Removal Defense Checklist in Criminal Charge Cases

APPENDIX K

(Updated as of 1/31/11)

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This checklist summarizes defensive legal arguments and strategies that noncitizens and their legal representatives may pursue in removal proceedings involving crime-related charges. Some contrary authority is in brackets. The checklist is by no means exhaustive. It is designed as a starting point for others to develop additional arguments and strategies. Some of the listed arguments and strategies may require going into federal court and may raise complicated federal court jurisdictional issues. For further guidance, contact the Immigrant Defense Project (IDP) at 212-725-6422. For checklist updates, visit the IDP website at www.immigrantdefenseproject.org.

The IDP is a legal resource and training center that defends the legal, constitutional and human rights of immigrants facing criminal or deportation charges. Founded to respond to the devastating 1996 immigration law "reforms" that placed thousands of immigrants at risk of mandatory detention and deportation for virtually any interaction with the criminal justice system, IDP develops enhanced knowledge among criminal justice advocates, immigrant advocates and immigrants themselves on how to defend against unjust immigration consequences of criminal dispositions; supports community-based advocacy against the harsh laws and policies; and, supports litigation challenging these laws and policies, through technical assistance, recruitment of pro bono counsel, and *amicus* submissions in potential high-impact precedent cases.

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CHECKLIST

☐ Seek release from detention during removal proceedings

In general, under the Immigration and Nationality Act (INA), a noncitizen detained by the Department of Homeland Security (DHS) may be released on bond or conditional parole pending completion of removal proceedings. See INA 236(a) (2). After the initial DHS custody determination of the local district director, which is supposed to be based on whether the noncitizen has shown that he or she would not pose a danger to the community or be a risk of flight, see 8 C.F.R. 236.1(c) (8), a detainee may seek a redetermination by requesting a bond hearing before an Immigration Judge. See 8 C.F.R. 1236.1(d) (1). However, if the district director had determined that the noncitizen should not be released or has set of bond of $10,000 or more, and an Immigration Judge orders release on bond or otherwise, the DHS may obtain an automatic stay of the order if the DHS files a notice of intent to appeal the custody redetermination within one business day of issuance of the order, and the DHS files the notice of appeal with the Board of Immigration Appeals (BIA) within 10 business days of the Immigration Judge's decision. See 8 C.F.R. 1003.19(i)(2) and 1003.6(c)(1). Some detainees have been able successfully to challenge this automatic stay provision in federal court on constitutional grounds. See *Zavala v. Ridge*, 310 F. Supp.2d 1071 (N.D. Ca. 2004); *Ashley v. Ridge*, 288 F.Supp.2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F. Supp.2d 446 (D.Conn 2003); *Almonte-Vargas v. Ellwood,* 2002 U.S.Dist. LEXIS 12387 (E.D.Pa. 2002). However, the DHS has issued regulations effective November 1, 2006 limiting the duration of the automatic stay to 90 days after the DHS files its notice of appeal, subject to the authority of the DHS to seek a discretionary stay pursuant to 8 C.F.R. 1003.19(i)(1) to stay the Immigration Judge's order in the event the BIA does not issue a decision on the custody appeal within the period of the automatic stay. See 8 C.F.R. 1003.6(c) (4)&(5). A detainee charged with inadmissibility may request a parole determination from the DHS. See INA 212(d) (5) (A); 8 C.F.R. 212.5.

As amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), however, the INA now provides that a noncitizen who is deportable or inadmissible by reason of having committed an offense covered under certain deportability and inadmissibility grounds shall be subject to mandatory detention after release from criminal custody, i.e., detention without any statutory right to seek release on bond or under parole pending completion of removal proceedings. See INA 236(c) (1) (listing grounds of criminal deportability and inadmissibility covered by this new policy of mandatory detention). Under the statute, an individual may be released only if release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." INA 236(c) (2). Denial of the right to seek release on bond or under parole may be challenged before the immigration authorities or in federal court on various statutory and constitutional grounds:

- ✓ **The government has not charged the detainee with an offense that fits within any of the mandatory detention criminal deportability or inadmissibility grounds.** Certain criminal deportability or inadmissibility grounds are not subject to mandatory detention under INA 236(c) (1). Examples include INA 237(a) (2) (E) (Crimes of domestic violence, stalking, or violation of protection order, crimes against children), or offenses charged under INA 237(a) (2) (A) (i) (Crimes of moral turpitude) for which the person has not been sentenced to a

term of imprisonment of at least one year. Some federal courts have held that the notice to appear must charge a person with removability based on one of the mandatory detention grounds before the person may be detained pursuant to INA 236(c) (1). See, e.g., Alikhani v. Fasano, 70 F. Supp. 2d 1124 (S.D. Cal. 1999) (finding that offense for which petitioner was found deportable determined whether individual was entitled to a bond hearing or subject to mandatory deportation); cf. Alvarez-Santos v. INS, 332 F.3d 1245, 1253 (9th Cir. 2003); Yousefi v. INS , 260 F.3d 318, 325 (4th Cir. 2001); Xiong v. INS, 173 F.3d 601, 608 (7th Cir. 1999); Choeum v. INS, 129 F.3d 29, 40 (1st Cir. 1997) (cases in which the courts of appeals have held that the criminal bar to judicial review is only implicated when a person actually was ordered removed on the basis of the covered deportability or inadmissibility ground); [but see Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007) (individual need not be charged with the ground that provides the basis for mandatory detention in order to be considered an alien who "is deportable" under that ground); Fernandez v. AG, 257 F.3d 1304, 1309-10 (11th Cir. 2001); Lopez-Elias v. Reno, 209 F.3d 788, 793 (5th Cir. 2000)]. In addition, even if the DHS (formerly INS) charges a deportability or inadmissibility ground that is covered by INA 236(c) (1), an individual who has an argument that the deportability/inadmissibility charge is incorrect may raise the argument in the context of an Immigration Judge hearing held pursuant to the BIA decision in Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (lawful permanent resident immigrant is not "properly included" with a mandatory detention category if the government is "substantially unlikely to establish at the merits hearing, or on appeal, the charges that would otherwise subject the alien to mandatory detention"). See below "Deny deportability or inadmissibility." In addition, if an Immigration Judge finds that an individual is not deportable or inadmissible, and the DHS invokes the automatic stay provision in 8 C.F.R. 1003.19(i) (2), the detainee may challenge such application of the automatic stay provision on constitutional grounds. See Uritsky v. Ridge, 286 F. Supp.2d 842 (E.D. Mich. 2003).

- ✓ **The detainee may not be charged with inadmissibility after a brief trip abroad.** If the person is a lawful permanent resident charged with inadmissibility after a brief trip abroad, the individual may challenge the DHS' (formerly INS') determination that he or she is subject to inadmissibility review in the context of a federal court *habeas corpus* challenge to detention pending completion of the inadmissibility review. See, e.g., *Made v. Ashcroft*, Civil No. 01-1039 (D. N.J. 2001); [but see *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003)]. In addition, if the returning lawful permanent resident immigrant is charged with inadmissibility based on a criminal conviction prior to April 1, 1997 (IIRIRA general effective date), the person may be able to argue that he or she is not subject to inadmissibility review based on the law in effect prior to IIRIRA. Cf. *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). For a discussion of such statutory arguments, see generally below "Move to terminate proceedings if the respondent is a permanent resident charged with inadmissibility after a brief trip abroad." Finally, detention without an individualized bond or parole hearing of an individual returning from a trip abroad may also be challenged on constitutional equal protection grounds, see *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (violation of equal protection arises if a noncitizen is penalized under the immigration laws based upon the fortuity of departure from the United States), as well as under the Constitution's due process and excessive bail clauses (see subsection below entitled "Mandatory detention is unconstitutional"); see generally below "Raise estoppel or constitutional or international law arguments."
- ✓ **The detainee was released from criminal custody prior to October 8, 1998.** IIRIRA stated that INA 236(c) mandatory detention applies to "individuals released after [the end of a 1-year or 2-year transitional period]." IIRIRA § 303(b) (2). That transitional period ended on October 8, 1998. Thus, at the very least, as the Board of Immigration Appeals (BIA) and the DHS (formerly INS) have agreed, INA 236(c) should not be applied in cases where the individual placed in removal proceedings was released from criminal custody prior to October 8, 1998. See *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) (INA 236(c) does not apply to noncitizens whose most recent release from custody by an authority other than the INS (now DHS) occurred prior to the expiration of the Transition Period Custody Rules). A sentence to probation or other non-physical restraint after October 8, 1998 does not count as a release from custody triggering mandatory detention. See *Matter of West*, 22 I&N Dec. 1405 (BIA 2000).
- ✓ **The detainee was released from criminal custody after October 8, 1998 but the detainee's criminal conviction or offense pre-dated IIRIRA.** Even if the detainee was released after October 8, 1998, the individual may argue that INA 236(c) mandatory detention does not apply when his or her criminal conviction or conduct occurred prior to IIRIRA's general effective date of April 1, 1997. Cf. *Montero v. Cobb*, 937 F.Supp. 88 (D.Mass. 1996) (finding that mandatory detention provisions in predecessor AEDPA statute did not apply retroactively

in the absence of clear Congressional intent). IIRIRA did not include any statement that INA 236(c) should be applied retroactively in cases based on pre-IIRIRA convictions or conduct. All the statute provided is that INA 236(c) applies to "individuals released after [October 8, 1998]." IIRIRA § 303(b) (2). In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court held that, absent an explicit statement of legislative intent to apply a new law to past events, a statute should apply prospectively only. Recently, the Supreme Court made clear that this presumption against retroactivity applies to immigration legislation; in fact, the Court applied the presumption to another IIRIRA provision that, like IRRIRA § 303, lacked any explicit statement of retroactive legislative intent in cases based on past events. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) (holding that IIRIRA § 304(b) — eliminating a pre-IIRIRA right to apply for a discretionary waiver of deportation — could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result).

- ✓ **The detainee was released from criminal custody after October 8, 1998 but for a reason other than the conviction that falls within a mandatory detention ground.** Even if the detainee was released after October 8, 1998, the individual should not be subject to INA 236(c) mandatory detention if the release from non-DHS custody related to an arrest/conviction that does not fall within a mandatory detention ground. See *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010) (overruling *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008), which had earlier found that INA 236(c)(1) does not support limiting the non-DHS custodial setting solely to criminal custody tied to the basis for detention under that section); *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009) (reversing BIA decision in *Matter of Saysana*); *Ortiz v. Napolitano*, 667 F. Supp. 2d 1108 (D. Ariz. 2009); *Mitchell v. Orsino*, U.S. Dist. LEXIS 71908, 2009 WL 2474709 (S.D.N.Y 2009)("Petitioner's release from custody after the effective date of § 1226(c) for a nonremovable offense does not make him subject to mandatory detention under the statute."); *Garcia v. Shanahan*, 615 F.Supp.2d 175 (S.D.N.Y 2009) ("The mandatory detention provision cannot be retroactively applied to aliens who were released from custody for removable offenses prior to October 9, 1998 — even if they are later released from custody for a nonremovable offense.").
- ✓ **The detainee was not in criminal custody when arrested by the DHS (formerly INS).** Even if the detainee was released after October 8, 1998, the individual may argue that INA 236(c) mandatory detention does not apply when he or she was not detained immediately after release from criminal custody. Detention is required "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." INA 236(c) (1). The "when released" language indicates that detention is not required of an individual who was not in criminal custody when arrested by the DHS (formerly INS). For example, an individual may argue that this "when released" language means that mandatory detention should not apply to an individual who was not sentenced to imprisonment, or who was sentenced to imprisonment but was not taken into custody by the DHS at the time the person was released from criminal custody but rather was taken into custody by the DHS at some subsequent point. See *Louisaire v. Muller*, *2010 U.S. Dist. LEXIS 129193* (S.D.N.Y. 2010); *Monestime v. Reilly*, *2010 U.S. Dist. LEXIS 35344 (S.D.N.Y. 2010); Khodr v. Adduci*, 2010 U.S. Dist. LEXIS 22754 (E.D.Mich. 2010) ("Because the statute is clear that the detention must be immediate, the Court will not defer to the BIA's interpretation to the contrary."); *Scarlett v. U.S. Dept of Homeland Security*, U.S. Dist. LEXIS 2864, 2009 WL 2025336 (W.D.N.Y. 2009) ("Applying that analysis to the instant case, petitioner's detention was not authorized by 8 U.S.C. § 1226(c) because petitioner was released from incarceration nearly eighteen months prior to his immigration detention"); *Waffi v. Loiselle*, 527 F. Supp.2d 480 (E.D. Va. 2007) (found that the mandatory detention statute did not apply to an alien such as the detainee, who was taken into immigration custody well over a month after his release from state custody); *Bromfield v. Clark,* U.S. Dist. LEXIS 10077, 2007 WL 527511 (W.D.Wash. 2007) (concluding that the "when the alien is released" requires aliens to be detained at the time of release from state custody); *Boonkue v. Ridge*, 2004 WL 1146525, 2004 U.S. Dist. LEXIS 9648 (D.Or. 2004), *Quezada-Bucio v. Ridge*, 317 F. Supp.2d 1221 (W.D.Wash. 2004); *Alikhani v. Fasano*, 70 F. Supp.2d 1124 (S.D. Cal. 1999); *Aguilar v. Lewis*, 50 F. Supp.2d 539 (E.D. Va. 1999); *Alwaday v. Beebe*, 43 F. Supp.2d 1130 (D. Or. 1999); *Pastor-Camarena v. Smith*, 977 F. Supp. 1415 (W.D. Wash. 1997); see also dissenting opinion of BIA member Rosenberg in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); [but see majority opinion in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001) ("A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to section 236(c) ... even if the alien is not immediately taken into custody by the Immigration and

Naturalization Service when released from incarceration."); see also *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007)(individual apprehended at home while on probation for criminal convictions is subject to mandatory detention].

- ✓ **If the detainee is contesting removability or applying for relief from removal, mandatory detention is unconstitutional.** Prior to April 29, 2003, many noncitizens had successfully argued that detention of noncitizens without the right to an individualized bond hearing pending completion of removal proceedings deprived individuals of their liberty in violation of substantive and procedural due process, or in violation of the Eighth Amendment excessive bail clause. See, e.g., *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); [but see *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999) (where detainee had conceded deportability)]. On April 29, 2003, however, the Supreme Court reversed the Ninth Circuit decision in *Kim v. Ziglar* and held that the government may detain classes of immigrants without conducting individualized bond hearings. *Demore v. Kim*, 538 U.S. 510 (2003). Nevertheless, the Supreme Court's decision was premised on a finding that the petitioner in *Kim* conceded removability. Cases where the person is challenging removability, or is seeking relief from removal, may be distinguished from the Supreme Court's holding in *Kim* on that basis. See, e.g., *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004) (*Kim* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable"); *Uritsky v. Ridge*, 2003 U.S. Dist. LEXIS 17698 (E.D. Mich. 2003); see also below "Deny deportability or inadmissibility" and "Apply for relief from removal;" see also Beth Werlin, "Practice Advisory — Mandatory Detention after *Kim v. Demore*" (American Immigration Law Foundation, Washington, D.C., August 29, 2003), available at <www.ailf.org>.
- ✓ **If detention is or may be prolonged or indefinite, mandatory detention is unconstitutional.** The Supreme Court upheld mandatory detention in *Demore v. Kim* relying, in part, on a finding that "not only does detention have a definite termination point, in the majority of cases it lasts for less than [] 90 days." The Court did so to avoid conflict with its earlier decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) (striking down government indefinite detention of noncitizens following completion of removal proceedings), in which the Court held that individuals with final orders of removal could validly be detained for only six months. 533 U.S. at 701. Cases where the length of detention has exceeded, or is likely to exceed, such time periods may be distinguished from *Demore* on that basis. See *Demore* at 1722 (Kennedy, J., concurring) (explaining Justice Kennedy's understanding that the majority opinion may allow a challenge to detention when, for example, there has been unreasonable delay by the DHS, formerly INS); *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008) ("Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be "constitutionally doubtful," we hold that § 1226(a) must be construed as *requiring* the Attorney General to provide the alien with such a hearing"); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) ("Despite the substantial powers that Congress may exercise in regard to aliens, it is constitutionally doubtful that Congress may authorize imprisonment of [two years and four months'] duration for lawfully admitted resident aliens who are subject to removal"); *Ly v. Hansen,* 351 F.3d 263 (6th Cir. 2003) (construing the statute to include a reasonable time limitation in bringing a removal proceeding to conclusion without an individualized bond hearing); *Monestime v. Reilly*, 2010 U.S. Dist. LEXIS 35344 (S.D.N.Y. 2010) *("*at more than eight months in ICE detention, Monestime has crossed both the *Demore* and *Zadvydas* thresholds"*); Flores-Powell v. Chadbourne*, 2010 U.S. Dist. LEXIS 913 (D.Mass. 2010); *Vongsa Senkeo v. Horgan*, 2009 U.S. Dist. LEXIS 109899 (D.Mass 2009); *Bourguignon v. McDonald*, 667 F. Supp. 2d 175 (D.Mass 2009) ("[P]eriod of time that Petitioner has already been held goes far beyond anything contemplated by *Demore*, exceeding two years so far"); *Duhaney v. U.S.D.H.S.*, 2009 U.S. Dist. LEXIS 90348 (M.D.Pa. 2009); *Occelin v. District Director*, 2009 U.S. Dist. LEXIS 51444 (M.D.Pa. 2009); *Scarlett v. U.S. Dept of Homeland Security*, 2009 U.S. Dist. LEXIS 2864 (W.D.N.Y. 2009) ("petitioner's detention [of over five years] has far exceeded the parameters of the 'brief' or 'limited' period of time which the United States Supreme Court deemed constitutional in *Demore v. Kim*"); *Parlak v. Baker*, 374 F. Supp. 2d 551 (E.D.Mich. 2005); *Fuller v. Gonzales*, 2005 U.S. Dist. LEXIS 5828 (D. Conn. 2005) ("Although *Kim* held that the desire to ensure an alien's presence at future proceedings and the desire to protect the community provide sufficient justification for a short mandatory detention, the sufficiency of that justification decreases as the length of incarceration increases"); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003); see also Beth Werlin, "Practice Advisory — Mandatory Detention after *Kim v. Demore*" (American

Immigration Law Foundation, Washington, D.C., August 29, 2003), available at www.ailf.org; see also below "Raise estoppel or constitutional or international law arguments."

☐ **Persuade the DHS (formerly INS) to exercise favorable prosecutorial discretion**

In a particularly sympathetic case, one should always consider whether it might be possible to persuade the DHS (formerly INS) to exercise favorable prosecutorial discretion, i.e., to decline to file charges or to move to dismiss charges already brought. In the past, persuading the INS (now DHS) to exercise such prosecutorial discretion has been difficult, if not impossible. Since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRIRA, however, the INS had been under some pressure to exercise such discretion in particularly compelling cases. In a January 2000 letter responding to twenty-eight members of Congress who had inquired about INS use of prosecutorial discretion to ameliorate certain harsh consequences, the Justice Department acknowledged that the INS has discretion with respect to both the initiation and the termination of removal proceedings and that it was working on developing additional guidance for its officers "in cases with the potential for extreme hardship." Letter of Assistant Attorney General Robert Raben to twenty-eight U.S. Congresspersons, dated January 19, 2000; see also Memorandum entitled "Prosecutorial Discretion" for All OPLA Chief Counsel, dated October 24, 2005, available via the Internet at <http://www.aila.org/content/fileviewer.aspx?docid=19310&link id=145122>; Memorandum of INS Commissioner Doris Meissner, dated November 17, 2000, available via the Internet at <http://uscis.gov/graphics/lawsregs/handbook/discretion.pdf>; *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, n.8 (1999) ("At each stage [of the deportation process] the Executive has discretion to abandon the endeavor"). When a DHS (formerly INS) official needs to be persuaded that the DHS has authority to exercise such favorable discretion, the following regulatory or administrative provisions may be cited:

- ✓ **DHS (formerly INS) authority to cancel a Notice to Appear (NTA) for a removal hearing when the NTA has not yet been filed with the Office of the Immigration Judge.** See 8 C.F.R. 239.2(a). According to regulations, this authority may be exercised where the NTA was "improvidently issued," or where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." 8 C.F.R. 239.2(a) (6)&(7). These two grounds appear to give the agency wide latitude to exercise prosecutorial discretion if it is so inclined. See also *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (finding that the INS (now DHS) retains prosecutorial discretion to decide whether or not to commence removal proceedings against a respondent subsequent to the enactment of IIRIRA).
- ✓ **DHS (formerly INS) authority to move to dismiss removal proceedings when the NTA has already been filed with the Office of the Immigration Judge.** See 8 C.F.R. 239.2(c). This authority may also be exercised in the circumstances described in 8 C.F.R. 239.2(a) (6)&(7) (see authority to cancel a Notice to Appear above).
- ✓ **DHS (formerly INS) authority to defer action or otherwise decline to pursue proceedings against a particular individual.** See former INS Operating Instruction 242.1(a) (22) (describing authority to defer action). According to the INS internal administrative directive which provided for deferred action, the INS could consider "sympathetic factors which, while not legally precluding deportation, could lead to unduly protracted deportation proceedings," or "because of a desire on the part of the administrative authorities or the courts to reach a favorable result, could result in a distortion of the law with unfavorable implications for future cases," or "because of the sympathetic factors in the case, a large amount of adverse publicity will be generated which will result in a disproportionate amount of Service time being spent on responding to such publicity or justifying actions." Id. While this Operating Instruction was rescinded in 1997, the INS apparently continued to exercise such discretion. See Letter of Assistant Attorney General Robert Raben to twenty-eight U.S. Congresspersons, dated January 19, 2000; see also *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, n.8 (1999). The DHS (formerly INS) may also exercise such discretion.

☐ **Move to terminate removal proceedings if the respondent was "in proceedings" before April 1, 1997**

IIRIRA's transition rules provide that the general rule is that the new IIRIRA removal rules shall not apply in the case of an alien who is "in exclusion or deportation proceedings before the Title III-A effective date [April 1, 1997]." See IIRIRA § 309(c) (1). Thus, if a noncitizen currently in removal proceedings has any argument that he or she was in deportation or exclusion proceedings before April 1, 1997, and the individual would be better off in such pre-IIRIRA proceedings (e.g., eligible to apply for INA 212(c) relief if the person was in proceedings before April 24, 1996 — see below "Apply for relief from removal — Apply for 212(c) waiver"; see also 8 C.F.R. 212.3(g)), IIRIRA § 309(c) (1) provides support for a motion to terminate removal proceedings.

Examples of cases where a noncitizen has an argument that he or she was in proceedings "before" April 1, 1997 are the following:

- ✓ **Filing of Charging Document Prior to April 1, 1997.** According to regulations, proceedings "commence" when the INS (now DHS) files a charging document with the Immigration Court. 8 C.F.R. 1003.14(a). Thus, a noncitizen was clearly in proceedings before April 1, 1997 if the INS filed with an Immigration Court a Form I-221 Order to Show Cause (relating to deportation proceedings) or a Form I-122 Notice to Alien Detained for Hearing by an Immigration Judge (relating to exclusion proceedings) prior to that date. Even if the prior proceedings were suspended (e.g., administratively closed) or terminated without entry of an order of deportation or exclusion (e.g., *Fleuti* termination) before April 1, 1997, the noncitizen should be considered to have been "in proceedings before" that date. If the prior proceedings were administratively closed, they were never formally terminated and are technically still pending. And if the prior proceedings were terminated before April 1, 1997, one can point out that the original language of the IIRIRA general transitional rule applied to aliens in proceedings "as of" April 1, 1997, but that the words "as of" were replaced by Congress with the word "before" in a technical correction passed a few days after enactment of IIRIRA. See P.L. 104-302, 110 Stat. 3656. The plain meaning of the new language covers noncitizens in proceedings anytime "before" April 1, 1997, and not only those in proceedings "as of" that date. Cf. *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000) (concurring opinion of Board Member Filppu).
- ✓ **Service or Issuance of Charging Document Prior to April 1, 1997.** Even if the INS (now DHS) did not file the pre-IIRIRA charging document with the Immigration Court prior to April 1, 1997, and instead filed a Notice to Appear for IIRIRA removal proceedings on or after April 1, 1997, federal courts have found that INS (now DHS) service or issuance of a charging document is sufficient to consider a case to be pending as of the date of service or issuance. See *Lyn Quee de Cunningham v. U.S. Atty. Gen*., 335 F.3d 1262 (11th Cir. 2003); *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000) (held that proceedings had begun prior to IIRIRA and AEDPA when the INS had previously served an Order to Show Cause and lodged a detainer against the noncitizen); accord *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (service of order to show cause sufficient to demonstrate pendency of deportation proceeding when AEDPA enacted); *Woo v. Reno*, 200 F.R.D. 516 (D.Ct. Md. 2000) (issuance and service of order to show cause prior to April 1, 1997); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 363 (E.D.N.Y. 2000) ("Since Pena-Rosario was served with an order to show cause before enactment of the 1996 amendments, his case was pending then."); *Dunbar v. INS*, 64 F. Supp.2d 47, 52 (D.Conn. 1999); cf. *Saqr v. Holder*, 580 F.3d 414 (6th Cir. 2009) ("[T]his Court is persuaded by the Eleventh and First Circuits that removal proceedings begin when an alien is served with a Notice to Appear."). These courts have chosen not to apply the 8 C.F.R. 1003.14(a) regulatory definition of when proceedings "commence," i.e., when the INS (now DHS) files a charging document with the Immigration Court. As the First Circuit stated in *Wallace*: "In this case we are not concerned with the INS' internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This questions turns on considerations unrelated to the purpose of INS regulations. ... From *this* standpoint, we think that when an order to show cause is served on the alien, the deportation process has effectively begun." 194 F.3d at 287. [But see *Arenas-Yepez v. Gonzalez*, 421 F.3d 111 (2d Cir. 2005) (in footnote 5, distinguishing *Wallace* and other cases as cases involving criminal aliens, suggesting that the Second Circuit Court might follow *Wallace* in a case involving a criminal alien); *Dipeppe v. Quarantillo*, 337 F.3d 326 (3d Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Deleon-Holguin v. Ashcroft*, 253 F.3d 811 (5th Cir. 2001); *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001); and *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000) (all requiring filing of charging document with the Immigration Court to find proceedings commenced)].
- ✓ **Detention at Port of Entry and Parole Prior to April 1, 1997.** In addition to citing the analogous case law in section 2 above, a noncitizen in this situation can point to the analysis of the U.S. Court of Appeals for the Second Circuit in *Henderson v. INS* in which the court took a broad view of when sufficient INS (now DHS) activity has occurred such that a noncitizen could be considered to be "in proceedings" on the effective date of a Congressional enactment. See *Henderson v. INS*, 157 F.3d 106 (2nd Cir. 1998). In that decision, the Second Circuit determined that one of the petitioners (Guillermo Mojica) in that case was "in exclusion proceedings" on the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) even though the INS had not yet filed a charging document with the Immigration Court. Id. at 130 n.30. The Second Circuit found it sufficient that the INS had detained Mr. Mojica at an airport port of entry and then

paroled him into the country pending deferred inspection. Id. at 11[; but see *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000)].

- ✓ **Other Initiation of Process of Deportation Prior to April 1, 1997.** A noncitizen may make an argument that he or she was "in proceedings" before April 1, 1997 whenever the INS (now DHS) has in some way initiated the process of subjecting the individual to exclusion or deportation proceedings prior to that date. [But see *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (deportation proceedings may not be deemed to have begun with the issuance of a detainer notice alone)]. In the alternative, a noncitizen against whom the INS (now DHS) had initiated the process of subjecting the noncitizen to exclusion or deportation proceedings prior to April 1, 1997 can argue that the agency should be estopped from now pursuing removal proceedings, or may argue that DHS/INS initiation of removal proceedings after delaying formally commencing proceedings prior to April 1, 1997 led to a denial of the noncitizen's due process rights. Cf. *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) (INS foot-dragging in completing deportation proceedings until petitioner no longer statutorily eligible for relief stated the basis of a substantial constitutional due process claim); see also below "Raise estoppel or constitutional or international law arguments." Yet another way of raising this claim is to argue that there is no rational basis for subjecting the noncitizen to removal proceedings when similarly situated individuals were placed in pre-IIRIRA proceedings, thus violating his or her constitutional right to equal protection of the laws. See below "Raise Estoppel or Constitutional Arguments."

☐ **Move to terminate proceedings of a lawful permanent resident charged with inadmissibility after a brief trip abroad**

The Immigration and Nationality Act provides that the grounds of inadmissibility apply only to those applying for a visa outside the United States or seeking admission to the United States. See INA § 212(a). As amended by IIRIRA, the Act further provides that a lawful permanent resident "shall not" be regarded as seeking an admission into the United States unless, *inter alia*, the noncitizen has committed an offense identified in section 212(a) (2) (criminal inadmissibility grounds). The mandatory "shall not" language of this provision precludes application of the grounds of inadmissibility unless one of the exceptions applies. The provision, however, does not contain any such mandatory language requiring that, if one of the exceptions applies, the noncitizen "shall" be subject to admissibility review. This is significant because prior Supreme Court precedent held that a returning lawful permanent resident is not subject to admissibility review upon return from an "innocent, casual, and brief" trip abroad that was not meant to be "meaningfully interruptive" of his or her lawful admission status. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Therefore, although the Board of Immigration Appeals has rejected the argument that the *Fleuti* doctrine still applies after IIRIRA, see *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1997), it may be possible to persuade a federal court to find that a lawful permanent resident immigrant is not subject to the grounds of inadmissibility if the individual's departure was brief, casual, and innocent. See *Richardson v. Reno*, 994 F. Supp. 1466, 1471 (S.D. Fla. 1998), reversed and vacated on other grounds, 162 F.2d 1338 (11th Cir. 1998); see also dissenting opinion of Board member Rosenberg in *Matter of Collado-Munoz*, 21 I&N Dec. at 1067-68; [but see *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010); *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007); *Malagon de Fuentes v. Gonzales,* 462 F.3d 498, 501 (5th Cir. 2006); *Olatunji v. Ashcroft*, 387 F.3d 383, 395-96 (4th Cir. 2004); *Tineo v. Ashcroft*, 350 F.3d 382, 2003 U.S. App. LEXIS 24430 (3d Cir. 2003)]. In addition, if the returning lawful permanent resident immigrant is charged with inadmissibility based on a criminal conviction prior to April 1, 1997 (IIRIRA general effective date), the person may argue that, even if it is true that IIRIRA eliminated the *Fleuti* doctrine, this IIRIRA amendment may not be applied retroactively at least to a conviction involving a pre-4/1/97 agreement to plead guilty because there is no clear statement of such Congressional intent. See *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007); *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004); [but see *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010)]. Finally, a returning permanent resident may argue that it violates the Fifth Amendment's due process clause to subject a returning resident to admissibility review if his or her departure was not a meaningful interruption of previously conferred lawful admission status in the United States. See below "Raise estoppel or constitutional arguments — Substantive Due Process."

☐ **Deny deportability or inadmissibility**

In the post-IIRIRA era, when relief from removal is statutorily unavailable in many cases, it becomes more important than ever to contest DHS (formerly INS) charges of deportability or inadmissibility. Keep in mind that, if the respondent has been lawfully admitted to the United States, the burden of proof is on the DHS (formerly INS) to establish deportability by "clear and convincing evidence." See INA 240(c) (3) (A); see also *Woodby v. INS*, 385 U.S. 276 (1966) (enunciating "clear, unequivocal and convincing" evidence standard). Also keep in mind that,

while the burden of proof is generally on the applicant to establish admissibility, see INA 240(c) (2) (A), & 291, the burden has been held to shift to the INS (now DHS) to prove inadmissibility in the case of a lawful permanent resident returning from a trip abroad. See, e.g., *Matter of Huang*, 19 I&N 749 (BIA 1988); see also 8 C.F.R. 240.8(c).

■ **Deny "alienage"**

- ✓ **Where individual is a U.S. citizen by birth in United States**, including Puerto Rico, the U.S. Virgin Islands, and Guam. See INA 301(a)&(b), 302, 304-307 (in addition, note that prior citizenship laws no longer in the statute may apply to certain individuals).
- ✓ **Where individual acquired citizenship by birth outside United States to citizen parent(s).** See INA 301(c) (d) (e)&(g), 301a, 303 (in addition, note that prior citizenship laws no longer in the statute may apply to certain individuals).
- ✓ **Where individual derived citizenship by naturalization of parent(s) while individual was a minor.** See INA 320 (effective February 27, 2001) (note that prior citizenship laws — including former INA 320 and 321 — no longer in the statute may apply to certain individuals).
- ✓ **Where individual naturalized as a citizen by applying for and being sworn in as a U.S. citizen.** See INA 310 et al.
- ✓ **Where individual is a U.S. national, even if not a U.S. citizen.** See INA 101(a) (3) (defining an "alien" as "any person not a citizen or a national of the United States") and 101(a) (22) (defining a "national" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States"). It may be possible to argue that an individual is a national if the individual has previously taken formal steps to declare allegiance to the United States. See *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996) (finding that an individual who was a permanent resident alien of the United States and who had previously applied for U.S. citizenship was a U.S. national); see also *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001) and *Oliver v. INS*, 517 F.2d 426 (2d Cir. 1975) (cases rejecting nationality claims but leaving open the possibility that the result might have been different had the petitioner in each case previously begun the process of applying for U.S. citizenship); [but see *Matter of Navas-Acosta*, 23 I&N Dec. 586 (BIA 2003); *Fernandez v. Keisler,* 502 F.3d 337 (4th Cir. 2007) ("Because the BIA's interpretation of the INA's definition of 'national of the United States' is not 'arbitrary, capricious, or manifestly contrary to the statute, *Chevron,* ... we must defer to it in this case, *Morin* notwithstanding."); *Abou-Haidar v. Gonzales,* 437 F.3d 206 (1st Cir. 2006) (holding that a naturalization application cannot confer national status on an alien because one can become a U.S. national only by birth or full naturalization); *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005) (rejecting claim that one becomes national by pledging allegiance to the U.S. prior to service in the U.S. military); *Sebastian-Soler v. U.S.A.G.*, 409 F.3d 1280 (11th Cir. 2005); *U.S. v. Jimenez-Alcala*, 353 F.3d 858 (10th Cir. 2003) (correcting jury instruction stating that a person becomes a national merely by submitting an application for U.S. citizenship); *Salim v. Ashcroft*, 350 F.3d 307 (3d Cir. 2003) (rejecting claim that one becomes national merely by submitting an application for U.S. citizenship and registering for selective service); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003) (rejecting claim that one becomes a national merely by submitting an application for U.S. citizenship)].
- ✓ **Where the DHS (formerly INS) is unable to prove alienage.** See 8 C.F.R. 240.8 ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service [now DHS] must first establish the alienage of the respondent").

■ **Deny "conviction"**

Most of the criminal grounds of deportability require a "conviction." In addition, while most of the criminal grounds of inadmissibility do not require a conviction, the DHS (formerly INS) in practice usually also has relied on a criminal court "conviction" when charging inadmissibility. As a result of IIRIRA, the Immigration and Nationality Act now provides that a criminal disposition may be considered a conviction for immigration purposes in the following two circumstances: (1) a *formal judgment of guilt* of the alien has been *entered* by a court, or (2) *adjudication of guilt has been withheld*, but a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See INA § 101(a) (48) (A), added by IIRIRA § 322. The Board of Immigration Appeals has broadly interpreted this new definition to

find that no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute). Immigrants and their advocates should be aware that the removal order in *Roldan-Santoyo* was later vacated by the U.S. Court of Appeals for the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act — see discussion below), but *Lujan-Armendariz* is a binding precedent only within the Ninth Circuit. See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002). In fact, as a result of the new definition and *Roldan-Santoyo*, the DHS (formerly INS) seems to be taking the position that *any* criminal case disposition where there is some finding or admission of guilt is automatically and irrevocably transformed into a conviction for immigration purposes.

- ✓ **The disposition of the criminal case is not an entry of a formal judgment of guilt, nor a withheld adjudication meeting the required elements of the IIRIRA "conviction" definition.** Despite its seemingly broad *Roldan-Santoyo* interpretation of the IIRIRA definition of conviction, the Board of Immigration Appeals has found that some dispositions involving a finding or admission of "guilt" may not be convictions for immigration purposes. For example, after *Roldan-Santoyo*, the Board held that a New York State youthful offender adjudication, which involves the immediate vacatur of a guilty plea conviction in certain cases involving young defendants and its substitution by a youthful offender finding, is not a conviction for immigration purposes. See *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) ("The adjudication of a person determined to be a … youthful offender is not a conviction *ab initio*, nor can it ripen into a conviction at a later date"). Thus, certain "guilty plea" dispositions that cannot be classified as neither a formal judgment of guilty, nor a withholding of adjudication of guilt, may be distinguished from the deferred adjudications at issue in *Roldan-Santoyo* (Idaho withholding of adjudication statute), and *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (Texas deferred adjudication statute). Moreover, for a deferred adjudication disposition to come within the IIRIRA definition, it must involve a sufficient finding of guilt. See *Crespo v. Holder*, 2011 U.S. App. LEXIS 502, __ F.3d __ (4th Cir. 2011) ("Subsection (i) specifies five sufficient findings: a finding of guilt by a judge or jury (i.e., a trial), a plea of guilt, a plea of no contest, or an admission *by the alien* of facts sufficient to find guilt. As Crespo correctly notes, *none* of these five possibilities occurred in his case because neither a judge nor a jury found him guilty after a trial and he did not plead guilty or no contest or admit to any facts, let alone facts sufficient to warrant a finding of guilt.").
- ✓ **The disposition of the criminal case is analogous to a federal disposition that is not considered a conviction of a crime under federal law.** Certain federal dispositions are specifically precluded from being deemed criminal convictions. Examples are adjudications under the Federal First Offender Act, 18 U.S.C. 3607 (relating to expungements of first-time simple possession drug offenses), and the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 (relating generally to violations of law committed by a person prior to his 18th birthday). Thus, based on constitutional equal protection requirements, one may argue that a noncitizen whose first-time drug possession offense is expunged under state or foreign law should similarly not be deemed convicted for immigration purposes. See *Jimenez-Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010) (first-time offender whose state conviction of using or being under the influence of a controlled substance is subsequently expunged under state law is eligible for the same immigration treatment as those convicted of simple drug possession whose convictions are expunged under the Federal First Offender Act); *Ramirez-Altamirano v. Mukasey*, 563 F.3d 800 (9th Cir. 2009) (applying *Lujan-Armendariz* to individual's expunged state conviction for possession of drug paraphernalia used only for unlawfully injecting or smoking certain controlled substances); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (applying same principle to a foreign conviction); see also *Gradiz v. Gonzales*, 490 F.3d 1206, 1208 (10th Cir. 2007)(agreeing with *Luhan-Armendariz* in dicta); see also below "Raise estoppel or constitutional or international law arguments — Equal Protection;" [but see *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (declining to follow *Lujan-Armendariz* in cases arising outside of the Ninth Circuit); W*ellington v. Holder*, 623 F.3d 115 (2d Cir. 2010); *Estrada v. Holder,* 560 F.3d 1039 (9th Cir. 2009) (FFOA relief is not available when the person whose conviction is expunged has violated a condition of probation); *Ballesteros v. Ashcroft*, 452 F.3d 1153 (10th Cir. 2006); *Resendiz-Alcaraz v. U.S. Atty. Gen.*, 383 F.3d 1262 (11th Cir. 2004); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321,

328-31 (5th Cir. 2004); *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003); *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003); *Vazquez-Velezmoro v. United States INS*, 281 F.3d 693 (8th Cir. 2002)]. Likewise, it may be possible to argue that a noncitizen who committed a state or foreign offense under the age of 18 would have been adjudicated as a juvenile delinquent under federal law and therefore should not be considered to have been convicted of a crime. See *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) (holding that a New York State youthful offender adjudication is not a conviction as it corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) ("It is well-settled that an act of juvenile delinquency is not a conviction for a crime within the meaning of our immigration laws"); [but see *Singh v. U.S. Atty. Gen.*, 561 F.3d 1275 (11th Cir. 2009) (adopting the readings of the First, Ninth and Second Circuits in *Vieira-Garcia*, *Vargas-Hernandez*, and *Savchuk*); *Savhcuk v. Mukasey*, 518 F.3d 119 (2d Cir. 2008) (irrelevant that the alien was not yet 18 when he committed grand larceny offense as the conviction was a formal adjudication of guilt under 8 U.S.C. § 1101(a)(48)(A)); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 923 (9th Cir. 2007) (conviction for voluntary manslaughter committed at the age of 16 constitutes a conviction under INA § 101(a)(48)(A) even if the conviction qualified for treatment under the Federal Juvenile Delinquency Act); *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005) (Michigan "youthful trainee" disposition counts as conviction for immigration purposes); *Vieira-Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001); see also *Wallace v. Gonzales*, 463 F.3d 135, 139 & n.4 (2d Cir. 2006) (New York State youthful offender adjudication may be considered as adverse discretionary factor)].

- ✓ **The disposition of the criminal case is not final.** If a conviction relied upon by the DHS (formerly INS) is on direct appeal, the individual should present evidence of such to defeat the DHS (formerly INS) charge and, if the person is in DHS custody, he or she should be released because the conviction is not yet final. See *Pino v. Landon*, 349 U.S. 901 (1955) (per curiam), *rev'g Pino v. Nicols*, 215 F.2d 237 (1st Cir. 1954) ("On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of [former section] 241 of the Immigration and Nationality Act."); *Paredes v. AG*, 528 F.3d 196 (3d Cir. 2008) ("'[A] conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.'"); *Walcott v. Chertoff*, 517 F.3d 149, 154 (2d Cir. 2008) ("conviction was not deemed final for immigration purposes until July 1, 1998, when direct appellate review of it was exhausted"); *United States v. Garcia-Echaverria*, 374 F.3d 440, 445 (6th Cir. 2004) ("To support an order of deportation, a conviction must be final.") (citation omitted); *Grageda v. United States INS*, 12 F.3d 919, 921 (9th Cir. 1993) ("[a] criminal conviction may not be considered by an IJ until it is final" and a conviction is not final until an alien has "'exhausted the direct appeals to which he is entitled.'") (quoting *Morales-Alvarado v. INS*, 655 F.2d 172, 174 (9th Cir. 1981)); *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Aguilera-Enriquez v. INS,* 516 F.2d 565 (6th Cir.1975); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971); see also majority opinion in *Matter of Cardenas-Abreu*, 24 I&N Dec. 795, 798 (BIA 2009) (reviewed the IIRIRA definition of "conviction" and the legislative history and stated that "a forceful argument can be made that Congress intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law."), as well as dissenting opinion of Board Member Greer joined by 5 other Board Members, id. at 811-823, and concurring opinion of Board Member Grant, id. at 802-803 (both of which opinions determined, as a general matter, that a direct appeal as of right precludes negative immigration consequences of a conviction unless and until the appeal is dismissed and the conviction becomes final). Although there are indications that some members of the Board of Immigration Appeals believe the IIRIRA definition of "conviction" means that finality is no longer required, see concurring opinion of Board Member Pauley joined by Board Member Cole in *Matter of Cardenas-Abreu*, 24 I&N Dec. at 803-811 (BIA 2009), a requirement of finality is still Board precedent. See *Matter of Ozkok*, 19 I&N Dec. 546 at n.7 (BIA 1988) ("It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived."); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (concurring and dissenting opinion of Board member Rosenberg) (finality a separate requirement from "conviction" for immigration purposes); compare with *Paredes v. AG*, 528 F.3d 196 (3d Cir. 2008) (pendency [of post-conviction motions or other forms of collateral attack] does not vitiate finality, unless and until the convictions are overturned as a result of the collateral motions); [but see *Puello v. BCIS*, 511 F.3d 324 (2d Cir. 2007); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007); *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007); *Abiodan v. Gonzales*, 461 F.3d 1210, 1213 (10th Cir. 2006); *Montenegro v.Ashcroft* , 355 F.3d 1035 (7th Cir.

2003); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) ("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of "conviction" found in IIRIRA § 322(a)")].

- ✓ **The criminal conviction has been vacated.** If a conviction has been vacated on legal or constitutional grounds, that vacatur should be respected by the immigration authorities. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will ... accord full faith and credit to this state court judgment [vacating a conviction under New York state law]"); *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) ("[W]hen a court ... vacates an original judgment of guilt, its action must be respected); *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). In *Rodriguez-Ruiz*, the Board distinguished the New York State statute under which Mr. Rodriguez-Ruiz' conviction was vacated from an expungement statute or other rehabilitative statute. Thus, it may be important for an individual whose conviction has been vacated to show that the vacatur is based on legal error in the underlying criminal proceedings as opposed to an expungement or other rehabilitative statute. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (held that a conviction vacatur was ineffective to eliminate its immigration consequences since the "quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes."). However, some federal courts, including the Sixth Circuit in reversing *Matter of Pickering*, have put the burden on the government to show that the vacatur was solely to avoid adverse immigration consequences or other rehabilitative reasons, as opposed to legal defect. See *Pickering v. Gonzales*, 454 F.3d 525, (6th Cir. 2006); see also *Bakarat v. Holder*, 2010 U.S. App. LEXIS 19213, __ F.3d __ (6th Cir. 2010) (following prior Sixth Circuit decision in *Pickering* and finding that BIA improperly placed burden on immigrant, and distinguishing *Sanusi* by observing that, in *Sanusi*, the state court filings were included as part of the administrative record, and thus, there was a factual basis for the BIA to conclude that the conviction at issue was vacated for rehabilitative or immigration reasons.); *Nath v. Gonzales,* 467 F.3d 1185, 1188-89 (9th Cir. 2006) (held that the DHS has the burden of showing that a vacated conviction remains valid for immigration purposes); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10th Cir. 2005) (government failed to show that Utah conviction reduced to lesser non-AF offense continued to be conviction of higher level AF offense for immigration purposes as reduction could have been based upon consideration of matters leading up to the conviction, not based upon post-conviction, rehabilitative events); *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001) (Illinois state court re-sentencing constituted a vacatur relating to violation of a fundamental statutory or constitutional right in the underlying criminal proceedings rather than involving a state rehabilitative scheme); but compare with *Sanusi v. Gonzales*, 474 F.3d 341 (6th Cir. 2007) (distinguished prior Sixth Circuit decision in *Pickering* to find that it would not give effect to Arkansas vacatur where state court *coram nobis* petition and the state court order failed to provide the evidence from which it may be reasonably inferred that the writ was granted on any recognized legal ground); *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006) (alien failed to show that the Vermont state court vacated the conviction based on a defect in the underlying criminal proceedings.); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (Arizona setting aside of conviction upon successful completion of probation constituted an expungement for rehabilitative purposes and therefore the underlying criminal disposition remains a conviction for immigration purposes); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (New York State granting of a certificate of relief from civil disabilities involves a state rehabilitation statute and therefore the underlying criminal disposition remains a conviction for immigration purposes); *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000) (a Puerto Rico dismissal of charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, does not vitiate the original admission of guilt); and *United States v. Campbell*, 167 F.3d 94 (2d Cir. 1999) (dealing with a Texas vacatur of a conviction in the context of illegal reentry sentencing). The Fifth Circuit has, in dicta, indicated that any vacated conviction remains a conviction for immigration purposes. See *Renteria-Gonzalez v. Ashcroft*, 322 F.3d 804 (5th Cir. 2002), as amended on denial of rehearing en banc (2003); but see *Gaona-Romero v. Gonzales*, 2007 U.S. App. LEXIS 19911 (5th Cir. 2007)(on motion for rehearing and at the request of the government, vacating prior panel decision and remanding the case to the BIA so that the government could withdraw charge of removability based on vacated drug conviction); *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005) (vacating prior decision published at 369 F.3d 472, which had found that a conviction vacated because of procedural and substantive errors remained a conviction for immigration

purposes under *Renteria-Gonzalez*, after the government filed a motion seeking vacatur of the prior Fifth Circuit decision and a remand for agency to decide the case under *Matter of Pickering*).

- ✓ **Documentary evidence is insufficient to establish conviction of the charged offense.** When the DHS (formerly INS) offers its documentary proof of a criminal conviction, the practitioner should make sure it satisfies legal requirements. See 8 C.F.R. 1003.41 (listing documents that "shall be admissible as evidence in proving a criminal conviction"); see also INA 240(c) (3) (B) (listing documents that "shall constitute proof of a criminal conviction" in proceedings under IIRIRA). And, even where the legal requirements are met, one can still argue that the evidence does not meet the DHS' (formerly INS') burden of proof. See, e.g., *Cheuk Fung S-Yong v. Holder*, 578 F.3d 1169 (9th Cir. 2009) (rejecting immigration judge's reliance on Yong's admissions and an unidentified "conviction document" to determine that Yong's conviction was a controlled substance offense under the INA); *Francis v. Gonzales*, 442 F.3d 131 (2d Cir. 2006) (Jamaican police report insufficient to prove conviction for purposes of establishing deportability); *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004) (holding that district court improperly relied solely on an abstract of a California judgment as proof that defendant had entered a guilty plea in state court to the specific charge of sale and transportation of methamphetamine); *Dashto v. INS*, 59 F.3d 697, 701 (7th Cir. 1995) (holding that clerk's certified "statement of conviction" that crime was a firearm offense, without more, did not satisfy INS' burden of proof)[; but see *Rosales-Pineda v. Gonzales*, 452 F.3d 627 (7th Cir. 2006) (holding that rap sheet was sufficient proof to establish ineligibility for relief since government does not have burden of proving ineligibility for relief by clear and convincing evidence as it does when it must establish deportability)].

■ **Deny "admission" of offense**

Certain inadmissibility grounds are triggered not only by convictions, but also by admissions of having committed certain offenses or having committed the essential elements of such offenses. See INA 212(a) (2) (A) (i) (covering admissions of a crime involving moral turpitude or a violation of law relating to a controlled substance). If the DHS (formerly INS) charges an individual with having admitted such an offense, one may, depending on the circumstances, raise the following arguments:

- ✓ **Conduct admitted does not constitute a crime under the laws of the jurisdiction where it occurred.** See *Matter of M*, 1 I&N Dec. 229 (BIA 1942).
- ✓ **Individual did not admit all factual elements of the crime.** See *Matter of E.N.*, 7 I&N Dec. 153 (BIA 1956).
- ✓ **Individual was not provided with a definition of the crime before making the alleged admission.** See *Matter of K*, 9 I&N Dec. 715 (BIA 1962).
- ✓ **Admission was not voluntarily given.** See *Matter of G*, 1 I&N Dec. 225 (BIA 1942).
- ✓ **Guilty plea alone, without conviction, is ordinarily not an admission of a crime for immigration purposes.** See *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (guilty plea, which resulted in something less than a conviction, insufficient to sustain a finding of inadmissibility based on admission of offense); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (limiting use of conviction on appeal to discretionary considerations); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (where dismissal or acquittal results from purely technical infirmities or from perjured testimony, BIA will not abide by its usual practice of deference to judicial decisions); *Matter of Ozkok*,19 I&N Dec. 546 (BIA 1988) (overruling *Matter of Seda* and other BIA precedent decisions "to the extent they are inconsistent with the standard enunciated by the Board today")].
- ✓ **Independent admission of crime after dismissal of criminal case is ordinarily not an admission of crime for immigration purposes.** See *Matter of G*, 1 I&N Dec. 96 (BIA 1942); *Matter of C.Y.C.*, 3 I&N Dec. 623 (BIA 1950); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (immigration authorities may make independent determinations concerning inadmissibility; however, the Board noted that it has been customary to consider the criminal court's adjudication binding as to the cause)].

■ **Deny "reason to believe" that the individual is a drug trafficker**

One often-charged inadmissibility ground is based DHS (formerly INS) "reason to believe" that the individual has been an illicit trafficker in a controlled substance. See INA 212(a) (2) (C). If the DHS (formerly INS) charges an individual with this ground of inadmissibility, one may, depending on the circumstances, raise the following arguments:

- ✓ **Individual was not a knowing and conscious participant in the drug trafficking.** See *Matter of R.H*, 7 I&N Dec. 675 (BIA 1958).
- ✓ **DHS (formerly INS) evidence of drug trafficking is not reasonable, substantial, and probative.** See *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977) (enunciating standard); see also *Garces v.U.S. Atty. Gen.*, 611 F.3d 1337 (11th Cir. 2010) (after stating that "[o]ur task is to determine whether the BIA's decision is supported by reasonable, substantial and probative evidence," found that uncorroborated arrest reports did not meet this standard); *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007) (unpublished) (where individual acquitted on charges relating to the importation of heroin, drug charges alone did not constitute reasonable, substantial and probative evidence to support a belief that the individual was involved in drug trafficking); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000).
- ✓ **Guilty plea alone, without conviction and without independent evidence of drug trafficking, is insufficient evidence to sustain DHS (formerly INS) charge of "reason to believe."** See *Garces v.U.S. Atty. Gen.*, __ F.3d __, 2010 U.S. App. LEXIS 16233 (11th Cir. 2010) (after individual's guilty plea was vacated based on a finding that it was involuntary, there was no substantial evidence that he admitted anything when he pleaded guilty sufficient to support "reason to believe" that he was a drug trafficker); cf. *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (guilty plea, which resulted in something less than a conviction, insufficient to sustain a finding of inadmissibility based on admission of offense); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (limiting use of conviction on appeal to discretionary considerations); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (where dismissal or acquittal results from purely technical infirmities or from perjured testimony, BIA will not abide by its usual practice of deference to judicial decisions); *Castano v. INS*, 956 F.2d 236, 238-39 (11th Cir. 1992) (upholding BIA's determination of removability based on facts underlying conviction for distributing cocaine, even though conviction was expunged under federal youthful-offender rehabilitation statute).].
- ✓ **No "reason to believe" if probable cause standard is not met.** See U.S. Dep't of State, 9 *Foreign Affairs Manual* 40.23 Notes n.2(b) ("The essence of the [reason to believe] standard is that the consular officer must have more than a mere suspicion — there must exist a probability, supported by evidence, that the alien is or has been engaged in trafficking. ..."); cf. *Matter of U-M-*, 23 I&N Dec. 355, 356 (BIA 2002) (addressing USA Patriot Act standard of "reasonable ground to believe" that someone is engaged in terrorist activity," finds that the standard is akin to the familiar "probable cause" standard).
- ✓ **"Reason to believe" did not exist at the time of entry or admission.** See *Matter of Rocha*, 20 I&N Dec. 994 (BIA 1995) (deportation charge based on inadmissibility at time of entry will not be sustained unless "reason to believe" existed at time of entry)[; but see *Matter of Casillas-Topete*, 25 I&N Dec. 317 (BIA 2010) ("reason to believe" may be based on information known to immigration officials other than the inspecting immigration officer as long as the conduct at issue predated or occurred contemporaneously with the alien's application for admission)].

■ **Deny "aggravated felony" (AF)**

There are many possible challenges to DHS (formerly INS) charges that an individual is deportable, or otherwise disadvantaged under the immigration laws, based on conviction of an aggravated felony. Examples of some of the possible arguments are:

- ✓ **Offense is not an AF if it is not a felony.** Unless perhaps the definition of a particular AF category specifically provides otherwise, see, e.g., INA 101(a) (43) (F) (AF "crime of violence" category referencing federal law definition of "crime of violence," which might include offense classified by a state as a misdemeanor so long as it comes within the first prong of the 18 U.S.C. § 16 definition), legislative history and common sense dictates that Congress' use of the term "aggravated felony" evidences Congressional intent that only offenses classified as felonies would be covered. See dissenting opinions in *U.S. v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005) (Judge Berzon); *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2003)) (Judge Berzon), *cert. denied*, 538 U.S. 1008 (2003; *U.S. v. Marin-Navarette*, 244 F.3d 1284 (11th Cir. 2001) (Judge Cox), *cert. denied*, 534 U.S. 941 (2001); and *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (Judge Straub), *cert. denied*, 533 U.S. 904 (2001); *amicus curiae* brief of the New York State Defenders Association in support of petition for rehearing in *U.S. v. Pacheco*, No. 00-1015 (2d Cir. 2000), available at http://www.nysda.org/PachecoBrief.pdf; see also dissenting opinion of Justice Thomas in *Lopez v. Gonzales*, 549 U.S. 47, 127 S. Ct. 625, 638 (2006) ("It is at least anomalous, if not inconsistent, that an actual misdemeanor

may be considered an "aggravated felony."); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF);[but see *Matter of Small*, 23 I&N Dec. 448 (BIA 2002) (misdemeanor offense of sexual abuse of a minor may constitute "sexual abuse of a minor" AF); *U.S. v. Cardoza-Estrada*, 385 F.3d 56 (1st Cir. 2004); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001); *U.S. v. Graham*, 169 F.3d 787 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999) (holding that the New York misdemeanor of petty larceny may be deemed a theft offense AF if the offense otherwise meets the sentence of imprisonment threshold for such an AF); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *U.S. v. Urias-Escobar*, 281 F.3d 165 (5th Cir.), *cert. denied*, 122 S. Ct. 2377 (2002); *U.S. v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001); *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2003), *cert. denied*, 538 U.S. 1008 (2003); *U.S. v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir.), *cert. denied*, 123 S. Ct. 315 (2002); *U.S. v. Christopher*, 239 F.3d 1191 (11th Cir.), *cert. denied*, 534 U.S. 877 (2001)]. Support for considering the ordinary meaning of the "aggravated *felony*" term is provided by the Supreme Court decision in *Lopez v. Gonzales,* 549 U.S. 47, 127 S. Ct. 625 (2006), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (considering the ordinary meaning of the terms "drug trafficking crime" and "crime of violence" when analyzing INA references to federal definitions of these terms).

- ✓ **State offense involving a minor victim is not a "sexual abuse of a minor" AF if it covers conduct other than "sexual abuse" or does not necessarily involve a minor victim under state law, and/or the state offense does not contain the same elements as the federal offense of sexual abuse of a minor, and/or the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question.** See INA 101(a) (43) (A). Under the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. __, 129 S. Ct. 2294 (2009), the "sexual abuse of a minor" language refers to a generic crime and, therefore, must be analyzed under the traditional categorical approach requiring the fact finder to look only at the elements of the statute of conviction and the record of conviction, and not the alleged underlying facts, in order to establish deportability. The federal offense of "sexual abuse of a minor" requires the victim to be (a) between the ages of 12 and 16, and (b) at least four years younger than the defendant. See 18 U.S.C. 2243(a). And the federal offense does not cover "touching" through clothing. Thus, if the state offense is broader (that is, it may have involved a victim age 16 or over, or the victim may have been less than four years younger than the defendant was, or the offense may have involved touching through clothing), the offense would not necessarily be covered under the federal offense of sexual abuse of a minor. See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc); see also dissenting opinion of Board member Guendelsberger in *Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999); cf. *U.S. v. Munoz-Ortenza*, 563 F.3d 112 (5th Cir. 2009) (for purposes of Sentencing Guidelines definition including "sexual abuse of a minor," California Penal Code conviction for oral copulation of a minor, which defines minor as one under eighteen, is overbroad because it criminalizes conduct that would not be criminalized under the generic, contemporary meaning of sexual abuse of a minor); [but see *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006) (conviction of offense involving 16 or 17 year old victim may still be considered a "sexual abuse of a minor" AF); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (majority of the Board of Immigration Appeals found that conviction under a broader state offense may still be considered a "sexual abuse of a minor" AF); *Restrepo v. AG*, 617 F.3d 787 (3d Cir. 2010) (deferring to BIA definition of sexual abuse of a minor in *Matter of Rodriguez-Rodriguez*); *Gaiskov.v. Holder*, 567 F.3d 832 (7th Cir. 2009); *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008); *Vargas v. DHS*, 451 F.3d 1105 (10th Cir. 2006); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (statutory rape involving minor over age 16), *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001) (offense need not require physical contact); see also *U.S. v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009) (distinguished *Estrada-Espinoza* on the ground that 18 U.S.C. 2243 "encompassed statutory rape crimes only" and therefore a crime that is not a statutory rape crime may still meet the federal generic offense of "sexual abuse of a minor" if (1) the conduct prohibited by the criminal statute is sexual, (2) the statute protects a minor, and (3) the statute requires abuse); *U.S. v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000)]. In addition, an offense involving a minor victim is not necessarily "sexual abuse of a minor" if the offense covers conduct other than "sexual abuse." See *Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007) (attempted public sexual indecency to a minor does not constitute sexual abuse of a minor because the minor does not have to be touched or even aware of the offending conduct for a conviction and the attempt statute is broader than the federal definition); *Stubbs v. Atty. Gen. of the United States*, 452 F.3d 251 *(3d Cir. 2006) (New Jersey endangering welfare of children is not necessarily "sexual abuse of a minor" since record*

of conviction failed to establish that the petitioner engaged in sexual conduct with the child, or that the abusive conduct actually occurred); U.S. v. Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004) (California annoying or molesting a child under 18 is not necessarily "sexual abuse of a minor"). Likewise, an offense involving a minor victim is not necessarily "sexual abuse of a minor" if a finding of the age of the victim is not required for conviction under state law. See *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); see also *Larroulet v. Ashcroft*, 2004 U.S. App. LEXIS 18518 (9th Cir. 2004) (unpublished opinion). Also, one could argue that an offense involving mere solicitation of a sexual act without knowledge that the person solicited is a minor is not "sexual abuse of a minor". See dissenting opinion of Judge Posner in *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005). Finally, an offense should not be deemed a "sexual abuse of a minor" AF if the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question. See *Gonzalez v. Ashcroft*, 369 F. Supp.2d 442 (SDNY 2005) (state offense of use of a child in a sexual performance is not an AF if the offense does not require knowledge of the sexual nature of the performance).

- ✓ **State drug offense is not an "illicit trafficking in a controlled substance" AF.** See INA 101(a) (43) (B), including a "drug trafficking crime," as defined in 18 U.S.C. 924(c). Under the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. __, 129 S. Ct. 2294 (2009), the "illicit trafficking in a controlled substance" language refers to a generic crime and, therefore, must be analyzed under the traditional categorical approach requiring the fact finder to look only at the elements of the statute of conviction and the record of conviction, and not the alleged underlying facts, in order to establish deportability. The more general definitional term — "Illicit trafficking" — is not defined. The narrower definitional term — "drug trafficking crime" — is defined to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." As for state offenses, the U.S. Supreme Court has interpreted this definition to apply only to state offenses punishable as felonies under federal law (*Lopez v. Gonzales,* 549 U.S. 47 (2006)). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), but simple possession drug offenses are punishable as felonies only when the defendant has a prior drug conviction (and the prosecution has charged and proven the existence, validity, and finality of the prior conviction) or is convicted of possession of flunitrazepam. See 21 U.S.C. 801 et seq., and especially 21 U.S.C. 844 (Penalties for simple possession).

  Despite the Supreme Court's decision in *Lopez*, several issues relating to what state drug offenses may be deemed "illicit trafficking" aggravated felonies remain unresolved. For guidance on arguments that may be raised post-*Lopez* with respect to some of these issues, see "Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases — The Impact of *Lopez v. Gonzales*," posted at www. immigrantdefenseproject.org. More generally, the following arguments may be made with respect to certain state drug offenses (note that the strength or viability of the claim may depend on the law of the circuit in which the case arises):

  - Drug offense should not be considered an "illicit trafficking" AF if the offense does not require the prosecution to allege and prove that the controlled substance at issue is one that is included in the definition of "controlled substance" in section 102 of the Controlled Substances Act. See INA 101(a) (43) (B). See *Cheuk Fung S-Yong v. Holder*, 578 F.3d 1169 (9th Cir. 2009) (rejecting immigration judge's reliance on Yong's admissions and a government attorney's assessment of an extra-record document to determine that Yong's conviction was a controlled substance aggravated felony under the INA); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) ("DHS has failed to establish unequivocally that the particular substance which Ruiz-Vidal was convicted of possessing in 2003 is a controlled substance as defined in section 102 of the Controlled Substances Act"); *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003) (finding offense to be AF only after conducting analysis to determine that record of conviction proved that offense involved controlled substance listed on federal schedules referenced in section 102 of the Controlled Substances Act).
  - State drug offense should generally not be considered an "illicit trafficking" AF unless it is a "felony" and covers only "trafficking" conduct. On "felony" requirement, see *Matter of Sanchez-Cornejo*, 25 I&N Dec. 273 (BIA 2010) (citing *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF)); see also Point I in Brief for NYSDA Immigrant Defense Project in *Matter of*

Grant, available at http://www.nysda.org/idp/docs/file12_05_GrantAmicusBrief.pdf; Point I(A) in Brief for NYSDA Immigrant Defense Project in Martinez v. Ridge, available at http://www.nysda.org/idp/docs/07_Martinezv%20Ridge_LetterBrief.pdf;

— and Point I(B) in Brief for Amicus Curiae American Bar Association in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006), available at http://www.nysda.org/idp/docs/06_American%20Bar%20Association%20(Amicus).pdf. On trafficking requirement, see *Lopez v. Gonzales,* 549 U.S. 47, 127 S. Ct. 625 (2006) ("ordinarily 'trafficking' means some sort of commercial dealing"); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) ("unlawful trading or dealing"); *Jeune v. Atty. Gen.*, 476 F.3d 199 (3d Cir. 2007) (same); see also Brief for Amici Curiae NYSDA Immigrant Defense Project et al., in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006), available at http://www.nysda.org/idp/docs/06_IDP,%20ACLU,%20ACLU,%20ILRC,%20NACDL,%20NLADA%20(Amicus).pdf. Support for considering the ordinary meaning of the "aggravated *felony*" and "illicit *trafficking*" terms is provided by the Supreme Court decision in *Lopez v. Gonzales,* 549 U.S. 47, 127 S. Ct. 625 (2006) (considering the ordinary meaning of the term "illicit trafficking") and *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (considering the "ordinary meaning of the term "crime of violence" when analyzing an INA reference to a federal definition of the term).

— State drug possession offense should not be considered an "illicit trafficking" AF as falling within the referenced federal definition of "drug trafficking crime" unless the offense would be a felony under federal law, i.e., conviction required a showing of intent to sell, possession of more than five grams of crack (possession of more than five grams of crack no longer a federal felony, eff. August 3, 2010 — see Fair Sentencing Act, Pub. L. 111-220, Section 3) or any amount of flunitrazepam, or a prior final drug conviction. See *Lopez v. Gonzales,* 549 U.S. 47, 127 S. Ct. 625 (2006) (first-time state simple possession offenses are not aggravated felonies when the state conviction does not correspond to a federal felony); *Carachuri-Rosendo v. Holder*, __ U.S. __ 130 S. Ct. 2577 (2010) (second or subsequent state simple possession offenses are not aggravated felonies when the state conviction is not based on the fact of a prior conviction, as required under federal law for such an offense to be a felony). When analyzing a state conviction, such required components of a "drug trafficking" aggravated felony must be shown "categorically," i.e., by reference to the range of conduct covered under the state statute and not alleged facts outside the statute and record of conviction. *See Carachuri-Rosendo*, id.; see also *Alsol v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2009) ("[W]hatever petitioner was convicted of under state law must correspond with the crime of recidivist possession under the CSA ... ."); *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2009) ("Provided that an individual has been *convicted* under a state's recidivism statute and that the elements of that statute include a prior drug-possession conviction that has become final at the time of the commission of the second offense, then that individual, under the categorical approach, has committed an aggravated felony... ."); *see generally Nijhawan v. Holder*, 129 S. Ct. 2294, 2300 (2009) (listing "illicit trafficking in a controlled substance" as an example of a generic crime aggravated felony category to which the categorical approach applies).

— Even if a state drug possession conviction does involve some finding of a prior final drug conviction, a state possession offense should not be considered an "illicit trafficking" AF if the conviction did not require the prosecution to allege and prove the prior conviction, as is required under federal law — see 21 U.S.C. 851(a) (1) ("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court ... stating in writing the previous convictions to be relied upon.") — for the second possession offense to be treated as a felony. See *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 391 (BIA 2007) (at a minimum, the state must have provided the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper in order for a particular crime to be deemed to correspond to a federal "recidivist" felony offense); *see also Gerbier v. Holmes*, 280 F.3d 297, 317 (3d Cir. 2002) ("[W]e must be satisfied that the state adjudication possessed procedural safeguards equivalent to the procedural safeguards that would have accompanied the enhancement in federal court."). Even though the Supreme Court in *Carachuri* did not resolve whether these notice and process requirements contained in 21 U.S.C. § 851 also must have been met in the criminal case for a second or subsequent state possession conviction to be deemed the equivalent of a federal felony, the Court did point out that these requirements are mandatory under federal law, and observed that "these procedural requirements have great practical significance with

respect to the conviction itself and are integral to the structure and design of our drug laws." *Carachuri-Rosendo v. Holder*, __ U.S. __ 130 S. Ct. 2577, 2588 (2010).Federal courts strictly construe the notice requirement of 21 U.S.C. 851(a) (1). See, e.g., *Price v. U.S.*, 537 U.S. 1152 (2003) (held that petitioner's 21 U.S.C. § 844(a) drug possession offense could not be treated as a felony given the government's failure to file a notice of enhancement under § 851(a)).

— State drug "sale" offense that covers non-trafficking conduct does not necessarily fall within the referenced federal definition of "drug trafficking crime" as a felony offense punishable under the federal Controlled Substances Act. For example, a marijuana "sale" offense that might cover transfer of a small amount of marijuana for no compensation should not be considered an "illicit trafficking" AF if the offense might cover transfer of a small amount of marijuana for no compensation, by analogy to 21 U.S.C. 841(b) (4) ("distributing a small amount of marijuana for no remuneration" is treated as simple possession misdemeanor under 21 U.S.C. 844). See *Thomas v. AG*, 625 F.3d 134 (3d Cir. 2010); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Evanson v. Atty. Gen.*, 550 F.3d 284 (3d Cir. 2008); *Jeune v. Atty. Gen.*, 476 F.3d 199 (3d Cir. 2007); *Jordan v. Gonzales,* 204 Fed. Appx. 425 (5th Cir. 2006) (unpublished); *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also Point II in *amicus curiae* brief of the New York State Defenders Association in *Matter of Grant*, A40 093 259 (BIA. 2005), available at http://www.nysda.org/idp/docs/file12_05_GrantAmicusBrief.pdf [but see *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008) (Absent controlling precedent to the contrary, a State law misdemeanor offense of conspiracy to distribute marijuana qualifies as an "aggravated felony" where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana, as defined by 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008) (in the absence of defendant meeting his burden to show his conduct fits within § 841(b)(4), possession of any amount of marijuana up to fifty kilograms with intent to distribute it is punishable as a felony under § 841(b)(1)(D)); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(finding NY misdemeanor marijuana "sale" offense to be a "drug trafficking crime" aggravated felony for criminal sentencing purposes without considering that the offense might cover transfer of a small amount of marijuana for no remuneration); but see also *Catwell v. AG*, 623 F.3d 199 (3d Cir. 2010) (120.5 grams of marijuana is not a "small" amount of marijuana for purposes of 21 U.S.C. 841(b)(4))]. For other examples, see *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007) (California conviction for transporting drugs was not necessarily an aggravated felony for purposes of determining the immigrant's eligibility for cancellation of removal given the inconclusive record of conviction); *Jeune v. Attorney General*, 476 F.3d 199 (3d Cir. 2007) (Pennsylvania "manufacture, delivery, or possession with intent to manufacture or deliver" offense where statute covers some nontrafficking conduct is not categorically an aggravated felony); *Mendieta-Robles v. Gonzales,* 226 Fed. Appx. 564 (6th Cir. 2007) (Ohio trafficking in cocaine offense is not categorically an aggravated felony where the state statute covers offering to sell) (unpublished); *Escobar v. Attorney General of U.S.,* 221 Fed. Appx. 85 (3d Cir. 2007) (New York possession offense that includes a subsection penalizing possession with intent to sell should not categorically be determined to be a aggravated felony if the government is unable to show by clear and convincing evidence that the individual was convicted under the "intent to sell" subsection) (unpublished); [but see *Rendon v. Mukasey*, 520 F.3d 967 (9th Cir. 2008) (possession with intent to sell is necessarily an aggravated felony under "illicit trafficking" first prong); *Vasquez-Martinez v. Holder*, 564 F.3d 712 (5th Cir. 2009) (possession with intent to deliver is a "drug trafficking crime")].

— State drug-related solicitation or facilitation offense, or even a drug offense that might cover solicitation or facilitation, or an offer to sell, should not be considered an "illicit trafficking" AF as such offenses are not listed among the drug trafficking crimes covered in the federal Controlled Substances Act. See *Davila v. Holder,* 2010 U.S. App. LEXIS 12230 (5th Cir. 2010) (unpublished) (N.Y. Penal Law § 220.41 criminal sale of a controlled substance could cover an offer to sell, which is not an offense under the CSA, and therefore is not categorically a drug trafficking crime aggravated felony); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007) (California "transports, imports, sells, etc., ... or offers to transport, import, sell, etc. ... not necessarily an aggravated felony where record of conviction does not exclude solicitation-type conduct); *Mendieta-Robles v. Gonzales,* 226 Fed. Appx. 564 (6th Cir. 2007) (Ohio trafficking in cocaine offense is not categorically an aggravated felony where the state statute covers offering to sell) (unpublished); *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (applied *Leyva-Licea* in the

sentencing context to find that a state offense that includes "offers" to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct not covered under the Controlled Substances Act and, thus, could not categorically be determined to be an aggravated felony) (en banc); *Leyva-Licea v. INS*, 187 F.3d 147 (9th Cir. 1999) (found that a state conviction of solicitation to possess marijuana for sale is not punishable under the federal Controlled Substances Act since that Act does not mention solicitation although it does cover attempt and conspiracy, and therefore the offense is not an aggravated felony); *cf. U.S. v. Price*, 516 F.3d 285, 287 (5th Cir. 2008) (finding it dispositive that "the definition of 'drug trafficking offense' under the Sentencing Guidelines does not include an offer to sell"); *U.S. v. Gonzalez*, 484 F.3d 712, 714 (5th Cir.), cert. denied, 127 S.Ct. 3031 (2007) (held that Texas offense covering offering to sell a controlled substance does not come within definition of drug trafficking offense under U.S. Sentencing Guideline § 2L1.2); *United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006) (holding that a prior conviction for solicitation to deliver cocaine did not warrant a drug trafficking offense enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(B)).

- Accessory-after-the-fact offense, even if connected to a drug offense, should not be considered an "illicit trafficking" AF. See *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999).
- Other state drug offenses should not be considered an "illicit trafficking" AF as falling within the referenced federal definition of "drug trafficking crime" if the state offense is broader or covers different conduct as compared to felony drug offenses under the federal Controlled Substances Act (see 21 U.S.C. 863). See, e.g., *Eudave-Mendez v. Keisler*, 249 Fed. Appx. 617 (9th Cir. 2007) (found that BIA erred in holding that California conviction for providing place for manufacture or distribution of controlled substance was categorically an aggravated felony because the *mens rea* requirement is only "knowingly" and not "knowingly and intentionally" as in the comparable federal statutory provision) (unpublished).

✓ **Offense is not a firearm AF under INA 101(a)(43)(E) if it does not include the same elements as one of the listed federal firearms offenses, or if it covers a broader range of conduct than the listed federal firearms offenses.** See, e.g., *U.S. v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000) (state firearm offense is not an AF when it applies to all noncitizens, whereas federal statute applies only to those illegally in the United States); [but see *Nieto-Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008), rehearing en banc denied, 2008 U.S. App. LEXIS 9712 (2008), *U.S. v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir.), *cert. denied*, 534 U.S. 931 (2001), and *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002) (decisions rejecting claims that a state firearm offense was not a firearm AF because the state offense did not include an "affecting commerce" element as did the analogous listed federal offense)].

✓ **Offense is not a "crime of violence" AF if it does not necessarily fall within the referenced federal definition of "crime of violence", or if the sentence did not include a term of imprisonment of at least one year.** See INA 101(a)(43)(F), referencing federal definition of "crime of violence" located at 18 U.S.C. 16. The referenced federal definition includes: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See 18 U.S.C. 16. Under the case law, the following arguments may be made with respect to certain offenses that the government charges are crimes of violence:

- Under the categorical approach to determining whether an offense falls within the AF definition, an offense is not necessarily a "crime of violence" if the elements of the particular offense do not establish that the offense falls within this "crime of violence" definition. See *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (Colorado child abuse is not a crime of violence where the statute proscribing such conduct is divisible and the record of conviction does not establish that either of the prongs of the federal definition are met); cf. *Johnson v. U.S.*, __ U.S. __, 130 S. Ct. 1265 (2010) (Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use ... of physical force against the person of another," and thus does not constitute a "violent felony" for purposes of Armed Career Criminal Act); *Chambers v. U.S.*, 555 U.S. 122 (2009) (Illinois crime of failure to report for penal confinement falls outside the scope of Armed Career Criminal Act "violent felony" definition, which is similar to 18 U.S.C. 16 "crime of violence" definition, as this offense amounts to a form of inaction that rarely involves violence and therefore cannot be said to involve conduct that presents a

serious potential risk of physical injury to another); see also *Serna-Guerra v. Holder*, 354 Fed. Appx. 929 *(5th Cir. 2009) (holding, after remand from the Supreme Court in* ___ U.S. ___, 129 S.Ct. 2764 (2009) for further consideration in light of *Chambers* v. *United States*, 555 U.S. 122 (2009), *that Texas unauthorized use of a vehicle offense is not a "crime of violence" since it does not have an essential element of violent and aggressive conduct*); *Malta-Espinoza v. Gonzales,* 478 F.3d 1080 (9th Cir. 2007) (since California harassment offense could include conduct carried on only at a long distance from the victim, the court found it impossible to say that there was a substantial risk of applying physical force to the person or property of another as required by 18 U.S.C. 16(b)); *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) (Arizona discharging firearm at residential structure that might include structure not currently inhabited is not a crime of violence); *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006) (Kansas aggravated battery offense that can be violated by physical contact that does not constitute a use of physical force is not necessarily a crime of violence); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (California simple battery offense that covers mere touching is not a crime of violence under 16(a) first prong of federal definition); *Valencia v. Gonzales*, 439 F.3d 1046, (9th Cir. 2006) (statutory rape involving age 17 victim not a crime of violence); *Gonzalez-Garcia v. Gonzales*, 166 Fed. Appx. 740, 2006 U.S. App. LEXIS 3512 (5th Cir. 2005) (unpublished) (Texas simple assault conviction not a crime of violence in that the "offensive or provocative contact" element did not require physical force); *Szucz-Toldy v. Gonzales,* 400 F.3d 978 (7th Cir. 2005) (Illinois harassment by telephone is not "crime of violence" under 16(a) first prong of federal definition because elements of offense do not require use, attempted use, or threatened use of physical force); *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005) (federal conviction for possession of firearm by felon did not categorically present a substantial risk of violence under federal "crime of violence" definition similar to 18 USC 16 because it did not naturally involve a person acting in disregard of the risk that physical force may have been used against another in committing an offense); *U.S. v. Martinez-Mata*, 393 F.3d 625 (5th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 3182 (2005) (Texas retaliation conviction is not a "crime of violence" under the criminal illegal reentry Sentencing Guideline that is similar to the 16(a) prong of the 18 U.S.C. 16 definition because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) (Oregon harassment conviction is not "crime of violence" under 16(a) prong as referenced by the crime of domestic violence deportation category because its elements reached acts that involved offensiveness by invasion of personal integrity, but that did not amount to the use, attempted use, or threatened use of physical force); *U.S. v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 932 (2005) (Texas child endangerment conviction is not a "crime of violence" under the criminal illegal reentry Sentencing Guideline similar to the 16(a) prong because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *Flores v. Ashcroft,* 350 F.3d 666 (7th Cir. 2003) (Indiana battery is not "crime of violence" under 16(a) for the crime of domestic violence deportation category because the elements of the offense do not require use of physical force); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (although Connecticut assault provision requires proof that defendant intentionally caused physical injury to another, it is not a crime of violence AF under first prong of federal definition because it does not require proof that defendant used *physical force* to cause the injury); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003) (minimum conduct required to violate New York manslaughter provision is categorically not a crime of violence AF under second prong of federal definition because statute covered passive conduct or omissions that do not involve risk of use of physical force); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (violation of the New York DWI statute in question is categorically not a crime of violence AF under second prong of federal definition because risk of use of physical force is not a requisite element); *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (Texas offense of injury to a child is not a crime of violence AF under first prong of federal definition because state statute does not require use, attempted use, or threatened use of force); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999) (Wisconsin 2nd degree sexual assault is not a crime of violence because offense encompasses conduct that does not fall within the federal definition); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (Illinois burglary of a motor vehicle is a divisible statute encompassing conduct that does not constitute a crime of violence under second prong of federal definition as well as conduct that does; therefore, court may not categorically classify offense as an aggravated felony by merely reading statutory language without other evidence from the record of conviction); *Ye v. INS*, 214 F.3d 1128 (9th

Cir. 2000) (California auto burglary conviction is not a crime of violence because entry into a locked vehicle is not essentially "violent in nature," the risk of violence against a person or property is low, and the legislative history does not indicate that Congress intended to include vehicle burglaries); *U.S. v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) (Arizona felony endangerment is not categorically a crime of violence AF under second prong of federal definition where not all conduct punishable under state statute involve substantial risk that physical force may be used); [but see *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005) (Texas unauthorized use of a vehicle is a crime of violence), aff'd, *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007) (but note that this holding placed in doubt by Supreme Court remand in *Serna-Guerra v. Holder,*___ U.S. ___, 129 S.Ct. 2764 (2009) for further consideration in light of *Chambers* v. *United States*, 555 U.S. 122 (2009) (see cf. citation above)); *Brooks v. Holder*, 621 F.3d 88 (2d Cir. 2010) (New York felony conviction for possession of a loaded firearm with the intent to use it unlawfully against another person plainly "involves a substantial risk that physical force against the person or property of another may be used" and therefore constitutes a "crime of violence"); *Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006) (Connecticut conviction for assaulting peace officer is crime of violence under 16(b) second prong of federal definition); *Vargas-Sarmiento v.United States DOJ,* 448 F.3d 159 (2d Cir. 2006) (New York manslaughter in the first degree is crime of violence under second prong of federal definition); *Aguiar v. Gonzales*, 438 F.3d 86 (1st Cri. 2006) (Rhode Island sexual assault offense that covered consensual sex with a minor involved a substantial risk of use of physical force) (collecting cases); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002) (Minnesota offense of criminal vehicular homicide is a crime of violence under second prong of federal definition); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (Texas burglary of a vehicle is a crime of violence under second prong of federal definition); but cf. *James v. U.S.*, 550 U.S. 192 (2007) (Florida attempted burglary is a "violent felony" under Armed Career Criminal Act)].

— Furthermore, even if an offense may involve a substantial risk of physical force, it should not be considered a crime of violence if it does not require specific intent to use force, or at least recklessness. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (Florida conviction for driving under the influence and causing serious bodily injury was not a crime of violence for purposes of the deportation statute as the phrase "use of physical force against the person or property of another" required a higher *mens rea* than negligent or accidental conduct); *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005) (California conviction for gross vehicular manslaughter while intoxicated was not "crime of violence" AF as it required only gross negligence); *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005) (California conviction for evading officer was not categorically "crime of violence" AF as it included offenses involving mere negligence); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (state conviction for vehicular homicide is not a crime of violence in part because offense required only criminal negligence); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (although § 16(b) encompasses both intentional and reckless conduct, California DWI can be committed by mere negligence and therefore is not a crime of violence within § 16(b)); see also *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002) (stating, prior to Supreme Court decision in *Leocal*, that, in circuits where the federal court of appeals has not decided whether DWI is a crime of violence, an offense will be considered so only if the offense must involve at least reckless conduct). Many cases indicate that even a reckless *mens rea* is not sufficient; the government may be required to show that the offense involves specific intent to use physical force. See *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557 (7th Cir. 2008) (reckless crimes are not crimes of violence under Section 16(b)); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (holding that reckless assault on a police officer was not a crime of violence); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (holding that reckless vehicular homicide was not crime of violence); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (held, in the context of the INA crime of domestic violence deportation ground, that because Arizona domestic violence statute permitted conviction when a defendant recklessly but unintentionally caused physical injury to another, conviction under statute could not be deemed "crime of violence") (en banc); *Garcia v. Gonzales,* 455 F.3d 465 (4th Cir. 2006) (held that NY reckless assault offense is not a crime of violence under 18 U.S.C. 16(b)); *Oyebanji v. Atty. Gen. USA*, 418 F.3d 260 (3rd Cir. 2005) (reckless vehicular manslaughter is not crime of violence AF); *Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006) (Pennsylvania recklessly endangering another person is not a crime of violence AF because it requires no more than a *mens rea* of recklessness); *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005) (Pennsylvania simple assault crime not a crime of violence AF under 16(a) prong since it may involve

only recklessness)[but note *Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006) (separate Pennsylvania simple assault offense involving attempt by physical menace to put another in fear of imminent serious bodily injury is a crime of violence AF because it necessarily involves specific intent);]; *Tran v. Gonzales,* 414 F.3d 464 (3d Cir. 2006) (Pennsylvania reckless burning offense is not a crime of violence because it does not involve intentional use of force or risk of intentional use of force); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005) (involuntary manslaughter is not crime of violence AF); *United States v. Vargas-Duran,* 356 F.3d 598 (5th Cir. 2004) (Texas intoxication assault is not a crime of violence under Sentencing Guideline similar to first prong of federal definition because intentional use of force is not a necessary component of the offense); *United States v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003) (Texas driving while intoxicated offense is not a crime of violence under second prong of federal definition because it does not require intentional or close to intentional conduct); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003) (New York involuntary manslaughter provision is not a crime of violence AF under second prong of federal definition because statute covered unintentional accidents caused by recklessness); *U.S. v. Chapa-Garza*, 243 F.3d 921, as revised and amended, 262 F.3d 479 (5th Cir. 2001) (DWI is not a crime of violence under second prong of federal definition because intentional force against the person or property of another is seldom, if ever, employed to commit the offense); *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (Texas offense of injury to a child is not a crime of violence AF under second prong of federal definition because conviction under state statute may stem from omission rather than intentional use of force); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001) (DWI is not a crime of violence under either prong of the federal definition because it does not involve the intentional use of force); cf. *U.S. v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010) (Arizona aggravated assault statute does not require either the use of a deadly weapon or the intent to cause serious bodily injury, and, therefore, its elements do not substantially correspond to the elements of the generic offense of aggravated assault and a conviction of this crime is not per se a "**crime of violence**" under the Sentencing Guidelines); see also Katherine Brady and Erica Tomlinson, "Intent Requirement of the Aggravated Felony "Crime of Violence," Bender's Immigration Bulletin (Vol. 4, No. 10, May 15, 1999); [but see *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002) (holding that gross negligence or equivalent sufficient for criminal vehicular homicide to be deemed a "crime of violence" under second prong of federal definition)].

- Offense covering conduct involving mere offensive touching does not rise to level of a "crime of violence." See *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1017 (9th Cir. 2006); cf. *Johnson v. U.S.*, ___ U.S. ___, 130 S.Ct. 1265 (2010) (Florida conviction for simple battery does not have an element of use of "violent" physical force against another when this offense covers any intentional physical contact, no matter how slight, and thus falls outside the Armed Career Criminal Act "violent felony" definition, which is similar to 18 U.S.C. 16 "crime of violence" definition).
- The offense may not be deemed a "crime of violence" under 18 U.S.C. 16(b) unless the offense is classified as a felony by the convicting jurisdiction. See *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (finding that a Pennsylvania misdemeanor offense could not be considered a crime of violence under 18 U.S.C. 16(b) even though the offense was punishable by more than one year in prison and therefore would have been deemed a felony under federal law); cf. *U.S. v. Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005) (Since the prior offense was neither classified as a felony by federal or Maryland law, the offense was not a "felony" under 21 U.S.C.S. § 802(13) nor an "aggravated felony" under U.S. Sentencing Guidelines Manual § 2L1.2); see also discussion in *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006); [but see *Blake v. Gonzales*, 481 F.3d 152 (2d Cir. 2007) (finding that a Massachusetts misdemeanor offense could be considered a crime of violence under 18 U.S.C. 16(b) because the offense was punishable by more than one year in prison and therefore would have been deemed a felony under federal law)].
- Finally, even if the offense is found to fall within the "crime of violence" definition, it does not constitute an AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a) (43) (F).

✓ **Offense is not a "theft" offense AF if the offense does not fall within a generic definition of theft, or if the offense only involved intent to commit theft, or if the sentence did not include a term of imprisonment of at least one year (and, in the case of an offense also involving fraud or deceit, a finding of loss to the victim exceeding $10,000).** See INA 101(a) (43) (G). The Supreme Court, several federal circuit courts of

appeals, and the BIA have adopted a generic definition of "theft" to include offenses involving a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. See *Gonzales v. Duenas-Alvarez,* 549 U.S. 183 (2007); *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008); *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). If the offense does not fall within this definition, then the offense is not a theft AF. See, e.g., *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008) (Rhode Island welfare fraud offense that does not require taking "without consent" is not a "theft offense"); *Jaggernauth v. U.S. A.G.*, 432 F.3d 1346 (11th Cir. 2005) (conviction that might have been under Florida offense subpart that requires only an intent to "appropriate use" of the property would not necessarily constitute a "theft" under the BIA's definition, because this subpart lacks the requisite intent to deprive the owner of the rights and benefits of ownership); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005) (found that Virginia credit card fraud offense did not substantially correspond to a theft offense under the INA because the indictment did not establish, among other things, that the individual was charged with taking goods without the consent of the merchant); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (holding that certain sections of the Arizona statute for "theft of a means of transportation" did not contain the "criminal intent to deprive the owner" and were therefore not properly considered theft AFs); *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (California petty theft offense is not a theft AF as it might cover conduct outside the generic definition of theft, such as aiding and abetting theft, theft of labor, and solicitation of false credit reporting); [but see *Almeida v. Holder*, 588 F.3d 778 (2009) (Connecticut larceny offense that covered intent to appropriate property in addition to intent to deprive another of property is categorically a theft AF based on a finding that the broad, generic intent to deprive required for a theft AF embraces both an intent to deprive and an intent to appropriate under the Connecticut statute); *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004) (Connecticut theft offense is a theft AF even though the offense might cover theft of services)]. In addition, if an offense only involved intent to commit theft, one can argue that it is not a theft offense. See *Lopez-Elias v. Reno*, 209 F.3d 758 (5th Cir. 2000) (Texas burglary of a vehicle with intent to commit theft is not a theft offense), *cert. denied*, 531 U.S. 10691 (2001); [but see *U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001) (Illinois burglary of vehicle is an AF as an attempted theft offense where record of conviction established intent to commit theft and substantial step toward its commission), *cert. denied*, 534 U.S. 1149 (2002)]. Finally, even if an offense is a theft offense, it does not constitute a theft AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a) (43) (G). Even where a prison sentence of at least one year is imposed, one court has found that a theft offense that is also an offense involving "fraud or deceit" is not an aggravated felony if it does not also meet the $10,000 threshold for a "fraud or deceit" offense to be deemed an aggravated felony. See *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004) (involving Pennsylvania theft by deception conviction).

✓ **Offense is not a "burglary" offense AF if the offense does not fall within the generic definition of burglary set forth in Taylor v. United States, 495 U.S. 575 (1990), or if the sentence did not include a term of imprisonment of at least one year.** See INA 101(a) (43) (G). In *Taylor*, for purposes of a sentence enhancement statute where Congress similarly did not define what it meant by its use of the burglary term, the Supreme Court applied a generic definition encompassing only offenses involving unlawful entry into a building with the intent to commit a crime. Thus, for example, New York burglary in the third degree does not necessarily constitute burglary under this generic definition because it may include entering or remaining unlawfully in structures beyond the ordinary meaning of the term "building," such as vehicles, watercraft, motor trucks, or motor truck trailers. See New York Penal L. §§ 140.20 and 140.00(2); cf. *U.S. v. Brown*, 514 F.3d 256, 265-67 (2d Cir. 2008) (NY §140.20 violation could not be considered "burglary of a dwelling" for sentencing guidelines purposes because "[p]lainly, 'building[s]' under the NY statute includes structures other than 'dwelling[s]'"). See *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (Texas burglary of a vehicle is not a burglary offense for AF purposes); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (Illinois burglary of a motor vehicle conviction is not a burglary offense for AF purposes); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (Texas burglary of a vehicle conviction is not a burglary offense for AF purposes), *cert. denied*, 531 U.S. 10691 (2001); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (California auto burglary is not a burglary offense for AF purposes). Even if the offense does fall within the generic definition of burglary, it does not constitute a burglary AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a) (43) (G).

- ✓ **Offense is not a "fraud or deceit" offense AF unless fraud or deceit is a necessary or proven element of the crime and the offense is not a tax offense, or if the conviction does not establish loss to the victim (or revenue loss to the government) exceeding $10,000 (and, in the case of an offense also involving theft, a sentence to a term of imprisonment of at least one year).** See INA 101(a) (43) (M) (i). Under the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. __, 129 S. Ct. 2294 (2009), the "fraud or deceit" language refers to a generic crime and, therefore, must be analyzed under the traditional categorical approach requiring the fact finder to look only at the elements of the statute of conviction and the record of conviction, and not the alleged underlying facts, in order to establish deportability. An offense is not a "fraud or deceit" AF unless fraud or deceit is a necessary or proven element of the crime. See *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005) (scheme laid out in indictment referred to stolen airline tickets, not fraudulently obtained ones); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002); see also case law on fraud or deceit offenses as crimes involving moral turpitude, e.g., *Matter of Balao*, 20 I&N Dec. 440 (BIA 1992) (Pennsylvania passing a bad check not a CIMT because fraud is not an essential element); [but see *Ferreira v. Ashcroft,* 390 F.3d 1091 (9th Cir. 2004) (found that a state offense that did not explicitly involve intent to defraud or deceive nevertheless categorically qualified as an offense involving fraud or deceit where state case law held that the state statute should be construed to include an element of fraudulent intent); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) (held that conviction of misapplication of bank funds constitutes an aggravated felony because crime necessarily involved fraud or deceit)]. A tax offense should not be deemed a "fraud or deceit" AF as INA 101(a) (43) (M) (ii) defines the one tax offense (tax evasion under 26 USC 7201) that may be deemed an AF. See *Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004); [but see *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004) (defeating a tax and evading a tax were interchangeable terms and thus conviction for defeat of a tax was a conviction for an aggravated felony within 8 U.S.C.S. § 1101(a) (43) (M) (ii).)]. Even if fraud or deceit is a necessary or proven element of the crime at issue, the offense should not constitute an AF unless the loss to the victim or victims exceeded $10,000. See INA 101(a)(43)(M)(i). However, under the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. __, 129 S. Ct. 2294 (2009), the $10,000 loss amount need not be be analyzed under the traditional categorical approach. See *Nijhawan*. at 2302 ("Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion"). Nevertheless, the Court stated that the evidence relied on under this circumstance-specific approach must be "tied to the specific counts covered by the conviction." See *Nijhawan* at 2303. Thus, it can be argued that evidence outside the record of conviction is relevant to establish loss only to the extent that it is consistent with jury findings or pleas of guilt. See *Alaka v. AG of the U.S.*, 456 F.3d 88 (3d Cir. 2006) (reliance on the amount of loss tied to dismissed charges is improper); *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005) (same); *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (reliance for the amount of the loss on information in a pre-sentence report is improper at least where this information is contradicted by explicit language in the plea agreement); [but see *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002) (where count to which the petitioner had pled guilty "did not allege a discrete fraud . . . [but] alleged a scheme to defraud that encompassed a number of checks," the loss to be measured is the loss resulting from that scheme)]. In addition, one can argue that the government may not rely on evidence outside the record of conviction to establish loss if the evidence was not obtained under "fundamentally fair procedures" and does not meet a "clear and convincing" standard, as required by the INA. See *Nijhawan* at 2303; see also decisions that applied the categorical approach to the monetary loss threshold, and thus have been overruled in part by *Nijhawan*, but that pointed out the unreliability in some cases of evidence outside the record of conviction, such as *Dulal-Whiteway v. U.S. D.H.S.*, 501 F.3d 116 (2d Cir. 2007) (found that restitution order at issue in the case was based on a loss amount established by a preponderance of the evidence and was not necessarily tied to the facts found by a jury or admitted by a defendant's plea); *Obasohan v. United States AG*, 479 F.3d 785 (11th Cir. 2007) (found that restitution amount — based on findings made by a preponderance of the evidence — could not, standing alone, establish removability by clear, unequivocal and convincing evidence since neither Obasohan's indictment nor his plea agreement specified a loss amount); *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004) (rejected reliance on the loss finding reflected in the judge's Guidelines sentencing decision); [but see *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (permits consideration of loss amount indicated in a pre-sentence investigation report); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171,177 (5th Cir. 2008) (held that presentence investigation report could be used as evidence of the amount of loss as there was clear and convincing evidence that the PSR accurately reflected the amount of loss); *Nijhawan v. AG*, 523 F.3d 387 (3d Cir. 2008) (found

that, taken together, the indictment, court finding regarding "total loss" from conspiracy, and stipulation for the purposes of sentencing provided clear and convincing evidence that the requisite loss was tied to the alien's offense of conviction); *Conteh v. Gonzales,* 461 F.3d 45 (1st Cir. 2006) (relied on restitution order to establish removability by clear, unequivocal and convincing evidence)]. Where the actual loss did not exceed $10,000, the DHS (formerly INS) may not evade this monetary loss requirement by charging the offense under INA 101(a) (43) (U) as an "attempt" to commit a fraud or deceit AF involving a loss exceeding $10,000, unless the conviction establishes the completion of a substantial step toward committing such an offense. See *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). [Note, however, that an offense might fall under INA 101(a) (43) (U) as an "attempt" to commit a fraud or deceit AF even without any actual loss, if the *attempted* loss to the victim or victims exceeded $10,000 and if the record of conviction establishes the completion of a substantial step toward committing such an offense. See *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999)]. Even where there is a finding of loss to the victim exceeding $10,000, one could argue that a fraud or deceit offense that also fits within another AF category requiring a one year or more prison sentence (e.g., a theft offense or an offense relating to counterfeiting or forgery) is not an aggravated felony if it does not also meet the one year or more prison sentence threshold. Cf. *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004); but see *Bobb v. U.S.A.G.*, 458 F.3d 213, 226 (3d Cir. 2006) ("[U]nlike in *Nugent* where we noted that the term "theft offense" defined a class that was entirely a subset of the larger class 'offense,' the class 'offense related to forgery' is not entirely a subset of the class 'offense involving fraud.' … Thus, *Nugent*'s holding that the universal must be proven if it subsumes the subclass is inapplicable to this case.)"].

- ✓ **The government may not establish that a conviction falls within an AF category based on information outside the record of conviction.** When the statutory elements of a particular conviction cover conduct broader than that covered by a generic definition in the AF statute, a police report, pre-sentence report or other information outside the record of conviction reciting the alleged facts of the crime (at least without identifying whether the facts came from an acceptable source, such as a signed plea agreement, a transcript of a plea of hearing, or a judgment of conviction) is insufficient evidence to establish that an individual pled guilty to the elements of the generic definition in the AF statute. See *Shepard v. U.S.*, 544 U.S. 13 (2005) (rejecting reliance on a police report to determine whether an offense was a burglary offense for criminal sentencing purposes); and *Conteh v. Gonzales,* 461 F.3d 45 (1st Cir. 2006); *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003); *Hernandez-Martinez v. Ashcroft*, 343 F.2d 1075 (9th Cir. 2003); and *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (cases rejecting reliance on pre-sentence reports); and *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (rejecting reliance on testimonial evidence outside the record of conviction to find that offense involved violence and that violence was domestic).
- ✓ **The government may not establish a term of imprisonment threshold for a state conviction to fall within an AF category based on the maximum term for an indeterminate sentence where state law indicates that the term imposed is not measured by reference only to the maximum term.** See *Shaya v. Holder*, 586 F.3d 401 (6th Cir. 2009) (rejecting the BIA's determination that the respondent's sentence under Michigan law should be measured by its statutory maximum term because the maximum term under Michigan law is set by statute and is nondiscretionary, and finding that the term imposed should be measured instead by whichever is longer of the minimum sentence applied and the time actually served); [but see *Matter of S-S-*, 21 I&N Dec. 900, 903 (1997) (finding that the term to which the respondent was sentenced in Iowa was for the maximum potential sentence because, under Iowa sentencing law, an incarcerated individual remains in the custody of the director of the Department of Corrections until the maximum term of the person's confinement has been completed or until released by order of the Board of Parole); *Bokvun v. Ashcroft*, 283 F.3d 166, 170-71 (3d Cir. 2002) (finding that a Pennsylvania sentence of eleven-to-twenty-three months qualified as a term of imprisonment of "at least one year"); *Nguyen v. INS*, 53 F.3d 310, 311 (10th Cir. 1995)].
- ✓ **The government may not establish a term of imprisonment threshold for a conviction to fall within an AF category by means of a sentence enhancement.** See *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (determining that petty theft offense for which the maximum prison sentence is less than one year may not be deemed an aggravated felony theft conviction because the individual received a sentence of one year or more based on statutory recidivist sentence enhancements); [but cf. *U.S. v. Rodriquez*, 128 S. Ct. 1783 (2008) (relied on the maximum term of imprisonment set by an applicable recidivist provision to find that state drug convictions at issue counted as "serious drug offenses" under the Armed Career Criminal Act)].

- ✓ **A conviction does not meet the AF definition where the conviction was not an AF at the time of conviction.** See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003) (reversing noncitizen defendant's conviction for illegal reentry after removal after finding that prior removal order was invalid as defendant had "plausible" claim that Congress' retroactive application of IIRIRA § 321 [expanding categories of offenses falling within AF ground] violated due process); *United States v. Salvidar-Vargas*, 290 F. Supp. 2d 1210 (S.D.Cal. 2003) (followed *Ubaldo-Figueroa*) [; but see *Lovan v. Holder*, 574 F.3d 990, 997 (8th Cir. 2009) and decisions cited therein].
- ✓ **A conviction does not meet the IIRIRA expanded AF definition where removal proceedings were initiated before IIRIRA.** See § IIRIRA 321(c) (provided that the revised definition of "aggravated felony" would be effective only in "actions taken" on or after the enactment of IIRIRA); *Saqr v. Holder*, 580 F.3d 414 (6th Cir. 2009) ("the term "action taken" appears to this Court to derive from the point at which the removal action begins for purposes of determining whether the pre-or post-IIRIRA definition of aggravated felony applies"); *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006) (IIRIRA Section 321(c) "explicitly limits the application of the revised definition of 'aggravated felony' to *proceedings initiated* after September 30, 1996"); [but see *Biskupski v. A.G. of the U.S.*, 503 F.3d 274 (3d Cir. 2007); *Garrido-Morato v. Gonzales*, 485 F.3d 319 (5th Cir. 2007); Kuhali v. Reno, 266 F.3d 93, 110-11 (2d Cir. 2001); *Xiong v. INS,* 173 F.3d 601 (7th Cir. 1999); *Choeum v. INS,* 129 F.3d 29 (1st Cir. 1997); Mendez-Morales v. INS, 119 F.3d 738, 739 (8th Cir. 1997); *Valderrama-Fonseca v. INS,* 116 F.3d 853 (9th Cir. 1997)].
- ✓ **The respondent is not deportable under AF ground where the conviction occurred prior to November 18, 1988.** See § 7344(b) of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690 ("The amendments ... shall apply to any alien who has been convicted, on or after the date of the enactment of this Act, of an aggravated felony"); *Ledezma-Galicia v. Holder*, __ F.3d __, 2010 U.S. App. LEXIS 26400 (9th Cir. 2010) ("the 1988 law that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988; and ... neither Congress's overhaul of the grounds for deportation in 1990 nor its rewrite of the definition of aggravated felony in 1996 erased that temporal limitation"); [but see § 602 of the Immigration Act of 1990 (IMMACT), Pub. L. 101-649; *Gelman v. Ashcroft*, 372 F.3d 495 (2d Cir. 2004); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000); *Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000); *Lewis v. INS*, 194 F.3d 539 (4th Cir. 1999); *Matter of Lettman*, 22 I&N Dec. 3365 (BIA 1998)].

■ **Deny "crime involving moral turpitude" (CIMT)**

- ✓ **Offense is not a CIMT.** See Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law relating to particular offense.
- ✓ **The CIMT was not committed within five years after the date of admission for purposes of INA 237(a)(2)(A)(i) deportability.** The date of "admission", for purposes of this ground of deportability, is the date of lawful entry to the U.S. upon inspection and authorization by an immigration officer, NOT the subsequent date of one's adjustment of status to lawful permanent residence. See *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (BIA impermissibly interpreted "the date of admission" in § 237 (a) (2) (A) (i) to include the date on which Shanu's status was adjusted; however, in so ruling, the Court expressed no opinion on whether adjustment of status may properly be considered "the date of admission" where the alien sought to be removed has never been "admitted" within the meaning of § 101(a) (13) (A)); *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Shivaram v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004); cf. *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) (individual who has adjusted post-entry to LPR status is not barred from seeking the INA 212(h) waiver of inadmissibility under bars for those previously "admitted" as an LPR); [but see *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005) (holding that (1) the date of adjustment of status qualifies as "the date of admission" under § 1227(a) (2) (A) (i), and that (2) where there is more than one potential date of admission, *any* such date qualifies as "*the* date of admission" under that provision); and, on issue of what constitutes the "date of admission" when the individual has never been "admitted," see *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) (concluding that in such circumstance date of adjustment qualifies as "date of admission"); *Matter of Rosas-Ramirez,* 22 I&N Dec. 616 (BIA 1999) (same); cf. *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) (same for purposes of determining what qualifies as admission for purposes of 7 year continuous residence requirement for 212(h) waiver eligibility for someone who has "previously been admitted" as an LPR)].

- ✓ **The CIMT was not one for which a sentence of one year or longer may be imposed for purposes of INA 237(a)(2)(A)(i) deportability.** The maximum possible sentence of an offense should be determined without regard to any recidivist sentence enhancement. See *Rusz v. Ashcroft*, 2004 U.S. App. LEXIS 16091 (9th Cir. 2004) (unpublished opinion); [but cf. *U.S. v. Rodriquez*, 128 S. Ct. 1783 (2008) (relied on the maximum term of imprisonment set by an applicable recidivist provision to find that state drug convictions at issue counted as "serious drug offenses" under the Armed Career Criminal Act)].
- ✓ **Two or more CIMTs arose out of a single scheme of criminal misconduct and thus do not trigger INA 237(a)(2)(A)(ii) deportability.**
- ✓ **Offense is subject to single juvenile offense exception for inadmissibility pur poses.** See INA 212(a)(2)(A)(ii)(I).
- ✓ **Offense is subject to single petty offense exception for inadmissibility purposes.** See INA 212(a)(2)(A)(ii)(II).

■ **Deny "controlled substance offense" (CSO)**

- ✓ **Offense is not a CSO.** See INA 237(a)(2)(B)(i), 212(a)(2)(A)(i)(II), and Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law.

■ **Deny "firearm offense" (FO)**

- ✓ **Offense is not a FO.** See INA 237(a)(2)(C) and Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law.

■ **Deny "crime of domestic violence," (CODV), "crime of stalking," "crime of child abuse, child neglect, or child abandonment," or a "violation of a protection order"**

- ✓ **Offense is not a CODV, etc.** See INA 237(a)(2)(E).
- ✓ **Conviction or violation pre-dated October 1, 1996, the date of enactment of the IIRIRA, which added this ground of deportability.** See IIRIRA § 350(b) (new deportation ground applies only to convictions on or after the date of enactment).

☐ **Apply for relief from removal**

■ **Move to terminate proceedings to permit naturalization hearing**

Where the respondent is a lawful permanent resident who can establish prima facie eligibility for naturalization, see generally INA §§ 311 et seq., and the matter involves "exceptionally appealing or humanitarian factors," an immigration judge has discretion to terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization. See 8 C.F.R. 1239.2(f). However, it may be necessary to obtain some written or oral communication from the DHS (formerly INS), or a finding by a court declaring the noncitizen prima facie eligible for naturalization but for the pendency of the removal proceedings. See *Matter of Acosta-Hidalgo,* 24 I&N Dec. 103 (BIA 2007) (**Because the Board of Immigration Appeals and the Immigration Judges lack jurisdiction to adjudicate applications for naturalization, removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) where the Department of Homeland Security has presented an affirmative communication attesting to an alien's prima facie eligibility for naturalization**). If the DHS (formerly INS) is unwilling to make such a representation, it may be possible to obtain such a finding from a federal court. See *Gatcliffe v. Reno*, 23 F.Supp.2d 581 (D.V.I. 1998) (finding noncitizen petitioner fully qualified to be naturalized but for the pendency of deportation proceedings); accord *Ngwana v. Attorney General*, 40 F.Supp.2d 319 (D.Md. 1999); [but see *Matter of Acosta-Hidalgo,* 24 I&N Dec. 103 (BIA 2007) (overruling prior BIA decision in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975), insofar as that decision contemplated that aliens could obtain declarations from courts as to prima facie eligibility for naturalization); see also *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 341 (5th Cir. 2007); *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1047 (9th Cir. 2004); *Zayed v. United States*, 368 F.3d 902, 907 & n.6 (6th Cir. 2004) (circuit court decisions questioning whether courts could issue declarations as to prima facie eligibility for naturalization in light of the language in 8 U.S.C. § 1421(a) granting the Attorney General exclusive jurisdiction over naturalization applications); see generally *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009) (holding that, once removal proceedings are in progress, not only courts but also DHS are barred by IMMACT amendments to 8 U.S.C. § 1429 from considering an alien's application)].

■ **Apply for 212(c) waiver**

Under pre-AEDPA and pre-IIRIRA law, most lawful permanent residents in pre-IIRIRA exclusion or deportation proceedings were eligible to apply for a waiver of exclusion or deportation as long as they had been lawfully domiciled in the United States for at least seven years and had not served a term of imprisonment of five years or more for conviction of one or more aggravated felonies. See former INA § 212(c) (repealed 1996). However, AEDPA restricted the availability of INA § 212(c) relief in deportation proceedings (but not exclusion proceedings), and IRRIRA repealed INA § 212(c). Nevertheless, the Supreme Court has ruled that INA 212(c) relief remains available for permanent residents who agreed to plead guilty prior to AEDPA (effective 4/24/96) and IIRIRA (effective 4/1/97) and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) (holding that AEDPA and IIRIRA 212(c) waiver bars could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result). Following *St. Cyr*, a lawful permanent resident (LPR) can argue that 212(c) relief should also be available in the following situations:

- ✓ LPR is in "exclusion" proceedings — see *Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997) (AEDPA bar to 212(c) is inapplicable to persons in exclusion proceedings).
- ✓ LPR is in "deportation" proceedings but would have been found eligible for 212(c) relief had the LPR traveled outside the country and been subject to "exclusion" proceedings — see *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (striking down such a distinction in 212(c) relief eligibility between similarly situated individuals as a violation of equal protection) [but see *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2008) (overruled prior Ninth Circuit holding in *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981), that there was no rational basis for providing § 212(c) relief from inadmissibility, but not deportation), rehearing en banc denied by *Abebe v. Holder,* 2009 U.S. App. Lexis 18571; *Chuang v. U.S. Atty. Gen.*, 382 F.3d 1299, 1303-04 (11th Cir. 2004) (no equal protection violation because there was a rational basis for distinction); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001); *Almon v. Reno,* 192 F.3d 28 (1st Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999); *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999)].
- ✓ LPR is in "deportation" proceedings commenced before April 1, 1997 (IIRIRA general effective date) and April 24, 1996 (AEPDA enactment date) — see 8 C.F.R. § 1212.3(g); *Garcia-Padron v. Holder*, 558 F.3d 196 (2d Cir. 2009) (held that, in IIRIRA section 309(c), Congress explicitly stated that the IIRIRA amendments, including IIRIRA's repeal of section 212(c), do not apply to individuals whose deportation proceedings predate the effective date of IIRIRA); *Beltran v. Mukasey*, 2008 U.S. App. LEXIS 14601 (6th Cir. 2008) (unpublished); see also *Alanis-Bustamante v. Reno* 201 F.3d 1303 (11th Cir. 2000) (held that proceedings had begun prior to AEDPA when the INS had previously served an Order to Show Cause and lodged a detainer against the noncitizen even though the OSC was not filed with the immigration court until after April 24, 1996); accord *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (service of order to show cause sufficient to demonstrate pendency of deportation proceeding when AEDPA enacted); *Lyn Quee de Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003); cf. *Saqr v. Holder*, 580 F.3d 414 (6th Cir. 2009) (in determining when immigration proceedings have commenced in the context of the "actions taken" aggravated felony amendments effective date provision at IIRIRA § 321(c), "this Court is persuaded by the Eleventh and First Circuits that removal proceedings begin when an alien is served with a Notice to Appear"); [but see *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (issuance of notice of detainer alone not sufficient to find deportation proceedings commenced) along with *Dipeppe v. Quarantillo*, 337 F.3d 326 (3d Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Deleon-Holguin v. Ashcroft*, 253 F.3d 811 (5th Cir. 2001); *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001) (all requiring filing of charging document with the Immigration Court to find proceedings commenced)]].
- ✓ LPR plead or agreed to plead guilty before 4/24/96 — As mentioned above, the Supreme Court has ruled that 212(c) relief remains available for permanent residents who agreed to plead guilty prior to AEDPA (effective 4/24/96) and IIRIRA (effective 4/1/97) and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); see also *Alvarez-Hernandez v. Acosta*, 401 F.3d 327 (5th Cir. 2005) (rejected government's argument that the date that the judgment of conviction was entered rather than the date of the plea determined application of the IIRIRA bar to § 212(c) relief).

- ✓ LPR did not plead or agree to plead guilty before 4/24/96, but the individual did do so before 10/1/96 and was not deportable at the time of the plea — Possible examples include individuals convicted of offenses now deemed "aggravated felonies" as a result of the changes made to the definition of aggravated felony in IIRIRA effective 10/1/96, but which would not have been deemed aggravated felonies under pre-IIRIRA law, such as a theft, burglary, or crime of violence with a prison sentence of less than five years — See *Maria v. McElroy*, 58 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, *Pottinger v. Reno*, 2000 U.S. App. LEXIS 33521 (2d Cir. 2000) (unpublished opinion); see also *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005) (finding, under Ninth Circuit case law, no violation of the statute under the presumption against retroactivity and no violation of due process, but finding equal protection violation), vacated as moot by *Cordes v. Mukasey*, 517 F.3d 1094 (2008) [; but see *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) and *U.S. v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002), cert. denied, 540 U.S. 1210 (2004) (finding no violation of presumption against retroactivity)].
- ✓ LPR did not have seven years of lawful domicile in the United States at the time of his or her pre-AEDPA or pre-IIRIRA agreement to plead guilty, but would otherwise have been eligible for 212(c) relief at the time and accrued seven years before entry of a final order of deportation or removal — See 8 CFR 1.1(p) (LPR status terminates only "upon entry of a final administrative order of exclusion or deportation"); 8 CFR 3.2(c) (1) ("motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) … may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation"); *Alvarez-Hernandez v. Acosta*, 401 F.3d 327 (5th Cir. 2005) (found that LPR, at the time of his plea, would have been allowed to accrue additional time following his plea toward the total period of continuous domicile; therefore, the district court erred in finding that he had to have accrued seven years' lawful domicile at the time of his plea); see also J. Traci Hong, "Practice Advisory — St. Cyr and Accrual of Lawful Unrelinquished Domicile" (American Immigration Law Foundation, Washington, D.C., October 25, 2001), available at <www.ailf.org>.
- ✓ LPR did not plead guilty before AEDPA or IIRIRA, but was convicted at trial and was not deportable or would have been eligible for 212(c) relief at the time that the LPR chose not to plead guilty — See *Lovan v. Holder*, 574 F.3d 990 (8th Cir. 2009) (followed Third Circuit decision in *Atkinson*); *Atkinson v. A.G.,* 479 F.3d 222 (3d Cir. 2007) (extended *Ponnapula* to case where individual not offered plea agreement prior to AEDPA/IIRIRA); *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006) (concluded that a defendant who proceeded to trial but gave up his right to appeal when 212(c) relief was potentially available suffered retroactive effects under IIRIRA); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004) (plea agreement offered but rejected prior to AEDPA/IIRIRA in potential reliance on availability of 212(c) relief); [but see *Canto v. Holder,* 593 F.3d 638 (7th Cir. 2010); *Kellermann v. Holder,* 592 F.3d 700 (6th Cir. 2010); *Ferguson v. U.S. Atty. Gen.*, 563 F.3d 1254 (11th Cir. 2009), cert. denied, 2010 U.S. LEXIS 2299 (2010); *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006); *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), petition for rehearing denied, 2003 U.S. App. LEXIS 14474; *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); but see also *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002) (rejecting equal protection challenge to distinction between lawful permanent residents who are convicted after trial and those who plead guilty, but not reaching statutory interpretation issue of applicability of traditional presumption against retroactivity)]. In addition, an individual who was convicted after trial but gave up or may have given up the right to apply for 212(c) relief affirmatively before AEDPA/IIRIRA in reliance on the later availability of such relief may be able to seek 212(c) relief. See *Carranza de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007) (followed Second Circuit decision in *Wilson*); *Wilson v. Gonzales,* 471 F.3d 111 (2d Cir. 2006) (remanded to the BIA, under *Restrepo*, for findings as to whether the individual gave up right to apply for 212(c) relief in reliance on ability to apply for such relief at a later date); *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); cf. *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007) (individual may have applied for naturalization in reliance on the right to apply for suspension of deportation if denied naturalization).
- ✓ LPR was not convicted before AEDPA or IIRIRA either by plea or trial, but the individual's underlying criminal conduct occurred before AEDPA or IIRIRA — See concurring opinion of Judge Straub in *Zuluaga-Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008) (suggesting review of precedents, such as the Second Circuit decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), that require a showing of reliance on prior law in order to demonstrate impermissible retroactive effect under *Landgraf* step two and reject a finding of reasonable

reliance at the time of the criminal conduct); concurring opinion of Judge Rovner in *U.S. v. De Horta Garcia*, 519 F.3d 658 (7th Cir. 2008) ("the precedents that stand in De Horta Garcia's path may be incorrect and should be re-visited."); opinion of Judge Calabresi in *Thom v. Ashcroft*, 369 F.3d 158, 163 n.6 (2d Cir. 2004) ("judging on a clean slate, I would read the Supreme Court's seminal decision on civil retroactivity, *Landgraf*[] — at a minimum — to say that, where Congress has not made its intent clear, courts should presume that any civil statute that would be considered *ex post facto* in the criminal context was meant to apply prospectively only."); dissenting opinion of Judge Underhill in *Thom v. Ashcroft*, 369 F.3d 158, 168 n.2 (2d Cir. 2004) ("If it is, indeed, absurd to suggest that a person contemplating the commission of a crime considers the potential consequences of criminal conduct, then Congress and the Sentencing Commission surely are misguided in their attempts to deter crime through increased sentences. I respectfully suggest that it is far from absurd to believe the prospect of certain deportation, rather than possible deportation, might well deter a significant number of aliens from committing aggravated felonies."); dissenting opinion of Judge Goodwin in *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Garcia-Plascencia v. Ashcroft,* No. CV 04-1067-PA (D. Or. 2004) (holding that the date of offense, rather than the date of plea or conviction is the relevant date for retroactivity analysis); *Mohammed v. Reno*, 205 F. Supp.2d 39 (E.D.N.Y. 2002) (district court decision urging the U.S. Court of Appeals for the Second Circuit to reconsider its decision in *Domond*)); *Beharry v. Reno*, 183 F. Supp. 2d 584, 591 (EDNY 2002) ("*Domond* . . . should be reconsidered as the courts interpret and develop the Supreme Court's more recent immigration rulings and the requirements of international law."); *Pena-Rosario et al. v. Reno*, 83 F. Supp.2d 349 (E.D.N.Y. 2000), motion for reconsideration denied, 2000 WL 620207 (E.D.N.Y. 2000); *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, 2000 WL 186477 (2d Cir. 2000) (unpublished opinion); *amicus curiae* brief of the New York State Defenders Association in *Zgombic v. Farquharson*, No. 00-6165 (2d Cir. 2000) available at <www.immigrantdefenseproject.org>; [but see *U.S. v. De Horta Garcia*, 519 F.3d 658 (7th Cir. 2008); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007); *Khan v. Ashcroft*, 352 F.3d 521 (2d Cir. 2003) (finding that the Second Circuit's prior decision in *Domond* remained good law despite *St. Cyr*); *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001) (held, prior to the Supreme Court decision in *INS v. St. Cyr*, that the repeal of 212(c) relief could be applied in a case where only the criminal conduct and not the conviction preceded the repeal because "it cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation.")].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA aggravated felony conviction(s), but the individual had not yet served five years at the time of his or her deportation or removal proceedings — See *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004) (found that, where petitioners accrued more than five years' imprisonment subsequent to the legally erroneous denial of their § 212(c) applications, an award of *nunc pro tunc* relief to allow them to apply for such relief was appropriate); *De Cardenas v. Reno,* 278 F.Supp.2d 284 (D. Ct. 2003) (remanding to the BIA for the entry of an order granting 212(c) relief nunc pro tunc based on the immigration judge's finding that she would have granted such relief in the original proceedings but for the BIA's prior erroneous interpretation of the law); *Mancheno Gomez v. Ashcroft,* 2003 U.S. Dist. LEXIS 10160 (EDNY 2003) (petitioner asserted right to seek 212(c) relief after only 15 months in prison and should not be denied review because an erroneous decision of the immigration judge allowed the five year time period to expire); *Hartman v. Elwood,* 255 F.Supp.2d 510 (E.D. Pa. 2003); *Falconi v. INS*, 240 F.Supp.2d 215 (EDNY 2002) (petitioner had not yet served five years at the time of the Immigration Judge decision erroneously finding petitioner ineligible for 212(c) relief); *Archibald v. INS*, 2002 U.S. Dist. LEXIS 11963 (E.D. Pa. 2002); *Bosquet v. INS*, 2001 U.S. Dist. LEXIS 13573 (SDNY 2001); *Webster v. INS*, 2000 U.S. Dist. LEXIS 21522 (D. Conn. 2000); *Lara v. INS*, No. 3:00CV24 (D. Conn. 2000); see also *Fejzoski v. Ashcroft* 2001 U.S. Dist. LEXIS 16889 (N.D. Ill. 2001) (rejected govt. claim of petitioner's ineligibility for 212(c) based on service of five years after issuance of the notice to appear for removal proceedings noting that the petitioner "may have a viable claim that it violated his due process rights for the INS to lie in the weeds waiting for the five year period to run before seeking removal"); *Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994); see also below "Raise estoppel or constitutional arguments;" [but see *Fernandes-Pereira v. Gonzales*, 417 F.3d 38 (1st Cir. 2005) (declining to follow Second Circuit decision in *Edwards* granting *nunc pro tunc* relief); *Velez-Lotero v. Achim*, 414 F.3d 776 (7th Cir. 2005) (although petitioner had not served five years at the time of his guilty plea or at the time of his first immigration judge hearing when he did not seek 212(c) relief, he had served five years by the time of his later motion to reopen to apply for 212(c) relief);

Brown v. Ashcroft, 360 F.3d 346 (2d Cir. 2004) (petitioner had served five years before BIA issuance of final removal order, but had also served five years even prior to the Immigration Judge's decision)].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA aggravated felony conviction(s), but the individual had not served five years in a single term of imprisonment — See *Paulino-Jimenez v. INS,* 279 F.Supp.2d 313 (SDNY 2003); *Toledo-Hernandez v. Ashcroft,* 280 F.Supp.2d 112 (SDNY 2003) (BIA decisions vacated and remanded to the BIA for a determination on whether separate sentences of imprisonment could be aggregated for purposes of the five years served bar); see also *United States v. Figueroa-Taveras,* 228 F. Supp. 2d 428 (SDNY 2002), vacated on other grounds, 2003 U.S. App. LEXIS 13983 (2d Cir. 2003) [but see, e.g., *Herrera v. Giambruno*, 2002 U.S. Dist. LEXIS 19387 (SDNY 2002)].
- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA conviction of an aggravated felony, but the conviction occurred before 11/29/90, the enactment date of the Immigration Act of 1990 (IMMACT), including § 511, which added the five years served bar to the INA — See 8 C.F.R. 1212.3(f) (4) (ii) (applicable only to pre-1990 plea convictions); *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003) (application of IMMACT § 511 to the pre-1990 plea conviction at issue in case was impermissibly retroactive under *St. Cyr*); see also *amici curiae* brief of the New York State Defenders Association, et al, in Bell *v. Ashcroft*, No. 03-2737 (2d Cir. 2004) available at <www.immigrantdefenseproject.org> [; but see *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009); *Reid v. Holmes*, 323 F.3d 187 (2d Cir. 2003) (decisions that followed Second Circuit's pre-*St. Cyr* decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993) holding that IMMACT § 511(a) could be applied retroactively to noncitizens with pre-IMMACT trial convictions)].
- ✓ LPR is charged with deportability for criminal offense under deportation ground for which there is no exact counterpart inadmissibility (formerly, excludability) ground, but which could have triggered inadmissibility/excludability had the person traveled abroad — see *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007) (petitioners are eligible for 212(c) waiver if their particular aggravated felony offenses could form the basis of exclusion as a crime of moral turpitude); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991) (found eligibility for 212(c) in deportation proceedings for AF drug trafficking conviction even though there was no AF excludability ground since there was an excludability ground for drug offenses that would have encompassed the conviction at issue); see also Section 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052 (effective Nov. 29, 1990), which amended then INA section 212(c) to include that a section 212(c) waiver "shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years," implying that some aliens who have been convicted of an aggravated felony are eligible for a section 212(c) waiver, and 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) ("Section 212(c) provides relief from exclusion and by court decision from deportation... . This discretionary relief is obtained by numerous excludable and deportable aliens, including aliens convicted of aggravated felonies... ."); see also *Lovan v. Holder*, 574 F.3d 990, 993-96 (8th Cir. 2009) (where petitioner previously traveled abroad but was readmitted despite been inadmissible when the court found that the BIA would have considered him eligible for § 212(c) relief, *nunc pro tunc*, prior to the statute's repeal, "then it was an error of law in applying St. Cyr to deny him eligibility under former § 212(c) at this time"); see generally *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (striking down a distinction in 212(c) relief eligibility between similarly situated individuals based on whether they traveled abroad as a violation of equal protection); [but see 8 C.F.R. 1212.3(f) (5) (requiring that the person be deportable or removable on a ground that has a statutory counterpart in the inadmissibility grounds) as interpreted by *Matter of Blake,* 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005) (requiring that the inadmissibility ground use "similar language" as the deportation ground sought to be waived; *De La Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327 (11th Cir. 2009) (concluded that De la Rosa's conviction of the aggravated felony of sexual abuse of a minor does not have a statutory counterpart in the grounds of inadmissibility in § 212(a)), petition for cert. filed, No. 09-594 (U.S. Nov. 13, 2009); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009) ("212(c) relief is available to Koussan only if he can establish grounds of inadmissibility that are comparable to the ground of removal/deportation filed against him"), rehearing denied, 2008 U.S. App. LEXIS 11295 (2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008) (petitioner were ineligible for waivers because immigration statute did not list convictions of sexual abuse of a minor offenses as a ground for exclusion), rehearing denied, 2008 U.S. App. LEXIS 8748 (2008); *Vue v. Gonzales,* 496 F.3d 858 (8th Cir. 2007) (Because aggravated felony crime of violence ground of deportation did not have a statutory counterpart in § 212(a), peti-

tioner could not claim relief under 212(c)); *Vo v. Gonzales*, 482 F.3d 363, 366-70 (5th Cir. 2007); *Caroleo v. Gonzales,* 476 F.3d 158, 162 (3d Cir. 2007) ("In order for Caroleo to establish his eligibility for § 212(c) relief, he must demonstrate ... that the basis for his removal has a 'statutory counterpart' ground for exclusion in INA § 212(a)"); *Valere v. Gonzales,* 473 F.3d 757, 762 (7th Cir. 2007) ("Because there is no statutory counterpart in § 212(a) for his crime of indecent assault of a minor, Valere is not similarly situated to an inadmissible, returning alien who is eligible to apply for § 212(c) relief"); *Kim v. Gonzales,* 468 F.3d 58, 63 (1st Cir. 2006) ("Congress never itself created waiver authority for those deported for aggravated felonies or crimes of violence ... and Congress' own views on the subject of waivers are reflected in its repeal of section 212(c) in its entirety"); but see generally *Abebe v. Gonzales,* 493 F.3d 1092 (9th Cir. 2009) (overruled prior Ninth Circuit holding in *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981) that there was no rational basis for providing § 212(c) relief from inadmissibility, but not deportation; thus, because petitioner was not eligible for § 212(c) relief in the first place, the BIA did not violate his right to equal protection by finding him ineligible for § 212(c) relief), rehearing en banc denied by *Abebe v. Holder,* 2009 U.S. App. Lexis 18571]. However, regardless of whether there is such an equal protection argument, a lawful permanent resident immigrant who travels abroad after conviction but is nevertheless admitted may argue that he is eligible to seek 212(c) relief *nunc pro tunc* under the prior BIA decisions in *In re G-A-*, 7 I. & N. Dec. 274 (B.I.A. 1956), following *In re L-*, 1 I. & N. Dec. 1 (A.G. 1940). See *Lovan v. Holder*, 574 F.3d 990 (8th Cir. 2009) ("If the BIA would have made Lovan eligible for § 212(c) relief, *nunc pro tunc*, prior to the statute's repeal, then it was an error of law in applying St. Cyr to deny him eligibility under former § 212(c) at this time, and the agency should proceed to determine whether he warrants a § 212 waiver."); see also *Romero-Rodriguez v. Gonzales*, 488 F.3d 672, 677-79 (5th Cir. 2007) (remanded to the BIA because it failed to consider whether the alien was eligible for *nunc pro tunc* § 212(c) relief under the *In re L-* line of cases). In addition, if the individual is eligible to re-adjust to permanent residence and thereby avoid deportability, he or she may seek a 212(c) waiver to waive inadmissibility in connection with an application for adjustment of status. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) and *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); see also *Drax v. Reno*, 338 F. 3d 98 (2d Cir. 2003) (noting that, even if an individual is not currently eligible for re-adjustment of status because an immigrant visa number is not immediately available, an immigration judge has discretion to continue proceedings for a reasonable length of time until an immigrant visa number is available).

- ✓ For a general discussion of these statutory interpretation arguments, see Nancy Morawetz, "Practice Advisory — Who Should Benefit from *St. Cyr*" (American Immigration Law Foundation, Washington, D.C., August 1, 2001). For a general discussion of possible constitutional arguments against government claims of ineligibility for 212(c) relief that are based on unfair treatment or irrational distinctions, see below "Raise estoppel or constitutional or international law arguments."

■ **Apply for 240A(a) cancellation of removal**

Some lawful permanent residents in removal proceedings may be eligible for cancellation of removal under INA 240A(a). In order to be eligible for this relief, a lawful permanent resident respondent would have to show the following:

1. Respondent has been an LPR for at least five years.
2. Respondent has resided in the United States continuously for seven years after having been admitted in any status.
3. Respondent has not been convicted of an aggravated felony (see above "Deny aggravated felony").

The aggravated felony bar precludes eligibility for many long-term lawful permanent residents. However, it may be possible to argue that certain convictions should not be deemed aggravated felonies. See above "Deny aggravated felony." In addition, in certain situations, it may be possible to argue that it violates due process for a conviction to be retroactively deemed an "aggravated felony" for this purpose if it was not an aggravated felony at the time of conviction. See concurring and dissenting opinions of Board members Rosenberg and Espinoza in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002) (finding retroactive application of a new administrative interpretation of what drug offenses constitute aggravated felonies to be contrary to due process); see below "Raise estoppel or constitutional arguments."

Another problem that may be encountered is that the IIRIRA provided that the required seven years' period of residence "shall be deemed to end when the alien is served a notice to appear ... or when the alien has

committed an offense referred to in section 212(a) (2) that renders the alien inadmissible to the United States under section 212(a) (2) or removable from the United States under section 237(a) (2) ..., whichever is earliest." See INA 240A(d) (1). To the extent, however, that the DHS (formerly INS) is relying on the second clause of this clock-stopping rule to argue ineligibility for cancellation of removal — i.e., that the respondent had not resided in the United States for seven years prior to *commission of the offense* — the respondent may be able to make the following arguments:

- ✓ **The respondent has continuously resided in the U.S. for at least seven years from the date of his first lawful admission to the U.S. to the date of the commission of the offense.** The period of respondent's residence in the U.S. after admission on a nonimmigrant visa may be considered in calculating these 7 years. *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002).
- ✓ **The respondent's parent has continuously resided in the U.S. for at least seven years after admission in any lawful status prior to the date of the respondent's commission of the offense.** The period of respondent's parent's residence in the U.S. after admission may be considered in calculating these 7 years. See *Cuevas-Gaspar v. Gonzales*, 430 F. 3d 1013 (9th Cir. 2005) (parent's admission for permanent resident status was imputed to an unemancipated minor child residing with the parent); [but see *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008); *Augustin v. AG*, 520 F.3d 264 (3d Cir. 2008)].
- ✓ **The "commission of offense" clock-stopping rule does not apply if the respondent did not commit an offense "referred to in section 212(a) (2)."** If the respondent has committed an offense that makes him or her removable but not inadmissible from the United States, the respondent has not committed an offense "referred to in section 212(a) (2)" and, therefore, should not be subject to this part of the clock-stopping rule. This is because the phrase "removable from the United States under section 237(a) (2)" requires that the offense be one of those listed in section 212(a) (2). Thus, for example, a firearm offense that comes within the firearm ground of deportability but which does not come within any ground of inadmissibility should not trigger this clock-stopping rule. See *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000); see also *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010) (Conviction for a single crime involving moral turpitude that qualifies as a "petty offense" is not for an "offense referred to in section 212(a)(2)" for purposes of triggering the "stop-time" rule in section 240A(d)(1), even it renders the noncitizen removable under section 237(a)(2)(A)(i)); *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003) (stop-time rule does not apply until the second conviction where the first conviction was a "petty offense"); *Castillo-Cruz v. Holder*, 58 F.3d 1154, 1161-62 (9th Cir. 2009) (a "petty offense" conviction does not trigger the stop-time rule because such an offense does not make one inadmissible).
- ✓ **The "commission of offense" clock-stopping rule does not apply to pre-IIRIRA offenses.** Where the offense at issue pre-dated April 1, 1997, the general effective date of IIRIRA, the respondent may argue that the "commission of offense" part B of the INA 240A(d)(1) clock-stopping rule should not be applied retroactively to such a case. IIRIRA expressly specified the circumstances under which the clock should stop prior to the effective date of IIIRIRA, and those circumstances do not include persons seeking cancellation relief under 240A as enacted as part of IIRIRA. In IIRIRA § 309(c)(5), entitled "Transitional Rule With Regard to Suspension of Deportation," Congress specified that the rule would apply retrospectively to persons seeking suspension of deportation under the old law. [See *Tablie v. Gonzales,* 471 F.3d 60 (2d Cir. 2006) (transitional stop-time rule of INA 240A(d)(1) part B applies retroactively to stop accrual of the seven years of continuous residence required under INA 240A(a)(2)); *Peralta v. Gonzales*, 441 F.3d 23 (1st Cir. 2006); *Okeke v. Gonzales*, 407 F. 3d 585 (3d Cir. 2005)]. No such retrospective provision was included with respect to persons seeking cancellation of removal. Furthermore, when Congress revisited the clock stop rule in section 203 of NACARA, it made clear that the retrospective provision applied only to deportation cases under the old law — thereby requiring those who enjoyed the benefits of more generous suspension rules under the old law to accept the less generous clock stop rule of the new law. Section 203 of NACARA further provides that when a person is moved from deportation proceedings into removal proceedings "paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act shall not apply. ..." This provision makes clear that the retrospective application of the clock stop rule was limited to those seeking suspension under the old law. Furthermore, to the extent that there is any ambiguity, the general rule against retroactive application of new rules applies. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), Under *Landgraf* step two, the Supreme Court held that, absent an explicit statement of retroactivity, a statute should apply prospectively only. Thus, under either *Landgraf* step one or step two, the "commis-

sion of offense" clock-stopping rule should not be applied retroactively to an individual whose criminal offense predated the general effective date of IIRIRA. See *Sinotes-Cruz v. Gonzales,* 469 F.3d 1190 (9th Cir. 2006) (permanent stop-time rule of INA 240A(d)(1) part B does not apply retroactively under *Langdraf* step two to stop accrual of the seven years of continuous residence required under INA 240A(a)(2)); see also dissenting opinion of Judge Straub in *Zuluaga-Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008) (suggesting that requiring a showing of reliance on prior law in order to demonstrate impermissible retroactive effect under *Landgraf* step two should be reviewed); *Mulholland v. Ashcroft*, 2004 U.S. Dist. LEXIS 21426 (E.D.N.Y. 2004); *Generi v. Ashcroft*, 2004 U.S. Dist. LEXIS 6396 (W.D. Mich. 2004); *Henry v. Ashcroft*, 175 F.Supp.2d 688 (SDNY 2001); see generally Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 N.Y.U. L. Rev. 97, 151-154 (April 1998) (reviews legislative history supporting the argument that Congress did not intend for this part of the clock-stopping rule to be applied retroactively); [but see *Matter of Robles,* 24 I&N Dec. 22 (BIA 2006) (applying stop-time rule part B retroactively to a pre-IIRIRA offense); *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999) (holding that Congress intended retroactive application without any discussion of the negative implication and legislative history referenced above); *Zuluaga-Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008) (held that retroactive application of permanent stop-time rule is not impermissible under *Langdraf* step two as the rule did not change the consequence of the petitioner's criminal act because commission of the crime immediately placed the petitioner in a category of persons eligible upon conviction for deportation without eligibility for cancellation and therefore settled expectations were not disrupted); *Valencia-Alvarez v. Gonzales*, 469 F. 3d 1319 (9th Cir. 2006) (applying clock stop rule where eligibility for discretionary relief had not "vested"); *Heaven v. Gonzales*, 473 F.3d 167 (5th Cir. 2006) (presuming that application of clock stop rule to deportation cases involving suspension relief requires application to cancellation of removal cases for LPRs).

- ✓ **The "commission of offense" clock-stopping rule does not apply if the respondent has resided in the United States continuously for 7 years after commission of the offense.** The clock-stop rule speaks of events — such as commission of the offense and service of the notice to appear for removal proceedings — that are deemed to end "any" period of continuous residence. See INA 240A(d) (1). This language indicates that an individual may accrue the required seven years of residence between events, e.g., after commission of the offense but before the DHS (formerly INS) served the notice to appear. Cf. *Matter of Cisneros-Gonzales*, 23 I&N Dec. 668 (BIA 2004) (for purposes of the analogous requirement of ten years of continuous physical presence for INA 240A(b) cancellation of removal (see below), individual who was deported and illegally reenters U.S. can begin to accrue a new period of physical presence beginning on the date of his return); *Okeke v. Gonzales*, 407 F.3d 585 (3d Cir. 2005) (individual who departs the U.S. after committing offense triggering inadmissibility and legally reenters can begin to accrue a new period of physical presence beginning on the date of his return); [but cf. *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000) (noncitizen may not accrue the requisite seven years of continuous physical presence required for INA 240A(b) predecessor relief of suspension of deportation *after* service of the charging document); *Briseno-Flores v. Atty. Gen. of the U.S.*, 492 F.3d 226 (3d Cir. 2007) (deferring to BIA decision in *Mendoza-Sandino*);].

■ **Apply for 240A(b) cancellation of removal / suspension of deportation**

Some individuals in removal proceedings may be eligible for cancellation of removal under INA 240A(b). Under INA 240A(b)(1)(A) thru (D), a noncitizen respondent would have to show the following:

1. Respondent has been physically present in the U.S. for a continuous period of not less than ten years (see discussion above of comparable seven years' continuous residence requirement for INA 240A(a) relief).
2. Respondent has been a person of good moral character during such period.
3. Respondent has not been convicted of an offense under INA section 212(a) (2) (criminal inadmissibility grounds), 237(a) (2) (criminal deportability grounds), or 237(a) (3) (failure to register, document fraud, and falsely claiming citizenship).
4. Respondent establishes that removal would result in exceptional and extremely unusual hardship to the noncitizen's spouse, parent, or child, who is a U.S. citizen or lawful permanent resident.

The INA 212(a) (2) and 237(a) (2) criminal ground bars preclude eligibility for many noncitizens convicted of crimes in their past. However, it may be possible to argue that certain convictions do not fall within these inadmissibility or deportability grounds. See, e.g., *Matter of Pedroza*, 25 I. & N. Dec. 312 (BIA 2010) (held that a noncitizen's conviction for a crime involving moral turpitude was not "described under" either section 212(a)

(2) or 237(a)(2)(A)(i) of the Act where the maximum possible sentence for his crime was less than 1 year and he was sentenced to 10 days in jail, so it did not render him ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act); *Matter of Gonzalez-Silva*, 24 I&N Dec. 218 (BIA 2007) (held that an offense can be one "described under" section 237(a)(2)(E)(i) (domestic violence-related offenses) only if the conviction for that offense occurred after the September 30, 1996, effective date of that section); *Matter of Garcia-Hernandez*, 23 I. & N. Dec. 590, 593 (BIA 2003) (held that, for purposes of determining eligibility for cancellation for certain nonpermanent residents, the language of section 240A(b)(1)(C) of the Act, "convicted of an offense under section 212(a)(2)," does not encompass a crime involving moral turpitude that was subject to the "petty offense" exception, because the plain language of the statute referenced the entirety of section 212(a)(2), including the petty offense aspect); [but see *Matter of Cortez*, 25 I. & N. Dec. 301 (BIA 2010) (held that a noncitizen's conviction of a crime involving moral turpitude that was punishable by a sentence to imprisonment for a year was therefore "described under" section 237(a)(2), even though the crime was not committed within five years of admission as required for deportability under 237(a)(2), explaining that in determining which offenses are "described under" sections 212(a)(2), 237(a)(2), and 237(a)(3), only language specifically pertaining to the criminal offense, such as the offense itself and the sentence imposed or potentially imposed, should be considered); *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (rejecting the respondent's argument that because he was an "arriving alien" charged with inadmissibility under section 212(a)(6)(a)(i), his offense could not be considered "described under" section 237(a)(2), following the Ninth Circuit decision in *Gonzalez-Gonzalez v. Ashcroft*); *Vazquez-Hernandez v. Holder*, 590 F.3d 1053 (9th Cir. 2010) (finding an inadmissible noncitizen ineligible for cancellation of removal under section 240A(b)(1)(C) because his conviction was "described under" section 237(a)(2)(E)(i) (deportability ground for domestic-related offenses)); *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004) (holding that a noncitizen is statutorily ineligible for cancellation of removal under section 240A(b)(1)(C) if the noncitizen is convicted of an offense described in either 212(a)(2) or 237(a)(2) regardless of the noncitizen's status as inadmissible or deportable)]. In addition, these criminal ground bars did not apply under pre-IIRIRA law. See former INA § 244(a) (1) (repealed 1996). Thus, an individual with a pre-1996 conviction may argue that Congress did not clearly state in IIRIRA that it intended for these new restrictions to be applied retroactively to pre-1996 convictions. See *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007) (finding impermissible retroactive application of the repeal of suspension of deportation where the petitioner may have applied for naturalization in reliance on the right to apply for suspension of deportation if denied naturalization); *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006) ("[t]o deprive Lopez-Castellanos of eligibility for discretionary relief would produce an impermissible retroactive effect for aliens who, like Lopez-Castellanos, were eligible for [suspension of deportation] at the time of the plea"). This argument is similar to those available to argue for continued eligibility for old 212(c) relief for lawful permanent resident immigrants with pre-1996 convictions. See above "Apply for 212(c) waiver".

- **Apply for adjustment of status**

  Some individuals in removal proceedings may be eligible to apply for adjustment of their status to lawful permanent residence as a defense to criminal charge removal. See INA 245. This may include an individual who is already a lawful permanent resident but for whom it may be advantageous to re-adjust their status in order to wipe the slate clean and avoid a criminal ground of deportability that does not make the individual inadmissible, e.g., firearm offense that does not constitute a crime involving moral turpitude. See *Matter of Rainford*, 20 I&N 598 (BIA 1992). A lawful permanent resident immigrant may seek a 212(c) waiver to waive a ground of inadmissibility in connection with an application for re-adjustment of status. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) and *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); see also *Drax v. Reno*, 338 F. 3d 98 (2d Cir. 2003) (noting that, even if an individual is not currently eligible for re-adjustment of status because an immigrant visa number is not immediately available, an immigration judge has discretion to continue proceedings for a reasonable length of time until an immigrant visa number is available).

- **Apply for 212(h) waiver of inadmissibility**

  Some individuals in removal proceedings, who are applying for admission or eligible for adjustment of status (see above) and who are not inadmissible due to conviction or admission of a drug offense (other than a single offense of simple possession of 30 grams or less of marijuana), may be able to apply for a 212(h) waiver of other criminal inadmissibility as a defense to criminal charge removal. See INA 212(h). An individual convicted of a drug paraphernalia offense relating to possession of 30 grams or less of marijuana may be found eligible. See *Escobar-Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008) (petitioner was eligible for consideration of

212(h) waiver because his Nevada conviction for possessing one pot pipe related to single offense of simple possession of 30 grams or less of marijuana.). For when one can argue that a drug conviction that has been vacated or expunged is not a "conviction" for immigration purposes; see above "Deny 'Conviction'".

An individual who is a lawful permanent resident seeking readmission after a trip abroad may also seek a 212(h) waiver of criminal inadmissibility without needing to be eligible to apply for readjustment of status. In addition, a lawful permanent resident may seek a 212(h) waiver to waive deportability based on an offense that is also covered by an inadmissibility ground. See *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995); [but see *Klementanovsky v. Gonzales*, 501 F.3d 788, 791-94 (7th Cir. 2007)]. However, in IIRIRA, Congress amended 212(h) to provide that a lawful permanent resident must have lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of removal proceedings and must not have been convicted of an aggravated felony. See INA 212(h) (last paragraph). Nevertheless, a lawful permanent resident who was not "admitted" to the U.S. as a lawful permanent resident but adjusted to LPR status may be able to avoid these bars on 212(h) relief. See *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) (individual who has adjusted to LPR status is not barred under 212(h) aggravated felony bar for those previously "admitted" as an LPR); cf. *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (BIA impermissibly interpreted "the date of admission" in § 237 (a) (2) (A) (i) to include the date on which Shanu's status was adjusted); *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Shivaram v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004); [but cf. *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005) (holding that (1) the date of adjustment of status qualifies as "the date of admission" under § 1227(a) (2) (A) (i), and that (2) where there is more than one potential date of admission, *any* such date qualifies as "*the* date of admission" under that provision); and, on issue of what constitutes the "date of admission" when the individual has never been "admitted," but see *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) ("Martinez did not consider whether the same rule would apply in a case like the respondent's where the alien was not previously admitted"); cf. *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) (concluding that in such circumstance date of adjustment qualifies as "date of admission"); *Matter of Rosas-Ramirez,* 22 I&N Dec. 616 (BIA 1999) (same)]. In addition, these bars on lawful permanent resident eligibility for the 212(h) waiver are subject to equal protection challenge. See *Roman v. Ashcroft*, 181 F. Supp.2d 808 (N.D. Ohio 2002), reversed on other grounds, 2003 U.S. App. LEXIS 16537 (6th Cir. 2003); *Song v. INS*, 82 F.Supp.2d 1121 (C.D.Cal. 2000); see also below "Raise estoppel or constitutional arguments — Equal Protection;" [but see *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002); *DeLeon-Reynoso v. Ashcroft*, 293 F.3d 633 (3d Cir. 2002); *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002); *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001)].

- **Apply for 209(c) waiver of inadmissibility**

Refugees or asylees who are in removal proceedings, who are eligible for refugee/ asylee adjustment of status and who are not inadmissible based on reason to believe they are a drug trafficker, may be able to apply for a 209(c) waiver of inadmissibility as a defense to criminal charge removal. See INA 209(c) and 209 generally; see also *Matter of K-A-,* 23 I&N Dec. 661 (BIA 2004) (asylee adjustment); *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999) (refugee adjustment). Refugees or asylees who have already adjusted to permanent resident status may argue that they retained refugee/asylee status and should still be eligible for a 209(c) waiver in connection with an application for re-adjustment of status. Cf. *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004) (calling plausible the petitioner's argument that, after he adjusted to permanent resident status, his refugee status, unless formally terminated, coexists with LPR status) [; but see *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008) ("it is logical to conclude that an alien ... who has previously acquired permanent resident status but was later rendered removable ... is ineligible to acquire LPR status again under § [209]); *Gutnick v. Gonzales,* 469 F.3d 683 (7th Cir. 2006)].

- **Apply for asylum**

Individuals in removal proceedings who fled or fear persecution in their country of nationality may be able to apply for asylum as a defense to criminal charge removal. See INA 208. Asylum is generally barred to an individual who, having been convicted of a "particularly serious crime," constitutes "a danger to the community of the United States." See INA 208(b) (2) (A) (ii). For asylum purposes, an individual convicted of an aggravated felony is deemed by statute to have been convicted of a particularly serious crime. See INA 208(b) (2) (B) (i). If the individual has not been convicted of an aggravated felony, or if it is not clear that the conviction is an aggravated felony, one can argue that the decision-maker determining whether an offense is a "particularly

serious crime" should look to the term's international law origins and international law sources, which set a minimum standard when they define a "serious" offense as a "capital crime or a very grave punishable act." See discussion below under "Apply for withholding of removal." In addition, although the BIA has indicated that the determination of whether an alien poses a danger to the community is subsumed within the analysis of whether the crime is "particularly serious," there is some support for nevertheless arguing — in the hope of a future change in this interpretation — that the decision-maker must make a separate determination that the noncitizen is actually "a danger to the community." See discussion below under "Apply for withholding of removal." It may also be possible to argue that the particularly serious crime asylum bar should not apply to pre-1990 convictions. See *Kankamalage v. INS*, 335 F.3d 858, 860, 863 (9th Cir. 2003) (**immigration** regulation promulgated in 1990, which made aliens convicted of "a particularly serious crime" ineligible for asylum, did not apply retroactively to an alien who pled guilty to robbery in 1988).

■ **Apply for withholding of removal**

Individuals in removal proceedings whose life or freedom would be threatened in the country of removal may be able to apply for withholding of removal as a defense to criminal charge removal. See INA 241(b)(3). Withholding of removal is generally barred to an individual who, having been convicted of a "particularly serious crime," is "a danger to the community of the United States." See INA 241(b)(3)(B)(ii). For withholding of removal purposes, however, an individual convicted of an aggravated felony or felonies is deemed by statute to have been convicted of a particularly serious crime only if he or she has been sentenced to an aggregate term of imprisonment of at least five years. See INA 241(b)(3)(B). A noncitizen sentenced to less than five years' imprisonment may be determined to have been convicted of a particularly serious crime only after an individual examination of (i) the nature of the conviction; (ii) the circumstances and underlying facts for the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *Steinhouse v. Ashcroft*, 247 F.Supp.2d 201 (D.Conn. 2003) (remanding case to BIA for failure to examine whether the type and circumstances of the crime indicated that the individual would be a danger to the community)[; but see *Matter of N-A-M-,* 24 I. & N. Dec. 336 (B.I.A. 2007) ("We note that our approach to determining whether a crime is particularly serious has evolved since the issuance of our decision in *Matter of Frentescu, ...* . For example, once an alien is found to have committed a particularly serious crime, we no longer engage in a separate determination to address whether the alien is a danger to the community. ... [T]he proper focus for determining whether a crime is particularly serious is on the nature of the crime and not the likelihood of future serious misconduct."); *Ursu v. INS*, *20 Fed. Appx. 702* (9th Cir. 2001) (holding that the determination of whether a crime qualifies as particularly serious requires a three-part examination and does not include the inquiry as to whether the individual will be a danger to the community)].

Although the BIA has indicated that the determination of whether an alien poses "a danger to the community" is subsumed within the analysis of whether the crime is "particularly serious," see *Matter of Carballe*, 19 I. & N. Dec. 357 (BIA 1986) ("If it is determined that the crime was a "particularly serious" one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative. We do not find that there is a statutory requirement for a separate determination of dangerousness focusing on the likelihood of future serious misconduct on the part of the alien"); *Ahmetovic v. I.N.S.,* 62 F.3d 48, 53 (2d Cir. 1995) (collecting cases in which this "interpretation conflating the two requirements has been accepted by every circuit court that has considered the issue"), there is some support for nevertheless arguing — in the hope of a future change in this interpretation — that the decision-maker must make a separate determination that the noncitizen is actually "a danger to the community." See concurring opinion of Judge Henry in *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009) ("To accept the BIA's recent contention that the "danger to the community" inquiry is subsumed within the "particularly serious" offense inquiry seems to run afoul of the clear language of the statute. The statute mentions both a "danger to the community" inquiry and a "particularly serious" offense inquiry; ignoring one of those inquiries does not give full effect to the meaning to the statute."); see also *Ahmetovic v. I.N.S.,* 62 F.3d at 52 ("we are ... troubled by the BIA's failure to give separate consideration to whether [petitioner] is a 'danger to the community.'") In addition, international law supports reading the statute to require a separate finding of dangerousness. See concurring opinion of Judge Henry in *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009) ("[A] wealth of persuasive authority reveals that under both the Convention and the Refugee Act implementing the Convention, the 'decisive factor is not the seriousness or categorization of the

crime that the refugee has committed, but, rather, whether the refugee, in light of the crime and conviction, poses a *future* danger to the community.'").

The "particularly serious crime" inquiry should not go beyond the record of conviction and sentencing information. See *Matter of L-S-*, 22 I. & N. Dec. 645, 651 (BIA 1999) (permissible to "look to the conviction records and sentencing information ... [but] ... not [to] engage in a retrial of the alien's criminal case or go behind the record of conviction to redetermine the alien's innocence or guilt."); *Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007) (IJ erred in relying on the facts recited in a Washington appellate court's opinion because those facts were not admitted or established as "the circumstances and underlying facts of conviction.")[; but see *Matter of N-A-M-,* 24 I. & N. Dec. 336 (B.I.A. 2007) (citing *Matter of L-S-* to find that "once the elements of the offense are examined and found to potentially bring the offense within the amibit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, iincluding the conviction records and sentencing information, as well as other information outside the confines of a record of conviction")].

The Attorney General has through an adjudicative decision created a strong presumption that a drug trafficking offense resulting in a sentence of less than five years is a "particularly serious crime." See *Matter of Y-L-*, 23 I. & N. Dec. 270 (Op. Att'y Gen. 2002). However, the agency must still engage in an individualized determination. See *Chong v. Dist. Dir., INS*, 264 F.3d 378, 387 (3d Cir. 2001) (BIA must analyze the specific facts of the case "rather than blindly following a categorical rule, i.e., that all drug convictions qualify as 'particularly serious crimes.'"). In addition, one can argue that this presumption may not be applied retroactively. See *Miguel-Miguel v. Gonzales*, 500 F.3d 948 (9th Cir. 2007).

If the offense in question is not an aggravated felony, one can argue that it should not be deemed a particularly serious crime for withholding purposes. See concurring and dissenting opinion of Judge Berzon in *Delgado v. Holder*, 563 F.3d 863, 877 (9th Cir. 2009) ("[T]he withholding of removal provision confers on the Attorney General the authority to determine that an offense is a 'particularly serious crime' notwithstanding the length of the sentence imposed, but does not confer any express authority to designate non-aggravated felonies as 'particularly serious.'"); *Alaka v. AG of the U.S.*, 456 F.3d 88 (3d Cir. 2006) ("text and structure of the statute suggest that an offense must be an aggravated felony to be 'particularly serious.'"); [but see *Matter of N-A-M-*, 24 I. & N. Dec. 336, 337-41 (B.I.A. 2007), aff'd, *N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009); *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (rehearing en banc granted on Sept. 2, 2010); *Zhan Gao v. Holder*, 595 F.3d 549 (4th Cir. 2010); *Nethagani v. Mukasey*, 532 F.3d 150 (2d Cir. 2008); *Ali v. Achim,* 468 F.3d 462 (7th Cir. 2006)].

If the statute is ambiguous as to whether an offense is an aggravated felony, or if there is uncertainty over whether the offense is otherwise a particularly serious crime, one can argue that the decision-maker should look to international law. See Brief for Human Rights First as Amicus Curiae in Support of Petitioners in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). This is because withholding of removal relief exists in order to comply with U.S. obligations under the 1967 U.N. Protocol Relating to the Status of Refugees. Where international obligations are involved, any statutory ambiguity must be resolved in a way that respects the international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64. A key relevant source of international law is the U.N. Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook does not specifically define a "particularly serious crime," but sets a minimum standard when it defines a "serious" offense as a "capital crime or a very grave punishable act." Although the Supreme Court has determined that the Handbook is not legally binding on U.S. officials, the Court stated that it nevertheless provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). See generally *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982) (looking at international law, states that "a '**particularly serious crime**' is more serious than a 'serious nonpolitical crime'"); *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (petitioner's DUI offenses "do not exceed the 'capital or grave' standard of 'serious' nonpolitical crimes, and *Frentescu* indicates that **particularly serious crimes** should exceed that standard") (rehearing en banc granted on Sept. 2, 2010).

- **Apply for relief under Torture Convention**

Individuals in removal proceedings who may be tortured or suffer other cruel treatment in their country of removal may be eligible to apply for relief under the U.N. Torture Convention as a defense to criminal charge removal. See Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment (in effect for the United States in 1994). The Convention does not include any bar on relief based on criminal record. And, while implementing legislation enacted in 1998 directs the prescribing of regulations excluding from eligibility those excluded from eligibility for withholding of removal (see above), the legislation recognizes that the regulations should do so only "[t]o the maximum extent consistent with the obligations of the United States under the Convention ..." Foreign Affairs Reform and Restructuring Act of 1998 § 2242(c). Interim regulations, effective March 22, 1999, provide for withholding of removal for those who would not be excluded from eligibility for such relief, see 8 C.F.R. 208.16(c), and for "deferral" of removal for those who would be excluded from withholding based on criminal record. See 8 C.F.R. 208.17.

■ **Apply for voluntary departure in lieu of a removal order**

See INA 240B.

☐ **Raise estoppel or constitutional or international law arguments**

Whenever a removal case has a particularly unfair or unjust feel to it, there may be good estoppel and/or constitutional (or international law) arguments to be raised. Such an argument may eventually require going into federal court. This is because immigration judges and the BIA will generally not rule on an estoppel or constitutional argument. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991) (estoppel claim); *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991) (constitutional claim). For that reason, however, one may be able to argue that one need not have raised such an argument at the administrative level in order to raise it before a federal court. See, e.g., *Garberding v. INS*, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (although a party may be required to exhaust a procedural due process claim that could be remedied by the immigration judge, an equal protection claim that the immigration judge or the BIA cannot decide does not require exhaustion). One should, however, raise such an argument at the administrative level to avoid the risk of a later finding by a federal court that the argument has been waived for failure to raise it before the agency. See, e.g., *Ruiz-Macias v. INS*, 89 F.3d 846 (9th Cir. 1996) (alien's failure to raise estoppel argument before BIA constituted waiver of claim). In addition, even if an immigration judge or the BIA will not rule on the argument, they may consider it in ruling on other arguments. Finally, it may be necessary to raise the argument before an immigration judge in order to make the record necessary for later federal court review. See INA 242(b) (4) (A) ("the court of appeals shall decide the petition only on the administrative record on which the order of removal is based"); *INS v. Miranda*, 459 U.S. 14, 18 n.3 (1982) (noting, in refusing to find estoppel for unreasonable delay in processing, that "because the issue of estoppel was raised initially on appeal [to the BIA], the parties were unable to develop any factual record on the issue").

■ **Estoppel**

"Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Services*, 467 U.S. 51 (1984). The law of estoppel has long recognized that a wrongdoer should not be permitted to reap unfair advantage from his or her own wrongful conduct. In the immigration context, estoppel-type arguments might be raised where a respondent has relied on a government misrepresentation to his or her detriment, or to prevent the government from gaining an unfair advantage from a wrongful act that deprives the respondent of a constitutionally protected liberty or property interest. In fact, it was in an immigration case that the United States Court of Appeals for the Second Circuit explained that the government may be precluded from benefiting from its own wrongful conduct even where the Act, "read in vacuo, might suggest a different result." *Corniel-Rodrigues v. INS*, 532 F.2d 301 (2d Cir. 1976).

The traditional elements of "equitable estoppel" are: (a) a misrepresentation; (b) that the party making the misrepresentation had reason to believe the party asserting estoppel would rely on it; (c) that it was reasonable for the party asserting estoppel to rely on the misrepresentation; and (d) that the party asserting estoppel relied on the misrepresentation to his detriment. *Heckler*, 467 U.S. at 59. Several federal circuit courts have found equitable estoppel to lie where there is an element of "affirmative misconduct" on the part of the government. See *Corniel-Rodrigues*, 532 F. 2d 301 (2d Cir. 1976) (INS failure to warn alien that her visa would automatically become invalid if she married before arriving to the United States sufficient to support estoppel); *Yang v. INS*, 574 F.2d 171, 174-75 (3rd Cir. 1978) (affirmative misconduct by government official gives rise to estoppel); *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987) (allegation that INS acted "willfully, wantonly, recklessly, and negligently" in delaying processing of alien's visa application encompassed element of affirmative misconduct necessary to state equitable estoppel claim); *Mendoza-Hernandez v. INS*, 664 F.2d 631, 639 (7th Cir. 1981) (affirmative misconduct by government official gives rise to estoppel claim). Equitable estoppel doctrine may be useful in immigration cases where the respondent is seeking to stop a removal that may be said to have

resulted from affirmative misconduct by the government, e.g., where the respondent has lost waiver eligibility due to wrongful DHS (formerly INS) delay in commencing deportation or removal proceedings.

There is a another line of Supreme Court cases, which generally do not use the term estoppel, but which similarly preclude the government from gaining an unfair advantage from a wrongful act where the misconduct deprives a person of a constitutionally protected liberty or property interest. See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (Court refused to permit the government to take advantage of a BIA ruling obtained by a procedure contrary to agency regulations); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Court prevented the government from using the fruits of an illegal search and seizure as evidence in a criminal case); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Court ruled that government could not destroy a constitutionally protected property interest due to its negligent failure to hold a required mediation hearing within the statute of limitations period). This line of cases may also be useful in immigration cases where the respondent is seeking to stop a removal that may be said to have resulted in some way from government wrongdoing.

- **Procedural Due Process**

The Fifth Amendment's due process clause protects against federal government deprivation of life, liberty, or property without fair and adequate procedures. See *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court recently reaffirmed that the protection of the due process clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 US 678 (2001). While the Court recognized that prior precedent found that full constitutional protections might not apply to an alien who had not "entered" the United States (including individuals stopped at the border and/or "paroled" into the United States), the Court did not rule out that such precedent might no longer be good law. See *Zadvydas*.

Thus, for example, procedural due process challenges may be made to mandatory detention statutes or practices in certain situations. It is generally a violation of procedural due process for the government conclusively to presume unfitness for some benefit on the basis of some event or characteristic, without holding an individualized hearing on the issue of unfitness. Thus, procedural due process challenges may be made to mandatory detention rules that do not permit individualized hearing on the issue of whether an individual is a threat to the community or a risk of flight in certain situations. See above section entitled "Challenge mandatory detention during removal proceedings."

Another example of where a procedural due process challenge might be raised is where removal results from a DHS (formerly INS) failure to commence deportation proceedings when statutorily required to do so. See *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) (INS foot-dragging in completing deportation proceedings until petitioner no longer statutorily eligible for relief stated the basis of a substantial constitutional due process claim); see also above discussion in subsection on "Estoppel" of the line of Supreme Court cases precluding the government from gaining an unfair advantage from a wrongful act where the misconduct deprives a person of a constitutionally protected liberty or property interest.

- **Substantive Due Process**

The Fifth Amendment's due process clause also protects against government action infringing fundamental liberty interests, no matter what process is provided, where the infringement is not narrowly tailored to serve a compelling state interest. See *Reno v. Flores*, 507 U.S. 292, at 301-302 (1993). This fundamental or substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987), quoting *Rochin v. California*, 342 U.S. 165, 172 (1952). As the Supreme Court recently stated: "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587 (1996). Legislation imposing disproportionate penalties affecting liberty or property interests may be challenged under substantive due process notions. Id. In addition, legislation that has retroactive aspects affecting such interests may also be challenged as violative of due process where retroactive application is irrationally unfair. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation ... must meet the test of due process"); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation"); *BMW*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the

conduct that will subject him to punishment but also of the severity of the penalty that a state may impose"). Thus, retroactive application of a new deportation statute may be found to violate the due process clause. See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003) (reversing noncitizen defendant's conviction for illegal reentry after removal after finding that prior removal order was invalid as defendant had "plausible" claim that Congress' retroactive application of IIRIRA § 321(expanding categories of offenses falling within AF ground) violated due process);. *Mojica v. Reno*, 970 F. Supp. 130, 169-171 (E.D.N.Y. 1997), aff'd sub nom., *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998); see generally Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 N.Y.U. L. Rev. 97 (April 1998).

- **Equal Protection**

  While the equal protection clause of the Fourteenth Amendment applies only to the states, the Fifth Amendment's due process clause has also been interpreted to bar arbitrary discrimination by the federal government. Thus, certain irrational distinctions between similarly situated noncitizens made by the federal deportation laws, or how the federal government applies these laws, may be found unconstitutional. See, e.g., *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (distinction between similarly situated individuals as to whether their expunged drug dispositions constitute convictions for immigration purposes struck down as irrational); *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995) (distinction between similarly situated individuals as to 212(h) waiver relief eligibility struck down as irrational); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (distinctions between similarly situated individuals as to 212(c) waiver relief eligibility struck down as irrational).

- **Naturalization Clause**

  When a noncitizen in one state is subject to more adverse immigration consequences than a noncitizen in another state for a similar offense solely because of varying state criminal law standards and definitions, the noncitizen may argue that such disparate treatment violates the Constitution's Naturalization Clause, which requires a "uniform Rule" of naturalization (and hence of deportation law). See Iris Bennett, "The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions," 74 N.Y.U. L. Rev. 1696 (December 1999); see also Point III in Brief of the American Bar Association as Amicus Curiae in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). Alternatively, the noncitizen may argue that his or her rights to equal protection of the laws has been violated. See above subsection on "Equal Protection."

- **Ex Post Facto**

  Although challenges to retroactive deportation laws under the ex post facto clause have been rejected in the past on the basis that the clause only applies to criminal punishment, the now often mandatory imposition of the "civil" penalty of removal upon conviction suggests that it may be worth preserving such a claim in the hope that the courts will revisit the issue. See *Padilla v. Kentucky*, __ U.S. __, 2010 U.S. LEXIS 2928 (2010) ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. ... And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context."); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (concurring opinion of Justice Thomas) (expressing willingness to reconsider whether retroactive civil laws are unconstitutional under the ex post facto clause); *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) ("If deportation under such circumstances is not punishment, it is difficult to envision what is"); see also Robert Pauw, "A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply," 52 Adm. L.R. 305 (Winter 2000); Javier Bleichmar, "Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law," 14 Geo. Immgr. L.J. 115 (Fall 1999).

- **Double Jeopardy**

- **Cruel and Unusual Punishment**

- **International Law**

  Where international obligations are involved, any statutory ambiguity must be resolved in a way that respects the international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64; see also Brief for Human Rights First as Amicus Curiae in Support of Petitioners in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). For an example of a court decision that applies international law obligations to the interpretation of an immigration statute, see *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, 2000 WL 186477 (2d

Cir. 2000) (aff'd on other grounds in an unpublished opinion) (district court decision interpreting IIRIRA amendments in a way that avoided retroactive application to pre-IIRIRA conduct in order to avoid conflict with U.S. obligations under international law); see also *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (petitioner's DUI offenses are not "particularly serious crimes" as they "do not exceed the 'capital or grave' standard of 'serious' nonpolitical crimes" based on the international law origins of the "particularly serious crime" term).

☐ **Pursue post-conviction relief or other non-immigration remedies**

■ **Criminal court vacatur or resentencing**

If a conviction has been vacated on legal or constitutional grounds, see, e.g., *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473 (2010) (allowing to go forward an action to vacate a conviction based on a finding of ineffective assistance of counsel for failure to give correct advice regarding deportation consequences of a guilty plea), that vacatur should be respected by the immigration authorities. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will ... accord full faith and credit to this state court judgment [vacating a conviction under New York state law]"); *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) ("[W]hen a court ... vacates an original judgment of guilt, its action must be respected); see also *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). See generally Norton Tooby, *Post-Conviction Relief for Immigrants* (Law Offices of Norton Tooby, Oakland, California 2004); Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group, 2009), Chapter 4 ("Amelioration of Criminal Activity: Post-Conviction Remedies); Norton Tooby, *Criminal Defense of Immigrants, National Edition* (Law Offices of Norton Tooby, Oakland, California 2007), Chapter 8 ("Vacating Criminal Convictions"); Katherine A. Brady, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws, 10th edition* (Immigrant Legal Resource Center, San Francisco, California 2009), Chapter 8 ("Post-Conviction Relief" by Norton Tooby); Manuel D. Vargas, *Representing Immigrant Defendants in New York, 4th edition* (New York State Defenders Association, Albany, New York 2006), Section 5.3.M ("Seek post-judgment relief").

In *Rodriguez-Ruiz*, the Board distinguished the New York State statute under which Mr. Rodriguez-Ruiz' conviction was vacated from an expungement statute or other rehabilitative statute. Thus, it may be important for an individual whose conviction has been vacated to show that the vacatur is based on legal error in the underlying criminal proceedings as opposed to an expungement or other rehabilitative statute. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (held that a conviction vacatur was ineffective to eliminate its immigration consequences since the "quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes."); *Ali v. Ashcroft,* 395 F.3d 722, 728-29 (7th Cir. 2005) (deferring to *Matter of Pickering*, held that a state conviction remained valid for immigration purposes even though it was amended to a misdemeanor by the state court). However, some federal courts, including the Sixth Circuit in reversing *Matter of Pickering*, have put the burden on the government to show that the vacatur was solely to avoid adverse immigration consequences or other rehabilitative reasons, as opposed to legal defect. See *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006); see also *Barakat v. Holder*, 2010 U.S. App. LEXIS 19213, __ F.3d __ (6th Cir. 2010) (following prior Sixth Circuit decision in *Pickering* and finding that BIA improperly placed burden on immigrant, and distinguishing *Sanusi* by observing that, in *Sanusi*, the state court filings were included as part of the administrative record, and thus, there was a factual basis for the BIA to conclude that the conviction at issue was vacated for rehabilitative or immigration reasons.); *Nath v. Gonzales,* 467 F.3d 1185, 1188-89 (9th Cir. 2006) (held that the DHS has the burden of showing that a vacated conviction remains valid for immigration purposes); see also discussion above under "Deny deportability or inadmissibility — Deny 'conviction' — The criminal conviction has been vacated"; [but compare with *Sanusi v. Gonzales*, 474 F.3d 341 (6th Cir. 2007) (distinguished prior Sixth Circuit decision in *Pickering* to find that it would not give effect to Arkansas vacatur where state court *coram nobis* petition and the state court order failed to provide the evidence from which it may be reasonably inferred that the writ was granted on any recognized legal ground); *Rumierz v. Gonzales,* 456 F.3d 31 (1st Cir. 2006) (held that the BIA did not err in placing the burden on the alien to show the effect of convictions which were vacated or modified after final orders of removal had entered because such a position was not contrary to the applicable statutes, which did not address the burden in such situations, was consistent with BIA regulations, and served the interest of finality)].

If an individual's conviction is vacated subsequent to entry of a removal order based on the conviction, the agency should reopen the removal case to consider whether the conviction still counts for immigration purposes. See *Cardoso-Tlaseca v. Gonzales,* 460 F.3d 1102 (9th Cir. 2006); *Cruz v. AG of the United States*, 452 F.3d 240 (3d Cir. 2006); *see also Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) (granting motion to reopen where conviction that supported petitioner's deportation had been vacated based on defects in underlying proceedings); *Cruz-Sanchez v. INS*, 438 F.2d 1087, 1088-89 (7th Cir. 1971) (noting the BIA's position that the proper way to attack deportation based upon a subsequently vacated conviction is in a motion to reopen); [but see *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007) (Where the respondent presented no evidence to prove that his conviction was not vacated solely for immigration purposes, he failed to meet his burden of showing that his motion to reopen should be granted)].

Finally, where an individual is re-sentenced to a shorter prison sentence, the new sentence counts for immigration purposes. See *Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005) (trial court's decision to modify or reduce an alien's criminal sentence nunc pro tunc is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction); *Matter of Song*, 23 I&N 173 (BIA 2001).

- **Congressional private bill**

  See Robert Hopper and Juan P. Osuna, "Remedies of Last Resort: Private Bills and Deferred Action," *Immigration Briefings*, No. 97-6 (Federal Publications, Washington, D.C., June 1997).

- **Executive pardon**

  See INA 237(a) (2) (A) (v).

☐ **Seek release from detention after removal order**

The Supreme Court has struck down the government's practice under the current immigration statute of indefinitely detaining individuals who have been ordered deported or removed after having "entered" the United States, but whom the government is unable to deport or remove. See *Zadvydas v. Davis*, 533 U.S. 678 (2001). Noting the serious constitutional problem that would arise if the immigration statute were read to permit indefinite or permanent deprivation of human liberty (at least with respect to individuals who had formally "entered" the United States, as opposed to being stopped at the border or only "paroled" into the country), the Court interpreted the statute to limit post-order detention to a period reasonably necessary to bring about the detainee's removal from the United States. For the sake of uniform administration in the federal courts, the Court stated that six months would be a presumptively reasonable period of detention to effect a detainee's removal from the country. If removal is not accomplished within this period, the Court indicated that the individual should be released if "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); see also *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008) (Supreme Court precedent did not create an exception for indefinite detention of individuals based on harm threatening mental illness; to overcome the presumptive period, the government had to show that there was a significant likelihood of removal in the foreseeable future.); *D'Alessandro v. Mukasey*, 2009 U.S. Dist. LEXIS 24954 (W.D.N.Y. 2009) (granting habeas relief after finding that the petitioner "has been confined to civil detention for sixteen months, well beyond the presumptively reasonable six-month period set forth in *Zadvydas*").

The Supreme Court has extended the rationale of its *Zadvydas* decision to individuals ordered excluded or removed after being stopped at the border or "paroled" into the country because the Court read the statute's post-order detention provisions to prohibit indefinite detention and these statutory provisions do not distinguish between different groups of detainees. See *Clark v. Martinez*, 543 U.S. 371 (2005).

If failure to remove is due to an individual's securing of a stay of removal pending court review of his or her removal order, one court has found that this does not mean that the individual may be denied meaningful consideration for release pending the court's review of the removal order. See *Oyedeji v. Ashcroft*, 332 F. Supp.2d 747 (M.D. Pa. 2004).

In addition, while the government may condition release upon the posting of a bond, one court found that the bond must be reasonable and appropriate under the circumstances and held that a bond that had the effect of preventing an immigrant's release because of inability to pay and resulted in potentially permanent detention was presumptively unreasonable. See *Shokeh v. Thompson*, 369 F.3d 865 (5th Cir. 2004).