

CHAPTER 42

AUGUST, 2011

Immigration Consequences of Criminal Proceedings

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§ 42.1 LEGAL CATEGORIES FOR PEOPLE

§ 42.1A. OVERVIEW OF THE SYSTEM

Recent changes in U.S. immigration law have dramatically increased the likelihood of deportation and other negative immigration consequences for non-U.S. citizen defendants. Criminal practitioners must become familiar with the intricacies of U.S. immigration law as much of the need for representation has shifted to the criminal part of the process. Decisions taken in criminal court that appear innocuous or even favorable to the defendant may have disastrous and irrevocable consequences in immigration proceedings. Indeed, the U.S. Supreme Court has confirmed that the Sixth Amendment norms of *Strickland v. Washington* apply to a noncitizen’s claim that criminal defense counsel was ineffective due to allegedly incorrect advice concerning the risk of deportation. Such advice on deportation is not “categorically removed from the ambit of the Sixth Amendment right to counsel” even though deportation is nominally a civil sanction. *Padilla v. Kentucky*,¹ In most cases, a consultation with an experienced immigration lawyer or expert should be arranged. Nevertheless, a solid grasp of immigration fundamentals is essential for most criminal practitioners.

On the most basic level, the practitioner may wish to consider the following “road map” to the material that follows in this chapter:

1. Determine the immigration status of the client — if a U.S. citizen, stop. If not:
2. Determine the client's exact legal status and all potential routes to U.S. citizenship;

¹ 559 U.S. ___, 130 S. Ct. 1473 (2010). In *Commonwealth v. Clarke*, 460 Mass. 30 (2011), the SJC clarified that *Padilla* applies retroactively to all convictions obtained after April 1, 1997.

3. Obtain the client's complete prior record, from every jurisdiction;
4. Make sure you are aware of and understand all pending charges;
5. Determine if any prior criminal charges, even if they did not result in conviction, could affect the client's current or potential immigration status; if so, consider all possible ways to vacate, expunge, withdraw pleas, appeal, attack collaterally, revise, revoke, etc.;
6. Analyze the potential effects of pending charges on immigration status, making sure to distinguish immigration consequences in general from the more specific threats of inadmissibility and removal from the United States;
7. Consider ways to plea bargain or otherwise structure a disposition to avoid immigration consequences. For example, is there a possible disposition that is not a conviction? Or, is there a way to plead to an offense with less drastic immigration consequences?
8. Always try to avoid an *aggravated felony* conviction;
9. Consider whether any waivers are or will be available to mitigate immigration consequences;
10. Consider all possible postconviction strategies;
11. Make sure to advise the client not to leave the United States, and not to attempt naturalization without consulting an immigration specialist.²
12. If your client does get deported, contact the *Post-Deportation Human Rights Project* at Boston College Law School. The web site for this project is <http://www.bc.edu/centers/humanrights/projects/deportation.html>

42.1B. CITIZENS AND APPLICANTS FOR CITIZENSHIP

The first specific problem facing the criminal law practitioner who encounters a noncitizen in criminal proceedings is to determine as accurately as possible the person's exact legal status under the immigration laws of the United States. This can be surprisingly difficult, especially in light of the major changes to U.S. immigration law wrought by Congress in 1996. Immigration law is primarily controlled by federal statute and regulations, as interpreted by administrative agencies and federal courts. In March, 2003, INS ceased to exist and its duties were transferred to the Department of Homeland Security (DHS). *See* 6 U.S.C. § 291(a) (2006). The main enforcement agency is Immigration and Customs Enforcement (aka ICE).

This apparently organized structure belies famous complexity. As one court has put it: “Whatever guidance the regulations furnish to those cognoscenti familiar with [immigration] procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.”³

The primary statute is the Immigration and Nationality Act of June 27, 1952, as amended (INA). The INA in its current form is codified at 8 U.S.C. § 1101 et seq. Most immigration practitioners tend to refer to the INA by its more informal section

² For excellent and timely discussions of current immigration/criminal issues in Massachusetts, *see* reports and newsletters issued by the CPCS Immigration Impact Unit. For fuller, national coverage, *see* the manual prepared by the Defending Immigrants Partnership at www.defendingimmigrants.org. *See also*, Ira J. Kurzban, [KURZBAN'S IMMIGRATION LAW SOURCEBOOK](#); Kesselbrenner, Baldini-Potermin and Rosenberg, [IMMIGRATION LAW AND CRIMES](#) (WEST 2011).

³ Dong Sik Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

numbers, rather than by citation to the U.S. Code (e.g., § 208 as opposed to 8 U.S.C. 1158) and this chapter will follow that convention. Most regulations pertaining to immigration law are found at 8 C.F.R., though some matters are also covered in sections of 20, 22, 28, 45 C.F.R. and elsewhere. The most important agency for purposes of the nonspecialist is the Board of Immigration Appeals (BIA). The BIA issues appellate administrative decisions that are binding on the Immigration and Naturalization Service (INS) nationwide unless modified or overruled by the Attorney General or a Federal court. All BIA decisions are subject to judicial review in the Federal courts. Administrative decisions designated as precedential by the BIA are referred to either by an “Interim Decision” citation (e.g., *Matter of Ozkok*, Int. Dec. 3044 (BIA 1988)) or, for older decisions, by a citation such as *Matter of A-F*, 8 I&N Dec. 429 (BIA, A.G. 1959). These decisions are published and are available on both LEXIS and Westlaw.

An “alien” is generally defined negatively under U.S. law as any person who is not a citizen of the United States. Because of the pejorative aspects of the term “alien”, this chapter will generally use the term “noncitizen” instead. With only a few exceptions, such as some children of diplomats, citizenship is obtained automatically by birth on U.S. soil pursuant to the Fourteenth Amendment to the U.S. Constitution. Thus, if your client was born in the United States the chances are quite good that she is a U.S. citizen. This would be true even if she left the United States soon after birth and has lived abroad for many years.⁴ Since the late eighteenth century, U.S. statutes have also provided for the grant of U.S. citizenship to the children of U.S. citizens born abroad. The rules, however, have changed dramatically over the years, and such cases are notoriously complex. If your client had even one U.S. citizen parent or was adopted by a U.S. citizen it is very important to research this question thoroughly. The law in force at the time of birth will generally control.⁵

Citizenship may also be conferred by the government through “naturalization proceedings.”⁶ Generally, in order to be naturalized, the noncitizen must have been a lawful permanent resident continuously for the five years preceding her application,⁷ physically present in the United States for at least half that time, and in a particular state for at least three months.⁸ A client who is a naturalized U.S. citizen will have been given a certificate evidencing this fact. Naturalization records may be verified by checking with the clerk of the U.S. District Court where the swearing-in ceremony took place.

The minor children of a person who naturalizes may be entitled to derivative citizenship. This may be true even if the child becomes aware that his or her parent

⁴ It is, however, possible that a client who was born in the United States has lost citizenship through voluntary expatriation. *See* INA § 349(a). *See also* *Vance v. Terrazas*, 444 U.S. 252 (1980) (intent to relinquish citizenship must be proved by preponderance of the evidence).

⁵ The current rules are set forth in INA §§ 301, 308, and 309. *See also* *Rogers v. Bellei*, 401 U.S. 815 (1971) (analyzing constitutional status of statutory citizens).

⁶ *See* INA § 310 et seq.

⁷ The statute requires three years if the applicant is married to a U.S. citizen, under certain circumstances. *See* INA § 318, 8 C.F.R. § 319.1(b)(2)(ii)(B).

⁸ INA § 316. Note that there are a wide variety of exceptions to these rules. For example, a person who served honorably in the U.S. military may apply for naturalization without becoming a permanent resident. INA § 329(a).

naturalized many years ago.⁹ In addition to the client's own immigration history, every client should therefore be asked about the complete immigration history of his parents and grandparents.

With a very few, extremely rare exceptions, a U.S. citizen client will not face any immigration consequences as a result of criminal proceedings. An applicant for naturalization, however, may be denied naturalization on the basis of a criminal conviction. The INA requires applicants for naturalization to be of "good moral character" for five years before the date of application.¹⁰ As discussed more specifically below, the term *good moral character* is defined by the statute in a way that frequently involves criminal admissions and convictions.¹¹ The INA, however, also provides that in determining good moral character, the government is not necessarily limited to the five years preceding one's application for naturalization, but may take into consideration certain acts or conduct *at any time* prior to that date.¹² Therefore, even if a defendant is not currently applying for citizenship, the possible consequences of a particular criminal disposition on future applications must be considered.

§ 42.1C. LAWFUL PERMANENT RESIDENT ALIENS AND THE REENTRY PROBLEM

Noncitizens who attain the status of U.S. legal permanent residents (so-called "LPR" or "PRA" status) are among the most likely to be affected by criminal proceedings in the United States. (Unfortunately, many people are unaware of this fact and believe incorrectly that long-term legal residents will not be deported for minor crimes such as simple possession of marijuana or petty larceny.) Most such persons will at least be aware of their status as permanent residents and will have in their possession the so-called "green card" which, in keeping with the anomalous nature of much of immigration practice, is not necessarily green.¹³

The main concern for an LPR in criminal proceedings should be whether he will be deported or, as the new law puts it, "subject to removal proceedings" as a result of actions taken in the criminal case. As discussed more fully below, bases of deportability or removal are described quite specifically in the INA. It is also crucial, however, to advise the client that each time he leaves the United States he may be subject, as a noncitizen, to all grounds of "inadmissibility" as well.¹⁴ While there are

⁹ See INA §§ 320, 321. See also INA § 322 (naturalization of children on application of U.S. citizen parent).

¹⁰ INA § 316(a).

¹¹ See INA § 101(f).

¹² INA § 316(e).

¹³ It is also possible, however, for a person to be a permanent resident and not have a green card. Sometimes these cards take a long time to process. In the interim, most permanent residents will have a stamp in their passports as evidence of their status.

¹⁴ See INA § 212. An exception to this rule was the so-called *Fleuti* doctrine, which provides that an "innocent, casual, and brief" departure that is not "meaningfully interruptive" of permanent resident status will not subject a permanent resident to the entry doctrine on return to the United States. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). The 1996 law eliminates some, but not necessarily all of this distinction, and the issue is currently being litigated. But see *Matter of Collado*, Int. Dec. 3333 (BIA 1997) (*Fleuti* no longer requires the admission of an LPR whose departure was brief, casual and innocent but who had a conviction that would bar him under INA § 212(a)(2)).

similarities, the grounds for deportation/removal and those for exclusion/inadmissibility differ in significant and subtle ways. Thus, it is not uncommon that a criminal disposition is structured in such a way that it avoids deportation but renders the client subject to exclusion on reentry. The consequences of this sort of mistake could be truly disastrous. A client may be permitted to live in the United States but may be denied reentry into the United States and could very well be arrested at an airport or border and subject to long-term incarceration on her return from a trip abroad.

The 1996 amendments to the INA substantially changed the former distinction between persons who have “entered” the United States, and those who have not. The INA now contains a new term — *admission*. Admission, unlike what was formerly called *entry*, only means “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”¹⁵ Returning permanent residents generally will not be regarded as seeking admission (and therefore will not face the former risk of exclusion due to criminal convictions that preceded their departure from the United States) unless the noncitizen:

1. Has abandoned or relinquished that status;
2. Has been absent from the United States for a continuous period in excess of 180 days;
3. Has engaged in illegal activity after having departed the United States;
4. Has departed from the United States while under legal process seeking removal of the noncitizen from the United States, including removal proceedings under the INA and extradition proceedings;
5. Has committed an offense identified in INA § 212(a)(2),¹⁶ unless since such offense the noncitizen has been granted relief under INA § 212(h) or 240A(a);¹⁷ or
6. Is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

The amendments have thus reduced the risk of exclusion for legal permanent residents. Nevertheless, anytime a noncitizen with a criminal record leaves the United States, a consultation with an immigration practitioner would still be wise.

§ 42.1D. CONDITIONAL LAWFUL PERMANENT RESIDENT ALIENS

Some noncitizens have what is called “Conditional Permanent Resident Status.”¹⁸ This status most often comes about as a result of a marriage between a noncitizen and a U.S. citizen or an LPR entered into less than twenty-four months before the noncitizen applies for LPR status.¹⁹ The noncitizen and the spouse must return to the Immigration and Naturalization Service (the INS) before the second anniversary of the grant of the conditional status in order to convert it into LPR status. In virtually all other respects, Conditional Residents have the same rights and face the same consequences in criminal cases as LPRs.

§ 42.1E. LAWFUL NONIMMIGRANTS

¹⁵ See INA § 101(a)(13).

¹⁶ See *infra* § 42.3.

¹⁷ See *infra* § 42.5.

¹⁸ INA § 216.

¹⁹ See also INA § 216A regarding Conditional Residence for certain entrepreneurs.

All noncitizens who enter the United States are presumed to be “immigrants,” which means that the government presumes that they are entering to live permanently in the United States.²⁰ So-called “nonimmigrants” are those noncitizens who are admitted within one of a number of specifically defined categories in the INA.²¹ Each category has a letter designation. In general, the noncitizen who enters in one of these categories must have demonstrated both a specific nonimmigrant purpose for entry *and* an intention *not* to remain in the United States permanently.²² The most common categories of nonimmigrants are business visitors and tourists (B-1 and B-2), students and exchange visitors (F, M, or J), and temporary workers (H). Nonimmigrants will generally have a visa stamp in their passport evidencing their status as well as a card showing that they were admitted in the proper category by the INS at the border or airport. (Noncitizens from certain countries, especially Western Europe, Canada, and Japan, may be admitted for three months under the “Visa-Waiver” category in which case they will not have a visa stamp in their passports.)

Apart from being subject to removal if they exceed the limits of their category (e.g., tourists are not permitted to work in the United States), nonimmigrants are of course also subject to removal for criminal convictions. Indeed, the INS takes the position in regulations that any nonimmigrant who is convicted²³ of a crime of violence²⁴ for which a sentence of one year or longer *may be imposed* is deportable for failure to maintain status.²⁵ Moreover, because nonimmigrants are highly likely to leave the United States and may seek to return here, it is especially important to consider the grounds of inadmissibility discussed below as well as those of removal.

§ 42.1F. REFUGEES AND ASYLUM-SEEKERS²⁶

One of the most poignant and significant consequences of a criminal conviction or admission can be the denial of an application for political asylum²⁷ or for “restriction

²⁰ INA § 101(a)(15).

²¹ INA § 101(a)(15).

²² In some categories, such as the H-1B category for professional workers (“specialty occupations”) the concept of “dual intent” is recognized. “Dual intent” means that the noncitizen can still be recognized and treated as a nonimmigrant without being penalized even if the noncitizen might also have the intention to remain in the United States and become an immigrant.

²³ Note that “conviction” is an immigration law term of art. *See infra* § 42.4A.

²⁴ The meaning of the term “crime of violence” is discussed *infra* in § 42.4E.

²⁵ C.F.R. § 214.1(g) (2011). As the statute does not provide for deportation on this basis, this regulation may be subject to challenge. However, INA § 214(a) does state that the admission of nonimmigrants, “shall be for such time and under such conditions as the Attorney General may by regulations prescribe.”

²⁶ Though it is beyond the scope of this work, practitioners should be aware that relief from removal may be available for some clients with criminal convictions pursuant to the Convention Against Torture. *See* Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988); § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, 112 Stat. 2681–821; 8 C.F.R. 208.16–208.18 (2000).

²⁷ *See* INA § 208.

on removal.”²⁸ If there is *any possibility whatsoever* that your client has applied or *may ever* apply for one of these forms of relief from political or other persecution, it is critically important that you evaluate any action taken in the criminal case from this perspective. The asylum regulations, for example, mandate denial if: “(1) The alien, having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community; or . . . (3) There are reasonable grounds for regarding the alien as a danger to the security of the United States.”²⁹ The statute also states that a noncitizen convicted of a so-called “aggravated felony”³⁰ may not be granted asylum.³¹ Similarly, restriction on removal because of one’s fear of persecution may be denied for conviction of a “particularly serious crime.”³²

§ 42.1G. UNDOCUMENTED AND OUT-OF-STATUS PERSONS

Noncitizens who overstay their periods of legal admission, violate the terms of admission, or enter the United States without documentation or with false documentation are subject to deportation or removal as soon as they come to the attention of the INS.³³ This does not mean, however, that criminal proceedings are irrelevant to their immigration status. Their “removal” proceedings will be very different and a number of significant immigration remedies which may allow them to eventually gain legal status, may be made unavailable to such noncitizens by certain types of criminal convictions.³⁴ A noncitizen who is deported because of a criminal conviction will also be excluded from admission to the United States for at least five years, and for life in the case of a noncitizen convicted of a so-called “aggravated felony.”³⁵

§ 42.1H. MISCELLANEOUS CATEGORIES

²⁸ See INA § 241(b)(3).

²⁹ 8 C.F.R. § 208.14.

³⁰ See *infra* § 42.4E.

³¹ INA § 208(d).

³² An aggravated felony for which a noncitizen has been sentenced to an aggregate term of at least five years is automatically a “particularly serious crime.” INA § 241(b)(3)(B). See *Matter of N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007) (an offense need not be an aggravated felony to be a particularly serious crime, and the court may examine any reliable evidence to determine whether a crime is “particularly serious”) With respect to aggravated felony convictions for which a lesser sentence has been imposed, Congress explicitly empowered the Attorney General to determine what constitutes a “particularly serious crime.” *Id.* In the absence of a decision by the Attorney General, the BIA has made this determination on a case by case basis. See also *Matter of Y-L-*, *Matter of A-G-* and *Matter of R-S-R-*, the Attorney General spoke for the first time on the issue. 23 I&N Dec. 270 (A.G. 2002) (aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute “particularly serious crimes” and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible).

³³ They do, of course, have the right to a hearing as well as substantial constitutional and statutory protections.

³⁴ Including relief formerly known as § 212(c) relief and Suspension of Deportation, now both subsumed under the new heading, “Cancellation of Removal” (INA § 240A). See *infra* § 42.5.

³⁵ INA § 212(a)(9)(A)(i).

Noncitizens in a variety of other statuses, including applicants for legalization under INA § 245A (also known as Temporary Residents), persons granted or applying for Temporary Protected Status,³⁶ applicants for relief under the so-called “ABC” case,³⁷ those granted Deferred Enforced Departure,³⁸ applicants under the Convention Against Torture,³⁹ a U or T visa,⁴⁰ or protection under the Violence Against Women Act.⁴¹ may also face severe consequences as a result of criminal convictions or admissions. For instance, an applicant for Temporary Protected Status may be rendered statutorily ineligible as a result of a criminal conviction. It is essential, therefore, in any case that involves a non-U.S. citizen client, to determine as fully as possible not only the client's current status, but all potential relief that is now or may someday be available.

§ 42.2 OVERVIEW OF THE EFFECTS OF CRIMINAL PROCEEDINGS

³⁶ Temporary Protected Status (TPS) is a temporary immigration status granted to eligible nationals of designated countries (or parts thereof). In 1990, Congress established a procedure by which the Attorney General may provide TPS to noncitizens in the United States who are temporarily unable to return to their homeland because of ongoing armed conflict, environmental disasters, or other extraordinary and temporary conditions.

³⁷ “ABC” refers to a temporary status for Salvadorans with pending asylum claims under the so-called *American Baptist Churches* (ABC) settlement. These individuals may now be eligible to apply for adjustment of status pursuant to NACARA (Nicaraguan Adjustment and Central American Relief Act) suspension of deportation.

³⁸ An example of “Deferred Enforced Departure” was the executive order promulgated by President Bush following the Tiananmen Square incident in 1990 that directed the Attorney General to defer deportation of certain Chinese nationals.

³⁹ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), 1468 U.N.T.S., done Dec. 10, 1984. *Non-refoulement*-type protections under CAT were implemented by the Foreign Affairs Reform and restructuring Act of 1998 (FARRA), Div. G., Pub.L. 105-277, 112 Stat. 2681. See 8 CFR 208.16-.18 and 8 CFR 208.30-.31 (defining scope of protection that may be ordered by immigration Judges pursuant to the CAT.)

⁴⁰ U and T visas were also created by VAWA 2000. They are now codified at 8 U.S.C. § 1101(a)(15)(T) and (U).

⁴¹ The original Violence Against Women Act of 1994 (VAWA) (P.L. 103-322, 108 Stat. 1902) was introduced in Congress in 1990 and enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 to address the problems of domestic violence, sexual assault, and other forms of violence against women. VAWA included measures to reduce the frequency of violence against women, provide services to victims of gender-based violence, and hold perpetrators accountable. Its immigration provisions empowered battered immigrant women to obtain lawful immigration status without relying on the assistance of an abusive citizen husband. A variety of such protective measures are now part of U.S. immigration law. VAWA 1994 allowed abused spouses placed in removal proceedings to seek “cancellation of removal,” a form of discretionary relief from removal available to individuals in unlawful immigration status with strong equities, after three years rather than the seven ordinarily required. The statute also granted similar rights to minor children abused by their citizen or lawful permanent resident parent, whose immigration status, like that of the abused spouse, would otherwise be dependent on the abusive parent. Further protections were contained in “VAWA 2000”, Division B of the Victims of Trafficking and Violence Protection Act of 2000 (H. R. 3244); P.L. 106-939.; and “VAWA 2005”, The Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960.

§ 42.2A. INADMISSIBILITY

As noted above, a noncitizen seeking entry (now also known as “admission”) or reentry into the United States may be subject to specific, categorical grounds of inadmissibility.⁴² A noncitizen in what were formerly called exclusion proceedings has been held to be only minimally, if at all, protected by the Constitution, and has been granted only those rights specified in statutes and regulations. Thus, it may be important for the practitioner to examine whether and when a client's last “entry” occurred. Under the new definition of “admission” discussed above, this calculation may be quite complex. A well-developed body of case law exists on this subject, however, at least as it was understood under pre-1996 law⁴³ -- noncitizens “paroled” into the United States after being detained by officials have not made an entry.⁴⁴ Also, under the 1996 amendments to the INA, people in the United States who were not lawfully admitted are subject to grounds of inadmissibility even though they are physically present here. These persons should, however, have greater due process protections than do those seeking entry.

§ 42.2B. REMOVAL

Any other legally-admitted noncitizen who is found within the United States, no matter how long she has been resident in the United States and even if a lawful permanent resident, is subject to grounds of removal.⁴⁵

§ 42.2C. “GOOD MORAL CHARACTER”

As noted above, naturalization — as well as a number of forms of relief from removal or exclusion from the United States — depends on a finding of “good moral character.”⁴⁶ The INA specifically *precludes* a finding of good moral character for a

⁴² Adjustment of status is in many respects treated as if it was an entry or an admission. Thus, a noncitizen may be denied adjustment if convicted of a crime that would render the person excludable. *But see Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), overruling in part *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005)(date of admission for purposes of removal due to crime of moral turpitude is the date of the admission pursuant to which the person is in the United States not the date of adjustment).

⁴³ *See, e.g.*, *United States v. Oscar*, 496 F.2d 492, 493 (9th Cir. 1974) (entry involves physical crossing of international border without restraint); *Matter of Chiang & Chen*, 19 I&N Dec. No. 203 (BIA 1984) (entry made when noncitizen escaped from airline following completion of exclusion proceedings).

⁴⁴ *United States v. Kavazanjian* 623 F.2d 703, 736 (1st Cir. 1980).

⁴⁵ *See infra* § 42.4. ICE, as did its predecessor, INS, retains considerable prosecutorial discretion. Over the years, the agencies have issued guidelines for the exercise of this discretion. *See e.g.*, INS Memorandum to Regional Directors, District Directors, Chief Patrol Agents and Regional and District Counsel, [Exercising Prosecutorial Discretion](#), November 17, 2000. In 2010-11, however, DHS and ICE have developed quite extensive and specific prosecutorial discretion which may result in some cases not being prosecuted and others being administratively closed. The thrust of these initiatives, however, are not generally protective in criminal deportation cases. *See ICE Fact Sheet on Prosecutorial Discretion* available at: <http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-enforcement-facts.pdf>

⁴⁶ INA § 101(f).

person who, during the relevant period⁴⁷ immediately preceding the application for relief is:

1. A habitual drunkard;
2. A member of the class of persons described in INA § 212(a)(2)(D) (prostitution and commercialized vice), (6)(E) (alien smugglers), (9)(A) (polygamy), or § 212(a)(2)(A) (crime of moral turpitude or controlled substance, except for single offense of simple possession of 30 grams or less of marijuana); or (B) (multiple criminal convictions); or (C) (controlled substance trafficker, including the person whom the “immigration officer has reason to believe” is or was an illicit trafficker in a controlled substance”).⁴⁸
3. One whose income is derived principally from illegal gambling activities; or who has been convicted of two or more gambling offenses;
4. Found to have given false testimony to gain any immigration benefits;
5. Confined to a penal institution, as a result of a conviction, for an aggregate period of 180 days or more;
6. Convicted of an aggravated felony after November 29, 1990.

Even if a criminal disposition can be structured to avoid these enumerated grounds, the INS may, in its discretion, find a person not to be of good moral character based on convictions or even admissions to criminal conduct.⁴⁹ Some guidance on this question may be found in the INS Operating Instructions.⁵⁰ The BIA has, however, held that “good moral character does not mean moral excellence” and that it is not necessarily destroyed by a single incident.⁵¹

§ 42.3 SPECIFIC GROUNDS OF INADMISSIBILITY RELATED TO CRIME

§ 42.3A. CRIMES OF MORAL TURPITUDE

The category of “crimes of moral turpitude” appears in both the grounds of inadmissibility and those of removal or deportation. INA § 212(a)(2)(A)(i)(I) states in pertinent part that any noncitizen is inadmissible to the United States who has been “convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of — a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime).” Note first that *a conviction is not required under this section of the statute*. An admission alone may well suffice to render a person inadmissible to the United States.

The next question, then, is whether a particular offense is one of moral turpitude. An extensive and complicated body of case law has developed on this point. One common, if somewhat florid, definition is “an act of baseness, vileness, or

⁴⁷ The relevant period for naturalization is generally five years, INA § 316(a), for voluntary departure five years, INA § 240B(b), and for cancellation of removal either seven or ten years depending on the client’s legal status, INA §§ 240A, 240B, period of residence in the United States, basis of removal, and other factors.

⁴⁸ Beware! This section does not require a conviction. An “admission” may be enough.

⁴⁹ See, e.g., *Matter of Turcotte*, 12 I&N Dec. No. 206 (BIA 1967).

⁵⁰ INA § 316.1(e)–(g). The Operating Instructions can be found in GORDON, MAILMAN, & YALE-LOEHR, IMMIGRATION LAW & PROCEDURE.

⁵¹ *Matter of Sanchez-Linn*, Int. Dec. No. 3156 (BIA, 1991).

depravity.”⁵² Courts generally will look *not* to the facts of the case itself (or what the defendant actually did) but to the inherent nature of the crime as defined by statute and interpreted by the courts, and in the case of divisible statutes, as limited and described by the record of conviction.”⁵³ Thus, if there is a hypothetical way that a person could be convicted under a given statutory section without committing a crime of moral turpitude, then all convictions under that statute should be held not to be crimes of moral turpitude.⁵⁴

Though it should be noted that this is still a rather fluid area of law, it is helpful for the practitioner to consider examples of crimes that have already been considered by the BIA and federal courts:

Serious crimes against the person such as murder, voluntary manslaughter, kidnapping, attempted murder, assault with intent to rob or kill, assault with a deadly weapon, and aggravated assault are generally considered crimes of moral turpitude.

Accessory to murder is a crime of moral turpitude in Massachusetts.^{54.5}

Involuntary manslaughter, in Massachusetts, is most likely a crime of moral turpitude.^{54.7}

Assault and battery with a dangerous weapon in Massachusetts has been found to be a crime of moral turpitude;⁵⁵ as has indecent assault and battery.^{55.2} However, simple assault and battery, and even assault with intent to commit a felony (unless the underlying felony is itself a crime of moral turpitude) have been held *not* to be crimes of moral turpitude. The differences in assault and battery statutes can be subtle. Compare, for example, G.L. c. 265, § 13B (indecent assault and battery on a child), which probably is a crime of moral turpitude⁵⁶ with G.L. c. 265, § 13D (assault and battery on a police officer), which seems not to be.⁵⁷

Most sexual offenses, especially rape and prostitution, are crimes of moral turpitude. Failure to register as a sex offender is likely to be considered a crime of moral turpitude.⁵⁸

⁵² See *United States ex rel. Robinson v. Day*, 51 F.2d 1022 (2nd Cir. 1931); *United States v. Smith*, 320 F.2d 428, 431 (5th Cir. 1970).

⁵³ Only statutes which are “divisible”, or include some subsections or distinct offenses which involve moral turpitude and some which do not, permit a court to look to the record of conviction (i.e., the indictment or complaint, the plea, verdict, and sentence) to determine the nature of the offense of which the defendant was convicted. *Matter of Short*, Int. Dec. 3125 (BIA 1989) (assault with intent to commit a felony is a crime of moral turpitude only if it is found from the record of conviction that the felony intended as a result of the assault involves moral turpitude because simple assault is not a crime of moral turpitude).

⁵⁴ See *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979).

^{54.5} *Cabral v. INS*, 15 F.3d 193 (1st Cir. 1994).

^{54.7} The BIA has held, in examining a Missouri statute, that involuntary manslaughter is a crime of moral turpitude when the statute includes criminally reckless behavior as an element of the crime. *Matter of Franklin*, Int. Dec. 3228 (BIA 1994); Compare G.L. c. 265 § 13. *But see Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013 (9th Cir. 2005) (Burglary or breaking and entering may not be a CIMT, depending upon proof of intent to commit another crime).

⁵⁵ *Thomas v. INS*, 976 F.2d 786 (1st Cir. 1992).

^{55.2} *Maghsoudi v. INS*, 181 F.3d 8 (1st Cir. 1999).

⁵⁶ See *Fitzgerald ex rel. Miceli v. Landon*, 238 F.2d 864 (1st Cir. 1956).

⁵⁷ See *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926); *Matter of Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007) (simple assault is not a CIMT).

⁵⁸ See *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (2007).

Among crimes against property, arson, robbery, burglary, passing bad checks, and malicious destruction of property have been found crimes of moral turpitude.⁵⁹

Crimes involving fraud as an essential element are almost always held to involve moral turpitude.

Violations of regulatory laws, including, most notably, driving under the influence (DUI) generally do not involve moral turpitude. Recently, the BIA held that likewise the offense of aggravated DUI, or conviction of second or subsequent DUI is not a crime of moral turpitude.⁶⁰ However, an Arizona law for aggravated driving under the influence which requires the driver to know that he or she is prohibited from driving under any circumstances (i.e., after the driver's license has been suspended or revoked), was held to be a crime involving moral turpitude.⁶¹

Weapons offenses generally are held to involve moral turpitude. However, simple gun possession (i.e., .G.L. c. 269, § 10) is not a crime of moral turpitude, although it is a separate basis of removal.⁶² Thus, a noncitizen with a gun conviction could be subject to removal but would not necessarily be inadmissible on that ground.⁶³ A noncitizen with a gun possession conviction may still be considered to lack good moral character, however.⁶⁴

It cannot be emphasized strongly enough that this list is not conclusive and that this is a constantly evolving and shifting area of law. Before advising the client to admit to or plead out to any offense, it is essential to research the question of moral turpitude thoroughly.

It is also important to note that the statute itself provides that this *inadmissibility* section⁶⁵ will not apply to a noncitizen who: (1) Committed only one crime; (2) When the noncitizen was under eighteen years of age; (3) And the crime was committed; (4) And the noncitizen was released from confinement more than five years before the date of applying to enter the United States.⁶⁷

Similarly, a noncitizen will not be inadmissible under this section if: (1) the maximum penalty *possible* for the crime did not exceed imprisonment for one year; and (2) the noncitizen was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).⁶⁸

§ 42.3B. CONTROLLED SUBSTANCES

⁵⁹ *But see, In re: Afzal*, A73 042 981 (BIA June 12, 2000) (non-precedential decision holding that offense of Access Without Authorization of a Facility Through Which an Electronic Communication Service was Provided [18 U.S.C. § 2701(a)(1)] was not a crime of moral turpitude.)

⁶⁰ *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

⁶¹ *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999).

⁶² *Matter of Rainford*, Int. Dec. 3191 (BIA 1992).

⁶³ *See Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994).

⁶⁴ *See Acevedo-Tosciano v. INS*, 1994 U.S. App. LEXIS 20638 (9th Cir. 1994) (unpublished).

⁶⁵ Conviction of a crime of moral turpitude is also a ground of removal, for which there are different exceptions. *See infra*, Sec. 42.4B.

⁶⁶ [Reserved]

⁶⁷ INA § 212(a)(2)(A)(ii)(I).

⁶⁸ INA § 212(a)(2)(A)(ii)(II). Note that a suspended sentence will now be considered a term of imprisonment under the INA. *See* INA § 101(a)(48).

Inadmissibility for controlled substance violations is governed by INA § 212(a)(2)(A)(i)(II), which renders inadmissible any noncitizen:

... convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of — a violation of (or a conspiracy or attempt to violate) any law or regulation 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 (21 U.S.C. 802)).

This section is very broadly construed and will include virtually any controlled substance offense the practitioner is likely to encounter.^{68.5} Further, INA § 212(a)(2)(C) excludes from the United States any person whom the government knows or has reason to believe is an illicit trafficker in any controlled substance or is or has been a “knowing assistor, abettor, conspirator or colluder in such trafficking.”

A violation under the Massachusetts “civil” marijuana law⁶⁹ should be a “safe” disposition for purposes of removal, as it is not a criminal conviction. However, the law also authorizes municipalities to adopt ordinances making public use of marijuana a criminal offense punishable by a fine of up to \$300. *See* St. 2008 c. 387; G.L. c. 40, § 21. Such offenses would likely result in a “conviction” and therefore could well cause removal. But even civil dispositions under this law could cause problems under the inadmissibility grounds, which only require an “admission.”^{56.2} Beware, too, of possible grounds of inadmissibility and removal for “drug abusers.”

§ 42.3C. MULTIPLE OFFENSES

INA § 212(a)(2)(B) renders inadmissible any noncitizen:

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.

Note that for this section to apply a “conviction” is required, but moral turpitude is not.⁷⁰ The term *actually imposed* in this context is complex. Prior to the 1996 amendments to the INA, courts had generally held that a sentence was deemed “imposed” even if it was suspended. However, deferral of the imposition of sentence was held to avoid excludability under this section.⁷¹

^{68.5} In *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000), the Ninth Circuit held that even possession of drug paraphernalia, where that possession is accompanied by the use, or intended use, of the paraphernalia for a drug related purpose is a controlled substance offense, and thus a deportable offense within the meaning of the INA.

⁶⁹ The Massachusetts law decriminalizes possession of one ounce or less of marijuana or tetrahydrocannabinol (THC). Possession is punishable by a \$100 civil penalty. The law also authorizes municipalities to adopt ordinances making public use of marijuana a criminal offense punishable by a fine of up to \$300. *See* St. 2008 c. 387; G.L. c. 40, § 21. Such offenses would likely result in a “conviction” and therefore could well cause removal.

^{56.2} *See* *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (noncitizen found inadmissible for admitting drug possession to a physician); *see also* 8 U.S.C. § 844

⁷⁰ *See infra* § 42.4A (discussing the meaning of the term *conviction*).

⁷¹ *See also* *Rodrigues v. INS*, 994 F.2d 32 (1st Cir. 1993) (10-year sentence that was “deemed to be served” is not considered “actually imposed”).

The 1996 amendments redefined imprisonment as follows:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.⁷²

It still appears that creative sentencing could make a difference under this ground of inadmissibility and that consultation with an experienced immigration lawyer in such a case would probably be fruitful.

§ 42.3D. PROSTITUTION

INA § 212(a)(2)(D)(i)–(iii) bans from the United States any noncitizen who is coming to the United States “solely, principally, or incidentally to engage in prostitution or who has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status, [or who, “directly or indirectly procures or attempts to procure” or within that period], procured, or attempted to procure, or to import prostitutes, or who received proceeds from prostitution or “is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.”

§ 42.3E. MISCELLANEOUS

INA § 212 contains a number of other bases for inadmissibility which should be consulted if they appear even potentially applicable. For example, § 212(a)(3), entitled “Security and related grounds,” contains very broad bases of inadmissibility, including “any other unlawful activity” and “terrorist activities,” which are defined rather loosely. Section 212(a)(2)(E) relates to certain noncitizens who have asserted immunity from criminal prosecution.

§ 42.4 SPECIFIC GROUNDS OF REMOVAL RELATED TO CRIME

§ 42.4A. THE MEANING OF “CONVICTION”

Unlike the grounds for inadmissibility, most criminal grounds of removal from the United States require a conviction. The definition of conviction for immigration purposes is one of federal, not state law. The INA contains this definition.⁷³ INA § 101(a)(48) reads as follows:

⁷² INA § 101(a)(48)(B).

⁷³ Prior to 1996, this question was controlled by *Matter of Ozkok*, Int. Dec. 3044 (BIA 1988). Under *Ozkok*, a conviction existed if:

- (1) There has been a formal adjudication of guilt and entry of judgment of guilt or
- (2) An adjudication of guilt is withheld, but
 - (a) There has been a finding of guilty by a judge or jury, or an entry of a plea of guilty or *nolo contendere*, or an admission to sufficient facts;
 - (b) The judge has ordered some form of punishment, penalty, or restraint on the person’s liberty; and
 - (c) A judgment of adjudication of guilt may be imposed if the person violates the terms of probation or fails to comply with the requirements of the court’s order, without further proceedings regarding the person’s guilt or innocence of the original charge.

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.

The First Circuit Court of Appeals — even under the prior so-called *Ozkok* test — has applied the federal conviction standard rather strictly.⁷⁴ For example, the Court has held that a plea of *nolo contendere* which included a probationary term was a conviction for immigration purposes even though, after successful completion of probation, it was not considered a conviction under state law.⁷⁵

Convictions may include felonies, misdemeanors, violations, and “infractions.”⁷⁶ In *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004), the BIA held that the phrase “judgment of guilt,” appearing in the definition of conviction in INA §101(a)(48), is “a judgment in a criminal proceeding, that is, a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication.” The BIA thus held that a finding of guilt of a third-degree theft offense which involved a non-conventional criminal proceeding, *did not* result in a conviction for immigration purposes. Generally speaking, a Massachusetts Continuance Without a Finding (CWO) is a conviction for immigration purposes.⁷⁷ Also, court costs have been considered to be a punishment or penalty.⁷⁸

It is still clear, however, that pretrial probation would not be considered a conviction for immigration purposes.⁷⁹ Moreover, the First Circuit has held that a

⁷⁴ The Court held that a first-tier 1993 CWO with a “*Duquette* waiver” is sufficient to increase a defendant’s sentence under the federal Sentencing Guidelines, though the case does not clearly conclude that the admission is a “conviction.” See *United States v. Nicholas* 133 F.3d 133 (1st Cir. 1998).

⁷⁵ *Molina v. INS*, 981 F.2d 14 (1st Cir. 1992).

⁷⁶ See *Afzal v. Gonzales*, 203 Fed. Appx. 830 (9th Cir. 2006).

⁷⁷ See *De Vega v. Gonzales*, 503 F.3d 45, 49 (1st Cir. 2007). (“We conclude that the particular order in this case was plainly a punishment or penalty. De Vega was required to pay a large sum of money. If she failed to make her payments, her admission could ripen into a guilty plea and she would be subject to further punishment. See also *Matter of Corcino*, 2007 WL 1430785 (BIA) (unpublished decision) (Massachusetts CWO held to be a conviction);, Int. Dec. 3364 (BIA 1998) (a “deferred adjudication” under Texas law held to be a conviction for immigration purposes in light of new statutory definition).

⁷⁸ *Matter of Cabrera*, 24 I. & N. Dec. 459, 462 (BIA 2008).

⁷⁹ Similarly, a disposition under G.L. c. 276A (pretrial diversion) or G.L. c. 111E (drug treatment) should not be considered a conviction, especially if there is no admission. *Commonwealth v. Quispe*, 433 Mass. 508 (2001), should not be read as precluding the pretrial probation disposition to noncitizen clients. In that case, the Court found that a BMC judge in purporting to hold a *Brandano* hearing, see *infra*, §39.5A, had really just concluded that the potential immigration consequences to the defendant of an admission to sufficient facts justified a dismissal. *Id.* at 512-13. In doing so, the judge had not carefully considered the “interests of justice” (which may have as one component the interests of the Defendant, but should also include the interests of the Commonwealth, the interests of the “public” and the victim(s)) as he was required to do, but was substituting his judgment for that of the Legislature. *Id.*

Massachusetts “guilty filed” disposition is not a conviction for immigration purposes where there is no punishment, or restraint on the individual’s liberty.⁸⁰ Another complication is the question of finality. In addition to the factors listed in the statute, the BIA and many courts have historically held that a disposition must attain “finality” in order to be a conviction.⁸¹ Thus, the rule has long been that a person cannot be deported pending direct appeal of his criminal conviction.⁸² The First Circuit held (under pre-1996 law) that a “guilty filed” in Massachusetts was not a conviction because it does not have sufficient finality.⁸³ Although the BIA once held, in an unpublished (and therefore non-precedential) decision, that a Massachusetts “guilty filed” is a conviction for immigration purposes,⁸⁴ the First Circuit has held that a guilty filed is not a conviction so long as there is no associated punishment, penalty or restraint on liberty.⁸⁵

§ 42.4B. CRIMES OF MORAL TURPITUDE

INA § 237(a)(2)(A)(i) provides that any noncitizen 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.”⁸⁶

⁸⁰ *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001).

⁸¹ In *Matter of Polanco*, Int. Dec. 3232 (BIA 1994), the BIA held that a noncitizen who has waived or exhausted the right to a direct appeal of a conviction is subject to deportation, and the potential for further discretionary review on direct appeal will not prevent the conviction from being considered final for immigration purposes. See also *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA May 4, 2009)(a late-reinstated appeal under N.Y. law would not prevent removal); *rev’d by Cardenas-Abreu v. Holder*, 378 Fed. Appx. 59 (2d Cir. 2010) (An appeal reinstated pursuant to CPL 460.30 was equivalent to any other direct appeal for the purposes of finality.) *Cf. Planes v. Holder*, 2011 U.S. App. LEXIS 13648 (noncitizen was convicted despite the fact that there had been a remand for a possible resentencing, because the first definition of “conviction” in 8 U.S.C.S. § 1101(a)(48)(A) required only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived); *Montenegro v. Ashcroft*, 355 F.3d 1035, (7th Cir. 2004)(IRIRA eliminated the finality requirement for a conviction, set forth in *Pino*, even for those who were found guilty before April 1, 1997); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (new statutory definition of conviction held to eliminate requirement of finality.) See also *Matter of Thomas*, Int. Dec. 3245 (BIA 1993) (although a non-final conviction can neither support a charge of deportability nor trigger a statutory bar to relief, under a section of the INA premised on the existence of a conviction, even a nonfinal criminal conviction may be considered relevant to the denial of certain forms of discretionary relief from deportation).

⁸² Note that collateral attacks on a conviction — such as a habeas corpus petition, or motions for a new trial — do not have the same effect.

⁸³ *White v. INS*, 17 F.3d 475 (1st Cir. 1994). See also *Pino v. Landon*, 349 U.S. 901 (1955).

⁸⁴ Unpublished BIA decision dated 5/9/00 on file with authors. See also, *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (new statutory definition of conviction held to eliminate requirement of finality).

⁸⁵ See *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001).

⁸⁶ Prior to the 1996 Amendments, INA § 241(a)(2)(A)(i) had read that an alien in the United States was subject to deportation if she (1) is convicted (2) of a crime involving moral

A noncitizen thus faces removal for conviction of a single crime of moral turpitude “for which a sentence of one year or longer *may be* imposed.” The critical issues, then, are:

1. Is the crime one of moral turpitude as described *supra* in § 42.2?
2. Is the disposition a “conviction”?
3. What is the possible statutory sentence that may be imposed? (not what is the actual sentence rendered);
4. When was the client's date of admission; and
5. Is the client an LPR?

Note that the last question is one that should probably be answered by an immigration specialist as it is more complex than it might appear. Still, it is clear that a plea to a lesser included offense that is either not a crime of moral turpitude or for which a sentence of one year or longer may not be imposed could make a tremendous difference in such cases.

§ 42.4C. MULTIPLE CONVICTIONS

A noncitizen is deportable under INA § 237(a)(2)(A)(ii) if he, at *any time* after admission: (1) is convicted (2) of two or more crimes (3) involving moral turpitude (4) not arising out of a single scheme of criminal misconduct, (5) regardless of whether confined, and (6) regardless of whether the convictions were in a single trial. This section raises the same issues of conviction and moral turpitude as does INA § 237(a)(2)(A)(i). Another important issue in cases under this section may be whether the convictions arose out of a “single scheme.” There is a fairly extensive and rather fact-specific body of case law on this point.⁸⁷ The First Circuit Court of Appeals has held that a single scheme involves acts that take place at one time, with no substantial interruption that allows the perpetrator to reflect on his actions.⁸⁸ In 1992, the BIA, using a less expansive interpretation of “single scheme” than some circuits, held that credit card fraud, where the defendant used several names over several months, did not constitute a single scheme.⁸⁹

§ 42.4D. CONTROLLED SUBSTANCES

A noncitizen is deportable (subject to removal) under INA § 237(a)(2)(B) 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) (21 U.S.C. 802), *other than a single offense involving possession for one’s own use of thirty grams or less of marijuana* [emphasis added].

Even if it is possible to avoid conviction for a controlled substance violation, the practitioner must also attempt to avoid the consequences of INA § 237(a)(2)(B)(ii) which renders a noncitizen deportable if, at any time after admission, she becomes a

turpitude (3) committed within five years after the date of entry, and either (4) sentenced to confinement or (5) confined in prison (6) for one year or longer.

⁸⁷ See, e.g., *Nguyen v. INS*, 991 F.2d 621 (10 Cir. 1993).

⁸⁸ *Pacheco v. INS*, 546 F.2d 448, 451 (1st Cir. 1976).

⁸⁹ *Matter of Adetiba Int. Dec. No. 3177* (BIA 1992).

drug addict or drug abuser. Also, the BIA has held that even simple possession of under 30 grams of marijuana may render a person deportable if it took place in prison.⁹⁰ A conviction for solicitation to commit a crime related to a controlled substance may also render a noncitizen deportable as one convicted of a violation of a law related to controlled substances.⁹¹ However, a conviction for accessory after the fact to a drug offense (G.L. c. 274, §4) is probably not a controlled substance offense, as it is a separate and distinct crime from the substantive offense.⁹²

Controlled substance offenses that may be dismissed or expunged under various state and federal rehabilitative statutes present complex immigration law problems. The BIA, in *Matter of Manrique*,⁹³ had once held that, as a matter of policy in cases dealing with drug-related convictions under state law, any noncitizen who was accorded rehabilitative treatment pursuant to a state statute would not be deported if he established that he would have been eligible for federal first-offender treatment under the provisions of 18 U.S.C. § 3607(a) (1988)⁹⁴ had he been prosecuted under federal

⁹⁰ See *In re Moncada-Servellon*, 24 I. & N. Dec. 62 (B.I.A. 2007) (prison held to be a separate element); see also *In re Martinez-Zapata*, 24 I. & N. Dec. 424 (B.I.A. 2007)(drug-free zone).

⁹¹ *Matter of Beltran*, Int. Dec. 3179 (BIA 1992). The Ninth Circuit Court of Appeals has, however, held that an Arizona conviction for solicitation to possess cocaine is not a deportable offense under this section of the INA. *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). Cf. *Mizrahi v. INS*, 492 F.3d 156, 163-64, 175 (2d Cir. 2007) (disagreeing with *Coronado*); see also *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Arizona conviction for solicitation to possess cocaine is not an aggravated felony).

⁹² The BIA has held that a person who was an accessory after the fact to drug trafficking was not convicted of a controlled substance offense. *Matter of Batista*, Int. Dec. 3321 (BIA 1997) (this was a Pyrrhic victory, however, as the BIA held that the crime is an aggravated felony as an offense relating to obstruction of justice for which the term of imprisonment was at least one year).

⁹³ *Matter of Manrique*, Int. Dec. 3250 (BIA 1995).

⁹⁴ The federal first offender statute, 18 U.S.C. § 3607 provides as follows:

(a) PRE-JUDGMENT PROBATION. — If a person found guilty of an offense described in section 404 of the Controlled Substance Act (21 U.S.C. 844)

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection; the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) RECORD OF DISPOSITION. — A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c),

law.⁹⁵ The Board, however, has overruled *Manrique* and a number of other cases and rendered state rehabilitative statutes ineffective to prevent deportation even if the conviction is dismissed.⁹⁶ Though the First Circuit has not yet ruled on whether the BIA was correct to abandon *Manrique*, the 9th Circuit has determined that it was not.⁹⁷

shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) EXPUNGEMENT OF RECORD DISPOSITION. — If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be an expunged for all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

⁹⁵ See *Manrique, supra*, Int. Dec. 3250 (BIA 1995). The Louisiana statute at issue in *Manrique* had provided that the court may, “without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as may be required.” On the defendant’s violation of any of the terms or conditions of his probation, the court could enter an adjudication of guilt and impose sentence on such person. But, “upon fulfillment of the terms and conditions of probation imposed in accordance with this section, the court shall discharge such person and dismiss the proceedings against him.” Discharge and dismissal under this law “shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions.”

Although the Board found that proceedings under this section could constitute a conviction under *Matter of Ozkok* (the case that defined convictions prior to 1996), it further held that the policy of leniency in immigration proceedings shown to noncitizens subject to treatment under 18 U.S.C. § 3607(a) (1988) will be extended to noncitizens prosecuted under state law who establish the following criteria:

1. The noncitizen is a first offender, that is, he has not previously been convicted of violating any federal or state law relating to controlled substances.
2. The noncitizen has pled to or been found guilty of the offense of simple possession of a controlled substance.
3. The noncitizen has not previously been accorded first-offender treatment under any law.
4. The court has entered an order pursuant to a state rehabilitative statute under which the noncitizen’s criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation.

Creative use of alternative pleas and dispositions might thus permit a Massachusetts first offender to fit within *Manrique*. *But see* *Matter of Dillingham*, Int. Dec. No. 3325 (BIA 1997) (expungement of foreign drug-related conviction pursuant to a foreign rehabilitation statute is not effective to prevent a finding of inadmissibility even if noncitizen would have been eligible for federal first-offender treatment under *Manrique*).

⁹⁶ See *Matter of Roldan*, Int. Dec. 3377 (BIA 1999). See also, *Matter of Salazar-Regino*, Int. Dec. 3462 (BIA 2002) (“the question before us, therefore, is whether, because of the

§ 42.4E. AGGRAVATED FELONY

INA § 237(a)(2)(A)(iii) provides that “any alien who is convicted of an aggravated felony at any time after admission is deportable.”

Aggravated felonies are a sub-category of criminal convictions that result in a number of extremely serious negative consequences.⁹⁸ Though the category was originally quite limited, it has expanded tremendously to the point where virtually any crime may be an aggravated felony. Even offenses classified by state law as misdemeanors can be aggravated felonies. For example, crimes of violence for which at least a one year sentence (even if suspended) is imposed are aggravated felonies. The Massachusetts crime of assault and battery (G.L. c. 265, §13A), though a misdemeanor offense, is a crime of violence, thus, can be an aggravated felony if a sentence of one year or more is imposed. However, the BIA has held that a Massachusetts conviction for DUI (G.L. c. 90, §24) is *not* an aggravated felony as violation of the statute is not, by its nature, a crime of violence.⁹⁹ The practitioner representing a noncitizen should attempt to avoid a conviction for an aggravated felony, if at all possible, because the consequences are devastating. Noncitizens convicted of aggravated felonies may be detained without bond¹⁰⁰ and will be deported as

nature of the crime, we should carve out an exception to accord special treatment to first-time drug offenders who have received rehabilitative treatment under a state law. We find that... we have no authority to make such an exception.”)

⁹⁷ *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The Ninth Circuit reasoned that the First Offender Act was not repealed in whole or in part by the recent amendments to the immigration laws (specifically, the enactment of a definition for the term “conviction”), and that persons whose offenses would qualify for treatment under the First Offender Act but who are convicted and have their convictions expunged under analogous state laws, may not be removed on account of those offenses.

⁹⁸ An offense classified by state law as a misdemeanor can be an aggravated felony if the offense otherwise conforms to the federal definition of aggravated felony found in INA 101(a)(43). *See e.g., Matter of Small*, 23 I&N Dec. 448 (BIA 2002). A drug offense will thus qualify as a “drug trafficking crime” (and therefore an aggravated felony) if it is punishable under one of the three federal drug statutes listed in INA §101(a)(43)(B) and is a felony. In *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (2002) the BIA held that it will in the future follow the standards of each federal circuit court of appeals to decide whether a state felony drug conviction is an aggravated felony under INA §101(a)(43)(B). Practitioners will thus have to look to evolving decisional law of the First Circuit for guidance. A state drug offense will also be deemed a felony if the offense is classified as a felony under the law of the relevant state. *Id.*; *see also*, *United States v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996) (under the Controlled Substances Act’s “unambiguous definition, a state offense . . . which is classified as a felony under the law of the convicting state would clearly qualify as a felony for that definition’s purpose, even if the offense could be punished only as a misdemeanor under federal law.”) Pursuant to this definition, the offense of simple possession, in Massachusetts, would not be a felony (and therefore cannot be an “aggravated felony”) *for a defendant with no prior convictions*.

⁹⁹ *Matter of Ramos*, I&N Dec. 336 (BIA April 4, 2002). The BIA has also held that an Arizona conviction for aggravated driving while under the influence is a “crime of violence” and an aggravated felony. *Matter of Magallanes-Garcia*, Int. Dec. 3341 (BIA 1998).

¹⁰⁰ The subject of mandatory detention is beyond the scope of this work. There are, however, exceptions to the general rule of which the practitioner should be aware. In particular, most respondents (other than those who have traveled abroad and are charged with

expeditiously as possible. An aggravated felon is now “conclusively presumed” to be deportable/subject to removal and is also rendered ineligible for virtually all forms of relief from removal including asylum. A person deported as an aggravated felon may also be banned from the United States for life.¹⁰¹

The Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), the Antiterrorism and Effective Death Penalty Act of 1996¹⁰² (AEDPA), and the Immigration and Nationality Technical Corrections Act of 1994¹⁰³ (INTCA) substantially broadened the definition of an aggravated felony. The broadened definition is virtually completely retroactive.¹⁰⁴ *As a result, great care must be taken with clients whose prior convictions may now be retroactively deemed to be aggravated felonies. It is not uncommon for a defendant to come to court for a purpose such as the dismissal of a charge only to be arrested by ICE agents and placed in removal proceedings due to an old conviction.*

The term “aggravated felony” is defined at INA § 101(a)(43) to include:

(A) murder, rape, or sexual abuse of a minor;¹⁰⁵

inadmissibility on criminal grounds) who were released from criminal custody prior to October 9, 1998 are not subject to mandatory detention. *See Velasquez v. Reno*, 37 F. Supp. 2d 663 (D.N.J. 1999); *see also*, Memorandum dated July 12, 1999 of Michael A. Pearson, INS Executive Associate Commissioner for Field Operations (affirming INS agreement with this interpretation). Noncitizens who have never been in criminal custody (e.g., received probation) may not be subject to mandatory detention. *See Aguilar v. Lewis*, 50 F. Supp. 2d 539 (E.D. Va. 2000). Moreover, the U.S. Supreme Court granted certiorari to determine whether mandatory detention is unconstitutional as it applies to lawful permanent residents. *See Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002) cert. granted sub nom *Demore v. Kim*, 122 S. Ct. 2696 (June 28, 2002) *see also*, *Zgombic v. Farquharson*, 89 F. Supp. 2d 220 (D. Conn. 2000.)

As to the question of the permissible length and review rights during post-removal order mandatory detention *see Zadvydas v. Davis*, 533 U.S. 678 (2001)(Court interpreted INA § 1231(a)(6) as containing an implicit “reasonable time” limitation of six months, the application of which was subject to federal court review).

¹⁰¹ INA § 212(a)(9).

¹⁰² Pub. L. No. 104–132, 110 Stat. 1214, 1277.

¹⁰³ Pub. L. No. 103-416, 108 Stat. 4305, 4311.

¹⁰⁴ *See Lettman v. Reno*, 207 F.3d 1368 (2000) (a noncitizen convicted of an aggravated felony is subject to deportation regardless of the date of conviction).

¹⁰⁵ The phrase “sexual abuse of a minor” is not defined in the INA, either expressly or with reference to any other statutory provision. Generally, the BIA has considered the ordinary meaning of the words when analyzing whether state statutes constitute “sexual abuse of a minor,” without looking to any specific federal criminal statute for comparison. The state statute at issue need not be a felony offense. *See Matter of Small*, 23 I&N Dec. 448 (BIA 2002).

The Massachusetts crime of indecent assault and battery on a child under fourteen, G.L. c. 265, §13B, has been determined to be sexual abuse of a minor within the meaning of the statute. *Emile v. INS*, 244 F.3d 183 (1st Cir. 2001). A closer question is whether indecent assault and battery on a person fourteen or older, G.L. c. 265, §13H, would be considered “sexual abuse of a minor” if the victim were in fact a minor (though this is not an element of the offense). It is unclear whether the statute would be considered divisible, or whether immigration judges may allow in evidence of the victim’s age from not only the record of conviction, but from police reports and other evidence. *See id.* (court looked at police reports to determine defendant’s actual conduct); *see also, Lara-Ruiz v. INS.*, 241 F.3d 934, 940 (7th Cir. 2001) (Illinois felony conviction for sexual assault was sexual abuse of a minor where the record of conviction indicated that the victim was a four year old girl). Thus, practitioners should be aware that any references to the age of the victim in the record of conviction, even

(B) illicit trafficking in a controlled substance [as defined in section 102 of the Controlled Substances Act [21 U.S.C. § 802], including a drug trafficking crime [as defined in section 924(c) of title 18, United States Code];¹⁰⁶

(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) section 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 [26 U.S.C.A. § 5861] (relating to firearms offenses);

(F) a crime of violence¹⁰⁷ (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [imposed; including a suspended sentence] is at least one year;

with respect to offenses that do not contain age as an element, might be used to prove an offense an aggravated felony.

¹⁰⁶ Some possessory drug offenses (and second or subsequent possession offenses) have been considered “trafficking” offenses for purposes of the aggravated felony definition. Possession with intent to distribute marijuana has been held to be an aggravated felony. *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008); *Cf. Wilson v. Ashcroft*, 350 F.3d 377, 381 (3d Cir. 2003). However, the Supreme Court has made clear that a first offense state felony conviction for simple possession of a controlled substance is NOT an aggravated felony drug trafficking offense. *Lopez v. Gonzales*, 549 U.S. 47 (2006).

Recidivist possession may still be an aggravated felony, but in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) the Supreme Court held that a second or subsequent simple drug possession offense was not an aggravated felony when the state conviction was not based on the fact of a prior conviction. *see* Vargas, “Practice Advisory: Multiple Drug Possession Cases After *Carachuri-Rosendo*,” Immigrant Defense Project, Jun. 21, 2010, available at http://www.immigrantdefenseproject.org/docs/2010/10_Carachuri%20Practice%20Advisory%2020100622-FINAL.pdf The First Circuit has also held that the record of conviction must be clear. *See Berhe, supra*.

If the crime is a state-law misdemeanor or would be a misdemeanor if prosecuted under federal law, the offense should not be held an aggravated felony. *See e.g., Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002) (each of noncitizen’s two convictions for possession of marijuana is classified as a misdemeanor offense under Texas law; therefore, neither conviction is a felony within the meaning of 18 U.S.C. § 924(c)(2) or an aggravated felony within the meaning of INA § 101(a)(43)(B)); *see generally, Matter of Yanez-Garcia*, Int. Dec. 3473 (2002) (explaining analytical framework for such cases with reference to Circuit Court’s criminal law decisions.)

¹⁰⁷ Crimes of violence are defined as: (1) any offense that has as an element the use or attempted use of force against persons or property; or (2) any other felony that by its nature involves a risk that force may be used. In *Matter of B.*, Int. Dec. No. 3270 (BIA 1996), the BIA held that second-degree “statutory” rape is a “crime of violence” and therefore an aggravated felony. The BIA generally will include offenses in the “crime of violence” category where the

(G) a theft offense¹⁰⁸ (including receipt of stolen property) or burglary offense for which the term of imprisonment [imposed; including a suspended sentence] is at least one year;

nature of the crime as defined is such that its commission would ordinarily present a risk that physical force is used. It does not matter that the risk did not develop or that harm did not actually occur. However, the Supreme Court has held that state DUI offenses which either did not have a *mens rea* component or required only a showing of negligence do not qualify as aggravated felony “crimes of violence.” *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Specific intent is not required, however; even recklessness may suffice, especially in the First Circuit. *See U.S. v. Nason*, 269 F.3d 10 (1st Cir. 2001)(Maine assault statute was a crime of domestic violence predicate offense under 18 U.S.C. § 922(g)(9)); *Lopes v. Keisler*, 505 F.3d 58 (1st Cir. 2007), (Rhode Island assault statute was a crime of violence under 18 U.S.C. §16); *U.S. v. Earle*, 488 F.3d 537 (1st Cir. 2007), (G.L. c. 265 §15A(b) was a crime of violence under the U.S. Sentencing Guidelines § 2L1.2 which defines “crime of violence” as including “... any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person or another.” The Court reasoned, in apparent contradiction to *Leocal*, that because the statute required the causation of injury to another, the statute had as an element the use of force); see also, *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 768, 770 (BIA 2005), *aff’d*, 483 F.3d 356 (5th Cir. 2007)(use without authority held to be an aggravated felony); *Matter of Alcantar*, Int. Dec. 3220 (BIA 1994) (involuntary manslaughter held to be an aggravated felony).

A so-called *divisible statute* (i.e. one that encompasses crimes that are not crimes of violence as well as those that are), however, raises interesting possibilities for defense of removal proceedings in immigration court. In an unpublished decision, *Matter of G-D-*, A34 231 152 (BIA Sept. 29, 2000) the BIA has held that a conviction for voluntary manslaughter under Massachusetts law was *not* an aggravated felony because the Massachusetts definition of voluntary manslaughter does not include as a required element “the use, attempted use, or threatened use of physical force against the person or property of another.” *See* Interpreter Releases, Vol. 77, No. 42 page 1547, October 30, 2000. The Board also intimated that involuntary manslaughter under Massachusetts law may not be a crime of violence either. This sort of analysis may well be applied to other Massachusetts statutes in the future. Moreover, it is not confined to the crimes of violence category.

¹⁰⁸ This category is broadly construed as “taking property or exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Martinez-Perez v. Ashcroft*, 417 F.3d 1022 (9th Cir. 2005); *see also*, *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007) (state conviction for aiding and abetting the theft of a vehicle held a “theft offense”). It has been interpreted to include misdemeanor state offenses such as shoplifting and larceny, *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (2001); *U.S. v. Christopher*, 239 F.3d 1191 (11th Cir. 2001);, as well as attempted possession of stolen property, *Matter of Bahta*, 22 I&N Dec.1381 (BIA 2000); entering a motor vehicle with intent to steal, *Novitskiy v. Ashcroft*, 2005 U.S. App. LEXIS 1178 (10th Cir. 2005) (unpub’d); possession of stolen mail, *Ibrahim v. Ashcroft*, 2003 U.S. App. LEXIS 18917 (5th Cir. 2003). unlawful driving or taking of a vehicle, *Matter of V-Z-S*, 22 I &N Dec. 1338 (BIA 2000); and theft of services, *Ilchuk v. Attorney General*, 434 F.3d 618 (3d Cir. 2006). The BIA has held that the taking of property is a theft offense whenever the conviction required proof of criminal intent to deprive the owner of property, regardless of whether the deprivation is total, partial, permanent or temporary. *Matter of V-Z-S*, Int. Dec. 3434 (BIA 2000) (California conviction for “unlawful driving and taking” of a vehicle held to be an aggravated felony); *but see Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000), cert. denied, 531 U.S. 1069 (2001) (Texas conviction for burglary of vehicle with intent to commit theft held not to be a theft offense.) Moreover, the BIA has determined that the “receiving stolen property” parenthetical is intended to clarify that the term “theft” is not being used in its limited, traditional sense to require proof that the offender was involved in the actually taking of the property at issue. *Matter of Bahta*, Int. Dec. 3437 (BIA 2000). Thus,

(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 there is a sentence of one year imprisonment or more;

(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 2423 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; or

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents or 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 [26 U.S.C. § 7201] (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) [8 U.S.C. § 1324(a)(1)(A) or (2)] (relating to alien smuggling) except in the case of a first offense for which the noncitizen has affirmatively shown that the offense was committed for the purpose of assisting, abetting, or aiding only the noncitizen's spouse, parent, or child (and no other individual) to violate a provision of the INA;

(O) an offense described in section 275(a) or 276 [8 U.S.C. §1325(a) or 1326] committed by a noncitizen 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 imposed (regardless of

theft includes the category of offenses involving knowing receipt, possession, or retention of property from its rightful owner. *Id.* (Nevada offense of attempted possession of stolen property is an attempted theft offense under INA 101(a)(43)(G)). Note, however, that the divisible statute analysis described above might apply to various apparent theft offenses. *See, Matter of Afzal*, A73 042 981 (BIA June 12, 2000) (non-precedential decision holding that offense of Access Without Authorization of a Facility Through Which an Electronic Communication Service was Provided [18 U.S.C. § 2701(a)(1)] was not a crime of moral turpitude.)

The BIA has looked to the U.S. Supreme Court case of *Taylor v. United States*, 495 U.S. 575 (1990) to define the term burglary. In so doing, it has determined that the Texas offense of burglary of a vehicle is not “burglary” within the definition of an aggravated felony in INA § 101(1)(43)(G). *Matter of Perez*, Int. Dec. 3432 (BIA 2000).

any suspension of such imprisonment) is at least 12 months except in the case of a first offense for which the noncitizen has affirmatively shown that the offense was committed for the purpose of assisting, abetting, or aiding only the noncitizen’s spouse, parent, or child (and no other individual) to violate a provision of the INA;

(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 [note the difference in terminology here—the actual sentence is not controlling]*; and

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

The statute also states that 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 fifteen years.¹⁰⁹

The 1996 IIRIRA amended INA §101(a)(43) to include “rape or sexual abuse of a minor.” This category may include state misdemeanors with victims up to 18 years of age, and even if the sexual contact was consensual.¹¹⁰

As noted above, IIRIRA also substantially lowered the required sentence and minimum dollar amounts for many aggravated felonies. Thus, some of the above crimes that formerly required at least a five-year sentence now only require a one-year sentence, even if suspended. The new law also adds to the end of INA §101(a)(43) a rule that the term *aggravated felony* shall apply “regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.” The amendments made by this section, however, are then said to apply to “actions taken on or after the date of enactment of this Act.” The proper construction and the constitutionality of these provisions will undoubtedly require more judicial analysis. However, courts have construed these new definitions as *completely retroactive*. Great care must be taken with clients whose prior convictions may now be aggravated felonies.

The statute also states that 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 fifteen years.¹¹¹

§ 42.4F. FIREARMS VIOLATIONS

INA § 237(a)(2)(C) provides for the deportation of:

¹⁰⁹ INA Section 101(a)(43).

¹¹⁰ *In Re V--- F--- D---*, 23 I. & N. Dec. 859, Int. Dec. 3523 (BIA 2006); *Matter of Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (BIA 1999).

¹¹¹ INA Section 101(a)(43).

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.

The important thing to note about this section is its breadth (virtually any firearms offense will qualify) and the inclusion of attempt and conspiracy offenses. Recent decisions of the BIA have further broadened this section to include offenses in which possession or use of a firearm is an essential element of another charge.¹¹²

§ 42.4G. DOMESTIC VIOLENCE

INA § 237(a)(2)(E) provides for the deportation of noncitizens who are convicted of “crimes of violence, stalking, child abuse, child neglect, child abandonment, and certain violations of protective orders.” This is a very broad statute that has not yet been meaningfully analyzed by the BIA or the courts. Its full text should, however, be read very closely as it could apply to a very wide variety of cases:

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission 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) 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 who is cohabiting with or has cohabited with the person as a spouse, 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.

(ii) Violators of protection orders

Any alien who at any time after admission 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,

¹¹² See *In re Martinez-Zapata*, 24 I. & N. Dec. 424, 429 (B.I.A. 2007), (overruling *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, (B.I.A. 1992), which had held that a noncitizen convicted of theft with a firearm was not deportable under the firearm ground of deportability because the use of the gun in the commission of the offense merely increased the punishment for the theft and did not constitute a distinct offense.) *Lopez-Amaro v. INS*, 25 F.3d 986 (11th Cir. 1994) (enhancement provision for firearm possession in murder statute is possession conviction for deportation purposes); *Matter of Chow*, Int. Dec. No. 3199 (BIA 1993), *aff'd*, 12 F.3d 34 (5th Cir. 1993); *Matter of K.L.*, Int. Dec. No. 3200 (BIA 1993); *Matter of P.F.*, Int. Dec. No. 3201 (BIA 1993); *Matter of Perez-Contreras*, Int. Dec. No. 3194 (BIA 1992).

including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a *pendente lite* order in another proceeding.

§ 42.4H. MISCELLANEOUS

The above is not an exhaustive list of all bases for removal/deportation. Certain other rather rare grounds involving criminal conduct include smuggling (of noncitizens), marriage fraud, espionage, sabotage, treason, sedition, Selective Service violations, falsification of documents, and “terrorist activities.”

§ 42.4I. JUVENILE AND YOUTHFUL OFFENDER OFFENSES

A finding of delinquency in a juvenile proceeding is not considered to be a conviction for immigration purposes.¹¹³ Also, as noted above, a noncitizen may not be subject to exclusion if he committed only one crime of moral turpitude while under the age of eighteen more than five years ago, or, if imprisoned, was released more than five years ago. A finding of delinquency may, however, preclude a finding of good moral character. The 1996 IIRIRA also amended INA § 301(e)(3) to bar so-called Family Unity benefits “granted or extended” after September 30, 1996 to a person:

who has committed an act of juvenile delinquency which if committed by an adult would be classified as — (A) a felony crime of violence that has as an element the use or attempted use of physical force against another individual, or (B) a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense.

If a juvenile is tried and convicted as an adult, then she would most likely be treated as having a conviction in immigration proceedings. It is uncertain at this time whether a Massachusetts “youthful offender” adjudication would be deemed a conviction for immigration purposes. The exact nature of the proceedings and the ultimate sentence would, however, be important factors for the BIA to consider. The BIA has held that a “youthful offender” adjudication under New York law did not constitute a conviction for immigration purposes.¹¹⁴

§ 42.5 POSSIBLE WAIVERS AND OTHER FORMS OF RELIEF UNDER U.S. IMMIGRATION LAWS

If a noncitizen is found to be inadmissible to the United States, or found to be deportable or subject to removal, a number of possible “waivers” are available. What follows is a brief, selective overview of some of these possibilities.

§ 42.5A. SECTION 212(C) / CANCELLATION OF REMOVAL PART A

¹¹³ See *Vieira Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (17 year old who was charged and convicted as an adult in Rhode Island state court held not entitled to have his offense treated as one of juvenile delinquency for purposes of removal proceedings); *Matter of C.M.*, 5 I&N Dec. 327 (BIA 1953); *Matter of Ramirez-Rivera*, 18 I&N Dec. 135 (1981).

¹¹⁴ *Matter of Devison*, Int. Dec. 3435 (BIA 2000) (reasoning by analogy to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–5042 (1994 & Supp. II 1996)).

Relief from removal may be available to some long-term lawful permanent residents with criminal convictions. For many years, the main avenue for such relief was Section 212(c) of the INA. Section 212(c) relief was, however, essentially eliminated and replaced in the 1996 law with a form of relief from deportation known as “cancellation of removal.”¹¹⁵ Cancellation of removal, unlike the former Section 212(c) waiver, precludes eligibility to those convicted of an aggravated felony. Recently, the Supreme Court held that Section 212(c) relief was not eliminated from the law retroactively.¹¹⁶ Thus, Section 212(c) remains available to noncitizens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for Section 212(c) relief at the time of their plea under the law then in effect.¹¹⁷ If a noncitizen client is a lawful permanent resident, and has old convictions, an immigration consultation should be arranged to determine whether 212(c) relief might still be available.

Cancellation of removal requires seven years of continuous residence, five of those in LPR status. This relief is barred to anyone with an aggravated felony conviction. It might, however, permit a noncitizen convicted of other deportable offenses, such as a crime of moral turpitude, to waive deportation and stay in the United States. The new provisions took effect on April 1, 1997. Before that date, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) — which had already severely limited § 212(c) relief — were in effect.¹¹⁸

§ 42.5B. SUSPENSION OF DEPORTATION / CANCELLATION OF REMOVAL PART B

The former discretionary relief from deportation known as suspension of deportation was replaced in the 1996 INA with a new form of relief called “cancellation of removal.”¹¹⁹ To avoid deportation, a noncitizen must prove ten years of continuous physical presence and “good moral character.” Note that a criminal conviction may

¹¹⁵ See INA § 240A(a).

¹¹⁶ *INS v. St. Cyr*, 533 U.S. 289 (2001). See generally, Kanstroom, *St. Cyr or Insincere?: The Strange Quality of Supreme Court Victory*, 16 Georgetown Immigration Law Journal 413 (2002); , Kesselbrenner, Baldini-Potermin and Rosenberg, IMMIGRATION LAW AND CRIMES, *supra*, *passim*

¹¹⁷ *Id.* See *Judulang v. Holder*, 132 S. Ct. 476; 181 L. Ed. 2d 449 (2011)(so-called “comparable-grounds” rule used by the Board of Immigration Appeals (BIA) to determine whether a deportable noncitizen could seek relief from removal under former § 212(c) of the Immigration and Nationality Act (INA) held arbitrary and capricious.)

¹¹⁸ AEDPA § 440(d) eliminated § 212(c) relief for any noncitizen who is “deportable by reason of having committed any criminal offense covered in” INA § 241(a)(2)(A)(iii) (aggravated felony) § 241(a)(2)(B) (controlled substance offense and drug abuser), § 241(a)(2)(C) (firearm offense), § 241(a)(2)(D) (miscellaneous crime offenses), or any offense covered by § 241(a)(2)(A)(ii) (multiple criminal convictions) for which both predicate offenses are covered by § 241(a)(2)(A)(I) (crimes or moral turpitude committed within five years of last entry into the U.S. (or, in certain cases, 10 years) and for which a sentence of one year or longer may be imposed). Noncitizens remained eligible under AEDPA for a § 212(c) waiver for smuggling, marriage fraud, falsification of documents, certain single crimes of moral turpitude or certain multiple crimes of moral turpitude. AEDPA § 440(d) did not appear to change the availability of § 212(c) relief in exclusion proceedings. The later IIRIRA, however, as noted above, largely eliminated § 212(c).

¹¹⁹ See INA § 240A(b).

well preclude the latter. Further, relief under this statute is not available to a person who has been convicted of an offense under INA § 212(a)(2), 237(a)(2), or 237(a)(3) (*see supra*), which renders it virtually useless to anyone convicted of a crime. The statute also requires a showing of “exceptional and extremely unusual hardship” to a qualifying U.S. citizen or LPR spouse, parent, or child (not hardship to the applicant herself or himself). The ten-year period of continuous physical presence is deemed to end when the charging document in removal proceedings is issued or when the applicant “committed” an offense that makes her inadmissible or removable, whichever date is earlier.

§ 42.5C. INA § 212(H)

Noncitizens in removal proceedings may be eligible for a waiver of inadmissibility pursuant to INA § 212(h). A waiver under INA § 212(h) will forgive certain crimes involving moral turpitude, commission of more than one crime, prostitution, and simple possession of 30 grams or less of marijuana. The 1996 amendments to the INA provided that waiver is unavailable to an LPR who, since admission as an LPR, has been convicted of an aggravated felony or has not lawfully resided continuously in the United States for at least seven years before removal proceedings began. However, this provision does not apply to non-LPRs. This strange, anomalous, and possibly unconstitutional change took effect on September 30, 1996.¹²⁰

§ 42.6 POSTCONVICTION MEASURES AVAILABLE TO DEFENSE COUNSEL

A conviction that has been vacated pursuant to state or federal law may not constitute a conviction for immigration purposes.¹²¹ However, great care is required here. A conviction that is vacated for “equitable” reasons may still be considered a conviction for immigration purposes.¹²² The First Circuit has held that a vacation or expungement must be based on the “procedural or substantive invalidity” of the conviction.¹²³ If the vacation is “solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings” it will not be effective.¹²⁴ A sentence reductions, however, may be treated more generously, and can make a huge difference in the

¹²⁰ *But see*, *Jankowski-Burczyk v. INS*, 291 F.3d 172 No. 01-2353 (2nd Cir. May 29, 2002) (LPRs and non-LPRs are distinct classifications that support disparate treatment under the INA); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) (difference in treatment between LPRs and non-LPRs in amended Section 212(h) is rationally related to a legitimate government purpose); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001).

¹²¹ *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (2000) (BIA determined it would give full faith and credit to New York Criminal Procedure Law vacating criminal conviction). *Contrast Matter of Roldan*, Int. Dec. 3377 (1999).

¹²² *See Matter of Marroquin-Garcia*, 23 I. & N. Dec. 705 (Att’y Gen. 2005) (conviction stands for immigration purposes if set aside pursuant to a state expungement statute for reasons that do not go to the legal propriety of the original judgment); *Matter of Luviano-Rodriguez*, 23 I. & N. Dec. 718 (Att’y Gen. 2005) (same).; *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006)(upholding the reasoning of *Marroquin*).

¹²³ *Rumierz*, *supra*, at 40.

¹²⁴ *Matter of Pickering*, 23 I&N 621 (BIA 2003).

aggravated felony context.¹²⁵ Once a noncitizen has been convicted of a crime that would render him inadmissible or subject to removal, there are two common bases in Massachusetts for a motion to withdraw the guilty plea and to vacate the conviction: (1) the trial court's failure to provide the mandatory warnings; (2) the defense lawyer's failure to explain the consequences. Of course, if a trial took place, transcripts should be scoured thoroughly for possible bases for appeals or new trial motions. In addition, the defendant may seek an expungement or a pardon. Finally, in certain circumstances, relief in the federal courts may be sought by writs of error *coram nobis*, *audita querela*, or *habeas corpus*.¹²⁶

§ 42.6A. MOTION TO VACATE PURSUANT TO G.L. C. 278, § 29D

In Massachusetts and some other states, judges must warn a defendant who is pleading guilty or taking another like disposition of the immigration consequences of that plea.¹²⁷ Failure to provide such warning may provide grounds for a motion to

¹²⁵ See *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005)(criminal court had reduced sentence after defendant alerted court that a sentence of one year would likely lead to deportation); *Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001). The First Circuit has sustained this distinction in *Rumierz*, *supra*.

¹²⁶ For a full discussion of these remedies, see *Defending Immigrants Partnership*, <http://defendingimmigrants.org/> see also Kesselbrenner, Baldini-Potermin and Rosenberg, *IMMIGRATION LAW AND CRIMES* (WEST 2011)

¹²⁷ See G.L. c. 278, § 29D (amended by 2004 Mass. Acts 225; amendments effective Aug. 28, 2004). The 2004 amendment requires that the record providing evidence that the warnings were given be an "official record or a contemporaneously written record kept in the Court file." St. 2004, c. 225, § 1. The new language applies only to pleas occurring on or after the effective date of the amendment. See St. 2004, c. 225, § 2 The wording of the statute is unequivocal:

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

vacate the conviction.¹²⁸ In Massachusetts, the burden to so advise the defendant is on the court.¹²⁹ The burden to provide a record that shows that the advisement has been given is on the Commonwealth.¹³⁰ Absent a record of such advisement, a new trial should be granted.¹³¹ There is no statutory or regulatory time limit for filing a § 29D motion.

In *Commonwealth v. Grannum*, 457 Mass. 128 (2010), the SJC concluded that no “presumption of regularity” applied to challenges brought pursuant to [§ 29D](#) given the specific language in the statute. The burden is on the Commonwealth to prove that the requirements of [§ 29D](#) have been satisfied. However, the defendant was not entitled to withdraw his admission to sufficient facts because he failed to show the federal government had taken some step toward deporting him or that there was a federal express written policy that called for the initiation of deportation proceedings against him.¹³² The defendant generally bears the burden of demonstrating that s/he may face or is facing one of the enumerated consequences.¹³³ The defendant must show “more

¹²⁸ See *Commonwealth v. Soto*, 431 Mass. 340 (2000); *Commonwealth v. Mahadeo*, 397 Mass. 314 (1986); *Commonwealth v. Schofield*, 391 Mass. 772 (1984); *Commonwealth v. Abreu*, 391 Mass. 777 (1984); *Commonwealth v. Hason*, 27 Mass. App. Ct. 840 (1989) (statutory warning is all that is required). *But see* *Commonwealth v. Cartagena*, 71 Mass App 907, (2008) (Defendant was not entitled to withdraw guilty plea because, inter alia, when defendant was denied permanent residency due to conviction, GL c 278, § 29D did not list a denial of permanent residence as an immigration consequence); *Commonwealth v. Villalobos*, 52 Mass App 903 (2001), *aff'd* 437 Mass 797, (2002) (Defendant may not withdraw admission to sufficient facts after having been advised of specified immigration consequences orally and in writing because statutory language failed to apprise him of changes in Federal immigration law that in certain instances treat admission to sufficient facts as equivalent to conviction)

¹²⁹ *Commonwealth v. Hilaire*, 51 Mass. App. Ct. 818, *further review granted*, 434 Mass 1107 (2001) (Legislature intended that defendant be orally advised by judge of immigration consequences of guilty plea; thus, written advisement of warnings contained in the "Tender of Plea or Admission/Waiver of Rights" form is not sufficient).

¹³⁰ See *infra* ch. 44.

¹³¹ *Commonwealth v. DeSorbo*, 49 Mass. App. Ct. 910 (2000). *But see* *Commonwealth v. Ashmon*, 434 Mass 1005 (2001) (record of noncitizen advisement given during plea colloquy could be adequately reconstructed solely from trial judge's statement of his customary practice); *Commonwealth v. Rzepphiewski*, 431 Mass. 48 (2000) (although tape recording of plea hearing had been destroyed and docket sheet did not indicate immigration warnings had been given, sufficient presumption of advisement found where judge noted that defendant had admitted to sufficient facts after a hearing, he had taken notes as to specific details of the hearing, and had a practice of including the deportation advisement in a plea colloquy); *Commonwealth v. Pryce*, 429 Mass. 556, 557-58 (1999) (docket sheet bearing the notation “defendant offers to plea guilty – after hearing,” coupled with a statement by a judge, who was not the judge who took the defendant’s plea, that this notation referred to his court’s standard plea colloquy and thus connoted that the defendant had received the deportation advisement, was sufficient to satisfy presumption); contrast *Commonwealth v. Ciampa*, 51 Mass. App. 459 (2001) (record could not be reconstructed with general affidavit of judge – one that neither stated whether practice of giving warnings was in place on relevant date or specified that it was the judge’s practice to give all three required warnings).

¹³² See also *Commonwealth v. Jones*, 417 Mass. 661 (1994) (judge incorrectly denied defendant's 1992 motion to withdraw his 1981 admission to sufficient facts, where the Commonwealth did not carry its burden, under G.L. c. 278, § 29D, of proving that the judge accepting the admission had satisfied the statutory requirements).

¹³³ *Commonwealth v. Grannum*, 457 Mass. 128, 134 (2010). See also *Commonwealth v. Berthold*, 441 Mass. 183, 185 (2004).

than a hypothetical risk of such a consequence, but that s/he actually faces the prospect of its occurring.” *Id.* The defendant also must demonstrate that the immigration consequences were caused by the admission at issue in the motion.¹³⁴

Recent cases imply that the more time that passes, the less likely there is to be a record of nonadvisement and the more important the so-called presumption of regularity in such proceedings may become.¹³⁵ Moreover, there is a strong suggestion that the remedy afforded by G. L. c. 278, § 29D, to vacate the judgment and enter a plea of not guilty, is not available after the noncitizen client has been physically deported.¹³⁶ It should be noted that the statute requires more than that a defendant be notified of the possibility of deportation — it also requires a warning about “exclusion from admission to the United States, or denial of naturalization.”¹³⁷ The Supreme Judicial Court held in *Commonwealth v. Soto*, *supra*, that a criminal defendant who was advised of the possibility of deportation and denial of naturalization, but not exclusion from the U.S., was entitled to have his plea vacated as the “legislature has put the three required warnings in quotation marks, and each of them is required to be given so that a person pleading guilty knows exactly what immigration consequences his or her guilty plea may have.”¹³⁸

§ 42.6B. INEFFECTIVE ASSISTANCE OF COUNSEL

Under current doctrine, there is no right to appointed counsel in immigration cases, even deportation cases based on criminal conduct.¹³⁹ Still, a criminal conviction may be vacated due to ineffective assistance of counsel, thereby saving a client from deportation. In *Padilla v. Kentucky*, *supra*, the Supreme Court made clear that “constitutionally competent counsel” would have advised Mr. Padilla that his plea made him subject to “automatic deportation. The Court noted that the importance of accurate legal advice for noncitizens accused of crimes “has never been more important.” Moreover, “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”¹⁴⁰

Thus, the framework of *Strickland v. Washington*,¹⁴¹ now applies to such situations. Under *Strickland*, to prove ineffective assistance of counsel, a defendant

¹³⁴ See *Commonwealth v. Pryce*, *supra*; *Commonwealth v. Barreiro*, 67 Mass. App. Ct. 25, 26, (2006).

¹³⁵ See *e.g.*, *Commonwealth v. Rzepchiewski*, *supra*; *Commonwealth v. Casimir*, 68 Mass. App. Ct. 257, 259 (2007).

¹³⁶ *Commonwealth v. DeSorbo*, 49 Mass. App. Ct. 910 (2000).

¹³⁷ In the past, noncitizens who have sought to withdraw a guilty plea by alleging that they were really not aware of the immigration consequences even though they have been warned have generally not been successful. See, *e.g.*, *United States v. Del Rosario*, 902 F.2d 55, 56–69 (D.C. Cir. 1990). See also, *Commonwealth v. Villalobos*, *supra*.

¹³⁸ *Commonwealth v. Soto*, 431 Mass. 340 (2000).

¹³⁹ See generally, Kanstroom, “Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,” 113 *Harvard Law Review* 1890 (2000).

¹⁴⁰ See Daniel Kanstroom, *The Right To Deportation Counsel In Padilla v. Kentucky: The Challenging Construction Of The Fifth-And-A-Half Amendment*, 58 *UCLA L. Rev.* 1461 (2011); and *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?* 45 *New England Law Rev.* 101 (2011).

¹⁴¹ 466 U.S. 668 (1984).

must prove that: (1) his attorney's representation fell below objective standards of reasonableness; and (2) he was prejudiced as a result of defense counsel's performance. A defense counsel's failure to advise or to advise correctly a defendant of the immigration consequences will now quite possibly result in a finding of ineffective assistance of counsel. The SJC has held that *Padilla* applies retroactively to convictions obtained after April 1, 1997.¹⁴²

In general, however, federal courts have not been eager to find ineffective assistance of counsel on these grounds, which are sometimes deemed to be too “collateral” to warrant a new trial or withdrawal of a plea.¹⁴³ The First Circuit Court of Appeals had earlier held (pre-*Padilla*) that immigration consequences are collateral to the criminal conviction, thus barring, at least under the federal constitution, any ineffective assistance of counsel claims based on a criminal attorney’s failure to advise a client of the immigration consequences of the criminal matter.¹⁴⁴

§ 42.6C. EXPUNGEMENT AND PARDON

1. Expungement

The possible use of expungement to ameliorate deportation consequences of a criminal conviction has evolved from case law. An expungement has been defined in this manner:

It is not simply the lifting of disabilities attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect. It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication and thereby restoring to the regenerative offender his original status ante.¹⁴⁵

Unfortunately, the BIA has recently sought to preclude the use of expungement to defeat deportability.¹⁴⁶ The BIA has reasoned that the new federal definition of “conviction” has redefined the term for immigration purposes, precluding the use of any “state rehabilitative actions” which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding. Previously, though, expungements could be used to

¹⁴² See *Commonwealth v. Clarke*, 460 Mass. 30 (2011).

¹⁴³ See, e.g., *Downs-Morgan v. INS*, 765 F.2d 1534, 1540–41 (11th Cir. 1985); *United States v. Galivan*, 761 F.2d 226 (5th Cir. 1985). *But see* *United States v. Castro*, 26 F.3d 557 (5th Cir. 1994) (where counsel failed to advise a client of relief from deportation in the form of a JRAD, a sentence was set aside for the ineffective assistance of counsel).

¹⁴⁴ *United States v. Gonzalez*, 202 F.3d 20 n. 5 (1st Cir. 2000)). However, the court did acknowledge that “collateral” immigration consequences will sometimes exert a greater impact on the defendant’s life than will the criminal sanction. Thus, it suggested that courts can (and perhaps should) be willing to grant a defendant leave to withdraw his plea in certain cases, though they are not required to do so.

¹⁴⁵ Grough, *Expungement of Records*, 1966 WASH. U. L.Q. 147, 149 (1966).

¹⁴⁶ See *Matter of Marroquin-Garcia*, *supra* (conviction stands for immigration purposes if set aside pursuant to a state expungement statute for reasons that do not go to the legal propriety of the original judgment); *Matter of Luviano-Rodriguez*, 23 I. & N. Dec. 718 (Att’y Gen. 2005) (same); *Rumierz v. Gonzales*, *supra*. See also *Matter of Roldan*, Int. Dec. 3377 (1999), *supra*; *but see* *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. August 1, 2000) (overruling *Roldan* in the Ninth Circuit).

defeat deportability for many offenses other than narcotics convictions.¹⁴⁷ For example, convictions for crimes of moral turpitude and certain other deportation grounds would not be a basis for deportation if expunged.¹⁴⁸ This is a fluid and evolving area of law, so practitioners should probably consult an immigration specialist if there is any chance of vacating or expunging a conviction.¹⁴⁹

2. Pardon

Only “full and unconditional” executive pardons may be used to defeat deportability, although this is also unavailable to narcotics offenders. Legislative pardons may not be used. Pardons can be used for noncitizens convicted of crimes of moral turpitude, including aggravated felonies that are not drug related. A noncitizen pardoned of a crime will not be precluded from showing good moral character.¹⁵⁰

3. Miscellaneous

Some cases have held that a U.S. Attorney may bind the U.S. government — and especially the INS — to a plea bargain that includes matters relating to deportation proceedings. More recent changes to regulations and in practice, however, render such an outcome highly unlikely.¹⁵¹

§ 42.6D. MASSACHUSETTS POSTCONVICTION MOTIONS, WRITS, ETC.

One should not view G.L. c. 278, § 29D as the only available remedy under Massachusetts law for a noncitizen client. Counsel should always consider postconviction motions pursuant to Mass. R. Crim. P. 25, 29, or 30, as described more fully *infra* in ch. 44. There are a wide variety of situations in which such motions may be useful and the entire history of the client's prior proceeding must therefore be fully examined.

In *Commonwealth v. Gautreaux*, 458 Mass. 741 (2011) the SJC held that notifications required by art. 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (art. 36 or Vienna Convention) must be provided to foreign nationals on their arrest; and, if not provided, a challenge to the soundness of any conviction resulting therefrom may be made in a motion for a new trial. The standard to be applied in such circumstances is the substantial risk of a miscarriage of justice. (A substantial risk of a miscarriage of justice exists when we

¹⁴⁷ *Matter of A-F*, 8 I&N Dec. 429 (BIA AG 1959).

¹⁴⁸ *Matter of G.*, 9 I&N Dec. 159, 163 (BIA AG 1960); *Matter of Luviano*, Int. Dec. 3267 (BIA 1996) (firearms offense expunged).

¹⁴⁹ See e.g., *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000) (New York state court order vacating criminal conviction held *not* to constitute a “state rehabilitative action” under *Roldan*; removal proceedings therefore terminated).

¹⁵⁰ *Matter of H.*, 7 I&N Dec. No. 249 (BIA 1956).

¹⁵¹ See, e.g., *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994) (U.S. Attorney agreement that “the Government will not oppose any motion by your counsel for . . . relief from deportation” held binding on INS); *Margalli-Olvera v. INS*, 43 F. 3d 345 (8th Cir. 1994) (following *Thomas*). *But see* 61 Fed. Reg. 48,405–06 (Sept. 13, 1996) (interim rule requiring federal prosecutors and others to obtain written consent from INS when entering into a plea agreement that involves favorable treatment by INS). UPDATE THIS ISSUE

'have a serious doubt whether the result of the [proceeding] might have been different had the error not been made.'" *Commonwealth v. McCoy*, 456 Mass. 838, 850, 926 N.E.2d 1143 (2010), quoting *Commonwealth v. LeFave*, 430 Mass. 169, 174, 714 N.E.2d 805 (1999).) The defendant in this case was found not to have met this standard, however. *See also*, *Commonwealth v. Argueta*, 899 N.E.2d 896 (Mass. App. Ct., 2009) (dismissal of CWOFF does not render matter moot: "In light of the genuine and serious collateral consequences attendant upon the continuance without a finding, the defendant has a continuing personal stake in the outcome of this litigation, and his appeal is not moot.")¹⁵² For example, it may be possible pursuant to Rule 29 to have a sentence revised below the current aggravated felony threshold (e.g., to 360 days as opposed to one year).¹⁵³

Counsel may also consider bringing an inadmissibility or removal case (based on a criminal conviction) before a federal court on a writ of error *coram nobis* or a writ of *audita querela*. Though formally abolished in civil cases (*see* Fed. R. Civ. P. 60(b)), these writs remain available in very limited circumstances with respect to criminal convictions.¹⁵⁴ *Coram nobis* is available to redress an adverse consequence resulting from an illegally imposed criminal conviction or sentence.¹⁵⁵ *Audita querela* is probably available where there is a legal, as contrasted with an equitable, objection to a conviction that has arisen subsequent to the conviction and that is not redressable pursuant to another postconviction remedy.¹⁵⁶

¹⁵² *But see* Ch. 44 and § 42.6 *supra* for discussion of recent decisions by the S.J.C. regarding post-conviction motions.

¹⁵³ *See Matter of Song*, 23 I&N Dec. 173 (BIA 2001) (where a criminal court vacated the 1-year prison sentence of a noncitizen convicted of a theft offense and revised the sentence to 360 days of imprisonment, the noncitizen does not have a conviction for an aggravated felony within the meaning of INA § 101(a)(43)(G)).

¹⁵⁴ *See* *United States v. Morgan*, 346 U.S. 502 (1954) (*coram nobis*); *United States v. Holder*, 936 F.2d 1 (1st Cir. 1991) (*audita querela*); *United States v. Castro*, 26 F.3d 557, 559 (5th Cir. 1994) (ineffective assistance of counsel).

¹⁵⁵ *United States v. Morgan*, 346 U.S. 502, 512–13 (1954).

¹⁵⁶ *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991). *See also* *United States v. LaPlante*, 57 F.3d 252, 252 (2nd Cir. 1995) (denying relief). Such cases have, however, not met with much success in the federal courts to date. *See* *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998) (vacation of conviction by writ of *audita querela* by California court will not impede deportation based on narcotics conviction where writ was allowed on equitable, not legal grounds). *But see* *United States v. Castro*, 26 F.3d 557 (5th Cir. 1994) (sentence set aside on writ of error *coram nobis* due to ineffective assistance of counsel).