Coronado-Durazo v INS* (9th Cir 1997) 123 F3d 1322, 1326, cited in *Rivera-Sanchez*, holding that a conviction of solicitation of a controlled substance does not cause deportability as a drug conviction. See also Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §4.4(G) (10th ed 2008). Thus a plea to offering to transport, or a plea to the statute that takes advantage of the disjunctive “or,” is not a plea to an aggravated felony and will give immigration practitioners at least an opportunity to argue that the offense is not a basis for deportation. This plea will make the person *inadmissible*, however, so that it is a bad option for an undocumented person or anyone who is applying for permanent residency, e.g., through a family visa petition. For further discussion of pleas in drug cases, see Note “Drug Offenses” accompanying the California Chart on Immigration Consequences at <http://www.ilrc.org/criminal.php>.

- **Warning:** It is very possible that legislation will erase the use of “offering” as a defense, and there is a small possibility that any such legislation would be retroactive. Therefore, the best practice is for defense practitioners, when possible, to use another alternative.

**Exception for one conviction of simple possession of 30 grams or less of marijuana or hashish.** Conviction of 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. Conviction of being under the influence of marijuana has the same benefit. See *Flores-Arellano v INS* (9th Cir 1993) 5 F3d 360. See also *Medina v Ashcroft* (9th Cir 2005) 393 F3d 1063 (Nevada conviction for attempting to be under influence of THC comes within this exception). However, the Board of Immigration Appeals has ruled that the exception to deportability for simple possession of 30 grams

or less of marijuana does not apply to a conviction under a state statute containing an element requiring that the offense occurred in a prison or other protected location, or when an enhancement increased the maximum punishment for possession, such as an enhancement for possession within a “drug-free zone.” *Matter of Moncada-Servellon* (BIA 2007) 24 I&N Dec 62 (possession in prison); *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424 (enhancement for “drug-free zone”).

The INS (now DHS) General Counsel ruled that conviction of simple possession of 30 grams or less of hashish or other cannabis products comes within the marijuana exception to the deportation ground and can be waived under INA §212(h) (8 USC §1182(h)). In the context of the §212(h) waiver, the General Counsel recommended that the INS deny a waiver to one who possessed an amount of hashish equivalent to more than 30 grams of marijuana leaves. See INS General Counsel Legal Opinion 96-3 (Apr. 23, 1996), withdrawing previous INS General Counsel Legal Opinion 92-47 (Aug. 9, 1992). See also 21 USC §802(16), defining “marihuana” to include all parts of the cannabis plant, including hashish.

**In delinquency proceedings.** As always, a delinquency disposition is not a “conviction” for immigration purposes. A plea to possession, under the influence, etc., is not a basis for deportation or inadmissibility, nor is it a plea to an aggravated felony. However, defense counsel should conservatively assume that a delinquency plea to sale, possession for sale, or other trafficking offenses will make the person inadmissible, because it will provide DHS with “reason to believe” that the minor has been or assisted a trafficker. See §52.33. This may not be such a serious result for a permanent resident, but if the minor is undocumented, this plea is likely to permanently bar him or her from ever getting lawful immigration status.

### §52.33 c. Which Drug Offenses Are Aggravated Felonies

- **Note:** The strategies outlined in §§52.32 and 52.34 to prevent classification as a controlled substance offense also prevent classification as a controlled substance aggravated felony.

An aggravated felony subjects the person convicted of it to the penalties and restricted rights discussed in §52.44. 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). A state or federal drug offense, or an attempt or conspiracy to commit such an offense (8 USC §1101(a)(43)(U)), will be considered an aggravated felony in immigration proceedings in the Ninth Circuit if:

- It is generally considered to be a trafficking offense (e.g., sale or possession for sale); or
- It is listed in 18 USC §924(c)(2) or, if a state crime, is analogous to one of the federal crimes listed in that section that carries a potential sentence of 1 year or more.

**Offer to commit an offense: the Rivera-Sanchez rule.** In a highly significant and unanimous en banc decision, the Ninth Circuit ruled that *offering* to commit a trafficking 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 §§52.10, 52.26. 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).

- ▶ **Important practice tip:** The best plea is one that leaves open the possibility that the offense was offering to commit a drug crime *or* was transportation, or in the very best scenario, offering to transport (not for gain). Congress might remove the “offering” advantage by adding solicitation to the definition of aggravated felony, but transportation for personal use—while a deportable conviction—will not be an aggravated felony.

Note that offenses such as possession for sale under Health & S C §11351 do not include offering and therefore do not come within the beneficial *Rivera-Sanchez* rule. For this reason, it has been held ineffective assistance of counsel not to advise a noncitizen defendant of the immigration benefit of declining a plea to possession for sale and instead pleading up to offering to sell. *People v Bautista* (2004) 115 CA4th 229, 239, 8 CR3d 862.

- ▶ **Note:** The reasoning and underlying precedent cited in *Rivera-Sanchez* 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 §52.32. A conviction of offering to commit a drug transaction, however, will establish inadmissibility on the ground that the noncitizen is a person who authorities have reason to believe is or has assisted a drug trafficker. In contrast, offering to transport may not have this disadvantage. See 8 USC §1182(a)(2)(C) and discussion in §52.50.

**Simple possession as an aggravated felony.** A state drug conviction is an aggravated felony if the offense is exactly analogous to a federal felony offense that appears in any of the federal drug statutes in the Controlled Substances Act. See 8 USC §1101(a)(43)(B).

**First conviction for simple possession.** The Supreme Court held that a first conviction for simple possession of a controlled substance is not an aggravated felony, even if the state classifies the offense as a felony. *Lopez v Gonzales* (2006) 549 US 47, 166 L Ed 2d 462, 127 S Ct 625. This affirmed the rule already in existence in the Ninth Circuit under *Ferreira v Ashcroft* (9th Cir 2004) 382 F3d 1045. The exception is that a first conviction for simple possession of more than five grams of cocaine base or any amount of flunitrazepam is an aggravated felony. See 21 USC §841(a).

**Two or more possession convictions.** In contrast to a first conviction for simple possession, defense counsel should view a *second* possession conviction as a very

dangerous offense and should assume that it will be held to be an aggravated felony if the individual's status as a recidivist drug offender was charged and admitted or found to be true. *Matter of Carachuri-Rosendo* (BIA 2007) 24 I&N Dec 382. A second possession conviction also is dangerous because under *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, it cannot be eliminated for immigration purposes by deferred entry of judgment or other rehabilitative relief.

- ▶ **Practice tip:** To avoid an aggravated felony for two or more possession convictions, either plead to an offense other than a possession offense, or make sure that the prior possession offense(s) are not charged and admitted or found to be true.
- ▶ **Note:** A noncitizen defendant's first conviction of simple possession, even of more than five grams of cocaine base or any amount of flunitrazepam, will not have an immigration consequence if it is successfully eliminated by "rehabilitative relief," such as withdrawal of plea under deferred entry of judgment, Proposition 36, or Pen C §1203.4. See *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, 735. But if there was a preplea diversion under the diversion law before its amendment as of January 1, 1997, a first conviction that was eliminated by "rehabilitative relief" will remain a "conviction" for immigration purposes. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. See also §52.13. The second conviction of simple possession cannot be eliminated in this way for immigration purposes.

**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, which is not a federal offense, can be eliminated by any state rehabilitative relief. *Cardenas-Urriarte v INS* (9th Cir 2000) 227 F3d 1132. Transportation for personal use (e.g., Health & S C §§11352(a), 11360(a), 11379(a)) has no exact federal analogue and for that reason has been held not to be an aggravated felony. *U.S. v Almazan-Becerra* (9th Cir 2007) 482 F3d 1085, 1089. Convictions for under the influence and transportation also will not be counted when calculating whether a noncitizen has a "first" possession conviction. However, transportation and the other minor drug offenses discussed here do subject the defendant to deportability and inadmissibility because they are offenses "relating to" drugs under 8 USC §1227(a)(2)(B). See §52.31. Offering to transport is not an aggravated felony and arguably is not a basis for deportation, under *U.S. v Rivera-Sanchez, supra*.

**Cultivation of marijuana.** Cultivation of marijuana (Health & S C §11358) is categorically an aggravated felony as a drug trafficking offense as an analogue to 21 USC §841(b)(1)(D). *U.S. v Reveles-Espinoza* (9th Cir 2008) 522 F3d 1044.

**Prescription offenses; maintaining a place where drugs are sold.** A conviction of obtaining a controlled substance by means of a fraudulent or forged prescription under Bus & P C §4324 or Health & S C §11173 or §11368 might be held to be an aggravated felony, because the offense might be held analogous to 21 USC §843(a)(3). A safer plea would be to a forgery offense that does not contain the drug element. Note, however, that a conviction of any kind of forgery is an aggravated felony if a 1-year sentence is imposed. See §52.41. Maintaining a place where drugs are sold

might be held an aggravated felony as analogous to a federal felony, while being in a place where drugs are used would not be.

#### §52.34 d. Strategy

Defense counsel should try to prevent the client from being convicted of any offense—even a minor one—related to controlled substances. If that option 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. For more detailed instructions about dealing with controlled substance charges, see Note “Drug Offenses” accompanying the Quick Reference Chart to Immigration Consequences of California Convictions (<http://www.ilrc.org/criminal.php>), and extensive discussion in Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, chap 3 (10th ed 2008). Note that some of the following strategies avoid aggravated felon status but still leave the person deportable and inadmissible for having a drug conviction.

“Rehabilitative relief,” such as withdrawal of a plea under deferred entry of judgment under Pen C §1000, §1203.4 or Proposition 36, will eliminate the immigration effect of a *first* conviction for certain minor drug offenses. These include a first offense, whether felony or misdemeanor, of simple possession of any controlled substance (*Lujan-Armentariz v INS* (9th Cir 2000) 222 F3d 728, 735), or a first offense that is less serious than simple possession and that is not analogous to a federal felony, such as being under the influence or possession of paraphernalia (*Cardenas-Urriarte v INS* (9th Cir 2000) 227 F3d 1132, 1137 (expungement of conviction for possession of paraphernalia)). A first conviction of giving away a small amount of marijuana ought to receive the same treatment. See 21 USC §841(b)(4). However, rehabilitative relief will *not* eliminate the effect of a conviction for transportation for personal use, or for a second drug conviction of any kind, and will also not eliminate the effect of a conviction if there was a prior preplea diversion. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. Counsel must make sure that the instant conviction is actually the defendant’s first conviction *in any jurisdiction* and that there was no prior preplea diversion.

The conviction retains its immigration effect until it is actually eliminated under state law, e.g., until probation or other requirements are completed and the plea is withdrawn. *Chavez-Perez v Ashcroft* (9th Cir 2004) 386 F3d 1284, 1290. Counsel can protect a noncitizen defendant by structuring a disposition that does not leave the defendant exposed. This could be accomplished, for example, through an informal arrangement for a deferred prosecution in which the case is continued without a plea while the defendant fulfills certain conditions, with the understanding that the prosecution will consider dropping the charges based on good performance. Alternatively, if possible, a very short probation period or an arrangement for probation to end on release from criminal incarceration would permit the conviction to be expunged quickly under §1203.4. Once a conviction is so treated, the original guilty plea should no longer constitute a formal “admission” of a drug offense that causes inadmissibility under 8 USC §1182(a)(2)(A)(i). See, e.g., *Matter of E.V.* (BIA 1953) 5 I&N Dec 194.

A first conviction for simple possession is a deportable offense, but not an aggravated

felony unless it is for possession of flunitrazepam or more than five grams of cocaine base. A first conviction can be eliminated for immigration purposes by rehabilitative relief under *Lujan-Armendariz v INS*, *supra*. A second conviction for possession will probably be deemed an aggravated felony if it is pleaded as a specific-drug recidivist enhancement and proved or admitted; the second conviction then cannot be eliminated for immigration purposes except by vacation for cause. However, if the first conviction was or could be eliminated by rehabilitative relief, arguably the second conviction becomes the “first” for purposes of defining an aggravated felony. See §52.33.

A very good alternative is to negotiate a conviction of accessory after the fact for a controlled substance offense with less than a 1-year sentence imposed (*Matter of Batista-Hernandez* (BIA 1997) 21 I&N Dec 955). This is not a drug conviction involving deportability or inadmissibility, or an aggravated felony. There is, however, the danger that DHS will allege that accessory after the fact, when the record shows that the principal offense involved drug *trafficking*, makes the defendant inadmissible by providing “reason to believe” he or she assisted in trafficking; therefore this is not an optional plea for an undocumented person. See §52.50. Also, the Ninth Circuit has determined that accessory after the fact is not a crime involving moral turpitude. *Navarro-Lopez v Gonzales* (9th Cir 2007) 503 F3d 1063.

Another very good alternative is to ensure that the record of conviction (charging papers, plea or judgment, sentence, definition of the offense) does not indicate the specific controlled substance involved. The reason is that California statutes concerning “controlled substances,” such as Health & S C §§11350-11351, 11352(a), 11377-11378, 11379(a), cover substances that are not defined as controlled substances under the federal Controlled Substances Act and therefore are not included in the immigration definition. Thus, in evaluating a conviction under a broadly defined statute such as Health & S C §11377, DHS cannot prove that the offense involved a federally controlled substance unless the substance is identified on the record. See *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072; *Matter of Paulus* (BIA 1965) 11 I&N Dec 274. A plea to an original or amended charge phrased in the language of the statute will avoid identification of the substance and avoid deportability and inadmissibility for a drug offense.

- **Practice tip:** To avoid deportation or inadmissibility for any overinclusive or divisible statute, consider entering a no contest plea under *People v West* (1970) 3 C3d 595, 91 CR 385, without any admission that the defendant is pleading guilty “as charged” in the complaint and without admitting any facts. The Ninth Circuit held that “unless the record of the plea proceeding reflects that the defendant admitted to facts, a *West* plea, without more, does not establish the requisite factual predicate.” *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072, 1090 (en banc). In *Vidal*, the defendant’s waiver-of-rights form specified “*People v. West*” in the section requesting a description of “facts as to each charge” to which he pleaded no contest.

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 for transportation. A very good plea would rely on the language of the statute in the disjunctive, leaving open the possibility that the offense involved either transportation or offering to commit some offense (including, if possible, transportation).

► **Practice tip:** Possession for sale will be held to be an aggravated felony. When it will not be possible to plead to a lesser offense, counsel should advise the noncitizen defendant of the option of pleading up to transportation or offering to sell, offenses that have more serious criminal consequences but are not aggravated felonies; in fact, under current law, immigration counsel can argue that these are not deportable offenses. See *People v Bautista* (2004) 115 CA4th 229, 237, 8 CR3d 862 (failure to try to negotiate agreement in which client pleaded guilty to offering to sell deemed ineffective assistance of counsel). Even better, when possible, counsel should make every attempt to plead to accessory after the fact with a sentence of less than 1 year. This is not an aggravated felony and not a crime of moral turpitude. See §52.33. Another option is to plead down to a first possession or to being under the influence, to possession of paraphernalia, or to some other offense. While all of these are deportable drug offenses, which may be a serious or fatal disability depending on the case, none is an aggravated felony, which is far worse. The very best plea might be to some other offense.

► **Warning:** A fact contained in a sentence enhancement that serves to increase the maximum penalty for a crime and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, will be treated as an element of the underlying offense. *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424. For example, to avoid an aggravated felony drug trafficking offense, do not have a client admit an enhancement based on sale, manufacturing, or possession for sale, among other things.

Some dispositions do not constitute a conviction for immigration purposes. See §§52.27-52.29. 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.

► **Practice tip:** When a plausible basis exists for a motion to suppress evidence, counsel should consider filing the motion if conviction would render a client deportable. If the suppression motion fails in the trial court, the defendant can plead to the offense and still pursue an appeal under Pen C §1538.5(m). If the appeal is still pending when the noncitizen's sentence is up, any removal proceeding would be subject to a motion to terminate by immigration counsel because the conviction is not "final." If this is the noncitizen's only deportable offense, DHS will be unable to further detain the noncitizen and proceed with removal proceedings while the appeal is pending.

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. Preplea diversion (under the law in effect before Jan. 1, 1997, or in a county that has established a drug court program under Pen C §1000.5) is not a conviction, but a deferred adjudication when a guilty plea was taken is a conviction for immigration purposes (unless it is a first conviction for one of the minor offenses that can be eliminated for immigration purposes by state rehabilitative relief under *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728).

If a first offense involving simple possession of a small amount of marijuana or hashish is involved, counsel should obtain a stipulation on the record that it was less than 30 grams, to avoid removability and preserve eligibility for a waiver of inadmissibility. See 8 USC §§1227(a)(2)(B), 1182(h). See also §52.32.

#### 4. Offenses Involving Firearms or Destructive Devices

§52.35

##### 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” includes all guns and other firearms, frames and receivers, mufflers and silencers; “destructive device” includes bombs, grenades, rockets, missiles, mines or similar items, and parts used to convert them. An exception is made 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. *Matter of Saint John* (BIA 1996) 21 I&N Dec 593.

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 §§52.38-52.40. A “crime of violence” with a 1-year sentence imposed is an aggravated felony. See discussion in §52.47.

Finally, some firearms offenses, notably “trafficking in firearms” and “ex-felon in possession of a firearm,” are aggravated felonies. See discussion in §52.36. Alternative pleas that avoid immigration consequences are discussed in §52.37.

§52.36

##### 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 involving 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 inditcee, felon, fugitive, addict, mental defective, or committee);
- 18 USC §844(d) (transporting or receiving explosives in interstate or foreign commerce with intent to injure, intimidate, or damage property);



- 18 USC §844(e) (communication of threat or false information about 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 committing 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 U.S. citizenship);
- 18 USC §922(j) (receiving stolen arms or ammunition);
- 18 USC §922(n) (shipping or receiving arms or ammunition by felony indicttee);
- 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 altered serial number).

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 §§52.10-52.26. 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 firearm under Pen C §12021 is sufficiently similar to 18 USC §922(g)(1) to be aggravated felony under federal sentencing guidelines); *Matter of Vasquez-Muniz* (BIA 2002) 23 I&N Dec 207 (following *Castillo-Rivera*). However, Pen C §12021(a) is a divisible offense because 18 USC §922(g)(1) requires a prior felony conviction and §12021(a) includes the possession of a firearm by an individual convicted of certain misdemeanors and by “anyone who is addicted to the use of any narcotic drug.” To the extent that a defendant pleads to a complaint worded in the exact language of the statute in the disjunctive or to those discrete offenses, a §12021(a) conviction will not be deemed an aggravated felony, but it will still be a deportable offense as a firearms offense. See *Anaya-Ortiz v Mukasey* (9th Cir 2009) 553 F3d 1266.

Other than a §12021(a) conviction with the record showing that the defendant had a prior felony, most common California firearms offenses do not appear to have an exact federal substantive analogue. Some less common California offenses, such as possession of a machine gun, may have a federal analogue. Counsel should review the listed federal offenses to identify whether the state offense charged may be an aggravated felony. Again, any offense relating to trafficking in firearms or destructive devices may be held to be an aggravated felony, even if it is not exactly analogous to a federal offense.

### §52.37 c. Strategy

Conviction of any offense relating to firearms will make a noncitizen deportable, but not inadmissible. Undocumented persons may not have as a high priority avoiding the grounds of deportability, because they are already deportable for lack of lawful status. In contrast, a lawful permanent resident will lose lawful status and face removal if convicted of even the most minor firearms offense such as possession of an unregistered weapon.

A well-constructed plea to Pen C §12020(a) may avoid this ground. This is a divisible statute that includes offenses that do not relate to firearms, *e.g.*, possession of a blackjack in Pen C §12020(a)(1) or carrying a concealed dirk or dagger under Pen C §12020(a)(4). If the record of conviction does not establish that a firearm was involved in the offense, the conviction does not trigger deportability on the firearms ground. Thus a defendant could plead guilty to possessing a specific weapon that was not a firearm, or to possession of an “illegal weapon” listed in §12020(a) or (a)(1), as long as the record of conviction (charging papers, judgment or plea colloquy and sentence) does not state that the weapon was a gun or an explosive. This particular plea would have no other immigration consequences.

Penal Code §245(a) also is a divisible statute for purposes of the firearms ground. Penal Code §245(a)(1) penalizes assault with weapons other than a firearm, and Pen C §245(a)(2) penalizes assault with a firearm. If the defendant pleads to §245(a)(1), or if the record of conviction does not reveal whether the offense involved was (a)(1) or (a)(2), the conviction does not make the defendant deportable on the firearms ground. This offense, however, is likely to be deemed an aggravated felony as a crime of violence if the sentence imposed is 1 year or more and the offense is a crime involving moral turpitude.

A conviction under a statute that does not explicitly involve a weapon does not incur deportability under the firearms ground even if the record reveals that a firearm was used. *Matter of Perez-Contreras* (BIA 1992) 20 I&N Dec 615 (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 on the firearms ground—especially if the record of conviction (charge, plea, verdict, sentence) is cleared of any reference to firearm use. *Matter of Madrigal-Calvo* (BIA 1996) 21 I&N Dec 323; *Matter of Teixeira* (BIA 1996) 21 I&N Dec 316; *Matter of Pichardo-Sufren* (BIA 1996) 21 I&N Dec 330.

▮ **Practice tip:** If the record of conviction (complaint, judgment, plea colloquy, sentencing

hearing and documents) does not establish whether the firearm is an antique weapon or not, there is a chance that the defendant can avoid deportability since the “antique firearm exception” has gained traction in unpublished Board of Immigration Appeal decisions in 2008. However, the use of other strategies mentioned above are the first line of defense for a noncitizen defendant faced with a firearms offense. See §52.35 for the antique firearm exception.

- ▶ **Warning:** A fact contained in a sentencing enhancement that serves to increase the maximum penalty and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, is treated as an element of the underlying offense. *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424. To avoid deportability for a firearms offense, avoid any sentence enhancement dealing with firearms or explosive devices.

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 of accessory after the fact is not a firearms offense. However, if a sentence of 1 year or more is imposed, the conviction is an aggravated felony. See §52.34.

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. *Matter of Gabryelsky* (BIA 1993) 20 I&N Dec 750; *Matter of Rainford* (BIA 1992) 20 I&N Dec 598.

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 §52.55. Cancellation is barred if there is an aggravated felony conviction. Deportability on the firearms ground does not “stop the clock” for purposes of establishing residency for cancellation. For more information on firearms convictions and strategies, see Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §§6.1, 9.18, 11.10 (10th ed 2008).

## 5. Crime Involving Moral Turpitude

### §52.38

#### 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 §52.39. 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 §52.39.

The term "crime involving moral turpitude" has been defined by the Attorney General as "a reprehensible act with some form of scienter." *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, 706. 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 particular moral turpitude conviction will bring immigration consequences may depend on such factors; see §52.39.) On one hand, murder, rape, voluntary manslaughter, robbery, burglary with intent to commit theft, theft (grand or petty, when there is an intent to permanently deprive), arson, aggravated forms of assault, crimes that have a specific intent to defraud, 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 (when no injury occurs) have not. A crime of moral turpitude includes a conviction which requires proof that the defendant willfully or knowingly committed an act that causes "significant societal harm" or reprehensible conduct that is committed intentionally or with willfulness or recklessness. *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, 706 n5. For further discussion, see chart at <http://www.ilrc.org/criminal.php>, and more-detailed sources listed in §52.40.

**Conflict between Ninth Circuit and BIA.** A crime is decided to be one of moral turpitude by case law of the Board of Immigration Appeals (BIA) and U.S. Courts of Appeals. The Ninth Circuit can reverse a BIA decision on whether a crime is one of moral turpitude as the Ninth Circuit has consistently held it reviews de novo "whether a state statutory crime constitutes a crime of moral turpitude." *Cuevas-Gaspar v Gonzales* (9th Cir 2005) 430 F3d 1013, 1017. However, it is unclear if a conflicting Ninth Circuit decision will be controlling. See *National Cable & Telecomms. Ass'n v Brand X Internet Servs.* (2005) 545 US 967, 982, 162 L Ed 2d 820, 125 S Ct 2688 ("it is for the agencies, not courts, to fill statutory gaps"). It is also unclear if the Ninth Circuit will defer to the definition of a crime of moral turpitude set forth by the Attorney General in *Matter of Silva-Trevino*, *supra*. Before the *Silva-Trevino* decision, the Ninth Circuit had opined that "[S]ince the Board hasn't done anything to particularize the meaning of 'crime involving moral turpitude,' giving ... deference to its determination of that meaning has no practical significance." *Nicanor-Romero v Mukasey* (9th Cir 2008) 523 F3d 992, 997 (quoting *Mei v Ashcroft* (7th Cir 2004) 393 F3d 737, 739). Examples of conflicts in this area include:

- *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687. The Attorney General stated that any crime involving intentional sexual contact with a minor is a crime of moral turpitude; compare *Quintero-Salazar v Keisler* (9th Cir 2007) 506 F3d 688 (consensual unlawful sexual intercourse between minor under 16 and adult at least 4 years older (Pen C §261.5(d)) is not categorically a crime of moral turpitude).

► **Note:** A Pen C §261.5(d) crime is an aggravated felony for "sexual abuse of a minor." *Estrada-Espinoza v Mukasey* (9th Cir 2008) 546 F3d 1147.

- *Matter of Tobar-Lobo* (BIA 2007) 24 I&N Dec 143. The BIA held that failure register as a sex offender under the California statute is a crime of moral turpitude use it is reprehensible and involves willfulness and knowledge of the requirement;

compare *Plasencia-Ayala v Mukasey* (9th Cir 2008) 516 F3d 738, 747 (failure to register as a sex offender under Nevada statute is not crime of moral turpitude because “[w]here an act is only statutorily prohibited, rather than inherently wrong, the act generally will not involve moral turpitude” (quoting *Cuevas-Gaspar v Gonzales* (9th Cir 2005) 430 F3d 1013, 1018)).

Counsel should consult an immigration attorney or publications to ascertain whether a particular crime constitutes a crime of moral turpitude. See §52.40 for a list of publications.

**Divisible statutes and statutes lacking an element of knowledge or intent.** Before the decision in *Matter of Silva-Trevino, supra*, facts outside the formal “record of conviction” (complaint, judgment, plea transcript, sentencing document) could not be considered when determining whether a conviction constitutes a crime of moral turpitude. Reversing nearly a century of precedent, the Attorney General held in *Silva-Trevino* that in making that determination, the immigration court may consider any facts, even those outside the elements of the statute of conviction and outside the record of conviction. It is unclear if the Ninth Circuit will find this decision controlling. Until there is more clarity, criminal defense counsel should attempt to choose dispositions for which there is no evidence that would bring the offense within the moral turpitude category. See §52.26 for more information on divisible statutes. See §52.40 for strategy.

### §52.39      **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 5 years after admission if the possible sentence was 1 year or more (8 USC §1227(a)(2)(A)(i)).

**Example of two crimes of moral turpitude as ground for deportation.** Jane obtained her “green card” in 1967. She then had two petty theft convictions, one in 1968 and one in 2008. Jane is deportable for two crimes of moral turpitude committed at any time after admission. If Jane’s attorney had negotiated a petty theft infraction under Pen C §490.1(a) or a trespass, Jane would not be deportable under this ground.

**Example of one crime of moral turpitude within 5 years of admission with potential 1-year sentence as ground for deportation.** John obtained his “green card” on January 20, 2003. He was charged with violation of Pen C §484e(a) (theft of access card), a misdemeanor, committed on January 20, 2008, and he was convicted the next day on January 21, 2008. Because his crime was one of moral turpitude committed within 5 years of admission with a potential sentence of 1 year or more, conviction of this offense makes John deportable even if he receives no actual jail time and even though his conviction occurred more than 5 years after admission. If John’s attorney had negotiated a disposition to an offense with a maximum potential sentence of less

than 1 year, such as attempted misdemeanor theft under Pen C §484g, the conviction would not make John deportable under this ground.

**Reduction to a misdemeanor and deportability.** Many offenses become aggravated felonies if a 1-year sentence is *imposed*. See §52.42. In contrast, convictions trigger consequences under the moral turpitude deportability and inadmissibility grounds partly on the basis of *potential* sentence. A first conviction for a moral turpitude offense that was committed within 5 years of admission will make a permanent resident deportable if it has a *potential sentence of 1 year or more*. Therefore, reducing a “wobbler” to a misdemeanor under Pen C §17(b) will not help the client avoid deportability, because a misdemeanor still has a potential sentence of 1 year. However, conviction for attempt to commit a wobbler offense, which then is reduced to a misdemeanor, will have a potential sentence of only 6 months and will avoid deportability on the grounds of moral turpitude. However, reduction to a misdemeanor has a different effect on inadmissibility on the grounds of moral turpitude.

► **Practice tip:** Conviction of petty theft within 5 years of admission will not be a deportable offense because the maximum punishment for petty theft is 6 months under Pen C §490. But a petty theft with a prior conviction under Pen C §666 would have a possible 1-year sentence if the Ninth Circuit follows *U.S. v Rodriguez* (2008) \_\_\_ US \_\_\_, 170 L Ed 2d 719, 128 S Ct 1783, in which the Supreme Court held that, in a criminal law context, the “maximum term of imprisonment prescribed by law” includes a recidivist sentence enhancement that may be imposed on the defendant.

**Reduction to a misdemeanor and inadmissibility.** 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. Whether an admission has occurred, or whether a new admission has possibly occurred for purposes of restarting the 5-year clock, can be a complex question; in case of doubt, consult with an immigration expert. “Admission” is defined as lawful entry into the United States with inspection. 8 USC §1101(a)(13)(A). A person who entered surreptitiously without inspection at a border point has not been admitted, but a person who entered with inspection by means of a tourist visa, permanent resident card, or other document has been admitted, even if fraud was committed. In some cases lawful permanent residents who return from a trip abroad do not make a new “admission” (8 USC §1101(a)(13)(C)), and in some cases a person who “adjusts status” to permanent residency at a government office within the United States is deemed to be making an admission (see *Shivaraman v Ashcroft* (9th Cir 2004) 360 F3d 1142; see also §52.19). Immigration counsel should be consulted when there is a question about when or whether a client has been “admitted” to the country.

**Inadmissibility; exceptions.** 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 important petty-offense exception, a noncitizen is not inadmissible if he or she committed only one crime involving moral turpitude, the sentence actually imposed was 6 months or less, and the maximum possible sentence for the offense was

no more than 1 year. 8 USC §1182(a)(2)(A)(ii)(II). A previous moral turpitude conviction, even if vacated, may destroy eligibility for the exception, if the conviction is vacated on technical grounds. *Matter of S.R.* (BIA 1957) 7 I&N Dec 495. Because the offense cannot have a maximum penalty of more than 1 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 1 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 6 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 incarcerated. See §52.10.

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 5 years before the current application. 8 USC §1182(a)(2)(A)(ii)(I).

**Formal admission of a crime involving moral turpitude.** 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, vacating the conviction, delinquency disposition), the DHS must accept this order as binding on both the admission (plea) and the conviction. See *Matter of E.V.* (BIA 1953) 5 I&N Dec 194. Moreover, the DHS faces many 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 (2008).

**Postconviction relief.** 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. Neither a delinquency disposition nor infractions will constitute a basis for deportability.

### §52.40 c. Strategy

Counsel should consult immigration texts or an immigration attorney to ascertain whether a particular crime constitutes a crime of moral turpitude. For California convictions, see Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, App 4-A, *Table: Crimes Involving Moral Turpitude Under the California Penal Code* (10th ed 2008) (annotated chart of 70 common violations of the California Penal Code). See also Quick Reference Chart of Immigration Consequences of California Convictions (<http://www.ilrc.org/criminal.php>). For federal and out-of-state convictions, see Tooby, *Crimes of Moral Turpitude* (2005); Tooby, *Criminal Defense of Immigrants*, App C (2003) (comprehensive list including federal and out-of-state convictions); Kesselbrenner & Rosenberg, *Immigration Law and Crimes*,

App E (2008). 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 immigration authorities in calculating whether the person is deportable or inadmissible. Counsel should gather and review information on 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 to amend the charging document 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 §§52.41–52.47 to assess whether the offense might also be an aggravated felony. For example, conviction of theft, burglary, a crime of violence, perjury, bribery, or forgery is an aggravated felony *if* a 1-year sentence is imposed. See §52.46. Conviction of rape, murder, or sexual abuse of a minor is an aggravated felony regardless of the sentence.

## 6. Aggravated Felonies

### §52.41

#### a. Definition of Aggravated Felony: Overview

The list of offenses that qualify as “aggravated felonies” includes some that are neither “aggravated” nor “felonies.” The current definition consists of 21 paragraphs, some containing many offenses, in 8 USC §1101(a)(43). The statutory definition of aggravated felony includes these offenses:

- “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); see discussion in §52.45);
- Trafficking in drugs (any offense) plus certain federal drug felonies and violations of state statutes that punish exactly the same act (state “analogues”) (8 USC §1101(a)(43)(B); see discussion in §§52.30–52.34);
- 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 §§52.35–52.37);
- 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 (8 USC §1101(a)(43)(D));



- Fraud or deceit, or certain tax offenses, when the loss to the victim or government exceeded \$10,000 (8 USC §1101(a)(43)(M));
- A “crime of violence” resulting in a sentence imposed of 1 year or more (8 USC §1101(a)(43)(F); see §52.47);
- Theft, receipt of stolen property, or burglary if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(G); see §52.46);
- Alien smuggling, transporting, or harboring, except for immediate family (8 USC §1101(a)(43)(N));
- Certain false-document offenses if the sentence imposed is at least 1 year (note that Proposition 187 (Pen C §113) made document fraud a state criminal offense with a mandatory sentence of 5 years) (8 USC §1101(a)(43)(P));
- Vehicle trafficking with altered identification numbers if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(R));
- Perjury, bribery, forgery, or obstruction of justice if the sentence imposed is 1 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 5 years or more, or to face charges if the underlying sentence is punishable by a term of 2 years or more (8 USC §1101(a)(43)(Q), (T)); see *Renteria-Morales v Mukasey* (9th Cir 2008) 551 F3d 1076, 1079 (conviction for violation of 18 USC §3146 for bail jumping is not categorically an aggravated felony under 8 USC §1101(a)(43)(T), but it is categorically an aggravated felony for obstruction of justice if 1-year sentence is imposed);
- Various offenses, such as demand for ransom, child pornography, and RICO offenses punishable with a 1-year sentence; running a prostitution business; slavery; and offenses relating to national defense, sabotage, or treason; (see 8 USC §1101(a)(43)); and
- Attempt or conspiracy to commit any listed offense (see 8 USC §1101(a)(43)(U)).

These types of offenses are included in the list of aggravated felonies whether they are in violation of federal or state law (*Matter of Barrett* (BIA 1990) 20 I&N Dec 171), or are 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)).

- ▶ **Practice tip:** Solicitation to commit an aggravated felony has been held not to constitute an aggravated felony. However, it is possible that legislation will erase this defense, so the best practice is for defense practitioners to not rely upon it when there is an alternative. See §52.33.
- ▶ **Note:** Defining aggravated felonies is a complex and quickly changing area of the law with harsh consequences. For a more detailed discussion, see Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, chap 9 (10th ed 2008); Tooby, *Criminal Defense of Immigrants* (2008); Tooby, *Aggravated Felonies* (2008); Kesselbrenner & Rosenberg, *Immigration Law and Crimes* (2008).

## §52.42

### b. Sentence Requirements for Some Aggravated Felonies

Many generic aggravated felony offenses require that a sentence of 1 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 1 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)). Note that other aggravated felonies, such as sexual abuse of a minor (8 USC §1101(a)(43)(A)) or drug trafficking (8 USC §1101(a)(43)(B)), have no sentence requirement.

**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 1 year or more, and therefore none of the offenses constitutes an aggravated felony. While the Ninth Circuit had held that a sentence enhancement imposed for recidivism does not constitute a “sentence” for this purpose (*U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201 (en banc)), the Supreme Court later held, in a criminal law context, that a recidivist sentence enhancement constituted part of the “maximum term of imprisonment prescribed by law.” *U.S. v Rodriguez* (2008) \_\_\_ US \_\_\_, 170 L Ed 2d 719, 128 S Ct 1783. See further discussion of sentencing and strategy in §52.10.

### §52.43 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 automobile under California law is not “burglary” for aggravated felony purposes, because federal generic definition includes only burglary of building); *U.S. v Anderson* (9th Cir 1993) 989 F2d 310 (defining extortion under Armed Career Criminal Act sentence enhancement provision, 18 USC §924(e)). See discussion in Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §9.5, pt A (10th ed 2008).

**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 aggravated felony under U.S. sentencing guidelines); *Matter of Vasquez-Muniz* (BIA 2002) 23 I&N Dec 207 (following *Castillo-Rivera*). See further discussion relating to firearms aggravated felonies in §52.36 and in Brady et al., *Defending Immigrants* §9.5, pt C.

#### §52.44 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 U.S. citizenship, if the conviction occurred after November 29, 1990. See §52.1.
- 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 immigration 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 U.S. Supreme Court held that this requirement of mandatory detention for certain criminal aliens was constitutional as applied to a permanent resident alien. *Demore v Hyung Joon Kim* (2003) 538 US 510, 515, 155 L Ed 2d 724, 732, 123 S Ct 1708. Once the noncitizen has

a final removal order, he or she will be detained at least for the period reasonably necessary to bring about removal. If removal appears impossible (e.g., if it is to a country to which the United States is not currently deporting people), the individual has some right to release. See *Clark v Martinez* (2005) 543 US 371, 160 L Ed 2d 734, 125 S Ct 716; *Zadvydas v Davis* (2001) 533 US 678, 150 L Ed 2d 653, 121 S Ct 2491; *Ma v Ashcroft* (9th Cir 2001) 257 F3d 1095.

- 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. This sentence can be enhanced if the defendant has prior felony convictions. See §52.63.

A nonpermanent resident can be removed by a DHS 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).

#### §52.44A e. Specific Aggravated Felonies and Exceptions

An offense may be an "aggravated felony" for immigration purposes even if it is a misdemeanor under California law. Ascertaining whether a particular California offense is an aggravated felony is not always easy, and there is not always a definitive answer. To determine whether a particular crime is likely to be considered an aggravated felony, counsel may want to consult the Quick Reference Chart at <http://www.ilrc.org/criminal.php>.

#### §52.45 (1) Rape, Sexual Abuse of a Minor

The terms "rape" and "sexual abuse of a minor" are included in the aggravated felony definition under 8 USC §1101(a)(43)(A). In a major reversal of Ninth Circuit precedent, the court held en banc that the following offenses are categorically not aggravated felonies as "sexual abuse of a minor" since they are overbroad in comparison with the federal crime under 18 USC §2243: Pen C §261.5(c) (unlawful sexual intercourse with a minor more than 3 years younger), Pen C §286(b)(1) (consensual sodomy with minor), Pen C §288a(b)(1) (consensual oral copulation with minor), and Pen C §289(h) (consensual sexual penetration by foreign object of person between ages 14 and 18). *Estrada-Espinoza v Mukasey* (9th Cir 2008) 546 F3d 1147. The Ninth Circuit found that the generic offense of "sexual abuse of a minor" under 18 USC §2443 requires (1) a mens rea level of knowing; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least 4 years between the defendant and the minor. 546 F3d at 1152. Under this definition, a Pen C §261.5(d) offense (unlawful sexual intercourse with minor under age 16 with defendant over age 21) is an aggravated felony. *Estrada-Espinoza* did not overrule precedent holding that a broadly defined "lewd act" with a child under the age of 14 is categorically an aggravated felony under Pen C §288(a) (see, e.g., *U.S. v Baron-Medina* (9th Cir

1999) 187 F3d 1144), nor did it overturn opinions holding that a statute punishing less serious behavior, such as Pen C §647.6 (annoying or molesting child), is a divisible statute encompassing both conduct that may be “sexual abuse of a minor” and conduct that is not abusive. While immigration attorneys can argue that these offenses do not conform to the generic definition set forth in *Estrada-Espinoza*, criminal defense attorneys should continue to avoid pleading to offenses previously held to be sexual abuse of a minor until the law is clarified.

The Ninth Circuit has also held that “rape” includes rape by means of intoxication under Pen C §261 (*Castro-Baez v Reno* (9th Cir 2000) 217 F3d 1057).

Alternative pleas could include battery, sexual 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. Misdemeanor molest/annoy under Pen C §647.6(a) is not an aggravated felony if the record of conviction does not indicate that the act amounted to “abuse.” *U.S. v Pallares-Galan* (9th Cir 2004) 359 F3d 1088.

► **Warning:** Some but not all of these offenses have additional immigration consequences. See California Chart and “Note: Safer Alternatives, Alternate Pleas with Less Severe Immigration Consequences” (for violent or sexual offenses) at <http://www.ilrc.org/criminal.php>.

One recourse for a defendant in a case involving sex with a minor is that there remain some possibilities for immigration relief and waivers, despite the fact that these offenses are aggravated felonies. Depending on the individual situation, this might include withholding of removal (an asylum-like relief), adjustment of status for a person already granted asylum, or a family visa petition, with or without a waiver of inadmissibility. In some cases it is very helpful to obtain a misdemeanor conviction, including a felony reduced to a misdemeanor under Pen C §17, rather than a straight felony. See Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §9.1 (10th ed 2008).

## §52.46 (2) **Burglary, Theft, Receipt of Stolen Property, Forgery, Crime of Fraud or Deceit With Loss Exceeding \$10,000**

**Burglary, theft, or receipt of stolen property.** Burglary, theft, or receipt of stolen property is an aggravated felony if a 1-year sentence is imposed. 8 USC §1101(a)(43)(G). Aggravated felon status can be prevented in all cases by obtaining a sentence of 364 days or less. See §§52.10, 52.42 for discussion of sentence.

Burglary with a 1-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 §52.47 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 §459 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 *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; generic definition is unlawful entry into a building with intent to commit a crime). In addition, because Pen C §459 does not require that an entry be “unlawful or unprivileged,” the statute lacks an element of the generic definition of burglary of a dwelling and this missing element may not be added to by a complaint or admission in the record of conviction. *U.S. v Aguila-Montes* (9th Cir 2009) 553 F3d 1229. However, burglary of an automobile under §459 is an aggravated felony as an attempted theft if a sentence of 1 year or more is imposed and the record of conviction shows that the defendant pleaded guilty to entering a locked motor vehicle with the intent to commit theft, rather than any felony. *Ngaeth v Mukasey* (9th Cir 2008) 545 F3d 796. California’s Pen C §459(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 the §460(b) conviction is for entry into a building, the offense will not constitute “burglary” or a “crime of violence” for this purpose. If the record of conviction is vague as to whether the conviction is for intent to commit theft or any felony, it will not be an aggravated felony as an attempted theft. For further discussion of record of conviction, see §52.26. 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 et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §9.10 (10th ed 2008).

A “theft offense (including receipt of stolen property)” is an aggravated felony if a 1-year sentence is imposed. 8 USC §1101(a)(43)(G). The Ninth Circuit held that an offense meets the aggravated felony definition of theft even if there is intent only to temporarily deprive the owner of property rights. However, the theft must be of property. Penal Code §484 is a divisible statute for this purpose because it includes theft of labor. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201, 1205 (en banc).

► **Practice tip:** To avoid an aggravated felony for theft when a sentence of a year or more is unavoidable, plead to the exact language of Pen C §484, which includes “theft of labor,” which is not an aggravated felony as a theft offense. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201 (en banc).

► **Note:** Although a taking of property with the intent to temporarily deprive the owner can be an aggravated felony, it is not a crime involving moral turpitude. *Matter of D.* (1941) 1 I&N Dec. 143. On moral turpitude generally, see §52.38.

A plea to Veh C §10851 (taking a vehicle), even with a sentence of 1 year or more imposed, will not be deemed an aggravated felony as a “theft offense” if the record of conviction does not establish that the defendant acted as the principal rather than as an accessory after the fact. *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072 (en banc). Counsel should still act conservatively and try to obtain a sentence imposed of 364 days or less.

► **Warning:** A sentence enhancement imposed for recidivist behavior will be counted as part of the “sentence.” Thus, a conviction of petty theft with a prior under Pen C §§484 and 666 is an aggravated felony if the sentence, including enhancement, is 1 year or more. *U.S. v Rodriguez* (2008) \_\_\_ US \_\_\_, 170 L Ed 2d 719, 128 S Ct 1783.

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. *Matter of Bahta* (BIA 2000) 22 I&N Dec 1381.

**Forgery.** An offense relating to forgery is an aggravated felony if a sentence is imposed of 1 year or more. 8 USC §1101(a)(43)(R). Penal Code §476 was found categorically to correspond to the generic definition of forgery for purposes of 8 USC §1101(a)(43)(R) in that it requires “intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument.” *Morales-Alegria v Gonzales* (9th Cir 2006) 449 F3d 1051, 1056. On the other hand, a conviction for violation of Pen C §475(c) was found not to be an offense relating to forgery because the generic definition of forgery requires the “falsification” of a document or instrument and §475(c) prohibits the use of certain documents which are “real” as well as “fictitious.” *Vizcarra-Ayala v Mukasey* (9th Cir 2008) 514 F3d 870, 875.

- ▶ **Practice tip:** To avoid an aggravated felony for a Pen C §475(c) offense, keep the record of conviction in the words of the statute in the disjunctive, plead only to uttering a “real” document, or obtain a sentence of 364 days or less.

**Fraud or deceit with loss exceeding \$10,000.** A crime involving fraud or deceit with loss to a victim or victims exceeding \$10,000 is an aggravated felony under 8 USC §1101(a)(43)(M)(i). To avoid an aggravated felony for this offense, the defendant may plead to an offense in which there is no element or implied element of fraud or deceit. For example, a crime of theft for taking or carrying away property without consent will not be deemed a crime of fraud or deceit. *Matter of Garcia-Madruga* (BIA 2008) 24 I&N Dec 436 (distinction between crime involving fraud or deceit and theft is that “taking” of property must be “without consent” but certain offenses such as theft by deception might fit into both categories). However, if the defendant pleads to a theft offense, the sentence imposed cannot be more than 364 days or the offense is an aggravated felony theft offense.

If the conviction is to a crime with an element or implied element of fraud or deceit, unless the statute also has an element requiring the loss to exceed \$10,000, the offense is not an aggravated felony under this section. *Kawashima v Mukasey* (9th Cir 2008) 530 F3d 1111. While the Ninth Circuit has held that the record of conviction must show a loss in excess of \$10,000 for a crime of fraud or deceit to be an aggravated felony (*Li v Ashcroft* (9th Cir 2004) 389 F3d 892), the BIA would allow an immigration judge to go outside the record of conviction, including examination of additional evidence and testimony, to establish the amount of the loss. *Matter of Babaisakov* (BIA 2007) 24 I&N Dec 306, 322. Because of the lack of clarity in this area, defense counsel should attempt to have a defendant plead to a theft offense if there is loss to a victim or victims exceeding \$10,000 provided that the sentence is 364 days or less. If pleading to a crime involving fraud or theft is unavoidable, defense counsel should try to establish in the record that the loss was \$10,000 or less. If that cannot be done, then counsel should attempt to keep the record of conviction free of any mention of the amount of the loss if it exceeds \$10,000. See Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §9.20 (10th ed 2008).

- **Note:** The Supreme Court granted certiorari in *Nijhawan v Attorney Gen.* (cert granted Jan. 16, 2009, No. 08-495; superseded opinion at (3d Cir 2008) 523 F3d 387), which deals with whether the categorical approach applies to the loss amount in a fraud/deceit aggravated felony case.

### §52.47 (3) Crimes of Violence

A person convicted of a crime of violence and sentenced to imprisonment of 1 year or more is an aggravated felon (8 USC §1101(a)(43)(F)), subject to the penalties and restricted rights discussed in §52.44. To avoid an aggravated felony conviction for his or her client, counsel must either avoid a sentence of 1 year or more or plead to an offense that is not a “crime of violence.”

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 substantial risk of such force.

The Supreme Court held that felony driving under the influence, as an offense involving negligent causation of harm, is not a “crime of violence.” See *Leocal v Ashcroft* (2004) 543 US 1, 160 L Ed 2d 271, 125 S Ct 377. Misdemeanor or felony reckless infliction of injury also is not a crime of violence; thus, involuntary manslaughter under Pen C §192(b) is not a crime of violence. See *Fernandez-Ruiz v Gonzales* (9th Cir 2006) 466 F3d 1121. Gross vehicular manslaughter while intoxicated is not a crime of violence. See *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217. In addition, offenses such as battery or spousal battery under Pen C §243(a), (e), are not crimes of violence, because they can be committed by mere offensive touching. A Veh C §2800.2 conviction is not a crime of violence if the “wanton, reckless” intent was supplied by having prior traffic violations. *Penuliar v Mukasey* (9th Cir 2008) 528 F3d 603, 609.

Other crimes of violence include:

- Making a terroristic threat under Pen C §422 (see *Rosales-Rosales v Ashcroft* (9th Cir 2003) 347 F3d 714, 717);
- Exhibiting a deadly weapon with intent to resist arrest under Pen C §417.8 (see *Reyes-Alcaraz v Ashcroft* (9th Cir 2004) 363 F3d 937, 938);
- Mayhem under Pen C §203 (see *Ruiz-Morales v Ashcroft* (9th Cir 2004) 361 F3d 1219, 1222); and
- Felony burglary of a dwelling, but not an automobile (see *Ye v INS* (9th Cir 2000) 214 F3d 1128); and
- Aiding and abetting assault with a deadly weapon under Pen C §245(a)(1) (see *Ortiz-Magana v Mukasey* (9th Cir 2008) 542 F3d 653, 659).

The following offenses have been held not to be crimes of violence, and therefore would not be aggravated felonies even if a sentence of 1 year or more were imposed:

- Simple battery under Pen C §243(a), (e) (see *Ortega-Mendez v Gonzales* (9th Cir 2006) 450 F3d 1010; see also *Matter of Sanudo* (BIA 2006) 23 I&N Dec 968);
- Misdemeanor sexual battery under Pen C §243.4 (see *U.S. v. Lopez-Montanez* (9th Cir 2005) 421 F3d 926);



- A simple battery that can be committed by mere offensive touching, when the record of conviction does not establish that actual violence occurred (see, e.g., *Singh v Ashcroft* (9th Cir 2004) 386 F3d 1228, discussed in §52.49);

- Driving under the influence, when the offense does not have a mens rea component or requires only a showing of negligence (*Leocal v Ashcroft* (2004) 543 US 1, 160 L Ed 2d 271, 125 S Ct 377; see *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140; *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217;

- Possession of a dangerous weapon (dirk or dagger) under Pen C §12020(a) (see *U.S. v Medina-Anicacio* (5th Cir 2003) 325 F3d 638);

- Stalking under Pen C §649.9, because “harassing” conduct does not necessarily create a risk that force may be used. *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080. However, “stalking” is a deportable offense under 8 USC §1227(a)(2)(E), and *Malta-Espinoza* did not reach the question of whether violation of Pen C §649.9 was a deportable offense on that ground; and

- Maliciously and willfully discharging a firearm at inhabited building or vehicle under Pen C §246 is not categorically a crime of violence under U.S. sentencing guidelines, since the offense can be committed by reckless or grossly negligent conduct, rather than intentional use of force. *U.S. v Narvaez-Gomez* (9th Cir 2007) 489 F3d 970. It is an open question whether this would be an aggravated felony crime of violence because the standard in the sentencing guideline is similar to 18 USC §16(a) and *Narvaez-Gomez* does not address the result for an 18 USC §16(b) case. However, a Pen C §246 offense would be a deportable crime as a firearms offense under 8 USC §1227(a)(2)(C).

► **Note:** Setting fire to a structure or forest land under Pen C §452(c) is not categorically an aggravated felony crime of violence because the defendant could have set fire to his own property (*Jordison v Gonzales* (9th Cir 2007) 501 F3d 1134) and 18 USC §16(a) defines a crime of violence as the use of force against another person or another’s property.

► **Note:** There is a strong argument, although no guaranty, that felony conviction under Pen C §236 or §237 is not a crime of violence if it is effected by deceit or fraud. A misdemeanor conviction under Pen C §§236 and 237 ought not to be held a moral turpitude offense. Likewise, conviction under Pen C §136.1(b) (nonviolently persuading someone not to file a police report) ought not to be a crime of violence, although there is no published precedent.

See further discussion in “Note: Safer Pleas” at the California Quick Reference Chart and Notes at <http://www.ilrc.org/criminal.php>, and Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §9.13 (10th ed 2008).

► **Practice tip:** When the client is charged with an offense that might be classified as a crime of violence, defense counsel should attempt to obtain a sentence of less than 1 year—meaning imposition of sentence suspended or a sentence of 364 days or less (either directly imposed or ordered as a condition of probation) to avoid aggravated felon status for the client.

## 7. Domestic Violence and Crimes Against Children

### §52.48 a. Definition

Persons convicted of offenses related to domestic violence can suffer immigration consequences in two ways:

- If the crime is classified as a “crime of violence” and a 1-year sentence is imposed, the offense will be an aggravated felony under 8 USC §1101(a)(43)(F). See discussion in §52.47.

- There is a broadly defined ground of deportability specifically based on domestic violence offenses. 8 USC §1227(a)(2)(E).

**Ground for deportation.** 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 after the person was admitted and on or after September 30, 1996. 8 USC §1227(a)(2)(E)(i). A court finding of violation of certain portions of a domestic violence protection order, even absent a conviction, is a basis for deportability if the behavior that constituted the violation occurred on or after September 30, 1996. 8 USC §1227(a)(2)(E)(ii). There is no analogous basis for inadmissibility. However, these types of offenses may constitute crimes involving moral turpitude and must be analyzed independently regarding inadmissibility on that ground.

**Conviction of crime against child.** A crime of child abuse, child neglect, or child abandonment is a deportable offense if committed after admission. The BIA has defined “child abuse” very broadly as “any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” The injury may be slight, and emotional mistreatment or conduct injurious to morals is encompassed within this definition. *Matter of Velazquez-Herrera* (BIA 2008) 24 I&N Dec 503, 512. The BIA did not define “child neglect” or “child abandonment.” The immigration court will look both at the elements of the statute and the admissible record of conviction to determine if the noncitizen’s conviction included the necessary elements of this offense. 24 I&N Dec at 518.

► **Practice tip:** To avoid deportability for a “crime of child abuse, child neglect, or child abandonment,” plead to a generic offense that does not have as an element the minority age of the victim and keep the record of conviction free of any reference to the victim’s age.

For purposes of this deportation ground, counsel should assume that any conviction under Pen C §273a(a) (endangering child or causing or permitting child to suffer physical pain, mental suffering, or injury) will result in deportability.

**Stalking.** The Ninth Circuit has held that stalking under Pen C §646.9 is not categorically an aggravated felony. *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080, 1083. However, the court did not reach the question of whether the defendant was removable under 8 USC §1227(a)(2)(E), which specifically makes a conviction for stalking a ground for removal. 478 F3d at 1081 n1.

**Conviction of “Crime of Domestic Violence.”** The term “crime of domestic violence” is specifically defined in 8 USC §1227(a)(2)(E)(i) to include

any crime of violence (as defined in section 16 of title 18 [United States Code]) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual 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 specified domestic relationship to the accused. If counsel can prevent either of these factors from being present, the conviction will not be a deportable "crime of domestic violence." Those two factors are the only considerations for the deportation ground: 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. See §52.49 for alternative plea suggestions.

Information in the record of conviction (*e.g.*, charging papers, verdict or judgment, sentencing) must establish the domestic relationship in order for the offense to be a deportable "crime of domestic violence." *Tokatly v Ashcroft* (9th Cir 2004) 371 F3d 613, 624 (testimonial evidence outside record of conviction was inadmissible to establish that victim and perpetrator had had dating relationship, and kidnapping-burglary conviction was thus not a crime of domestic violence). See §52.49.

**Court finding of violation of certain portions of a protection order.** 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. Under 8 USC §1227(a)(2)(E)(ii):

Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated, harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purposes of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a *pendente lite* order in another proceeding.

## §52.49

### b. Strategy

When a charge of domestic violence is lodged against a noncitizen, the defense and the prosecution may have important interests in common. Depending on the specific 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 a parent; or the victim may wish to attempt reconciliation after counseling. It is often possible to structure an alternative 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 deliberations between defense and prosecution.

Defense counsel can avoid a conviction of a crime of domestic violence by his or her client by pleading to an offense that is not a crime of violence, or by avoiding proof in the record that the victim shared the specified domestic relationship with the defendant.

**Avoid conviction of a crime of violence.** Some offenses have no potential element of violence: for example, theft. Other offenses are not categorically or necessarily crimes of violence, although a particular conviction may be held to be of a crime of violence if the record establishes that the offense involved intended or actual use of violent force. A plea to these offenses will avoid a conviction of a domestic violence offense as long as counsel keeps evidence of actual violence out of the record of conviction. See §52.47. For example, battery and spousal battery under Pen C §243(a), (e), are not necessarily crimes of violence, because the statute can be violated by mere offensive touching, and a misdemeanor under Pen C §236 is not necessarily a crime of violence, because it requires no violence. Likewise, dissuading (with no threats of violence) an individual from filing a complaint under Pen C §136.1(b) is a potentially very useful plea because it appears not to have immigration consequences, and it can fulfill many requirements of the prosecution in that it is a potential strike (see Pen C §1192.7(c)(37)) and may be punished as a felony or as a misdemeanor. In contrast, infliction of injury on a spouse or other family member, as defined by Pen C §273.5, is a crime of violence and hence is a crime of domestic violence. Reckless infliction of harm is not a crime of violence, so that offenses such as involuntary manslaughter and felony involuntary manslaughter (Pen C §§191.5, 192(b)) are not crimes of violence. See *Fernandez-Ruiz v Gonzales* (9th Cir 2006) 466 F3d 1121 (en banc); *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217.

► **Practice tip:** To avoid a deportable offense for a crime of “domestic violence,” arrange a plea to Pen C §243(e)(1), which is not necessarily a “crime of domestic violence” provided the defendant does not admit any use of *violent* physical force. A plea to Pen C §273.5, which is categorically a crime of “domestic violence” and an aggravated felony if a sentence of 1 year or more is imposed, is to be avoided. See *Ortega-Mendez v Gonzales* (9th Cir 2006) 450 F3d 1010 (misdemeanor battery under Pen C §242 is not crime of violence or domestic violence offense); *Matter of Sanudo* (BIA 2006) 23 I&N Dec 968 (battery and spousal battery under Pen C §§242, 243(e) are not crimes of violence, domestic violence offenses, or crimes involving moral turpitude).

If the plea is not to a crime of violence, it will not be considered a deportable domestic violence conviction even if domestic violence counseling or anger management is imposed as a condition of probation, or other evidence shows that the event was in fact a domestic violence incident.

**Avoid proof in the record of conviction that the victim had the specific domestic relationship.** A conviction of a crime of violence is not a deportable domestic violence crime unless the record establishes the required domestic relationship between the victim and defendant. This relationship includes current or ex-spouse, coparent of child, cohabitant living as spouse, or other relationship protected under the domestic violence laws of the state of conviction, such as California.

► **Practice tip:** For more-serious domestic violence offenses, when the prosecutor will not reduce a Pen C §273.5 charge to a Pen C §243(e)(1) charge or allow a plea to Pen C §136.1(b) (nonviolent dissuasion of a witness), counsel should consider a plea to Pen C §243(d), or Pen C §245(a)(1) (no firearm), either as a felony or a misdemeanor. However, a felony Pen C §243(d) conviction is a “strike” if *personal* infliction of the injury is shown (*People v Moore* (1992) 10 CA4th 1868, 13 CR2d 713), and Pen C §245(a)(1) will be charged as a crime of moral turpitude and an aggravated felony if a sentence of 365 or more days is imposed. While Pen C §243(d) probably is not a crime of moral turpitude, because it does not require an intent to cause serious bodily injury and, for the same reason, arguably is not an aggravated felony even with a sentence of 365 or more days imposed, counsel should conservatively attempt to obtain a sentence of 364 days or less on a Pen C §243(d) offense.

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) will avoid a deportable domestic violence offense. Working to control the record so that the relationship is not proved is another good strategy. For example, the Ninth Circuit found that when the *victim was not named* in the count of conviction, the following did not establish the domestic relationship (*Cisneros-Perez v Gonzales* (9th Cir 2006) 465 F3d 386):

- Dropped charges named a victim and alleged that the victim had a domestic relationship with the defendant;
- As part of the judgment, the defendant received a stay-away order relating to a person of the same name as in the dropped charge;
- As part of the judgment, the defendant was ordered to attend domestic violence counseling; and
- The defendant in immigration proceedings stated that the person named in the stay-away order had the domestic relationship, *e.g.*, was an ex-wife.

Finally, immigration counsel have a good argument, although no published precedent, that a crime of violence against property is not included in the definition of domestic violence. The definition of crime of violence, and suggestions for alternate pleas, is discussed in more detail in §52.47. See also Notes “Domestic Violence” and “Safer Pleas” at the California Quick Reference Chart and Notes at <http://www.ilrc.org/criminal.php>; Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §6.15 (10th ed 2008).

**Judicial finding that protection order against domestic violence was violated.** Deportability also can be caused by a civil or criminal court finding a violation of a protection order against domestic violence. Rather than plead to violating a protection order against domestic violence, the defendant should plead to an alternate offense that is not a crime of violence or stalking. A plea to Pen C §273.6(a) for violation of a protective order is not categorically a deportable offense under this ground because the statute can be violated not only by violation of Family Code restraining orders, which are protection orders against domestic violence, but also by violations of restraining orders under the anti-harassment section of CCP §527.6(c), which does not depend on the existence or nature of a “domestic” relationship. *Alanis-Alvarado v Mukasey* (9th Cir 2008) 541 F3d 966. If the record of conviction shows that the defendant

violated a restraining order issued under Fam C §6320 or §6321, the conviction is grounds for deportation.

Because this ground includes a civil court finding of violation, a finding that a juvenile has violated a domestic violence protection order might be a basis for the juvenile's deportation. On conduct-based immigration consequences, see §52.50.

- **Practice tip:** If the defendant needs to plead to violation of Pen C §273.6, a plea to the exact language of the statute in the disjunctive without admitting any domestic relationship with the victim would avoid a deportable offense. Alternatively, a plea to violation of Pen C §166.4 for willful disobedience of any process or order of the court will not trigger this ground of deportation if the record of conviction does not indicate that the defendant disobeyed a domestic protection order.

### §52.50 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 §52.24 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 §52.9) or by police reports or other evidence. See *Matter of Rico* (BIA 1979) 16 I&N Dec 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 DHS 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 5 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. *Matter of Martinez-Gomez* (BIA 1972) 14 I&N Dec 104. Importation or possession for one's own use is not trafficking. See *Matter of McDonald & Brewster* (BIA 1975) 15 I&N Dec 203. Similarly, transportation for personal use should not be considered trafficking. See discussion in §52.33.

Even after a conviction is vacated, the DHS can use a guilty plea or any evidence or information from the event to attempt to establish its “reason to believe” drug trafficking occurred. However, individuals who have plausibly asserted that they did not intend to traffic 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 *Matter*

of *F.S.C.* (BIA 1958) 8 I&N Dec 108. The definition of “drug abuser” is a matter of controversy. Some government-licensed doctors use the definition that more than one-time experimentation within the past 3 years qualifies as “current” drug abuse. Certainly admission of addiction/abuse required for CRC placement or in some instances to participate in “drug court” will be used to designate the persons as an addict or abuser. The definition of drug abuser is particularly strictly applied by U.S. consulates abroad. Persons with consular appointments abroad should be warned of the interviews and, if necessary, should delay the application until 3 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 any history of illegal drug use with police or the probation department in order 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 10 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 *Matter of R.M.* (BIA 1957) 7 I&N Dec 392. In addition, persons who engage in prostitution and, conceivably, customers can be found to have committed a crime involving moral turpitude. See, e.g., *Matter of Lambert* (BIA 1965) 11 I&N Dec 340. Prostitution is defined for this purpose as providing sexual intercourse, as opposed to other sexual acts, for hire. *Kepilino v Gonzales* (9th Cir 2006) 454 F3d 1057. A conviction for violation of Pen C §647(b) is broader than the ground of inadmissibility because §647(b) can encompass a single, isolated sexual act other than sexual intercourse. *Matter of Gonzalez-Zoquiapan* (BIA 2008) 24 I&N Dec 549. For the same reason, a conviction of Pen C §647(b) does not bar a noncitizen from establishing good moral character under 8 USC §1101(f).

- **Practice tip:** If a conviction for prostitution cannot be avoided, do not stipulate to the police report as the factual basis for the plea because the conduct described in the police report might establish more than an isolated act and might establish acts of sexual intercourse.

**Persons arrested or 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 U.S. consulate has excluded persons on this ground, based on a conviction of driving under the influence within the previous 2 years. Immigrant visa applicants applying outside the United States will be referred to a panel physician to determine possible inadmissibility for alcoholism if an applicant has either:

- A single drunk driving arrest or conviction within the last 3 calendar years; or
- Two or more drunk driving arrests or convictions in any time period.

U.S. Department of State Foreign Affairs Manual, vol. 9, §40.11 n8.3. Driving under the influence is not, as was previously held, an aggravated felony as a crime of violence. *Leocal v Ashcroft* (2004) 543 US 1, 160 L Ed 2d 271, 125 S Ct 377; *Montiel-Barraza*

*v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140. See §52.47 for discussion.

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

**Persons who test HIV-positive.** Persons who test HIV-positive are no longer inadmissible, but HIV/AIDS remains on the list of communicable diseases that must be waived to enter the United States.

**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.** Members of 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 extensive and includes a section on “any other unlawful activity.” With new antiterrorism 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. Others may simply have been arrested at airports, or come afoul of the special registration requirements for persons from several Moslem countries. For advice on such cases, see “Post-9/11 Resources” at <http://www.nationalimmigrationproject.org>, or contact the National Immigration Project for assistance.

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.** A 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 5 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 §52.55) 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 alternative plea would be to plea to aiding and abetting another person’s illegal entry under 8 USC §1325, because the aggravated felony definition specifically refers to §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 restraining 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 Sept. 30, 1996). See 8 USC §1227(a)(2)(E); §§52.48-52.49. 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 DHS 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, overruled on other grounds in *Barapind v Enomoto* (9th Cir 2005) 400 F3d 744, 751. To be classified as a political offense, the common-law character must be outweighed by the political element. *Matter of McMullen* (BIA 1994) 19 I&N Dec 90.

**§52.51 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. Often, the defendant does not know his or her exact status. For example, many people mistakenly think that marriage to a U.S. 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 DHS 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 in §52.3. For extensive information describing immigration applications and how to avoid convictions that would bar them, see Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, chap 11 (10th ed 2008).

**Is the defendant a U.S. citizen without knowing it?**

A U.S. citizen cannot be deported, excluded, or removed for any reason. Anyone born in the United States is a U.S. citizen, as are persons born in Puerto Rico, Guam, the U.S. Virgin Islands and, the Commonwealth of the Northern Mariana Islands. 8 USC §1101(a)(38). A national of the United States is not a U.S. citizen, but cannot

be deported. Persons born in an outlying possession of the United States, such as American Samoa and the Swains Islands, are nationals.

Other persons may have automatically acquired U.S. citizenship without realizing it. The two threshold questions to ask a defendant are:

- At the time of his or her birth, was a parent or grandparent of the defendant a U.S. citizen?
- Before the defendant's 18th birthday, did he or she become a permanent resident and did at least one parent become a naturalized U.S. citizen?

If the answer to either question might be yes, the defendant should be referred for immigration counseling to learn whether citizenship was passed on. See §52.54 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. For such clients, it is important to keep in mind the distinction between removal owing 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 §52.1. See also California Quick Reference Chart and Notes at <http://www.ilrc.org/criminal.php>.

Some persons who immigrate through a spouse are conditional permanent residents who must report to the DHS within 2 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 2-year interview, the person might be asked questions under oath about grounds for deportation.

- **Note:** A lawful permanent resident who might be deportable should try to avoid contact with immigration authorities before obtaining expert immigration counseling. Applying for a 10-year "renewal" of a green card, applying for naturalization to U.S. citizenship, or traveling abroad and then reentering the United States all place the person at risk.

**□ Has the defendant been a lawful permanent resident for 5 years, with a total of 7 years' continuous residence after any lawful admission?**

Lawful permanent residents who have held that status for at least 5 years and who have resided continuously in the United States for 7 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 7 years at the time of issuance of a Notice to Appear or commission of certain acts rendering a person deportable or inadmissible, but the accrual of 5 years as a permanent resident is not similarly

cut off. Convictions from before April 1, 1997, ought not to “stop the clock” on accrual of the 7 years, although this may be further litigated. Cancellation of removal for lawful permanent residents is discussed in §52.53.

**Has the defendant, not a permanent resident, lived in the United States for at least 10 years?**

A defendant without lawful immigration status may be eligible to apply for cancellation of removal for nonpermanent residents if he or she has 10 years’ residence, good moral character (see §52.1), and can establish that removal would cause the defendant’s U.S. citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship. See §52.55 on cancellation of removal for nonpermanent residents.

**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 §52.60). He or she must not be inadmissible and must establish good moral character (see §52.1).

**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 nonpermanent residents. Alternatively, they may qualify for voluntary departure.

► **Note:** For an undocumented person with no immediate prospect of achieving lawful immigration status, the highest defense priority may be to minimize jail time to diminish the likelihood of encountering immigration officials.

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

The defendant may be eligible to immigrate through a visa petition at some point (see §52.56). The defendant must not be inadmissible.

**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 §52.57). 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 §52.58. Special relief under Nicaraguan Adjustment and Central American Relief Act (NACARA) legis-

lation was extended to Salvadorans, Guatemalans, and nationals of the former Soviet bloc countries. See §52.55.

Alternatively, the defendant may wish to apply for voluntary departure. See §52.59.

**□ Is the defendant under juvenile court jurisdiction or an abused spouse or child, whether or not under court jurisdiction?**

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 §52.61.

A noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under 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), (B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only 3 years of good moral character and physical presence in the United States. 8 USC §1229b(b)(2). See §52.61.

**□ Can the defendant provide valuable information to law enforcement authorities about criminal or terrorist activity, 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, 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 §52.62.

**§52.52 F. Forms of Immigration Relief Available From Department of Homeland Security (DHS) and Federal Courts**

Even a noncitizen who is undocumented or inadmissible or deportable (or all three) may nevertheless qualify for certain waivers or immigration benefits that will allow him or her to gain or retain legal status. To safeguard a defendant's opportunity to apply for such benefits, certain outcomes must be avoided. Criminal counsel's strategy will depend on the client's documented or undocumented status and the potential eligibility for affirmative immigration benefits. To assist counsel in prioritizing and setting goals, §§52.53–52.62 provide a general overview of the most commonly encountered forms of relief in removal proceedings and explain the most widely available immigration benefits. For a more detailed discussion, see Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, chap. 10 (10th ed 2008). Some information is available from the U.S. Citizenship and Immigra-

tion Services (USCIS) at <http://www.uscis.gov>. Ideally, criminal defense counsel advising defendants to make concessions in criminal court in order to obtain a disposition that may preserve eligibility for relief in immigration proceedings should consult with immigration counsel to confirm both statutory eligibility and whether, considering the individual facts and the pattern of discretionary decision making at local immigration courts, there is likelihood of success.

### §52.53 1. Lawful Permanent Residents: Cancellation of Removal

**Is the defendant a permanent resident of 5 years, with 7 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 5 years (8 USC §1229b(a)(1)) and must have resided in the United States continuously for 7 years after having been admitted in any status (*e.g.*, as a permanent resident, tourist, or student) (8 USC §1229b(a)(2)). The 5 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 7-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 listed 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 7 years are crimes involving moral turpitude, prostitution, drug offenses, and conviction of two or more offenses with an aggregate 5-year sentence, if the person becomes deportable or inadmissible because of the offense. However, a conviction by plea from before April 1, 1997, may not stop this clock, and the person might remain eligible to apply for cancellation. See *Sinotes-Cruz v Gonzales* (9th Cir 2006) 468 F3d 1190.

► **Note:** An immigration attorney's assistance may be needed to assess whether charges would come within the "clock-stopping" category. A defendant who needs more time to accrue the 7 years should, if possible, plead to an offense that occurred later rather than earlier in time.

**Did the permanent resident defendant plead guilty to an offense (even an aggravated felony) with immigration consequences before April 24, 1996?**

In *INS v St. Cyr* (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271, the Supreme Court held that the abolition of 8 USC §1182(c) on April 24, 1996, was not retroactive. Thus, a qualifying permanent resident may be able to avoid deportation by applying, under former 8 USC §1182(c), to waive a conviction received before that date. This relief (formerly known as "section 212(c) relief") could waive even conviction of an aggravated felony, although it was not sufficient in *INS v St. Cyr, supra*, to waive a firearms conviction.

Counsel with any questions about former 8 USC §1182(c) should contact an immigration attorney. More information is available at the websites of the National Immigration Project of the National Lawyers Guild (<http://www.nationalimmigrationproject.org>), the American Immigration Law Foundation (<http://www.aifl.org>), and the Immigrant Legal Resource Center (<http://www.ilrc.org/criminal.php>).

## §52.54 2. United States Citizenship

**Is the defendant a permanent resident of 5 years (or sometimes less) who wishes to apply for U.S. citizenship?**

Lawful permanent residents may apply for citizenship after residing in the United States and demonstrating good moral character (see §52.1) for 5 years. 8 USC §1427. Special procedures apply to spouses and minor children of U.S. citizens (who need show only 3 years of permanent residency), military personnel (who may need 1 year or less, and in some cases do not need to be permanent residents, and who may accrue residency time even when residing with their spouse abroad during military duty), and religious workers. 8 USC §1430.

**Did the defendant have a parent or grandparent who was a U.S. citizen at the time of defendant's birth?**

**Did the defendant become a permanent resident before age 18 and did one of the defendant's parents become a naturalized citizen before the defendant turned 18?**

Some defendants may be unaware that they are U.S. citizens. If the answer to the first question is yes, or if the answer to both parts of the second question is yes, the defendant should be referred for immigration counseling.

► **Note:** When representing a permanent resident who is currently under the age of 18, counsel can advise the family that the minor will become a citizen—and therefore be immune to deportation—if one parent with lawful custody naturalizes to U.S. citizenship before the minor's 18th birthday. Special benefits exist for adopted children of U.S. citizens. See Benchbook and Fact Sheets at <http://www.ilrc.org/sijs.php>.

## §52.55 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 10 continuous years?**  
 **Does the defendant meet the requirements for any of the special rules on 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 10 years. 8 USC §1229b(b)(1)(A). 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 at least 10 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 deport-

able; and not be deportable for failure to register as an alien, falsification of documents, or a false claim to U.S. citizenship. Finally, an extremely restrictive requirement is that the applicant must demonstrate that deportation would cause a U.S. citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship.

**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 a note 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, Vietnam, Laos, Cambodia, Poland, Czechoslovakia, Romania, Haiti, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia and their spouses and children. Other countries have also received special treatment. 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 Citizenship and Immigration Services' website at <http://www.uscis.gov>, which contains a section with answers to frequently asked questions.

- ▶ **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.

Older convictions may be a benefit. The criminal record requirements are very strict for cancellation for nonpermanent residents: The person cannot be deportable or inadmissible and must have good moral character. However, if the person was convicted by plea before April 1, 1997, of a disqualifying offense, the person still may be permitted to apply.

Noncitizens who have been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a U.S. citizen or lawful permanent resident may apply for cancellation of removal under 8 USC §1229b(b)(2). See §52.61.

#### §52.56      4. **Immigration Through Visa Petition Based on Relationship With Citizen or Permanent Resident Relative; Waiver of Certain Crimes-Based Grounds of Inadmissibility**

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

A noncitizen who is not inadmissible (see §52.1) may obtain permanent resident status through a visa petition based on a relationship with a qualifying U.S. citizen or permanent resident. 8 USC §1154.

Persons classified under 8 USC §1151(b) as immediate relatives of U.S. 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.

Adults who have spent time without lawful status in the United States and then leave the country, either through voluntary departure (see §52.59) or removal, face a 3-year or 10-year bar before they can reenter the United States on a family visa. A waiver of this inadmissibility ground based on hardship is available. 8 USC §1182(a)(9)(B).

► **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 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:

- One or more convictions of crimes involving moral turpitude. 8 USC §1182(a)(2)(A)(i)(I).
- One conviction of simple possession of 30 grams or less of marijuana (or a smaller amount of hashish). 8 USC §1182(a)(2)(A)(i)(II). Note that this is the only drug offense that can be waived under this provision.
- Two or more convictions with an aggregate 5-year sentence. 8 USC §1182(a)(2)(B).
- Engaging in prostitution (8 USC §1182(a)(2)(D)).

This waiver is available only 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 U.S. 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).
- The defendant is an abused spouse or child of a U.S. citizen or permanent resident who qualifies for classification under 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 in §52.61.

Permanent residents are barred from applying for this waiver if, after obtaining permanent resident status, they (a) were convicted of an aggravated felony or (b) have



not accrued 7 years before the issuance of the Notice to Appear (the charging document beginning removal proceedings). 8 USC §1182(h)(2).

**§52.57            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. Unless there are special circumstances, the person must apply within 1 year after coming to the United States.

(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 §§208.16–208.17.

**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 any of the following:

- 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)).

► **Note:** The Attorney General has held that asylum is not normally granted to a person convicted of a “violent or dangerous” crime. *Matter of Jean* (AG 2002) 23 I&N Dec 373.

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.” *Matter of S-S-* (BIA 1999) 22 I&N Dec 458.

Conviction of a “particularly serious crime” for purposes of asylum includes conviction of an aggravated felony (8 USC §1158(b)(2)(B)); but even an offense which is not an aggravated felony may be a “particularly serious crime” and the BIA can decide this on a case-by-case basis, rather than by regulation. *Delgado v Mukasey* (9th Cir 2008) 546 F3d 1017, 1023.

For purposes of withholding of removal, “a particularly serious crime” includes one or more aggravated felonies for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years (8 USC §1231(b)(3)). See also 8 CFR §§208.13, 208.16. However, the Attorney General has discretionary authority to determine whether any offense, even a non-aggravated felony conviction resulting in a sentence of less than 5 years, is a particularly serious crime for purposes of withholding. *Delgado v Mukasey*, 546 F3d at 1021.

- ▶ **Warning:** Even a Veh C §23153(b) DUI conviction may be a “particularly serious offense” barring withholding of removal when the facts of the offense are serious. *Anaya-Ortiz v Mukasey* (9th Cir 2009) 553 F3d 1266, 1276 (alien testified at removal hearing that his car hit a house which caused injury to elderly woman inside).

The Attorney General has also determined that, except in very rare instances, any conviction of drug trafficking will be a bar to withholding as a particularly serious crime. *Matter of Y-L-* (BIA 2002) 23 I&N Dec 270, overruled on other grounds in *Zheng v Ashcroft* (9th Cir 2003) 332 F3d 1186. But the Ninth Circuit held that this presumption is not retroactive to guilty pleas entered before March 5, 2002, for drug trafficking offenses. *Miguel-Miguel v Gonzales* (9th Cir 2007) 500 F3d 941. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a “particularly serious crime.” *Matter of Juarez* (BIA 1988) 19 I&N Dec 664.

- ▶ **Note:** For purposes of determining what is a “particularly serious offense,” evidence outside the record of conviction, including police reports and the alien’s testimony at an immigration hearing, may be considered. *Anaya-Ortiz v Mukasey*, *supra*.

The argument remains that not all serious offenses or aggravated felonies should be found to be particularly serious crimes. See, e.g., *Matter of L-S-* (BIA 1999) 22 I&N Dec 645 (conviction of smuggling in violation of 8 USC §1324(a)(2)(B)(iii) with 3½-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.

## §52.58

### 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 are currently designated for TPS include Burundi, El Salvador, Honduras, Nicaragua, Somalia, and Sudan. To check for the most accurate list of what countries are still listed and the requirements, go to the U.S. Citizenship and Immigration Services' website at <http://www.uscis.gov>, click "Services & Benefits," then click "Humanitarian Benefits," and then click "Temporary Protected Status." Persons from certain other countries are granted Deferred Enforced Departure (DED), which provides temporary protection from removal. Liberians are currently given this protection.

Persons are ineligible for TPS if they are inadmissible (see §52.1) 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 §52.57. 8 USC §1254a(c)(2)(B)(ii).

- **Practice tip:** To preserve TPS eligibility, it is important to avoid two misdemeanors or one felony. Counsel should consider whether a misdemeanor charge can be pleaded to an infraction or reduced to an infraction. See Pen C §§19.8 (offenses that can be charged either as misdemeanors or infractions), 490.1 (petty theft of property valued at \$50 or less). Under Pen C §17(d), the infractions/misdemeanors listed in Pen C §19.8 constitute infractions if the prosecutor files the charge as an infraction (unless defendant objects) or if the court decides that the offense is an infraction. A postjudgment motion to reduce can be made at any time, since the code section does not specify any time limit. In addition, a felony may be reduced to a misdemeanor. See Pen C §17(b).

## §52.59 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 10 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.

**§52.60 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 the following:

- Good moral character (see §52.1) for a reasonable period;
- Not inadmissible (although this requirement is called into question by *Matter of Sanchez-Linn* (BIA 1991) 20 I&N Dec 362); and
- Not ineligible for U.S. citizenship (through convictions for draft evasion or desertion; see 8 USC §1425).

**§52.61 9. Relief for Abused Spouses and Children** **Is defendant a victim of spousal abuse or child abuse, neglect, or abandonment?**

**Special immigrant juvenile status.** A child who is in dependency or delinquency court proceedings and cannot be returned to either parent owing 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 that 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 irrelevant. Although this special status has been applied most often to children and young people in dependency proceedings, it also applies to youth in delinquency proceedings who meet the above criteria. For more information, see Brady & Kinoshita, *Immigration Benchbook for Juvenile and Family Courts* (2003); Kinoshita & Brady, *Special Immigrant Juvenile Status* (2005); and *Fact Sheets: Immigration Options for Undocumented Children*. All can be downloaded free of charge at the Immigrant Legal Resource Center website (<http://www.ilrc.org/sijs.php>).

**Violence Against Women Act (VAWA) immigration provisions.** A noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under the Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without needing the cooperation of the abusing citizen or permanent resident. 8 USC §1154(a)(1)(A)(iv), (B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only 3 years of good moral character and physical presence in the United States. 8 USC §1229b. Although 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 fact sheets in several languages, or to order a manual, go to <http://www.ilrc.org/vt.php>. See also <http://www.nationalimmigrationproject.org> (click on “Noncitizen Survivors of Domestic Violence”).

## §52.62 10. Status for Victims, Witnesses, and Informants Regarding Crime

### Is the defendant a victim of or does the defendant have information about a crime?

Congress has created temporary visas, which can lead to permanent residency, for persons who are victims of, 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. Even persons whom the government suspects of assisting in drug trafficking are potentially eligible for these visas.

Noncitizens who are victims of serious crime and are, have been, or may be helpful to authorities investigating or prosecuting the crime can apply for temporary, or perhaps permanent, status under a "U" visa. 8 USC §1101(a)(15)(U). A victim is a person who has suffered direct harm or who is directly or proximately harmed as a result of the crime. The DHS has discretion to grant "U" visas for victim bystanders who suffer unusually direct injury as a result of a qualifying crime. Certain family members of murder and manslaughter victims and victims who are incompetent or incapacitated also are eligible. Examples of serious crimes 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. Victims eligible for "U" visas may be able to terminate pending removal proceedings, and if the "U" visa is approved, either an order of removal, deportation, or exclusion will be canceled or, if the order was issued by an immigration judge, the case may be reopened and terminated. In addition, noncitizens who were victims of a "severe form of trafficking in persons" can apply for temporary and perhaps permanent lawful status under a "T" visa. 8 USC §1101(a)(15)(T). Severe trafficking includes sex trafficking of persons under age 18 and any 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" visa can be found at the following websites: Immigrant Legal Resource Center, <http://www.ilrc.org/uvisa.php>; National Immigration Project of the National Lawyers Guild, <http://www.nationalimmigrationproject.org> (click on "Immigrant Rights Resources"); and Citizenship and Immigration Services, <http://www.uscis.gov>. For assistance with "U" visas, see <http://www.asistaonline.org>; for "T" visas or in trafficking cases, see <http://www.lafla.org/clientervices/specialprojects/traffic.asp>.

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). There is no requirement that the person be a crime victim. The person and his or her family may become eligible for permanent residency. Only 125 such visas are distributed nationally each year.

- ▶ **Note:** The Ninth Circuit held that the United States was not estopped from removing a noncitizen on the basis of the government's alleged agreement not to deport him in exchange for his cooperation in a federal drug prosecution when there was no claim that an official having the authority to do so made a specific promise of such relief. *Morgan v Gonzales* (9th Cir 2007) 495 F3d 1084.

## §52.63

**G. Deported Clients Convicted of Certain Offenses Face Severe Federal Penalties for Illegal Reentry**

Many noncitizen defendants tried and convicted for criminal offenses in state court are removed immediately after serving their sentence and then attempt to reenter the United States illegally. Illegal reentry is a commonly prosecuted federal crime, with steep sentence enhancements if the person was removed after being convicted of certain offenses. See 8 USC §1326(b); *U.S. v Pimentel-Flores* (9th Cir 2003) 339 F3d 959. A surprisingly high number of federal criminal cases involve this offense. Criminal defense counsel should advise deportable noncitizen defendants when a proposed plea can serve as a prior in an illegal re-entry case, and, when possible, should fashion a plea to avoid this consequence. Just as counsel would try to avoid conviction of an offense that can be used as a “strike” in a future prosecution, counsel representing a noncitizen defendant should try to avoid a conviction that can be used to enhance a sentence for illegal reentry if the client attempts to return illegally to the United States.

Two types of crimes cause the most serious sentence enhancements. Prior conviction of an aggravated felony triggers an 8-level increase under the federal sentencing guidelines. See 8 USC §1326(b)(2); 18 USC App USSG §2L1.2(b)(1)(C). Prior conviction of certain other felony offenses triggers a 16-level increase under the guidelines. See 8 USC §1326(b)(1); 18 USC App USSG §2L1.2(b)(1)(A).

► **Note:** In *U.S. v Booker* (2005) 543 US 220, 160 L Ed 2d 621, 125 S Ct 738, the Supreme Court made sentencing under the guidelines voluntary in order to avoid constitutional problems entailed in judicial fact-finding with respect to “conduct” enhancements that increase a defendant’s sentence beyond the statutory maximum. See *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348. It is expected, however, that many federal judges will continue to adhere to the guidelines, especially as they relate to enhancements for prior convictions, which were explicitly excluded from *Apprendi*’s Sixth Amendment jury trial requirement. 530 US at 476, 147 L Ed 2d at 447. Thus, when possible, counsel will want to avoid conviction of an offense that is considered an aggravated felony. See §§52.41-52.47.

Further, counsel will want to avoid the “other felony” category that gives rise to a more serious sentence enhancement than an aggravated felony. This section discusses the “other felony” category. In general, obtaining a misdemeanor rather than felony conviction will avoid the most serious problems. When that is not possible, federal public defenders are often willing to advise on the effect under the guidelines of proposed state court pleas. For further discussion, see Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* §9.50 (10th ed 2008).

**“Felony offense” creating a 16-level enhancement under the federal sentencing guidelines.** A 16-level increase will be imposed for felony conviction of many offenses, regardless of whether any sentence was imposed and based only upon the fact that the offense is a state felony. These offenses fall into two categories:

- Many nondrug offenses (including assault, burglary, statutory rape, and possession

of a firearm) trigger a 16-level increase in sentence solely by being classed as a state felony, regardless of the sentence imposed; and

- Felony drug trafficking offenses, such as sale or possession for sale, trigger a 16-level increase if the sentence imposed was more than 13 months, and a 12-level increase if the sentence was 13 months or less.

**Nondrug felony offenses that trigger the 16-level increase.** Under the federal sentencing guidelines, any of the following prior convictions will result in a 16-level increase, regardless of what sentence was imposed (18 USC App USSG §2L1.2(b)(1)(A)):

- A “crime of violence”;
- A firearms offense;
- A child pornography offense;
- A national security or terrorism offense;
- A human trafficking offense; or
- An alien smuggling offense.

A crime of violence includes the following felony offenses: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, and any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against another person. 18 USC App USSG §2L1.2, Application Note 1(B)(iii).

**Definition of felony; effect of reduction of felony to misdemeanor.** The sentencing guidelines define a felony as “any federal, state, or local offense punishable by imprisonment for a term exceeding one year.” 18 USC App USSG §2L1.2, Application Note 2. This definition of felony is the same in California law. Reduction of a felony to a misdemeanor under Pen C §17(b) or §19 is effective for immigration purposes (*Garcia-Lopez v Ashcroft* (9th Cir 2003) 334 F3d 840) and should be effective here, as under the guidelines. The Ninth Circuit will follow state law in determining the maximum penalty available for an offense. See, e.g., *U.S. v Robles-Rodriguez* (9th Cir 2002) 281 F3d 900. If possible, state defenders should plead to a misdemeanor or arrange to reduce a felony to a misdemeanor for these offenses, and advise the client of the penalties that a felony conviction would bring if the client was ever deported and attempted to return illegally.

**“Drug trafficking” offenses that trigger 16-level increase.** A prior conviction of an offense charged as an aggravated felony under the drug trafficking category results in an 8-level increase under the guidelines. However, an offense charged as a “felony drug trafficking offense” can be punished more severely than this. Under the guidelines, a drug trafficking offense is “an offense under federal, state or local law that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” 18 USC App USSG §2L1.2, Application Note 1(B)(iv). Conviction of a felony drug trafficking offense for which the sentence imposed exceeded 13 months results in a sentence

increase of 16 levels. Conviction of a felony drug trafficking offense for which the sentence imposed was 13 months or less results in a 12-level increase. 18 USC App USSG §2L1.2(b)(1)(A)-(B). A simple possession offense is not a “drug trafficking offense” under the guideline definition and so does not get the 16-level increase. However, felony simple possession is an aggravated felony that will cause an 8-level increase. See, e.g., *U.S. v Robles-Rodriguez* (9th Cir 2002) 281 F3d 900.

**Offenses that trigger less serious guideline enhancements in prosecution for illegal reentry.** A prior “conviction for any other felony” results in a 4-level increase, as do “three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.” 18 USC App USSG §2L1.2(b)(1)(D)-(E).