A CRIMINAL IMMIGRATION BENCH GUIDE FOR STATE COURT TRIAL JUDGES

A BENCH GUIDE FOR STATE TRIAL COURT JUDGES ON THE IMMIGRATION CONSEQUENCES OF STATE COURT CRIMINAL ACTIONS

IMMIGRATION BENCH GUIDE

Center for
PUBLIC POLICY STUDIES

A BENCH GUIDE

FOR STATE TRIAL COURT JUDGES ON THE IMMIGRATION CONSEQUENCES OF STATE COURT CRIMINAL ACTIONS

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Introduction

This bench guide is intended to help state trial court judges identify circumstances before them in which a state criminal conviction or sentence might have possible collateral immigration consequences, to assure that alien litigants have been properly advised by their attorneys of the possible immigration implications of entering a guilty plea or going to trial. In particular, judges need to be aware of these issues when taking a guilty plea or determining an appropriate sentence.

The guide is designed for a specific purpose, to provide quick access for judges electronically from the bench during a trial or plea hearing to identify potential immigration issues in cases before them. It is not meant to be an in-depth treatise on immigration law. ITS PURPOSE IS TO HELP JUDGES SPOT ISSUES, NOT PROVIDE DEFINITIVE ANSWERS ON IMMIGRATION RIGHTS.

Immigration is covered by in U.S. Code Title 8, Chapter 12, Subchapter II. Unless otherwise specified, all statutory references are to that Title, Chapter, and Subchapter. Cases cited in this bench guide are decisions of the Board of Immigration Appeals. It should be noted, however, that pertinent federal circuit court law also should be consulted. Federal circuits may conflict with one another as well as the Board on particular immigration issues. In addition, immigration case law should be consistently cite checked, as this area of the law can be highly fluid.

Red text and red buttons next to text are clickable links to other sections of the bench book. Each page of the bench guide also has clickable links at the bottom of the page back to Table 1, type of criminal action, and Table 2, category of immigration status. Web links to the internet for statutes are in blue type and require internet access.

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CRIMINAL ACTIONS WITH IMMIGRATION CONSEQUENCES

NOTE: The following table is not intended to be a comprehensive list of crimes within each category, but rather a list of crimes that a state criminal court judge is most likely to encounter. For each category, the link leads to a more detailed discussion.

Table 1: Criminal Actions With Immigration Consequences	
AGGRAVATED FELONY • Murder • Rape • Sexual abuse of a minor • Violent crime with sentence of one year or more √ Special rules for DUI • Theft with sentence of one year or more • Burglary with sentence of one year or more • Drug trafficking with sentence of more than one year • Running a prostitution business • Child pornography • Racketeering • Money laundering exceeding $10,000 • Receipt of ransom • Fraud with loss to victim exceeding $10,000 • Forgery of an immigration document • Obstruction of justice, perjury, failure to appear	**CRIME OF MORAL TURPITUDE** • Conceptual definitions √ Evil or malicious intent or inherent depravity √ Intent or reckless behavior to commit great bodily harm √ Intent to defraud • Conviction and sentence: √ For deportation: (1) possible sentence of one year or more; or (2) two convictions √ For inadmissibility: any CMT, with exception for a petty offense • Case types √ Theft, fraud, or perjury √ Assault √ Prostitution √ DUI
CRIME RELATED TO CONTROLLED SUBSTANCE • Any violation of state, Federal, or foreign law regarding a controlled substance • Exception for single offense of possession for own use of 30g or less of marijuana	**CRIME OF DOMESTIC VIOLENCE** • Stalking • Domestic violence • Criminal child abuse, neglect or abandonment • Violation of protective order
FIREARM OFFENSE • Purchase, sale, exchange, use, ownership, possession, or carrying a firearm or attempting or conspiring to do any of the above in violation of any law	**DOCUMENT FRAUD** • Fraud and misuse of visas, permits, or other entry document • Civil document fraud
OTHER CRIMES • High-speed flight • Failure to register as a sex offender • Espionage, treason, or sedition • Terrorist activity • Illegal travel • Violation of Selective Service Act	**ILLEGAL ACTIVITY NOT REQUIRING A CRIMINAL CONVICTION** • Drug abuse or addiction • Alien smuggling • Violation of protection order against threats of violence, repeated harassment, or bodily injury • Civil document fraud • Falsely claiming U.S. citizenship • Illegal voting

For what is considered a conviction and sentence under Federal immigration law, click on the following links:

WHAT IS A CONVICTION?

WHAT IS A SENTENCE?

TABLE 1 TABLE 2 PREVIOUS

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MAJOR CATEGORIES OF LEGAL IMMIGRATION STATUS

NOTE: This chart does not list every category of legal immigration status in the law, but just those of relevance to state criminal court judges. Also note that the term "immigrant" in federal Immigration law is used as a term of art referring to an alien who intends to live in the United States permanently. Temporary visitors are referred to as non-immigrant aliens. See 1101(a)(15).

Table 2: Major Categories of Legal Immigration Status	
NATURALIZED CITIZEN • Residency requirements • Must be of good moral character	**LAWFUL PERMANENT RESIDENT (LPR)** • Green card holders • Intend to reside permanently in the US • Permanent stay subject to revocation or dissolution under law
CONDITIONAL PERMANENT RESIDENT (Spouse and spouse's child based on qualifying marriage to citizen or LPR) • Expires on second anniversary of obtaining conditional status • The conditional immigrant and the legal spouse or parent must apply together for LPR status	**DEPENDENT JUVENILE (SPECIAL IMMIGRANT JUVENILE STATUS)** • State court finding that juvenile is √ abused, neglected, or abandoned √ eligible for long term foster care √ not returnable to home country
DOMESTIC VIOLENCE VICTIM (VIOLENCE AGAINST WOMEN ACT SELF-PETITIONERS) • Spouse or child abused by citizen or lawful permanent resident • Abuse of battery or extreme cruelty • Marriage legal and in good faith • Petitioner must be of good moral character	**LEGAL TEMPORARY VISITOR** • In the US legally on temporary basis • Does not intend to abandon foreign residence to reside permanently in the US • Includes vacationers, students, workers • Length of stay as specified by visa
REFUGEE OR ASYLEE • Person with a well-founded fear of persecution if returned to home country • Stay as long as expulsion from the US would put them at a safety risk	**TRAFFICKING VICTIM (T VISA)** • Victim of severe form of human trafficking • In the US because of the trafficking • Willing to cooperate in the investigation of the trafficking or is under the age of 18 • Would suffer severe hardship if removed
CRIME VICTIM OR WITNESS (U VISA) • Willing to cooperate in a criminal investigation • Need certification from local court, prosecutor, or law enforcement agency	

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The Judges Responsibility to Assure Defendants Are Advised

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The Judges Responsibility to Assure Defendants are Advised

A growing number of states require judges to investigate whether non-citizen criminal defendants have been advised concerning the immigration implications of a guilty plea. Judges thus need to be able to recognize situations where the potential outcome of a criminal case could affect the defendant's immigration status.

The following are examples of the range of requirements that different states have placed on judges with regard to non-citizen criminal defendants.

- California, Penal Code Ann. § 1016.5 (West 1985) requires a general advisement. This is the most common approach taken by those states that deal with the issue.

  The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

- D. C., Code Ann.§16-713 (1997) adds a provision that the defendant may request additional time to reconsider the plea.

  (a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime, the court shall administer the following advisement on the record to the defendant: "If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

  (b) Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement. If the court fails to advise the defendant as required by subsection (a) and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by subsection (a), the defendant shall be presumed not to have received the required advisement.

- Massachusetts, Gen..Laws § 278:29D (1996 Supp.) requires a more specific advisement, including that admission of facts may have immigration consequences, and provides for a remedy if the advisement is not given.

  The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

  If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty,

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plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

- Minnesota, Rule Crim. Proc. 15.01 (2000) requires that, before accepting a plea, the judge must question both the defendant and the defendant's counsel as to:

  10. Whether defense counsel has told the defendant and the defendant understands: …

  d. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

- Connecticut, Gen. Stat. § 54-1j (2001) goes the furthest and puts a burden on the court to determine if the defendant understands the possible immigration consequences of a guilty plea.

  (a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea.

  (b) The defendant shall not be required at the time of the plea to disclose the defendant's legal status in the United States to the court.

  (c) If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant's plea, as required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant's plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.

Other states with statutory provisions include:

- Florida, Rule Crim. Proc. 3.172(c)(8) (1999);
- Georgia, Code Ann. §17-7-93 (1997);
- Hawaii, Rev. Stat. § 802E-2 (1993);
- Maryland, Rule 4-242 (2001);
- Montana Code Ann. § 46-12-210 (1997);
- New Mexico, Rule Crim., Form 9-406 (2001);
- New York, Crim. Proc. Law § 220.50(7) (McKinney 2001 Cum. Supp.);
- North Carolina Gen. Stat. § 15A-1022 (1999);
- Ohio, Rev. Code Ann. § 2943.031 (1997);

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- Oregon, Rev. Stat. § 135.385 (1997);
- Rhode Island, Gen. Laws § 12-12-22 (2000);
- Texas, Code Crim. Proc. Ann., Art. 26.13(a)(4) (Vernon 1989 and Supp. 2001);
- Washington, Rev. Code § 10.40.200 (1990;
- Wisconsin, Stat. § 971.08 (1993-1994).

Effect of failure to advise defendant

- A conviction vacated under state law for failure of trial court to advise defendant of possible immigration consequences of a guilty plea is no longer a conviction for immigration purposes. (Case 3525)

The following is the link to the judge's ability to shape criminal convictions and sentences to achieve immigration outcomes.

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SECTION II

The Judges' Ability to Consider Immigration Consequences

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The Judge's Ability to Consider Immigration Consequences

Whether a state court judge can consider immigration consequences in shaping convictions and sentences is a controversial issue. On the one hand, such a practice can raise a number of concerns, including federalism and disparate treatment issues. On the other hand, state court judges are concerned about their authority to consider a wide range of factors about an individual defendant in their sentencing decisions.

The Board of Immigration Appeals has held that the immigration courts must determine the immigration consequences to an individual alien based on the crime as charged and convicted and the sentence as determined by the state court judge, even if the criminal charge or sentence was shaped by the prosecutor or judge in part to mitigate or maximize adverse immigration consequences on the defendant.

- The crime as charged and convicted in the state court is the conviction, even if the prosecutor's charge was initially fashioned or later modified, even retroactively, to minimize immigration consequences. (Case 3610)

- A sentence as modified by the trial court nunc pro tunc is the effective sentence for immigration purposes without regard to the trial court's reasons for the modification, even if the sentence was modified solely to affect immigration consequences. (Case 3522)

On the other hand the BIA has held the following with regard to vacated sentences.

- A conviction vacated solely to alleviate immigration consequences, without other factors affecting the legal sufficiency of the conviction, is still considered a conviction for immigration purposes. (Case 3493)

The following is the link to the judge's responsibility to advise defendants about possible immigration consequences of a guilty plea or conviction.

THE JUDGE'S RESPONSIBILITY TO ASSURE DEFENDANTS ARE ADVISED

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SECTION III

Intersecting with the ICE Process

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Intersecting with the ICE Process

The following is a brief description of ICE's process and how it relates to the state courts.

Reporting to ICE

- ICE's interest is first to identify and detain potential terrorists, second to identify and remove illegal aliens, and third to identify aliens who may be subject to deportation for other reasons.

- On reporting suspected illegal aliens to ICE, the desire of ICE is to be notified of any foreign-born individual who gets involved with the state criminal courts. ICE can then interview the individual to determine if the individual is in the U.S. lawfully or not. ICE would like all justice system officials to report foreign-born individuals that come before them, but no justice official, including a judge, is under any legal obligation to report.

- ICE would like to be notified when a state court approves a name change for a non-citizen.

ICE process for investigating aliens and initiating holds

- Once ICE is notified of an alien who has contact with the criminal justice system, ICE will interview the individual. ICE may place an immigration detainer (ICE hold) on the person. If the individual is in state custody, ICE will typically wait to exercise the detainer until the individual is eligible for release from state custody. This includes completing the trial in state court and any sentence of incarceration resulting from the trial. A person who is released to probation is considered released from state custody and may be detained by ICE at that time.

- When the individual is eligible for release from state custody, ICE is to be notified. Under 8 CFR 287.7, ICE then has 48 hours, not including weekends and holidays, to take custody of the individual. If ICE does not take custody of the individual within that time frame, the state can release the individual.

- Once ICE takes custody of an individual, ICE can then determine whether to hold the person in custody, release on bail (cash only, no bonds), or release on own recognizance. The Field Office Director makes the release determination. In some states, ICE contracts with local jails for custody of individuals under ICE detainers. As the space available to ICE is limited, many aliens are released while awaiting their deportation hearing.

Effect of an ICE hold on a state criminal case

- When a person in ICE detention is still awaiting trial in state court, the court must issue a writ to ICE to have the individual brought back to the court for court hearings. ICE may elect not to return the person to the court, if the state trial will not affect removal of the individual from the country.

- If a person on probation is in ICE custody, it is up to the local probation department to check with ICE to determine the status of the individual. ICE does not automatically notify the local court or probation office when a person is held in detention or removed from the country.

Removal of aliens from the country by ICE

- Only an immigration court can issue a deportation order against an individual. Many aliens, however, agree to leave the country voluntarily rather than go through a deportation hearing in immigration court.

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- There have been instances where an individual has agreed to leave the country but then not actually leave. ICE may not know whether the person actually left or absconded.

- Once a person has been ordered removed from the country, ICE has 180 days to effect the removal. If ICE cannot effect removal in that time, the person will be released. This may happen if the person's home country will not permit the individual to enter and ICE cannot find a country to admit the person safely.

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SECTION IV

Categories of Foreign Born Status

TABLE 1 TABLE 2 PREVIOUS

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Categories of Foreign Born Status

Naturalized Citizen 1427(a)

- Must meet residency requirements.
- Must be of good moral character.
- Must support the Constitution and be disposed to the good order and happiness of the U.S.

Lawful Permanent Resident (LPR) 1101(a)(20)

A grant of lawful permanent resident (LPR) status allows an alien to reside and work permanently in the United States. LPRs are also known as green card holders, although the card is no longer green. To be eligible for LPR status, the applicant must indicate an intention to reside permanently in the US.

The following are the major underlying visa petition categories through which an alien can acquire lawful permanent status.

- Family-based visas: unmarried sons or daughters of citizens; spouses and children of LPRs; unmarried sons or daughters (not a child) of LPRs; married sons or daughters of citizens; brothers or sisters of citizens.
- Employment-based visas: (1) priority workers (aliens who possess extraordinary ability, professors or researchers, multinational executives); (2) aliens who hold advanced degrees or possess exceptional ability; (3) certain classes of skilled workers, professionals, or other workers who perform jobs for which qualified workers are not available in the US.
- Diversity-based visas: as determined by the Attorney General.

An alien can also acquire lawful permanent resident status through other means, such as by adjusting status from that of a refugee or asylee.

Lawful permanent residents can be subject to removal for engaging a wide variety of criminal activity, as specified in the Federal Immigration Statutes. The following are links to criminal activity that can make an individual ineligible for LPR status or put an individual with LPR status at risk for removal.

- **INADMISSIBLE ALIENS**
- **GROUNDS FOR DEPORTATION**
- **ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER**

Conditional Permanent Resident 1186a

Conditional permanent residents include alien spouses and their children who applied for lawful permanent resident status based on a qualifying marriage to a LPR or a citizen. The conditional status expires on second anniversary of obtaining conditional status unless the alien and his or her spouse have jointly applied for lawful permanent resident status prior to that time.

The following can cause loss of conditional permanent resident status.

- Failure to file a joint petition to remove the conditional status prior to the two-year expiration period or to appear for the requisite interview.
- Affirmative termination prior to the expiration of the two-year period.
- Adjudication and denial of the joint petition.
- The marriage is found to be fraudulent.

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- Divorce, unless a waiver is available under law for hardship reasons under 1186a(c)(4), including as a battered spouse. See also VAWA Self-Petitioner.

The conditional permanent resident is subject to removal for engaging in a variety of criminal activity described in the link below.

GROUNDS FOR DEPORTATION

Special Immigrant Juvenile Status (SIJS) 1101(a)(27)(J)

Special immigrant juvenile status is available under the following conditions.

- There must be a state court finding that the juvenile is:

  √ abused, neglected, or abandoned;
  √ eligible for long term foster care; and
  √ not returnable to home country.

- The juvenile must concurrently apply for lawful permanent resident status.

- The dependency case must not have been filed as a sham solely to obtain immigrant status.

Juvenile delinquency is generally not a bar to SIJS status, as delinquency is not considered adult criminal activity.

- What constitutes juvenile delinquency is to be determined by Federal law. (Case 3435)

- Federal law defines a juvenile as anyone under the age of 18, and juvenile delinquency as an act committed by a juvenile that would be a crime if committed by an adult. 18 U.S.C. 5031

- Certain crimes committed by juveniles may be considered adult criminal convictions under 18 U.S.C. 5032.

The following conduct does not require a criminal conviction to make an alien inadmissible or deportable. An alien juvenile who engages in any of these areas of conduct may be ineligible for SIJS status:

- Drug trafficking;
- Being a drug addict;
- Prostitution;
- Violation of protection order;
- Use of false documents; or
- Having a mental condition that is a threat to others.

ILLEGAL ACTIVITY NOT REQUIRING A CRIMINAL CONVICTION

VAWA Self-Petitioner 1101(a)(51) and 1154(a)

Immigration law provides that an alien married to a citizen or LPR may petition for LPR status without the cooperation of the spouse if:

- The spouse or child has been battered or subjected to extreme cruelty by citizen or lawful permanent resident spouse;
- The act or threatened act was one of extreme cruelty, including physical violence, sexual abuse, forced detention, or psychological abuse against the petitioner or petitioner's child by the spouse

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during the marriage 8 C.F.R. 204.2(c)(2)(v);
- The marriage legal and in good faith;
- The petitioner is not the primary perpetrator of the violence; and
- The petitioner is of good moral character 1101(f).

The following can be used to prove abuse 8 C.F.R. 204.2(b)(2)(iv):

- Reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, other social service agency personnel;
- Letters from advocates;
- Protection orders;
- Allegations in divorce petitions; or
- Reports on police calls to petitioner's home.

The conditions that might serve as a bar to be eligibility for cancellation of a removal order for battered spouse are described in the link below.

ELIGIBILITY FOR CANCELLATION OF REMOVAL ORDER

Non-immigrant Visitor 1101(a)(15)

The law provides for a variety of categories of aliens that are eligible for visas to legally enter the United States on a temporary basis for a limited period of time. Eligible aliens include vacationers, students, certain classes of temporary workers, and a variety of specialized categories. The authorized length of stay is specified in the visa. The alien may have to take certain actions to maintain the status.

Non-immigrant Refugee or Asylee 1101(a)(42), 1157, 1158

The following are the basic conditions for refugee or asylee status.

- The individual has a well-founded fear of persecution on the basis of race, religion, nationality, member of a particular social group, or political opinion if returned to the home country or country of last permanent residence.
- The individual is not a security risk or perpetrator of persecution.
- The individual has not committed certain categories of crimes.

Once admitted the alien will be allowed to stay in the U.S. as long as expulsion from the U.S. would put them at a safety risk, unless he or she meets one of the grounds for loss of status listed below.

- The individual is able to safely return to home country or move to another country.
- The individual no longer meets the requirements of eligibility.
- The individual has participated in persecution.
- The individual presents a security risk.
- The individual has been convicted of a serious crime, including conviction of an aggravated felony.

Non-immigrant victim of human trafficking 1101(a)(15)(T)

The "T" visa is available for individuals who have been the victims of human trafficking and meets the following requirements.

- The person is the victim of severe trafficking.
- The person is assisting in the investigation or prosecution of traffickers.

The maximum length of stay under the "T" visa status is four years unless extended 1184(o)(7). The holder of a T visa is eligible to apply for lawful permanent resident status if he or she is of good moral character, 1255(l)(1)(B), and has been continuously in the U.S. for three years.

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Non-immigrant crime victim or witness 1101(a)(15)(U)

The "U" visa is available to individuals who are in the U.S. as undocumented aliens but meet the following requirements

- The individual has suffered severe physical or mental abuse as a result of being a victim of criminal activity.
- The individual has been, is being, or is likely to be of help to a Federal, state, or local investigation of the criminal activity causing the abuse.
- The individual has certification from a Federal, state, or local judge, prosecutor, law enforcement officer, or other justice system official involved in prosecuting the criminal activity that he or she has been, is being, or is likely to be of help to a Federal, state, or local investigation of the criminal activity causing the abuse. 1184(p)(1)

The rights of the "U" visa holder include the following.

- The maximum length of the "U" visa is four years unless extended. 1184(p)(6)
- The "U" visa holder may apply for any other immigration benefit or status for which he or she is eligible. 1184(p)(5)
- The holder of a U visa is eligible to apply for lawful permanent resident status with three years of continuous residence after receiving U visa status.

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SECTION V

Good Moral Character

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Good Moral Character Primary statutory links: 1101(f), 1182

Good moral character is a condition for the following immigration privileges or actions.

- Eligibility to become a naturalized citizen.
- Eligibility of a VAWA Self-Petitioner for lawful permanent resident status.
- Eligibility of a T Visa holder for lawful permanent resident status.
- Eligibility of a non-permanent resident for cancellation of a deportation order or adjustment to lawful permanent resident status.
- Eligibility of a non-permanent resident battered child or spouse for cancellation of a deportation order or adjustment to lawful permanent resident status.

Good moral character is not determined by a single act, but rather by a person's actions generally. It does not require perfection, but is a measure of a person's character measured by the sum of all his or her actions. (Case 3623)

- Falsely claiming citizenship on an I-9 employment verification form does not automatically mean lack of good moral character. (Case 3623)

The statute provides that an individual who is or has engaged in any of the following is not of good moral character: 1101(f), with reference to 1182(a)(2)(A), (B), (C), and (D), 1182(a)(6)(E), and 1182(a)(10)(A).

- Habitual drunkard;
- Prostitution or other commercialized vice;
- Receiving one's primary income from illegal gambling;
- Conviction of two or more gambling offenses;
- Conviction of a crime of moral turpitude;
- Multiple convictions with aggregate sentence of more than five years;
- Drug trafficking;
- Giving false testimony for the purpose of gaining benefits under Title 8, Chapter 12;
- Confinement in a penal institution for 180 days or more;
- Conviction of an aggravated felony;
- Smuggling aliens into the U.S.;
- Polygamy;
- Crime related to a controlled substance;
- Participation in Nazi persecution or religious persecution; and
- Illegal voting or falsely claiming U.S. citizenship.

There is a petty offense exception to the crime of moral turpitude. 1182(a)(2)(A)(ii)(II)

- A petty offense is defined as one conviction of a crime involving moral turpitude with maximum sentence of one year or less and actual sentence of six months or less.
- The court looks to actual sentence imposed, not the possible sentence. If the imposition of the sentence is suspended, the sentence is not "imposed", but if the execution of the sentence is suspended, the sentence is considered "imposed". (Case 3073)
- Commission of a petty offense does not bar a person from establishing good moral character. (Case 3490)

The fact that an individual does not fall within any of these classes does not preclude a finding that s/he is or was not a person of good moral character

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Inadmissible Aliens

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Inadmissable Aliens Primary Statutory Link 1182

The following can make an alien inadmissible to the US. These can also preclude an alien from readmission to the U.S. if the alien leaves the country.

- Conviction or admission to having committed a crime of moral turpitude, subject to petty offense exception. 1182(a)(2)(A)(i)(I)

- Conviction or admission to having committed a crime relating to a controlled substance 1182(2)(2)(A)(i)(II), subject to exception in 1182(h).

  √ There is an exception for single offense of simple possession or 30 grams or less of marijuana 1182(h), if (1) the offense took place more than 15 years from application for admission, the alien is not a security threat, and the alien has been rehabilitated, or (2) alien is a spouse, parent, or child of a citizen or LPR and refusal to admit would cause hardship on the citizen or LPR, or (3) the alien is a VAWA self-petitioner.

  √ If the crime is enhanced by taking place in a drug free zone, it is treated as the enhanced crime. (Case 3594)

- Two convictions with aggregate sentence of five years or more. 1182(a)(2)(B)

- Known or reasonably believed to have engaged in trafficking in a controlled substance. 1182(a)(2)(C)

- Coming to the U.S. to engage in prostitution or having engaged in prostitution in the 10 years prior to application for admission. 1182(a)(2)(D)

  √ One act of soliciting prostitution for oneself does not preclude admissibility. (Case 3613)

- Known or reasonably believed to have engaged in trafficking in persons. 1182(a)(2)(H)

- Known or reasonably believed to have engaged in money laundering. 1182(a)(2)(I)

- Known or reasonably believed to have engaged in or come to the U.S. to engage in terrorist activity. 1182(a)(3)(B)

- Known or reasonably believed to have engaged in or come to the U.S. to engage in various acts of espionage, treason, or sedition. 1182(a)(3)(A)

- Illegal voting. 1182(a)(10)(C)

- Note: Conviction of an aggravated felony is not automatic grounds for inadmissibility. (Case 3449)

There is a petty offense exception for crime of moral turpitude. 1182(a)(2)(A)(ii)(II)

- One conviction of a crime involving moral turpitude with maximum sentence of one year or less and actual sentence of six months or less does not make an alien inadmissible.

- The court looks to actual sentence imposed, not the possible sentence. (Case 3073)

- If the imposition of the sentence is suspended, the sentence is not "imposed", but if the execution of the sentence is suspended, the sentence is considered "imposed". (Case 3073)

Admissibility after deportation

- An alien who has been deported may not seek readmission for 10 years after deportation. 1182(a)(9)(A)(ii)

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- An alien who has left the country voluntarily may seek readmission 3 years after deportation. 1182(a)(9)(B)(i)

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SECTION VII

Grounds for Deportation

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Grounds for Deportation Primary Statutory Link 1227

The following state court criminal actions are grounds for deportation of any alien.

(1) Was in an inadmissible category at time of entry. 1227(a)(1)

(2) Has been convicted of one of the following types of crimes. 1227(a)(2) For a definition of conviction, click on ***What is a Conviction?*** 1101(a)(48)

- Crime of moral turpitude with possible sentence of one year or more, committed within five years of entry to the U.S. 1227(a)(2)(A)(i)

- Two crimes involving moral turpitude not arising out of a single scheme of conduct. 1227(a)(2)(A)(ii)

- Aggravated felony 1227(a)(2)(A)(ii) as defined in 1101(a)(43).

- Crime relating to controlled substance.

  √ Any violation of a law relating to a controlled substance, as defined in 21 U.S.C. 802, is deportable, with an exception for possession of 30 grams or less of marijuana. 1227(a)(2)(B)(i)
  √ The exception is for simple possession, so the possession plus an added factor such as possession in a prison setting is not simple possession. (Case 3549)

- Drug abusers and addicts. 1227(a)(2)(B)(ii)

- Firearm offense. 1227(a)(2)(C)

- Crime of domestic violence. 1227(a)(2)(E)(i)

  √ Crime of violence against a person protected by domestic violence laws.
  √ Crime of violence as defined by 18 U.S.C. 16 is (1) a crime that involves the use, attempted use, or threatened use of physical force against a person or property, or (2) a felony that involves a substantial risk of the use of physical force against a person or property.

- Crime of child abuse, neglect, or abandonment. 1227(a)(2)(E)(i)

  √ Defined as any "intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child, or that impairs the child's physical or mental well-being, including sexual abuse or exploitation." (Case 3610)
  √ Includes infliction of physical harm, even if slight, mental, or emotional harm, or morally harmful. (Case 3610)
  √ A child is anyone under the age of 18.
  √ The crime must be considered solely based on the defined elements in state law and admissible portions of the conviction record, and not on additional facts unrelated to the elements of the crime.
  √ Where act was against a child but the conviction was under a general assault statute in which age was not an element of the crime, other facts indicating that the victim was a child does not make the crime a conviction of a child abuse offense.

- Violation of protection order. 1227(a)(2)(E)(ii)

(3) Failure to register or falsification of documents

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- Failure to file change of address under 1305.
- Failure to register as an alien under 1306.
- Fraud or misuse of visas or other entry documents in violation of 18 U.S.C. 1546.

(4) Document fraud. 1227(a)(3)(C)

- This include civil document fraud under 1324c.

(5) Other crimes.

- High-speed flight. 1227(a)(2)(A)(iv)
- Failure to register as a sex offender in violation of 18 U.S.C. 2250. 1227(a)(2)(A)(v)
- Illegal voting. 1227(a)(6)
- Terrorist activity. 1227(a)(4)(B)
- Engaging in espionage, treason, or sedition. 1227(a)(2)(D)
- Violation of the Selective Service Act. 1227(a)(2)(D)
- Illegal Travel. 1227(a)(2)(D)

(6) Illegal Activity not requiring a Criminal Conviction.

- Drug abuse or addiction. 1227(a)(2)(B)
- Alien smuggling. 1227(a)(1)(E)
- Violation of a protection order. 1227(a)(2)(E)(ii)
- Civil document fraud. 1227(a)(3)(C), 1324c
- Falsely claiming U.S. citizenship. 1227(a)(3)(D)
- Illegal voting. 1227(a)(6)

Admissibility after deportation

- An alien who has been deported may not seek readmission for 10 years after deportation. 1182(a)(9)(A)(ii)

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SECTION VIII

Eligibility for Cancellation of a Removal Order

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Eligibility for Cancellation of a Removal Order Primary Statutory Link 1229b

The following are conditions that must be met for aliens subject to a removal order to be eligible for cancellation of the order. Certain criminal activity, as listed below, could serve as a bar to eligibility.

For Lawful Permanent Resident 1229b(a)

To be eligible for cancellation of a removal order, a LPR must show that he or she:

- Has been a resident for seven years and LPR for five years;
- Has not committed an aggravated felony; and
- Warrants the favorable exercise of discretion.

For non-permanent resident generally

To be eligible for cancellation of removal and adjustment to LPR status, a non-permanent resident must show: 1229b(b)(1)

- Physical presence in the U.S. for ten years;
- Good moral character;
- Not inadmissible or deportable for certain enumerated crimes and offenses;
- Not deportable for failure to register or for the falsification of documents; and
- Removal would cause "exceptional and extremely unusual hardship" to the citizen or LPR spouse, parent, or child.

For non-permanent resident battered spouse or child

The following are special rules for eligibility for cancellation of removal and adjustment to LPR status for a non-permanent resident battered spouse or child. 1229b(b)(2)

The alien must show that he or she has been or is:

- Subject to being battered or extreme cruelty by a citizen or LPR spouse, bigamist, or parent;
- Physically present in the United States for three years;
- Of good moral character;
- Not inadmissible or deportable for certain enumerated crimes and offenses;
- Not inadmissible for security reasons;
- Not deportable for marriage fraud;
- Not deportable for conviction of crime;
- Not deportable for failure to register or for the falsification of documents; and
- Removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

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Special rules regarding the required periods of continuous residence or continuous physical presence and the "stop time rule" 1229b(d)(1)

- The periods of required continuous residence or continuous physical presence for cancellation of a removal order under 1229b(a) and 1229b(b), respectively, are broken by either: (a) service of a Notice to Appear for removal proceedings (except in the case of a battered spouse or child under 1229b(b)(2)), or (b) commission of an offense under 1182(a)(2) (certain crimes),1227(a)(2) (certain crimes), or 1227(a)(4) (security grounds).

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What is a Conviction?

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What is a Conviction?

For the purposes of Federal immigration law, a conviction is defined as follows. 1101(a)(48)

- Conviction includes admission on record of facts supporting a conviction.
- Expungement does not erase the conviction for immigration purposes. (Case 3508)
- A pardon does not erase the conviction for immigration purposes.
- A diversion agreement is a conviction if there is a finding of guilt.
- Deferred adjudication is a conviction if (1) the defendant enters a plea of guilty or nolo contendere or admits facts sufficient to support a finding of guilt, (2) some form of punishment is imposed (Case 3601), and (3) a conviction can be entered without a trial if the defendant fails to meet imposed conditions.
- Deferred adjudication coupled with rehabilitative treatment is a conviction. (Case 3462)
- A suspended sentence is a conviction.
- Conviction of crime with an enhanced sentence based on factors that have to be proved beyond a reasonable doubt is considered a conviction of the enhanced offense. (Case 3594)
- The crime as charged and convicted in the state court is the conviction, even if the prosecutor's charge was initially fashioned or later modified, even retroactively, to minimize immigration consequences. (Case 3610)

What does <u>not</u> count as a conviction.

- Pretrial diversion.
- Dismissal of charges with prejudice after completion of a pretrial intervention program. (Case 3103)
- Deferred prosecution.
- Conviction vacated for legal insufficiency.
  - √ But a conviction vacated solely to alleviate immigration consequences is still considered a conviction for immigration purposes. (Case 3493)
- Conviction vacated for failure of trial court to advise defendant of possible immigration consequences of a guilty plea. (Case 3525)
- Conviction of a "violation" where the burden of proof is by a preponderance of the evidence rather than beyond a reasonable doubt. (Case 3502)

The following are crimes for which a conviction mandates immigration detention under 1226(c):

- Recent aggravated felony;
- Drug crimes;
- Firearm offense;
- Prostitution;

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- Crime of moral turpitude with actual sentence of one year or more;
- Two crimes of moral turpitude;
- Two or more crimes with aggregate sentence of five years or more;
- Human trafficking; and
- Money laundering.

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What Is A Sentence?

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What is a Sentence?

For the purposes of Federal immigration law, a sentence is defined as follows. 1101(a)(48)

- A suspended sentence is a sentence.
- A sentence of probation is a conviction but not a sentence unless accompanied by a suspended sentence.
- A therapeutic court sentence is governed by rules for deferred adjudication or probation, whichever is involved.
- A modified sentence will be considered a sentence for the length as modified.

  √ A sentence of 365 days that is vacated and revised to under 365 days is not a sentence of at least one year for immigration purposes. (Case 3455)

Conviction of crime with an enhanced sentence based on factors that have to be proved beyond a reasonable doubt is considered a conviction of the enhanced offense. (Case 3594)

The following crimes require an actual sentence of one year or more to be classified as an aggravated felony to trigger deportation:

- Violent crime;
- Theft;
- Burglary;
- Forgery of an immigration document; and
- Commercial bribery, counterfeiting, or forgery, including trafficking in vehicles with altered Vehicle Identification Number.

The following crimes require a possible sentence of one year or more (365 days or more) to trigger deportation:

- Any crime, to be classified as a crime of moral turpitude.

The following crimes require a possible sentence of more than one year (366 days or more) to be classified as an aggravated felony to trigger deportation.

- Illicit drug trafficking under Federal or state law (offense must carry a possible sentence of more than one year to be classified as a felony under Federal law. (18 U.S.C. 3559)

Illegal aliens can be eligible for a sentence to probation.

- While illegal entry into the U.S. is classified as a crime, once the alien is in the U.S., continued presence as an undocumented alien is a civil offense and not a criminal offense, so illegal aliens do not violate the standard probation condition of not committing a crime by their mere presence in the U.S.

Judges may take into account Immigration consequences in determining a sentence.

- A sentence as modified by the trial court nunc pro tunc is the effective sentence for immigration purposes without regard to the trial court's reasons for the modification, even if the sentence was modified solely to affect immigration consequences. (Case 3522)

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SECTION XI

Aggravated Felony

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Aggravated Felony Primary Statutory Link 1101(a)(43)

Conviction of an aggravated felony is grounds for deportation. 1227(a)(2)(A)(ii) The following are the rules for determining whether a crime is classifiable as an aggravated felony under Federal immigration law.

Statutory Definition of Aggravated Felony 1101(a)(43)

The following crimes are specifically identified as aggravated felonies by Federal immigration law:

- Murder;
- Rape;
- Sexual abuse of a minor;
  - √ Including offenses classified as misdemeanors under state law; (Case 3476)
  - √ Indecent exposure to a child. (Case 3411)
  - √ For the purposes of this section, a minor is a child under the age of 18. (Case 3523)
  - √ Sexual abuse includes statutory rape. (Case 3523) (Case 3270)
- Violent crime with sentence of one year or more;
  - √ Statutory rape is a crime of violence, in that it carries a substantial risk of violence. (Case 3270)
- Theft or burglary with sentence of one year or more;
- Drug trafficking with sentence of more than one year;
- Sale, possession for sale, or manufacture of a controlled substance;
- Trafficking in firearms;
- Trafficking in persons;
- Dealing in stolen explosive materials;
- Demand for or receipt of ransom;
- Owning, managing, or supervising a prostitution business;
- Sexual exploitation of children;
- Racketeering as defined by 18 U.S.C. 1962;
- Money laundering if the amount exceeds $10,000;
- Tax fraud in excess of $10,000;
- Fraud with loss to victim exceeding $10,000;
- Forgery of an immigration document under 18 U.S.C. 1543 or 18 U.S.C. 1546 with sentence of one year or more;
- Crimes compromising national security or intelligence;
- Failure to appear for service of sentence where the underlying offense is punishable by imprisonment

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for 5 years or more;

- Commercial bribery, counterfeiting, or forgery, including trafficking in vehicles with altered Vehicle Identification Number, with sentence of one year or more;

- Obstruction of justice or perjury; and

- Failure to appear to answer felony charge with possible sentence of two years or more.

Conviction of an aggravated felony includes conviction of the crime itself, conviction of attempt to commit the crime, or conviction of conspiracy to commit the crime.

Of the above crimes, the following are defined as aggravated felonies if they are defined as felonies under federal law:

- Crime of violence, as defined by 18 U.S.C. 16;

- Trafficking in controlled substance, including sale, possession for sale, or manufacture, with sentence of more than one year, as defined by 21 U.S.C. 802 and 18 U.S.C. 924c;

  √ State drug convictions are aggravated felonies only if they are analogous to offenses punishable as felonies under federal drug trafficking laws. (Case 3482)
  √ Legal standards for what constitutes a Federal drug trafficking crime must be made by reference to decisions of the Circuit Court of Appeals governing the state in which the case arises. (Case 3474) (Case 3473)
  √ Two convictions of misdemeanor simple possession of marijuana do not constitute an aggravated felony. (Case 3482) (Case 3474)
  √ A conviction for simple possession is not a felony under federal law unless it can be classified as recidivism. If there is no prior drug conviction, the defendant must have admitted the recidivism or the judge or jury must have determined it in connection with the prosecution of the simple possession case. (Case 3592)

- Firearms offenses, as defined by 18 U.S.C. 921, 18 U.S.C. 922, 18 U.S.C. 924, and 26 U.S.C. 5861;

- Money laundering, as defined by 18 U.S.C. 1956, 18 U.S.C. 1957;

- Crimes involving dealing in stolen explosive materials, as defined by 18 U.S.C. 841(c), 18 U.S.C. 842, and 18 U.S.C. 844;

- Demand for or receipt of ransom, as defined by 18 U.S.C. 875, 18 U.S.C. 876, 18 U.S.C. 877, and 18 U.S.C. 1202;

- Child pornography, as defined by 18 U.S.C.2251, 18 U.S.C. 2251A, and 18 U.S.C.2252;

- Racketeering (RICO) offenses, as defined by 18 U.S.C. 1962, 18 U.S.C. 1084, and 18 U.S.C. 1955;

- Transportation for the purposes of prostitution for commercial advantage, as defined by 18 U.S.C. 2241, 18 U.S.C. 2242, and 18 U.S.C. 2243;

- Tax fraud in excess of $10,000, as defined by 26 U.S.C. 7201;

- Alien smuggling, as defined by 18 U.S.C. 1581-1585 and 18 U.S.C. 1588-1591;

- Reentry by an alien previously deported, as defined by 1325(a) and 1326;

- Forgery of an immigration document, as defined by 18 U.S.C. 1543 and 18 U.S.C. 1546(a); and

- Crimes compromising national security or intelligence, as defined by 18 U.S.C. 793, 18 U.S.C. 798, 18

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U.S.C. 2153, 18 U.S.C. 2381, 18 U.S.C. 2382, and 50 U.S.C. 421.

Rules of construction

The following are rules for employing categorical approach as opposed to a factual approach to interpreting the law. (Case 3610)

- The categorical approach looks just at the elements of the crime. Most aggravated felonies must be considered in that manner.
- The immigration court must take the crime as charged and convicted in the state court. (Case 3610)
  - √ Where the prosecutor charged the defendant with simple assault under a statute where age of the victim was not a factor, the immigration court cannot look to other facts to determine the age of the victim in order to classify the crime as one of child abuse for immigration purposes.
- The factual approach can consider facts not related to the elements of the crime to determine if the crime is an aggravated felony. Two areas where the courts have indicated that additional facts can be considered include, (1) where an amount exceeding $10,000 must be involved in the crime (Case 3585), and (2) where the crime requires that the act be for "commercial advantage" (Case 3556).

The following rules are applied for cases in Circuits where the Circuit Court of Appeals has ruled on the issue. (Case 3462)

- The Court of Appeals ruling is binding in that Circuit.
- Different rules may apply in different Circuits if rulings of the Courts of Appeal differ from one Circuit to another.
- The Immigration Court decides on its own in Circuits where no Court of Appeals has ruled.

The immigration court must accept prosecutorial or judicial decisions on charges and convictions, even if the decisions were taken in part to achieve immigration outcomes.

- Where the length of sentence is a part of the definition of an aggravated felony, the sentence as modified by the trial court nunc pro tunc is the effective sentence for immigration purposes without regard to the trial court's reasons for the modification, even if the sentence was modified solely to mitigate immigration consequences for the defendant. (Case 3522)
- The immigration court must take the crime as charged and convicted in the state court, even if the prosecutor's charge was initially fashioned or later modified, even retroactively, to minimize immigration consequences. (Case 3610)

The following are aggravated felonies for which the actual sentence must be 365 days or more. 1101(a)(43)

- Violent crime;
- Theft;
- Burglary;
- Forgery of an immigration document; and
- Commercial bribery, counterfeiting, or forgery, including trafficking in vehicles with altered Vehicle Identification Number.

What is the actual sentence?

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- A sentence of 365 days that is vacated and revised to under 365 days is not a sentence of at least one year for immigration purposes. (Case 3455)

Some examples of aggravated felonies

- Crime of violence under 18 U.S.C. 16.

  √ Stalking when under a temporary restraining order is a crime of violence. (Case 3498)

  √ Unauthorized use of a motor vehicle is a crime of violence in that it involves a substantial risk of the use of force. (Case 3514)

  √ Manslaughter in the first degree that requires intent to cause death or serious harm. (Case 3497)

- Conviction of crime of distributing an indeterminate amount of marijuana, if it contains the necessary elements to be classified as a felony under 21 U.S.C. 841 and 21 U.S.C. 846, even if classified as a misdemeanor under state law. (Case 3600)

- Theft.

  √ Taking of property without the owner's consent with intent to deprive the owner of the rights and benefits of ownership, even if not permanently, is theft. (Case 3434)
  √ Mere joyriding or other types of "glorified borrowing", is not theft with intent to deprive the owner of the rights and benefits of ownership. (Case 3434)
  √ Welfare fraud is not an aggravated felony, in that the property was not obtained without the owner's consent. (Case 3596)

- Receiving stolen property.

- Burglary.

  √ Burglary must meet the definition under Federal law to qualify as an aggravated felony. (Case 3432)
  √ Under Federal law burglary requires entry into a building or other structure, so entry into an automobile does not fall within the Federal definition. (Case 3432)

- Bribery of witness.

- Commercial bribery.

- Counterfeiting.

- Forgery of a passport, visa, or other immigration document.

  √ Falsification of a Social Security number is not an automatic ground for deportation.

- Trafficking in vehicles with altered VIN.

- Obstruction of justice.

- Perjury. (Case 3456)

- Falsifying documents or trafficking in falsified documents.

DUI Cases as crimes of violence and thus aggravated felonies

- In Circuits where the Court of Appeals has ruled on whether a DUI is a crime of violence under 18

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U.S.C. 16, that ruling holds.

- In Circuits where the Court of Appeals has not ruled, a DUI is a crime of violence only if it is committed recklessly and involves a substantial risk of use of force. (Case 3468)

Effects of conviction of aggravated felony

(1) Effect on required detention.

- Conviction of an aggravated felony results in mandated immigration detention.

(2) Effect on admissibility if the defendant leaves the country and attempts to return.

- Conviction of an aggravated felony is not automatic grounds for inadmissibility or denial of eligibility for readmission if the alien leaves the country. (Case 3449)

(3) Effect on deportation.

- Conviction of an aggravated felony is statutory grounds for deportation.

(4) Effect on eligibility for cancellation of deportation order.

- Conviction of an aggravated felony is a bar to eligibility for cancellation of a deportation order.

(5) Effect on ability to establish good moral character.

- Conviction of an aggravated felony is a bar to establishing good moral character.

Links:

- **GOOD MORAL CHARACTER**
- **WHAT IS A CONVICTION?**
- **WHAT IS A SENTENCE?**
- **INADMISSIBLE ALIENS**
- **GROUNDS FOR DEPORTATION**
- **ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER**

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SECTION XII

Conviction of Crime of Moral Turpitude

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Conviction of Crime of Moral Turpitude Primary statutory link 1227(a)(2)(A)(i)

The term "crime of moral turpitude" is not defined in 1227(a)(2)(A)(i). As a result, the following discussion is based entirely on case law from Board of Immigration Appeals decisions.

Definition from case law

- A crime of moral turpitude is one that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between persons, either to individuals or society in general.
- The crime must involve evil or malicious intent or inherent depravity.
- The statute and not the actual behavior controls: the aspect of moral turpitude must be a necessary element of the crime as defined by state statute. If a person could be convicted the crime, as defined by statute, without an aspect of moral turpitude, it is not a crime of moral turpitude.
- Where the crime as defined by statute includes both crimes that qualify as moral turpitude and crimes that do not, the record of conviction, including indictment, plea, verdict, and sentence, may be considered.
- Neither the seriousness of the crime nor the severity of the sentence is determinative of whether a crime is a crime of moral turpitude. (Case 3573)

Types of crimes that have been found to involve moral turpitude include the following.

- Crime involving intent or reckless behavior to commit great bodily harm.
  - √ Specific intent to cause physical injury or reckless behavior causing serious bodily injury must be an element of the crime. (Case 3574)
  - √ Knowing gross deviation from reasonable standard of care is reckless behavior.
  - √ Reckless behavior alone is not enough to constitute a crime of moral turpitude, unless coupled with the infliction of serious bodily injury. (Case 3285)
  - √ For an assault to be a crime of moral turpitude, there must be an aggravating factor. (Case 3285)
- Crimes involving an intent to defraud.
  - √ Theft.
  - √ Fraud.
  - √ Perjury.
  - √ Where knowledge of illegality is not required, it is not a crime of moral turpitude.
  - √ Conviction of possession of fraudulent immigration document without proof of intent to use it is not a CMT. (Case 3188)
- Prostitution.
- Possession of child pornography. (Case 3529)
- Money laundering. (Case 3553)
- Concealing a Federal felony committed by another, where there was active intent to conceal the crime and not just failure to report it, even if the offense does not rise to the level of accessory after the fact. (Case 3542)
- Trafficking in counterfeit goods. (Case 3559)

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- Willful failure to register as a sex offender. (Case 3562)

The following are rules regarding DUI cases, as determined by Board of Immigration Appeals decisions.

- Simple DUI is not a crime of moral turpitude.
- A conviction of DUI coupled with knowingly driving while license suspended or revoked due to a prior DUI conviction is a crime of moral turpitude. (Case 3423)
- Multiple convictions of simple DUI, where none of the convictions alone constitutes a crime of moral turpitude, are not considered a crime of moral turpitude. (Case 3449)

Crimes that have been found not to involve moral turpitude include the following.

- Unauthorized use of a motor vehicle. (Case 3514)
- Joyriding.
- Simple assault without intent to cause serious bodily harm. (Case 3285)
- Domestic assault is not a crime of moral turpitude if committed without intent to cause serious bodily harm, or if defined by state law to include just an unwanted or offensive touching. (Case 3537) (Case 3573)

Effect of conviction of crime of moral turpitude

(1) Effect on admissibility if the defendant leaves the country and attempts to return.

- Any crime involving the elements of moral turpitude, or attempt or conspiracy to commit such a crime, renders the person inadmissible.
- Petty offense exception 1182(a)(2)(A)(ii)(II)

  √ One conviction of a crime involving moral turpitude with maximum sentence of one year or less and actual sentence of six months or less does not make an alien inadmissible.
  √ Court looks to actual sentence imposed, not the possible sentence. (Case 3073)
  √ If imposition is suspended, the sentence is not "imposed", but if execution of the sentence is suspended, the sentence is considered "imposed". (Case 3073)

(2) Effect on deportation.

The following crimes of moral turpitude are grounds for deportation:

- Crime involving moral turpitude with the possibility of a sentence of one year or longer committed within five years of admission to the United States; and
- Any two convictions of crimes involving moral turpitude not arising from a single event.

(3) Effect on eligibility for cancellation of deportation order.

- For lawful permanent residents, conviction of a crime of moral turpitude does not serve as a bar to eligibility for cancellation of a deportation order.
- For non-permanent residents, conviction of a crime of moral turpitude is a bar to eligibility got cancellation order if it meets the requirements for deportation.

  √ Commission of a crime falling within the petty offense exception to the crime of moral turpitude does not bar a person from establishing good moral character. (Case 3490)

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(4) Effect on ability to establish good moral character.

- Conviction of a crime of moral turpitude is a bar to establishing good moral character.

Links:

- **GOOD MORAL CHARACTER**
- **WHAT IS A CONVICTION?**
- **WHAT IS A SENTENCE?**
- **INADMISSIBLE ALIENS**
- **GROUNDS FOR DEPORTATION**
- **ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER**

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SECTION XIII

Crime of Domestic Violence

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Crime of Domestic Violence Primary Statutory Link 1227 (a)(2)(E)

Conviction of a crime of domestic violence is grounds for deportation. The following are categories of crimes of domestic violence that can affect immigration status.

- Stalking. 1227(a)(2)(E)(i)
- Domestic violence. 1227(a)(2)(E)(i)
  - √ Must qualify as a crime of violence under 18 U.S.C. 16.
  - √ Must be committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected 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.
- Criminal child abuse, neglect or abandonment. 1227(a)(2)(E)(i)
  - √ The statute does not include civil child abuse and neglect.
- Violation of domestic violence protective order. 1227(a)(2)(E)(ii)

Domestic violence can also be an aggravated felony.

- A crime of domestic violence can be an aggravated felony if it meets the requirements for a crime of violence under 18 U.S.C. 16 and resulted in a sentence of one year or more.
- A domestic violence victim may be eligible for an exception to deportation for conviction of the crime of aggravated felony if the following conditions are met. 1227(a)(7)
  - √ The convicted person is a victim of extreme violence.
  - √ The convicted person was not the primary perpetrator of the violence.

Domestic violence is not automatically a crime of moral turpitude.

- Domestic assault is not a crime of moral turpitude if committed without intent to cause serious bodily harm, or if defined by state law to include just an unwanted or offensive touching. (Case 3537) (Case 3573)

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SECTION XIV

Crime Related to Controlled Substance

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Crime Related to Controlled Substance Primary Statutory Link 1182, 1227

The following crimes related to a controlled substance can serve as direct grounds for inadmissibility.

- Conviction or admission to having committed a crime relating to a controlled substance. 1182(a)(2)(A)(i)(II)

- The above is subject to the following exception. 1182(h)

  √ There is an exception for single offense of simple possession or 30 grams or less of marijuana, if (1) the offense took place more than 15 years from application for admission, the alien is not a security threat, and the alien has been rehabilitated, or (2) alien is a spouse, parent, or child of a citizen or LPR and refusal to admit would cause hardship on the citizen or LPR, or (3) the alien is a VAWA self-petitioner.
  √ If the crime is enhanced by taking place in a drug free zone, it is treated as the enhanced crime (Case 3594)

- Trafficking in a controlled substance. 1182(a)(2)(C)

The following crimes related to a controlled substance can serve as direct grounds for deportation.

- Any violation of a law relating to a controlled substance, as defined in 21 U.S.C. 802, is deportable, with an exception for possession of 30 grams or less of marijuana. 1227(a)(2)(B)(i)

  √ The exception is for simple possession, so the possession plus an added factor such as possession in a prison setting is not simple possession. (Case 3549)

- Drug abusers and addicts. 1227(a)(2)(B)(ii)

The following crimes related to a controlled substance can also be considered as an aggravated felony.

- Trafficking in controlled substance with sentence of more than one year, including sale, possession for sale, or manufacture, as defined by 21 U.S.C. 802 and 18 U.S.C. 924(c).

  √ State drug convictions are aggravated felonies only if they are analogous to offenses punishable as felonies under federal drug trafficking laws. (Case 3482)
  √ Legal standards for what constitutes a Federal drug trafficking crime must be made by reference to decisions of the Circuit Court of Appeals governing the state in which the case arises. (Case 3474) (Case 3473)
  √ Two convictions of misdemeanor simple possession of marijuana do not constitute an aggravated felony. (Case 3482) (Case 3474)
  √ A conviction for simple possession is not a felony under federal law unless it can be classified as recidivism. If there is no prior drug conviction, the defendant must have admitted the recidivism or the judge or jury must have determined it in connection with the prosecution of the simple possession case. (Case 3592)

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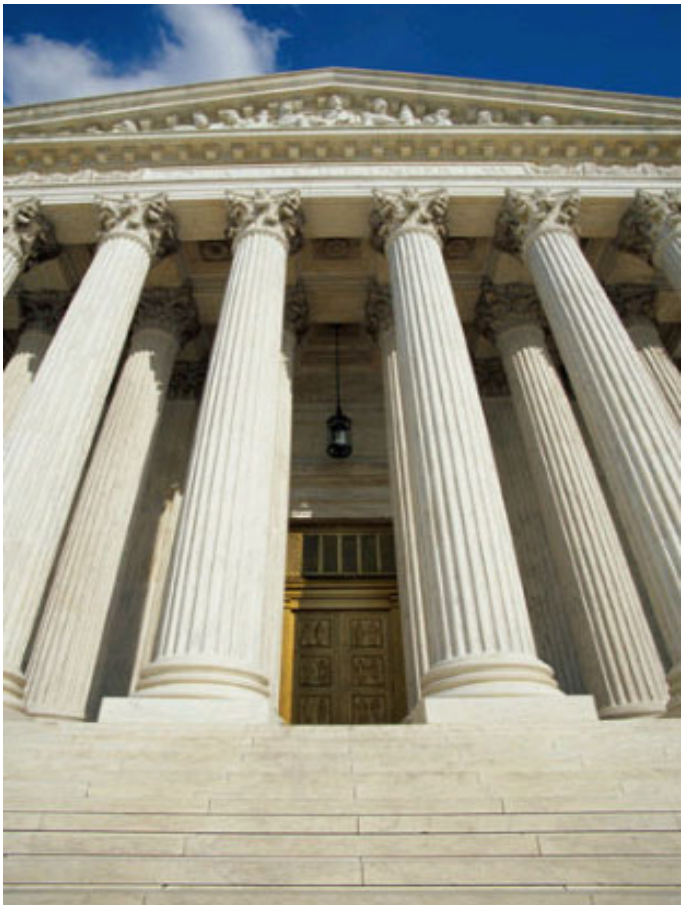
Firearm Offense



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Firearm Offense Primary Statutory Link 1227(a)(2)(C)

The following firearm offenses can serve as direct grounds for deportation.

- Purchase, sale, exchange, use, ownership, possession, or carrying a firearm or attempting or conspiring to do any of the above in violation of any law. 1227(a)(2)(C)
- The firearm offense includes use of a firearm in the commission of another crime.
- The firearm need not be actually fired to constitute a firearm offense. (Case 3200)
- The use of the firearm must be either a separate offense or a required element of the crime for which the alien has been convicted. (Case 3200) (Case 3201) (Case 3202)

  √ Where the presence of a firearm causes enhancement of sentence but is not an element of the offense for which the defendant is convicted, there is no conviction of a firearm offense for immigration purposes. (Case 3189 – sentence enhanced because a co-defendant was armed)

A firearm offense does not preclude admissibility or eligibility for adjustment of status.

- Conviction of a firearm offense is not an automatic ground for making a person inadmissible to the U.S. (Case 3191)
- Conviction of a firearm offense does not make a person ineligible for adjustment of status to lawful permanent resident. (Case 3191)

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Document Fraud

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Document Fraud

Document fraud can constitute an aggravated felony under the following circumstances.1101(a)(43)(P)

- Crime of passport forgery under 18 U.S.C. 1543.
- Crime of fraud and misuse of visas, permits, or other entry document under 18 U.S.C. 1546(a).

Document fraud can serve as a separate ground for deportation under the following circumstances. 1227(a)(3)(C)

- Conviction of violation, or attempt or conspiracy to violate, 18 U.S.C. 1546, the crime of fraud and misuse of visas, permits, or other entry document.
- Violation of civil document fraud provisions of 8 U.S.C. 1324c.
- A waiver is possible for document fraud solely to assist the offender's spouse or child gain entry. 1227(a)(3)(C)(ii)

Effects of violation of state document fraud statutes.

- The way the crime is classified under federal law is the controlling factor for immigration purposes, not how the crime is classified under state law.
- Document fraud could constitute a crime of moral turpitude if it carries a possible sentence of one year or more and intent to defraud is a necessary element of the crime.

  √ For an example of such a stature, see Minnesota Statutes 609.63 Forgery.

Using a false Social Security Number.

- This is covered by 18 U.S.C. 1028(a)(6), fraud in the production or use of identity documents.
- This crime is not automatic grounds for deportation.

Civil document fraud under 1324c serves as grounds for deportation, where the alien has knowingly done one of the following.

- Created a false document to obtain a benefit under immigration laws.
- Used, attempted to use, possessed, received, obtained, accepted, or provided to another a false document to satisfy a requirement or obtain a benefit under immigration laws.
- Used, attempted to use, provided, or attempted to provide a document issued lawfully to another to satisfy a requirement or obtain a benefit under immigration laws.
- Accepted, received, or provided a document issued lawfully to another to obtain a benefit under immigration laws.
- Prepare or assist another in preparing an application for benefits under immigration law knowing or with reckless disregard to the fact that the application was falsely made.

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SECTION XVII

Other Crimes

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Other Crimes Primary Statutory Links 1182, 1227

The following are other crimes that can provide grounds for inadmissibility.

- Illegal voting. 1182(a)(10)(C)
- Engaging in specified types of terrorist activity. 1182(a)(3)(B)
  - √ Donating to an organization classified as terrorist constitutes providing "material support" regardless of the donor's intentions for use of the funds or the intended use of the funds by the donee. (Case 3534)
- Espionage, treason, or sedition. 1182(a)(3)(A)

The following are other crimes that can provide grounds for deportation.

- Failure to register as a sex offender. 1227(a)(2)(A)(v)
- High speed flight. 1227(a)(2)(A)(vi)
- Illegal voting. 1227(a)(6)
- Engaging in specified types of terrorist activity. 1227(a)(4)(B)
- Espionage, treason, or sedition. 1227(a)(2)(D)
- Violation of the Selective Service Act. 1227(a)(2)(D)
- Illegal Travel. 1227(a)(2)(D)

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SECTION XVIII

Illegal Activity Not Requiring a Criminal Conviction

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Illegal Activity Not Requiring a Criminal Conviction

Primary statutory link 1227

The following activity can give rise to deportation without a criminal conviction. These can apply to juveniles as well as adults.

- Drug abuse or addiction. 1227(a)(2)(B)
- Alien smuggling. 1227(a)(1)(E)
- Violation of a protection order against credible threats of violence, repeated harassment, or bodily injury. 1227(a)(2)(E)(ii)
- Civil document fraud. 1227(a)(3)(C), 1324c
- Falsely claiming U.S. citizenship. 1227(a)(3)(D)
- Illegal voting. 1227(a)(6)

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