GROUNDS OF DEPORTABILITY AND INADMISSIBILITY RELATED TO CRIMES[1]

by
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Contents

I. Overview of Immigration Proceedings

A. Civil Nature

Immigration proceedings are civil in nature. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). Although the consequences of deportation may be "drastic," deportation is not punishment. *Galvan v. Press*, 347 U.S. 522, 530 (1954). Consequently, the Supreme Court has held repeatedly that the prohibition against *ex post facto* laws does not apply to deportation proceedings. *See, e.g., Lehmann v. Carson*, 353 U.S. 685, 690 (1957); *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). There is a statutory right to counsel, but not at government expense. 8 U.S.C. § 1362, INA § 292.

B. Removal Proceedings

All immigration proceedings that began on or after April 1, 1997, are called "removal" proceedings. In removal proceedings, an immigration judge decides whether a noncitizen is inadmissible to or deportable from the United States. 8 U.S.C. § 1229(a), INA § 240. The grounds of inadmissibility apply if a person is seeking admission to the

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United States. The grounds of deportability apply to a person whom the United States has admitted as either an immigrant or a non-immigrant.

C. Deportation and Exclusion Proceedings

Before April 1, 1997, there were two types of immigration proceedings: exclusion and deportation. Exclusion proceedings were for people seeking to enter the United States. Deportation proceedings were for people who already had entered the United States.

D. Burden of Proof for Inadmissibility

A first time applicant for admission must establish that he or she is "clearly and beyond doubt entitled to be admitted." 8 U.S.C. § 1229a(c)(2)(A), INA § 240(c)(2)(A). A person returning to a status must establish by "clear and convincing evidence" that he or she is "lawfully present pursuant to a prior admission." 8 U.S.C. § 1229a(c)(3)(B), INA § 240(c)(3)(B).

The Supreme Court, federal courts, and Board of Immigration Appeals have recognized that there are due process problems with requiring a returning permanent resident to bear the burden. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). In a subsequent decision involving the same noncitizen, the D.C. Circuit applied the law of the case doctrine to hold that the burden of proof is with the government. *Kwong Hai Chew v. Rogers*, 257 F.2d 606 (D.C. Cir. 1958). In *Landon v. Plasencia*, 459 U.S. 21, 35 (1982), the Court recognized that the BIA has accepted the decision in *Kwong Hai Chew* to put burden on government in case of returning resident even though the INA "provides that the burden of proof is on the alien in an exclusion proceeding" *In re Salazar*, 17 I & N Dec. 167, 169 (BIA 1979); *In re Kane*, 15 I & N Dec. 258, 264 (BIA 1975); *In re Becerra-Miranda*, 12 I & N Dec. 358, 363-364, 366 (BIA 1967). In all these cases, the due process requirements for returning residents trumped the statutory language of the INA, which had put burden on noncitizen since 1950's.

Congress provided that a returning permanent resident generally is not an applicant for admission unless certain conditions exist. 8 U.S.C. § 1101(a)(13). One such condition is if a noncitizen committed an offense that made him or her inadmissible under the criminal grounds of inadmissibility. 8 U.S.C. § 1101(a)(13)(C)(v).

In *Matter* of *Rivens*, 25 I&N Dec. 623 (BIA 2011), the Board of Immigration Appeals held that the government bears the burden of proving that the condition exists to treat a returning resident as an applicant for admission.[4] Certain circuits have decided that once a noncitizen establishes a colorable claim to being a returning LPR, government bears burden of persuasion. *Matadin v. Mukasey*, 546 F.3d 85 (2d Cir. 2008) (deciding

[4] The BIA expressly reserved the issue of whether a DHS bears the burden beyond the question of whether a returning resident is an applicant of admission. *Matter* of *Rivens*, 25 I&N Dec. 623, 626 (BIA 2011).

issue where charge is abandonment); *Hana v. Gonzales*, 400 F.3d 472, 476 (6th Cir.2005) (same); *Khodagholian v. Ashcroft*, 335 F.3d 1003, 1006 (9th Cir.2003) (same).

E. Burden of Proof for Deportability

The burden is on the DHS to establish a ground of deportability by "clear and convincing evidence" in the case of a noncitizen who has been admitted to the United States. 8 U.S.C. § 1229(a)(c)(3)(A), INA § 240(c)(3)(A).

II. Definition of Conviction

A. Statutory Definition

Congress defines "conviction" at 8 U.S.C. § 1101(a)(48)(A), INA § 101(a)(48) as follows:

> 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 a jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

B. Specific Dispositions

A juvenile court disposition is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). A disposition under a pre-plea diversion statute is not a conviction. *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989).

C. Vacated Convictions/Sentence Reductions

Outside of the Fifth Circuit, a conviction that a trial or appeals court vacates because of a legal defect is not a conviction for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970). Unlike the Board, the Fifth Circuit treats a conviction vacated for a legal defect as a conviction for immigration purposes. *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002).

In one case, however, the Fifth Circuit has granted a government motion to

permit a remand to the BIA so that the BIA could terminate proceedings where a conviction had been vacated for a legal defect. *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005). The Fifth Circuit recognizes the validity of a nunc pro tunc judgment, which it considers to be different than a vacated conviction. *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006). The Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (recognizing that effective assistance of counsel requires defense counsel to advise about immigration consequences) may cause the Circuit to revisit the issue since the Court's reasoning in Padilla is in tension with the Fifth Circuit's decision in *Renteria*.

The BIA uses different standards to determine the validity of a vacated conviction than it does to determine the validity of a sentence reduction. A conviction that a trial court vacates for equitable reasons remains a conviction for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Immigration authorities must respect a sentence reduction even where the express justification is to avoid immigration consequences. *Matter of Cota*, 23 I&N Dec. 849 (BIA 2005).

III. Sentence for Immigration Purposes

A. Statutory Definition

In 1996, Congress established a statutory definition for what is a sentence for immigration purposes. 8 U.S.C. § 1101(a)(48)(B), INA § 101(a)(48)(B). The provision treats as a sentence "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution" of all or part of the sentence.

B. Implications for Aggravated Felony Definition

This definition has important consequences for the aggravated felony ground of deportability, because the INA defines certain offenses as aggravated felonies only if the defendant receives a sentence to imprisonment or confinement of a year or more. *See United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) (requiring that a court impose a sentence of a year rather than that the statute merely authorize a possible sentence of a year). The BIA respects a state court's sentence modification even when the court's reasons are equitable. *Compare Matter of Song*, 23 I&N Dec. 173 (BIA 2001) (recognizing sentencing modification without questioning motivation) *with Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (refusing to recognize vacation of judgment when the respondent could not establish that the vacation was based on a legal or constitutional defect).

IV. Controlled Substance Offenses

A. Deportability for Controlled Substance Offenses

A noncitizen convicted of an offense relating to a controlled substance is

deportable and subject to removal from the United States. 8 U.S.C. § 1227(a)(2)(B), INA § 237(a)(2)(B).

B. Specific Controlled Substance Offenses and Deportability

A conviction for a conspiracy or an attempt to possess, distribute, or manufacture a controlled substance is a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i). Outside the Ninth Circuit, a conviction for solicitation to possess a controlled substance is a deportable offense under the controlled substance ground of deportability. *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992); *but see Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (drawing negative implication from the statutory language that includes "attempts or conspiracies").

1. Any record of conviction that does not identify the drug cannot support an order of deportability. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

2. A conviction for a single offense for simple possession of 30 grams or less of marijuana is not a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i). The BIA has held that this exception does not apply when the conviction is more than merely simple possession. *Matter of Moncada*, 24 I&N Dec. 62 (BIA 2007).

3. See Section V below for a discussion of the aggravated felony ground for drug trafficking offenses.

C. Effect of Rehabilitative Disposition

A dismissal or expungement under the Federal First Offender Act is not a conviction for "any purpose whatsoever." 18 U.S.C. § 3607. The BIA treats as a conviction for immigration purposes a disposition under a state counterpart to the Federal First Offender Act. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). For cases heard in the Ninth Circuit, an expunged drug conviction for a first-time controlled substance offender vacated on or before July 14, 2011 is not a conviction for immigration purposes. *Nuñez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 20111) (en banc).

D. Inadmissibility for Controlled Substance Offenses

A single conviction for any controlled substance triggers inadmissibility under 8 U.S.C. § 11182(a)(2)(A)(i)(II), INA § 212(a)(2)(A)(i)(II). A noncitizen is inadmissible if he or she makes a formal, knowing admission of a drug offense to a Department of State or a DHS official. 8 U.S.C. § 11182(a)(2)(A)(i)(II), INA § 212(a)(2)(A)(i)(II). No conviction is necessary to trigger inadmissibility under this section. A noncitizen must

admit voluntarily to the elements of the offense after the official explains the offense in plain terms for it to constitute a valid admission. *See, e.g.*, *Matter of G.M.*, 7 I&N Dec. 40 (A.G. 1956). The BIA has held that it will not treat a plea from a disposition that results in less than a conviction as an admission to the essential elements of a crime. *Matter of Winter*, 12 I&N Dec. 638 (BIA 1968).

A noncitizen is inadmissible if a Department of State or a DHS official has a "reason to believe" that the noncitizen is or was a drug trafficker. 8 U.S.C. § 1182(a)(2)(C), INA § 212(a)(2)(C). No conviction is necessary to trigger inadmissibility under this section.

A waiver exists to forgive a single conviction for simple possession of 30 grams or less of marijuana for personal use. 8 U.S.C. § 11182(h), INA § 212(h) noncitizen convicted of possessing paraphernalia used with marijuana is also eligible for the waiver. *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).[5]

A noncitizen who is a "drug addict" or "drug abuser" is inadmissible. 8 U.S.C. § 11182(a)(1)(A)(iv), INA § 212(a)(1)(A)(iv). These are medical determinations, however, which an immigration factfinder cannot make without a physician's certificate.

V. Aggravated Felonies

A. Overview

Conviction of an aggravated felony is a ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(iii), INA § 237(a)(2)(A). The INA defines the term "aggravated felony" at 8 U.S.C. § 1101(a)(43), INA § 101(a)(43).

Congress imposes severe immigration penalties for conviction of an aggravated felony. A noncitizen with an aggravated felony conviction is ineligible for most forms of relief from deportation. Congress also provides severe federal criminal penalties for noncitizens that unlawfully re-enter the United States after having been convicted of an aggravated felony and deported or removed.

B. Specific Offenses Defined as Aggravated Felonies

1. Rape, Murder, or Sexual Abuse of a Minor

A conviction for rape, murder, or sexual abuse of a minor is an aggravated felony. 8 U.S.C. § 1101(a)(43)(A), INA § 101(a)(43)(A).

[5] See *Matter of Moncada*, 24 I&N Dec. 62 (BIA 2007) (determining that conviction for possession of marijuana in a prison was not a conviction for simple possession for purposes of statutory exception to deportability under 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i)).

a) Rape

The BIA has held that statutory rape is a crime of violence. *Matter of B*, 21 I&N Dec. 287 (BIA 1996) (applying crime of violence analysis to statutory rape conviction). The Second Circuit has adopted this view. *Mugalli v. Ashcroft*, 258 F.3d 32 (2d Cir. 2001).

b) Murder

In *Matter of M-W*, 25 I&N Dec. 748 (BIA 2012), the BIA held that the generic definition of "murder" includes a reckless taking of a life that involves a depraved indifference to human life. The inquiry is whether a statute fits the generic definition of "murder," not the grade a state attaches to the crime.[6] A conviction for manslaughter may be a crime of violence, but it is not murder. *See, e.g., Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

c) Sexual Abuse of a Minor

The Immigration and Nationality Act does not define the phrase "sexual abuse of a minor." The BIA selected 18 U.S.C. § 3509(a)(8) as a guidepost to define "sexual abuse of a minor." *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). A misdemeanor conviction can constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(A), INA § 101(a)(43)(A). *Matter of Small*, 23 I&N Dec. 448 (BIA 2002).

2. Drug Trafficking

The Immigration and Nationality Act defines the words "aggravated felony" to include:

> illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)
> 8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B).

The BIA interprets the definition as being in two parts. *See Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002) (discussing history of administrative and judicial interpretation of the definition). The phrase "illicit trafficking" is the first part, and the phrase "drug trafficking crime" is the second part.

[6] *See Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998) (holding that conviction for third degree murder constitutes an aggravated felony).

a) Illicit Trafficking

Any offense that fits the common meaning of "illicit trafficking" and is punishable by more than one year is an aggravated felony. 8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).[7]

b) Drug Trafficking Crime

Even if the conviction does not fit the "illicit trafficking" part of the definition, an offense could be an aggravated felony if is a "drug trafficking crime." *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). The aggravated felony definition incorporates the test under 18 U.S.C. § 924(c) of Title 18 to determine whether an offense is a drug trafficking crime. Section 924(c) defines a trafficking crime as a "felony punishable under the Controlled Substances Act (21 U.S.C. §§ 801 *et seq*.), the Controlled Substances Import and Export Act (21 U.S.C. §§ *951 et seq*.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. §§ 1901 *et seq*.)".

In *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), the United States Supreme Court held that a state felony conviction for possession of a controlled substance is not a drug trafficking aggravated felony unless it would be a felony under federal law.

Under federal law, First offense possession is a federal misdemeanor unless it is for possession of flunitrazepam, a date rape drug commonly known as "roofies."

A second conviction for possession is a felony under federal law only if the defendant had a prior conviction. 21 U.S.C. § 844(a). *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2009).

3. Firearms Trafficking

A conviction for trafficking in firearms or federal crimes relating to firearms or destructive devices (bombs, grenades) is an aggravated felony. 8 U.S.C. § 1101(a)(43) (C), (E), INA § 101(a)(43) (C), (E). The Immigration and Nationality Act does not define "trafficking." The Second Circuit interprets "trafficking" to include crimes that have a mercantile nature even if distribution is not an element of the offense. *Kuhali v. INS*, 266 F.3d 93 (2d Cir. 2001).

A federal conviction for being a felon in possession of a firearm satisfies

[7] Although *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002), expressly modified *Davis*, it appears that the BIA's concern was with the "drug trafficking crime" part of the definition, and not the "illicit trafficking" part.

the definition of aggravated felony because it is an offense described in 18 U.S.C. § 922(g)(1). 8 U.S.C. § 1101(a)(43)(E)(ii), INA § 101(a)(43)(E)(ii). In 2002, the BIA held that a state conviction for possession of a firearm is an aggravated felony because it is also "described in" 18 U.S.C. § 922(g)(1), even though the state offense lacks the "interstate commerce" element described in 18 U.S.C. 922(g)(1). *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), *overruling Matter of Vasquez-Muniz*, 22 I&N Dec. 1415 (BIA 2000).

4. Money Laundering

A conviction for money laundering and monetary transactions from illegally derived funds is an aggravated felony. 8 U.S.C. § 1101(a)(43)(D), INA § 101(a)(43)(D).

5. Fraud

A conviction involving fraud, or deceit tax is an aggravated felony if the loss to the victim or government exceeds $10,000 is an aggravated felony. 8 U.S.C. § 1101(a)(43)(M), INA § 101(a)(43) (M). Because it determined that the $10,000 loss requirement was "circumstance-specific," the Supreme Court permits a factfinder to go outside the record of conviction to determine the amount of the loss. *Nijhawan v. Holder*, 557 U.S. 29 (2009). The Court in *Nijhawan* determined that that the categorical approach applies to most aggravated felony removal grounds or provisions, which reference generic crimes rather than the particular factual circumstances surrounding commission of the crime on a specific occasion.[8]

Whether a conviction involves fraud or deceit does not require the offense to have fraud or deceit as an essential element of the offense. *Kawashima v. Holder*, 132 S.Ct. 1166 (2012). According to the Supreme Court it is sufficient if fraud or deceit inheres in the elements of the offense. *Kawashima*, *supra* at 1173.

6. Crime of Violence

A conviction for a crime of violence is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F). A crime of violence includes an offense that has the use of force as an element of the offense. 18 U.S.C. § 16(a). The crime of violence definition also includes any felony that by its nature presents a substantial risk that force will be used against a person or property in the commission of the offense. 18 U.S.C. § 16(b). In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a unanimous Supreme Court reversed the 11th Circuit and held that a Florida conviction for driving

[8] *Nijhawan v. Holder*, 557 U.S. 29, 39-40 (2009).

under the influence and causing serious bodily injury was not a crime of violence, because the state merely had to prove negligence, which was inconsistent with the active "use of force" required under 18 U.S.C. § 16. After *Leocal*, several circuits have held recklessness is also inconsistent with the requirement that there be an active "use of force." [9] The BIA's view is that a conviction for a reckless offense can come within 18 USC § 16(b) as long as there is a substantial risk that violent force may be used intentionally during the commission of the offense.[10] *Matter of Singh*, 25 I&N Dec. 670, 676 (BIA 2012).

The Fifth Circuit now recognizes that for an offense to constitute a generic crime of violence it must "involve purposeful, violent and aggressive conduct." *U.S. v. Armendariz-Moreno*, 571 F.3d 490, 492 (5th Cir. 2009) (holding that Texas conviction for unauthorized use of a vehicle is not a crime of violence aggravated felony).

7. Theft or burglary

a) Theft

A conviction for theft, receipt of stolen property, or burglary is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(G), INA § 101(a)(43)(G). The BIA also has held that a conviction for attempted possession of stolen property constitutes an aggravated felony. *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000). In so doing, the BIA equated "possession of stolen property" and "receipt of stolen property." *Id*. According to the BIA, a taking of property constitutes a theft offense for purposes of the aggravated felony definition regardless of whether a permanent taking of the property is an element of the offense. *Matter of V-Z-S-*, 22 I&N Dec.1338 (BIA 2000).

A theft offense requires the taking of property without consent of the owner. *Matter of Garcia-Madruga*, 24 I. & N. Dec. 436 (BIA 2008). As a result, a welfare fraud conviction would not be a theft offense where the offense involves consensual taking of property.

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[9] *U.S. v. Torres-Villalobos*, 477 F.3d 978 (8th Cir. 2007); *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006); *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 375-76 (2d Cir. 2003); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *U.S. v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005). The Second Circuit rejected the BIA's characterization of Second Circuit law. *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008) (rejecting view that it a second offense could be an aggravated felony conviction where it was possible that defendant could have been prosecuted under a recidivist statute).

[10] *Matter of Singh*, 25 I&N Dec. 670, 676 (BIA 2012).

b) Burglary

A conviction for a "burglary" offense is not necessarily a conviction for an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(G), INA § 101(a)(43)(G) unless it comports with the federal definition of burglary established in *Taylor v. United States*, 495 U.S. 575 (1990).[11] Under this definition, a conviction for burglary of an automobile is not a "burglary offense." *Matter of Perez*, 22 I&N Dec. 132 (BIA 2000).

8. Commercial Bribery

A conviction for commercial bribery, forgery, or trafficking in vehicles with altered numbers is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(R), INA § 101(a)(43)(R).

9. Obstruction of Justice

A conviction for obstruction of justice, bribery of a witness, or perjury is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(S), INA § 101(a)(43)(S). A federal conviction for accessory after the fact comes within the aggravated felony definition for obstruction of justice. *Matter of Batista-Hernandez*, 21 I&N Dec. 995 (BIA 1997). A federal conviction for misprision of felony is not obstruction of justice as defined in 8 U.S.C. § 1101(a)(43)(S), INA § 101(a)(43)(S). *Matter of Espinosa*, 22 I&N Dec. 889 (BIA 1999).[12]

10. False Documents

A conviction for using or creating false documents is an aggravated felony if the term of imprisonment is at least a year. There is an exception for a first offense committed to aid the defendant's spouse, child, or parent. 8 U.S.C. § 1101(a)(43)(P), INA § 101(a)(43)(P).

11. Smuggling

A conviction for smuggling is an aggravated felony. There is an exception for a first offense in which only the smuggler's parent, spouse, or child is involved. 8 U.S.C. § 1101(a)(43)(N), INA § 101(a)(43)(N). The BIA considers

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[11] For purposes of the Career Criminal Offender Act, the Supreme Court defined burglary as an unlawful or unprivileged entry in a building or other structure with the intent to commit a crime. *See Taylor v. United States*, 495 U.S. 575, 598 (1990).

[12] The Board of Immigration Appeals has held that a misprision conviction is a crime involving moral turpitude. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006).

harboring or transporting offenses also to be aggravated felonies. *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999), *aff'd Ruiz-Romero v. Reno*, 205 F.3d 837 (5th Cir. 2000).

12. Failure to Appear

A conviction for failure to appear to serve a sentence if the underlying offense is punishable by a term of five years, or to face charges of an offense for which a court may impose a sentence of two years is an aggravated felony. 8 U.S.C. § 1101(a)(43)(Q), (T), INA § 101(a)(43) (Q), (T).

13. Other Offenses

Various offenses such as demand for ransom, child pornography, RICO offenses punishable by a one-year sentence, running a prostitution business, slavery, offenses relating to national defense, sabotage, treason, or revealing the identity of a foreign or domestic undercover agent are aggravated felonies. 8 U.S.C. § 1101(a)(43)(H), (I), (J), (K), (L), INA § 101(a)(43) (H), (I), (J), (K), (L). A conviction for illegal re-entry after conviction of an aggravated felony followed by deportation is an aggravated felony. 8 U.S.C. § 1101(a)(43)(O), INA § 101(a)(43) (O).

14. Conspiracies or Attempts

A conviction for conspiracy or attempt to commit any offense listed in the aggravated felony definition is an aggravated felony. 8 U.S.C. § 1101(a)(43)(U), INA § 101(a)(43)(U). There is a tension, however, between the BIA and at least one circuit as to whether a conviction that involves attempted or intended loss can ever be an attempted fraud aggravated felony. [13]

The Second Circuit used the common law and the Model Penal Code to define an "attempt" as being the intent to commit a crime along with a substantial step toward its commission. *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). The Seventh Circuit treats a conviction for burglary with the intent to commit theft as an "attempted theft" offense. *United States v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001).

VI. Crimes Involving Moral Turpitude

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[13] *Compare Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) (holding that a failed insurance fraud in which the claim exceeded $10,000 was an aggravated felony even though there was no actual loss, *with Singh v. Holder*, 677 F.3d 503 (3d Cir. 2012) (holding that conviction for fraud offense with no actual loss can never qualify as an attempted fraud aggravated felony).

A. Deportability

Since 1917, there has been a ground of deportability for noncitizens convicted of "crimes involving moral turpitude." 8 U.S.C. § 1227(a)(2)(A), INA § 237(a)(2)(A). Although there is no statutory definition of the phrase, the Supreme Court has held that it is not void for vagueness. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

1. One Crime Involving Moral Turpitude

A noncitizen is deportable for a crime of moral turpitude if he or she:

-- Is convicted;
-- Of a crime involving moral turpitude;
-- Committed within five years of admission;[14] and
-- For which he or she could receive a sentence of one year or more.[15]

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

2. Two or More Crimes Involving Moral Turpitude

A noncitizen is also deportable if he or she:

-- Is convicted;
-- Of two or more crimes involving moral turpitude;
-- That did not arise out of "a single scheme of criminal misconduct."

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

B. Definition of Crime Involving Moral Turpitude (CIMT)

1. Changed Test

In 2008, the Attorney General redefined what constitutes a crime involving moral turpitude for immigration purposes. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). Under the new test, a conviction must be for "reprehensible" conduct and have some degree of scienter for it to be a conviction for a CIMT. If the statute does not include as an element specific intent,

[14] The period is ten years for those noncitizens who obtained an immigrant visa because they provided significant assistance in a state or federal prosecution. 8 U.S.C. § 1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i).

[15] Before the Anti-Terrorism and Effective Death Penalty Act of 1996, the statute required that the defendant receive a sentence of a year or more. The change applies to proceedings initiated after April 24, 1996.

deliberateness, willfulness or recklessness, then it cannot be a conviction for a CIMT. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). The test also included a three-part test that expands the scope of the inquiry beyond what it had been before the decision in *Silva-Trevino.* The Third Circuit in *Jean Louis v. Holder*, 582 F.3d 462 *Holder*, (3d Cir. 2009) repudiated the AG's decision in *Silva-Trevino*, including the Board's view that it could ignore one-hundred years of settled law that had used the categorical approach. The Fourth[16] and Eleventh[17] Circuits rejected *Silva-Trevino* too. In the Third Circuit, the categorical approach is the test for determining whether an offense involves moral turpitude.

2. Step One: *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)

In Step one, a factfinder must determine whether the conduct necessary for conviction always (or never) defines a crime involving moral turpitude (CIMT) in all cases that have a "realistic probability" of being prosecuted? If factfinder can answer that question with a "yes" or a "no" then the case is over. If not, the inquiry proceeds to Step two. By imposing a "realistic probability" limitation, a respondent cannot rely on broad statutory language that would not involve reprehensible conduct unless she or he can demonstrate that someone has been prosecuted for that non-reprehensible conduct.

A noncitizen could demonstrate a "realistic probability" of prosecution by showing any of the following:

--A reported decision under the statute
--An unreported decision under the statute.
--The defendant's own case.
-- A declaration of defense counsel or anyone else
--Form jury instructions should also be acceptable.

3. Step 2: *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)

If the answer to the first step is inconclusive, then the factfinder will examine the "record of conviction" to identify whether the conduct for which the defendant is convicted necessarily involved moral turpitude. The record of conviction includes the charging document, plea agreement, plea colloquy transcript, judgment of conviction, and sentence. *Matter of Vargas-Sarmiento,* 23 I&N Dec. 651 (BIA 2004). If the record of conviction establishers that the

16 *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012).

17 *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303 (11th Cir. 2011)

conviction does not involve moral turpitude, the inquiry ends and the factfinder does not go on to Step 3. *Matter of Ahortalejo*, 25 I&N Dec. 465 (BIA 2011).

4. Tests Compared

Under the pre-*Silva-Trevino* test, the government would lose if the record of conviction did not establish that the conviction necessarily involved moral turpitude. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Under *Silva-Trevino*, the factfinder will proceed to step 3, if there is no definitive answer for either side for steps 1 and 2.

5. Step 3: *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)

Under Step 3, a factfinder may examine evidence outside of the record of conviction to determine whether offense constitutes a CIMT. A factfinder cannot litigate again facts that were necessarily concluded by the criminal court. A factfinder could also determine that in some cases it would not be appropriate to hear evidence beyond the record of conviction.

C. Specific Offenses

In determining whether an offense involves moral turpitude, a factfinder will apply the *Silva-Trevino* test to the statute of conviction.

1. Fraud Offenses

The Supreme Court has held that a conviction for an offense in which fraud is an essential element of the crime always involves moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223 (1951). The Attorney General's decision in *Silva-Trevino*, should not change that outcome.

2. Theft Offenses

A conviction for an offense that includes as an element the intent to deprive the rightful owner permanently of his or her property involves moral turpitude. *Compare Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) (holding that theft constitutes a conviction for a crime involving moral turpitude) *with Matter of M-*, 2 I&N Dec. 686 (BIA 1946) (holding that joyriding does not involve moral turpitude because statute included temporary taking of a motor vehicle).

3. Driving Under the Influence Offenses

A conviction for driving under the influence (DUI) that is a strict liability

offense should not qualify as a crime involving moral turpitude under Silva-Trevino because it lacks the requisite scienter. *See Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) for analysis under former categorical approach. Since a second DUI offense without a sufficient mental state would not change the character of the offense, it should not involve moral turpitude under *Silva-Trevino*. *See Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) for pre-*Silva-Trevino* analysis.

4. Burglary of an Occupied Dwelling

In *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), a post-*Silva-Trevino* decision, the BIA held that conviction for burglary of an occupied dwelling in violation of Florida Statutes sec. 810.02(3)(a) was categorically a conviction for a crime involving moral turpitude under Step One because there was no realistic possibility that the noncitizen would be prosecuted for a benign violation of the statute.

In reaching its decision in *Louissaint* the BIA did not remand the case to provide the respondent with the opportunity to demonstrate a "realistic possibility," but rather concluded on its own that no such possibility existed. The BIA in a footnote, however, offered respondent a chance to show otherwise via a motion to reopen.

D. Inadmissibility for Moral Turpitude[18] Offenses

A noncitizen is inadmissible for a single conviction for a crime involving moral turpitude unless the person qualifies for the petty offense exception or youthful offender exception. 8 U.S.C. § 1182(a)(2)(A)(ii), INA § 212(a)(2)(A)(ii).

1. Exception for “Petty Offense”

The petty offense exception applies when:

-- A noncitizen has committed a single offense that involves moral turpitude;
-- The maximum possible punishment is a year or less; and
-- The noncitizen received a sentence of six months or less.

2. Youthful Offender Exception

The youthful offender exception applies when:

[18] Whether an offense satisfies the definition of "moral turpitude" is the same for inadmissibility and deportability. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

-- A noncitizen has committed a crime involving moral turpitude while under the age of 18; and

-- Any imprisonment for the offense ended more than five years before the current visa application.

3. Admission of Crime Involving Moral Turpitude

The moral turpitude ground of inadmissibility may apply even if a noncitizen does not have a conviction. A noncitizen is inadmissible if he or she voluntarily admits the essential elements of a crime involving moral turpitude to a DHS or Department of State official. A noncitizen must admit voluntarily to the elements of the offense after the DHS or Department of State official explains the offense in plain terms for the offense to constitute a valid admission. *See, e.g., Matter of G.M.*, 7 I&N Dec. 40 (A.G. 1956).

VII. Firearms and Explosive Devices

A. Deportability

A noncitizen faces removal from the United States if he or she has a single conviction for purchasing, selling, using, owning, or possessing a firearm in violation of law. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

1. Scope of Record

If the statutory definition of the offense does not involve a weapon, then a conviction is not a firearm offense even if the record of conviction shows that the defendant actually used a firearm. *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992). If a statute punishes use of a weapon, including a firearm, then it is a "divisible offense." A noncitizen convicted under a "divisible statute" is not deportable for a firearm offense unless the record of conviction establishes that the offense committed involved firearms. *See, e.g., Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996). A police report is not part of the record of conviction. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996). A conviction for possession of ammunition is not a firearm offense. *Kuhali v. Reno*, 266 F.3d 93 (2nd Cir. 2001).

2. Sentencing Enhancements

In 2007, the Board expressly modified its earlier interpretation of what constituted a sentencing enhancement in light of Supreme Court decisions in *Blakely v. Washington*, 542 U.S. 296, (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The BIA now holds that if a defendant admitted a fact that increases

punishment or if the law of the convicting jurisdiction requires the prosecution to establish that fact to a jury under a beyond a reasonable doubt standard, then it would be an element of an offense, and not an enhancement. *In re Martinez-Zapata*, 24 I. & N. Dec. 424, 429, (BIA 2007), *overruling Matter of Rodriguez-Cortes*, 20 I. &; N. Dec. 587 (BIA 1992).

VIII. Domestic Violence

A. Deportability

In 1996, Congress added a ground of deportability for domestic violence convictions and for violations of civil protection orders. 8 U.S.C. § 1227(a)(2)(E), INA § 237(a)(2)(E).

1. Domestic Violence Conviction

A person is deportable for a conviction for a domestic violence offense if on or after September 30, 1996, he or she "is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." The statute defines domestic violence as a "crime of violence (as defined in section 16 of title 18)" directed against a current or former spouse, co-parent of a child, co-habitator, or other person similarly situated under domestic violence laws. A crime of violence under 18 U.S.C. § 16 includes an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or a felony that by its nature involves significant risk of use of such force. The Supreme Court's analysis of the meaning of the "use of force" in 18 U.S.C. § 16 in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), also applies to domestic violence ground of deportability which also references 18 U.S.C. § 16 in defining a crime of domestic violence. *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).[19]

2. Violation of a Protective Order

The ground of deportability also applies when a noncitizen is enjoined by a protective order and is found by a criminal or civil court to have violated the portion of the order that protects "against credible threats of violence, repeated harassment, or bodily injury." 8 U.S.C. § 1227(a)(2)(E), INA § 237(a)(2)(E).

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[19] Two distinguishing features between the aggravated felony ground and the crime of domestic violence ground are that the former requires a one year sentence to incur deportability, while the latter has no sentence requirement at all, and that the crime of domestic violence ground covers force against a person and the aggravated felony ground includes force against a person or property.