

Chapter 3

Criminal Grounds of Removal and Other Immigration Consequences

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3.1 Removal Defined

Before 1996, immigration law provided for two types of processes to eject noncitizens from the U.S.—“deportation” (if a noncitizen was found to be deportable) and “exclusion” (if a noncitizen was found to be inadmissible). *See infra* § 3.2, Deportability vs. Inadmissibility. Laws passed in 1996 ended the distinction and created a single process called removal.

There are several ways the government can remove a noncitizen. Before being removed, many noncitizens receive an administrative hearing before an immigration judge with the Department of Justice, Executive Office for Immigration Review. *See* INA § 240, 8 U.S.C. § 1229a. The immigration judge must make findings of fact and determine whether the noncitizen is removable under immigration law. If the immigration judge orders a noncitizen removed and that order becomes final, U.S. Immigration and Customs Enforcement (ICE) will physically remove that individual from the U.S. For a discussion of other procedures for removing a noncitizen, *see infra* § 7.4B, Removal Proceedings.

Removal from the U.S. is the immigration consequence that will probably be of most importance to your client. For a discussion of priorities based on the client’s particular immigration status (e.g., lawful permanent resident, refugee, etc.), *see infra* Chapter 5, Determining Possible Immigration Consequences Based on Your Client’s Immigration Status.

3.2 Deportability vs. Inadmissibility

A. Consequences Distinguished

A noncitizen can lose her status and be forced to leave the U.S. (removed) if she comes within a ground of *deportability*. In general, the grounds of deportability apply to noncitizens who have been lawfully “admitted”—that is, noncitizens who have entered the U.S. after inspection and authorization by an immigration officer. Lawful permanent residents and others who have a secure lawful immigration status fear becoming deportable.

A noncitizen can be denied admission to the U.S. (and thereby removed) or denied lawful permanent resident status (a green card) if he or she comes within a ground of *inadmissibility*. The grounds of inadmissibility generally apply to individuals who have

not been “admitted” and are viewed as seeking admission to the U.S. Immigration law generally deems a person as seeking admission when:

- An individual present at the border or port of entry, including airports and seaports, seeks permission to enter the U.S.
- An individual is physically present in the U.S. but entered without inspection (e.g., crossed the border illegally).
- An individual applies to become a lawful permanent resident (LPR) (*see supra* § 2.2B, Lawful Permanent Resident Status).
- In some instances, a lawfully admitted individual travels abroad after being convicted of a crime and then returns to the U.S.

There are several criminal grounds of deportability and inadmissibility in the federal immigration statute. *See* INA § 212, 8 U.S.C. § 1182 (grounds of inadmissibility); INA § 237, 8 U.S.C. § 1227 (grounds of deportability). These grounds overlap somewhat, but they are not the same and do not have the same impact. It is critical to determine which consequences your client is concerned about, which will depend on your client’s current status and on any future immigration status he or she may seek. For example, a noncitizen client with a non-immigrant work visa will be subject to the grounds of deportability because he or she has already been lawfully admitted to the U.S., but the client will also be concerned about the grounds of inadmissibility if he or she hopes to adjust status to an LPR in the future.

Key Terms: The following definitions may help counsel distinguish different immigration terms.

Admission means the lawful entry into the U.S. after inspection and authorization by an immigration officer. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A).

Deportability applies to noncitizens who have been lawfully admitted to the U.S. (even if their lawful status has expired). LPRs who are in the U.S. and will not be traveling abroad will be most concerned about avoiding deportability.

Inadmissibility applies to people who are seeking admission into the U.S. Noncitizens who plan to adjust status/apply for a green card will be most concerned about avoiding inadmissibility. Also, LPRs convicted of crimes falling within the grounds of inadmissibility who travel abroad may be viewed as seeking admission on their return and thus subject to the grounds of inadmissibility.

B. Relief from Removal

If an immigration judge finds that an individual is deportable or inadmissible, the individual will be removed from the U.S. unless he or she is granted some form of relief from removal.

There are several forms of relief from removal codified in the immigration statute, each with its own specific eligibility requirements. Most forms of relief are discretionary and will depend on an individual's ties to the U.S. and other factors. In most cases, an immigration judge will determine whether relief from removal will be granted and the individual allowed to remain in the U.S. Certain convictions will make noncitizens ineligible for relief from removal, regardless of ties to the U.S., demonstrated rehabilitation, contributions to the community (including military service), and hardship to family members. For a discussion of different forms of relief, see Immigrant Legal Resource Center, [Immigration Relief Toolkit for Criminal Defenders: How to Quickly Spot Possible Immigration Relief for Noncitizen Defendants](#) (Jan. 2016). The main types of convictions that bar relief from removal are discussed in Chapter 5, Determining Possible Immigration Consequences Based on Your Client's Immigration Status.

Practice Note: Except as noted, a person convicted of one of the offenses discussed below may be eligible for limited forms of relief from removal. However, because it can be difficult to get relief, your client should *not* count on it. When possible, it is best for a noncitizen to avoid convictions that provide grounds for removal.

C. Long-Term Consequences of Removal Order

Noncitizens who have been ordered removed face a number of obstacles in returning to the U.S. Once deported, most individuals will not be able to return lawfully to the U.S.

Generally speaking, clients who are removed from the U.S. will be barred from future admission into the U.S. for a statutory period. An individual ordered removed after a removal hearing will generally be barred from the U.S. for ten years. *See* INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii). In the case of a second or subsequent removal, an individual will be barred from the U.S. for twenty years. *See id.* Although an individual may request permission from the government to return to the U.S. before the end of the statutory time period, such permission is difficult to obtain. *See* 8 C.F.R. § 212.2. Even after the statutory period has passed, it will not be easy for your client to return to the U.S.—your client will still have to establish eligibility for an immigrant visa.

The most drastic consequences are for clients who are removed on the basis of an aggravated felony conviction, discussed further below. These clients will generally not be able to return to the U.S. for life unless special permission to return is authorized by the Attorney General. *See* INA § 212(a)(9)(A)(ii)&(iii), 8 U.S.C. § 1182(a)(9)(A)(ii)&(iii).

Noncitizens who return or attempt to return unlawfully are subject to federal prosecution for illegal reentry and face lengthy prison sentences. *See* INA § 276, 8 U.S.C. § 1326. Prison sentences run up to twenty years if the noncitizen was removed after a conviction of an aggravated felony. *See* INA § 276(b)(2), 8 U.S.C. § 1326(b)(2). In recent years, the U.S. Attorneys' offices have significantly increased enforcement of these federal immigration crimes.

3.3 Determining Whether a State Offense Triggers Removal

A. Categorical Approach and Variations

Minimum culpable conduct. To determine whether a state conviction qualifies as an offense that triggers removal, the immigration court employs the “categorical approach.” Under this approach, the factfinder compares the elements of the statute of conviction to the federal removal ground. *See Moncrieffe v. Holder*, 569 U.S. 184, 133 S. Ct. 1678 (2013). The actual conduct that led to the defendant’s prosecution is irrelevant. What matters is whether the “least of the acts” criminalized by the statute necessarily comes within the ground of removal. *Id.*, 133 S. Ct. at 1684. For example, in *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015), the Fourth Circuit considered whether the defendant’s conviction for unauthorized use of a vehicle under Virginia law was an aggravated felony theft offense. The aggravated felony theft ground of removal requires that an element of the offense be a non-consensual taking. In *Castillo*, the Court found that the minimum culpable conduct criminalized under the Virginia statute is where the car is entrusted to the defendant but is used in a manner not specifically authorized by the owner. The Court found that the statute was not a categorical match because the minimum culpable conduct under the statute did not involve a taking without the owner’s consent and thus did not come within the aggravated felony theft ground. Thus, no convictions under the Virginia unauthorized-use statute qualify as an aggravated felony theft offense. It does not matter that the noncitizen may in fact have taken the car without the owner’s consent because the immigration court is required to presume that the conviction rested on the least of the acts under the statute.

As part of this analysis, the immigration court must consider whether a “realistic probability” exists that the convicting jurisdiction actually prosecutes the minimum culpable conduct. *Moncrieffe*, 133 S. Ct. at 1684–85. If there is a “realistic probability” that the state would apply the statute of conviction to conduct falling outside the federal removal ground, the immigration consequence is not triggered.

How have courts determined whether a realistic probability of prosecution exists? The Supreme Court has explained that a noncitizen can satisfy this standard by pointing to a case in which the state courts applied the statute to conduct falling outside the removal ground. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Eleventh Circuit has held that where the statute on its face expressly reaches conduct that falls outside the generic ground of removability, the statute satisfies the standard. *Ramos v. Attorney General*, 709 F.3d 1066, 1071–72 (11th Cir. 2013) (concluding that where a Georgia theft statute expressly covered alternative intents, one of which did not satisfy the elements of an aggravated felony theft crime, the statute’s language created the realistic probability that it would punish crimes beyond generic theft). The BIA, however, does not apply this express language rule. *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014). The Fourth Circuit has held that even where the language of the statute does not expressly include the minimum conduct, but the case law interpreting the statutory language does, the realistic probability standard is satisfied. *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc).

Modified categorical approach. The above approach includes an additional step, called the “modified categorical approach,” if the statute of conviction is *divisible*—that is, it defines more than one offense, at least one of which comes within the removal ground and one of which does not. *Descamps v. U.S.*, ___ U.S. ___, 133 S. Ct. 2276 (2013). In these cases, the immigration judge cannot perform the required categorical analysis until it has been determined which offense the individual was convicted of. For this limited purpose, the immigration judge can look beyond the language of the statute to a limited set of official court documents from the defendant’s criminal case, called the “record of conviction.” The defendant’s particular conduct remains irrelevant under this analysis; the only issue is which of the multiple offenses defined by the statute was the basis of the conviction. *Id.* The specific documents that comprise the record of conviction are listed below.

Until recently, it was unclear when the immigration court could look to the record of conviction in applying the modified categorical approach. Some statutes contain a disjunctive list of acts, which are considered alternative ways of committing a single crime. In other statutes, the acts are considered elements, which are part of separate crimes. In identifying the offense committed by the defendant, can the immigration court look at the record of conviction in both instances or only when the statute creates separate crimes?

For example, suppose a statute defines burglary as unlawfully breaking and entering into a *building, car, or boat* with the intent to commit a felony. For immigration purposes, burglary of a car or boat is not an aggravated felony burglary offense. Can the immigration court look to the record of conviction to determine whether the defendant was guilty of burglary of a building (which is an aggravated felony burglary) or burglary of a car (which is not an aggravated felony burglary). The U.S. Supreme Court recently held that this question turns on whether the items in the list (building, car, or boat) are “elements” of the offense, which must be found unanimously and beyond a reasonable doubt, or are alternative means of committing a single offense. *See United States v. Mathis*, ___ U.S. ___, 136 S. Ct. 2243 (2016). If the former, then the immigration court may look to the record of conviction. If the latter, the immigration court cannot because the statute creates only one offense. This is an important distinction because if “building, car, or boat” are alternative means of committing one offense, then the minimum conduct punished under the statute does not come within the burglary aggravated felony ground and does not trigger removal on that basis.

Assume instead that “building, car, or boat” are three different elements, defining three different crimes. In that case, because the statute defines more than one offense, the immigration judge would be permitted to consult the record of conviction to determine for which offense the defendant was convicted. If the record indicates that he was convicted of entering a building, the client would be deportable. If the record of conviction is silent, then the immigration court should conclude that the noncitizen is not deportable because the burden of proof lies with the government. *See infra* § 3.3B, Burden of Proof on ICE in Establishing Deportability. Similarly, if the defendant takes an *Alford* plea, there is an argument that the government cannot meet its burden of

establishing under which prong of a divisible statute the defendant was convicted. *See infra* § 6.1C, Categorical Approach and Record of Conviction.

A practitioner would generally look to state law to make this determination. Researching state case law and examining the state criminal statute's text is therefore an essential and critical first step to ascertaining whether a criminal statute is divisible and permits review of the record of conviction. For a discussion of this issue in the context of pleading requirements, see 1 North Carolina Defender Manual § 8.5G, Disjunctive Pleadings (2d ed. 2013); Robert L. Farb, [The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity of Jury Verdict](#) (Feb. 1, 2010).

Record of Conviction. The Board of Immigration Appeals and U.S. Supreme Court have determined that the following documents make up the record of conviction:

- statute of conviction,
- charging document (such as the indictment or information),
- written plea agreement,
- transcript of plea colloquy,
- any factual findings by the judge to which the defendant agreed
- stipulations to the factual basis for the offense, and
- jury instructions if the defendant is convicted after a jury trial.

The following documents are beyond the record of conviction and ordinarily may not be considered by the immigration court:

- police reports,
- probation or pre-sentence reports, and
- statements by the noncitizen outside the judgment and sentence transcript.

The record of conviction can be affected by counsel's handling of the case, discussed *infra* in § 6.1C, Categorical Approach and Record of Conviction.

Non-categorical exceptions. In a few limited contexts, the immigration court may take a non-categorical, "circumstance-specific" approach, which permits an inquiry into the facts of a conviction without regard to the elements of the statute of conviction. In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the U.S. Supreme Court held that some aggravated felony definitions are made up of two parts: one or more "generic" offenses that are subject to the categorical approach, and one or more "circumstance-specific" factors that are not. *Nijhawan* concerned the aggravated felony of a crime of fraud or deceit in which the loss to the victim exceeds \$10,000. INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M). The Court found that the amount of loss is circumstance-specific and need not be proved under the categorical approach, while fraud and deceit are generic offenses that are subject to the categorical approach. Thus, in determining whether the loss was greater than \$10,000, the immigration court is permitted to look at documents beyond the record of conviction, such as presentence reports. Other areas in which this approach applies include the exception to deportability for an offense involving

possession of thirty grams or less of marijuana (*see Matter of Davey*, 26 I&N 37 Dec. (BIA 2012); *see also infra* § 3.4D, Conviction of any Controlled Substance Offense) and proof of a domestic relationship for purposes of the domestic violence ground of deportability. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *see infra* § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order

B. Burden of Proof on ICE in Establishing Deportability

In removal proceedings, ICE has the burden of establishing that the noncitizen is deportable. *See* INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a). Thus, ICE must demonstrate that the offense of conviction falls into a ground of removal. If the statute of conviction defines multiple offenses (some of which come within the immigration ground and some of which do not), and there is insufficient information in the record of conviction to determine the offense of conviction, the government would be unable to demonstrate that the noncitizen is deportable. *See Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *see also infra* § 6.1C, Categorical Approach and Record of Conviction (discussing *Alford* pleas).

C. Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility

If ICE establishes that a noncitizen is deportable, the noncitizen may be able to apply for some form of relief from removal. In general, the noncitizen has the burden of proving that he or she is eligible for a form of relief from removal. *See* 8 C.F.R. § 1240.8(d); *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009). Also, noncitizens subject to grounds of inadmissibility generally bear the burden of demonstrating that they are admissible. *See* INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2). Thus, in some instances, the noncitizen has the burden of documenting necessary information in the record of conviction. For example, an individual convicted of Class 1 misdemeanor marijuana possession in North Carolina is inadmissible on controlled substance grounds. But, the individual may qualify for relief from removal for such an offense by demonstrating that the conviction involved 30 grams or less of marijuana. Because Class 1 misdemeanor possession of marijuana covers quantities of more and less than 30 grams, the noncitizen must ensure that the record of conviction indicates that the amount of possession was 30 grams or less. Counsel may be able to take steps to safeguard the record. *See infra* § 6.1C, Categorical Approach and Record of Conviction.

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)

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.

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).

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 Tavidishvili*, 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 Cir. 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	<ul style="list-style-type: none"> Includes felonies and some misdemeanors Carries most severe immigration consequences Includes 21 broad categories of offenses as set forth in immigration statute (<i>see supra</i> § 3.4A, Aggravated Felonies Generally) 	
Conviction of crime involving moral turpitude (CMT)	<ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> Committed at any time after admission Length of sentence immaterial 	CMTs arising out of a single scheme
Conviction relating to a controlled substance	<ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> • Includes felonies and misdemeanors • Domestic violence crime must be a crime of violence (<i>see supra</i> § 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	<ul style="list-style-type: none"> • 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

3.5 Crime-Related Grounds of Inadmissibility

This section reviews the main crime-related grounds of inadmissibility. The criminal grounds of inadmissibility are generally broader than the grounds of deportability and include offenses that are not covered under the comparable deportability grounds. For example, a conviction of simple possession of 30 grams or less of marijuana triggers inadmissibility, but not deportability. There is some overlap with the deportability grounds, but the grounds are different and require close scrutiny. For example, the crime involving moral turpitude ground of inadmissibility covers the same offenses as the crime involving moral turpitude deportability ground, but different rules apply depending on the length of sentence and number of convictions.

Certain criminal grounds of inadmissibility do not require a conviction—mere “bad acts” or status can trigger the penalty. Examples include engaging in prostitution or if the government has “reason to believe” the person has been a drug trafficker, as discussed below.

The controlled substance and moral turpitude grounds of inadmissibility also allow for a finding of inadmissibility without a conviction where a noncitizen *admits* the essential elements of a controlled substance offense or of a crime involving moral turpitude. *See* INA §§ 212(a)(2)(A)(i)(I)&(II), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I)&(II). Generally, this ground has come into play when a noncitizen has made certain admissions to an immigration judge or an ICE officer; it does not apply to an admission in a criminal case that does not result in a conviction. *See Matter of Seda*, 17 I&N Dec. 550 (BIA 1980), *overruled in part on other grounds Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

A. Controlled Substance Offense

A noncitizen is inadmissible for any conviction of an offense related to any controlled substance, whether felony or misdemeanor. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). (A noncitizen can also be inadmissible for an admission of committing such an offense, usually to an immigration judge or immigration officer.) With one exception, the language of this ground is almost identical to the controlled

substance ground of deportability discussed *supra* in § 3.4D, Conviction of Any Controlled Substance Offense. The inadmissibility ground does not contain the exception for a single offense of simple possession of 30 grams of marijuana. In other words, a conviction for possession of any amount of marijuana will make your client inadmissible.

Drug offenses carry serious consequences for non-LPR clients. Drug offenses trigger inadmissibility and permanently preclude noncitizens from obtaining LPR status. The one offense that can be waived by an immigration judge in certain circumstances is simple possession of 30 grams or less of marijuana if the defendant has no prior drug convictions.

Practice Note: If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana, which includes quantities of more and less than 30 grams of marijuana, it is important to document in the record of conviction that your client possessed 30 grams or less of marijuana, if applicable. *See supra* § 3.3C, Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility.

A person is also inadmissible if the U.S. government knows or has reason to believe that the person is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in illicit trafficking, in a controlled substance (as defined in 21 U.S.C. § 802). *See* INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C). No conviction (or admission) is necessary. Cases have held “drug trafficking” to mean that a person must have been a knowing and conscious participant or conduit in the transfer, passage, or delivery of narcotic drugs.

B. Crime Involving Moral Turpitude

A noncitizen is inadmissible for a conviction of a crime involving moral turpitude (CMT). *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). (A noncitizen can also be inadmissible for an admission of such an offense, usually to an immigration judge or immigration officer.) The types of offenses constituting CMTs are described *supra* in § 3.4C, Conviction of a Crime Involving Moral Turpitude.

For purposes of inadmissibility, there is an exception for a petty offense. A conviction is considered a petty offense if the noncitizen has no prior CMT convictions and the maximum *possible* sentence for that offense is one year or less and the *actual* sentence of imprisonment, active or suspended, is six months or less. *See* INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II). For discussion of what constitutes the maximum possible sentence, see *supra* § 3.4C, Conviction of a Crime Involving Moral Turpitude.

Practice Note: Because misdemeanors in North Carolina other than impaired driving are not punishable by one year or more of imprisonment under structured sentencing, the commission of one misdemeanor CMT offense will fall within the petty offense exception and not make your client inadmissible. Two CMTs will not fall within the petty offense inadmissibility exception, however, even if they arise out of the same transaction

or are consolidated for judgment or run concurrently. The reason is that the petty offense exception is limited to one CMT.

C. Conviction of Two or More Offenses of Any Type with an Aggregate Sentence of Imprisonment of at Least Five Years

A noncitizen who has been convicted of two or more offenses of any type with an aggregate sentence of imprisonment, active or suspended, of five years or more is inadmissible. *See* INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

D. Prostitution

Prostitutes or persons who have engaged in or sought to engage in prostitution or to procure prostitution within 10 years of application for admission are inadmissible. *See* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D); 22 C.F.R. § 40.24. The Board of Immigration Appeals has held that to “engage in” prostitution, one must have engaged in a regular pattern of behavior and conduct. *See Matter of T-*, 6 I&N Dec. 474 (BIA 1955); *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008) (noncitizen convicted of a single act of solicitation of prostitution did not come within inadmissibility ground for prostitution). A conviction of a prostitution offense is also a crime involving moral turpitude and may trigger inadmissibility on that ground, possibly even if only a one-time occurrence. *See, e.g., Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).

E. Significant Traffickers in Persons

Any noncitizen is inadmissible if he or she commits or conspires to commit human trafficking offenses in the U.S. or outside of the U.S. *See* INA § 12(a)(2)(H), 8 U.S.C. § 1182(a)(2)(H). A person is also inadmissible if the government knows or has reason to believe that the individual has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons. *See id.*

F. Money Laundering

A noncitizen is inadmissible if the government knows or has reason to believe that the individual has engaged, is engaging, or seeks to enter the U.S. to engage in money laundering, or who is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in money laundering. *See* INA § 212(a)(2)(I), 8 U.S.C. § 1182(a)(2)(I).

G. Chart of Principal Criminal Grounds of Inadmissibility

The following chart lists the principal criminal grounds of inadmissibility. It does not include two other grounds involving foreign government officials and diplomats, which are not of concern to state law practitioners. An interested reader can find the complete list of the criminal grounds of inadmissibility at INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

Ground of Inadmissibility	Significant Features	Exceptions
Crime involving moral turpitude (CMT)	<ul style="list-style-type: none"> • Conviction (or admission) • Committed at any time 	Petty offense, including almost all misdemeanors, if <ul style="list-style-type: none"> • client has no prior CMTs, • maximum <i>potential</i> prison sentence is one year or less, and • <i>actual</i> sentence is six months or less
Controlled substance offense	<ul style="list-style-type: none"> • Conviction (or admission) • Includes felonies or misdemeanors • Includes drug paraphernalia offenses • Includes single offense of simple possession of 30 grams or less of marijuana (even though it is not an offense triggering deportation) 	Controlled substance offenses render an individual permanently inadmissible, except for a single possession of 30 grams or less of marijuana if the defendant has no prior drug convictions; such an offense can be waived by an immigration judge under certain circumstances
Trafficking in controlled substance	<ul style="list-style-type: none"> • No conviction (or admission) necessary • May be based on government knowledge or reason to believe 	
Conviction of multiple offenses	<ul style="list-style-type: none"> • Includes offenses of any type • Must be at least 2 convictions • Aggregate sentence of imprisonment (active or suspended) of 5 years or more 	
Prostitution	<ul style="list-style-type: none"> • No conviction (or admission) necessary (however, immigration officers generally rely on a conviction or an admission) 	
Trafficking in persons	<ul style="list-style-type: none"> • No conviction necessary • May be based on government knowledge or reason to believe 	
Money laundering	<ul style="list-style-type: none"> • No conviction necessary • May be based on government knowledge or reason to believe 	

3.6 Criminal Bars to Naturalization

In addition to removal, there are other potential adverse immigration consequences of a conviction. For many noncitizens, the potential for naturalization is a big concern.

Naturalization requires a showing of good moral character for a qualifying period of time, in many cases five years. *See* INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). If an LPR client is convicted of or admits certain crimes, he or she is statutorily precluded for up to five

years (or permanently in the case of an aggravated felony conviction) from demonstrating good moral character for naturalization purposes. The convictions listed below have this effect.

Immigration authorities still have discretion to find that your client lacks the requisite moral character for U.S. citizenship based on other dispositions, but they do not automatically preclude your client from demonstrating good moral character.

- Conviction of an aggravated felony, entered on or after November 29, 1990. This makes your client permanently ineligible for citizenship, *see* INA § 101(f)(8), 8 U.S.C. § 1101(f)(8), and will almost certainly result in your client’s removal from the U.S. as well. *See supra* § 3.4A, Aggravated Felonies Generally.
- Conviction or admitted commission of any controlled substance offense except one offense of simple possession of 30 grams or less of marijuana if no prior drug convictions. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).
- Conviction or admitted commission of a crime involving moral turpitude, except if the client does not have a prior conviction for a crime involving moral turpitude and the offense is not subject to a potential prison sentence of more than one year and does not carry an actual sentence of imprisonment, active or suspended, of more than six months. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).
- Conviction of two or more offenses of any type, plus an aggregate sentence of imprisonment, active or suspended, of five years or more. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).
- Conviction of two or more gambling offenses. *See* INA § 101(f)(5), 8 U.S.C. § 1101(f)(5).
- Confinement, as a result of conviction, to a penal institution for an aggregate period of 180 days or more. *See* INA § 101(f)(7), 8 U.S.C. § 1101(f)(7).

For additional grounds barring a finding of good moral character, see INA § 101(f), 8 U.S.C. § 1101(f).

3.7 Criminal Bars to Deferred Action for Childhood Arrivals

Some individuals without status might be eligible for Deferred Action for Childhood Arrivals (DACA). On June 15, 2012, the Obama Administration announced that it would not deport certain undocumented people who entered the U.S. as children. Deferred action means that even though the noncitizen is here without status and subject to deportation, the government agrees to “defer” any actions to remove them. Individuals granted DACA receive a two year deferral of deportation and are able to apply for work authorization and a social security number. While deferred action does not provide a pathway to getting LPR status or citizenship, it does allow noncitizens without status to stay and work legally in the U.S.

Practice Note: The Trump administration is considering repealing DACA but hasn’t taken action as of release of this edition of the manual.

To qualify, the individual must:

- be younger than 31 years old as of June 15, 2012;
- have entered the U.S. when he or she was under age 16;
- have been physically present in the U.S. on June 15, 2012, and have continuously resided in the U.S. during the preceding five years (except for brief, casual, and innocent absences); and
- currently be in school or have graduated from high school or obtained a GED, or been honorably discharged from the coast guard or armed forces.

Convictions of a broad array of criminal offenses will bar eligibility unless a person can show “exceptional circumstances” (but such approvals are very rare). Such convictions will also bar someone who already has DACA from renewing his or her status, which must be done every two years. The convictions below have this effect:

- conviction of any felony (federal, state, or local offense that is punishable by imprisonment of more than one year);
- conviction of a “significant misdemeanor,” which means an offense that is punishable by imprisonment of one year or less but more than five days and is an offense of
 - domestic violence,
 - sexual abuse or exploitation,
 - burglary,
 - unlawful possession or use of a firearm,
 - drug distribution or trafficking,
 - driving under the influence of alcohol or drugs, or
 - any conviction for which the individual was sentenced to a jail sentence of more than 90 days (suspended sentences do not count toward the 90 days);
- conviction of three or more non-significant misdemeanors that do not occur on the same day or arise from the same act or scheme of conduct. (Minor traffic offenses, such as driving without a license, will not count against the limit of three nonsignificant misdemeanors.)

The following dispositions will *not* automatically disqualify someone, but the Department of Homeland Security (DHS) will consider them on a case by case basis:

- any state immigration-related felony or misdemeanor (to the extent any exist),
- juvenile delinquency adjudications, and
- expunged convictions.

For more information on the DACA criminal bars, see Immigrant Legal Resource Center, [Understanding the Criminal Bars to the Deferred Action Policy for Childhood Arrivals](#) (Oct. 2012).