

# Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases

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## **Disclaimer**

This manual is not intended to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to defense attorneys who are working with non-citizen clients. On account of the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, Federal court rulings and Congressional whim, attorneys are strongly urged to contact an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.

## **Introduction**

This manual is intended to provide public defenders and criminal defense attorneys with a basic overview of the immigration provisions that may have consequences for their non-citizen clients in Minnesota criminal and civil courts. Where possible, rulings by the Eighth Circuit Court of Appeals and the Immigration and Naturalization Board directly relating to Minnesota statutes have been noted. While this manual focuses on the immigration consequences of convictions under Minnesota law, it is hoped that the manual may also be helpful to criminal defense attorneys and legal advocates for immigrants in other states. The manual focuses on the Anti-Terrorism and Effective Death Penalty Act of 1996<sup>1</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>2</sup> Because of the important changes made by these two federal laws, pre-plea advisals, Rule 15 motions, Rule 27 motions and post-conviction relief will make the difference for many non-citizens who want to remain in the United States with their families or avoid possible persecution (including torture and death) in their countries of nationality.

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

2. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

## I. Defending Non-Citizens in Minnesota Courts: An Overview

With recent changes in the immigration law,<sup>3</sup> non-citizens and attorneys who defend non-citizens must become aware of the immigration consequences of criminal convictions. The role of public defenders and private criminal defense attorneys is critical to the ultimate outcome of a non-citizen's criminal case and immigration case. This manual is intended to assist public defenders and criminal defense attorneys to become aware of the issues that may affect their non-citizen clients and to provide resources for obtaining individual case evaluations and advice from immigration attorneys.

A non-citizen is any person in the United States who is not a United States citizen by birth or naturalization, i.e. legal permanent residents (persons with "green cards"), persons in the United States on temporary visas and undocumented persons. In analyzing a non-citizen's case relating to immigration, several questions must be asked:

1. Is your client a United States citizen?
2. If not a United States citizen, what is the non-citizen's current immigration status?
3. Is your non-citizen client deportable or inadmissible?
4. Will a plea or admission of facts result in a "conviction" for your non-citizen client?
5. Will a proposed disposition of your non-citizen client's case render her deportable or inadmissible?
6. If the non-citizen is deportable or inadmissible, is she eligible for relief from deportation or removal?
7. For final convictions, would post-conviction relief affect deportability or inadmissibility and possible relief from deportation or removal?

Each non-citizen's case should be discussed with an immigration attorney who works on criminal immigration issues before a plea is entered. Plea bargains under different sections of the Minnesota statutes will have different consequences for immigration purposes. For example, a conviction for fifth degree domestic vio-

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3. For general discussions about changes in immigration law, see Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317-26 (1997) and Juan P. Osuna, *The 1996 Immigration Act: Criminal Aliens and Terrorists*, 73 INTERPRETER RELEASES 1713, 1713-22 (1996).

lence makes a non-citizen deportable whereas a conviction for disorderly conduct should not make a non-citizen deportable. Creative strategies may ultimately save your non-citizen client's future in the United States.

#### A. *Non-Citizens in Minnesota*

The numbers and nationalities of non-citizens in Minnesota have dramatically increased since 1980. Today more than 80 languages are spoken by immigrant children in Minnesota.<sup>4</sup> The exact number of non-citizens in Minnesota is unknown.

Non-citizens have come to Minnesota for a variety of reasons. Foreign exchange students have come from many countries to learn about life in the United States and to obtain high school and advanced degrees. Mexican farmworkers have settled in Minnesota since the early 1920s to make better lives for themselves and their children. United States companies also hire foreign workers to fill the gaps in areas of business and industry where there are not enough United States citizen workers. Non-citizens from around the world, including Europe, come to the United States to join their family members already here. Some non-citizens initially settle in other parts of the United States and later move to Minnesota to join family members, to find better jobs, as well as to live in safe communities. Many families are comprised of legal permanent residents and United States citizen parents, spouses and children. Non-citizens have become a part of Minnesota communities in schools, churches, neighborhoods and workplaces.

Minnesota is home to a large number of political refugees and asylees as well as asylum applicants. In the late 1970s and early 1980s, Hmong, Laotian, Vietnamese and Cambodian refugees were resettled in Minnesota. Minnesota is home to the largest Somali population<sup>5</sup> and second largest Hmong population in the United States.<sup>6</sup> In the 1980s and early 1990s, Central Americans arrived after escaping the civil wars and conflicts in their home countries of El Salvador, Guatemala, Nicaragua and Honduras. Since the late 1980s and early 1990s, African refugees have resettled in the Twin Cities area; the countries from which the refugees, asylees and asylum applicants come include Liberia, Somalia, Ethiopia,

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4. See Lourdes Medrano Leslie, *Tailored Programs Help Schools Meet Bilingual Needs*, STAR TRIB. (Minneapolis), June 7, 1998, at 1B.

5. See David Rathbun, *Telling 'Secrets'*, STAR TRIB. (Minneapolis), July 5, 1998, at 14F (estimating that 13,000 Somalis live in Minnesota).

6. See Rohan Preston, *Soldiers of Misfortune*, STAR TRIB. (Minneapolis), Mar. 12, 1999, at 1E.



Sudan, Sierra Leone, Nigeria and Algeria. Jewish refugees from the former Soviet Union and eastern block countries have resettled in the Twin Cities and other areas of Minnesota.

Working with non-citizens who find themselves in the Minnesota criminal justice system can be challenging. Many non-citizens have a different frame of reference with respect to judicial systems and the world around them. Often non-citizens have come from countries where the justice system exists or existed in the form of a brutal police or military force. For example, the Communist regimes in Laos, Vietnam and Cambodia systematically killed attorneys and judges after taking over the countries and interned thousands of people in "re-education" camps. Until recently, the police were in charge of registering births and deaths as well as issuing certificates for marriage and divorce. Bribery was a way of life in dealing with the police in order to get birth certificates issued or to report crimes. As a result, criminal defense attorneys may be seen as working for or with the police and against the interests of their non-citizen clients.

Non-citizen youth face numerous challenges in the juvenile justice system. Many non-citizen youth have not known stability in their lives. They may have fled civil war or chaos with their families or traveled alone from one country to another in search of safety. Some may have grown up in refugee camps. Others may have been forcibly recruited to fight with rebel forces in civil wars from which they later deserted. Post-traumatic stress disorder is common among non-citizen youth who have come to the United States seeking refuge.

In addition, many non-citizens have been previously arrested in their home countries, imprisoned and tortured for political reasons. They may have been denied the right to a trial in front of a judge and held incommunicado in detention for weeks, months or even years. As a result, they may suffer from post-traumatic stress disorder and depression.

Based on their experiences with other judicial systems and prisons and often understandably misguided perceptions about the judicial and correctional systems in the United States, many non-citizens may tell their defense attorneys that they will take any deal that will get them out of jail or prison as quickly as possible or will keep them out of jail, without knowing what the immigration consequences will be for a particular criminal plea. In addition, gender roles and differences may influence what information a non-citizen reveals to his or her attorney. For example, a man from Afghanistan may not directly answer the questions from a

female defense attorney based on his perceptions about the role of women in Afghanistan, where women generally do not have the same opportunities to receive an education as women in the United States. An indigenous Guatemalan woman who was raped in a Guatemalan police station in retaliation for her political activities may not want to discuss her fear of continued detention in a Minnesota county jail with a male defense attorney.

In working with non-citizens from these countries, defense attorneys may need to explain to their clients exactly what their roles are and how the criminal justice system works in the United States. Non-citizens need to understand how the criminal justice system works, i.e. their responsibility to go to court and what will happen at each court appearance. Clients may not ask many questions based on their past experiences with other justice systems in which they could not ask questions out of fear for their lives. They may tell their attorneys "yes" to avoid possible confrontation or conflict even when they want to say "no." In addition, different words in English may not exist in their native languages. For example, the word "attorney" does not exist in the Hmong language. Other foreign judicial systems do not have jury trials. Thus, non-citizens may agree to waive their rights without fully understanding the rights that they are waiving or how their immigration status may be affected.

Resources are available to assist attorneys and their non-citizen clients who suffer from post-traumatic stress disorder. The Center for Victims of Torture (CVT) works with persons who have suffered political torture.<sup>7</sup> The licensed CVT psychiatrists, psychologists and social workers will work with non-citizens to help them rebuild their lives. The staff can also provide evaluations, which can be used in court proceedings. These evaluations can be instrumental in plea bargaining, trial and sentencing issues. The CVT can also provide the names and phone numbers of similar treatment providers in other areas of the country.

Pacer Center, Inc., a non-profit parent training center in Minneapolis, has a special project, the Juvenile Justice Project, which works with juveniles with disabilities in the juvenile justice system.<sup>8</sup> Juveniles with disabilities include youth with conduct disorders, depression, post-traumatic stress disorder, attention

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7. The CVT is located in Minneapolis on the east bank of the Mississippi River, near the University of Minnesota-Twin Cities campus. To refer a client to the CVT, call 612/626-1400.

8. Pacer Center, Inc. is located at 4826 Chicago Avenue South in Minneapolis. To contact the Juvenile Justice Project, call 612/827-2966.

deficit/hyperactivity disorder, oppositional defiant disorder, learning and developmental disabilities and mental retardation. Pacer Center, Inc. also works with the families of the youth in the juvenile justice system. The staff can provide assistance to parents and public defenders as well as coordinate with other agencies. Staff are fluent in Hmong, Lao, Spanish and Portuguese. The Juvenile Justice Project has published a helpful resource entitled *Unique Challenges, Hopeful Responses. A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System*.

The Minnesota Disability Law Center works with youth with disabilities in educational settings, their families and attorneys representing disabled youth in juvenile court proceedings.<sup>9</sup> Under the Individuals with Disabilities Education Act<sup>10</sup> and Minnesota statute section 125A (1996), it may be possible for a public defender to move for dismissal of a juvenile court petition where the non-citizen youth's behavior in an educational setting is based on a disability.

#### *B. Is Your Client a United States Citizen?*

Confusion among non-citizens and United States citizens arises around the question of whether a person is a United States citizen. In general, a United States citizen is a person who was born in the United States, a person born to two United States citizens living outside of the United States, or a person who has naturalized.<sup>11</sup> Persons born in Puerto Rico on or after January 13, 1941 and subject to the jurisdiction of the United States are United States citizens at birth.<sup>12</sup> Persons born in outlying United States possessions are United States nationals but not United States citizens at birth.<sup>13</sup>

A non-citizen can apply to naturalize to become a United States citizen if she is a United States national or if she meets the requirements for naturalization. In general, a non-citizen must be a legal permanent resident for five years (or three years if legal permanent residency was obtained based on marriage to a United

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9. The Minnesota Disability Law Center is located at 430 First Avenue North, Suite 300 in Minneapolis. To contact the Special Education Unit, call 612/332-1441.

10. 20 U.S.C. § 1400 et seq. (1997).

11. See the Immigration and Nationality Act (I.N.A.) Title III, section 301, for law regarding a person born outside of the United States who has one parent who is a United States citizen.

12. See I.N.A. § 302.

13. See I.N.A. § 308.

States citizen), have good moral character, speak English and pass an examination on United States government and civics (waivers are available for elderly and disabled individuals), be willing to take an oath of allegiance, pass a criminal investigation and pay a \$225 application fee to the Immigration and Naturalization Service (I.N.S.).<sup>14</sup> Even though a non-citizen who has applied for naturalization may think that he is a United States citizen, he is not a United States citizen until sworn in as a United States citizen by a federal district court judge.

The following persons are not United States citizens: legal permanent residents, non-citizens with Temporary Protected Status (TPS), asylees, refugees, parolees, asylum applicants, Amnesty/Family Unity applicants, non-citizens with H1-B labor visas, foreign students with F-1/M-1/J-1 visas or their dependents with F-2/M-2/J-2 visas, visitors with B-1/B-2 visas, visitors who entered under the Visa Waiver Pilot Program, non-citizens who entered with border crossing identification cards and non-citizens who entered the United States without inspection by a United States official (entered illegally).

The first question that a public defender or defense attorney asks her client should be, "Are you a United States citizen?" The stakes for a non-citizen with a criminal conviction are very high on account of the changes in the immigration law and possible deportation with lifetime bars. Many Canadians and Africans speak with an accent similar to that of native Minnesotans and may appear to be United States citizens. In addition, Canadians are one of the five largest "illegal" populations in the United States according to the I.N.S.<sup>15</sup> It is not unusual for long-term legal permanent residents, especially those who entered the United States in their infancy or childhood and speak only English, to have not yet naturalized and thus remain at risk of deportation.

To find out what immigration status a client has, the attor

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14. See generally I.N.A. §§ 310-44.

15. See *INS Releases Estimates of Undocumented Population, Announces New Removal Tracking System*, 74 INTERPRETER RELEASES 298, 299 (1997) (citing Mexico, El Salvador, Guatemala, Canada and Haiti as the five countries from which the largest "illegal" populations in the United States have come). Canadians may be illegally in the United States after having overstayed the time permitted as a visitor or having entered the United States through the Boundary Waters National Park. Anyone who enters the United States through the Boundary Waters must report to one of the United States Customs stations located throughout northern Minnesota and obtain Form I-68. See *INS Issues Interim Rule on Canadian Border Boat Landing Program*, 74 INTERPRETER RELEASES 1558 (1997).

ney should ask the client to see her immigration documents and passport. Common immigration documents that a client may have include: a green card (I-551 or I-151) or I-551 stamp in a foreign passport, temporary resident card (I-688), I-94 Arrival/Departure Record, an employment authorization document or work permit (I-688B), Mexican border crossing identification card (I-586 or I-186), Mexican border visitors permit (I-444), Canadian border crossing card (I-185) or parole authorization (I-512).

By first asking about citizenship status to every client in the criminal justice system and then consulting with an immigration attorney regarding possible immigration consequences for the non-citizen client as a result of criminal proceedings, Minnesota Rules of Criminal Procedure Rule 15 motions to withdraw guilty pleas, motions to reduce sentences and motions for post-conviction relief may be avoided.

## II. Provisions of Immigration Law Involving Criminal Issues

Immigration law relating to non-citizens with criminal behavior has changed dramatically in the last ten years with the most far-reaching changes in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>16</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).<sup>17</sup> Congress changed the definition of a "conviction" for immigration purposes. Certain felony convictions and certain misdemeanor convictions can now permanently bar long-term permanent residents from remaining in the United States, even though the permanent residents may have never served any time in prison, are married to United States citizens and have United States citizen children. Much of the discretion that immigration judges previously had to grant relief from deportation for minor offenses has been stripped by the expansion of the number of crimes now considered to be "aggravated felonies" for immigration purposes.

### A. Definition of Conviction

In the IIRAIRA, Congress amended the definition of conviction for immigration purposes. The amended immigration conviction definition impacts non-citizens in Minnesota criminal proceedings. Under the immigration definition of conviction, a Minnesota stay of adjudication will be a "conviction" for immigra-

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16. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

17. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

tion purposes where a non-citizen admits facts on the record and receives any penalty, punishment or restraint on her liberty, including a period of probation or a fine. Care must be taken to analyze the requirements of pretrial diversion programs as the requirements differ from county to county in Minnesota.

To prove that a non-citizen has a "conviction" for immigration purposes, the Immigration and Naturalization Service may offer the following documents or records or a certified copy of: an official record of judgment and conviction; an official record of plea, verdict and sentence; a docket entry from court records that indicates the existence of the conviction; or official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.<sup>18</sup> Different strategies and plea bargains may lead to or avoid deportation consequences as discussed below.

### 1. Statute

#### I.N.A. § 101(a)(48) [8 U.S.C. § 1101(a)(48)]

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, *and*

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment of a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless* of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part. [emphasis added]

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18. See I.N.A. § 240(c)(3)(B). Other proof of a criminal conviction that may be offered by the I.N.S. includes:

[a]n abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence[;] [a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction[;] [or] [a]ny document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

*Id.*

## 2. Case Law

In a proceeding where the adjudication of guilt has been stayed and the defendant successfully completes probation, the plea will often be vacated or dismissed and there will not be a conviction under state law. For a non-citizen defendant, however, where the adjudication of guilt has been stayed and both prongs (i) and (ii) of the definition of conviction have been met, a non-citizen will have a conviction for immigration purposes even though there is not a conviction under state law.<sup>19</sup> In a recent decision, the Board of Immigration Appeals (Board) interpreted the statutory definition of "conviction" to mean that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.<sup>20</sup> A couple of dispositions that have not been deemed "convictions" include: (1) a state conviction reversed on direct appeal on the merits and (2) a state conviction reversed on direct appeal relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings (not as the result of the operation of a state rehabilitative statute).<sup>21</sup>

Prong (ii) has been broadly defined. The Board defined the terms "punishment, penalty, or restraint on liberty" to "include incarceration, probation, a fine or restitution, a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service."<sup>22</sup>

In *In re S-S*,<sup>23</sup> the Board interpreted I.N.A. section 101(a)(48)(B), by clarifying that a criminal sentence includes any part of the sentence suspended by the court. The Board applied the new definition and held that a suspended sentence for an indeterminate term not to exceed five years under an Iowa statute was

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19. See *In re Roldan*, Int. Dec. 3377 (B.I.A. 1999); *In re Punu*, Int. Dec. 3364 (B.I.A. 1998).

20. *In re Roldan*, Int. Dec. 3377 (overruling *In re Luviano*, Int. Dec. 3267 (B.I.A. 1996); *In re Ibarra-Obando*, 12 I. & N. Dec. 576 (A.G. 1967); *In re G-*, 9 I. & N. Dec. 159 (A.G. 1961)).

21. See *In re Roldan*, Int. Dec. 3377 at 15, 16 n.9 (declining to decide the effect to be given a federal disposition under 18 U.S.C. § 3607 until that issue is directly presented to the B.I.A.).

22. *In re Ozkok*, 19 I. & N. Dec. 546, 551 (B.I.A. 1988); see also *Molina v. I.N.S.*, 981 F.2d 14, 18 (1st Cir. 1992) (sustaining I.N.S. interpretation of "conviction" to include probation ordered by a judge in a deferred adjudication).

23. Int. Dec. 3317 (B.I.A. 1997).

a five year sentence.<sup>24</sup> The sentencing scheme in this case was an indeterminate sentencing scheme.<sup>25</sup>

The immigration consequences can differ under a determinate sentencing scheme because the sentence is for a specific number of days. For example, in a determinate sentencing scheme, a non-citizen sentenced to 364 days for theft will be considered to be sentenced to 364 days even though the maximum allowed by the statute may be three years.<sup>26</sup>

Minnesota has a determinate sentencing scheme. Under a determinate sentencing scheme, a stayed sentence may be accomplished by either a stay of imposition or a stay of execution.<sup>27</sup> Under Minnesota Statute section 609.135(a)(2),<sup>28</sup> the state district court may stay the imposition of a sentence and place a defendant on probation. Under a stay of imposition of sentence in a felony case, the state district court reserves the right to later impose or pronounce a prison sentence where a defendant violates the terms of probation, including a sentence to the statutory maximum.<sup>29</sup> If the defendant successfully completes probation, then the case is discharged and the defendant has a record of a misdemeanor rather than a felony for civil purposes.<sup>30</sup> If a stay of execution of a sentence is granted, the sentence is pronounced but the execution of the sentence is delayed.<sup>31</sup> If the defendant successfully completes probation, then the case is discharged but the defendant has

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24. See *id.* at 5.

25. See *id.*

26. In an indeterminate sentencing scheme, the state court imposes a sentence by ordering that the defendant be committed to the Department of Corrections or a similar agency for an indeterminate period, i.e. zero to five years. See *Sentencing Reform*, in *SENTENCING REFORM IN OVERCROWDED TIMES* 3, 6 (Michael Tonry & Kathleen Hatlestad, eds., 1997). The Department of Corrections then determines the length of the sentence that the defendant will serve. In a determinate sentencing scheme, the state court will follow the sentencing guidelines mandated by the legislature and established by the sentencing commission. See *id.* at 7-8. The sentencing commission predetermines a sentence based on criminal history and severity level of the offense. The state court has the discretion to depart durationally and/or dispositionally from the guidelines based on aggravating or mitigating factors but will impose a determinate sentence, i.e. two years. See Debra Dailey, *Minnesota's Sentencing Guidelines—Past and Future in Sentencing Reform*, in *SENTENCING REFORM IN OVERCROWDED TIMES* 35, 37 (Michael Tonry & Kathleen Hatlestad, eds., 1997).

27. See Minn. Sentencing Guidelines, Appendix, Definition of Terms (1994) [hereinafter MN Definitions].

28. MINN. STAT. § 609.135(a)(2) (1997 Supp.).

29. See MN Definitions, *supra* note 28.

30. See *id.*

31. See *id.*



a record of a felony conviction.<sup>32</sup> When a defendant violates the terms of probation, the state district court has three options under Minnesota statute section 609.14, subdivision 3 (1994). The court can continue the stay of imposition of sentence, impose the sentence under the sentencing guidelines and stay its execution, or impose and execute the sentence under the sentencing guidelines.<sup>33</sup>

Prior to the 1996 legislation, the Supreme Court held that a conviction must be final under state or federal court procedure in order to be a conviction for immigration purposes.<sup>34</sup> Generally, a conviction is not final until all direct appeals are exhausted; a conviction is final where a discretionary appeal has been taken. In light of the change in the definition of conviction under IIRAIRA, the issue of whether a judgment on direct appeal can be considered to be a final conviction for immigration purposes has not been addressed by the Board.<sup>35</sup>

In conclusion, pre-trial diversion programs in Minnesota requiring an admission of facts on the record will no longer prevent a finding that a non-citizen has a conviction for immigration purposes where the non-citizen has admitted sufficient facts to warrant a finding of guilty and a judge has imposed a period of probation, a fine, or any other form of penalty, punishment or restraint on the liberty of the non-citizen.<sup>36</sup>

### 3. Application to Cases

#### *Case of Epherem from Sudan:*

Epherem became a legal permanent resident on December 3, 1994. On June 1, 1997, he was arrested by the Minneapolis police department for allegedly shoplifting a \$300 ruby ring from a local department store. Since this was his first arrest, the judge granted a stay of adjudication after Epherem admitted on the record that he had taken the ring. The judge placed him on supervised probation for two years.

Analysis: Under the new definition of conviction, Epherem has a conviction for immigration purposes. He admitted guilt on the record. Second, he was placed on probation, which has been found to be a form of restraint on liberty. Since his shoplifting

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32. See *id.*

33. See MINN. STAT. § 609.14, subd. 3 (1994).

34. See *Pino v. Landon*, 349 U.S. 901 (1955) (*per curiam*).

35. See *In re Roldan*, Int. Dec. 3377 at 15 (B.I.A. 1999).

36. See Minnesota Pleas and Sentencing Disposition and the Immigration Definition of Conviction Chart at Appendix B.

conviction is a conviction for a crime involving moral turpitude within his first five years after becoming a legal permanent resident and a sentence of one year or longer could have been imposed, he is deportable under the Immigration and Nationality Act (I.N.A.) section 237(a)(2)(A)(i). He is eligible to apply for asylum and withholding of deportation if he believes that he will be persecuted upon his return to Sudan.

Epherem, however, cannot defend his green card, or legal permanent resident status, because he has only resided in the United States as a legal permanent resident for three years. A person who has resided in the United States for seven years, including at least five years as a legal permanent resident and two years in another legal status, such as refugee status, is eligible to defend his or her green card by requesting cancellation of removal from the immigration judge, provided that no convictions are deemed to be aggravated felonies.<sup>37</sup>

#### 4. Defense Practice Tip

Both prongs of I.N.A. section 101(a)(48)(A) must be met in order to find that a non-citizen has a conviction for immigration purposes. The first prong addresses admissions of guilt or sufficient facts by the non-citizen to warrant a finding of guilt. Many counties in Minnesota require an admission of facts by the alleged violator in order to qualify for pretrial diversion. The courts and prosecutors must be educated as to why a non-citizen should qualify for pretrial diversion without admitting facts that could lead to a finding of guilt on the record. Arguments can be made that these counties should follow their neighboring counties and not require an admission of facts on the record for pretrial diversion. In addition, the Alford plea will be treated as a guilty plea or admission of sufficient facts to fit the immigration definition of conviction because the Alford plea in essence means that the non-citizen could be found guilty of the alleged crime.

The second prong addresses deprivation of a non-citizen's liberty. Probation is a deprivation of liberty sufficient to meet the second prong. The issue then becomes how to avoid any restraint or deprivation of liberty. Creativity and education of the courts by defense attorneys is the key. Some strategies to consider: continuance for dismissal with no admissions and no restraints; defendant is responsible to the court (not a probation officer); and restitution/community service through alternative sentencing pro-

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37. See Aggravated Felony, *infra* p. 611.

cedures (outside of court). Finally, some clients are more likely than others to violate the terms of their probation. In such cases, the state court should be requested to impose a definite sentence with a stay of execution designed to avoid an aggravated felony or another conviction that falls under the grounds of inadmissibility or deportability.

### *B. Grounds for Deportation of Non-Citizens*

Non-citizens who are physically present in the United States will become deportable or subject to removal once they act in a manner that places them within one of the grounds of deportation. Many of the grounds of deportation apply after a non-citizen has been "admitted." "Admission" in this context means that a non-citizen has made a lawful entry into the United States after being inspected by an immigration officer at an airport or a land border. Non-citizens are also admitted by the I.N.S. official or immigration judge who adjudicates and approves the non-citizen's adjustment application for legal permanent residency. For example, in order to find a non-citizen deportable for having committed a crime involving moral turpitude with a possible maximum sentence of one year or longer, the non-citizen must have committed the crime within five years after being admitted to the United States. Other grounds of deportation do not require that a non-citizen be "admitted" before deportation consequences may attach, such as the ground of deportation involving a conviction for falsification of documents.

By passing the IIRAIRA in 1996, Congress added new grounds of deportation. Two grounds that greatly affect families are the grounds for any conviction for domestic violence or any violation of a protection order. A fifth degree or misdemeanor domestic assault conviction entered since September 30, 1996 makes a non-citizen deportable. Non-citizens who are convicted of misdemeanor domestic assault and who have less than seven years of lawful presence in the United States, including five years during which they have had legal permanent residence, have no relief from deportation unless they have a strong fear of persecution or torture in their home country or can readjust their status as an immediate relative of a United States citizen.<sup>38</sup> Another ground involves false claims to United States citizenship made on or after September 30, 1996, including the use of false birth certificates in

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38. See Asylum *infra* p. 664; Withholding of Removal *infra* p. 673, Convention Against Torture, *infra* p. 696; Adjustment of Status *infra* pp. 655, 659.

order to obtain employment or marking the box labeled "United States citizen" on the I-9 employment eligibility form.

## 1. Statute

### **Deportable aliens**

#### **I.N.A. § 237 [8 U.S.C. § 1227]**

##### **(a) Classes of deportable aliens**

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

##### **(1) Inadmissible at time of entry or of adjustment of status or violates status**

###### **(A) Inadmissible aliens**

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

###### **(B) Present in violation of law**

Any alien who is present in the United States in violation of this Act or any other law of the United States is deportable.

###### **(C) Violated nonimmigrant status or condition of entry**

###### **(i) Nonimmigrant status violators**

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status, is deportable.

###### **(ii) Violators of conditions of entry**

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 212(g) is deportable.

###### **(D) Termination of conditional permanent residence**

###### **(i) In general**

Any alien with permanent resident status on a conditional basis under section 216 (relating to conditional permanent resident status for certain

alien spouses and sons and daughters) or under section 216A (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 216(c)(4) (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2)(including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the

United States in violation of law.

(F) [Stricken]

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 212(a)(6)(C)(i)) and to be in the United States in violation of this Act (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such admission of the alien and which, within two years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility

specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of *a crime* involving moral turpitude committed *within five years* (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) *after the date of admission*, and

(II) is convicted of a crime for which a *sentence of one year or longer may be imposed*, is deportable. [emphasis added] [includes gross misdemeanors]

(ii) Multiple criminal convictions

Any alien who at any time *after admission* is convicted of *two or more crimes involving moral turpitude*, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable. [emphasis added] [includes misdemeanors/gross misdemeanors]

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at *any time after admission* is deportable. [emphasis added]

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18, United States Code (relating to high speed flight from an immigration checkpoint), is deportable.

(v) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in

the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who *at any time after admission* has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act 921 U.S.C. § 802)), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable. [emphasis added]

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of *purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry*, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgement on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18, United States Code;

(iii) a violation of any provision of the Military



Selective Service Act (50 U.S.C. App.451 *et seq.*) or the Trading With the Enemy Act (50 U.S.C. App. 1 *et seq.*); or

(iv) a violation of section 215 or 278 of this Act, is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and [sic]

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government. [This subsection is effective for convictions on or after September 30, 1996.]

(ii) Violators of protection orders

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

tained by filing an independent action or as a pendent lite order in another proceeding. [This subsection is effective for violations on or after September 30, 1996.]

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 265 is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 266(c) of this Act or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 *et seq.*), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 274C is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 274C and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act

(including section 274A) or any Federal or State law is deportable. [This subsection is effective for claims made on or after September 30, 1996.]

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 212(a)(3)(B)(iii)) is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 212(a)(3)(C) shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 212(a)(3)(C)(i).

(D) Assisted in Nazi persecution or engaged in genocide

Any alien described in clause (i) or (ii) of section 212(a)(3)(E) is deportable.

(5) Public charge

Any alien who, within five years after the date of en-

try, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

Any alien who has voted in violation of any Federal, state, or local constitutional provision, statute, ordinance, or regulation is deportable.

(b) Deportation of certain nonimmigrants

An alien, admitted as a nonimmigrant under the provisions of either section 101(a)(15)(A)(i) or 101 (a)(15)(G)(i), and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a).

(c) Waiver of grounds for deportation

Paragraphs 1(A), 1(B), 1(C), 1(D), and 3(A) of subsection (a) (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 212(a) shall not apply to a special immigrant described in section 101(a)(27)(J) based upon circumstances that existed before the date the alien was provided such special immigrant status.

(d) [Repealed]

## 2. Case Law

### *a. Crimes Involving Moral Turpitude*

A crime involving moral turpitude has been defined as "[a]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted customary rule of right and duty between man and man . . ."<sup>39</sup> The Eighth Circuit uses the above definition for crimes involving moral turpitude.<sup>40</sup> Moral turpitude has also been defined as involving conduct "which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good

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39. *Ng Sui Wing v. United States*, 46 F.2d 755 (7th Cir. 1931) (quoting *In re Henry*, 99 P. 1054, 1055 (Idaho 1909)).

40. See *Marciano v. I.N.S.*, 450 F.2d 1022, 1025 (8th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972).

living persons.”<sup>41</sup> The United States Supreme Court held that crimes in which fraud is an ingredient have always been regarded as involving moral turpitude.<sup>42</sup> Foreign convictions can also constitute crimes involving moral turpitude for purposes of deportability, exclusion or inadmissibility.<sup>43</sup>

When making the determination of whether a particular crime involves moral turpitude, the Board has found it relevant that an act is not illegal in all states.<sup>44</sup> To determine whether a crime involves moral turpitude, the court looks at the nature of the offense and determines whether the violation of that statute, without reference to the alien's particular crime, inherently involves moral turpitude.<sup>45</sup> If the court finds that the law punishes acts that do not inherently involve moral turpitude, then the court must rule that no conviction under the statute involves moral turpitude even though the particular conduct of the alien was immoral.<sup>46</sup> If the statute defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes.<sup>47</sup> Where a statute includes some offenses involving moral turpitude and others that do not, then the court will look to the record of conviction, including the indictment, plea, verdict and sentence to determine whether the offense for which the alien was convicted was a crime involving moral turpitude.<sup>48</sup> In addition, where an underlying or substantive crime involves moral turpitude, then a conviction for aiding in the commission of the crime or for otherwise acting as an accessory

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41. *In re D-*, 1 I. & N. Dec. 190, 194 (B.I.A. 1942).

42. See *Jordan v. De George*, 341 U.S. 223, 227 (1951). The Supreme Court discussed the history of the term “moral turpitude,” stating that it first appeared in the Immigration Act of March 3, 1891, 26 Stat. 1084, which directed the exclusion of “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” *Id.* at 229 n.14 (quoting Act of Mar. 3, 1891, 26 Stat. 1084). The court also cited to crimes involving fraud, including obtaining goods under fraudulent pretenses, conspiracy to defraud by deceit and falsehood, using the mails to defraud, concealing assets in bankruptcy, obtaining money and property by false and fraudulent pretenses, and willful evasion of federal income taxes. See *id.* at 228 & n.13.

43. See, e.g., *In re Bader*, 17 I. & N. Dec. 525 (B.I.A. 1980) (holding that a conviction to defraud the public of money or valuable security under Canadian Criminal Code section 338(a), which required proof of intent to defraud as a necessary element of the offense, is a crime involving moral turpitude).

44. See *In re R-*, 6 I. & N. Dec. 444, 452-53 (B.I.A. 1954).

45. See *id.* at 448.

46. See *id.*

47. See *In re Short*, 20 I. & N. Dec. 136, 137 (B.I.A. 1989).

48. See *id.* at 137-38 (citing *In re Esfandiary*, 16 I. & N. Dec. 659 (B.I.A. 1979)); *In re Ghunaim*, 15 I. & N. Dec. 269 (B.I.A. 1975); *In re Lopez*, 13 I. & N. Dec. 725 (B.I.A. 1971); *In re S-*, 2 I. & N. Dec. 353 (A.G. 1945).

before the fact is also a conviction for a crime involving moral turpitude.<sup>49</sup>

The Board has held that when criminally reckless conduct requires a conscious disregard of a substantial and unjustifiable risk to the life or safety of others, then the crime involves moral turpitude even though no harm was intended.<sup>50</sup> Similarly, a conviction for distribution of cocaine under 21 U.S.C. § 841(a)(1) is a conviction for a crime involving moral turpitude where knowledge or intent is an element of the offense.<sup>51</sup>

The Eighth Circuit Court of Appeals has noted that crimes have been divided according to their nature into crimes *mala in se* and *mala prohibita*.<sup>52</sup> The court also noted that "[g]enerally, but not always, crimes *mala in se* involve moral turpitude, while crimes *mala prohibita* do not."<sup>53</sup> The Board has also recognized that the classification of a crime as a felony is not determinative of whether it constitutes a crime involving moral turpitude.<sup>54</sup>

The Eighth Circuit has specifically ruled that the following crimes involve moral turpitude:

\* First degree sexual assault of a minor. See *Mendez-Morales v. I.N.S.*, 119 F.3d 738 (8th Cir. 1997) (also held to be an aggravated felony).

\* Aiding and abetting simple robbery. See *Xiong v. I.N.S.*, No. 95-3758, 1996 U.S. App. Lexis 23427 (8th Cir. Sept. 9, 1996).

\* Involuntary manslaughter. See *Franklin v. I.N.S.*, 72 F.3d 571 (8th Cir. 1995).

\* Third degree criminal sexual conduct. See *Maashio v. I.N.S.*, 45 F.3d 1235 (8th Cir. 1995).

\* Obtaining a Pell Grant by fraud. See *Izedonmwon v. I.N.S.*, 37 F.3d 416 (8th Cir. 1994).

\* Two counts of sexual assault on two children under age fourteen. See *Hajiani-Niroumand v. I.N.S.*, 26 F.3d 832 (8th Cir. 1994) (deportable based on marijuana conviction but not sexual assault because offenses occurred later than five years after entry; Note—today the sexual

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49. See *In re Short*, 20 I. & N. Dec. 136 (following *In re F*, 6 I. & N. Dec. 783 (B.I.A. 1955)).

50. See *In re Wojtkow*, 18 I. & N. Dec. 111, 112-13 (B.I.A. 1981) (second degree manslaughter in New York); *In re Medina*, 15 I. & N. Dec. 611, 613-14 (B.I.A. 1976), *aff'd sub nom.*; see also *Medina-Luna v. I.N.S.*, 547 F.2d 1171 (7th Cir. 1977) (aggravated assault in Illinois).

51. See *In re Khourn*, Int. Dec. 3330 (B.I.A. 1997).

52. See *Kempe v. United States*, 151 F.2d 680, 688 (8th Cir. 1945).

53. *Id.* (citing 22 C.J.S. Criminal Law section 8).

54. See *In re Short*, 20 I. & N. Dec. 136, 139 (citing *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929)).

assault convictions would be found to be aggravated felonies).

\* Lascivious acts with a child. See *Varela-Blanco v. I.N.S.*, 18 F.3d 584 (8th Cir. 1994).

\* Falsely and willfully representing oneself as a United States citizen, conviction under 18 U.S.C. § 911 (1988). See *White v. I.N.S.*, 6 F.3d 1312 (8th Cir. 1993) (dismissed for lack of jurisdiction due to untimely filing of petition for certiorari; the Board and immigration judge both found that respondent's conviction was a crime involving moral turpitude).

\* Possession of stolen mail. See *Okoroha v. I.N.S.*, 715 F.2d 380 (8th Cir. 1983) (also held that a suspended sentence is a sentence of confinement for immigration purposes regarding crimes involving moral turpitude).

\* Statutory rape under Minnesota Statute § 609.295(4). See *Marciano v. I.N.S.*, 450 F.2d 1022 (8th Cir. 1971), cert. denied, 405 U.S. 997 (1972).

\* Willfully and knowingly attempting to evade a large part of income tax due. See *Maroon v. I.N.S.*, 364 F.2d 982 (8th Cir. 1966).

Where the Eighth Circuit Court of Appeals has not ruled that a crime involves moral turpitude, the decisions of the Board control. The Board has held in two cases specifically dealing with Minnesota statutes that first degree manslaughter and carrying a concealed and deadly weapon with the intent to use it against another person are crimes involving moral turpitude.<sup>55</sup>

Simple assault is not a crime involving moral turpitude.<sup>56</sup> However, the Board held that the willful infliction of corporal injury on a spouse, cohabitant or parent of the offender's child in violation of California Penal Code section 273.5(a) is a crime involving moral turpitude.<sup>57</sup>

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55. See *In re S.*, 8 I. & N. Dec. 344 (B.I.A. 1959); *In re S.*, 1 I. & N. Dec. 689 (B.I.A. 1943); see also Appendix D (charting Minnesota statutes and crimes that involve moral turpitude).

56. See *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926); *In re Fualaau*, Int. Dec. 3385 (B.I.A. 1996); *In re Perez-Contreras*, 20 I. & N. Dec. 615 (B.I.A. 1992) (withdrawing from *In re Baker*, 15 I. & N. Dec. 50 (B.I.A. 1974), to the extent it holds that third degree assault resulting in great bodily harm is a crime involving moral turpitude without regard to the existence of intentional or reckless conduct); *In re Short*, 20 I. & N. Dec. 136 (citing *United States ex rel. Zafarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933)); *In re Danesh*, 19 I. & N. Dec. 669 (B.I.A. 1988); *In re Logan*, 17 I. & N. Dec. 367 (B.I.A. 1980).

57. See *In re Tran*, Int. Dec. 3271 (B.I.A. 1996).

*b. Crimes Involving Firearms*

The Eighth Circuit Court of Appeals has held that a conviction for aggravated robbery under Minnesota Statute section 609.245 (1991) constitutes a firearms offense for immigration purposes.<sup>58</sup> The court held that a weapon must be an essential element within the definition of the offense in question and that the weapon must be a firearm or destructive device.<sup>59</sup> Under Minnesota statute, aggravated robbery has as an element that the person is armed with a dangerous weapon or other article that a victim believes to be a dangerous weapon. Minnesota Statute section 609.02(6) (1991) defines "dangerous weapon" to include any firearm. The court upheld the Board, which had examined the conviction record, including the charge, indictment, plea, verdict and sentence, to determine that the respondent had used a dangerous weapon, a revolver.<sup>60</sup>

The same analysis regarding firearms applies to second degree assault under Minnesota Statute section 609.222. Where a dangerous weapon is involved, the immigration court will look to the formal record of conviction to see if a firearm was used to commit the crime. If the record of conviction states that a firearm was used, then the non-citizen will be found to be deportable for a firearms offense.<sup>61</sup>

The Board held that the 1994 amendment to I.N.A. section 241(a)(2)(C), which added attempt and conspiracy to the deportation grounds relating to firearms offenses, applies retroactively to convictions entered before, on or after October 25, 1994.<sup>62</sup>

*c. Crimes Involving Controlled Substances*

A single conviction for simple possession of a controlled substance, while a deportable offense, is not an aggravated felony.<sup>63</sup> The Board's recent holding that state rehabilitative statutes do not eliminate convictions for immigration purposes applies to first of-

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58. See *Vue v. I.N.S.*, 92 F.3d 696 (8th Cir. 1996).

59. See *id.* at 698.

60. See *id.*

61. See *id.*; I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (proof of record of conviction).

62. See *In re St. John*, Int. Dec. 3295 (B.I.A. 1996); see also *In re P-F*, 20 I. & N. Dec. 661 (B.I.A. 1993) (holding that convictions for first degree armed burglary and robbery with a firearm under Florida statute constitute a firearms offense under I.N.A. § 241(a)(2)(c) where the use of a firearm was an essential element of the crimes).

63. See *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).



fenders in controlled substance cases.<sup>64</sup> This interpretation applies retroactively regardless of the date of conviction.

Regarding foreign convictions, the Board held that the expungement of a foreign drug-related conviction pursuant to a foreign rehabilitative statute does not eliminate the conviction for immigration purposes even where the convicted non-citizen would have been eligible for federal first offender treatment if prosecuted in the United States.<sup>65</sup> The Board limited the exculpatory provisions of the I.N.A. relating to pardons to domestic convictions.<sup>66</sup>

### 3. Application to Cases

#### *a. Crimes Involving Moral Turpitude*

##### *Case of Roman from Ukraine:*

Roman entered the United States in April 1992 as a refugee. In February 1994, he adjusted his status and became a legal permanent resident. In June 1995, he pled guilty to shoplifting three packs of cigarettes and received six months of probation. In December 1996, he was arrested for shoplifting a camera and several lenses. He pled guilty to a misdemeanor and was placed on one year of probation. In January 1998, he was placed in removal proceedings by the I.N.S. for having been convicted of two crimes involving moral turpitude after admission to the United States. He is eligible for asylum and withholding of deportation, but not for cancellation of removal because he had been in the United States for less than seven years when he stole the camera.

##### *Case of Bin from China:*

As the son of a Chinese party official, Bin received permission from the Chinese government to study in the United States. In August 1991 at age twenty, he entered the United States as an M-1 student to complete a master's degree in electrical engineering. In January 1993, he was hired by a computer corporation which filed a labor certification application on his behalf. In June 1993, the application was granted and Bin received his green card. In July 1997, Bin was arrested for fourth degree criminal sexual conduct with his seventeen year old girlfriend whose mother wanted

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64. See *In re Roldan*, Int. Dec. 3377 (BIA 1999) (overruling *In re Manrique*, Int. Dec. 3250 (B.I.A. 1995)).

65. See *In re Dillingham*, Int. Dec. 3325 (B.I.A. 1997).

66. See *id.*; see also Definition of Aggravated Felony, *infra* pp. 611-20 (discussing case law regarding controlled substances).

to end their relationship. He pled guilty and was sentenced to five years probation.

Analysis: Bin is deportable for having been convicted of a crime involving moral turpitude within the first five years after admission where the possible sentence was one year. Criminal sexual conduct is considered to be a crime involving moral turpitude. In addition, he has been convicted of an aggravated felony, sexual abuse of a minor.<sup>67</sup> Bin has NO defense to deportation as he does not have a claim of persecution by the Chinese government.<sup>68</sup>

*b. Defense Practice Tip*

Where a non-citizen has had a green card for less than five years and has been in the United States legally for less than seven years, work with the judge and prosecutor to plead the non-citizen under a provision that is neither a crime involving moral turpitude nor an aggravated felony. For example, fifth degree assault is not a crime involving moral turpitude. If that is not possible, try to plead the non-citizen to a misdemeanor crime involving moral turpitude, not a gross misdemeanor or felony crime involving moral turpitude. If the non-citizen is convicted for a single misdemeanor for which a maximum term of imprisonment is ninety days, then she will not be deportable because the crime involving moral turpitude must have a maximum term of imprisonment of 365 days and be committed within five years of admission.

However, if the non-citizen has a prior conviction for a crime involving moral turpitude (even a misdemeanor) and is convicted for a second misdemeanor crime involving moral turpitude, then she will be deportable even though both convictions occurred more than five years after the non-citizen legally entered the country or received her green card. Due to the second conviction for a crime involving moral turpitude, the non-citizen will be subject to mandatory detention without bond.<sup>69</sup> Again, aggravated felony charges need to be avoided.

*c. Controlled Substance Violations*

*Case of Joseph from England:*

Joseph entered the United States as a legal permanent in June 1987 at age seventeen with his mother who was married to a

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67. See Definition of Aggravated Felony *infra* p. 612.

68. See Withholding of Removal *infra* p. 674.

69. See Mandatory Detention *infra* p. 695.

United States citizen. In December 1995, he was convicted for possession of sixteen grams of heroin. After leaving a bar late one night in January 1999, a local police officer stopped him, gave him a breathalyzer test, arrested him and took him to the county jail for seventy-two hours. He was charged with driving while intoxicated. While in the county jail, the jailer asked him if he was a United States citizen because he had a British accent. He told the jailer that he had a green card. The jailer called the I.N.S. who put an administrative hold on Joseph. Joseph was served with a Notice to Appear in immigration court and was informed that he could not be released from I.N.S. custody under the mandatory detention rules. He pled guilty to a DWI and was sentenced to thirty days in the county jail.

Analysis: Joseph is deportable for having been convicted of a controlled substance violation. He has not been convicted of an aggravated felony because he only has a fifth degree possession conviction. He is eligible to apply for cancellation of removal because he has been a legal permanent resident for more than five years, has resided in the United States lawfully for seven years continuously and has not been convicted of an aggravated felony.

*Case of Maria from Mexico:*

Maria entered the United States without inspection in 1981 to work as an in-home day care provider. She later became a legal permanent resident in 1990, through the 1986 Amnesty Program. In January 1995, she was stopped by the local sheriff for allegedly failing to come to a complete stop at a stop sign. Seeing that she was having difficulty finding her driver's license, the sheriff asked to look in her purse. Being afraid, she gave the officer her purse where he found a small baggie of marijuana. He arrested her and impounded her car. She was charged with possession of a small amount of marijuana. The I.N.S. placed a hold on Maria. She pled guilty to the charge and her public defender asked the judge to note for the record that the amount of marijuana was only twenty-two grams. Upon receiving a copy of the conviction record, the I.N.S. released its hold on Maria.

Analysis: Maria is not deportable for her marijuana conviction because she qualifies for the marijuana exception under I.N.A. section 237(a)(2)(B)(i). If she is convicted for another controlled substance violation, then she will be deportable and will be considered to have been convicted of an aggravated felony.<sup>70</sup>

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70. See *infra* pp. 612-21 (defining aggravated felony and discussing case law of

*d. Defense Practice Tip: Protect the Record*

Where your non-citizen client is being charged with possession of a small amount of marijuana of less than thirty grams under Minnesota Statute section 152.027 subdivision 4 and it is the client's first controlled substance violation, ask the judge to state on the record the exact amount of marijuana. Such a statement in the record will protect your non-citizen client from deportation consequences, because simple possession of an amount of marijuana under thirty grams is an exception to the ground of deportability for controlled substances.<sup>71</sup>

*e. Domestic Violence and Violations of Protection Orders:  
Section 237(a)(2)(E)*

*Case of Mohamed from Sudan:*

Mohamed became a legal permanent resident in January 1990. He married Rebka, a legal permanent resident, in 1994 and they began having difficulties in May 1997. On June 14, 1997, they got into a shouting match about money. Mohamed pushed Rebka and she fell to the floor. He kicked her a couple of times and left the apartment. The neighbors who lived underneath them called the police to report domestic violence. As Mohamed was leaving the apartment, the police arrested him and took him to jail for domestic assault. In criminal court, a no-contact order was issued to protect Rebka from threats by Mohamed and he pled guilty to fifth degree domestic assault. The judge stayed a ninety day term of imprisonment. Three days later, Mohamed saw Rebka in the grocery store where he walked toward her and insulted her. Then, he quickly left the store. Based on the incident in the grocery store, however, Rebka filed an application for an Order for Protection (OFP) with the civil county court. The civil court judge granted the OFP and also found that Mohamed had violated the no-contact order issued by the criminal court. The district attorney called the I.N.S. to report Mohamed. The I.N.S. served Mohamed with a Notice to Appear on August 1, 1997.

Analysis: Mohamed is deportable on two grounds. First, he is deportable because he was convicted for a crime of domestic violence after September 30, 1996 and the I.N.S. began removal proceedings against Mohamed after April 1, 1997. Second, he is deportable because the judge found that Mohamed had violated the no-contact order September 30, 1996 and was placed in re-

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crimes involving controlled substances).

71. See I.N.A. § 237(a)(2)(B).

moval proceedings. As Mohammed has not been convicted of an aggravated felony and has been a permanent resident for seven years, he is eligible to apply for cancellation of removal, a form of discretionary relief from deportation.

*Case of Marcos from Guatemala:*

Marcos entered the United States without inspection in 1992, looking for work to help support his elderly parents in Guatemala. In October 1994, he married Esmeralda, a United States citizen, who filed an application for Marcos to obtain legal permanent resident status under I.N.A. section 245(i). Marcos received his green card in February 1995. They had two United States citizen children born in December 1995 and October 1996. On August 28, 1997, he and Esmeralda got into a fight because Marcos had been selling small amounts of marijuana for extra cash for the family. Marcos punched Esmeralda in the face, severely bruising her cheek and eye. She called the police who came to the house and arrested Marcos for third degree domestic assault. In court, Marcos pled guilty to domestic violence on September 20, 1997 and was given a 120 day suspended sentence. He served ten days in the workhouse and went into a drug treatment program, which he successfully completed.

Analysis: Marcos is deportable based on the conviction for a crime of domestic violence for which he was convicted after September 30, 1996. He has no relief available from removal under cancellation of removal because he has only been a permanent resident for two and a half years. To be eligible for cancellation of removal, a non-citizen must have been in the United States in a lawful status for seven years, of which the person was a legal permanent resident for at least five of the seven years.<sup>72</sup> If he fears persecution on account of race, religion, nationality, political opinion, or membership in a particular social group or torture if he were to return to Guatemala, then Marcos may be eligible for asylum, withholding of removal or deferred removal.<sup>73</sup> Based on the facts in this particular case, however, Marcos is deportable without any remedy or defense to removal (deportation) unless Esmeralda agrees to file another marriage petition on his behalf and a criminal waiver is granted to allow him to adjust his

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72. See Cancellation of Removal for Legal Permanent Residents with Convictions, *infra* p. 656.

73. See Asylum *infra* p. 665; Withholding of Removal *infra* p. 674; and Convention Against Torture *infra* p. 697.

status.<sup>74</sup>

*f. Defense Practice Tip*

To avoid placing a non-citizen at risk of removal proceedings for domestic issues, negotiate for a lesser charge that does not involve a crime that falls under the categories of aggravated felonies or crimes involving moral turpitude. Because the deportation ground for domestic violence is new as of April 1, 1997, it is too early to tell whether an admission of facts on the record relating to domestic violence, as defined by the Minnesota statute, will be sufficient for the I.N.S. to charge the non-citizen as being deportable for a crime of domestic violence where the conviction is for disorderly conduct or fifth degree assault, not domestic violence. Therefore, where possible, the original complaint should be dismissed, a new complaint alleging facts constituting disorderly conduct or fifth degree assault without mentioning the relationship should be issued and the client should plead to the barest facts of the case in order to avoid admitting facts that could constitute domestic violence. The relationship between your client and the alleged victim should not be admitted on the record. For example, a client could admit that he was speaking loudly with a woman and that they had a verbal disagreement, but not that he pushed his wife to try to get her to agree with him.

You may need to educate the prosecutor and the court to show the ramifications of the changes in the immigration law for convictions of crimes of domestic violence and the effect on any United States citizen or legal permanent resident spouse or children involved. Domestic violence is a serious issue, but one spouse may not want to have the other spouse deported over what may be seen by both parties as a "misunderstanding." In addition, deportation may not be the best solution for the children where the deported parent is the sole wage earner for the family, especially with the five year limits on welfare receipt. Finally, child support is not easily collected from a parent in another country, particularly where wages are much lower than in the United States, such as the case of a Mexican worker who earns forty cents per hour in a clothing assembly plant.

*C. Definition of Aggravated Felony*

The term "aggravated felony" is an immigration law term. When the term "aggravated felony" was statutorily defined by

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74. See Adjustment of Status *infra* p. 656, 660; § 212(h) waivers *infra* p. 680.

Congress in 1988 in the Anti-Abuse Drug Act,<sup>75</sup> it included only three crimes: murder, controlled substance or drug trafficking and weapons trafficking. In 1990, Congress amended the definition to include crimes of violence for which the term of imprisonment was at least five years.<sup>76</sup> In 1994, Congress again amended the definition of aggravated felony, adding twenty new offenses to include money laundering, child pornography, prostitution and theft, where the term of imprisonment was five years or more.<sup>77</sup> In the AEDPA and IIRAIRA, Congress expanded the definition of aggravated felony to include more than fifty offenses and reduced the imposed term of imprisonment for many crimes from five years to one year.

It is critical to note that an immigration judge has no discretion to grant any form of relief from deportation or removal once she finds that the non-citizen has been convicted of an aggravated felony. The impact of this provision has been great, particularly in light of the retroactive application of the definition of aggravated felony to convictions that are ten, twenty or even thirty or more years old, for which a non-citizen may have never served any prison time, successfully completed probation and has been a productive and contributing member in her community. In addition, many of these convictions carried no immigration consequences when the non-citizens committed the acts or were convicted for the acts. For example, a non-citizen sentenced to a term of imprisonment of 365 days with a stay of execution and placed on probation for one gross misdemeanor theft offense prior to September 30, 1996 was not previously deportable but is now convicted of an aggravated felony for purposes of immigration law. Similarly, non-citizens convicted of criminal sexual conduct (including statutory rape) and placed on probation will be found to have been convicted of aggravated felonies for immigration purposes.

#### 1. Statute

**I.N.A. § 101(a)(43) [8 U.S.C. § 1101(a)(43)]**

**The term "aggravated felony" means—**

- (A) murder, rape, or sexual abuse of a minor;
- (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a

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75. Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988).

76. See Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 501(b), 104 Stat. 4978 (1990).

77. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(b), 108 Stat. 4305 (1994).

drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) sections 922(g)(1), (2), (3), (4) or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18, United States code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year;<sup>78</sup>

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

(J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses) for which a sentence of one year impris-

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78. A crime of violence is defined as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (1992).



onment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2433 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18, United States Code (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. § 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or

(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(O) an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating

to document fraud) and (ii) for which the term of imprisonment [is at least] 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

## 2. Case Law

Analyzing the length of sentences is critical to avoid convictions for aggravated felonies and to determine the consequences for convictions defined as aggravated felonies.<sup>79</sup> Concurrent sen-

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79. Non-citizens deported on grounds other than having been convicted of an aggravated felony who later illegally reenter the United States face a maximum penalty of two years of incarceration. See 8 U.S.C. § 1326(a). In contrast, non-citizens who illegally reenter the United States after being deported for an aggravated felony face an enhanced term of imprisonment of up to twenty years in prison. See Pub. L. No. 103-322, § 130001(b)(2), 108 Stat. 1796, 2023 (1994). In determining sentencing enhancement for illegal reentry into the United States after deportation for an aggravated felony in violation of 8 U.S.C. §§ 1326(a), (b)(2), the Eighth Circuit Court of Appeals has upheld sentencing enhancements. See

tences are evaluated as the length of the longest sentence whereas consecutive sentences are added together.<sup>80</sup> Where the sentences for aggravated felony convictions are five years (sixty months) or more, the non-citizen will be statutorily ineligible for withholding of deportation or removal.<sup>81</sup>

*a. Retroactivity of I.N.A. Section 101(a)(43)*

A non-citizen who has been convicted of an aggravated felony is subject to deportation or removal, without regard to the date of conviction, if she is placed in proceedings on or after March 1, 1991 and the crime qualifies as an aggravated felony.<sup>82</sup> In *In re Lettman*, the Board held that a non-citizen convicted in 1987 for third degree murder in Florida and placed in proceedings in 1996 was deportable because she was convicted of an aggravated felony.<sup>83</sup>

Similarly, a panel of the Eighth Circuit Court of Appeals indicated that the amended definition of aggravated felony applies retroactively. In a footnote, the court stated that Congress clearly intended to apply the amended definition of aggravated felony retroactively by using the words "convictions entered before, on, or

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United States v. Cazares-Gonzalez, 152 F.3d 889 (8th Cir. 1998) (federal conviction for aggravated rape); United States v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998) (Minnesota conviction for fifth degree sale of a controlled substance); United States v. Garcia-Chavez, 1997 WL 468268 (8th Cir. Aug. 18, 1997) (Nebraska conviction for possession of more than one pound of marijuana); United States v. Baca-Valenzuela, 118 F.3d 1223 (8th Cir. 1997) (conviction in United States district court in Arizona for aiding and abetting the possession of cocaine with intent to distribute); United States v. Briones-Mata, 116 F.3d 308 (8th Cir. 1997) (Florida conviction for purchasing marijuana); United States v. Haggerty, 85 F.3d 403 (8th Cir. 1996) (second California conviction for methamphetamine); United States v. Martinez-Amaya, 67 F.3d 678 (8th Cir. 1995) (conviction for delivery of cocaine); United States v. Torres-Sanchez, 68 F.3d 227 (8th Cir. 1995) (convictions for attempted possession of cocaine and distribution of a controlled substance); Camacho-Bordes v. I.N.S., 33 F.3d 26 (8th Cir. 1994) (conviction for distribution of cocaine); United States v. Gomez, 38 F.3d 1031 (8th Cir. 1994) (conviction for delivering a controlled substance); United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (convictions for distribution of LSD and statutory rape); United States v. Maul-Valverde, 10 F.3d 544 (8th Cir. 1993) (conviction for burglary); United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992) (conviction for lascivious acts with a child as a crime of violence); see also *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that a provision of the I.N.A. pertaining to reentry of deported aliens after conviction of an aggravated felony is a sentencing enhancement, not a separate criminal offense).

80. See *In re Fernandez*, 14 I. & N. Dec. 24 (B.I.A. 1972).

81. See *In re S-S-*, Int. Dec. 3374 (B.I.A. 1999) (removal proceedings); *In re Q-T-M-T-*, Int. Dec. 3300 (B.I.A. 1996) (deportation proceedings); see also *Withholding of Removal* *infra* p. 674.

82. See *In re Lettman*, Int. Dec. 3370 (B.I.A. 1998).

83. See *id.*

after" the enactment of IIRAIRA on September 30, 1996.<sup>84</sup> In *Mendez-Morales v. I.N.S.*, the court determined that a 1992 conviction for first degree sexual assault of a thirteen year old constituted an aggravated felony and that the non-citizen was, therefore, deportable.<sup>85</sup> The court also held that it did not have jurisdiction to review the denial of his section 212(h) waiver application and adjustment of status application by the Board.<sup>86</sup>

The Eighth Circuit in *Mendez-Morales* did not directly decide the issue of retroactivity, but indicated how the issue may be ultimately decided. Negotiating with the prosecutor and the judge in current cases is critical. The Minnesota Rules of Criminal Procedure have been amended, effective January 1, 1999, to require an advisal in the plea agreement that if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.<sup>87</sup> For convictions entered prior to the passage of IIRAIRA (September 30, 1996), limited possibilities for post-conviction relief may be the only means by which to avoid an aggravated felony conviction.<sup>88</sup>

#### *b. Crimes Involving Controlled Substances*

In *In re L-G-*, the Board held that a first conviction for simple possession of any drug in state court is not an aggravated felony, even if the law of the state categorizes the offense as a felony, because whether an offense is a felony or not for purposes of the aggravated felony drug provision depends on the federal classification.<sup>89</sup> The Board stated that a first conviction for simple possession is only a misdemeanor under federal law and, therefore, does not meet the definition of an aggravated felony drug offense, even if the offense is classified as a felony under state law.<sup>90</sup> *In re L-G-*, is binding on the immigration court for cases involving a first conviction for simple possession of a controlled substance because

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84. See *Mendez-Morales v. I.N.S.*, 119 F.3d 738 (8th Cir. 1997) (dismissing for lack of jurisdiction on account of other provisions of IIRAIRA eliminating judicial review for § 212(h) waivers).

85. See *id.* at 738.

86. See *id.*

87. See MINN. R. CRIM. PROC. 15.01, 15.02.

88. See Post-Conviction Relief *infra* p. 700.

89. *In re L-G-*, Int. Dec. 3254 (B.I.A. 1995).

90. See *id.* A second conviction of simple possession of a controlled substance is an aggravated felony. See *United States v. Garcia-Olmedo*, 112 F.3d 399 (9th Cir. 1997).

the Eighth Circuit Court of Appeals has not overruled the Board.<sup>91</sup>

The Board held that a conviction for accessory after the fact is not sufficiently related to a controlled substance violation to support a finding of deportability under I.N.A. section 241(a)(2)(B)(i).<sup>92</sup> The Board also held that a conviction for accessory after the fact is an aggravated felony under I.N.A. section 101(a)(43)(S), "obstruction of justice," where the term of imprisonment is at least one year.<sup>93</sup>

### c. Crimes of Violence

In *United States v. Rodriguez*,<sup>94</sup> the Eighth Circuit Court of Appeals held that a court must look at the nature of the crime to determine whether it is a crime of violence.<sup>95</sup> The court stated,

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91. Cf. *United States v. Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997) (defining felony possession offenses for purposes of enhanced sentencing for an illegal reentry after deportation for an aggravated felony). For purposes of sentencing enhancement under the sentencing guidelines for an illegal reentry after deportation for an aggravated felony, the Eighth Circuit held that a state drug offense can be an aggravated felony "if the offense is classified as a felony under the law of the relevant state, even if the same offense would be punishable only as a misdemeanor under federal law." *Id.* (citing *United States v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996)); see also *United States v. Haggerty*, 85 F.3d 403 (8th Cir. 1996) (enhanced sentencing for an illegal reentry after deportation for an aggravated felony). The court specifically dismissed the defendant's contention that the term "aggravated felony" includes only drug crimes with a distribution element. See *Briones-Mata*, 116 F.3d 308.

The reasoning of the Eighth Circuit Court of Appeals draws on the interplay between the Federal Sentencing Guidelines, the federal Controlled Substances Act and the federal criminal code. Ruling in the context of the federal sentencing guidelines' definition of aggravated felony, the court found that the definition of "aggravated felony" applies to offenses described in either 18 U.S.C. § 924(c) or 21 U.S.C. § 802. A drug trafficking crime is defined in 18 U.S.C. § 924(c)(2) as including "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)." Under federal law, an offense is a felony if the maximum terms of imprisonment authorized for the offense is more than one year. See 18 U.S.C. § 3559(a). Possession of a controlled substance is punishable as a felony under the Controlled Substances Act if the defendant has a prior federal or state drug conviction because the defendant may be sentenced up to two years. See 21 U.S.C. § 844(a). Under the Controlled Substances Act, "any Federal or State offense classified by applicable Federal or State Law as a felony" is a felony. 21 U.S.C. § 802(a)(13).

92. See *In re Batista-Hernandez*, Int. Dec. 3321 (B.I.A. 1997).

93. See *id.*

94. 979 F.2d 138 (8th Cir. 1992).

95. A crime of violence is defined as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (1992).

"All crimes which by their nature involve a substantial risk of physical force share the risk of harm. It matters not one whit whether the risk ultimately causes actual harm. Our scrutiny ends upon a finding that the risk of violence is present."<sup>96</sup>

In *In re L-S-J*, the Board held that a non-citizen convicted of robbery with a deadly weapon for which he was sentenced to two and a half years had been convicted of a crime of violence and an aggravated felony.<sup>97</sup> Looking at the issue of crimes of violence in *In re B*-, the Board held that statutory rape by its nature involves a substantial risk of the use of physical force against a child and, therefore, constitutes a crime of violence and an aggravated felony.<sup>98</sup>

*d. DWI As a Crime of Violence and Aggravated Felony*

The Board upheld an immigration judge's decision finding that a non-citizen had been convicted of an aggravated felony on account of his conviction for "aggravated driving while under the influence" under Arizona Revised Statute sections 28-192(A)(1) and 28-697(A)(1), (D), (E), (G)(1), (H) and (I).<sup>99</sup> In this case, the non-citizen was found guilty of a felony, driving while under the influence while his driver's license was suspended, revoked or in violation of a restriction under Arizona Revised Statutes sections 28-192(A)(1) and 28-697(A)(1), (D), (E), (G)(1), (H) and (I).<sup>100</sup> The Board held that the nature of the crime committed under the Arizona statute involves a type of crime that involves a substantial risk of harm to persons and property and, therefore, falls within the second part of the definition of a crime of violence, "a felony . . . by its nature . . . involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."<sup>101</sup> In deciding that the non-citizen had been convicted of a crime of violence and therefore an aggravated felony on account of the two and a half year sentence imposed, the Board stated,

[W]e point to the incontrovertible evidence that drunk driving is an inherently reckless act, which exacts a high societal toll in the forms of death, injury, and property damage. . . . [A]pplying the 18 U.S.C. § 16(b) test to the conduct required

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96. *United States v. Bauer*, 990 F.2d 373 (8th Cir. 1993) (citing *United States v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992)).

97. Int. Dec. 3322 (B.I.A. 1997).

98. Int. Dec. 3270 (B.I.A. 1996).

99. See *In re Magallanes*, Int. Dec. 3341 (B.I.A. 1998).

100. See *id.* at 2.

101. *Id.* at 4 (citing 18 U.S.C. §16(b)).

for a conviction under section 28-692(a)(1) or section 28-697(a)(1) of the Arizona Revised Statutes, we find that the respondent was convicted of a "crime of violence" within the meaning of the [Immigration and Nationality] Act.<sup>102</sup>

Based on *In re Magallanes*,<sup>103</sup> a defense attorney should work with the prosecutor and the judge to sentence a non-citizen to 364 days or less to avoid a finding by the immigration judge that her client has been convicted of a crime of violence and an aggravated felony, which will bar all immigration relief except withholding of removal.<sup>104</sup> In Operation Last Call in Texas, the Immigration and Naturalization Service arrested more than 500 long-term permanent residents who had been convicted of felony level DWI offenses and placed them in removal proceedings.<sup>105</sup>

*e. An Offense Involving Fraud Where the Loss Exceeds \$10,000*

The Board recently held that a conviction for submitting a false claim with the intent to defraud arising from an unsuccessful scheme to obtain \$15,000 from an insurance company is a conviction for an "attempt" to commit a fraud in which the loss to the victim exceeded \$10,000 and, therefore, an aggravated felony.<sup>106</sup>

3. Application to Cases

*Case of Francisco from Mexico:*

Francisco came to the United States in 1971 from Mexico as a legal permanent resident because his mother had married a United States citizen. In 1974, Francisco was nineteen years old when he was charged with and pled guilty to having sex with his fifteen year old girlfriend, a minor crime for which he could not be deported in 1974. The judge imposed on him a suspended sentence of sixty days. Francisco successfully completed one year of

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102. *Id.* at 6.

103. *Id.*

104. The Minnesota Supreme Court declared the enhanced gross misdemeanor statutes, Minnesota Statute sections 169.121 subdivision 3(d) and 169.129 subdivision 2(b), as well as the related amendment in 1997 of the felony definition in Minnesota Statutes section 609.02, subd. 2, unconstitutional. See *Baker v. State*, 590 N.W.2d 636 (Minn. 1999) (holding that the authorization of local imprisonment for a period exceeding one year without a 12 person jury violates article I, section 6 of the Minnesota Constitution).

105. See William Branigin, *INS Reviews DWI Deportations; Texas Offices' Program Angers Immigrants' Rights Groups*, WASH. POST, Dec. 22, 1998, at A21; *Texas Drunken Drivers Arrested for Deportation; 537 Legal Immigrants with 3 Convictions Are Rounded Up by INS*, BALT. SUN, Sept. 4, 1998, at A4.

106. See *In re Oynido*, Int. Dec. 3379 (B.I.A. 1999).

probation. Since 1974, Francisco has not been arrested for any other violations of the law.

In 1989, Francisco married a United States citizen, Martha, and together they opened a small grocery store in their neighborhood. They now have three young United States citizen children, ages two, three and six. Life was going well for Francisco, Martha and their family. On July 2, 1997, Francisco was stopped by the local police for failing to signal a left-hand turn at an intersection while driving a friend's car to the gas station. The police officer gave Francisco a ticket and told him to go to traffic court on July 7, 1997.

Francisco went to traffic court and pled guilty to failing to signal for a turn, a misdemeanor. At court, the city attorney discovered that Francisco was convicted in 1974 and called the I.N.S. The I.N.S. placed a hold on Francisco who was very surprised to be taken to jail because he was not arrested by the police officer who gave him the traffic ticket. The I.N.S. served Francisco with a Notice to Appear before the immigration court for a hearing on whether Francisco should be removed (deported) from the United States for his 1974 conviction.

Analysis: Francisco's conviction is now an aggravated felony because it is a crime involving sexual abuse of a minor and Congress, through IIRAIRA, stated that the new definition of aggravated felony should be applied retroactively. Unless the retroactivity provision of IIRAIRA is overturned by the federal courts, Francisco will be considered to have been convicted of an aggravated felony and will be barred from any form of relief, including cancellation of removal. Thus, a twenty-five year old minor conviction for which he was not deportable in 1974 now has the effect of a bar to any immigration relief for at least twenty years after Francisco is removed from the United States. Post-conviction relief or a pardon may provide some form of relief from deportation or removal for Francisco.

#### 4. Defense Practice Tip

Many non-citizen youth face criminal sexual conduct charges for their sexual relations with girlfriends or boyfriends. Two possible plea bargains under the Minnesota statute may prevent removal or deportation. In both instances, the original complaint should be dismissed and a new complaint issued with facts not constituting sexual relations. The first possible plea bargain is to negotiate a plea agreement for disorderly conduct, keeping admissions regarding the relationship of the non-citizen and the boy-



friend or girlfriend out of the court record.

The second is to negotiate a plea agreement under Minnesota Statute section 609.26, subdivision 6, Depriving Another of Custodial or Parental Rights. A conviction under this provision may still lead to immigration consequences because it will be a conviction for a crime involving moral turpitude. If the non-citizen is convicted of a crime involving moral turpitude within her first five years after admission, then she is deportable and may only be eligible for asylum and withholding of removal. If it is the non-citizen's second conviction involving moral turpitude at any time after admission, then the non-citizen will be deportable. In either case, the sentence must be 364 days or less to avoid an aggravated felony conviction.

If the prosecutor is not willing to allow the non-citizen to plead to a different statutory provision, then the case should be taken to trial because even a fifth degree conviction for criminal sexual conduct may be deemed to be an aggravated felony.

*Case of Ezekiel from Jordan:*

Ezekiel entered the United States as legal permanent resident in 1985 based on his marriage to a United States citizen. In 1986, he pled guilty to driving under the influence and his license was suspended for three months. In January 1995, he pled guilty to a second charge of driving under the influence and received thirty days in the workhouse. In July 1995, he pled guilty to a third charge of driving under the influence. He received forty-five days in the workhouse and his license was suspended for one year. On January 1, 1998, he was stopped by the police on his way to work at 8:00 a.m. A breathalyzer test showed that his blood alcohol was 0.21. He was charged with a felony for driving while intoxicated. He pled guilty and was sentenced to thirteen months in prison.

Analysis: Although traffic violations generally will not have the effect of making a legal permanent resident deportable, Ezekiel may be deportable for having been convicted of an aggravated felony under IIRAIRA. An immigration judge will probably find that he has been convicted of a crime of violence and an aggravated felony.<sup>107</sup> A successful motion to reduce the sentence to 364 days will have the effect of making him not deportable.

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107. See *supra* pp. 620-21 (discussing *In re Magallanes*, Int. Dec. 3341 (B.I.A. 1998)).

### 5. Defense Practice Tip

To avoid a conviction for an aggravated felony, first analyze whether a charged crime falls within the definition of aggravated felony as a sentence or a category crime. Category crimes are aggravated felonies regardless of the length of the term of imprisonment imposed. Category crimes include murder, rape, sexual abuse of a minor, drug trafficking, weapons trafficking and an offense involving fraud or deceit where the loss to the victim or victims exceeds \$10,000. If the non-citizen has been charged with a category aggravated felony crime, work with the prosecution to re-charge the non-citizen under another provision of Minnesota statutes.

Sentence crimes are aggravated felonies that require an imposed sentence of at least one year. Sentence crimes include theft, burglary, crimes of violence, forgery, an offense relating to the obstruction of justice and perjury. Work with the prosecution and judge to arrange a sentence for a term of imprisonment of 364 days or less to avoid a conviction for an aggravated felony. In addition, where a long-term legal permanent resident is charged with third degree assault with an offer from the prosecution for a two year sentence, a plea to two counts of third degree assault with each having a 364 day sentence will avoid convictions for aggravated felonies; such a plea will make a non-citizen deportable for two crimes involving moral turpitude but she may be eligible for cancellation of removal.<sup>108</sup>

In addition, many aggravated felonies are also crimes involving moral turpitude, including murder, rape, theft and burglary. Non-citizens are deportable and/or inadmissible for convictions of crimes involving moral turpitude unless such conviction meets the petty offense definition under I.N.A. section 212(a)(2)(A)(ii).<sup>109</sup> Depending on the non-citizen's immigration status and length of time in the United States, immigration relief may be available. Work with the prosecution to have the crime charged under a provision of law that does not involve moral turpitude.

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108. See Cancellation of Removal for Certain Permanent Residents *infra* p. 656.

109. See Grounds of Inadmissibility *infra* p. 627.

### Sentencing Factors and Immigrants

The following factors are areas for arguments for a more lenient sentence for non-citizens:

<u>Factors</u>	<u>Immigrants/Refugees</u>
1. Nature of Conviction	Pretext arrest/Racial incident? Similar to act of self-defense? Post-traumatic stress disorder?
2. Degree of Aggravation of Offense	Post-traumatic stress disorder? Other mental or emotional issues?
3. Mitigating Factors regarding Defendant's Behavior	Post-traumatic stress disorder? Lack of understanding of U.S. laws? Lived in situation of anarchy? Lived in country without functioning judicial system? Lack of understanding regarding the U.S. judicial system?
4. Prior Conviction Record of Defendant	Juvenile record?
5. Personal Characteristics of Defendant:	Post-traumatic stress disorder? Refugee? Living conditions prior to coming to U.S.? Tortured by governmental or other agent? Imprisoned in another country? Length of time and conditions? Possibility or probability of political persecution, other problems or torture in home country if deported?
—Mental/psychological stability	
—Employment	Recently cut-off of welfare and/or food stamps? Possible effect on current employment? Sole provider for family?
—Family ties	Married to U.S. citizen or immigrant? Ages of children, if any? Extended family in U.S.? Psychological impact on U.S. citi-

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| <p>—Community ties</p>                                       | <p>zen/LPR spouse, children, or parents if defendant is deported?</p> <p>Position within local ethnic community? (i.e. clan leader)</p> <p>Length of time in community?</p> <p>Volunteer in community organization?</p> |
| <p>6. Treatment Needs and Desires of Defendant</p>           | <p>Post-traumatic stress disorder?</p> <p>Chemical dependency treatment? Culturally appropriate treatment?</p>  |
| <p>7. Economic Situation of Defendant</p>                    | <p>Number of persons supported by defendant? Current employment or possibility? Economic impact on U.S. citizen/LPR spouse, children, or parents if defendant is deported?</p>  |
| <p>8. Defendant's Attitude Toward Criminal Behavior</p>      | <p>Acceptance of guilt? Reason for criminal act?</p>  |
| <p>9. Victim's Attitude toward Defendant</p>                 | <p>Victim wants prosecution of defendant? Victim wants charges dropped? Victim was the primary aggressor?</p>   |
| <p>10. Type of Judge with Sentencing Authority</p>           |   |
| <p>11. Dividing Lines regarding Immigration Consequences</p> | <p>Aggravated Felony: Category v. Sentence Crimes 365 v. 364 days term of imprisonment. Crimes Involving Moral Turpitude: possible maximum sentences.</p>   |

#### *D. Grounds of Inadmissibility*

Any non-citizen who applies to become a legal permanent resident must overcome the grounds of inadmissibility in order to be granted permanent residency. Such non-citizens include immediate family members who are beneficiaries of relative visa petitions, such as the daughter of a United States citizen or legal permanent resident. Other such non-citizens are refugees and asylees who may apply to adjust their status to become permanent residents after being in the United States as refugees or asylees for one year.

In a significant departure from past law, all legal permanent residents who have committed certain crimes and have not been granted a waiver under section 212(h) or Cancellation of Removal are now subject to the grounds of inadmissibility upon their return to the United States.<sup>110</sup> This includes permanent residents who fly to another country for business or a vacation as well as those who cross the Canadian or Mexican border to shop or visit family members for only a few hours and then return to the United States. When a legal permanent resident presents herself at the border, she will have to answer questions from a federal officer, including whether she has ever been convicted of any crimes. If a legal permanent resident has been convicted of a crime that is a ground of inadmissibility but has not previously been granted a waiver, that non-citizen will be detained by the I.N.S. and placed in removal proceedings.

The number of different grounds of inadmissibility increased with the passage of IIRAIRA. New grounds include proof of vaccinations and a permanent bar for false claims of United States citizenship. Additional permanent bars include any conviction for violation of a controlled substance law (other than where a non-citizen qualifies for a waiver for a single simple possession offense for thirty grams or less of marijuana) and any conviction or admis-

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110. In *In re Collado*, the Board of Immigration Appeals held that the language of I.N.A. section 101(a)(13)(C)(v) compelled the finding that

[A] lawful permanent resident who has committed an offense identified in section 212(a)(2), who has not since such time been granted relief under sections 212(h) or 240A(a) (to be codified at 8 U.S.C. § 1250a(a)), who departs the United States and returns, shall be regarded as seeking an admission into the United States despite his lawful permanent resident status.

Int. Dec. 3333 at 5 (B.I.A. 1997) (en banc).

The Board stated that the permanent resident is seeking an admission and that the *Fleuti* doctrine regarding entry and a "brief, casual, and innocent departure" does not apply under the clear change in the law. *Id.* at 7.

sion of facts related to murder or torture. Limited waivers for certain grounds are available for non-citizens with United States citizen or legal permanent resident spouses, children or parents, but permanent bars cannot be waived.

1. Statute

**I.N.A. § 212 [8 U.S.C. § 1182]**

**Excludable aliens**

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

[(1) Health-related grounds—omitted here]

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. § 802), is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the

crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). [petty offense exception]

**(B) Multiple criminal convictions**

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is inadmissible.

**(C) Controlled substance traffickers**

Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or coluder with others in the illicit trafficking in any such controlled substance, is inadmissible.

**(D) Prostitution and commercialized vice**

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10 year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether

or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h)),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who engaged in particularly severe violations of religious freedom

Any alien who, while serving as a foreign official, was responsible for or directly carried out, at any time during the preceding 24-month period, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998, and the spouse and children, if any, are inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Gov-



ernment of the United States by force, violence, or other unlawful means, is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity,

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iii)),

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity,

(IV) is a representative (as defined in clause (iv)) of a foreign terrorist organization, as designated by the Secretary under section 219, which the alien knows or should have known is a terrorist organization, or

(V) is a member of a foreign terrorist organization, as designated by the Secretary under section 219, is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purpose of this Act, to be engaged in a terrorist activity.

(ii) Terrorist activity defined

As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any— (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) Engage in terrorist activity defined

As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(iv) Representative defined

As used in this paragraph, the term

"representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is excludable.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of

the Senate of the identity of the alien and the reasons for the determination.

**(D) Immigrant membership in totalitarian party**

**(i) In general**

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

**(ii) Exception for involuntary membership**

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

**(iii) Exception for past membership**

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

**(I) the membership or affiliation terminated at least—**

**(a) 2 years before the date of such application, or**

**(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and**

**(II) the alien is not a threat to the security of the United States.**

**(iv) Exception for close family members**

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of

a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecutions or genocide

[(i) Participation in Nazi persecutions (1933-1945—omitted here)]

(ii) Participation in genocide

Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is inadmissible.

[(4) Public charge—omitted here]

[(5) Labor certification and qualifications for certain immigrants—omitted here]

(6) Illegal entrants and immigration violators

(A) Aliens present without permission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designed by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children

Clause (i) shall not apply to an alien who demonstrates that—

(I) the alien qualifies for immigrant status under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1),

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse

or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

**(B) Failure to attend removal proceeding**

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

**(C) Misrepresentation**

**(i) In general**

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

**(ii) Falsely claiming citizenship**

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is excludable. [This subsection is effective for claims made on or after September 30, 1996.]

**(iii) Waiver authorized**

For provision authorizing waiver of clause (i), see subsection (i).

**(D) Stowaways**

Any alien who is a stowaway is inadmissible.

**(E) Smugglers**

**(i) In general**

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

**(ii) Special rule in the case of family reunifica-**

tion

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301 (b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) Subject of civil penalty

(i) In general

An alien who is the subject of a final order for violation of section 274C [document fraud] is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) Student visa abusers

An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) and who violates a term or condition of such status under section 214(I) is excludable until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid un-

expired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a), or

(II) whose visa has been issued without compliance with the provisions of section 203, is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k).

(B) Nonimmigrants

(i) In general

Any nonimmigrant who—

(I) is not in possession of a passport valid for minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is inadmissible.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) Guam visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam, see subsection (1).

(iv) Visa waiver pilot program

For authority to waive the requirement of clause (i) under a pilot program, see section 217.

(8) Ineligible for citizenship

(A) In general

Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) Draft evaders

Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war



or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 235(b)(1) [summary removal at port of entry] or at the end of proceedings under section 240 [removal proceedings] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United

States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees

No period of time in which an alien has a bone fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered women and children

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if

'violation of the terms of the alien's nonimmigrant visa' were substituted for 'unlawful entry into the United States' in subclause (III) of that paragraph.

(iv) Tolling for good cause

In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who—

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

## (ii) Exception

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

## (10) Miscellaneous

## (A) Practicing polygamists

Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) Guardian required to accompany helpless alien  
Any alien—

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 232(c), and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i), is inadmissible.

## (C) International child abduction

## (i) In general

Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by the order, is inadmissible until the child is surrendered to the person granted custody by that order.

## (ii) Aliens supporting abductors and relatives of abductors

## Any alien who—

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who

is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) Exceptions

Clauses (i) and (ii) shall not apply—

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) Unlawful voters

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is excludable.

(E) Former citizens who renounced citizenship to avoid taxation

Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is excludable.

## 2. Case Law

For case law regarding possible waivers for certain grounds of inadmissibility, see section 212(h) at page 679, section 212(i) at page 683, and section 212(c) at page 685.

### 3. Application to Cases

#### *Case of Herbert from France:*

Herbert came to the United States as an F-1 student in August 1993. In March 1996, he pled guilty to fifth degree possession of cocaine. In July 1997, he married a United States citizen, Harriet. They went to file an application for permanent residency for him at I.N.S. At the window, the clerk reviewed his application and noted that he had checked the box for having been arrested and explained on a separate page that he had been convicted for possession of cocaine. She called a deportation officer who came to the counter and arrested him.

Analysis: Herbert is permanently inadmissible (as well as deportable) for having violated a controlled substance law. No waivers are available for controlled substance violations unless it is for one simple possession of thirty grams or less of marijuana and the non-citizen qualifies for a section 212(h) waiver.<sup>111</sup>

#### *Case of Pamela from Guinea:*

Pamela came to the United States as a legal permanent resident in 1989 based on the family visa petition filed in 1983 by her legal permanent resident father. In October 1991, she pled guilty to charges for gross misdemeanor theft and was given a stay of execution for a nine month sentence and five years of probation. In December 1997, she went to Toronto, Canada to visit her sister who was studying at a university in Toronto. When she presented herself to I.N.S. officers in Detroit in January 1998, she was questioned by the officers. They asked her how long she had been out of the country, why she had gone to Canada and if she had committed any crimes in the United States before she went to visit her sister in Toronto. She told them that she had been convicted for theft but did not serve any jail time. The officers arrested her and detained her at the local I.N.S. detention facility.

Analysis: Pamela is inadmissible. As a permanent resident, she is subject to the grounds of inadmissibility upon her return to the United States. Pamela has been convicted of a crime involving moral turpitude, which does not meet the petty offense exception under I.N.A. section 212(a)(2)(A)(ii) because she has been sentenced to nine months, regardless of the stay of execution. In addition, she did not apply for or receive a grant under section 212(h) or cancellation of removal prior to going to Canada. She will have a hearing with an immigration judge under summary removal pro-

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111. See section 212(h) Waivers *infra* p. 680.

ceedings to determine whether she will be removed from the United States and whether she is eligible for a section 212(h) waiver.

*E. "S" or "Snitch" Visa*

For non-citizens who are arrested and charged with crimes, including drug crimes, snitching on their cohorts in crime may be an opportunity to avoid the consequences of deportation through the "S" visa or "snitch" visa. Congress created the S visa as part of the Violent Crime Control and Law Enforcement Act of 1994 to allow the lawful admission and adjustment of status to become legal permanent residents of non-citizens who provide testimony or information to law enforcement agencies.<sup>112</sup> The S visa allows the spouse, married and unmarried sons and daughters, and parents of the non-citizen to enter the United States with an immigrant visa or to adjust their status to become legal permanent residents if they are already in the United States upon the "snitching" non-citizen's adjustment of status to legal permanent resident.

Under I.N.A. section 101(a)(15)(S), two types of S visas are available. First, for non-citizens whose presence is required for the investigation or prosecution of criminal organizations, up to 200 visas may be issued each fiscal year (throughout the United States). Second, for non-citizens who have reliable information about terrorist groups or organizations, up to fifty visas may be issued each year. The S visa is a nonimmigrant visa valid for three years. At the end of the three year period, if the non-citizen is deemed to have contributed enough information that has substantially contributed to the success of an investigation or prosecution, the non-citizen may apply for adjustment of status under I.N.A. section 245(j). In the case of a non-citizen who has supplied information regarding terrorist organizations, the non-citizen must have substantially contributed to the prevention or frustration of an act of terrorism against a United States person or property or have contributed to the success of an investigation or prosecution of a person involved in an act of terrorism.

Individuals and their attorneys cannot apply for the S visas. Only law enforcement agencies can file applications with the Assistant Attorney General for Criminal Division in the Department of Justice to obtain the S visas. The law enforcement agency must agree to conditions relating to the non-citizen and certify the need for an S visa for the particular non-citizen. The Assistant Attorney

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112. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

General then has seven days to respond to the request. The I.N.S. District Director can still arrest a non-citizen to initiate removal (formerly deportation) proceedings against her if the request to the Assistant Attorney General is denied or the non-citizen commits another crime at any time.

If your non-citizen client is interested in working with a law enforcement agency, contact an immigration attorney who can work with you to assist the local law enforcement agency to prepare the application.

### III. Juveniles and Immigration Consequences

Non-citizen juveniles may face immigration consequences for certain criminal acts. The consequences depend on the nature of the acts and whether they are in juvenile delinquency proceedings, in extended juvenile jurisdiction proceedings or certified to stand trial as an adult in Minnesota.

The Juvenile Justice Project at the Pacer Center, Inc. has been created to work with youth, including non-citizen youth, in the Minnesota juvenile justice system. The staff can provide assistance to public defenders and coordinate with other agencies.<sup>113</sup>

The Minnesota Disability Law Center works with youth with disabilities in educational settings, their families and attorneys representing disabled youth in juvenile court proceedings.<sup>114</sup> Under the Individuals with Disabilities Education Act<sup>115</sup> and Minnesota Statute section 120.17, it may be possible for defense counsel to move for dismissal of a juvenile court petition where the non-citizen youth's behavior on school premises or a school bus is based on a disability and his special education needs have not been sufficiently addressed by the school.

#### A. Juvenile Delinquency Proceedings

Non-citizens placed in juvenile delinquency proceedings who have been found to have committed an act of juvenile delinquency have *not* been subject to deportation or exclusion proceedings under deportation or exclusion law. A juvenile who is adjudicated

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113. To contact the Juvenile Justice Project, call 612/827-2966. For more information on youth with disabilities, the Juvenile Justice Project has published a manual, *Unique Challenges, Hopeful Responses. A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System* (1997).

114. The Minnesota Disability Law Center is located at 430 First Avenue North, Suite 300 in Minneapolis. To contact the Special Education Unit, call 612/332-1441.

115. 20 U.S.C. § 1400 et seq. (1997).



delinquent by the juvenile court is not considered to have committed a crime unless the juvenile court certifies the matter in accordance with Minnesota Statute section 260.125, transfers the matter to a court in accordance with section 260.193, or convicts the child as an extended jurisdiction juvenile and subsequently executes the adult sentence under section 260.126, subdivision 5. Under Minnesota Statute section 260.211, subdivision 1(a), an adjudication of a child in the jurisdiction of the juvenile court shall not operate to impose any of the civil disabilities imposed by conviction, nor deem the child to be a criminal, nor constitute a criminal conviction. In addition, the disposition of the child and any evidence given by the child cannot be admitted as evidence against the child in any case or proceedings in any other court except it may be later used to determine a proper sentence.<sup>116</sup>

An act of juvenile delinquency is not considered a crime under deportation or exclusion law.<sup>117</sup> Since an act of juvenile delinquency is not considered to be a crime for deportation purposes, non-citizens placed in juvenile delinquency proceedings will not be deportable for their acts of delinquency. They may, however, be found to be inadmissible based on their conduct and consequently deportable. A non-citizen juvenile is inadmissible: for an adjudication or admissions involving controlled substances other than minor drug offenses relating to simple possession or use of controlled substances that occurred under age eighteen;<sup>118</sup> if the I.N.S. has "reason to believe" that the juvenile is or has been a drug trafficker, drug abuser or drug addict;<sup>119</sup> or if she was involved in prostitution within ten years of the date of her application for adjustment of status to become a legal permanent resident.<sup>120</sup> A non-citizen juvenile may also be inadmissible and deportable for having knowingly encouraged, induced, assisted, abetted or aided another non-citizen to enter the United States under I.N.A. sections 237(a)(1)(E) and 212(a)(6)(E).

In addition, certain dispositions for juvenile delinquency bar applicants from adjusting to become legal permanent residents through Family Unity under the 1986 Amnesty and 1988 Special Agricultural Worker (SAW) Programs. If an act of juvenile delinquency, which if committed by an adult would be a felony involv-

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116. See MINN. STAT. § 260.211, subd. 1(a).

117. See *In re Ramirez-Rivero*, 18 I. & N. Dec. 135 (B.I.A. 1981); 22 C.F.R. § 40.21(a)(2) (1998).

118. See 9 FOREIGN AFF. MAN. 40.21(b) N2.1 (1996).

119. *Id.*; see I.N.A. § 212(a)(2)(C).

120. See I.N.A. § 212(a)(2)(D).

ing violence or the threat of physical force against another person, then the juvenile disposition is a bar to Family Unity benefits granted or extended after September 30, 1996 under the Immigration Act of 1990 section 301(e) as amended by the IIRAIRA section 383.

### 1. Defense Practice Tip

In cases involving the trafficking or manufacturing of controlled substances, smuggling of non-citizens or prostitution, the juvenile court records should be sealed to avoid immigration consequences. Even though the juvenile disposition is not a "conviction" for immigration purposes, a juvenile non-citizen may still be found to be inadmissible in these cases, which may result in the juvenile being found deportable and subsequently removed from the United States.

### *B. Extended Juvenile Jurisdiction (EJJ) Proceedings*

In 1994, the Minnesota legislature passed the extended juvenile jurisdiction (EJJ) statute, which enables a juvenile court judge to place a juvenile on probation until he or she turns twenty-one years old.<sup>121</sup> Since the statute was recently enacted, parts of the statute remain unclear regarding long-term civil and immigration consequences. The Immigrant Law Center of Minnesota (a.k.a. Oficina Legal) sent a letter to the local I.N.S. office in 1998 requesting a formal I.N.S. policy and is still waiting for a response. A formal policy will enable defense attorneys to adequately advise their juvenile non-citizens about the immigration consequences for juvenile delinquency adjudications and possible revocations of EJJ jurisdiction under the EJJ statute. As of May 31, 1999, the Board had not decided any cases involving hybrid statutes, such as Minnesota's statute for EJJ proceedings, and the issue of deportability for delinquency adjudications or executed sentences under such statutes.

### 1. Minnesota Statute

Defense attorneys representing juveniles in extended juvenile jurisdiction (EJJ) proceedings should *treat the juvenile's case as though the juvenile were an adult* for purposes of evaluating whether the juvenile may face subsequent immigration consequences. Under Minnesota law, a juvenile alleged to have committed a felony offense may be placed in EJJ proceedings by the court

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121. See MINN. STAT. § 260.126.

after a request by the prosecutor and hearing by the court.<sup>122</sup> If the EJJ prosecution results in a guilty plea or finding of guilt, the court imposes a juvenile disposition and an adult criminal sentence with a stay of execution.<sup>123</sup> If the juvenile then violates probation or other terms of the disposition or commits a new offense, then the court may revoke the stay of execution of the adult sentence and probation.<sup>124</sup> Once the stay of execution is revoked, then the juvenile's extended jurisdiction status and juvenile court jurisdiction are terminated.<sup>125</sup> Ongoing jurisdiction for adult sanctions is with the adult court.<sup>126</sup>

Thus, a juvenile placed in extended juvenile jurisdiction (EJJ) proceedings has an adjudication of delinquency and an adult sentence, which turns into an adult conviction and sentence if she violates probation and the adult sentence is executed. In essence, revocation of EJJ status imposes an adult conviction and an adult sentence.<sup>127</sup>

Since immigration consequences do attach where the EJJ juvenile violates probation, the attorney should assume that the EJJ juvenile may violate probation. Therefore, the felony charges must be evaluated for possible grounds of deportation and inadmissibility, including whether the conviction will be considered to be a crime involving moral turpitude and/or an aggravated felony. The analysis regarding immigration consequences will be the same as for adult non-citizens.

## 2. Application to Cases

### *Case of Marlo from Italy:*

In 1995, Marlo entered the United States at age sixteen as a legal permanent resident with his parents who invested a large amount of money to open a chain of bakeries and obtained their green cards. He got into a fight on the soccer field eight months later and punched another player in the face, breaking the player's

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122. See MINN. STAT. § 260.126, subd. 1 and 2.

123. See MINN. STAT. § 260.126, subd. 4(a).

124. See MINN. STAT. § 260.125, subd. 5.

125. See *id.*

126. See *id.*

127. This appears to be the policy of the St. Paul District I.N.S. office. In addition, a letter dated February 10, 1997, addressed to an Anoka county attorney, district counsel for the Immigration and Naturalization Service Office in Bloomington, Minnesota, stated that no adverse immigration consequences attach for a juvenile non-citizen in EJJ proceedings as long as the stay of the adult sentence is not revoked. Letter from Richard Soli, District Counsel of the I.N.S., to Barbara Jondahl, Assistant County Attorney for Anoka County (Feb. 10, 1997) (on file with the *Journal of Law and Inequality: A Journal of Theory and Practice*).

nose. The prosecutor filed a petition to place him in EJJ proceedings which was granted by the court. Marlo was adjudicated guilty of third degree assault. The court stayed the execution of a year and a day sentence. Two months later, Marlo was arrested for allegedly stealing a can of freon from the local gas station. His probation was revoked and his sentence was executed.

Marlo is now deportable for having been convicted of an aggravated felony. He has been convicted of a crime of violence for which a year term of imprisonment has been imposed. Unless he has a claim of persecution for withholding of removal, which is unlikely in his case, he will be found to be deportable for having been convicted of an aggravated felony and will be removed from the United States. No waivers are available to Marlo.

### 3. Defense Practice Tip

In EJJ proceedings, a juvenile is technically supposed to admit to a felony and receive a felony sentence of a year and a day. To avoid an aggravated felony conviction for immigration purposes, negotiate a sentence for 364 days or less with the prosecution.<sup>128</sup>

### *C. Certification As an Adult*

Where the possibility exists that a juvenile non-citizen may be certified to stand trial as an adult under Minnesota Statute section 260.125, then the case must be analyzed as if the juvenile were an adult non-citizen. A juvenile non-citizen with an adult conviction and sentence will be treated as an adult for immigration purposes.

## **IV. Immigration Remedies or Defenses Under the Immigration and Nationality Act for Non-Citizens**

### *A. Overview*

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),<sup>129</sup> which became effective April 1, 1997, Congress created a new system of removal proceedings to deport or remove non-citizens from the United States. Removal proceedings have combined deportation and exclusion proceedings into a single proceeding. A removal order has the same result as a

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128. For a list of aggravated felonies, see Definition of Aggravated Felony, page 612.

129. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

deportation or exclusion order: the non-citizen is ordered to be physically removed from the United States.

The charging documents issued by the I.N.S. control whether a non-citizen is in deportation, exclusion or removal proceedings. Persons who were issued the charging document, Order to Show Cause, by the I.N.S. prior to April 1, 1997, remain in deportation proceedings, and those issued a different charging document for exclusion proceedings prior to April 1, 1997, remain in exclusion proceedings. Persons in deportation proceedings have made an "entry" for immigration purposes and, as a result, have more rights and constitutional protections than those in exclusion proceedings who have not made an "entry" for immigration purposes. Since April 1, 1997, the I.N.S. has issued the new charging document called a Notice to Appear to place non-citizens into removal proceedings. The distinction is critical because different forms of relief are available to non-citizens depending on whether they have been placed in deportation, exclusion or removal proceedings.<sup>130</sup>

### *B. Good Moral Character*

Good Moral Character (GMC) is a statutory requirement for certain immigration benefits under the Immigration and Nationality Act in both removal and deportation/exclusion proceedings. Such immigration benefits include registry, voluntary departure, suspension of deportation, naturalization and cancellation of removal for certain nonpermanent residents. The finding of good moral character may also affect the determination of applications for discretionary relief, including asylum and adjustment of status to a legal permanent resident.

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#### 130. General Chart of Forms of Immigration Relief

Proceedings Begun: AFTER 4/1/97

Proceedings Begun: BEFORE 4/1/97

Removal Proceedings	Deportation/Exclusion Proceedings
Cancellation of Removal for Certain Permanent Residents	§ 212(c) Waiver
Cancellation of Removal for Nonpermanent Residents	Suspension of Deportation
§ 212(h) Waiver	§ 212(h) Waiver
Asylum	Asylum
Withholding of Removal	Withholding of Deportation
Adjustment of Status Based on a Family Relationship	Adjustment of Status Based on a Family Relationship

Certain statutory bars to demonstrating good moral character have been enumerated in the immigration statute.<sup>131</sup> The statutory list, however, is not exhaustive. Courts have created two tests to determine whether an applicant has shown good moral character in the exercise of discretion. In *Postusta v. United States*, Judge Learned Hand stated that good moral character should be defined based on the ethical standards current at the time.<sup>132</sup> Other courts have defined good moral character as "conduct which measures up as good among the average citizens of the community in which the applicant lives, or that it is conduct which conforms to the 'generally accepted moral conventions current at the time.'"<sup>133</sup>

### 1. Statute

#### I.N.A. § 101(f) [8 U.S.C. § 1101(f)]

For the purposes of this Act—

No person shall be regarded as, or found to be a person of good moral character who, during the period for which good moral character is required to be established, is, or was

(1) a habitual drunkard;

(2) [Removed]

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D) [prostitution and commercialized vice], (6)(E) [smuggling aliens], and (9)(A) [certain aliens previously removed] of section 212(a) of this Act; or subparagraphs (A) [crimes involving moral turpitude or controlled substances] and (B) [multiple criminal convictions] of section 212(a)(2) and subparagraph (C) [controlled substance traffickers] thereof such section (except as such paragraph relates to a single offense of simple possession of thirty grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

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131. See I.N.A. § 101(f).

132. 285 F.2d 533, 535 (2d Cir. 1961).

133. *In re Denssy*, 200 F. Supp. 354, 358 (D. Del. 1961) (quoting Annotation: Naturalization - 'Good Moral Character,' 22 A.L.R.2D 244, 250 (1952)); see also, *In re Paoli*, 49 F. Supp. 128, 130 (N.D. Cal. 1943).

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, *regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period*; [emphasis added]

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

## 2. Exceptions to Statutory Bars

Two exceptions exist to the statutory bars above for crimes involving moral turpitude.<sup>134</sup> First, a crime classifiable as a petty offense under I.N.A. section 212(a)(2)(A)(ii)(II) is not subject to the mandatory bar. Second, a pardon for a conviction for a crime involving moral turpitude will not trigger the mandatory bar.<sup>135</sup>

## 3. Application to Cases

### a. GMC and Naturalization

#### *Case of Xia from Laos:*

Xia came to the United States as a refugee in 1988 and adjusted his status to a legal permanent resident in 1989. He was convicted for fifth degree possession of opium in 1995. An applicant for citizenship must demonstrate his good moral character for five years as a legal permanent resident prior to applying. Xia's opium conviction statutorily precludes him from ever establishing good moral character. In addition, he can be deported based on the drug conviction if he were to apply for naturalization or if he were to come to the attention of the I.N.S. Xia should *not* apply for

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134. Expungements of convictions for crimes involving moral turpitude under state rehabilitative statutes are no longer given effect in immigration proceedings. See *In re Roldan*, Int. Dec. 3377 (B.I.A. 1999); see also *supra* p. 587 (discussing the definition of "conviction").

135. Pardons forgive convictions under moral turpitude deportation grounds only. See 8 U.S.C. § 1251(A)(2)(a)(iv), I.N.A. § 241(a)(2)(A)(iv); see also *In re Lindner*, 15 I. & N. Dec. 170 (B.I.A. 1975). In an application for naturalization, a pardon for murder will not erase the basis for a finding of a lack of good moral character since the fact of murder still exists. See, e.g., *In re Salani*, 196 F. Supp. 513 (D.C. Cal. 1961); *In re Armando de Angelis*, 139 F. Supp. 779 (E.D.N.Y. 1956).

naturalization.

*John from Finland:*

John entered the United States as a university student in 1970. In 1975, he married a United States citizen and became a permanent resident. In 1992, he was convicted for credit card fraud and served 150 days in jail. In 1993, he was convicted for welfare fraud in the amount of \$2000 and served 100 days in jail. John is statutorily ineligible for citizenship because he has served an aggregate of 250 days in jail within the five year period required for good moral character. In addition, he is deportable for having been convicted for a second crime involving moral turpitude since he became a legal permanent resident. John should *not* apply for naturalization.

*b. GMC and Non-Immigrant Visas*

*Case of Marla from Argentina:*

Marla entered the United States in 1994 on a student visa. In 1996, she stopped attending the technical college and began working as a waitress. In December 1996, she was driving home from work when the police pulled her over for failing to come to a complete stop at a red light. As Marla got out of the car to follow the officer to his squad car, a baggie containing sixty grams of marijuana fell out of her coat pocket. She was convicted of fifth degree possession of marijuana for sixty grams of marijuana and the county attorney called I.N.S. In removal proceedings in May 1997, the immigration judge found that Marla had violated her F-1 visa on account of her separation from the college and her fifth degree controlled substance violation. Marla requested the immigration relief of voluntary departure. An applicant for voluntary departure must show good moral character for at least five years immediately preceding the application. The immigration judge found Marla statutorily ineligible for voluntary departure based on her marijuana conviction and ordered her removed from the United States. Under the judge's final removal order, Marla is barred from returning to the United States for at least ten years whereas a grant of voluntary departure would not have barred her from returning to the United States. Based on her controlled substance conviction, however, she is permanently inadmissible.



c. *GMC and Suspension of Deportation/Cancellation of Removal*

*Case of Jose from Guatemala:*

Jose entered the United States illegally in 1989, fleeing forced recruitment by the Guatemalan Army. In 1991, he filed for immigration status as part of the *American Baptist Churches* settlement in which Salvadorans and Guatemalans were permitted to have their claims for asylum adjudicated under fair terms. In January 1997, he was convicted for fifth degree assault for a bar fight in which Jose defended himself against racially biased comments by another patron. Based on arguments by his public defender, the judge ordered Jose to serve 100 days in jail and agreed to a stay of imposition for the remainder of the eleven month sentence. Jose has not been convicted of an aggravated felony and remains prima facie eligible for suspension of deportation. Fifth degree assault is not a crime involving moral turpitude. The immigration judge may, however, find that the underlying facts of Jose's conviction preclude Jose from establishing good moral character.

*Case of Sylvia from Sierra Leone:*

Sylvia entered the United States illegally in 1982. In 1985, she gave birth to a United States citizen son. In 1988, she pled guilty to driving under the influence and was placed on probation. In June 1998, the I.N.S. arrested her during a workplace raid and began removal proceedings against her. Sylvia is statutorily eligible for cancellation of removal; her conviction for driving under the influence is not a statutory bar to good moral character. To be eligible for cancellation of removal, Sylvia must show that she has been physically present in the United States for at least ten years, has had good moral character for the past ten years and there would be exceptional and extremely unusual hardship to a United States citizen child if she were removed from the United States.

4. Defense Practice Tip

Where a non-citizen would otherwise be eligible for relief from deportation or removal and has been charged with a crime triggering one of the mandatory bars to good moral character, an attempt should be made to have the non-citizen charged under another provision of law that will not trigger such bars. In addition, the immigration definition of "conviction" must be considered where the non-citizen is required to admit facts on the record in order to be eligible for pretrial diversion or to enter a guilty plea.

### *C. Removal Proceedings*

Legal permanent residents with criminal convictions may be eligible for limited forms of relief, including cancellation of removal for certain legal permanent residents, section 212(h) waiver for an adjustment of status, asylum and withholding of removal. Undocumented persons may be eligible for a different category of cancellation of removal, adjustment of status, voluntary departure, asylum and withholding of removal.

#### **1. Cancellation of Removal: Non-Citizens *with* Criminal Convictions**

Cancellation of Removal for Certain Permanent Residents is a discretionary waiver available to long-term legal permanent residents who have been convicted of certain crimes, not including aggravated felonies. An immigration judge will weigh positive and negative equities in determining whether the ground for deportability that has arisen since the non-citizen became a permanent resident will be waived. Non-citizens who have previously been granted section 212(c) waivers, suspension of deportation or cancellation of removal for certain permanent residents are ineligible for this relief.

##### *a. Statute*

##### **I.N.A. § 240A [8 U.S.C. § 1229b]**

##### **Cancellation of removal; adjustment of status**

##### **(a) Cancellation of removal for certain permanent residents**

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

. . . .

##### **(c) Aliens ineligible for relief**

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as

a nonimmigrant exchange alien as defined in section 101(a)(15)(J), or has acquired the status of such nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 212(e).

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J) or has acquired the status of such nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 212(e), and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 212(a)(3) [security and related grounds] or deportable under section 237(a)(4) [security and related grounds].

(5) An alien who is described in section 241(b)(3)(B)(i) [statutorily barred from withholding of removal due to persecution of another on account of one of five protected grounds].

(6) An alien whose removal has been previously cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a) that renders the alien inadmissible to the United States under section 212(a)(2) [convictions of certain crimes] or removable from the United States under section 237(a)(2) [criminal offenses] or 237(a)(4) [security and related

grounds], whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in armed forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

*b. Statutory Changes from I.N.A. Section 212(c) Relief*

In IIRAIRA,<sup>136</sup> Congress created a new form of relief for long-term permanent residents who have been convicted of crimes not constituting aggravated felonies and are placed in removal proceedings. Cancellation of Removal for Certain Permanent Residents, I.N.A. section 240A, replaces section 212(c) relief which had been available to non-citizens convicted of crimes for which they could be deported. In very limited cases, section 212(c) relief remains available to eligible non-citizens against whom deportation or exclusion proceedings were begun prior to April 1, 1997.<sup>137</sup> Cancellation for legal permanent residents is available to non-citizens placed in Removal Proceedings on or after April 1, 1997.<sup>138</sup>

*c. Case Law*

The Board held that once a non-citizen meets the statutory requirements for cancellation, the non-citizen must also establish

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136. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

137. See IIRAIRA § 347 (noting that replacement of § 212(c) applies prospectively from the date of the IIRAIRA enactment).

138. See *id.*

that she warrants such relief as a matter of discretion.<sup>139</sup> The general standards set forth in *In re Marin*<sup>140</sup> for the exercise of discretion for section 212(c) relief apply to the exercise of discretion for cancellation.<sup>141</sup>

*d. Application to Cases*

*Case of Joshua from England:*

Joshua entered the United States in January 1989 with a B-2 visitor's visa. He became a legal permanent resident in May 1989 as the step-son of a United States citizen. On October 15, 1996, he pled to one count of misdemeanor domestic assault. His previous convictions included two other domestic assault misdemeanor convictions entered prior to September 30, 1996, possession of drug paraphernalia and fifth degree possession of marijuana. He has four United States citizen children under the age of eight from a relationship with a United States citizen. In June 1997, the I.N.S. served him with a Notice to Appear.

Analysis: Joshua is deportable due to his misdemeanor domestic assault conviction in October 1996 but not for the prior domestic assault convictions since they were entered prior to the passage of IIRAIRA on September 30, 1996. He is statutorily eligible for cancellation of removal because he has not been convicted of an aggravated felony and has been lawfully in the United States for eight years as a permanent resident.

*Case of Paul from Liberia:*

Paul came to the United States as a legal permanent resident in 1973 when he was eleven years old as the son of a legal permanent resident. In 1979, he pled guilty to petty theft for stealing \$5 worth of batteries from a gas station and was placed on probation for five months. In 1992, he was convicted for fifth degree possession of cocaine. He successfully completed one year of probation. In May 1997, he was arrested on suspicion of possession of crack which turned out to be drywall plaster. Charges were never filed by the county attorney. Upon his arrest, however, the jailer called the I.N.S. to report him. Although he was to be released from the county jail, I.N.S. had placed an immigration hold on him and he was transferred to I.N.S. custody where he received a Notice to Appear charging him with being deportable for his 1992 controlled

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139. See *In re C-V-T*, Int. Dec. 581 (B.I.A. 1998).

140. 16 I. & N. Dec. 581 (B.I.A. 1978).

141. See *infra* pp. 686-92 (discussing §212(c) relief and relevant case law).

substance violation.

Analysis: Paul is deportable for having been convicted of a controlled substance since he was admitted to the United States as a legal permanent resident. His petty theft does not make him deportable because the maximum possible sentence was less than one year. Paul has been a permanent resident for more than twenty-five years and has not been convicted of an aggravated felony. Therefore, he is eligible for cancellation of removal.

## 2. Cancellation of Removal: Non-Citizens *Without* Criminal Convictions

Cancellation of Removal for Nonpermanent Residents is a discretionary waiver of the ground of deportability for non-citizens who have been physically present in the United States without being detected or arrested by the I.N.S. for at least ten years before applying for cancellation and who can show exceptional and extremely unusual hardship to a qualifying relative. Cancellation of removal is available as a defense to removal (deportation) in removal proceedings before the immigration judge. Special rules apply to non-citizen spouses and children who have been battered or subjected to extreme cruelty by a United States citizen or legal permanent resident spouse or parent. A non-citizen who is granted the waiver will be a legal permanent resident as of the date that a visa number becomes available. Immigration judges may only grant 4000 waivers per year, although certain nationalities are exempt from the yearly cap and the new standard of hardship under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).<sup>142</sup>

### *a. Statute*

#### **I.N.A. § 240A [8 U.S.C. § 1229b]**

#### **Cancellation of removal; adjustment of status**

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

#### **(1) In general**

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the

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142. For statutory eligibility specifically affecting Nicaraguans and Cubans who entered the United States on or before December 1, 1995 as well as Salvadorans, Guatemalans and persons from the former Soviet Union and eastern block countries who entered the United States prior to the end of 1990 seeking refuge, see the NACARA, Pub. L. No. 105-100, 111 Stat. 2160 (1997), or contact an immigration attorney.

United States if the alien—

(A) has been physically in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2) [conviction of certain crimes], 237(a)(2) [criminal offenses], or 237(a)(3) [security and related grounds]; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(A) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent);

(B) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;

(C) the alien has been a person of good moral character during such period;

(D) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraph (1)(G) or (2) through (4) of section 237(a), and has not been convicted of an aggravated felony; and

(E) the removal would result in extreme hardship to the alien, the alien's child, or (in the case of an alien who is a child) to the alien's parent.

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence rele-

vant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2).

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J), or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 212(e).

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J) or has acquired the status of such nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 212(e), and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 212(a)(3) or deportable under section 237(a)(4).

(5) An alien who is described in section 241(b)(3)(B)(i).

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigra-



tion Reform and Immigrant Responsibility Act of 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in armed forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual Limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension

and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 244(a).

*b. Case Law*

The standard of hardship changed for cases brought since April 1, 1997. The Board has not yet defined the new standard of "exceptional and extremely unusual hardship." This new standard covers all cases initiated by the filing of a Notice to Appear in Removal Proceedings on or after April 1, 1997, except for the cases that fall under the NACARA for which the extreme hardship standard will be applied. The standard for extreme hardship was defined by the Board in *In re Anderson*,<sup>143</sup> to include the age of the non-citizen, family ties in the United States and abroad, the length of residence in the United States, the non-citizen's health, conditions in the country to which the non-citizen is deportable (including economic and political conditions), the non-citizen's financial status (including employment and occupation), the possibility of other means of adjustment of status, whether the non-citizen is of special assistance to the United States or community, her immigration history in the United States (including immigration violations) and ties to the United States community.

*c. Application to Cases*

*Margarita from Panama:*

Margarita entered the United States as an F-1 student in January 1987 to study English for one year. In November 1997, she married a legal permanent resident, Pablo, from Panama. Pablo was the only child of his parents who are deceased. They have a United States citizen son who was born with cerebral palsy and requires constant care. Pablo did not file a marriage visa petition for Margarita because he said that she did not need a green card because she was going to remain at home to care for their son. In May 1997, Pablo fell from a scaffold at a construction site and died from internal hemorrhaging. After his funeral, Margarita asked a neighbor to watch her son. She went to apply for a job at the mall where a store owner called the I.N.S. after discovering that she did not have a green card. Margarita was arrested and then released to continue caring for her son.

Analysis: Margarita is eligible for cancellation of removal. She has been physically present in the United States for more

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143. 16 I. & N. Dec. 596 (B.I.A. 1978).

than ten years and has good moral character. She must show that her United States citizen son would suffer exceptional and extremely unusual hardship if she were removed or deported to Panama. Such hardship can be shown through evidence of lack of medical facilities and support for her son in Panama as well as the fact that if she is deported, her son does not have any other family in the United States who can care for him.

*Enrique from Spain:*

Enrique entered the United States as a B-2 tourist in 1991. He overstayed his sixty-day visa and started working for his uncle. In 1995, he married Sonia from Spain who was undocumented. Their United States citizen daughter was born in January 1997. In November 1997, Enrique was stopped by the police for running a red light. The police officer asked him for his license and his green card. Enrique told the officer that he did not have a green card. The officer called the I.N.S. who arrested Enrique and issued him a Notice to Appear before an immigration judge. Enrique does not have any family member in the United States who could file a family visa petition for him which would give him an immediate relative visa.

Analysis: Enrique is not eligible for cancellation of removal. He has not been in the United States for the statutory minimum of ten years. In addition, he cannot show any exceptional and extremely unusual hardship to his United States citizen daughter other than the normal consequences of deportation. Enrique has no defense to removal except voluntary departure.

### 3. Asylum and Refugees

Non-citizens may arrive in the United States after being forced to flee their home countries due to political threats on their lives. In certain countries, membership in a union, student group or political party which peacefully and politically opposes an elected or military government can put a person's life at risk. Many non-citizens have been arrested, imprisoned and tortured or have suffered other forms of persecution before arriving in the United States. They may have family members and friends who have been disappeared by governmental or non-governmental forces. They fear for their safety and their family's safety if they are forced to return to their home country.

Such persons are eligible to apply for asylum unless they are statutorily barred for certain criminal convictions, including aggravated felonies and particularly serious crimes. Applicants must

meet the definition of "refugee," which is an international standard,<sup>144</sup> adopted by the United States in the enactment of the Refugee Act of 1980.<sup>145</sup> A refugee is a non-citizen outside of her country of nationality or country of last habitual residence where a she has no nationality

who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . .

. . .<sup>146</sup>

An asylum applicant must prove that a possibility of persecution exists (10% chance),<sup>147</sup> which differs from the probability of persecution standard required for withholding of deportation/removal (51% or more likely than not).<sup>148</sup>

An immigration judge exercises her discretion in deciding whether to grant an applicant asylum. While most misdemeanor convictions and traffic violations will not statutorily bar a non-citizen from applying for asylum, such convictions and violations may be used to deny asylum in the exercise of discretion. A non-citizen who is granted asylum within the territory of the United States has the immigration status of an asylee indefinitely.

A non-citizen convicted of an aggravated felony is statutorily barred from applying for asylum. Nonetheless, she may be eligible to apply for withholding of removal/deportation where the imposed term of imprisonment is less than five years. If she demonstrates that it is more likely than not that she will suffer persecution if returned to her country of nationality (or of country last habitual residence where an applicant has no nationality), the applicant must be granted withholding of removal/deportation unless she is statutorily ineligible on account of having been convicted of a "particularly serious crime" or other statutory bar.<sup>149</sup>

Refugees are non-citizens who are determined by representatives of the United States government to meet the definition of refugee while overseas. Often they are recognized as refugees

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144. Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, T.I.A.S. No. 6577 (1951); Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, T.I.A.S. No. 6577 (1967).

145. Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980).

146. I.N.A. § 101(a)(42)(A).

147. See *Cardoza-Fonseca v. I.N.S.*, 480 U.S. 421, 469 (1987).

148. See *Stevic v. I.N.S.*, 467 U.S. 407, 430 (1984).

149. For the statutory bars to withholding of removal and a discussion on particularly serious crimes, see *Withholding of Removal*, page 673.

while in a refugee camp run by the United Nations High Commissioner on Refugees. Non-citizens may also apply for refugee status at a United States Consulate or Embassy. Refugees are admitted to the United States under I.N.A. section 207. A non-citizen who is a refugee has the immigration status of a refugee indefinitely.

The issue of convictions again becomes an issue when asylees and refugees apply for lawful permanent resident status. Asylees and refugees apply for adjustment of status immediately prior to the end of their first year as asylees or refugees. At the time of their applications for adjustment, they are subject to all of the grounds of inadmissibility for which a waiver may be possible for certain convictions and at the same time may also be subject to the grounds of deportation for convictions.<sup>150</sup> If a refugee or an asylee is found to have been convicted of an aggravated felony and sentenced to less than five years, then she may be eligible for removal or deportation. A refugee or asylee who is found to have been convicted of a particularly serious crime for a crime which is not an aggravated felony will also be statutorily ineligible for withholding of removal/deportation.<sup>151</sup> Where an asylee, refugee or other non-citizen is ineligible for asylum, cancellation or withholding, the non-citizen may be eligible for deferred removal if she can prove by substantial evidence that she will probably be tortured upon return to her country.<sup>152</sup> In the case where a refugee or asylee is statutorily barred even from withholding of removal/deportation, analyzing the possibility of a Rule 15 Motion to Withdraw a Guilty Plea and post-conviction relief is critical.

*a. Statute*

Below are the definition of "refugee"<sup>153</sup> and relevant sections of asylum law.<sup>154</sup>

**I.N.A. § 101(a)(42) [8 U.S.C. § 1101(a)(42)]**

The term "refugee" means—

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return

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150. See Grounds of Inadmissibility *supra* p. 627, Grounds of Deportation *supra* p. 593.

151. See Withholding of Removal *infra* p. 674.

152. See Convention Against Torture, *infra* p. 697.

153. I.N.A. § 101(a)(42).

154. I.N.A. § 208.

to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such persons' nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

#### **I.N.A. § 208 [8 U.S.C. § 1158]**

##### **Asylum procedure**

###### **(a) Authority to apply for asylum**

###### **(1) In general**

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 235(b).

###### **(2) Exceptions**

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for Granting Asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General de-

termines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activities), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).



(C) Additional limitations

The Attorney General may by regulations establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(c) Asylum Status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances [in the country of nationality or last habitual residence from which the alien fled persecution];

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement to a country (other

than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 212(a) and 237(a), and the alien's removal or return shall be directed by the Attorney General in accordance with sections 240 and 241.

*b. Case Law*

An applicant for asylum has established a well-founded fear of persecution if she shows that a reasonable person in her circumstances would fear persecution based on one of the five grounds specified in the Act.<sup>155</sup> Unlike withholding of deportation or removal, asylum may be denied in the exercise of discretion to an alien who establishes statutory eligibility for the relief.<sup>156</sup> Case law regarding the five grounds of asylum is extensive.

Criminal convictions are considered by the I.N.S. asylum officer or the immigration judge who grants asylum in the exercise of discretion. Under *In re Pula*,<sup>157</sup> an asylum officer or immigration judge will consider the totality of the circumstances in the exercise of discretion. Factors to be considered include: whether the appli-

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155. See *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

156. See *id.*; *Cardoza-Fonseca v. I.N.S.*, 480 U.S. 421 (1987).

157. 19 I. & N. Dec. 467 (B.I.A. 1987).

cant passed through any other countries or arrived in the United States directly from the country of persecution; whether orderly refugee procedures were in fact available to help him in any country he passed through and whether he made any attempts to seek asylum before coming to the United States; the length of time the applicant remained in a third country and living conditions, safety, and potential for long-term residency; personal ties to the United States; whether the applicant engaged in fraud to circumvent orderly refugee procedures and the seriousness of any fraud; age or health; immigration violations in the United States; and criminal history in the United States.<sup>158</sup> The danger of persecution should generally outweigh all but the most egregious of adverse factors in the applicant's case.<sup>159</sup>

*c. Application to Cases*

*Case of Ivan from Bulgaria:*

Ivan was expelled from Bulgaria by Communist government officials for his political organizing activities in March 1988. He lived in Austria for three years where he applied for asylum but his asylum claim was never adjudicated by the government. He came to the United States as a tourist in July 1991 and immediately applied for asylum with the I.N.S. In December 1995, he was arrested for driving under the influence. He pled guilty and received fifteen days in the county jail.

Analysis: Ivan is eligible for asylum. He has not been convicted of an aggravated felony. His conviction will be considered in the totality of the circumstances and should not bar a favorable exercise of discretion if the immigration judge finds him credible and to have a well-founded fear of future persecution. In light of the changed country conditions and democracy now in Bulgaria, he may be denied for failure to show a well-founded fear of future persecution in Bulgaria. As a former citizen of an eastern block country, he may be eligible for cancellation of removal under the NACARA.<sup>160</sup>

*Michael from Sudan:*

Michael was forcibly recruited into a guerrilla force at age twelve to fight against the Muslim government in southern Sudan. Three years later he defected and fled to a refugee camp in Kenya.

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158. *See id.*

159. *See id.*

160. *See* Cancellation of Removal for Nonpermanent Residents *supra* p. 660.

In 1994, he was recognized by the United States government as a refugee and brought to the United States where he resettled in Minnesota. In July 1995, he adjusted his status to become a legal permanent resident. In December 1995, he went with a friend to North Dakota to visit other friends. Outside of a grocery store, he was assaulted by some local teenagers looking for money. His friends called the police who arrived at the store. One of the officers grabbed Michael from behind and Michael kicked him, believing that the officer was one of the teens. He was arrested and later pled guilty to fourth degree assault. He received a suspended sentence of nine months and was placed on unsupervised probation. In May 1997, his probation officer told him to come to his office. Michael was surprised to see two immigration officers at the probation office. They arrested him for having committed a crime involving moral turpitude within five years of admission and placed him in removal proceedings.

Analysis: Michael is eligible to apply for asylum because he has not been convicted of an aggravated felony. The immigration judge will consider the seriousness of his conviction against the persecution that Michael would face if returned to Sudan. The judge will also consider whether he has violated his probation and has any support from the community where he now lives.

#### 4. Withholding of Removal (Formerly Known As Withholding of Deportation)

The expansion and retroactivity of the definition of aggravated felony has greatly impacted non-citizens in Minnesota and across the country. Minnesota is the home to refugees and asylees from many countries, including Bosnia-Herzegovina, Cambodia, El Salvador, Ethiopia, Guatemala, Laos, Liberia, Nicaragua, Somalia, the former Soviet Union, Sudan and Vietnam. Many refugees and asylees have become permanent residents but not United States citizens for various reasons, including difficulty learning English and not having been a legal permanent resident for five years.

Withholding of removal/deportation is a critical form of relief for asylees, refugees and legal permanent residents who face a probability of persecution, including torture and death, if they are forced to return to their home countries. However, even those who can prove that they will be harmed or killed upon their return are statutorily barred from withholding if an immigration judge determines that they have been convicted of a "particularly serious crime" or have been sentenced to an aggregate term of imprisonment of five years or more for an aggravated felony or aggravated

felonies have been imposed. Non-citizens will be deported once the order of removal or deportation is final, which occurs once the non-citizen has exhausted all possible appeals and the government of the country to which they will be deported agrees to accept them.

If an immigration judge finds that the non-citizen has not been convicted of an aggravated felony but denies asylum in the exercise of discretion, then the immigration judge *must* grant withholding of removal/deportation where the non-citizen has proven that she would probably be persecuted if deported to her country of nationality or last habitual residence. A grant of withholding of removal/deportation will never lead to a non-citizen adjusting her status to become a legal permanent resident. A grant of withholding does, however, withhold the removal or deportation of the non-citizen to a country where he or she will probably be persecuted. The Attorney General can revoke the grant of withholding upon a finding that the non-citizen no longer faces a probability of persecution due to a change in country conditions.

*a. Statute*

**I.N.A. § 241(b)(3) [8 U.S.C. § 1231(b)(3)]**

**Restriction on removal to a country where alien's life or freedom would be threatened**

**(A) In general**

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

**(B) Exception**

Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that—

(i) the alien ordered, incited, assisted or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the

United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an *aggregate* term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. [emphasis added] For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) [terrorist activity] shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

*b. Definition of a Particularly Serious Crime*

A non-citizen convicted of one or more aggravated felonies for which the aggregate sentence is at least five years is considered to have committed a particularly serious crime which bars him from eligibility for withholding of deportation.<sup>161</sup> For non-citizens convicted of an aggravated felony and sentenced to less than five years imprisonment, the burden of proof and standard to determine whether she has been convicted of a particularly serious crime depends on whether the non-citizen is in deportation or removal proceedings. In a recent decision, the Board held that where a non-citizen has been convicted of an aggravated felony or felonies, sentenced to less than five years imprisonment, and placed in removal proceedings, the immigration court must conduct an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction to determine whether he or she has been convicted of a particularly serious crime.<sup>162</sup>

For non-citizens in deportation proceedings, however, a dif-

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161. See *In re S-S*, Int. Dec. 3374 (B.I.A. 1999); *In re Q-T-M-T*, Int. Dec. 3300 (B.I.A. 1996).

162. See *In re S-S*, Int. Dec. 3374 (following *In re Frutescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982), which held that whether a crime is a "particularly serious crime" depends on the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community).

ferent standard is applied. In deportation proceedings, a non-citizen convicted of an aggravated felony or felonies and sentenced to less than five years must rebut the presumption that he or she has been convicted of a particularly serious crime.<sup>163</sup> If an evaluation of the nature and circumstances of the offense indicates that the particular aggravated felony cannot be rationally deemed "particularly serious" in light of United States treaty obligations under the United Nations Protocol Relating to the Status of Refugees,<sup>164</sup> the presumption can be overcome.<sup>165</sup>

Prior to the 1996 statutory changes, certain crimes had been held to be inherently particularly serious crimes.<sup>166</sup> These categories or types of inherently particularly serious crimes no longer exist.<sup>167</sup> Other crimes analyzed under the *Frentescu* test may be found to be "particularly serious crimes."<sup>168</sup>

Drug trafficking is an aggravated felony<sup>169</sup> and, therefore, a

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163. See *In re Q-T-M-T*, Int. Dec. 3300.

164. 606 U.N.T.S. 268, T.I.A.S. No. 6577 (1967).

165. See *In re Q-T-M-T*, Int. Dec. 3300 (holding that robbery with a deadly weapon was a particularly serious crime where lives were threatened and endangered); see also *In re L-S-J*, Int. Dec. 3322 (B.I.A. 1997) (holding that robbery with a deadly weapon was a particularly serious crime).

166. See *Ahmetovic v. I.N.S.*, 62 F.3d 48 (2d Cir. 1995) (first degree manslaughter); *Bogle-Martinez v. I.N.S.*, 1995 WL 163618 (9th Cir. Apr. 7, 1995) (two counts of unlawful sexual intercourse with a person under age 18 and one count of lewd or lascivious act with a child of 14-15 years of age); *Dor v. I.N.S.*, 891 F.2d 997 (2d Cir. 1989) (first degree manslaughter); *Abascal-Montalvo*, 901 F. Supp. 309 (D. Kan. 1995) (armed criminal assault); *Cepero v. I.N.S.*, 882 F. Supp. 1575 (D. Kan. 1995) (aiding and abetting armed bank robbery); *In re C*, 20 I. & N. Dec. 529 (B.I.A. 1992) (murder); *In re B*, 20 I. & N. Dec. 427 (B.I.A. 1991) (aggravated battery); *In re Carballe*, 19 I. & N. Dec. 357 (B.I.A. 1986) (armed robbery with a deadly weapon); *In re Garcia-Garrocho*, 19 I. & N. Dec. 423 (B.I.A. 1986) (first degree residential burglary).

167. See *In re S-S*, Int. Dec. 3374 (explaining and distinguishing *In re Gonzalez*, 19 I. & N. Dec. 692 (B.I.A. 1988)).

168. See, e.g., *Hamma v. I.N.S.*, 78 F.3d 233 (6th Cir. 1996) (an alien convicted of felonious assault, possession of firearm in commission of a felony, and carrying a pistol in a vehicle was found to pose a substantial risk of violence toward another person and thus was found to have been convicted of a particularly serious crime); *Maashio v. I.N.S.*, 45 F.3d 1235 (8th Cir. 1995) (two misdemeanor convictions for third degree sexual misconduct and repeated misdemeanor convictions for driving under the influence evidenced serious criminal misconduct and a danger to the community).

169. A drug trafficking crime as defined in 18 U.S.C. § 924(c) is an aggravated felony. See I.N.A. § 101(a)(43)(B). For a drug offense to be an aggravated felony, it must fall under 18 U.S.C. § 924(c)(2) as a felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substance Import and Export Act (21 U.S.C. § 951 *et seq.*) or the Maritime Drug Law Enforcement Act (46 U.S.C. § App. 1901, *et seq.*). See I.N.A. § 101(a)(43). A drug offense falls within 18 U.S.C. § 924(c)(2) where the offense is punishable under the Controlled Substance Act, the Controlled Substance Import and Export Act or the Maritime Drug Law Enforcement Act and the offense is a felony. See 21 U.S.C. § 802(13). An offense

"particularly serious crime."<sup>170</sup> Simple possession of a controlled substance, however, is not an aggravated felony.<sup>171</sup> Consequently, a conviction for simple possession of a controlled substance is not a particularly serious crime.<sup>172</sup>

*c. Application to Cases*

*Case of Cheng from Laos:*

Cheng is Hmong. He fought with the United States Central Intelligence Agency (C.I.A.) in Laos from 1960 to 1975 under the direction of General Pao. In 1975, he fled to Thailand where he lived with his family in a refugee camp. In September 1980, he came to the United States as a refugee. Cheng was arrested in St. Paul on August 31, 1990 and charged with possession of 800 grams of opium with intent to distribute and with fourth degree assault. In jury trials, he was convicted and sentenced to forty-seven months for the opium and twelve months for the assault.

Analysis: Cheng is deportable under I.N.A. section 237(a)(2)(B)(i) for his controlled substance conviction and for his assault conviction. Both convictions are aggravated felonies under I.N.A. section 101(a)(43)(B), illicit trafficking in a controlled substance, and I.N.A. section 101(a)(43)(F), a crime of violence for which the term of imprisonment is at least one year. An assault falls under the federal definition of a crime of violence. Cheng has been sentenced to fifty-nine months, which will allow him the opportunity in removal proceedings to rebut the presumption that he has been convicted of a particularly serious crime. If the immigration judge finds that he has not been convicted of a particularly serious crime, he will then be allowed to apply for withholding of removal based on his fear that he will probably be killed by the Communist Laotian government on account of his participation with the C.I.A. and political opposition to the Communist govern-

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is a felony if the maximum term of imprisonment authorized for the offense is more than one year. See 18 U.S.C. § 3559(a)(1)-(5). An offense is a misdemeanor if the maximum term of imprisonment is five days to one year. See 18 U.S.C. § 3559(a)(6)-(8).

170. See *Al-Salehi v. I.N.S.*, 47 F.3d 390 (10th Cir. 1995) (guilty plea and conviction for possession with intent to distribute at least 500 grams of cocaine); *Mosquera-Perez v. I.N.S.*, 3 F.3d 553 (1st Cir. 1993) (conviction for possession of cocaine with intent to distribute); *In re K.*, 20 I. & N. Dec. 418 (B.I.A. 1991) (conviction for distribution and possession with intent to distribute); *In re U-M.*, 20 I. & N. Dec. 327 (B.I.A. 1991) (conviction for sale of marijuana and LSD); *In re Gonzalez*, 19 I. & N. Dec. 682 (guilty plea and conviction for two counts of trafficking in heroin).

171. See *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).

172. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (designated by Attorney General Janet Reno as precedent on June 19, 1994).



ment.

Cheng cannot defend his legal permanent residence even though he has been a legal permanent resident for years. His convictions for aggravated felonies preclude eligibility for any other form of immigration relief. Post-conviction relief, however, may provide relief for Cheng if he is able to obtain both a reduction in his sentence for the assault and a vacation of the controlled substance conviction. If he is successful in state court on both convictions, he will be able to move to terminate the deportation or removal proceedings because he will no longer be deportable. A judgment that is vacated eliminates the conviction *ab initio*, as having been illegal from the time it was imposed.<sup>173</sup>

*d. Defense Practice Tip*

To avoid the effect of the retroactive expanded definition of aggravated felony, seek to have a client who was originally convicted of a single crime (which is now defined as an aggravated felony) and sentenced to a term of imprisonment of more than five years to be resentenced to a term of imprisonment of less than five years (i.e. fifty-nine months) in order to preserve eligibility for withholding of removal/deportation. Defense counsel may be asked to try to have a client convicted of a single crime (now considered to be an aggravated felony) originally sentenced to a term of imprisonment of more than one year to be re-sentenced to a term of imprisonment of less than one year (i.e. eleven months or 364 days) in order to take the crime out of the category of aggravated felony, and thus, preserving eligibility for other forms of relief, including section 212(c), cancellation of removal for certain permanent residents and asylum. Reducing a sentence by one day (from 365 to 364 days) will still result in a "serious" conviction for the prosecution but will allow an otherwise eligible non-citizen the opportunity to apply for relief from immigration consequences.

In addition, "good" facts should be entered into the record when a non-citizen client pleads guilty to a crime, such as the fact that an unloaded gun or toy gun was used in the case of a burglary or that a victim consented when the non-citizen is charged with criminal sexual conduct involving a young non-citizen's boyfriend or girlfriend.

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173. See *In re Kaneda*, 16 I. & N. Dec. 677 (B.I.A. 1979); *In re Sirhan*, 13 I. & N. Dec. 592 (B.I.A. 1970).

### 5. Section 212(h) Waivers

A section 212(h) waiver allows the I.N.S. or an immigration judge to waive grounds of inadmissibility (exclusion) for non-citizens who have committed certain criminal convictions: one crime involving moral turpitude, prostitution, commercialized vice, multiple criminal convictions or a single offense of possession of thirty grams or less of marijuana. A non-citizen must show extreme hardship to a qualifying relative. If the non-citizen does not have a qualifying relative, then the non-citizen must show that he or she committed the act of inadmissibility more than fifteen years before applying for the waiver, has been rehabilitated and is not a danger to the United States. Non-citizens who previously adjusted their status to become legal permanent residents or who are first applying to adjust their status to become legal permanent residents can apply. If the I.N.S. or an immigration judge grants the waiver, then the non-citizen will become a legal permanent resident. Waivers are not available to non-citizens who have committed murder or criminal acts involving torture. In addition, legal permanent residents who have been convicted of an aggravated felony since becoming a legal permanent resident or who have not resided lawfully in the United States for seven years before initiation of removal proceedings are ineligible for the section 212(h) waiver.

#### *a. Statute*

##### **I.N.A. § 212(h) [8 U.S.C. § 1182(h)]**

##### **Waiver of Subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)**

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) [crime involving moral turpitude], (B) [multiple criminal convictions with aggregate sentences to confinement imposed for 5 years or more], (D) [prostitution and commercialized vice], and (E) [certain aliens involved in serious criminal activity who have asserted immunity from prosecution] of subsection (a)(2) and subparagraph (A)(i)(II) [violation of controlled substance laws] of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the

alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an *immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence* if it is established to the satisfaction of the Attorney General that the *alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien*; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. [emphasis added]

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection. [emphasis added]

## *b. Case Law*

### 1. Eligibility Issues

Eligibility for a section 212(h) waiver is currently available to non-citizens who are not permanent residents and who have been convicted of an aggravated felony but not to legal permanent resi-

dents convicted of an aggravated felony. In *In re Michel*,<sup>174</sup> the Board held that a non-citizen who has not been previously admitted as a lawful permanent resident is statutorily eligible for a section 212(h) waiver, despite a conviction for an aggravated felony. In contrast, in *In re Yeung*,<sup>175</sup> the Board held that the IIRAIRA amended definition of aggravated felony applied retroactively to a legal permanent resident in deportation proceedings who filed a section 212(h) waiver prior to the enactment of IIRAIRA. The Board held that the legal permanent resident had been convicted of an aggravated felony and, therefore, was ineligible for a section 212(h) waiver.<sup>176</sup>

In *In re Pineda*,<sup>177</sup> the Board denied a motion to reopen deportation proceedings for a non-citizen to apply for a section 212(h) waiver in conjunction with an application for adjustment of status. The Board held that the non-citizen would be ineligible for relief because he would be considered to be convicted of an aggravated felony under the IIRAIRA amended definition of aggravated felony if deportation proceedings were reopened.<sup>178</sup>

## 2. Extreme Hardship Standard

The Board has stated that "extreme hardship" encompasses both present and future hardship and necessarily depends on all of the facts and circumstances of each case.<sup>179</sup> Extreme hardship means more than common results of exclusion, such as separation and financial difficulties.<sup>180</sup> The applicant for the waiver must demonstrate some greater additional injury that the denial of the waiver would cause to the relevant citizen or legal permanent resident family member. For example, in *In re Pao*, the Administrative Appeals Unit held that where an applicant's wife suffered from clinical depression due to the applicant's exclusion from the United States, a finding of hardship was warranted.<sup>181</sup> Once extreme hardship is shown, the I.N.S. or immigration judge will look at the following factors to determine whether an applicant deserves a favorable exercise of discretion to grant the waiver: the nature of the offense, the circumstances leading to the offense,

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174. Int. Dec. 3335 (B.I.A. 1998).

175. Int. Dec. 3297 (B.I.A. 1997).

176. *See id.*

177. Int. Dec. 3326 (B.I.A. 1997).

178. *See id.*

179. *See In re Shaughnessy*, 12 I. & N. Dec. 810 (B.I.A. 1968).

180. *See id.*

181. A70 270 864 (Comm'r [AAU] Apr. 23, 1992).

whether the offense is isolated or is part of a pattern of criminal behavior, evidence of rehabilitation, the extent of hardship to the applicant's United States citizen or legal permanent resident family members and the stability of the applicant's marriage, if married to a United States citizen or legal permanent resident.<sup>182</sup>

*c. Application to Cases*

*Case of Kim from Korea:*

Kim entered the United States in January 1990 on an F-1 student visa and attended college. In November 1995, he married a United States citizen. Their daughter was born in Minneapolis on August 20, 1996. In September 1996, he adjusted his immigration status to become a legal permanent resident based on marriage to his United States citizen wife. In January 1997, he was arrested for paying for a \$300 lawnmower with a forged check at a hardware store. He pled guilty to the charges and was placed on one year probation with a stay of imposition of sentence. In August 1997, the I.N.S. arrested him and placed him in removal proceedings.

Analysis: Kim is deportable for having committed a crime involving moral turpitude within five years of becoming a legal permanent resident. He is eligible, however, for a section 212(h) waiver. His wife will be able to file another marriage petition for him with the I.N.S. He will file an adjustment of status application along with Form I-601 for the section 212(h) waiver with the immigration judge. If the I.N.S. approves the marriage, Kim will need to show the immigration judge that his United States citizen wife and daughter will suffer extreme hardship if he is deported. If the immigration judge grants Kim's section 212(h) waiver application, then the immigration judge will adjudicate his adjustment of status application for legal permanent residency.

*Case of Michael from Nigeria:*

Michael entered the United States in July 1996 as a B-2 tourist to visit his grandmother. His grandmother asked him to pick up her mail at her box at the post office. Her younger neighbor, Tom, asked him for a ride to the post office and he agreed to take Tom with him. At the post office, they both retrieved mail from the boxes and walked out. They had driven about a block when the police pulled them over. The police arrested Tom for receiving stolen property (stolen checks) and Michael for aiding and

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182. See *id.*; see also *In re Mendez-Morales*, Int. Dec. 3272 (B.I.A. 1996).

abetting the receipt of stolen property because he was driving the get-away car. Michael pled guilty to driving the car and was placed on probation for five years. After the sentencing hearing, Michael was transferred to the I.N.S. and held without bond.

Analysis: Michael is deportable for having violated the terms of his visitor's visa by committing a crime involving moral turpitude. He is *not* eligible for a section 212(h) waiver because he does not have any means by which he can adjust his status to become a legal permanent resident.

## 6. Section 212(i) Waivers

The I.N.S. and the immigration judge have the power to waive the ground of inadmissibility relating to fraud or willful misrepresentations made by non-citizens where the non-citizen has a qualifying relative and can prove extreme hardship to the relative if the non-citizen were to be refused admission for permanent residence. The qualifying relatives include a United States citizen or legal permanent resident spouse, son or daughter. Fraud or willful misrepresentations that can be waived include use of a false green card in order to obtain employment or to cross the United States border from Canada or Mexico. Falsely representing oneself to be a United States citizen *cannot* be waived for such misrepresentations made on or after September 30, 1996 and constitute grounds for deportation.<sup>183</sup>

### a. Statute

#### I.N.A. § 212(i) [8 U.S.C. § 1182(i)]

##### **Admission of immigrant excludable for fraud or willful misrepresentation of material fact**

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) [misrepresentation] in the case of an *immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence* if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in *extreme hardship* to the citizen or lawfully resident spouse or parent of such an alien. [emphasis added]

(2) No court shall have jurisdiction to review a decision or

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183. See Grounds of Deportation *supra* p. 593; Grounds of Inadmissibility *supra* p. 627.

action of the Attorney General regarding a waiver under paragraph (1).

*b. Case Law*

In 1996, Congress amended the standard to require extreme hardship for section 212(i) waivers. The factors to be used in determining whether a non-citizen has established extreme hardship to a qualifying relative include, but are not limited to: the presence of lawful permanent resident or United States citizen family ties to the United States; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to those countries; the financial impact of the departure from the United States; and significant conditions of health and lack of availability of suitable medical care in the country where the qualifying relative would relocate.<sup>184</sup> Further, the underlying fraud or misrepresentation for which the non-citizen seeks a waiver of inadmissibility may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion.<sup>185</sup>

*c. Application to Cases*

*Case of Dominique from Haiti:*

Dominique fled political turmoil in Haiti in December 1990 and entered the United States using her twin sister's green card which she presented to a United States immigration officer at the Miami Airport. In February 1991, she used her sister's green card again to obtain employment as a nursery school janitor. In March 1997, she married a United States citizen. In July 1997, she gave birth to twin daughters who are United States citizens. They filed a marriage petition and a section 212(i) waiver application with the I.N.S. on January 13, 1998.

Analysis: Dominique is eligible for the section 212(i) waiver. She misrepresented herself as being a permanent resident to an immigration officer and her employer. She must demonstrate extreme hardship to her United States citizen husband and daughters.

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184. See *In re Cervantes*, Int. Dec. 3380 (B.I.A. 1999).

185. See *id.* (following *In re Tijam*, Int. Dec. 3372 (B.I.A. 1998)).

#### *D. Deportation and Exclusion Proceedings*

Even though cancellation proceedings began on April 1, 1997, hundreds of cases in Minnesota still remain undecided in deportation and exclusion proceedings. It will take several years for the cases to be initially decided by an immigration judge and finalized through the appellate process. Where post-conviction relief is obtained while a case is pending on appeal before the Board or the Eighth Circuit Court of Appeals, a motion to reopen the deportation and exclusion proceedings may be made to review the case in light of changed circumstances relating to the conviction or convictions on which the prior deportation or exclusion order was entered. For this reason, the following section on forms of relief in deportation and exclusion proceedings is included.

##### **1. Section 212(c) Relief**

Section 212(c) relief is a discretionary waiver of the grounds of exclusion (inadmissibility) that an immigration judge can grant to a legal permanent resident convicted of certain crimes. Originally only available to returning residents in exclusion proceedings, it was made available to legal permanent residents who had not departed the United States but were in deportation proceedings.<sup>186</sup> In essence, it allows a legal permanent resident a second chance to keep his or her legal residency in the United States. Before changes made by the AEDPA and IIRAIRA, cases were often granted to non-citizens with convictions such as fifth degree possession of a controlled substance, theft and assault. Because the judge exercises discretion in granting section 212(c) relief, a non-citizen must show that her positive equities, including rehabilitation, outweigh the criminal behavior and any other adverse factors.

##### *a. Statute*

##### **I.N.A. § 212(c) [8 U.S.C. § 1182(c)]**

##### **Nonapplicability of Subsection (a)**

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, *may* be admitted in the discretion of the Attorney General without

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186. See *Francis v. I.N.S.*, 532 F.2d 268 (2d Cir. 1976).



regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii) [aggravated felony], (B) [controlled substances], (C) [firearm offenses], (D) [miscellaneous crimes, i.e. espionage, treason], or any offense covered by section 241(a)(2)(A)(ii) [two or more convictions for crimes involving moral turpitude] for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) [crime involving moral turpitude].<sup>187</sup> [emphasis added]

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187. In cases initiated prior to the AEDPA amendments on April 24, 1996, the AEDPA amendments do not apply to I.N.A. section 241(a)(2)(A)(i)(II), 8 U.S.C. § 1251(a)(2)(A)(i)(II), according to AEDPA section 435(a) and the following statutory language applies:

(i) Crimes of moral turpitude.

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within 5 years after the date of entry, *and*

(II) either is *sentenced* to confinement or is *confined* therefor in a prison or correctional institution for one year or longer, is deportable. [emphasis added]

I.N.A. § 241(a)(2)(A)(i)(II) (1995).

In cases initiated on or after April 24, 1996 and prior to April 1, 1997, the AEDPA amendments do apply to I.N.A. section 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i), and the following statutory language is in effect:

(i) Crimes of moral turpitude.

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within 5 years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) [snitch visa adjustment] of this title) after the date of entry, *and*

(II) is convicted of a crime for which a *sentence of one year or longer* may be imposed,

is deportable. [emphasis added]

I.N.A. § 241(a)(2)(A)(i) (as amended by AEDPA).

I.N.A. section 212(c), 8 U.S.C. § 1182(c) prior to AEDPA and IIRAIRA amendments:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, *may* be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). *The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.* [emphasis added]

*b. Statutory Changes with AEDPA and IIRAIRA*

Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) eliminated the availability of section 212(c) for persons convicted of *any* controlled substance offense (including fifth degree possession offenses), *any* firearms offense and more than one felony offense for a crime involving moral turpitude. On February 21, 1997, the Attorney General issued a decision on certification in *In re Soriano*,<sup>188</sup> following her previous vacation of the Board's published opinion on September 12, 1996. Attorney General Janet Reno determined that the application of AEDPA section 440(d) to section 212(c) does not impair a right, increase a liability or impose new duties on criminal aliens and concluded that AEDPA section 440(d) can be applied retroactively to section 212(c) applications involving controlled substance or firearms offenses pending before the immigration court on April 24, 1996. Legal challenges in the federal courts continue over the effective date of section 440(d) and its application to section 212(c) cases pending with the immigration court and the Board on April 24, 1996, the date of enactment.<sup>189</sup> Cancellation of removal restored this relief for legal permanent residents in removal proceedings who have been convicted for controlled substance offenses, firearms offenses or multiple convictions for crimes

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I.N.A. § 212(c) (1995).

188. Int. Dec. 3289 (A.G. 1997).

189. Constitutional challenges are pending in federal courts on whether AEDPA section 440(d) applies retroactively to 212(c) cases filed with the immigration court on or before April 24, 1996 in light of the United States Supreme Court decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994) (holding that a presumption against retroactivity applies when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive because "settled expectations should not be lightly disrupted"). The Eighth Circuit Court of Appeals has not yet ruled on the constitutionality of this provision of the AEDPA. The federal courts that have decided the issue on statutory interpretation grounds have held that AEDPA section 440(d) does *not* apply retroactively. See *Henderson v. Reno*, 157 F.3d 106 (2d Cir. 1998); *Pak v. Reno*, 8 F. Supp.2d 1001 (N.D. Ohio 1998) (same); *Goncalves v. Reno*, 144 F.3d 110, (1st Cir. 1998), cert. denied, 98-835, *Reno v. Goncalves*, 119 S. Ct. 1140 (1999); *Magana-Pizano v. I.N.S.*, 152 F.3d 1213 (9th Cir. 1998) vacated and remanded 98-836; *I.N.S. v. Magana-Pizano with 98-1011 Magana-Pizano v. I.N.S.*, \_\_\_ S. Ct. (Mar. 8, 1999). Other federal courts have overruled the Board of Immigration Appeals' decision in *In re Fuentes-Campos*, Int. Dec. 3318 (B.I.A. 1997) that AEDPA section 440(d) does not apply to non-citizens in exclusion proceedings and that section 212(c) is, therefore, available to non-citizens in exclusion proceedings but not available to legal permanent residents in deportation proceedings. See *Jorge de Sousa v. Reno*, 30 F. Supp. 844 (E.D. Pa. 1998) (holding that AEDPA § 440(d) applies retroactively and that allowing adjudication of § 212(c) applications in exclusion but not deportation proceedings violates equal protection); *Almon v. Reno*, 13 F. Supp.2d 143 (D. Mass. 1998); *Cruz v. Reno*, 6 F. Supp.2d 744 (N.D. Ill. 1998); *Jurado-Gutierrez v. I.N.S.*, 977 F. Supp. 1089 (D. Colo. 1997).

involving moral turpitude that are not aggravated felonies.

For example, Mario has been a permanent resident for eight years and has only one conviction. He was convicted for a fifth degree possession of a controlled substance in 1992 (prior to passage of AEDPA on April 24, 1996) and placed in deportation proceedings in December 1995. The final deportation hearing on his 212(c) application was set for September 1996. Mario's case is what immigration practitioners call a "gap case:" he is a long-term permanent resident who would be eligible for 212(c) relief but for AEDPA section 440(d), which the I.N.S. argues retroactively eliminated such relief for any non-citizen convicted of *any* controlled substance crime, including fifth degree simple possession, regardless of whether the non-citizen pled guilty with the knowledge that he or she would be eligible for 212(c) relief from deportation. He would be eligible for cancellation of removal if the Attorney General, through the local I.N.S. office, would move to terminate deportation proceedings and initiate removal proceedings.

Under IIRAIRA section 309(c), the Attorney General has the discretion to terminate deportation or exclusion proceedings and initiate removal proceedings where an evidentiary hearing has not yet taken place.<sup>190</sup> Only recently did the Department of Justice decide that legal permanent residents with cases pending before the immigration court or the Board who would be eligible for Cancellation of Removal for Permanent Residents could be "repapered" at the discretion of the I.N.S. to have their cases in deportation proceedings terminated and to be placed in removal proceedings in order to apply for Cancellation of Removal upon request by the non-citizen.<sup>191</sup>

For those non-citizens who exhausted their appeal rights to the Board, the process of "repapering" is not available.<sup>192</sup> Post-conviction relief is an important option for non-citizens with gap cases who would not be eligible for Cancellation of Removal.

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190. IIRAIRA section 304(b) repealed section 212(c) effective on the Title III-A effective date, April 1, 1997. However, section 306(d) of IIRAIRA amends AEDPA section 440(d), which in turn amends former I.N.A. section 212(c), which is in effect during the transition period and for cases that fall within IIRAIRA section 309(c)'s sweep, that is cases where the I.N.S. issues an Order to Show Cause on or before March 31, 1997 for deportation or exclusion proceedings and an evidentiary hearing has not yet taken place.

191. See Memorandum from Michael J. Creppy, chief immigration judge, Dec. 9, 1998, reprinted in 75 INTERPRETER RELEASES app. II (1998); Memorandum from Paul W. Virtue, general counsel for the Immigration and Naturalization Service, Dec. 7, 1998, reprinted in 75 INTERPRETER RELEASES app. II (1998).

192. See *id.*

c. Case Law

Although section 212(c) appears to apply only to legal permanent residents who departed from the United States and subsequently attempt to return to the United States, the federal courts have extended section 212(c) relief to legal permanent residents who have not left the United States but are in deportation proceedings for certain criminal convictions. In *Francis v. I.N.S.*, the Second Circuit Court of Appeals held that section 212(c) relief is available to legal permanent residents in deportation proceedings under the equal protection component of the Fifth Amendment's due process clause which requires extension of the exclusion waiver to similarly situated legal permanent residents in deportation hearings.<sup>193</sup>

An applicant for section 212(c) relief must establish that she warrants the favorable exercise of discretion. The court balances favorable and unfavorable factors. Relevant favorable factors for the exercise of discretion include family ties in the United States, length of residence in the United States, United States military service, employment history, property ownership, business ties, community service, rehabilitation after criminal convictions and good moral character references.<sup>194</sup> Unfavorable factors include adverse immigration history, reports of general bad moral character and the nature, seriousness and recency of criminal convictions.<sup>195</sup> Where a criminal conviction is involved, the court will look to the nature and seriousness of the offense, the length of sentence, frequency or recency of convictions and the presence or absence of rehabilitation.<sup>196</sup> In cases involving a serious drug crime, a grave crime or a pattern of serious criminal misconduct, the applicant must show outstanding and unusual countervailing equities to obtain relief.<sup>197</sup>

Section 212(c) relief is not available in three circumstances. First, section 212(c) relief is not available where deportability is based on a firearms conviction under section 241(a)(2)(C) of the I.N.A. (1990), regardless of whether the firearms offense involved moral turpitude. Second, recently in *In re Fuentes-Campos*, the Board held that non-citizens cannot seek section 212(c) waiver to

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193. 532 F.2d 268, 273 (2d Cir. 1976).

194. See *In re Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978).

195. See *id.*

196. See *In re Edwards*, 20 I. & N. Dec. 191 (B.I.A. 1990).

197. See *Maashio v. I.N.S.*, 45 F.3d 1235, 1239-40 (8th Cir. 1995) (holding that misdemeanor convictions may be sufficient to trigger the outstanding equities requirement); *In re Buscemi*, 19 I. & N. Dec. 628 (B.I.A. 1988).

establish adjustment of status in deportation proceedings even though such relief is available to non-citizens in exclusion proceedings.<sup>198</sup> In *In re Gonzalez-Camarillo*, the Board reaffirmed its decision in *In re Fuentes-Campos* stating the AEDPA amendment for section 212(c) applies retroactively and that there is no unconstitutional disparate treatment because Congress clearly precluded aliens who are "deportable" on the basis of specified criminal offenses from establishing eligibility for a waiver.<sup>199</sup> Third, a non-citizen who is deportable for having been convicted of two or more crimes involving moral turpitude and whose deportation proceedings were initiated prior to the enactment of AEDPA on April 24, 1996 is ineligible for a section 212(c) waiver if more than one conviction resulted in a sentence or confinement of one year or longer.<sup>200</sup>

*d. Application to Cases*

*George from South Africa:*

In 1983, George was twelve when he entered the United States as a legal permanent resident based on the visa petition filed for him by his mother. In 1990, George pled guilty to third degree assault from a fight in a bar. He received a stay of imposition of sentence and was placed on three years of probation. In 1993, he pled guilty to misdemeanor theft of a motorcycle; he was sentenced to thirty days in prison with a stay of execution and placed on probation for one year. In November 1996, George pled guilty to gross misdemeanor theft of a computer harddrive. He was sentenced to ninety days in prison. As he was finishing his prison term in January 1997, the I.N.S. placed an administrative hold on him. He was transferred to I.N.S. custody and served with an Order to Show Cause which initiated deportation proceedings against him.

Analysis: George is deportable for having committed two crimes involving moral turpitude since he entered the United States, third degree assault and gross misdemeanor theft. He is ineligible for section 212(c) relief because I.N.S. began deportation proceedings against him after the AEDPA amendments took effect and he has been convicted of third degree assault, a felony with a possible sentence of more than one year. Even though he is a legal permanent resident who had resided in the United States for four-

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198. Int. Dec. 3318 (B.I.A. 1997).

199. *In re Gonzalez-Camarillo*, Int. Dec. 3320 (B.I.A. 1997).

200. See *In re Fortiz*, Int. Dec. 3340 (B.I.A. 1998).

teen years at the time I.N.S. began deportation proceedings against him, he is statutorily ineligible for section 212(c) relief.<sup>201</sup>

*Katarina from Switzerland:*

Katarina entered the United States in January 1986 on a fiancée visa. She married a United States citizen, Barry, who then filed a marriage petition for her. She became a legal permanent resident in May 1986. After they were married, Barry began growing marijuana plants in the basement of their home and smoking marijuana frequently. He became abusive toward Katarina when he was under the influence of the marijuana. One day while he was beating her in July 1993, she grabbed a fireplace poker and struck him repeatedly on the head and chest. He began bleeding and she called for an ambulance. The police arrived, found the marijuana plants, and arrested her. She was charged with second degree assault as well as possession of marijuana with intent to distribute. Barry was charged with possession of marijuana with intent to distribute. In a plea bargain, she agreed to testify against him and pled guilty to third degree assault in exchange for an eleven month sentence in December 1993. While in prison, her husband filed for divorce, which she did not oppose, and the state district court granted. After her release from prison in July 1994, she obtained employment. In November 1995, the I.N.S. mailed her an Order to Show Cause to appear for her first immigration court hearing which was held in February 1996.

Analysis: Katarina is deportable for having committed a crime involving moral turpitude within her first five years after entry. She is eligible for section 212(c) because her case was initiated by the I.N.S. prior to the AEDPA amendments on April 24, 1996; if it were initiated after April 24, 1996, she would be ineligible for section 212(c) relief because third degree assault is a felony punishable by a term of imprisonment of more than one year. She is a legal permanent resident and has legally resided in the United States for seven years.<sup>202</sup>

## 2. Suspension of Deportation

Suspension of deportation is a discretionary remedy for non-citizens in deportation proceedings who have lived in the United States for at least seven years, can demonstrate that their deportation will result in extreme hardship to themselves or a qualifying relative and can demonstrate good moral character. Recent

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201. See discussion *supra* p. 686.

202. See discussion *supra* p. 686.

amendments by the NACARA apply retroactively to terminate the amount of time that a non-citizen has accumulated for purposes of the seven year physical presence requirement. The seven year period stops accumulating upon arrest of the non-citizen or issuance of the Order to Show Cause or Notice to Appear by the I.N.S. In addition, certain nationalities will be treated more favorably based on the NACARA.

*a. Statute*

**I.N.A. § 244(a) (1995) [8 U.S.C. § 1254(a) (1995)]**

**Adjustment of status for permanent residence; contents [suspension of deportation]**

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(4)(D)) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;<sup>203</sup>

(2) is deportable under paragraph (2), (3) or (4) of sec-

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203. For most non-citizens with potential suspension of deportation cases, the following amendment by the Nicaragua Adjustment and Central American Relief Act of 1997 applies:

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2160, 2196 (1997).

The entire NACARA is too long to reproduce here. For rules specifically affecting Nicaraguans and Cubans who entered the United States on or before December 1, 1995 as well as Salvadorans, Guatemalans, and persons from the former Soviet Union and eastern block countries who entered the United States prior to the end of 1990 seeking refuge, see the NACARA or contact an immigration attorney.

tion 241(a); has been physically present in the United States for a continuous period of not less than 10 years *immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation*, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(3) is deportable under any law of the United States except section 241(a)(1)(G) and the provisions specified in paragraph (2); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child. [emphasis added]

*b. Case Law*

The standard for extreme hardship was defined by the Board in *In re Anderson*, to include the age of the non-citizen, family ties in the United States and abroad, the length of residence in the United States, the non-citizen's health, conditions in the country to which the non-citizen is deportable (including economic and political conditions), the non-citizen's financial status (including employment and occupation), the possibility of other means of adjustment of status, whether the non-citizen is of special assistance to the United States or community, her immigration history in the United States (including immigration violations) and ties to the United States community.<sup>204</sup>

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204. See *In re Anderson*, 16 I. & N. Dec. 596 (B.I.A. 1978).



*c. Application to Cases**Case of Ian from Ireland:*

Ian entered the United States without inspection by canoeing through the Boundary Waters in northern Minnesota in August 1985. He used a false green card to obtain employment on a construction crew. In January 1997, he was arrested by the I.N.S. during a raid on a construction site and was issued an Order to Show Cause.

Analysis: Ian is statutorily eligible for suspension of deportation. He does not have a criminal record, has good moral character and has been in the United States for more than seven years. He will have to demonstrate extreme hardship to himself beyond the normal consequences of deportation which may be difficult in his case.

*E. Mandatory Detention: Deprivation of Liberty at Its Best.*

As of October 9, 1998, the I.N.S. must detain many categories of non-citizens without bond, regardless of whether they are a flight risk or pose a danger to the local community. Non-citizens who are subject to mandatory detention include those non-citizens who have been convicted of a crime involving moral turpitude for which they have been sentenced to one year or more, convicted of an aggravated felony, convicted for possession or sale of a controlled substance other than simple possession of thirty grams or less of marijuana, or convicted of two or more crimes involving moral turpitude, regardless of the length of the sentence, if any.<sup>205</sup> Thus, a non-citizen with two misdemeanor shoplifting convictions can be held in detention by the I.N.S. without bond.

For non-citizen clients from countries to which the United States does not or cannot currently deport non-citizens, mandatory detention can result in indefinite and even lifetime detention if the non-citizen is not successful in gaining withholding of removal or another form of immigration relief. There have been some successful habeas corpus actions across the country requiring that a long-term permanent resident be given a bond hearing and/or a bond.<sup>206</sup> However, not every legal permanent resident may be successful in obtaining such federal court relief. For this reason, it is critical to investigate a non-citizen's past history, including any stay of adju-

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205. See I.N.A. § 236(c), 8 U.S.C. § 1226(c).

206. See, e.g., *Cabreja-Roja v. Reno*, 999 F. Supp. 493 (S.D.N.Y. 1998); *Morisath v. Smith*, No. C97-12392, (W.D. Wash. Apr. 13, 1998); *Ekekhor v. Aljets*, 979 F. Supp. 640 (N.D. Ill. 1997); *St. John v. McElroy*, 917 F. Supp. 243 (S.D.N.Y. 1996).

dication or deferred adjudication cases. A non-citizen who has been convicted for one misdemeanor crime involving moral turpitude and pleads guilty to a second misdemeanor crime involving moral turpitude may find himself subject to mandatory detention by the I.N.S. In order to avoid mandatory detention, you may be able to convince a state court judge or prosecutor to allow your client to plead to a crime that is not an aggravated felony and does not involve moral turpitude.

In statutory rape cases where the relations were consensual, it is critical that the non-citizen plead to a provision which will not result in an aggravated felony conviction. For example, an eighteen year old non-citizen who marries a sixteen year old in a Hmong clan traditional marriage can be convicted for statutory rape in Minnesota because Minnesota does not recognize common law marriage where the relationship arises within the state of Minnesota. In this case, the male non-citizen will have an aggravated felony conviction and will be subject to mandatory detention even though he is a valedictorian of his high school class and is working to support his new wife.

#### *F. Vienna Convention on Consular Relations*

The United States is a party to the Vienna Convention on Consular Relations.<sup>207</sup> As a treaty made under the authority of the United States Constitution, the Vienna Convention on Consular Relations is a federal law and supreme law of the land.<sup>208</sup> Under the Vienna Convention on Consular Relations, a non-citizen who is detained and/or charged with a crime must be informed of her right to speak with a consular officer from her country.<sup>209</sup> Unfortunately, few police departments or other law enforcement agencies are even aware of the Vienna Convention on Consular Relations. Consulates of foreign countries can appear in criminal cases

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207. Vienna Convention on Consular Relations and Optional Protocols, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262-512, ratified by the United States on November 21, 1969.

208. See U.S. CONST. art. VI.

209. Article 36(1)(b) provides:

If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Vienna Convention on Consular Relations and Optional Protocols, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262-512.

as *amicus curiae*. Consulates have an interest in ensuring that the rights of their citizens be respected.

The lack of an advisal regarding the right to contact a consulate officer may be a ground under which a motion to suppress statements given in violation of the Vienna Convention, to vacate a conviction or to expunge a conviction can be brought. In the context of a motion to suppress, the Ninth Circuit Court of Appeals held that where a non-citizen shows that the Vienna Convention was violated by a failure of authorities to inform her of her right to contact her consulate, the defendant non-citizen has the initial burden in a criminal proceeding of producing evidence showing prejudice from that violation.<sup>210</sup> To establish prejudice, the defendant non-citizen must show that she did not know of her right; she would have availed herself of the right had she known of it; and "there was a likelihood that the contact would have resulted in assistance to [her] in resisting deportation."<sup>211</sup>

Once the defendant non-citizen meets that burden, the government must rebut the showing of prejudice.<sup>212</sup> At the Minnesota state level, a state court used the three step approach to determine prejudice.<sup>213</sup> The state court held that where a non-citizen was not advised of his right to contact a consulate officer upon his arrest and charge in state court, the motion to vacate must be granted and the conviction must be withdrawn based on the manifest injustice resulting from the denial of his right to contact his consulate.

### *G. Convention Against Torture*

For non-citizens who face probable torture if returned to their country of origin, a new form of relief from deportation or removal may be available to them. The United States is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>214</sup> Under Article 3 of the

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210. See *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999) (case remanded for prejudice determination).

211. *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989) (quoting *United States v. Rangel-Gonzales*, 617 F.2d 529, 533 (9th Cir. 1980)), overruled on other grounds by *United States v. Proa-Tovar*, 975 F.2d 592, 594 (9th Cir. 1992).

212. See *Lombera-Camorlinga*, 170 F.3d 1241.

213. See, e.g., *Ademodi v. State*, No. 90063152 (Henn. Co., 4th Jud. Dist., Minn. Dec. 21, 1998).

214. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (entered into force for the United States Nov. 20, 1994).

CAT, the United States is prohibited from removing a non-citizen to a country where there are substantial grounds for believing that she would be in danger of being subjected to torture.<sup>215</sup> Torture may be physical or mental.<sup>216</sup>

Thus, a non-citizen who is ineligible for asylum or withholding of removal may be eligible to have her removal deferred until a time when he does not face the probability of torture in that country upon her return. Similar to withholding of removal, a grant of deferral of removal will not lead to legal permanent residency. Moreover, a grant of deferral of removal may not lead to release from I.N.S. custody.<sup>217</sup>

#### *H. Rule 15 Motions to Withdraw a Guilty Plea, Motions to Reduce Sentences and Post-Conviction Petitions*

In light of the Board of Immigration Appeal's decision in *In re Roldan* expungements for crimes involving moral turpitude and pleas under Minnesota Statute section 152.18 will no longer be given effect in immigration proceedings.<sup>218</sup> However, a successful direct appeal of a conviction based on the merits or on an underlying statutory or constitutional defect will be given effect in immigration proceedings.<sup>219</sup>

##### 1. Rule 15 Motions to Withdraw a Guilty Plea

In analyzing the options to reduce or alleviate the immigration consequences for non-citizens with convictions meeting the immigration definition of conviction, defense attorneys may need to file a motion to withdraw a guilty plea.<sup>220</sup> Rule 15 Motions are based on the "manifest injustice" standard. The lack of an advisal regarding immigration consequences at the time of the plea alone

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215. See § 242(a) of Pub. L. No. 105-227, reprinted in 144 CONG. REC. H11265 (daily ed. Oct. 19, 1998).

216. Torture has been defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a).

217. For further information, contact an immigration attorney in your area.

218. Int. Dec. 3377 (B.I.A. 1999).

219. See *id.*

220. See MINN. R. CRIM. PROC. 15.220.

does not constitute "manifest injustice" as deportation and other immigration consequences are merely collateral consequences.<sup>221</sup> Thus, in order to bring a Rule 15 motion, you will need to state a statutory defect, a state constitutional defect, a federal statutory defect, or a federal constitutional defect in the plea as the reason for the existence of the manifest injustice.

Successful Rule 15 motions have been brought after *Alanis v. Minnesota*. In one case, the state court judge held that the failure of the prosecution to offer pretrial diversion was a state defect in the plea process that combined with the harm that the defendant would suffer if deported to Nigeria, his ties to the United States, hardship to his family and lack of other criminal history, rose to the level of manifest injustice and allowed the guilty plea to burglary to be withdrawn.<sup>222</sup> In another case, the state court allowed a plea for sale of a controlled substance to be withdrawn where the defendant was not advised of his right to contact his Nigerian consular officer under the Vienna Convention on Consular Relations.<sup>223</sup> In both cases, the defendants were long-term permanent residents who were not advised of potential immigration consequences prior to entering their pleas.

Non-citizens who do not speak English have the right to an interpreter in their native language in court. The lack of an interpreter or a competent interpreter may be grounds to argue that a plea was not knowing, voluntary or intelligent.

## 2. Rule 27 Motion to Reduce a Sentence

To avoid aggravated felony convictions and certain convictions for crimes involving moral turpitude that bar admissibility, you may need to bring a motion under Rule 27 to reduce a sentence by a few days or even a few months.<sup>224</sup> For example, a non-citizen who is sentenced to a year and a day (366 days) for theft has an aggravated felony conviction. A successful motion to reduce the sentence to 364 days will mean that the non-citizen has been convicted of a crime involving moral turpitude but not of an aggravated felony, thus possibly rendering the non-citizen eligible for different forms of relief.

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221. See *Alanis v. Minnesota*, 583 N.W.2d 573 (Minn. 1998); *Berkow v. State*, 583 N.W.2d 562 (Minn. 1998).

222. See *Adegoke v. Minnesota*, No. 90-01549 (2d Jud. Dist. Sept. 18, 1998).

223. See *Ademodi v. Minnesota*, No. 90063152 (4th Jud. Dist. Dec. 21, 1998).

224. See MINN. R. CRIM. PROC. 27.

### 3. Post-Conviction Relief

Where a Rule 15 Motion is not successful, then post-conviction relief should be considered under Minnesota Statute section 590. If a motion for post-conviction relief is filed, then the Minnesota Attorney General must also be served. Involving the Attorney General can create difficulties in negotiations with the prosecutor; for this reason, attorneys should first attempt a Rule 15 Motion.

### 4. Pardons

Under I.N.A. section 237(a)(2)(A)(v), a full and unconditional pardon by the President of the United States or the governor of a state will prevent deportation for a conviction for a crime involving moral turpitude, an aggravated felony or high-speed flight near a border.

### Conclusion

Immigration consequences must be considered when representing non-citizens in the criminal justice system. Working with non-citizen defendants to advise them of their rights and the immigration consequences for criminal behavior as well as with the prosecutors and the courts can prevent the permanent destruction of families and save lives.

## Appendix A

### Glossary of Immigration Terms and Abbreviations

**Admissibility:** To be admissible, a non-citizen must demonstrate that he or she is not barred by one of the grounds of inadmissibility in order to enter the United States as a visitor, a legal permanent resident, to adjust his or her immigration status to become a legal permanent resident or to return as a legal permanent resident to the United States. Bars to inadmissibility include lack of proof of vaccinations and certain criminal convictions.

**Admission/Admitted:** The lawful entry of a non-citizen into the United States after inspection and authorization by an immigration officer.

**Amnesty Program:** Program created in the Immigration Reform and Control Act of 1986 for non-citizens who were physically present in the United States on or before January 1, 1982. Amnesty applicants whose applications were approved became legal permanent residents.

**Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA):** Legislation enacted on April 24, 1996 that restricted availability of waivers of deportation for legal permanent residents convicted of certain crimes, including firearms and controlled substance violations, and created new immigration provisions relating to domestic and international terrorism.

**Asylee:** A non-citizen who has been granted asylum by an immigration judge or an I.N.S. asylum officer.

**Asylum Applicant:** A non-citizen who has applied for political asylum with an I.N.S. Asylum Office or with an immigration judge. This non-citizen may have entered the country legally (i.e. as a tourist or with a student visa) or without inspection.

**Board of Immigration Appeals (B.I.A.):** The federal administrative law appellate board located in Falls Church, Virginia that reviews decisions of the immigration judges. Decisions are binding on immigration judges in Minnesota unless

## **Appendix A**

the Eighth Circuit Court of Appeals has ruled on the particular issue in question. The B.I.A. is an administrative agency within the Executive Office for Immigration Review in the Department of Justice and separate from the Immigration and Naturalization Service.

**Border Crossing Identification Card:** An identity document issued to a non-citizen who is a legal permanent resident or who is a resident in a foreign contiguous territory for the purpose of crossing over the borders between the United States and the foreign contiguous territory (i.e. Mexico or Canada).

**Conditional Permanent Resident:** A non-citizen who has been granted conditional residency (conditional green card) for two years based on marriage to a United States citizen. At the end of the two year period, the non-citizen must apply to have the conditions removed; once the conditions are removed, the non-citizen is a legal permanent resident (green card holder).

**Deportability:** A non-citizen is deportable for having violated a section of the Immigration and Nationality Act, such as having overstayed the time allowed by a visitor's visa or having committed certain crimes. The Immigration and Naturalization Service serves a charging document with allegations of deportability on a non-citizen. An immigration judge makes the determination whether a non-citizen is deportable in deportation or removal proceedings and whether a non-citizen has a defense to deportation or removal from the United States.

**Employment Authorization Document (EAD):** Also known as a work permit, the EAD provides evidence of eligibility to work in the United States. A person with an EAD does not have permanent status in the United States because he or she has a pending application that has not yet been granted by the I.N.S. or an immigration judge.

**Executive Office for Immigration Review (EOIR):** Federal administrative agency in the Department of Justice, which includes the Office of the Immigration Judge and the Board of Immigration Appeals. The local immigration court is in Bloomington, Minnesota. Court office: (612) 725-3765.



## Appendix A

**Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA):** Legislation enacted on September 30, 1996 that overhauled the immigration law, greatly expanding the definition of aggravated felony, creating removal proceedings in lieu of deportation/exclusion proceedings with different and yet similar forms of relief from removal (deportation), and adding new grounds of deportability and inadmissibility.

**Immigration and Nationality Act of 1990 (IMMACT 1990):** Legislation enacted in December 1990 that expanded the definition of aggravated felony and created Temporary Protected Status (TPS) as well as other major changes in immigration law.

**Immigration and Naturalization Service (I.N.S.):** Federal administrative agency in the Department of Justice charged with enforcing the Immigration and Nationality Act of 1990 (as amended). Local office in Bloomington, Minnesota. District covers Minnesota, South Dakota, and North Dakota. Deportation office: (612) 313-9060.

**Lawful or Legal Permanent Resident (LPR):** A non-citizen who has been granted legal (lawful) permanent residence, also known as a "green card."

**Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA):** Legislation enacted at the end of November 1997 that allows Nicaraguans and Cubans present in the United States on or before December 1, 1995 to apply for adjustment of status to become legal permanent residents. NACARA also allows Salvadorans and Guatemalans who entered the United States in 1990 (and meet other requirements), as well as persons from the former Soviet Union and Eastern block countries who entered in 1990 and applied for asylum prior to December 1991, to apply for cancellation of removal under the former standards of suspension of deportation.

**Notice to Appear (NTA):** Charging document served by I.N.S. on non-citizens to begin removal proceedings; may state a date at which to appear before an immigration judge or may state that notice of a hearing will be sent later. NTA's issued since April 1, 1997 place non-citizens in removal proceedings.

## **Appendix A**

**Order for Deportation/Deportation Order:** An order issued by an immigration judge to remove (deport) a non-citizen from the United States at government expense where the charging document was an Order to Show Cause.

**Order for Removal/Removal Order:** An order issued by an immigration judge to remove (deport) a non-citizen from the United States at government expense where the charging document was a Notice to Appear.

**Order of Release on Own Recognizance (OR):** Order entered by an I.N.S. officer or an immigration judge releasing a non-citizen from detention by the I.N.S. without a bond.

**Order to Show Cause (OSC):** Charging document served by I.N.S. on non-citizens to begin deportation proceedings; may state a date at which to appear before an immigration judge or may state that notice of a hearing will be sent later. OSC's issued prior to April 1, 1997 place non-citizens in deportation proceedings.

**Refugee:** A non-citizen recognized overseas by the I.N.S. or United States Embassy/Consulate as being a refugee under immigration law; can apply after one year to become an LPR.

**Special Agricultural Workers Program (SAW):** Program created by the Immigration Reform and Control Act of 1986 for non-citizens who had worked in agriculture (i.e. farmworkers) for ninety days between May 1985 and May 1986. Most SAW applicants become legal permanent residents in December 1990 or December 1991.

**Temporary Protected Status (TPS):** A non-citizen may have been granted TPS, which is temporary permission to live and work in the United States. The Attorney General has the authority to designate the countries from which its nationals or citizens are eligible for TPS based on a natural disaster or civil chaos. Such designations last for one year and may be renewed by the Attorney General. Some countries for which TPS status has been designated in the past include Bosnia-Herzegovina, Burundi, El Salvador, Kosovo, Kuwait, Lebanon, Liberia, Montserrat, Honduras, Nicaragua, Rwanda, Sierra Leone, Somalia and Sudan.

## Appendix A

**United States Border Patrol:** Federal administrative agency in the Department of Justice that arrests non-citizens suspected of having violated the immigration law; active in northern Minnesota and North Dakota. Local headquarters in Grand Forks, North Dakota.

**Undocumented Non-Citizen:** Non-citizen who entered the United States without inspection (illegally) by a United States official.

**Voluntary Departure:** A form of relief granted by an immigration judge to a non-citizen who has the opportunity to leave at his or her own expense in lieu of a deportation or removal order. Failure to depart by the specified date may lead to a five year bar from being able to adjust his or her status to become a legal permanent resident as well as other forms of relief.

**Voluntary Deportation:** A non-citizen agrees to be deported by the I.N.S. and waives his or her rights to a hearing before an immigration judge.

**Voluntary Return:** A non-citizen agrees to voluntarily return to Mexico at his or her own expense after being arrested by the United States Border Patrol at the United States-Mexico border.

## Appendix B

### Minnesota Pleas and Sentencing Dispositions and the Immigration Definition of Conviction

<i>Type of Disposition</i>	<i>Admission of Facts</i>	<i>+ Punishment, Penalty or Restraint on Liberty<sup>1</sup></i>	<i>= Immigration Conviction?</i>
Guilty plea	Yes	Yes	Yes
Nolo Contendere plea (federal court)	Yes (taken as guilty plea)	Yes	Yes
Alford plea	Yes (taken as guilty plea)	Yes	Yes
Continuance for Dismissal with Stipulated Facts <sup>2</sup>	Yes	Yes	Yes
Continuance for Dismissal without Stipulated Facts <sup>3</sup>	No	Immaterial	No
Suspended Prosecution <sup>4</sup>	No	Immaterial	No
Stay of Adjudication <sup>5</sup>	If yes, and If no, then	Yes, then Immaterial	Yes No

1. The form of punishment, penalty or restraint on liberty must be ordered by a judge. A "penalty" includes fines. "Restraint on liberty" includes probation and any term of imprisonment.

2. Continuance for Dismissal with Stipulated Facts: If there is not any admission of facts on record to get into pretrial diversion, then there will not be an immigration conviction. De Novo (Hennepin County) and Project Remand (Ramsey County) are examples of diversion programs.

3. Continuance for Dismissal without Stipulated Facts: If there is not any admission of facts on record to get into pretrial diversion, then there will not be an immigration conviction. If the defendant violates terms of probation, then the defendant will return to court to enter plea of guilty or not guilty with subsequent trial which may lead to an immigration conviction.

4. If probation violation, then the case goes to trial.

5. See *State v. Foss*, 556 N.W.2d 540 (Minn. 1996) (holding that a stay of adjudication over prosecutor's objection is not warranted where no special circumstances are present and trial court merely disagreed with prosecutor's exercise of charging discretion in routine assault cases); *State v. Krotzer*, 548 N.W.2d 252 (Minn. 1996) (holding that a trial court may, under the doctrine of inherent judicial authority, stay adjudication over prosecutor's objection if special circumstances are present).

## Appendix B

<i>Type of Plea</i>	<i>Admission of Facts</i>	<i>+ Punishment, Penalty or Restraint on Liberty<sup>6</sup></i>	<i>= Immigration Conviction?</i>
Stay of Imposition of Sentence (Plea of guilty with stay of imposition to be vacated and dismissed) Hennepin County: 609 for dismissal Ramsey County: deferred sentence	Yes	Yes	Yes
Stay of Imposition for Discharge (only probation gets discharged)	Yes	Yes	Yes
Stay of Execution of Sentence	Yes	Yes	Yes
Sentenced Imposed and Executed	Yes	Yes	Yes
Dismissal (by court, negotiated or after trial)	No	No	No
Other Procedures Discharge of a Defendant MINN. STAT. § 609.13(3)	Yes	Yes	Yes
Plea withdrawal Minn. R. Crim. P. 15.05	No	Yes	No
Dismissal in interest of justice MINN. STAT. § 631.21	No	Immaterial	No
Sentence pursuant to MINN. STAT. § 152.18 re: drug offenses	Yes	Yes	Yes

**\*\*Note:** If admission of facts, punishment, penalty or restraint on liberty are not found, then the non-citizen will not have a conviction for immigration purposes.\*\*

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6. The form of punishment, penalty or restraint on liberty must be ordered by a judge. A "penalty" includes fines. "Restraint on liberty" includes probation and any term of imprisonment.

## Appendix C

CONVICTIONS UNDER SELECTED MINNESOTA STATUTES AND  
IMMIGRATION CONSEQUENCES

## Key:

364d&lt; TP = Term of Imprisonment of 364 days or less

TP&gt; 365(+) = Term of Imprisonment of 365 days or more

## Notes:

If a firearm is an essential element of a crime, then the non-citizen will be deportable for a firearms offense.

If the non-citizen has been a legal permanent resident for less than 5 years and is convicted for a crime involving moral turpitude with a maximum possible sentence of one year or more, that non-citizen will be deportable.

Non-citizens convicted of an aggravated felony (or aggravated felonies) with an aggregate term of imprisonment of 5 years or more will be found to have been *per se* convicted of a particularly serious crime and ineligible for withholding of deportation. Deportation grounds apply to non-citizens who have violated the immigration law.

Inadmissibility grounds apply to non-citizens who are attempting to enter the U.S. or adjust their status to become legal permanent residents.

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
<b><u>Homicide &amp; Suicide</u></b>					
Murder: all degrees 609.185, 609.19, 609.195	Yes	Yes	Yes	Yes	Yes
Manslaughter: 1st degree 609.20					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes	Yes	Yes	Yes	Possibly
subd. 3	Yes	Yes	Yes	Yes	Possibly
subd. 4	Yes	Yes	Yes	Yes	Possibly
subd. 5	Yes	Yes	Yes	Yes	Possibly

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Manslaughter: Second degree: 609.205					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes	Yes	Yes	Yes	Yes
subd. 3	Yes	Yes	Yes	Yes	Yes
subd. 4	Yes	Yes	Yes	Yes	Yes
subd. 5	Yes	Yes	Yes	Yes	Yes
Criminal Vehicular Homicide/Injury 609.21					
subd. 1	Yes	Yes	For all subds: No: 364d ≤ TP Yes: TP ≥ 365(+)	Probably	Yes
subd. 2	Yes	Yes		Probably	Yes
subd. 2(a)	Yes	Yes		Probably	Yes
subd. 2(b)	Yes	Possibly		Possibly	Possibly
subd. 3	Yes	Yes		Yes	Yes
subd. 4	Yes	Yes		Yes	Yes
<u>Crimes against the Person</u>					
Assault: 1 <sup>st</sup> Degree 609.221	Yes	Yes	No: 364d ≤ TP Yes: TP ≥ 365(+)	Yes	Yes
Assault: 2 <sup>nd</sup> Degree 609.222					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes	Yes	Yes	Yes	Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Assault: 3 <sup>rd</sup> Degree 609.223					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes	Yes	Yes	Yes	Yes
subd. 3	Yes	Yes	Yes	Yes	Yes
Assault: 4 <sup>th</sup> Degree 609.2231					
subd. 1	Yes	Yes	For all subds: No: 364ds TP	Possibly	Yes
subd. 2	Yes	Yes	Yes: TP≥ 365(+)	Possibly	Yes
subd. 3	Yes	Yes		Possibly	Yes
subd. 4	Yes	Yes		Possibly	Yes
subd. 5	Yes	Yes		Possibly	Yes
subd. 6	Yes	Yes		Possibly	Yes
Assault: 5 <sup>th</sup> Degree 609.224					
subd. 1 (1)					
subd. 1 (2)					
subd. 2	Yes	Possibly	For subds 2,3 & 4: No: 364ds TP	Possibly	Possibly
subd. 3	Yes	Possibly	Yes: TP≥ 365(+)	Possibly	Possibly
subd. 4	Yes	Possibly		Possibly	Possibly
Domestic Assault 609.2242					
subd. 1	Yes	Probably			
subd. 2	Yes	Probably	For subds 2,3 & 4: No: 364ds TP	Possibly	Probably
subd. 3	Yes	Probably	Yes: TP≥ 365(+)	Possibly	Probably
subd. 4	Yes	Probably		Possibly	Probably
Female Genital Mutilation 609.2245					
subd. 1	Yes	Probably	No: 364ds TP Yes: TP≥ 365(+)	Possibly	Probably



## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Great Bodily Harm Caused by Distribution of Drugs 609.228	Yes	Yes	Yes	Probably	Yes
Crime Committed for Benefit of a Gang 609.229 subd. 2 & 3	Depends on under- lying charges	Depends on under- lying charges	Depends on under- lying charges and in some cases, length of sentence	Depends on under- lying charges	Depends on under- lying charges
Simple Robbery 609.245	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably—depends on the underlying facts	Yes
Aggravated Robbery 609.245 subd. 1 1 <sup>st</sup> Degree subd. 2 2 <sup>nd</sup> Degree	Yes Yes	Yes Yes	For both subds.: No: 364d≤ TP Yes: TP≥ 365(+)	Probably Probably	Yes Yes
Kidnapping 609.25	Yes	Yes	If rape is involved, no minimum sentence required. Otherwise, No: 364d≤ TP Yes: TP≥ 365(+)	Yes	Yes
False Imprisonment 609.255 subd. 2 subd. 3	Yes Yes	Yes Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Possibly Possibly	Yes Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Depriving Another of Custodial or Parental Rights 609.26			For listed subds. where there is also a violation of subd. 6(a)(2)(i)-(iii) and term of imprisonment imposed (regardless of stay of execution or executed sentence), then:		
subd. 1(1)	Yes	Yes	No: 364d≤ TP	Possibly	Yes
subd. 1(2)	Yes	Yes	Yes: TP≥365(+)	Possibly	Yes
subd. 1(3)	Yes	Yes		Possibly	Yes
subd. 1(4)	Yes	Yes		Possibly	Yes
subd. 1(5)	Yes	Yes		Possibly	Yes
subd. 1(6)	Yes	Yes		Possibly	Yes
subd. 1(7)	Yes	Yes		Possibly	Yes
subd. 1(8)	Yes	Yes		Possibly	Yes
subd. 1(9)	Yes	Yes		Possibly	Yes
Abduction (of a minor for marriage) 609.265	Possibly	Possibly	Possibly	Possibly	Possibly
<u>Sex Crimes</u>					
Solicitation, Inducement and Promotion of Prostitution 609.322					
subd. 1	Yes	Yes	Yes	Probably	Yes
subd. 1(a)	Yes	Yes	Yes	Probably	Yes
subd. 2	Yes	Yes	Yes	Probably	Yes
subd. 3	Yes	Yes	Yes	Probably	Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Other Prohibited Acts 609.324	Yes	Yes	Yes	Probably	Yes
subd. 1(a)(1)	Yes	Yes	Probably	Probably	Yes
1(a)(2)	Yes	Yes	Yes	Yes	Yes
1(b)(1)	Yes	Yes	Probably	Probably	Yes
1(b)(2)	Yes	Yes	Yes	Yes	Yes
1(c)(1)	Yes	Yes	Probably	Probably	Yes
1(c)(2)	Yes	Yes	Probably	Probably	Yes
subd. 2	Yes	Yes	Yes	Probably	Yes
subd. 3(1)		Yes-possible petty offense exception			
3(2)					
Criminal Sexual Conduct- 1 <sup>st</sup> Degree 609.342	Yes	Yes	Yes	Probably	Yes
Criminal Sexual Conduct- 2 <sup>nd</sup> Degree 609.343	Yes	Yes	Yes	Probably	Yes
Criminal Sexual Conduct- 3 <sup>rd</sup> Degree 609.344	Yes	Yes	Yes	Probably	Yes
Criminal Sexual Conduct- 4 <sup>th</sup> Degree 609.345	Yes	Yes	Yes	Probably	Yes
Criminal Sexual Conduct- 5 <sup>th</sup> Degree 609.3451	Yes	Yes	Yes	Probably	Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
<u><i>Crimes against the Family</i></u>					
Malicious Punishment of a Child 609.377	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Possibly	Yes
Neglect or Endangerment of a Child 609.378 any subd.	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Possibly	Yes
<u><i>Crimes against the Administration of Justice</i></u>					
Perjury 609.48	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably	Yes
Release, Failure to Appear 609.49 subd. 1 1(a) subd. 2	Yes Yes	Yes Yes	For subds. 1 & 1(a), No: 364d≤ TP Yes: TP≥ 365(+)	Possibly Possibly	Yes Yes
Prohibiting Giving Peace Officer False Name 609.506 subd. 1 subd. 2 subd. 3	Yes if 2 <sup>nd</sup> crime involving moral turpitude Yes Yes	Yes Yes Yes	For subd. 2 & 3, No: 364d≤ TP Yes: TP≥ 365(+)	Possibly Possibly	Petty offense exception Yes Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
<b><u>Theft and Related Crimes</u></b>					
Theft 609.52 Acts in subd. 2—look at sentencing in subd. 3 subd. 3(1)-(4)	Yes	Yes	For subd. 3(1)-(4) No: 364d≤ TP Yes: TP≥ 365(+) see also Def. of Aggravated Felony	Probably/Possibly	Yes
subd. 3(5)	Yes if 2 <sup>nd</sup> crime involving moral turpitude	Yes			Petty offense exception
Issuance of Dishonored Checks 609.535 subd. 2(a)(1) 2(a)(2)	Yes Yes if 2 <sup>nd</sup> crime involving moral turpitude	Yes Yes	Probably		Yes Petty offense exception
<b><u>Damage or Trespass to Property</u></b>					
Arson- 1 <sup>st</sup> , 2 <sup>nd</sup> , 3 <sup>rd</sup> Degree 609.561-3 609.561	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably	Yes
Burglary 609.582 any subd.	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably/Possibly	Yes
Damage to Property 609.595 subd. 1, 1(a), 2 subd. 3	Yes Yes if 2 <sup>nd</sup> crime involving moral turpitude	Yes Yes	For subd. 1, 1(a) & 2, No: 364d≤ TP Yes: TP≥ 365(+)	Probably—including where based on race, religion, etc.	Yes Petty offense exception

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
<b><u>Forgery and Related Crimes</u></b>					
Aggravated Forgery 609.625	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably	Yes
Forgery 609.63	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably/Possibly	Yes
Check Forgery; Offering a Forged Check 609.631	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Probably/Possibly	Yes
<b><u>Crimes against Public Safety and Health</u></b>					
Dangerous Weapons 609.66					
subd. 1(a)(1)	Yes	Probably	For subds. 1(a)(1)-(6), 1d, 1f & 1g	Probably	Probably
1(a)(2)	Yes	Probably	No: 364d≤ TP	Probably	Probably
1(a)(3)	Yes	Probably	Yes: TP≥ 365(+)	Probably	Probably
1(a)(4)	Yes	Probably		Probably	Probably
1(a)(5)	Yes	Possibly		Probably	Possibly
1(a)(6)	Yes	Probably		Probably	Probably
subd. 1a.	Yes	Yes	Yes	Yes	Yes
subd. 1b.	Yes	Yes	Yes	Yes	Yes
subd. 1c.	Yes	Yes	Yes	Yes	Yes
subd. 1d.	Yes	Yes	Probably	Probably	Yes
subd. 1e.	Yes	Yes	Yes	Yes	Yes
subd. 1f.	Yes	Yes	Yes	Probably	Yes
subd. 1g.	Yes	Yes	Probably	Yes	Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Explosive and Incendiary Devices 609.668 subd. 6(a) 6(b) 6(c)	Yes Yes Yes	Yes Yes Probably	Yes Probably Yes	Yes Probably Probably	Yes Yes Probably
<u><b>Public Misconduct or Nuisance</b></u>					
Terroristic Threats 609.713 subd. 1 subd. 2 subd. 3	Yes Yes Yes	Yes Yes Yes	For all subds, No: 364d≤ TP Yes: TP≥ 365(+)	Probably	Yes Yes Yes
Disorderly Conduct 609.72 subd. 1 subd. 3	Yes	Yes	No: 364d≤ T Yes: TP≥ 365(+)	Possibly	Yes
Harassment; Restraining Order 609.748 subd. 6	Yes		Possibly—threats to safety + TP≥ 365(+)	Possibly	

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Harassment; Stalking; Penalties 609.749	Yes	Probably	for subds. 2(1)-(2), 3, 4 & 5 No: 364d≤ TP Yes: TP≥ 365(+)	Possibly	Probably
subd. 2(1)	Yes	Probably		Possibly	Probably
2(2)	Possibly not				
2(3)	Possibly not				
2(4)	Possibly not				
2(5)	Yes	Possibly			Possibly
2(6)	Yes	Yes		Yes	Yes
subd. 3(1)	Yes	Yes		Possibly	Yes
3(2)	Yes	Yes		Probably	Yes
3(3)	Yes	Yes		Possibly	Yes
3(4)	Yes	Yes		Possibly	Yes
3(5)	Yes	Probably		Possibly	Probably
subd. 4	Yes	Yes		Possibly	Yes
subd. 5	Yes	Yes		Probably	Yes
<u>Crimes Relating to Communication</u>					
Emergency Telephone Calls and Communications 609.78 any subd.	Yes—if 2 <sup>nd</sup> crime involving moral turpitude	Yes			Yes
<u>Crimes Relating to a Business</u>					
Financial Transaction Card Fraud 609.821 any subd.	Yes	Yes	No: 364d≤ TP Yes: TP≥ 365(+)	Possibly	Yes



## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
<u>Miscellaneous Crimes</u>					
Falsely Impersonating Another 609.83 subd. 1	Yes	Yes	No: 364d ≤ TP Yes: TP ≥ 365(+)	Possibly	Yes
subd. 2	Yes	Yes			Yes
<u>RICO</u>					
Racketeering 609.903-4	Yes	Yes	Yes	Probably	Yes
<u>Drugs, Controlled Substances</u>					
Controlled Substance Crime — 1 <sup>st</sup> Degree					
152.021					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes			Possibly	Yes
Controlled Substance Crime — 2 <sup>nd</sup> Degree					
152.022					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes			Possibly	Yes
Controlled Substance Crime — 3 <sup>rd</sup> Degree					
152.023					
subd. 1	Yes	Yes	Yes	Yes	Yes
subd. 2	Yes			Possibly	Yes

## Appendix C

Minnesota Stat.	Deportable?	Moral Turpitude?	Aggravated Felony?	Particularly Serious Crime?	Inadmissible?
Controlled Substance Crime — 4 <sup>th</sup> Degree 152.024 subd. 1 subd. 2	Yes Yes	Yes	Yes	Yes Possibly	Yes Yes
Controlled Substance Crime — 5 <sup>th</sup> Degree 152.025 subd. 1 subd. 2	Yes Yes	Yes	Yes	Yes	Yes Yes
Other Controlled Substance Offenses 152.027 subd. 1 subd. 2 subd. 3 subd. 4(a) sale possession 4(b) 4(c)	Yes Yes Yes Yes Yes-unless 1 <sup>st</sup> offense for 30g < of marijuana Yes Yes if sale	Yes  Yes  Yes Yes	Yes  Yes  Yes	Yes  Yes  Yes	Yes Yes Yes Yes Yes Yes Yes

## Appendix D

### Immigration Law Resources in Minnesota

The following agencies have attorneys who are available to answer questions about immigration law from public defenders and defense attorneys:

Centro Legal, Inc.  
651/642-1890

Immigrant Law Center of Minnesota (a.k.a. Oficina Legal)  
651/291-0110

Legal Assistance to Minnesota Prisoners (LAMP)  
612/625-6336

Minnesota State Public Defender  
612/627-6980

**Appendix E****QUESTIONS FOR CALLS REGARDING IMMIGRATION CONSEQUENCES  
FOR NON-CITIZENS IN CRIMINAL PROCEEDINGS**Non-Citizen Information

Name: \_\_\_\_\_ Date of Birth: \_\_\_\_\_

Immigration Status: (Choose one)

Legal Permanent Resident	Amnesty/Family Unity	NIV Overstay
Refugee	Visitor	J-1/F-1/M-1 Student
Naturalization Applicant	Temporary Protected Status	Other: _____
Asylee	H1-B	
Asylum Applicant	Undocumented	

Country of Citizenship: \_\_\_\_\_

Date of first entry into U.S.: \_\_\_\_\_

Manner of entry: (Inspected or not inspected by U.S. Customs; Claimed U.S. citizenship):  
\_\_\_\_\_

Date of last entry into U.S.: \_\_\_\_\_

Manner of entry: (Inspected or not inspected by U.S. Customs; Claimed U.S. citizenship):  
\_\_\_\_\_

Family Members and Their Immigration Status in U.S.: \_\_\_\_\_

If U.S. citizen parent(s), defendant's age when parent(s) naturalized: \_\_\_\_\_

Date of Current Arrest: \_\_\_\_\_

Current Charges

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Prior arrests &amp; outcomes, including sentences:

\_\_\_\_\_  
\_\_\_\_\_