§ N.11 Burglary, Theft, and Fraud

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Don't Let Your Work Go to Waste – Hand the Defendant (And Family) a Copy of a Legal Summary And, If Useful, of the Conviction and Sentencing Record. To get a short summary of the legal defense, you can photocopy sections of this Note, or of the discussion of the offense at Selected California Offenses and Immigration Defenses at www.ilrc.org/chart. Physically hand this to the defendant, with instructions to give it to an immigration defense attorney, or to the immigration judge if there is no defense attorney. Because most noncitizens have no counsel in removal proceedings, this may be the only way your client will benefit from the defense you create. Try to give an additional copy to the defendant's designated friend or family member, especially if the defendant will be detained by ICE, because ICE often seizes legal documents from detainees.

I. OVERVIEW

A. Defense Goals

Property offenses such as burglary, theft, fraud, deceit, forgery, and counterfeiting have two potential adverse immigration consequences: a conviction could be an "aggravated felony" (AF) and/or an immigration-defined "crime involving moral turpitude" (CIMT). Avoiding these two consequences is the defense goal with such offenses.

The good news is that an informed criminal defender often can avoid these consequences with careful pleading. If you are consulting with a "crim/imm" expert, they will identify the defense goals for you. Otherwise, you must do this. *Each noncitizen defendant requires an individual analysis* of how a criminal disposition will affect them. The harm caused by a CIMT or even an AF can vary depending upon the person's prior convictions, immigration history, and current or hoped-for lawful immigration status. Some defendants can take a CIMT conviction depending on various factors, while others cannot.

1. Overview: Aggravated Felonies (AF)

In most cases, the most important goal is to avoid a conviction that meets the federal definition of an "aggravated felony." See 8 USC § 1101(a)(43). So-called aggravated felonies, or AFs, carry the worst immigration consequences – although AFs that involve property offenses are somewhat less harmful than those related to drugs or violence.

Despite its name, an aggravated felony can be a misdemeanor, and not very aggravated. Only some property offenses are potential AFs. *No* property offense will be an AF unless (a) a sentence of a year or more is imposed, and/or (b) the loss to the victim/s exceeded $10,000. Generally, a "theft" offense must avoid the sentence of a year or more but can take a loss exceeding $10,000, while an offense involving

"fraud or deceit" is the opposite: it must avoid the $10,000 but can take the year. But these are just general rules. To check whether specific California offenses carry these consequences, start by consulting a crim/imm resource such as ILRC, *California Quick Reference Chart* (2018) at www.ilrc.org/chart (hereafter the *California Chart*), or *Immigration Law and Crimes* (Thomson Reuters). If it is a potential AF, we can propose appropriate substitute pleas that will not be AFs.

Example: Looking at the *California Chart*, you see that receipt of stolen property, Pen C § 496, is an AF if a year is imposed, but is not an AF if the loss to victim/s exceeds $10,000. In contrast, passing bad checks, Pen C § 476, is *not* an AF if a year or more is imposed, but *is* one if the loss to victim/s exceeds $10,000. Theft, Pen C § 487, is a great plea: it can take *either* a year's sentence *or* a $10,000 loss without becoming an AF (but it cannot take both).

If your client who is charged with Pen C § 496 must take a year or more on a single count, that is a potential AF. To avoid that, you could offer to plead instead to Pen C §§ 476, 487, or 530.5. On the other hand, if your client will not be sentenced to a year or more on the § 496, you can take that plea and it will not be an AF.

Note that if the case involves both a sentence imposed of at least a year *and* a loss to the victim/s of over $10,000, this is more complex. See Section III, below.

2. Overview: Crimes Involving Moral Turpitude (CIMT)

With crimes involving moral turpitude (CIMT), it is especially critical to make an individual analysis for each client. A CIMT analysis is a two-part inquiry. First, one must determine whether the offense is a CIMT. Consulting a resource like the *California Chart* is a good place to start. Second, one must see if the conviction actually makes the particular defendant deportable or inadmissible. Depending on a number of factors that are set out in the immigration statute – including, e.g., number of CIMT convictions, date of commission, potential or imposed sentence – one or more CIMT convictions can make a noncitizen "removable" (inadmissible and/or deportable).

Being inadmissible or deportable for a CIMT often does not bring penalties as serious as conviction of an aggravated felony. However, depending on the case, the conviction/s still can utterly destroy the defendant's current or potential lawful immigration status. See further discussion of CIMTs at Subsection B below.

3. Summary of Consequences of Common California Property Offenses

Here is a summary of current holdings on whether the below California offenses are aggravated felonies (AF) and crimes involving moral turpitude (CIMT). Note that some offenses become an AF if a sentence of a year or more is imposed on a single count, and some become an AF if the loss to the victim/s exceeds $10,000. For more detailed discussion and citations, look up the offense on the *California Chart*, including endnotes, at www.ilrc.org/chart.

Offense and Section	**AF if 1 year or more imposed?**	**AF if $10k loss to victim?**	**CIMT?**
Burglary, Pen C § 459/460[1]	No	No	Should not be
Forgery, Pen C § 470	Yes	Yes	Yes
Bad checks, Pen C § 476	No	Yes	Yes

[1] See Section II, below, regarding burglary.

Theft (and fraud), Pen C §§ 484, 487, 666[2]	No (but it is an AF if *both* 1-year *and* $10k)	No	Yes
Theft by misappropriation, Pen C § 485[3]	Yes	No	Should not be
Stolen property, Pen C § 496[4]	Yes	No	Should not be
Vehicle taking, Veh C § 10851[5]	Assume yes	No	No
Identity offense, Pen C §§ 529(3)[6] and 530.5(a), (d)(2)[7]	No	Yes	No
Welfare fraud, W&I C § 10980(c)	No	Yes	Yes
Intent to commit fraud or deceit	No	Yes	Fraud is always a CIMT; deceit varies by offense

This information can help construct safer pleas. For example, none of the following defendants has a conviction of an aggravated felony (AF) *or* a crime involving moral turpitude (CIMT) for immigration purposes. If that is the entire goal for the case, these are excellent pleas.

- Peter is convicted of hot residential burglary and sentenced to two years in prison.
- Paul is convicted of felony § 530.5(a) and sentenced to 16 months, with an order to repay $9,000.
- Mary is convicted of felony Veh C § 10851 and sentenced to felony probation, with 300 days' custody and an order to reimburse $15,000.

Notice that Pen C § 496 and Veh C § 10851 can be very good immigration pleas. They are not AFs as long as the sentence imposed is less than a year, plus they are not CIMTs. Section 485 probably is the same. But with a year imposed, all of these are dangerous. In contrast, Pen C § 487 can take a year imposed, or a loss exceeding $10,000, without becoming an AF—but it is a CIMT.

Example: Juan is charged with § 487 and faces a six-month sentence. This is not an AF, but it is a CIMT. If instead he can plead to § 496 with a six-month sentence, he will not have an AF *or* a CIMT.

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[2] See Section III, below, regarding theft and fraud.

[3] See *Sheikh v. Holder*, 379 Fed.Appx. 697, 2010 WL 2003567 (9th Cir. May 20, 2010) (unpublished), finding that Pen C § 485 is not a CIMT because it includes intent to deprive temporarily.

[4] Section 496 is an AF if a sentence of a year or more is imposed. *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009), *Verduga-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. 2009). Section 496 is overbroad as a CIMT because it includes intent to deny temporarily, by joyriding. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). While *Castillo-Cruz* held that § 496 was divisible, the Supreme Court has since clarified to be divisible, the statute must set out the relevant choices as statutory alternatives. See, e.g., *Descamps v. U.S.*, 570 U.S. 254 (2013). Because § 496 does not set out those statutory alternatives, it is not divisible. Therefore, it is never to be a CIMT.

[5] Regarding aggravated felony, while Veh C § 10851 is a theft offense, immigration advocates can assert it is not an AF with a year's sentence because it also includes accessory after the fact. However, it is likely that § 10851 accessory with a year's sentence would be charged as an AF under another category, obstruction of justice. See further discussion at *California Quick Reference Chart* (2018). Section 10851 never is a CIMT. *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc).

[6] See *Paolo v. Holder*, 669 F.3d 911 (9th Cir. 2011) (Section 529(3) is not a CIMT).

[7] *Linares-Gonzales v. Holder*, 823 F.3d 508 (9th Cir. 2016) (Section 530.5 is not a CIMT).

If instead Juan were facing a 16-month sentence, he would want to plead to Pen C § 487 even though it is a CIMT, because at least it can take the 16-month sentence without becoming an AF. Or even better, he could plead to felony burglary, which is neither an AF or a CIMT.

See Subsection B, next, for a further explanation of AFs and CIMTs. See Subsection C for a brief explanation of the categorical approach, which is the basis for many of our defenses. See Subsection D for a discussion of other ways that property convictions may hurt an immigrant.

B. More on Aggravated Felonies, Sentence Imposed, and Crimes Involving Moral Turpitude

1. Aggravated Felony (AF)

Conviction of an "aggravated felony" (AF) brings some of the worst immigration penalties.[8] It is not only a ground of deportation, it is a bar to being eligible for critical forms of relief such as asylum and all forms of cancellation of removal. There are two ways that property offenses can become an AF: if a sentence of a year or more is imposed, and/or if the loss to the victim/s exceeded $10,000.

a) AF Because a Sentence of at Least One Year Was Imposed

Offenses that are affected. Some California property offenses become an AF if a sentence of a year or more is imposed. This occurs if, under the categorical approach, the elements of the California offense are found to match the elements of the federal "generic" definition of theft (Pen C § 484 does not match), receipt of stolen property, burglary (Pen C § 459 does not match), forgery, or counterfeiting.[9] For a discussion of why Pen C §§ 487 and 459 do not match the generic definitions, see Subsection III, below.

The following California offenses *do* become an AF under these categories if sentence of a year or more is imposed: Pen C §§ 470 (forgery), 496 (receipt of stolen property), Veh C § 10851 (vehicle taking), and assume Pen C § 485 (theft by misappropriation).

The following offenses do *not* become an AF based on a sentence imposed of a year or more: Pen C §§ 487, 666, and other offenses that use the definition of theft at § 484; Pen C § 459, whether first or second degree; and offenses with an element of fraud or deceit rather than theft. For citations and further discussion of these offenses, see the chart at Subsection A, above, or see offenses and endnotes at ILRC, *California Quick Reference Chart* (2018) at www.ilrc.org/chart

How to avoid a sentence of a year or more. Some offenses only become an AF if a sentence of a year or more is imposed. Federal immigration law has its own definition of an imposed sentence, sometimes referred to as a "term of imprisonment." See 8 USC § 1101(a)(48)(B). Generally, this includes the entire sentence ordered by the court, regardless of whether the person serves all the time:

- It includes the whole sentence even if all or part of the execution was suspended;
- If imposition of sentence was suspended, there is no sentence *except for* any custody time ordered as a condition of probation;
- If the person waives credit for time that was served before being sentenced, that time is not part of the imposed sentence. If the person accepts the credit for the time served, that time is part of the imposed sentence. Some defendants can waive future "good-time" credits in exchange for a shorter sentence, because they will serve all of the time that the judge orders;
- The year or more for AF purposes must be imposed on a single count. Consecutive sentences are not added together, and can safely be "stacked" to equal more than one year in total;

[8] For more information see *§ N.6 Aggravated Felonies* at www.ilrc.org/chart.

[9] See 8 USC §§ 1101(a)(43)(G) (burglary, theft, receipt of stolen property) and (R) (forgery, counterfeiting).

- If more time is placed on the original count due to a probation violation, then the original and additional sentences are added together.

Example: Pablo was charged with Pen C § 496. The prosecution wants 16 months. Pablo needs a sentence imposed of 364 days or less, or the § 496 will become an AF. His attorney arranged for Pablo to spend five months in custody before sentencing (this could be either before or after the plea). At sentencing, Pablo waived credit for the five months served. The judge suspended imposition of sentence and imposed felony probation, with a condition of six months in custody. For immigration purposes, that was a "sentence" of just six months, because that was the amount of time the judge actually ordered. The conviction was not an AF.

Pablo was released from jail after spending an additional three months on the six-month sentence. Then he violated probation. Now the prosecution wants to impose an additional six-month sentence on the § 496, to reach a total of one year of custody imposed as a condition of probation. That would make the conviction an AF. Instead Pablo should try to bargain either (a) to get an additional five and a half rather than six months, so as not to reach one year, or (b) to not take the violation, but to plead guilty to a new offense and take the time on that.

For further discussion, including how to craft an immigration "sentence" of 364 days or less while the person spends significantly more time in custody, see ILRC, *§ N.4 Sentence* (2018) at www.ilrc.org/chart. For a discussion of how to eliminate an imposed sentence with post-conviction relief, see www.ilrc.org/immigrant-post-conviction-relief. See especially Pen C § 18.5(b), which permits a judge to reduce a sentence of 365 days to 364 days, on a misdemeanor or felony reduced to a misdemeanor.

b) AF Because a Crime of Fraud or Deceit Resulted in a Loss to the Victim/s Exceeding $10,000

A crime that has an element of, or by definition necessarily involves, "fraud or deceit" will be an aggravated felony if the loss to the victim or victims exceeded $10,000. Passing bad checks and all kinds of fraud meet this description. "Deceit" is broadly defined. Perjury, false personation, and other offenses that involve deceit, but that do not have as an element the intent to seriously harm another or gain a benefit, might be held an AF under this ground if this loss occurred.

There is heightened risk here because when it comes to proving the amount of loss, the categorical approach does not apply and the government can use evidence from outside the official record of conviction. If your client is charged with an offense that is a potential AF under this ground, there are two main defense strategies.

- The first and safest option is to plead to a different offense that does not necessarily involve fraud or deceit, such as Pen C §§ 459, 487, or 496, or Veh C § 10851, and take the loss on that. These offenses will not become AFs due to loss. (But if a sentence of a year or more also is imposed on any single count, then they risk being an AF as theft.) See Section II, below.

- If that is not possible, careful pleading as to the amount of loss also might be able to protect the person, even if they are convicted of an offense involving fraud or deceit. Essentially, one would plead specifically to a loss of, e.g., $9,000, but at sentencing agree to pay restitution for the larger amount, with a *Harvey* waiver. See Section III, below.

2. Crimes Involving Moral Turpitude (CIMT)

Some property offenses are "crimes involving moral turpitude" (CIMT) as defined by immigration law. The CIMT grounds of inadmissibility and deportability are unusual because they require a two-part inquiry. First, one must determine if the offense is a CIMT, by comparing the elements of the offense

with the immigration law definition. Second, if the offense is a CIMT, one must see if the particular conviction would cause the particular defendant to become deportable or inadmissible.

Step One: Is the offense a CIMT? Immigration law has its own definition of which offenses are CIMTs, which may differ from California CIMT definitions. An informed defender often can avoid a CIMT by negotiating for an alternative plea. A property offense is a CIMT if:

1) It has as an element the intent to deprive the owner permanently or "substantially" (e.g., for a long time), but *not* temporarily (e.g., not joyriding).
    - Receipt of stolen property, Pen C § 496, and vehicle taking, Veh C § 10851, are not CIMTs because the minimum conduct includes joyriding.

2) It has as an element intent to commit fraud. Mere intent to commit deceit might not be a CIMT.
    - An offense that involves deceit, but that does not have as an element the intent to cause serious harm or gain a benefit generally is not a CIMT. For this reason, Pen C §§ 529(3) and 530.5(a) or (d)(2) are likely not CIMTs.

In sum, the following property offenses should *not* be held CIMTs, because they do not necessarily involve fraud or intent to deprive permanently: Pen C §§ 459 (whether first or second degree), 496, 529(3), 530.5(a), (d)(2), and probably 485. The following property offenses *are* held CIMTs, because they necessarily involve fraud or intent to deprive permanently: Pen C §§ 470, 476, and 484/487.

Step Two: Does this CIMT conviction make this defendant removable? If the offense is a CIMT, one must analyze whether it will make this particular client deportable or inadmissible ("removable"). The CIMT removal grounds set out specific conditions for this, which can involve how many CIMTs the client has committed, when they were committed, the potential and imposed sentence, and other factors. For example, a noncitizen is deportable if they are convicted of one CIMT that they committed within five years of their date of admission to the U.S., *if* the CIMT has a potential sentence of a year. See 8 USC § 1227(a)(2)(A)(i). For a summary of the grounds and their requirements, see Section IV, below.

C. Crim/Imm Defenses and the Categorical Approach

Here is a brief overview of how crim/imm defenses work, which often is based on the categorical approach. Knowing the vocabulary and principles may help understand defenses. For a comprehensive discussion, see ILRC, *How to Use the Categorical Approach Now* (2017), at www.ilrc.org/how-use-categorical-approach-now.

Under the categorical approach, if the California offense reaches some conduct not reached by the applicable federal definition, then the California offense is "overbroad."

> **Example:** The federal, "generic" definition of burglary is an unlicensed entry into a building or structure with intent to commit a crime. California burglary is defined as an "entry" into a building, vehicle, etc., with intent to commit certain crimes. The California statute is "overbroad" because it reaches conduct not covered by the federal definition, for example, a licensed entry, or burglary of a vehicle.

If the California offense is overbroad, then it does *not* carry the immigration penalty – *unless* the California statute at issue is "divisible" into different discrete crimes, at least one of which matches the federal definition. The Supreme Court held that a statute is divisible only if it sets out statutory alternatives that are elements, meaning that a jury would have to unanimously decide between them in order to find guilt. If a jury is not required to decide unanimously between the statutory alternatives (as is

the case with many California statutes), then the statute is *in*divisible. If a criminal statute is both overbroad and indivisible, then no conviction, regardless of the underlying facts or admissions, ever triggers the immigration penalty.

> **Example:** Having found that Pen C § 459 is overbroad, now the question is whether it is "divisible" into discrete crimes, for example, one crime involving a licensed entry and another an unlicensed entry. Under California law, this is not the case: a jury need not decide unanimously between licensed and unlicensed entry in order to convict. (Plus, to meet the Supreme Court's test, Pen C § 459 would have to be phrased in the alternative, e.g., "a licensed or unlicensed entry.") Because § 459/460 is overbroad and indivisible, *no* conviction of Pen C § 459/460 can be an aggravated felony as "burglary." This is true even if the person in fact pled guilty to an unlicensed entry into a building. *Descamps v. U.S.*, 570 U.S. 254 (2013).

Practice Tip: Despite the above, do try to make a good record. The great majority of noncitizens are unrepresented in removal proceedings. Immigration judges are overworked and many are not expert in crim/imm. Some judges will wrongly consult the person's record of conviction, even if a statute is overbroad and indivisible. Therefore, although it is not legally necessary, as a practical matter try to give your client further protection by creating a good record of conviction. When possible, the best practice is to have the defendant allocute to a licensed entry, or intent to deprive temporarily, or an offensive touching. This may protect the person if immigration authorities are wrong on the law.

D. Other Immigration Consequences Beyond AF and CIMT

Property offenses can have some other immigration consequences simply because they are a felony conviction, or due to the amount of time served.

Conviction of any felony is a bar to DACA (which provides protection for some immigrants who came to the U.S. as children) and Temporary Protected Status. If the offense is reduced to a misdemeanor, this issued can be cured. For two-page summaries on DACA and on TPS, see ILRC, *§ N.17 Immigration Relief Toolkit* (2018) at www.ilrc.org/chart.

Some immigration consequences apply based on sentence, regardless of the elements of the offense. A person is inadmissible who, during their entire lifetime, has been convicted as an adult of at least two offenses and a total sentence of five years or more has been *imposed*. Also, a person cannot establish good moral character, which is required for naturalization and for cancellation of removal for non-permanent residents, if they have been in actual custody for 180 days as a result of conviction as an adult, during the period for which good moral character must be shown. For more on these and other sentence consequences, see ILRC, *§ N.4 Sentence* (2018) at www.ilrc.org/chart.

II. USING BURGLARY AS AN IMMIGRATION DEFENSE

California burglary, including residential burglary, has very few immigration consequences and is a recommended plea. It never is an aggravated felony, regardless of sentence. It never should be held a crime involving moral turpitude. This can make burglary an excellent substitute plea, both for relatively minor offenses (e.g., by pleading to misdemeanor second degree to avoid a CIMT) up to strikes with prison time (to avoid both an AF and a CIMT). In fact, burglary–even "hot" residential burglary where a resident is present–is one of the safest California pleas if a sentence of more than a year is required.

Note, however, that a misdemeanor or felony conviction of burglary is a bar to DACA, the protection for immigrants who came here as young children. See also Subsection I.D, regarding consequences based on sentence, or (for DACA and TPS) classification as a felony.

A. California Burglary Is Not an Aggravated Felony

California burglary is not an aggravated felony (AF) under any applicable category. It is not an AF as "burglary," as a "crime of violence," or as attempted "theft," even if a sentence of a year or more is imposed. It should not be held an AF as a crime of "fraud or deceit" even if the loss to the victim/s exceeds $10,000. Under the categorical approach, the elements of California burglary do not match the elements of the federal definition of the terms burglary, crime of violence, theft, or deceit.

Not an AF as "Burglary." A conviction of "burglary" (as it is defined for federal purposes) is an AF if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(G). The federal definition of burglary requires an unlicensed entry, while Pen C § 459 includes a licensed entry. Section 459 is not divisible between a licensed and unlicensed entry. Because § 459 is overbroad and indivisible, no conviction of § 459 amounts to "burglary" for any immigration purpose, regardless of information in the record of conviction. *Descamps v. U.S.*, 570 U.S. 254 (2013).

Not an AF as a Crime of Violence. A conviction of a "crime of violence" (COV) is an AF if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(F). Here a COV is defined at 18 USC § 16(a) as an offense that has as an element the use, or threatened or attempted use, of force. Section 459 contains no element of force, so it is not an AF as a COV even if a sentence of a year is imposed. Previously, residential burglary, Pen C §§ 459/460(a), was held a COV under a different definition set out at 18 USC § 16(b). But the Supreme Court reaffirmed the Ninth Circuit and struck down 18 USC § 16(b) as being unconstitutionally vague. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (Pen C § 459/460(a) is not a COV because 18 USC § 16(b) is void for vagueness).

Not an AF as Attempted Theft, Fraud, or Deceit (or Other Aggravated Felony Offense). Attempting to commit an aggravated felony is itself an aggravated felony. 8 USC §1101(a)(43)(U). For example, attempt to commit a "theft" offense is an aggravated felony if a year or more was imposed.

Section 459 is never an attempted theft, or any other offense, under two independent rationales. First, under the categorical approach, § 459 is overbroad because it includes entry with intent to commit *any felony*, including felonies other than theft, and it is not divisible as to the intended offense. Therefore, no conviction for California burglary is attempted theft. *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014). Second, an attempt requires intent plus a "substantial step" toward committing the offense. The Ninth Circuit held that the minimum conduct for § 459—a *licensed* entry, although with bad intent—does not constitute the required substantial step. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011) (commercial burglary). This also should hold true for attempted fraud or deceit.

B. California Burglary Should Not Be Held a Crime Involving Moral Turpitude

The BIA has two definitions of when burglary can be a CIMT, and California's statute does not meet either one. First, the BIA has long held that burglary by an *unlicensed* entry is a CIMT if the *intended* offense is a CIMT. See, e.g., *Matter of Z*, 5 I&N Dec. 383 (BIA 1953). California burglary does not meet this definition: it is overbroad and indivisible as to whether the entry was unlicensed (see *Descamps*, above) and as to what the intended offense was (see *Rendon*, above). In addition, the Ninth Circuit held that because § 460(b) can be committed merely by a lawful entry into a commercial building with bad intent, it is never a CIMT even if the intended offense were held a CIMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011).

Second, the BIA set out a definition of CIMT that only applies to residential burglary, meaning that it could apply to § 460(a) but not § 460(b). It held that an *unlicensed* entry into an occupied dwelling with intent to commit any crime is a CIMT, regardless of whether the intended crime is a CIMT. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). But, again, California burglary is overbroad and indivisible as to whether the entry was unlicensed (see *Descamps*, above), so no conviction can qualify.

Despite this, defenders still should try to create a good record of conviction in case immigration authorities erroneously file charges against an unrepresented immigrant. Where possible, indicate on the record that the entry was lawful and/or that the intended offense was a non-CIMT.

NOTE: Not every CIMT conviction will make an immigrant inadmissible or deportable. It depends upon potential and imposed sentence, number of CIMTs, and other factors. See Part V below, or see *§ N.7 Crimes Involving Moral Turpitude*.

III. DEFENSE STRATEGY: SWITCH THEFT AND FRAUD CHARGES

A. Strategies to Avoid a Theft or Fraud Aggravated Felony

1. Mix and Match Theft and Fraud

Under federal law, "theft" and "fraud" are defined differently. Further, each requires a different additional factor—either a one-year sentence imposed, or a loss exceeding $10,000—to become an aggravated felony. This gives rise to key defense strategies. Under federal immigration law:

- ✓ "Theft" is defined as a wrongful taking of property *without* consent, by stealth. "Fraud or deceit" is defined as a wrongful taking of property *with* consent, by deceit. Immigration law recognizes that theft and fraud are different and nearly mutually exclusive offenses.[10]
- ✓ Conviction of a "theft" offense is an aggravated felony (AF) *only* if a sentence of a year or more is imposed. See 8 USC § 1101(a)(43)(G).
- ✓ Conviction of an offense that involves either fraud or the broadly defined "deceit" is an AF *only* if the loss to the victim/s exceeds $10,000. See 8 USC § 1101(a)(43)(M)(ii).

Example: Jack was convicted of vehicle taking (a "theft" offense) where the loss to the victim was $17,000. Jack was sentenced to 180 days. He does not have an AF because he was not sentenced to a year or more for the theft offense. The amount of loss did not make the theft offense an AF.

Jill is convicted of elder fraud (a "fraud or deceit" offense) where the loss to the victim was $8,000. Jill was sentenced to 16 months. She does not have an AF because she was not convicted of a fraud offense where the loss exceeded $10,000. The sentence does not make the fraud offense an AF.

By mixing and matching theft and fraud/deceit offenses with the one-year sentence or loss exceeding $10,000, one can avoid an AF. For example, if the client is charged with a theft offense and faces a sentence of a year or more, plead to an offense involving fraud or deceit. If charged with an offense involving fraud or deceit where the loss exceeds $10,000, plead to a theft offense. (And see below regarding Pen C § 459 and § 487.)

Example: Bao was charged with felony passing bad checks under Pen C § 476. The prosecutor wants a sentence of four months and $15,000 payment in restitution. Section 476 is an offense involving "fraud or deceit," but is not an offense involving "theft."

[10] *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

If ICE can establish a loss exceeding $10,000, the § 476 conviction will be an AF. If instead Bao can plead to a "theft" offense with less than a year's sentence, or some other offense unaffected by the $10,000 loss, he will not have an AF. Good alternatives include Pen C §§ 459, 487, and 496.

2. Use Pen C § 459/460 or § 484/487 to avoid an AF

Section 484/487 is a very useful plea option, because it can act as either a fraud or a theft offense, depending upon what the defendant needs. Section 459/460 is similar because it cannot be held to involve either fraud or theft. Understanding why this works requires a basic understanding of the categorical approach, discussed above in Section I.

Section 484/487. Pen C § 484, which defines theft for purposes of Pen C § 487, can count as either a theft or a fraud offense, whichever the defendant needs.

- The Ninth Circuit held that a conviction under Pen C § 487 where a sentence of a year was imposed cannot be held an aggravated felony (AF) as "theft," because there is no way to prove that the offense did not involve fraud. *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir 2015). This is true even if the person pled guilty to stealing.

- Similarly, a conviction under Pen C § 487 where the loss to the victim/s exceeds $10,000 cannot be held an AF as "fraud or deceit," because the offense could have involved theft. This is true even if the person pled guilty to committing fraud.

For those interested, the reason that § 487 has this effect is based on the categorical approach and on California's treatment of the applicable definition of theft at Pen C § 484. Section 484 sets out several different types of conduct, including both theft (e.g., "steal") and fraud (e.g., "defraud"). Under California law, these types of conduct are not separate *elements* that set out multiple discrete crimes, but are merely *means* that show how § 484, a single offense, can be committed. Significantly, a jury can convict a defendant of a § 484 crime as long as they all agree the defendant did some conduct listed there, even if they disagree as to which conduct. In other words, if a hypothetical jury split, with half finding the defendant committed theft and half finding it was fraud, the jury still could convict the defendant under § 484. See CALCRIM 1861.

For purposes of the categorical approach, this means that Pen C § 484 is "overbroad" and "indivisible" as a theft and a fraud offense. The Ninth Circuit found that immigration authorities cannot look to the record of conviction to see whether the plea was to theft versus fraud, because those are not elements of the offense. Instead, the offense must be judged on the minimum conduct required for guilt, which could be theft or fraud. *Lopez-Valencia v. Lynch, supra*.

Example: Bonnie pled guilty to stealing a television worth $2,000 under Pen C § 487. Based on her priors she was sentenced to 16 months. Despite the one-year sentence and her specific plea to theft, this is not a theft AF, because theft is not an element of § 487.

Clyde pled guilty to defrauding his church under § 487, where the loss to victims was $18,000. Despite the loss exceeding $10,000 and his specific plea to fraud, this is not an AF as a crime of fraud or deceit, because fraud or deceit are not elements of § 487.

We just stated that legally, it does not matter whether the defendant pleads to conduct involving theft versus fraud under Pen C § 487. ***However, there are practical reasons that defenders should attempt to make a good record,*** by specifically pleading to "theft" when the loss exceeds $10,000 and "fraud" when the sentence is a year or more. The great majority of immigrants are unrepresented in immigration proceedings, and the immigration judge may not understand the law and may wrongly consult the individual's plea to define the offense. We can provide the defendant with extra protection by creating a

"good" record and pleading specifically to a theft or a fraud offense under Pen C § 487 – whichever would avoid AF status.

> **Example:** In Bonnie's case, above, the best practice would be to negotiate a plea to fraudulent conduct under Pen C § 487, since she is getting a sentence of 16 months. That way, if the immigration judge wrongly consults the record of conviction, the judge will not conclude that Bonnie is convicted of a theft offense and an AF. While a plea to fraud is not legally required to avoid an AF, it may help her if she is unrepresented.
>
> **Example:** Consider Bao from an earlier example, who was charged with Pen C § 476 (passing bad checks), where the loss exceeded $10,000. If he pleads to this fraud offense, the conviction can be an AF. If you can negotiate a plea to Pen C § 487 instead of § 476, he will not have an AF even if the $15,000 loss is proved, because § 487 is not necessarily a fraud offense (it is overbroad and indivisible as a fraud offense).
>
> Legally, Bao will not have an AF even if he pleads guilty to committing fraud under § 487, because under the categorical approach the record cannot be consulted. But you can further protect Bao by having him allocute to "theft" rather than fraud. If the immigration judge wrongly consults the conviction record, that plea means that Bao still will be safe.

Section 459/460. California burglary, including first degree burglary where a resident is present, has very few immigration consequences because it includes a lawful entry and it is not divisible as to the intended offense. See discussion at Section II, above. It is an even better plea than Pen C § 487, because burglary should never be held a CIMT. It is one of the safest California offenses on which to take a sentence of a year or more. Note, however, that any burglary conviction is a bar to DACA, the protection for noncitizens who arrived here as children, so this is not recommended if the defendant might benefit from DACA.

A plea to § 487 with both one year imposed and a loss exceeding $10,000. Do not plead to a single count of § 487 that involves *both* a sentence imposed of a year or more *and* a loss exceeding $10,000. That may be charged as an AF, on the grounds that there is no minimum conduct required for guilt that would not be an AF under some category. Get expert assistance. Pleading to two offenses, and taking the loss on one and the sentence on another, may work.

B. Adding CIMTs to the Mix; Case Examples

The above discussion dealt with aggravated felonies. It can become even more complex when you add crimes involving moral turpitude (CIMTs) into the mix. What happens when the client is at risk and it is vital to avoid both a CIMT and an AF?

Here is a short exercise with answers. Check the basic chart in Section I above, or the *California Quick Reference Chart*, and remember that the following property offenses are not CIMTs: Pen C §§ 459/460, 496, 529(3), 530.5, Veh C § 10851, and arguably Pen C § 485.

Clients:

1) Bernardo cannot afford to get a conviction of an AF or a CIMT. He is charged with vehicle taking, Veh C § 10851. The prosecution wants two years in custody.

2) Ariel cannot take an AF or a CIMT. She is charged with two counts of fraud, totaling $80,000. The prosecution wants 8 months.

Defense strategies:

1) Bernardo cannot take two years on the § 10851, because it will become an AF. We could substitute Pen C § 487, because it can take over a year without becoming an AF. However, § 487 is a CIMT and Bernardo cannot accept a CIMT either. We have at least two options:

   - We could try to get his "sentence" for immigration purposes to less than a year. For example, he could spend six months in custody before the sentencing hearing and then waive credit for time served in exchange for felony probation and an order of custody for 364 days. (He also could offer to waive future "good time" credits in exchange for a shorter sentence.) With a sentence of less than a year, he can safely plead to § 10851, which is not a CIMT and will not be an AF. But if Bernardo ever violates probation, he must be careful not to get an additional sentence on the original count that will bring the total to a year or more, because then the § 10851 will be an AF.

   - Or, he could plead to a different offense. He could try to plead to burglary, which is not a CIMT and which can take one year without becoming an AF (although it is always best to try to get to less than one year). Or depending on the facts, or on how far the prosecution is willing to stretch them, he could plead to Pen C §§ 530.5 or 529(3). These also are not CIMTs and are not AFs if a sentence of a year or more is imposed.

2) In Ariel's case, we need to avoid an offense involving fraud or deceit, because the loss to the victim exceeds $10,000. We can look to a theft offense, because the sentence will be less than one year. We must also avoid a CIMT. Offenses such as Pen C §§ 459 and 496, and Veh C § 10851, are very useful in that they are not CIMTs and do not become an AF as long as the sentence is under one year. In this case, the challenge is to persuade the prosecutor to accept one of these as a substitute plea.

   If the DA will not agree, we have a problem because all fraud offenses are CIMTs and Ariel cannot agree to that. We could try a plea to Pen C §§ 530.5 or 529(3), which are not CIMTs. But we still are in danger of getting an AF, because they involve deceit and the loss exceeded $10,000. Ariel can do the following: plead guilty to one count where the loss to the victims is held to equal $9,000. At sentencing, agree to pay restitution equaling $80,000 pursuant to a *Harvey* waiver. To spell it out for the immigration judge, state on the record that the $71,000 is not related to the count of conviction but is pursuant to uncharged conduct or dropped charges. While there is no case on point, this ought to protect her. See Section IV, next.

IV. PLEADING TO FRAUD OR DECEIT WHERE THE LOSS EXCEEDS $10,000

A. Overview

Conviction of a crime with elements of fraud or deceit, or that in every case necessarily involves fraud or deceit, is an aggravated felony (AF) if the loss to the victim/s exceeds $10,000.[11] Tax fraud where the loss to the government exceeds $10,000, and money laundering or illegal monetary transactions involving $10,000, also are AFs.[12]

The most secure defense strategy is to plead to an offense that is not classed as fraud or deceit under the categorical approach. Consider Pen C §§ 459, 485, 487 (even if it is necessary to plead to theft by

[11] 8 USC § 1101(a)(43)(M)(ii).

[12] 8 USC §§ 1101(a)(43)(D), (M)(i). See, e.g., *Kawashima v. Holder*, 564 U.S. 1058 (2011).

fraud), 496, or Veh C § 10851. These can safely take a loss exceeding $10,000 (although some cannot accept a sentence of a year or more). See Section III, above.

If this is not possible and the plea must be to an offense involving fraud or deceit, we must work with the record to try to separate the loss exceeding $10,000 from the count of conviction. See the strategies at Subsection B, below.

NOTE: Don't forget CIMTs. Aggravated felonies bring the harshest consequences, but it might also be critical to avoid a crime involving moral turpitude (CIMT). Any offense that has intent to commit fraud as an element is a CIMT. If you must plead to a fraud offense, apply the CIMT rules to see if the particular conviction actually will make that particular defendant inadmissible or deportable. See the rules at Part V below. Offenses such as Pen C §§ 529(3) and 530.5 involve deceit, and we still must prevent them from being AFs if there is a $10,000 loss, but at least they are not CIMTs.

B. Pleading to Fraud or Deceit

Assume that your client must plead to an offense that involves fraud or deceit, where the loss to the victim/s exceeded $10,000. In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Supreme Court loosened the evidentiary rules for how the government may prove the amount of loss for this purpose. The Court held that the more expansive "circumstance-specific" approach, rather than the categorical approach, applies to proving the amount. This means that (a) the offense need not have financial loss as an element and (b) ICE can prove the amount of loss with evidence from outside the record of conviction.

Nijhawan did not remove all procedural protection for how the $10,000 must be established. In particular, the Court held that the loss must "be tied to the specific counts covered by the conviction," and that the finding "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan*, 557 U.S. at 42. The categorical approach does apply to determining if the offense involves "fraud or deceit."

The following strategies should protect a client who must plead to a fraud or deceit offense. Most importantly, ***always create a written plea agreement stating that the loss to the victim/s for the count/s of conviction was a specific amount that does not exceed $10,000***. For example, the plea agreement could state: "The defendant and the prosecution agree that the offense to which the defendant is pleading guilty involves a loss to the victim of $8,000." If the prosecution will not join, the defendant should just make this written statement alone.

If possible, negotiate for a new charge that specifies this amount. For example, if the original charge was fraud totaling $80,000, negotiate for new charges: one alleging loss of $8,000 and one or more alleging a total loss of $72,000. If that is not possible, again, simply identify the specific smaller amount at the time of plea.

With this in place, immigration advocates will argue that if restitution is to an amount greater than $8,000, the additional amount is based on "dismissed counts or general conduct," which under *Nijhawan* should not be considered. Besides *Nijhawan*, there is some Ninth Circuit precedent to support this.[13] To

[13] Before *Nijhawan* was published, the Ninth Circuit held that where a written guilty plea to a fraud offense stated that the loss to the victim was $600, the federal conviction was not an aggravated felony under 8 USC § 1101(a)(43)(M)(i), despite the fact that the restitution order required the defendant to pay $30,000. *Chang v. INS*, 307 F.3d 1185,

provide further support, include a *Harvey* waiver[14] at sentencing to establish that the restitution ordered is in part for uncharged conduct or dropped charges. Because immigration authorities may not be familiar with a *Harvey* waiver, also try to spell it out in the judge's order, or just in the allocution and plea form, e.g., "The restitution ordered that is above the amount of $8,000 is based on uncharged conduct or dropped charges." Also, where possible, plead to the offense itself rather than to attempt or conspiracy to commit the offense. In pre-*Nijhawan* cases, attempt and conspiracy opened the door to considering the entire scheme, and authorities might wrongly consider those cases despite the subsequent restrictive language in *Nijhawan*.

Immigration authorities may not be familiar with this defense, and there may not be recent precedent that spells it out. Please try to give the client, and the client's attorney, friend, or family member, a brief written summary of this defense, as well as a copy of the written plea agreement or other document that limits the amount of loss on the offense of conviction. (We want to give a copy to someone other than the defendant in case the defendant is detained by ICE. ICE routinely confiscates legal papers.) The legal summary may help a client to take advantage of your hard work, even if they end up in removal proceedings with no legal representation. If convenient, use the text in the following box:

TO IMMIGRATION AUTHORITIES: I do not admit alienage by submitting this document. If I am charged with being an alien, I assert the following. For a conviction to be an aggravated felony under 8 USC § 1101(a)(43)(M)(ii), INA § 101(a)(43)(M)(ii), the conviction must be of a crime of fraud or deceit, where the loss to the victim or victims exceeds $10,000. The Supreme Court held that the amount of loss must "be tied to the specific counts covered by the conviction," and that the loss "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009).

The plea agreement identifies that the amount of loss to the victim based on the offense I was convicted of does not exceed $10,000. Additional payment ordered in sentencing was based on "acquitted or dismissed counts or general conduct," not this conviction. The additional payment cannot be counted toward the amount exceeding $10,000, under the Supreme Court's rule in *Nijhawan*. See also *Chang v. INS*, 307 F.3d 1185, 1190 (9th Cir. 2002).Further, the reimbursement order is pursuant to a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, which specifically provides that under California law the restitution may be based on dismissed counts or general conduct.

In case ICE challenges this, consider these additional protections:

- Attempt to obtain a court statement or stipulation that restitution ordered as a condition of probation is for repayment of loss and other costs, with the calculation based upon a "rational and factual basis for the amount of restitution ordered."[15] Even without this statement, immigration advocates will argue that restitution under Pen C § 1202.4 permits payment for collateral costs beyond direct loss (e.g., audit, travel, attorneys' fees, etc.) and that the standard of proof for calculating the amount is less than the "clear and convincing evidence" required to prove deportability.
- Order the payment of restitution pursuant to a separate civil agreement.

1190 (9th Cir. 2002). *Chang* is consistent with the court's ruling in *Nijhawan* that the loss must "be tied to the specific counts covered by the conviction" and "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan*, 557 U.S. at 42.

[14] *People v. Harvey* (1979) 25 Cal.3d 754.

[15] *People v. Gemelli* (2008) 161 Cal. App. 4th 1539, 1542-43.

- In cases involving welfare fraud, see discussion at the California Quick Reference Chart at www.ilrc.org/chart.

V. WHEN DOES A MORAL TURPITUDE CONVICTION HURT A NONCITIZEN?

Here is a quick summary of the rules regarding when a conviction of a crime involving moral turpitude (CIMT) will cause a particular defendant to become deportable or inadmissible. See also *§ N.7 Crimes Involving Moral Turpitude* (2018) at www.ilrc.org/chart.

Remember that in any case, we first need to determine whether the particular client will be harmed by becoming deportable and/or inadmissible. Becoming deportable under the CIMT or any ground primarily hurts a defendant who is a lawful permanent resident, or who is an undocumented person who wishes to apply for non-LPR cancellation. Becoming inadmissible primarily hurts a defendant who is applying for a green card, or for some immigration relief (including, among others, non-LPR cancellation) that requires the person to be admissible. A permanent resident also wants to avoid becoming inadmissible so that they can travel outside the U.S., and can apply for naturalization more quickly. For further discussion of the effect of CIMTs, see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2017) at https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude.

A. Moral Turpitude Grounds of Deportation

Two or more convictions of a CIMT will make a noncitizen deportable, if both convictions occurred after the person was admitted to the United States. See 8 USC § 1227(a)(2)(A)(ii).

There is an exception: multiple CIMT convictions that arose from a "single scheme of criminal misconduct" do not cause deportability as "two or more convictions" after admission. Assume that to meet the single scheme test they must have arisen from the very same incident. For example, the Board of Immigration Appeals held that a permanent resident was deportable for multiple CIMT convictions that arose from a day where he committed credit card fraud in a few locations over a few hours. The Board held that this was not a single scheme, because the person had time to reflect and desist between the violations.[16] If possible, clarify at the plea that the offenses arose from the same incident.

One conviction of a CIMT that was *committed within five years after the person's date of admission to the United States* will make a noncitizen deportable, but only if the CIMT has a *maximum possible sentence of a year or more*. See 8 USC § 1227(a)(2)(A)(i). Both requirements – committed within five years after admission, and the potential sentence of a year – must be met for the person to be deportable.

The "date of admission" that starts the five years is either:

- The date the person was first admitted to the U.S. in any status (e.g., as a tourist, green card holder, or whatever), even if they were here illegally for a while, and even if they later adjusted status to permanent residence (obtained a green card by processing at an office within the United States);
- Or, if instead the person never was admitted legally at the border, the date that they adjusted status to permanent residence.[17]

Example: Ana was admitted on a tourist visa in 2007. She overstayed the visa and lived without lawful status for some years. In 2013 she adjusted status in Fresno to become an LPR through her

[16] *Matter of Islam*, 25 I&N Dec. 637, 638 (BIA 2011).

[17] *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011). See ILRC *Alyazji* Practice Advisory at www.ilrc.org/practice-advisory-alyazji-moral-turpitude-deportation-grounds.

U.S. citizen husband. In 2015 she committed and was convicted of a CIMT. This CIMT cannot trigger this deportation ground. Amy's "date of admission" is 2007, when she came as a tourist, and she committed the offense more than five years after that, in 2015.

But if instead Ana had entered the U.S. without inspection (e.g., by wading across the Rio Grande), her date of admission would be the date she adjusted status. Then the CIMT could trigger the deportation ground, as long as it had a potential sentence of a year.

Besides being committed within five years, the CIMT must have a *potential* sentence of a year or more, regardless of the sentence that was imposed. Under Pen C § 18.5(a), the maximum possible sentence for a California misdemeanor is 364 days rather than one year. Under § 18.5(a), a California misdemeanor cannot trigger this deportation ground, even if the person committed it within five years, because a misdemeanor does not have a potential sentence of a year or more. The same goes for a California felony that is reduced to a misdemeanor.[18]

There is a legal conflict, however, about whether the 364-day limit applies to convictions originally received before January 1, 2015. While Pen C § 18.5(a) explicitly states that it applies retroactively, regardless of date of conviction, the Board of Immigration Appeals held that it will not give Pen C § 18.5(a) effect for any conviction from before January 1, 2015. *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018). Advocates are appealing this decision to the Ninth Circuit, but for now defenders should assume that a "one-year" misdemeanor conviction from before January 1, 2015 has a potential sentence of one year, rather than 364 days.

Example: Ali was admitted to the U.S. as an LPR in 2012. In 2014 he was convicted of felony Pen C § 487, a CIMT. He was sentenced to 15 days as a condition of felony probation. He since reduced the felony to a misdemeanor.

Under the BIA decision in *Matter of Velasquez-Rios*, Ali is deportable. He committed the CIMT within five years of his admission. Because the conviction occurred before January 1, 2015, the BIA will hold the misdemeanor has a potential sentence of a year rather than 364 days. If Ali is at risk of deportation, he should consider trying to vacate the conviction. If the Ninth Circuit ultimately overturns *Velasquez-Rios*, and applies the retroactivity provision in § 18.5, then Ali cannot be found deportable, because the conviction will have a potential sentence of 364 days.

If Ali had been convicted in 2015 instead of 2014, he would not be deportable under *Velasquez-Rios*, because the BIA will give effect to § 18.5(a) if the conviction occurred on or after January 1, 2015.

See online practice advisory on *Matter of Velasquez-Rios* and Pen C § 18.5(a), available at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.

B. Moral Turpitude Ground of Inadmissibility

One conviction of a CIMT will make a noncitizen inadmissible for moral turpitude, unless they come within an exception. See 8 USC § 1182(a)(2)(A).

The "Petty Offense" Exception: A noncitizen is automatically not inadmissible if (a) they have committed only one CIMT in their life, (b) the offense has a maximum potential sentence of a year or less, and (c) a sentence of six months or less was imposed. Reducing a California felony to a

[18] See *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (en banc), partially overruling *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003). See also CR-180 Petition for Dismissal form.

misdemeanor will meet the requirement of a maximum possible sentence of one year or less.[19] Note that here, Pen C § 18.5(a) is not needed, and *Matter of Velasquez-Rios* does not have an effect, because the petty offense exception just requires a potential sentence of a year or less, not less than a year.[20]

> **Example:** Samantha is applying for a green card (lawful permanent resident status) and must show that she is admissible. She was convicted in 2011 of felony welfare fraud. The judge ordered to 10 days' custody as a condition of probation, and reimbursement of $3,000. Like every fraud offense, this is a CIMT. In 2014 she reduced the felony to a misdemeanor under Pen C § 17(b)(3). Is she admissible? (Also, does she have an aggravated felony conviction?)
>
> Yes. She was inadmissible under the moral turpitude ground, but now she comes within the petty offense exception. Now that she has reduced the felony to a misdemeanor, the conviction is treated the same as if it had originally been a misdemeanor. Her CIMT conviction has a maximum potential sentence of a year or less, and the sentence imposed was six months or less (ten days).
>
> Samantha does not have an aggravated felony conviction. She was convicted of a fraud offense, but the loss to the victim (government) did not exceed $10,000.

The "Youthful Offender" Exception. A noncitizen is automatically not inadmissible if convicted (as an adult) of just one CIMT, committed while under the age of 18, and the conviction and resulting imprisonment ended at least five years before the current application.

> **Example:** At age 17, Arthur was convicted as an adult of second degree robbery and sentenced to two years in prison. He was released from prison at age 19. At age 30, Arthur has turned his life around and he wants to apply to adjust status to lawful permanent residence through his U.S. citizen mother. Is he admissible?
>
> Yes, he is admissible. He comes within the automatic youthful offender exception, because he committed just one CIMT while under the age of 18, and the conviction and release from imprisonment occurred at least five years ago.

[19] See *Ceron*, *supra.*

[20] But the bar to non-LPR cancellation of removal, like the deportation ground, needs the potential sentence to be less than a year. See discussion in practice advisory on *Matter of Velasquez-Rios* at www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.