3.4 Crime-Related Grounds of Deportability

This section reviews the main features of the different categories of criminal offenses that trigger deportability. The criminal grounds of deportability generally require that a "conviction" exist. There is a statutory definition of conviction for immigration purposes. State law does *not* determine whether a state disposition will be considered a conviction for immigration law purposes. For example, dispositions involving drug treatment court, deferral of prosecution, expunction, and prayers for judgment continued may be treated as convictions for immigration purposes. For the definition of conviction, see *infra* § 4.1, Conviction for Immigration Purposes.

A. Aggravated Felonies Generally

Definition. A noncitizen is deportable if convicted of an aggravated felony any time after admission. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). "Aggravated felony" is an immigration law term that includes an expanding list of offenses defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). The label is somewhat misleading, as an offense classified as an "aggravated felony" does not have to be either "aggravated" (as that term may be commonly understood) or a "felony" under state law. As a result of broad interpretations of the statutory language, the term may include some state misdemeanors, such as maintaining a place of prostitution.

The long list of aggravated felony offenses can generally be classified into the following groupings:

- specific offenses, regardless of sentence, such as murder, rape, sexual abuse of a minor, drug trafficking, and firearm trafficking;
- specific offenses for which an active or suspended sentence of imprisonment of one year or more is imposed (for definition of sentence length, see *infra* § 4.3, Sentence to a Term of Imprisonment), such as theft, burglary, forgery, crimes of violence, perjury, and obstruction of justice;
- specific offenses where a specific circumstance (other than the elements of the crime)

is met, such as fraud or deceit offenses in which the loss to the victim exceeds $10,000; and
- any attempt or conspiracy to commit any of the enumerated aggravated felony offenses.

The following table lists the broad categories of offenses classified as aggravated felonies. Offenses that do not meet these criteria may still constitute deportable or inadmissible offenses, discussed further below, but they do not trigger the severe consequences associated with aggravated felony convictions.

Aggravated Felonies Regardless of Sentence

- Murder
- Rape
- Sexual abuse of a minor (including indecent liberties with a minor under N.C. law)
- Drug trafficking
- Firearm trafficking and certain other firearm offenses
- Certain ransom offenses
- Certain child pornography offenses
- Offenses related to prostitution business
- Offenses related to slavery or involuntary servitude
- National security offenses
- Alien smuggling offenses, with an exception for spouse, parents, and children
- Illegal reentry after being previously deported for an aggravated felony
- Miscellaneous federal offenses, including racketeering and certain gambling offenses
- Offenses related to failure to appear for service of sentence if the underlying offense is punishable by five years or more imprisonment
- Offenses related to bail jumping if underlying offense is a felony punishable by two or more years imprisonment

Aggravated Felonies Triggered by a One-Year Term of Imprisonment (Active or Suspended) or More

- Crimes of violence
- Theft or burglary offenses (including possession or receipt of stolen property)
- Passport or document fraud offenses
- Offenses related to counterfeiting
- Offenses related to forgery
- Offenses related to commercial bribery
- Offenses related to trafficking in vehicles with altered identification numbers
- Offenses related to obstruction of justice
- Offenses related to perjury or subornation of perjury
- Offenses related to bribery of a witness

Aggravated Felonies Triggered by More than a $10,000 Loss

- Offenses involving fraud or deceit with a loss to the victim of more than $10,000
- Money laundering offenses involving more than $10,000
- Tax evasion with a loss to the government of more than $10,000

Consequences. Convictions for aggravated felonies carry the most severe immigration consequences. A conviction for an aggravated felony not only triggers deportability, it also bars eligibility for almost all forms of relief from removal, effectively subjecting the individual to mandatory removal without any consideration of his or her equities. When removed on the basis of an aggravated felony conviction, an individual is permanently inadmissible and thus permanently barred from returning to the U.S. (unless special permission from the government is obtained, which is quite difficult). *See* INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii). In addition, an individual removed on the basis of an aggravated felony conviction who returns to the U.S. unlawfully may be imprisoned for up to twenty years if federally prosecuted for illegal reentry. *See* INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).

B. Specific Types of Aggravated Felonies

Crime of Violence Aggravated Felonies. Offenses that constitute "crimes of violence" within the meaning of immigration law are aggravated felonies if a sentence of imprisonment (active or suspended) of one year or more is imposed (for definition of sentence length, see *infra* § 4.3, Sentence to a Term of Imprisonment). *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

The definition of crime of violence is broad in scope. It is defined in 18 U.S.C. § 16 as:

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

The definition has been the subject of much federal litigation. Note the distinction between § 16(a), which requires that force be an element of the offense, and § 16(b), which refers to force but does not require that it be an element. For example, the U.S. Supreme Court has said that felony burglary would come within § 16(b) because there is an inherent risk that the burglar may encounter the homeowner and use force against her in that confrontation. Offenses that have been found to constitute crimes of violence include intentional violent assaults, kidnappings, robberies, and burglaries.

Five federal courts of appeals have found that 18 U.S.C. § 16(b) is void for vagueness. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (holding that 18 U.S.C. § 16(b) is void for vagueness under reasoning of *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015)); *United States v. Vivas-Ceja*, 808 F.3d 719, 722–23 (7th Cir. 2015); *Shuti v.*

Lynch, 828 F.3d 440 (6th Cir. 2016); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016); *Baptiste v. Atty. Gen.*, 841 F.3d 601 (3d Cir. 2016). The U.S. Supreme Court has granted cert. on this issue in *Dimaya v. Lynch* and will decide by the end of the 2018 term whether § 16(b) is unconstitutionally vague. If it is found to be unconstitutionally vague, federal court and BIA cases finding that certain offenses are crimes of violence under § 16(b) will be overruled.

A misdemeanor assault does not constitute a crime of violence aggravated felony because under North Carolina law the sentence cannot exceed 150 days for even the most serious misdemeanor assault.

The Supreme Court has held that an offense requiring only proof of accidental or negligent conduct, even when involving serious physical injury or death, is not purposeful enough to qualify as an aggravated felony "crime of violence," as defined in 18 U.S.C. § 16. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that a state offense of driving under the influence of alcohol and causing serious bodily injury, which does not have a mens rea component or requires only a showing of negligence in the operation of a vehicle, is not crime of violence under 18 U.S.C. § 16). For example, a conviction of felony serious injury by vehicle, G.S. 20-141.4(a3), which penalizes unintentionally causing serious injury when driving while impaired (G.S. 20-138.1 or G.S. 20-138.2), should not qualify as a crime of violence aggravated felony even if the person receives a sentence of imprisonment of one year or more.

The U.S. Supreme Court has not resolved whether a state offense that requires proof of reckless use of force qualifies as a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004); *Voisine v. United States*, ___ U.S. ___, 136 S. Ct. 2272, 2280 n.4 (2016). Most federal courts of appeals, including the Fourth and Eleventh Circuits, however, have held that such an offense is not sufficiently purposeful to qualify as a crime of violence. *See, e.g.*, *Garcia v. Gonzalez*, 455 F.3d 465 (4th Cir. 2006) (holding that conviction for reckless assault in the second degree is not a crime of violence aggravated felony); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010).

Also, the Board of Immigration Appeals has held that the crime of battery by offensive touching does not require "violent" force and thus is not a crime of violence. *Matter of Velasquez*, 25 I&N Dec. 278, 282–83 (BIA 2010) (treating the rule in *Johnson v. United States*, 559 U.S. 133 (2010), as controlling authority in interpreting whether an offense is a "crime of violence" under § 16(a)).

Drug Trafficking Aggravated Felonies. Drug trafficking offenses within the meaning of immigration law are aggravated felonies regardless of the length of the sentence imposed.

Federal law, not state law, determines whether a state offense constitutes an aggravated felony "drug trafficking" offense. *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (drug trafficking crime is defined at 18 U.S.C. § 924(c)). "Controlled substance" is defined by federal law and refers to substances covered by the federal drug schedules in 21 U.S.C. § 802. At the time of this revised edition, it appears that all of the drugs listed

in the North Carolina state drug schedules are covered by the federal drug schedules, with one exception. Schedule III of the N.C. controlled substance schedules regulates chorionic gonadotropin, which steroid users employ to avoid testicular atrophy, a side effect from steroids. G.S. 90-91(k). This is not a federally controlled substance, so a conviction for such an offense would not come within this ground of removal. The U.S. Supreme Court has held that where the state drug statute is broader than the federal drug statute (by encompassing drugs that are not on the federal list), and the record of conviction does not reveal the identity of the drug involved, the government would not be able to meet its burden of proof to show that the immigrant is deportable for a controlled substance offense. *See Mellouli v. Lynch*, ___ U.S. ___, 135 S. Ct. 1980 (2015); *see infra* § 3.4D, Conviction of Any Controlled Substance Offense.

Below are examples from the cases of what are and are not drug trafficking aggravated felonies.

- A misdemeanor or felony conviction for simple possession of a controlled substance—except for possession of any amount of flunitrazepam (colloquially known as the "date rape drug")— is not a "drug trafficking" aggravated felony offense. *Lopez v. Gonzalez*, 549 U.S.47 (2006).
- Under *Lopez*, there is a strong argument, as evidenced by an unpublished administrative BIA decision, that North Carolina possession by trafficking should not qualify as an aggravated felony. *See infra* Appendix B, Relevant Immigration Decisions.
- Federal law punishes straight possession as a misdemeanor, regardless of quantity (although a federal prosecutor might charge the offense as possession with intent to distribute if the amount is large). Thus, where the state offense, like North Carolina possession by trafficking, proscribes straight possession (even where the quantity is large), it should not constitute a felony under federal criminal law and thus should not qualify as drug trafficking aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).
- A second North Carolina drug possession conviction, if prosecuted as a recidivist offense under G.S. 90-95(e)(3), may be deemed a drug trafficking aggravated felony. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).
- A conviction of any drug sale or possession with intent to sell continues to qualify as a drug trafficking aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47.
- The U.S. Supreme Court has also held that a statute that punishes conduct that includes the transfer of small amounts of marijuana for no remuneration is not a "drug trafficking" aggravated felony. *See Moncrieffe v. Holder*, 569 U.S. 184 (2013). Under *Moncrieffe*, there is a good argument that a conviction for delivery of marijuana or possession of marijuana with intent to manufacture, sell, or deliver under G.S. 90-95(b)(1) is not a drug trafficking aggravated felony. The reason is that a defendant can be convicted of possession with intent to manufacture, sell, or deliver without any evidence of remuneration and without the State establishing the amount of the marijuana. *See State v. Pevia*, 56 N.C. App. 384 (1982) (holding that it is not necessary for the State to prove remuneration or quantity of marijuana transferred for

offense of delivery.)[1] The Board of Immigration Appeals adopted this argument in an unpublished decision. *See infra* Appendix B, Relevant Immigration Decisions.

"Drug Trafficking" Aggravated Felony Offenses in North Carolina

- Any manufacture, sale, or delivery of controlled substance offense (except delivery of marijuana or involving chorionic gonadotropin)
- Any possession of controlled substance with intent to manufacture, sell, or deliver offense (except possession of marijuana with intent to manufacture, sell, or deliver or involving chorionic gonadotropin)
- Any N.C. drug trafficking offense (except possibly trafficking by possession or involving chorionic gonadotropin)
- Possibly a second N.C. drug possession offense prosecuted as a recidivist drug offense (except involving chorionic gonadotropin)

Not "Drug Trafficking" Aggravated Felony Offenses

- Possession of controlled substance, whether felony or misdemeanor, with the exception of any amount of flunitrazepam (date rape drug)
- Possession of drug paraphernalia
- Delivery of marijuana or possession with intent to manufacture, sell, or deliver
- Possibly trafficking by possession

***Practice Note*:** The above does not necessarily mean that a conviction for simple drug possession, delivery of marijuana, or other drug offenses is an "immigration-safe" plea. Any controlled substance conviction is a separate ground of deportability except for a one-time exception for possession of 30 grams or less of marijuana. *See infra* § 3.4D, Conviction of Any Controlled Substance Offense. However, these pleas may be beneficial because clients can avoid the harsh consequences of an aggravated felony and preserve the possibility of relief from removal.

Firearm Aggravated Felonies. There are two categories of firearm aggravated felonies. The first category covers certain offenses involving trafficking in firearms or destructive devices. *See* INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C). The Board of Immigration Appeals has found in an unpublished case that a single sale may constitute "trafficking." The second aggravated felony category covers miscellaneous firearm and explosives offenses, such as possession of a machine gun and possession of a firearm by felon. *See* INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E).

1. The North Carolina General Statutes contain a specific provision for the social sharing of marijuana, but only for up to 5 grams of marijuana. *See* G.S. 90-95(b)(2) ("the transfer of less than 5 grams of marijuana . . . for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1)"). In *Moncrieffe*, the Court suggested that a "small amount" covers up to 30 grams of marijuana, so someone who delivered 25 grams of marijuana would still come within the *Moncrieffe* exception (but not within G.S. 90-95(b)(2)). The actual amount of marijuana involved does not matter under *Moncrieffe* because the immigration court cannot go beyond the elements of the statute. *See supra* § 3.3A, Categorical Approach and Variations.

C. Conviction of a Crime Involving Moral Turpitude

A noncitizen may be deportable for a conviction of a crime involving moral turpitude (CMT) depending on the potential length of sentence, the number of CMT convictions, and the date the offense was committed in relation to when the noncitizen was admitted to the U.S. (discussed under Consequences, below).

Definition. There is no statutory definition for the immigration term "crime involving moral turpitude" (CMT). There is, however, a considerable amount of case law governing what constitutes a CMT. As a general rule, a crime involves "moral turpitude" if it is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See, e.g., Matter of Olquin-Rufino*, 23 I&N Dec. 896 (BIA 2006). Also, the Board of Immigration Appeals requires some form of scienter (at least recklessness) coupled with reprehensible conduct. *See, e.g., Matter of Leal*, 26 I&N Dec. 20 (BIA 2012); *Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017) (holding that criminally negligent homicide under New York law is categorically not a crime involving moral turpitude because it does not require that a perpetrator have a sufficiently culpable mental state). The CMT label covers a broad category of criminal offenses and generally includes:

- offenses in which either an intent to steal or defraud is an element (such as theft and forgery offenses),
- many aggravated assaults (depending on whether infliction of bodily injury is an element), and
- many sex offenses

Examples of crimes *not involving moral turpitude* include simple assault, misdemeanor breaking and entering, carrying a concealed weapon, trespass, unauthorized use of a vehicle, drunk and disruptive, disorderly conduct, and regulatory offenses.

There has been much litigation about whether the categorical approach applies to determining whether an offense qualifies as a CMT. Both the Fourth and Eleventh Circuits have held that the categorical approach applies. *See Prudencio v. Holder*, 669 F.3d 472 (4th 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011).

To determine whether a specific crime constitutes a CMT, consult Appendix A, Selected Immigration Consequences of North Carolina Offenses, at the end of this manual.

Assault Offenses. The cases are mixed on assault offenses—they are not all consistent and rely on different factors. Below is the recommended analysis.

- North Carolina simple assault does not qualify as a CMT for multiple reasons. First, simple assault or battery is generally not deemed to involve moral turpitude for purposes of immigration law because it requires general intent only. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Second, the Fourth Circuit has found that the minimum conduct for a simple assault under North Carolina law requires only

culpable negligence. *United States v. Vinson*, 805 F.3d 120, 126 (4th Cir. 2015). This mental state is sufficient for either an assault (essentially, an attempted battery) or a battery (essentially, unlawful physical contact), which are both covered by North Carolina's assault statute. Because culpable negligence does not rise to recklessness, the minimum scienter required for a CMT, North Carolina simple assault does not qualify as a CMT. *See id*. (holding that culpable negligence as defined in North Carolina is a lesser standard of culpability than recklessness, which requires at least "a *conscious* disregard of risk").

- An intentional or knowing assault involving some aggravating dimension that increases the culpability of the offense, such as the offender's use of a deadly weapon or infliction of serious injury on a person whom society views as deserving of special protection, such as children, domestic partners, or peace officers, is a CMT. *See Matter of Sanudo*, 23 I&N Dec. 968 (2006). North Carolina assault with a deadly weapon is possibly a CMT offense for that reason. This rule arguably should not apply to the simple forms of assault on a female, assault on an officer, and assault on a child because under *Vinson*, the minimum conduct under those statutes involves culpable negligence, which does not rise to a CMT. Accordingly, the BIA in an unpublished decision has found that assault on a female does not qualify as a CMT. *See infra* Appendix B, Relevant Immigration Decisions. Moreover, these offenses do not require infliction of bodily injury. Beware, however, that the Eleventh Circuit has held that no requirement of bodily injury is necessary. *See Gelin v. U.S. Atty. Gen.*, 837 F.3d 1236 (11th Cir. 2016) (holding that Florida abuse of an elderly or disabled person is a CMT because of the statutory elements of a vulnerable victim and a knowing or willful mental state). Additionally, an assault on an officer should not qualify as a CMT because the minimum conduct punished can be mere offensive touching, such as spitting at an officer. *See State v. Mylett*, ___ N.C. App. ___, 799 S.E.2d 419 (2017) (upholding conviction for assault on an officer where defendant spat at officer); *Matter of Sanudo*, 23 I&N Dec. 968 (2006) (where minimum conduct punished under statute is battery by offensive touching against a protected class, the offense does not rise to a CMT).

Impaired Driving Offenses. A conviction for impaired driving may be a CMT depending on the presence of aggravating or grossly aggravating factors. The Board of Immigration Appeals has held that a simple driving while impaired offense is not a CMT. *See Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). Further, an offense of driving while impaired with two or more prior convictions for simple driving while impaired under an Arizona statute has been held not to be a CMT. *See id*. In contrast, the BIA has held that a conviction for an aggravated DWI offense containing an element of driving with a revoked license is a CMT. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).

Under this case law, an impaired driving conviction under North Carolina law will not constitute a CMT offense if there are no aggravating sentencing factors. An impaired driving conviction with an aggravating sentencing factor of driving with a revoked license is possibly a CMT offense. It is unclear because the case law requires that the driving with a revoked license component be an element of the offense as opposed to a sentencing factor. Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), aggravating

factors that increase the penalty for a crime must be proven beyond a reasonable doubt and are considered to be elements of the offense. If viewed as offense elements, some of North Carolina's aggravating sentencing factors may make a DWI conviction a CMT. This manual does not address the impact of other sentencing factors.

Consequences. A noncitizen is deportable if convicted of one CMT committed within five years of admission to the U.S. and *punishable* by at least one year in prison. *See* INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). The Fourth Circuit Court of Appeals has held that to determine whether a North Carolina offense is punishable by at least one year in prison for purposes of the federal sentencing guidelines, courts consider the maximum sentence that a defendant could receive in state court based on the defendant's prior record level under North Carolina law. *See United States v. Simmons*, 649 F.3d 237, 240, 249–50 (4th Cir. 2011) (en banc). The North Carolina Justice Reinvestment Act, effective for offenses committed on or after December 1, 2011, introduced a new nine-month period of mandatory post-release supervision (PRS) for Class F through I felonies, the lowest felony classes in North Carolina. *See* G.S. 15A-1368.2(c). As a result, the sentence that "may be imposed" for any North Carolina felony conviction will be greater than a one year sentence. *See United States v. Barlow*, 811 F.3d 133 (4th Cir. 2015).

A noncitizen is also deportable if convicted of two or more CMTs, not arising out of a single scheme of criminal misconduct, committed at any time after admission and regardless of the actual or potential sentence. *See* INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). Two CMTs that arose out of a separate scheme and that are consolidated for judgment or are run concurrently, will likely still be considered separate convictions for immigration purposes and will trigger deportability. Conversely, if a person is convicted of two or more CMTs arising out of a single scheme, the convictions should not trigger deportability.

Practice Note: In North Carolina, because misdemeanors are generally not punishable by a year or more of imprisonment, the commission of one misdemeanor CMT will not trigger deportability.

D. Conviction of Any Controlled Substance Offense

Conviction of Any Controlled Substance Offense. A noncitizen is deportable for any violation of law "relating to" a controlled substance, whether felony or misdemeanor, except for a single offense of simple possession of 30 grams or less of marijuana (discussed further below). *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

"Controlled substance" is defined by federal law and refers to substances covered by the federal drug schedules in 21 U.S.C. § 802. At the time of this revised edition, it appears that all of the drugs listed in the North Carolina state drug schedules are covered by the federal drug schedules, with one exception. Schedule III of the N.C. controlled substance schedules regulates chorionic gonadotropin, which steroid users employ to avoid testicular atrophy, a side-effect from steroids. G.S. 90-91(k). This is not a federally controlled substance, so a conviction for such an offense would not come within this

ground of removal. The U.S. Supreme Court has held that where the state drug statute is broader than the federal drug statute (by encompassing drugs that are not on the federal list), and the record of conviction does not reveal the identity of the drug involved, the government would not be able to meet its burden of proof to show that the immigrant is deportable for a controlled substance offense. *See Mellouli v. Lynch*, ___ U.S. ___, 135 S. Ct. 1980 (2015). Thus, if your client pleads guilty to possession of a Schedule III drug and the record of conviction does not reveal the specific drug, there is a strong argument that your client is not deportable for a controlled substance offense under *Mellouli*. However, if the charging document names a controlled substance other than chorionic gonadotropin, the client will be deportable.

Conviction of Drug Paraphernalia. The government will likely argue that a conviction for drug paraphernalia is a controlled substance offense, but that may not be so.

In *Mellouli*, the Supreme Court held that a drug paraphernalia conviction is only a deportable controlled substance offense where a federally controlled drug is an element of the offense. Thus, a conviction for paraphernalia related to an unnamed Schedule III drug should not be a deportable offense, and for that reason defenders may want to negotiate such language where appropriate.

Additionally, there is an argument that no North Carolina conviction for drug paraphernalia is a deportable offense. Under *United States v. Mathis*, ___ U.S. ___, 136 S. Ct. 2243 (2016), the identity of the controlled substance is arguably not an *element* of the North Carolina paraphernalia statute (except when the paraphernalia involves marijuana under G.S. 90-113.22A). Because the state schedules are broader than the federal ones (because North Carolina's covers chorionic gonadotropin), a state paraphernalia conviction is arguably never a controlled substance offense. *See supra* § 3.3A, Categorical Approach and Variations.

Exception for Possession of Small Amount of Marijuana. A noncitizen is not deportable if she or he has been convicted of only "a single offense involving possession for one's own use of thirty grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i). A North Carolina possession conviction for less than 30 grams of marijuana will fall within this exception if the noncitizen has no prior drug convictions. In *Matter of Davey*, 26 I&N Dec. 37, 39 (BIA 2012), the Board of Immigration Appeals held that the immigration court is *not* limited to the elements of the offense and to the record of conviction; instead, the 30 grams exception calls for a circumstance-specific inquiry into the noncitizen's actual conduct. Thus, to meet its burden of proof, the government can look to court documents outside of the record of conviction to establish that more than 30 grams of marijuana was in fact involved. *See supra* § 3.3A, Categorical Approach and Variations.

Exception for Possession of Drug Paraphernalia Related to a Small Amount of Marijuana. The Board in *Davey* also found that the 30 grams exception would cover the possession of drug paraphernalia where the paraphernalia was merely an adjunct to the noncitizen's simple possession or use of 30 grams or less of marijuana. *Id.* at 40–41.

Thus, a client who pleads guilty to marijuana paraphernalia related to less than 30 grams of marijuana should not be deportable (assuming she has no other drug convictions). In 2014, North Carolina enacted a separate statute on marijuana drug paraphernalia, G.S. 90-113.22A. If a defendant violates that statute in a case involving 30 grams or less of marijuana, defenders should ensure that the record reflects that fact.

***Practice Note*:** A conviction for a Class 3 misdemeanor possession of marijuana should not make a noncitizen with no prior drug convictions deportable under the 30 grams or less exception discussed above. A conviction for a Class 1 misdemeanor possession of marijuana also should not make a noncitizen deportable, unless the record of conviction or other documents, like the lab report, establish possession of more than 30 grams of marijuana. Consequently, if your client is charged with a Class 1 misdemeanor involving possession of marijuana, you should document in the record that the amount involved was 30 grams or less.

Drug Abuse or Addiction. A noncitizen is also deportable if he or she is or has been a drug abuser or addict at any time after being admitted to the U.S. *See* INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii). This ground of deportability does not require a conviction. Drug abuse or addiction is determined in accordance with U.S. Department of Health and Human Services regulations. *See* INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv). Drug abuse is broadly defined as "current substance use disorder or substance-induced disorder, mild, as defined in the most recent edition of the Diagnostic and Statistical Manual for Mental Disorders (DSM) as published by the American Psychiatric Association, or by another authoritative source as determined by the Director of Centers for Disease Control and Prevention, of a substance listed in Section 202 of the Controlled Substances Act." 42 C.F.R. § 34.2(h). This ground generally requires a medical determination and should not be triggered by a mere admission by the defendant.

E. Conviction of a Firearm or Destructive Device Offense

A noncitizen is deportable for a single conviction of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, whether felony or misdemeanor, a firearm or destructive device (including part or accessory) as defined in 18 U.S.C. § 921(a). *See* INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). The federal definition of firearm includes explosive-powered firearms and destructive devices (as defined in 18 U.S.C. § 921(a)(4)). The federal definition does not cover air-powered weapons like BB or pellet guns. There is also a federal exception for antique firearms. *See* 18 U.S.C. § 921(a)(3).

There is not a single definition of firearm under the North Carolina criminal law statutes. Some of the firearm definitions may be broader than the federal law, while others seem to match. For example, with regard to carrying a concealed pistol or gun under G.S. 14-269(a1), neither the statute nor the pattern jury instructions define "pistol" or "gun." Case law suggests that a gun or pistol must be a "firearm," *see, e.g., State v. Best*, 214 N.C. App. 39 (2011), which other North Carolina statutes have defined as a weapon that

"expels a projectile by action of an explosion." Because there is no exception for an antique firearm as under federal law, there is an argument that this state offense is broader than the federal firearm ground of removal. *See Moncrieffe v. Holder,* 569 U.S. 184, 133 S. Ct. 1678, 1693 (2013); *see also supra* § 3.3A, Categorical Approach and Variations.

Where the use of a firearm (as defined in the federal statute) is an element of a crime, the conviction will be considered a firearm offense. *See, e.g.*, *Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993) (holding that convictions for first-degree armed burglary and robbery with a firearm under Florida statute constituted a firearm conviction where the use of firearm was an essential element of the crime). A conviction under a divisible statute (where the elements define both firearms offenses and non-firearms offenses) is not a deportable offense unless the record of conviction establishes that the conviction was under the firearms subsection. *See Matter of Pichardo-Sufren*, 21 I&N Dec. 330 (BIA 1996); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323 (BIA 1996); *see also supra* § 3.3A, Categorical Approach and Variations.

Practice Note: If your client is convicted of an offense where a weapon is an element of the offense, and the record of conviction does not establish that the weapon involved was a firearm, he or she should not be deportable for a firearm offense.

Federal law also criminalizes the possession of a firearm by noncitizens unlawfully present in the U.S. and by certain nonimmigrant visa holders. *See* 18 U.S.C. § 922(g)(5). Noncitizens in North Carolina have been federally prosecuted for this offense.

F. Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order

A noncitizen is deportable if convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, whether felony or misdemeanor. *See* INA § 237(a)(2)(E) (i), 8 U.S.C. § 1227(a)(2)(E)(i).

These grounds of deportability only apply to convictions or violations occurring after September 30, 1996. *See* Section 350(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Division C, 110 Stat. 3009-546.

Crime of Domestic Violence. A crime of domestic violence has two main requirements. First, the offense must be a crime of violence as defined in 18 U.S.C. § 16. The definition of crime of violence for a crime of domestic violence is the same as for aggravated felonies, discussed *supra* in § 3.4B, Specific Types of Aggravated Felonies. However, there is *not* a requirement of a one-year sentence here. Second, the offense must be against a current or former spouse, co-parent of a child, a person with whom the defendant is or has cohabited as a spouse, any other individual similarly situated to a spouse, or other individual protected under federal, state, tribal, or local domestic or family violence laws. *See* INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

The Fourth Circuit has found that the North Carolina offense of assault on a female is *not* a crime of domestic violence for purposes of 18 U.S.C. § 922(g)(9). *See United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015). Section 922(g)(9) is a federal criminal statute that prohibits anyone who has previously been "convicted . . . of a misdemeanor crime of domestic violence" from possessing firearms or ammunition. It has a broader definition of force than 18 U.S.C. § 16. If an offense is not a crime of domestic violence for purposes of 18 U.S.C. § 922(g)(9), then it cannot be a crime of violence under the narrower definition of 18 U.S.C. § 16. *Cf. United States. v. Castleman*, ___ U.S. ___, 134 S. Ct. 1405, 1411 n.4 (2014) (finding "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) to have a more expansive definition than crimes of violence under 18 U.S.C. § 16, which denotes "active and violent force"). The Board of Immigration Appeals in an unpublished case has found that assault on a female is not a crime of domestic violence for immigration purposes. *See infra* Appendix B, Relevant Immigration Decisions.

While the categorical approach applies to "crime of violence," the fact-based circumstance-specific approach applies to the requirement of a domestic relationship. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *see also Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). Thus, the relationship between the offender and the victim need not be an element of the crime of conviction. Moreover, the immigration court will be permitted to look to documents beyond the record of conviction, such as sentencing and pre-sentence documents, to determine whether the victim was a protected party. *See supra* § 3.3A, Categorical Approach and Variations.

Crime of Child Abuse. The Board of Immigration Appeals treats "child abuse, child neglect, or child abandonment" as a "unitary concept," not as three different categories of offenses. *See Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010). The immigration statute does not define this child abuse concept, but the BIA has interpreted it broadly to include "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation." *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008). The BIA defines "child" as anyone under age 18 and does not require that the offender be a parent or guardian caring for the child. *Id*.

In *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010), the Board held that no proof of actual harm or injury to the child is required. *Id.*; *see also Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016). As a result, whether a child abuse offense involves an omission or negligent conduct, this definition would appear to apply without proof of actual harm. *But see Ibarra v. Holder*, 736 F.3d 903, 915-16 (10th Cir. 2013) (rejecting the BIA's broad interpretation and finding that child abuse ground of removal does not encompass criminally negligent conduct with no resulting injury to a child).

The categorical approach still applies here. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513. Therefore, convictions for offenses that do *not* contain as an element "minor" or "child" should not come within this ground of removal.

Violation of a Protective Order. A noncitizen is also deportable if enjoined by a protective order to prevent acts of domestic violence and found by a civil *or* criminal court to have violated the portion of a protective order that protects against credible threats of violence, repeated harassment, or bodily injury. *See* INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii). The Board of Immigration Appeals has found that violation of a no-contact order falls within this ground of removal because the purpose of a no-contact order is to protect "against credible threats of violence, repeated harassment, or bodily injury" within the meaning of INA § 237(a)(2)(E)(ii). *See Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). However, a violation of an order requiring attendance at and payment for a counseling program or requiring the payment of costs for supervision during parenting time is *not* covered by the removal provision. *Id.* at 511.

In North Carolina, for protective order purposes, domestic violence is broadly defined to include persons of the opposite sex who have lived together, parents and children, grandparents and grandchildren, current or former household members, and persons involved in non-cohabitating romantic relationships. *See* G.S. 50B-1(b). A violation of such a no-contact protective order is a deportable offense.

Practice Note: Under certain circumstances, the grounds of deportability for a crime of domestic violence, stalking, and violation of a protective order may be waived by immigration authorities when the defendant has been battered or subjected to extreme cruelty and is not and was not the primary perpetrator of violence in the relationship. *See* INA § 237(a)(7), 8 U.S.C. § 1227(a)(7). If these circumstances seem to apply to your client, any documentation in court that the particular incident was part of a larger pattern of abuse against your client may be helpful to your client in future immigration proceedings.

G. Chart of Principal Deportable Offenses

The following chart lists the principal categories of deportable offenses. It does not include some miscellaneous grounds involving infrequently charged federal crimes, which are generally not of concern to state law practitioners. An interested reader can find the complete list of the criminal grounds of deportability at INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). There is also a growing list of security-related grounds of deportability and inadmissibility linked to criminal activity. This is a complicated and developing area of immigration law and covers alleged acts of terrorism, which a state law practitioner is unlikely to encounter. *See* INA § 237(a)(4), 8 U.S.C. § 1227(a)(4); INA § 212(a)(3), 8 U.S.C. § 1182(a)(3).

Keep in mind that one offense can be classified under multiple categories of deportability. For example, a conviction of assault with a deadly weapon with intent to kill against a spouse may be an aggravated felony, crime involving moral turpitude, and crime of domestic violence.

Ground of Deportability	Significant Features	Exceptions
Conviction of aggravated felony	• Includes felonies and some misdemeanors • Carries most severe immigration consequences • Includes 21 broad categories of offenses as set forth in immigration statute (*see supra* § 3.4A, Aggravated Felonies Generally)	
Conviction of crime involving moral turpitude (CMT)	• Committed within 5 years of admission to U.S. • Punishable by at least 1 year in jail	All misdemeanors, other than certain impaired driving offenses
Conviction of 2 or more CMTs	• Committed at any time after admission • Length of sentence immaterial	CMTs arising out of a single scheme
Conviction relating to a controlled substance	• Includes felonies and misdemeanors • May include drug paraphernalia offenses	An offense of simple possession of 30 grams or less of marijuana if no prior drug convictions
Firearm conviction	• Includes purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying a "firearm or destructive device" as defined under federal law • Includes felonies and misdemeanors • Includes carrying a concealed gun	
Conviction of domestic violence, stalking, child abuse, child neglect, or child abandonment	• Includes felonies and misdemeanors • Domestic violence crime must be a crime of violence (*see supra* § 3.4B, Specific Types of Aggravated Felonies) • Domestic violence crime must be directed against a protected party under state or federal domestic violence laws	Convictions or violations occurring before September 30, 1996
Violation of a protective order	• Violation of the portion of order that protects against credible threats of violence, repeated harassment, or bodily injury • Violation may be found in civil or criminal court	Convictions or violations occurring before September 30, 1996