A PRACTITIONERS GUIDEBOOK

A practitioner's resource for addressing the impact of immigration in the State Courts

IMMIGRATION and the STATE COURTS

CPPS
Center for Public Policy Studies

A PRACTITIONERS GUIDEBOOK

FOR ADDRESSING THE IMPACT OF IMMIGRATION IN THE STATE COURTS

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DISCLAIMER

This document is not meant to be an in-depth treatise on immigration law, policy and practice. Nor is it intended to provide definitive answers regarding immigration rights. Immigration law is constantly changing, and the electronic statutory materials for which the Guidebook provides links may not be up to date. Furthermore, the information provided in the Guidebook is based on what was available electronically up to the date of the Guidebook.

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SECTION I

ADDRESSING THE CHALLENGES OF IMMIGRATION IN THE STATE COURTS

The Practitioners Guide is one of the key outcomes of the ongoing State Justice Institute effort to anticipate and address significant emerging immigration issues in the state courts. The following section introduces the challenges state courts face while addressing immigration and provides an outline of the sections that follow in the Practioners Guide.

Introduction

More and more, state courts across the nation are being challenged by the size and diversity of the expanding populations of both legal permanent resident and undocumented immigrants the courts must serve. As a result, fundamental notions of justice are being severely tested. This includes challenges to long-held beliefs and values about equal access to the courts, equal and consistent justice for court users, the independence of the judiciary, and the appropriate relationship between federal and state judiciaries.

Further, when combined with a lack of national consensus about immigration generally, the complexity of the challenges posed by immigration is making it especially difficult for courts to:

- assess the impacts that serving diverse immigrants are now having on them; and
- develop effective strategies for better serving all those who use the courts.

This Practitioners Guide is one of the key outcomes of an ongoing State Justice Institute effort to anticipate and address significant emerging issues in the state courts. In May 2008, to assist state courts address the impacts of immigration, the State Justice Institute launched a multi-year strategic initiative focused on:

- increasing understanding and awareness about the impacts of immigration in the state courts;
- developing and testing state and local approaches for assessing and addressing the impact of immigration in the state courts;
- enhancing state and local court capacity to improve court services affected by immigration; and
- building effective national, state, and local partnerships for addressing the impact of immigration in the state courts.

Subsequently, over the past few years under strategic initiative grants provided by SJI, the Center for Public Policy Studies (CPPS) has developed, tested, and implemented tools and approaches for addressing the impacts of immigration that could be used in courts across the nation. In particular, six types of activities have been undertaken to address the four SJI strategic priorities.

First, we are identifying the major challenges and opportunities state courts need to address when dealing with immigrants in the courts and establishing a web-based resource network.

We are interested particularly in the impacts of immigration on caseloads, court operations, resources, service delivery and overall performance. Our goal is to provide systematic, comprehensive documentation of the issues and challenges facing state courts in delivering services to immigrants.

There is a substantial body of literature that discusses immigration issues generally but not how those issues affect courts and court services. Also, while there have been numerous stories from individual courts that illustrate the challenges they face in serving this population, there have not been comprehensive compilations of what those challenges are or how courts have addressed them. To address this gap, we have been and will continue to gather and summarize information from numerous sources to inventory immigration issues and how those issues affect or may affect the state courts.

The types of resources we have prepared and will expand upon in the coming months include brief articles for the State Justice Institute monthly newsletter, longer articles for the Court Manager, Judges Journal and other publications targeting judges and court practitioners, as well as interactive-electronic bench books, step-by-step court improvement guides, and training curriculums. Further, we have established an extensive immigration and the state courts website directed at court and justice system practitioners. Over the coming years, we will expand

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the website's capacity to include web-based training programs, and links to immigration experts, as well as access to written resources.

Second, we are working with eleven diverse court jurisdictions to learn first hand what challenges they face in addressing the needs of immigrant populations that use the courts and how to best address those challenges.

To date, the eleven learning sites have been the Maricopa County Superior Court (Phoenix, Arizona), Florida's Eleventh Judicial Circuit (Miami-Dade County, Florida), and the Eighth Judicial District of Minnesota (rural Western Minnesota), the State of Delaware Courts, the District and Circuit Courts in seven counties located in South-Eastern Michigan, the State of Michigan Courts, the State of Washington Courts, the State of New Jersey Courts, the municipal, district, and superior courts of Pierce County Washington, the Courts of the 18th Judicial District of Colorado, and the Courts of Harris County (Houston) Texas. We anticipate adding at least five more learning and technical assistance sites over the next few years.

The learning sites have been and will continue to be selected for their known concerns about how immigration is affecting court services in their jurisdictions, the diversity of the immigrant populations they serve, and geographic location. The purpose of working with the sites is to identify the range of issues they have encountered in providing services to immigrants, what impacts those issues have had on the courts, how the courts have responded, what tools/processes they believe would help them deal with immigration issues going forward, and what actions they are going to take to respond in the future.

Third, we have prepared two electronic, interactive, bench guides for judges. The first guide addresses the practical implications of state court criminal case processing involving immigrants. The second addresses the nexus of federal immigration status and family, juvenile, and dependency case processing.

The criminal bench guide draws on all of the research conducted in this project and the experiences of the judges in the pilot sites. A partial contents list of the criminal case processing and immigration bench guide includes:

- bail decisions;
- decisions regarding eligibility for and conditions of probation;
- taking guilty pleas and the effects of guilty pleas on immigration status;
- evidentiary issues, including the admissibility and use of immigration status;
- intersections of Federal and state laws;
- the impact of foreign laws;
- confidentiality and access of governmental officials to trial information; and
- required notification to Federal officials.

The family, juvenile, and dependency case processing bench guide covers all types of family and juvenile cases that intersect with immigration law, including:

- divorce, alimony, child support, custody, and visitation;
- domestic violence;
- civil protection orders;
- juvenile delinquency;
- dependency; and
- guardianship.

For the above case types, the bench guide includes the following topics:

- immigration rights that can be affected by state court actions, including:

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- ✓ eligibility for naturalization;
- ✓ eligibility for lawful permanent resident (LPR) status;
- ✓ eligibility for special immigrant juvenile status (SIJS);
- ✓ eligibility for cancellation of a removal order;
- ✓ voluntary removal; and
- ✓ eligibility for refugee or asylee status.

- immigration issues that may affect a family or juvenile court decision, including:

  - ✓ effects of possible removal of a spouse/parent on decisions regarding alimony, custody, and child support;
  - ✓ effects on dependency cases of parents being held in ICE custody;
  - ✓ eligibility for benefits or services;
  - ✓ ability to work and pay alimony or child support;
  - ✓ ability to meet conditions imposed for custody in a divorce case or return of a child in a dependency case;
  - ✓ ability to meet conditions imposed in protection orders; and
  - ✓ U.S. Department of Health and Human Services requirements for unaccompanied alien children in dependency cases.

Fourth, we are preparing and periodically updating this interactive electronic Guidebook for Addressing the Impacts of Immigration in the State Courts that can be used in courts across the nation.

Fifth, we are developing and conducting courses for judges and court personnel for addressing the impacts of immigration in the state courts and establishing and coordinating a nation-wide training network.

Although we have designed the training to be flexible to meet local needs, the focus of judge training includes general information about the nexus of federal, state, and local immigration law, policy, and practice and the practical implications of these connections on criminal, family, juvenile, and dependency case processing. The court personnel course stresses understanding the scope and consequences of immigration on a trial court and identifying and implementing improvements. The contents of the courses are built around the criminal and family bench guides and the guide for court administrators described above.

Moreover, to promote the effective use of the immigration and state courts courses by court training and support organizations across the nation, we are working with a variety of organizations to establish an immigration component as part of their educational programs. Among others, participants will include the National Council of Juvenile and Family Court Judges, the National Judicial College, the National Association for Court Management, and the National Association of State Judicial Educators. We are also identifying potential faculty and establishing a network of faculty capable of teaching about immigration and the state courts.

Sixth, we are helping to establish and facilitate an ongoing federal/state dialog to promote better collaboration between federal and state courts and justice organizations when addressing immigration issues that affect the state courts.

This dialog is especially important now as broader national immigration reform is contemplated. As noted previously, we have prepared numerous materials about the nexus of federal, state and local immigration law, policy, and practice. The topics addressed have been far reaching, encompassing everything from the connections among criminal, family, and, juvenile law and policy to the impacts of immigration on caseloads, court operations, resources, service delivery and performance measurement.

Expanding on this foundation, we are producing comprehensive materials that examine how the work of the state courts in cases involving immigrants could be enhanced substantially by collaborating more closely with

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the numerous local and state justice partners and federal organizations involved in immigration matters. This includes Immigration and Custom Enforcement (ICE), the Department of Housing, the Department of Health and Human Services, the federal judiciary, the federal immigration courts, federal corrections and probation, and other U.S. Department of Justice units.

In addition, these publications will examine the items that need to be addressed as part of any comprehensive federal immigration reform effort. The focus here will be on how to accommodate the needs of the state courts while serving the needs of immigrants in state courts, and complying with federal immigration law.

Figure I-1 provides a description of the eleven learning site court jurisdictions and the communities they serve.

Guidebook Purpose, Navigation, Contents and Organization

Purpose

The purpose of this Immigration and the State Courts Practitioners Guide is to provide practical information and tools to help trial courts determine the impacts of immigration on court caseloads, policy, operations, and practice, and develop responses for improving court performance in cases involving both lawful and illegal immigrants.

In particular, the Guide is designed for use by court practitioners who want to obtain the knowledge, skills, and tools required to:

- understand the size, composition, and needs of immigrant populations in the court;
- understand the connections between federal, state, and local immigration law, policy, and practice and the implications of these connections on court structure and operations;
- address the multiple aspects of culture that routinely accompany immigration;
- implement long-lasting improvements for better serving immigrants in court;
- monitor court effectiveness in serving immigrants in court; and
- help to build a national courts agenda for improving court and justice system capacity for addressing the impacts of immigration on the state courts.

Navigation

The contents of this Guide are structured around finding answers to the following four essential questions about immigration and the state courts:

- Why Should Court Administrators Be Concerned About Immigration?
- What Are the Major Impacts of Federal Immigration Law, Policy, and Practice on the State Courts?
- How Can State Court Actions Affect Immigrants In Ways That Differ From Other Litigants?
- What Types of Improvements Are State Courts Making to Address Immigration Concerns?

In particular, Figures I-2 through I-5 provide access to detailed resources for addressing each of the four essential questions. Words or phrases included in Figures I-2 to I-5 that are in red are clickable links to specific topical sections of the Guide. Web links to additional resources are in blue throughout the document. Moreover, a glossary of immigration terms and concepts can be accessed by using the "glossary" link at any point in the document.

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Figure I-1: Why Should Court Administrators Be Concerned About Immigration?

- There are numerous and increasing numbers of immigrants involved in the state courts.
- Providing court services for immigrant litigants and their families challenges fundamental notions of justice, and adherence to traditional court values.
- The presence of immigrant populations has numerous implications on court operations.
- State court action can affect the ability of both legal permanent resident and unauthorized immigrants and their families to remain in the United States, become US citizens, and be readmitted to the US.

Figure I-2: What Are the Major Impacts of Federal Immigration Law, Policy, and Practice on the State Courts?

In the **criminal** arena, some of the problems that immigration issues can cause for local law enforcement, prosecution, courts, jails, and probation, include difficulties in:

- Identifying individuals who have under different names, particularly for flagging multiple offenders;
- Determining when to use citation and release rather than arrest;
- Determining eligibility and conditions for pretrial release;
- Dealing with language issues at all stages of the court process;
- Scheduling preliminary hearings, plea hearings, and trials;
- Determining eligibility for probation and court services;
- Setting probation conditions that can be met by immigrants and illegal aliens;
- Tracking individuals who fail to appear for trial or probation appointments due to immigration holds;
- Finding rehabilitative services for immigrant defendants, especially services for illegal aliens; and
- Obtaining the testimony of witnesses who are reluctant to come forward due to fears of immigration consequences.

In the **civil and family** arenas, some of the problems that immigration issues can cause for courts, social service agencies, and treatment providers include:

- Determining custody of children of immigrant parents who are at risk of removal, both immigrant children and children who are natural-born American citizens;
- Achieving the best interests of the child in dependency cases;
- Providing family counseling and other treatment services for families;
- Providing counseling and treatment services for juveniles;
- Determining workable alimony and support;
- Creating a record of findings in dependency cases that are sufficient to support an application for Special Immigrant Juvenile Status;
- Setting achievable conditions for family reunification and return of children placed out of the home;
- Providing financial assistance, food stamps, medical services, mental health services, and other types of family assistance;
- Providing services in different languages; and
- Providing services geared to different cultures.

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Figure I-3: How Can State Court Actions Affect Immigrants In Ways That Differ From Other Litigants?

Criminal Law and Practice

- State court criminal arrests can trigger actions that may jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- State court felony and misdemeanor criminal convictions can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- State court criminal sentences can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- Federal immigration law can consider state court suspended sentences, as well as imposed sentences, in immigration decisions.
- Participation in state court drug courts and other therapeutic approaches can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- There are numerous federal immigration laws that provide a path to legal status for unauthorized immigrant victims of crimes, such the Violence Against Women Act, Battered Spouse Waivers, U Visas for cooperation with authorities in criminal cases, and T Visas for victims of severe forms of human trafficking.

Family and Juvenile Law and Practice

- A marriage must be bona fide to confer conditional permanent resident status.
- Divorce can affect conditional permanent residence status.
- Divorce can have an impact on Violence Against Women Act self-petitioners.
- Divorce may affect a stepchild's eligibility for immigration benefits.
- Noncitizens who violate some kinds of civil or criminal protection orders can be removed from the U.S.
- To greatly simplify adoption, immigrant children should be adopted before they are 16 years of age.
- There are many immigration implications surrounding sibling adoptions and orphans.
- Kinship care can be complicated by immigration status.
- Child custody and child support can be complicated by immigration status.

Civil Law and Practice

- Dealing with mentally or physically ill individuals in state court may be complicated because mental illness, and some forms of communicable diseases can jeopardize immigration status.
- State laws may limit civil damages for unauthorized immigrants.
- Applications for name changes may be complicated by immigration status.
- Tenant and housing status may be complicated by immigration status.

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Figure I-4: What Types of Improvements Are State Courts Making to Address Immigration Concerns?

Currently state court systems and trial courts participating in the CPPS Immigration and the State Court Initiative are:

- revamping state trial court records preparation and management practices to include criminal and family law case information in formats that could be used readily in concurrent or subsequent federal immigration proceedings;
- working with justice partners to increase access to interpreters early in the justice processes to assure that non-English speaking litigants have an opportunity to assess whether their immigration status might be a factor in their case before the state court;
- working with defense counsel and prosecutors to assure that the implications of immigration status are well known throughout the legal community;
- addressing the complicated interplay among immigration status and eligibility for the types of local, state, and federally funded services often associated with state court cases, such as substance abuse and mental health treatment, parenting assistance, and medical assistance for children;
- establishing information links between court and justice agency litigant assistance services and resources for immigrants such as national consulates and legal and family support organizations;
- establishing mechanisms for locating the family members of individuals involved in state court cases;
- redesigning self-help services that assist litigants to self-identify whether their or a family member's immigration status might be a factor in their state trial court case;
- working with state and federal justice partners to improve communications with ICE so that state court and local detention officials can determine quickly if state court litigants are in Immigration and Customs Enforcement custody or have been removed from the country and thus are no longer able to meet state court requirements, such as appearances for hearings, and other probation conditions;
- revamping plea acceptance practices to assure that defendants have been advised of the immigration consequences of their plea;
- preparing training materials and establishing education programs throughout the court to assure that judges and court personnel are aware of the connections between immigration status and criminal, family, and juvenile case processing; and;
- working with the Center for Public Policy Studies to establish a federal/state dialog to promote collaboration between federal and state courts and justice organizations when addressing immigration issues that affect the state courts.

Contents and Organization

Chronologically, the Guide continues in Section I with a description of a comprehensive framework and approach for addressing immigration in the state courts. The components of the framework examined in detail include the:

- factors shaping the immigration-related needs and demands on the state courts;
- strategic goals and values that might accompany state court processing of cases involving immigrants;

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- key policy issues courts need to address regarding the intersection of federal and state law involving immigrants;
- court work processes and procedures with potential immigration status consequences;
- potential desired outcomes of cases involving immigrants, such as finality; and
- court and justice system infrastructure needed to support adequately case processing in cases involving immigrants.

The glossary of essential immigration terms and concepts appears at the end of this section.

Examined next in Section II are the:

- size, diversity, composition, and distribution of the current legal permanent resident and undocumented immigrant populations in the U.S.; and
- the role and impact of immigrants on the economy.

Section III addresses the:

- complexity of the challenges posed by immigration in the state courts by inventorying the numerous points of intersection among federal, state, and local immigration law, policy and practice;
- how the challenges posed by immigration in the state courts test fundamental notions of justice, such as equal access, equal and consistent justice, judicial independence, and the independence of the state judiciary from the federal and state executive and legislative branches; and
- operational implications of immigration on the state courts.

Section IV focuses on immigration issues in juvenile and family case processing and, following a brief section introduction, examines;

- aspects of immigration law that may affect child custody and placement;
- aspects of immigration law that may affect eligibility to work;
- aspects of immigration law that may affect eligibility to meet probation conditions or eligibility for benefits of services;
- good moral character;
- inadmissible aliens;
- grounds for removal;
- eligibility for cancellation of a removal order;
- aggrevated felony;
- conviction of a crime of moral turpitude
- crime of domestic violence;
- illegal activity not requiring a criminal conviction.

Section V examines immigration issues in criminal case processing including:

- why state court criminal cases are important in immigration matters;
- the implications of Padilla V. Kentucky and the courts' responsibility to assure that defendants are advised about immigration consequences;
- the judge's ability to consider immigration consequences;
- intersecting with the ICE process;
- categories of foreign born status;
- good moral character;
- inadmissible aliens;
- grounds for removal;
- eligibility for cancellation of a removal order

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- what is a conviction;
- what is a sentence;
- aggrevated felony;
- conviction of a crime of moral turpitude;
- crime of domestic violence;
- crime related to a controlled substance;
- firearm offense;
- document fraud;
- other crimes; and
- illegal activity not requiring a criminal conviction.

Finally, Section VI inventories state court efforts to address the impacts of immigration including:

- promising approaches now being tried in courts across the nation;
- how to measure and monitor the impacts of immigration on the courts and monitor progress in adequately serving immigrants in court; and
- items that likely should be included in an ongoing dialog between the state courts and federal agencies involved in immigration in order to advance the interests of the state courts.

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Section I-B: A Framework for Addressing the Impacts of Immigration on the State Courts

In this section we describe a framework that includes a set of concepts and vocabulary designed to help courts think and communicate about how federal, state, and local law, policy, and practice might affect the work of the court and how the court can improve services for addressing the needs of immigrants. Also, note that worksheets based on the framework designed to help courts address their specific immigration related needs can be obtained by clicking on the "framework worksheets" link.

The structure of the framework for addressing immigration in the state courts presented in Figure I-6 stresses that state courts need to:

- understand the numerous factors shaping the immigration related needs and demands on the courts;
- have a clear, commonly shared set of goals and values regarding how immigrants should be served by the courts;
- have a clear commonly shared understanding of the desired outcomes of state court case processing of cases involving immigrants;
- have reached agreement among court policy-makers about the extent to which the court should (a) assure procedural justice for immigrants, (b) minimize the unintended consequences on federal immigration status on state court action, (c) assist the federal government in regulating immigration, and (d) provide services to immigrants;
- be clear about how the needs of immigrants and the complexities of federal immigration law, policy, and practice affect the numerous work processes used in criminal, civil, family, juvenile, and probate case processing; and
- provide court and justice infrastructure that supports effective case processing in cases involving immigrants.

Moreover, there are a variety of assumptions about the relationships among the five key components built into the framework for addressing immigration in the state courts. Specifically, the logic of the framework stresses that immigration related needs and demands on the courts need to be accounted for in the strategic goals and values and other aspects of the strategic direction established by the courts when addressing immigration related issues. In turn, the characteristics of work processes should reflect the court's chosen strategic direction and work processes should result in well-articulated desired outcomes. The framework also stresses that both inter-organizational justice system and court specific infrastructure should support work processes and reflect fundamental strategic goals and values.

In particular, immigration related needs and demands on the courts are shaped by a variety of factors. For example, the size of the immigrant presence in a state trial court is shaped by a variety of global, national, state and local economic, demographic, social, and policy trends such as:

- Labor force trends.
- Population aging trends of the native born U.S. population, including aging of the baby-boom population.
- Industry location trends, such as the location of key industries that depend heavily on immigrant labor, such as food processing, farming, ranching, construction, computer science, hospitality, and the medical industry.
- Trade and labor force regulation trends.
- Refugee resettlement policies and practices.
- Immigration enforcement policies and practices.

Also, the immigration related needs and demands on the courts are shaped by the intersections of federal, state, and local immigration law, policy, and practice shaping immigrant legal status in state courts, such as:

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- Federal voluntary removal practices.
- Citizenship eligibility law and practices.
- Document fraud law and practices.
- Service eligibility law and practices.
- Pre and post-conviction detention practices.
- Sentencing practices.
- Local/state court level prosecutorial charging practices.
- Plea acceptance practices.
- Law enforcement citation and release practices.

Moreover, the immigration related needs and demands on the courts are shaped by the capacity of immigrants to use the state courts, such as:

- language-based capacity, including English and other language skills, and literacy;
- culture-based capacity, such as gaps between court system and litigant assumption and beliefs about motivations for change, how to structure activity, gender roles, illness, discipline, contrition, authority, respect, and change, and;
- mistrust and fear of authority by immigrants of government personnel including justice system and court personnel.

With regard to strategic direction, perhaps the biggest challenge to addressing the impacts of immigration on the state courts is the current lack of either clear policy direction or shared values about the role of state courts in immigration matters or how immigrants should be treated in state courts. Our experience to date has been that courts typically have not articulated a set of values or policies regarding case processing involving immigrants. Moreover, we have seen that in many jurisdictions there is disagreement among court personnel about what these values and policies might be.

At the same time, court participants in the CPPS Initiative routinely report that there needs to be court-wide agreement about values and policies because without agreement, judges and staff fall back on their personal values, create their own policies, and, as one result, decisions and practices which should be uniform vary greatly from individual to individual. The lack of well articulated values and policies is particularly difficult for court personnel who deal directly with clients, such as litigant assistance personnel, family court staff, dependency and juvenile court staff, treatment providers, and pretrial release and probation staff.

Moreover, the lack of a clearly articulated court-wide strategic direction is especially difficult for line staff when working with individuals who have self-identified or been identified by other justice and human service organizations as undocumented immigrants or who are family members in unauthorized households that include undocumented immigrants.

For example, to date few courts have addressed questions regarding the extent to which the following values should accompany the processing of cases involving immigrants in state courts.

- Transparency – assure that the decisions made and work processes used in matters involving immigrants are apparent and understandable to litigants and local, state, and federal court and justice partners.

- Cost-Effective Service Provision – assure that federal, state, and local court and justice system law, policy, and practice are coordinated.

- Timeliness – exchange information across and among local, state, federal agencies, link litigants

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with interpreters and other resources, and complete case events in concert across agencies to assure expedient case processing.

- Equal Access and Consistency – provide access to needed defense, litigant assistance, treatment, language, and other services for all who use the courts, regardless of their ethnicity, income, education, or immigration status.

- Comprehensiveness – provide a range of forums and services to address the potentially multiple needs of all court users, including immigrants and their families.

- Culturally Appropriate – provide services that help all those who use the courts to navigate the courts and justice system successfully, process information, make wise decisions, and understand and comply with court orders.

Similarly, with regard to polices, our experience to date has revealed that there is likely little agreement in most jurisdictions about what should be the extent of state court efforts to:

- Adjudicate cases involving undocumented/illegal immigrants

  - ✓ Should undocumented immigrants be taken into custody and potentially be removed from the U.S. by Immigration and Customs Enforcement (ICE) at any point prior to state court case disposition?
  - ✓ Should undocumented immigrants be taken into custody and potentially be removed from the U.S. by ICE post-sentencing or after they have completed all or a portion of a sentence?
  - ✓ Should child protection and juvenile cases involving undocumented family members and violence against women cases be processed any differently than cases involving lawful permanent residents and U.S. citizens?

- Assure procedural justice for immigrants. Should the courts promote:

  - ✓ Respect and understanding – the extent to which lawful and undocumented immigrants are treated with dignity and understand what is happening in court?
  - ✓ Voice – the extent to which lawful and undocumented immigrants are given a chance to be heard?
  - ✓ Trust – the extent to which judges and court staff provide the impression that they care about lawful and undocumented immigrants needs?
  - ✓ Neutrality – the extent to which judges can instill confidence that they are treating lawful and undocumented immigrants fairly?

- Minimize the unintended consequences of state court actions, in part by assuring that state court judges and personnel understand the consequences of state court decisions on immigration status.

- Assist the federal government in regulating immigration. Should the courts:

  - ✓ Provide state court case information in formats that can be used in co-occurring or subsequent federal immigration case processing?
  - ✓ Check litigant immigration status?
  - ✓ Report suspected undocumented immigrants?

- Provide services to immigrants. Should the state courts provide both lawful and undocumented immigrants needed state court case processing services, sanctioned treatment, and other services at the same levels available to non-immigrant court users?

The third component in the assessment framework, work processes and procedures with immigration status

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consequences, focuses on the implications for case processing for immigrants. For example:

- state laws may limit bail eligibility for undocumented immigrants in some types of cases and thus bail determination processes might be altered;
- federal pre-hearing detention or release practices might interfere with access to immigrant litigants also involved in state court cases, such as the parents involved in child protection and juvenile cases;
- immigration status may interfere with immigrant litigant access to services and thus eligibility processes might be complicated;
- defense and interpreter assignment practices might need to be altered to link immigrant litigants with justice professionals earlier in case processing than is the usual practice; and
- court records processes might need to be altered to include information elements typically required in concurrent or subsequent federal immigration court matters.

The desired outcomes of court and justice system action in cases involving immigrants makeup the fourth component in the framework. In most jurisdictions, these outcomes likely should include:

- Closure -- Cases Involving Immigrants Are Completed. Lawful and undocumented Immigrants receive needed services, including immigrant offenders, victims, children and juveniles, small claims and other civil court users, conservatees, and wards in cases of guardianship. Service examples include:

  - ✓ Litigant assistance.
  - ✓ Probation services including domestic violence, substance abuse and other treatment services attached to probation.
  - ✓ Participation in victim restoration and other community programs.
  - ✓ Child protection services.
  - ✓ Medical and mental health treatment services, especially for children.
  - ✓ Victim protection services.

- Immigrants Comply With Court Orders. Examples include immigrants:

  - ✓ attending treatment services and meeting other conditions for probation;
  - ✓ making restitution payments and other victim compensation;
  - ✓ attending parenting, domestic violence, and other courses; and
  - ✓ serving state court sentences.

- Harm to Individuals and Community is Reduced.

  - ✓ Recidivism is reduced within immigrant communities.
  - ✓ Individuals change destructive behavior, such as substance use.
  - ✓ Individuals within immigrant communities report crime and assist law enforcement, such as serving as witnesses, and report to authorities when harm is observed such as domestic violence or child abuse.

Finally, a variety of hard and soft court and justice infrastructure for effectively supporting cases involving immigrants are included in the final component of the framework. The inventory presented in Figure I-7 provides examples of critical infrastructure needed for supporting case processing in cases involving immigrant litigants.

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FIGURE I-7

Figure I-7
Types of Infrastructure Required to Support Court Service Delivery in Cases Involving Immigrants

Technology

- Information systems for determining the identities of immigrants.
- Management information systems capable of exchanging information about identity, litigant location, and case status among local, state, and federal agencies.
- Multi-system-wide case tracking technology.
- Valid, best-practice based, and readily accessible assessment and treatment tools that are applicable to immigrant populations.
- Management information systems that share definitions, standards and guidelines across local, state, and federal agencies.

Equipment

- Accessible and well maintained multi-systems hardware and software.

Facilities

- Accessible, dispersed, community-based facilities.
- Sufficient space for co-locating local, state, and federal system partners throughout communities.

Budgeting and Finance

- Sufficient, predictable, and stable resources for providing litigant assistance, treatment and other services for immigrants.
- Flexibility to change during a budget cycle and over the long term to meet changing demands and needs including increasing resources and modifying expenditures as needed in light of changes in the size of immigrant populations.
- Budget, service procurement, and other business processes that encourage health care, treatment, detention, probation, and other resource sharing across local, state, and federal agencies and organizations.
- Fiscal processes that allow flexible use of funds, moving resources across agencies and organizations when needed.
- Funding set aside for multi-system-wide innovation and improvements.
- Predictable long-term financing that permits long-term system and multi-system budgeting and planning.
- Resources available to track decision outcomes across multiple agencies.

Planning

- Operational planning to ensure consistent responses across agencies and personnel.
- Multi-system wide, long-range, and operational planning to create linkages among agencies.

Policy Making and Dispute Resolution

- Capacity to address disputes among federal, state, and local court and justice agencies.
- Policy is based on research, national practices, and best practices.
- A decision making structure at the multi-system leadership level that is educated on the roles of all system partners.
- Policies for establishing and maintaining consistent decision-making practices across agencies and organizations.
- Transparent decision-making processes.

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Figure I-7
Types of Infrastructure Required to Support Court Service Delivery in Cases Involving Immigrants

Staffing/Training

- Multi-system, federal, state, and local training of all the personnel involved in case processing involving immigrants.
- Cultural competency training.
- Training about specific tools such as assessment and evaluation tools designed for immigrant populations.
- Capacity to cross train staff through coordination of staff development efforts.
- Staff available with decision-making authority to help litigants and families navigate successfully through multiple systems.

Communications and Coordination

- Timely access to information across agencies about cases involving immigrants.
- Capacity to communicate the results of assessments and evaluations with appropriate personnel across multiple systems.
- Capacity to track case progress within and across agencies and systems.
- Capacity to monitor caseloads across agencies and systems.
- Shared case management planning that addresses the multiple needs of litigants, children, families, and meets the mandates of system organizational partners.
- Development of multiple system-wide performance measurements for both processes and outcomes.

Leadership and Management

- Multiple system-wide and agency leaders to: (1) establish a long-term strategic direction for systems as well as individual agencies and organizations regarding immigration policies and practices; (2) develop long-term system capacity to provide services; (3) establish and monitor inter-agency, multi-system infrastructure for supporting services; (4) establish and maintain effective inter-organizational work processes; (5) monitor multi-system performance; and (6) work cooperatively to establish a strong fiscal foundation for ongoing service delivery.
- Capacity to work across multiple systems and agencies collaboratively and proactively.
- Capacity of the interagency management structure to ensure fair workload distribution.

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Immigration Framework

Immigration Related Needs and Demands on the State Courts

Factors Shaping the Size of the Immigrant Presence In State Courts.

- Economic, demographic, policy, and social trends that influence the numbers of immigrants who will use the state courts.

Factors Shaping the Legal Status of Immigrants in State Courts.

- Intersections of federal, state, and local immigration law, policy, and practice.

Factors Shaping the Capacity of Immigrants to Use the State Courts.

- Language based capacity.
- Culture based capacity.

Strategic Direction

Strategic Goals and Values (Examples)

- Transparency
- Cost-Effective Service Provision
- Timeliness
- Equal Access
- Comprehensiveness
- Consistency
- Culturally Appropriate

Strategic Policy Questions

What should be the extent of a state court's efforts to:

- Adjudicate Cases Involving undocumented/illegal immigrants?
- Assure Procedural Justice For Immigrants?
- Minimize the Unintended Consequences of State Court Action?
- Assist the Federal Government in Regulating Immigration?
- Provide Services to Immigrants?

Work Processes and Procedures With Immigration Status Consequences

Criminal Cases

- Pretrial Release and Bail Eligibility
- Pretrial Detention
- Initial Appearances
- Defense Assignment
- Charge Determination
- Plea Acceptance
- Sentencing
- Interpreter Assignment
- Probation and Other Service Eligibility

Family, Juvenile, Dependency, Civil Cases

- Juvenile, Family, and Dependency Case Processing Generally
- Content of Family Matter Consent Decrees
- Children and Family Service Eligibility
- Guardianships
- Unlawful Detainers

Traffic and Infractions

- Drivers Licenses
- Proof of Insurance
- Fine Payment

Outcomes

Closure – cases involving immigrants are completed.

Immigrants receive needed services, including immigrant:

- Offenders
- Victims
- Children and Juveniles
- Small Claims and Other Civil Court Users
- Conservatees
- Wards (Guardianships)

Immigrants comply with court orders.

Harm to individuals and community is reduced.

Court and Justice System Resources and Infrastructure

Technology	Facilities	Staffing and Training	Communication and Coordination	Performance Monitoring
Equipment	Management	Budgeting	Planning	Resolution

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Glossary of Key Terms In Federal Immigration Law

Aggravated Felony

An aggravated felony is a crime that falls under the definition specified by Federal immigration law. Conviction of an aggravated felony makes a lawful permanent resident deportable. The mere classification of a crime as an aggravated felony by state law does not make it an aggravated felony for purposes of Federal immigration law. Federal immigration law specifies a lengthy list of crimes that constitute aggravated felonies. Most violent crimes are included, such as:

- Murder;
- Rape
- Sexual abuse of a minor;
- Burglary with a sentence of one year or more;
- Theft with a sentence of one year or more; and
- Any other crime with an element of physical force with a sentence of one year or more.

Some state law misdemeanors qualify as aggravated felonies for immigration purposes, if the sentence imposed is one year or more. Some examples include misdemeanor assault, menacing, coercion, reckless endangerment, unlawful imprisonment, offensive touching, and theft. Conviction of an aggravated felony can make a non-citizen removable, ineligible for cancellation of a removal order, and ineligible for naturalization as a U.S. citizen.

Alien

An alien is any person who is not a citizen or national of the United States. This includes people with a wide range of statuses, including lawful permanent residents, tourists, students, diplomats, certain workers, refugees and aslyees, and unauthorized immigrants.

Asylee (See also Refugee)

An alien may qualify for asylee status if the individual has a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion if returned to the home country or country of last permanent residence. 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. An asylee is eligible to apply for lawful permanent resident status one year after admission to the U.S. Technically, refugee status is adjudicated while the individual is outside the U.S. while asylee status is adjudicated while the individual is in the U.S.

Citizen (See also National)

A U.S. citizen is an individual who has full rights of participation in all political arenas. An individual can become a citizen by birth in the United States or Puerto Rico (or Guam in some cases), by having U.S. parents or grandparents, or by naturalization. A U.S. citizen cannot be deported or removed.

CIS

See Citizenship and Immigration Services.

Citizenship and Immigration Services (CIS or USCIS)

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The U.S. Citizenship and Immigration Services is the division of the Department of Homeland Security that adjudicates application for immigration benefits, including applications for naturalization, permanent residence, refugee or asylee status, work authorization, and any other changes in immigration status.

Conditional Permanent Resident

Conditional permanent residents include alien spouses and their children who applied for lawful permanent resident status based on a qualifying marriage to a citizen that occurred less than two years before entry as a conditional resident. 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 and CIS has removed the condition.

Conviction

Under Federal immigration law a conviction is: (1) a formal judgment of guilt by a court through trial or plea; or (2) if adjudication has been withheld, admission by the alien of facts in court sufficient to warrant a finding of guilt, accompanied by imposition by a judge of a punishment, penalty, or restraint on liberty.

Conviction of specified crimes may make an alien deportable, inadmissible, or ineligible for naturalization.

A conviction of juvenile delinquency does not constitute a conviction of a crime under Federal immigration law.

Crime Involving Moral Turpitude

There is no definition of crime involving moral turpitude in the Federal immigration statutes, so the following definition comes from case law. Case law defines a crime involving moral turpitude as 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 fraud, evil or malicious intent, or inherent depravity.

Some crimes classified as misdemeanors under state law, and thus considered as relatively minor crimes, may still be considered a crime involving moral turpitude for Federal immigration purposes. For example, any crime that involves an element of fraud can be a crime involving moral turpitude, so that some minor crimes such as petty theft or fraud can be a crime involving moral turpitude. Other misdemeanors that may qualify as crimes involving moral turpitude include perjury and prostitution.

Conviction of a crime involving moral turpitude may make a lawful permanent resident removable, inadmissible, or ineligible for naturalization.

Customs and Border Protection (CBP)

Customs and Border Protection is the division of the Department of Homeland Security responsible for inspecting persons entering the U.S. at border points of entry. CBP has the power to order a person removed without a hearing before an immigration judge if the person is inadmissible for lack of proper documentation or fraud.

Board of Immigration Appeals

The Board of Immigration Appeals hears appeals from the Immigration Courts and appeals from decisions of the USCIS on applications for immigration benefits. It is a division of the U.S. Department of Justice.

Deportable Alien (See also Removal)

A deportable alien is an alien who is subject to removal from the United States under Federal immigration law.

Executive Office of Immigration Review (EOIR)

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The Executive Office of Immigration review is a division of the U.S. Department of Justice. The office includes the Immigration Courts throughout the country, which determine whether non-citizens are inadmissible or deportable and consider applications for discretionary relief from removal orders, and the Board of Immigration Appeals, which hears appeals from the Immigration Courts and appeals from decisions of the USCIS on applications for immigration benefits.

Family-Sponsored Visa

Family-sponsored visas are visas for admission as a lawful permanent resident for family members of U.S. citizens and lawful permanent residents. The preferences and numerical limitations for admission are determined by the status of the sponsoring family member (relatives of U.S. citizens have priority over relatives of lawful permanent residents) and the degree of connection to the sponsoring family member. Overall, about 80% of all legal immigration into the U.S. is through some type of family-sponsored visa.

The family relationships that can provide the basis of a family-sponsored visa are: spouse, unmarried child under 21, parent (if sponsor is a citizen 21 or older), unmarried son or daughter 21 or older, married son or daughter, and brother or sister.

Federal Immigration Law

Federal immigration law generally is found in U.S. Code Title 8.

Good Moral Character

For purposes of Federal immigration law, 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. Federal immigration law contains a list of activities that negate good moral character but also provides that a person who has not engaged in any of the listed activities may still be found to be not of good moral character for other reasons.

The statute provides that an individual who is or has engaged in any of the following is not of good moral character:

- 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 an aggregate of 180 days or more;
- Conviction of an aggravated felony;
- Smuggling aliens into the U.S.;
- Polygamy;

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- Crime related to a controlled substance;
- Participation in Nazi persecution or religious persecution; and
- Illegal voting or falsely claiming U.S. citizenship.

Being of good moral character is a requirement for certain immigration benefits, including eligibility to become a naturalized citizen, eligibility for the T visa, and eligibility for adjustment from non-permanent status to permanent resident status (including as a VAWA self-petitioner).

ICE

See Immigration and Customs Enforcement.

ICE Detention

ICE detention is the physical custody by ICE over an individual. ICE has its own detention centers and in some states also contracts with local jails to house individuals.

ICE Hold

An ICE hold (or ICE detainer) is a custody hold placed on an individual determined by ICE to be a possible subject for removal. With regard to state justice systems, the most common type of hold is a directive to a local jail not to release an individual without notifying ICE.

Illegal Alien

This refers to aliens who are in the United States without legal permission. See also undocumented alien/ undocumented immigrant/unauthorized immigrant.

Immigrant

The term "immigrant" in federal Immigration law is used as a term of art referring to every alien who does not fall into a non-immigrant category.

Immigration and Customs Enforcement (ICE)

Immigration and Customs Enforcement is the division of the Department of Homeland Security responsible for finding and removing unauthorized immigrants. It is the former Immigration and Naturalization Service.

Immigration Courts

Immigration Courts throughout the country determine whether non-citizens are inadmissible or deportable and consider applications for discretionary relief from removal orders. They also conduct bond redetermination hearings. They are a division of the U.S. Department of Justice.

Lawful Permanent Resident (LPR)

A grant of lawful permanent resident (LPR) status allows an alien to reside and work permanently in the United States. To be eligible for LPR status, the applicant must indicate an intention to reside permanently in the US. The LPR status must be renewed every ten years. Legal Permanent Residents are also known as green card holders. Conviction of a variety of specified crimes may result in loss of LPR status and removal.

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

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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.

National (See also Citizen)

A national is an individual who owes permanent allegiance to a state. A U.S. National is a citizen of the United States or a person not a citizen who was born in American Samoa or Swains Island. A national cannot be deported or removed.

Naturalized Citizen

A naturalized citizen is a foreign born individual who has been granted full rights as a United States citizen other than through birth to a U.S. citizen parent.

To become a naturalized U.S. citizen, an alien must:

- Be 18 years of age;
- Be lawfully admitted for permanent residence (see below);
- Have resided continuously in the United States for five years (or three years if married to a U.S. citizen) after being admitted for LPR status and been physically present in the U.S. at least half time during the five years prior to filing the application for citizenship;
- Be of good moral character; and
- Support the Constitution and be disposed to the good order and happiness of the U.S.

Non-Immigrant Alien

An alien who is in the United States legally on a temporary basis under a non-immigrant visa is defined in Federal immigration law as a non-immigrant alien.

Non-Immigrant Visa

A non-immigrant visa is a visa issued to an alien for permission to enter the United States on a temporary basis for a specified purpose. Examples of non-immigrant visas include visas for visitors, students, and certain specified temporary work categories.

Parole into the United States

This is a temporary entry into the United States of a non-immigrant who is applying for admission, granted by the Secretary of the Department of Homeland Security for humanitarian reasons or to achieve a public benefit. The person who is granted parole is not deemed to be admitted to the United States.

Refugee (see also Asylee)

An alien may qualify for refugee status if the individual has a well-founded fear of persecution on the basis of

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race, religion, nationality, membership in a particular social group, or political opinion if returned to the home country or country of last permanent residence. 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. Technically, refugee status is adjudicated while the individual is outside the U.S. while asylee status is adjudicated while the individual is in the U.S.

Removal (See also Deportable Alien)

Removal is the tem applied to the departure of a deportable alien pursuant to a final order of removal.

Sentence

The term of a sentence includes any sentence ordered by a court even if its imposition or execution is suspended. For example, a sentence that is suspended as part of a probation order or a sentence suspended pending successful completion of a drug court program both qualify as a sentence under Federal immigration law.

Special Immigrant Juvenile Status (SIJS)

Federal law defines a juvenile as anyone who has not reached his or her eighteenth birthday. Special immigrant juvenile status is available for an alien juvenile under the following conditions:

- There is a finding by a court in the United States with juvenile jurisdiction that the juvenile: is dependent on the court and placed in the custody of an agency or department of a state or an individual or entity appointed by the state or a juvenile court located in the United States; and whose reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis;
- There is an administrative or judicial finding that it would not be in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence;
- The juvenile has concurrently applied for lawful permanent resident status; and
- The dependency case was not filed as a sham solely to obtain immigrant status.

T Visa

The "T" visa is available for individuals who have been the victims of severe human trafficking and have assisted in the investigation or prosecution of traffickers. The maximum length of stay under the "T" visa status is four years unless extended. The holder of a T visa is eligible to apply for lawful permanent resident status if he or she is of good moral character and has been continuously in the U.S. for three years.

Temporary Protected Status

An alien from a select list of countries can get temporary protected status, which includes the right to work, without showing that he or she would be a target of persecution.

Temporary Visa

Non-immigrant visitors may legally enter the United States on a temporary visa 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. This is also called a non-immigrant visa.

U Visa

The "U" visa is available to non-immigrant aliens who: (1) have suffered severe physical or mental abuse as a result of being a victim of criminal activity; (2) have been, are being, or are likely to be of help to a Federal, state,

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or local investigation of the criminal activity causing the abuse; and (3) have 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. The maximum length of the "U" visa is four years unless extended. 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.

VAWA (Violence Against Women Act) Self-Petitioner

An alien who is the victim of severe domestic violence married to or a child of a citizen or LPR may petition for LPR status without the cooperation of the abusing spouse under the self-petitioning provisions of the VAWA. The petitioner must show that:

- 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 during the marriage;
- 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.

Unauthorized Immigrant/Undocumented Alien/Undocumented Immigrant

These are terms for an alien who is in the United States without legal permission through an officially issued visa or as otherwise provided in Federal immigration law.

USCIS

See Citizenship and Immigration Services.

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SECTION II

IMMIGRATION, AMERICAN SOCIETY AND THE STATE COURTS

In this section we show how state courts across the nation face unprecedented challenges resulting from the size and diversity of expanding immigrant populations, as well as the complexity of the inter-relationships among federal, state, and local immigration law, policy, and practice.

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Section II-A: Scope of Immigration -- Who, Location, Status, and Circumstances

Today's immigrant population, along with the projected future population, includes people from dozens of nations and cultures, and a vast range of richer and poorer, more and less well educated and skilled, and more and less mobile, people who, collectively, make a sizeable contribution to local, state, and the national economies. Today's immigrant population encompasses millions of people with a variety of different formal legal statuses that can have differing implications for the operations of the state courts. (See Figure II-1 for a list of different legal statuses.)

Numbers tell part of the story about the challenges to the state courts imposed by the size and diversity of the nation's immigrant populations.[I]

- About 38 million people living in the U.S. are foreign born.
- The legal permanent resident (LPR) immigrant population in the U.S. is about 12 million people. About 8.5 million of these people meet the residency requirements to become U.S. citizens.
- An additional 11.5 million people living in the U.S. are undocumented, illegal immigrants.
- About 12 million people living in the U.S. are naturalized citizens.
- An additional 1.3 million people in the U.S. are temporary legal migrants such as students and temporary workers.
- The percentage of U.S. residents who are foreign born, about 13 percent of the total U.S. population today, is expected to reach nearly 20 percent by 2050. This percentage will far exceed the historic highs recorded in 1890 (14.8%) and 1910 (14.7%).
- Between 40,000 and 60,000 refugees and asylees are admitted to the U.S. every year.

Understanding the country of origin, diversity, and distribution of immigrant populations across the U.S. provides additional insights about the scope of the immigration challenges state courts face.[II] For example:

- While California, New York, Texas, Florida, and Arizona remain leading centers for new immigrants, states with historically smaller immigrant populations – Georgia, Minnesota, Washington, and North Carolina – are also experiencing rapid immigrant population growth.
- In 17 states – Oregon, Nevada, Arizona, Idaho, Utah, Colorado, New Mexico, Texas, Kansas, Oklahoma, Michigan, North Carolina, Arkansas, Mississippi, Alabama, Georgia, and Tennessee – undocumented immigrants make up 40 percent or more of the entire foreign born population.
- People from Mexico and other Latin American countries account for well over half of both the legal and illegal immigrant populations in the U.S.
- Taking into account both documented and undocumented immigrants, 12.7 million Mexican immigrants lived in the U.S. in 2008, thus accounting for about one-third of all immigrants.[III]
- Compared with the U.S. born population, Mexican immigrants are more likely to be male, married, and live in larger households.
- People from Mexico and Latin America account for about 78 percent of the undocumented immigrant population in the U.S.
- People from Asian countries, particularly the Philippines, India, Vietnam, and Korea, account for an additional 25 percent of both the legal and illegal immigrant populations in the U.S.

Of particular significance to state courts as institutions that can have significant roles protecting children and working with distressed families, recent demographic assessments indicate that:[IV]

- 16.6 million people in the U.S. live in unauthorized families where the head of the family or the spouse of the head of the family is undocumented.
- 8.8 million people live in unauthorized families with U.S. citizen children.

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- In 2008, 5.5 million children live in unauthorized families. Of these children, about 1.5 million are undocumented, but an additional 4 million are U.S. citizens by birth.
- The younger children of undocumented immigrants are far more likely to be U.S. citizens than are older children – among children under age 6 whose parents are undocumented, 91% were born in the U.S., while among those ages 14 – 17, 50% where born in the U.S.
- 7 percent of all unauthorized families include both U.S. citizen and non-U.S. citizen children.
- Approximately 10% of all children now being born in the U.S. are the children of illegal immigrants.
- Children of undocumented immigrants are 6.8% of students enrolled in kindergarten through grade 12.
- In five states – Arizona, California, Colorado, Nevada, and Texas – more than one-in-ten students in grades K-12 have parents who are undocumented immigrants.

With regard to language and education:[V]

- 84 percent of the foreign-born population speaks a language other than English at home and 52 percent say they speak English less than "very well;"
- 32 percent of the foreign-born population has less than a high school education – compared to 13 percent of the native-born population;
- 24 percent are high school graduates – compared to 31 percent of the native-born population;
- 18 percent have some college education – compared to 29 percent of the native-born population;
- 16 percent have a bachelor's degree – compared to 17 percent of native born; and
- 11 percent have a graduate or professional degree in contrast to about 10 percent of the native-born population.

Section II-B: Impacts of Immigration on Economy and Society

Foreign-born U.S. residents including naturalized citizens, legal permanent resident immigrants and undocumented immigrants, are a significant presence in the U.S. labor force. With regard to occupation:[VI]

- 27 percent of the foreign-born population work in management and professional occupations;
- 23 percent work in service occupations;
- 18 percent work in sales and office occupations;
- 1.9 percent work in farming, fishing and forestry;
- 13.5 percent work in construction, maintenance and repair; and
- 17 percent work in production, transportation and material moving occupations.

Immigrants are a especially significant force in the engineering and high-technology portions of the U.S. economy:[VII]

- In 2003, 63% of all doctorate degrees in engineering, 50.2% in computer science, and 22.4% in the social sciences were awarded to non-U.S. citizens with temporary visas or LPR status. In computer science 50.2% of all doctoral degree recipients were immigrants (Matthews, 2006).
- Of the engineering degrees 45.5% of those students were from East Asia (Matthews, 2006).
- 13% of foreign-born engineering students remain in the U.S. permanently. Their numbers increase the size of the skilled workers in the labor force (Matthews, 2006).
- Congress allows the U.S. Citizenship and Immigration Service to offer 65,000 H1-B visas to applicants with at least a bachelor's degree and 20,000 for applicants with at least a master's degree. The demand by U.S. companies exceeds the cap set by Congress. In 2008, the USCIS received 163,000 employer applications within a week of accepting applications and within hours in 2008 (Sherk, 2008).
- 12% of H1-B workers have a doctorate degree, while 1% of the native born population have doctorates

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(Sherk, 2008).

- In 2003, 83,114 (38.5%) H1-B visas were given to immigrants in computer-related occupations and 26,843 (12.4%) visas were given to engineers (Matthews, 2006).
- The U.S. government argues that, "The inability of U.S. employers, particularly in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign non-immigrant workers has adversely affected the ability of US employers to recruit and retain skilled workers and creates a competitive disadvantage for US companies" (The Financial Express, 2009).
- Half of all new Silicon Valley company start-ups, in 2005, were started by highly educated immigrants (Wadhwa, 2009).
- According to the World Intellectual Property Organization database, in 2006 foreign nationals were named as inventors or co-inventors on 25.6% of patent applications from the U.S. This was a large increase in comparison to 1998 where immigrants were involved in 7.6% of all applications (Wadhwa, 2009).

At the same time, undocumented immigrants alone likely account for:[VIII]

- about 5.5 percent of the entire U.S. labor force;
- about 10 percent of the entire labor force in Nevada, California, and Arizona;
- at least 40 percent of brickmasons, 37 percent of drywall installers, one-third of all insulation workers, 27 percent of all butchers, 25 percent of all farm workers, and 27 percent of maids and housekeepers in the United States;
- between 10 percent and 14 percent of the entire U.S. food manufacturing, construction, textiles and food services work-force.

With regard to income:[IX]

- about 16 percent of the foreign-born population live below 100 percent of the federal poverty level;
- 24 percent live at 100 to 199 percent of the federal poverty level; and
- about 60 percent live at or above 200 percent of the federal poverty level.[X]

Finally, while arrest and incarceration rates for both legal permanent resident and undocumented immigrants are generally lower than the rates for other groups living in the U.S., fear of contact with law enforcement and the challenges to state and local justice systems from those who do commit violations of immigration regulations and state crimes can be formidable.[XI] In particular:

- A Pew Hispanic Center survey revealed that 57 percent of Latino immigrants worry about deportation of themselves or someone close to them.
- Anti-immigrant hate crimes have increased by nearly 30 percent in recent years.
- Over 1.2 million deportable illegal immigrants have been located by Immigration and Customs Enforcement (ICE) each of the past few years. There are currently over 400,000 active federal removal/deportation orders in force, but fewer than 32,000 beds in federal deportation facilities.
- About 65 percent of detained illegal immigrants are in state and local jails and prisons, 2 percent are in federal prisons, 14 percent are in ICE facilities, and 19 percent are in contracted facilities.
- Of 42.5 million male immigrants and U.S. natives between the ages of 18 and 39 years, 1.3 million (just over 3%) are incarcerated in federal, state or local jails. The incarceration rate for U.S. born males in this age group was 3.51 percent, or four times the rate of the foreign born (0.86%). The foreign born percentage includes Puerto Ricans (incarceration rate of 4.5%), even though they are U.S. citizens by birth and have unlimited access to the U.S. Excluding Puerto Ricans from the foreign born, the incarceration rate for immigrants drops to 0.68 percent.[XII]
- The least educated immigrant groups and the groups most stigmatized as "illegals" have the lowest incarceration rates: Mexicans 0.70 percent, and 0.52 percent for both Guatemalans and Salvadorans.

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- A total of five states incarcerate 80 percent of all criminal aliens: (1) California, 40 percent; (2) Texas, 15 percent; (3) New York, 8 percent; (4) Florida, 7 percent; and (5) Arizona, 6 percent

Figure II-1
Categories of Foreign Born Status

Naturalized Citizen

An alien who wishes to become a naturalized citizen must file an application and meet the following requirements: (1) at the time of filing of the application for citizenship, be a lawful permanent resident for five years prior, physically in the United States for at least half of that time, and a resident of the state in which the application is filed for three months; (2) be continuously in the United States from the time of filing to admission to citizenship; (3) be of good moral character; and (4) support the Constitution and be disposed to the good order and happiness of the U.S.

Lawful Permanent Resident (LPR)

A grant of lawful permanent resident (LPR) status allows an alien to reside and work permanently in the United States. To be eligible for LPR status, the applicant must indicate an intention to reside permanently in the U.S.

The following are the major categories of lawful permanent residents.

- 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 U.S.
- Diversity-based visas: as determined by the Attorney General.

Conditional Permanent Resident

A conditional permanent resident is an alien who does not have lawful permanent resident status but is legally in the U.S. as a child or spouse of a LPR or a citizen. The marriage giving rise to the conditional status must be legitimate. The conditional status expires on the second anniversary of obtaining conditional status unless the immigrant has made timely application for lawful permanent resident status. Both spouses must apply together.

Deportation of the lawful permanent resident spouse or divorce from a resident or citizen spouse terminates the conditional status unless the remaining spouse can meet the requirements for a hardship waiver, including as a VAWA self-petitioner or other hardship.

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Figure II-1
Categories of Foreign Born Status

Special Immigrant Juvenile Status

Special immigrant juvenile status (SIJS) is available under the following conditions.

- There must be a state court finding that the juvenile is: (1) abused, neglected, or abandoned; (2) eligible for long term foster care; and (3) 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.

Delinquency is generally not a bar to SIJS status, as delinquency is not considered adult criminal activity. A juvenile may be ineligible for SIJS status for: (1) being a drug addict; (2) violating a protection order; (3) being a sexual predator; (4) using false documents; (5) engaging in prostitution; or (6) engaging in drug trafficking.

Violence Against Women Act (VAWA) Self-Petitioner

Immigration law provides that a conditional immigrant spouse may petition for LPR without the cooperation of the lawful permanent resident spouse or citizen 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 during the marriage;
- The marriage was legal and in good faith;
- The petitioner is not the primary perpetrator of the violence; and
- The petitioner is of good moral character.

Non-Immigrant Visitor

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.

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Figure II-1
Categories of Foreign Born Status

Non-Immigrant Refugee or Asylee

The following are the conditions for admissibility into the U.S. as a refugee or asylee.

- The individual is likely to be persecuted on the basis of race, religion, nationality, member of a particular social group, or political opinion if returned to the home country or the country of last permanent residence.
- The individual is not a security risk or perpetrator of persecution.
- The individual has not committed a serious crime outside the U.S. before arriving in the U.S.

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: (1) is able to safely return to home country or move to another country; (2) no longer meets the requirements of eligibility; or (3) has been convicted of a serious crime, including conviction of an aggravated felony.

Non-Immigrant Victim of Human Trafficking

The "T" visa is available for individuals who have been the victims of severe human trafficking and is assisting in the investigation or prosecution of traffickers. The maximum length of stay under the "T" visa status is four years unless extended. The individual may apply for lawful permanent resident status if he or she is of good moral character.

Non-Immigrant Crime Victim or Witness

The "U" visa is available to an individual in the U.S. as an undocumented alien who: (1) has suffered severe physical or mental abuse as a result of being a victim of criminal activity; (2) 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; and (3) has certification from a federal, state, or local justice system official 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. The maximum length of the "U" visa is four years unless extended.

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SECTION III

THE IMPACTS OF IMMIGRATION ON THE STATE COURTS

In this section we describe a set of concepts and vocabulary designed to help courts think and communicate about how immigration policy and practice might affect the work of the court and how the court can improve services for addressing the needs of immigrants, including improving the cultural competency of state court processes. Finally, we provide examples of key intersections among federal, state and local policy and practice with regards to immigration that affect state courts.

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Section III-A: Complexity of Challenges Posed by Immigration on the State Courts

Much of the complexity of the challenges facing state courts associated with serving immigrants results from the often confusing nexus of constantly changing federal, state, and local immigration law, policy, and practice, coupled with the need to understand and serve greater numbers of people from cultures other than those that courts traditionally have served. For example, the brief inventory of the intersections of federal, state, and local law, policy, and practices that affect the state courts presented in Figure III-1 suggests that:

- There are numerous, diverse points of intersection among federal, state, and local law and policy regarding immigration that can affect many fundamental aspects of state court operations.
- The intersection of federal immigration law and practice and state law and practice can affect civil, family, juvenile, and dependency cases, as well as criminal cases.
- The U.S. citizenship eligibility status of the nation's 12 million Legal Permanent Residents and their U.S. residency status can be affected by numerous types of local justice system and state court activity such as criminal charges, convictions, and imposed and suspended sentences.
- There is a potential that court caseloads and case complexity might increase as a result of both the intersections of federal, state, and local law and practice and the increased presence of state laws regarding immigrants, such as laws regarding bail eligibility, document forgery, human smuggling, and employer sanctions for hiring undocumented workers.
- There are mechanisms available to local justice systems and the courts to protect immigrant victims, and juveniles and children.
- In addition to national and statewide action, understanding and addressing the impacts of immigration in the state courts will likely require local assessment and strategy development, because local interpretations and application of state and federal law can vary greatly.

In particular, the demands on state courts to address immigration have increased greatly over the past few years as a result of rapid and extensive growth in state legislation targeting immigration, coupled with shifting federal policy regarding the apprehension and removal of undocumented immigrants.

Although the regulation of immigration traditionally has been under the exclusive purview of the federal government, over the past decade state legislatures across the nation have become increasingly active in adopting immigration- focused legislation. The National Conference of State Legislatures reports that in 2005, 300 immigration related bills were introduced and 38 were enacted, while activity sky-rocketed to 1,562 bills introduced and 240 laws enacted in 2007. Preliminary figures for 2009 indicate that close to 2,000 bills have been introduced with about a total of 353 new laws and resolutions being passed in 48 states.[XIII]

The scope of state legislative immigration attention has been comprehensive, encompassing everything from employment eligibility verification, workers compensation, and unemployment benefits to efforts to either limit or encourage, depending on the state, education for the children of undocumented immigrants who graduate from public schools. Of special significance to the state courts has been legislation regulating:

- bail eligibility;
- human smuggling and trafficking;
- ability of undocumented workers to work;
- employer sanctions for employing undocumented workers;
- fake drivers licenses and other forged documents;
- education, treatment, and medical benefits eligibility;
- state and local law enforcement officers co-serving as immigration officers;
- eligibility for professional licenses; and

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- eligibility for hunting and fishing licenses.

Only now are many of the implications of all this legislation on state court operations and policy beginning to be revealed, but preliminary assessments suggest that depending on the state:

- some of the new laws – such as those regulating bail eligibility for undocumented immigrants – can greatly complicate pretrial release and initial appearance processes;
- state court decisions can greatly increase the chances for the removal of both lawful and undocumented immigrants;
- many of the new laws likely limit immigrant eligibility for services routinely offered to non-immigrants, such as treatment, probation, and other services; and
- family law matters are particularly complicated, especially in families with mixed immigration status – that is; some families may include members who are undocumented, are authorized to be in the U.S. and are U.S. citizens.

Also, in part, the complexity of the immigration challenges to state courts results from the reality that the availability of court resources and infrastructure for addressing the impacts of immigration varies greatly across the nation. For example, even though many jurisdictions in the Southwestern U.S. have very large and expanding immigrant populations, they often also have greater service capacity, such as the availability of language specialists and interpreters, ability to establish litigant assistance partnerships with organizations in Latin America, and an abundance of court staff with well developed ties to immigrant communities. In contrast, many other courts with rapidly expanding immigrant populations do not have these types of resources. At the same time, until recently very few courts, regardless of where they are located, have had much of a capacity for meeting the court service needs of many of the nation's more recent refugee and immigrant populations, such as new arrivals from Somalia, Eritrea, Ethiopia, and other parts of East Africa.

In particular, it is likely that in many jurisdictions the composition of the immigrant community is not well understood and courts make a variety of erroneous assumptions that complicate court operations. For example, many courts discover after multiple court sessions and with considerable frustration that many Spanish surnamed people from throughout Latin America have very limited Spanish language proficiency but instead speak a variety of indigenous languages, such as one of the many Mayan language groups like K'iche, Mam, and Kaqchikel[XIV] – three language groups which alone are spoken by at least one-third of the entire population of Guatemala and unknown numbers of Guatemalans living in the United States. Similarly, juvenile judges report that not knowing the immigrant populations they serve has limited their opportunities to shape appropriate sanctions such as culturally meaningful restitution. In short, knowing the immigrant community has become increasingly important to courts so they can provide effective services.

In addition, as a result of the local political climate and local policy, local law enforcement agencies in many trial court jurisdictions are reluctant to be involved in enforcing federal immigration policies and do so only when there is a link to serious criminal behavior while in others local law enforcement plays and active role in enforcing immigration laws. In some jurisdictions, corrections agencies are not involved in screening the immigration status of individuals when they are admitted to local jails, while in others those admitted to jail are screened for immigration status.

Similarly, document fraud laws that might be used to prosecute immigrants with fake drivers licenses are more or less aggressively enforced depending on the local political climate. Sometimes, in multi-county court jurisdictions, law enforcement and prosecutor policy and practices can vary dramatically from county-to-county. As one consequence, these differences in policy can greatly affect court caseloads and operations, such as case scheduling, prisoner transport, language service demand, sentencing options, and program eligibility.

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Furthermore, the complexity of the immigration challenges to state courts is increasing because immigration-fueled cultural diversity in the courts is dramatically expanding the need for courts and their justice partners to understand the complicated interplay of immigration, culture, language, and effective court service provision. Elsewhere you can access additional information about culture and the state courts, but here it is worth noting that culture refers to the commonly shared, largely taken for granted assumptions about goals, values, means, authority, ways of knowing, and the nature of reality and truth, human nature, human relationships, and time and space, that a group has learned throughout its collective history. Ethnic/national culture refers to groups whose individual members' common affiliation is defined by reference to ethnicity or nation.

Ethnic/national culture matters for the courts and justice system because notions of culture greatly affect how people:

- define justice, conflict, and disorder;
- determine when it is appropriate to involve third parties, including the state, in resolving problems and conflicts;
- describe events or "what happened;" and
- fashion responses or solutions to problems and conflicts.

Also, culture matters because it influences:

- the ways people communicate;
- perceptions about the sources of legitimate authority;
- beliefs about individual and group responsibility;
- beliefs about what are fair processes;
- fundamental, underlying beliefs about cause and effect – such as the causes and treatment of illness; and
- beliefs about people and their motivations.

Moreover, ethnic/national culture matters because the meeting of cultures within a justice system presents both risks of misunderstanding and opportunities for creative problem-solving.

In turn cultural competency means first understanding where, how, and why culture matters. Cultural competency also means developing individual, organizational, and system capacity for culturally appropriate service delivery that helps individuals successfully navigate the courts and justice system, process information, make wise decisions, and understand and comply with court orders.

In short, along with growth in immigrant populations, demand for culturally competent courts will continue to grow as courts across the nation attempt to maintain the delicate balance between traditional American court notions of what constitutes key behaviors, values, and beliefs, and the orientations of increasingly diverse populations of court users.[XV]

Section III-B: Challenges to Fundamental Notions of Justice and Traditional Court Values and Mission

Addressing immigration issues in state court cases presents a number of challenges to fundamental notions of justice.

In particular, the ability of the courts to provide equal access for immigrant litigants may be affected by a variety of issues, including, among others:

- unwillingness of immigrants to report crimes, from fear or distrust of local law enforcement officers or general reluctance to call attention to themselves or their families;
- fear of reprisals, including arrest and possible deportation, for appearing in court;

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- barriers created by language or culture; and
- general reluctance to engage government.

Moreover, providing equal and consistent justice can be a challenge. There may be a lack of resources and restricted access to certain types of programs for immigrants. For example, juvenile and adult offenders who are undocumented may not be able to pay restitution because they are prohibited from having jobs to earn money to pay restitution as a result of employer sanctions laws. This limits both the sanctions available for those individuals and the ability to provide compensation to victims. In short, it inhibits the use of restorative justice approaches for those individuals. Also, federal immigration status outcomes, which are often dependent on local case outcomes, can vary from one state court jurisdiction to another due to differing charging decisions of prosecutors and sentencing practices of judges.

Further, the independence of state judiciaries may be threatened in numerous ways by the nexus of federal, state, and local immigration law, policy, and practice. For example, the courts and local justice agencies, including law enforcement, probation, corrections, and social services, may face pressure to assist ICE by identifying and reporting illegal aliens to ICE authorities. Federal law authorizes ICE to deputize local law enforcement officers as ICE agents, and this may happen more frequently in the future. As many immigration rights are determined by outcomes in state court cases that can be affected by the discretion exercised by local judges and prosecutors, there may be increasing local political and social pressure to exercise that discretion in a way to maximize or minimize the immigration consequences for immigrants depending on local circumstances.

Finally, achieving procedural fairness can be a challenge to courts in dealing with aliens. Procedural fairness encompasses how the courts behave toward litigants and how people are treated in court, as opposed to what the courts decide. There are four main aspects of procedural fairness:

- Respect and understanding, or the extent to which people are treated with dignity and are helped to understand what is happening in court;
- Voice, or the extent to which people are given a chance to be heard;
- Trust, or the extent to which the judges and court staff give the impression that they care about people's needs; and
- Neutrality, or the extent to which judges can instill confidence that they are treating all people equally and fairly.

Newer immigrants often might not understand the court system or how justice operates in the United States and as a result may be fearful and confused by what is going on. Courts must take extra steps to assure that the goals of procedural fairness are met for these litigants.

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Figure III-1
Examples of Key Points of Intersection of Federal, State, and Local Law, Policy and Practice Regarding Immigration that Affect the State Courts

General Law and Practice

- Immigration and Custom Enforcement (ICE) practices can vary greatly from jurisdiction to jurisdiction. For example, some state courts report that ICE officials have sought interpreter, pretrial release, and probation records to identify potential immigration law violations and detain individuals outside courtrooms.
- Federal law enables state and local law enforcement personnel to act as immigration agents (287 G Certified Officers) to (1) arrest persons for smuggling, harboring, or transporting illegal aliens, and (2) perform a function of a federal immigration officer in relation to the investigation, apprehension, or detention of illegal aliens.
- Local ICE responsiveness to individuals with immigration holds in local jail facilities can vary from jurisdiction to jurisdiction.
- ICE contracts with many local jails for bed space.
- Eligibility for state-supported services may be affected by immigration status.

State Laws Used To Address Immigration Issues

- The vast majority of American states have enacted laws targeting immigration issues either directly or indirectly. The National Conference of State Legislatures reports that in 2007 alone, 1,562 bills were introduced across the nation targeting immigration concerns and 240 new laws were enacted in 46 states. These laws encompass making it a state law felony for illegal immigrants to hold a job in Mississippi to making it a felony for sheltering or transporting illegal immigrants in Oklahoma.
- For a particular jurisdiction the combined effects of state laws can challenge the courts' resources. In Arizona for example, local courts must take into account: (1) Prop. 102, a constitutional amendment relating to standing and punitive damage awards for illegal aliens, (2) Prop. 103, a constitutional amendment relating to English as the official language, (3) Prop. 300, a referendum on public program eligibility that denies illegal aliens in-state tuition, taxpayer supported adult education, and child care, (4) Prop. 100, limitations on bail for those who entered or have remained in the country illegally, (5) the Legal Arizona Workers Act which sets out employer sanctions for hiring illegal workers, (6) a smuggling statute under which many victims are charged with or otherwise plead to conspiracy to commit smuggling or solicitation to commit smuggling, (7) a class 4 felony forgery statute, and (8) a statute which allows the court to order detention of a material witness who may not be available to testify in a criminal proceeding because of immigration status.
- Many states have enacted document fraud laws that encompass making it a felony to use false documents including fake birth certificates and drivers licenses.
- Note also that across the nation the potential impact of many of these laws when courts deal with Lawful Permanent Residents and their families are waiting to be assessed, and likely in some circumstances, litigated.

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Figure III-1
Examples of Key Points of Intersection of Federal, State, and Local Law, Policy and Practice Regarding Immigration that Affect the State Courts

Criminal Law and Practice

- State court criminal arrests can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- State court criminal convictions can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship. Examples of these crimes include: (1) aggravated felonies, (2) prostitution, petty theft, perjury, (3) controlled substances, (4) crime with intent to commit great bodily harm, (5) crimes of moral turpitude, such as turnstile jumping and shoplifting, (6) domestic violence including stalking, (7) document fraud, (8) identity theft, and (9) violation of protection order.
- State court criminal sentences can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- Federal immigration law can consider state court suspended sentences, as well as imposed sentences, in immigration decisions.
- Participation in state court drug courts and other therapeutic approaches can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- There are numerous federal immigration laws that can be used to protect immigrant victims such the Violence Against Women Act, Battered Spouse Waivers, U Visas for cooperation with authorities in criminal cases, and T Visas for victims of server forms of human trafficking.

Family Law and Practice

- A person who gains lawful permanent status through marriage and later divorces the petitioning spouse cannot file a petition for a new spouse for five years, unless he or she can prove by clear and convincing evidence that the first marriage was bona fide, including reasons for that marriage's demise.
- A conditional permanent resident married to a U.S. citizen can become a lawful permanent resident within two years if at the end of the two years the couple jointly files to have the conditional permanent resident become a LPR. Children of conditional permanent residents are also conditional permanent residents. If divorce occurs prior to LPR process, conditional permanent residents must obtain a good faith, extreme hardship, or battery or extreme cruelty waiver.
- Divorce can have an impact on Violence Against Women Act self-petitioners.
- Divorce may affect a stepchild's eligibility for immigration benefits.
- Noncitizens who violate some kinds of civil or criminal protection orders can be removed from the U.S.
- To greatly simplify adoption, immigrant children should be adopted before they are 16 years of age.
- There are many immigration implications surrounding sibling adoptions and orphans.
- Kinship care can be complicated by immigration status.
- Child custody and child support can be complicated by immigration status.

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Figure III-1
Examples of Key Points of Intersection of Federal, State, and Local Law, Policy and Practice Regarding Immigration that Affect the State Courts

Juvenile Law and Practice

- Immigrant juveniles under juvenile court jurisdiction due to abuse, neglect, or abandonment, may be eligible for lawful permanent residency as "special immigrant juveniles."
- There are barriers to special immigrant juvenile status such as: (1) record of involvement with drugs, prostitution, or other crimes, (2) HIV positive, (3) classed as mentally ill, suicidal, or a sexual predator, (4) committed visa fraud or was previously deported.
- Some delinquency types can jeopardize juvenile immigration status such as prostitution, sale or possession for sale of drugs, and sex offenses.
- State courts in some instances can obtain jurisdiction over juveniles in ICE detention.

Civil Law and Practice

- Dealing with mentally or physically ill individuals in state court may be complicated because mental illness, and some forms of communicable diseases can jeopardize immigration status.
- State laws may limit civil damages for undocumented immigrants.
- Applications for name changes may be complicated by immigration status.
- Tenant and housing status may be complicated by immigration status.

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SECTION IV

IMMIGRATION ISSUES IN JUVENILE AND FAMILY CASE PROCESSING

Based on the CPPS Juvenile and Family Bench Guide, this section is intended to provide state trial court judges with an overview of areas of federal immigration law that might intersect with a juvenile or family case. This section is designed to provide judges with quick a summary of key areas of immigration law that they can access electronically from the bench and contains two types of analyses: (1) topical discussions that examine how immigration law can affect the issues that may arise in a family or juvenile case; and (2) summaries of select areas of federal immigration law regarding legal entry or exposure to removal.

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Guide Contents

This bench guide is intended to provide state trial court judges with an overview of areas of Federal immigration law that might intersect with a juvenile or family case. It is designed to provide judges with quick a summary of key areas of immigration law that they can access electronically from the bench. Judges using the guide should be aware that it is not meant to be an in-depth treatise on immigration law. Its purpose is twofold: (1) to help judges in family or juvenile cases spot immigration issues; and (2) to help judges identify people who might be referred for advice on immigration rights.

Immigration is generally found in U.S. Code Title 8. Unless otherwise specified, all statutory references are to that Title. 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. In addition, immigration case law should be consistently cite-checked, as this area of the law can be highly fluid.

Words or phrases that are in red are clickable links to other sections of the bench guide. Web links to the internet for statutes are in blue type.

The Guide contains two types of analyses: (1) topical discussions that examine how immigration law can affect the issues that may arise in a family or juvenile case; and (2) summaries of select areas of Federal immigration law regarding legal entry or exposure to removal.

Topical Discussions

- Introduction
- Aspects of Immigration Law That May Affect Child Custody or Placement Decisions
- Aspects of Immigration Law that May Affect Eligibility to Work
- Aspects of Immigration Law that May Affect Ability to Meet Probation Conditions or Eligibility for Benefits or Services

Legal Summaries

- Categories of Legal Immigration Status
- Good Moral Character
- Inadmissible Aliens
- Grounds for Removal
- Eligibility for Cancellation of a Removal Order
- Aggravated Felony
- Crime of Moral Turpitude
- Crime of Domestic Violence
- Illegal Activity Not Requiring a Criminal Conviction

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Introduction

There are millions of children in the U.S. who may potentially be affected by or directly subject to Federal immigration laws. A recent Pew Hispanic Center assessment found that in 2008, there were 5.5 million children living in families with at least one undocumented parent. Of these children, about 1.5 million were themselves undocumented and 4 million were U.S. citizens by birth. Further, it is common for different children in single family to have different immigration status, with the younger children of undocumented immigrants being far more likely to be U.S. citizens than are the older children.

Many immigrant families find themselves in state family or juvenile proceedings, due to divorce, protection orders, dependency, or delinquency. In those cases the treatment of families and children under Federal immigration law can work to undermine the goals of state family and juvenile law. In removal proceedings involving an alien family with children, the interests of the children are not considered in determining the immigration rights of the parents. As a result, Federal immigration law may separate a family that a state court might have sought to keep together, or may send a child legally in the U.S. to another country with a deported parent rather than allowing the family to remain in the U.S. for the welfare of the child.

In contrast, contemporary thinking about family and juvenile law across the United States suggests that troubled families and juveniles should be treated with a therapeutic perspective that emphasizes improving the families' capacity to increase the quality of life of all family members. This means attempting to create a coordinated court service infrastructure to treat families in a comprehensive and systemic way. Some of the desired outcomes of therapeutic justice include:

- For the children, a focus on best interests of the child, including safety, permanency, and physical and emotional well being, either through preservation of the family as a unit where possible or through placement in another stable environment; and
- For the parents, safety, preservation of the family where possible, or rearranging of relationships after termination of the family unit.

This Bench Guide will help state and local judges achieve appropriate outcomes for immigrant families and children. Some of the outcomes that the guide will help judges achieve include:

- Completing cases involving children of immigrant families in a timely fashion;
- Assuring that immigrant families and children receive needed services;
- Assuring that immigrant families are able to achieve court-imposed conditions for reunification;
- Promoting family preservation; and
- Promoting the best interests of the child.

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Aspects of Immigration law That May Affect Child Custody or Placement Decisions

In deciding child custody in divorce cases and child placement in dependency cases, judges are called upon to determine what is in the best interests of the child. In divorce matters, some state statutes provide detailed lists of the relevant factors that may be considered by a judge in determining the best interests of the child in a custody decision. The following are some of the factors that may be included:

- The wishes of the parents;
- The wishes of the child, if the child is of sufficient age;
- Which parent has been the child's primary caretaker;
- The interactions of the child with the child's parents, siblings, and other significant persons in the child's life;
- The child's adjustment to home, school, and community;
- The desirability of maintaining continuity of home, school, and community;
- The ability of each parent to provide permanence to the child as a family unit;
- The mental and physical health of all individuals involved;
- The capacity and disposition of each parent to give the child love, affection, and guidance;
- The child's cultural background and the willingness of each parent to educate and raise the child in the child's culture and religion;
- The effect on the child of the actions of an abuser; and
- The willingness and ability of each parent to permit continuing contact by the other parent with the child.

With regard to dependency matters, while the bases for determining what is in the best interests of the child have changed in emphasis over time, courts will need to balance the following considerations:

- Preservation of the family unit;
- Physical safety and health of the child;
- Physical and emotional well-being of the child;
- Provision of a safe, stable, permanent home for the child;
- Least restrictive of the rights of the parents; and
- Speedy resolution to achieve permanency.

The ultimate outcome of a dependency case may be a termination of the parental rights (TPR) action against one or both parents. The following are some of the factors that a court might consider in deciding to terminate the parental rights of a parent:

- The parent has abandoned the child;
- The parent has failed to provide the child with necessary food, clothing, shelter, education, and other care and supervision necessary for the child's physical, mental, and emotional health and development, and either (1) reasonable efforts by the social services agency have failed to correct the conditions or (2) the court finds that any reasonable efforts would be futile;
- The parent is unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child;

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- Following the child's placement out of the home, the child protective agency has made reasonable efforts, under the direction of the court, to rehabilitate the parent and reunite the family and those efforts have failed to correct the conditions leading to the child's placement; and
- The child has experienced harm in the parent's care of a nature or duration that indicates a lack of regard for the child's well-being.

The immigration status of one or both parents and the immigration status of the child may serve to limit the options available to the family judge or impact the ability of one parent to provide for the health, education, emotional well-being, or physical needs of the child. In some cases a key parent may be out of the country with no ability to obtain legal entry. It is thus important for the family or juvenile judge to be aware of the immigration status of the individuals before him or her, what can threaten that status, and what might allow the individual to change status. The immigration status of a parent may affect:

- The options for where and with whom the child will be able to live;
- The stability of the child's relationships;
- The stability of the child's home environment; and
- The visitation rights of parents.

Immigration status can also affect the ability of the parents to access services that the court deems necessary for return of the child and what constitutes reasonable efforts by the social service agency to provide services before a parent's parental rights are terminated. In addition, illegal or in some cases even legal immigrant parents may not be able to assure enough stability in their lives to maintain the ability to care for a child, although instability cannot be presumed from status alone.

Some the immigration issues involving a party or other person of importance to a case that the state court judges should be aware of in making child custody or placement decisions the context of a family or juvenile case include the following:

- What is the immigration status of the person?
- How can the person (parent or child) obtain legal immigration status?
- What might cause the person to lose immigration status?
- What is the person's possible exposure to removal?
- How can the person be protected from removal?
- Will a key person presently outside the U.S. be admissible into the U.S.?

The following table is a summary of the major types of legal immigration status and how that status can be lost. Click on the links for a more detailed discussion of each type.

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Type of Status	Whati is the basis of the status?	What can cause loss of status?
Lawful Permanent Resident (LPR) 1101(a)(15)	• Intend to reside permanently in the US • Permanent stay subject to revocation or dissolution under law	(1) Was in an inadmissible category at time of entry 1227(a)(1) (2) Conviction of crime, including by suspended sentence, deferred prosecution, or admission of elements of crime on record 1227(a)(2) • Aggravated felony 1101(a)(43) • Crime of moral turpitude • Crime relating to controlled substance • Firearm offense • Domestic violence offense (3) Behavior not requiring a criminal conviction 1227 • Terrorist activity • Drug abuse or addiction • Document fraud • Illegal voting • Foreign policy reasons • Becoming a public charge • Abandonment through extended stay outside the U.S.
Conditional Immigrant 1186(a)	• Status derived from status of spouse or parent • Expires on second anniversary of obtaining conditional status	(1) Deportation of spouse or parent (2) Failure to jointly file for lawful permanent resident status within statutory time (3) Marriage found fraudulent (4) Divorce, unless wairver available
Special Immigrant Juvenile 1101(a)(27)(J)	• Juvenile court makes the following findings: √ The child has been declared dependent on a juvenile court. √ The child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law. √ The child's best interest would not be served by being returned to his/her country of origin.	(1) Did not concurrently apply for lawful permanent resident status (2) Engaging in certain bad conduct not requiring a criminal conviction
VAWA Self-Petitioner 1101(a)(51) and 1154(a)	• Spouse or child abused by citizen or lawful permanent resident • Abuse of battery or extreme cruelty • Marriage legal and in good faith • Petitioner of good moral character (1101)(f)	(1) Causes listed for LPR, subject to exception for domestic violence offense if also a victim and meets 1227(a)(7) (2) Was the primary perpetrator of the domestic violence

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Type of Status	Whati is the basis of the status?	What can cause loss of status?
Visitor 1101(a)(15)	• In the US on temporary basis • Includes vacationers, students, workers • Length of stay as specified by visa	(1) Causes listed for LPR (2) Failure to take required actions to maintain status (3) Expiration of status
Refugee/Asylee 1101(a)(42)	• Person likely to be persecuted if returned to home country • Stay as long as return to home countrywould put them at a safety risk	(1) Causes listed for LPR (2) When able to safely return to home country or move to another country
Trafficking victim 1101(a)(15)(T)	• Victim of severe trafficking • Assisting in the investigation or prosecution of traffickers • Maximum stay of four years unless extended	(1) Causes listed for LPR
Crime victim or witness 1101(a)(15)(U)	• Willing to cooperate in a criminal investigation • Need certification from local court or law enforcement agency • Maximum stay of four years unless extended	(1) Causes listed for LPR

Issues in Keeping a Child in the U.S.

It is clear that judges cannot automatically assume in making custody or placement determinations that it is in the best interests of the child to remain in the U.S Still, where a judge determines that allowing a child to be removed will be detrimental to the child's welfare, the judge may need to recognize and work within the limitations imposed by immigration status. The following are some of the limitations that may arise.

- Immigration courts cannot prevent a deported parent from taking a child with him or her. What happens to the child is the parent's decision, even if the child is a citizen. Thus, where a judge determines that allowing a child to be removed by a parent will be detrimental to the child's welfare, the only way to prevent the child from being taken out of the country due to removal of an illegal immigrant parent may be to provide custody arrangements in the U.S.

- Where one parent is a citizen or LPR and the other is a conditional immigrant, the person with legal status has all the power regarding petitioning for a spouse or child. In divorce cases involving a U.S. citizen or LPR spouse and a conditional immigrant spouse, refusing to grant a divorce will not change the fact that the legal resident can still refuse to petition for his spouse or children. Similarly, a parent who is a lawful permanent resident does not need to have custody in order to petition for legal status for his or her children, as long as the child falls within the definition of a child under Federal immigration law, as set forth in 1101(b)(1) and 8 C.F.R. 204.2(d). See also the discussion under Family-Based Visas.

- A condition for custody that a parent obtain legal immigration status may not be achievable. Imposing such a condition on the assumption that it will prevent a child from being removed from the country will be ineffective where the parent has no legal ability to achieve legal status.

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- A child adopted after the age of 16 is not recognized as a child for immigration purposes, with one exception – a person under age 18 adopted along with a sibling under age 16 qualifies as a child. As a result, courts have sometimes sped up adoption proceedings to assure that an adopted child has the legal right to remain in the U.S.
- A U.S citizen or LPR parent can be the source of a family visa for a child. The converse, however, is not true; a U.S. citizen child cannot be the source of a family visa for an alien parent.

The Problems of Family Unity in Mixed Status Families

A recent Pew Hispanic Center assessment found that in 2008, there were 5.5 million children living in families with at least one undocumented parent. Of these children, about 1.5 million were themselves undocumented and 4 million were U.S. citizens by birth. Further, many families come to the U.S piecemeal, so families with different members having different immigration status are common. For example, it is common for different children in single family to have different immigration status, with the younger children of undocumented immigrants being far more likely to be U.S. citizens than are the older children. These mixed families face a number of problems that affect a family or juvenile judge's ability to achieve family unity. Some of the problems include the following.

- Immigration courts can't prevent a deported parent from taking a child with him or her. What happens to the child is the parent's decision, not the court's, even if the child is a citizen. If a custodial parent is deported and takes a child with him or her, that may affect the ability of the other parent to have contact with the child.
- One statutory ground for cancellation of a removal order is that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a citizen of the United States or an alien lawfully admitted for permanent residence." 1229b(b)(1)(D). The way the immigration courts have interpreted this ground, however, makes it extremely difficult to establish. The hardship must exceed the normal hardships that are inherent in moving a child to another country. The mere fact that the child is a U.S. citizen is not enough. The courts have refused to overturn a denial of cancellation of removal where a parent claimed hardship if US citizen child has to leave the US because the parent is deported. Martinez-Maldonado v. Gonzales, 7th Cir 2006. Further, cancellations of removal are limited to 4,000 per fiscal year. 1229b(e)(1) For a more detailed discussion, see Eligibility for Cancellation of a Removal Order.

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Aspects of Immigration Law that May Affect Eligibility to Work

Eligibility to obtain employment in the United States may be an important factor for a family or juvenile judge in determining issues of alimony, child support, the ability to meet conditions of probation, or the ability to pay for services. In some instances, the state courts may have to take into account lack of employment authorization in setting alimony or child support. For example, if a court that awards custody of a child to an immigrant parent who does not have the right to work, the court may have to require the non-custodial parent to pay sufficient alimony to assure that the custodial parent is able to provide an adequate home for the child.

The legal authority of the Secretary of DHS to regulate of employment of aliens is covered in 1324a(h) and the sections of the Code of Federal Regulations (CFR) noted throughout the following discussion. The following are the most common types of aliens with legal eligibility to work in the United States that are likely to appear in a family or juvenile case. See 8 C.F.R. 274a.12(a) for the complete list.

- Lawful permanent residents;
- Conditional immigrants;
- Refugees and Asylees;
- Aliens paroled by DHS into the U.S. as refugees;
- Juveniles who have been approved by DHS for Special Immigrant Juvenile Status (SIJS); and
- VAWA self petitioners whose application has been approved.

The following aliens must apply for a grant of discretionary approval by the DHS to be able to work in the United States. See 8 C.F.R. 274a.12(c) for the complete list.

- Conditional immigrants who fail to file a timely application for LPR status pending request for waiver if removal proceedings have been stayed;
- Aliens paroled into the U.S. for humanitarian reasons or for public benefit to pursue an application for admission 1182(d)(5);
- Aliens who have applied for asylum or withholding of removal may apply for employment authorization 150 days after completing the application for asylum, under 8 C.F.R. 208.7; and
- Aliens who have applied for adjustment to LPR status.

There may be circumstances in which a family or juvenile judge might be able to identify a party who is in a category of immigrant that, with referral to appropriate outside assistance, could be eligible to apply to DHS for permission to work.

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Aspects of Immigration Law that May Affect Ability to Meet Probation Conditions or Eligibility for Benefits or Services

Ability To Meet Probation Conditions

An illegal alien may be sentenced 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.

A sentence involving probation is a common outcome of a domestic violence case. Probation typically requires that specified conditions be met. Those conditions may include counseling, anger management classes, community service, or other requirements. The individual must be able to pay for classes, so the ability to work legally may arise as an issue for some aliens. In addition, the individual must be able to obtain transportation to the service providers, so the ability to obtain a valid driver's license may be a factor.

Further, an alien in ICE custody may not be able to attend required counseling or other services or meet reporting requirements.

Effects of ICE Holds on Parental Rights Cases

An immigration hold can affect an alien's ability to attend required services for family reunification.

Eligibility For Benefits Or Services

Courts may need to take into account limits on eligibility for benefits or services for both legal and undocumented aliens in custody determinations, dependency dispositions, and dispositions in juvenile offender cases. A court may make completion of counseling or other services a condition for a particular parent to receive custody of children in a divorce, for parents to obtain return of a child removed from the home in a dependency case, or for a juvenile to avoid detention in a delinquency case. In cases involving immigrants, the judge will have to be assured that the services ordered are available and accessible to the parent or child. In some instances, the judge may want to be aware that a party may need referral to outside assistance for accessing services.

Some of the limits on availability of services for illegal immigrants and culturally appropriate services for all immigrants include:

- Lack of services for illegal immigrant juveniles.
- Lack of adult probation services for illegal immigrants.
- Limits on benefits and services for some classes of legal immigrants; and
- Lack of services geared to the cultural needs of different immigrant populations.

Some of the major problem areas that judges in family and juvenile cases may face include:

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- The availability of services in different languages;
- The availability of services geared to different cultures;
- Probation conditions that can be met by illegal aliens sentenced to probation, such as the ability to get jobs to pay restitution; or
- Services that are not available to illegal immigrants, including medical services, mental health services, and financial assistance.

The following discussion presents the broad outlines of Federal immigration law related to eligibility for Federal or state public benefits or services. The discussion starts with a list of aliens classified as "Qualified Aliens" under Federal immigration law and the statutory sections covering different types of benefits. Then two tables are presented summarizing the application of the different statutory sections to different types of qualified and non-qualified aliens. Finally, a more detailed presentation of the statutory sections follows the two summary tables.

Definition of a Qualified Alien 1641

The term "qualified alien" means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is:

- An alien who is lawfully admitted for permanent residence;
- An alien who is granted asylum;
- A refugee who is admitted to the United States;
- An alien who is paroled into the United States for a period of at least 1 year;
- An alien whose deportation is being withheld;
- An alien who is granted conditional entry;
- An alien who is a Cuban and Haitian entrant; or
- An alien who has been approved or has a petition pending as a VAWA self-petitioner.

Summary of Statutory Sections

The following are the key sections in federal immigration law relating to eligibility for Federally funded benefits or services.

- 1611 – General eligibility for Federal public benefits;
- 1612(a) – Limited eligibility for SSI and food stamps;
- 1612(b) – Limited eligibility for TANF, Social Services Block Grants, and Medicare;
- 1613 – Eligibility for Federal means-tested benefits;
- 1621 – Eligibility for state or local public benefits; and
- 1622 – Authority of a state to determine eligibility for state benefits.

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Summary Table of Benefit Eligibility for Qualified Aliens

Benefit Eligibility Summary for Qualified Aliens					
Status	1611 General eligibility rules	1612(a) SSI and food stamps	1612(b) TANF, Social services, and Medicare	1613 Means-tested benefits	1621 State and local benefits
LPR	• Eligible for listed programs	• Exempt from prohibition in section	• May be eligible under specified rules	• Subject to prohibition in section	• Exempt from prohibition in section
Granted asylum or admitted as refugee	• Eligible for listed programs	• Prohibition does not take effect until seven years after admission	• May be eligible under specified rules	• Exempt from prohibition in section	• Exempt from prohibition in section
Paroled into the U.S. for one year or more	• Eligible for listed programs	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• Exempt from prohibition in section
Deportation withheld	• Eligible for listed programs	• Prohibition does not take effect until seven years after admission	• Subject to prohibition in section	• Exempt from prohibition in section	• Exempt from prohibition in section
Conditional entry	• Eligible for listed programs		• Subject to prohibition in section	• Subject to prohibition in section	• Exempt from prohibition in section
Cuban or Haitian Entrants	• Eligible for listed programs	• Prohibition does not take effect until seven years after admission	• Subject to prohibition in section	• Exempt from prohibition in section	• Exempt from prohibition in section
VAWA self-petitioner with petition pending or approved	• Eligible for listed programs	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• Exempt from prohibition in section

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Benefit Eligibility Summary for Qualified Aliens					
Status	1611 General eligibility rules	1612(a) SSI and food stamps	1612(b) TANF, Social services, and Medicare	1613 Means-tested benefits	1621 State and local benefits
Any qualified alien who has resided in the U.S. for five years	• Eligible for listed programs	• Exempt from prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• Exempt from prohibition in section

Summary Table of Benefit Eligibility for Non-Qualified Aliens

Benefit Eligibility Summary for Non-Qualified Aliens					
Status	1611 General eligibility rules	1612(a) SSI and food stamps	1612(b) TANF, Social services, and Medicare	1613 Means-tested benefits	1621 State and local benefits
Veterans or on active duty and their spouses and unmarried dependent children	• Not eligible for listed programs	• Exempt from prohibition in section	• May be eligible under specified rules	• Exempt from limitation in section	• Subject to prohibition in section
Certain defined Amerasians	• Not eligible for listed programs	• Prohibition does not take effect until seven years after admission	• Subject to prohibition in section	• Exempt from limitation in section	• Subject to prohibition in section
American Indians born abroad	• Not eligible for listed programs	• Subject to prohibition in section	• May be eligible under specified rules	• Subject to prohibition in section	• Subject to prohibition in section

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Benefit Eligibility Summary for Non-Qualified Aliens					
Status	1611 General eligibility rules	1612(a) SSI and food stamps	1612(b) TANF, Social services, and Medicare	1613 Means-tested benefits	1621 State and local benefits
Victims of trafficking and their spouses and unmarried dependent children	• Not eligible for listed programs	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section
Non-immigrants (temporary visa holders)	• Not eligible for listed programs	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• Exempt from prohibition in section
Aliens paroled into the U.S. for less than one year	• Not eligible for listed programs	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section
Illegal immigrants	• Not eligible for listed programs	• Subject to prohibition in section	• Subject to prohibition in section	• Subject to prohibition in section	• State may provide eligibility by state law

Eligibility Rules for Federal Benefits 1611

Subject to exceptions listed below, an alien who is not a qualified alien as defined in 1641, in essence an alien who is in the U.S. illegally with no basis in Federal immigration law for changing that status, is not eligible for any of the following Federal public benefits:

- Any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
- Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

The following Federal public benefits may be available in certain circumstances:

- Emergency medical assistance;
- Short-term, non-cash, in-kind emergency disaster relief;
- Assistance for immunizations with against communicable diseases; and

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- Programs authorized by the Attorney General that provide assistance necessary for the protection of life or safety.

Limited Eligibility for Specified Federal Programs 1612(a)

The following Federal programs are not available even to an alien who is a qualified alien under 1641.

- The supplemental security income (SSI) program under title XVI of the Social Security Act; and
- The food stamp program as defined in section 3(h) of the Food Stamp Act of 1977.

For the following aliens, the above prohibition does not take effect until seven years after the alien is admitted 1612(a)(2)(A):

- Aliens admitted as refugees;
- Aliens admitted as asylees;
- Cuban or Haitian entrants:
- Aliens whose deportation order is being withheld; and
- Certain Amerasian immigrants.

The following aliens are exempt from the prohibitions in 1612(a):

- Lawful permanent residents with 40 qualifying quarters of work 1612(a)(2)(B);
- Aliens who are veterans or on active duty and their spouses and unmarried dependent children 1612(a)(2)(C);
- Certain aliens who were receiving benefits on August 22, 1996;
- Certain disabled aliens residing in the U.S. on August 22, 1996; and
- Certain American Indians born abroad.

The following aliens are exempt from the prohibition on receiving food stamps:

- Aliens who were 65 or over and lawfully residing in the U.S. on August 22, 1996;
- Children;
- Certain Hmong and Laotian immigrants; and
- Any qualified alien who has resided in the United States for a period of 5 years or more beginning on the date of the alien's entry into the United States.

There are other special rules for aliens who were receiving SSI benefits or food stamps on or before August 22, 1996. 1612(a)(2)(D)

Limited Eligibility for Designated Federal Programs 1612(b)

The states are authorized to determine eligibility for the following programs:

- Temporary assistance for needy families: the program of block grants to States for temporary assistance for needy families under part A of title IV of the Social Security Act;

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- Social services block grant: the program of block grants to States for social services under title XX of the Social Security Act; and
- Medicaid: state plans approved under title XIX of the Social Security Act.

Exceptions: Qualified aliens listed below are eligible for the above programs subject to the special rules listed in 1612(b)(2):

- Certain refugees and asylees meeting specified time limits 1612(b)(2)(A);
- Certain permanent resident aliens 1612(b)(2)(B);
- Aliens who are veterans or on active duty and their spouses and unmarried dependent children 1612(b)(2)(C); and
- With regard to Medicaid, certain aliens on SSI and certain American Indians born abroad.

Eligibility for Federal Means-Tested Benefits 1613

A qualified alien who entered the United States on or after August 22, 1996, is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of entry into the United States as a qualified alien. 1613(a)

The following benefits are excluded from the above limitations on eligibility 1613(c):

- Emergency medical assistance;
- Short-term, non-cash, in-kind emergency disaster relief;
- Assistance or benefits under the Richard B. Russell National School Lunch Act;
- Assistance or benefits under the Child Nutrition Act of 1966;
- Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;
- Certain payments for foster care and adoption assistance;
- Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, which deliver in-kind services at the community level, including through public or private nonprofit agencies, do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and are necessary for the protection of life or safety;
- Certain programs of student assistance;
- Means-tested programs under the Elementary and Secondary Education Act of 1965;
- Benefits under the Head Start Act;
- Benefits under the Workforce Investment Act of 1998; and
- Assistance or benefits provided to individuals under the age of 18 under the Food Stamp Act of 1977.

The limits on eligibility in 1613(a) do not apply to the following aliens:

- Refugees and asylees;
- An alien whose deportation is being withheld;
- Cuban and Haitian entrants;
- Certain Amerasians; and

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- Aliens who are veterans or on active duty and their spouses and unmarried dependent children.

Eligibility for State or Local Public Benefits 1621

Subject to exceptions listed below, the following benefits are available only to aliens who are (1) qualified aliens, (2) nonimmigrants, or (3) aliens paroled into the United States for less that one year:

- Any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
- Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

The following state or local benefits are not subject to the above limitations on eligibility:

- Assistance for health care items and services that are necessary for the treatment of an emergency medical condition;
- Short-term, non-cash, in-kind emergency disaster relief;
- Public health assistance for immunizations with respect to immunizable diseases;
- Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General which (1) deliver in-kind services at the community level, including through public or private nonprofit agencies; (2) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (3) are necessary for the protection of life or safety.

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

Authority of State to Determine Eligibility For State Public Benefits 1622

A State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien, a nonimmigrant, or an alien who is paroled into the United States for less than one year.

Notwithstanding the above, the following aliens are eligible for any State public benefits:

- Refugees and asylees, aliens whose deportation is being withheld, and Cuban and Haitian entrants, for up to five years after entry into the United States;
- Certain Amerasians;
- Certain LPRs; and
- Aliens who are veterans or on active duty and their spouses and unmarried dependent children.

Other Provisions

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An alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident. 1623

A State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State, provided that any prohibitions, limitations, or restrictions imposed by a State or political subdivision of a State are not more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs. 1624

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Categories of Legal Immigration Status

The goal of family unity is an important consideration in divorce cases involving child custody decisions and in dependency cases for determining the best interests of the child. One factor potentially affecting family unity is the immigration status of the parties. It is important that the family or juvenile judges understand the ways in which a party before them may obtain or is at risk for losing legal immigration status.

The following discussion presents some of the major categories of eligibility for different types of immigration status that may arise in a family or juvenile case.

Naturalized Citizen 1427(a)

To become a naturalized U.S. citizen, an alien must:

- Be 18 years of age;
- Be lawfully admitted for permanent residence (see below);
- Have resided continuously in the United States for five years (or three years if married to a U.S. citizen) after being admitted for LPR status and been physically present in the U.S. at least half time during the five years prior to filing the application for citizenship;
- Be of good moral character; and
- 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 illegal activity, as specified in Federal Immigration Law. The primary areas of exposure of an LPR to removal are discussed in the following sections of the Guide.

- Grounds for Removal

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- Aggravated Felony
- Crime of Moral Turpitude
- Crime of Domestic Violence
- Illegal Activity Not Requiring a Criminal Conviction

Family-Sponsored Visas

Overall, about 80% of all legal immigration into the U.S., is through some type of family visa. The following table presents a summary of family visa categories.

Family-Sponsored Immigration Visa Categories		
Sponsor	**Visa Recipient**	**Special Rules and Conditions**
U.S. Citizen • 1151(b)(2)(A)(i) • 1101(b)(1) (definition of child)	• Immediate relative: alien spouse, unmarried minor child, or parent if citizen is 21 or older	• These recipients are not subject to numerical limitation. • Alien spouse or minor child will be a conditional immigrant if marriage is entered into less than 24 months prior to the date that the visa is obtained.
U.S. Citizen • 1153(a)((1), (3), and (4)	• Alien unmarried son or daughter not a child • Alien married son or daughter • Alien brother or sister	• These recipients are subject to numerical limitations and waiting lists • Alien spouse or minor child will be a conditional immigrant if marriage is entered into less than 24 months prior to the date that the visa is obtained.
Legal Permanent Resident • 1153(d)	• Alien spouse or unmarried minor child accompanying or following to join a spouse or parent	• These recipients will have the same priority as the petitioning LPR.
Legal Permanent Resident • 1153(a)(2)	• Alien spouse and children not accompanying or following to join a spouse or parent • Alien unmarried son or daughter not a child	• These recipients are subject to numerical limitations and waiting lists • Alien spouse or minor child will be a conditional immigrant if marriage is entered into less than 24 months prior to the date that the visa is obtained.

For conditional immigrants, the legal permanent resident spouse or parent and the conditional immigrant must jointly file to remove the condition in the 90-day period before the second anniversary of the admission as a conditional immigrant.

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Federal immigration law defines a "child" as an unmarried person under twenty-one years of age who falls into one of the following categories (See 1101(b)(1) and 8 C.F.R. 204.2(d) for full details):

- Born in wedlock;
- A stepchild who was under eighteen years of age at the time the marriage creating the status of stepchild occurred;
- Legitimated before the age of eighteen under the law of the child's or father's residence or domicile, whether in or outside the United States;
- Born out of wedlock, if status is sought by the child's natural mother or father;
- Adopted while under the age of sixteen years;
- Adopted under age 18 along with a sibling adopted under age 16; or
- orphaned under certain specified circumstances prior to the age of sixteen.

While a parent can be the source of a family visa for a child, a U.S. citizen child cannot be the source of a family visa for an alien parent. Acosta v. Gaffney, 558 F. 2d. 1153.

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.
- Divorce, unless a waiver is available under law for hardship reasons under 1186a(c)(4), including as a battered spouse, or the conditional resident can show that the marriage was bona fide even if short. See also VAWA Self-Petitioner.

The conditional permanent resident is subject to removal for engaging in a variety of criminal activity. See 1227.

A father does not need to have custody to petition for immigrant status for an undocumented child. 1101(b)(1)(C)

The person with legal status has all the power regarding petitioning for a spouse or child. 1151(b)(2)(A)(i) and 1153(a). The child is thus generally at the mercy of the parent, unless he or she falls under some specific exception such as a VAWA self-petitioner or an abused or neglected juvenile eligible for SIJS status. Even if a divorce is not granted, the husband can still refuse to petition for his wife.

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

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Federal law defines a juvenile as anyone under the age of 18. Special immigrant juvenile status is available under the following conditions.

- There is a finding by a court in the United States with juvenile jurisdiction that the juvenile: is dependent on the court and placed in the custody of an agency or department of a state or an individual or entity appointed by the state or a juvenile court located in the United States; and whose reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis;
- There is an administrative or judicial finding that it would not be in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence;
- The juvenile has concurrently applied for lawful permanent resident status; and
- The dependency case was not filed as a sham solely to obtain immigrant status.

The dependency court must retain jurisdiction until the juvenile is granted SIJS status.

The process for obtaining SIJS status begins with a finding in a court in the United States with juvenile jurisdiction that the juvenile meets the conditions set forth in 1101(a)(27(J). This requires that both the judge and the child's representative (attorney, GAL) know the requirements of Federal immigration law in 1101(a)(27)(J).

If the juvenile is an unaccompanied minor in the actual or constructive custody of the U.S. Department of Health and Human Services (DHHS) and the juvenile seeks to have custody transferred from DHHS to the juvenile court for placement, the juvenile needs the consent of DHHS to apply for SIJS status prior to initiating proceedings in a state dependency court.

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.

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

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

- The spouse or child has been battered or subjected to extreme cruelty by citizen or lawful permanent

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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 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 eligibility for cancellation of a removal order for battered spouse are described in the link below.

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.

Refugee/Asylee 1101(a)(42), 1157, 1158

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

- The individual has a well-founded fear of persecution on the basis of race, religion, nationality, membership in 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.

A person in the United Sates must generally apply for asylum within one year of admission.

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.

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A spouse or child (as defined in 1101(b)(1)) of an alien admitted as a refugee/asylee is admissible if "accompanying or following to join" the refugee/asylee. 1157(c), 1158(b)(3)

- The spouse or child cannot precede the refugee/asylee. Case 3005.

An alien granted refugee/asylee status may apply for LPR status after one year. 1159, Case 2857

- The alien must be admissible under 1182(a), or
- The Attorney General may waive the grounds for inadmissibility in 1182(a), except for those listed in 1159(c), for humanitarian purposes or to preserve family unity. 1159(c)

Victim of human trafficking 1101(a)(15)(T)

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

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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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 an aggregate of 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 for other reasons.

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

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Grounds for Removal [Primary statutory link 1227]

Judges have to be aware of the fact that even lawful permanent residents may be at risk for removal. Further, immigration courts do not consider the interests of the child in removal proceedings.

Removal may be detrimental to a child. Immigration courts can't prevent a deported parent from taking a child with him or her. What happens to the child is the parent's decision, not the court's, even if the child is a citizen.

The following are grounds for removal 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)

- 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)

  √ Crime involving evil or malicious intent or inherent depravity, intent or reckless behavior to commit great bodily harm, or intent to defraud.
  √ Some examples include: theft, fraud, perjury, assault, prostitution, and DUI.

- 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). Some examples include the following:

  √ Murder;
  √ Rape;
  √ Sexual abuse of a minor;
  √ Violent crime with sentence of one year or more;
  √ 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; and
  √ Obstruction of justice, perjury, failure to appear.

- 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)

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- √ 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.

- 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)

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- 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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Eligibility for Cancellation of a Removal Order [Primary statutory link 1229b]

An illegal alien or LPR who is under a removal order may, under Federal immigration law, be eligible for cancellation of the order. 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).

Cancellation of removal due to hardship to a child

One of the possible grounds for cancellation of a removal order is that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a citizen of the United States or an alien lawfully admitted for permanent residence." 1229b(b)(1)(D).

Two Board of Immigration Appeals (BIA) cases dealing with applications for cancellation of a removal order based on a claim of unusual hardship to a child illustrate the types of issues that can arise regarding the treatment of children in Federal immigration law.

- In Matter of Andazola, 23 I&N 319 (BIA 2002) (Case 3467) the BIA found that removal would not result in sufficient hardship to the U.S. citizen children. The alien mother was a single mother with two U.S. citizen children, ages 11 and 6. All of her extended family was in the U.S., as undocumented aliens. The father of her children lived with her and provided some support. She owned her home and two automobiles and had about $7,000 in savings. Her children were not fluent enough in Spanish to be placed in the same school grade in Mexico. The BIA found that, while the children would face some hardship, it was not unusual in comparison to other families being deported, particularly given the financial resources possessed by the mother.

- In Matter of Recinas, 23 I&N 467 (BIA 2002), (Case 3479), the BIA found that such hardship existed, in that: (1) the alien mother was the sole source of support for her family and had no means of providing that support in Mexico; (2) her U.S. citizen children, ages 12, 11, 8, and 5, had never traveled to Mexico and could not read or write Spanish; and (3) she had no extended family in Mexico. The BIA distinguished the prior case on the grounds that the mother in Andazola would have assistance in supporting her family in Mexico.

In both cases, the BIA noted that the children would suffer some hardship by being removed, as educational opportunities would be less available. The BIA was more concerned with the ability of the mother to support the family than the hardship caused by moving the children to a new and, to them, alien country.

With regard to U.S. citizen children of illegal immigrants, the courts have refused to overturn a denial of cancellation of removal where a parent claimed hardship because a U.S. citizen child would have to leave the U.S. if the parent were to be deported. Martinez-Maldonado v. Gonzales, 7th Cir 2006.

In determining hardship for cancellation of a removal order, immigration courts have held that deporting a parent in and of itself is not enough to result in undue hardship for the child, even if the child is a U.S. citizen. Immigration courts can't prevent a deported parent from taking a child with him or her. What happens to the child is the parent's decision, not the court's, even if the child is a citizen.

Cancellations of removal are limited to 4,000 per fiscal year. 1229b(e)(1)

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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 security or intelligence;
- Failure to appear for service of sentence where the underlying offense is punishable by imprisonment 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;

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- 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, 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 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

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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?

- 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)

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- √ 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 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.

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

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

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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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(1) 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
- INADMISSIBLE ALIENS
- GROUNDS FOR DEPORTATION
- ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER

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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)

Links:

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

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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. 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)

Links:

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

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SECTION V

IMMIGRATION ISSUES IN CRIMINAL CASE PROCESSESSING

This section is intended to help state trial court judges and court administrators 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.

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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 • 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

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MAJOR CATEGORIES OF LEGAL IMMIGRATION STATUS

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?

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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Assuring Defendants Are Properly Advised of the Potential Immigration Consequences of a Guilty Plea: Implications of Padilla v. Kentucky

A growing number of states require judges to investigate whether non-citizen criminal defendants have been advised of the potential immigration implications of a guilty plea. The issue has become a critical one for judges to consider with a recent U.S. Supreme Court decision, Padilla v. Kentucky, which held that failure of a defendant's attorney to advise him about the potential immigration consequences of pleading guilty to a deportable criminal offense constitutes ineffective assistance of counsel. The Padilla case raises a number of issues likely to be faced by state criminal court judges, including:

1. Assuring that defendants are properly advised of the potential immigration consequences of a guilty plea;
2. Providing effective appointed counsel for indigent defendants; and
3. Providing assistance for unrepresented defendants.

Summary of Facts and Decision of Padilla v. Kentucky

Jose Padilla was arrested driving a tractor-trailer truck containing over 1,000 pounds of marijuana. He was charged in state court with two drug possession misdemeanors, felony drug trafficking, and a tax related crime. He entered a guilty plea in return for a sentence of five years, as opposed to the ten years he might have received had he been convicted at trial. Padilla was a native of Honduras who had been living in the U.S. as a lawful permanent resident for over 40 years. He had served in the U.S. armed forces honorably in Vietnam. Due to his immigrant status, Padilla asked his counsel before accepting the plea if the conviction carried any adverse immigration consequences and was advised that it did not, given his length of residence in the U.S. That advice was incorrect, as it is clear under Federal immigration law that the conviction was for a removable offense. Padilla subsequently sought post-conviction relief to have his plea set aside for ineffective representation of counsel.

The U.S. Supreme Court's decision in Padilla v. Kentucky, announced on March 31, 2010, held that advice of counsel regarding deportation risks of a criminal conviction falls within the scope of the Sixth Amendment's right to counsel, so that failure to advise a defendant that a guilty plea might carry a risk of deportation deprives the defendant of effective representation under the Sixth Amendment. The Court determined that "deportation is an integral part of the penalty that could be imposed on non-citizen defendants who plead guilty to specified crimes." The Court rejected respondent's argument that deportation is a collateral consequence that does not fall within the defense attorney's scope of representation. Further, the Court held that the defective representation went beyond the affirmative misadvice provided to Padilla and applied to failure to advise as well.

The Court went on to say that to be eligible for relief, the defendant must also show prejudice, that is, show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a guilty plea, this means that there must be a reasonable probability that the defendant would have entered a different plea had he or she known of the risk of deportation. The Court remanded the case to the Kentucky Supreme Court to make that determination.

It is clear that Padilla will affect the practice of criminal defense attorneys in cases involving immigrant defendants, particularly since all non-citizens, including lawful permanent residents, face the risk of deportation

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for a wide range of criminal convictions. It is not clear from the Padilla decision, however, how state criminal court judges will be affected by the decision. The potential impact of Padilla on state criminal court judges is the subject of this article.

Assuring That Defendants Are Advised Regarding Potential Immigration Consequences of a Guilty Plea

The Supreme Court was silent on the issue of whether state criminal court judges have a duty to assure that immigrant defendants have been advised of the immigration consequences of a guilty plea, despite the fact that the issue was raised in the oral argument of the case. Still, a growing number of states now require, either through statute, court rule, or plea acceptance form, that judges investigate whether non-citizen criminal defendants have been advised of the potential immigration consequences of a guilty plea.

The following are examples of the range of requirements that different states have placed on judges with regard to advising defendants of the immigration consequences of guilty pleas. The examples below are presented in order from the least to the greatest required intervention by the judge. Note that the examples below address all potential immigration consequences of a guilty plea and not just the risk of deportation.

- California: 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.: (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: 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, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or

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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: Before accepting a plea in a felony, gross misdemeanor, or misdemeanor case, the judge must ensure that defense counsel has told the defendant and the defendant understands: If the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

- Connecticut: (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.

In addition, some states either have or are considering including language in the plea acceptance form that must be signed by a defendant asserting that the defendant understands that entering a guilty plea may have immigration consequences and generally track the advisement language contained in the above statutes.

Some states are struggling with efforts to develop appropriate requirements, either by statute or court rule, for judges in advising defendants. For example, one state is considering the following two very different alternatives for a court rule on plea advisements regarding immigration consequences of a guilty plea:

- Alternative A: If the defendant is not a citizen of the United States, ask the defendant's lawyer and the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant's plea until the deficiency is corrected.

- Alternative B: Advise the defendant who offers a plea of guilty or nolo contendere that such a plea by a non-citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. 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.

Alternative A requires that the judge inquire whether the defendant is a non-citizen, while alternative B is given to all defendants and thus does not require the judge to inquire about the defendant's immigration status.

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Also, alternative A requires the judge to explore what the defendant and his or her attorney have discussed, while alternative B does not.

Even without a specific state requirement or court rule that the judge assure that a defendant has been advised of immigration consequences of a guilty plea before accepting the plea, after Padilla it is likely that many judges will feel that they have an ethical duty to do so to assure fundamental fairness for immigrant defendants. If a defendant indicates in court that he or she has not been advised of the possible immigration consequences of a guilty plea, the judge may consider refusing to accept the plea until the defendant has been properly advised. Judges may also find that defense attorneys representing immigrants may request time to investigate the potential immigration consequences before advising a client to enter a guilty plea, in order to meet the requirements for effective representation set forth in Padilla.

Providing Effective Appointed Counsel for Indigent Defendants

There may be circumstances where a criminal court judge plays a role in appointing counsel for a defendant. This role may arise in a variety of contexts, including the following:

- The judge may share a responsibility for selecting attorneys to be included in the indigent criminal defense pool;
- The judge may select and appoint private counsel to serve as counsel for indigent criminal defendants, paid by the court; or
- The judge may select and appoint private counsel to represent indigent criminal defendants pro bono in individual cases.

In any of these circumstances, judges in cases involving immigrant defendants may find themselves faced with some of the following questions:

- In what circumstances, if any, should expertise in immigration law be a factor in selecting an attorney to represent an indigent defendant?
- How can a judge determine an attorney's level of expertise in immigration law?
- In what circumstances, if any, should a judge consider appointing an immigration attorney as co-counsel?

As a corollary to the above, in answering those questions judges must also consider what steps they might or should take to determine if a defendant is an immigrant, if the court does not already have information on the defendant's immigration status.

There may be circumstances where a trial court administrator plays a role in appointing counsel for a defendant. This role may arise in a variety of contexts, including the following:

- The court administrator may be responsible for selecting attorneys to be included in the indigent criminal defense pool;
- The court administrator may be responsible for assuring adequate funding to pay for private counsel appointed by a judge to serve as counsel for indigent criminal defendants; or
- The court administrator may be responsible for creating the list of private counsel willing to represent indigent criminal defendants pro bono in individual cases.

In any of these circumstances, judges may want to consider the following questions with their court administrators:

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- Should expertise in immigration law be a factor in selecting attorneys for the indigent defense pool?
- How can the court determine an attorney's level of expertise in immigration law?
- Should the court consider paying for an appointed immigration attorney as co-counsel?

Providing Assistance for Unrepresented Defendants

There may be cases where an immigrant offender charged with a misdemeanor may be unrepresented and not have a right to appointed counsel, but conviction of the misdemeanor may still carry a risk of deportation. For example, certain misdemeanors that are considered minor under state law may qualify as crimes involving moral turpitude, if an individual is convicted of two crimes not arising out of the same circumstances. These are crimes involving fraud or immoral behavior, such as theft, fraud, perjury, and prostitution.

There are no clear answers as to what the judge should do in cases involving unrepresented immigrant defendants, but some possibilities might include the following:

- Appoint counsel in any case involving a crime that may carry a risk of deportation.
- Appoint counsel in any case where the defendant indicates that he or she has not been advised of the deportation risks of the case.
- Offer the defendant an opportunity to request appointed counsel as part of the advisement that some crimes carry a risk of deportation.
- Take other steps to assist the defendant.

Judges may also work with their court administrators to consider what assistance, if any, they might provide to unrepresented defendants charged with crimes that may carry the risk of deportation. There are obviously no clear answers, as this is uncharted territory, but some possibilities might include the following:

- Flagging cases for the judge involving a crime that may carry a risk of deportation without regard to defendant's immigration status.
- Flagging cases for the judge involving a crime that may carry a risk of deportation where the defendant is known to be an immigrant.
- Flagging cases for the judge regardless of the crime where the defendant is known to be an immigrant.
- Advising the immigrant defendant that some crimes carry a risk of deportation and he or she may want to seek the advice of counsel.

In addition, some courts are investigating the feasibility of providing self-help materials for non-U.S. citizen criminal defendants on the potential immigration consequences of a criminal conviction. Federal immigration law is exceedingly complex and technical. As a result, it will be a challenge to develop materials that are understandable by an immigrant defendant but still complete enough to provide the defendant notice that he or she may be risking deportation and should seek expert advice.

Effect of Vacating Conviction for Failure to Properly Advise Defendant

The Board of Immigration Appeals has held that a conviction vacated under state law for failure of the trial court to advise the defendant of the possible immigration consequences of a guilty plea is no longer a

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conviction for immigration purposes. (Case 3525)

ASSURING DEFENDANTS ARE PROPERLY ADVISED OF THE POTENTIAL IMMIGRATION CONSEQUENCES OF A GUILTY PLEA

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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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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.
- There have been instances where an individual has agreed to leave the country but then not actually

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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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Categories of Foreign Born Status

To Become a Naturalized U.S. Citizen, an alien must: 1427(a)

- Be 18 years of age;
- Be lawfully admitted for permanent residence (see below);
- Have resided continuously in the United States for five years (or three years if married to a U.S. citizen) after being admitted for LPR status and been physical present in the U.S. at least half time during the five years prior to filing the application for citizenship
- Be of good moral character.
- 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

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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.
- Divorce, unless a waiver is available under law for hardship reasons under 1186a(c)(4), including as a battered spouse, or the conditional resident can show that the marriage was bona fide even if short. 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)

Federal law defines a juvenile as anyone under the age of 18. Special immigrant juvenile status is available under the following conditions.

- √ There is a finding by a court in the United States with juvenile jurisdiction that the juvenile: is dependent on the court and placed in the custody of an agency or department of a state or an individual or entity appointed by the state or a juvenile court located in the United States; and whose reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis;
- √ There is an administrative or judicial finding that it would not be in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence;
- √ The juvenile has concurrently applied for lawful permanent resident status; and
- √ The dependency case was not 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

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

Immigration law provides that an alien married to a citizen or LPR may self-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 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 eligibility for cancellation of a removal order for a 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.

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- The individual has been convicted of a serious crime, including conviction of an aggravated felony.

A person in the United States must generally apply for asylum within one year of admission.

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.

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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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 an aggregate of 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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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

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- An alien who has been deported may not seek readmission for 10 years after deportation. 1182(a)(9)(A)(ii)
- An alien who has left the country voluntarily may seek readmission 3 years after deportation if they leave voluntarily before the commencement of removal proceedings and they have been unlawfully present in the U.S. for at least 180 days or less than one year. 1182(a)(9)(B)(i)

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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)

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(3) Failure to register or falsification of documents

- 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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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

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- Removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

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?

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 presidential or gubernatorial pardon can eliminate deportability if the conviction involved crime(s) involving moral turpitude, aggravated felonies or high-speed flight from immigration checkpoints. No analagous provision exists for other grounds of deportability. 1227(a)(2)(A)(vi)
- 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, and (2) some form of punishment is imposed (Case 3601).
- 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 not 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;

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- Firearm offense;
- Prostitution;
- 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?

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.

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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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;
- 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;

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- Crimes compromising national security or intelligence;
- Failure to appear for service of sentence where the underlying offense is punishable by imprisonment 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, 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;

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- 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 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;

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- 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?

- 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.

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- 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 Leocal v. Ashcroft, 543 US 1 (2004), the Supreme Court held that DUI is not a crime of violence when the statute requires only the negligent use of force or no mens rea at all. The Court expressly left open whether a statute that requires the reckless (but not intentional) use of force against the person or property of another qualifies as a crime of violence. A statute that requires the intentional use of force clearly would qualify.

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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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)

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- Trafficking in counterfeit goods. (Case 3559)
- 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.

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- 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)

(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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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)

Links:

- INADMISSIBLE ALIENS
- GROUNDS FOR DEPORTATION
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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)

Links:

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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)

Links

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

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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.

Links:

- INADMISSIBLE ALIENS
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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)

Links:

- INADMISSIBLE ALIENS
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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)

Links:

INADMISSIBLE ALIENS

GROUNDS FOR DEPORTATION

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SECTION VI

STATE COURTS' EFFORTS TO ADDRESS THE IMPACTS OF IMMIGRATION

In this section we offer concrete examples of state court efforts to address the impacts of immigration including ways to measure and monitor the impacts of immigration on the courts and the progress courts are making to adequately serve immigrants as well as an inventory of items that likely should be included in an ongoing dialog between the state courts and federal agencies involved in immigration in order to advance the interests of the state courts.

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VI-A: Promising Approaches For Addressing the Impacts of Immigration on the State Courts

Only now are courts in the pilot jurisdictions developing and implementing responses for serving immigrants in court. Much of this early improvement activity is focusing on:

- collective learning among judges and court personnel about the consequences to litigants, court operations, and case processing of the intersections among, federal, state, and local law policy and practice;
- assessing and redesigning work processes to better address the problems that accompany immigration status;
- improving attorney representation of litigants whose immigration status may be affected by state court activity;
- improving record keeping practices so that state court records can be more readily used in federal immigration matters; and
- developing problem-solving groups that include federal agencies, such as Immigration and Customs Enforcement (ICE) as well as local justice agencies.

For example, taken together, the learning site courts participating in the SJI and CPPS initiative are:

- revamping state trial court records preparation and management practices to include criminal and family law case information in formats that could be used readily in concurrent or subsequent federal immigration proceedings;
- redesigning pretrial release and probation practices;
- working with justice partners to increase access to interpreters early in the justice processes to assure that non-English speaking litigants have an opportunity to assess whether their immigration status might be a factor in their case before the state court;
- working with defense counsel and prosecutors to assure that the implications of immigration status are well known throughout the legal community;
- addressing the complicated interplay among immigration status and eligibility for the types of local, state, and federally funded services often associated with state court cases, such as substance abuse and mental health treatment, parenting assistance, and medical assistance for children;
- establishing information links between court and justice agency litigant assistance services and resources for immigrants such as national consulates and legal and family support organizations to avoid system inefficiency;
- reviewing public defense assignment practices to determine if litigants receive needed assistance soon enough in the criminal process to avoid system inefficiency;
- reviewing jail management practices to determine impacts on case processing of local enforcement personnel acting as immigration agents and interactions between local jail and ICE regarding detainees with immigration matters;
- reviewing use of citation and release and other mechanisms often used for lesser offenses;
- reviewing methods for identifying people so that law enforcement, the courts, and the jails can determine who people are;
- dealing with the misgivings of some immigrant communities to engage court and justice systems as witnesses and victims;
- establishing mechanisms for locating the family members of individuals involved in state court cases;
- redesigning self-help services that assist litigants to self-identify whether their or a family member's immigration status might be a factor in their state trial court case;
- working with state and federal justice partners to improve communications practice so that state court

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and local detention officials can determine quickly if state court litigants are in Immigration and Customs Enforcement custody or have been removed from the country and thus are no longer able to meet state court requirements, such as appearances for hearings, and other probation conditions;
- revamping plea acceptance practices to assure that defendants have been advised of the immigration consequences of their plea; and
- preparing training materials and establishing education programs throughout the court to assure that judges and court personnel are aware of the connections between immigration status and criminal, family, and juvenile case processing.

Figure V-1 to V-3 provide examples of the worksheets that have been used in some of the learning sites to identify improvement needs and strategies.

Finally, as part of the ongoing effort, we are developing a detailed agenda of items that need to be included in ongoing dialog between federal immigration organizations and the state courts. Figure V-4 summarizes this federal/state dialog agenda.

VI-B: Monitoring Progress

Work in the learning sites has revealed that one of the greatest challenges courts face is tying to determine the impacts of providing services for immigrants. In large part this challenge is a result of a lack of available measurement tools and immigration sensitive data. As one result, the Immigration and the State Courts Initiative is developing a set of immigration sensitive measures that gauge the impacts of immigration on court workload, case processing time, costs, and the quality of justice services provided. In the coming months these measures will serve as the foundation for implementing comprehensive measurement systems.

Figure V-5 summarizes the key immigration sensitive measurement questions and measures that will be included in the on-going performance monitoring effort.

Figure V-4
Topics For State –Federal Court Dialog About Immigration

Problems Resulting From Complexity and Ambiguity in the Federal law

- Definition of crime of moral turpitude.
- Definition of good moral character.
- Numerous types of immigrant status.

Implications of Immigration Consequences Dependent on State Convictions or Sentences

- Criminal charges constituting an aggravated felony or crime of moral turpitude.
- Variations in sentencing practices.
- Effects of state law elements of crimes.

State Authority vs. Federal Supremacy

- Authority of prosecutors to tailor criminal charges to achieve immigration results.
- Authority of judges to tailor convictions and sentences to achieve immigration results.
- ICE dependence on state and local assistance and cooperation.
- Exchange of evidence between ICE officers and local prosecutors.

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Figure V-4
Topics For State –Federal Court Dialog About Immigration

Eligibility for Services and Probation

- State law restrictions on access to services.
- Federal law restrictions on access to services.
- Funding and reimbursement issues.
- Restrictions on ability of illegal aliens to meet probation conditions.
- Restrictions aimed at lawful permanent residents.

Implications for State Court Trial and Case Flow Management

- Need for and role of interpreters.
- Locating defendants in ICE custody.
- Protocols for obtaining information from ICE.
- Transportation from ICE custody.
- Advising defendants of immigration consequences of pleas.
- Open probation cases for defendants unable to meet conditions due to ICE custody or removal.

Impacts of Federal Use of Local Jails and State Prisons on State Court and Justice System Policy and Practice

- Jail overcrowding and management.
- State court pretrial release.
- Sentences.
- Financial incentives to alter local and state priorities to accommodate federal immigration policy and practice.
- Access to detainees by state courts.
- Cost to state systems of housing removable criminal undocumented immigrant prisoners.
- Detainee transportation.

ICE Voluntary Removal Process

- Criteria for allowing aliens to leave voluntarily.
- ICE officials authorized to make the decision.
- Tracking people to assure that they leave.
- Effect of voluntary removal on the alien's right to reenter the country legally.
- Notification to state and local justice officials as to who is removed.

System-Wide Coordination and Training

- Areas where coordination of different parts of the justice system is needed.
- Need for system-wide training.
- Learning objectives and content of a system-wide training programs.

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Figure V-5: Immigration and the State Courts Performance Measurement Summary

Measurement Questions	Example Measures
<u>Immigration Related Workload Demands on the State Courts</u> What is the relative size of the immigrant population within a jurisdiction? What are the relative sizes of the Legal Permanent Resident and undocumented populations within the immigrant community? What is the age structure within the immigrant population? What is the family composition within the immigrant population? What is the immigration status of families within the immigrant population? What are the levels of language proficiency within the immigrant population? What are the education levels within the immigrant population? What are the magnitudes of the cultural gaps between immigrant populations and the court workforce?	• Foreign born population as a percentage of total population. • Legal permanent resident immigrant population as a percentage of total population. • Estimate of illegal immigrant population as a percentage of total population. • Percentage of total population reporting languages other than English as language used in the home. • Percentage of total population with limited English proficiency.
<u>Support For Court Values and Outcomes</u> What should be the extent of a court's efforts to support fundamental and traditional public service values when serving immigrants in court? These values might include transparency, cost-effective service provision, timeliness, equal access and consistency, comprehensiveness, and cultural appropriateness. What are the outcomes of cases involving immigrants? Are cases involving immigrants completed at the same rates as are cases for other groups of court users? Do immigrants receive needed services at rates comparable to other court users? Do immigrants comply with court orders at rates comparable to other court users? Is the harm to individuals and communities attributable to immigrants at rates comparable to other court users? Are immigrant victimization rates comparable to those of other populations?	• Closure rates -- cases involving Immigrants are completed. • Service rates -- lawful and undocumented immigrants receive needed services. • Compliance rates -- Immigrants comply with court orders. • Participation rates – individuals within immigrant communities report crime and assist law enforcement, such as serving as witnesses, and report to authorities when harm is observed.

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Figure 2: Immigration and the State Courts Performance Measurement Summary (continued)

Addressing Key Immigration and the State Courts Policy Questions What should be the extent of a court's efforts to: Adjudicate cases involving undocumented immigrants in the country illegally? Assure procedural justice for immigrants? Minimize the unintended consequences of state court action in cases involving immigrants? Provide services to immigrants? Assist the federal government in regulating immigration?	• Litigant satisfaction with the courts – was the process seen as understandable, timely, and fair.
Assessing Service Delivery Costs, Efficiency, and Effectiveness What are the workload, caseload, and caseflow impacts of cases involving both Legal Permanent Resident and undocumented immigrants? Do cases involving immigrants take longer to process than cases involving other court users? Are more hearings required per case? Are additional types of hearings required, such as hearings to determine bail eligibility? Are trials demanded more often in minor criminal cases? Do cases involving immigrants complicate evidentiary practices? Are more interpreters required? Are different forms of probation monitoring required? Are other types of court services more frequently required in cases involving immigrants?	• Immigration related requests for records processed. • Language and culture assistance services provided to immigrants. • Interpreter services provided. • Case processing times. • Number of events per case.

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Figure V-1: Example Priority Improvement Project Worksheet 1
Accommodating Immigration Status in Criminal Case Processing

Problem Statement: Local justice officials often experience difficulties coordinating and integrating local day-to-day justice operations with ICE actions. There needs to be better communication so that local justice officials and ICE officials understand each other's needs.

Key issues to be addressed	Desired outcomes	Action items
• Responsibilities of and potential restrictions on local justice officials for reporting potentially deportable aliens to ICE. • Effect of ICE holds on jail use. • Required documentation for local jail officials to release a person into ICE custody. • ICE assistance to local justice officials to help identify people. • Sharing of evidence between ICE officials and local prosecutors. • Location of individuals in ICE custody for trial scheduling. • The ability of individuals under ICE holds to meet probation conditions. • The ability of probation to determine who is under an ICE hold for the purposes of probation supervision. • Information from ICE on individuals who have voluntarily agreed to leave the country. • Information on ICE holds from other jurisdictions. • Possible access to ICE databases by local justice officials.	• Protocols for local justice officials to determine the location and status of individuals in ICE custody who are defendants in state court or on supervised probation. • Protocols for reporting potentially deportable aliens to ICE. • Training on ICE procedures for local justice officials.	• Conduct ICE training of local justice officials on ICE procedures and operations. • Conduct planning meetings with key ICE officials. • Develop communication protocols. For each action item: (1) What steps will be required? (2) What is the time frame to complete each step? (3) What resources will you need and how will you get them? (4) Whose cooperation or assistance will you need? (5) What and who will likely hinder you, and how will you overcome the barriers? (6) What will make you stop or alter what you are doing? How will you measure your progress?

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Figure V-2: Example Priority Improvement Project Worksheet 2

Developing Justice Services for Immigrants

Problem Statement: Limitations on services available to aliens convicted of criminal offenses, particularly illegal aliens, serve to limit the sentencing options of local criminal courts. In addition, families of aliens who are convicted of criminal offenses or subject to deportation may be left without financial assistance and be subject to severe disruption of family life.

Key issues to be addressed	Desired outcomes	Action items
• Access to probation and family services by lawful and undocumented aliens. • Funding and reimbursement for services to lawful and undocumented aliens. Ability of lawful and undocumented aliens to meet probation conditions. • Assistance to families of deportable aliens.	• Improved services for illegal immigrant juveniles. • Expanded adult probation services for illegal immigrants. • Expanded availability of services geared to the culture and needs of different immigrant populations. • Availability of assistance to families of deportable aliens through foreign consulates.	• Identify service availability and service gaps for immigrants. • Coordinate with the Mexican Consulate to discuss possible collaboration and provision of services. • Identify and contact other consulates for services similar to those offered by the Mexican Consulate. For each action item: (1) What steps will be required? (2) What is the time frame to complete each step? (3) What resources will you need and how will you get them? (4) Whose cooperation or assistance will you need? (5) What and who will likely hinder you, and how will you overcome the barriers? (6) What will make you stop or alter what you are doing? (7) How will you measure your progress?

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Figure V-3: Example Priority Improvement Project Worksheet 3

Developing a System-Wide Understanding of and Coordinated Response to the Immigration Consequences of Criminal Cases

Problem Statement: Local justice officials across the justice system are unfamiliar with the potential immigration consequences of state criminal convictions and sentences and the ways in which immigration laws can be used to protect even undocumented aliens who are witnesses to victims of crimes. As a result, local justice officials may work at odds with each other due to differences in understanding of immigration laws.

Key Issues to be addressed	Desired outcomes	Action items
• Proper advisement of criminal defendants as to the immigration consequences of a plea or conviction. • Areas of immigration law where immigration consequences are dependent on the type of crime or length of sentence. • Rules of construction for what is considered a conviction and sentence under immigration law. • Rules of construction for classifying types of crimes for immigration purposes. • Effects of immigration laws on release decisions and achievable probation conditions. • Immigration laws available to protect victims and witnesses, including T and U visas and VAWA self-petitioners.	• Identification of areas where coordination of different parts of the justice system is needed. • Learning objectives and content of a system-wide training program. • Presentation of one system-wide training session.	• Develop training program. • Present training program. • Identify areas for coordination among justice officials and develop methods to facilitate coordination. For each action item: (1) What steps will be required? (2) What is the time frame to complete each step? (3) What resources will you need and how will you get them? (4) Whose cooperation or assistance will you need? (5) What and who will likely hinder you, and how will you overcome the barriers? (6) What will make you stop or alter what you are doing? (7) How will you measure your progress?

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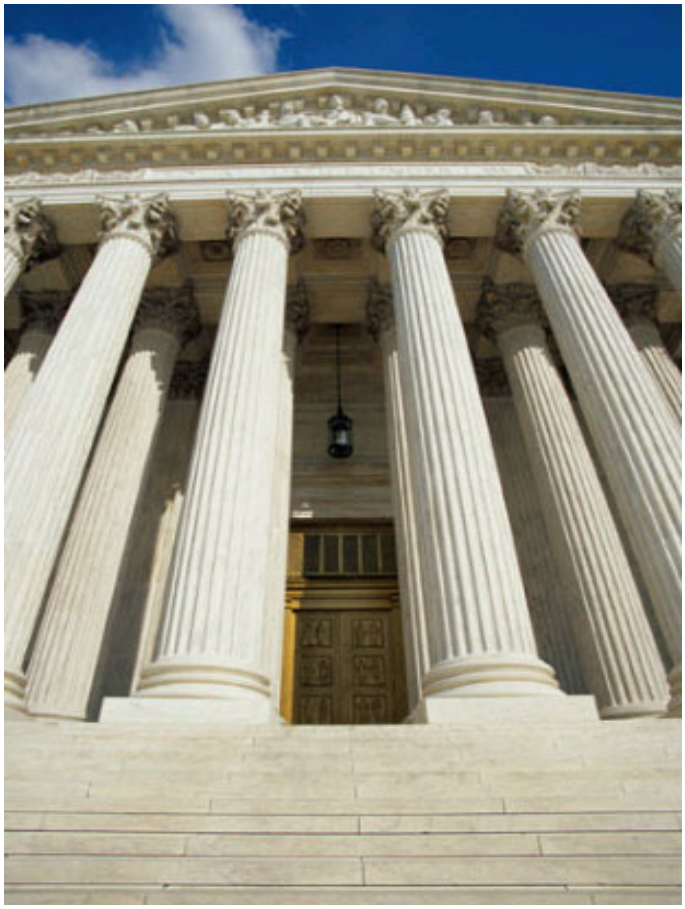
APPENDIX A

COURT ADMINISTRATOR COURSE EXERCISE WORKSHEETS



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Exercise Worksheet 1: Addressing Immigration In Our Court
A Framework For Addressing the Impacts of Immigration on the State Courts

The structure of the framework for addressing immigration in the state courts presented in Figure 1 stresses that state courts need to:

- understand the numerous factors shaping the immigration related needs and demands on the courts;
- have a clear, commonly shared set of goals and values regarding how immigrants should be served by the courts;
- have a clear commonly shared understanding of the desired outcomes of state court case processing of cases involving immigrants;
- have reached agreement among court policy-makers about the extent to which the court should (a) assure procedural justice for immigrants, (b) minimize the unintended consequences on federal immigration status on state court action, (c) assist the federal government in regulating immigration, and (d) provide services to immigrants;
- be clear about how the needs of immigrants and the complexities of federal immigration law, policy, and practice affect the numerous work processes used in criminal, civil, family, juvenile, and probate case processing; and
- provide court and justice infrastructure that supports effective case processing in cases involving immigrants.

Moreover, there are a variety of assumptions about the relationships among the five key components built into the framework for addressing immigration in the state courts. Specifically, the logic of the framework stresses that immigration related needs and demands on the courts need to be accounted for in the strategic goals and values and other aspects of the strategic direction established by the courts when addressing immigration related issues. In turn, the characteristics of work processes should reflect the court's chosen strategic direction and work processes should result in well-articulated desired outcomes. The framework also stresses that both inter-organizational justice system and court specific infrastructure should support work processes and reflect fundamental strategic goals and values.

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What Are The Immigrant Related Needs and Demands On Our Court? (1.A)

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Example Needs and Demands

Example Factors Shaping the Size of the Immigrant Presence In State Courts

Economic, demographic, policy, and social trends that influence the numbers of immigrants who will use the state courts, such as:

- Labor force trends.
- Population aging trends among native born U.S. population, including aging of baby-boom population.
- Industry location trends, such as location of key industries that depend heavily on immigrant labor, such as food processing, farming, ranching, construction, computer science, hospitality, and the medical industry.
- Trade and labor force regulation trends.
- Refugee resettlement policies and practices.
- Immigration enforcement policies and practices.

Factors Shaping the Legal Status of Immigrants in State Courts

Important intersections of federal, state, and local immigration law, policy, and practice shaping immigrant legal status in state courts, such as:

- Federal voluntary removal practices.
- Citizenship eligibility law and practices.
- Document fraud law and practices.
- Service eligibility law and practices.
- Pre and post-conviction detention practices.
- Sentencing practices.
- Local/state court level prosecutorial charging practices.
- Plea acceptance practices.
- Law enforcement citation and release practices.

Factors Shaping the Capacity of Immigrants to Use the State Courts

- Language based capacity, including English and other language skills, and literacy.
- Culture based capacity, such as gaps between court system and litigant assumption and beliefs about motivations for change, how to structure activity, gender roles, illness, discipline, contrition, authority, respect, and change.
- Mistrust and fear of authority by immigrants of government personnel including justice system and court personnel.

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What Values Should We Work From When Serving Immigrants In Court? (1. B)

Example Values

Transparency – assure that the decisions made and work processes used in matters involving immigrants are apparent and understandable to litigants and local, state, and federal court and justice partners.

Cost-Effective Service Provision – assure that federal, state, and local court and justice system law, policy, and practice are coordinated.

Timeliness – exchange information across and among local, state, federal agencies, link litigants with interpreters and other resources and complete case events in concert across agencies to assure expedient case processing.

Equal Access and Consistency – provide access to needed defense, litigant assistance, treatment, language, and other services for all who use the courts, regardless of their ethnicity, income, education, or immigration status.

Comprehensiveness – provide a range of forums and services to address the potentially multiple needs of all court users, including immigrants and their families.

Culturally Appropriate – provide services that help all those who use the courts to navigate, successfully, the courts and justice system, process information, make wise decisions, and understand and comply with court orders.

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What Should Be The Extent Of Our Efforts To…? (1.C)

Strategic Policy Question Descriptions – What Should Be The Extent Of Our Court's Efforts To:

- Adjudicate cases involving undocumented/illegal immigrants?
  - √ Should undocumented immigrants be taken into custody and potentially be removed from the U.S. by Immigration and Customs Enforcement (ICE) at any point prior to state court case disposition?
  - √ Should undocumented immigrants be taken into custody and potentially be removed from the U.S. by ICE post-sentencing or after they have completed all or a portion of a sentence?
  - √ Should child protection and juvenile cases involving undocumented family members and violence against women cases be processed any differently than cases involving lawful permanent residents and U.S. citizens?

- Assure procedural justice for immigrants? Should the courts promote:
  - √ **Respect and understanding** – the extent to which lawful and undocumented immigrants are treated with dignity and understand what is happening in court?
  - √ **Voice** – the extent to which lawful and undocumented immigrants are given a chance to be heard?
  - √ **Trust** – the extent to which judges and court staff provide the impression that they care about lawful and undocumented immigrant's needs?
  - √ **Neutrality** – the extent to which judges can instill confidence that they are treating lawful and undocumented immigrants fairly?

- Minimize the unintended consequences of state court actions, in part by assuring state court judges and personnel understand the consequences of state court decisions on immigration status?

- Assist the federal government in regulating immigration? Should the courts:
  - √ Provide state court case information in formats that can be used in co-occurring or subsequent federal immigration case processing.
  - √ Check litigant immigration status?
  - √ Report suspected undocumented immigrants?

- Provide services to immigrants? Should the state courts provide lawful and undocumented immigrants needed state court case processing, sanctioned treatment, and other services at the same levels available to non-immigrant court users?

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What Should Be The Outcomes Of Cases Involving Immigrants? (1.D)

Example Outcomes

Closure -- Cases Involving Immigrants Are Completed.

Lawful and undocumented Immigrants receive needed services, including immigrant offenders, victims, children and juveniles, small claims and other civil court users, conservatees, and wards in cases of guardianship. Example services include:

- Litigant assistance.
- Probation services including domestic violence, substance abuse and other treatment services attached to probation.
- Participation in victim restoration and other community programs.
- Child protection services.
- Medical and mental health treatment services, especially for children.
- Victim protection services.

Immigrants Comply With Court Orders. Examples include immigrants:

- attending treatment services and meeting other conditions for probation;
- making restitution payments and other victim compensation;
- attending parenting, domestic violence, and other courses; and
- serving state court sentences.

Harm to Individuals and Community is Reduced.

- Recidivism is reduced within immigrant communities.
- Individuals change destruction behavior, such as substance use.
- Individuals within immigrant communities report crime and assist law enforcement, such as serving as witnesses, and report to authorities when harm is observed such as domestic violence or child abuse.

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What Are The Key Aspects Of Our Work Potentially Affected By Immigration Considerations? (1.E)

Example Work Processes and Procedures With Immigration Status Consequences

Criminal Cases

- Pretrial Release and Bail Eligibility
- Pretrial Detention
- Initial Appearances
- Defense Assignment
- Charge Determination
- Plea Acceptance
- Sentencing
- Interpreter Assignment
- Probation and Other Service Eligibility

Family, Dependency, Juvenile, and Civil Cases

- Juvenile, Family, and Dependency Case Processing Generally
- Content of Family Matter Consent Decrees
- Children and Family Service Eligibility

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What Modifications In Our Infrastructure Might Be Required To Serve Immigrants In Our Court? (1.F)

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Example Infrastructure

Technology

- Information systems for determining the identities of immigrants.
- Management information systems capable of exchanging information about identity, litigant location, and case status between local, state, and federal agencies about immigrant case status.
- Multi-system-wide case tracking technology.
- Valid, best practice based, and readily accessible assessment and treatment tools that are applicable to immigrant populations.
- Management information systems that share definitions, standards and guidelines across local, state, and federal agencies.

Equipment

- Accessible and well maintained multi-systems hardware and software.

Facilities

- Accessible, dispersed, community-based, facilities
- Sufficient space for co-locating local, state, and federal system partners throughout communities.

Budgeting and Finance

- Sufficient, predictable, and stable resources for providing litigant assistance, treatment and other services for immigrants.
- Flexibility to change during a budget cycle and over the long term to meet changing demands and needs including increasing resource and modifying expenditures as needed in light of changes in size of immigrant populations.
- Budget, service procurement, and other business processes that encourage health care, treatment, detention, probation, and other resource sharing across local, state, and federal agencies and organizations.
- Fiscal processes that allow flexible use of funds, moving resources across agencies and organizations when needed.
- Funding set aside for multi-system-wide innovation and improvements.
- Predictable long-term financing that permits long-term system and multi-system budgeting and planning.
- Resources available to track decision outcomes across multiple agencies.

Planning

- Operational planning to ensure consistent responses across agencies and personnel.
- Multi-system wide, long-range, and operational planning to create linkages among agencies.

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Example Infrastructure

Policy Making and Dispute Resolution

- Capacity to address disputes among federal, state, and local court and justice agencies.
- Policy is based on research, national practices, and best practices.
- A decision making structure at the multi-system leadership level that is educated on the roles of all system partners.
- Policies for establishing and maintaining consistent decision-making practices across agencies and organizations.
- Transparent decision-making processes.

Staffing/Training

- Multi-system, federal, state, and local training of all the personnel involved in case processing involving immigrants.
- Cultural competency training.
- Training about specific tools such as assessment and evaluation tools designed for immigrant populations.
- Capacity to cross train staff through coordination of staff development efforts.
- Staff available with decision-making authority to help litigants and families navigate successfully through multiple systems.

Communications and Coordination

- Timely access to information across agencies about cases involving immigrants.
- Capacity to communicate the results of assessments and evaluations with appropriate personnel across multiple systems.
- Capacity to track case progress within and across agencies and systems.
- Capacity to monitor caseloads across agencies and systems.
- Shared case management planning that addresses the multiple needs of litigants, children, families, and meets the mandates of system organizational partners.
- Development of multiple system-wide performance measurements for both processes and outcomes.

Leadership and Management

- Multiple system-wide and agency leaders to: **(1)** establish long-term strategic direction for systems as well as individual agencies and organizations regarding immigration policies and practices; **(2)** develop long-term system capacity to provide services; **(3)** establish and monitor inter-agency, multiple system infrastructure for supporting sevices; **(4)** establish and maintain effective inter-organizational work processes; **(5)** monitor multiple system performance; and **(6)** work cooperatively to establish a strong fiscal foundation for on-going service delivery.
- Capacity to work across multiple systems and agencies collaboratively and proactively.
- Capacity of the interagency management structure to insure fair workload distribution.

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Exercise 2: Addressing Litigant Immigration Status in My Job (Job Worksheet 2)

What Are The Work Processes Associated With My Job Potentially Affected by Immigration Status? (2.A)

What Are The Key Aspects of My Job Potentially Affected by Immigration Status? (2.B)

How Might Work Processes and Key Aspects of My Job Be Modified to Address Immigration Related Needs? (2.C)

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Exercise 3 Worksheet: Court Improvement Strategy

What Are The Features of Our Improvement Strategy?

Summary of Issues We Need To Address.

Summary of Elements to Include in an Improvement Strategy.

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Example Problem Statement and Strategy Outline: Local justice officials often experience difficulties coordinating and integrating local day-to-day justice operations with ICE actions. There needs to be better communication so that local justice officials and ICE officials understand each other's needs.

Key Issues to be Addressed	Desired Outcomes	Action Items
• Responsibilities of and potential restrictions on local justice officials for reporting potentially deportable aliens to ICE. • Effect of ICE holds on jail use. • Required documentation for local jail officials to release a person into ICE custody. • ICE assistance to local justice officials to help identify people. • Sharing of evidence between ICE officials and local prosecutors. • Location of individuals in ICE custody for trial scheduling. • The ability of individuals under ICE holds to meet probation conditions. • The ability of probation to determine who is under an ICE hold for the purposes of probation supervision. • Information from ICE on individuals who have voluntarily agreed to leave the country. • Information on ICE holds from other jurisdictions. • Possible access to ICE databases by local justice officials.	• Protocols for local justice officials to determine the location and status of individuals in ICE custody who are defendants in statecourt or on supervised probation. • Protocols for reporting potentially deportable aliens to ICE. • Training on ICE procedures for local justice officials.	• Conduct ICE training of local justice officials on ICE procedures and operations. • Conduct planning meetings with key ICE officials. • Develop communication protocols.

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Example Problem Statement and Strategy Outline

Key Issues to be Addressed	Desired Outcomes	Action Items
•	•	•

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Example Problem Statement and Strategy Outline

Key Issues to be Addressed	Desired Outcomes	Action Items
•	•	•

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Example Problem Statement and Strategy Outline

Key Issues to be Addressed	Desired Outcomes	Action Items
•	•	•

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Example Problem Statement and Strategy Outline

Key Issues to be Addressed	Desired Outcomes	Action Items
•	•	•

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Example Problem Statement and Strategy Outline

Key Issues to be Addressed	Desired Outcomes	Action Items
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