CONTINUING LEGAL EDUCATION
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Immigration Consequences and Criminal Defense: Ethics and Practice

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APPELLATE DIVISION, FIRST AND SECOND JUDICIAL DEPARTMENTS
IN CONJUNCTION WITH THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK

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The immigration gulag: Why Defense Counsel Need to Pay Attention to Immigration

- Someone who never spent a day in jail for their criminal offense may spend months or years in immigration detention fighting their case
- Within days of being picked up by ICE in New York, a detainee may find him or herself in Pennsylvania, Texas, or New Mexico, unable to call family or a lawyer
- No right to appointed counsel in civil deportation proceedings.
  - Over 50% of all respondents are unrepresented.
  - Almost 90% of detained respondents are unrepresented.

Expansion of Criminal Removal

- In 1982, the U.S. deported 413 noncitizens based on criminal conduct
- In FY 2008, the US deported over 72,000 noncitizens based on criminal conviction(s)
- In FY 2008, ICE began removal proceedings against 221,805 it identified in jails and prisons

Training Goals

- Ethical and professional responsibilities of defense counsel representing immigrant clients
- How to integrate immigration consequences into your practice
- How to determine your client's immigration status
- Basic introduction to immigration consequences of criminal conduct
- Resources for case-specific advice

Duties of Criminal Defense Counsel to Advise of Immigration Consequences of Conviction

- In NY State, **affirmative misadvice** regarding immigration is IAC, while **failure to advise** is not IAC.
  - NY Const. Art. 1. § 6: *People v. McDonald*, 1 N.Y.3d 309 (2003); *People v. Ford*, 86 N.Y.2d 397 (1995).
  - Sixth Amendment: *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002); *United States v. Santelises*, 509 F.2d 703 (2d Cir.1975) (per curiam).
- *Padilla v. Kentucky*, No. 08-651 (argued October 13, 2009): Whether affirmative misadvice is IAC under the Sixth Amendment

So Why Advise?

- "Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If [the] respondent were a citizen, his aggregate sentences . . . would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty . . . ." *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting).

Immigration concerns may trump all other goals of representation

- "[I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *ABA Standards for Criminal Justice Pleas of Guilty* (3d ed.), commentaty to Std. 14-3.2(f)
- "'Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999))

Ethical Obligations of Defense Counsel (ABA)

- Responsibilities of Defense Counsel, Standard 14-3.2(f):

  To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Ethical Obligations of Defense Counsel, cont'd

- Commentary: "This Standard . . . strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or Alford plea. Further, counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces.

Ethical Obligations of Defense Counsel, cont'd

- Commentary, cont'd: [C]ounsel should be familiar with the basic immigration consequences that flow from different types of guilty plea, and should keep this in mind in investigating law and fact and advising the client."

Integrating Immigration Advice

- Indigent Defenders:
  - P. Markowitz, "Protocol for the Development of a Public Defender Immigration Service Plan" (2009) http://www.immigrantdefenseproject.org/webPages/crimJustice.htm
- Private Defenders:
  - M. Vargas, Representing Immigrant Defendants in New York State (4th ed. 2006)
  - M. Vargas, "Tips on How to Work With an Immigration Lawyer to Best protect Your Noncitizen Defendant Client" (handout materials)

Fulfilling Ethical Obligations

- Step 1: Determine your client's status
- Routinize: "Where were you born?"
- Be sensitive:
  - From the client's perspective you are part of the system.
  - Establish trust and explain why you're asking.
- Avoid asking for legal conclusions:
  - Ask "Where were you born," not "Are you a citizen?"
  - Ask "Do you have a green card," not "Are you legal?"
- *Never* assume status from rap sheet info, name, appearance, or anything else

Fulfilling Ethical Obligations

- Step 2: Obtain Critical Information for Assessing Immigration Consequences
  - LPRs: Date of residence & first lawful admission
  - Everyone: Date and manner of entry; family relationships and family members' status
    - Parents, spouses or partners, children
  - Past or pending applications to USCIS

Fulfilling Ethical Obligations

- Step 3: Determine if client is already subject to negative immigration consequences, and/or now at risk of negative consequences from open case
  - Check on priors in other jurisdictions
  - Obtain A number if possible and check for prior deportation orders:
    - 1 800 898 7180 (only reflects c. 1996 forward)

Fulfilling Ethical Obligations

- Step 4: Freeze the Status Quo
  - Advise client:
    - Do not travel abroad
    - Do not submit or take further action on USCIS application until full immigration advisal
    - Do not apply to renew green card
    - If client presently deportable, explain that being stepped in = deportation proceeding; get in clients out

Fulfilling Ethical Obligations

- Step 4: Determine your client's priorities and advise and counsel client accordingly
  - See "Suggested Approaches for Representing a Noncitizen in a Criminal Case" in handout materials

Basics of Immigration Status and Deportability

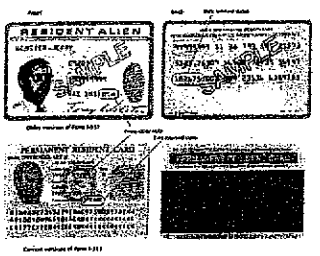
Types of immigration status

- U.S. Citizen
  - birth
  - naturalization
  - automatic derivation/acquisition:
    - Through either parent if born after 2/27/1983
    - If born on or before 2/27/1983, consult an expert
- Lawful Permanent Resident ("green card")
- Nonimmigrant (tourist, student, V)
- Asylee/refugee
- Overstay
- Entered Without Inspection ("EWI")

LPR Status

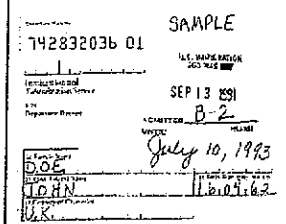
- Never expires unless:
  - IJ orders removal *or*
  - LPR abandons status by absence from U.S. or renunciation
- Expiration date of green card is irrelevant to status
- LPR status may be obtained 2 ways:
  - At a U.S. Consulate abroad ("Consular Processing")
  - While present in the United States ("Adjustment of Status")
- For LPRs, deportability and relief often turns on date of first lawful admission

Determining First Lawful Admission



- Consular processing: Green card will reflect date of first lawful entry.
- Adjustment of status: client may have had earlier lawful admission

Determining admission date and expiration of stay for Nonimmigrants



- A visa permits the holder to board a flight to the U.S.
- On arrival, BCP decides whether to admit and issues an I-94 authorizing stay
- Do not confuse visa expiration date with end of authorized period of stay

Work authorization

- Work authorization ("permiso") is not an immigration status
- It is generally evidence of pending application for status, TPS, or unenforced deportation order
- Get the Category code and call an expert

REVIEW

- What are the 3 ways to become a U.S. citizen?
- How do you determine LPR date? Is this date ever different than the date of first lawful entry?
- What is the difference between a nonimmigrant visa and an I-94 card? Which one tells you whether someone is currently in valid status?

Deportability v. Inadmissibility

INA § 237, 8 U.S.C. § 1227 INA § 212, 8 U.S.C. § 1182

- *Technically*:
  - deportability applies to those lawfully admitted (LPRs, NIVs, refugees)
  - inadmissibility applies to those seeking lawful admission
- *Practically*:
  - each set of rules, or both, may apply to the same person in various situations

Criminal Deportability

- Deportability usually requires "conviction"
  - INA § 101(a)(48)
  - 8 U.S.C. § 1101(a)(48)

Definition of "Conviction"

- A conviction is:
  - A formal judgment of guilt entered by a court
    or
  - Where adjudication of guilt has been withheld,
    - Δ admits facts sufficient to warrant a finding of guilt ***and***
    - Court has ordered some form of punishment, penalty, or restraint on liberty.
- Caselaw: "conviction" requires more than proof by preponderance

Definition of "Conviction" II

- YO: no
- JD: no
- JO: yes
- Family court offense: no
- ATI/diversionary plea: **yes**
- Pre-plea diversion: no
- Violations: **yes**
- ACD: no

REVIEW

- What is the difference between deportability and inadmissibility?
- Is a youthful offender adjudication a conviction?
- Can you be "convicted" under immigration law in a case that was dismissed?
- Is a noncriminal violation a "conviction"?
- Is a family court offense a "conviction"?

Criminal grounds of deportability

INA § 237(a)(2)
8 U.S.C. § 1227(a)(2)

Crimes Involving Moral Turpitude

INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A)

- No statutory definition
- CIMT = "inherently base, vile or depraved" *and* involves "corrupt scienter" (case law)
- Turpitude inheres in the intent
  - Negligent or SL crimes are never CIMTs
  - Reckless crimes may be CIMTs
  - Most specific intent crimes are CIMTs
- Hallmarks of CIMT:
  - Intent to defraud
  - Intent *permanently* to deprive
  - Specific intent to injure/ threaten/damage property
  - Reckless act causing serious injury
  - Lewd intent
- *Attempt* irrelevant to analysis (except w/r/t recklessness)

CIMT Deportability

INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A)

- One CIMT if:
  - committed w/in 5 years of a lawful admission
  - punishable by 1 year or more, regardless of sentence imposed
- IJ may consider actual conduct (*Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008))
- Two CIMTs
  - at any time
  - of any grade
  - unless part of a "single scheme of criminal misconduct"
    - Caution: very high standard for what constitutes "single scheme"

Controlled Substance Offenses

INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B)

- *Any* drug crime except single possessory marijuana offense ≤ 30g
- Being a "drug abuser or addict" (rarely enforced)
- Unlike CIMTs, level of offense and timing relative to admission are irrelevant to deportability (but may be relevant to relief)

REVIEW

- What characteristic of an offense would lead you to conclude that it is likely *not* a CIMT?
- Do the particular facts of the case matter in determining whether a given conviction = CIMT?
- If a person is lawfully admitted, under what two circumstances can a CIMT conviction make her deportable?
- If a person is lawfully admitted, under what circumstances can a CSO make him deportable?

Firearms offenses

INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D)

- Possession of a firearm, with or without intent to use
- Other offense "involving" a firearm
  - May not include possession of ammunition
- Again, level and timing of offense irrelevant

Crimes of domestic violence (CODV)

INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E)

- "Crime of violence":
  - Offense an element of which is the use, attempted use or threatened use of force, or a felony involving a substantial risk that force will be used
- 120.00(1) is not a COV; 240.26(1) might be.
- "Domestic": c/w must be current or former spouse, baby mama, "cohabitant as spouse," or person "protected under the domestic or family violence laws" of the j/d

CODV, II: Protective Orders

- Violates that portion of an OOP "involving protection against threats of harm, stalking, or repeated harassment"
- May or may not include violation of stay-away order
- Probably includes family court adjudications ("court has found")

Crimes Against Children (CAC)

INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E)

- Crime of "child abuse, child neglect, or child abandonment"
  - "[A]ny offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being . . . At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse . . . as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes." *Matter of Velasquez-Herrera*, 24 I&N Dec503 (BIA 2008)
- Minority of c/w must be an element of the offense

Crimes Against Children (CAC)

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- Minority of c/w must be an element of the offense

CODV & CAC II

- Like drugs and firearms, level and timing of offense irrelevant
- NB many of these offenses are <u>also</u> CIMTs
- These cases are difficult to work around if not dismissed: *especially* contempt

Aggravated Felonies

- Worst category of removable offense: cuts off most relief
- Murder, rape, kidnapping
- "Drug trafficking crime" (hypothetical federal felony)
  - Recidivist possession
  - Simple poss. >5g crack
- "Crime of violence" ≥ 1 yr sent.
- Theft/burglary ≥ 1 yr
- Forgery/counterfeiting ≥ 1 yr
- Fraud > $10,000

- Need not be felony, nor aggravated
- **Sexual Abuse of a Minor (possibly misdemeanors not requiring sexual conduct)**
- **Bail jumping on a felony**
- **Certain firearms offenses, esp. for undocumented immigrants**
- **Obstruction/perjury ≥ 1 yr**
- **Certain gambling offenses**

REVIEW

- Can a misdemeanor be an "aggravated felony"?
- How many years after lawful admission can an LPR safely plead to a gun crime?
- Is a family court offense of assault against a spouse a CODV? Is a family court contempt finding a CODV?
- Is misdemeanor assault against a baby-mama a CODV?
- Would you rather plead a client to a CODV or an aggravated felony? Why?

Criminal grounds of inadmissibility

- Does not always require conviction
- CIMT
  - *Except* a single CIMT if max. possible penalty is not greater than 1 yr and actual penalty ≤ 6 mos.: "Petty offense exception"
- CSO (not subject to marijuana exception)
- 2 convictions w/ aggregate sentence ≥ 5 years
- Reason to Believe Drug Trafficker
- Prostitution & Commercialized Vice

REVIEW

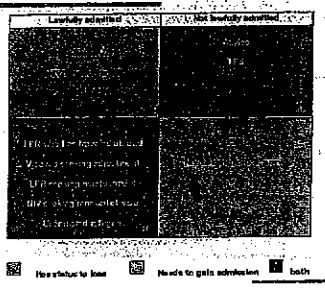
- Do inadmissibility grounds require a conviction?
- Name two deportation grounds that are not inadmissibility grounds
- When can someone be convicted of a CIMT but still be admissible?

Other Consequences of Criminal Convictions

- "Good moral character" bar to naturalization
- Discretionary denial of LPR status
- Bar to Temporary Protected Status
- Bar to asylum/withholding of removal
- Inability to renew green card or travel
- Mandatory detention

Determining Client Priorities

Deportability or inadmissibility: what applies when?



Priorities for LPRs

- Avoid deportation grounds ("237" grounds)
- Avoid inadmissibility ("212" grounds) to preserve right to travel
- Maintain Good Moral Character for naturalization
- Preserve eligibility for relief
  - No AF
  - No "tolling" 212 offense within 7 years of lawful admission
  - For admissibility, no CSO
- Avoid ICE detection if already deportable

Priorities for non-LPRs

- Avoid deportability if currently in status
- Preserve future admissibility
- Maintain eligibility for admissibility waivers
  - No CSO
- Maintain eligibility for persecution-based relief if applicable
- Avoid ICE detection if out of status

General Defense Strategies

In addition to seeking to negotiate non removable plea/sentence, strategies may include:

- Pre-plea diversion (CPL Art. 216)
- Removal to family court for JO
- YO treatment in criminal court
- DA sponsorship of S or U visa for cooperators/cross-complainants

General Defense Strategies (2)

- Control allocution of potentially removable offense:
  - Avoid admissions of any conduct beyond bare elements of offense
- Make a record of reliance on immigration advice at allocution (in-status clients)
- File appeal
- Seek post-judgment relief
  - *People v. Correa* (1st Dept)

ICE Detection of Clients

- Arrest to arraignment
- Rikers/Boat/Tombs
- Green card renewal
- Other applications: AOS, citizenship
- Return from travel abroad
- Sex offenders

Detainers

- Only currently deportable noncitizens are subject to detainer
  - Plead to deportable offense after jail time accrued, not before
- Detainer does not prevent release from DOC custody, but does mean client will be held for pickup by ICE
- Client has right to refuse ICE interview in DOC custody (Form 144)
- Never lie to ICE about citizenship

RESOURCES: Consultation

- Collect basic data
- Advise client not to travel abroad, warrant, or contact USCIS
- Have complaint & rap sheet available
- Call IDP Hotline: (212) 725-6422
- Call NLG (federal): (617) 227-9727

RESOURCES: Web

- Immigrant Defense Project
  - www.immigrantdefenseproject.org
- Defending Immigrants Partnership
  - http://defendingimmigrants.org/
- National Immigration Project, NLG
  - http://www.nationalimmigrationproject.org/

RESOURCES: Print

- M. Vargas, Representing Immigrant Defendants in New York State (4th ed.)
- N. Tooby, Tooby's Guide to Criminal Immigration Law (2008)
  - free download @ www.criminalandimmigrationlaw.com
- N. Tooby, Criminal Defense of Immigrants (4th ed.)
- N. Tooby, Safe Havens (2005)

NYSDA Immigrant Defense Project
Immigration Consequences of Convictions Summary Checklist*

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)

Aggravated Felony Conviction
- ➢ *Consequences* (in addition to deportability):
  - Ineligibility for most waivers of removal
  - Ineligibility for voluntary departure
  - Permanent inadmissibility after removal
  - Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal
- ➢ *Crimes covered* (possibly even if not a felony):
  - Murder
  - Rape
  - Sexual Abuse of a Minor
  - Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)
  - Firearm Trafficking
  - Crime of Violence + 1 year sentence**
  - Theft or Burglary + 1 year sentence**
  - Fraud or tax evasion + loss to victim(s) > $10,000
  - Prostitution business offenses
  - Commercial bribery, counterfeiting, or forgery + 1 year sentence**
  - Obstruction of justice or perjury + 1 year sentence**
  - Certain bail-jumping offenses
  - Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
  - Attempt or conspiracy to commit any of the above

Controlled Substance Conviction
- ➢ EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude (CIMT) Conviction
- ➢ For crimes included, see Grounds of Inadmissibility
- ➢ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)
- ➢ Two CIMTs committed at any time "not arising out of a single scheme"

Firearm or Destructive Device Conviction

Domestic Violence Conviction or other domestic offenses, including:
- ➢ Crime of Domestic Violence
- ➢ Stalking
- ➢ Child abuse, neglect or abandonment
- ➢ Violation of order of protection (criminal or civil)

GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)

Conviction or *admitted commission* of a **Controlled Substance Offense**, or DHS has reason to believe individual is a drug trafficker
- ➢ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)

Conviction or *admitted commission* of a **Crime Involving Moral Turpitude** (CIMT)
- ➢ Crimes in this category cover a broad range of crimes, including:
  - Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
  - Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
  - Most sex offenses
- ➢ *Petty Offense Exception*—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months

Prostitution and Commercialized Vice

Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

INELIGIBILITY FOR US CITIZENSHIP

Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:
- ➢ **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- ➢ **Crime Involving Moral Turpitude** (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
- ➢ **2 or more offenses** of any type + **aggregate prison sentence of 5 years**
- ➢ **2 gambling offenses**
- ➢ **Confinement** to a jail for an aggregate period of 180 days

Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) *permanently* bars a finding of moral character and thus citizenship eligibility

CONVICTION DEFINED

A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:
(i) a judge or jury has found the noncitizen guilty or the noncitizen 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 noncitizen's liberty to be imposed.

THUS:
- ➢ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- ➢ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction
- ➢ A youthful offender adjudication (e.g., NY YO) is NOT a conviction

INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL
- ➢ Aggravated felony conviction
- ➢ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States

INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL

"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:
- ➢ Aggravated felonies
  - All will bar asylum
  - Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding
  - Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding
- ➢ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)

*For the most up-to-date version of this checklist, please visit us at **http://www.immigrantdefenseproject.org**.

See reverse ➢

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

[12/06]

NYSDA Immigrant Defense Project
Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- Drug offense (§5.4)
- Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- Property offense, including theft, burglary or fraud offense (§5.6)
- Firearm offense (§5.7)

1. If your client is a LAWFUL PERMANENT RESIDENT:

➢ First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)

➢ Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).

➢ If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).

➢ If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).

➢ If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a REFUGEE or PERSON GRANTED ASYLUM:

➢ First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).

➢ If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).

➢ If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is ANY OTHER NONCITIZEN who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

➢ First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).

➢ If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).

➢ If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (**TPS**) of not removing individuals based on conditions in that country:

➢ First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).

➢ If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).

➢ In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual.

See reverse ➢

Immigrant Defense Project

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PRACTICE ADVISORY

RECENT DEVELOPMENTS IN THE CATEGORICAL APPROACH: TIPS FOR CRIMINAL DEFENSE LAWYERS REPRESENTING IMMIGRANT CLIENTS

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OVERVIEW

This practice advisory provides:

- **Introduction (see pp. 2–3)** discussing the basics of the "categorical approach" that immigration courts employ to determine whether a state or federal criminal offense falls within the criminal grounds of removal (deportation) and why it is important to criminal defense attorneys;
- **Background on recent developments in the "categorical approach" (see pp. 3–7)**; and
- **Practice tips (see pp. 8–18)** to help criminal defenders representing immigrant clients to take advantage of the categorical approach where it applies and to avoid or mitigate negative immigration consequences under these new legal developments.

What is the categorical approach and how have recent developments changed it?

- The categorical approach limits the documents that an immigration court can consult to find an individual removable on the basis of a conviction. Under the "strict" categorical approach, the court cannot look behind the bare elements of the statute of conviction when determining whether a given conviction triggers removability. Under the "modified" categorical approach, the court may also consult a limited set of court documents in the "record of conviction," including at a minimum, the charging document, plea agreement, plea colloquy transcript, and verdict or judgment of conviction.
- Recent caselaw, including the Supreme Court's decision in *Nijhawan v. Holder* and the Attorney General's opinion in *Matter of Silva-Trevino*, has significantly eroded the categorical approach in some areas. The *Nijhawan* decision reaffirms, however, that the categorical approach continues to apply to many criminal grounds of deportation.
- The categorical approach continues to apply to many common "aggravated felony" deportation categories, including drug trafficking crimes, crimes of violence, firearms offenses, theft and burglary crimes, obstruction of justice and bail jumping offenses, and sexual abuse of a minor, and most non-aggravated felony grounds of removal, including controlled substance offenses, crimes of child abuse, and firearms offenses.
- The categorical approach has been significantly modified for a few aggravated felony offenses, including "fraud and deceit," tax evasion offenses, alien smuggling, and passport fraud, and possibly for the broad, non-aggravated felony deportation grounds for "crimes involving moral turpitude."

What does this mean for me as a criminal defense lawyer?

- You may be able to protect your immigrant clients by paying attention to the statutory elements necessary for conviction, comparing those elements to relevant grounds of removability, and keeping the record clear of facts other than those necessary elements.

INTRODUCTION

The "categorical approach" describes the method that immigration judges and reviewing federal courts usually employ to decide whether a given local, state or federal criminal offense triggers deportation or other immigration consequences under federal law.[1] Since at least 1914, most courts have engaged in an abstract, "categorical" analysis that compares the minimum statutory elements of the offense of conviction to the relevant deportation ground, without reference to the particular conduct that underlies the defendant's conviction. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862–63 (2d Cir. 1914). The Board of Immigration Appeals ("BIA"), the administrative appeals body that interprets the immigration laws on behalf of the Attorney General, has also usually used this approach, both on its own and in deference to applicable circuit law. *See, e.g.*, *Matter of Pichardo*, 21 I. & N. Dec. 330, 335–36 (BIA 1996).

The modern version of this "categorical approach" is modeled on the analysis elaborated by the Supreme Court in a pair of federal criminal sentencing cases, *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990), and recently applied in the immigration context in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). Under the "strict" version of the "*Taylor/Shepard*" categorical approach, courts simply compare the general or "generic" federal ground of removal with the minimum conduct necessary to offend the criminal statute. If every violation of the criminal statute necessarily falls within the federal removal ground, then a conviction under that criminal statute categorically triggers deportation. But if the criminal statute can be offended without engaging in conduct that falls within the generic deportation ground, the conviction will not be found to trigger removal regardless of the actual conduct that resulted in conviction.

Most courts employ some version of a "modified" *Taylor/Shepard* categorical approach. Under this modified analysis, if the statute of conviction punishes some conduct that falls within the generic deportation ground and some conduct that falls outside it, the court moves on to a second step in which it examines the "record of conviction," a set of official court documents, to determine whether the defendant was necessarily convicted of an offense falling within the deportation ground. Statutes that contain more than one offense, one or more of which does not trigger deportation, are sometimes called "divisible" statutes.[2] The "record of conviction" that a court will consult to determine what offense a defendant committed under a divisible statute consists, at a minimum, of the complaint/indictment or other charging document, any plea agreement, any plea colloquy transcript, and a verdict or judgment of conviction. *See Matter of Short*, 20 I. & N. Dec. 136, 137–38 (BIA 1989).

Both the strict and the modified categorical approaches provide criminal defense counsel with important tools to help noncitizen clients avoid or mitigate immigration consequences of conviction. In addition, understanding the categorical analysis is essential to properly advising

[1] While immigration law technically distinguishes between grounds of "deportability" and "inadmissibility" in many contexts, *compare* 8 U.S.C. § 1182 *with* 8 U.S.C. § 1227, the terms "deportability" and "removability" are used interchangeably in this advisory to refer to any grounds to expel a noncitizen from the United States.

[2] In dicta in *Duenas-Alvarez*, 549 U.S. at 193, the Court stated that there must be a "realistic possibility" that the statute reaches conduct that falls outside of the generic deportation ground, as evidenced by reported cases (or the immigrant's own case). In light of this dictum, a farfetched hypothetical possibility that a statute could trigger prosecution for an offense falling outside the deportation ground definition may not be sufficient to show that a statute is divisible.

clients about the immigration consequences that may attach to a decision to plead guilty to a given offense or to proceed to trial.

A number of recent BIA and federal court decisions have limited or eroded the categorical approach; at the same time, the Supreme Court and the BIA have reaffirmed and clarified its use in several contexts. This practice advisory discusses these recent developments and provides concrete tips for criminal defenders to protect their noncitizen clients in light of these cases. The first part of this advisory summarizes the recent developments. The second part contains practice tips for criminal defense counsel on how to handle charges in particular criminal offense categories.

HOW HAS THE CATEGORICAL APPROACH BEEN CHANGED?

A. The BIA Has Abandoned the Categorical Approach in Making Certain "Aggravated Felony" Determinations, Distinguishing Between "Element" and "Nonelement" Requirements for Removability

In a pair of 2007 decisions, the BIA departed from precedent to limit the application of the *Taylor/Shephard* categorical approach. In *Matter of Babaisakov*, the BIA, addressing the same issue later treated by the Supreme Court in *Nijhawan v. Holder* (discussed below), found that the amount of monetary loss required for a fraud offense to be an "aggravated felony" under immigration law does not need to be an element of the statute of conviction, but may be proved by evidence outside the record of conviction. 24 I. & N. Dec. 306 (BIA 2007). In *Matter of Gertsenshteyn*, the BIA found that "any available probative evidence" could be used to determine whether a given prostitution offense was "committed for commercial advantage," making it an aggravated felony. 24 I. & N. Dec. 111 (BIA 2007), *rev'd*, 544 F.3d 137 (2d Cir. 2008).

In *Babaisakov* and *Gertsenshteyn*, the Board drew a distinction between criminal removability grounds that demand exclusive focus on the elements of the prior conviction, therefore requiring a categorical inquiry, and those grounds that include requirements "not tied to the elements of any State or Federal criminal statute"—so-called "nonelement" requirements for removability. 24 I.& N. Dec. at 309. The BIA described these "nonelement" requirements as those that do not describe a category of state or federal offenses, but rather serve as "limiting or aggravating factor[s]" meant to distinguish between more and less serious violations of statutes of the same general type. 24 I. & N. Dec. at 313–16. Such "nonelement" factors, the BIA held, can be established by evidence outside of the record of conviction. *Id.* at 318–19.

In *Matter of Velasquez-Herrera*, however, the BIA declined an invitation from the government's attorneys to extend the *Gertsenshteyn/Babaisakov* approach to the non-aggravated felony removal ground of "crime[s] of child abuse," 8 U.S.C. § 1227(a)(2)(E)(i). 24 I. & N. Dec. 503 (BIA 2008). In order to trigger this ground, the BIA held, a criminal offense must include the minority of the complaining witness as an element of the crime. *Velasquez* reaffirms that the categorical approach will continue to apply where the immigration statute does not "invite" inquiry into nonelement factors, although the opinion gives little guidance about what may constitute such an "invitation." One relevant factor is apparent from *Gertsenshteyn* and *Velasquez*: in both cases, the BIA considered whether a categorical analysis would render the relevant deportation ground significantly "underinclusive" of state offenses that involved

deportable conduct. *Velasquez*, 24 I. & N. Dec. at 515; *Gertsenshteyn*, 24 I. & N. Dec. at 114. In other words, the BIA seems more likely to deem a particular factor triggering removal to be a "nonelement" factor that can be established by evidence outside the record of conviction if that factor is generally *not* included as an element in relevant state or federal criminal statutes, because a categorical approach would result in most defendants convicted under such statutes escaping removal.

B. In *Silva-Trevino*, the Attorney General Significantly Modified the Categorical Approach With Respect to Crimes Involving Moral Turpitude

The most radical potential slippage in the categorical approach involves the broad deportation ground of "crimes involving moral turpitude" ("CIMTs").[3] In *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), former Attorney General Mukasey drastically altered the categorical approach as it is applied to determining whether a given offense constitutes a CIMT. This decision, issued just weeks before the Bush administration left office, permits immigration judges in certain cases to examine an open universe of evidence to assess whether the conduct underlying a conviction involved moral turpitude. While *Silva-Trevino* is expressly limited to the CIMT context, it contravenes the law of almost every federal circuit court, which had accepted the BIA's nearly century-old categorical CIMT analysis,[4] and is arguably inconsistent with the Supreme Court's subsequent decision in *Nijhawan* (discussed below). For now, however, defense lawyers should conservatively assume that *Silva-Trevino* will govern how their immigrant clients' convictions will be analyzed.[5]

A.G. Mukasey's decision in *Silva-Trevino* instructs immigration judges to apply the traditional categorical analysis as a first step to determine whether a given conviction constitutes a CIMT. The defendant's actual conduct is completely irrelevant at this first step; the sole question is whether the elements of the statute of conviction either *necessarily* fall within the definition of a CIMT or *never* do so.[6] If the immigration judge is unable to determine that the prohibited conduct under the statute either *always* or *never* involves turpitude, then the judge proceeds to consult the traditional "record of conviction," as a court would under the typical "modified" categorical approach. *Id.* at 704. Again, the turpitude inquiry will end if the court is able to determine, at this second step, whether or not the defendant was convicted of a CIMT. However, if this modified categorical inquiry does not resolve the question one way or the other, the *Silva-Trevino* decision provides for an unprecedented third step: the immigration judge is instructed to consider "any additional evidence the adjudicator determines is necessary or

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[3] Noncitizens may be deportable or inadmissible upon conviction of one or more "crimes involving moral turpitude," depending on their individual circumstances. *See* 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), (ii). This undefined term has been used in federal immigration statutes since 1891, *see* Act of March 3, 1891, 26 Stat. 1084, and its meaning has been the subject of decades of administrative and judicial case law. *See generally Jordan v. DeGeorge*, 341 U.S. 223 (1951) (rejecting a void-for-vagueness challenge to the term and defining it to include any offenses involving a specific intent to defraud).

[4] The Seventh Circuit was the only federal court to have rejected the categorical approach in the CIMT context. *See Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

[5] The Third Circuit has squarely rejected *Silva-Trevino*'s modification of the categorical approach for CIMTs and reasserted that cases arising within the Third Circuit continue to be governed by existing precedent. *Jean-Louis v. Att'y Gen.*, ___ F.3d ___, No. 07-3311, slip op. at 18-48 (3d Cir. Oct. 6, 2009). Note, however, that defendants convicted in the Third Circuit still face a significant risk of being subjected to deportation proceedings elsewhere.

[6] In making this determination, immigration judges are instructed to consider whether there is a "realistic probability" that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I. & N. Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193).

appropriate to resolve adequately the moral turpitude question," whether or not contained in the formal conviction record.[7] 24 I. & N. Dec. at 704.

WHAT DOES *SILVA-TREVINO* MEAN FOR CRIMINAL DEFENSE COUNSEL?

Practice tips for particular offense categories are set out in the second part of this advisory. In general, criminal defenders should keep in mind the following about offenses that might be deemed crimes involving moral turpitude ("CIMTs"):

- **Defense counsel can no longer safely rely on the divisible or broad nature of a statute to protect immigrant clients charged with a crime that sometimes might be deemed a CIMT.**
  For example, since temporary taking of property is not a CIMT, prior to *Silva-Trevino* a noncitizen who pled to a theft statute that punished both permanent and temporary takings could later argue, under the categorical approach, that the conviction was not a CIMT. If the record of conviction was completely silent as to whether the defendant intended a permanent or temporary taking, the government would be unable to establish that the offense was a CIMT. Now, where the record does not indicate whether the taking was temporary or permanent, the government might be allowed to resort to other evidence to show that the defendant intended a permanent taking. (A plea to a temporary taking, however, should still be safe even under *Silva-Trevino*.)

- **It is no longer safe to assume that a silent or indeterminate record will protect a client from a CIMT finding.**
  The Attorney General's *Silva-Trevino* opinion may result in the burden being placed on your client to prove to the immigration judge that she did *not* commit a CIMT.

- **Defense counsel should continue to seek pleas under non-CIMT statutes or divisible statutes, but in addition should do everything possible to create an affirmative record that the client has not been convicted of a CIMT.**
  Defense counsel should ask the prosecution to re-draft charging documents to eliminate extraneous CIMT charges or, when this is not possible, affirmatively deny guilt of CIMT charges to which the defendant is not pleading. If a defendant is charged with a CIMT offense but pleads guilty to a related divisible or non-CIMT offense in satisfaction of that charge, it is possible that an immigration judge would take note of the original charge or particular factual allegations in the police report or complaint as evidence that the defendant in fact committed a CIMT. Mere silence as to the original charges may be regarded as tacit admission of facts alleged. For instance, in the example discussed above, rather than simply trying to keep the record opaque as to whether a defendant intended a permanent or temporary taking, defense counsel should ask the prosecutor to re-draft the charging instrument to allege only a temporary taking, or allocute their clients specifically to a temporary taking[0].

- **When it is not possible to eliminate or directly contradict allegation[0]s in the charging document that constitute "turpitudinous" behavior, defense counsel at a minimum should state or have their client state on the record that the defendant admits to the offense of conviction but "no other allegations in the complaint."**

[7] The *Silva-Trevino* opinion arguably does not apply the methodology it describes, and is subject to attack on numerous grounds. *See* Norton Tooby & Dan Kesselbrenner, "Living Under *Silva-Trevino*" (Apr. 27, 2009), *available at* http://www.criminalandimmigrationlaw.com/public/eNewsletter/ Silva-Trevino.pdf. Criminal defense counsel, however, should assume that an immigration judge outside the Third Circuit will apply the methods the Attorney General describes. *See* supra note 5.

C. The Supreme Court Provided Clarity on the Categorical Approach in *Nijhawan v. Holder*

In *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the Supreme Court considered the "fraud and deceit" aggravated felony ground of removability at 8 U.S.C. § 1101(a)(43)(M)(i), which requires a loss to the victim exceeding $10,000. Mr. Nijhawan was found guilty of fraud, had stipulated for sentencing purposes that the loss to the victim exceeded $100 million, and was ordered to pay restitution of $683 million. The Court held that it was appropriate for the immigration court to abandon the categorical approach in determining the loss amount for the purpose of the aggravated felony determination, and to look beyond the record of conviction to evidence such as stipulations at sentencing and restitution orders.

Although *Nijhawan*'s narrow holding specifically concerns the amount of loss requirement at 8 U.S.C. § 1101(a)(43)(M)(i), the decision created a framework for the more general application of the categorical approach in removal proceedings. The Court affirmed that the categorical approach as outlined in *Taylor* and *Shepard* remains appropriate when the removal statute refers to a "generic crime." It contrasted this approach with a "circumstance-specific approach" that is appropriate when the removal statute refers to "the specific way in which an offender committed the crime on a specific occasion," allowing the immigration court to investigate underlying facts, using evidence beyond the record of conviction.

In dicta, *Nijhawan* defines the following offenses as "generic" and therefore limited to the categorical approach: "murder, rape, or sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A); "illicit trafficking in a controlled substance," 8 U.S.C. § 1101(a)(43)(B); "illicit trafficking in firearms or destructive devices," 8 U.S.C. § 1101(a)(43)(C); and aggravated felony grounds referring to an "offense described" in sections of the federal criminal code including explosive materials and firearms, ransom, child pornography, racketeering and gambling, and sabotage and treason, 8 U.S.C. §§ 1101(a)(43)(E), (H), (I), (J), and (L). *Nijhawan*, 129 S. Ct. at 2300. Although crimes of violence, 8 U.S.C. § 1101(a)(43)(F), and theft offenses, 8 U.S.C. § 1101(a)(43)(G), are not explicitly referenced as "generic" offenses in *Nijhawan*, the reasoning used by the court in categorizing other offenses as generic strongly supports their inclusion as such. *Id.* *See* the discussion of "crimes of violence" in the "assault offenses" practice tip below.

Nijhawan further states that the following grounds require "circumstance-specific" analysis: the loss requirement for the tax evasion aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(ii); the "if committed for commercial advantage" qualifier in the aggravated felony ground relating to transportation for the purpose of prostitution, 8 U.S.C. § 1101(a)(43)(K)(ii); and the exception to the passport fraud and smuggling aggravated felony grounds for offenses committed to assist family members, 8 U.S.C. §§ 1101(a)(43)(P) and (N).[8] *Nijhawan*, 129 S. Ct. at 2301.

[8] For a comprehensive discussion of the likely impact of *Nijhawan* on each aggravated felony ground in the Immigration and Nationality Act, *see* Dan Kesselbrenner & Manuel D. Vargas, "Practice Advisory: The Impact of *Nijhawan v. Holder* on the Categorical Analysis of Aggravated Felonies" app. (June 24, 2009), *available at* http://www.immigrantdefense project.org/docs/09_Nijhawanpracticeadvisory--(6-24-09).pdf.

WHAT DOES *NIJHAWAN* MEAN FOR CRIMINAL DEFENSE COUNSEL?

Practice tips for particular offense categories are set out in the second part of this advisory. In general, the *Nijhawan* decision may be helpful to defenders representing non-citizen clients. It clarified the applicability of the categorical approach and reminded lower courts that the categorical approach still applies in immigration proceedings in all but a few circumstances. Criminal defense counsel, therefore, can represent immigrant clients with a clearer sense of what documents in the criminal record might later be used against the client in removal proceedings, depending on whether the categorical or circumstance-specific approach will be applied.

- ***Nijhawan* draws a distinction between "generic" and "circumstance-specific" grounds of removability and explicitly states that the categorical approach as outlined in *Taylor* and *Shepard* still applies to "generic" grounds.**
  Although *Nijhawan* dealt with only one specific aggravated felony ground, the Court addressed many others in dicta and its reasoning is clearly applicable to more. Furthermore, the decision limits the extra-statutory inquiry to the traditionally defined "record of conviction" for generic offenses. Generally, *Nijhawan*'s Court's affirmation of the categorical analysis for "generic" crimes of removability allows defenders representing immigrant clients to focus exclusively on the statute of conviction in certain cases and the statute and record of conviction in others. *See Nijhawan*, 129 S. Ct. at 2300 (listing offenses deemed "generic").

- ***Nijhawan* provides guidance on the types of offenses that require a "circumstance-specific" approach, highlighting for defenders those types of cases that demand extra attention be paid to evidence outside of the record of conviction.**
  Generally, the Court provides that the circumstance-specific approach may be applied "where the relevant aspect of the removable offense refers to the specific way in which a defendant committed a crime on a particular occasion." *See Nijhawan*, 129 S. Ct. at 2301. The tips section below provides an accounting of the most common circumstances in which documents and admissions outside of the record of conviction may be scrutinized in immigration proceedings.

- ***Nijhawan* sets some limits on the sources of evidence an immigration judge may consult for a "circumstance-specific" inquiry.**
  Although it is clear from *Nijhawan* that the circumstance-specific approach allows the immigration court to look beyond the statute and record of conviction, the decision does not specify the full reach of the approach. The Court set some limits based on notions of fairness that may help immigration practitioners argue that certain documents in the criminal record are too unreliable to be considered in immigration court. *See Nijhawan*, 129 S. Ct. at 2303. Perhaps most importantly, evidence in the criminal record may only be considered in immigration court if it is "tied to the specific counts covered by the conviction." *Id.* Nevertheless, at a minimum, defenders must assume that sentencing documents and admissions, including restitution orders and stipulations, may be used against immigrant defendants in immigration proceedings in certain circumstances. *Id.* Various circuit court precedents indicate that pre-sentence reports are also very likely to be considered under the circumstance-specific approach. *See, e.g., Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008) (allowing consideration of pre-sentencing report as "reasonable, substantial, and probative evidence"); *Ali*, 521 F.3d at 743.

PRACTICE TIPS

Keeping recent developments regarding the categorical approach in mind, defense counsel should consider the following practice tips when representing immigrant defendants.[9] These practice tips are divided into the following crime categories:

Introductory Note on what it means to "keep the record clean":

Many of the tips in this advisory urge you to protect your client by "keeping the record clean." Doing so may provide your client with a defense to removability in immigration court. Keeping the record clean means:

1. Keeping all information except for the statutory elements of the offense out of the record of conviction and other documents such as pre-sentence reports and sentencing documents.
2. Asking the prosecutor to issue a new charging document that excludes damaging allegations, if necessary.
3. Controlling the plea colloquy so that your client admits only to the bare statutory elements of the offense. If underlying facts pose a risk of removability, you may want to disprove those facts or, if this is not possible, state on the record that your client admits to the elements of the statute required for conviction and nothing more.

A. Drug Offenses:

Drug offenses may trigger removal for noncitizen clients under either the "drug trafficking" aggravated felony ground or the non-aggravated felony "controlled substance" grounds of removal.[10] *Nijhawan* clarified that the drug trafficking aggravated felony ground of removability is a "generic crime" demanding the categorical approach pursuant to the *Taylor/Shepard* framework. The general controlled substance grounds are also analyzed under the categorical approach. Defenders representing immigrant defendants on drug charges, therefore, should focus their attention on the statute of conviction and the traditionally defined record of conviction, as immigration judges will be limited in their inquiry to these documents.

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[9] Criminal defense attorneys should be aware that the constitutional prohibition against *ex post facto* laws does not apply in the immigration context. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (noting that Congress may attach new immigration consequences to past convictions within certain constitutional limits). In some circumstances where disclosure of your client's immigration status is not prejudicial, it may be advisable to make a record during allocution that your client is pleading guilty in reliance on immigration advice that you have provided. While this will not automatically shield your client from future changes in immigration law, such a record may strengthen available arguments against retroactive application.

[10] 8 U.S.C. § 1101(a)(43)(B) (aggravated felony ground); 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(2)(C), 1227(a)(2)(B) (non-aggravated felony inadmissibility and deportability grounds).

- **Negotiate a plea to an offense without a controlled substance element in the statute of conviction.** Pursuant to the categorical approach as clarified in *Nijhawan*, allegations or evidence of drug possession or sale included in the charging document or elsewhere in the criminal record cannot be consulted in immigration proceedings unless the statute of conviction has a drug offense as a necessary element of conviction.

- **Keep the record clean of reference to the *type* of drug involved.** If it is impossible to negotiate a plea to a non-drug offense, keep the record of conviction free of any reference to the *type* of drug involved in the case. To establish deportability on controlled substance grounds, the government often has the burden of proving by clear and convincing evidence that the substance involved is included in the controlled substance schedule at 21 U.S.C. § 802.[11] *Nijhawan* supports the view that the immigration factfinder cannot look beyond the record of conviction to establish the type of drug involved. Therefore, if no record of the type of drug is included in the record and if the state law at issue punishes offenses relating to even a single substance that is not included in the federal schedules, the government cannot meet its burden in deportation proceedings and your client will have a defense to deportability.[12] (Note, however, that in some contexts your client may be required to prove that she did *not* commit a controlled substance offense. In such cases, an indeterminate record may not be sufficient to prevail).

- **Negotiate a plea to an offense without a drug trafficking element so as to avoid an aggravated felony.** If it is impossible to negotiate a plea to a non-drug offense or to keep the type of drug out of the record of conviction, a guilty plea to a drug offense will almost certainly render your client removable pursuant to the general controlled substance grounds of removability.[13] You may, however, be able to preserve your client's eligibility for immigration relief by avoiding an aggravated felony conviction.[14] A state drug felony or misdemeanor may be categorized as an aggravated felony if it involves an element of commercial dealing. Avoid a drug trafficking aggravated felony by negotiating a plea to a possession-only offense with no element of sale, distribution or intent to sell or distribute (note, however, that second or subsequent possession offenses may be aggravated felonies—see tip below—and that possession offenses involving more than five grams of crack cocaine or any amount of flunitrazepam are aggravated felonies). If this is impossible, in marijuana cases you can at the very least preserve an argument that the conviction is not a drug trafficking aggravated felony by negotiating a plea to an offense that is broad enough in its wording to include non-remunerative

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[11] *See Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965).

[12] You may want to take some time to compare the controlled substances covered in your state's penal code with the drugs scheduled at 21 U.S.C. § 802 and its accompanying regulations to determine if the former includes any substances not included in the latter (or find out if there is an immigration practitioner in the state who has already done so).

[13] There is a minor exception under the controlled substance ground of deportability for the possession of thirty grams or less of marijuana for one's own personal use. *See* 8 U.S.C. § 1227(a)(2)(B). This exception does not exist for the corresponding ground of inadmissibility.

[14] Conviction of an "aggravated felony" presents a bar to almost every type of immigration relief. *See, e.g.*, 8 U.S.C. §§ 1101(f), 1158(b)(2)(B)(i), 1229b. An individual deported on the basis of an "aggravated felony" also faces a lifetime bar to lawful return to the U.S. 8 U.S.C. § 1182(9)(A)(ii).

transfers or gifts in addition to sale. You must then keep the record of conviction clean of any reference to a sale or exchange of money.[15]

- **Beware of second or subsequent simple possession offenses, and keep the record clean of any reference to prior offenses or recidivist enhancement.** As noted above, almost every simple possession offense will render your client removable. However—as with the tip above—you may preserve your client's eligibility for immigration relief by avoiding an aggravated felony conviction. A circuit split has developed around the question of whether multiple simple possession offenses can be aggregated to constitute a drug trafficking aggravated felony. The government has argued that a second or subsequent simple possession offense, even if it is a misdemeanor, constitutes a drug trafficking aggravated felony because it could hypothetically be prosecuted federally as a recidivist felony offense. Immigration advocates have petitioned for certiorari on this issue,[16] but defenders should assume the worst for the time being and avoid a plea to a second or subsequent simple possession offense if at all possible. However, if this is not possible, you should keep the record clean of any mention of a prior drug conviction or any analog to federal recidivist prosecution under 21 U.SC. §§ 844(a) and 851.

B. Offenses Against the Person:

Offenses against the person may trigger deportation for noncitizen clients under a variety of grounds. Certain offenses for which a sentence of one year or more is imposed will trigger the aggravated felony ground for "crimes of violence."[17] Many intentional assault offenses and some reckless assault crimes will constitute "crimes involving moral turpitude" ("CIMTs").[18] Sex crimes may additionally place clients at risk of removal under the "rape" or "sexual abuse of a minor" aggravated felony grounds.[19] Offenses against spouses or household members may trigger removal under the separate "crimes of domestic violence" grounds of removability, and offenses against minors can trigger removal under another prong of this ground of removability.[20]

1. Sex Crimes

Sexual abuse of a minor

Sexual abuse of a minor ("SAM") is an aggravated felony.[21] While some federal courts had previously been hesitant to apply the categorical approach to this ground,[22] *Nijhawan* strongly supports the argument that this removal ground is a "generic" one requiring application of the categorical approach. 129 S. Ct. at 2300. Immigration advocates can argue after

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[15] *See generally* Immigrant Defense Project Practice Advisory: Using *Lopez v. Gonzales* to Challenge Aggravated Felony Drug Trafficking Charges or Bars on Relief (May 19, 2008), *available at* http://www.immigrantdefense project.org/docs/08_Post-LopezPracticeAdvisory51908.pdf.

[16] *See Carachuri v. Holder*, No. 09-60 (petition for certiorari pending).

[17] 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

[18] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).

[19] 8 U.S.C. §§ 1101(a)(43)(A).

[20] 8 U.S.C § 1227(a)(2)(E)(i), (ii).

[21] 8 U.S.C. § 1101(a)(43)(A).

[22] *See, e.g., Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005).

Nijhawan that the categorical approach should apply such that both the "sexual abuse" requirement and the minority of the complainant must be elements of the offense or at a minimum must be established in the record of conviction.[23] Defense counsel should therefore seek pleas that do not include either sexual conduct or the minority of the victim (or both) as elements.

- **Seek a plea to a statute that lacks any element of sexual abuse.** A plea to a broad child-endangerment or false imprisonment statute that lacks the element of lewd or sexual conduct and/or intent is far less likely, after *Nijhawan*, to constitute an aggravated felony.[24]

- **Seek a plea to a statute that lacks the age of the victim as an element and keep the record clear of the complainant's minority.** As an additional defense, controvert or keep the record clear of any mention of the minority of the complainant.[25]
- **Be aware of additional grounds of removability that may apply even if the offense does not fall within the sexual abuse of a minor aggravated felony ground discussed above.** Many pleas that avoid the SAM aggravated felony ground may nonetheless trigger grounds of removal, including a CIMT or a crime of "child abuse, child neglect or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i), a ground applicable to noncitizens who have been lawfully admitted or paroled. In some cases a CIMT plea or a plea to a "child abuse" offense will be materially better for your client than a SAM aggravated felony, but you should not advise a noncitizen that such a plea is "safe" without consulting immigration counsel. Furthermore, false imprisonment statutes may constitute "crime of violence" or "obstruction of justice" aggravated felonies when a sentence of one year or more is imposed. To avoid this risk, seek a sentence of 364 days or less.

- **Be aware that ICE has prioritized removal of sex offenders and devotes significant resources to identifying and arresting noncitizen sex offenders in the community.** When it is not possible to avoid conviction of a sex offense, particularly a sex offense involving a minor, avoid sentences that increase the likelihood of ICE detection and detention, including incarceration, probation, and sex offender registration.

Rape

"Rape" is an aggravated felony ground.[26] *Nijhawan* strongly supports the argument that the rape ground is a generic one calling for the categorical approach. 129 S. Ct. at 2300. While the immigration statute does not define the term "rape," immigration advocates can argue that the aggravated felony ground is only triggered by convictions that satisfy the federal criminal

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[23] *See Garcia-Lara v. Holder*, No. 08-4023, 2009 WL 2589115, at *3 (7th Cir. Aug. 25, 2009) (noting the "categorical approach that governs the determination whether a conviction constitutes the aggravated felony of sexual abuse of a minor," citing *Nijhawan*, and questioning whether resort to a police report to determine minority of complainant was proper).

[24] *But see James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008) (pre-*Nijhawan* case remanding to BIA question of whether child endangerment statute lacking sexual conduct element was "divisible" as to SAM aggravated felony).

[25] *See Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); *but see Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005) (pre-*Nijhawan* case allowing resort to extrinsic evidence of complaining witness's age).

[26] 8 U.S.C. § 1101(a)(43)(A).

prohibition on "aggravated sexual abuse" at 18 U.S.C. § 2241 (which generally requires forcible compulsion), or at a minimum, convictions that contain the elements of sexual intercourse and lack of consent.[27] Defense counsel can preserve these arguments by avoiding conviction under statutes that punish forcible or compelled sexual conduct, as well as statutes that punish sexual penetration without consent.

- **Seek an alternate plea to a statute that does not include conduct satisfying the common-law definition of rape or the federal definition of "aggravated sexual abuse."** Offenses such as false imprisonment, a non-sexual assault statute, or a sexual abuse statute that penalizes sexual misconduct other than non-consensual intercourse may not be considered to fall within the rape aggravated felony ground. To avoid the risk that such a plea will nonetheless constitute a "crime of violence" aggravated felony, seek a sentence of 364 days or less.

- **Be aware that such pleas, while avoiding the rape aggravated felony ground, may nonetheless constitute CIMTs that may subject your client to removal.** In some cases a CIMT plea will be materially better for your client than an aggravated felony, but you should not advise a noncitizen client that a plea to assault or a false imprisonment statute is "safe" without consulting immigration counsel.

2. **Assault Offenses:**

A "crime of violence" for which a sentence of a year or more is imposed is an aggravated felony.[28] A "crime of violence" is defined for these purposes as a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used," or a misdemeanor or felony offense that has as an element the use, threatened use, or attempted use of force against the person or property of another.[29] Recent case law developments have not altered the courts' consensus that the "crime of violence" aggravated felony inquiry is a categorical one.[30] However, defense counsel should be cautious before concluding that a given felony offense does not, "by its nature," involve a possibility that force may be used or that a given offense lacks an element of the use, threatened use, or attempted use of force. The Supreme Court's *Duenas-Alvarez* decision now arguably requires a showing of a "realistic probability, not a theoretical possibility," of prosecution on facts that do not involve the substantial risk of use of force, or on facts that do not necessarily involve the use of force, before deportation may be avoided under this ground. *See Duenas-Alvarez*, 549 U.S. at 193. Such a showing may be based on the defendant's own case or on other state case law.

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[27] *See, e.g., Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000) (relying on Black's Law Dictionary definition of "rape" to hold that "rape" aggravated felony requires nonconsensual intercourse; rejecting the argument that "rape" requires forcible compulsion); *but see Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006) (statutory rape may fall within the "rape" aggravated felony ground).

[28] 8 U.S.C. § 1101(a)(43)(F).

[29] *Id.* (incorporating by reference 18 U.S.C. § 16).

[30] Although *Nijhawan* does not explicitly list crimes of violence as a "generic" crime, "crime of violence" is defined in the Immigration and Nationality Act with reference to 18 U.S.C § 16, making it analogous to the "violent felony" analysis in the Armed Career Criminal Act at issue in *Taylor*; *Chambers v. United States*, 129 S. Ct. 687 (2009); and *James v. United States*, 550 U.S. 192 (2007), in which the Supreme Court used the categorical approach. *See also supra* n.8.

Assault offenses may also trigger the CIMT grounds of removability. In this regard, *Silva-Trevino* probably does not upset prior BIA case law drawing complex distinctions between assault statutes that are CIMTs and those that are not. Prior BIA cases provided that "simple" assault crimes, i.e., those that punish offensive touching with no specific intent to injure, are not CIMTs. *See Matter of Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989). The BIA has also stated that assault statutes punishing intentional but *de minimis* offensive contact are not CIMTs. *See In re Solon*, 24 I. & N. Dec. 239, 241 (BIA 2007). In contrast, "intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous." *Id.* at 242. In addition, *Silva-Trevino* arguably does not disturb existing case law requiring that reckless crimes involve some aggravating dimension to be turpitudinous. *See Solon*, 24 I. & N. Dec. at 242 ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.").

- **To avoid an aggravated felony conviction, seek a plea to a felony that does not "by its nature" involve risk that force will be used, if state case law supports that argument; or seek a plea to misdemeanor that does not include as an element the use, attempted use, or threatened use of force.** "Use" of force in this context means "active employment," so negligent offenses will not be deemed "crimes of violence." *Leocal v. Ashcroft*, 534 U.S. 1, 8 (2004). By the same token, recklessness as to the risk of injury or property damage does not make an offense a crime of violence, because the "risk" required is risk that force will be actively employed. *Id.* at 10. While the Supreme Court reserved the question in *Leocal*, the Second, Third, Fourth, Seventh and Ninth Circuits have found that the reckless use of force itself is insufficient to make an offense a "crime of violence."[31]

- **If conviction of a crime of violence is unavoidable, seek a sentence of 364 days or less.**

- **To avoid a CIMT, seek a plea to a statute requiring only negligent conduct.** It remains the case after *Silva-Trevino* that negligent conduct cannot constitute a CIMT. *Silva-Trevino*, 24 I. & N. Dec. at 689 n.1; *Solon*, 24 I. & N. Dec. at 242.

- **Seek to protect against a CIMT finding by creating an affirmative record that a reckless assault offense did not include aggravating dimensions such as serious physical injury.** Reckless assault crimes with no aggravating factor such as serious injury may not be CIMTs. At the very least, however, in many jurisdictions they will not constitute "crime of violence" aggravated felonies, as noted above. Thus, where a plea to a negligent offense is not possible, a plea to a reckless offense may guard against the aggravated felony risk if not the CIMT risk. For some clients, conviction of a CIMT has less drastic consequences.

- **Protect against a CIMT finding by seeking a plea to attempted reckless assault.** Several federal courts have found that because the offense of attempted reckless assault

[31] *See Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003); *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006); *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc).

lacks any logically coherent *mens rea*, it is categorically not a CIMT. *See Gill v. INS*, 420 F.3d 82 (2d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004). As these cases illustrate, it is sometimes possible to plead guilty to a logically incoherent offense.

- **To avoid a CIMT, seek a plea to a "simple" assault statute and construct an affirmative record that your client's assault conviction did not involve moral turpitude.** *Silva-Trevino* may make it more likely that an immigration court will examine the particular facts of a defendant's case, even where the defendant is prosecuted under a statute that punishes "simple" or general-intent assault, or where a statute punishes both *de minimis* offensive contact and conduct resulting in injury.[32] If your client is charged under such a statute and an alternate plea to negligent conduct is not possible, make a record at allocution that your client lacked a specific intent to injure and/or deny that injury resulted.

- **In jurisdictions with "simple" or non-specific intent assault statutes, controvert or keep the record clear of allegations of other aggravating factors.** Factors such as a special relation of trust between the defendant and the complainant, the use of a weapon or dangerous instrument, or a complainant's status as a police officer or other official may make even a "simple" assault a CIMT and should be excluded from the record.

Crimes Against Children

As discussed above, under the BIA's decision in *Velasquez-Herrera*, a conviction will only trigger removal under the rubric of a "crime of child abuse, child neglect, or child abandonment," if the minority of the complainant is an element of the statute of conviction.[33]

- **If a defendant is charged with an offense specific to minors, seek an alternate plea to an offense that does not include as an element the minority of the complainant.**

- **Be aware that such offenses may nonetheless constitute CIMTs or may trigger other removal grounds, depending on the nature of the offense.**

Domestic Violence Offenses

Apart from general assault crimes, discussed above, there is a distinct ground of deportability for "crimes of domestic violence," which requires for removability both that: 1) the offense must be a "crime of violence" as defined at 18 U.S.C. § 16 (discussed *supra* under "assault offenses" generally); and 2) the offense must have been committed against a complaining witness with a domestic relationship to the defendant as defined in the immigration statute or who would be protected by federal or state domestic violence laws.[34]

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[32] *Compare, e.g., Solon*, 24 I. & N. Dec. at 241 ("[T]he conviction will be found to be for a crime involving moral turpitude only if the full range of the conduct prohibited in the statute supports such a finding.") *with Silva-Trevino*, 24 I. & N. Dec. at 696–98 (rejecting the "minimum conduct" approach to determining whether a statute is a CIMT).

[33] 8 U.S.C. § 1227(a)(2)(E)(i). The government may argue that the *Velasquez-Herrera* decision should be revisited in light of the Supreme Court's decision in *United States v. Hayes*, 129 S. Ct. 1079 (2009), which held that a criminal statute that includes wording similar to 8 U.S.C. § 1227(a)(2)(E)(i) invited circumstance-specific inquiry into the status of the complainant, but no court has yet indicated that *Velasquez-Herrera*'s holding is in doubt.

[34] 8 U.S.C § 1227(a)(2)(E)(i).

- **Negotiate a plea to an offense that is not a "crime of violence."** (*See* discussion at pages 12–13, above). *Nijhawan* supports the proposition, and the circuits are nearly unanimous,[35] that the strict categorical approach applies to the categorization of an offense as a "crime of violence." By negotiating a plea to an offense that is not necessarily a "crime of violence," you can protect your client from the "crime of domestic violence" ground of deportability regardless of the relationship between your client and the complaining witness.

- **Keep the record clean—within and outside of the record of conviction—of any reference to the relationship between the defendant and the complaining witness.** *Nijhawan* and *U.S. v. Hayes*, 129 S. Ct. 1079 (2009), may support the government's argument that the "circumstance-specific" approach may be used to determine the relationship between the defendant and the complaining witness for the purpose of the domestic violence ground of deportability. This argument, if successful, allows the immigration court to reach beyond the record of conviction to establish a domestic relationship between the defendant and complaining witness. Most circuit courts of appeals were headed in this direction prior to *Nijhawan*,[36] with the exception of the Ninth Circuit, which continued to adhere strictly to the categorical approach for all aspects of the domestic violence ground of removability.[37] Although immigration practitioners will certainly continue to advance the argument that the entirety of this ground of removability should be subject to the categorical approach, defenders who cannot avoid a plea to a "crime of violence" offense can best protect their clients by keeping the relationship between the defendant and the complaining witness entirely out of the criminal record, not only the record of conviction.

- **Be aware of additional grounds of removability that may apply even if the offense does not fall within the "domestic violence" ground of removability discussed above.** Defenders should be aware that an offense at risk of categorization as a crime of domestic violence may also fall under: the CIMT ground of removability, 8 U.S.C. § 1227(a)(2)(A)(i); the "crime of violence" aggravated felony ground of removal if the sentence imposed is a term of imprisonment of one year or longer, 8 U.S.C. § 1101(a)(43)(F); and potentially the "sexual abuse of a minor" aggravated felony ground of removal, 8 U.S.C. § 1101(a)(43)(A). For tips on how to address these potential dangers, see the practice tips for "assault offenses" and "sex crimes" above.

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[35] *See, e.g., Sutherland v. Reno*, 228 F.3d 171, 177 n.5 (2d Cir. 2000); *Gonzales-Garcia v. Gonzales*, 166 F. App'x 740 (5th Cir. 2006) (unpublished); *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003); *Tokatly v. Gonzales*, 71 F.3d 613, 621–24 (9th Cir. 2004); *Cesar v. Attorney General*, 240 F. App'x 856, 857 (11th Cir. 2007) (unpublished).

[36] *See, e.g., Flores*, 350 F.3d at 671 (finding the second prong of the domestic violence ground of removability to be a "real-offense characteristic" which "may be proved without regard to the elements of the crime" and setting no real limit on the evidence that might be used to prove it). Several of the circuit courts had not reached the issue but deliberately failed to conclusively limit the analysis of the second prong to the record of conviction. *See, e.g., Sutherland*, 228 F.3d at 177; *Gonzales-Garcia*, 166 F. App'x at 743 n.6; *Cesar*, 240 F. App'x at 857.

[37] *See Tokatly*, 71 F.3d at 621–24 (applying the strict categorical approach to both the "crime of violence" categorization and the determination of the relationship between defendant and complaining witness, finding the government's argument that the second prong should reach beyond the categorical approach while the first prong remains within it to be a "convoluted and bipolar methodology"); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391–92 (9th Cir. 2006).

C. Offenses Against Property:

Offenses against property may trigger removal against noncitizen clients under a variety of grounds. Many theft, fraud and property damage offenses will trigger the CIMT grounds of removability.[38] In addition, there are specific aggravated felony grounds of removal for: fraud and deceit offenses with a loss to the victim exceeding $10,000; theft or burglary offenses for which a sentence of one year or more is imposed; offenses relating to commercial bribery, forgery and counterfeiting; and money laundering offenses "described in" specified provisions of federal criminal law and involving more than $10,000 in funds.[39]

"Fraud and Deceit" Offenses

As discussed above, *Nijhawan* narrowly addressed the question of whether a stipulation of monetary loss at sentencing could trigger the aggravated felony ground for crimes "involv[ing] fraud or deceit in which the loss to the victim . . . exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). While the Court held that the statute of conviction need not include the relevant loss amount as an element, the *Nijhawan* opinion does place limits on the evidence the immigration court may examine to determine loss amount. In addition, *Nijhawan* affirms that the question of whether an offense "involves fraud or deceit" remains a categorical one. 129 S. Ct. at 2297.

- **In cases involving charges of fraud or deceit and an actual or intended loss of more than $10,000, seek an alternate plea to a theft offense that does *not* involve an element of fraud or deceit.** Under *Nijhawan* and *Babaisakov*, this inquiry remains strictly categorical. The BIA regards theft and taking by fraud as distinct offenses. *See Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008). A theft offense that does not include fraud or deceit as a necessary element for conviction is therefore probably not an aggravated felony under section § 1101(a)(43)(M)(i) even where actual or intended loss exceeds $10,000. Note, however, that such an offense may nonetheless constitute a "theft" aggravated felony if the sentence imposed is one year or more.

- **Where an alternate plea to a theft offense is not possible, create an affirmative record of "convicted" loss of $10,000 or less.** *Babaisakov* and *Nijhawan* both affirm that only losses specifically tied to *convicted* conduct are relevant to the $10,000 inquiry. In cases involving fraud or deceit where it is likely that restitution of over $10,000 will be ordered or charging instruments allege losses or intended losses over $10,000, allocute your client to a loss amount of $10,000 or less tied to convicted conduct, or enter a written stipulation or plea agreements to that effect. Such a record may prevent the immigration authorities from later proving by the requisite "clear and convincing evidence" that additional amounts for which restitution was ordered are tied to convicted conduct.

- **Be aware that fraud and deceit offenses may also trigger removability under the CIMT deportation ground as well as the aggravated felony grounds for various**

[38] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).
[39] 8 U.S.C. §§ 1101(a)(43)(M)(i) (fraud and deceit); 1101(a)(43)(G) (theft and burglary); 1101(a)(43)(R) (bribery, forgery and counterfeiting); 1101(a)(43)(D) (money laundering).

forgery and counterfeiting and other offenses "described in" provisions of federal criminal law, 8 U.S.C. §§ 1101(a)(43)(D), (R).

Theft or Burglary Offenses

A "theft" or "burglary" offense, including receipt of stolen property, with a sentence of one year or more is an aggravated felony.[40] This inquiry remains categorical. *See Nijhawan*, 129 S. Ct. at 2299; *Duenas-Alvarez*, 549 U.S. at 189.

- **For theft, receipt of stolen property, and burglary offenses, seek a sentence of 364 days or less to avoid the aggravated felony ground.**
- **To avoid a CIMT, seek an alternate plea to an offense that punishes mere temporary conversion (*e.g.*, unauthorized use of vehicle or "joyriding" in preference to grand larceny or grand theft auto), and if possible create an affirmative record that the intention was to effect a temporary taking.** *Silva-Trevino* leaves undisturbed BIA case law holding that larceny statutes that punish an intent to convert property temporarily, as opposed to an intent permanently to deprive the owner of his/her property, do not involve moral turpitude. *See, e.g.*, *Matter of Grazley*, 14 I. & N. Dec. 330 (BIA 1973); *Matter of P*, 2 I. & N. Dec. 887 (BIA 1947). However, for statutes that punish both temporary and permanent takings, *Silva-Trevino* greatly expands the universe of evidence that may be consulted to determine whether the defendant in fact intended a permanent taking. Where it is not possible to seek an alternate plea, try to controvert or keep the record clear of evidence suggesting an intent to effect a permanent taking.

D. Weapons Offenses:

Weapons offenses may trigger removability for noncitizen clients under the aggravated felony grounds related to firearms and explosive devices and illicit firearms trafficking, as well as the non-aggravated ground of removal for certain convictions relating to the purchase, sale, possession, use, ownership, and carrying of a "firearm or destructive device," including any attempt or conspiracy offenses.[41] *Nijhawan* affirms that the categorical analysis is used for convictions falling under the firearms aggravated felony grounds, both of which define the relevant categories of offenses as those "described in" listed federal statutes. Additionally, nothing in *Nijhawan* or the BIA's recent categorical approach cases purports to alter the analysis of the non-aggravated firearms ground, which remains categorical. The term "firearm or destructive device" is defined at 18 U.S.C. § 921(a).

- **To avoid aggravated felony removal grounds linked to federal firearm offenses, seek alternate pleas to state statutes that lack one or more of the elements required under the listed federal statutes.** Note, however, that the BIA and the Seventh and Ninth Circuits have held, under the categorical approach, that a state offense need not contain any counterpart to the federal "jurisdictional" element

[40] 8 U.S.C. § 1101(a)(43)(G).

[41] 8 U.S.C. §§ 1101(a)(43)(C), (E) (firearm and explosive device aggravated felonies); 1227(a)(2)(C) (non-aggravated felony firearms ground).

requiring an effect on interstate commerce in order to qualify as an aggravated felony. *See Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002); *accord Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1272 (9th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 502 (7th Cir. 2008).

- **To avoid general firearm deportation ground, where your client is charged with possession of a firearm, seek an alternate plea to an offense that does not involve possession of a "firearm or destructive device" as defined at 18 U.S.C. § 921(a). Keep the record clear of the nature of the weapon if the statute includes but is not exclusive to "firearms" or "destructive devices" as defined in federal law.**

- **To avoid CIMT removal grounds, where your client is charged with possession of a weapon with intent to use it, seek an alternate plea to a weapons offense that punishes mere possession of a weapon with no intent to use. Create an affirmative record that the defendant did not intend to use the weapon unlawfully.** The recent developments discussed in this advisory leave undisturbed the longstanding distinction in BIA and circuit case law between weapons offenses that punish mere knowing possession of contraband weapons, which do not involve moral turpitude, and offenses that punish possession of a weapon with intent to use it unlawfully against the person or property of another, which generally do involve moral turpitude. Where a statute punishes both possession with intent to use and possession with no such intent, *Silva-Trevino* expands the universe of evidence an immigration judge may consult to determine whether the defendant possessed the weapon with intent to use it, so you should create an affirmative record regarding the lack of intent.

For further information on immigration consequences of convictions, please contact the Immigrant Defense Project at 212.725.6422 or visit www.immigrantdefenseproject.org.

Public defenders can also find resources on representing immigrants on the website of the Defending Immigrants Partnership, www.defendingimmigrants.org.

TIPS ON HOW TO WORK WITH AN IMMIGRATION LAWYER TO BEST PROTECT YOUR NONCITIZEN DEFENDANT CLIENT

by Manuel D. Vargas

1. **As a preliminary matter, know your professional duties relating to a noncitizen client**

   Revised ABA Standards for Criminal Justice, Pleas of Guilty, Third Edition (1999):

   - Responsibilities of Defense Counsel -- Standard 14-3.2(f):

     To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

   - Commentary on Standard 14-3.2(f) (Collateral consequences)

     This Standard . . . strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or Alford plea. Further, counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces. For example, depending on the jurisdiction, it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.

2. **Attend immigration law training programs to develop base of knowledge on the immigration consequences of criminal convictions**

   Some training providers:

   - **National Immigration Project of the National Lawyers Guild** (Boston, Massachusetts) – (617) 227-9727
   - **Immigrant Legal Resource Center** (San Francisco, California) – (415) 255-9499
   - **Immigrant Defense Project of the New York State Defenders Association** (New York, New York) -- (212) 898-4131

- Expert private criminal and/or immigration lawyers also provide training on the immigration consequences of criminal convictions. One leading example is Norton Tooby of The Law Offices of Norton Tooby in Oakland, California – (510) 601-1300. For a referral to an appropriate local immigration lawyer who provides such training, defense lawyers may contact the local chapter of the **American Immigration Lawyers Association (AILA)**. Contact the Washington, D.C. AILA national office at (202) 371-9377 for a current telephone number for your local AILA chapter.

3. **Get necessary basic information from a foreign-born client before consulting with an immigration lawyer/expert**

- Determine citizenship status – make sure you are getting right answer

- Obtain detailed information regarding immigration history – make sure you are getting right answer

  - Current immigration status?
  - If lawfully admitted, when?
  - Re-admission(s) during the last five years?
  - Prior removal?
  - Look at documents
  - If young client, talk to parent or guardian

- Obtain detailed information regarding criminal record – make sure you are getting right answer (including any out-of-state convictions)

  - Info regarding priors
  - Info regarding current charges, and possible alternatives
  - Immigration lawyer needs to know more than name of offense, needs to know elements of offense and what will be in the record of conviction

- Obtain information regarding client's equities

- Determine how important immigration consequences vis-à-vis penal consequences are for the particular client

- Use immigration questionnaire, such as the following samples:

  - Immigration Intake Questionnaire (developed by Ann Benson of the Washington Defender Immigration Project in the State of Washington) (attached)
  - Basic Immigration Status Questionnaire (developed by The Law Offices of Norton Tooby in Oakland, California) (attached)
  - Client Questionnaire (developed by Bretz and Coven, LLP, in New York, New York) (attached)

4. **Consult with published materials and/or internet resources before consulting with the immigration lawyer/expert**

Consult with published materials, such as the following:

- Immigration Law and Crimes, by Dan Kesselbrenner and Lory D. Rosenberg, under the auspices of the National Immigration Project of the National Lawyers Guild (published by West Group, 620 Opperman Drive, St. Paul, MN 55164 / (800) 328-4880)

- Criminal Defense of Immigrants, by Norton Tooby with Katherine A. Brady (distributed by the The Law Offices of Norton Tooby, 516 52nd Street, Oakland, CA 94604 / (510) 601-1300)

- Cultural Issues in Criminal Defense, edited by James G. Connell, III, and Rene L. Valladares, including Chapter 11, "Immigration Consequences of Criminal Convictions" by Tova Indritz (published by Juris Publishing, Inc., 9 East Carver Street, Huntington, NY 11743 / (800) 887-4064)

- California Criminal Law and Immigration, by Katherine A. Brady (distributed by The Immigrant Legal Resource Center, 1663 Mission Street, Suite 602, San Francisco, CA 94103 / (415) 255-9499)

- Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios, by Maria Baldini-Potermin (distributed by the Minnesota Bar Association / (612) 333-1183)

- Representing Noncitizen Criminal Defendants in New York State, by Manuel D. Vargas (distributed by the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany, NY 12210-2314 / (518) 465-3524)

- "Deportation: An Immigration Law Primer for the Criminal Defense Lawyer," by William R. Maynard (published in the June 1999 issue of NACDL's The Champion and available on the internet at http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument)

Consult with internet resources, such as the following:

- United States Code
  http://www.law.cornell.edu/

- Code of Federal Regulations
  www.access.gpo.gov/nara/cfr/cfr-table-search.html

- U.S. Supreme Court and Court of Appeals decisions
  http://laws.findlaw.com/

- Board of Immigration Appeals precedent decisions
  http://www.usdoj.gov/eoir/efoia/bia/biaindx.htm

- Immigration and Naturalization Service information and forms
  http://www.ins.usdoj.gov

- U.S. State Department Country Reports on Human Rights Practices
  http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html

- American Immigration Lawyers Association
  http://www.aila.org/

- National Lawyers Guild/National Immigration Project
  http://www.nlg.org/nip/homepage.html

- Immigrant Legal Resource Center
  http://www.ilrc.org

- New York State Defenders Association/Criminal Defense Immigration Project
  http://www.nysda.org/NYSDA_Resources/Defense_Immigration_Project/defense_immigration_project.html

- Law Offices of Norton Tooby
  http://www.ilw.com/tooby

- NACDL Immigration Articles
  http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument

5. Consult with an immigration lawyer who is an expert on crime-related issues

- Private immigration lawyers

When immigration counsel is required for a specific case, defense lawyers are encouraged to contact an immigration lawyer with expertise in criminal/immigration issues. An expert should be aware of the latest developments in the law relevant to your' client's particular situation. For a referral to an appropriate local immigration lawyer, defense lawyers may contact the local chapter of the **American Immigration Lawyers Association (AILA)**. Contact the Washington, D.C. AILA national office at (202) 371-9377 for a current telephone number for your local AILA chapter.

- National backup resource

  National Immigration Project of the National Lawyers Guild – (617) 227-9727 (Contact Dan Kesselbrenner)

- Some state backup resources

  California

  Immigrant Legal Resource Center – (415) 255-9499 (Charges fee with lower rate for public defenders)

  Florida

  Florida Immigrant Advocacy Center – (305) 573-1106 (Contact Rebecca Sharpless)

  Illinois

  Midwest Immigrant Rights Center – (312) 660-1370 (Contact Maria Baldini-Potermin)

  New York

  Immigrant Defense Project of the New York State Defenders Association -- (212) 898-4132 (Contact Immigrant Defense Project hotline staff person on Tuesdays and Thursdays)

  Texas

  Lawyers' Committee for Civil Rights Under Law of Texas – (915) 532-3370 (Contact Lynn Coyle)

  Washington

  Washington Defender Immigration Project of the Washington Defender Association – (206) 726-3332 (Contact Ann Benson)

6. **Consult with the immigration lawyer/expert as early as possible**

7. **Give the immigration lawyer/expert information on your client's criminal record and immigration history in advance or have it ready**

8. **Discuss the immigration implications of conviction of each charge against your client, and potential alternative pleas**

9. Discuss the immigration effect of any potential sentence

10. Discuss the immigration effect of any potential disposition that is not a conviction under the law of your jurisdiction to make sure that the disposition will not be considered a conviction for immigration purposes

11. If necessary, obtain the immigration analysis in writing (e.g., where D.A. may want to see expert's analysis before agreeing to certain disposition of the case)

12. Discuss other issues regarding which you may want to advise your client, e.g. effect of appeal or post-conviction relief, early parole, removal proceedings, future inadmissibility, consequences of illegal reentry

13. If client will be subject to removal proceedings after the criminal case, hook the client up with immigration lawyer before or after criminal case is over

14. To minimize consultation costs, develop relationship with specific immigration attorney or expert (for quick free evaluations in return for referrals and/or occasional evaluation fee in a more complicated case)

15. If client is indigent, contact not-for-profit backup resource center and/or seek reimbursement for any consultation fee -- Assigned counsel consulting with an expert immigration lawyer should seek reimbursement for any fees charged from assigned counsel plan funds available for expert testimony or consultations

UNDERSTANDING THE IMMIGRATION CONSEQUENCES OF YOUR CRIMINAL CHARGES

Prepared by the New York State Defenders Association Immigrant Defense Project
Last Updated January 2008

This handout is for information purposes only and is not a substitute for legal advice.
The information here may no longer be up-to-date.
You should talk to a qualified immigration expert before agreeing to enter any plea or program.

As an immigrant, one day you may want to become a lawful permanent resident (LPR) or a citizen. Being charged with a crime can hurt your chances of becoming an LPR or a citizen, and may put you at risk of deportation – even if you have lived here for a long time and/or have legal status. This handout briefly explains what the risks are, and lists some organizations that can help you.

(1) What kinds of criminal charges lead to immigration problems?

If you plead guilty or are convicted of a crime or offense, you may have immigration problems, including possible detention, deportation, and/or ineligibility to become an LPR or a citizen. Many felonies, misdemeanors, and even some "violations" or other non-criminal offenses can cause these problems. This may be true even if you don't spend any time in jail or only pay a fine.

But not all pleas and convictions lead to negative immigration consequences. Immigration law is very complex, so you should talk to an immigration lawyer to find out whether your specific criminal case will have immigration consequences. You can call one of the organizations listed at the end of this handout to get advice. The Immigrant Defense Project website – www.immigrantdefenseproject.org – also has some helpful information and resources.

(2) What if my criminal charges were dismissed?

If you never pled guilty or admitted guilt to an offense and your charges were dismissed, the Department of Homeland Security generally cannot use those criminal charges to deport you or bar you from applying to become an LPR or citizen.

If you never pled guilty or admitted guilt to an offense and were given an "Adjournment in Contemplation of Dismissal," then the Department of Homeland Security also generally cannot use those charges to deport you or bar you from applying to become an LPR or citizen once the case is dismissed.

But until your case is actually dismissed, any contact with Department of Homeland Security officials (for example, if you travel outside the country, renew your greencard, or apply to become an LPR or citizen) may cause problems because the government might treat your case as still "open" until the actual date of dismissal.

If you do plead guilty to an offense but are able to get your charges dismissed by completing a court-ordered program (for example, drug treatment), that will probably still be considered a "conviction" for immigration purposes and could lead to deportation. Generally, when you plead guilty or admit guilt in court and then are given some kind of sentence or court-ordered requirement, you can face negative immigration consequences.

(3) I'm a lawful permanent resident – can I still be deported?

Yes. Generally anyone who is not a citizen of the United States can be deported based on some types of criminal pleas and convictions. You might be able to apply for certain types of "relief" from deportation

depending on how long you've been in the country, how long you've been an LPR, and the types of crimes and offenses in your case. You should talk to an immigration lawyer to figure out the risks.

(4) I'm undocumented – how do criminal pleas and convictions affect my status?

Even though you are undocumented, you might have an opportunity to "adjust your status" under current law to become an LPR. Pleas and convictions may hurt your chances of becoming an LPR through this type of "adjustment." In addition, the United States Congress has considered the possibility of creating a new legalization program for undocumented immigrants. Congress has not created a new legalization program yet. Depending on if and how any new laws are written, pleas and convictions might hurt your chances of becoming an LPR under these future laws, too.

Also, any time you spend in jail, even if you are not eventually convicted, puts you in danger of being placed in deportation proceedings. The Department of Homeland Security often questions people in jails and prison about immigration issues. Anyone who is undocumented can be deported just because he or she is here without valid legal documents. Avoiding criminal charges helps you preserve your ability to stay in the country and maybe adjust your status to become an LPR in the future.

(5) What should I do to protect my immigration status in this country?

If your criminal case is still going on, you should talk to an immigration lawyer right away, ideally before you accept any plea, go to trial, or are sentenced. Also, be sure to tell your criminal defense lawyer about the need to talk to an immigration lawyer. An immigration lawyer may be able to help you and your criminal defense lawyer figure out a plea or sentence or another outcome that will prevent negative immigration consequences in your case.

If your criminal case is over, or you have old convictions, you should talk to an immigration lawyer about whether your pleas or convictions will create immigration problems.

Until you know the consequences of your criminal history, you should be aware that traveling outside the United States, renewing your greencard, or applying to become an LPR or citizen could put you at risk of being placed into deportation proceedings. You should be very careful to obey all criminal laws since any further arrests or interaction with the government might also put you at risk of being put in deportation proceedings.

(6) What organizations and resources are out there to help me?

There are some free, non-profit organizations that can help you figure out the immigration consequences of your criminal charges, including but not limited to:

NYSDA Immigrant Defense Project
www.immigrantdefenseproject.org
(212) 725-6422

Families for Freedom
www.familiesforfreedom.org
(646) 290-5551

Legal Aid Society
www.legal-aid.org
(212) 577-3300

IMMIGRANTS & PLEAS IN PROBLEM-SOLVING COURTS: A GUIDE FOR NONCITIZEN DEFENDANTS & THEIR ADVOCATES

Prepared by the New York State Defenders Association Immigrant Defense Project
Last Updated August 2007

This guide is for information purposes only and is not a substitute for legal advice.
The information here may no longer be up-to-date.
You should talk to a qualified immigration expert before agreeing to enter any plea or program.

Problem-solving courts can give some defendants a chance to participate in rehabilitation programs and rejoin their communities rather than face time in jail or prison.

However, if you are a noncitizen, you might face deportation or other negative immigration consequences if you participate in certain problem-solving court programs. This guide explains why you are at risk, and what you and your attorney or reentry service provider can do to help you avoid these risks when working with problem-solving courts.

What are problem-solving courts and how do they work?

"Problem-solving courts" are courts that focus on treatment and rehabilitation rather than long prison sentences. Examples of "problem-solving courts" are drug courts, domestic violence courts, mental health courts, and community courts.

Defendants who participate in these special courts are often required to plead guilty to the criminal charges against them and/or admit to committing a crime. Instead of being immediately sentenced to prison, however, the defendant is ordered to attend a program (for example, drug treatment or anger management/batterer classes). The court carefully monitors the defendant's progress. In some courts, if the defendant completes the program successfully, the criminal charges are reduced or even dropped. In other courts, the defendant may end up with a low-level criminal conviction or non-criminal violation or regulatory offense.

If my charges are dismissed or if I only end up with a non-criminal violation or offense, why would participation in a problem-solving court lead to deportation or other negative consequences for me?

The definition of "conviction" in immigration is law is broader than the definition of "conviction" in criminal law. Immigration law defines a conviction as:

> "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."

This definition of "conviction" for immigration purposes can cover some charges or offenses that are not even considered "crimes" in criminal law. Furthermore, even if your charges are dropped because you successfully participated in a program, immigration law might still treat the combination of your plea in court and the court order requiring you to attend a program as a "conviction" for immigration purposes. That "conviction" might make you deportable or unable to get permanent resident status or citizenship.

Before you plead guilty to anything, you should check with an immigration attorney to find out if there are immigration consequences to your plea. If you already pled guilty to something, check with an immigration attorney to find out whether you are deportable and if you might have a way to fight deportation.

What if I didn't have to plead guilty or admit any guilt to a crime?

If you are told that you do not have to plead guilty or admit guilt to any crime, then you probably will not have a "conviction" for immigration purposes. An Adjournment in Contemplation of Dismissal (ACD) in New York law is an example of the kind of result that will not lead to deportability. However, you should be careful about what you do before your case is actually dismissed.

Even if you are not deportable, any interaction with the criminal justice system, even an arrest or case not yet dismissed, can give the Department of Homeland Security a reason to scrutinize your application for permanent residence or citizenship more closely, or cause problems when you are trying to travel to and from the United States. Always talk to an immigration attorney to be sure about what to expect, and if possible, avoid traveling or submitting applications to the Department of Homeland Security until your case is actually dismissed.

What if I have old convictions?

Any old convictions might get you into trouble, even if your current court case results in an outright dismissal or an Adjournment in Contemplation of Dismissal (ACD). Immigration law has changed in recent years, and some old convictions are now deportable offenses even though they were not deportable offenses in the past. You should talk to an immigration attorney to find out what risks you face now.

How can I, or my attorney, find out whether my case in problem-solving court or old convictions will cause immigration problems?

You or your lawyer should speak to an experienced immigration attorney to find out whether what's happening in court (the plea offer, an agreement to attend a program, etc.), or old convictions you already have, will result in immigration problems. As explained above, even pleas to some misdemeanors and non-criminal violations might result in deportation or other immigration problems. Your risk of being deported might also depend on your immigration status (whether you are a greencard/permanent resident card holder, a refugee/asylee, or undocumented), your criminal record (even if your convictions are very old), how many years

you had been living in the United States before committing any crimes and/or whether you have relatives in the United States.

You or your advocate can get free advice from the NYSDA Immigrant Defense Project, (212) 725-6422. For more written information, please see "Understanding the Immigration Consequences of Your Criminal Charges" by the NYSDA Immigrant Defense Project.

When might the government start deportation proceedings against me if I've already pled guilty to a deportable offense in a problem-solving court or have an old conviction that makes me deportable?

Even if your case is going to be dismissed and sealed, you may still be at risk for deportation if you pled guilty or admitted that you committed a crime in court and then are ordered into a program, or have an old conviction that makes you deportable. The government might find out about the current plea/admissions of guilt or the old conviction in the following circumstances:

(1) When you are in jail or prison, even if only for a short period of time (including if you are imprisoned for a few days as a "sanction" for failure to comply with the rules of your treatment program)
(2) If you are returning to the United States from an international trip
(3) If you apply for a lawful permanent resident card (greencard) or citizenship
(4) If you renew your greencard
(5) If you have other interactions with government officials (including police, border agents, and others)

If you do not follow the rules of your court-ordered program, the court might send you to jail for a few days (this is a common sanction in drug treatment courts, for example). Many jails permit immigration officials to interview people being held there. You should not answer any questions without your lawyer present, but you can avoid this situation altogether if you comply with the rules of your court-ordered program, so that you are not sent back to jail or prison. Also, before you decide to travel outside the U.S. or submit any immigration/citizenship applications to the government, you should consult with an immigration attorney to find out if you could face deportation or other negative immigration consequences.

What are some examples of how noncitizen defendants have been placed in deportation proceedings following participation in problem-solving courts?

Consider these examples, taken from New York State law:

Example 1: Jane is a lawful permanent resident (i.e., a green card holder) and has been charged with Criminal Possession of a Controlled Substance in the 5th degree, a class D felony (NYPL 220.06). She pleads guilty to this charge as part of a drug court program and is ordered into drug treatment. Upon her successful completion of the program requirements, the charges are dismissed. She believes that she does not have a conviction on her criminal record. A year later, Jane applies for citizenship. The application form instructs her to disclose if she has ever been placed in a rehabilitative or diversion program. She explains the

drug treatment order. The Department of Homeland Security initiates removal proceedings against her, saying she can be deported because of her conviction.

Example 2: John is a noncitizen and does not have legal status. He has been married to a United States citizen for five years. John has been charged with Aggravated Harassment, 2nd degree, a Class A misdemeanor. He pleads down to Harassment in the 2nd degree (Penal Law 240.26), a violation. It is his second such conviction. He is sentenced to a conditional discharge and a batterer program. He completes the program successfully and receives a discharge. A few months later, his wife sponsors his adjustment of status application so that he can receive lawful permanent resident status (a green card). He is placed in removal proceedings, and told that he might be deported on the basis of his status and his convictions.

What options in problem-solving court will give me the best chance of rejoining my family and community in the U.S. rather than being deported?

Some problem-solving courts and prosecutors may be willing to consider certain alternative arrangements for noncitizen defendants who want to preserve their opportunity to rejoin their families and communities. These alternatives help fulfill the objectives of problem-solving courts because they permit the defendant to seek rehabilitation and return to his or her family as a law-abiding caretaker and wage earner.

You can ask your criminal defense attorney and/or reentry advocate to approach the court with the following alternatives:

1. **Ask to enter the program without pleading guilty**

Some courts will permit defendants to participate in court-ordered treatment without pleading guilty to the initial criminal charges (for example, through an Adjournment in Contemplation of a Dismissal (ACD)). Your criminal defense attorney should ask the court to consider that option in your case. If the court seems unwilling to drop the plea requirement, your attorney can offer something else instead of a guilty plea or on-the-record admission. For example, with the assistance of your attorney, you could sign a contract with the prosecutor in which you agree to give up certain trial rights in exchange for entering the court-ordered program without any admission of guilt.

For examples of the kinds of alternative arrangements that have been successfully used in problem-solving courts, contact the Immigrant Defense Project at (212) 725-6422.

2. **Ask to plead to a different charge**

Some courts will not be willing to consider letting you participate in the treatment program without some kind of guilty plea. In that case, you should talk to your criminal defense attorney about whether another plea might be appropriate given the facts of your case. For example, while a plea to a drug offense will almost certainly make you subject to possible deportation, a plea to another charge in your case might leave you in a better position to face

any future immigration issues (such as a low-level simple trespass or resisting arrest offense, which might be a safer option in some states).

Contact the Immigrant Defense Project at (212) 725-6422 for advice about possible alternative pleas in your case.

3. **Ask to enter the program without a court order requiring your participation**

If you are never formally ordered by the court to attend a program as part of your criminal case, you might be able to argue that you do not have a "conviction" for immigration purposes. Some courts may permit you to enter a program voluntarily or through an off-the-record agreement with the prosecution, and then later will dismiss the charges without having ordered you to do anything. Thus, you may be able to argue that there is no court-ordered "punishment, penalty or restraint on liberty" in your case, and thus it is not a "conviction" under immigration law. However, there has not been much litigation on this issue, so we do not know if you will be safe from deportation simply by entering a program on your own or through an off-the-record agreement. But, if the court is willing to let you enter the program without a court order and either does not require a plea or allows an alternative plea, you will be in a strong position to argue that you do not have a "conviction" for immigration purposes.

The law on these issues is not fully developed. You should always contact an immigration attorney for advice before accepting any plea or diversion program. We are available to help you make these decisions. Contact the Immigrant Defense Project at (212) 725-6422.

Order Form
Representing Immigrant Defendants in New York
4th Edition

By Manuel D. Vargas
Immigrant Defense Project
New York State Defenders Association

Nearly 20 percent of New York State residents are foreign-born, according to the U.S. Census, and many of those residents are not naturalized citizens. *Representing Immigrant Defendants in New York* offers detailed, practical, straightforward, and up-to-date information for criminal defense attorneys about:

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