California Criminal Law & Immigration

Chapter 4
Crimes Involving Moral Turpitude

2000 UPDATE

PLEASE INSERT THESE SIX (6) UPDATE PAGES AT THE BEGINNING OF UNIT 4. DO NOT REPLACE ANY CHAPTER PAGES OF THE 1999 EDITION.

How to understand the Update changes:
BOLD: Affected section header(s).
Italics: Instructions pertaining to specific section update information.

Summary of Update

1. Pending future Ninth Circuit review, this part of the holding in *Matter of Roldan* remains in force: expungement of a crime involving moral turpitude is not effective for immigration purposes. The Ninth Circuit in *Lujan-Armendariz* restored the immigration effect of expungement for first offense, simple possession of a drug, but did not reach the issue of the effectiveness of expungements on moral turpitude or other offenses. *[Amend § 4.7.]*

2. The BIA reaffirmed that simple driving under the influence of drugs or alcohol is *not* a crime involving moral turpitude. However, it held that the offense of driving under the influence while on a suspended license *is* a crime involving moral turpitude. California has no such offense, but other states do. *Matter of Lopez-Meza [Amend § 4.8.]*

3. In a controversial decision, the BIA held that "theft" for purposes of the aggravated felony definition can include a temporary taking of property such as joyriding. It is possible that the BIA would extend this to find that joyriding is a crime involving moral turpitude. *Matter of V-Z-S- [Amend § 4.8.]*

4. The Ninth Circuit held that illegally completing an I-9 form and making a false attestation of social security card are not crimes involving moral turpitude. *Beltran-Tirado v. INS [Amend § 4.8.]*

5. Because the offense of "attempt" generally carries half the potential sentence of conviction of the principal offense, a plea to this offense can be a way of avoiding deportability for conviction within five years of admission of an offense with a possible sentence of one year or more. *[Amend § 4.5 (Part B).]*

6. An INS regulation affirms the effectiveness of former Judicial Recommendation Against Deportation orders that were issued before November 29, 1990. *[Amend § 4.7.]*

1. **Pending future Ninth Circuit review, this part of the holding in *Matter of Roldan* remains in force: expungement of a crime involving moral turpitude is not effective for immigration purposes. The Ninth Circuit in *Lujan-Armendariz* restored the immigration effect of expungement for first offense, simple possession of a drug, but did not reach the issue of the effectiveness of expungements on moral turpitude or other offenses.**

   [Please replace the first paragraph of § 4.7 Expungement of Conviction, Other Post-Conviction Relief with this section.]

In *Matter of Roldan*,[1] the BIA overruled decades of Attorney General decisions to hold that expungement would no longer eliminate the immigration effect of a conviction of a crime involving moral turpitude. It also held that expungement would not eliminate a first offense, simple possession of a drug, despite prior Ninth Circuit holdings that this would be unconstitutional.[2] Mr. Roldan had been convicted of first offense, simple possession of marijuana, and had had the offense expunged under an Idaho statute similar to Calif. Penal Code §1203.4. Mr. Roldan appealed his order of deportation to the Ninth Circuit.

At the Ninth Circuit Mr. Roldan's case was joined with the case of Mr. Lujan. Since both Mr. Lujan and Mr. Roldan were convicted of first offense, simple possession of a drug, the Ninth Circuit addressed only the question of the immigration effect of an expungement or other relief upon conviction of that type of offense. It did not address the separate legal question, and separate rationale, of why expungements also have been held to eliminate the immigration effect of crimes involving moral turpitude.

In *Lujan-Armendariz v. INS* the Ninth Circuit reversed the BIA in the Roldan and Lujan cases and held that an expungement, deferred adjudication, or other rehabilitative relief will eliminate a first offense drug conviction of the type that would be eligible for treatment under the Federal First Offender Act if the case were brought in federal court.[3] While the court declined to directly rule on the issue of the immigration effect of expungements of moral turpitude or other offenses, it did include a lengthy discussion and critique of the BIA's entire reasoning in *Matter of Roldan*, saying that it found the BIA's basic premises about congressional intent and expungements "wholly unpersuasive." The *Lujan-Armendariz* decision in that sense is useful to practitioners challenging the BIA's holding in *Roldan* on expungements in general.

See further discussion of *Lujan-Armendariz* in Update to Chapter 2, and see the brief submitted in *Lujan-Armendariz* arguing that the BIA was wrong to eliminate general expungements in *Matter of Roldan*, posted at the Immigrant Legal Resource Center website at www.ilrc.org.

Counsel should continue to obtain expungements of crimes involving moral turpitude and other non-drug offenses. Counsel in immigration proceedings should not concede inadmissibility or deportability based on expunged moral turpitude, firearms, or other offenses, and should request continuances for cases involving such expungments, pending Ninth Circuit consideration of the general expungement issue.

---

[1] Int. Dec. 3377 (BIA 1999).

[2] These rulings had held that first offense simple possession must be eliminated by expungement as a matter of equal protection of the laws, because it was analogous to relief under the federal First Offender Act. See Garberding v. INS, 21 F.3d 1137 (9th Cir. 1994), followed in Matter of Manrique, Int. Dec. 3250 (BIA 1995).

[3] Lujan-Armendariz v. INS , 222 F.3d 728 (9th Cir. 2000).

2. **The BIA reaffirmed that simple driving under the influence of drugs or alcohol ("DUI") is *not* a crime involving moral turpitude. However, it held that the offense of driving under the influence while on a suspended license *is* a crime involving moral turpitude.**

[Please substitute this section for the paragraph on "Drunk Driving" in § 4.8 What Constitutes a Crime Involving Moral Turpitude?]

The BIA reaffirmed the long-established rule that simple driving under the influence ("DUI") does *not* constitute a crime involving moral turpitude ("CMT"). However, it also held that the offense of driving under the influence while legally prohibited from driving *is* a CMT. *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999).

A person convicted of DIU in the state of California should not be affected by the BIA's holding that conviction of the offense of DUI while prohibited from driving is a CMT. California does not have any single aggravated DUI offense that contains these two elements (i.e., prohibiting DUI while the license is suspended).[4] A person can be convicted separately of driving while prohibited from doing so, and of driving under the influence, but the separate convictions should not come within the *Lopez-Meza* rule.

However, when analyzing out-of-state DUI offenses, advocates must carefully check to see if the offense for which the person was convicted required proof both of DUI, and of a legal prohibition against driving.

Case Summary. In *Lopez-Meza* the Board first reaffirmed that simple DUI does not involve an evil intent and is not turpitudinous.

> "[S]imple DUI is ordinarily a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge." (Id. at p. 9.) "We find that the offense of driving under the influence under Arizona law, does not, without more, reflect conduct that is necessarily morally reprehensible or that indicates such a level of depravity or baseness that it involves moral turpitude." (Id. at pp. 9-10.)

The Board then found that aggravated DUI under the Arizona statute did involve moral turpitude. It held that while crimes involving moral turpitude often involve an evil intent, *specific* intent is not a requirement. Mr. Lopez Meza was.convicted under an Arizona statute that punished someone who committed a DUI while on a suspended or cancelled license, or while on a license restricted because of a prior DUI. The Board found that even if there is no specific intent, a person's *knowledge* that he has been barred from driving makes his driving under the influence a crime involving moral turpitude. The Board found that the statutory elements required a showing that the offender "knew or should have known that his license was suspended." (Id. at p. 11.)

---

[4] In California, the list of DUI offenses is short. See Vehicle Code §§ 23140(minor driving with 0.05% BA), 23152 (simple DUI), 23153 (DUI with injury), 23220 (drinking while driving). The complexities are found in Division 11.5, Vehicle Code §§ 23500 ff., entitled "Sentencing for Driving While Under the Influence." None of these sentencing enhancements involve driving on a suspended or revoked license; they all involve committing a new DUI offense within a certain time period after prior DUI-type convictions. However, advocates must remember that if a *one-year sentence is imposed* for a DUI conviction for any reason, the offense will be held to be an aggravated felony under current interpretation. See discussion in section 9.10, infra.

> We find that a person who drives while under the influence, knowing that he or she is *absolutely prohibited* from driving, commits a crime so base and so contrary to the currently accepted duties that persons owe to one another and to society in general that it involves moral turpitude. (Id. at pp. 11-12 [emphasis supplied].)

The dissent noted that there was no evidence that Mr. Lopez-Meza had in fact been "absolutely prohibited" from driving. Since there was apparently no record of conviction before the court, it was not clear whether respondent's license had been suspended, or merely restricted, since both conditions trigger the aggravated penalties. (See Board Member Rosenberg, concurring and dissenting, at pp. 17-18.) The dissent made the even more disturbing point that the majority had held with no basis that the combination of two offenses, neither of which alone involved moral turpitude, somehow together did so.

3. **In another controversial decision, the BIA held that "theft" for purposes of the aggravated felony definition can include a temporary taking of property such as joyriding. It is possible that the BIA would extend this to finding that joyriding is a crime involving moral turpitude.**

*[Please substitute this section for the paragraph on "Theft" in § 4.8 **What Constitutes a Crime Involving Moral Turpitude?**]*

A divided BIA held that even a temporary taking of property, such as temporarily stealing a car to go "joyriding," can constitute theft for purposes of the aggravated felony definition.[5] It is possible that the Board would extend this ruling to the definition of theft for purposes of the moral turpitude ground. The decision is being appealed to the Ninth Circuit.

In this case the respondent was convicted under Calif. Penal Code 10851, a provision that prohibits taking another's vehicle with the intent to deprive the person of it permanently (which is auto theft) or temporarily (often referred to as "joyriding"). The Board held that this was "theft." The Board appears to be clearly mistaken. Common law terms such as theft that appear in the aggravated felony definition should be interpreted according to their "ordinary, contemporary, and common meaning."[6] The definition of theft universally requires as an element the intent to *permanently* deprive the owner of property, or to approximate a permanent deprivation, under common law, the Model Penal Code, and generally under state law.[7] To support its conclusion that joyriding can amount to theft, the majority decision relied not upon common law sources, state laws, or treatises on the definition of theft, but on a particular federal statute that relates to taking stolen cars across state borders.

---

[5] Matter of V-Z-S-, Int. Dec. # 3434 (BIA 2000).

[6] See, e.g., United States v. Baron-Medina, 187 F.3d 1144 (9th cir. 1999); Taylor v. United States, 495 U.S. 575, 598 (1990). Matter of L-G-, In. Dec. 3254 (BIA 1995) (federal, not state, definition applies to determine whether a state drug offense is a "felony"); Kahn v. INS, 37 F.3d 1412 (9th Cir. 1994) (the INA "was designed to implement a uniform federal policy, and the meaning of concepts important to its application are "not to be determined according to the law of the forum, but rather require a uniform federal definition""(citation omitted).

[7] See, e.g., Black's Law Dictionary, Sixth Edition, West Publishing Company 1990; Model Penal Code and Commentaries pt. II, art. 223.9 cmt 4 (1980) (while some temporary takings at critical times or of great length could amount to theft, casual joyriding does not). See discussion in Matter of V-Z-S-, supra, Concurrence and Dissent, pp. 25-29.

4. **The Ninth Circuit held that illegally completing an I-9 form and making a false attestation of social security card are not crimes involving moral turpitude.**

The Ninth Circuit has ruled that illegally completing an I-9 form in violation of 18 USC § 1546(b)(3), and making a false attestation about a social security card in violation of 42 USC § 408(a)(7)(B), are not crimes involving moral turpitude.[8]

The court made this finding based on language in the legislative history to another section of the false attestation statute, 42 USC § 408(d). That section provides that anyone granted permanent residency through registry or legalization/SAW program should not be prosecuted for having used a false social security number in the past in order to obtain lawful employment. The legislative history stated that the INS should not consider that act to be a crime involving moral turpitude in any determination for those exempted persons.

The Ninth Circuit reasoned that even though Ms. Beltran-Tirado did not come within the protections of 42 USC 408(d) (because she was not granted registry or amnesty), Congress had specifically shown its intent that the act described did not involve moral turpitude. The Court also noted that Ms. Beltran-Tirado's use of the social security number was to "engage in otherwise lawful conduct." The conduct penalized in these statutes was malum prohibitum, rather than *malum in se*.

Interestingly, while the BIA also had denied a finding of good moral character as a matter of discretion, the Ninth Circuit reversed and remanded for further consideration of the discretionary denial since it found it likely that the BIA relied on wrong assertion of moral turpitude in its discretionary decision.

In an unpublished decision, the BIA also held that the I-9 violation is not a crime involving moral turpitude.[9]

6. **Because the offense of "attempt" generally carries half the potential sentence of conviction of the principal offense, a plea to this offense can be a way of avoiding deportability for conviction within five years of admission of an offense with a possible sentence of one year or more.**

Conviction of a turpitudinous offense committed within five years of last admission is a basis for deportability, but only if the offense has a potential sentence of one year. Under Penal Code § 664, the offense of attempt is generally punishable by a maximum term of one half of what the principal offense would have been. (There are exceptions for very serious charges.) If a moral turpitude offense is a one-year misdemeanor, or felony/misdemeanor reduced to a misdemeanor, that carries a potential one-year sentence, then conviction for attempting the offense carries a maximum six-month sentence.. There is some authority that switching price tags in a store should always be held to be attempt.[10]

If the prosecution requires a plea where the person will actually serve close to six months in jail, counsel can use strategies to increase the amount of jail time even with the low potential sentence, such as

---

[8] Beltran-Tirado v INS, 213 F.3d 1179 (9th Cir. 2000)

[9] Matter of Casas-Garcia (BIA September 28, 2000) (unpublished).

[10] People v. Lorenzo, 64 Cal.App.3d Supp. 43 (1976).

by waiving credit for time served, waiving future credits, taking more time on a non-turpitudinous offense, etc.. See discussion of sentence strategies at Appendix 5-A following Chapter 5.

7. **An INS regulation affirms the effectiveness of former Judicial Recommendation Against Deportation that were obtained before November 29, 1990.**

*[Please add this section to footnote 45, "Judicial Recommendation Against Deportation" in § 4.7 **Expungements, Other Post-Conviction Relief, Waivers, the Former JRAD.**]*

The INS policy of accepting the former Judicial Recommendation Against Deportation orders that were issued before November 29, 1990 is set out not only in a memorandum, but also at 8 CFR 240.10(d).

Chapter 4

Crimes Involving Moral Turpitude

Introduction and overview. Hundreds of offenses qualify as "crimes involving moral turpitude," and even minor convictions have immigration impact. But intelligent plea bargaining, especially over sentence or potential sentence, can avoid immigration consequences. Unless the BIA case *Matter of Roldan*[1] is reversed, expungement of a moral turpitude or other offense under Calif. Penal Code § 1203.4 will not eliminate the immigration consequences. Vacation of judgement will eliminate the ocnviction, as long as the judgement is vacated to correct legal error. See Chapter 8.

This chapter will first discuss the grounds of inadmissibility and deportability relating to crimes involving moral turpitude, i.e. how many convictions and what types of sentences involving this kind of offense will bring immigration penalties.

Next it will discuss how to determine whether an offense will be held to involve moral turpitude. Also, the Crimes Involving Moral Turpitude Chart and Annotations following Chapter 12 analyzes seventy sections of the Califomia Penal Code for moral turpitude and suggests alternate "safe" pleas of lesser included or related offenses.

---

[1] Int. Dec. 3377 (BIA 1999).

As always, do not neglect the possibility that your client is a U.S. citizen or at least cannot be proved by the INS or federal prosecutors to be an alien. See Citizenship, § 11.16 and "Citizenship Defense in Section 1326 Prosecutions," Appendix 9-B.

Warning: Moral Turpitude Offenses, or Any Offenses Involving Violence, May Be Aggravated Felonies. Many crimes involving moral turpitude with a *one year sentence imposed* now are aggravated felonies. These include a "crime of violence" defined under 18 USC § 16,[2] theft, burglary, robbery, bribery, counterfeiting, obstruction of justice, perjury, and subornation of perjury. In addition, rape and sexual abuse of a minor (which may include statutory rape) are aggravated felonies regardless of sentence. Money laundering, using funds illegally obtained, fraud, deceit or tax evasion involving $10,000 or more is an aggravated felony. Consult Chapter 9 and check INA § 101(a)(43), 8 USC §1101(a)(43), carefully to make sure that the crime involving moral turpitude is not an aggravated felony.

Warning: A "Domestic Violence Offense," False Claim to Citizenship and Other Offenses Need Not Involve Moral Turpitude to be Bases for Removal. Conviction of the broadly defined domestic violence offense (any crime of violence defined under 18 USC § 16 committed against a current or former spouse, co-habiter or co-parent), stalking, or child abuse, abandonment or neglect is a ground of deportability.[3] No particular sentence is required, and the domestic violence offense does not specifically require moral turpitude: for example, simple assault against a former lover or vandalism against the person's property might qualify. In addition, false claim to U.S. citizenship and illegal voting in violation of federal or local law are deportable acts, even absent a conviction.[4] Except for illegal voting, these offenses are bases for deportation only if the conviction or act occurred on or after September 30, 1996. See discussion in Chapter 6.

§ 4.1 The Moral Turpitude Ground of Inadmissibility: Conviction or Admission of One Crime Involving Moral Turpitude.

A non-citizen is inadmissible if he or she:

1) is convicted of, or admits committing, or admits committing the elements of one crime involving moral turpitude (other than a "purely political offense"),

2) *unless* the event comes within the petty offense or youthful offender exception. In that case, the person is not inadmissible.[5]

---

[2] This definition includes any offense that involves a substantial risk that force will be used against people or property, and should not be confused with a violent felony for "strike" purposes. It has been held to include driving under the influence and involuntary manslaughter, although this should be contested. See sec. 9.10 and Appendix 9-E

[3] See INA § 237(a)(2)(E) and § 6.15

[4] See INA 237(a)(3)(D), (6), and Chapter 6.

[5] INA § 212(a)(2)(A)(I), 8 USC § 1182(a)(2)(A)(I).

Many people avoid admissibility under the moral turpitude ground because they come within the "petty offense" exception to the ground. See discussion in § 4.2.

Good Moral Character. An alien inadmissible under the moral turpitude section is also precluded from establishing good moral character,[6] and therefore ineligible for naturalization to U.S. citizenship, cancellation of removal for nonpermanent residents, the former suspension of deportation, one kind of voluntary departure and registry. See Chapter 7.

Waiver under§ 212(h). Certain people who are inadmissible under this ground may be able to apply for a discretionary waiver of inadmissibility under INA § 212(h), 8 USC § 1182(h). See §§ 4.7, 11.11. Better yet, many people may be able to avoid being found inadmissible by qualifying for the petty offense exception.

§4.2 -- The Petty Offense Exception to the Inadmissibility Ground

A person can avoid being inadmissible under the moral turpitude ground by coming within the petty offense exception to the ground. The requirements are:

1) the person must have committed only one crime involving moral turpitude (ever);

2) the person must not have been "sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)"; and

3) The offense must have a maximum possible sentence of one year.[7]

Committed only one crime involving moral turpitude: If a person has *committed* more than one crime involving moral turpitude, he or she will not qualify. Clearing the record of a prior conviction for such an offense will not restore eligibility.[8] On the other hand, the fact that the person committed another offense that does not involve moral turpitude -- for example, drunk driving -- does not preclude eligibility for the exception.

Definition of "sentence to term of imprisonment." The sentence actually imposed must not be greater than six months. The 1996 IIRIRA established a statutory definition of what constitutes a sentence for immigration purposes. A sentence includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the *imposition or execution* of that

---

[6] INA § 101(f)(3), 8 USC § 1101(f)(3).

[7] INA §212(a)(2)(A)(ii)(II), 8 USC §1182(a)(2)(A)(ii)(II). The third requirement was added by the Immigration Act of 1990. It applies to people who make an entry or application after June 1, 1991 or who filed for permanent residency under an amnesty program after June I, 1991. IA90 § 601(e). See discussion at §1.3.

[8] Matter of S.E., 7 I&N 495 (BIA 1957) (expunged prior conviction). In additional the person may be ineligible for the exception if a "preponderance of the evidence" shows that he or she committed another offense involving moral turpitude, even if the person was never convicted. Id.

imprisonment or sentence in whole or in part."(emphasis added.)[9] In other words, if imposition of sentence is suspended and a judge sentences a person to jail for seven months as a condition of probation, the INS will count the seven months as a "sentence" and the person will not be eligible for the petty offense exception. Likewise, if a sentence of a year is imposed but eleven months of the sentence' execution is suspended, there still is a sentence imposed on one year. See Chapter 5.

Maximum possible sentence of one year. The Ninth Circuit has held that when a felony conviction of a "wobbler" offense (an offense could have been punished as a felony or misdemeanor) is reduced to a misdemanor under Calif. Penal Code §§ 17 and 19, the offense has a maximum possible sentence of one year and therefore potentially qualifies for the petty offense exception.[10]

> **Example:** Franz wants to immigrate through his U.S. citizen wife. He is convicted of felony grand theft, his first offense. Imposition of sentence is suspended and he is ordered to spend seven months in jail as a condition of probation. The felony offense is reduced to a misdemeanor under Penal Code § 17.
>
> Franz meets the first and third requirements for the petty offense exception to the moral turpitude ground of inadmissibility. Regarding the first requirement, he has committed only one crime involving moral turpitude. Regarding the third requirement, since the felony was reduced to a misdemeanor the offense has only a one year maximum possible sentence.
>
> However, Franz does not meet the second requirement, that sentence imposed be six months or less. Franz's defense attorney should have bargained for an official sentence imposed of six months instead of seven months. Franz is not eligible for the petty offense exception and is inadmissible He can, however, apply for a discretionary waiver under INA § 212(h). See §§ 4.7, 11.11

Strategy: Qualifying for the Petty Offense Exception

- o If possible, plead to an offense that does not involve moral turpitude. See Chart and Annotations following Chapter 12.
- o Check the defendant's entire criminal record to make sure that she has committed only one crime involving moral turpitude.

---

[9] IIRIRA 322 created the statutory definition of sentence at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B). Before the IIRIRA change, sentence imposed had a different definition. If imposition of sentence was suspended there was no "sentence," even if the person spent time in jail as a condition of probation. In contrast, suspended execution of sentence offered no similar relief: the entire sentence was counted, regardless of whether the sentence was executed. See, e.g., Matter of Castro, Int. Dec. 3073 (BIA 1988). However, the new IIRIRA definition purports to apply to all sentences, whether entered 'before, on or after" the date of enactment of IIRIRA. IIRIRA § 322(c).

[10] La Farga v. INS, 170 F.3d 1213 (9th Cir. 1999).

- Obtain a sentence of six months or less. See Chapter 5 for strategies in sentence bargaining such as waiving credit for time served, taking time on a non-turpitudinous offense, taking a new offense rather than a probation violation, etc.

- Negotiate a plea to a misdemeanor rather than a felony conviction. Or, if the felony conviction is a "wobbler," obtain reduction from a felony to a misdemeanor under Penal Code §§ 17 and 19, if possible before the person comes before immigration authorities. See Chapter 8.

- If the person does not come within the petty offense exception, obtain an expungement under Penal Code 1203.4, unless there is some reason not to do so. Currently expungements are *not* accepted by the INS, but the law might change.[11] In any event, the expungement brings no disadvantage. It does not prevent the person from seeking vacation of judgement or other post-conviction relief that actually will eliminate the conviction.

- Any number of moral turpitude convictions can be waived under INA § 212(h). Special restrictions apply to people who committed the offense after becoming lawful permanent residents. See § 4.7, 11.11.

§4.3– Relief for Youthful Offenders

Statutory Exception. Under the "youthful offender" exception, a person will not be found inadmissible if he or she committed only one offense involving moral turpitude, while under the age of eighteen, and if the commission of the offense and the release from any resulting imprisonment occurred over five years before the current application.[12]

Effect of Juvenile Proceedings. Note that if the person under eighteen was tried in juvenile proceedings in the U.S. or abroad, he or she does not need to use this exception because there was never any "conviction" or "admission" of a crime for immigration purposes. There is an argument that immigration authorities should use the federal definition of who should be tried as a juvenile, rather than whether the person actually was tried as a juvenile in state court, as the measure of whether a conviction exists. See § 2.3.

State Department Policy. In addition, the State Department rule in issuing visas is that a person will not be found inadmissible for a moral turpitude offense committed (a) while the person was under fifteen or (b) between the person's fifteenth and eighteenth birthdays, unless the person was convicted as an adult for a felony involving violence, as defined in 18 USC §§ 1 and 16. If the person committed two

---

[11] See Matter of Roldan, Int. Dec. 3377 (BIA 1999). It is possible that the Ninth Circuit or the Attorney General will overrule Roldan. See § 2.5, Part E for discussion of Roldan and Chapter 8 for discussion of expungement.

[12] INA §212(a)(2)(A)(ii)(I), 8 USC §1182(a)(2)(A)(ii)(I).

crimes involving moral turpitude between the ages of 15 and 18, however, he or she will be inadmissible.[13]

§ 4.4– Admissions of Crimes Involving Moral Turpitude.

Even absent a conviction, a formal admission of a convictions of a crime involving moral turpitude can be a basis for inadmissibility. This includes admission of commission of the crime itself, or of all of the elements of the crime. A qualifying admission is made when an alien, after being informed of each element of the crime in understandable terms, voluntarily admits all the factual elements of an offense which constitutes a crime involving moral turpitude under the law of the jurisdiction where the admitted acts were performed.[14]

A person also is inadmissible who formally admits committing any offense relating to controlled substances. See § 3.3.

Because a plea of guilty in criminal proceedings constitutes an admission, it might seem that every defendant who pleads guilty to a crime involving moral turpitude will be found inadmissible, even if the conviction is later erased. This is not the rule. The BIA has had a longstanding policy that if a criminal court judge has heard charges relating to an incident, immigration authorities will defer to the resolution of the case in criminal court. It has declined to find inadmissibility based on a guilty plea if the conviction is followed by an expungement, pardon, (in the past) JRAD, or where no resolution amounting to a conviction is entered pursuant to the plea.[15] This may be true even when the defendant has independently admitted the crime before an INS officer or immigration judge.[16] However, it is not

---

[13] 22 CFR § 40.21(a)(2), (3). For discussion of the definition of a crime of violence under 18 USC § 16, see § 9.10 and Appendix 9-E, following Chapter 9.

[14] Matter of I, 2 I&N 285 (BIA 1945), Matter of G.M., 7 I&N 40 (AG 1956). Regarding requirement to define crime, see Matter of K, 7 I&N 594, 597 (BIA 1957), but see Matter of P, 4 I&N 252 (AG 1951) (definition given of larceny did not include intent), and Matter of Z, 7 I&N 253 (BIA 1956) (no definition given). For further information, see discussion in Immigration Law and Crimes, at §3.2.

[15] Matter of E.V., 5 I&N 194 (BIA 1953) (P.C. §1203.4 expungement); Matter of G, 1 I&N 96 (BIA 1942) (dismissal pursuant to Texas statute); Matter of Winter, 12 I&N 638 (BIA 1967, 1968) (case placed "on file" under Massachusetts statute); Matter of Seda, 17 I&N 550 (BIA 1980) (state counterpart of federal first provisions, no conviction); but see also Matter of Ozkok, Int. Dec. 3044 (BIA 1988), providing new definition for resolutions not amounting to a conviction.

Compare this to the much looser standard for when the INS has "reason to believe" that the person ever was a drug trafficker, under a separate inadmissibility ground. There the INS only has to have substantial and probative evidence. See Chapter 3.

[16] Matter of C.Y.C., 3 I&N 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); Matter of E.V.,supra, note 6 (expungement under P.C. §1203.4 controls even where admission made to immigration judge). But see Matter of I, 4 I&N 159 (BIA, AG 1950) (independent admission supports exclusion where alien convicted on same facts of lesser offense not involving moral turpitude.)

guaranteed that a person who is acquitted will be protected from independent admissions.

Counsel should guard against formal admissions to a judge or other official of a crime that is not resolved in court proceedings. If the client appears to have formally admitted the elements of a crime involving moral turpitude or drug offense to a police officer, particularly if that offense is not charged, counsel should gather information from the client as to whether the officer explained all of the elements of the offense in an understandable manner before the admission was made and met other immigration requirements for such admissions.

§ 4.5 Deportation Ground: Two Convictions After Admission, or One Conviction Within Five Years After Admission of an Offense Carrying a Potential One Year Sentence

A. Overview

The deportation ground involving moral turpitude is different from the inadmissibility ground. The moral turpitude deportation ground provides two distinct bases of deportability in removal proceedings:

1) One conviction of a crime involving moral turpitude for an offense committed within five years after the date of last admission into the United States, for which a sentence of one year or more could be imposed; and

2) Two convictions of crimes involving moral turpitude acquired after admission, not arising out of a single scheme of criminal misconduct, regardless of length of sentence or whether the convictions were in the same trial.[17]

The 1996 AEDPA imposed a special requirement on the few persons who adjust status under INA § 245(j), after qualifying for an "informer" visa.[18] Those persons are deportable for an offense committed within ten years of admission, not five.

If the defendant can escape coming within these categories, he will not be deportable for a moral turpitude offense. Note that if the person still is in deportation proceedings instead of removal proceedings, a different rule applies if there is only one conviction. See Part C, below.

---

[17] INA § 237(a)(2)(A), 8 USC § 1227(a)(2)(A).

[18] See INA § 101(a)(15)(S)(i), and see § 11.17 in the manual for discussion of informant visas. This requirement applies to the AEDPA deportation ground and the IIRIRA removal ground for moral turpitude. At one point through a clerical error the informant or "snitch" visa adjustment provision was listed under INA § 245(i), although that subsection was designated for adjustment of status for all persons who had entered without inspection and would pay a penalty fee. The IIRIRA corrected the mistake by redesignating the informant visa adjustment provision to INA § 245(j), and changed the reference to § 245(j) in the moral turpitude ground of deportability.

B. Persons in Removal Proceedings Convicted of One Moral Turpitude Offense

A person is deportable who has been convicted of one moral turpitude offense, committed within five years after his or her last admission, that carries a potential sentence of one year.

One Conviction. There must be only **one existing conviction** of a moral turpitude offense. Counsel should check the person's criminal record from all jurisdictions. The fact that a person may have committed more than one moral turpitude offense has no effect on the deportation ground. (It does affect the petty offense exception discussed at § 4.2.) Thus a prior moral turpitude conviction that has been vacated will not be added to the current conviction to make more than one conviction.

Committed within five years after last admission into the United States. Admission is a term of art, defined by statute. Generally an admission is any lawful entry into the United States after inspection and authorization.[19] For more information on the definition of admission, see § 1.3.

> **Example:** Maurice was admitted to the U.S. as a visitor and overstayed his visitor's visa. Four years later he was convicted of misdemeanor grand theft, which has a potential sentence of one year. He was sentenced to one month. He is deportable for being convicted of one turpitudinous offense, with a potential one year sentence, committed within five years after his last admission. (Oddly enough, the conviction makes Maurice deportable but not inadmissible. See discussion in § 4.6.).

> **Example:** Juana entered the U.S. without inspection, by secretly crossing the U.S./Mexican border. The next year she was convicted of misdemeanor grand theft, which carries a potential sentence of one year. A few years later Juana immigrated through a family member and was admitted as a permanent resident. Juana is not deportable for the conviction because she committed the offense *before* she was admitted, not within five years after her admission.

Returning Lawful Permanent Residents. A special rule applies to lawful permanent residents who return to the U.S. from a trip abroad. A returning lawful permanent resident is presumed *not* to make a formal admission back into the country. There are in turn six exceptions to this rule. A returning permanent resident *will* be held to have made an admission if the person

> -- has abandoned permanent resident status,
> -- has been absent for 180 days at one time,
> -- engaged in illegal activity after leaving the U.S.,
> -- departed while under removal or extradition proceedings,
> -- has committed an offense in § 212(a)(2), the criminal ground of inadmissibility (unless it has been waived), or
> -- is attempting to enter without inspection.[20]

---

[19] INA § 101(a)(13)(A). 8 USC § 1101(a)(13)(A).

[20] INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C). See further discussion in § 1.5.

Example: Bob and Ted both adjusted status to permanent residency in 1990. They both are convicted of felony theft (a crime involving moral turpitude) in 1998. In 1995 Bob left the U.S. for a month-long visit with his family. His 1995 return to the U.S. should not be held to be an admission, because he does not come within one of the six exceptions. Therefore, he should not be held deportable for commission of an moral turpitude offense within five years of admission, because he committed the offense in 1998 and his last admission was 1990.

Ted left the country in 1995 and remained outside the country for over six months. Because this comes within one of the six exceptions listed above, Ted will be held to have made an admission in 1995, and will be held to be deportable for commission of the 1998 crime within five years of last admission.

Travel Warning. Lawful permanent residents who are inadmissible under the moral turpitude ground (or any criminal grounds) should not travel outside the United States. They might be held to be applying for admission, and inadmissible, upon their return as a person who has committed an offense listed in INA § 212(a). Some waivers (cancellation of removal, § 212(h)) may be available. See §§ 11.10, 11.11.

Adjustment of Status as an Admission. Adjustment of status under INA § 245 is the act of becoming a permanent resident or gaining other status through processing at an INS office inside the United States, as opposed to processing through a U.S. consulate abroad. It does not fit the statutory definition of admission under INA § 101(a)(13), which is a "lawful entry" into the United States, because there is no physical "entry" into the U.S. Although this leads to an absurd result,[21] under the plain language of the statute counsel can argue that adjustment does not equal an admission. If it is not an admission, it does not re-start the five year clock for the moral turpitude deportation ground.

The BIA recognized that adjustment of status does not fit the definition of admission provided at INA § 101(a)(13), but held that it nevertheless would count adjustment to permanent residency as an admission for at least for some purposes.[22] Therefore, while immigration counsel may wish to argue that

---

[21] For example, in the case of people who entered without inspection and then adjusted under INA § 245(i), this would lead to the conclusion that they never had been admitted at all and were subject to the grounds of inadmissibility.

[22] Matter of Rosas-Ramirez, Int. Dec. 3384 (BIA 1999). There the BIA considered whether the requirement in INA § 237(a)(2)(A)(iii) (the aggravated felony ground of deportation) that the offense be committed "after admission" includes noncitizens who entered the U.S. unlawfully and then adjusted status to permanent residency. Because these people never were "lawfully admitted" to the U.S., arguably they could not have committed the offense "after admission." The Board did not find that adjustment of status to permanent residency meets the definition of admission found at INA § 101(a)(13), which is a lawful entry into the U.S. Instead it relied on the definition in INA § 101(a)(20) that "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status no having changed." This definition encompasses permanent residency gained through adjustment

adjustment is not an admission (and as always should pursue post-conviction relief while doing so), they should anticipate that adjustment eventually will be held to be an admission for all purposes, or the statute will be amended to make it so.[23] See discussion in § 1.3 (Part B).

Criminal defense counsel who are unsure of the definition of admission should consult expert immigration counsel.

Maximum possible sentence of one year. Many California misdemeanors have a potential one year sentence, and therefore would trigger deportability. Other California misdemeanors have a potential six month sentence, and therefore would not trigger deportability. See discussion in Part D, below.

C. Persons Still in Deportation Proceedings and Convicted of One Moral Turpitude Offense

The following discussion is only relevant to noncitizens in deportation proceedings that began before April 1, 1997. They are subject to one of two former versions of the moral turpitude ground, depending upon the date that the proceedings began.

If deportation proceedings began before April 24, 1996 a person is deportable under former INA § 241(a)(2)(A)(i) who

> (I) was convicted of a crime involving moral turpitude (CMT) committed within five years after last ***entry*** if a sentence of one year or more was ***imposed***, or
>
> (II) has two convictions of CMT's after entry that are not a "single scheme of criminal misconduct"[24]

If deportation proceedings began on or after April 24, 1996 but before April 1, 1997, former INA § 241(a)(2)(A)(i) as amended by AEDPA provides that a person is deportable who

> (I) was convicted of a crime involving moral turpitude (CMT) committed within five years after last ***entry*** if the maximum ***possible*** sentence was one year or more, regardless of what was imposed, or
>
> (II) has two convictions of CMT's after entry that are not a "single scheme of criminal

---

or admission, and the Board found that this should suffice for the deportation ground requirement that the conviction occur "after admission."

See also Matter of Connelly, 19 I&N 156 (BIA 1984) (adjustment of status is not an "entry").

[23] In 1997, legislation was introduced that would have added adjustment of status to the definition of admission, but the legislation was dropped for that year.

[24] Effective date provided by AEDPA § 436.

misconduct"[25]

Note that the second deportability basis, conviction of two offenses, is the same in both deportation grounds and the removal ground.

Last entry, not last admission, is the starting date for the five years in deportation proceedings. Entry is a term of art. A lawful permanent resident whose trip outside the U.S. was "brief, casual and innocent" and not meaningfully interruptive of his or her residence may be held not to have made a new "entry" upon return to the U.S., under *Rosenberg v. Fleuti.*[26] In a different context, the BIA ruled that adjustment of status is not an "entry."[27]

Sentenced to confinement in a "prison or corrective institution." If proceedings began before April 24, 1996, there must have been a one year sentence actually imposed, not just possible. Moreover, the sentence must have been to a "prison or corrective institution." In California, sentence to CYA after trial as an adult does not constitute sentence to prison or correctional institution, even if the person is placed in prison under CYA auspices. See Chapter 5. (Recall that commitment after trial as a juvenile is not relevant because it does not follow a "conviction.") Transfer of mentally ill prisoners to state hospitals in California clearly constitutes a sentence, whereas commitment as an addict to the non-punitive California Rehabilitation Center probably does not constitute a sentence to a prison or correctional institution (but see other immigration penalties for drug addiction, § 3.4). Authority was split regarding such commitments in other jurisdictions.[28]

D. Many California offenses have a possible one year sentence

The statute provides that a basis for deportation is conviction of one moral turpitude offense,

---

[25] This definition applies in deportation proceedings commenced on or after April 24, 1996 but not to removal proceedings commenced on or after April 1, 1997..

[26] 374 U.S. 449 (1963). See former INA §101(a)(13), 8 USC §1101(a)(13), defining entry (changed as of April 1, 1997 to contain the definition of admission).

[27] See Matter of Connelly, 19 I&N 156 (BIA 1984). There an applicant for a waiver of deportation under INA § 241(f) (now cited as § 237(a)(1)(H)) claimed that he qualified for the relief because he committed visa fraud in his application for adjustment of status, and therefore was excludable "at time of entry." The BIA denied eligibility for § 241(f) on the grounds that adjustment does not constitute an "entry." The BIA stated, "[A]s the respondent was not coming into the United States from a foreign port or place or from an outlying possession when he applied for adjustment of status, he was not making an entry at that time. We note that this is not inconsistent with the position that an alien applying for adjustment of status under section 245 is assimilated to the position of an alien who is making an entry. The only purpose of that 'assimilation' is to decide whether the alien meets the requirement of section 245(a) that he be 'admissible to the United States for permanent residence.'" Connelly at p. 159.

[28] See, e.g., Holzapfel v. Wyrsch, 259 F.2d 890 (3d Cir. 1958) and United States ex rel. Abbenante v Butterfield, 112 F. Supp 324 (E.D. Mich 1953), aff'd per curiam, 212 F.2d 794 (6th Cir. 1954).

committed within five years of admission, with a *possible sentence of a year or more* This definition misses the point by one day. Under federal (and California) law, a felony offense carries a sentence of more than a year, while a misdemeanor offense can carry a sentence of up to a year.[29] Therefore, while one would assume that Congress intended to subject people convicted of a *felony* to the moral turpitude deportation ground, regardless of sentence, they in fact have included many misdemeanor convictions. Advocates should press for Congress to correct the statute.

Many California offenses carry a possible one year sentence. Under California law:

-- All felonies carry a potential one year sentence.

-- Any "wobbler" (an offense that is listed in the Penal Code as being punishable as either a felony or a misdemeanor) that could have been charged as a felony, but was designated or reduced to a misdemeanor, carries a potential one year sentence. For example, in California a charge of felony grand theft that as a wobbler was designated as a misdemeanor would have a potential sentence of one year, and consequently would be a basis for deportation.

-- Other misdemeanors may carry a **maximum six month sentence** and so would not be a basis for deportation. For example, in California petty theft (as opposed to misdemeanor grand theft) has a maximum potential sentence of six months.

-- To determine the maximum sentence for an offense, look up the offense in the Penal Code. The sentence will be in or near the section that defines the crime.

E. Conviction of Two or More Crimes Involving Moral Turpitude

The second section in the moral turpitude deportation ground punishes conviction of two crimes involving moral turpitude obtained at any time after admission, regardless of the sentence imposed or whether the convictions resulted from a single trial, but not arising out of a single scheme of criminal misconduct. This rule applies the same under current law and for people still in deportation proceedings that began before April 1, 1997 (except that it is any time after entry).

Caution: Drug trafficking and other moral turpitude convictions that were waived under former INA § 212(c) can come back to life. A conviction that has been "excused" by an immigration judge under a previous application for the former § 212(c) waiver (and presumably the current cancellation of removal or § 212(h) waiver) still can be joined to a second, subsequent conviction and form the basis for deportation under this section.[30] A conviction that has been vacated cannot be used in this way.

---

[29] See 18 USC § 3559(a) (felony is punished by a sentence of more than a year), California Penal Code §§ 17-19 (same).

[30] Matter of Khourn, Int. Dec. 3330 (BIA 1997); Molina-Amezcua v. INS, 6 F.3d 646 (9th Cir. 1993); Matter of Balderos, Int. Dec. 3159 (BIA 1991).

Some permanent residents were able to waive aggravated felonies such as drug trafficking under the former § 212(c) waiver. If one of these convictions involved moral turpitude, it can be joined with a *new* moral turpitude conviction to make the person deportable for having *two* moral turpitude convictions. The BIA held that **drug trafficking** is a crime involving moral turpitude. Thus an old drug trafficking conviction that was waived under former INA § 212(c) could be joined with a new petty theft conviction to make two moral turpitude convictions.[31]

Single scheme of criminal misconduct. Where possible, counsel should create a record supporting a finding that the crimes arose from a single scheme. As with all elements supporting deportability, the INS has the burden of proving by clear, unequivocal and convincing evidence that the two crimes did *not* arise from a single scheme of criminal misconduct.[32]

"Single scheme of criminal misconduct" has been defined differently by various federal appeals courts.[33] Generally, the factors to be considered include identity of time, object and purpose, methods and procedures, and identity of participants and victims. While the Ninth Circuit has noted that, "(I)n the *absence of all evidence to the contrary*, two complete crimes constitute two crimes not arising out of a single scheme of criminal misconduct," it found that two robberies arose out of a single scheme where credible evidence showed that they took place a few days apart, involved the same participants, and had been both proposed at the same meeting a few weeks before they took place.[34] Outside the Ninth Circuit, the BIA uses a more restrictive test.[35]

---

[31] Matter of Khourn, Int. Dec. 3330 (BIA 1997) (if knowledge or intent is an element of the offense, drug trafficking involves moral turpitude, citing federal cases to that effect). Because conviction of drug trafficking is an aggravated felony, whether it involves moral turpitude as well would seem to be a minor issue. However, persons who were convicted of a drug trafficking offense and had it waived under the former § 212(c) relief can be charged with deportability based on two crimes involving moral turpitude, if they are convicted of a second offense such as theft. Such was the case here.

[32] Woodby v. INS, 385 U.S. 276 (1966).

[33] Compare Pacheco v. INS, 546 F.2d 448, 451 (1st Cir.), cert. denied, 430 U.S. 985 (1977), with Nason v. INS, 394 F.2d 223 (2d Cir.). cert. denied, 393 U.S. 830 (1968) and Sawkow v. INS, 314 F.2d 34 (3rd Cir. 1963).

[34] Wood v.Hoy, 266 F.2d 825, 830-832 (9th Cir. 1959), quoting Chanin Din Khan v. Borber, 253 F. 2d 547 (9th Cir. 1958), cert. denied 357 U.S. 920 (1958) (emphasis supplied in Wood opinion). See also Gonzalez v. INS, 910 F.2d 614 (9th Cir. 1990) (two bank robberies within two days, at same bank, evidence planned at same time and executed according to plan is single scheme; reaffirming Wood v. Hoy); but see Leon-Hernandez v. INS, 926 F.2d 902 (9th Cir. 1991) (conviction of two counts oral copulation with a minor not single scheme where acts took place with the same person in ongoing relationship a month apart; single scheme "implies a specific, more or less articulated and coherent plan or program of future action, much more than a vague, indeterminate expectation to repeat a prior criminal modus operandi.").

[35] See, e.g., Matter of Adetiba, Int. Dec. 3177 (B(A 1992) (essentially holds crimes must take place at same time, following Pacheco v. INS, supra, and declining to follow expansive tests set out by Ninth, Second and Third Circuits outside of jurisdictions of those courts).

§ 4.6 Some Persons Are Deportable but Not Inadmissible for Moral Turpitude

The 1996 amendments to the moral turpitude grounds of inadmissibility and deportability made it quite easy for a person to be deportable but not inadmissible for moral turpitude (as well as other grounds; see Chapter 1). This is relevant in several immigration contexts. The BIA has held that a person who is deportable but not inadmissible is eligible to apply for adjustment of status.[36] A person who comes within the petty offense exception can establish good moral character under INA § 101(f), regardless of being deportable. A person who is deportable but is able to establish good moral character can apply for naturalization, if the judge agrees to discretionary termination of removal proceedings under 8 CFR 239.2(f) (see § 11.20) or voluntary departure at conclusion of proceedings under INA § 240B(b)(1).

Deportable But Not Inadmissible for One Conviction. A person can be deportable but not inadmissible based on one moral turpitude conviction. The petty offense exception will excuse inadmissibility for conviction of an offense with a *potential one year sentence*, as long as a sentence of more than six months was not imposed. But a person with the same conviction would be deportable, if he had committed the offense within five years of admission (in removal proceedings) or entry (in AEDPA deportation proceedings). Consider the following example:

> **Example: Primero** was convicted of misdemeanor grand theft three years after he was admitted to the U.S. as a permanent resident. He received probation and no sentence was imposed. Now he has been an LPR for seven years and is applying for naturalization. He is not barred from establishing good moral character, because he falls within the petty offense exception of the ground of inadmissibility (it was his first CMT, less than six months sentence was imposed, and the maximum sentence was one year). He is, however, deportable, because he has one conviction of a crime involving moral turpitude committed within five years of admission and the maximum possible sentence was one year.

Deportation Ground Penalizes Offenses Committed After *Admission.* A person is deportable in removal proceedings if convicted of an offense committed within five years of *admission*.[37] Admission thus is a condition precedent to deportability for moral turpitude. A person who committed the offense before being lawfully admitted (and was admitted because the offense was waived, or was not a basis for inadmissibility at the time) is not deportable under this ground. See discussion in § 1.3 (Part C).

> **Example**: This time, assume that **Primero** entered the U.S. without inspection and three years later was convicted of the same offense as in the above example, misdemeanor grand theft with no sentence impose., Then he adjusted status under INA § 245(i). He was not inadmissible when he adjusted status, because he came within the petty offense exception. He is not deportable under the plain language of the statute, because the current test is whether he committed the

---

[36] See *Matter of Rainford*, Int. Dec. 3191 (BIA 1992) (deportable for firearms), discussed in § 6.1. The question of whether a person who is deportable but not inadmissible for moral turpitude could apply for a waiver of inadmissibility under INA § 212(h) has not been litigated.

[37] INA § 237(a)(2)(A)(I)(I).

offense within five years after last *admission*. His admission (the adjustment of status, according to the BIA) happened after the conviction.

Primero's brother **Segundo** was convicted of misdemeanor grand theft he committed six years after he was admitted to the U.S. He also received probation and no sentence was imposed, and now he is applying for naturalization. Segundo is *not* deportable. He has not been convicted of two crimes involving moral turpitude, and he was not convicted of one crime involving moral turpitude committed **within five years of admission**. Because he happened to wait more than five years after admission to commit the offense, he is not deportable. Neither is Segundo inadmissible. He comes within the petty offense exception, as did Primero.

§ 4.7 Expungement of Conviction, Other Post-Conviction Relief; Waivers; the former JRAD

Expungement. The BIA held for forty years that an "expungement" or dismissal of charges under Penal Code §1203.4 or related sections would eliminate the immigration effects of a moral turpitude conviction.[38] It reversed this position in the 1999 case *Matter of Roldan,* holding that expungements will be given no effect in immigration proceedings.[39] It is possible that *Roldan* will be reversed by the Ninth Circuit or the Attorney General.

Matter of Tinajero. Elimination of the effect of expungement eliminates another useful rule that helped people who would have been able to expunge the offense in the future. According to its own Operations Instructions, INS should not bring deportation proceedings against a person based on a potentially expungeable conviction of a moral turpitude offense, until the person has had a chance to complete probation and apply for the expungement.[40] The BIA enforced this rule in *Matter of Tinajero.*[41] There INS brought proceedings against a person based on conviction of a crime involving moral turpitude. The person had received five years probation, at the conclusion of which he would be able to expunge the offense under Calif. Penal Code § 1203.4. The BIA ordered that the case be returned to the immigration judge and held in abeyance during the years it would take for the person to complete

---

[38] See, e.g., .Matter of G, 9 I&N 159 (BIA, AG 1961), Matter of Ozkok, 19 I&N 546 (BIA 1988).

[39] Int. Dec. 3377 (BIA 1999). For further discussion of Roldan, see 2.5, Part E, and Chapter 8.

[40] INS Operations Instructions 242.1a(28) states that "A conviction expunged under a state law may not be used as a basis for deportation under [the moral turpitude section]. In the case of an alien who may avail himself of a state expungement procedure upon fulfilling the conditions of probation, the district director shall defer deportation proceedings during the period of probation and during the pendency of any proceeding to obtain expungement. The alien shall be advised that the institution of deportation proceedings has been deferred and for what period of time. If the alien's probation is revoked, or if he is refused an expungement, or if the alien does not obtain an expungement within a reasonable period of time after discharge from probation, the district director may institute deportation proceedings."

[41] 17 I&N 424 (BIA 1980); reaffirmed, Matter of Ozkok, Int. Dec. 3044 (BIA 1988). See also Matter of Luviano, Int. Dec. 3267 (BIA 1996) (majority opinion finds that proceedings also should be continued to allow expungement of a firearms or other expungeable offense).

probation and apply for §1203.4 relief. All convictions, whether felony or misdemeanor, in which probation has been imposed are amenable to P.C. §1203.4 relief. See Chapter 8.

If the *Roldan* case is reversed and expungements are again given effect, the Operations Instruction and rule in *Matter of Tinajero* should continue as well.[42]

Post-Conviction Relief, Appeal. The immigration penalties of a conviction of a crime involving moral turpitude can be removed by vacation of judgement based on legal error, successful appeal, or obtaining an executive pardon.[43] See Chapter 8 on bases for and how to obtain post-conviction relief.

Judicial Recommendation Against Deportation. Until 1990, the judicial recommendation against deportation (JRAD) offered protection to persons convicted of a crime involving moral turpitude. The JRAD was an order, signed by a criminal court judge, requiring INS to withhold immigration penalties based on conviction of a crime involving moral turpitude. The JRAD was eliminated by the Immigration Act of 1990.[44] The INS has agreed to honor JRAD's that were actually signed by a judge

---

[42] The BIA recently reaffirmed and expanded the Tinajero rule, in Matter of Luviano, Int. Dec. 3267 (BIA 1996). Mr. Luviano had argued among other things that his deportation hearing should have been continued in order to give him time to expunge his firearms conviction, analogizing to the Tinajero opinion regarding moral turpitude convictions. The Luviano BIA majority opinion (there were also concurring and dissenting opinions) stated that it was within the Judge's discretion to grant or deny the continuance in a firearms case. The panel stated that it would not review the Service's exercise of its prosecutorial discretion. "In the present case, the Immigration Judge denied the respondent's motion for a continuance which had been opposed by the Service on the basis that the respondent's conviction was for a firearms violation, and thus, Matter of Tinajero, supra, was inapplicable. The decision to grant or deny a continuance is within the discretion of the Immigration Judge, if good cause is shown, and that decision not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing." The panel noted that since the respondent in any event had obtained an expungement, no prejudice could result from the denial of a continuance. Thus while the Board would not compel a judge to grant a Tinajero motion, it affirmed the judge's ability to do so, in firearms as well as expungement cases. See also discussion in § 6.1.

[43] INA § 241(a)(2)(A)(iii), 8 USC § 1251(a)(2)(A)(iii) (pardon). The State Department in issuing visas recognizes a pardon from the U.S. President or state government and certain pardons from Germany, but no others. 22 CFR § 40.21(a)(5). See Chapter 8.

[44] The 1990 Act stated that the change was retroactive, so that offenses committed before the Act's effective date of November 29, 1990 could not be treated by the JRAD after the effective date. The Ninth Circuit has upheld the statute although it has been described by other justices as a violation of the ex post facto clause IA90 § 505. U.S. v. Murphey, 731 F.2d 606 (9th Cir. 1991)(judges divested of jurisdiction to issue JRAD as of date of passage of IA90; ex post facto concerns not discussed) and see also discussion of ex post facto concerns' inapplicability to immigration consequences in U.S. v. Yacoubian, 24 F.3d 1 (9th Cir. 1994), but see, e.g., dissent by Judge Bownes in U.S. v. Bodre, 948 F.2d 28 (1st Cir. 1991).

before November 29, 1990.[45] If an immigrant received a moral turpitude conviction before November 29, 1990 and a JRAD was not discussed or sought, counsel should investigate the case to determine if this was ineffective assistance of counsel and a basis for vacating the prior conviction.[46]

Waivers. Certain classes of noncitizens can apply for a discretionary waiver of deportation or exclusion from the INS or immigration judge, such as cancellation of removal or the former § 212(c) relief (see § 11.10) or the § 212(h) waiver (see § 11.11)., *infra*.

Cancellation of removal for permanent residents. Cancellation of removal under INA § 240A(a) can waive any ground of deportability or inadmissibility except for conviction of an aggravated felony. It has stringent requirements for calculating whether the applicant has the required seven years lawful residence since any admission: that period ends when the person commits certain offenses or when the Notice to Appear is issued. See discussion in § 11.10.

Cancellation of removal for non-permanent residents. This relief for non-permanent residents of ten years with U.S. citizen or permanent resident relatives is not available to persons who "have been convicted of an offense under" INA §§ 212(a)(2) or 237(a)(2), which include the moral turpitude inadmissibility and deportability grounds. Presumably a person who comes within the petty offense or youthful offender exception to the inadmissibility ground and is not deportable would not be barred. See § 11.3.

Section 212(h) relief waives inadmissibility for conviction of one or more moral turpitude offenses. Permanent residents face additional requirements to apply for 212(h): since becoming a permanent resident, the person cannot have committed an aggravated felony, and must have amassed seven years before initiation of proceedings. See § 11.11.

The Former § 212(c) relief. This discussion is relevant only to permanent residents still in deportation proceedings (commenced before April 1, 1997) and eligible for relief under the former § 212(c). It will focus on what crimes involving moral turpitude can be waived under the former § 212(c) relief. For a more thorough discussion, see § 11.10.

The 1996 AEDPA amended INA § 212(c) to bar noncitizens who are "deportable for having committed offenses described" in certain deportation grounds, plus certain moral turpitude offenses, from applying for this relief.[47] Under the AEDPA restrictions, § 212(c) is not available to waive *two* moral

---

[45] Memorandum by INS Commissioner Gene McNary, February 4, 1991, reprinted in Interpreter Releases, February 25, 1991, p. 220.

[46] See, e.g., People v. Soriano (1987 1st Dist.) 194 Cal.App.3d 1470, 240 Cal.Rptr. 328; People v. Barocio (1989) 216 Cal.App.3d 99, 264 Cal.Rptr. 573 (failure to advise regarding JRAD is ineffective assistance of counsel).

[47] The language used in AEDPA as modified by IIRIRA is "deportable under section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

The IIRIRA modification was to remove a requirement that the last offenses described, the two moral

turpitude convictions, *both* of which carry a potential sentence of a year or more.[48] An exception to this rule is that if deportation proceedings were initiated before April 24, 1996, both moral turpitude convictions must have had sentence imposed of one year -- not a potential one year sentence -- in order to be a specified ground and bar § 212(c) relief.[49]

---

turpitude convictions, both have been committed within five years of last entry. See next footnote.

[48] Under the original AEDPA provision, the person needed two convictions of a crime involving moral turpitude, both offenses committed within 5 years of entry, and both carrying a potential sentence of one year. IIRIRA sec. 306(d) eliminated the requirement that the offenses were committed within 5 years of entry, and made the change retroactive to the passage of AEDPA. The deportation ground based on one crime involving moral turpitude conviction retains the requirement that the offense have been committed within five years entry.

[49] The specified grounds constituting a bar to § 212(c) relief refer to the deportation grounds. The AEDPA changed the moral turpitude deportation ground from requiring a sentence imposed of one year to requiring only a potential sentence of one year. This change is effective only in deportation proceedings initiated after April 24, 1996. AEDPA § 436.

Whether the AEDPA restrictions on 212(c) apply at all, or apply retroactively to cases pending as of April 24, 1996, is pending before federal district court. Absent the AEDPA restrictions, 212(c) relief can waive any moral turpitude offense except one that is an aggravated felony with a five year sentence imposed. The BIA has held that the AEDPA amendments do not apply to respondents who were pursuing § 212(c) relief in *exclusion* proceedings.[50] It also, held, however, that the AEDPA amendments apply to a person in deportation proceedings who is seeking to apply for a waiver of exclusion under INA § 212(c) in conjunction with an application for adjustment of status.[51] Federal courts are considering both of these issues.[52]

§ 4.8 What Constitutes a Crime Involving Moral Turpitude?[53]

The most noteworthy feature of the term "crime involving moral turpitude" is its breadth and vagueness. The courts and the BIA frequently cite the definition given in *Bouvier's Law Dictionary* (3rd Ed. 1914) as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Despite criticism of the vagueness of "moral turpitude," the standard as applied in immigration cases has been upheld as meeting the specificity requirement for constitutional due process.[54]

Moral turpitude does not depend on classification as a felony or misdemeanor, nor on the severity of punishment allowable or actually imposed. The designation of a crime as "infamous" or "*malum in se*"

---

[50] Matter of Fuentes-Campos, Int. Dec. 3318 (BIA 1997).

[51] Matter of Gonzalez-Camarillo, Int. Dec. 3320.

[52] The Ninth Circuit has pending before it this issue in Magana-Pizano v. INS, 152 F.3d 1213, amended 159 F.3d 1217 (9th Cir. 1998) (per curiam), remanded from the Supreme Court. That case presents among other issues the question of whether the AEDPA restrictions on 212(c) relief should not be enforced at all because they violate equal protection. But in the interim another Ninth Circuit panel has ruled, in an appeal of sentence under 8 USC § 1326(b)(2) for illegal re-entry of a deported aggravated felon, that the prior deportation hearing in the case was not illegal because the AEDPA restrictions on §212(c) relief do not violate equal protection; rather, those restrictions apply equally to exclusion proceedings as well as deportation proceedings (thereby disapproving of Matter of Fuentes-Campos, supra). United States v. Estrada-Torres, 19 Daily Report DAR 5546 (9th Cir. June 7, 1999).

[53] Other texts discussing this issue include Kesselbrenner and Rosenberg, Immigration Law and Crimes (Clark Boardman) and 23 A.L.R. Fed. 480.

[54] Jordan v. DeGeorge, 341 U.S. 223 (1951). The State Department provides that the determination of whether a crime involves moral turpitude "shall be based upon the moral standards generally prevailing in the United States." 22 CFR 40.21(a)(1).

does not necessarily make a crime turpitudinous.[55]

Although case law applying the definition of "moral turpitude" frequently reaches counter-intuitive or inconsistent results, a few broad principles can be discerned. In general, the following types of crimes have been held to involve moral turpitude:

1) crimes (felonies or misdemeanors) in which either an intent to defraud or an intent to steal is an element;

2) crimes (typically felonies) in which great bodily harm is caused or threatened by an intentional or willful act or by recklessness;

3) felonies and some misdemeanors in which "malice" is an element;

4) some sex offenses in which "lewd" intent is an element.

Thus, murder, rape, voluntary manslaughter, robbery, burglary, theft (grand or petit), arson, aggravated forms of assault, and forgery all have been consistently held to involve moral turpitude. On the other hand, crimes which involve none of the above elements have been held not to involve moral turpitude, including involuntary manslaughter (except where recklessness is an element[56]), simple assault, "breaking and entering" (see Annotation) or criminal trespass, "joyriding," and various weapons possession offenses. (For case citations and discussion of these and other specific offenses, see the Chart and Annotations "Crimes Involving Moral Turpitude Under the California Penal Code" at the end of this book.)

Drug Trafficking. The BIA held that knowing or intentional participation in illegal drug trafficking involves moral turpitude because it is inherently evil. Conviction of drug trafficking is an aggravated felony and so has greater penalties than a moral turpitude offense, but in some immigration contexts the moral turpitude designation is relevant.[57]

---

[55] United States ex rel. Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928).

[56] The BIA held that where criminally reckless conduct is an element of the offense under the penal code, involuntary manslaughter is a crime involving moral turpitude. Matter of Franklin, Int. Dec. 3228 (BIA 1994); see also Matter of Perez-Contreras, Int. Dec. 3194 (BIA 1992) (third degree assault statute that involved criminal negligence but not recklessness is not turpitudinous). Recklessness is not an element of involuntary manslaughter under Calif. Penal Code 192(b). See discussion of involuntary manslaughter and vehicular manslaughter in Annotations on moral turpitude offenses at the end of this book.

[57] Matter of Khourn, Int. Dec. 3330 (BIA 1997) (if knowledge or intent is an element of the offense, drug trafficking involves moral turpitude, citing federal cases to that effect). Because conviction of drug trafficking is an aggravated felony, whether it involves moral turpitude as well would seem to be a minor issue. However, persons who were convicted of a drug trafficking offense and had it waived under the former § 212(c) relief can be charged with deportability based on two crimes involving moral turpitude, if they are convicted of a second offense such as theft. Such was the case here.

Drunk Driving. The BIA continues to hold in unpublished opinions that driving under the influence does not involve moral turpitude. In 1999 a Boardmember held in an unpublished opinion that DUI does involve moral turpitude, but the opinion was quickly withdrawn and reversed.[58] If a driving offense has recklessness as an element, then it is possible that the BIA will view it as turpitudinous. See Annotations.

Theft. There is an argument that conviction for theft under Calif. Penal Code §§ 484 or 487 is a divisible statute for moral turpitude purposes, because not every offense included in the statute involves an intent to permanently deprive the owner of property. See discussion of divisible statutes at § 4.10, *infra*. The California theft statute encompasses various types of offenses under the heading theft, such as false pretenses, fraud and embezzlement, for example.[59] The statute does not contain as a required element the intent to permanently deprive the owner of property. While case law has added the element of intent to deprive permanently to most offenses, it appears that conviction of some of the offenses listed in the statute is possible even where the intent is to deprive only temporarily.[60] This would make the offense a divisible statute, with some subsections requiring intent to deprive the owner permanently and others with intent to deprive the owner temporarily of property. As such it is similar to the "joyriding" statute, California Vehicle Code §10851, which involves the taking of a vehicle "with intent either to permanently or temporarily deprive the owner therefor of his or her title to or possession of the vehicle..." A conviction under such statute has been found insufficient to establish theft for purposes of the INA.[61]

Where a conviction is a divisible statute, the court may look to the record of proceeding to see if it can be determined which provision the respondent was convicted under. If the record of proceeding does not establish this, then the charge of removability for moral turpitude cannot be sustained. See further discussion at § 4.10.

Under this reasoning, it is arguable that conviction under P.C.§§ 484 or 487 with a one year sentence imposed would not be an aggravated felony. See § 9.11.

Criminal defense attorneys should not rely on this argument: they should assume that conviction under 484 will be held to involve moral turpitude and, if a one year sentence is imposed, to be an aggravated felony. But if conviction is inevitable, one should attempt to clear the record of conviction of references that indicate which offense under §§ 484/487 the person was convicted of.

Regulatory Offenses. Some regulatory offenses relating to immigration status are not crimes involving moral turpitude unless there is an intent to defraud. Transportation and alien smuggling do not

---

[58] For a copy of that opinion, contact the National Immigration Project of the National Lawyers Guild, nipdan@nlg.org.

[59] See, e.g., People v. Turner, 73 Cal.Rptr. 263 (1968) (offense of theft includes offense formerly known as larceny, obtaining property by false pretenses and embezzlement).

[60] People v. Britz, 95 Cal.Rptr. 823 (1968) (embezzlement need not involve intent to deprive permanently); People v. Silver, 1212 Cal.Rptr. 153 (1975).

[61] Matter of T, 2 I&N 22 (BIA 1944); Matter of M, 2 I&N 686 (BIA 1946).

involve moral turpitude because they do not involve fraud or evil intent.[62] (Conviction of alien smuggling, harboring or transportation, except of close family members, is an aggravated felony, however.)

The BIA and Ninth Circuit's rulings on the offense of causing a financial institution to fail to file currency transaction reports and structuring currency transactions to evade reporting requirements provide important commentary on moral turpitude. The BIA had held that this offense involved moral turpitude, but the Ninth Circuit reversed it, pointing out that this was a regulatory offense only and did not involve morally reprehensible conduct.[63] In *Matter of L-V-C-*, the BIA overruled its previous decision and agreed to apply the Ninth Circuit rule nationally.[64] The BIA agreed with the Ninth Circuit that fraud was not an essential element of every offense listed in 31 USC 5324(1) and (3). The offense at issue did not involve the use of false statements or false documents; nor did the noncitizen obtain anything from the government.

A conviction under federal law for knowingly possessing an altered immigration document does not involve moral turpitude unless an intent to use the document unlawfully is an element of the offense.[65] Calif. Penal Code §§ 113, 44, enacted by Proposition 187 and currently in force, penalize manufacture, distribution or sale of false documents to conceal immigration status and use of false documents to conceal status. These offenses might be found by the BIA to be turpitudinous because of intent to conceal status.[66]

State law. State statutes and court decisions use the phrase "moral turpitude" as a standard for a variety of non-immigration purposes such as impeachment of witnesses or disbarment of attorneys. State law characterizing offenses as turpitudinous is not relevant to whether a crime involves moral turpitude under the immigration laws.[67] State law is relevant to the extent that it defines or clarifies what elements make up an offense described in a state penal code section. See, e.g., discussion of bigamy under California law in the Annotations.

Conspiracy, Attempt. Whether moral turpitude inheres in conspiracy or attempt to commit a

---

[62] See, e.g., Matter of Tiwari, 19 I&N 875 (BIA 1989).

[63] See Matter of Goldeshtein, 20 I&N 382 (BIA 1991), rev'd, Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993),

[64] Matter of L-V-C-, Int. Dec. 3382 (BIA 1999).

[65] Matter of Serna, Int. Dec. 3188 (BIA 1992) (record of conviction under 18 U.S.C. § 1546 showed conviction was only for possession and not for use).

[66] See, e.g., Matter of Flores, 17 I&N 255 (BIA 1980); but see also discussion in Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993) and Matter of L-V-C-, Int. Dec. 3382 (BIA 1999). Note that these offenses are punishable by a mandatory five year prison term or fine of $75,000 (sale)/$25,000 (use).

[67] Gonzalez v. Barber, 207 F.2d 398, 400 (9th Cir. 1953), aff'd 374 U.S. 637 (1954).

crime depends upon whether the primary crime is turpitudinous under the relevant statute.[68]

"Any Felony" in Burglary and Other Offenses. The offense alleged to involve moral turpitude must be clearly identified in the statute or record of conviction. The BIA recently found that conviction of a federal offense, assault with intent to commit a felony upon a minor, could not be found to involve moral turpitude because the record of conviction did not identify the felony intended.[69] In this way, burglary (entry with intent to commit theft *or* any felony) arguably does not involve moral turpitude if the underlying felony was not identified on the record. See "burglary" in Annotations, the discussion of divisible statutes in § 4.11, *infra,* and also the discussion of burglary with a one year sentence imposed as an aggravated felony.[70]

Accessory. The BIA has held that being an accessory after the fact to a moral turpitude offense is itself a crime involving moral turpitude,[71] but there is a strong argument that this is incorrect and that being an accessory after the fact to any offense does not involve moral turpitude and is a viable alternative plea to an otherwise unavoidable moral turpitude charge. Conviction of accessory after the fact is an aggravated felony if a one year sentence is imposed. See discussion in §4.11.

§ 4.9 Minimum Conduct Required to Violate the Statute

To determine whether a given crime involves moral turpitude, one looks not at the conduct of the defendant in question, but rather at the crime as defined. The analysis begins with the elements of the crime as set forth in the statute and the case law of the jurisdiction applying the statute. *The minimum or least offensive conduct violating the statute must involve moral turpitude in order for a conviction under the statute to involve moral turpitude.*[72] If any of the elements required to sustain a conviction involve moral turpitude, the crime defined by the statute involves moral turpitude.

In some cases, the statute itself may appear to lack the element of turpitudinous intent, but this element may be provided by case law. For example, if a defense of lack of guilty knowledge has arisen in the cases, the element of guilty knowledge becomes part of the definition of the crime, which may therefore be turpitudinous. See, *e.g.*, discussion of P.C. §281 (bigamy) in Annotations.

---

[68] See, e.g., Jordan v. DeGeorge, supra, McNaughton v. INS, 612 F.2d 457 (9th Cir. 1980) (conspiracy); Matter of Awaijane, 14 I&N 117 (BIA 1972) (attempt).

[69] Matter of Short, Int. Dec. 3125 (BIA 1989)(conviction for 18 USC § 113(b)), reversing Matter of Baker, 15 I&N 50 (BIA 1974).

[70] Advocates will make a separate argument that California burglary with a one year sentence imposed is not an aggravated felony, because it does not fit the generic definition of burglary established by the Supreme Court in United States v. Taylor, 495 U.S. 575, 110 S.Ct. 2143 (1990). See discussion in §§ 9.5 (Part A) and 9.11.

[71] Matter of Sanchez-Marin, 11 I&N 264 (BIA 1965).

[72] United States ex rel. Robinson v. Day, 51 F.2d 1022, 1022-23 (2d Cir. 1931).

If neither the statute nor the record of conviction sufficiently defines the offense as one involving moral turpitude, the reviewing authority will not hold the offense to be turpitudinous. Thus, where a person was convicted of assault with intent to commit a felony and the record of conviction did not identify the felony, the person had not been convicted of a crime involving moral turpitude.[73] Similarly burglary potentially does not involve moral turpitude since it prohibits breaking and entering with intent to commit *any felony*. If the record does not reveal that the intended felony was turpitudinous, then the conviction will not be held to be of an offense involving moral turpitude. With a one year sentence imposed, however, burglary would be an aggravated felony. See INA § 101(a)(43)(G), but see also discussion of limitation on burglary definition at § 9.11. See also divisible statutes, next section.

§ 4.10 Divisible Statutes and the Record of Conviction

The definition of a crime frequently goes beyond the statutory language and interpretive case law to include the "record of conviction" in the particular case. The record of conviction consists of the indictment or information, the plea or verdict, and the sentence.[74] The record of conviction does not include the trial record, presentence report, the prosecutor's sentencing remarks, or the trial judge's opinion as to whether a given crime is turpitudinous. It may, however, include a defendant's admissions made while entering his plea.[75] The court may not look to information in the record of a co-defendant to further define the offense.[76]

A code section whose terms encompass both turpitudinous and non-turpitudinous crimes is a "divisible statute." For example, a code section may contain multiple subsections, some of which involve moral turpitude and some of which do not. See, e.g., P.C. §602, "criminal trespass." It may define the crime in the disjunctive, as where, for example, California Vehicle Code § 10851 defines "vehicle taking" as a taking with an intent to deprive the owner of possession "permanently" (turpitudinous) or "temporarily" (not turpitudinous). Finally, a section may be so broadly or vaguely drawn that it could include turpitudinous and non-turpitudinous conduct, as is P.C. §272, "contributing to the delinquency of a minor." See Annotations for discussion of the above examples.

Where a conviction under a divisible statute creates an ambiguity as to whether the alien violated the section involving moral turpitude, the BIA and the immigration judge will look to information

---

[73] See Matter of Short, supra (reviewing authority will not look to co-defendant's record of conviction to further define the offense).

[74] Matter of Mena, 7 I&N 38 (BIA 1979); Wadman v. INS, 329 F.2d 812, 814 at n. 63 (9th Cir. 1964).

[75] Matter of Cassisi, 10 I&N 136 (BIA 1963) (prosecutor's remarks). Matter of Goodalle, 12 I&N 106, 107-8 (BIA 1967). Matter of Mena, 17 I&N 38 (BIA 1979).

[76] Matter of Short, Int. Dec. 3125 (BIA 1989) (where wife convicted of assault with intent to commit a felony, court cannot look to husband's record of conviction to define the felony).

contained in the record of conviction in an attempt to resolve the question.[77] Where the record of conviction does not reveal whether turpitudinous conduct was involved, the court must decide in favor of the defendant, and a finding of moral turpitude cannot be made.[78] For reasons of judicial economy, the reviewing authority will not consider facts outside the record of conviction to decide whether a given conviction involves moral turpitude.[79]

It is thus in the defendant's interest to plead simply to the minimum activity required to violate the statute, and for the record of conviction to reflect this. At the time of sentencing, some judges may ask the defendant a series of factual questions regarding his or her conduct during commission of offenses. Statements should be avoided which may describe conduct which exceeds or does not relate to the pled offense, and which could conceivably constitute an admission of a crime involving moral turpitude, or at least suggest turpitudinous behavior under a divisible statute.

Where the indictment or information alleges turpitudinous acts not necessary to support the conviction agreed upon in a plea bargain, defense counsel may try to bargain for a substitute information omitting those allegations. Where a plea is made to a lesser included offense of the one charged, reviewing authorities may consider allegations of the original indictment which are factually relevant to the lesser included offense as being included in the record of conviction.[80]

It is quite common for the prosecution to charge California offenses in the language of the statute, and the Penal Code expressly permits this vague practice.[81] For example, in the case of breaking and entering, if the complaint or information charges the accused with the commission of burglary by entry with intent to commit theft *or* any felony, the charge arguably does not establish that the offense is a crime of moral turpitude (because the second clause, "or any felony," does not identify a turpitudinous offense). If the plea is guilty "as charged in Count I," the plea will not establish moral turpitude. If the sentence and judgment can be kept from identifying the particular felony defendant intended to commit, or can be phrased in the statutory language (including the magic word, "or"), then they will not establish that the offense is a crime of moral turpitude. If the prosecution and court does not know the INS requirements for moral turpitude, it may be possible by artful wording of the plea ("I admit to entry with intent to commit theft or any felony") to avoid creating a record of conviction that establishes moral turpitude. Or, it may be possible to bargain for a record of conviction framed in sufficiently vague terms.

---

[77] See, e.g., Matter of W, 5 I&N 239 (BIA 1953); Matter of Garcia, 11 I&N 521 (BIA 1966). Most U.S. Circuit Courts permit themselves review of the record of conviction in any case, not merely those involving divisible statutes. See e.g., Wadman v. INS, supra, at 814. However, these courts generally adhere in practice to the rule that turpitude is determined by the crime charged and not by the conduct of the particular defendant.

[78] Matter of C, 5 I&N 65, 71 (BIA 1953).

[79] United States ex rel. Zaffarono v. Corsi, 63 F.2d 757, 759 (2nd Cir. 1933).

[80] Matter of Ghunaim, 15 I&N 269 (BIA 1975); Matter of Beato, 10 I&N 730 (BIA 1964).

[81] "[The charge] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Penal Code § 952.

An important example of a divisible statute in federal criminal law is 18 U.S.C. § 1001(a)(2), concerning the making of false, fictitious and fraudulent statements. This may be a relatively "safe" plea for persons charged with making fraudulent applications for passports, welfare benefits, and other offenses that incur immigration penalties because of moral turpitude or false representation of U.S. citizenship.

Section 1001 sets forth three distinct offenses.[82] The BIA has held that a conviction of the first subsection of the statute involves moral turpitude.[83] The second clause is phrased in the disjunctive: "the making of false, fictitious *or* fraudulent statements ..." Proof of a false or a fraudulent statement has been held sufficient to sustain a conviction under the statute even where the indictment is phrased in the conjunctive.[84] Thus the conviction will not necessarily involve moral turpitude by the statutory language or by the wording of the indictment, because fraud is not an essential element of the crime as defined.[85]

Convictions under the third clause of 18 U.S.C. § 1001 have also been held not to involve moral turpitude. Given conflict among the circuits as to whether materiality is an element of the offense, the BIA has stated that as long as the U.S. Supreme Court has established that materiality is an element of the offense, the third clause does not involve moral turpitude.[86]

Strategy: Criminal defense counsel may be able to protect a defendant by pleading to a divisible statute and negotiating for a substitute indictment or other means to keep the record of conviction clear of information regarding moral turpitude. For information on divisible statutes under California law, see annotated chart of crimes involving moral turpitude under the California Penal Code.

Note: The divisible statute and record of conviction rule is related to the concept of the "categorical analysis" of an aggravated felony, and the rule put forward in one context by the U.S. Supreme Court that a reviewing court may look to charging documents and jury instructions to identify the elements of the offense in the conviction.[87] See discussion in § 9.5, Parts A and B.

---

[82] That section provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[83] Matter of P., 6 I&N 193 (BIA 1954).

[84] Neely v. United States, 300 F.2d 67 (9th Cir. 1962).

[85] Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962).

[86] Matter of G., 8 I&N 315, 316 (BIA 1959); see also Matter of Espinosa, 10 I&N 98 (BIA 1962).

[87] U.S. v. Taylor, 495 U.S. 575 (1990).

§ 4.11 Accessory After the Fact

Under California law, an accessory is one who, knowing that a felony has been committed, "harbors, conceals, or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment ..." The offense can be punished as a misdemeanor or felony. Calif. P.C. § 32.

Summary. There are two ways that accessory after the fact has been held to be a crime involving moral turpitude. First, in an older case the BIA held that accessory after the fact involves moral turpitude if the principal offense did, i.e. accessory takes on the character of the offense committed by the principal actor. This legal theory is discredited and that case should not be controlling. The BIA has held that accessory does not take on the character of an underlying drug offense, and the Ninth Circuit has held that accessory after the fact to a crime of violence is not itself a crime of violence. Moreover, California law interpreting the California accessory statute is quite clear that accessory does not take on the character/intent of the principal offense. State law is definitive on the question of interpreting the elements of state statutory offenses.

Second, the Attorney General once reversed the BIA to hold that the act of being an accessory -- helping someone who committed a crime to hide from authorities -- involves moral turpitude because it obstructs justice. While this case has been occaisionally cited by the BIA, it should be reversed in the light of subsequent federal and BIA decisions.

In practice, in at least some cases in California the INS has been persuaded to drop a charge of moral turpitude based on accessory. However, if the INS does pursue this charge, however wrongly, the respondent may remain in detention during the legal fight.

WARNING: The BIA held that accessory after the fact *with a one year sentence imposed* is an **aggravated felony** as an obstruction of justice offense.[88] See § 9.13. It is imperative to avoid a one year sentence imposed on any single conviction of accessory after the fact. See Chapter 5 for discussion of sentence.

A. Accessory After the Fact Does Not Take on the Character of the Principal Offense

Is conviction as an accessory to a drug offense or a crime involving moral turpitude a conviction of an offense "relating to" illegal drugs or "involving" moral turpitude? The BIA has ruled that accessory after the fact to a drug offense is not itself a drug offense.[89] The question remains how accessory after the fact to a moral turpitude offense will be categorized.

In 1965 the BIA held in *Matter of Sanchez-Marin*[90] that being an accessory to a crime involving

---

[88] Matter of Batista-Hernandez, Int. Dec. 3321 (BIA 1997).

[89] Matter of Batista-Hernandez, supra.

[90] 11 I&N 264 (BIA 1965).

moral turpitude is a turpitudinous offense, because it takes on the character of the underlying offense.[91] In *Sanchez-Marin* the BIA found that a person convicted under a Massachusetts accessory statute nearly identical to the California statute had been convicted of a crime involving moral turpitude. The BIA provided no reason for this conclusion other than the fact that the principal offense (voluntary manslaughter) involved moral turpitude. In 1994 the First Circuit, basing its decision on a policy of strict deference to agency interpretation, upheld another (unpublished) BIA decision finding that the same Massachusetts accessory statute involved moral turpitude based on the principal offense.[92]

Since *Sanchez-Marin* was published, however theBIA has held repeatedly that offenses such as misprision of felony and accessory do not take on the character of the underlying offense.[93] Significantly, the Ninth Circuit has held that accessory after the fact is not a crime of violence under 18 USC § 16, even where the principal offense was murder for hire.[94] In a similar analysis, the Ninth Circuit also held that solicitation to commit a crime carries a distinct intent and character from the underlying offense.[95]

Finally, California case law definitively establishes that accessory involves a separate and distinct intent from the principal offense. While the BIA is not bound by state courts' appraisal of whether a state offense involves moral turpitude or is an aggravated felony, it does look to state law to define the elements of a state offense.[96] California courts have made it abundantly clear that the intent required for

---

[91] Reportedly the BIA held in an unpublished opinion that federal misprision under 18 USC § 4 is a crime involving moral turpitude. In re Giraldo-Valencia, A36 520 954 (BIA Index Dec. Oct. 22, 1992).

[92] *Cabral v. INS*, 15 F.3d 193, 197 (1st Cir. 1994). The court stated that "[a]lthough we recognize the force of the countervailing view, we are not persuaded that the BIA's interpretation and application of section 1254(a)(4) can be considered either arbitrary, unreasonable or contrary to law." In fact, the court seemed particularly influenced by the facts of the case and the fact that the principal's offense was murder ("Given Cabral's guilty plea to an indictment alleging that he *knew* that the principal *intentionally* murdered another human being ..."), while the better test would appear to be whether accessory after the fact necessarily involves moral turpitude if the principal offense, whatever it may be, does also.

[93] Matter of Batista-Hernandez, supra (federal accessory after the fact), Matter of Velasco, 16 I&N 281 (BIA 1977) (federal misprision of felony), following Castaneda de Esper v. INS, 557 F.2d 79 (6th Cir. 1977). See also Matter of Carrillo, 16 I&N 625, 626 (BIA 1978) (federal conviction of unlawful carrying of firearm during commission of a felony not a drug offense even where felony identified as drug offense).

[94] U.S. v. Innie, 7 F.3d 840 (9th Cir. 1993).

[95] Coronado-Durazo v. INS, 123 F.3d 1322 (9th Cir. 1997) (solicitation to commit a crime if not an offense relating to drugs, even if the crime solicited was a drug trafficking offense).

[96] See, e.g., discussion in Gonzalez-Martinez v. Landon, 203 F.2d 196, 197 (9th Cir. 1952) (case law has established that intent is an element of bigamy, which therefore is a crime involving moral turpitude); Matter of Esqueda, Int. Dec. 3226 (BIA 1994) (the BIA recognizes addition through case law of element of guilty knowledge in various California drug offenses).

In particular see Coronado-Durazo v. INS, supra, at 1325. In its finding that solicitation under an Arizona "generic" statute (solicitation to commit any crime) did not take on the character of the underlying

being an accessory after the fact is unrelated to the intent required for the principal offense. The two offenses are mutually exclusive, and accessory is not a lesser included offense of the principal. As a California Court of Appeals explained in interpreting Penal Code § 32,

> "The requisite intent to be a principal in a robbery is to permanently deprive the owner of his property. Thus, this is a totally different and distinct state of mind from that of the accused whose intent is to aid the robber to escape. These are mutually exclusive states of mind and give rise to mutually exclusive offenses."[97]

Thus accessory after the fact should not be held to be an aggravted felony solely because the principal offender committed an aggravated felony.[98]

The BIA should be persuaded to concede that its own reasoning on this issue has changed. Moreover the Ninth Circuit has taken a different as to when offenses such as accessory or even solicitation "take on the character" of the underlying offense for immigration purposes, and it does not share the First Circuit's policy of extreme deference to the agency on the question of whether an offense involves moral turpitude.[99] This issue may be well worth litigating.

---

offense, the Ninth Circuit relied on Arizona case law to interpret the Arizona statute. The discussion is exactly applicable to accessory after the fact:

> Arizona's solicitation statue, however, specifies a general offense applicable to a range of underlying offenses ... Arizona courts have explicitly held that solicitation, a preparatory offense, is a separate and distinct offense from the underlying crime because it requires a different mental state and different acts. *See State v. Telley*, 799 P.2d 1, 2 (Ariz .Ct .App. 1989) ("Solicitation is not a lesser included offense of the sale of narcotic drugs because the mental and physical elements of solicitation are not necessary elements of the underlying offense.") Thus solicitation is a generic offense under Arizona law.

[97] People v. Prado (1977), 67 Cal.App.3d 267, 273, 136 Cal.Rptr. 521, 524. See also People v. Mitten (1974) 37 Cal.App.3d 879, 883, 112 Cal.Rptr. 713 and Witkin, California Criminal Law, 2nd Ed., §§ 90, 91.

[98] Matter of Sanchez-Marin was decided before Castaneda de Esper and the BIA cases following it, Matter of Velasco and Matter of Carrillo, supra. While these cases addressed the issue of whether certain offenses were ones "relating to" narcotic drugs, as opposed to "involving" moral turpitude, they demonstrate the BIA's acceptance of the proposition that an offense such as misprision of felony is wholly distinct from the underlying crime.

However, note that Sanchez-Marin was recently cited by the BIA. In Matter of Short, Int. Dec. 3125 (BIA 1989), the BIA declined to find moral turpitude in aiding assault with intent to commit a felony when the felony was not identified on the record. It distinguished Sanchez-Marin, stating that moral turpitude was found in that case because the underlying offense was clearly identified on the record.

[99] For example see statements and citations regarding standard of review in Corodado-Durazo v. INS, supra at 1324, citing among other cases Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993), reversing Matter of Goldeshtein, Int. Dec. 3158 (BIA 1991) on the issue of whether structuring financial transactions to avoid reporting requirements is a crime involving moral turpitude. See also Londono-Gomez v. INS, 699 F.2d 475 (9th Cir. 1983)(unlike misprision of felony statute, aiding and abetting statute does not define separate offense).

B. The Act of Being an Accessory After the Fact Should Not Be Held to Involve Moral Turpitude

The INS may charge that the offense of accessory itself -- harboring, concealing or aiding a known felon with intent that the person evade punishment -- is a crime involving moral turpitude, regardless of the character of the principal offense. In *Matter of Sloan*,[100] a 1968 case, the BIA held in two considerations that harboring an escaped felon in violation of 18 USC § 1071 was *not* a crime involving moral turpitude because it did not involve force, an evil intent, vileness, depravity, etc. The Attorney General reviewed the case and decided in a brief opinion that harboring was a moral turpitude offense on the basis that it was "the active and knowing interference with the enforcement of the laws of the United States ..."

While this decision has not been overturned, other cases strongly support the premise that simple interference or failure to cooperate with law enforcement does not necessarily involve fraud or evil intent and is not turpitudinous.[101]

First, the act of accessory is aiding a known felon with the intent that the felon escape punishment or trial. The BIA has held that the act of escape from law enforcement authorities does not involve moral turpitude.[102] It has held repeatedly that aiding or conspiring with someone to commit a crime takes on the character of the principal offense.[103] Therefore, aiding someone to escape takes on the intent of the escape offense, and does not involve moral turpitude.

---

[100] 12 I&N 840 (BIA 1966, A.G. 1968)

[101] For example, resisting arrest has been held not to involve moral turpitude. See United States ex rel. Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933) (New York law prohibiting "assault with intent to prevent or resist the execution of any lawful process or mandate of any court or officer" did not involve moral turpitude). See also Goldeshtein v. INS, 8 F.3d 645 (9th cir. 1993), reversing Matter of Goldeshtein, Int. Dec. 3158 (BIA 1991). There the BIA had held that structuring financial transactions for the purpose of evading government reports in violation of 31 USC 5324(3) involves moral turpitude because it is inherently fraudulent and "impairs an important function of the government" by "deceit, graft, trickery, or dishonest means." The Ninth Circuit found that intent to defraud was not an essential element of the crime. The court noted that all crimes against the government cases cited by INS as involving moral turpitude involved "some false or deceitful conduct through which the alien obtained something from the government." In contrast, the restructuring offense "does not involve the use of false statements or counterfeit documents, nor does the defendant obtain anything from the government." 8 F.3d at 648. This reasoning applies even more strongly to a person who commits federal misprision of felony (failure to report a felony committed by someone else) or is an accessory after the fact under state law (harbors, conceals or aids another person). The actor does not obtain anything from the government, or necessarily make any false statements or have contact with authorities.

[102] See, e.g: Matter of I, 4 I&N 512 (1951) (attempt to escape is not a crime involving moral turpitude); United States ex. rel Manzella v. Zimmerman, 71 F.Supp. 534 (D.C. Pa. 1947) (breaking out of prison not crime involving moral turpitude).

[103] See Matter of B, 5 I&N 538 (BIA 1953) (aiding escape is not moral turpitude). Whether moral turpitude inheres in conspiracy depends upon whether the primary offense involves moral turpitude under the statute. McNaughton v. INS, 612 F.d 457 (9th Cir. 1980) (conspiracy); Matter of Short, supra (aiding and abetting).

Indeed, the BIA has held that alien smuggling is not a crime involving moral turpitude because the offense can be motivated by "love, charity, or kindness," or by religious principles. It cited examples of cases involving alien harboring and transporting as having the same character.[104] Alien harboring in furtherance of unlawful status has an intent very similar to hiding a criminal in furtherance of continued evasion of law enforcement, in terms of whether the offense contains an "inherently evil" intent. In the same way, a person may harbor a fugitive out of love for a child or spouse or a belief that the person was wrongly convicted.

If concealing or harboring a felon were held to involve moral turpitude and aiding a felon to escape were held not to, the accessory section would be a divisible statute (see § 4.10). If the record of conviction (indictment, plea, verdict, sentence) does not identify the specific subpart for which the person was convicted, the conviction should not be considered a turpitudinous offense.

The BIA followed the Ninth Circuit's ruling that the offense of causing a financial institution to fail to file currency transaction reports and structuring currency transactions to evade reporting requirements is not a moral turpitude offense. The BIA had held that this offense involved moral turpitude, but the Ninth Circuit reversed it, pointing out that this was a regulatory offense only and did not involve morally reprehensible conduct.[105] In *Matter of L-V-C-*, the BIA overruled its previous decision and agreed to apply the Ninth Circuit rule nationally.[106] The discussion of moral turpitude by the Ninth Circuit, and the BIA's acceptance of this rationale, is instructive. The Ninth Circuit, then followed by the BIA, emphasized that fraud was not an essential element of the offens. Further the offense did not involve affirmative use of false statements or false documents; nor did the noncitizen obtain anything from the government. The Ninth Circuit noted that even if the offense were held to involve guilty knowledge (knowledge that the transaction reportage was required), these elements would overcome a finding of moral turpitude. Likewise the offense of accessory after the fact does not require any overt misstatements or fraud, and the noncitizen does not obtain anything from the government.

C. Accessory After the Fact With a One Year Sentence Imposed is an Aggravated Felony as "Obstruction of Justice"

Conviction of obstruction of justice is an aggravated felony if a sentence of one year is imposed.[107] In an opinion open to challenge, the BIA held that the federal offense accessory after the fact constitutes obstruction of justice for this purpose, and so is an aggravated felony if and only if a one year

---

[104] See Matter of Tiwari, 19 I&N 875 (BIA 1989) (alien smuggling is not crime involving moral turpitude), quoting United States v. Merkt, 794 F.2d 950 (5th Cir. 1986); United States v. Elder, 601 F.Supp. 1574 (S.D. Tx. 1985).

[105] See Matter of Goldeshtein, 20 I&N 382 (BIA 1991), rev'd, Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993),

[106] Matter of L-V-C-, Int. Dec. 3382 (BIA 1999).

[107] INA § 101(a)(43)(S), 8 USC § 1101(a)(43)(S).

sentence is imposed.[108] The Board held that federal misprision of felony does not constitute obstruction of justice and therefore is not an aggravated felony even if a sentence of a year is imposed.[109]

D. Accessory After the Fact is not a "Crime of Violence" for Immigration Purposes

Conviction of a "crime of violence" as defined under 18 USC § 16 is an aggravated felony for immigration purposes if a sentence of one year is imposed.[110] The Ninth Circuit held that accessory after the fact was not to be a crime of violence as defined in 18 USC § 16, even where the principal offense was murder for hire.[111]

§ 4.12 Defense Strategy

A. In Criminal Court:

- Obtain a disposition that is not a conviction: non-guilty plea diversion, treatment as a juvenile, direct appeal, including late appeal. California accessory after the fact or federal misprision of felony might be not be held to be a crime involving moral turpitude. See § 4.11. Note, however, that with a sentence imposed of one year it will be an aggravated felony conviction. See § 9.13

- Plead to an offense that does not involve moral turpitude. See Chart and Annotations on Crimes Involving Moral Turpitude Under the California Penal Code, following Chapter 12, for suggestions.

- Plead to a "divisible" statute and do not permit the record of conviction to establish conviction under the section that involves moral turpitude. See § 4.11.

- Check the defendant's *entire* criminal record to see if this is the first conviction of a crime involving moral turpitude. If this is the first moral turpitude offense

  -- analyze when the person's last "admission" occurred. If it was within five years of the date of commission of the moral turpitude offense, the offense must not carry a potential sentence of one year. Plead to a six month misdemeanor (i.e. petty theft instead of misdemeanor grand theft) or to a non-turpitudinous offense. This will keep an admitted individual from being deportable.

---

[108] Matter of Batista-Hernandez, Int. Dec. 3321 (BIA 1997). See discussion in §§ 9.5 (Part A) and 9.13.

[109] Matter of Espinoza, Int. Dec. 3402 (BIA 1999). See discussion in § 9.13.

[110] INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F).

[111] U.S. v. Innie, 7 F.3d 840 (9th Cir. 1993).

-- if the person needs to avoid becoming inadmissible, plead to a misdemeanor and obtain a sentence or six months or less; consider whether a felony can be reduced to a misdemeanor. This will meet the requirements for the "petty offense" exception to the ground of inadmissibility. See § 4.2.

- o If this is the second moral turpitude offense, try to discover evidence or elicit testimony or a judicial statement that the offenses were a result of a single scheme of criminal misconduct. This might be of assistance in deportation proceedings See § 4.5.

- o WARNING: It is *critical* to avoid a one year sentence for a crime of violence, theft, burglary, document fraud, counterfeiting, forgery, obstruction of justice, perjury or similar crimes. A one year sentence will make these offenses an aggravated felony. See INA § 101(a)(43) and Chapter 9.

  Strategies include "stacking" consecutive sentences of less than one year; pleading to alternative offenses and taking the jail time on those; and engaging in aggressive criminal defense tactics.

- o WARNING: Money laundering, use of illegally derived funds, fraud, deceit and tax evasion are aggravated felonies if the amount involved is $10,000 or more. Obtain a finding that the amount in question was less than $10,000, or clear the record of conviction of reference to an amount. See discussion of record of conviction at § 4.11.

- o WARNING: Conviction of rape (probably including statutory rape) or sexual abuse of a minor are aggravated felonies, regardless of sentence imposed. See § 9.7.

- o WARNING: Conviction of any "crime of violence" as defined in 18 USC 16 is a basis for deportability if it was committed against a current or former spouse, co-habiter, or co-parent of a child under the domestic violence ground. "Crime of violence" in this context is different from a violent felony for purposes of a "strike," and can include any act threatening physical force to person or property. Conviction of child abuse, neglect or abandonment, and a finding of a violation of a domestic violence temporary restraining order, also are bases for deportability. See § 6.15.

In Immigration Court

- o If deportation is based on a conviction, require INS to prove the conviction with one of the documents listed at INA 240(c)(3)(B). Under no circumstances should you admit the conviction without putting the INS to its proof. The INS often does not have the record, or the conviction is not as asserted.

- o Do not concede deportability if the offense arguably does not involve moral turpitude. The INS has the burden of proving that the offense is turpitudinous, either by oral argument or by brief. If the INS briefs the issue you have the right to time to prepare a brief in reply. See Chart and Annotations following Chapter 12 in this manual, or chart

in Immigration Law and Crimes or 23 A.L.R. Fed. 480 for initial research. Pursue post-conviction relief during the briefing period.

- Do not concede alienage. Your client might be a U.S. citizen without knowing it. See Citizenship at § 11.16 and "Raising the Citizenship Defense," Chapter 9, Appendix 9B, Part Two.

- Immediately investigate whether the offense can be eliminated by any form of post-conviction relief, for example by writ based on violation of constitutional rights or by filing for a late appeal. Review Chapter 8 to see what relief might be available.

- A JRAD signed by a judge before November 29, 1990 is valid. See § 4.6.

- Some waivers are available. Investigate cancellation of removal for permanent residents and waivers under INA § 212(h) relief. See § 4.7 and Chapter 11.

- Continue to seek post-conviction relief during the pendency of any appeals.