

Chapter 5

Determining Possible Immigration Consequences Based on Your Client's Immigration Status

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The immigration consequences of a criminal conviction or other disposition vary largely with the noncitizen's particular immigration status. This chapter discusses and prioritizes adverse immigration consequences of a criminal disposition based on the client's particular immigration status. For the purposes of presenting the various immigration consequences, noncitizens are divided into five broad categories:

- Lawful permanent residents (LPRs) (*see* § 5.1)
- Refugees (who have not yet obtained LPR status) (*see* § 5.2)
- Persons granted asylum (who have not yet obtained LPR status) (*see* § 5.3)
- Nonimmigrant visa holders (*see* § 5.4)
- Noncitizens with Temporary Protected Status (*see* § 5.5)
- Noncitizens without immigration status (*see* § 5.6)

These are the immigration statuses you are most likely to encounter, but they are not exhaustive.

5.1 Lawful Permanent Resident

A lawful permanent resident, or LPR, is a person allowed to live and work in the U.S. permanently. *See supra* § 2.2B, Lawful Permanent Resident Status. Such a client may have immigrated to this country as a child, may have lived and worked in this country for many years, and may have most, if not all, of his or her family in the U.S.

An LPR can be removed or face other adverse immigration consequences because of a criminal conviction, regardless of number of years in the U.S. or U.S. citizen family relationships.

A. LPR Client's Immigration Priorities

An LPR can be removed from the U.S. for an offense triggering deportability. *See supra* § 3.2A, Consequences Distinguished. Generally, since LPRs want to remain in the U.S., such a conviction will be their greatest immigration concern. In particular, an LPR will be concerned about an aggravated felony conviction, which carries the most severe consequences, including being barred from most forms of relief from removal.

A second concern is a conviction that triggers inadmissibility. Generally, an LPR cannot be removed for an offense that triggers inadmissibility. However, if an LPR travels outside of the U.S. after being convicted of such an offense, he or she may be placed in removal proceedings on attempting to return to the U.S. While an LPR can avoid this consequence by not traveling outside of the U.S., this is easier said than done, as many noncitizens travel to visit family members outside of the U.S.

Third, if your client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. permanently by seeking relief from removal. Dispositions to avoid include aggravated felonies and particularly serious crimes, explained further below.

In addition, an LPR may be concerned about eligibility to become a naturalized citizen, which has numerous benefits. Once an LPR has lawfully obtained citizenship, it generally cannot be revoked; he or she can remain in the U.S. without fear of removal. Therefore, if your client is able to avoid a deportable offense, he or she may also want to avoid a disposition that bars a showing of good moral character necessary for naturalization.

Last, certain convictions where the victim is a minor will bar a permanent resident (or U.S. citizen) from being able to sponsor a family member for immigration in the future.¹

B. Impact on LPR of an Aggravated Felony Conviction

Generally, an LPR's greatest immigration priority will be to avoid a conviction for an aggravated felony. It not only makes your client deportable, but it also bars eligibility for most forms of relief from removal, resulting in virtually mandatory removal for most clients. If an individual is deportable, a grant of relief from removal allows an individual to remain in the U.S. and keep his or her green card. Most forms of relief are

1. The Adam Walsh Act passed in 2006 imposes immigration penalties on U.S. citizens and permanent residents who are convicted of specified crimes relating to minors, including sex and kidnapping offenses. Certain convictions would prevent them from filing a visa petition on behalf of a close family member. *See* Section 402 of the Adam Walsh Act; INA §§ 204(a)(1)(A)(viii), (B)(i), 8 USC §§ 1154(a)(1)(A)(viii), (B)(i). For example, if your LPR client is convicted of indecent liberties, he may not be permitted to file a visa petition for a noncitizen relative.

discretionary and will depend on an individual's ties to the U.S and other factors. Certain convictions will make noncitizens ineligible for relief from removal. An aggravated felony conviction bars almost all forms of immigration relief.

An aggravated felony carries other serious immigration consequences, including:

- It subjects a person to mandatory detention during the removal process.
- It subjects a person to up to twenty years in prison if he or she is prosecuted and convicted of reentering the U.S. without permission after removal.
- It permanently bars immigration to the U.S. in the future.

For a table of the categories of offenses classified as aggravated felonies, see *supra* § 3.4A, Aggravated Felonies Generally.

C. Impact on LPR of Other Dispositions Triggering Deportability

In addition to an aggravated felony, an LPR will be concerned about offenses that trigger deportability on other grounds. *See supra* § 3.4G, Chart of Principal Deportable Offenses. If not convicted of an aggravated felony, a deportable client may remain eligible for relief from removal.

D. Impact on LPR of a Criminal Disposition Triggering Inadmissibility

If your client plans to travel abroad in the future, an additional concern is a criminal disposition that triggers 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. As a result, an LPR client convicted of such an offense would not be subject to removal and could remain in the U.S. unless he or she traveled outside of the U.S. and on return was considered inadmissible. Inadmissible LPR clients should be warned of the consequences of leaving the United States.

For the principal criminal grounds of inadmissibility, see *supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility.

E. Forms of Relief Depending on Offense

If your client cannot avoid deportability, he or she may still be able to remain in the U.S. and keep his or her green card by seeking relief from removal. Below are three principal forms of relief for an LPR client. It may be helpful to consult with an immigration lawyer to determine whether your client is otherwise eligible for these forms of relief.

Cancellation of Removal (if not convicted of an aggravated felony). This is one of the most common forms of relief for a deportable LPR. To be eligible, the person must have lived in the U.S. for at least seven years (since being admitted in any status, e.g., as a tourist or LPR)² and must have been an LPR for at least five of those years. *See* INA § 240A(a), 8 U.S.C. § 1229b(a). A conviction for an aggravated felony will bar such relief. *Id.* Cancellation of removal does not require a showing of any particular level of hardship, either to the applicant or his or her family; however, more serious crimes require more substantial equities to warrant cancellation.

Adjustment of Status (if not convicted of an inadmissible offense). If your client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. if he or she is able to “re-immigrate” through a U.S. citizen or LPR family member. Adjusting status is a defense to deportation and requires that the noncitizen be admissible. *See Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). Note that the criminal grounds of inadmissibility do not include some crimes that would render a person deportable—namely, firearm and domestic violence offenses. (If, however, the firearm or domestic violence offense constitutes a crime of moral turpitude, which is one of the crimes of inadmissibility, the offense could still render the person inadmissible.) Therefore, a conviction for carrying a concealed firearm would not render your client inadmissible and would not bar adjustment of status.

Withholding of Removal (if not convicted of a particularly serious offense). If your client cannot avoid an offense triggering deportability, and fears persecution in the country of removal, he or she may still be able to remain in the U.S. by seeking “withholding of removal.” *See* § INA 241(b)(3); 8 U.S.C. § 1231(b)(3). It is a less beneficial form of persecution-based relief and requires a higher threshold showing of persecution than asylum.

Withholding of removal is barred by a conviction of a “particularly serious crime.” In this context, a particularly serious crime includes one or more aggravated felony convictions with an aggregate sentence of imprisonment (active or suspended) of five years or more. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The five-year sentence may be for one conviction or different convictions, whether or not resolved at the same time. A particularly serious crime presumptively includes an aggravated felony conviction involving trafficking in a controlled substance. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (recognizing that presumption of particularly serious crime is rebuttable). Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying facts of the conviction and the type of sentence imposed.

2. The clock for the seven year residence requirement stops—that is, the person does not get any credit for any of the time—following the *commission* of an offense triggering inadmissibility. *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1). For example, if your client commits an inadmissible offense six years after moving to the United States (and even if she continues to live here for five more years before being placed in removal proceedings), she will be unable to apply for cancellation of removal.

F. Impact on LPR of a Criminal Disposition Barring Naturalization

LPRs seek to naturalize and become U.S. citizens for several reasons. Once lawfully obtained, citizenship generally cannot be revoked and LPRs can remain in the U.S. without fear of removal. There are also a number of other benefits of citizenship, such as the right to vote, the right to travel freely, the right to sponsor relatives for immigration to the U.S., and eligibility for certain state and federal jobs. If an LPR client is able to avoid a deportable offense, which will generally be the client's highest immigration priority, a secondary concern may be avoiding a disposition that bars eligibility for naturalization.

In many cases, naturalization requires a showing of good moral character for five years. *See supra* § 3.6, Criminal Bars to Naturalization. If an LPR client is convicted of *or* admits certain crimes, he or she is precluded from demonstrating good moral character for up to five years. The convictions listed below bar a showing of good moral character:

- Convictions triggering inadmissibility that involve crimes involving moral turpitude (subject to the petty offense exception), drugs, prostitution, and multiple criminal convictions.
- Conviction, on or after November 29, 1990, of an aggravated felony. Such a conviction makes your client *permanently* ineligible for citizenship.
- Conviction of two or more gambling offenses.
- Actual confinement, as a result of one or more convictions during the five-year period, to a penal institution for an aggregate period of 180 days or more.

Bear in mind that if your client is convicted of one of these offenses (if it is not an aggravated felony), he or she may still be eligible for naturalization five years *after* the date of conviction or the completion of any jail sentence (whichever is later).

5.2 Refugee (who has not yet obtained LPR status)

Refugees have been conditionally admitted to the U.S. based on a fear of persecution in their country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion. *See supra* § 2.2C, Refugee or Asylee Status.

Refugees can be removed because of a criminal conviction and thus can be returned to a country where they may be harassed, imprisoned, tortured, or even killed. There is much at stake in a criminal case for a client with refugee status.

Both refugees and asylees (discussed *infra* in § 5.3, Person Granted Asylum (who has not yet obtained LPR status)) have been admitted to the U.S. due to a threat of persecution. Both groups can work in the U.S. and adjust to LPR status. Refugee status, however, is granted to an individual *before* entering the U.S., based on U.S. refugee policy and priorities. Upon application, he or she is granted a visa, and then is admitted to the U.S. as a refugee. In contrast, asylum is granted to an individual *after* entry into the U.S. Thus,

the individual entered the U.S. in some other status or unlawfully, but then applied for and was granted asylum.

A. Refugee Client's Immigration Priorities

Refugees may be removed from the U.S. based on an offense that triggers deportability. *See Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012). Such offenses are their primary immigration concern.

A secondary concern is an offense that triggers inadmissibility. Refugees who have been in the U.S. for at least one year are eligible to adjust to LPR status. *See* INA § 209(a), 8 U.S.C. § 1159(a). These individuals will be concerned about offenses that trigger inadmissibility, which would preclude them from becoming an LPR and remaining in the U.S. permanently.

Third, if your refugee client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. permanently by seeking relief from removal. Dispositions to avoid include drug trafficking, violent offenses, and particularly serious crimes, explained further below.

B. Impact on Refugee of a Criminal Disposition Triggering Deportability

The principal concern for a refugee client is a disposition triggering deportability, as he or she can be removed from the U.S. for such offenses. For the principal criminal grounds of deportability, see *supra* § 3.4G, Chart of Principal Deportable Offenses.

C. Impact on Refugee of a Criminal Disposition Triggering Inadmissibility

Another significant concern for a refugee client is an offense that renders him or her inadmissible. Because refugee status does not confer a permanent right to reside in the U.S., a refugee may want to adjust to LPR status. To adjust his or her status, a refugee must avoid the crime-related grounds of inadmissibility. For the principal criminal grounds of inadmissibility, see *supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility. Other offenses can result in a denial of adjustment of status in the discretion of the immigration judge or officer, but they are not automatic bars.

D. Forms of Relief Depending on Offense

If your client cannot avoid deportability, he or she may still be able to remain in the U.S. by seeking relief from removal. Below are three principal forms of relief for a refugee client. It may be helpful to consult with an immigration lawyer to determine whether your client is otherwise eligible for these forms of relief.

209(c) Waiver (if not convicted of drug trafficking or violent offense). If your refugee client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. permanently by seeking a 209(c) waiver, a special form of relief for

refugees and asylees for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. *See* INA § 209(c), 8 U.S.C. § 1159(c). Such relief is barred by any conviction that provides the government “reason to believe” that the refugee has been involved in drug trafficking. *See id*; *see also supra* § 3.5A, Controlled Substance Offenses.

In addition, since 2002, a conviction of a “violent or dangerous” crime will presumptively bar such discretionary relief. *See Matter of Jean*, 23 I&N Dec. 373, 381–84 (A.G. 2002). Neither the statute nor regulations define “violent and dangerous” crime, but both court and agency decisions indicate that it may include crimes of assault, manslaughter, robbery, and sex offenses.

Adjustment of status (if not convicted of inadmissible offense). If your refugee client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. permanently by seeking adjustment of status and becoming an LPR. Adjusting status is a defense to deportation, and refugees are otherwise eligible to adjust status after one year of residence in the U.S. Note that the criminal grounds of inadmissibility do not include some crimes that would render a person deportable—namely, firearm and domestic violence offenses. (If, however, the firearm or domestic violence offense constitutes a crime of moral turpitude, which is one of the crimes of inadmissibility, the offense could still render the person inadmissible.) Therefore, a conviction for carrying a concealed firearm would not render your client inadmissible and would not bar adjustment of status.

Withholding of Removal (if not convicted of a particularly serious offense). If your refugee client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. by seeking “withholding of removal” based, again, on the client’s previously determined fear of persecution in the country of removal. *See* § INA 241(b)(3); 8 U.S.C. § 1231(b)(3). It is a less beneficial form of persecution-based relief and requires a higher threshold showing of persecution than asylum.

Withholding of removal is barred by a conviction of a “particularly serious crime.” In this context, a particularly serious crime includes one or more aggravated felony convictions with an aggregate sentence of imprisonment (active or suspended) of five years or more. The five-year sentence may be for one conviction or different convictions, whether or not resolved at the same time. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). A particularly serious crime presumptively includes an aggravated felony conviction involving trafficking in a controlled substance. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (recognizing that presumption of particularly serious crime is rebuttable). Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying facts of the conviction and the type of sentence imposed.

5.3 Person Granted Asylum (who has not yet obtained LPR status)

A person granted asylum has been admitted indefinitely to the U.S. due to a threat of persecution in his or her country of nationality. *See supra* § 2.2C, Refugee or Asylee Status. Asylees can be removed because of a criminal conviction and thus returned to a country where they may be harassed, imprisoned, tortured, or even killed. There is much at stake in a criminal case for a client who has been granted asylum.

Both refugees (discussed *supra* in § 5.2, Refugee (who has not yet obtained LPR status)) and asylees have been admitted to the U.S. due to a threat of persecution. Both groups can work in the U.S. and adjust to LPR status. Refugee status, however, is granted to an individual *before* entering the U.S., based on U.S. refugee policy and priorities. Upon application, he or she is granted a visa, and then is admitted to the U.S. as a refugee. In contrast, asylum is granted to an individual *after* entry into the U.S. Thus, the individual entered the U.S. in some other status or unlawfully, but then applied for and was granted asylum.

For technical immigration law reasons pertaining to their status, a refugee can be removed for an offense triggering deportability (*see supra* § 5.2A, Refugee Client's Immigration Priorities), while an asylee's status can be terminated only if convicted of a "particularly serious crime." However, both groups are also concerned about adjusting to LPR status and therefore with avoiding offenses that trigger inadmissibility.

A. Asylee Client's Immigration Priorities

An asylee's greatest concern is conviction of a "particularly serious crime," including any aggravated felony. Such a conviction may result in the termination of his or her asylum status, after which he or she can be removed for grounds of inadmissibility. *See* INA § 208(c)(2)(B)&(3), 8 U.S.C. § 1158(c)(2)(B)&(3); 8 C.F.R. § 1208.22(2013). An asylee will not be removed based on the crime-related grounds of deportability. *See Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013).

Another significant concern for asylees is an offense triggering inadmissibility. An asylee has been given conditional, not permanent, permission to reside in the U.S. An asylee can lose his or her status if conditions in the country of nationality change. To remain permanently in the U.S., an asylee must adjust status to an LPR. If the asylee has been convicted of a crime making him or her inadmissible, he or she is ineligible to become an LPR.

Third, if your asylee client cannot avoid an aggravated felony, he or she may still be able to remain in the U.S. permanently by seeking relief from removal. Dispositions to avoid include drug trafficking, violent offenses, and particularly serious crimes (as defined for the purposes of withholding), explained further below.

B. Impact on Asylee of an Aggravated Felony Conviction

An asylee's primary immigration concern is a conviction of a "particularly serious crime," for which his or her status can be terminated. *See* INA § 208(c)(2)&(3), 8 U.S.C. § 1158(c)(2)&(3). There is no statutory definition of a particularly serious crime. However, in the context of determining whether an asylee can be deported, an aggravated felony conviction is *per se* a conviction for a "particularly serious crime." *See* INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i). For a table of the categories of offenses classified as aggravated felonies, see *supra* § 3.4A, Aggravated Felonies Generally.

Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying circumstances of the conviction and the type of sentence imposed.

C. Impact on Asylee of a Criminal Disposition Triggering Inadmissibility

Another significant concern for an asylee client is an offense that renders him or her inadmissible. Because asylum does not confer a permanent right to reside in the U.S., an asylee may want to adjust to LPR status. To adjust his or her status, a person granted asylum must avoid the crime-related grounds of inadmissibility. *See supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility. Other offenses can result in a denial of adjustment of status in the discretion of the immigration judge or officer, but they are not automatic bars.

D. Forms of Relief Depending on Offense

If your client cannot avoid an aggravated felony, he or she may still be able to remain in the U.S. by seeking relief from removal. Below are two principal forms of relief for an asylee client. It may be helpful to consult with an immigration lawyer to determine whether your client is otherwise eligible for these forms of relief.

209(c) Waiver (if not convicted of drug trafficking or violent offense). If your asylee client cannot avoid an aggravated felony, he or she may still be able to remain in the U.S. permanently by seeking a § 209(c) waiver, a special form of relief for refugees and asylees for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. *See* INA § 209(c), 8 U.S.C. § 1159(c). Such relief is barred by any conviction that provides the government "reason to believe" that the refugee has been involved in drug trafficking. *See id*; *see also supra* § 3.5A, Controlled Substance Offense (discussing meaning of drug trafficking in this context).

In addition, a conviction of a "violent or dangerous" crime will presumptively bar such discretionary relief. *See supra* "209(c) Waiver (if not convicted of drug trafficking or violent offense)" in § 5.2D, Forms of Relief Depending on Offense.

Withholding of Removal. If your asylee client cannot avoid an aggravated felony, he or she may be able to seek “withholding of removal” based, again, on the client’s previously determined fear of persecution in the country of removal. *See* § INA 241(b)(3); 8 U.S.C. § 1231(b)(3). It is a less beneficial form of persecution-based relief and requires a higher threshold showing of persecution than asylum.

Withholding of removal is barred by a conviction of a “particularly serious crime.” In this context, a particularly serious crime includes one or more aggravated felony convictions with an aggregate sentence of imprisonment (active or suspended) of five years or more. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The five-year sentence may be for one conviction or different convictions, whether or not resolved at the same time. A particularly serious crime presumptively includes an aggravated felony conviction involving trafficking in a controlled substance. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (recognizing that presumption of particularly serious crime is rebuttable). Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying circumstances of the conviction and the type of sentence imposed.

5.4 Nonimmigrant Visa Holder

Nonimmigrant visa holders are admitted to the U.S. on a temporary visa for a specific purpose, such as tourism, study, or temporary work. *See supra* § 2.2D, Individuals with Temporary Lawful Status or Pending Application for Status. These noncitizens may have only temporary status, but like LPRs they may have come to this country many years ago and may have lived and worked in this country for many years. They can be removed because of a criminal conviction.

A. Immigration Priorities for Nonimmigrant Visa Holder

A nonimmigrant visa holder may be removed from the U.S. based on an offense that triggers deportability. Such offenses are, therefore, their primary immigration concern.

A secondary concern is an offense that triggers inadmissibility. Certain nonimmigrant visa holders may be able to become LPRs based on a family relationship or employer sponsor. These individuals will be concerned about offenses that trigger inadmissibility, which would preclude them from becoming an LPR and remaining in the U.S. permanently.

Third, if your client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S. by seeking relief from removal. Dispositions to avoid include controlled substance offenses, violent offenses, and particularly serious crimes, explained further below.

B. Impact on Nonimmigrant Visa Holder of a Criminal Disposition Triggering Deportability

Concern about Deportable Offenses. The greatest immigration concern for lawfully admitted noncitizens are dispositions triggering deportability, as they can be removed from the U.S for such offenses. *See supra* § 3.4G, Chart of Principal Deportable Offenses.

Additional Concern for Nonimmigrant Visa Holder Client. As a practical matter, a criminal disposition of any kind can potentially trigger a separate ground of deportability for nonimmigrant visa holders. A nonimmigrant who has failed to meet the conditions for continued nonimmigrant status is deportable. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i). For example, a student who has failed to maintain a full course of study because he or she was sentenced to six months in jail may be deportable on this ground, even if the conviction itself is not a deportable offense. Similarly, a nonimmigrant with “visitor” status who is sentenced to active time in jail or prison will be deemed to have failed to maintain that status. *See Matter of A-*, 6 I&N Dec. 762 (BIA 1955) (visitor status cannot be pursued in jail).

Practice Note: If your client has a nonimmigrant visa other than a visitor visa, your client should consult with an immigration attorney before addressing the pending criminal charges. The consequences for each nonimmigrant status vary substantially and are beyond the scope of this manual.

C. Impact on Nonimmigrant Visa Holder of a Criminal Disposition Triggering Inadmissibility

A second concern for a nonimmigrant is an offense that triggers inadmissibility, which would prevent them from becoming an LPR. Some noncitizens may have a pending application for LPR status or some basis for acquiring LPR status in the future. *See supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility.

Practice Note: The routes to LPR status are a complicated and constantly changing area of law. If your client is in the process of seeking LPR status, you should consult with his or her immigration attorney regarding the status of the application.

D. Forms of Relief Depending on Offense

If your client cannot avoid deportability, he or she may still be able to remain in the U.S. by seeking relief from removal. Here are three principal forms of relief. It may be helpful to consult with an immigration lawyer to determine whether your client is otherwise eligible for these forms of relief.

Adjustment of Status (if not convicted of inadmissible offense). If your client cannot avoid an offense triggering deportability, he or she may still be able to remain in the U.S.

permanently by seeking adjustment of status and becoming an LPR. Adjusting status is a defense to deportation, but your client would need a route to seek such status. Note that the criminal grounds of inadmissibility do not include some crimes that would render a person deportable—namely, firearm and domestic violence offenses. (If, however, the firearm or domestic violence offense constitutes a crime of moral turpitude, which is one of the crimes of inadmissibility, the offense could still render the person inadmissible.) Therefore, a conviction for carrying a concealed firearm would not render your client inadmissible and would not bar adjustment of status.

212(h) Waiver (if not convicted of controlled substance offense). If your client cannot avoid a crime of inadmissibility and is otherwise able to adjust status, he or she may still be able to obtain LPR status by seeking a form of relief known as a 212(h) waiver. *See* INA § 212(h), 8 U.S.C. § 1182(h). In many cases, to obtain this waiver, the noncitizen would need to demonstrate that she is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident and that denial of the waiver would result in “extreme hardship” to that relative. A conviction of a controlled substance offense (other than a single offense of simple possession of 30 grams or less of marijuana if the client has no prior controlled substance convictions) is a bar to a 212(h) waiver and consequently a permanent bar to obtaining LPR status.

In addition, Department of Homeland Security (DHS) regulations provide that a conviction of a “violent or dangerous” crime will presumptively bar a 212(h) waiver. *See* 8 C.F.R. 212.7(d); *see also supra* “209(c) Waiver (if not convicted of drug trafficking or violent offense)” in § 5.2D, Forms of Relief Depending on Offense.

Practice Note: A conviction for a Class 1 misdemeanor possession of marijuana may involve more or less than 30 grams of marijuana. If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana, it is important to document in the record of conviction that your client possessed 30 grams or less of marijuana, if applicable, for purposes of 212(h) relief. *See supra* § 3.3C, Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility.

Withholding of Removal (if not convicted of a particularly serious offense). If your client cannot avoid an offense triggering deportability, and fears persecution in the country of removal, he or she may still be able to remain in the U.S. by seeking “withholding of removal.” *See* § INA 241(b)(3); 8 U.S.C. § 1231(b)(3). It is a less beneficial form of persecution-based relief and requires a higher threshold showing of persecution than asylum.

Withholding of removal is barred by a conviction of a “particularly serious crime.” In this context, a particularly serious crime includes one or more aggravated felony convictions with an aggregate sentence of imprisonment (active or suspended) of five years or more. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The five-year sentence may be for one conviction or different convictions, whether or not resolved at the same time. A particularly serious crime presumptively includes an aggravated felony conviction involving trafficking in a controlled substance. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N

Dec. 270 (A.G. 2002) (recognizing that presumption of particularly serious crime is rebuttable). Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying facts of the conviction and the type of sentence imposed.

5.5 Noncitizens with Temporary Protected Status

Temporary Protected Status (TPS) provides temporary protection to nationals of countries experiencing dire and extraordinary conditions that make it too dangerous to return. *See supra* § 2.2D, Individuals with Temporary Lawful Status or Pending Application for Status. The countries designated for TPS as of August 16, 2017 are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. These noncitizens may have only temporary status, but like LPRs they may have come to this country many years ago and may have lived and worked in this country for many years. They can be removed because of a criminal conviction.

For technical immigration law reasons pertaining to their status, individuals with TPS will lose their status and face removal if convicted of:

- Any felony conviction or two or more misdemeanor convictions (whether the convictions are entered separately or consolidated for judgment). *See* INA § 244(c)(2)(B)(i), 8 U.S.C. § 1254a(c)(2)(B)(i).
- A “particularly serious crime.” *See* INA § 244(c)(2)(B)(ii), 8 U.S.C. § 1254a(c)(2)(B)(ii). There is no statutory definition of a particularly serious crime. However, in this context, an aggravated felony conviction is *per se* a conviction for a “particularly serious crime.” *See* INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i). For a table of the categories of offenses classified as aggravated felonies, see *supra* § 3.4A, Aggravated Felonies Generally. Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying circumstances of the conviction and the type of sentence imposed.
- Specific offenses that come within the crime-related grounds of inadmissibility: a crime involving moral turpitude (except for an offense that falls within the petty offense exception), a drug offense (except for a single offense of possession of 30 grams or less of marijuana), or evidence that supports a charge of drug trafficking. *See* INA § 244(c)(2)(A) (iii), 8 U.S.C. § 1254a (c)(2)(A)(iii).

5.6 Noncitizens without Immigration Status

Noncitizens without lawful status have no government authorization to be present in the United States. *See supra* § 2.2E, Individuals without Immigration Status. This category includes undocumented people who entered the U.S. without inspection (crossed the

border illegally), as well as individuals who entered the U.S. on a valid visa but remained past their authorized period of stay. Some of these individuals may have pending applications for status or may be able, now or in the future, to obtain LPR status or persecution-based relief.

These noncitizens may have no current immigration status, but like LPRs they may have come to this country many years ago and may have lived and worked in this country for many years. An individual without status can be removed because of a criminal conviction. If an individual does not have lawful immigration status, he or she also may be removed immediately on that basis alone.

Because a client without status can be removed for being here unlawfully, sometimes criminal defense attorneys assume that the outcome of the criminal case does not matter. However, a removal based on criminal grounds (especially aggravated felony grounds) carries many more adverse consequences than a removal based on unlawful presence in the U.S. Thus, the outcome of the criminal case may still be important.

A. Immigration Priorities for Noncitizen Client without Immigration Status

Some individuals without immigration status may have a pending application for status or may be able, now or in the future, to obtain LPR status through a U.S. citizen spouse, relief from removal, or persecution-based relief. Even if an individual is currently ineligible to obtain lawful status, that circumstance could change in the future, so the client may still be concerned about offenses that bar eligibility for lawful status in the future.

A client who wants to acquire LPR status, now or in the future, will be most concerned about offenses that trigger inadmissibility. To qualify for LPR status, the noncitizen must not be convicted of an offense that triggers inadmissibility.

If your client cannot avoid an offense that triggers inadmissibility, he or she may still be able to become an LPR by seeking 212(h) relief, which allows noncitizens to adjust to LPR status despite such a conviction (if the noncitizen is otherwise eligible to obtain LPR status). A controlled substance offense bars 212(h) relief.

If your client has a fear of persecution in the country of nationality, he or she will also be concerned about any disposition that bars persecution-based relief, in particular a conviction of an aggravated felony or drug trafficking offense.

If your client is potentially eligible for Deferred Action for Childhood Arrivals (DACA) (see further description below in Section E.), he or she will be concerned about any felony conviction and certain misdemeanors, which bar eligibility for the DACA program.

In addition, your client may be concerned about “voluntary departure.” Voluntary departure allows an individual to leave the U.S. voluntarily at his or her own expense in

lieu of being removed by the government. If eligibility for voluntary departure is a concern, your client should avoid an aggravated felony conviction, which is a bar to voluntary departure.

Clients who cannot avoid serious convictions should be warned of enhanced prison penalties should they return to the U.S. illegally after removal.

B. Impact on Noncitizen without Immigration Status of a Criminal Disposition Triggering Inadmissibility

Your client may have a pending application for LPR status or may be otherwise concerned about his or her ability to obtain LPR status in the future. If this is a priority for your client, he or she should avoid offenses that trigger inadmissibility. *See supra* § 3.5G, Chart of Principal Criminal Grounds of Inadmissibility.

In most cases, the grounds of deportability are irrelevant to an undocumented person because he or she has not been admitted to the U.S.³ Note that the criminal grounds of inadmissibility do not include some crimes that would render a person deportable—namely, firearm and domestic violence offenses. (If, however, the firearm or domestic violence offense constitutes a crime of moral turpitude, which is one of the crimes of inadmissibility, the offense could still render the person inadmissible.) Therefore, a conviction for carrying a concealed firearm would not render your client inadmissible and bar adjustment to LPR status.

C. Impact on Noncitizen without Immigration Status of Controlled Substance and Certain Other Dispositions

If your client cannot avoid a crime of inadmissibility and is otherwise eligible to adjust status, he or she may still be able to obtain LPR status by seeking 212(h) relief. *See supra* “212(h) Waiver (if not convicted of controlled substance offense)” in § 5.4D, Forms of Relief Depending on Offense.

A conviction of a controlled substance offense (other than a single offense of simple possession of 30 grams or less of marijuana if the client has no prior controlled substance convictions) is a bar to 212(h) relief and consequently a permanent bar to obtaining LPR status.

In addition, a conviction of a “violent or dangerous” crime may make it more difficult to obtain 212(h) relief. *See supra* “209(c) Waiver (if not convicted of drug trafficking or violent offense)” in § 5.2D, Forms of Relief Depending on Offense.

3. The main exception is if the person will apply for non-permanent resident cancellation of removal, based upon 10-years residence in the U.S. and exceptional hardship to citizen or permanent resident relatives. *See* INA § 240A(b)(1), 8 USC § 1229b(1). A conviction for an offense described in the grounds of deportability would bar this relief.

Practice Note: A conviction for a Class 1 misdemeanor possession of marijuana may involve more or less than 30 grams of marijuana. If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana, it is important to document in the record of conviction that your client possessed 30 grams or less of marijuana, if applicable, for purposes of 212(h) relief. *See supra* § 3.3C, Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility.

D. Impact on Noncitizen without Immigration Status of an Offense that Bars Persecution-Based Claims

Generally. Your client may have a pending application for asylum. Or, your client may be someone who fears persecution in his or her country of nationality but never applied for asylum. Or, your client may be a national of a country designated as experiencing civil strife, environmental disaster, or other extraordinary and temporary conditions, and thus be eligible for Temporary Protected Status (TPS).

If your client has a pending application for asylum, fears persecution in the country of removal, or is a national of a TPS-designated country, it may be an important goal to avoid offenses that bar persecution-based claims.

Practice Note: The law of asylum and other persecution-based relief from removal is a complicated and constantly changing area of law. In addition, the countries that are designated for temporary grants of TPS constantly change. If your client has already begun the process of seeking asylum or TPS, and has an immigration attorney or other representative, you should consult with that representative regarding the current status of the application. If not, and your client wants to remain in the U.S., you or your client may consider contacting an immigration lawyer to determine what options are available to your client under the current immigration laws. Once you have been able to determine more precisely your client's immigration prospects, you and your client will be in a better position to determine appropriate strategies for the criminal case.

Asylum. A conviction of a "particularly serious crime" bars asylum. *See* INA § 208(b)(2)(A) (ii), 8 U.S.C. § 1158(b)(2)(A)(ii). There is no statutory definition of a "particularly serious crime." For *asylum* purposes, an aggravated felony conviction is considered a "particularly serious crime." *See* INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i). Other offenses may be considered a conviction of a particularly serious crime in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying facts of the conviction and the type of sentence imposed.

In addition, a conviction of a "violent or dangerous" crime will make it more difficult to obtain asylum. *See supra* "209(c) Waiver (if not convicted of drug trafficking or violent offense)" in § 5.2D, Forms of Relief Depending on Offense.

Withholding of Removal. Even if your client is not eligible for asylum, he or she may be eligible for withholding of removal. *See* § INA 241(b)(3); 8 U.S.C. § 1231(b)(3). It is a less beneficial form of persecution-based relief and requires a higher threshold showing of persecution than asylum.

Withholding of removal is barred by a conviction of a “particularly serious crime.” In this context, a particularly serious crime includes one or more aggravated felony convictions with an aggregate sentence of imprisonment (active or suspended) of five years or more. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The five-year sentence may be for one conviction or different convictions, whether or not resolved at the same time. A particularly serious crime presumptively includes an aggravated felony conviction involving trafficking in a controlled substance. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (recognizing that presumption of particularly serious crime is rebuttable). Other offenses may be considered particularly serious crimes in the discretion of the immigration judge. *See Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The relevant factors include the nature and underlying facts of the conviction and the type of sentence imposed.

Temporary Protected Status (TPS). Your client may be eligible for the temporary relief of TPS if he or she is a national of a designated country. The countries designated for TPS as of August 16, 2017 are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.

Obtaining TPS is barred by any felony conviction, two or more misdemeanor convictions, or a conviction for a particularly serious crime. *See* INA § 244(c)(2)(B), 8 U.S.C. § 1254a(c)(2)(B); *see also supra* § 5.5, Noncitizens with Temporary Protected Status. Obtaining TPS is also barred by a crime involving moral turpitude (except for an offense that falls within the petty offense exception), a drug offense (except for a single offense of possession of 30 grams or less of marijuana), or evidence that supports a charge of drug trafficking. *See* INA § 244(c)(2)(A) (iii), 8 U.S.C. § 1254a (c)(2)(A)(iii).

Practice Note: TPS country designations constantly change; the designations of the countries listed above may expire or new countries may be added. If your client is a national of one of the countries listed above, check the website of the U.S. Citizenship and Immigration Service—www.uscis.gov—to determine if the country is still designated. Also, if your client is not from a country listed above, but that country is now suffering from some dangerous condition, you can check the website to determine whether it has been designated for TPS.

E. Impact on Noncitizen without Immigration Status of a Conviction that Bars Deferred Action of Childhood Arrivals (DACA)

Some individuals without status might be eligible for Deferred Action for Childhood Arrivals (DACA) or may already have 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 work legally in the U.S. 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.

A broad array of criminal offenses, including any felony and certain misdemeanors, will bar eligibility unless a person can show “exceptional circumstances.” For a chart of the DACA criminal bars, see *supra* § 3.7, Criminal Bars to Deferred Action for Childhood Arrivals. It is unclear whether the current administration will continue to grant DACA once individuals’ grants expire, but it has thus far not eliminated the program.

F. Impact on Noncitizen without Immigration Status of a Conviction that Bars Voluntary Departure

If your client cannot avoid removal, he or she may be interested in “voluntary departure.” Voluntary departure allows an individual to leave the U.S. voluntarily at his or her own expense in lieu of being removed by the government. Your client may prefer this alternative to deportation. For example, if deported by the government, your client will be barred from immigrating to the U.S. for a minimum statutory period of time (depending on the basis for the removal). See *supra* § 3.2C, Long-term Consequences of a Removal Order. If your client voluntarily departs, he or she may not be subject to these statutory bars to returning to the U.S. Also, your client may want to avoid any harassment or stigma in the country to which he or she returns as a result of forcible removal from the U.S. Last, the act of unlawfully reentering the U.S. after removal is a more serious and more commonly prosecuted offense than illegal reentry following a voluntary departure.

Clients interested in voluntary departure must avoid a conviction of an aggravated felony, which is a bar to voluntary departure. See INA §§ 240B(a)(1), (b)(1)(C), 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C).

G. Enhanced Liability for Illegal Reentry after Removal

Many noncitizens removed from the United States subsequently reenter or attempt to reenter the country to join their families. If a noncitizen does so after a criminal conviction, he or she may face more criminal exposure than the sentence of two years

otherwise possible. You should warn of enhanced prison penalties for a conviction of illegal reentry. Specifically:

- Removal after a conviction of any aggravated felony may result in a prison sentence of up to twenty years.
- Removal after a conviction of any felony may result in a prison sentence of up to ten years.
- Removal after a conviction of three or more misdemeanors involving drugs or crimes against the person, or both, may result in a prison sentence of up to ten years.

5.7 Summary of Priorities in Representing Noncitizen Clients by Status

The following is based on the likely priorities of noncitizen clients in criminal proceedings.

LPR's Immigration Priorities

1. Most importantly, an LPR should avoid an aggravated felony conviction, which bars most forms of relief from removal.
2. An LPR should also avoid other offenses triggering deportability, for which he or she can be removed.
3. If your client plans to travel abroad in the future, he or she should avoid a criminal disposition that triggers inadmissibility.
4. If your client cannot avoid deportability and wants to apply for relief from removal, he or she should avoid an aggravated felony or other offenses that bar relief from removal.
5. If your client is able to avoid a deportable offense, he or she may also want to avoid a disposition that bars naturalization.

Refugee's Immigration Priorities

1. Most importantly, a refugee should avoid an offense triggering deportability, as a refugee can be removed from the U.S. for such an offense.
2. A refugee should avoid an offense that triggers inadmissibility if he or she wants to adjust to LPR status.
3. If your refugee client cannot avoid an offense that triggers deportability and wants to apply for relief from removal, he or she should at least avoid a drug trafficking disposition, violent offenses, and particularly serious crimes.

Asylee's Immigration Priorities

1. An asylee should avoid a conviction of a particularly serious crime, specifically an aggravated felony, as he or she can lose his or her asylum status for such an offense.
2. Your asylee client should avoid an offense that triggers inadmissibility if he or she wants to adjust to LPR status.
3. If your asylee client cannot avoid an aggravated felony and wants to apply for relief from removal, he or she should at least avoid a drug trafficking disposition, violent offenses, and particularly serious crimes.

Immigration Priorities for Nonimmigrant Visa Holder

1. A nonimmigrant visa holder should avoid an offense that triggers deportability or otherwise results in loss of status.
2. A nonimmigrant visa holder should avoid an offense that triggers inadmissibility if he or she wants to adjust to LPR status.
3. If your nonimmigrant client cannot avoid a crime of inadmissibility and is otherwise able to adjust status, he or she should at least avoid a controlled substance offense, which precludes adjustment to LPR status through a 212(h) waiver.

Immigration Priorities for Noncitizen with Temporary Protected Status (TPS)

1. An individual with TPS should avoid any felony conviction or two or more misdemeanor convictions, which will result in a loss of status.
2. An individual with TPS should avoid a conviction of a particularly serious crime, specifically an aggravated felony, as he or she can lose his or her status for such an offense.
3. An individual with TPS should avoid a conviction of a crime involving moral turpitude, a drug offense, or evidence that supports a charge of drug trafficking, which will result in a loss of status.

Immigration Priorities for Noncitizen Client without Immigration Status

1. A noncitizen without immigration status should avoid an offense that triggers inadmissibility if he or she wants to acquire LPR status.
2. If a noncitizen client without immigration status cannot avoid a crime of inadmissibility, he or she should at least avoid a controlled substance offense, which permanently bars an individual from adjusting to LPR status.
3. If your client has a fear of persecution in the country of nationality, he or she should avoid any disposition that bars persecution-based relief.
4. If your client is eligible for or currently has DACA, he or she should avoid any disposition that would be a bar to the DACA program.
5. If your client is interested in voluntary departure, he or she should avoid an aggravated felony conviction.