6.5 Cases Involving Firearms

Offenses in which the use of a firearm (as defined under federal law) is an essential element will render your lawfully-admitted client deportable based on the firearm ground of deportability. Certain firearm offenses may also be considered aggravated felonies and carry additional adverse immigration consequences.

There is no firearm ground of inadmissibility. If, however, the firearm-related offense constitutes a crime involving moral turpitude, which is one of the crimes of inadmissibility, the offense would render the person inadmissible. For example, an offense involving the sale of a firearm is probably a crime involving moral turpitude.

If your client is charged with a firearm offense, the following options may eliminate the immigration consequences or at least the added consequences of an aggravated felony firearm conviction.

A. Weapons Offenses That Do Not Specifically Involve a Firearm

If a noncitizen is convicted of an offense containing a general weapon element, and the elements of the offense do not establish that the weapon is a firearm, the offense does not qualify as a firearm offense for immigration purposes.

B. Firearm Offenses That Do Not Come within the Federal Definition of Firearm

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, 45 (2011), which other North Carolina statutes have defined as a weapon that "expels a projectile by action of an explosive." *See* G.S. 14-415.1(a) (possession of firearm by felon); *see also In re N.T.*, 214 N.C. App. 136 (2011) (so defining gun for assault by pointing gun). Because there is no stated exception under G.S. 14-269(a1) for

an antique firearm as under federal law (and under G.S. 14-415.1), 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 supra* § 3.3A, Categorical Approach and Variations.

For assistance in determining whether a firearm-related offense may come within the firearm ground of removal, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

C. Non-Aggravated Felony

A firearm offense can be considered an aggravated felony on two different grounds. First, certain offenses involving sale or delivery of firearms may be deemed a firearm trafficking offense. Second, specific firearm offenses, such as possession of a machine gun and possession of a firearm by a felon, are considered aggravated felonies because similar federal offenses have been designated as aggravated felonies in the immigration statute.

A non-aggravated felony firearm conviction will still have adverse immigration consequences as a firearm-related offense, but it will not have the more severe consequences associated with an aggravated felony conviction.

For assistance in determining whether a firearm-related offense may be considered an aggravated felony, *see* Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

D. Accessory after the Fact

The offense of accessory after the fact to a firearm offense (under G.S. 14-7) is probably not a firearm offense and thus probably does not trigger the immigration consequences associated with a firearm offense. *Cf. Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (holding that federal accessory after the fact offense under 18 U.S.C. § 3 insufficiently relates to a controlled substance offense because it is not an inchoate crime, but a crime separate and apart from the underlying crime). An accessory after the fact conviction is considered an "obstruction of justice offense," however, and is considered an aggravated felony offense if accompanied by a one-year term of imprisonment (active or suspended) or more. An accessory after the fact offense is generally punishable two classes lower than the principal offense under structured sentencing.

This rule does not apply to the offenses of attempt, conspiracy, and accessory before the fact to a firearm offense, which probably *are* firearm offenses.