

A JUVENILE AND FAMILY IMMIGRATION BENCH GUIDE FOR STATE COURT TRIAL JUDGES

A BENCH GUIDE FOR STATE TRIAL COURT  
JUDGES ON IMMIGRATION ISSUES IN  
JUVENILE AND FAMILY CASES

# JUVENILE & FAMILY IMMIGRATION BENCH GUIDE



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# **A BENCH GUIDE**

## **FOR STATE TRIAL COURT JUDGES ON IMMIGRATION ISSUES IN JUVENILE AND FAMILY CASES**

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### **DISCLAIMER**

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. It is not intended to provide definitive answers regarding immigration rights.

Judges using this guide should also be aware that immigration law is constantly changing, electronic statutory materials for which the Guide provides links may not be up to date, and the information provided in the Guide is based on what was available electronically up to the date of the Guide.



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# **Introduction and Guide Contents**



# 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](#)
- [Glossary of Terms](#)
- [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](#)

# 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.

# Glossary of Key Terms Used In This Bench Guide

## **Aggravated Felony**

An aggravated felony is a crime as specifically defined 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. In addition, some state law misdemeanors qualify as aggravated felonies for immigration purposes.

## **Alien**

An alien is any person who is not a citizen or national of the United States.

## **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.

## **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 USCIS 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 and imposition by a judge of a punishment, penalty, or restraint on liberty.

## **Crime of Moral Turpitude**

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. This includes crimes that include an element of fraud, so that some routine crimes such as theft can be a crime of moral turpitude. Conviction of a crime of moral turpitude often makes a lawful permanent resident deportable.

## **Good Moral Character**

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. Being of good moral character is a requirement for becoming a naturalized citizen. Federal immigration law contains a list of activities that negate good moral character.

## **ICE**

See Immigration and Customs Enforcement.

**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.

**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 illegal aliens. It is the former Immigration and Naturalization Service.

**Lawful Permanent Resident (LPR)**

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.

**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.

**Non-Immigrant Alien**

An alien who is in the United States legally on a temporary basis 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.

**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 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.



## **Sentence**

The term of a sentence includes any sentence ordered by a court even if the imposition or execution is suspended.

## **Special Immigrant Juvenile Status (SIJS)**

Special immigrant juvenile status is available for an alien juvenile for whom a juvenile court has made the following findings: (1) the child has been declared dependent on a juvenile court; (2) the child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and (3) the child's best interest would not be served by being returned to his/her country of origin.

## **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, 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 a citizen or LPR may petition for LPR status without the cooperation of the abusing spouse under the self-petitioning provisions of the VAWA.

## **Undocumented Alien/Undocumented Immigrant/Unauthorized 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.

## SECTION II

# Aspects of Immigration Law That May Affect Child Custody or Placement Decisions



## 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;
- 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.

Type of Status	What is the basis of the status?	What can cause loss of status?
<b>Lawful Permanent Resident (LPR)</b> 1101(a)(15)	<ul style="list-style-type: none"> <li>Intend to reside permanently in the US</li> <li>Permanent stay subject to revocation or dissolution under law</li> </ul>	(1) Was in an <b>inadmissible category</b> at time of entry 1227(a)(1) (2) <b>Conviction of crime</b> , including by suspended sentence, deferred prosecution, or admission of elements of crime on record 1227(a)(2) <ul style="list-style-type: none"> <li>Aggravated felony 1101(a)(43)</li> <li>Crime of moral turpitude</li> <li>Crime relating to controlled substance</li> <li>Firearm offense</li> <li>Domestic violence offense</li> </ul> (3) <b>Behavior not requiring a criminal conviction</b> 1227 <ul style="list-style-type: none"> <li>Terrorist activity</li> <li>Drug abuse or addiction</li> <li>Document fraud</li> <li>Illegal voting</li> <li>Foreign policy reasons</li> <li>Becoming a public charge</li> <li>Abandonment through extended stay outside the U.S.</li> </ul>
<b>Conditional Immigrant</b> 1186(a)	<ul style="list-style-type: none"> <li>Status derived from status of spouse or parent</li> <li>Expires on second anniversary of obtaining conditional status</li> </ul>	(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 waiver available
<b>Special Immigrant Juvenile</b> 1101(a)(27)(J)	<ul style="list-style-type: none"> <li>Juvenile court makes the following findings:               <ul style="list-style-type: none"> <li>✓ The child has been declared dependent on a juvenile court.</li> <li>✓ The child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.</li> <li>✓ The child's best interest would not be served by being returned to his/her country of origin.</li> </ul> </li> </ul>	(1) Did not concurrently apply for lawful permanent resident status (2) Engaging in certain bad conduct not requiring a criminal conviction
<b>VAWA Self-Petitioner</b> 1101(a)(51) and 1154(a)	<ul style="list-style-type: none"> <li>Spouse or child abused by citizen or lawful permanent resident</li> <li>Abuse of battery or extreme cruelty</li> <li>Marriage legal and in good faith</li> <li>Petitioner of good moral character (1101)(f)</li> </ul>	(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
<b>Visitor</b> 1101(a)(15)	<ul style="list-style-type: none"> <li>In the US on temporary basis</li> <li>Includes vacationers, students, workers</li> <li>Length of stay as specified by visa</li> </ul>	(1) Causes listed for LPR (2) Failure to take required actions to maintain status (3) Expiration of status

Type of Status	What is the basis of the status?	What can cause loss of status?
Refugee/Asylee 1101(a)(42)	<ul style="list-style-type: none"> <li>Person likely to be persecuted if returned to home country</li> <li>Stay as long as return to home country would put them at a safety risk</li> </ul>	(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)	<ul style="list-style-type: none"> <li>Victim of severe trafficking</li> <li>Assisting in the investigation or prosecution of traffickers</li> <li>Maximum stay of four years unless extended</li> </ul>	(1) Causes listed for LPR
Crime victim or witness 1101(a)(15)(U)	<ul style="list-style-type: none"> <li>Willing to cooperate in a criminal investigation</li> <li>Need certification from local court or law enforcement agency</li> <li>Maximum stay of four years unless extended</li> </ul>	(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.
- 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*, 7<sup>th</sup> 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](#).

## SECTION III

# Aspects of Immigration Law That May Affect Eligibility to Work





## 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.

## SECTION IV

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



# 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:

- 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**

**T**he 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**

**T**he 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.

## 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	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>May be eligible under specified rules</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Granted asylum or admitted as refugee	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Prohibition does not take effect until seven years after admission</li> </ul>	<ul style="list-style-type: none"> <li>May be eligible under specified rules</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Paroled into the U.S. for one year or more	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Deportation withheld	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Prohibition does not take effect until seven years after admission</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Conditional entry	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>		<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Cuban or Haitian Entrants	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Prohibition does not take effect until seven years after admission</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
VAWA self-petitioner with petition pending or approved	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Any qualified alien who has resided in the U.S. for five years	<ul style="list-style-type: none"> <li>Eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>

## 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	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>May be eligible under specified rules</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from limitation in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>
Certain defined Amerasians	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Prohibition does not take effect until seven years after admission</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from limitation in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>
American Indians born abroad	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>May be eligible under specified rules</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>
Victims of trafficking and their spouses and unmarried dependent children	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>
Non-immigrants (temporary visa holders)	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Exempt from prohibition in section</li> </ul>
Aliens paroled into the U.S. for less than one year	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>
Illegal immigrants	<ul style="list-style-type: none"> <li>Not eligible for listed programs</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>Subject to prohibition in section</li> </ul>	<ul style="list-style-type: none"> <li>State may provide eligibility by state law</li> </ul>

## 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
- 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)**

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

### **Eligibility for State or Local Public Benefits 1621**

**S**ubject 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 than 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**

**A**n 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](#)

## SECTION V

# Categories of Legal Immigration Status



## 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**

**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 <ul style="list-style-type: none"><li>• 1151(b)(2)(A)(i)</li><li>• 1101(b)(1) (definition of child)</li></ul>	<ul style="list-style-type: none"><li>• Immediate relative: alien spouse, unmarried minor child, or parent if citizen is 21 or older</li></ul>	<ul style="list-style-type: none"><li>• These recipients are not subject to numerical limitation.</li><li>• 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.</li></ul>
U.S. Citizen <ul style="list-style-type: none"><li>• 1153(a)((1), (3), and (4)</li></ul>	<ul style="list-style-type: none"><li>• Alien unmarried son or daughter not a child</li><li>• Alien married son or daughter</li><li>• Alien brother or sister</li></ul>	<ul style="list-style-type: none"><li>• These recipients are subject to numerical limitations and waiting lists</li><li>• 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.</li></ul>
Legal Permanent Resident <ul style="list-style-type: none"><li>• 1153(d)</li></ul>	<ul style="list-style-type: none"><li>• Alien spouse or unmarried minor child accompanying or following to join a spouse or parent</li></ul>	<ul style="list-style-type: none"><li>• These recipients will have the same priority as the petitioning LPR.</li></ul>
Legal Permanent Resident <ul style="list-style-type: none"><li>• 1153(a)(2)</li></ul>	<ul style="list-style-type: none"><li>• Alien spouse and children not accompanying or following to join a spouse or parent</li><li>• Alien unmarried son or daughter not a child</li></ul>	<ul style="list-style-type: none"><li>• These recipients are subject to numerical limitations and waiting lists</li><li>• 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.</li></ul>

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.

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)**

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 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 States 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**.

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.

## SECTION VI

# Good Moral Character



## 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.

## SECTION VII

# Inadmissible Aliens



## 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)

## SECTION VIII

# Grounds For Removal



## 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)
  - √ 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)

• 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\(a\)\(9\)\(A\)\(ii\)](#)

## SECTION IX

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# Eligibility for Cancellation of a Removal Order



## 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.

### **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*, 7<sup>th</sup> 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)

## SECTION X

# Aggravated Felony



## Aggravated Felony [Primary statutory link [1101\(a\)\(43\)](#)]

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

### Statutory Definition of Aggravated Felony [1101\(a\)\(43\)](#)

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

- Murder;
- Rape;
- Sexual abuse of a minor;
  - ✓ Including offenses classified as misdemeanors under state law; ([Case 3476](#))
  - ✓ Indecent exposure to a child. ([Case 3411](#))
  - ✓ For the purposes of this section, a minor is a child under the age of 18. ([Case 3523](#))
  - ✓ Sexual abuse includes statutory rape. ([Case 3523](#)) ([Case 3270](#))
- Violent crime with sentence of one year or more;
  - ✓ Statutory rape is a crime of violence, in that it carries a substantial risk of violence. ([Case 3270](#))
- Theft or burglary with sentence of one year or more;
- Drug trafficking with sentence of more than one year;
- Sale, possession for sale, or manufacture of a controlled substance;
- Trafficking in firearms;
- Trafficking in persons;
- Dealing in stolen explosive materials;
- Demand for or receipt of ransom;
- Owning, managing, or supervising a prostitution business;
- Sexual exploitation of children;
- Racketeering as defined by [18 U.S.C. 1962](#);
- Money laundering if the amount exceeds \$10,000;
- Tax fraud in excess of \$10,000;
- Fraud with loss to victim exceeding \$10,000;
- Forgery of an immigration document under [18 U.S.C. 1543](#) or [18 U.S.C. 1546](#) with sentence of one year or more;
- Crimes compromising national security or intelligence;
- Failure to appear for service of sentence where the underlying offense is punishable by imprisonment for 5 years or more;
- Commercial bribery, counterfeiting, or forgery, including trafficking in vehicles with altered Vehicle Identification Number, with sentence of one year or more;
- Obstruction of justice or perjury; and

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

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

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

- Crime of violence, as defined by [18 U.S.C. 16](#);
- Trafficking in controlled substance, including sale, possession for sale, or manufacture, with sentence of more than one year, as defined by [21 U.S.C. 802](#) and [18 U.S.C. 924c](#);
  - √ State drug convictions are aggravated felonies only if they are analogous to offenses punishable as felonies under federal drug trafficking laws. ([Case 3482](#))
  - √ Legal standards for what constitutes a Federal drug trafficking crime must be made by reference to decisions of the Circuit Court of Appeals governing the state in which the case arises. ([Case 3474](#)) ([Case 3473](#))
  - √ Two convictions of misdemeanor simple possession of marijuana do not constitute an aggravated felony. ([Case 3482](#)) ([Case 3474](#))
  - √ A conviction for simple possession is not a felony under federal law unless it can be classified as recidivism. If there is no prior drug conviction, the defendant must have admitted the recidivism or the judge or jury must have determined it in connection with the prosecution of the simple possession case. ([Case 3592](#))
- Firearms offenses, as defined by [18 U.S.C. 921](#), [18 U.S.C. 922](#), [18 U.S.C. 924](#), and [26 U.S.C. 5861](#);
- Money laundering, as defined by [18 U.S.C. 1956](#), [18 U.S.C. 1957](#);
- Crimes involving dealing in stolen explosive materials, as defined by [18 U.S.C. 841\(c\)](#), [18 U.S.C. 842](#), and [18 U.S.C. 844](#);
- Demand for or receipt of ransom, as defined by [18 U.S.C. 875](#), [18 U.S.C. 876](#), [18 U.S.C. 877](#), and [18 U.S.C. 1202](#);
- Child pornography, as defined by [18 U.S.C. 2251](#), [18 U.S.C. 2251A](#), and [18 U.S.C. 2252](#);
- Racketeering (RICO) offenses, as defined by [18 U.S.C. 1962](#), [18 U.S.C. 1084](#), and [18 U.S.C. 1955](#);
- Transportation for the purposes of prostitution for commercial advantage, as defined by [18 U.S.C. 2241](#), [18 U.S.C. 2242](#), and [18 U.S.C. 2243](#);
- Tax fraud in excess of \$10,000, as defined by [26 U.S.C. 7201](#);
- Alien smuggling, as defined by [18 U.S.C. 1581-1585](#) and [18 U.S.C. 1588-1591](#);
- Reentry by an alien previously deported, as defined by [1325\(a\)](#) and [1326](#);
- Forgery of an immigration document, as defined by [18 U.S.C. 1543](#) and [18 U.S.C. 1546\(a\)](#); and
- Crimes compromising national security or intelligence, as defined by [18 U.S.C. 793](#), [18 U.S.C. 798](#), [18 U.S.C. 2153](#), [18 U.S.C. 2381](#), [18 U.S.C. 2382](#), and [50 U.S.C. 421](#).

### Rules of construction

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

- The categorical approach looks just at the elements of the crime. Most aggravated felonies must be considered in that manner.

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

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

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

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

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

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

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

What is the actual sentence?

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

### Some examples of aggravated felonies

- Crime of violence under 18 U.S.C. 16.
  - √ Stalking when under a temporary restraining order is a crime of violence. (Case 3498)
  - √ Unauthorized use of a motor vehicle is a crime of violence in that it involves a substantial risk of the use of force. (Case 3514)
  - √ Manslaughter in the first degree that requires intent to cause death or serious harm. (Case 3497)
- Conviction of crime of distributing an indeterminate amount of marijuana, if it contains the



necessary elements to be classified as a felony under [21 U.S.C. 841](#) and [21 U.S.C. 846](#), even if classified as a misdemeanor under state law. ([Case 3600](#))

- Theft.
  - ✓ Taking of property without the owner's consent with intent to deprive the owner of the rights and benefits of ownership, even if not permanently, is theft. ([Case 3434](#))
  - ✓ Mere joyriding or other types of "glorified borrowing", is not theft with intent to deprive the owner of the rights and benefits of ownership. ([Case 3434](#))
  - ✓ Welfare fraud is not an aggravated felony, in that the property was not obtained without the owner's consent. ([Case 3596](#))
- Receiving stolen property.
- Burglary.
  - ✓ Burglary must meet the definition under Federal law to qualify as an aggravated felony. ([Case 3432](#))
  - ✓ Under Federal law burglary requires entry into a building or other structure, so entry into an automobile does not fall within the Federal definition. ([Case 3432](#))
- Bribery of witness.
- Commercial bribery.
- Counterfeiting.
- Forgery of a passport, visa, or other immigration document.
  - ✓ Falsification of a Social Security number is not an automatic ground for deportation.
- Trafficking in vehicles with altered VIN.
- Obstruction of justice.
- Perjury. ([Case 3456](#))
- Falsifying documents or trafficking in falsified documents.

### **DUI Cases as crimes of violence and thus aggravated felonies**

- In Circuits where the Court of Appeals has ruled on whether a DUI is a crime of violence under [18 U.S.C. 16](#), that ruling holds.
- In Circuits where the Court of Appeals has not ruled, a DUI is a crime of violence only if it is committed recklessly and involves a substantial risk of use of force. ([Case 3468](#))

### **Effects of conviction of aggravated felony**

- (1) Effect on required detention.
  - Conviction of an aggravated felony results in mandated immigration detention.
- (2) Effect on admissibility if the defendant leaves the country and attempts to return.
  - Conviction of an aggravated felony is not automatic grounds for inadmissibility or denial of eligibility for readmission if the alien leaves the country. ([Case 3449](#))
- (3) Effect on deportation.
  - Conviction of an aggravated felony is statutory grounds for deportation.
- (4) Effect on eligibility for cancellation of deportation order.

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

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

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

Links:

**[GOOD MORAL CHARACTER](#)**

**[INADMISSIBLE ALIENS](#)**

**[GROUNDS FOR DEPORTATION](#)**

**[ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER](#)**

## SECTION XI

# Conviction of Crime of Moral Turpitude



## 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](#))

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 for 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](#)**

**[INADMISSIBLE ALIENS](#)**

**[GROUNDS FOR DEPORTATION](#)**

**[ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER](#)**

## SECTION XII

# Crime of Domestic Violence



## 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**

**GROUND FOR DEPORTATION**

**ELIGIBILITY FOR CANCELLATION OF A REMOVAL ORDER**



## SECTION XIII

# Illegal Activity Not Requiring A Criminal Conviction



## 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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