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THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT

Nelson A. Vargas-Padilla*

Introduction

For aliens convicted of crimes in the United States, the prospect of spending time in a federal, state, or county jail is not the only or even the most frightening consequence of their conviction. Aliens convicted of certain crimes face protracted civil immigration detention, limits on their ability to travel, and removal from the United States. Not even legal permanent residence status can protect an alien convicted of certain crimes from possibly losing their immigration status and facing deportation to their native land. The purpose of this article is to provide an overview of the criminal grounds by which an alien may be charged with inadmissibility or deportability, and removed from the United States.¹

The Removal Process

To better understand the removal consequences attendant to criminal convictions, it is necessary to understand the removal process. Aliens convicted of certain crimes may be either deported or deemed inadmissible from the United States.² With some limited exceptions, a determination as to whether an alien is removable from the United States is made in removal proceedings pursuant to the process codified at section 240 of the Immigration and Nationality Act (“the Act”).³

Removal proceedings are initiated by the Department of Homeland Security (DHS) with service of a Notice to Appear (Form I-862) upon the alien and on the Immigration Court.⁴ The Immigration Court is an administrative adjudicatory body within the United States Department of Justice. By statute, the Notice to Appear must provide the alien with the nature of the proceedings against him or her, the legal authority under which the proceedings are being conducted, the acts or conduct alleged to be in violation of law, and the statutory grounds under which the alien’s removal is being sought.⁵

An alien placed in removal proceedings may be charged under two separate grounds of removal – deportability or inadmissibility.⁶ The grounds charged depend upon whether an alien has or has not been admitted to the United States. The terms “admission” and “admitted” are statutorily defined under section 101(a)(13) of the Act.⁷ With respect to an alien, “admission” and “admitted” refers to the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”⁸

It is important to note that section 101(a)(13)(C) of the Act carves out an exception to this definition for aliens lawfully admitted for permanent residence in the United States. Returning legal permanent residents are regarded as not seeking admission into the United States under section 101(a)(13)(C) of the Act unless they: (1) have abandoned or relinquished that status; (2) have been absent from the United States for a continuous period in excess of 180 days; (3) have engaged in illegal activity after having departed the United States; (4) have departed from the United States while in removal proceedings; (5) have committed certain criminal offenses; or (6) are

attempting to enter at a time or place other than through a designated immigration checkpoint.⁹

An alien admitted to the United States will be charged with *deportability* under the grounds of removal enumerated at section 237 of the Act.¹⁰ An alien who was never admitted or is seeking admission to the United States is subject to the grounds of inadmissibility found under section 212 of the Act.¹¹ Both sections 237 and 212 of the Act contain criminal grounds of removal.¹²

What Constitutes a “Conviction” for Purposes of Immigration Law

In order to properly understand the immigration consequences of criminal conduct, it is important to understand the way immigration law considers and interprets criminal convictions. The term “conviction” carries its own unique statutory definition under federal immigration law. Conviction is defined at section 101(a)(48)(A) of the Act to include “a formal judgment of guilt of the alien entered by a court[,]” as well as any adjudication where “a judge or jury has found the alien guilty[,] . . . the alien has entered a plea of guilty or nolo contendere[,] or [the alien] has admitted sufficient facts to warrant a finding of guilt[,]” and “some form of punishment, penalty, or restraint on the alien’s liberty” is imposed.¹³ Congress intentionally enacted this section to include deferred adjudications, probation before judgment, certificates of relief from disabilities, and expungements into the definition of conviction.¹⁴ Consequently, such adjudications are considered convictions for purposes of removal and pretermittting applications for immigration benefits.¹⁵

When a state court grants a plea withdrawal or vacates a conviction, the conviction will be eliminated for purposes of immigration law where the reasons cited for the withdrawal or vacatur involves a procedural or substantive defect in the underlying criminal proceeding.¹⁶ Alternatively, a conviction vacated solely to avoid the adverse immigration hardships will continue to stand for immigration purposes.¹⁷ It is important to note; however, that the Board of Immigration Appeals (the Board) has held that vacating a conviction for failure to warn an alien of the immigration consequences of his or her plea is a substantive reason that will be given full faith and credit by the Immigration Court and the Board.¹⁸

Likewise, juvenile and youthful offender adjudications are not considered convictions under federal immigration law.¹⁹ To be excluded from the conviction definition, however, a juvenile adjudication must be pursuant to a process analogous to that provided under the Federal Juvenile Delinquency Act (FJDA).²⁰ Otherwise, the adjudication will stand as a conviction for immigration purposes. For example, a state statutory scheme which provides for a revocable youthful adjudication determination is not analogous to the irrevocable adjudicative status afforded under the FJDA.²¹ Therefore, a youthful adjudication pursuant to such an adjudicatory scheme has been held to qualify as a “conviction” for purposes of removal proceed-

ings.²²

In most jurisdictions, finality is a requirement for a criminal conviction to satisfy the immigration conviction definition.²³ “A conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review has been exhausted or waived.”²⁴ Nonetheless, within the jurisdiction of both the Seventh and Fifth Circuit Courts of Appeals, the courts have held that the conviction definition at section 101(a)(48)(A) of the Act has eliminated the requirement of appellate finality.²⁵ As such, within those jurisdictions appellate finality is not a requirement for purposes of considering a criminal conviction for purposes of removal proceedings.

Interpreting Convictions: The Categorical and Modified Categorical Approach

Both the federal circuit courts of appeals and the Board have used the categorical approach in interpreting state, foreign, and federal criminal statutes for purposes of immigration law. Under the categorical approach, the court or adjudicator must look to the elements and the nature of the offense, rather than to the facts of the particular crime, in deciding whether it fits a ground of deportability.²⁶ The Courts have deemed this necessary since an elaborate fact-finding process regarding the alien’s conduct would be impracticable and unfair.²⁷ Nonetheless, while the categorical approach requires that the examination be limited to the elements required for a conviction, it does permit an adjudicator to go beyond the mere fact of conviction where there is a divisible offense – that is, where an offense encompasses conduct that carries immigration consequences and conduct that does not.²⁸

For example, the offense of brandishing a weapon under section 18.2-282 of the Virginia Code requires proof that the offender pointed, held, or brandished a “firearm, air or gas operated weapon, or any object similar in appearance to a firearm, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another.”²⁹ In contrast, the firearms ground of deportation renders removable from the United States an alien who “at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law.”³⁰ Since the Virginia offense encompasses both brandishing a firearm, as well as brandishing an object similar in appearance to a firearm, it is a divisible statute. This means that the offense encompasses acts which would render an alien removable under section 237(a)(2)(C) of the Act, and offenses which would not.³¹ Thus, an adjudicator in this scenario would use the *modified* categorical approach.

Pursuant to the modified categorical approach, when faced with a divisible statute, inquiry into the facts proven which resulted in the alien’s conviction is permissible.³² Under such circumstances examination of the record of conviction is

necessary to ascertain whether the alien was convicted of a removable offense.³³ The record that may be reviewed is limited to the charging document, plea agreement, transcript of the plea colloquy between judge and defendant, and/or a comparable judicial record.³⁴

It is important to note that there is a distinction between proving a charge of deportability and limiting an alien’s access to relief from removal. DHS has the burden of proving by clear and convincing evidence that the alien is deportable as charged.³⁵ Therefore, the evidence allowable to establish a criminal charge of removal is limited to the record of conviction. Where a charge of deportability is contested, an alien’s own statements, made outside the context of criminal proceedings, are insufficient to satisfy the government’s burden of proving deportability.³⁶ Likewise, documents not identified as part of the record of conviction, such as police reports and rap sheets, are insufficient to prove deportability.³⁷ An alien seeking admission to the United States or attempting to apply for an immigration benefit, however, bears the burden of proof.³⁸ Under these circumstances, DHS may use evidence not considered part of the record of conviction.³⁹

Aliens convicted of, or who admit having committed, acts which constitute the essential elements of a crime involving moral turpitude (CIMT) are deemed inadmissible...A CIMT is an act which is per se morally reprehensible and intrinsically wrong or malum in se.

Criminal Grounds of Inadmissibility

Section 235 of the Act provides for the examination by an immigration officer of all persons seeking to enter the United States.⁴⁰ Once it is determined that the applicant for admission is not a United States citizen, he or she will be inspected as an alien. Aliens who have been convicted of certain criminal offenses are deemed to be inadmissible to the United States under the following nine categories enumerated at section 212 of the Act.⁴¹ Such aliens carry the burden of proving that they are clearly and without a doubt admissible to the United States.⁴²

Crimes Involving Moral Turpitude

Aliens convicted of, or who admit having committed, acts which constitute the essential elements of a crime involving moral turpitude (CIMT) are deemed inadmissible.⁴³ Even aliens convicted of or who admit to an attempt or conspiracy to commit such a crime are inadmissible.⁴⁴ CIMTs are generally defined as acts or omissions that are contrary to the moral laws or that are so base or vile as to be contrary to the accepted and customary rule of right and duty between people.⁴⁵ Neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude; rather, it is rather a question of the offender’s intent.⁴⁶ A CIMT is an act which is *per se* morally reprehensible and intrinsically wrong or *malum in se* and conspiracy to commit a CIMT qualifies as a CIMT. Likewise, aiding and abetting is a CIMT where the underlying crime is a CIMT.⁴⁷

Crimes committed against people involve moral turpitude when a specific intent to commit the crime is an element of the offense. Such criminal intent may also be inferred from the presence of unjustified violence or the use of a dangerous weapon.⁴⁸ Thus, the general intent crime of simple assault and

battery is generally not considered a CIMT.⁴⁹ This is so because simple assault may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude.⁵⁰ Simple assault and battery crimes often include offenses involving nothing more than a nonviolent touching.⁵¹ Given the lack of evil intent such offenses do not qualify as CIMTs.⁵²

Assault and battery offenses, however, may appropriately be classified as crimes of moral turpitude if they include certain aggravating factors. For example, assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude, because the knowing or attempted use of deadly force is deemed an act of moral depravity that takes the offense outside the “simple assault and battery” category.⁵³ Likewise, assault and battery offenses that necessarily involve the intentional infliction of serious bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.⁵⁴ Another aggravating factor that elevates an assault offense to a CIMT is the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers.⁵⁵

Aggravated assault is a CIMT where the elements of the offense require a showing that the person acted recklessly, consciously disregarding a substantial and unjustifiable risk, and that such disregard constituted a gross deviation from the standard of care a reasonable person would have exercised in the situation.⁵⁶ This definition of recklessness requires an actual awareness of the risk created by the criminal violator's action.⁵⁷

Assaults committed with the intent to carry out carnal abuse or rape are CIMTs as are sodomy, indecent assaults, and lewd acts.⁵⁸ Generally, a conviction for driving while intoxicated is not a CIMT,⁵⁹ however, where an alien is convicted for driving while intoxicated and the alien knew that his or her driver's license was suspended, cancelled, or revoked, this conviction will be considered a CIMT.⁶⁰ Likewise, failure to stop and render aid after being involved in a vehicular accident resulting in an injury or death is a CIMT.⁶¹

Incest, prostitution, and statutory rape are CIMTs.⁶² Maintaining a house of prostitution where knowledge is not an element of the offense, however, is not.⁶³ Both murder and voluntary manslaughter are CIMTs.⁶⁴ Involuntary manslaughter, however, is only a CIMT where there the intent element requires that a criminal defendant consciously disregards an unjustifiable risk.⁶⁵

Moral turpitude also attaches to property crimes involving an evil or predatory intent. Therefore, theft crimes, which have as an essential element the intent to “permanently deprive” an owner of his property, are CIMTs.⁶⁶ Fraud against the government is also a CIMT, but only in those cases where the intent to inflict pecuniary loss on the government is an element of the offense.⁶⁷

Alien smuggling is typically not a CIMT.⁶⁸ Although a conviction for illegally transporting individuals under a statute that requires a fraudulent intent to conceal the individuals from law enforcement authorities is.⁶⁹ Arson, accessory after the fact, and drug trafficking are all CIMTs.⁷⁰ Writing bad

checks is a CIMT where the statute has as an essential element the intent to defraud.⁷¹ Contempt of court is not a CIMT.⁷² A conviction for knowingly procuring naturalization in violation of 18 U.S.C. section 1425(a) is a CIMT.⁷³ Obstruction of justice for knowingly providing false information to a police officer to prevent the apprehension or to obstruct prosecution of any person is a CIMT.⁷⁴

Exceptions to the CIMT Ground of Inadmissibility

Two statutory exceptions to the CIMT ground of inadmissibility exist. First, section 212(a)(2)(A)(ii)(I) of the Act exempts an alien from the CIMT ground of removal if the alien's CIMT conviction occurred when he or she was under-age. Thus, an alien who is under eighteen years of age when the CIMT was committed and was released from any confinement more than five years before his or her application for admission to the United States is not rendered inadmissible to the United States. Second, under section 212(a)(2)(A)(ii)(I), an alien convicted of a petty offense is not inadmissible to the United States.⁷⁵ To qualify as a petty offense, the alien's criminal conviction must be for a single offense for which the potential maximum sentence does not exceed one year and the actual sentence to imprisonment does not exceed six months.⁷⁶

Controlled Substance Violator

An alien is rendered inadmissible under section 212(a)(2)(A)(i)(II) of the Act if he or she violates any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, as that term is defined under 21 U.S.C. section 802.⁷⁷ This ground of inadmissibility applies where the alien is convicted of an offense involving a controlled substance listed on the federal drug schedules.⁷⁸

Multiple Criminal Convictions

Any alien convicted of two or more crimes, other than purely political offenses, is inadmissible under section 212(a)(2)(B) of the Act.⁷⁹ For this ground of inadmissibility to apply, the aggregate sentences to confinement must be for five years or more.⁸⁰

Controlled Substance Traffickers

Section 212(a)(2)(C) of the Act renders inadmissible any alien whom the consular officer or the Attorney General knows, or has reason to believe, is or has been an illicit trafficker in any controlled substance.⁸¹ This includes aliens who have, to the knowledge of a consulate or Attorney General, aided, abetted, assisted, conspired, or colluded with others in the illicit trafficking of controlled substances.⁸² In order for this inadmissibility ground to apply, the examining immigration officer must, at the time the alien is inspected and admitted into the United States, have a reason to believe that he or she was an illicit trafficker in any controlled substance.⁸³ Consequently, a conviction solely for possession of narcotics, without any allegation in the record that such possession was related to illicit trafficking, will not sustain a ground of inadmissibility under section 212(a)(2)(C) of the Act.⁸⁴

Prostitution and Commercialized Vice

Under section 212(a)(2)(D) of the Act, any alien coming to the United States solely, principally, or incidentally to engage in prostitution, or who has engaged in prostitution within ten years of the date of application for a visa, admission, or adjustment of status, is inadmissible.⁸⁵ Similarly, an alien is inadmissible if he or she has: directly or indirectly procured or attempted to procure prostitutes or persons for the purpose of prostitution; procured or attempted to procure for import prostitutes within ten years of the date of application for a visa, admission, or adjustment of status; or received in whole or in part, the proceeds of prostitution.⁸⁶ Any alien who is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is likewise inadmissible.⁸⁷

Certain Aliens Involved in Serious Criminal Activity who have Asserted Immunity from Prosecution

Any alien who committed a serious criminal offense in the United States, sought and obtained immunity from criminal prosecution, departed from the United States, and has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense is inadmissible.⁸⁸ For purposes of this ground of inadmissibility, a “serious criminal offense” is defined at section 101(h) of the Act to include: (1) any felony; (2) any crime of violence, as defined under 18 U.S.C. section 16; and (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or prohibited substances, if such crime involves personal injury to another.⁸⁹

Significant traffickers in Persons

Section 212(a)(2)(H)(i) of the Act renders inadmissible any alien listed in a report submitted pursuant to 22 U.S.C. section 7108, and any alien the consular officer or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with a trafficker in severe forms of trafficking in persons, as defined in 22 U.S.C. section 7102.⁹⁰ The term “severe forms of trafficking in persons” includes: (1) trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained eighteen years of age; or (2) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁹¹

Under this section of the Code, the President of the United States reports to Congress foreign persons that the President determines are appropriate for sanctions due to having been engaged in human trafficking. Section 212(a)(2)(H)(ii) of the Act renders inadmissible any alien whom the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of the inadmissible alien, and who within the previous five years, knowingly obtained any financial or other benefit from the illicit activity of that alien. Exceptions section exist for sons and daughters of the trafficker who were children at the time he or she received

the benefit.⁹²

Money Laundering

Section 212(a)(2)(I) of the Act renders inadmissible any alien whom a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in a money laundering offense described in 18 U.S.C. sections 1956 or 1957.⁹³ These sections include any alien who the consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense to engage in a money laundering offense described in 18 U.S.C. sections 1956 or 1957.⁹⁴

Criminal Grounds of Deportability

Criminal aliens who have been admitted to the United States are subject to the criminal grounds of deportability under section 237 of the Act.⁹⁵ Unlike the grounds of inadmissibility, it is the government’s burden to prove by clear and convincing evidence that an alien is deportable under any of the grounds enumerated under section 237 of the Act.⁹⁶ The criminal grounds of deportability are as follows:

1. Crimes Involving Moral Turpitude

Under section 237(a)(2)(A)(i)(I) of the Act, an alien is deportable from the United States for having been convicted of a crime involving moral turpitude committed within five years of admission, or, in the case of an alien accorded legal permanent resident status under an “S” visa, within ten years of admission.⁹⁷ Section 237(a)(2)(A)(i)(II) of the Act renders deportable an alien who, at any time after admission, is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.⁹⁸ Crimes are considered not to arise out of a single scheme of criminal misconduct when the acts performed constitute in and of themselves, complete, individual, and distinct crimes; this is the case regardless of whether one crime follows closely to the other, whether the crimes are similar in character, and even whether the crimes are part of an overall criminal plan.⁹⁹

2. Aggravated Felony

Section 237(a)(2)(A)(iii) of the Act renders any alien convicted of an aggravated felony after being admitted to the United States deportable.¹⁰⁰ “Aggravated felony” is an immigration term of art which is defined by section 101(a)(43) of the Act.¹⁰¹ Aggravated felonies encompass state, federal, or foreign convictions. An aggravated felony need not actually be a “felony” as that term is commonly defined. The federal circuit courts of appeals as well as the Board have noted that Congress made its intent clear in enacting the aggravated felony definition to specifically include within the definition offenses with no link to any term of imprisonment. As such, state, federal, or foreign convictions which fit the definition at section 101(a)(43) of the Act qualify as aggravated felonies, even if

the convicting jurisdiction classifies the offense as a misdemeanor.¹⁰² The term aggravated felony as defined under section 101(a)(43) of the Act includes the following offenses:

Murder, Rape, and Sexual Abuse of a Minor

Section 101(a)(43)(A)[†] of the Act includes within the aggravated felony definition the crimes of murder, rape, and sexual abuse of a minor.¹⁰³ The Board and federal circuit courts have adopted the federal definition of minor found under 18 U.S.C. section 3509(a)(2), and define it as a person under the age of eighteen.¹⁰⁴ In adopting this definition, the Board found that it best reflected the common usage of the word “minor”, and conformed to the intent of Congress to maintain a broad definition of an aggravated felony to protect children.¹⁰⁵

The Board and the federal circuit courts of appeals have also looked to the definition of sexual abuse under 18 U.S.C. section 3509(a) in interpreting the term “sexual abuse of a minor.” It is important to note that neither the Board nor the federal courts have adopted this statutory section as a definitive standard but, instead, have invoked it as a guide in identifying the types of crimes that would be considered to be sexual abuse of a minor.¹⁰⁶ Consequently, sexual abuse of a minor includes the “employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct.”¹⁰⁷ The offense includes “molestation, prostitution, or other form [sic] of sexual exploitation of children, or incest with children.”¹⁰⁸ The “sexual abuse of a minor” aggravated felony also includes convictions for statutory rape.¹⁰⁹ The First Circuit Court of Appeals has also held that the offense of statutory rape qualifies as an “aggravated felony” under the “rape” language found at section 101(a)(43)(A) of the Act.¹¹⁰ The First Circuit noted that “[u]nder the explicit language of the INA, all rape - including statutory rape - comes within the aggravated felony taxonomy.”¹¹¹

Controlled Substance Trafficker

Section 101(a)(43)(B) of the Act includes in the definition of aggravated felony, state, federal, or foreign convictions for illicit trafficking in any controlled substance, as defined in 21 U.S.C. section 802, including any drug trafficking crime as defined in 18 U.S.C. section 924(c)(2).¹¹² This section has been interpreted as encompassing two offenses. The first part of the definition refers to any state, federal, or foreign convictions involving unlawful trading or dealing in a controlled substance.¹¹³ The second part of the definition refers to any state, federal, or foreign conviction which can be construed as a “drug trafficking crime” under 18 U.S.C. section 924(c)(2). The term “drug trafficking crime” is defined at 18 U.S.C. section 924(c)(2) to include any “felony punishable under the Controlled Substances Act (21 U.S.C. section 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. section 951 et seq.), or chapter 705 of Title 46.”¹¹⁴ The Supreme Court has interpreted the “drug trafficking” aggravated felony to include any state or foreign conviction, whether it is a felony or misdemeanor, which is analogous to a federal felony enumerated under 18 U.S.C. section 924(c)(2).¹¹⁵ For example, an alien convicted for first-time simple possession of marijuana in New York has not been convicted of an aggravated felony, since

first-time simple possession of marijuana is punishable under the Controlled Substances Act only as a misdemeanor.¹¹⁶ The same alien convicted in New York for first-time simple possession of over five grams of cocaine-base, would be removable as an alien convicted of an aggravated felony since possession of five grams or more of cocaine-base is a felony offense under the Controlled Substances Act.¹¹⁷

Illicit Trafficking in Firearms and Destructive Devices

Section 101(a)(43)(C) of the Act includes within the definition of aggravated felony illicit trafficking in firearms or destructive devices, as defined in 18 U.S.C. section 921, or explosive materials, as defined in 18 U.S.C. section 841(c).¹¹⁸ The term “firearm” under this section is defined under 18 U.S.C. section 921(a)(3) to include any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, the frame or receiver of any such weapon, firearm silencer, or any destructive device.¹¹⁹ Antique firearms produced on or before 1898 are specifically excluded from the firearms definition.¹²⁰ Destructive device is defined as any explosive, incendiary, or poison gas bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter ounce, mine, or device similar to any of the devices previously described.¹²¹ Destructive device also includes projectile weapons which have a barrel with a bore of more than one-half inch in diameter.¹²² Section 841(c) of Title 18 defines “explosive materials” to mean means explosives, blasting agents, and detonators.¹²³

Money Laundering

Section 101(a)(43)(D) of the Act includes within the definition of “aggravated felony” money laundering offenses, as described under 18 U.S.C. section 1956 or 1957 where the amount of the funds exceeds \$10,000.¹²⁴

Miscellaneous Firearms and Explosive Materials Offenses

Section 101(a)(43)(E) of the Act includes within the definition of “aggravated felony” explosive device offenses described in 18 U.S.C. sections 824(h), (i), or 18 U.S.C. section 844(d), (e), (f), (g), (h), or (i).¹²⁵ Aliens convicted of a firearms offense described in 18 U.S.C. sections 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), (r), or 18 U.S.C. sections 924(b) or (h), or 26 U.S.C. section 5861, is an aggravated felon. In interpreting this section, the Board has found that the effect on interstate or foreign commerce element required for conviction is purely a federal jurisdictional provision; consequently, a state conviction is not required to have this as an essential element for it to be classified as an aggravated felony.¹²⁶

Crime of Violence

Section 101(a)(43)(F) of the Act includes in the definition of aggravated felony crimes of violence for which a term of imprisonment is at least one year.¹²⁷ The sentence to imprisonment includes the period of incarceration or confinement ordered by a court of law, regardless of any suspension of the imposition or execution of that imprisonment or sentence.¹²⁸ The phrase “crime of violence” incorporates the definition

under 18 U.S.C. section 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.¹²⁹

For a state, federal, or foreign conviction to qualify as a crime of violence aggravated felony the offense must involve some specific intent to commit a violent act.¹³⁰ Convictions that have as an essential element merely negligent or accidental conduct, do not qualify as aggravated felonies.¹³¹

For example, the United States Supreme Court has held that although Florida's vehicular manslaughter statute involves a substantial risk of force be used in the commission of the offense, that force could be accidental.¹³² Similarly, the Fourth Circuit Court of Appeals concluded that a Virginia conviction for vehicular manslaughter did not satisfy the aggravated felony definition under section 101(a)(43)(F) of the Act.¹³³ As such, neither reckless driving nor involuntary manslaughter qualifies as crimes of violence. This is because the violence risked by the commission of the offense must be intentional, rather than accidental in nature.¹³⁴

Other offenses, which have been construed as a crime of violence, aggravated felony, include arson, burglary, assault, unauthorized use of a vehicle, sexual battery, and statutory rape.¹³⁵ Arson has been identified as an aggravated felony because fire, which is a destructive force, necessarily involves physical force. When that destructive force is maliciously set in motion by a human hand for the purpose of burning a home, church, meetinghouse, or other similar structure, a physical force is used against the property of another.¹³⁶

Where a one-year sentence has been imposed, the crimes of both burglary and unauthorized use of a vehicle are aggravated felonies under section 101(a)(43)(F) of the Act, because an essential element of both offenses is that the perpetrator break and enter someone else's property. The act of breaking and entering by its nature means that violence will have to be used to commit the offense.¹³⁷

Sexual battery and statutory rape have been identified as crimes of violence.¹³⁸ The Board and federal courts have noted that the crime of statutory rape encompasses sexual conduct by an adult with a person incapable of legally consenting to the act.¹³⁹ When an older person attempts to sexually touch a child, there is always a substantial risk that physical force will be used to ensure the child's compliance.¹⁴⁰ Most courts have equated a victim's legal incapacity to consent with an actual unwillingness to be touched, and thus, have concluded that there is a substantial risk that physical force may be used in ensuring the child's compliance.¹⁴¹

Some circuit courts of appeals, however, such as the Ninth and Seventh circuits have either modified or rejected this approach. The Ninth Circuit Court of Appeals has distinguished cases in which the victim and the perpetrator are close in age.¹⁴² In the case of a twenty-three-year-old alien convicted of statutory rape for engaging in consensual sex with a minor age seventeen, the Ninth Circuit held that legal incapacity of the victim did not suggest a risk that force might be used in com-

mitting the offense.¹⁴³ As such, the Court rejected the argument that the alien's conviction was an aggravated felony as defined under section 101(a)(43)(F) of the Act. The Seventh Circuit Court of Appeals has, likewise, held that the age of the perpetrator and victim are relevant for purposes of determining whether the conviction qualifies as a crime of violence and aggravated felony.¹⁴⁴ The Court reasoned that absent a significant age difference, a statutory rape conviction involving consensual sex between an adult male and his fifteen-year-old girlfriend did not, by its nature, involve a substantial risk that physical force would be used, and therefore, would not satisfy the aggravated felony definition found under section 101(a)(43)(F) of the Act.¹⁴⁵

Theft and Burglary and Receipt of Stolen Property

Section 101(a)(43)(G) of the Act includes theft, receipt of stolen property, and burglary offenses for which the term of imprisonment imposed is at least one year within the aggravated felony definition.¹⁴⁶ The Board has held that unlike CIMTs, Congress' use of the term "theft" in section 101(a)(43)(G) of the Act was intended to be broadly interpreted.¹⁴⁷ The Board, therefore, concluded that a "theft offense" does not require as a statutory element the specific intent to permanently deprive an owner of his property, but rather, a taking of property constitutes a "theft offense" whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.¹⁴⁸

The necessary elements for a conviction to be an aggravated felony under the "receipt of stolen property" statutory provision are actual knowledge that the received goods were stolen or evidence demonstrating that a reasonable person would have realized that they were stolen.¹⁴⁹

In interpreting the term "burglary" for purposes of section 101(a)(43)(G) of the Act, the Board adopted the generic federal definition of burglary expressed by the United States Supreme Court in *Taylor v. US*.¹⁵⁰ According to the Court in *Taylor*, in order for a state burglary offense to qualify as an aggravated felony, it must include the elements of the unlawful or unprivileged entry into, or remaining in, a building or other structure with the intent to commit a crime.¹⁵¹ As such, under this definition a conviction of burglary of a vehicle would not qualify as a "burglary" aggravated felony since the federal definition specifically requires that the offense be committed on a building or structure, not a vehicle.¹⁵²

Kidnapping and Ransom Demands

Section 101(a)(43)(H) of the Act, includes within the definition of aggravated felony convictions for kidnapping, demand for ransom, and threats to kidnap as described in 18 U.S.C. sections 875, 876, 877 or 18 U.S.C. section 1202.¹⁵³ This section includes within the definition of aggravated felony convictions for extortion by threats to injure the property or reputation of another, convictions for receipt, possession, or disposal of ransom money, and convictions for transporting, transmitting, or transferring ransom money.¹⁵⁴

Child Pornography

Section 101(a)(43)(I) of the Act includes within the definition of aggravated felony any state, federal, or foreign

conviction for child pornography as described in 18 U.S.C. sections 2251, 2251A, or 2252.¹⁵⁵ This section includes within the aggravated felony definition convictions for possessing, making, transferring, and distributing child pornography.¹⁵⁶ This section also describes convictions for the sexual exploitation of children for purposes of making child pornography.¹⁵⁷

Racketeering and Gambling

Section 101(a)(43)(J) of the Act includes within the definition of aggravated felony any racketeering offense described in 18 U.S.C. section 1962, or any offense described in 18 U.S.C. sections 1084 or 1955, relating to gambling offenses, for which a sentence of one year imprisonment or more may be imposed.¹⁵⁸

Prostitution and Slavery

Section 101(a)(43)(K) of the Act includes within the definition of aggravated felony convictions for human trafficking.¹⁵⁹ This section includes convictions for owning, controlling, managing, or supervising a prostitution business. It also includes convictions for transporting persons for the purpose of prostitution, peonage, slavery, and involuntary servitude.¹⁶⁰

Sabotage and Treason

Section 101(a)(43)(L) of the Act includes within the aggravated felony definition convictions for sabotage and treason.¹⁶¹ For purposes of this section, convictions for offenses described in 18 U.S.C. section 793 (relating to gathering or transmitting national defense information), 18 U.S.C. section 798 (relating to disclosure of classified information), 18 U.S.C. section 2153 (relating to sabotage), or 18 U.S.C. sections 2381 or 2382 (relating to treason), are aggravated felonies.¹⁶²

Fraud and Tax Evasion

Section 101(a)(43)(M) of the Act includes within the definition of aggravated felony convictions involving fraud or deceit in which a loss to the victim exceeds \$10,000.¹⁶³ There is no need to prove that the actual loss to the victim or victims exceeds \$10,000 in order for a fraud conviction to qualify as an aggravated felony under this section.¹⁶⁴ Instead, it is sufficient that the potential loss be more than \$10,000.¹⁶⁵ Moreover, the amount of loss to the victim need not be an actual element of the state, federal, or foreign offense and may be proven with evidence contained outside of the record of conviction.¹⁶⁶ Convictions for tax evasion as described in 26 U.S.C. section 7201 are also included within the definition of aggravated felony, provided that the revenue loss to the Government exceeds \$10,000.¹⁶⁷

Alien Smuggling

Section 101(a)(43)(N) of the Act includes within the definition of aggravated felony convictions for alien smuggling.¹⁶⁸ For an alien smuggling conviction to qualify as an aggravated felony under this section, the offense must be one described in sections 274(a)(1)(A) and (2) of the Act.¹⁶⁹ Convictions under this section include smuggling and harboring aliens. An exception exists where an alien can affirmatively

show that this was his or her only offense and it was committed for the purpose of smuggling into the United States his or her spouse, child, or parent.¹⁷⁰

Previous Removals

Section 101(a)(43)(O) of the Act includes within the definition of aggravated felony convictions for unlawful attempts to re-enter the United States in violation of sections 275(a) or 276 of the Act, committed aliens who were previously deported on the basis of a conviction for an aggravated felony.¹⁷¹

Falsely Making, Forging, Counterfeiting, Mutilating or Altering a Passport

Section 101(a)(43)(P) of the Act includes within the definition of aggravated felony convictions for falsely making, forging, counterfeiting, mutilating, or altering a passport in violation of Title 18, sections 1543 or 1546 of the United States Code, for which the term of imprisonment imposed is at least twelve months.¹⁷² An exception to this section exists where it is a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent, and no other individual, to enter the United States.¹⁷³

Failure to Appear

Section 101(a)(43)(Q) of the Act includes within the definition of aggravated felony convictions relating to a failure to appear by a defendant for service of a criminal sentence.¹⁷⁴ For purposes of this section, the underlying offense must be punishable by imprisonment for a term of five years or more to qualify as an aggravated felony under this section.¹⁷⁵

Bribery, Forgery, Counterfeiting, and Trafficking in Vehicles

Section 101(a)(43)(R) of the Act includes within the definition of aggravated felony convictions for commercial bribery, counterfeiting, forgery, or trafficking in vehicles whose identification numbers have been altered.¹⁷⁶ This section requires that the alien be sentenced to a term of imprisonment of at least one year.¹⁷⁷

Obstruction of Justice and Perjury

Section 101(a)(43)(S) of the Act includes within the definition of aggravated felony convictions relating to obstruction of justice, perjury, or bribery of a witness, for which the term of imprisonment imposed is at least one year.¹⁷⁸ Interpreting this section, the Board adopted the federal statutory definition of perjury found at 18 U.S.C. section 1621,¹⁷⁹ defining perjury to include lying under an oath administered by a competent tribunal, officer, or person authorized to administer such an oath.¹⁸⁰ Perjury includes both oral and written statements, in which a defendant willfully and contrary to such oath states or subscribes to a material matter which he or she does not believe to be true.¹⁸¹

The obstruction of justice aggravated felony does not

include the crime of misprision of a felony under 18 U.S.C. section 4.¹⁸² Misprision of a felony under 18 U.S.C. section 4 is defined as whoever: “having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than 3 years, or both.”¹⁸³ Elements of the crime of misprision of a felony are that the principal committed and completed the felony alleged and that the defendant had full knowledge of that fact, failed to notify the authorities, and took an affirmative step to conceal the crime.¹⁸⁴ The Board held that in general, obstruction of justice involves interfering with court proceedings or the intent to harm or retaliate against others who cooperate in the process of justice.¹⁸⁵ Misprision of a felony does not have as an element either active interference with court proceedings or investigation, or action or threat of action against those who would cooperate in the process of justice. Consequently, the Board concluded that a conviction for misprision of a felony did not qualify as an obstruction of justice aggravated felony.¹⁸⁶

By contrast, the Board construed a conviction for accessory after the fact under 18 U.S.C. section 3 as being an obstruction of justice aggravated felony.¹⁸⁷ The Board reasoned that 18 U.S.C. section 3 criminalizes actions knowingly taken to “hinder or prevent (another’s) apprehension, trial or punishment.”¹⁸⁸

Bail Jumping

Section 101(a)(43)(T) of the Act includes within the definition of aggravated felony convictions relating to an alien’s failure to appear before a court pursuant to a court order to answer to or dispose of a felony charge, for which a sentence of two years’ imprisonment or more may be imposed.¹⁸⁹

Attempt and Conspiracy

Section 101(a)(43)(U) of the Act includes within the definition of aggravated felony any attempt or conspiracy to commit any of the aggravated felony offenses listed above.¹⁹⁰ For example, the Board has held that an alien convicted of conspiracy to commit fraud has been convicted of an aggravated felony within the meaning of sections 101(a)(43)(M)(i) and (U) of the Act, where the substantive crime that was the object of the conspiracy was an offense that involved “fraud or deceit” and where the potential loss to the victim or victims exceeded \$10,000.¹⁹¹

3. High Speed Flight

An alien convicted of high speed flight from an immigration checkpoint in violation of 18 U.S.C. section 758 is deportable from the United States.¹⁹² Section 758 of Title 18 requires for conviction that the alien flee federal, state, or local law enforcement officers in a motor vehicle in excess of the legal speed limit.¹⁹³ An alien who runs away from an immigration checkpoint, but does not exceed the speed limit cannot be convicted under 18 U.S.C. section 758.¹⁹⁴

4. Failure to Register as a Sex Offender

Any alien convicted under 18 U.S.C. section 2250 for failing to register as a sex offender is deportable.¹⁹⁵ This section includes state and federal convictions for failing to register as a sex offender under state or federal law.¹⁹⁶

5. Controlled Substance Offenses

Any alien, who at any time after admission, has been convicted of a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, as defined in 21 U.S.C. section 802, is deportable.¹⁹⁷ The phrase “relating to” a controlled substance has been interpreted broadly to encompass any offense connected to a controlled substance violation.¹⁹⁸

The statutory ground of deportability carves out an exception for aliens convicted of a single offense of thirty grams or less of marijuana for one’s own personal use.¹⁹⁹ This exception has been very narrowly construed by the Board and federal courts of appeals.²⁰⁰ For example, this exception will not apply where an alien has been convicted of possessing thirty grams or less of marijuana while incarcerated.²⁰¹

6. Firearms Offenses

An alien, who at any time after admission, is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any firearm or destructive device, as that term is defined under 18 U.S.C. section 921(a), is deportable.²⁰²

The elements of conviction must encompass that the weapon was indeed a firearm.²⁰³ Proof of this fact must be found in the record of conviction in order for deportability to be sustained by the Immigration Court.²⁰⁴ Evidence from the police report that the weapon was a firearm is insufficient to sustain this ground of deportability because the police report is not a part of the record of conviction.²⁰⁵ The alien’s own admission during removal proceedings, indicating that he or she was convicted of possessing a firearm is, likewise, insufficient to establish deportability under this section if the statute is divisible, the alien contests removal, and the record of conviction is silent as to the weapon possessed.²⁰⁶

Much like the controlled substance ground of deportability, the language “relating to” a firearms offense has been interpreted broadly. Consequently, a conviction for robbery, which has as an element of conviction the use of a firearm during the commission of the offense, will support a charge of deportability under this section.²⁰⁷

7. Domestic Violence, Stalking, and Child Abuse

A conviction for domestic violence will render an alien deportable.²⁰⁸ Domestic violence is defined as a “crime of violence,” under 18 U.S.C. section 16, committed by a current or former spouse, by an individual with whom the victim shares a child in common, by an individual who is cohabiting with or has cohabited with the victim as a spouse, by an individual similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a victim who is pro-

ected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.²⁰⁹

Any alien convicted for the crime of child abuse, child neglect, or child abandonment is deportable.²¹⁰ Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.²¹¹ The term "protection order" is defined as any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts.²¹²

8. Document Fraud Conviction

Any alien who has been convicted under section 274C of the Act, 8 U.S.C. section 1324c, is deportable.²¹³ Section 274C makes it unlawful to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement or obtaining a benefit under the Immigration and Nationality Act.²¹⁴ This includes the possession, use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document.²¹⁵

Conclusion

How immigration law treats an alien convicted of committing a crime often turns on decisions made by criminal defense attorneys, prosecutors, and judges. Clearly, immigration law must no longer be under the rubric of specialty practitioners.

¹ The article does not examine the effect an alien's criminal conduct can have on applications for immigration benefits, such as adjustment to legal permanent residence or naturalization. Instead, the article provides a general overview of what crimes may result in removal from the United States. It is not intended to replace research on the many issues flowing from the intersection between immigration and criminal law.

² 8 U.S.C. § 1182(a)(2) (2000); 8 U.S.C. § 1227(a)(2) (2000).

³ 8 U.S.C. § 1229. Other methods for removing an alien from the United States include expedited and administrative removal. Expedited removal involves a screening process at a port of entry followed by the denial of an alien's admission to the United States and removal where appropriate. *See* 8 U.S.C. § 1225. Administrative removal is a process in which an alien who is unlawfully present in the United States and has been convicted of an aggravated felony may be ordered removed by DHS without being referred to the Immigration Court. *See* 8 U.S.C. § 1228(b). For purposes of this article, I will focus only on the removal process before the Immigration Court.

⁴ 8 U.S.C. § 1229(a).

⁵ *Id.*

⁶ *Id.*

⁷ 8 U.S.C. § 1101(a)(13)(A).

⁸ *Id.*

⁹ 8 U.S.C. § 1101(a)(13)(C).

¹⁰ 8 U.S.C. § 1227.

¹¹ 8 U.S.C. § 1182.

¹² 8 U.S.C. § 1227; 8 U.S.C. § 1182.

¹³ 8 U.S.C. § 1101(a)(48)(A).

¹⁴ *See* Matter of Punu, 22 I&N Dec. 224, 227 (BIA 1998) (stating that Congress deliberately included deferred adjudications in the definition of "conviction"); Matter of Chairez, 21 I&N Dec. 44, 45-47 (BIA 1995) (finding that a deferred judgment is considered a "conviction" under the Act).

¹⁵ *See* Mugalli v. Ashcroft, 258 F.3d 52, 61-62 (2d Cir. 2001) (concluding that the term "conviction," for the purposes of immigration, applies when a court entered a formal judgment of guilt, as well as when the judge or jury entered a conviction or the alien entered a guilty or nolo contendere plea or the alien admitted sufficient facts to warrant a guilty finding, and the court ordered some form of restraint on the alien's liberty, penalty, or punishment).

¹⁶ *See, e.g.,* Gradiz v. Gonzales, 490 F.3d 1206 (10th Cir. 2007); Matter of Roldan, 22 I&N Dec. 512, 521-23 (BIA 1999) (asserting that under the INA, the immigration consequences of a "conviction" apply to an alien even where the state applied a subsequent rehabilitative state action, so long as the subsequent action had no relation to the merits of the original charge); Matter of Punu, 22 I&N Dec. 224, 227-28 (BIA 1998) (claiming that the revisions to the INA were intended to clarify that for the purposes of immigration, an original finding or confession of guilt is sufficient for a "conviction," even if states view the conviction differently under various provisions that ameliorate the effects of the conviction under state law).

¹⁷ *See, e.g.,* Pickering v. Gonzalez, 465 F.3d 263, 266-67 (6th Cir. 2006) (upholding the BIA's finding that convictions vacated to avoid immigration hardships stand for the purpose of immigration law, but finding that the government has the burden of showing that this was the reason for vacating the conviction); Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003) (holding that convictions vacated solely for the purpose of avoiding immigration law consequences continue to stand for the purposes of immigration law). *But see* Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000); Dillingham v. INS, 267 F.3d 996 (9th Cir. 2001) (holding that a conviction vacated or expunged under state or foreign law analogous to 18 U.S.C. § 3607 no longer remains a conviction for purposes of immigration law).

¹⁸ Matter of Adamiak, 23 I&N Dec. 878, 879-80 (BIA 2006).

¹⁹ *See, e.g.,* Matter of Devison, 22 I&N Dec. 1362, 1365-66 (BIA 2000) (explaining that a juvenile delinquency proceeding results in the adjudication of a status rather than a conviction for a crime).

²⁰ 18 U.S.C. § 5032 (2000). *See, e.g.,* Vieira Garcia v. INS, 239 F.3d 409, 412-13 (1st Cir. 2001) (holding that where a juvenile was charged and pled guilty in adult court, the FJDA does not apply, and the juvenile has a conviction for the purposes of immigration law); Matter of Devison, 22 I&N Dec. at 1373-74 (concluding that where a juvenile adjudication was pursuant to a process analogous to the FJDA, the adjudication and subsequent resentencing for violating probation are not "convictions" for the purpose of immigration law); Matter of De La Nues, 18

I&N Dec. 140, 144 (BIA 1981) (holding that the applicant has the burden of showing that he was dealt with as a juvenile under a foreign country's laws and that the procedures are equivalent to those of the FJDA).

²¹ See *Uritsky v. Gonzales*, 399 F.3d 728, 734-35 (6th Cir. 2005) (concluding that a revocable youth adjudication determination is not the equivalent of the FJDA's procedures and constitutes a "conviction" for the purpose of removal proceedings, reasoning that revocable procedures are more akin to expungement or deferred adjudication than the juvenile delinquency procedures of the FJDA).

²² *Id.*

²³ See *Pino v. Landon*, 349 U.S. 901 (1955) (ordering that the judgment be reversed because based on the record, the Court was unable to determine whether the conviction was sufficiently finalized as to support deportation).

²⁴ *Matter of Thomas*, 21 I&N Dec. 20, 21 n.1 (BIA 1995).

²⁵ See *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (holding that Congress amended the INA to no longer require finality for convictions); *Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999) (noting that Congress removed the finality requirement).

²⁶ See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (holding that the analysis of crimes is based on the statute itself instead of the individualized alleged conduct).

²⁷ See *Taylor v. United States*, 495 U.S. 575, 601-02 (1990) (finding that legislative history supports the categorical approach).

²⁸ See *Matter of Sweetser*, 22 I&N Dec. 709, 714 (BIA 1999) (holding that in determining whether divisible offenses sustain grounds of deportability, courts look at the elements required to sustain the conviction when examining the record of conviction and the documents admissible as evidence in proving a criminal conviction).

²⁹ VA. CODE ANN § 18.2-282 (2005) (emphasis added).

³⁰ 8 U.S.C. § 1227 (2000) (emphasis added).

³¹ See *Matter of Sweetser*, 22 I&N Dec. at 709 (applying a divisibility analysis to crimes involving physical force); *Matter of Short*, 20 I&N Dec. 136, 137-38 (BIA 1989) (applying a divisibility analysis to crimes involving moral turpitude); *Matter of Ghunaim*, 15 I&N Dec. 269, 270 (BIA 1975).

³² See *Tran v. Gonzales*, 414 F.3d 464, 469 n.4 (3d Cir. 2005) (noting that the court's inquiry was whether the defendant's conduct covered by the statute was a crime, and not whether any conduct that the statute covered was a crime).

³³ See *Matter of Teixeira*, 21 I&N Dec. 316, 322 (BIA 1996) (applying a divisibility analysis to crimes involving firearms).

³⁴ See *id.* at 321 (holding that a police report could not be used in determining deportability in instances where the inquiry is focused on a criminal conviction and not the alien's conduct); see *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 819 (2007) (noting what parts of the record are reviewed under a modified categorical approach).

³⁵ 8 U.S.C. § 1229a(c)(3).

³⁶ See *Matter of Pichardo*, 21 I&N Dec. 330, 335-36 (BIA 1996) (finding that an alien's deportation hearing testimony about the underlying conduct which gave rise to a firearms-related conviction was not sufficient proof of deportability).

³⁷ See *Matter of Teixeira*, 21 I&N Dec. at 321 (holding that a

police report could not be used in determining deportability in instances where the inquiry is focused on a criminal conviction and not the alien's conduct).

³⁸ 8 U.S.C. § 1992a(c)(2).

³⁹ *Id.*

⁴⁰ 8 U.S.C. § 1225(a)(3).

⁴¹ 8 U.S.C. § 1182.

⁴² 8 U.S.C. § 1229a(c)(20(A)).

⁴³ 8 U.S.C. § 1182(a)(2)(A)(i)(I).

⁴⁴ *Id.*

⁴⁵ See *Jordan v. DeGeorge*, 341 U.S. 223, 235 nn.6-7 (1951) (examining what is encompassed in the phrase "crime involving moral turpitude").

⁴⁶ See *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992) (analyzing what is included in the definition of CIMT).

⁴⁷ *Id.* at 582; *Matter of Bader*, 17 I&N Dec. 525, 529 (BIA 1980) (concluding that a conviction for conspiracy to commit a CIMT qualifies as a CIMT).

⁴⁸ See *Matter of O-*, 3 I&N Dec. 193, 194-95 (BIA 1948) (noting that assault with a deadly weapon in general has been held to be a CIMT).

⁴⁹ *Id.*

⁵⁰ See, e.g., *Matter of Faualaau*, 21 I&N Dec. 475, 478 (BIA 1996) (stating that an alien's intent is crucial to determinations regarding moral turpitude and finding that simple assault does not constitute a CIMT); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 619 (BIA 1992) (holding that criminal negligence where intent was not required for a conviction did not constitute a CIMT).

⁵¹ See, e.g., *Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953), *aff'd on other grounds*, 347 U.S. 637 (1954).

⁵² See *Matter of Sanudo*, 23 I&N Dec. 968, 970-71 (BIA 2006) (explaining the difference between CIMTs and crimes that carry a similar label of assault, aggravated assault, and battery, but lacking the evil intent found in CIMTs).

⁵³ See, e.g., *Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953), *aff'd on other grounds*, 347 U.S. 637 (1954) (holding that the knowing use or attempted use of deadly force and not the gravity of punishment imposed is determinative of whether a crime involves moral turpitude).

⁵⁴ See *Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000) (holding that a heightened level of injury inflicted can raise assault to a CIMT); *Matter of P-*, 7 I&N Dec. 376, 377 (BIA 1956) (affirming that "maiming or wounding" during an assault and battery involves moral turpitude).

⁵⁵ See, e.g., *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001) (finding it was within the INS's discretion to conclude that domestic partner assault was a CIMT, although INS ultimately chose to drop deportation proceedings); *Matter of Tran*, 21 I&N Dec. 291, 295 (BIA 1996) (concluding that willful infliction of corporal injury on a spouse, cohabitant, or parent of one's child, is a CIMT); *Matter of Danesh*, 19 I&N Dec. 669, 673 (BIA 1988) (concluding that aggravated assault on a peace officer was a CIMT).

⁵⁶ *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976). See *Pichardo v. INS*, 104 F.3d 756 (5th Cir. 1997) (concluding that where all categories of an aggravated assault statute involve bodily injury together with a minimum mens rea of recklessness, any aggravated assault would be a CIMT).

⁵⁷ Matter of Medina, 15 I&N Dec. at 613.

⁵⁸ See, e.g., Matter of Beato, 10 I&N Dec. 730, 733, 735 (BIA 1964) (holding that attempted assault with intent to commit carnal abuse and rape is a CIMT); Matter of Z , 7 I&N Dec. 253, 255 (BIA 1956) (holding that indecent assault is a CIMT); Matter of S , 8 I&N Dec. 409, 415 (BIA 1959) (holding that sodomy and gross indecency between male persons are CIMTs); Matter of B , 5 I&N Dec. 538, 539 (BIA 1953) (noting that rape and assault with intent to rape are CIMTs).

⁵⁹ Matter of Torres-Varela, 23 I&N Dec. 78, 86 (BIA 2001) (holding that multiple DUI offenses that on their own are not CIMTs do not, by themselves, aggregate into a CIMT).

⁶⁰ Matter of Lopez-Meza, 22 I&N Dec. 1188, 1195-96 (BIA 1999) (holding that while a simple DUI is not a CIMT, an aggravated DUI where one commits a DUI while knowingly driving on a suspended, canceled, or revoked license, is a CIMT).

⁶¹ Garcia-Maldonado v. Gonzales, 491 F.3d 284, 290 (5th Cir. June 29, 2007) (concluding that failure to stop and render aid after a motor vehicle accident resulting in an injury or death is a CIMT).

⁶² See, e.g., Castle v. INS, 541 F.2d 1064 (4th Cir. 1976) (statutory rape); Matter of Y , 3 I&N Dec. 544 (C.O. 1949) (incest); Matter of W , 4 I&N Dec. 401 (C.O. 1951) (prostitution); Matter of A , 3 I&N Dec. 168 (BIA 1948).

⁶³ Matter of A , 3 I&N Dec. 94, 170 (BIA 1948) (holding that the broad statute of keeping a house of ill-fame does not involve a CIMT in every instance).

⁶⁴ See, e.g., Matter of Lopez-Amaro, 23 I&N Dec. 668 (BIA 1993) (murder); Matter of Chavez-Calderon, 20 I&N Dec. 744 (BIA 1993) (voluntary manslaughter).

⁶⁵ See, e.g., Franklin v. INS, 72 F.3d 571, 572-73 (8th Cir. 1995) (consciously disregarding a substantial and unjustifiable risk that resulted in the death of the alien's child was a CIMT).

⁶⁶ Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973) (noting that thefts with an intent for a permanent taking are CIMTs).

⁶⁷ See, e.g., Jordan v. DeGeorge, 341 U.S. 223 (1951).

⁶⁸ See Matter of Tiwari, 19 I&N Dec. 875, 881 (BIA 1989) (holding that alien smuggling is not a CIMT).

⁶⁹ See Fuentes-Cruz v. Gonzales, 489 F.3d 724, 726 (5th Cir. 2007) (declaring that alien smuggling with an intent to deceive law enforcement is a CIMT).

⁷⁰ Matter of S , 3 I&N Dec. 617 (BIA 1949) (arson); Navarro-Lopez v. Gonzales, 455 F.3d 1055 (9th Cir. 2006) (accessory after the fact); Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997) (drug trafficking).

⁷¹ Matter of Colbourne, 13 I&N Dec. 319, 321 (BIA 1969) (finding that a bad check conviction was not a CIMT where there was no evidence that the alien had knowledge that his account lacked sufficient funds to cover the check).

⁷² Matter of P-, 6 I&N Dec. 400, 404 (BIA 1954) (holding that there was no CIMT where an alien was held in contempt for court for violating a court order, and the alien's intent was not base or vile and the conduct itself was not base, vile, or inherently immoral).

⁷³ See Amouzadeh v. Winfrey, 467 F.3d 451, 456 (5th Cir. 2006) (holding that all convictions under 18 U.S.C. § 1425(a)'s prohibition against "knowingly procuring or attempting to procure, contrary to law, the naturalization of any person, or documen-

tary or other evidence of naturalization or citizenship," are CIMTs).

⁷⁴ Padilla v. Gonzales, 397 F.3d 1016, 1020 (7th Cir. 2005) (finding that obstruction of justice lacks the element of fraud but the elements of making false statements and concealing criminal activity are sufficient to render it a CIMT).

⁷⁵ 8 U.S.C. § 1182 (a)(2)(A)(i) (2000).

⁷⁶ See, e.g., Matter of Garcia-Hernandez, 23 I&N Dec. 590, 593 (BIA 2003) (concluding that respondent's misdemeanor conviction for spousal injury was not a basis for inadmissibility).

⁷⁷ 8 U.S.C. § 1182 (a)(2)(A)(i)(II).

⁷⁸ See Argaw v. Ashcroft, 395 F.3d 521, 527 (4th Cir. 2005) (reversing Board of Immigration's decision ordering the removal of petitioner based on the court's conclusion that the drug ("khat") the petitioner brought into the States was neither listed, nor established, to be a controlled substance under 21 U.S.C. § 812); Matter of Mena, 17 I&N Dec. 38, 39-40 (BIA 1979) (upholding respondent's deportation on the basis that respondent admitted, during the acceptance of a guilty plea (after being fully and carefully advised of his rights), that the controlled substance in his possession was heroin).

⁷⁹ 8 U.S.C. § 1182(a)(2)(B).

⁸⁰ *Id.*

⁸¹ 8 U.S.C. § 1182(a)(2)(C).

⁸² See, e.g., Matter of Rico, 16 I&N Dec. 181, 186-87 (BIA 1977) (dismissing respondent's appeal upon the court's conclusion that respondent was a knowing and conscious participant or conduit in an attempt to smuggle marijuana into the United States).

⁸³ See Matter of Rocha, 20 I&N Dec. 944, 946-48 (BIA 1995) (finding that under the plain language of the Act, because the examining officer did not "know" or articulate a "reason to believe" at the time of respondent's entry that the respondent was a trafficker, the immigration judge did not err in finding the respondent "not deportable").

⁸⁴ See Matter of L-, 5 I&N Dec. 169, 171-72 (BIA 1953) (stating that the evidence showed that the quantity of drugs found on the possessor consisted of only two butts of marijuana cigarettes, indicating that such possession, "without more," did not constitute the trafficking of narcotics).

⁸⁵ 8 U.S.C. § 1182(a)(2)(D).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 8 U.S.C. § 1182(a)(2)(E).

⁸⁹ 8 U.S.C. § 1101(h).

⁹⁰ 8 U.S.C. § 1182(a)(2)(H)(i).

⁹¹ 22 U.S.C. § 7108 (2000).

⁹² 8 U.S.C. § 1182(a)(2)(H)(iii).

⁹³ 8 U.S.C. § 1182(a)(2)(I)(i).

⁹⁴ 8 U.S.C. § 1182 (a)(2)(I)(ii).

⁹⁵ 8 U.S.C. § 1227.

⁹⁶ 8 U.S.C. § 1229a(c)(3).

⁹⁷ 8 U.S.C. § 1227(a)(2)(A)(i)(I). "S" visas are granted to aliens who have substantially contributed to the success of an authorized criminal investigation or the prosecution of an individual. See 8 U.S.C. § 1255(j).

⁹⁸ 8 U.S.C. § 1227(a)(2)(A)(i)(II).

⁹⁹ See Matter of Adetiba, 20 I&N Dec. 506, 509 (BIA 1992) (finding that respondent's continuous use of illegally obtained

credit cards did not flow from and was not the natural consequence of a single criminal act).

¹⁰⁰ 8 U.S.C. § 1227(a)(2)(A)(iii)

¹⁰¹ 8 U.S.C. § 1101(a)(43).

¹⁰² See, e.g., *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); *United States v. Gonzales-Vela*, 276 F.3d 763, 764 (6th Cir. 2001); *Guerrero-Perez v. INS*, 256 F.3d 546, 546 (7th Cir. 2001); *United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 317 (2001); *Matter of Small*, 23 I&N Dec. 448 (BIA 2002).

¹⁰³ 8 U.S.C. § 1101(a)(43)(A).

¹⁰⁴ See *Matter of V-F-D-*, 23 I&N Dec. 859, 861 (BIA 2006) (finding that because states categorize sex crimes against children in many different ways the federal definition needed to be one of a broad spectrum).

¹⁰⁵ *Id.* at 862.

¹⁰⁶ *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999).

¹⁰⁷ *Id.* at 995.

¹⁰⁸ *Id.*

¹⁰⁹ The term “statutory rape” generally refers to “unlawful sexual intercourse with a person under the age of consent, as defined by statute, regardless of whether it is against that person’s will.” BLACK’S LAW DICTIONARY (8th ed. 2004).

¹¹⁰ *Silva v. Gonzales*, 455 F.3d 26, 29 (1st Cir. 2006).

¹¹¹ *Id.*

¹¹² 18 U.S.C. § 924(c)(2) (2000).

¹¹³ See, e.g., *Matter of Barrett*, 20 I&N Dec. 171, 177-78 (BIA 1990) (concluding that the definition of “drug trafficking crime” for purposes of determining drug-related “aggravated felonies” within the meaning of the Immigration and Nationality Act encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act).

¹¹⁴ 18 U.S.C. § 924(c)(2).

¹¹⁵ See *Lopez v. Gonzalez*, 127 S. Ct. 625, 627-28 (2006) (finding that because the petitioner’s state offense was not punishable as a federal felony it did not count for removal purposes).

¹¹⁶ 21 U.S.C. § 844(a) (2000).

¹¹⁷ *Id.*

¹¹⁸ 8 U.S.C. § 1101(a)(43)(C) (2000).

¹¹⁹ 18 U.S.C. § 921(a)(3).

¹²⁰ *Id.*

¹²¹ 18 U.S.C. § 921(a)(4).

¹²² *Id.*

¹²³ 18 U.S.C. § 841(c).

¹²⁴ See, e.g., *Perez v. Elwood*, 294 F.3d 552, 556-57 (3d Cir. 2002) (affirming lower court’s denial of petitioner’s writ of habeas corpus brought after the Board of Immigration Appeal ordered the removal of petitioner following his conviction for conspiracy to launder money).

¹²⁵ 8 U.S.C. § 1101(a)(43)(E) (2000).

¹²⁶ See *Matter of Vasquez-Muniz*, 22 I&N Dec. 1415 (BIA 2000) (affirming immigration judge’s decision that the respondent was eligible to apply for cancellation of removal because his conviction for possession of a firearm by a felon in violation of California state law is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), because it is not an offense “described

in” 18 U.S.C. § 922).

¹²⁷ 8 U.S.C. § 1101(a)(43)(F).

¹²⁸ 8 U.S.C. § 1101(a)(48)(B). See also *Matter of Aldabesheh*, 22 I&N Dec. 983, 988 (BIA 1999) (holding that because the respondent was sentenced to an aggregate term of only three years and therefore not presumed to have committed a particularly serious crime, the respondent was entitled to an individual examination of his conviction, the sentence imposed, and the circumstances and underlying facts of the conviction).

¹²⁹ 18 U.S.C. § 16 (2000).

¹³⁰ See *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003) (finding that petitioner’s conviction for manslaughter was not a crime of violence within the meaning of 18 U.S.C. § 16(b), and therefore not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)).

¹³¹ See *Leocal v. Ashcroft*, 543 U.S. 1, 2 (2004) (finding that a DUI conviction was not a crime of violence under 18 U.S.C. § 16(b)).

¹³² *Id.*

¹³³ See *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (holding that a state conviction for aggravated involuntary manslaughter was not a crime of violence under 18 U.S.C. § 16(b)).

¹³⁴ See *Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (finding that the Board erroneously concluded that Garcia was eligible for deportation based on a conviction for reckless assault, after he struck a pedestrian in his vehicle while speeding); *Bejarano-Urrutia*, 413 F.3d at 447 (finding that the Board erred in holding petitioner’s conviction of aggravated involuntary manslaughter a crime of violence within the meaning of 18 U.S.C. § 16(b)).

¹³⁵ See, e.g., *Mbea v. Gonzalez*, 482 F.3d 276, 277 (4th Cir. 2007).

¹³⁶ See, e.g., *id.* (holding that the petitioner’s arson conviction to be an aggravated felony that rendered him statutorily ineligible for cancellation of removal); *Matter of Palacios*, 22 I&N Dec. 434 (BIA 1998) (stating that petitioner’s state conviction of arson in the first degree was a conviction of a “crime of violence” within the meaning of section 101(a)(43)(F) of the Immigration and Nationality Act, and therefore is deportable, as an alien convicted of an aggravated felony).

¹³⁷ See, e.g., *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 265 (2006) (burglary); *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005) (unauthorized use of a motor vehicle).

¹³⁸ See, e.g., *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000) (sexual battery); *Matter of B-*, 21 I&N Dec. 287 (BIA 1996) (statutory rape).

¹³⁹ See *id.*

¹⁴⁰ See *United States v. Reyes-Castro*, 13 F.3d 377, 378 (10th Cir. 1993) (concluding that even though the state law definition of attempted sexual abuse of a child did not specifically involve physical force as an element, the district court properly concluded that attempted sexual abuse of a child was a crime of violence).

¹⁴¹ See *Chery v. Ashcroft*, 347 F.3d 404, 408-09 (2d Cir. 2003) (finding that conviction for sexual assault of a fourteen-year-old child was a crime of violence under the Act); *United States v. Alas-Castro*, 184 F.3d 812, 813 (8th Cir. 1999) (concluding that appellant’s prior conviction for sexual assault of a child consti-

tuted an aggravated felony); *Ramsey v. INS*, 55 F.3d 580, 583 (11th Cir. 1995) (holding that an attempt to commit a lewd assault under Florida state law was a crime of violence as defined in 18 U.S.C. § 16, thus constituting an aggravated felony).

¹⁴² *Valencia v. Gonzales*, 439 F.3d 1046, 1051 (9th Cir. 2006) (asserting that it is the victim's *actual* non-consent that counts).

¹⁴³ *Id.* at 1052-53.

¹⁴⁴ *See Xiong v. INS*, 173 F.3d 601, 608 (7th Cir. 1999) (vacating and remanding a deportation order after concluding that the immigration judge was unjustified in limiting his inquiry to the language of the statute and should have considered the facts which consisted of consensual sex between a boyfriend and his fifteen-year-old girlfriend).

¹⁴⁵ *Id.* at 606-07.

¹⁴⁶ 8 U.S.C. § 1101 (2000).

¹⁴⁷ *See Matter of V-Z-S-*, 22 I&N Dec. 1338, 1345 (BIA 2000) (holding that the respondent's conviction for unlawful driving and taking of a vehicle is a "theft" offense).

¹⁴⁸ *Id.* at 1346.

¹⁴⁹ *See Matter of Bahta*, 22 I&N Dec. 1381, 1383 (BIA 2000) (concluding that removal proceedings should be terminated because the record does not contain clear and convincing evidence to prove a conviction for either theft or receipt of stolen property).

¹⁵⁰ *See Matter of Perez*, 22 I&N Dec. 1325, 1326-27 (BIA 2000) (holding that the respondent's conviction for burglary of a vehicle is not an aggravated felony burglary offense under the Act).

¹⁵¹ *See Taylor v. United States*, 495 U.S. 575 (1990) (asserting that states cannot have different definitions of burglary since that would allow sentencing for identical conduct in different states to turn upon whether the particular states consider the conduct "burglary").

¹⁵² *Matter of Perez*, 22 I&N at 1327.

¹⁵³ 8 U.S.C. § 101(a) (2000).

¹⁵⁴ *Id.*

¹⁵⁵ 8 U.S.C. § 1101.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See Matter of Boris*, 24 I&N Dec. 111, 117 (BIA 2007) (holding that respondent's offense was committed for a "commercial advantage" where it was evident that he knew his employment was designed to create a profit for the prostitution business for which he worked).

¹⁶¹ 8 U.S.C. § 1101.

¹⁶² 18 U.S.C. § 793 (2000); 18 U.S.C. § 798 (2000); 18 U.S.C. § 2153 (2000); 18 U.S.C. § 2381 (2000); 18 U.S.C. § 2382 (2000).

¹⁶³ 8 U.S.C. § 1101.

¹⁶⁴ *Id.*

¹⁶⁵ *See Li v. Ashcroft*, 389 F.3d 892, 896 n.8 (9th Cir. 2004) (holding that the charging document which alleged that the alien submitted false claims to the government in excess of \$10,000 and the conviction were insufficient to show that the jury had found that the alien's fraud had resulted in loss of more than \$10,000 and provided a basis for removal).

¹⁶⁶ *See Matter of Babaisakov*, 24 I&N Dec. 306, 306 (BIA

2007) (finding that the loss may be proved by evidence outside the record of conviction as long as the loss related to the conduct for which the person was convicted).

¹⁶⁷ 8 U.S.C. § 1101.

¹⁶⁸ *Id.*

¹⁶⁹ 8 U.S.C. §§ 1324(a)(1)(A) and (2).

¹⁷⁰ *See Matter of Alvarado*, 22 I&N Dec. 718, 719 (BIA 1999) (holding that respondent did not commit an aggravated felony as he had never been deported for an offense described in another subparagraph).

¹⁷¹ 8 U.S.C. §§ 1325(a) or 1326.

¹⁷² 8 U.S.C. § 1101.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 18 U.S.C. § 1621 (2000).

¹⁸⁰ *Id.*

¹⁸¹ *See Matter of Martinez-Recinos*, 23 I&N Dec. 175, 177-78 (BIA 2001) (finding that because all of the parts of the California Penal Code encompass the definition of the aggravated felony crime of perjury in the federal statute the offense is an aggravated felony).

¹⁸² *See Matter of Espinoza*, 22 I&N Dec. 889, 889 (BIA 1999) (finding that the obstruction of justice offenses listed "have as an element interference with the proceedings of a tribunal or require an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate").

¹⁸³ *Id.* at 891.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 892.

¹⁸⁶ *Id.* at 893.

¹⁸⁷ *See Matter of Batista-Hernandez*, 21 I&N Dec. 955, 955 (BIA 1997) (finding that the offense of accessory of the fact is an aggravated felony because it falls within the definition of an obstruction of justice crime and because the respondent's sentence was at least one year).

¹⁸⁸ *Id.* at 956.

¹⁸⁹ 8 U.S.C. § 1101 (2000).

¹⁹⁰ *Id.*

¹⁹¹ *Matter of S-I-K-*, 24 I&N Dec. 324 (BIA 2007).

¹⁹² 18 U.S.C. § 758 (2000).

¹⁹³ *Id.*

¹⁹⁴ *See United States v. Clemente E.*, 392 F.3d 1164, 1164 (10th Cir. 2004) (concluding that a stop sign does not create a speed limit and that the failure to stop is not within the plain language of the statute).

¹⁹⁵ 18 U.S.C. § 2250.

¹⁹⁶ *See 42 U.S.C. § 16913* (2000) (explaining that individuals convicted of sexual offenses committed against children are required to register in the jurisdiction of their residence).

¹⁹⁷ 21 U.S.C. § 802 (2000).

¹⁹⁸ *See Matter of Hernandez-Ponce*, 19 I&N Dec. 613, 613 (BIA 1988) (holding that the respondent is deportable because he was convicted twice for the crime of use and being under the influence of phencyclidine).

¹⁹⁹ 8 U.S.C. § 1227(a)(2)(B)(i) (2000).

²⁰⁰ *Id.*

²⁰¹ See *Matter of Moncada-Servellon*, 24 I&N Dec. 62 (BIA 2007) (concluding that the respondent's conviction for marijuana possession while incarcerated is a valid factual predicate for the charge of deportability and does not fall within the scope of the personal-use exception).

²⁰² 8 U.S.C. § 1127(a)(2)(C); 18 U.S.C. § 921(a) (200).

²⁰³ *Matter of Pichardo*, 21 I&N Dec. 330, 336 (BIA 1996) (finding that the record of conviction failed to identify which weapon the defendant was convicted of possessing).

²⁰⁴ See *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996) (noting that where the statute under which an alien was convicted encompasses offenses that constitute firearms violations and offenses that do not, the Board looks to the record of conviction and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes a firearms violation within the meaning of the Act).

²⁰⁵ *Id.*

²⁰⁶ *Matter of Pichardo*, 21 I&N Dec. 330.

²⁰⁷ *Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993).

²⁰⁸ 18 U.S.C. § 16 (2000).

²⁰⁹ *Id.*

²¹⁰ 8 USC § 1227 (a)(2)(E).

²¹¹ *Id.*

²¹² *Id.*

²¹³ 8 U.S.C. § 1324c (2000).

²¹⁴ *Id.*

²¹⁵ *Id.*

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†101(a) (43) (A) – (U)

The term "aggravated felony" means-

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of Title 18, United States Code);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;

(E) an offense described in-

(i) section 842 (h) or (i) of Title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of Title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, United

States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18, United States Code (relating to child pornography);

(J) an offense described in section 1962 of Title 18, United States Code (relating to racketeer influenced corrupt organizations, or an offense described in section 1084 (if it is the second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of 1 year imprisonment or more may be imposed;

(K) an offense that-

(i) relates to the owning, controlling, managing, or supervising of a prostitution business; or

(ii) is described in sections 2421, 2422, 2423, of Title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in-

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

(M) an offense that-

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or

(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(O) an offense described in sections 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more; and

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.