

*Immigration Consequences
of Criminal Convictions:
Padilla v. Kentucky*

Office of Immigration Litigation

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Table of Contents

Preface

Purpose and Use of the Monograph..... i

Section 1: Overview of the Removal Process..... 1

Section 2: Consequences of Criminal Acts..... 6

A. **Criminal Grounds of Removability**..... 6

B. **Aggravated Felonies**..... 19

Section 3: Relief and Protection from Removal..... 26

A. **Discretionary Relief**..... 26

B. **Relief and Protection from Removal Based on a Fear of Persecution or Torture**..... 35

Section 4: Other Immigration Consequences of Guilty Pleas..... 40

Section 5: Brief Overview of Criminal Law-Related Amendments to the Immigration and Nationality Act..... 49

Appendices:

A. **Glossary of Terms**

B. **Immigration Law Sources and Resources**

C. **What Constitutes a Conviction for Immigration Purposes**

D. **The Method for Evaluating Immigration Consequences of Criminal Convictions**

Preface

This monograph has been prepared by the Office of Immigration Litigation (“OIL”) within the Department of Justice. The mission of OIL is to defend and preserve the Executive Branch’s authority to administer the Immigration and Nationality Act. In that capacity, OIL is responsible for handling and coordinating all federal court immigration litigation. OIL attorneys routinely litigate cases involving immigration statutes described in this monograph and are experts in interpreting and applying these statutes.

In addition to handling litigation, OIL provides resource materials and educational training to various Government components and agencies, including the United States Attorneys’ Offices, the Department of Homeland Security (“DHS”), and the Executive Office for Immigration Review (“EOIR”). As part of its resource and training function, OIL has created this monograph in response to the Supreme Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The Court’s holding in *Padilla* requires defense counsel to have a basic understanding of immigration law – an area in which they “may not be well versed” – in order to effectively advise their clients. *Id.* at 1483. The Court’s holding, however, affects not only defense attorneys, but also federal and state prosecutors and judges, as well as other interested parties. This monograph is intended to assist these parties in understanding the immigration consequences of an alien’s guilty plea in a criminal case.

OIL regularly provides immigration law training to various Government components. If you are interested in having OIL provide training for your office or organization at the state or federal level you may contact:

Thomas W. Hussey, Director
David M. McConnell, Deputy Director
Francesco Isgro, Training Coordinator
Office of Immigration Litigation
450 Fifth Street, NW
Washington, D.C. 20001
Phone: 202-616-4877
francesco.isgro@usdoj.gov

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Purpose and Use of the Monograph

I. Purpose of the Monograph

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that the Sixth Amendment requires defense counsel to advise a noncitizen client of the risk of deportation arising from a guilty plea. Defense counsel's failure to so advise, or defense counsel's misadvice regarding the immigration consequences of the plea, may constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court held specifically that when the risk of removal resulting from a guilty plea is "clear," counsel must advise his or her client that "deportation [is] presumptively mandatory"; on the other hand, when that risk is less clear, counsel need only advise the defendant "that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S. Ct. at 1483. The Court acknowledged that a "[l]ack of clarity in the law . . . will affect the scope and nature of counsel's advice." *Id.* at 1483 n.10.

Applying these rules to Padilla's claim, the Court concluded that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, 130 S. Ct. at 1478. It observed that Padilla's "is not a hard case in which to find deficiency," because the consequences of the plea "could easily be determined from reading the removal statute," which is "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction," and counsel's advice was incorrect. *Id.* at 1483.

In light of *Padilla*, it is even more important than ever for prosecutors, defense counsel, judges, and other interested parties at the federal and local levels to have a basic understanding of the immigration consequences that flow from an alien's guilty plea. This is true for at least three reasons. First, going forward, knowledge of immigration consequences will ensure that defendants enter knowing and intelligent pleas that will not be subject to challenge under *Padilla*. Second, a basic understanding of immigration law will assist those litigating and evaluating challenges to already-entered plea agreements based on the alleged failure to advise of the immigration consequences. Third, as the Supreme Court noted in *Padilla*, "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process." 130 S. Ct. at 1486. "By bringing deportation consequences into this process," the parties may not only preserve the finality of pleas, but may also negotiate better agreements on behalf of the State and the noncitizen defendant. *Id.*

Accordingly, the Office of Immigration Litigation ("OIL") has prepared this monograph to provide a basic overview of the immigration consequences of a guilty plea. We emphasize that this monograph does not attempt to provide an interpretation of the scope and applicability of *Padilla*. Nor does it provide in-depth analyses of issues that arise under the Immigration and Nationality Act ("INA") and its implementing regulations, or a summary of immigration case law. Indeed, administrative and judicial precedents on immigration matters are far from uniform, and determining

what precedent to apply might be difficult because the removal proceeding may not be completed in the same jurisdiction as the criminal proceeding. For these reasons, and because the Supreme Court's decision requires defense attorneys to advise aliens of the potential risks of immigration consequences from the "terms of the relevant immigration statute," *Padilla*, 130 S. Ct. at 1483, we have focused our efforts on presenting a brief, cogent, and clear introduction that summarizes and cites the relevant statutory provisions bearing on those consequences.

II. How to Use the Monograph

This monograph is organized in a way that makes it easy for the reader to use both as an introduction to immigration consequences of criminal convictions, and as a resource for future reference when specific issues arise. The opening section provides an overview of the removal process and an introduction to relevant immigration terminology. This section covers basic concepts, including how the Government places an alien in removal proceedings, what occurs during such proceedings, and what happens after a final order of removal is issued against the alien. If the reader is unfamiliar with this process, we recommend that he or she briefly review the opening section.

For the reader who is preparing for a plea colloquy or a settlement negotiation, or who for some other reason needs to evaluate the potential consequences of a particular crime, he or she should consult Sections 2 and 3. These sections provide a framework for evaluating immigration consequences, beginning with the most direct and immediate consequences.

Section 2 addresses when a conviction may trigger removal proceedings by summarizing the criminal grounds of deportability and inadmissibility set forth in the INA. This includes the INA's classification of an "aggravated felony," which constitutes a ground of deportability. Commencement of immigration proceedings against an alien may be the most immediate and significant consequence of a guilty plea. A federal or state conviction may trigger removal proceedings rendering an alien defendant ineligible either (a) to remain in the United States, (b) to be admitted into the United States, if he or she travels abroad, or (c) both. Therefore, the reader should begin his or her analysis of immigration consequences here.

An alien found removable based on a crime may still be able to avoid removal through an immigration agency adjudicator's favorable grant of various forms of discretionary relief and protection from removal. A conviction, however, may also render aliens ineligible for these forms of relief and protection. Accordingly, it is important for the reader to be aware of these immigration consequences. Section 3 of the monograph provides an overview of the various forms of immigration "relief" and "protection" from removal in the INA (*e.g.*, asylum, cancellation of removal, adjustment of status), and sets forth the crimes that render an alien ineligible for such relief and protection.

The plea consequence of ineligibility for relief or protection is particularly important for aliens who are not currently in lawful immigration status. These aliens are already removable from

the United States for having entered the country illegally or for violating the terms of their visa or on some other basis. The overview of relief and protection in Section 3 summarizes which classes of aliens (lawful permanent residents, illegal aliens, etc.) are eligible for the various forms of relief and protection.

In addition to triggering removability and ineligibility for relief, a plea may also have other immigration consequences which are more attenuated. Section 4 describes these consequences, which include restrictions on judicial review and readmission to the United States, ineligibility for naturalization, mandatory detention, exposure to summary removal, and enhanced sentences for criminal reentry. While it is unclear whether *Padilla* requires defense counsel to advise an alien of these consequences, we include them so that the reader is aware of such consequences.

The reader who is determining the immigration consequences of a plea entered prior to the *Padilla* decision should consult Section 5. This section provides an overview of the significant amendments to the INA over the last few decades, including the creation and subsequent expansion of the aggravated felony ground of removability and the enactment of criminal bars to eligibility for immigration relief and protection. If courts conclude that *Padilla*'s holding applies retroactively to enable aliens to challenge pre-*Padilla* pleas, the adequacy of defense counsel's advice will be determined in large part by an analysis of the law existing at the time of the plea. This section offers a broad narrative of how that law has changed as it relates to the immigration consequences of a guilty plea. We note that this section is not an exhaustive summary for every change in the INA over the last few decades. The reader should also research the case law and legislative history.

Lastly, at the end of the monograph are detailed appendices that will provide the reader with helpful tools for understanding immigration consequences and, more broadly, immigration law. Appendix A contains a list of definitions of immigration terms that are used in the monograph. Appendix B provides a detailed list of further resources for the reader, including primary sources, secondary sources, internet resources, and other basic research tools. Appendix C contains the definition and examples of what constitutes a conviction for immigration purposes. Appendix D provides a quick reference guide to the method that is generally used for evaluating immigration consequences of criminal convictions.

In sum, it is our hope that the monograph will serve as a useful tool for those who need to quickly review the potential immigration consequences of a guilty plea.

Section 1: *Overview of the Removal Process*

- I. Introduction**
 - II. Removal Proceedings with a Hearing Before an Immigration Judge**
 - A. Commencement**
 - B. The Alien’s Rights**
 - C. Resolving Removability Issues**
 - 1. Burdens of Proof**
 - 2. Procedure**
 - D. Relief and Protection from Removal**
 - E. Administrative Finality of a Removal Order**
 - F. Enforcement of a Removal Order**
 - G. Judicial Review**
 - III. Removal Without a Hearing Before an Immigration Judge**
 - A. Administrative Removal**
 - B. Expedited Removal**
 - C. Visa Waiver Program**
 - D. Reinstatement of Removal**
 - E. Judicial Removal**
-

I. Introduction.

The procedures for determining whether an alien is to be removed from the United States are set forth in the Immigration and Nationality Act (“INA”) and corresponding regulations. This section provides a brief overview of those procedures.

The procedure used in a given case depends on the alien’s circumstances. Some classes of aliens are not entitled to a hearing before an immigration judge and may be ordered removed by an immigration enforcement officer. Most aliens, however, are entitled to an on-the-record proceeding before an immigration judge, who is authorized to grant applications for relief and protection from removal (which are described in Section 3). All immigration proceedings include the following features: the proceeding is commenced by or with the consent of a relevant component of the United States Department of Homeland Security (“DHS”) – either Immigration and Customs Enforcement (“ICE”), Customs and Border Protection (“CBP”), or Citizenship and Immigration Services (“CIS”); the alien is provided written notice of the grounds upon which the alien’s removal is sought, an opportunity to address whether the charged grounds apply, and an opportunity to be considered for protection from persecution and/or torture; and, when a removal order is enforced, the alien is provided written notice of the consequences of illegally returning to the United States.

II. Removal Proceedings with a Hearing Before an Immigration Judge.

At issue in a removal hearing is the alien's right to remain in the United States.¹ A removal hearing has two phases – determining whether the alien is removable (inadmissible or deportable) from the United States, and if so, determining whether the alien will be granted relief or protection from removal. The hearing resembles a trial in many respects but is not a purely adversarial process. Among other things, the immigration judge, a Department of Justice employee, is required to consider whether a removable alien may be eligible for any form of relief or protection, and to advise an alien when it appears he or she may be eligible. As described below, the allocation of the burdens of proof will depend on the alien's personal circumstances, and the stage of the proceeding. The proceedings are not governed by the Federal Rules of Evidence.

- A. Commencement.** A removal proceeding commences when DHS files a charge that an alien is deportable or inadmissible with the immigration court. At or before that time, the alien is also served with the charging document. The charging document is referred to as a Notice to Appear (“NTA”) or, in hearings commenced before April 1997, as an Order to Show Cause (“OSC”). The document refers to the statutory provision(s) upon which removal is sought, and alleges the facts believed to underlie the charge(s).

An alien is charged as “deportable” under statutory provisions in 8 U.S.C. § 1227(a) when the alien is present in the United States pursuant to a prior admission. “Admission” means lawful entry into the United States pursuant to authorization by an immigration officer, following inspection. 8 U.S.C. § 1101(a)(13)(A). An alien is charged as “inadmissible” under the statutory provisions in 8 U.S.C. § 1182(a) when the alien is not present in the United States pursuant to a prior admission (including when an alien is stopped at a port of entry, and when the alien is apprehended in the interior of the United States). DHS in its prosecutorial discretion may prioritize enforcement of the immigration laws. The more common criminal grounds of deportability and inadmissibility are summarized in Section 2.

¹ Before the enactment of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), there were two distinct types of proceedings used to determine whether an alien would be permitted to remain in the United States. An alien who had effected an “entry” into the United States was placed into a “deportation proceeding” and charged with being deportable; an alien who had not effected an “entry” was placed into an “exclusion proceeding” and charged with being excludable. IIRIRA consolidated deportation proceedings and exclusion proceedings into a single “removal proceeding.” IIRIRA also replaced the concept of “entry” with “admission,” and substituted the term “inadmissible” for “excludable.”

B. The Alien's Rights. An alien in civil immigration proceedings is not afforded the same rights as a defendant in a criminal trial. The alien has a right to representation at no expense to the Government, to an interpreter if necessary, to contact an attorney or legal representative, and to communicate with a consular official from his or her home country. *See* 8 U.S.C. § 1229a(b)(4); 8 C.F.R. §§ 1236.1(e) and 1240.3-1240.10. The alien is also provided a list of free or low-cost legal service providers. 8 U.S.C. § 1229(b)(2). The alien is entitled to a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government. 8 U.S.C. § 1229a(b)(4)(B).

C. Resolving Removability Issues.

1. Burdens of Proof.

- If an alien is an applicant for admission, he or she has the burden of establishing that he or she is “clearly and beyond a doubt” entitled to be admitted and is not inadmissible. 8 U.S.C. § 1229a(c)(2)(A).
- If the alien is *not* an applicant for admission, he or she has the burden to demonstrate by “clear and convincing evidence” that he or she is present pursuant to a prior admission. 8 U.S.C. § 1229a(c)(2)(B). DHS then has the burden to establish that the alien is deportable as charged by “clear and convincing evidence.” 8 U.S.C. § 1229a(c)(3).

2. Procedure.

- The immigration judge reads the charges of deportability or inadmissibility to the alien, obtains confirmation that the alien understands the charges, and then requires the alien to admit or deny the charges.
- When removability depends on a conviction, DHS may prove the charges by using documents from the criminal prosecution, such as the judgment and charging instrument or other evidence. What documents and evidence may be considered, and how they may be used, is an important and commonly-litigated issue. *See* Appendix D (The Method for Evaluating Immigration Consequences of Criminal Convictions).

D. Relief and Protection from Removal. If the immigration judge concludes that the alien is removable as charged, the immigration judge must then consider whether the alien may be eligible for any relief or protection from removal. The alien bears the

burden not only of establishing eligibility, but also, where applicable, of persuading the immigration judge to exercise discretion in favor of the alien. 8 U.S.C. § 1229a(c)(4)(A). Frequently requested forms of relief from removal, and related protections from persecution and torture, are described in Section 3.

- E. Administrative Finality of a Removal Order.** Both an alien and DHS may appeal the decision of an immigration judge to the Board of Immigration Appeals (“Board”), an administrative appellate authority located in Falls Church, Virginia. Under the Board’s case management system, cases involving aliens detained in ICE custody are given priority. In general, a removal order becomes administratively final upon: (a) waiver of the right to appeal; (b) expiration of the time for filing an appeal, without an appeal having been filed; or (c) a decision from the Board affirming the order of removability. *See* 8 U.S.C. § 1101(a)(47)(B).
- F. Enforcement of a Removal Order.** The final step in the removal process is the enforcement of the removal order. Except in cases where the alien leaves the United States, the alien is required to surrender for removal, and is transported to the designated country of removal at the cost of the Government. At the time of removal, the alien is also provided a written notice of the consequences of illegally re-entering the United States. There are a number of bars to readmission, as well as other consequences, that attach once an alien has been deported or leaves the country under an order of removal. Those consequences are discussed in Section 4.
- G. Judicial Review.** An alien may also petition a federal appeals court to review a Board decision within 30 days of that decision. 8 U.S.C. § 1252(a)(1) & (b)(1). The venue for filing a petition for review lies with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. 8 U.S.C. § 1252(b)(2). Because of statutory limits on judicial review, an alien ordered removed because of certain criminal conduct may be able to receive judicial review only of the determination that the alien is deportable or inadmissible and of certain constitutional and legal claims. An alien may request a stay of removal, but if the court does not grant the stay, DHS may enforce the removal order while the case is pending and the alien must litigate the petition for review from abroad. If the court concludes that the Board decision is erroneous after the removal order is enforced, the alien will be permitted to return to the United States to obtain any remedy required by the court.

III. Removal Without a Hearing Before an Immigration Judge.

The following classes of aliens are among those who are not entitled to a full removal hearing before an immigration judge:

- A. **Administrative Removal.** An alien who has not been lawfully admitted for permanent residence to the United States or has permanent resident status on a conditional basis, and has been convicted of an aggravated felony can be removed by an administrative order issued by a designated DHS official. 8 U.S.C. § 1228(b).
- B. **Expedited Removal.** An arriving or recently-arrived alien (*i.e.*, an alien who has been in the United States less than two weeks and is encountered within 100 miles of the border) who has not been admitted to the United States and who lacks a valid immigration document or who is inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(C) (fraud or willful misrepresentation) can be removed by a designated DHS official. 8 U.S.C. § 1225(b); *see also* “Designating Aliens For Expedited Removal,” 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004).
- C. **Visa Waiver Program.** Since 1986, aliens from specified countries have been allowed to come to the United States for short periods of time without first obtaining a tourist visa, provided that the alien waives any right to contest removal from the United States, except for asylum. If an alien permitted entry through the visa waiver program fails to depart, the alien may be removed by an administrative order issued by a designated DHS official. 8 U.S.C. § 1187(a)-(b).
- D. **Reinstatement of Removal.** An alien who has illegally re-entered the United States after removal is not entitled to a hearing before an immigration judge. Instead, DHS can reinstate the previous removal order, and enforce it. 8 U.S.C. § 1231(a)(5).
- E. **Judicial Removal.** At the request of the United States Attorney, and with the concurrence of DHS, a federal district court may enter an order of removal at the time of sentencing. 8 U.S.C. § 1228(c).

Section 2: *Consequences of Criminal Acts*

Part A: Criminal Grounds of Removability

- I. Introduction**
- II. Conviction-Related Removal Grounds**
 - A. Crimes That Trigger Deportability**
 - 1. Controlled Substance Offenses**
 - 2. Crimes Involving Moral Turpitude**
 - 3. Multiple Moral Turpitude Convictions**
 - 4. Aggravated Felonies**
 - 5. Firearm and Destructive Device Convictions**
 - 6. Espionage, Sabotage, Treason, and Other Crimes**
 - 7. Crimes of Domestic Violence, Stalking, Child Abuse, Child Abandonment, or Neglect**
 - 8. Failure to Register as a Sex Offender**
 - 9. Violating a Protective Order**
 - 10. High Speed Flight From an Immigration Checkpoint**
 - 11. Failure to Register or Falsification of Documents**
 - B. Crimes That Trigger Inadmissibility**
 - 1. Crimes Involving Moral Turpitude**
 - 2. Controlled Substance Offenses**
 - 3. Multiple Criminal Convictions**
- III. Conduct-Related Removal Grounds (No Conviction Required)**
 - A. Crimes Involving Moral Turpitude**
 - B. Controlled Substance Offenses**
 - C. Prostitution**
 - D. Fraud or Misrepresentation**
 - E. False Claim to United States Citizenship**
 - F. Alien Smuggling**
 - G. Marriage Fraud**
 - H. Human Trafficking**
 - I. Money Laundering**
 - J. Espionage, Sabotage, and Treason**
 - K. Terrorism**
 - L. Alien With a Physical or Mental Disorder Who Poses Danger to Self or Others**
 - M. Unlawful Voters**
 - N. Polygamy**
 - O. International Child Abduction**

I. Introduction.

In the Immigration and Nationality Act (“INA”), Congress has provided grounds for an alien’s removal based on various immigration violations, only some of which are related to criminal activity. An alien, therefore, may be removable from the United States for reasons separate and apart from having committed certain crimes. Even so, a removal action against an alien may be the most immediate and significant consequence of a guilty plea. Thus, in evaluating the immigration consequences of a plea, it is critical to determine whether the crime may make the defendant alien removable. This section sets forth the more common criminal grounds of removal.

An alien’s removability for a crime depends on whether his or her state or federal conviction fits within one or more classes of removable offenses identified in the INA. The INA separates removal grounds into two categories: inadmissibility grounds codified at 8 U.S.C. § 1182(a) and deportability grounds codified at 8 U.S.C. § 1227(a). Both inadmissible and deportable aliens are referred to as “removable” aliens. The question of which category applies turns on whether the alien has been admitted to the United States, *i.e.*, whether the alien has made a lawful entry after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A). An alien who has not been admitted to the United States is subject to removal based on one or more grounds of inadmissibility. In contrast, an alien who has been admitted to the United States, and thereafter commits a crime, may be subject to removal based on one or more grounds of deportability.

An alien’s removability based on a plea may also depend upon whether such a plea would result in a “conviction,” as that term is defined in the INA. Deferred adjudications, for example, are generally considered “convictions” for immigration purposes. *See* Appendix C (What Constitutes A Conviction For Immigration Purposes). Also, any reference to a term of imprisonment or a sentence in the INA includes the period of incarceration or confinement ordered by a court, as well as any suspension of the imposition or execution of that term of imprisonment or sentence.

The INA also includes grounds of removal based on an alien’s criminal conduct alone, regardless of whether there is a conviction. These grounds are generally based on: (1) an alien’s admission that he or she committed a crime; or (2) a finding by immigration authorities that there is reason to believe that an alien has engaged in criminal activity. Most of these grounds are set forth as grounds of inadmissibility. While the reader should be most familiar with the conviction-based grounds of removal, it is also important to be aware of the “non-conviction” grounds because:

- they often overlap or are similar to grounds that do require convictions, thus making the issue potentially relevant in evaluating prejudice under a *Strickland* analysis.
- an alien’s guilty plea may not provide a ground of removal based on the conviction but may do so based on the admitted conduct.

II. Conviction-Related Removal Grounds.

A. Crimes That Trigger Deportability.

The criminal grounds of deportability are found at 8 U.S.C. § 1227(a)(2).

1. ***Controlled Substance Offenses.*** The INA provides that any alien who at any time after admission is convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation (foreign or domestic (federal or state)) relating to a controlled substance (as defined in schedules in 21 U.S.C. § 802) is deportable.² 8 U.S.C. § 1227(a)(2)(B)(i). The only exception is for “a single offense” of possession of 30 grams or less of marijuana for one’s own use. A conviction for a drug paraphernalia offense may also “relate to” a controlled substance violation under this provision.
2. ***Crimes Involving Moral Turpitude.*** Any alien convicted of a crime involving moral turpitude (“CIMT”) is deportable, when the potential term of imprisonment is one year or longer, and the offense was committed within five years of the alien’s admission to the United States, or within ten years of admission if the alien was granted lawful permanent resident status due to the alien’s substantial contribution and assistance in a criminal investigation or prosecution. 8 U.S.C. § 1227(a)(2)(A)(i); *see also* 8 U.S.C. § 1255(j). The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi).
 - “Moral turpitude” is not defined in the INA. The Board and various courts have recognized that moral turpitude generally refers to conduct that is inherently dishonest, base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.
 - Offenses that may be morally turpitudinous include: murder, voluntary manslaughter, kidnaping, mayhem, rape, fraud, spousal abuse, child abuse, incest, assault with intent to commit another specific intent offense, aggravated assaults, assaults on vulnerable classes (*e.g.*, children, the elderly, or the mentally disabled), communication with a minor for immoral purposes, lewd and lascivious conduct toward a child, knowing possession of child pornography, driving under the influence without a license, theft

² The full list of controlled substances in 21 U.S.C. § 802 is provided at <http://www.deadiversion.usdoj.gov/schedules/index.html>.

offenses, robbery, receiving stolen goods with guilty knowledge, forgery, embezzlement, extortion, perjury, and willful tax evasion. Offenses that may fall outside the definition include: simple assault, unlawful entry, damaging private property, escape, possession of an altered or fraudulent document, and indecent exposure.

3. ***Multiple Moral Turpitude Convictions.*** Any alien who at any time after admission is convicted of two or more CIMTs is deportable if the offenses do not arise out of a single scheme of criminal misconduct. 8 U.S.C. § 1227(a)(2)(A)(ii). This ground of deportability does not require the imposition of a sentence of confinement. The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi).
4. ***Aggravated Felonies.*** Any alien who is convicted of an aggravated felony at any time after admission is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi). This category of deportable offenses includes numerous crimes and is covered specifically in part B of this section.
5. ***Firearm and Destructive Device Convictions.*** Any alien who at any time after admission is convicted of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying (or of attempting or conspiring to do any of the foregoing) any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 U.S.C. § 921) in violation of any law is deportable. 8 U.S.C. § 1227(a)(2)(C).
6. ***Espionage, Sabotage, Treason, and Other Crimes.*** Any alien who at any time has been convicted of committing, or conspiring or attempting to commit espionage, sabotage, treason, and sedition for which a term of imprisonment of five or more years may be imposed, or convicted of any offense under 18 U.S.C. § 871 (threats against the President or his or her successors) or 18 U.S.C. § 960 (expedition against friendly nation), or a violation of the Military Selective Service Act or the Trading With The Enemy Act, or a violation of 8 U.S.C. § 1185 (travel control of citizens and aliens entering or departing the United States) or 8 U.S.C. § 1328 (importation of an alien for prostitution or other immoral purposes), is deportable. 8 U.S.C. § 1227(a)(2)(D).
7. ***Crimes of Domestic Violence, Stalking, Child Abuse, Child Abandonment, or Neglect.*** Any alien who at any time after admission is convicted of any one of the following crimes is deportable: domestic violence, stalking, child abuse, child neglect, or child abandonment. 8 U.S.C. § 1227(a)(2)(E)(i).

8. ***Failure To Register as a Sex Offender.*** Any alien who is convicted of knowingly failing to register or update a registration as required by the Sex Offender Registration and Notification Act, in violation of 18 U.S.C. § 2250, is deportable. 8 U.S.C. § 1227(a)(2)(A)(v).
9. ***Violating a Protective Order.*** Any alien who at any time after admission is enjoined under a protective order issued by a court and whom the court determines has engaged in conduct that violates a portion of the protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protective order was issued, is deportable. 8 U.S.C. § 1227(a)(2)(E)(ii).
10. ***High Speed Flight From an Immigration Checkpoint.*** Any alien who is convicted of violating 18 U.S.C. § 758 (relating to high speed flight from an immigration checkpoint) is deportable. 8 U.S.C. § 1227(a)(2)(A)(iv). The President of the United States or a Governor of any State may grant a full and unconditional pardon to waive this ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(vi).
11. ***Failure to Register or Falsification of Documents.*** Any alien who is convicted under 8 U.S.C. § 1306(c) (relating to filing a registration application with information known to be false or procuring, or attempting to procure, registration through fraud) or section 36(c) of the Alien Registration Act, 1940 (same), or of a violation of, or attempt or conspiracy to violate the Foreign Agents Registration Act of 1938 (22 U.S.C. §§ 611 et seq.) (requiring persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities) or 18 U.S.C. § 1546 (relating to fraud and misuse of visas, permits, and other admission documents), is deportable. 8 U.S.C. § 1227(a)(3)(B).

B. Crimes That Trigger Inadmissibility.

The criminal grounds of inadmissibility are found at 8 U.S.C. § 1182(a)(2).

1. ***Crimes Involving Moral Turpitude.*** An alien is inadmissible if he or she has been convicted of a CIMT, or attempts or conspires to commit such a crime. 8 U.S.C. § 1182(a)(2)(A)(i)(I). There are two exceptions to this ground of inadmissibility. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) & (ii)(II). First, this ground of inadmissibility does not apply to an alien who committed a CIMT when he or she was under 18 years of age, and the crime was committed more than 5 years before the alien's application for a visa or other entry document and

the date of his or her application for admission to the United States. Second, the ground does not apply to offenses for which the maximum possible term of imprisonment was one year or less and the alien was not sentenced to more than six months in prison. Also, a limited waiver for this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

2. ***Controlled Substance Offenses.*** An alien convicted of a violation of (or conspiracy or attempt to violate) any controlled substance law or regulation (foreign or domestic (federal or state)) is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II). A limited waiver for this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, for “a single offense of simple possession of 30 grams or less of marijuana.” 8 U.S.C. § 1182(h) (discussed in detail in Section 3). “Controlled substance” is defined at 21 U.S.C. § 802. A conviction for a drug paraphernalia offense may also fall within the “relating to” language in the controlled substance provision.
3. ***Multiple Criminal Convictions.*** An alien convicted of two or more offenses for which the aggregate sentences of confinement were 5 years or more is inadmissible. 8 U.S.C. § 1182(a)(2)(B). A limited waiver for this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

III. Conduct-Related Removal Grounds (No Conviction Required).

As discussed above, there are certain grounds of removal (mostly set forth in the grounds of inadmissibility) that are based on criminal conduct, but do not require a conviction. An alien who engages in such conduct may, in DHS’ discretion, be placed in removal proceedings even if not prosecuted criminally. These grounds are summarized below.

- A. ***Crimes Involving Moral Turpitude.*** An alien who admits having committed a CIMT (or attempting or conspiring to commit a CIMT), or who admits having committed the essential elements of a CIMT (or of attempting or conspiring to commit the essential elements of a CIMT), is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I). There are two exceptions – the juvenile and petty offense exceptions – which are described above. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) & (ii)(II). Also, a limited waiver of this ground of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

B. *Controlled Substance Offenses.*

- An alien who admits having committed a controlled substance offense (or attempting or conspiring to commit such offense), or who admits having committed the essential elements of a controlled substance offense (or of attempting or conspiring to commit the essential elements of such offense), is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II). A limited discretionary waiver of this ground of inadmissibility is available for “a single offense of simple possession of 30 grams or less of marijuana.” 8 U.S.C. § 1182(h) (discussed in detail in Section 3).
- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in 21 U.S.C. § 802), is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of any controlled or listed substance or chemical, or endeavored to do so, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- Any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien who is an illicit trafficker of a controlled or listed substance or chemical (including an alien who is an aider, abettor, assister, conspirator, or colluder with others in such illicit trafficking), and the spouse, son, or daughter has obtained, within the previous five years, any financial or other benefit from the illicit trafficking activity, and the spouse, son, or daughter knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(ii).
- Any alien who is determined by the immigration authorities to be a drug abuser or addict is subject to removal under either a ground of inadmissibility or deportability. 8 U.S.C. §§ 1182(a)(1)(A)(iv) and 1227(a)(2)(B)(ii) (drug abuser or addict after admission into the United States).

C. *Prostitution.*

- Any alien who is coming to the United States solely, principally, or incidentally to engage in prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(i).

- Any alien who has engaged in prostitution within ten years of the date of an application for a visa, admission, or adjustment of status, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(i).
- Any alien who directly or indirectly procures, or attempts to procure, or (within ten years of the date of an application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(ii).
- Any alien who receives or received within ten years of the date of an application for a visa, admission, or adjustment of status, in whole or part, the proceeds of prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(ii).
- Any alien who is coming to the United States to engage in any unlawful commercialized vice, whether or not related to prostitution, is inadmissible. 8 U.S.C. § 1182(a)(2)(D)(iii).
- A limited waiver for these grounds of inadmissibility may be granted by the Attorney General, in his or her discretion, in certain circumstances. 8 U.S.C. § 1182(h) (discussed in detail in Section 3).

D. *Fraud or Misrepresentation.*

- Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or sought to procure or has procured) a visa, other documentation, or admission into the United States or other immigration benefit, is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(i). A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General in the case of an alien who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence upon the requisite showing of hardship. 8 U.S.C. § 1182(i).
- Under 8 U.S.C. § 1324c it is a crime for any person to knowingly engage in various aspects of document fraud for the purpose of satisfying a requirement or obtaining a benefit under the INA. Any alien who is the subject of a final order for a violation of 8 U.S.C. § 1324c is inadmissible and deportable. 8 U.S.C. §§ 1182(a)(6)(F)(i) and 1227(a)(3)(C)(i). The Attorney General may waive this ground of inadmissibility and deportability in the case of an alien lawfully admitted for permanent residence if no civil monetary penalty was imposed for violating section 1324c, and the offense was incurred solely to assist, aid, or support the alien's spouse or child. 8 U.S.C. §§ 1182(a)(6)(F)(ii) and 1227(a)(3)(C)(ii).

E. *False Claim to United States Citizenship.* Any alien who falsely represents or has falsely represented himself or herself to be a citizen of the United States for any purpose or immigration benefit or any federal or state law is inadmissible and deportable. 8 U.S.C. §§ 1182(a)(6)(C)(ii)(I) and 1227(a)(3)(D)(i). Representations of citizenship made by an alien who reasonably believed that he or she was a citizen at the time of the representations are excluded from this ground of inadmissibility and deportability, so long as the alien's natural parents are or were citizens and the alien permanently resided in the United States prior to the age of sixteen. 8 U.S.C. §§ 1182(a)(6)(C)(ii)(II) and 1227(a)(3)(D)(ii).

F. *Alien Smuggling.*

- Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. 8 U.S.C. § 1182(a)(6)(E)(i).
- Any alien who (prior to the date of entry, at the time of entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable. 8 U.S.C. § 1227(a)(1)(E)(i).
- There is a limited exception for this ground of inadmissibility and deportability on the basis of family reunification, 8 U.S.C. §§ 1182(a)(6)(E)(ii) and 1227(a)(1)(E)(ii), and there is a limited waiver at the discretion of the immigration authorities to assure family unity or when it is in the public interest, 8 U.S.C. §§ 1182(a)(6)(E)(iii) and 1227(a)(1)(E)(iii). *But see* 8 U.S.C. §§ 1227(a)(2)(D)(iv) and 1185(a)(2) (an alien convicted of unlawfully transporting or attempting to transport another person from or into the United States is deportable and no waiver or exception is available).

G. *Marriage Fraud.*

- An alien is deportable for having procured a visa or other documentation by fraud (within the meaning of 8 U.S.C. § 1182(a)(6)(C)(i) (fraud or willful misrepresentation of a material fact to procure a benefit)) and for being in the United States in violation of 8 U.S.C. § 1227(a)(1)(B) (alien present in violation of law) if:
 - The alien is admitted into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such admission and the marriage is judicially annulled or terminated within two years after any admission to the United States. There is an exception for aliens who establish

to the satisfaction of the Attorney General that the marriage was not contracted for the purpose of evading immigration laws. 8 U.S.C. § 1227(a)(1)(G)(i).

- The alien, as it appears to the satisfaction of the Attorney General, failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant. 8 U.S.C. § 1227(a)(1)(G)(ii).
- A limited waiver exists for aliens who were "inadmissible at the time of admission" based on fraud or misrepresentation, including marriage fraud as described above. 8 U.S.C. § 1227(a)(1)(H).
 - The waiver is available at the Attorney General's discretion to any alien (other than an alien who participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing) who: (1) is the spouse, parent, son, or daughter of a United States citizen or lawful permanent resident and (2) was in possession of an immigrant visa or equivalent document and was otherwise admissible except for those grounds at 8 U.S.C. § 1182(a)(5)(A) (labor certification) & (a)(7)(A) (documentation requirements) which were a direct result of that fraud or misrepresentation. 8 U.S.C. § 1227(a)(1)(H)(i).
 - The waiver is also available at the Attorney General's discretion to an alien who is a Violence Against Women Act ("VAWA") self-petitioner. 8 U.S.C. § 1227(a)(1)(H)(ii).

H. *Human Trafficking.*

- Any alien who commits or conspires to commit human trafficking offenses in or outside of the United States, or who the immigration authorities know or have reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with a human trafficker in severe forms of human trafficking, is inadmissible. 8 U.S.C. § 1182(a)(2)(H)(i).
- Any alien that the immigration authorities know or have reason to believe is the spouse, son, or daughter of an alien inadmissible under 8 U.S.C. § 1182(a)(2)(H)(i) is inadmissible, if, within the previous five years, the spouse, son, or daughter benefitted financially or in some other way from the illicit activity of his or her family member, and knew or reasonably should have know that the benefit was the product of illicit activity. 8 U.S.C.

§ 1182(a)(2)(H)(ii). This ground does not apply to a son or daughter who was “a child” at the time of receiving the benefit. 8 U.S.C. § 1182(a)(2)(H)(iii).

- In addition, any alien who is described as inadmissible under section 1182(a)(2)(H) is deportable. 8 U.S.C. § 1227(a)(2)(F).

I. *Money Laundering.* Any alien who the immigration authorities know or have reason to believe has engaged, is engaging in, or seeks to enter the United States to engage in, an offense relating to money laundering is inadmissible. 8 U.S.C. § 1182(a)(2)(I)(i). Similarly, any alien who the immigration authorities know is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in a money laundering offense, is inadmissible. 8 U.S.C. § 1182(a)(2)(I)(ii).

J. *Espionage, Sabotage, and Treason.*

- Generally, any alien who seeks to enter the United States to engage in espionage, sabotage, or treason, or who has been convicted of such misconduct after admission is inadmissible or deportable.
- Any alien who the immigration authorities know or have reasonable ground(s) to believe, is seeking to enter the United States to engage solely, principally, or incidentally in espionage, sabotage, violating or evading any law relating to the export control of goods, technology, or sensitive information, or any activity a purpose of which is the opposition to, or the control or overthrow of, the United States Government by force, violence, or other unlawful means, is inadmissible. 8 U.S.C. § 1182(a)(3)(A).
- Any alien who has engaged, is engaged, or at any time after admission engages in the foregoing activities or any other criminal activity which endangers public safety or national security, is deportable. 8 U.S.C. § 1227(a)(4)(A); *see also* 8 U.S.C. § 1227(a)(2)(D)(i), (ii) & (iii) (conviction-based ground of deportability discussed above).

K. *Terrorism.*

- Any alien who has engaged in terrorist activity, incited terrorist activity, is a representative of a terrorist organization or a group that endorses or espouses terrorist activity, is a member of a terrorist organization, endorses or espouses or persuades others to engage in terrorist activity or support a terrorist organization, or who the immigration authorities know or reasonably believe is engaged in or is likely to engage after entry in any terrorist activity, is inadmissible. 8 U.S.C. § 1182(a)(3)(B).

- A spouse or child of an alien inadmissible under this section is also inadmissible if the activity occurred within the last 5 years. There is a limited exception for a spouse or child who did not know or should not reasonably have known of the terrorist activities or who has renounced the terrorist activities to the satisfaction of the consular official or the Attorney General. 8 U.S.C. § 1182(a)(3)(B)(ii).
- Any alien who the Secretary of State or the Attorney General determines has been associated with a terrorist organization and intends while in the United States to engage in activities that could endanger the welfare, safety, or security of the United States, is inadmissible. 8 U.S.C. § 1182(a)(3)(F).
- In addition, any alien who is described in 8 U.S.C. § 1182(a)(3)(B) & (F) is deportable. 8 U.S.C. § 1227(a)(4)(B).

L. *Alien With a Physical or Mental Disorder Who Poses Danger to Self or Others.*

- Any alien who is determined to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed a threat to the alien or others, is inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iii)(I). A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General. 8 U.S.C. § 1182(g)(3).
- Any alien who is determined to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the alien or others and which behavior is likely to recur or to lead to other harmful behavior, is inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iii)(II). A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General. 8 U.S.C. § 1182(g)(3).

M. *Unlawful Voters.* Any alien who voted in a federal, state, or local election in violation of any federal, state, or local constitutional provision, statute, ordinance, or regulation may be removable on either a ground of inadmissibility or deportability. 8 U.S.C. §§ 1182(a)(10)(D)(i) and 1227(a)(6)(A). Aliens who violate a lawful restriction of voting to citizens are neither inadmissible nor deportable if the alien reasonably believed that he or she was a citizen at the time of the unlawful voting, so long as the alien's natural parents are or were citizens and the alien permanently resided in the United States prior to the age of sixteen. 8 U.S.C. §§ 1182(a)(10)(D)(ii) and 1227(a)(6)(B).

N. *Polygamy.* Any alien coming to the United States to practice polygamy is inadmissible. 8 U.S.C. § 1182(a)(10)(A).

- O. *International Child Abduction.*** Any alien who, in violation of a court's custody order relating to a United States citizen child, detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by the court is inadmissible until the child is surrendered to the person granted custody. 8 U.S.C. § 1182(a)(10)(C)(i). Additionally, anyone known to have intentionally assisted or to have provided material support or safe haven to such an abductor is inadmissible. 8 U.S.C. § 1182(a)(10)(C)(ii)(I) & (II). A spouse, child, parent, sibling, or agent of an alien inadmissible for child abduction is inadmissible until the abducted child is surrendered to the person granted custody. 8 U.S.C. § 1182(a)(10)(C)(ii)(III). Among other exceptions, these provisions do not apply if the child is abducted to a country that is a party to the Hague Convention. 8 U.S.C. § 1182(a)(10)(C)(iii).

Section 2: *Consequences of Criminal Acts*

Part B: Aggravated Felonies

- I. Introduction**
 - II. Aggravated Felony Removal Grounds**
 - A. Murder, Rape, Sexual Abuse of a Minor Offenses**
 - B. Illicit Trafficking in a Controlled Substance, Including a Drug Trafficking Crime**
 - C. Illicit Trafficking in Firearms, Destructive Devices, or Explosive Materials**
 - D. Laundering of Monetary Instruments**
 - E. Explosive Materials and Firearms Offenses**
 - F. Crimes of Violence**
 - G. Theft or Burglary Offenses**
 - H. Crimes Relating to Ransom Demands or Receipt**
 - I. Child Pornography**
 - J. Racketeering and Gambling Offenses**
 - K. Prostitution, Peonage, Slavery, Involuntary Servitude, and Trafficking in Persons**
 - L. Crimes Relating to National Defense Information, Classified Information, Sabotage, Treason, and Protection of Undercover Agents**
 - M. Fraud and Deceit Offenses**
 - N. Alien Smuggling**
 - O. Improper Entry or Reentry by an Alien Deported for an Aggravated Felony**
 - P. Forging, Counterfeiting, Altering Passport or Similar Instrument**
 - Q. Failure to Appear for Service of Sentence**
 - R. Offense of or Relating to Commercial Bribery, Counterfeiting, or Trafficking in Vehicles with Altered ID Number**
 - S. Obstruction of Justice, Perjury, or Subornation**
 - T. Failure to Appear Before a Court to Answer to a Charge of Felony**
 - U. Attempt or Conspiracy to Commit an Aggravated Felony**
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I. Introduction.

As introduced in Part A of this section, the INA provides that an alien who is convicted of an aggravated felony offense is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). “Aggravated felony” is a term of art created by Congress to describe a discrete set of criminal offenses that subject an alien convicted of such an offense to more serious immigration consequences. The INA sets forth a multi-

part definition of the term “aggravated felony,” which applies to violations of federal and state law as well as violations “of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.” 8 U.S.C. § 1101(a)(43).

As a general matter, an alien convicted of an aggravated felony offense (also referred to as an “aggravated felon”) is statutorily ineligible for most forms of discretionary relief from removal, including cancellation of removal and asylum, although the alien may, under certain narrow circumstances, be eligible for adjustment of status and a waiver of inadmissibility under 8 U.S.C. § 1182(h). Notwithstanding an aggravated felony conviction, any alien may apply for deferral of removal under the United Nations Convention Against Torture regulations if they fear torture upon returning to their home country. Aliens might also be able to apply for withholding of removal if they fear persecution upon removal and their aggravated felony conviction is not a “particularly serious crime.” A conviction for an aggravated felony offense may subject the alien to expedited removal procedures. 8 U.S.C. § 1228. Further, an aggravated felon deportee is permanently barred, regardless of the date of the aggravated felony conviction, from readmission to the United States, unless the Attorney General has consented to the alien reapplying for admission. 8 U.S.C. § 1182(a)(9)(A).

II. Aggravated Felony Removal Grounds.

The “aggravated felony” ground of deportability is found at 8 U.S.C. § 1227(a)(2)(A)(iii). The term “aggravated felony” is defined at 8 U.S.C. § 1101(a)(43), and the various aggravated felony offenses are enumerated in subsections A-U.

- A. *Murder, Rape, Sexual Abuse of a Minor Offenses.*** 8 U.S.C. § 1101(a)(43)(A) provides that “murder,” “rape” and “sexual abuse of a minor” are aggravated felonies. The INA provides no definition or cross-reference to another part of the United States Code for these terms.
- B. *Illicit Trafficking in a Controlled Substance, Including a Drug Trafficking Crime.*** 8 U.S.C. § 1101(a)(43)(B) provides that illicit trafficking in a “controlled substance” (as defined in 21 U.S.C. § 802) is an aggravated felony. “Illicit trafficking” is not otherwise defined. The offense also includes a “drug trafficking crime” (as defined in 18 U.S.C. § 924(c)).
- “Drug trafficking crime” is defined as “any felony punishable under the Controlled Substances Act (21 U.S.C. 801, et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951, et seq.), or chapter 705 of title 46.”
 - “Trafficking” means some sort of commercial dealing. *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006).

- A state offense constitutes a felony punishable under the Controlled Substances Act only if it proscribes conduct that is punishable as a felony under federal law. *Lopez*, 549 U.S. at 60.
- A second or subsequent simple possession offense constitutes a felony under the Controlled Substances Act only if the conviction has been enhanced based on the fact of a prior conviction. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).
- “Controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of subchapter I (21 U.S.C. §§ 811-814). 21 U.S.C. § 802.³

C. *Illicit Trafficking in Firearms, Destructive Devices, or Explosive Materials.* 8 U.S.C. § 1101(a)(43)(C) provides that “illicit trafficking in firearms or destructive devices (as defined in [18 U.S.C. § 921]) or in explosive materials (as defined in [18 U.S.C. § 841(c)])” is an aggravated felony.

D. *Laundering of Monetary Instruments.* 8 U.S.C. § 1101(a)(43)(D) provides that “an offense described in [18 U.S.C. § 1956] (relating to laundering of monetary instruments) or [18 U.S.C. § 1957] (relating to engaging in monetary transactions in property derived from specific unlawful activity)” is an aggravated felony “if the amount of the funds exceeded \$10,000.”

E. *Explosive Materials and Firearms Offenses.* 8 U.S.C. § 1101(a)(43)(E) provides that an offense described in:

- (i) 18 U.S.C. § 842(h) or (i), or 18 U.S.C. §§ 844(d), (e), (f), (g), (h), or (i) “(relating to explosive materials offenses);”
- (ii) 18 U.S.C. § 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 18 U.S.C. § 924(b) or (h) “(relating to firearms offenses);” or
- (iii) 26 U.S.C. § 5861 “(relating to firearms offenses)”

is an aggravated felony.

³ The full list of controlled substances in 21 U.S.C. § 802 is provided at <http://www.deadiversion.usdoj.gov/schedules/index.html>.

- F. *Crimes of Violence.*** 8 U.S.C. § 1101(a)(43)(F) provides that “a crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense) for which the term of imprisonment [is] at least one year” is an aggravated felony.
- 18 U.S.C. § 16 defines a “crime of violence” as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”
 - 18 U.S.C. § 16(b) requires a higher *mens rea* than merely accidental or negligent conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).
- G. *Theft or Burglary Offenses.*** 8 U.S.C. § 1101(a)(43)(G) provides that “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year” is an aggravated felony.
- The INA provides no definition or cross-reference to another part of the United States Code to define “a theft offense,” “receipt of stolen property,” or “burglary offense.”
 - The generally accepted judicial definition of burglary is: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.
 - The generally accepted judicial definition of theft is: the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.
- H. *Crimes Relating to Ransom Demands or Receipt.*** 8 U.S.C. § 1101(a)(43)(H) provides that “an offense described in” 18 U.S.C. §§ 875, 876, 877, or 1202 “(relating to the demand for or receipt of ransom)” is an aggravated felony.
- I. *Child Pornography.*** 8 U.S.C. § 1101(a)(43)(I) provides that “an offense described in [18 U.S.C. §§ 2251, 2251A, or 2252] (relating to child pornography)” is an aggravated felony.
- J. *Racketeering and Gambling Offenses.*** 8 U.S.C. § 1101(a)(43)(J) provides that “an offense described in [18 U.S.C. § 1962] (relating to racketeer influenced corrupt organizations), or an offense described in [18 U.S.C. § 1084] (if it is a second or subsequent offense) or [18 U.S.C. § 1955] (relating to gambling offenses), for which

a sentence of one year imprisonment or more may be imposed” is an aggravated felony.

K. *Prostitution, Peonage, Slavery, Involuntary Servitude, and Trafficking in Persons.* 8 U.S.C. § 1101(a)(43)(K) provides an offense that:

- (i) “relates to the owning, controlling, managing, or supervising of a prostitution business;”
- (ii) “is described in [18 U.S.C. §§ 2421, 2422, or 2423] (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or”
- (iii) “is described in any of [18 U.S.C. §§ 1581-1585 or 1588-1591] (relating to peonage, slavery, involuntary servitude, and trafficking in persons)”

is an aggravated felony.

L. *Crimes Relating to National Defense Information, Classified Information, Sabotage, Treason, and Protection of Undercover Agents.* 8 U.S.C. § 1101(a)(43)(L) provides that an offense described in 18 U.S.C. § 793 “(relating to gathering or transmitting national defense information), [18 U.S.C. § 798] (relating to disclosure of classified information), [18 U.S.C. § 2153] (relating to sabotage) or [18 U.S.C. §§ 2381 or 2382] (relating to treason),” or 50 U.S.C. § 421 (relating to protecting the identity of undercover agents and undercover intelligence agents), is an aggravated felony.

M. *Fraud and Deceit Offenses.* 8 U.S.C. § 1101(a)(43)(M) provides “an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or (ii) is described in [26 U.S.C. § 7201] (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000” is an aggravated felony.

- The \$10,000 loss requirement need not be an element of the statute under which the alien was convicted. *Nijhawan v Holder*, 129 S. Ct. 2294, 2298 (2009).

N. *Alien Smuggling.* 8 U.S.C. § 1101(a)(43)(N) provides that “an offense described in [8 U.S.C. § 1324(a)(1)(A) or (2)] (relating to alien smuggling)” is an aggravated felony “except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of” the immigration laws.

- O. *Improper Entry or Reentry by an Alien Deported for an Aggravated Felony.*** 8 U.S.C. § 1101(a)(43)(O) provides that “an offense described in [8 U.S.C. §§ 1325(a) or 1326] committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph” is an aggravated felony.
- 8 U.S.C. § 1325(a) relates to entering or attempting to enter the United States at the improper time or place, eluding examination or inspection by immigration officials, or entering or attempting to enter the United States through misrepresentation or concealment of a material fact.
 - 8 U.S.C. § 1326 relates to the reentry of removed aliens.
- P. *Forging, Counterfeiting, Altering Passport or Similar Instrument.*** 8 U.S.C. § 1101(a)(43)(P) provides that “an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of [18 U.S.C. § 1543] or is described in [18 U.S.C. § 1546(a)] (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months” is an aggravated felony “except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of” the immigration laws.
- Q. *Failure to Appear for Service of Sentence.*** 8 U.S.C. § 1101(a)(43)(Q) provides that “an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more” is an aggravated felony.
- R. *Offense of or Relating to Commercial Bribery, Counterfeiting, or Trafficking in Vehicles with Altered ID Number.*** 8 U.S.C. § 1101(a)(43)(R) provides that “an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year” is an aggravated felony.
- S. *Obstruction of Justice, Perjury, or Subornation.*** 8 U.S.C. § 1101(a)(43)(S) provides that “an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year” is an aggravated felony.
- T. *Failure to Appear Before a Court to Answer to a Charge of Felony.*** 8 U.S.C. § 1101(a)(43)(T) provides that “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for

which a sentence of 2 years' imprisonment or more may be imposed" is an aggravated felony.

- U.** *Attempt or Conspiracy to Commit an Aggravated Felony.* 8 U.S.C. § 1101(a)(43)(U) provides that "an attempt or conspiracy to commit an offense described in this paragraph [8 U.S.C. § 1101(a)(43)]" is also an aggravated felony.

Section 3: *Relief and Protection From Removal*

Part A: Discretionary Relief

- I. Introduction**
- II. Discretionary Relief Conferring Lawful Status**
 - A. Cancellation of Removal for Permanent Resident Aliens and Non-Permanent Resident Aliens**
 - 1. Qualifying for Cancellation**
 - 2. Criminal Bars to Cancellation**
 - 3. Other Bars to Cancellation**
 - B. Adjustment or Re-Adjustment of Status**
 - 1. Qualifying for Adjustment or Re-Adjustment of Status**
 - 2. Criminal Bars to Adjustment or Re-Adjustment of Status**
 - 3. Other Bars to Adjustment of Status**
 - C. Adjustment of Status for Asylees and Refugees Under 8 U.S.C. § 1159**
 - 1. Qualifying for Adjustment of Status Under 8 U.S.C. § 1159**
 - 2. Criminal Bars to Adjustment of Status Under 8 U.S.C. § 1159**
 - D. Waiver of Inadmissibility Under 8 U.S.C. § 1182(h)**
 - 1. Qualifying for Section 212(h) Waiver**
 - 2. Classes of Criminal Activity Whose Consequences May Be Waived Under Section 212(h)**
 - 3. Criminal Bars to Section 212(h) Waiver**
- III. Discretionary Relief Not Conferring Lawful Status**
 - A. Temporary Protected Status**
 - 1. Limits on Applying for Temporary Protected Status**
 - 2. Bars to Temporary Protected Status**
 - B. Voluntary Departure**
 - 1. Pre-Hearing Voluntary Departure**
 - 2. Post-Hearing Voluntary Departure**
 - 3. Consequences of Failing to Comply with Grant of Voluntary Departure**

I. Introduction.

An alien who is inadmissible or deportable may avoid removal from the United States by being granted discretionary relief from removal. The Attorney General and the Secretary of Homeland Security are authorized by Congress to grant several forms of relief, and they have delegated that authority to lower officials. An alien's criminal conduct and resulting guilty plea may

prevent him or her from qualifying for, or being granted, relief. This section outlines the most common forms of relief from removal that may provide the alien with lawful status to remain in the United States and sets forth the requirements that must be met to obtain the relief and the circumstances that bar an alien from obtaining relief. The section also includes other common forms of discretionary protection that do not provide an alien with lawful status. While it is unclear whether *Padilla* requires defense counsel to advise an alien if a plea may make the alien ineligible for these grounds of relief from removal, we include them for the reader's information.

All of the forms of relief discussed in this section are discretionary, which means that the applicant must convince the adjudicator that discretion should be exercised in favor of the applicant. For some forms of relief, the adjudicator may be guided by special policies. As a general matter, however, the adjudicator decides whether to exercise discretion by balancing the positive equities shown by the applicant against any adverse factors. Adverse factors include such matters as the alien's criminal activities or convictions, and violations or evasions of immigration law or other laws. Positive equities include the applicant's length of residence in the United States, family and personal ties in the United States, honorable military or maritime service, reputation and integration into the community, and good conduct and accomplishments while in the United States.

II. Discretionary Relief Conferring Lawful Status.

A. Cancellation of Removal for Permanent Resident Aliens and Non-Permanent Resident Aliens. Cancellation of removal is a one-time forgiveness of grounds of deportability or inadmissibility for certain lawful permanent resident ("LPR") aliens. An alien who is not a LPR may also apply for cancellation and obtain LPR status if he or she meets a more stringent set of eligibility requirements. Specific cancellation of removal provisions offering relaxed eligibility standards have been enacted for the benefit of certain classes of aliens, including battered children and spouses, *see* 8 U.S.C. § 1229b(b)(2), and aliens from Guatemala and El Salvador, *see* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997).

1. Qualifying for Cancellation.

- **Lawful Permanent Residents.** An alien who is a LPR must show at least seven continuous years of residence in the United States following an admission in any status, plus five years of lawful permanent resident status. The commission of a crime that renders the alien deportable or inadmissible under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) or (a)(4), or the service of a charging document alleging that the alien is inadmissible or deportable interrupts a period of residence. 8 U.S.C. § 1229b(a) & (d)(1).

- **Non-Lawful Permanent Residents.** An alien who is not a LPR must meet stringent requirements before being considered for a grant of cancellation of removal. Those requirements, set forth in 8 U.S.C. § 1229b(b)(1), include a showing of:
 - A period of 10 years of continuous physical presence (the commission of a crime that renders the alien deportable or inadmissible under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) or (a)(4), or the service of a charging document alleging that the alien is inadmissible or deportable interrupts a period of residence);
 - A period of 10 years of “good moral character;” and
 - “[E]xceptional and extremely unusual” hardship to the alien’s parent(s), spouse, or child(ren) who are themselves either United States citizens or LPR aliens.

2. Criminal Bars to Cancellation.

- **Lawful Permanent Residents.** To qualify for cancellation of removal, a LPR alien is required to prove that he or she has not been convicted of an aggravated felony, as defined at 8 U.S.C. § 1101(a)(43), and is not inadmissible or deportable for security and related grounds under 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4). 8 U.S.C. § 1229b(a)(3) & (c)(4).
- **Non-Lawful Permanent Residents.** To qualify for cancellation of removal, an applicant who is not a LPR is required to prove that he or she has not been convicted of an offense under 8 U.S.C. §§ 1182(a)(2) (criminal and related grounds), 1227(a)(2) (criminal offenses), or 1227(a)(3) (failure to register and falsification of documents), and is not inadmissible or deportable for security and related grounds under 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4). 8 U.S.C. § 1229b(b)(1)(C) & (c)(4).
- **Good Moral Character.** Non-LPRs must demonstrate that they are persons of good moral character to be eligible for cancellation of removal. Whether an applicant possesses “good moral character” is a discretionary determination. The statute does not define good moral character; rather, it sets forth a non-exclusive list of circumstances that foreclose a finding of good moral character. 8 U.S.C. § 1101(f). A catchall provision makes clear that these *per se* rules are not

exclusive: “The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.” Pursuant to 8 U.S.C. § 1101(f), the following criminal acts preclude an alien from establishing good moral character if committed within the required period:

- At any time convicted of an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)), 8 U.S.C. § 1101(f)(8);
- Crimes involving moral turpitude (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(I)), 8 U.S.C. § 1101(f)(3);
- Controlled substance violations, except as it relates to a single offense of simple possession of 30 grams or less of marijuana (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(II) & (a)(2)(C)), 8 U.S.C. § 1101(f)(3);
- Multiple convictions resulting in cumulative sentences of at least five years’ imprisonment (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(B)), 8 U.S.C. § 1101(f)(3);
- Prostitution and commercialized vice (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(D)), 8 U.S.C. § 1101(f)(3);
- Alien smuggling (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(6)(E)), 8 U.S.C. § 1101(f)(3);
- Polygamy (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(10)(A)), 8 U.S.C. § 1101(f)(3);
- Habitual drunkard, 8 U.S.C. § 1101(f)(1);
- Any individual “whose income is derived principally from illegal gambling activities,” 8 U.S.C. § 1101(f)(4);
- Any individual convicted of two or more gambling offenses, 8 U.S.C. § 1101(f)(5);
- Any individual who has given false testimony in order to obtain an immigration benefit, 8 U.S.C. § 1101(f)(6);

- Any individual who has been imprisoned for an aggregate period of 180 days during the time in which he or she has to establish good moral character, regardless of when the offense or offenses for which he or she was incarcerated were committed, 8 U.S.C. § 1101(f)(7);
- Any individual who, at any time as a foreign government official, was responsible for a “particularly severe violation of religious freedom” (as described in 8 U.S.C. § 1182(a)(2)(G)), 8 U.S.C. § 1101(f)(9);
- Any individual who, at any time, participated in Nazi persecution, genocide, torture, or extrajudicial killing (as described in 8 U.S.C. § 1182(a)(3)(E)), 8 U.S.C. § 1101(f)(9).

3. Other Bars to Cancellation. An alien is ineligible for cancellation of removal if the alien was previously granted cancellation of removal, suspension of deportation under 8 U.S.C. § 1254 (repealed), or a waiver under 8 U.S.C. § 1182(c) (repealed). 8 U.S.C. § 1229b(c)(6).

B. Adjustment or Re-Adjustment of Status. Through an adjustment or re-adjustment of status, an alien present in the United States can obtain, or (in the case of re-adjustment) be permitted to retain, LPR status. In general, adjustment of status refers to the procedure for obtaining LPR status without having to leave the United States for consular processing abroad and then applying for admission as a LPR through a port of entry. 8 U.S.C. § 1255. Re-adjustment of status refers to a grant of adjustment of status to an alien who is already a LPR, principally to avoid grounds of deportability that are not also grounds of inadmissibility, such as a firearms offense or certain aggravated felonies. Specific adjustment provisions have been enacted for the benefit of certain classes of aliens from specific countries, including Cambodia (1989) (2000), the People’s Republic of China, Cuba, Haiti, Laos (1989) (2000), Nicaragua, the former Soviet Union, Syria, and Vietnam (1989) (2000). Generally, adjustment of status under any of these country-specific provisions requires physical presence in the United States on or before a fixed date.

1. Qualifying for Adjustment or Re-Adjustment of Status. Adjustment of status requires an applicant to establish that an immigrant visa is immediately available to him or her. As a practical matter, this means that the alien must be the beneficiary of an approved petition for an immigrant visa, be able to show that the visa number is current, and that the alien is not inadmissible under any provision of law. To qualify for adjustment or re-adjustment under the general adjustment of status provision, 8 U.S.C. § 1255(a), the alien must have been inspected and admitted or paroled into the United States, rather

than having entered illegally. Adjustment under 8 U.S.C. § 1255(i), enacted in 1994 and amended several times, is available irrespective of the form of the alien's entry, but is limited to aliens who are beneficiaries of a visa petition or application for labor certification (in most cases, the first filing required for an employment-based immigration preference) filed on or before April 30, 2001.

2. **Criminal Bars to Adjustment or Re-Adjustment of Status.** Because eligibility for adjustment of status requires the alien to be admissible, any crime that renders an alien inadmissible also makes the alien ineligible for adjustment of status, unless the alien is eligible for and can obtain a waiver of the inadmissibility ground. *See* Section 2, part A (addressing the criminal grounds of inadmissibility).
3. **Other Bars to Adjustment of Status.** Subject to narrow exceptions, an alien is barred from being granted adjustment of status for a period of 10 years from the date of entry of an *in absentia* order of removal. 8 U.S.C. § 1229a(b)(7). An alien is also barred from being granted adjustment of status for a period of 10 years from the date that the alien fails to depart the United States in accordance with any grant of voluntary departure. 8 U.S.C. § 1229c(d)(1)(B). An alien may also be barred from adjusting status if he or she entered the United States through a visa waiver program. 8 U.S.C. §§ 1187(b)(2) and 1255(c)(4). An alien deportable under 8 U.S.C. § 1227(a)(4)(B) (terrorist activities) may also be ineligible for adjustment of status. 8 U.S.C. § 1255(c)(6).

C. **Adjustment of Status for Asylees and Refugees Under 8 U.S.C. § 1159.** An alien admitted to the United States as a refugee or granted asylum while in the United States may obtain LPR status.

1. **Qualifying for Adjustment of Status Under 8 U.S.C. § 1159.** Adjustment of status under this provision requires, among other things, that an alien admitted as a refugee or granted asylum be physically present in the United States for at least one year and otherwise be admissible. An alien admitted as a refugee who has already acquired LPR status is not eligible to readjust. 8 U.S.C. § 1159(a)(1)(C). An alien granted asylum is not eligible to adjust unless he or she continues to be a refugee within the meaning of 8 U.S.C. § 1101(a)(42)(A) and has not firmly resettled in a foreign country. 8 U.S.C. § 1159(b).
2. **Criminal Bars to Adjustment of Status Under 8 U.S.C. § 1159.** Because eligibility for adjustment of status under this provision requires the alien to be admissible, any crime that renders an alien inadmissible also makes the

alien ineligible for adjustment of status. Most grounds of inadmissibility either do not apply to aliens seeking to adjust under 8 U.S.C. § 1159 or can be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. 8 U.S.C. § 1159(c). Aliens inadmissible for offenses relating to illicit trafficking in a controlled substance under 8 U.S.C. § 1182(a)(2)(C) or offenses relating to national security, terrorism, Nazi persecution, torture, extrajudicial killings, and genocide under 8 U.S.C. § 1182(a)(3)(A), (B), (C), & (E) are not eligible for a waiver. 8 U.S.C. § 1159(c).

D. Waiver of Inadmissibility Under 8 U.S.C. § 1182(h). Pursuant to 8 U.S.C. § 1182(h), INA § 212(h) (“section 212(h)”), the Attorney General or Secretary may waive the application of particular grounds of inadmissibility in 8 U.S.C. § 1182, including inadmissibility resulting from criminal conduct. A grant of a section 212(h) waiver, by itself (in the case of certain LPRs seeking admission) or in conjunction with a grant of adjustment of status or re-adjustment of status, may permit an alien to avoid removal based on convictions for particular types of crimes when those crimes are also grounds of inadmissibility.

- 1. Qualifying for Section 212(h) Waiver.** An alien may qualify for a section 212(h) waiver in a variety of ways, but the most common is where the alien is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence, and the alien establishes that denying him or her admission to the United States would result in extreme hardship to such person(s). *See* 8 U.S.C. § 1182(h)(1)(A)-(C). For an alien previously admitted to the United States as a LPR to qualify for a section 212(h) waiver, he or she must have resided continuously in the United States for a period of at least 7 years immediately preceding the date of initiation of removal proceedings.
- 2. Classes of Criminal Activity Whose Consequences May Be Waived Under Section 212(h).** A section 212(h) waiver may be used to waive application of grounds of inadmissibility stemming from crimes involving moral turpitude, multiple criminal convictions resulting in cumulative sentences of at least five years’ imprisonment, prostitution and commercialized vice-related activities, and assertions of immunity from prosecution. The waiver also applies to grounds of inadmissibility based on a conviction for violating a law relating to a controlled substance, but the waiver is limited to a single offense of simple possession of 30 grams or less of marijuana.

3. **Criminal Bars to Section 212(h) Waiver.** An alien may not be granted a section 212(h) waiver if he or she has been convicted of, or admitted committing or conspiring to commit, acts that constitute murder or criminal acts involving torture. An alien may also not be granted a section 212(h) waiver if he or she was previously admitted to the United States as a LPR alien and, since the date of admission, has been convicted of an aggravated felony.

III. Discretionary Relief Not Conferring Lawful Status.

A. **Temporary Protected Status.** Temporary protected status (“TPS”) stays or delays an alien’s removal for six to eighteen months if his or her home country has been designated by the United States Government to be unsafe due to armed conflict, natural disaster, or extraordinary temporary conditions. 8 U.S.C. § 1254a. Countries whose nationals are eligible for TPS are published in the Federal Register. An alien granted TPS may not be deported during the authorized time period and can obtain employment authorization.

1. **Limits on Applying for Temporary Protected Status.** An alien may not apply for TPS unless he or she has been in the United States continuously since his or her home country was designated for that status. 8 U.S.C. § 1254a(c)(1)(A).

2. **Bars to Temporary Protected Status.** The following classes of aliens are ineligible for TPS:

- An alien who is inadmissible to the United States. Most grounds of inadmissibility can be waived for humanitarian purposes, to ensure family unity, or when otherwise in the public interest. Several grounds, however, may not be waived, including a crime involving moral turpitude, a controlled substance offense, two or more offenses with an aggregate sentence of 5 years or more, a drug trafficking offense (with a limited exception), or offenses relating to national security. 8 U.S.C. § 1254a(c)(2)(A).
- An alien who has been convicted of any felony or of two or more misdemeanors. 8 U.S.C. § 1254a(c)(2)(B).

B. **Voluntary Departure.** If an alien is inadmissible or deportable from the United States, the alien may request, either prior to the conclusion of the removal proceedings or at the conclusion of the proceedings, the privilege of departing the United States voluntarily at his or her own expense. 8 U.S.C. § 1229c. Opting for voluntary departure over removal has several advantages, including that the alien

may choose (within limits) the time and manner of departure and the destination to which the alien will travel. One of the most significant advantages is that the alien will not be subjected to a bar on readmission that applies to aliens who are deported. See 8 U.S.C. § 1182(a)(9)(A).

1. **Pre-Hearing Voluntary Departure.** If an alien requests voluntary departure prior to the completion of proceedings, an immigration judge may grant up to 120 days of voluntary departure. An alien convicted of an aggravated felony offense or deportable for terrorist activities (8 U.S.C. § 1227(a)(2)(A)(iii) & (a)(4)(B)) is not eligible for pre-hearing voluntary departure. 8 U.S.C. § 1229c(a).

2. **Post-Hearing Voluntary Departure.** If the alien requests voluntary departure at the conclusion of a removal proceeding, the immigration judge may grant up to 60 days of voluntary departure. 8 U.S.C. § 1229c(b). To qualify for post-hearing voluntary departure, an alien must:
 - Be physically present in the United States for at least one year immediately preceding the date the alien is served with the notice to appear;
 - Be a person of good moral character (as defined above) for at least 5 years immediately preceding the application for voluntary departure;
 - Not be deportable as an aggravated felon or based on security and related grounds (8 U.S.C. § 1227(a)(2)(A)(iii) & (a)(4)); and
 - Have the means and the intent to depart the United States.

3. **Consequences of Failing to Comply with Grant of Voluntary Departure.** An alien who fails to depart after being granted voluntary departure is subject to fines and is ineligible for a period of 10 years from receiving cancellation of removal, adjustment of status, and other forms of relief from removal. 8 U.S.C. § 1229c(d). Since 2007, however, an alien who files a motion to reopen, motion to reconsider, or petition for judicial review before the period of voluntary departure expires is not subject to this bar because the alien's act is deemed to terminate the grant of voluntary departure. 8 C.F.R. § 1240.26(e)(1) & (i).

Section 3: *Relief and Protection from Removal*

Part B: Relief and Protection from Removal Based on a Fear of Persecution or Torture

- I. Introduction**
 - II. Relief and Protection from Removal Based on a Fear of Persecution or Torture**
 - A. Asylum**
 - 1. General**
 - 2. Limits on Applying for Asylum**
 - 3. Exceptions and Bars to Asylum**
 - 4. Particularly Serious Crime**
 - B. Withholding of Removal**
 - 1. General**
 - 2. Exceptions and Bars to Withholding of Removal**
 - 3. Particularly Serious Crime**
 - C. Protection Under the Convention Against Torture**
 - 1. General**
 - 2. No Criminal Bars to Torture Protection**
-

I. Introduction.

An alien who is inadmissible or deportable may also seek relief or protection based on a fear of persecution (and in some limited circumstances past persecution alone) or torture in his or her home country. Relief from removal based on a well-founded fear of persecution is discretionary and may lead to lawful permanent resident status in the United States. There are also mandatory, non-discretionary forms of protection from removal available to an alien who proves that it is more likely than not that he or she will be persecuted or tortured. Except for asylum, these forms of protection do not provide the alien with lawful status while he or she remains in the United States. An alien's criminal conduct and resulting guilty plea may prevent him or her from qualifying for, or being granted, these various forms of relief or protection. This section provides a brief description of these forms of relief and protection from removal, their requirements, and their bars and exceptions. While it is unclear whether *Padilla* requires defense counsel to advise an alien if a plea may make the alien ineligible for these grounds of relief and protection from removal, we include them for the reader's information.

II. Relief and Protection from Removal Based on a Fear of Persecution or Torture.

A. Asylum. An alien who establishes that he or she is unable or unwilling to return to his or her home country (or, if the alien is stateless, the country of last habitual residence) because of past persecution or a “well-founded fear” of future persecution in that country may be granted asylum. 8 U.S.C. § 1158. Asylum is discretionary and, as with other forms of relief discussed in Part A of this section, can be denied even if the statutory requirements are met.

1. General. The persecution (or feared persecution) must be motivated by the applicant’s race, religion, nationality, membership in a particular social group, or political opinion (imputed or actual). 8 U.S.C. § 1101(a)(42). Asylum is not permanent and may be terminated under certain circumstances. 8 U.S.C. § 1158(c)(2). However, an asylee cannot be removed from the United States while in that status, and may apply for lawful resident alien status a year after being granted asylum. *See* 8 U.S.C. § 1159. To be granted LPR status, the asylee must establish that he or she is not inadmissible, or obtain an asylum-specific waiver of inadmissibility. *See* 8 U.S.C. § 1159(c). An asylee’s immediate family (the asylee’s spouse and unmarried children under 21 years of age) may obtain asylum through the asylee. Asylees may obtain employment authorization and permission to travel abroad.

2. Limits on Applying for Asylum. Generally, an alien is expected to apply for asylum within a year of arriving in the United States, and may not file successive applications (*i.e.*, must not have previously applied for asylum and had such application denied). An alien may be considered for asylum notwithstanding these limits, however, if the alien demonstrates changed circumstances that materially affect his or her eligibility for asylum, or extraordinary circumstances relating to his or her delay in filing an application within the one-year filing period. 8 U.S.C. § 1158(a)(2)(D).

3. Exceptions and Bars to Asylum. The following classes of aliens are not eligible for asylum:

- Aliens who have persecuted others, 8 U.S.C. § 1158(b)(2)(A)(i);
- Aliens who have been convicted of a “particularly serious” crime, constituting a danger to the community, 8 U.S.C. § 1158(b)(2)(A)(ii);
- Aliens who have committed a serious nonpolitical crime outside the United States, 8 U.S.C. § 1158(b)(2)(A)(iii);

- Aliens who pose a danger to the security of the United States, 8 U.S.C. § 1158(b)(2)(A)(iv);
- With limited exceptions, aliens who are tied to terrorist activities, 8 U.S.C. § 1158(b)(2)(A)(v); and
- Aliens who have “firmly resettled” in another country before coming to the United States, 8 U.S.C. § 1158(b)(2)(A)(vi).

4. **Particularly Serious Crime.** For purposes of asylum eligibility, all aggravated felony offenses are expressly declared by statute to be “particularly serious” crimes constituting a danger to the community. 8 U.S.C. § 1158(b)(2)(B)(i). Other crimes may also be determined to be “particularly serious,” considering (i) the nature or elements of the offense; (ii) the circumstances and underlying facts of the conviction; and (iii) the type of sentence imposed. Crimes against the person are likely considered “particularly serious” crimes constituting a danger to the community, as are aggravated property offenses and drug trafficking crimes. A crime for which no term of imprisonment is imposed may also be considered a “particularly serious” crime, depending on its nature and underlying circumstances.

B. Withholding of Removal. Unless an exception applies, an alien who can establish a “clear probability” that his or her life or freedom would be threatened in a particular country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion (actual or imputed) may not be returned to that country. 8 U.S.C. § 1231(b)(3). If an alien qualifies for withholding of removal, the grant is mandatory and cannot be denied in the exercise of discretion.

1. **General.** An inadmissible or deportable alien who obtains withholding of removal to a particular country may be removed from the United States to any other country that will receive the alien, but as a practical matter, removal to such countries is relatively rare. An alien granted withholding of removal may be granted work authorization. A grant of withholding of removal is not a form of lawful status, however, and an alien granted withholding is not entitled for that reason to be re-admitted to the United States if he or she travels internationally.

2. **Exceptions and Bars to Withholding of Removal.** The following classes of aliens are ineligible for withholding of removal:

- Aliens who have persecuted others, 8 U.S.C. § 1231(b)(3)(B)(i);

- Aliens who have been convicted of a “particularly serious” crime, constituting a danger to the community, 8 U.S.C. § 1231(b)(3)(B)(ii);
- Aliens who have committed a serious nonpolitical crime outside the United States, 8 U.S.C. § 1231(b)(3)(B)(iii); and
- Aliens who pose a danger to United States security, 8 U.S.C. § 1231(b)(3)(B)(iv), including aliens who are deportable under 8 U.S.C. § 1227(a)(4)(B) & (D) (involving terrorist activities, Nazi persecution, genocide, commission of torture or extrajudicial killing).

3. **Particularly Serious Crime.** A particularly serious crime constituting a danger to the community pursuant to 8 U.S.C. § 1231(b)(3)(B)(ii) includes an aggravated felony for which a 5-year or longer sentence is ordered (whether imposed or suspended). 8 U.S.C. § 1231(b)(3)(B). Other crimes may also be determined to be “particularly serious,” considering: (i) the nature or elements of the offense; (ii) the circumstances and underlying facts of the conviction; and (iii) the type of sentence imposed. Crimes against the person are likely to be considered “particularly serious” crimes constituting a danger to the community, as are aggravated property offenses and drug trafficking crimes. A crime for which no term of imprisonment is imposed may also be considered “particularly serious,” depending on its nature and underlying circumstances.

C. **Protection Under the Convention Against Torture.** Under regulations implementing certain protections under the United Nations Convention Against Torture, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), an alien may not be returned to a country where it is “more likely than not” that the alien will be tortured. “Torture” is defined as “an extreme form of cruel and inhuman treatment” that “must cause severe pain or suffering.” To qualify for a grant of protection, the alien must show that the torture will be inflicted by or at the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity. *See generally* 8 C.F.R. §§ 208.18 and 1208.18. If an alien qualifies for torture protection, the grant is mandatory and cannot be denied in the exercise of discretion.

1. **General.** An inadmissible or deportable alien granted protection under the Convention Against Torture regulations may be removed from the United States to another country that will receive the alien, but in practice, such removals are relatively rare. An alien granted protection may be given work authorization. A grant of protection is not a form of lawful status, however, and an alien granted such protection is not entitled for that reason to be re-admitted to the United States if he or she travels internationally.

2. **No Criminal Bars to Torture Protection.** An alien may apply for protection under the Convention Against Torture regulations regardless of the ground of removability or the severity of his or her criminal conduct. Accordingly, even an alien convicted of an aggravated felony remains eligible for torture protection. *See* 8 C.F.R. § 1208.17(a) (providing for deferral of removal under the Convention Against Torture).

Section 4: *Other Immigration Consequences of Guilty Pleas*

- I. Introduction**
- II. Restrictions on Readmission to the United States**
 - A. Aliens Convicted of Aggravated Felonies**
 - B. Aliens Whose Criminal Conduct or Convictions Make Them Inadmissible**
 - 1. Controlled Substance Offenses**
 - 2. Fraud or Misrepresentation**
 - 3. False Claim to United States Citizenship**
 - 4. Alien Smuggling**
 - 5. Other Grounds of Inadmissibility Restricting Readmission**
- III. Mandatory Detention**
 - A. Criminal and Related Grounds of Inadmissibility**
 - B. Multiple Criminal Convictions, Aggravated Felonies, Controlled Substance Violations, Firearm Offenses, and Miscellaneous Crimes**
 - C. Crimes Involving Moral Turpitude**
 - D. Terrorist and Related Activities**
- IV. Bar to Naturalization**
- V. Restriction on Judicial Review**
 - A. Criminal and Related Grounds of Inadmissibility**
 - B. Aggravated Felonies, Controlled Substance Violations, Firearm Offenses, and Miscellaneous Crimes**
 - C. Multiple Criminal Convictions**
- VI. Exposure to Summary Removal**
 - A. Aliens Convicted of Aggravated Felonies Who Are Not Lawful Permanent Residents, Asylees, or Refugees**
 - B. Aliens Who Illegally Enter the United States After Previously Being Deported**
- VII. Enhanced Criminal Penalties for Unlawful Reentry By Aliens Who Have Committed Certain Crimes**

I. Introduction.

Beyond removability and ineligibility for relief, a guilty plea may implicate other immigration consequences. This section discusses some of these consequences, including restrictions on readmission to the United States and judicial review, ineligibility for naturalization,

mandatory detention, exposure to summary removal, and enhanced sentences for criminal reentry. While it is unclear whether *Padilla* requires defense counsel to advise an alien of these consequences, we include them for the reader's information.

II. Restrictions on Readmission to the United States.

The Immigration and Nationality Act ("INA") provides that aliens who have been convicted of certain crimes face restrictions on readmission.

A. Aliens Convicted of Aggravated Felonies.

- An alien who: (1) has been convicted of an aggravated felony; (2) has been ordered removed; and (3) again seeks admission is **inadmissible at any time** he or she seeks admission. By contrast, aliens previously removed who have not been convicted of aggravated felonies do not face a permanent bar to readmission but instead face a 5-year bar (arriving aliens), 10-year bar (aliens other than arriving aliens), or a 20-year bar (in the case of a second or subsequent removal). *See* 8 U.S.C. § 1182(a)(9)(A)(i) & (ii).
- **Exception:** Although ineligible for readmission, an alien convicted of an aggravated felony (and other aliens), may apply to the Attorney General for consent to apply for readmission. 8 U.S.C. § 1182(a)(9)(A)(iii). An alien must apply for such advance consent from outside of the United States.

B. Aliens Whose Criminal Conduct or Convictions Make Them Inadmissible.

In addition to aliens convicted of aggravated felonies, aliens who commit crimes that make them inadmissible face restrictions on readmission because of their inadmissibility. The grounds of inadmissibility presented below have already been discussed previously in Section 2, Part A. But we reference them again to emphasize that a plea which renders an alien inadmissible not only may result in a risk of removal, but also may restrict an alien's readmission to the United States. In fact, it is not necessary for an alien to be placed in removal proceedings to trigger the bar to readmission. If an alien is convicted of, or commits an inadmissible offense, and thereafter voluntarily departs the United States, even on a short trip, he or she is inadmissible to return because of the offense. Finally, in some instances (as noted below), no waiver is available for an alien who is outside of the United States to cure the ground of inadmissibility.

The following aliens are inadmissible, and therefore ineligible to apply for readmission unless a waiver of inadmissibility is available, and the Attorney General, in his or her discretion, grants such waiver.

1. *Controlled Substance Offenses.*

- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in 21 U.S.C. § 802), is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- Any alien who the consular officer or Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any controlled or listed substance or chemical, or endeavored to do so, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(i).
- A spouse, son or daughter of an alien covered in section 1182(a)(2)(C)(i) who has, within the previous 5 years, benefitted from the illicit activity of the alien described in (C)(i), and knew or reasonably should have known that the benefit was illicit, is inadmissible. 8 U.S.C. § 1182(a)(2)(C)(ii).
- Any alien who is determined by the immigration authorities to be a drug abuser or addict is inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iv).
- Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation relating to a controlled substance, is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II).
- **Note:** For these drug offenses, there is no waiver of inadmissibility available (except as it relates to a single offense of simple possession of 30 grams or less of marijuana). *See* 8 U.S.C. § 1182(h).

2. *Fraud or Misrepresentation.*

- Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or sought to procure or has procured) a visa, other documentation, or admission into the United States or other immigration benefit is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(i).
Note: A waiver of this ground of inadmissibility may be granted in

the discretion of the Attorney General if the alien is eligible. See 8 U.S.C. § 1182(i).

- Any alien who is the subject of a final order for a violation of 8 U.S.C. § 1324c (document fraud) is inadmissible. 8 U.S.C. § 1182(a)(6)(F)(i). **Note:** A waiver of this ground of inadmissibility may be granted in the discretion of the Attorney General if the alien is eligible. 8 U.S.C. § 1182(a)(6)(F)(ii).
3. ***False Claim to United States Citizenship.*** Any alien who falsely represents himself or herself to be a U.S. citizen for any purpose or immigration benefit is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(ii)(I). This does not include representations of citizenship made by an alien who reasonably believed that he or she was a citizen at the time of the representation as long as the alien's parents (natural or adopted) are or were citizens and the alien permanently resided in the United States prior to the age of sixteen. 8 U.S.C. § 1182(a)(6)(C)(ii)(II). **Note:** There is no waiver available for this ground.
4. ***Alien Smuggling.*** Any alien who at any time knowingly has encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. 8 U.S.C. § 1182(a)(6)(E)(i). **Note:** There is a limited exception for this ground of inadmissibility on the basis of family reunification, 8 U.S.C. § 1182(a)(6)(E)(ii), and there is a limited waiver at the discretion of the immigration authorities to assure family unity or when it is in the public interest, 8 U.S.C. § 1182(a)(6)(E)(iii).
5. ***Other Grounds of Inadmissibility Restricting Readmission.*** Any alien who falls within the following grounds is inadmissible.
- Crimes involving moral turpitude (or an attempt or conspiracy to commit such a crime), 8 U.S.C. § 1182(a)(2)(A)(i)(I). **Note:** There are two exceptions to this ground of inadmissibility: the juvenile and petty offense exceptions. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) & (ii)(II).
 - Multiple criminal convictions resulting in cumulative sentences of at least 5 years' imprisonment, 8 U.S.C. § 1182(a)(2)(B).
 - Prostitution-related offenses, 8 U.S.C. § 1182(a)(2)(D).
 - **Note:** For the three crimes above, there is waiver of inadmissibility at 8 U.S.C. § 1182(h) that aliens may be eligible to apply for, and the

Attorney General may grant in his or her discretion (*see* Section 3 for a summary of the eligibility requirements for a 212(h) waiver).

- Threats by an alien with a physical or mental disorder, 8 U.S.C. § 1182(a)(1)(A)(iii). **Note:** A waiver of this ground may be granted at the discretion of the Attorney General. 8 U.S.C. § 1182(g)(3).
- Human trafficking-related offenses, 8 U.S.C. § 1182(a)(2)(H). **Note:** There is a limited exception to this ground of inadmissibility for a son or daughter who was a “child” at the time of receiving a benefit from the illicit activity of his or her parent. 8 U.S.C. § 1182(a)(2)(H)(iii).
- Money laundering, 8 U.S.C. § 1182(a)(2)(I). **Note:** There is no waiver available for this ground.
- Espionage, Sabotage, Treason, and Terrorism, 8 U.S.C. § 1182(a)(3)(A), (B) & (F). **Note:** There is a limited exception to the terrorist ground of inadmissibility for a spouse or child of the inadmissible alien. 8 U.S.C. § 1182(a)(3)(B)(ii).
- Polygamy, 8 U.S.C. § 1182(a)(10)(A). **Note:** There is no waiver available for this ground.
- International Child Abduction, 8 U.S.C. § 1182(a)(10)(C). **Note:** There are exceptions, including instances where a child is abducted to a country that is a party to the Hague Convention.
- Unlawful Voters, 8 U.S.C. § 1182(a)(10)(D)(i). **Note:** There is an exception for an alien who reasonably believed that he or she was a citizen at the time of the unlawful voting, subject to certain requirements. 8 U.S.C. § 1182(a)(10)(D)(ii).

III. Mandatory Detention.

Some criminal convictions may trigger mandatory detention provisions in the INA. In such cases, detention is mandatory while removal proceedings are pending. 8 U.S.C. § 1226(a) & (c)(1). Specifically, aliens who fall within the following grounds of inadmissibility or deportability may be subject to mandatory detention:

- A. Criminal and Related Grounds of Inadmissibility.** 8 U.S.C. § 1182(a)(2) (various grounds of inadmissibility based on crimes involving moral turpitude, drug offenses, multiple convictions resulting in cumulative sentences of at least 5 years’ imprisonment, prostitution, human trafficking, and money laundering);

- B. Multiple Criminal Convictions, Aggravated Felonies, Controlled Substance Violations, Firearm Offenses, and Miscellaneous Crimes.** 8 U.S.C. § 1227(a)(2)(A)(ii), (iii), (B), (C), & (D) (various grounds of deportability including two crimes involving moral turpitude, aggravated felonies, drug offenses, firearm offenses, and certain crimes relating to treason, sabotage, espionage);
- C. Crimes Involving Moral Turpitude.** 8 U.S.C. § 1227(a)(2)(A)(i) (ground of deportability for a crime involving moral turpitude for which the alien has been sentenced to a term of imprisonment of at least one year and if committed within five years (or ten years in the case of a lawful permanent resident provided status under 8 U.S.C. § 1255(j)) after the date of admission);
- D. Terrorist and Related Activities.** 8 U.S.C. § 1182(a)(3)(B) (ground of inadmissibility for terrorist activities), or 8 U.S.C. § 1227(a)(4)(B) (ground of deportability based on terrorist and related activities).

Note: Even where an alien's crime does not require his or her mandatory detention, the crime is an adverse factor that reduces the chance the alien will be released on bond at the discretion of the Attorney General and his or her delegates. *See* 8 U.S.C. § 1226(a) (providing the Attorney General with discretion to release an alien on bond pending removal proceedings).

IV. Bar to Naturalization.

Aliens who have committed certain crimes are ineligible for naturalization. Typically, in order to be eligible for naturalization, applicants must establish good moral character in the five years preceding their application, and in the period between their application and admission to citizenship. 8 U.S.C. § 1427(a). Pursuant to 8 U.S.C. § 1101(f), the following criminal acts preclude an alien from establishing good moral character if committed within the required periods:

- At any time convicted of an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)), 8 U.S.C. § 1101(f)(8);
- Crimes involving moral turpitude (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(I)), 8 U.S.C. § 1101(f)(3);
- Controlled substance violations, except as it relates to a single offense of simple possession of 30 grams or less of marijuana (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(A)(i)(II) & (a)(2)(C)), 8 U.S.C. § 1101(f)(3);
- Multiple convictions resulting in cumulative sentences of at least five years' imprisonment (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(B)), 8 U.S.C. § 1101(f)(3);

- Prostitution and commercialized vice (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(2)(D)), 8 U.S.C. § 1101(f)(3);
- Alien smuggling (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(6)(E)), 8 U.S.C. § 1101(f)(3);
- Polygamy (whether inadmissible or not, described in 8 U.S.C. § 1182(a)(10)(A)), 8 U.S.C. § 1101(f)(3);
- Habitual drunkard, 8 U.S.C. § 1101(f)(1);
- Any individual “whose income is derived principally from illegal gambling activities,” 8 U.S.C. § 1101(f)(4);
- Any individual convicted of two or more gambling offenses, 8 U.S.C. § 1101(f)(5);
- Any individual who has given false testimony in order to obtain an immigration benefit, 8 U.S.C. § 1101(f)(6);
- Any individual who has been imprisoned for an aggregate period of 180 days during the time in which he or she has to establish good moral character, regardless of when the offense or offenses for which he or she was incarcerated were committed, 8 U.S.C. § 1101(f)(7);
- Any individual who, at any time as a foreign government official, was responsible for a “particularly severe violation of religious freedom” (as described in 8 U.S.C. § 1182(a)(2)(G)), 8 U.S.C. § 1101(f)(9);
- Any individual who, at any time, participated in Nazi persecution, genocide, torture, or extrajudicial killing (as described in 8 U.S.C. § 1182(a)(3)(E)), 8 U.S.C. § 1101(f)(9).

Additionally, acts committed by the applicant outside the required statutory periods specified above may be considered in adjudicating the application for naturalization, and may render an applicant ineligible for naturalization as a matter of discretion. 8 U.S.C. § 1427(e). Furthermore, the fact that the applicant does not fall within any of the *per se* categories listed above does not preclude a finding that such person is or was not of good moral character. *See* 8 U.S.C. § 1101(f). Finally, any of the acts described above, if committed before an alien naturalizes, can be a basis for denaturalization. 8 U.S.C. § 1451(a). Failing to disclose such acts or making false statements regarding them on the naturalization application or during the interview, may also be independent grounds for denaturalization.

V. **Restriction on Judicial Review.**

Certain criminal aliens (*i.e.* aliens who commit crimes that subject them to removal) are barred from seeking judicial review of their removal orders, except to the extent they raise challenges to their removability and certain questions of law or constitutional claims. *See* 8 U.S.C. § 1252(a)(2)(C) & (D). Specifically, aliens who fall within the following grounds of inadmissibility or deportability, and are subject to this judicial review bar, are precluded from seeking judicial review of non-legal questions:

- A. **Criminal and Related Grounds of Inadmissibility.** 8 U.S.C. § 1182(a)(2) (various grounds of inadmissibility based on crimes involving moral turpitude, drug offenses, multiple convictions resulting in cumulative sentences of at least 5 years' imprisonment, prostitution, human trafficking and money laundering);
- B. **Aggravated Felonies, Controlled Substance Violations, Firearm Offenses, and Miscellaneous Crimes.** 8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), (D) (various grounds of deportability including aggravated felonies, drug offenses, firearm offenses, and certain crimes relating to treason, sabotage, espionage);
- C. **Multiple Criminal Convictions.** 8 U.S.C. § 1227(a)(2)(A)(ii) (ground of deportability based on two crimes involving moral turpitude for which both offenses are, without regard to their date of conviction, otherwise covered in 8 U.S.C. § 1227(a)(2)(A)(i), which is the ground of deportability based on one crime involving moral turpitude).

VI. **Exposure to Summary Removal.**

Aliens who commit certain crimes may be subject to summary removal, *i.e.*, they will not have the opportunity to go before an immigration judge to apply for discretionary immigration relief, other than to assert claims that they fear persecution or torture.

- A. **Aliens Convicted of Aggravated Felonies Who Are Not Lawful Permanent Residents, Asylees, or Refugees.**
 - These aliens are subject to “administrative removal” under 8 U.S.C. § 1228(b).
 - The removal cases are heard before Department of Homeland Security (“DHS”) officers rather than immigration judges, and the aliens are ineligible for discretionary relief. 8 U.S.C. § 1228(b)(5); 8 C.F.R. § 238.1.
 - Such aliens, however, may raise a claim of persecution or torture, and if a DHS officer finds the fear to be reasonable, the alien is referred for a full

hearing before an immigration judge to apply for withholding of removal (if eligible) and protection under the Convention Against Torture. 8 C.F.R. §§ 238.1(f)(3) and 208.31.

B. Aliens Who Illegally Enter the United States After Previously Being Deported.

- These aliens are subject to “reinstatement of removal” under 8 U.S.C. § 1231(a)(5).
- The removal cases are heard before DHS officers rather than immigration judges, and the aliens are ineligible for relief. 8 U.S.C. § 1231(a)(5).
- Such aliens, however, may raise a claim of persecution or torture, and if a DHS officer finds the fear to be reasonable, the alien is referred for a full hearing before an immigration judge to apply for withholding of removal (if eligible) and protection under CAT. 8 C.F.R. §§ 241.8(e) and 208.31.

VII. Enhanced Criminal Penalties for Unlawful Reentry By Aliens Who Have Committed Certain Crimes.

Aliens who have been removed from the United States face criminal prosecution if they re-enter, attempt to re-enter, or are found in the United States. 8 U.S.C. § 1326. Generally, such aliens may be imprisoned for **not more than two years** and may assert a defense to prosecution if they obtain advance permission from the Attorney General to reapply for admission, or establish that such advance consent was not required. 8 U.S.C. § 1326(a).

Aliens whose removal was subsequent to a conviction for certain crimes, however, face enhanced sentences as set forth below and may be ineligible for advanced consent for readmission.

- An aggravated felony - alien may be imprisoned for not more than **20 years**, 8 U.S.C. § 1326(b)(2).
- A felony (other than an aggravated felony) - alien may be imprisoned for not more than **10 years**, 8 U.S.C. § 1326(b)(1).
- Three or more misdemeanors involving drugs, crimes against the person, or both - alien may be imprisoned for not more than **10 years**, 8 U.S.C. § 1326(b)(1).
- Additionally, aliens convicted of certain non-violent crimes who are removed prior to completion of their prison sentence pursuant to 8 U.S.C. § 1231(a)(4)(B) face enhanced sentences. These aliens may be imprisoned for not more than **10 years**, and may assert a defense based on advance consent. 8 U.S.C. § 1326(b)(4).

Section 5: *Brief Overview of Criminal Law-Related Amendments to the Immigration and Nationality Act*

- I. Introduction**
 - II. The Immigration and Nationality Act of 1952**
 - III. The 1986 and 1988 Amendments**
 - IV. The Immigration Act of 1990**
 - V. The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991**
 - VI. The Immigration and Technical Corrections Act of 1994**
 - VII. Act of August 26, 1994 (Pertaining to Adjustment of Status under 8 U.S.C. § 1255(i) and Subsequent Acts Regarding 8 U.S.C. § 1255(i))**
 - VIII. The Antiterrorism and Effective Death Penalty Act of 1996**
 - IX. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996**
 - X. The REAL ID Act of 2005**
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I. Introduction.

The Supreme Court's holding in *Padilla* is likely to result in collateral challenges to pre-*Padilla* convictions based on ineffective assistance of counsel. If courts conclude that *Padilla*'s holding applies retroactively, thus enabling aliens to raise such challenges, the adequacy of defense counsel's advice will be determined in large part by an analysis of the law existing at the time of the plea. This section offers the reader a broad narrative of how that law has changed as it relates to the immigration consequences of a guilty plea by describing some of the most significant amendments to the Immigration and Nationality Act ("INA") over the last few decades. This section is not an exhaustive summary for every change in the INA during this period of time. The reader should also research the case law and legislative history.

II. The Immigration and Nationality Act of 1952.

The nation's earliest immigration laws were animated by the primary objectives of public welfare and national security. *See, e.g.*, Naturalization Act, ch. 54, 1 Stat. 567 (1798); Page Act, ch. 141, 18 Stat. 477 (1875); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1974); Immigration Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952). With the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) ("1952 Act," current version at 8 U.S.C. §§ 1101, *et seq.*), Congress completely and comprehensively revised and codified the nation's laws governing

immigration, naturalization, and nationality, and, as amended in the interim, it remains in effect today.

The 1952 Act contained a few provisions concerning the regulation of criminal aliens. Criminal activities that would subject an alien to the denial of admission (“exclusion”) or deportation included, but were not limited to: (1) crimes involving moral turpitude (“CIMT”); (2) offenses relating to prostitution; (3) violations of the drug laws; and (4) offenses relating to espionage and sabotage. 1952 Act §§ 212 and 241. Criminal aliens generally remained eligible for various forms of relief from deportation, such as waivers of inadmissibility under sections 212(c) and 212(h) of the 1952 Act, judicial recommendations against deportation (“JRADs”),⁴ suspension of deportation, asylum and withholding of deportation, and voluntary departure.

III. The 1986 and 1988 Amendments.

In the late 1980s, Congress enacted a series of amendments to the INA “[i]n an effort to deal more effectively and expeditiously with the involvement of aliens in serious criminal activities, particularly narcotics trafficking.” 55 Fed. Reg. 24,858-01 (June 19, 1990). In 1986, Congress classified all controlled substances as drugs for purposes of establishing grounds of exclusion and deportation under the immigration regulations. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. That same year, Congress established the Criminal Alien Hearing Program, which allowed immigration authorities to place a convicted criminal alien in deportation proceedings while the alien was still in criminal detention as a means to expedite deportation. Immigration Reform and Control Act of 1986 (“IRCA”), § 701, Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1254(i) (1986)).

In 1988, Congress passed an omnibus drug enforcement law, the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (“ADAA”), which introduced the term “aggravated felony” into the immigration law lexicon and resulted in the creation of a new class of deportable criminal aliens. Section 7342 of the ADAA defined an aggravated felony as including murder, drug trafficking crimes, illicit trafficking in firearms or destructive devices, or any attempt or conspiracy to commit such acts in the United States. *See* INA § 101(a)(43) (1988). Although the ADAA did not provide an effective date for section 7342’s amendments, the Board of Immigration Appeals (“Board”) subsequently held that the aggravated felony definition applied to all convictions occurring “before, on, or after” the November 18, 1988 enactment date. *Matter of A-A-*, 20 I. & N. Dec. 492, 495 (BIA 1992).

In addition to mandating the detention of aliens convicted of aggravated felony offenses (“aggravated felons”) during the pendency of their deportation proceedings and following the completion of their criminal incarcerations, *see* ADAA § 7343(a), the ADAA: (1) rendered aliens

⁴ The Supreme Court’s decision in *Padilla v. Kentucky*, discusses the history and purpose of JRADs. 130 S. Ct. 1473, 1479-80 (2010).

deportable as aggravated felons ineligible for voluntary departure, ADAA § 7343(b); (2) reduced (from 180 to 60 days) the period within which aggravated felons could petition the courts of appeals for review of their deportation orders, ADAA § 7347(b); and (3) prohibited a deported aggravated felon from applying for admission to the United States during the ten-year period following his or her deportation, even if the alien was otherwise eligible for admission, ADAA § 7349.

IV. The Immigration Act of 1990.

On November 29, 1990, Congress enacted the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (“IMMACT90”), which broadly impacted criminal aliens, most notably in its expansion of the definition of “aggravated felony” to include:

- Any offense for money laundering, as defined in 18 U.S.C. § 1956, *see* IMMACT90 § 501(a)(3);
- “[C]rimes of violence,” as defined in 18 U.S.C. § 16 (but not including “purely political offense[s]”), for which “the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years,” *see* IMMACT90 § 501(a)(3); and
- Additional grounds of controlled substance trafficking, *see* IMMACT90 § 501(a)(2), and attempts to violate these drug laws, *id.* at § 508.

The Act clarified that the definition of aggravated felony was applicable to both federal and state convictions, *see* IMMACT90 § 501(a)(5), as well as to convictions for comparable foreign offenses if the term of imprisonment was completed within the previous fifteen years, *id.* at § 501(a)(6). Congress specified that the amendments applied to offenses occurring on or after the enactment date of November 29, 1990, except for drug trafficking offenses and offenses in violation of state law, which went into effect as if enacted as part of the ADAA in 1988. *See* IMMACT90 § 501(b).

IMMACT90 also affected aggravated felons’ procedural rights with respect to detention and bond. *See* IMMACT90 § 504(a) & (b). It further reduced the time period, from 60 to 30 days, within which an alien ordered deported as an aggravated felon could seek review of his or her deportation order in the federal courts of appeals, *id.* at § 502(a), and eliminated the automatic stay of deportation that was triggered upon the filing of a petition for judicial review, *id.* at § 513. Thus, to obtain a stay of deportation pending judicial review, an alien ordered deported as an aggravated felon was required to file a motion for a stay of removal or risk having the court lose jurisdiction over the case upon his or her deportation. Additionally, Congress increased the period of inadmissibility for aggravated felons so that once deported, an aggravated felon was now barred from applying for admission for at least twenty years following the date of deportation. *Id.* at § 514.

The legislation also placed limitations on the availability of deportation relief to aggravated felons:

- JRADs were eliminated for aggravated felony offenses and CIMTs. IMMACT90 § 505. Congress specified that section 505 applies to convictions entered before, on, or after November 29, 1990, *id.*, and the former Immigration and Naturalization Service (“INS”) took the position that the provision applied to “all final convictions except those for which JRADs had been granted prior to date of enactment.” 67 Interpreter Releases 1362 (Dec. 3, 1990) (reproducing INS IMMACT90 Wire 5 (Nov. 28, 1990)).
- Aggravated felons were barred from demonstrating “good moral character,” a prohibition that rendered them statutorily ineligible for such immigration benefits as suspension of deportation under 8 U.S.C. § 1254(a) (1988), registry under 8 U.S.C. § 1259 (1988), voluntary departure under 8 U.S.C. § 1254(e) (1988), and naturalization under 8 U.S.C. § 1247 (1988). IMMACT90 § 509.
- Lawful permanent residents who had served prison terms of at least five years because of aggravated felony convictions were barred from applying for a waiver of inadmissibility under section 212(c) of the INA, 8 U.S.C. § 1182(c). IMMACT90 § 511.
- Aggravated felons were barred from applying for or being granted asylum. IMMACT90 § 515(a)(1). This amendment applied to asylum applications made on or after November 29, 1990. *Id.* at § 515(b)(1).
- Aggravated felons were deemed to have *per se* committed a “particularly serious crime” and, therefore, were ineligible for withholding of deportation. IMMACT90 § 515(a)(2).

V. The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.

One year later, Congress passed a bill making technical changes to IMMACT90 and further substantive changes to the INA. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (“Immigration Technical Corrections Act of 1991”). In addition to amending the bail and detention provisions applicable to criminal aliens, the legislation clarified that for purposes of determining a criminal alien’s eligibility for section 212(c) relief, the period of time an alien has served in prison for any aggravated felony convictions must be considered in the aggregate. *Id.* at § 306(a)(10). Congress also mandated that a murder conviction, regardless of the date, will be a bar to a finding of good moral character. *Id.* at § 306(a)(7). Moreover, aggravated felons would have only 30 days to seek judicial review of an *in absentia* deportation order (other criminal aliens continued to have 60 days). *Id.* at § 306(c)(6)(G).

Congress further clarified that, regardless of the date of the aggravated felony conviction, the INS was not required to stay an aggravated felon's deportation pending judicial review, unless otherwise ordered by a court. *Id.* at § 306(a)(11).

VI. The Immigration and Technical Corrections Act of 1994.

With the passage of the Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 ("INTCA"), Congress again expanded the definition of "aggravated felony" to include the following types of crimes:

- Offenses relating to explosives and firearms;
- Theft and burglary offenses with sentences of at least five years;
- Kidnaping for ransom;
- Child pornography;
- Offenses relating to a racketeer influenced organization ("RICO") for which a sentence of five years or more could be imposed;
- Managing, owning, controlling, or supervising a prostitution business;
- Involuntary servitude-related offenses;
- Offenses relating to espionage, sabotage, and treason;
- Fraud or deceit involving a loss of more than \$200,000 to the victim(s);
- Tax evasion involving the loss of more than \$200,000 to the Government;
- Alien smuggling for commercial advantage;
- Document fraud for which a minimum sentence of five years could be imposed; and
- Failure to appear for service of sentence if the underlying sentence is punishable by a term of 15 years or more.

Id. at § 222(a) (amending 8 U.S.C. § 1101(a)(43)).

VII. Act of August 26, 1994 (Pertaining to Adjustment of Status under 8 U.S.C. § 1255(i) And Subsequent Acts Regarding 8 U.S.C. § 1255(i).

In 1994, Congress enacted section 245(i) of the INA, 8 U.S.C. § 1255(i). Pub. L. No. 103-317, § 506(b), 108 Stat. 1766-67, *reprinted in* 8 U.S.C.A. § 1182 note. Generally, aliens who enter the country without inspection are ineligible to seek adjustment to lawful permanent resident status. *See* 8 U.S.C. § 1255(a). Section 245(i) of the INA provided an exception to this general rule, permitting any alien who entered the country without inspection to seek adjustment of status upon the payment of an increased filing fee if the alien has an immigrant visa “immediately available.” *Id.* at § 1255(i)(2)(B). In the 1994 Act, Congress specified that its amendment “shall cease to have effect on October 1, 1997.” Act of Aug. 26, 1994 § 506(c). The law expired on that date but Congress revived it later that same year and extended its availability to aliens who were the beneficiaries of qualifying classification petitions or labor certification applications filed on or before January 14, 1998. *See* Pub. L. No. 105-119, § 111(a)(1)(i)(B)(i), 111 Stat. 2440 (1997). Congress again extended the provision in the Legal Immigration Family Equity Act of 2000, Pub. L. No. 106-554, § 1502(a)(1)(B), 114 Stat. 2763, making section 1255(i) available as long as the visa petition or adjustment application was filed on or before April 30, 2001. Following the 2000 legislative amendment, adjustment of status under section 1255(i) is presently unavailable except for those aliens who qualify as being grandfathered into the section. *See* 8 C.F.R. § 245.10(b).

VIII. The Antiterrorism and Effective Death Penalty Act of 1996.

In the wake of the 1995 Oklahoma City bombing, Congress enacted on April 24, 1996, legislation designed to deter and punish terrorism, which also included, among other significant changes to the immigration laws, an expansion of the grounds of deportability, broader mandates for detention of criminal aliens, and tighter restrictions on the availability of discretionary relief and judicial review. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (“AEDPA”). AEDPA amended the aggravated felony definition to include:

- Gambling offenses and the transmission of wagering information;
- Transportation for purposes of prostitution;
- Document fraud offenses, such as falsely making, forging, counterfeiting, mutilating, or altering a passport for which a sentence of at least eighteen months is imposed;
- Improper entry or re-entry, or misrepresentation or concealment of facts by an alien previously deported as an aggravated felon;
- Offenses for commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers for which a sentence of five years or more may be imposed;

- Offenses for obstruction of justice, perjury, subornation of perjury, or bribery of a witness for which a sentence of five years or more may be imposed; and
- Failure to appear for service of sentence if the underlying sentence is for a felony punishable by a term of two years or more.

AEDPA § 440(e). These amendments applied prospectively to convictions entered on or after the April 24, 1996 date of enactment. *Id.* at § 440(f).

Additionally, AEDPA amended the aggravated felony alien smuggling provision by deleting the requirement that the offense be committed for commercial gain and instead providing that any conviction for alien smuggling for which a five-year sentence is imposed qualifies as an aggravated felony. AEDPA § 440(e)(3). This change applied retroactively to convictions entered on or after October 24, 1994. *Id.* at § 440(f).

Until the enactment of AEDPA, aggravated felons who had served less than five years in prison for their aggravated felony convictions remained eligible to seek relief from deportation under section 212(c) of the INA. In AEDPA, however, Congress expressly disallowed section 212(c) relief for aggravated felons and aliens convicted of other specified categories of criminal offenses, including controlled substance offenses, firearm offenses, and multiple criminal convictions. AEDPA § 440(d). AEDPA also removed the *per se* bar to withholding of deportation for aggravated felons convicted of a particularly serious crime. *Id.* at § 413(f).

IX. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

A few months after AEDPA was enacted, Congress passed legislation that amended and overhauled the immigration laws, with particularly significant effects on criminal aliens. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (“IIRIRA”). Taken together, AEDPA and IIRIRA created enhanced penalties for immigration-related crimes and also significantly increased the number of consequences for aliens convicted of serious crimes. IIRIRA carried forward AEDPA’s statutory prohibition on judicial review of criminal aliens’ deportation orders and expanded it to include excludable criminal aliens as well. IIRIRA § 242(a)(2).

For the first time, Congress enacted a statutory definition of “conviction” for immigration purposes. IIRIRA § 322(a) (codified at 8 U.S.C. § 1101(a)(48)(A)). The statutory definition had a stated purpose of “deliberately broaden[ing] the scope of [the Board’s] definition of ‘conviction’ [as set forth in *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988)],” which, in Congress’s view, did “not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended.” Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. H10,899 (daily ed. Sept. 24, 1996). Section 322 of IIRIRA therefore “clarifies Congressional intent that even in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to

establish a ‘conviction’ for purposes of the immigration laws.” *Id.*; see Appendix C (detailed discussion of what constitutes a conviction for immigration purposes).

IIRIRA also eliminated the distinction between the “imposed” and “actually imposed” requirement of most of the “term of imprisonment” provisions of the INA. In its place, Congress enacted a new definition of imprisonment for immigration purposes which provided that “[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” IIRIRA § 322(a)(1)(B).

Additionally, the definition of aggravated felony was once again expanded (in many instances, by lowering the sentence or monetary thresholds for offenses already included in the definition) to encompass:

- Crimes of rape and sexual abuse of a minor;
- Theft and burglary offenses for which the term of imprisonment is at least one year;
- RICO-related and gambling offenses for which a one-year term of imprisonment may be imposed;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles for which the term of imprisonment was at least one year;
- Offenses relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness for which a sentence of one year or more may be imposed;
- Money laundering offenses involving funds over \$10,000 (a lowering of the previous requirement of \$100,000);
- Fraud or deceit involving a loss of more than \$10,000 to the victim(s); and
- Tax evasion involving the loss of more than \$10,000 to the Government.

IIRIRA § 321. Similarly, IIRIRA broadened the document fraud offenses that qualify as aggravated felonies by lowering the sentence threshold from eighteen to twelve months, but created an exception for aliens whose convictions were for a first offense committed on behalf of their spouse, child, or parent. *Id.* at § 321(a)(9). A similar exception was created for persons convicted of alien smuggling if the conviction was a first offense that was committed on behalf of a spouse, child, or parent only. *Id.* at § 321(a)(8). However, Congress also eliminated the requirement that a sentence of at least five years be imposed for an alien smuggling conviction to qualify as an aggravated felony. *Id.* Thus, all alien smuggling convictions that do not fall within the narrow family/first offense exception are

now aggravated felonies. Congress expressly made IIRIRA's amendments to the aggravated felony definition retroactive by providing that they "appl[y] regardless of whether the conviction was entered before, on, or after the [September 30, 1996] date of enactment[.]" *Id.* at § 321(b).

In IIRIRA, Congress consolidated deportation and exclusion proceedings into unified "removal" proceedings, and created a new procedure that authorized expedited removal of criminal aliens. Under this change, non-permanent resident aggravated felons and lawful permanent residents who have fewer than two years of permanent residency can be placed in expedited administrative removal proceedings and ordered removed without appearing before an immigration judge. *See* IIRIRA § 308(b)(5). Additionally, aggravated felons are subject to expedited removal proceedings which are required by statute to be completed "to the extent possible . . . before the alien's release from incarceration for the underlying aggravated felony." IIRIRA § 242A; *see* 8 C.F.R. § 238.1 (procedures for expedited removal proceedings). In a further attempt to streamline the removal of criminal aliens, IIRIRA authorized federal judges to issue judicial orders of removal at the time of sentencing for aliens who are deportable. IIRIRA § 374. Judicial removal must be requested by the United States Attorney *with the concurrence* of the Department of Homeland Security ("DHS"). *Id.* Additionally, IIRIRA created the "stipulated deportation" process, in which a deportable alien can enter into a plea agreement, subject to the concurrence of DHS, in which the alien stipulates to being deported as part of his or her criminal sentence. *Id.* The stipulated deportation process eliminates the need for an immigration hearing (and further DHS detention), and ensures that DHS will immediately remove the alien from the United States upon completion of the alien's sentence. The statute requires the alien and his or her representative to waive an immigration hearing and waive the right to appeal from the order of removal. *Id.*

Congress also repealed section 212(c) relief entirely, and replaced it with cancellation of removal, a new discretionary form of relief that excludes aggravated felons from eligibility. IIRIRA § 304. Many criminal aliens challenged the retroactivity of AEDPA and IIRIRA's amendments, arguing that they detrimentally relied on the availability of section 212(c) relief in choosing to plead guilty. The Supreme Court decided this issue in *INS v. St. Cyr*, 533 U.S. 289 (2001), and held that criminal aliens who pleaded guilty prior to April 24, 1996, and who reasonably relied on the availability of a section 212(c) waiver at the time of their plea, remained eligible. In light of *St. Cyr*, an alien who entered a plea before April 24, 1996, and who was not convicted of an aggravated felony or felonies for which he or she was incarcerated for five years or more, was generally eligible to apply for a section 212(c) waiver. An alien who entered a plea between April 24, 1996, and April 1, 1997, and was not convicted of an aggravated felony, a controlled substance offense, a firearms offense, or two or more crimes involving moral turpitude for which he or she received a sentence of at least one year, was also generally eligible to apply for a section 212(c) waiver.

In section 348 of IIRIRA, Congress eliminated the availability of a section 212(h) waiver of inadmissibility for any lawful permanent resident who has been convicted of an aggravated felony. The waiver, however, remains available to non-lawful permanent resident aliens. There is no judicial review of the Attorney General's decision to grant or deny a section 212(h) waiver. *See* IIRIRA § 348(a).

IIRIRA also restored the automatic bar to withholding of deportation (now called “restriction on removal”) that AEDPA briefly removed for aggravated felons by establishing that an alien who has been convicted of one or more aggravated felonies and sentenced to an aggregate of five years or more, has been convicted of a “particularly serious crime.” IIRIRA § 305. Additionally, IIRIRA carried forward the bar to voluntary departure for aggravated felons and further prohibited judicial review of grants or denials of voluntary departure. IIRIRA § 304(a). Finally, in IIRIRA § 306, Congress created a specific jurisdictional bar for certain criminal aliens, precluding such aliens from seeking judicial review in any court. *See* 8 U.S.C. § 1252(a)(2)(C). While IIRIRA § 306 states that “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense,” the Supreme Court in *St. Cyr*, 553 U.S. 289, held that criminal aliens who fell within the terms of the bar could challenge their removal orders in district court habeas corpus proceedings.

X. The REAL ID Act of 2005.

The most recent major legislative change to the INA occurred on May 11, 2005, when President Bush signed into law the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (“REAL ID Act”). The REAL ID Act amended the jurisdictional provisions of the INA, the asylum provisions and other sections governing relief and protection, and the terrorism-related provisions of the immigration statute. Relevant here, the jurisdictional amendments were effective immediately, and were designed to overturn existing case law enabling aliens convicted of crimes in the United States to challenge their removal orders in district court. *See, e.g., St. Cyr*, 553 U.S. 289. To that end, the amendments provided that all aliens, including criminal aliens, may obtain review of constitutional claims and “questions of law” through petitions for review in the courts of appeals. REAL ID Act § 106(a). Specified categories of criminal aliens, including aggravated felons, are precluded from seeking review over the agency’s factual determinations. *Id.* The provisions are fully retroactive and apply to removal proceedings instituted before, on, or after the date of enactment, and to events or circumstances that occurred or arose before, on, or after enactment. REAL ID Act § 106(b).

Immigration Consequences Of Criminal Convictions: Appendices

Appendix A: *Glossary of Terms*

Appendix B: *Immigration Law Sources and Resources*

Appendix C: *What Constitutes a Conviction for Immigration Purposes*

Appendix D: *The Method for Evaluating Immigration Consequences of Criminal Convictions*

Appendix A: *Glossary of Terms*

Adjustment of Status. A procedure allowing certain aliens in the United States to apply for lawful permanent resident status (Green Card) without having to depart the United States and appear at an American consulate in a foreign country. *See* 8 U.S.C. § 1255(a) & (i).

Admission/Admitted. With respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A).

Aggravated Felony. A select group of offenses for which conviction entails significant additional immigration consequences. The INA bars aliens convicted of aggravated felonies from obtaining certain forms of discretionary relief, such as asylum, cancellation of removal, and voluntary departure. Such aliens generally are precluded from obtaining judicial review to the greatest extent permitted under the Constitution. *See* 8 U.S.C. § 1252(a)(2)(C). The definition of “aggravated felony” is found at 8 U.S.C. § 1101(a)(43).

Alien. Any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3). This includes immigrants (Lawful Permanent Residents) and non-immigrants.

Alien File/A-File. A file maintained by the Department of Homeland Security (“DHS”) containing an alien’s biographical information, applications for immigration benefits, documentation from any prior immigration proceedings, a photograph, and fingerprints.

Alien Number/A-Number. A registration number assigned by DHS to each alien and used for identification and tracking by DHS, the immigration courts, and the Board of Immigration Appeals. Currently, A-numbers consist of the letter “A” followed by nine digits. For example: A012-345-678.

Anti-Drug Abuse Act of 1988 (“ADAA”), Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988). Section 7342 of the ADAA added the definition of “aggravated felony” to the Immigration and Nationality Act (“INA”).

Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 132, 110 Stat. 1273 (Apr. 24, 1996). Amended the Immigration and Nationality Act to provide for expedited removal of criminal and terrorist aliens.

Asylee. An alien within the United States who has been granted the protection of the United States asylum laws because of persecution or a well-founded fear of persecution in his or her home country.

Board of Immigration Appeals (“Board” or “BIA”). The appellate body within the Department of Justice’s Executive Office For Immigration Review (“EOIR”) that hears administrative appeals from decisions of Immigration Judges and from certain decisions made by the United States Citizen and Immigration Services and by Customs and Border Protection.

Cancellation of Removal. A form of relief from removal for permanent residents and non-permanent residents. *See* 8 U.S.C. § 1229b(a) & (b).

Child. For immigration purposes, an unmarried person under the age of 21 years. 8 U.S.C. § 1101(b)(1). There are specific provisions regarding children born out of wedlock, stepchildren, and adopted children, which can be found in the comprehensive definition at 8 U.S.C. § 1101(b)(1)(A)-(F).

Conviction. With respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. 8 U.S.C. § 1101(a)(48)(A). Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part. 8 U.S.C. § 1101(a)(48)(B).

Crime Involving Moral Turpitude (“CIMT”). A ground of deportability and inadmissibility under the INA. *See* 8 U.S.C. §§ 1182(a)(2)(A) and 1227(a)(2)(A). “Moral turpitude” is not defined in the INA, but various courts have recognized that moral turpitude generally refers to conduct that involves fraud or is inherently base, vile, and depraved, and contrary to the accepted rules of morality and the duties owed between persons and to society in general.

Department of Homeland Security (“DHS”). The department created by the Homeland Security Act, and to which the functions of the former Immigration and Naturalization Service (“INS”) were transferred.

Deportation. The term used prior to April 1, 1997, to refer to the formal removal of an alien from the United States. It also refers to the type of immigration proceedings commenced prior to April 1, 1997, to remove an illegal or criminal alien who has made an entry into the United States.

Entry Without Inspection (“EWI”). Formerly, aliens who entered without inspection by an immigration officer were considered deportable under 8 U.S.C. § 1251(a)(1)(B) (1990). Under the amended INA, they are now known as aliens present without admission or parole (and may alternatively be referred to as “PWI” or “PWAP”), and are considered to be inadmissible. *See* 8 U.S.C. § 1182(a)(6)(A). Aliens who entered at a place or time other than as designated by DHS may be criminally prosecuted. *See* 8 U.S.C. § 1325.

Exclusion. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the formal denial of an alien’s entry into the United States, or the formal removal of the alien from the United States following an exclusion hearing.

Executive Office for Immigration Review (“EOIR”). An office within the U.S. Department of Justice that oversees the activities of the Office of the Chief Immigration Judge (including the immigration court system) and the Board of Immigration Appeals.

Good Moral Character. An element aliens must demonstrate in order to be eligible for various immigration benefits. *See, e.g.*, 8 U.S.C. §§ 1229a (cancellation of removal) and 1427(a) (naturalization). The INA does not define “good moral character,” but sets forth a non-exclusive list of circumstances that foreclose a finding of good moral character. 8 U.S.C. § 1101(f). A catchall provision makes clear that these *per se* rules are not exclusive: “The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”

Green Card. Commonly used term to describe the Alien Registration Receipt Card (Form I-551) issued to lawful permanent residents in lieu of a visa. The first such cards were issued in 1946 and were green in color. Although the cards later ceased to be green, they are still commonly called “green cards.”

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996). IIRIRA replaced “deportation” and “exclusion” proceedings with a single type of proceeding before immigration judges: “removal proceedings.” It also stripped courts of jurisdiction to review discretionary decisions by the Attorney General (*i.e.*, the Board of Immigration Appeals), including immigration bond, parole, and certain relief from removal.

Immigrant. Every alien seeking to enter the U.S. is presumed to be an immigrant, that is intending to settle here permanently, unless he or she can prove that he or she is a non-immigrant as defined in 8 U.S.C. § 1101(a)(15)(A)-(V). 8 U.S.C. § 1184(b).

Immigration Judge. An attorney appointed by the Attorney General as an administrative judge to conduct removal proceedings. 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10.

Immigration Act of 1990 (“IMMACT90”), Pub. L. No. 101-649, 104 Stat. 5005 (Nov. 29, 1990). Effective as of November 29, 1990. Among other things, it added two types of crimes to the INA’s definition of “aggravated felony”: (1) crimes of violence for which the alien is sentenced to or confined for a period of five years, and (2) money laundering.

Immigration and Nationality Act of 1952 (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (June 27, 1952). Establishes the basic structure of our immigration laws. The INA sometimes is referred to as the McCarran-Walter Act after the bill’s sponsors: Senator Pat McCarran (D-Nevada) and Congressman Francis Walter (D-Pennsylvania). Although it stands alone as a body of law, the INA is also codified at 8 U.S.C. § 1101 *et seq.* Congress has amended the INA numerous times, but it remains the basic statutory body of immigration law.

Immigration and Nationality Technical Corrections Act of 1994 (“INTCA”), Pub. L. No. 103-416, 108 Stat. 4320 (Oct. 25, 1994). Among other things, it expanded the class of aggravated felonies.

Immigration Marriage Fraud Amendments of 1986 (“IMFA”), Pub. L. No. 99-639, 100 Stat. 3537 (1986). These amendments impose strict conditions on any alien seeking to become a lawful permanent resident through marriage to a United States citizen or permanent resident, including conditional residency for a two-year period.

Immigration Reform Control Act of 1986 (“IRCA”), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986). Among other things, IRCA established the Criminal Alien Hearing Program, which allowed immigration authorities to place convicted criminal aliens in deportation proceedings while the alien was still in criminal detention as a means to expedite deportation.

Institutional Hearing Program (“IHP”). Refers to removal hearings held inside correctional institutions while the alien is serving his or her criminal sentence.

Judicial Removal. The procedure through which a United States District Judge may order the removal of a criminal alien during the sentencing phase of criminal proceedings. *See* 8 U.S.C. § 1228(c).

Lawful Permanent Resident (“LPR”). An alien who has been conferred permanent resident status, or an alien who has a “Green Card.” Upon meeting the statutory prerequisites for naturalization, an LPR may apply to become a naturalized citizen. 8 U.S.C. § 1427.

Naturalization. The process of conferring citizenship of a state on a person after birth. 8 U.S.C. § 1101(a)(23). *See also* 8 U.S.C. § 1400, *et seq.*

Nicaraguan Adjustment and Central American Relief Act of 1997 (“NACARA”), Pub. L. No. 105-119, 111 Stat. 2193 (Nov. 19, 1997). NACARA provided various forms of immigration benefits and relief from deportation to certain Nicaraguans, Cubans, Salvadorans, Guatemalans, nationals of former Soviet bloc countries and their dependents.

Non-Immigrant. An alien admitted to the United States for a temporary duration. 8 U.S.C. § 1101(a)(15)(A)-(V).

Notice to Appear (“NTA”). The NTA (Form I-862) is the charging document used by DHS to place an alien in removal proceedings. The charging document was formerly called an Order to Show Cause (“OSC”).

Parolee. An alien seeking admission at a port of entry who appears to DHS to be inadmissible, but for “urgent humanitarian reasons” or “significant public benefit” is allowed to come into the United States, provided the alien is not a security or flight risk. *See* 8 C.F.R. § 212.5(b).

Particularly Serious Crime. Crime for which a conviction will render an alien ineligible for asylum or withholding of removal. For purposes of asylum eligibility, all aggravated felony offenses are expressly declared by statute to be “particularly serious” crimes constituting a danger to the community. 8 U.S.C. § 1158(b)(2)(B)(i). Other crimes may also be determined to be “particularly serious” for asylum purposes. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) & (B)(ii). For purposes of withholding of removal, a particularly serious crime includes an aggravated felony for which a five-year or longer sentence is ordered (whether imposed or suspended). 8 U.S.C. § 1231(b)(3)(B)(ii). Other crimes may also be determined to be “particularly serious” despite the length of sentence imposed. 8 U.S.C. § 1231(b)(3)(B).

REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005). Among other things, the REAL ID Act streamlined the piecemeal judicial review of orders of removal by channeling them all to the United States Courts of Appeals and tightened laws on applications for asylum and removal of aliens for terrorist activity.

Refugee. A person who is outside the country of his or her nationality who is unable or unwilling to return to that country because of past persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42).

Removal. Following IIRIRA, the removal of an alien from the United States after a removal proceeding commenced on or after April 1, 1997. Among other things, IIRIRA consolidated deportation and exclusion proceedings into unified “removal” proceedings in which an immigration judge determines (1) whether an alien is subject to removal from the United States based on charges of inadmissibility or deportability filed by DHS and (2) whether the alien is eligible for any relief or protection from removal.

“S” Visa. A limited number of non-immigrant visas granted to aliens who have crucial, reliable information concerning criminal or terrorist activity, and are willing to provide such information to United States law enforcement authorities in ongoing investigations or prosecutions. *See* 8 U.S.C. § 1101(a)(15)(S).

Serious Criminal Offense. For purposes of 8 U.S.C. § 1182(a)(2)(E) (certain aliens involved in serious criminal activity who assert immunity from prosecution): (1) any felony; (2) any crime of violence, as defined in section 18 U.S.C. §16; or (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another. 8 U.S.C. § 1101(h).

Voluntary Departure (“VD”). The privilege of voluntarily departing the United States in lieu of being removed.

U.S. Citizenship and Immigration Services (“CIS”). The agency within DHS responsible for adjudicating applications for immigration benefits, including claims for refugee status and asylum.

U.S. Customs and Border Protection (“CBP”). An agency within DHS responsible for enforcing the immigration laws at our nation’s borders and ports of entry. The U.S. Border Patrol and the functions of the former INS inspectors have been transferred to this agency.

U.S. Immigration and Customs Enforcement (“ICE”). The agency within DHS principally responsible for enforcing the immigration laws in the interior of the United States.

Appendix B: *Immigration Law Sources and Resources*

I. Introduction.

The discussion of sources and list of resources in this appendix is not comprehensive but is intended to direct interested parties to key legislative and regulatory provisions, administrative and judicial decisions, and select resources that may be helpful in better understanding immigration law in general and particularly in analyzing potential immigration consequences of guilty pleas in criminal proceedings.

II. Constitutional and Federal Statutory Authority.

The United States Constitution gives Congress plenary authority to regulate immigration. *See* U.S. Const. art. I, § 8, cl. 4 (“Congress shall have [p]ower . . . [t]o establish an uniform [r]ule of [n]aturalization”). Pursuant to this authority, Congress enacted the Immigration and Nationality Act of 1952 (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (1952), over President Truman’s veto and established the basic structure of our immigration laws. The INA is codified at 8 U.S.C. § 1101 *et seq.*

Congress has amended the INA numerous times, but it remains the basic statutory body of immigration law. Some of the more significant amendments relevant to this monograph include:

- A. **Anti-Drug Abuse Act of 1988 (“ADAA”)**, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988). Section 7342 of the ADAA added the definition of “aggravated felony” to the INA.
- B. **Immigration Act of 1990 (“IMMACT90”)**, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990). Among other things, IMMACT § 501 added two types of crimes to the INA’s definition of “aggravated felony”: (1) crimes of violence for which the alien is sentenced to or confined for a period of five years, and (2) money laundering.
- C. **Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)**, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). AEDPA amended the INA to provide for the expedited removal of criminal and terrorist aliens. These amendments included a provision to eliminate discretionary relief for most criminal aliens illegally present in the United States, as well as a statutory bar to judicial review of deportation orders for such aliens.

- D. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)**, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996). IIRIRA replaced “deportation” and “exclusion” proceedings with a single type of proceeding before immigration judges: “removal proceedings.” It also stripped courts of jurisdiction to review discretionary decisions by the Attorney General and his or her delegates, including those related to immigration bond, parole, and certain relief from removal.
- E. REAL ID Act of 2005**, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005). Among other things, the REAL ID Act streamlined the piecemeal judicial review of orders of removal by channeling them all to the United States Courts of Appeals and tightened laws on applications for asylum and removal of aliens for terrorist activity.

For a more detailed description of significant amendments to the INA, *see* Section 5, Brief Overview of Criminal Law-Related Amendments to the Immigration and Nationality Act.

III. Federal Regulations and Agencies with Immigration Authority.

The general provisions of the INA, as enacted and amended by Congress, are interpreted and implemented by regulations issued by various agencies. After these regulations are published in the Federal Register, they are collected and published in the Code of Federal Regulations (“C.F.R.”). The C.F.R. is arranged by subject title and generally parallels the structure of the United States Code.

Title 8 of the C.F.R. deals with “Aliens and Nationality,” as does Title 8 of the United States Code. Thus, most regulations dealing with immigration are found within this title, including those promulgated by the Department of Homeland Security and the Department of Justice. Other departments with authority over immigration matters, namely the Department of Labor and Department of State, have regulations in titles 20 and 22 of the C.F.R., respectively.

A. Department of Homeland Security.

On March 1, 2003, the Immigration and Naturalization Service (“INS”), which was an agency within the Department of Justice, was abolished by the Homeland Security Act of 2002 (“HSA”), Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). The INS’s functions were divided among three agencies within the newly created United States Department of Homeland Security (“DHS”): (1) Immigration and Customs Enforcement (“ICE”), which principally is responsible for enforcing the immigration laws in the interior of the United States; (2) Citizenship and Immigration Services (“CIS”), which is responsible for adjudicating applications for immigration benefits, including affirmative claims for asylum and refugee status; and (3) Customs and Border Protection (“CBP”), which is responsible for enforcing the immigration laws at the nation’s borders.

Although the INS has been abolished and its functions transferred to DHS agencies, the regulations – and even the INA – still contain references to the Attorney General and INS officials. According to the Homeland Security Act, 6 U.S.C. § 557:

With respect to any function transferred by or under this chapter (including under a reorganization plan that becomes effective under section 542 of this title) and exercised on or after the effective date of this chapter, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred.

Regulations governing DHS are located at 8 C.F.R. chapter I (8 C.F.R. §§ 1.1-507).

B. Department of Justice.

Within the Department of Justice, the Executive Office for Immigration Review (“EOIR”) is responsible for adjudicating immigration cases. Specifically, under delegated authority from the Attorney General, EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate review, and administrative hearings. For a more detailed explanation of removal proceedings, *see* Section 1, Overview of Removal Process.

EOIR consists of three components: (1) the Office of the Chief Immigration Judge, which is responsible for managing the numerous immigration courts located throughout the United States where immigration judges adjudicate individual cases; (2) the Board of Immigration Appeals (“Board”), which primarily conducts appellate review of immigration judge decisions and certain decisions by DHS; and (3) the Office of the Chief Administrative Hearing Officer, which adjudicates immigration-related employment cases.

After the transfer of INS’s functions to DHS on March 1, 2003, a new 8 C.F.R. chapter V was established to recodify the regulations governing EOIR, which remained within the Department of Justice. *See* 68 Fed. Reg. 10349 (March 5, 2003). Within 8 C.F.R. chapter V, regulations governing the Board are found in Subpart A (8 C.F.R. §§ 1003.1-1003.8); those governing the Office of the Chief Immigration Judge are found in Subpart B (8 C.F.R. §§ 1003.9-1003.11); and those governing the immigration court’s rules of procedure are found in Subpart C (8 C.F.R. §§ 1003.12-47).

C. Department of Labor.

The Department of Labor is involved in those cases in which an alien seeks admission to the United States on the basis of his or her occupational qualifications. The relevant regulations promulgated by the Department of Labor are found at 20 C.F.R. §§ 655-56.

D. Department of State.

The Department of State's primary responsibility in the immigration context is issuing (or denying) visas for aliens to enter the United States. The relevant regulations promulgated by the Department of State are found at 22 C.F.R. §§ 41-62.

IV. Administrative Agency Decisions.

A. Department of Justice: EOIR.

As discussed above, EOIR is responsible for adjudicating the removability of aliens in removal proceedings and any defensive applications for relief and protection filed therein. Decisions issued by immigration judges are not published and are not binding precedent; however, the Board publishes administrative appellate decisions, which are binding on all DHS officers and immigration judges unless overruled by the Attorney General or a federal court.

There currently are 25 bound volumes of Board decisions from August 1940 to the present, titled "Administrative Decisions Under Immigration and Nationality Laws of the United States." Many of these decisions analyze whether an alien is removable for a conviction under certain state or federal statutes. Published – and some unpublished – Board decisions also are available on private online legal databases (*e.g.*, LexisNexis and Westlaw). Unpublished Board decisions are not binding authority. The Board posts new published decisions on EOIR's website at <http://www.justice.gov/eoir/vl/libindex.html>.

B. Department of Homeland Security: USCIS–AAO.

The Administrative Appeals Office ("AAO"), or Administrative Appeals Unit ("AAU"),¹ is an office within USCIS, a component agency of DHS, which has appellate jurisdiction over certain decisions of USCIS field offices and regional service centers, including, among other things, various waiver applications, certain visa petitions, and naturalization applications.²

¹ The regulations refer to this entity as the "Administrative Appeals Unit"; however, it is now called the "Administrative Appeals Office." 59 Fed. Reg. 60,065, 60,066 (Nov. 22, 1994).

² Specifically, AAO has appellate jurisdiction over those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions: (1) petitions for approval of schools and the appeals of denials of such petitions have been the responsibility of ICE since November 1, 2004; and (2) applications for S non-immigrant status have been the responsibility of the Office of Fraud Detection and National Security of USCIS since October 2004. *See USCIS Adjudicator's Field Manual* § 3.5(c). Current regulations do not contain 8 C.F.R. § 103.1(f)(3)(iii). The 2003 version of this regulation is available at:

Historically, AAO decisions were deemed precedent decisions or non-precedent decisions. 8 C.F.R. § 103.3(c) (2003). Precedent AAO decisions are published along with precedent Board decisions in bound volumes titled “Administrative Decisions Under Immigration and Nationality Laws of the United States” and are available through private online legal databases (e.g., LexisNexis and Westlaw). Non-precedential decisions have no binding authority on other USCIS adjudications. In 2005, AAO began publishing “USCIS Adopted Decisions.” These decisions are available at <http://www.uscis.gov> and provide guidance to applicants, petitioners, practitioners, and Government officials in the correct interpretation of immigration law, regulations, and policy.

V. Judicial Decisions.

The Board is not a federal court, but its decisions generally are subject to judicial review in the United States Court of Appeals in the Circuit where the immigration judge completed the alien’s removal proceedings. The Circuit Courts can vary greatly in their case law, so it is important to research decisions in the relevant circuit.

The AAO similarly is not a federal court, but its decisions generally are subject to judicial review in the United States District Courts. The district court decisions may then be appealed to the United States Courts of Appeals.

The Supreme Court may review Circuit Court decisions on immigration matters, and has published decisions of its own, which are binding on all courts.

United States Supreme Court: <http://www.supremecourtus.gov>

United States Courts of Appeals: http://www.uscourts.gov/Court_Locator.aspx

United States District Courts: http://www.uscourts.gov/courtlinks/Court_Locator.aspx

VI. Researching Immigration Law on Westlaw and LexisNexis.

Both Westlaw (<http://www.westlaw.com>) and LexisNexis (<http://www.lexis.com>) offer users specialized research tools in the immigration context. Westlaw has an “Immigration Practitioner” tab, which allows users to search databases of statutes and regulations, administrative and judicial decisions, administrative resources, practice guides, law review and news articles, and recent developments in immigration law.

On LexisNexis, when performing a “Quick Search,” users can specify that their search be performed in the “Immigration” practice area. LexisNexis also has an “Immigration” tab that users can select under the “Look for a Source” option on the “Search” page. The “Immigration” tab allows

http://edocket.access.gpo.gov/cfr_2003/8cfr103.1.htm (last visited June 14, 2010).

users to find statutes and regulations, judicial and administrative decisions, law review articles, and emerging issues in immigration law.

VII. Official Government Agency Websites.

- A. **Department of Homeland Security:** <http://www.dhs.gov>
U.S. Immigration and Customs Enforcement: <http://www.ice.gov>
U.S. Customs and Border Protection: <http://www.cbp.gov>
U.S. Citizenship and Immigration Services: <http://www.uscis.gov>
U.S. Citizenship and Immigration Services Historical Reference Library:
<http://207.67.203.70/U95007Staff/OPAC/>
- B. **Department of Justice:** <http://www.justice.gov>
Executive Office for Immigration Review: <http://www.justice.gov/eoir>
Executive Office for U.S. Attorneys: <http://www.justice.gov/usao/eousa>
Office of Immigration Litigation: <http://www.justice.gov/civil/oil/index.htm>
- C. **Department of Labor:** <http://www.dol.gov>
- D. **Department of State:** <http://www.state.gov>

VIII. Government Publications.

- A. ***EOIR's Immigration Law Advisor.*** This is a professional monthly newsletter that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the immigration courts and the Board. Any views expressed therein are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. Past issues are available at:
http://www.justice.gov/eoir/vll/ILA-Newsletter/lib_ila.html.
- B. ***OIL's Immigration Litigation Bulletin.*** The Immigration Litigation Bulletin is an internal publication about immigration litigation matters. The purpose of the publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. The views expressed in this publication do not necessarily reflect the views of the Office of Immigration Litigation or the Department of Justice. Past issues of the Immigration Litigation Bulletin that have been released pursuant to Freedom of Information Act requests are available at: <http://www.justice.gov/civil/oil/ImmigrationBulletin.htm>.

- C. ***United States Attorneys' Manual.*** The United States Attorneys' Manual is designed as a quick and ready reference for United States Attorneys, Assistant United States Attorneys, and Department of Justice Attorneys responsible for the prosecution of violations of federal law. It contains general policies and some procedures relevant to the work of the United States Attorneys' Offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice. Title 4 of the manual discusses immigration litigation. The manual is available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

IX. Non-Governmental Resources.³

A. Treatises and Casebooks.

1. **Thomas Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* (5th ed., Thompson/West 2003).** This is a leading law school case book.
2. **Robert C. Divine and R. Blake Chisam, *Immigration Practice (2010-2011 ed., Juris Publishing)*.** This annually published book covers all aspects of immigration law in one volume with over 3,000 footnote citations to the wide range of statutes, regulations, court and administrative agency cases, policy memos, operations instructions, agency interpretive letters, and internet sites.
3. **Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, *Immigration Law and Procedure* (Matthew Bender 1966 - present).** This is a leading treatise on immigration law. It contains case citations supporting statements made in the text. The looseleaf publication consists of 20 volumes and is updated on a regular basis.
4. **Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool* (12th ed., American Immigration Lawyer's Association 2010).** This is a popular outline with citations to Supreme Court, Federal Court, and Board decisions, as well as federal regulations.

³ **Disclaimer:** The listing of these resources should not be viewed as an endorsement by the Department of Justice. The Department takes no responsibility for, and exercises no control over, the views, accuracy, accessibility, copyright or trademark compliance or legality of the material contained therein.

5. **Stephen H. Legomsky, *Immigration and Refugee Law and Policy* (4th ed., Foundation Press 2005).** This is a leading law school case book.

B. Periodicals.

1. ***AILA – Immigration and Nationality Law Handbook.*** This is a “how to” annual publication by the American Immigration Lawyers’ Association. It contains sections on various topics prepared by AILA members in conjunction with their annual conference.
2. ***Bender’s Immigration Bulletin (Matthew Bender).*** This biweekly newsletter provides updates on immigration law and summaries of administrative and federal courts decisions. A daily edition with a searchable archive is available online at <http://bibdaily.com/>.
3. ***Georgetown Immigration Law Journal.*** This student-edited law journal is exclusively devoted to the study of immigration.
4. ***Immigration and Nationality Law Review.*** This student-edited annual law journal is published by William S. Hein & Co. of New York and is affiliated with the University of Cincinnati College of Law.
5. ***Interpreter Releases (West Group).*** This is a weekly newsletter on all aspects of immigration law.

C. Private Internet Resources.

1. **American Immigration Lawyers Association (AILA).** AILA is the national association of attorneys and law professors who practice and/or teach immigration law. Its website includes links to online resources and AILA publications.
2. **ILW.COM.** ILW.COM is a leading immigration law publisher. Its website offers thousands of pages of information on immigration law. ILW also publishes *Immigration Daily*, a daily “newspaper” on immigration law.
3. **Siskind’s Immigration Bulletin.** An electronic newsletter covering developments in immigration law.

X. Jurisdiction-Specific Resources: Immigration Consequences of Select Convictions.⁴

A. Federal.

- Dan Kesselbrenner & Sandy Lin, *Immigration Consequences of Select Federal Convictions Chart* (National Immigration Project 2010), (last visited June 15, 2010).
- Defending Immigrants Partnership, *Representing Noncitizen Criminal Defendants: A National Guide* (2008), (last visited June 15, 2010).
- Immigrant Defense Project and Defending Immigrants Partnership, *Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky* (2010), (last visited June 15, 2010).

B. Arizona. Katherine Brady, Holly Cooper, et al., *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (Immigrant Legal Resource Center 2006), (last visited June 15, 2010).

C. California.

- Katherine Brady, Norton Tooby, et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (2009).
- Katherine Brady, Holly Cooper, et al., *Quick Reference Chart for Determining Selected Immigration Consequences of Selected California Offenses* (Immigrant Legal Resource Center 2005), (last visited June 15, 2010).

D. Connecticut. Jorge L. Baron and Alix Walmsley, *A Brief Guide to Representing Noncitizen Criminal Defendants in Connecticut* (2005), (last visited June 15, 2010).

⁴ **Disclaimer:** The listing of these resources should not be viewed as an endorsement by the Department of Justice. The Department takes no responsibility for the accuracy of the following resources or the conclusions reached therein. It should be noted that these resources may be of limited use for predicting immigration consequences of particular crimes because an alien's removal proceedings may arise in a federal circuit different from that of the convicting criminal court.

- E. District of Columbia.** Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Defenders Service for the District of Columbia 2008), (last visited June 15, 2010).
- F. Florida.**
- Florida Immigrant Advocacy Center, *Immigration Consequences of Selected Florida Offenses: A Quick Reference Chart* (2003), (last visited June 15, 2010).
 - Florida Immigrant Advocacy Center, *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (2003), (last visited June 15, 2010).
- G. Illinois.**
- Maria Theresa Baldini-Potermin, *Defending Non-Citizens in Illinois, Indiana, and Wisconsin* (Heartland Alliance National Immigrant Justice Center 2009), (last visited June 15, 2010).
 - National Immigration Project, *Selected Immigration Consequences of Certain Illinois Offenses* (2003), (last visited June 15, 2010).
- H. Indiana.** Maria Theresa Baldini-Potermin, *Defending Non-Citizens in Illinois, Indiana, and Wisconsin* (Heartland Alliance National Immigrant Justice Center 2009), (last visited June 15, 2010).
- I. Maryland.** *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office 2007), (last visited June 15, 2010).
- J. Massachusetts.** Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project 2006), (last visited June 15, 2010).
- K. Michigan.** *Immigration Consequences of Criminal Convictions* (2008), (last visited June 15, 2010).
- L. New Jersey.** Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2005), (last visited June 15, 2010).

- M. New Mexico.** Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses* (2005), (last visited June 15, 2010).
- N. New York.**
- Association of the Bar of the City of New York, *The Immigration Consequences of Deferred Adjudication Programs in New York City* (2007), (last visited June 15, 2010).
 - Manny Vargas, *Appendix A: Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses* (2003), (last visited June 15, 2010).
- O. North Carolina.** Sejal Zota and John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services 2008), (last visited June 15, 2010).
- P. Texas.** Jodi Goodwin and Thomas Esparza, Jr., *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2008), (last visited June 15, 2010).
- Q. Vermont.** Rebecca Turner, *Reference Chart for Immigration Consequences of Select Vermont Criminal Offenses* (2006), (last visited June 15, 2010).
- R. Virginia.** Mary Holper, *Immigration Consequences of Selected Virginia Statutes* (2007), (last visited June 15, 2010).
- S. Washington.** Ann Benson and Johnathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses Under the RCW* (Washington Defender Association's Immigration Project 2006), (last visited June 15, 2010).
- T. Wisconsin.** Maria Theresa Baldini-Potermin, *Defending Non-Citizens in Illinois, Indiana, and Wisconsin* (Heartland Alliance National Immigrant Justice Center 2009), (last visited June 15, 2010).

Appendix C: *What Constitutes a Conviction For Immigration Purposes*

I. Definition of Conviction in the INA.

The INA provides the following definition of what constitutes a conviction for immigration purposes:

- (A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-
 - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.
- (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C. § 1101(a)(48).

The definition discusses two types of convictions:

1. Under the first prong, there must be a “formal judgment of guilt.”
2. Under the second prong, there must be both (i) a jury verdict, guilty plea, plea of nolo contendere, or admission of facts sufficient to warrant a finding of guilt, and (ii) an imposition of punishment.

II. Finality of Conviction.

- A. The statutory definition of “conviction” does not contain any requirement that the conviction be final before it results in immigration consequences. Immigration consequences can therefore attach even if the alien has a pending challenge against the validity of his or her conviction.

- B. Generally, an alien cannot collaterally attack a conviction in immigration proceedings.
- C. With some limited, circuit-specific exceptions, only convictions vacated by a state court on the basis of procedural and substantive defects are not valid convictions for immigration purposes. Convictions vacated for rehabilitative reasons remain valid convictions.

III. Examples of Possible Valid and Invalid Convictions Under the INA.

The following are some examples of what may or may not constitute convictions for immigration purposes. It is by no means an exhaustive list, but comes from published Board of Immigration Appeals (“Board”) decisions and federal district and circuit court opinions.

A. Possible Valid Convictions Under the INA.

1. **Pleas.** An Alford plea, no contest plea, and nolo contendere plea all satisfy the “formal judgement of guilt” requirement for a conviction.
2. **Deferred Adjudication.** Both the Board and the federal courts have held that a deferred adjudication is a conviction for immigration purposes where it involves an admission of guilt and limitations on the defendant’s liberty. *See* H.R. Conf. Rep. No. 104-828 at 224 (1996) (“Joint Explanatory Statement”) (clarifying “Congressional intent that even in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to establish a ‘conviction’ for purposes of the immigration laws”).
 - **Note:** New York’s Pretrial Diversion Agreement (“PDA”) is generally not considered a conviction because guilt has not been established by trial, plea or admission; nor have sufficient facts been admitted to support a finding of guilt.
 - **Note:** A “guilty-filed” disposition under Massachusetts law may or may not constitute a conviction under the INA.
 - **Note:** One court has held that a Massachusetts conviction, in which the defendant admitted to facts sufficient for a finding of guilt, with a continuation without a finding (“CWOFF”), and with the imposition of a restitution order, is a conviction under the INA.
3. **Court Martial.** A judgment of guilt that has been entered by a general court-martial of the United States Armed Forces qualifies as a “conviction” under the INA.

4. **Probation Before Judgment.** A court's grant of probation before judgment generally constitutes a conviction under the INA.
5. **Guilty Pleas Held In Abeyance.** A guilty plea held in abeyance may satisfy the statutory definition of conviction.
6. **Punishments and Penalties.** The imposition of costs and surcharges in the criminal sentencing context constitutes a form of "punishment" or "penalty" for purposes of establishing that an alien has a "conviction" under the INA. Also, a term of probation counts as punishment for purposes of defining conviction. Where the only consequence of a criminal judgment is a suspended non-incarceratory sanction, however, it may not constitute a conviction for immigration purposes.

B. Possible Invalid Convictions Under the INA.

1. **Juvenile Delinquency Proceedings.** Juvenile delinquency proceedings are not criminal proceedings, and findings of juvenile delinquency are not convictions for immigration purposes.
 - **Note:** At least one court has held that a defendant's status as a "youthful trainee" under Michigan's Holmes Youthful Trainee Act constitutes a conviction under the INA because the state court retains discretion to "revoke that status at any time . . . [and] enter an adjudication of guilt and proceed as provided by law."
 - **Note:** One court has held that a conviction under the District of Columbia Code's Youth Rehabilitation Act is a criminal conviction for immigration purposes.
2. **Violations.** "Violations" are mutually exclusive from "convictions," where no disability or legal disadvantage attached to a "violation," and "violation" proceedings are not the same as criminal proceedings.
 - **Note:** One court has held that a defendant found guilty of a "violation" under Oregon law in a proceeding conducted pursuant to section 153.076 of the Oregon Revised Statutes does not have a "conviction" for immigration purposes.

Appendix D: *The Method for Evaluating Immigration Consequences of Criminal Convictions**

I. Introduction.

This reference guide summarizes a two-step process that is generally used for evaluating the immigration consequences of a conviction, which is often referred to as the “categorical” and “modified categorical” analysis. In some instances, a simple reading of the statute will not be sufficient to determine whether a crime falls within the INA’s definition of a deportable or inadmissible offense. Rather, the reader will need to utilize the categorical and modified categorical analyses, and consult relevant case law to determine the immigration consequences. While it is unclear whether *Padilla* requires an attorney to apply this analysis in ascertaining the risk of removal given that the analysis often turns on ever-evolving and conflicting administrative and judicial precedents, we include this reference guide for the reader’s information.

II. The Categorical Analysis.

- A. Introduction.** The Board of Immigration Appeals (“Board”) and courts employ a method for evaluating the immigration consequences of a criminal conviction that resembles the “categorical” approach outlined by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990).
- B. The Categorical Analysis.** In general, the categorical approach consists of comparing the elements of the federal or state criminal statute of conviction with the elements of the “generic definition” of the criminal ground of removal under the INA. This approach looks only at the statutory definition of the offense (as defined by the statute or the courts) – not the underlying facts of the actual crime – to determine whether the alien’s conviction falls under the generic definition. If it does, the alien is removable under the ground at issue. In order to find that a statute of conviction describes a crime that falls outside of the generic definition, it must be shown that there is a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct falling outside the generic definition.

* This methodology applies only where the immigration statute requires a conviction to render an alien removable or inadmissible.

C. Relevant Definitions.

1. **Generic Definition.** The generic definition consists of the elements/criteria of the immigration criminal ground of removal. The generic definition of the immigration offense may be found in a statute (like the INA), Board case law, or judicial decisions. For example, the Supreme Court provided the “generic definition” of “burglary” in *Taylor*.
2. **Statute of Conviction.** The state or federal statute under which the alien was convicted.
3. **Categorical Match.** When the mere fact of conviction necessarily meets the criteria of the criminal ground of removal under the INA (*i.e.* all the elements of the statute of conviction match the elements of the generic definition), there is a categorical match.
4. **Elements.** The elements of the statute of conviction are those factors that must be established (beyond a reasonable doubt) by the prosecutor in order to prove a conviction. The elements of the “generic definition” are those criteria that must be established (by clear and convincing evidence) in order to render an alien removable.

D. Example of a Categorical Match.

Maine’s burglary statute: A person is guilty of burglary if he/she enters or remains in a structure knowing that he/she is not licensed or privileged to do so, with the intent to commit a crime therein. Me. Rev. Stat. Ann. tit. 17-A, § 401 (modified).

The elements of Maine’s statute of conviction are:

- (1) unlawful or unprivileged
- (2) entry or remaining in
- (3) a structure
- (4) with the intent to commit a crime therein

The elements of the generic definition of burglary under *Taylor* are:

- (1) unlawful or unprivileged
- (2) entry into, or remaining in
- (3) a building or structure
- (4) with intent to commit a crime

This statute has all of the elements of the generic definition as set forth in *Taylor* and thus appears to be a categorical match. It will often require research of the state/federal case law and other sources to determine whether the definition of each element of the statute of

conviction matches or is narrower than the definition of each element of the generic offense. Merely imagining a scenario where the statute of conviction could be violated in a way that falls outside of the generic definition (for example, suggesting that under the Maine statute above, “structure” could include a fenced, but open field), is insufficient; rather the alien must identify an actual case where the statute has been so applied. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Note: It does not matter if the statute of conviction required more elements than the generic definition (*i.e.* if it is narrower than the generic definition). For example, if the above statute also required that the act be done at night, it would still be a categorical match with the elements of the generic definition.

III. The Modified Categorical Analysis.

A. Introduction. If the statute of conviction covers a broader range of offenses than the generic definition – *i.e.*, a person can be convicted of violating the statute in a way that may or may not meet the generic definition – the Board and the courts may go beyond the “mere fact of conviction” and look at a limited set of conviction documents to determine whether the alien was convicted of an offense falling within the generic definition.

B. Divisible Statute of Conviction. The Board and most circuits use the term “divisible” to describe the process for when they can resort to the documents of conviction to establish that a certain conviction constitutes a removable offense. There is a split among the circuits as to what “divisible” means, but in general it means that a statute of conviction criminalizes acts which constitute a removable offense as well as acts that do not.

C. Examples.

1. Example Of An Overbroad Statute.

State X’s Burglary Statute: Whoever unlawfully and intentionally breaks and enters a locked shelter with intent to commit a felony is guilty of a felony. Assume that under State X’s law, a shelter includes a tent.

The elements of State X’s statute of conviction are:

(1) unlawfully and intentionally

(2) breaking and entering

The elements of the generic definition of burglary under *Taylor* are:

(1) unlawful or unprivileged

(2) entry into, or remaining in

(3) a locked shelter

(3) a building or structure

(4) with intent to commit a felony

(4) with intent to commit a crime

In this case, element #3 would appear to make this statute broader than the generic definition's element requiring a building or structure because a "shelter" includes a tent. In some circuits this is sufficient to resort to a modified categorical approach to determine what type of shelter was broken into. If the documents establish that it was a building, rather than a tent, then this is a match with the elements of the generic definition of burglary.

2. Example of a Statute Written in the Disjunctive.

Massachusetts Burglary Statute: Whoever unlawfully breaks and enters a building, ship, vessel, or vehicle, with intent to commit a felony. . . shall be punished by imprisonment. Mass. Gen. Laws Ann. ch. 266, § 16 (modified).

The elements of the state statute of conviction are:

The elements of the generic definition of burglary under *Taylor* are:

(1) unlawful

(1) unlawful or unprivileged

(2) breaking or entering

(2) entry into, or remaining in

(3) a building, ship, vessel, or vehicle

(3) a building or structure

(4) with intent to commit a felony

(4) with intent to commit a crime

In this case, element #3 is not a categorical match because the statute provides a list of options, one that would match the elements of the generic definition of burglary (a building) and others that would not (a ship, vessel, or vehicle). In most, if not all, circuits a modified categorical approach can be used to determine what type of shelter was burglarized. If the permissible conviction documents establish that the alien was convicted of breaking into a building, then this is a match with the elements of the generic definition of burglary.

3. Example of A Statute Missing an Element.

California's burglary statute: Every person who enters any house, room, apartment or other building with intent to commit grand or petit larceny or any felony is guilty of burglary. Cal. Penal Code § 459 (modified).

The elements of California's burglary statute are:

- (1)
- (2) entry into
- (3) any house, room, apartment or other building
- (4) with intent to commit grand or petit larceny or any felony

The elements of the generic definition of burglary under *Taylor* are:

- (1) unlawful or unprivileged
- (2) entry into, or remaining in
- (3) a building or structure,
- (4) with intent to commit a crime

In this case, element #1 is missing because the statute does not require that the entry be *unlawful* or *unprivileged*. At least one circuit has found that one cannot resort to the criminal record to establish removability under such circumstances because the record can never show that the jury or trier of fact was actually required to find (or that the defendant actually pled to) all the elements of the generic offense.

- D. Permissible Documents under the Modified Categorical Approach.** Documents that may be considered under a modified categorical approach include: a charging document (such as an indictment, information, or complaint); a plea agreement or transcript of the colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant; or some comparable judicial record of this information (such as an official record of judgment). Courts can only consider a police report insofar as it is incorporated into the terms of a plea agreement. The amount of information and detail on a permissible criminal document is often the most critical factor in determining removability.

IV. Circumstance-Specific Approach.

- A. Introduction.** The Supreme Court in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), recognized that in certain circumstances the INA refers to "generic crimes" and in other circumstances it refers to the specific acts in which an offender engaged on a specific occasion. In the latter circumstance, the "categorical" approach was found to be inapplicable.

- B. Circumstance-Specific Approach.** Where the “generic definition” refers to a “circumstance-specific requirement,” the courts will apply a “circumstance-specific” approach and look to the facts and circumstances underlying an offender’s conviction.

- C. Permissible Evidence under the “Circumstance Specific” Approach.** Documents that may be considered under a circumstance specific approach include sentencing-related documents (such as a sentencing stipulation or restitution order); consideration is not limited to the documents approved under the modified categorical approach.

- D. Relevant Definitions.**
 - 1. Generic Crime.** A “generic” crime does not refer to criteria that invites inquiry into the underlying facts that led to a conviction. “Generic crimes” are relatively unitary categorical concepts like murder, fraud, or theft.

 - 2. Circumstance-Specific Requirement.** A circumstance-specific requirement refers to the specific way in which an offender committed a crime on a specific occasion and thus invites inquiry into the underlying facts of the crime. “Circumstance-specific requirements” need not be elements of the statute of conviction, but must be established before the immigration court in accordance with the relevant burden of proof.

- E. Example.**

State X’s Bank Fraud statute: Whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution shall be guilty of a felony.

INA ground of removal: Any alien convicted of an aggravated felony offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000 is deportable. 8 U.S.C. §§ 1101(a)(43)(M)(i) and 1227(a)(2)(A)(iii).

The relevant element of State X’s statute of conviction is:

(1) knowingly executes, or attempts to execute, a scheme or artifice to defraud

(2) _____

The elements/criteria of the generic definition under the INA are:

(1) involves fraud or deceit

(2) loss to the victim or victims exceeds \$10,000

In this case, criteria #2 is missing because the statute of conviction does not require that the fraud involve a particular loss to the victims. The Supreme Court held that the loss requirement under 8 U.S.C. § 1101(a)(43)(M)(i) does not need to be an element of the fraud or deceit crime of conviction, but rather “the monetary threshold applies to the specific circumstances surrounding an offender’s commission of a fraud and deceit crime on a specific occasion.” *Nijhawan*, 129 S. Ct. at 2298, 2302. Issues of divisibility and evidentiary limitations under the modified categorical approach, therefore, are inapplicable in this inquiry. Rather, the evidence considered must be fair and demonstrate by the relevant burden of proof the amount of loss associated with the particular conviction at issue.