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Providing Immigration Advice During Criminal Proceedings: Preempting Ineffective Assistance of Counsel Claims When Non-Citizen Aliens Seek to Withdraw Guilty Pleas to Avoid Adverse Immigration Consequences

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Abstract

Criminal aliens have long been deported from the United States. In the past decade, U.S. Immigration and Customs Enforcement (ICE) has stepped up efforts to identify, detain, and remove criminal aliens incarcerated across all jurisdictions. The possible immigration consequences of criminal actions are now at the forefront of many criminal pleas. The Supreme Court's recent decision in *Padilla v. Kentucky* now mandates that defense counsel inform non-citizen alien clients whether a possible criminal plea carries a risk of deportation. The complexities of the Immigration and Nationality Act (INA) only add to the difficulties faced by defense attorneys when providing advice to non-citizen aliens concerning pleading to criminal dispositions. Failure to provide competent and accurate advice concerning potential deportation consequences now clearly constitutes a Sixth Amendment violation. This Article examines how an alien's residence status may be altered by a criminal plea; how all parties in the criminal justice system need to understand the potential immigration consequences of a given plea; and steps that should be taken to preempt future attempts to withdraw convictions

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based on a failure to inform an alien of potential immigration consequences.

I. Introduction

Deportation from the United States by immigration officials has always been a potential consequence of a criminal plea. However, with the growing implementation of Secure Communities[1]—the U.S. Immigration and Customs Enforcement's (ICE) plan to identify, detain, and remove criminal aliens incarcerated across all jurisdictions—the possible immigration consequences of criminal actions are now at the forefront of many criminal pleas.[2] The complexities of the Immigration and Nationality

1. *See* Press Release, U.S. Immigration and Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008) http://www.ice.gov/news/releases/0804/080414washington.htm. *See also Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Jan. 3, 2012); *Criminal Alien Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program/ (last visited Jan. 3, 2012).

2. In the last several years, ICE has significantly increased deportations for criminal aliens. The numbers have increased from 102,024 in fiscal year 2007, to 114,415 in fiscal year 2008, to 136,343 in fiscal year 2009, and finally 195,772 in fiscal year 2010. *See ICE Total Removals*, U.S. IMMIGRATION

Act (INA)[3] only add to the difficulties now faced by defense attorneys when providing advice to non-citizen aliens concerning pleading to criminal dispositions.[4]

The Supreme Court's recent decision in *Padilla v. Kentucky*[5] now mandates that defense counsel inform non-citizen alien[6] clients whether a possible criminal plea carries a risk of deportation. Although the penalty of deportation is "uniquely difficult to classify as either a direct or a collateral consequence,"[7] the Court restated its prior holding that deportation, as a consequence of a criminal conviction, is a "particularly severe penalty."[8] As such, failure to provide competent and accurate advice concerning potential deportation consequences constitutes a Sixth Amendment violation.[9] Additionally, when immigration consequences are "succinct, clear, and explicit," defense counsel must provide accurate advice as to possible immigration risks.[10] Although this decision directly affects defense counsel, prosecutors and judges must preserve limited judicial resources and affirmatively seek to prevent future ineffective assistance of counsel claims by defendants.[11]

AND CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf (last visited Jan. 3, 2012).

3. The Immigration and Nationality Act (INA) was originally created in 1952 and has been codified at 8 U.S.C. The INA has been modified numerous times by Congress. *See Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis (follow "LAWS" on top bar; then follow "Immigration Nationality Act" on page) (last visited Jan. 3, 2012).

4. The Department of Justice (DOJ), The Executive Office for Immigration Review (EOIR) provides free updated professional materials to aid counsel in understanding the INA. *See, e.g.,* CHARLES A. WIEGAND, III, FUNDAMENTALS OF IMMIGRATION LAW (2011), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/Fundamentals_of_Immigration_Law.pdf. State-specific materials are also available. The Immigrant Defense Project has "Quick Reference Charts" for various states, including New York, New Jersey, Connecticut, Vermont, and Pennsylvania. *See* IMMIGRANT DEFENSE PROJECT, http://immigrantdefenseproject.org/?s=quick+reference (last visited Jan. 3, 2012). *See also* MARY HOLPER, REFERENCE GUIDE TO THE BASIC IMMIGRATION CONSEQUENCES OF SELECT VIRGINIA OFFENSES (2007), *available at* http://www.lexisnexis.com/Community/immigration-law/cfs-filesystemfile.ashx/__key/CommunityServer.Components.SiteFiles/ImmigrationLawPDFs/Virginia-Reference-Guide-TOTAL.pdf; BECKY SHARPLESS, FLORIDA IMMIGRANT ADVOCACY CTR., QUICK REFERENCE GUIDE TO THE BASIC IMMIGRATION CONSEQUENCE OF SELECT FLORIDA CRIMES (2003), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_so_Guide%20-%20Florida%20Offenses%20-%202003.pdf.

5. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

6. An alien is defined as "any person not a citizen or national of the United States." Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2011).

7. *Padilla,* 130 S. Ct. at 1482.

8. *Id.* at 1481 (citing Fong Yue Ting v. United States, 149 U. S. 698, 740 (1893)).

9. *See id.* at 1482.

10. *See id.* at 1483.

11. The Court acknowledged the need for the government prosecutor to actively be informed of potential immigration consequences for defendant alien: "[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id*. at 1486.

Immigration law is rarely clear and always changing.[12] Adding to the uncertainty, immigration statutes generally articulate categories of crimes, such as crimes involving moral turpitude (CIMTs),[13] controlled substances,[14] or aggravated felonies[15] that would require the initiation of removal proceedings.[16] Determining which statutes apply is not always straightforward, as is demonstrated by numerous court decisions at the administrative and federal level.

Immigration terminology also differs from the common understanding of most criminal practitioners. Terms such as an "aggravated felony offense" apply to crimes not generally thought of as aggravated in the criminal context. Furthermore, evaluating whether a plea to a criminal statute may result in removal requires specific knowledge regarding whether a specific part of a divisible statute results in removal and which part of the statute would not trigger a removal proceeding.[17] Additionally, virtually any criminal convictions could preclude a finding of good moral character and thereby reduce an alien's chance of obtaining certain types of immigration relief and benefits.

Immigration law provides for two separate means of removal based on criminal offenses. Aliens lawfully admitted to the U.S., as lawfully permanent residents or as nonimmigrants, are deported pursuant to grounds articulated in INA § 237(a), 8 U.S.C. § 1227(a). Aliens seeking admission, or petitioning to lawfully remain in the U.S., must be admissible under the INA pursuant to lawful status and not ineligible for admission because of criminal acts pursuant to INA § 212(a)(2), 8 U.S.C. § 1182(a)(2). During removal proceedings, aliens may be represented by counsel; however, legal counsel is not appointed or provided for free by the government.[18]

The intricacy between which criminal convictions permit an alien to remain in the U.S. and which convictions require removal are litigated vigorously in the immigration courts on a daily basis. In some instances, non-citizen aliens facing removal may be allowed to remain in the U.S. if they are granted discretionary relief. Discretionary relief may include

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12. "Immigration law can be complex, and it is a legal specialty of its own." *Id*. at 1483.

13. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2011); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2011).

14. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2011); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2011).

15. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2011).

16. *See* INA § 240, 8 U.S.C. § 1229a (2011); *see also* 8 C.F.R. Part 1240 (2011).

17. *In re* Almanza-Arenas, 24 I. & N. Dec. 771, 773 (B.I.A. 2009) (holding that when a statute is divisible, the alien has the burden of establishing that the conviction was pursuant to the part of the statute that does not involve moral turpitude).

18. "In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." INA § 292, 8 U.S.C. § 1362 (2011).

adjustment of status[19] or cancellation of removal.[20] Humanitarian relief may be discretionary or mandatory relief such as asylum, withholding of removal, or Convention Against Torture (CAT) protection.[21] All aliens with criminal convictions, irrespective of the serious nature of the crime, may seek mandatory protection from removal if the alien's life or freedom would be threatened if returned to their country of citizenship.[22]

Furthermore, there are circumstances in which criminal aliens simply cannot be returned to their home countries. These include the failure to obtain an international treaty to permit aliens to be returned; the lack of a recognized government in power; or a refusal by a foreign government to issue a travel document.[23] At the same time, even if removal to certain countries may not be effectuated at this time, it is possible in the future those conditions could change and removal may be possible in the future. A non-citizen should never be assured or promised that discretionary or mandatory relief will be granted in immigration proceedings.

The complexities of the INA now place defense counsel in an untenable position when counseling a non-citizen client. Although there is great debate whether *Padilla v. Kentucky s*hould be applied retroactively or as a new rule, this article focuses on the need for defense counsel to provide general immigration advice to prevent future claims of ineffective assistance of counsel. Prosecutors and judges should also actively seek to prevent future ineffective assistance claims by understanding when potential immigration consequences will apply to guilty pleas and by making the record clear that the defendant is aware of the possible consequences.

So that all parties to the criminal proceeding can adequately determine the possible immigration consequences of a plea disposition, defendants should clearly acknowledge their general immigration status. A defendant's immigration status will rarely be clear on a rap sheet or police report, and it may be outright wrong.[24] If the defendant fails to articulate his general immigration status or declines to provide accurate information to the prosecution as part of the negotiation process, then the alien should be prevented from receiving any favorable plea disposition by government prosecutors. Prosecutors have an affirmative obligation to prevent future

19. *See, e.g.*, INA § 204, 8 U.S.C. § 1154 (2011); 8 C.F.R. § 1245.10 (2011).

20. *See, e.g.*, INA § 240A, 8 U.S.C. § 1229b (2011).

21. *See* 8 C.F.R. § 208 (2011).

22. *See* 8 C.F.R. §§ 1208.16–.17 (2011).

23. *See* INA § 241(b), 8 U.S.C. § 1231(b) (2011). However, recent statistics indicate that removals have been made in some instances to virtually every country worldwide. *See generally* OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

24. ICE acknowledges that fingerprints taken prior to 2005 may not be in the IDENT database. *See* Tom Jackman, *Rape Suspect's Fingerprints Not in ICE Database*, WASH. POST., Mar. 25, 2011, at B5. Only individuals processed by ICE will have their fingerprints in the IDENT system. *See id.* Therefore, aliens who entered illegally but were not caught by immigration officials, or aliens who simply overstayed their visa, would not be in the IDENT database.

claims arising under *Padilla*, and since the process is completely voluntary on the defendant's part, the alien defendant has the choice to disclose his immigration status or plea without any offers of consideration. Without affirmative steps by the prosecution, any alien's plea may be overturned on appeal when the alien asserts misadvice by counsel.

A defendant always has the right to assert a Fifth Amendment claim when the alien's immigration status relates to the element of a present or future criminal charge.[25] The Court has held that an alien does not have "to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[26] A valid argument exists that ICE could use the alien's immigration acknowledgement in a criminal proceeding to seek a future removal, but removal is a civil proceeding, not a criminal one. However, if an alien wishes to contest the advice given by his counsel under the *Padilla* decision, the alien will, at some point in the proceedings, have to reveal his actual immigration status to indicate that wrong advice was given. Aliens generally do not dispute their legal or illegal immigration admission status during removal proceedings, but rather contest removal on the basis of other legal grounds or seek relief options available to them.[27]

A distinct legal difference needs to be made if a defendant has entered the U.S. illegally, has overstayed the permitted term of visa admission, or has reentered the U.S. illegally after previously being removed. In these instances, the alien defendant is not in legal status and has no legal claim to presently remain in the U.S. Any relief sought by the unlawfully present alien to remain in the U.S. is only speculative, not subject to *Padilla*, and should not be considered by the prosecution when plea considerations are made.[28] Additionally, in the event that a defendant falsely asserts a claim to U.S. citizenship, then *Padilla* does not apply and should not be allowed to be raised later. A false claim to U.S. citizenship is

25. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself ." U.S. CONST. amend. V.

26. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

27. Aliens charged under INA Section 212 have the burden of proof to demonstrate they are admissible in the U.S. already. *See* INA § 291, 8 U.S.C. § 1361 (2011). For aliens who lawfully enter and are deportable under INA Section 237, the government has the burden of proof. *See* INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3) (2011). The government can demonstrate lawful entry through the use of computer records or alien files to document the alien's lawful entry into the U.S.

28. *Padilla* addressed advice being given to a permanent resident who was lawfully in the U.S. rather than an alien who may have some speculative relief available if placed in removal proceedings. "The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

also a removable offense[29] and is not subject to a general waiver.[30]

As part of any favorable criminal plea disposition, it is recommended that the government require that the defendant acknowledge: (1) the alien's general immigration status; (2) that the defendant has been advised of his rights under *Padilla*; (3) that there are potentially several immigration consequences as a result of the guilty plea, including a permanent bar to living in the U.S.;[31] (4) that the defendant could be detained during the pendency of immigration proceedings;[32] and (5) that no promises have been made that the defendant would not be detained or deported by ICE.[33] The alien may also need to provide additional residency and admission information if the alien wishes the government to assess the alien's eligibility to apply for certain relief from removal. For example, a plea disposition that allows an alien's sentence to be 364 days, as opposed to one year, may only matter if the alien can meet the minimum residency qualifications necessary to seek relief from removal.[34] An alien should not receive a favorable sentence, for immigration purposes, unless the alien can demonstrate that he is actually eligible and likely to receive some form of relief from removal.

Also, non-legal permanent residents should be aware that certain crimes may permit ICE to administratively remove the alien and there will not be an opportunity to apply for discretionary relief before an immigration judge.[35] Additionally, a defendant should also be required to acknowledge prior to a criminal trial that he has received advice pursuant to *Padilla* and fully discussed the immigration consequence of any possible plea offers. While the defendant in *Padilla* was adversely affected by pleading guilty, a defendant could likely also make a claim of ineffective assistance of counsel

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29. A criminal conviction is not required to sustain a removal charge when an alien asserts a false claim to U.S. citizenship. *See* INA § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2011); INA § 237(a)(3)(D)(i), 8 U.S.C. § 1227(a)(3)(D)(i) (2011).

30. The only waiver for a false claim to U.S. citizenship is if (1) there is a reasonable belief by the alien; (2) the alien's parents are or were U.S. citizens; and (3) the alien was a permanent resident prior to age 16. *See* INA § 212(a)(6)(C)(ii)(II), 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (2011); INA § 237(a)(3)(D)(ii), 8 U.S.C. § 1227(a)(3)(D)(ii) (2011).

31. Even in the event that the present conviction does not make the alien removable, this conviction, in conjunction with future convictions, could contribute to the alien's removal. *See Padilla*, 130 S. Ct. at 1481 n.8 ("The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen 'defendant that a criminal conviction may have adverse immigration consequences.'") (internal citation omitted).

32. *See* 8 C.F.R. § 1236.1(b) (2011) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody . . . ."); s*ee also In re* Rojas, 23 I&N Dec. 117 (B.I.A. 2001). A criminal alien who is released from criminal custody is subject to mandatory detention pursuant to INA 236(c), even if not immediately taken into custody by ICE when released from incarceration. *See In re* Kotliar, 24 I&N Dec. 124 (B.I.A. 2007).

33. *See* INA § 236, 8 U.S.C. § 1226 (2011) (giving a great deal of discretion to the Attorney General and ICE).

34. *See* INA § 240A(a), 8 U.S.C. § 1229b(a) (2011) (detailing the residency requirements for cancellation of removal for certain permanent residents).

35. INA § 238(b)(3), 8 U.S.C. § 1228(b)(3) (2011).

if counsel fails to discuss the potential *advantages* of taking a plea rather than going to trial, particularly when an offered plea may not have resulted in similar immigration consequences.

II. Determining a Defendant's Citizen and Immigration Status

In seeking to provide advice pursuant to *Padilla*, or to simply understand the immigration consequences of any criminal plea, one must first determine the individual's citizenship status and then look to the nature of the criminal conviction. A citizenship determination may require a complicated analysis and examination of the naturalization laws as applied to an alien during a specific period of time and which have changed significantly over the years. As a U.S. citizen cannot be deported,[36] the ramifications of who is a U.S. citizen now matter greatly when examining the potential consequence of a criminal disposition. Generally, a person born in the U.S. is automatically a U.S. citizen.[37] Citizenship for individuals born outside of the U.S. may only be acquired though Acts of Congress.[38] U.S. citizenship by either parent at the time of an individual's birth or adoption, or through the naturalization of a parent, may or may not convey U.S. citizenship on an individual.[39]

The nationality of a single parent is not the only determining factor. For instance, acquisition of citizenship or derivative citizenship may require U.S. citizenship or naturalization of both parents, the presence of the non-citizen in the United States for a residential period, and the lawful admission of the non-citizen as a permanent resident.[40] Additionally, children born out of wedlock may also need to determine whether paternity was established pursuant to the laws of the country of birth and at the time of birth.[41] Stepchildren who are not adopted are not eligible to derive citizenship from a stepparent.[42]

The burden of proof to establish eligibility for acquired or derivative

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36. *See, e.g.*, Fierro v. INS, 81 F. Supp. 2d 167, 168 (D. Mass. 1999) (discussing that Fierro defended his own deportation on the grounds that he was an American citizen).

37. INA § 301(a), 8 U.S.C. § 1401(a) (2011). Children born to foreign government officials entitled to diplomatic privileges in the United States are not entitled to citizenship by birth. U.S. Const. amend. XIV, § 1.

38. Miller v. Albright, 523 U.S. 420, 423 (1998).

39. *See, e.g.*, INA §§ 301, 303, 309, 324, 8 U.S.C. §§ 1401, 1403, 1409, 1435 (2011) (dealing with both "nationality at birth" and "nationality through naturalization").

40. *See In re* Nwozuzu, 24 I. & N. Dec. 609, 610 (B.I.A. 2008) (applying these requirements under former INA § 321(a), 8 U.S.C. § 1432(a) (1994)).

41. *See In re* Rowe, 23 I. & N. Dec. 962, 966–67 (B.I.A. 2006) (holding that under former INA § 321(a)(3), 8 U.S.C. § 1432(a)(3) (1994), a child born out of wedlock—absent subsequent marriage of the natural parents—was illegitimate under Guyanese law and therefore did not make the child a U.S. citizen upon the naturalization of his mother); *In re* Hines, 24 I. & N. Dec. 544, 547 (B.I.A. 2008) (same under former INA § 321(a)(3), 8 U.S.C. § 1432(a)(3) (1988), applying Jamaican law). When determining acquisition or derivation of citizenship based upon the natural father's citizenship at the time of birth, INA § 101(c) requires the child's legitimating. *See also* INA §§ 301 and 309.

42. *See In re* Guzman-Gomez, 24 I. & N. Dec. 824, 824–26 (B.I.A. 2009).

citizenship lies with the petitioner.[43] An individual with a valid claim to U.S. citizenship through parental lineage should affirmatively file an N-600[44] application with the U.S. Citizenship and Immigration Services (USCIS) for a determination on citizenship status. A determination that a foreign born individual has a valid claim to U.S. citizenship should never be assumed or relied upon to make a recommendation for plea purposes.

Application times for processing the N-600 vary significantly and it is unlikely that a final determination on citizenship may be obtained prior to the completion of criminal proceedings. USCIS's web site provides general processing times for these applications so that a general idea can be obtained as to the time it will take for an initial USCIS determination.[45] A negative decision from USCIS can be appealed to the Administrative Appeals Office (AAO).[46] Upon exhaustion of the administrative appeals process, an individual may sue in the U.S. District Court under 8 U.S.C. § 1503(a).

A non-citizen may also be eligible for naturalization if certain criteria have been met. Naturalization confers citizenship on an individual after birth.[47] Generally, only lawful permanent residents may apply for naturalization; however, some limited exceptions do exist.[48] U.S. citizenship through naturalization is not completed by simply filing the N-400 naturalization application.[49] Naturalization[50] requires an Oath of Allegiance to the U.S., generally administered in a formal naturalization ceremony.[51] Naturalization applicants must demonstrate good moral character,[52] and a

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43. Berenyi v. Dist. Dir., INS, 385 U.S. 630, 636–37 (1967).

44. Instructions detail which aliens qualify to fill out an N-600 form. *See* USCIS, FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP, *available at* http://www.uscis.gov/files/form/n-600instr.pdf.

45. *See* USCIS PROCESSING TIME INFORMATION, USCIS.GOV, https://egov.uscis.gov/cris/processTimesDisplayInit.do (last visited Jan. 3, 2012).

46. *See generally* THE ADMINISTRATIVE APPEALS OFFICE (AAO), USCIS.GOV, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=dfe316685e1e6210VgnVCM100000082ca60aRCRD&vgnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD (last visited Jan. 3, 2012).

47. INA § 101(a)(23), 8 U.S.C. § 1101(a)(23) (2011).

48. *See, e.g.*, USCIS, FORM M-480, NATURALIZATION ELIGIBILITY WORKSHEET INSTRUCTIONS, *available at* http://www.uscis.gov/files/article/attachments.pdf (including a checklist that states "You are not eligible to apply for naturalization" if the applicant is not a permanent resident). *See also* 8 INA § 329, 8 U.S.C. § 1440, and 8 INA § 329, 8 U.S.C. § 1446,

49. *See In re* Navas-Acosta, 23 I. & N. Dec. 586, 587 (B.I.A. 2003) (holding that respondent did not attain the status of a "national" of the United States "by applying for naturalization and taking an oath of allegiance").

50. *See* INA § 316, 8 U.S.C. § 1427 (2011); 8 C.F.R. Part 316 (2011).

51. *See* INA § 337, 8 U.S.C. § 1448 (2011).

52. *See* INA § 316(e), 8 U.S.C. § 1427(e) (2011) (referencing the burden of the applicant to demonstrate good moral character). Good moral character is not solely tied to criminal activity. A court may find that an alien failed to demonstrate good moral character when the alien: practiced or is practicing polygamy; earns his or her income principally from illegal gambling activities; is or was a habitual drunkard; willfully failed or refused to support dependents; or even had an extramarital affair which tended to destroy an existing marriage. 8 C.F.R. § 316.10(b) (2011). *See also* INA § 101(f), 8 U.S.C. § 1101(f) (2011).

criminal conviction could temporarily or permanently bar an application from being approved.[53] In general, most criminal convictions resulting in a temporary or permanent bar to naturalization could also result in the initiation of removal proceedings.

A. Lawful Permanent Resident

A Lawful Permanent Resident (LPR),[54] commonly referred to as a "Green Card" holder, has been accorded the privilege of residing permanently in the United States. However, an LPR is subject to removal from the U.S. or may be inadmissible to the U.S. for many, but not all crimes. Furthermore, there may also be situations where a criminal conviction may not make the individual removable on the first conviction, but may make the individual removable or inadmissible after a subsequent conviction.[55]

Even if determined to be removable in immigration proceedings,[56] an LPR may be eligible to apply for some forms of discretionary or mandatory relief.[57] For example, a form of discretionary relief includes Cancellation of Removal. This provision of the INA allows grounds of inadmissibility or deportability to be cancelled if the LPR: (1) has been lawfully admitted for permanent residence for not less than 5 years; (2) has resided in the U.S. continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony.[58]

Even if eligible to apply for relief, there is no guarantee that an LPR will be granted the discretionary or mandatory relief from removal desired. Most relief from removal is discretionary and requires that the alien not only demonstrate eligibility, but demonstrate compelling reasons why the alien should be granted the relief sought.[59] Furthermore, if the immigration proceedings are held close in time to the conviction, the LPR may not be able to demonstrate many positive rehabilitation factors to make an effective application for relief, such as making positive life changes since the criminal activity.

The *Padilla* decision primarily addressed the particularly severe immigration penalty faced by a long term LPR with significant ties to the

53. For example, a simple DWI offense is generally not a removable offense. However, a DWI arrest and/or conviction may be used to bar naturalization under the provision related to being a habitual drunkard. *See* 8 C.F.R. § 316.10(b)(2)(xii) (2011).

54. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2011).

55. *See generally* INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (2011); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2011) (addressing in part the deportation of aliens who are "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct"). Note that these provisions apply to *all* non-citizens or nationals of the United States. *See* INA § 101(a)(3); 8 U.S.C. § 1101(a)(3) (2011) (defining "alien").

56. *See generally* INA § 240, 8 U.S.C. § 1229a (2011) (addressing removal proceedings).

57. *See, e.g.*, 8 C.F.R. §§ 1240.11(a)(1), 1240.20 ,1240.21 (2011).

58. INA § 240A(a), 8 U.S.C. 1229b(a) (2011).

59. *See, e.g.*, *infra* notes 71–72, 88–89 and accompanying text.

community and prior military service.[60] In that case, Padilla pleaded guilty to the possession and trafficking of a large amount of marijuana in his tractor-trailer.[61] Only later did he assert that he would have gone to trial had he known about the potential immigration consequences.[62] The evidence against Padilla was rather overwhelming, and it is unclear whether going to trial would have further benefitted him.[63] When aliens are facing controlled substances charges, especially crimes involving trafficking in a controlled substance, "removal is practically inevitable."[64]

B. Nonimmigrant

A nonimmigrant alien is an individual who was lawfully admitted to the U.S. on a visa for a temporary purpose, such as a tourist, student, or for business.[65] A nonimmigrant can be in-status, within the period of legal admission, or out-of-status, meaning the period of admission has expired. Individuals who are in-status are subject to removal if they do not comply with the terms of their visa, such as a tourist who was illegally employed or by committing a removable crime.[66] Individuals who are out-of-status, generally known as "overstays," are immediately subject to removal from the U.S. for overstaying the terms of their admittance, as they no longer have a legal right to remain in the U.S.[67]

It is important to note that since a nonimmigrant does not have permanent legal status, virtually *any* crime committed by a nonimmigrant can be used to deny renewal of a U.S. visa or for readmission at the border into the U.S.[68] Admittance to the U.S. is a privilege, not a right, and individuals who commit a crime in the U.S. are not easily welcomed back. Additionally, a nonimmigrant with a criminal conviction that facilitates the initiation of removal proceeding may also have much greater limited relief options available.

Even with certain criminal convictions, excluding aggravated felony offenses,[69] an in-status or overstay nonimmigrant may still seek LPR status

60. Padilla v. Kentucky, 130 S. Ct. 1473, 1477–78 (2010).

61. *Id*. Further factual details of the Padilla case are found in the lower court decision. *See* Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

62. *See Padilla*, 130 S. Ct. at 1478 (noting that Padilla brought such claims "[i]n this post conviction proceeding . . . .").

63. *See id.*

64. *Id.* at 1480.

65. *See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2011).

66. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (2011) (defining "nonimmigrant status violators").

67. *See* Equan v. U.S. I.N.S., 844 F.2d 276, 278 (5th Cir. 1988).

68. *See* INA § 214(b), 8 U.S.C. § 1184(b) (2011) ("Every alien . . . shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status . . . .").

69. INA § 101(43), 8 U.S.C. § 1101(43) (2011).

under certain limited circumstances. To seek adjustment to an LPR, an alien must have a valid immigration petition that is immediately available[70] and a qualifying relative to seek a hardship waiver.[71] Aliens with certain criminal convictions must demonstrate that extreme hardship would be caused to a U.S. citizen or lawfully permanent residence spouse, parent, son, or daughter of the nonimmigrant.[72] An alien is unlikely to satisfy this requirement if the alien is detained for a lengthy period of time, and therefore, not financially, emotionally, or physically supporting the qualifying family member.

Adjustment of status eligibility requirement are found in 8 C.F.R. § 1245.1. There are numerous categories of restricted aliens who cannot adjust their status in the U.S.[73] For instance, individuals who enter as alien crewman, aliens continuing or accepting unauthorized employment, and aliens admitted in Transit Without Visa (TWV) are prohibited from seeking adjustment of status in the U.S.[74] Additionally, an alien who entered the U.S. on a fiancé visa also has limitations on adjusting status.[75] Therefore, it is essential to understand the general categories of aliens who can and who cannot adjust status in the U.S.

A nonimmigrant seeking LPR status must first have a validly filed immigrant petition. The two most common forms of immigrant petitions are family and labor based.[76] For family petitions, an alien must have an approved or immediately approvable I-130 relative petition.[77] The relative petition must be immediately available at the time the nonimmigrant seeks adjustment of status, such as relief in a removal hearing.[78] The following relatives can receive an immediately available petition: (1) spouses of U.S. citizens; (2) unmarried children under age twenty-one of U.S. citizens; and (3) parents of U.S. citizens, when the citizen is at least twenty-one years old.[79]

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70. 8 C.F.R. § 1245.10(b) (2011) (requiring the alien to "ha[ve] an immigrant visa number immediately available" and "[p]roperly file[] Form I-485," among other things).

71. *See, e.g.*, INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (2011) (giving the Attorney General discretionary authority to waive inadmissibility provisions as they would otherwise apply to "a single offense of simple possession of 30 grams or less of marijuana," conditioned on a showing of hardship to a related U.S. citizen).

72. *See id.*

73. 8 C.F.R. § 1245.1(b) (2011) (listing several categories of aliens who generally "are ineligible to apply for adjustment of status to that of a lawful permanent resident").

74. *See* INA § 245(c), 8 U.S.C. 1255(c) (2011).

75. *See, e.g., In re* Sesay, 25 I. & N. Dec. 431 (B.I.A. 2011) (noting several limitations, but ultimately holding that the applicant alien was eligible for adjustment).

76. *See* INA § 203(a), 8 U.S.C. § 1153(a) (2011) (setting preference allocation for family-sponsored immigrants); INA § 203(b), 8 U.S.C. § 1153(b) (2011) (setting preference allocation for employment-based immigrants). LPR status can also be obtained by winning the "Green Card Lottery." *See* INA § 203(c), 8 U.S.C. § 1153(c) (2011) (setting preference allocation of visas for "diversity immigrants").

77. *See* USCIS, I-130, PETITION FOR ALIEN RELATIVE, *available at* http://www.uscis.gov/files/form/i-140.pdf.

78. 8 C.F.R. § 1240.11(a)(1) (2011) (stating that an alien may apply for adjustment of status under INA § 245 during a removal proceeding if all the application requirements are met).

79. *See* INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (2011); USCIS, INSTRUCTIONS FOR FORM I-130, PETITION FOR ALIEN RELATIVE 5, *available at* http://www.uscis.gov/files/form/i-130instr.pdf ("When a petition is approved for the husband, wife, parent, or unmarried minor child of a United States citizen . . .

Other categories of family preference exist, but can have significant waiting periods. It is not uncommon for the waiting period to be five to ten years depending on the classification.[80] INA Family sponsored preference visas are issued to eligible immigrants in the order in which a petition has been filed.[81] The preference category includes the following: (1) unmarried sons and daughters over age twenty-one of U.S. citizens; (2) spouses of lawful permanent residents, and unmarried children (any age) of lawful permanent residents; (3) married children (any age) of U.S. citizens and; (4) brothers and sisters of U.S. citizens, when the citizen is at least twenty-one years old.[82]

A nonimmigrant may also seek adjustment of status with a labor petition.[83] The alien must have an immediately available I-140 labor petition[84] and a U.S. employer who is willing to immediately employ or continue to employ the alien in order for the alien to seek the adjustment of status.[85] In either case of a family or labor petition, a criminal conviction will prevent an alien from adjusting to LPR status unless the alien can demonstrate—among other things—that the alien's removal will result in extreme hardship to a qualifying U.S. citizen or LPR resident spouse, parent, or child.[86] In a rare twist, there may also be situations where an alien's conviction may make the individual deportable as an aggravated felon under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), but not inadmissible under INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) for having committed a CIMT. [87]

. [t]hey do not have to wait for a visa number because immediate relatives are not subject to the immigrant visa limit.").

80. *See generally Visa Bulletin*, U.S. DEP'T OF STATE, http://www.travel.state.gov/visa/bulletin/bulletin_1360.html (last visited Jan. 3, 2012). The preference categories change on a month to month basis.

81. INA § 203(e)(1), 8 U.S.C. §1153(e)(1) (2011).

82. INA § 203(a), 8 U.S.C. § 1153(a) (2011) (describing annual allocation of immigrant visas). First: (F1) Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference. 8 U.S.C. § 1153(a)(1) (2011). Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers. *See id*. at § 1153(a)(2). Third: (F3) Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences. *Id.* at § 1153(a)(3). Fourth: (F4) Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences. *Id.* at § 1153(a)(4).

83. INA § 203(b), 8 U.S.C. § 1153(b) (2011) (setting preference allocation for employment-based immigrants).

84. USCIS, FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER, *available at* http://www.uscis.gov/files/form/i-140.pdf.

85. *See supra* note 79 and accompanying text; USCIS, INSTRUCTIONS FOR I-140, IMMIGRANT PETITION FOR ALIEN WORKER, *available at* http://www.uscis.gov/files/form/i-140instr.pdf.

86. *See supra* notes 71–72 and accompanying text.

87. For example, a crime of violence with a one year sentence and that is not domestic violence related is an aggravated felony subject to deportation under INA § 237(a)(2)(A)(iii), but not a CIMT under § 212(a)(2)(A)(ii)(II). *See In re* Torres-Varela, 23 I. & N. Dec. 78, 78, 86–87 (B.I.A. 2001) (LPR who committed an aggravated felony offense and was found removable, sought relief in the form of a new adjustment of status as the conviction did not render him inadmissible as a CIMT offender).

A nonimmigrant without an immediate visa petition may also seek to remain in the U.S. if the alien can demonstrate—among other things—that removal would result in exception and extremely unusual hardship to the alien's spouse, parent or child who is a US citizen or an LPR.[88] The exceptional and extremely unusual hardship threshold is a very high standard and granted in only very limited cases, such as in the case of a sick or disabled child. In order to be eligible for Cancellation Removal and Adjustment of Status for Certain Nonpermanent Resident, the alien must also demonstrate ten years of continuous physical presence in the U.S. and good moral character during this period of time.[89] Therefore, a criminal conviction would defeat the good moral character requirement.[90]

C. Unlawfully Entered Without Inspection

An illegal entrant or immigrant violator is an individual who entered the U.S. without proper permission or parole.[91] This type of illegal entrant is commonly referred to as having entered without inspection (EWI).[92] EWI's are not in the U.S. legally and are subject to immediate removal for failing to lawfully enter.[93] Illegally entering or reentering the U.S. is also a federal crime.[94]

EWI's may seek relief from removal by applying for immigrant status similar to nonimmigrants. However, EWI's seeking adjustment of status based on an immediately available relative petition must also demonstrate that they have been grandfathered under the provision of INA Section 245(i).[95] In general, only individuals who have entered the U.S. prior to December 21, 2000 and who filed a valid immigrant petition prior to April 30, 2001 may qualify for grandfathering.[96] Some aliens may also be covered dependants when qualifying for the grandfathering requirements.[97] Therefore, an EWI who has illegally entered the U.S. after December 21, 2000 has no legal means of seeking LPR status though an immigrant petition here in the U.S. There may be other legal means of obtaining temporary or permanent status in the U.S., but illegal presence coupled with a criminal conviction severely limit the alien's possibility of future legal residence.

88. *See* INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2011).

89. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2011).

90. *See* INA § 101(f), 8 U.S.C. § 1101(f) (2011) (including several criminal offenses that preclude a finding of good moral character). *See also* INA § 316(d), 8 U.S.C. § 1427(d) (2011); 8 C.F.R. § 316.10 (2011).

91. INA § 212(a)(6)(A), 8 U.S.C. § 1182 (a)(6)(A) (2011).

92. *See, e.g.*, Villanueva v. Holder, 615 F.3d 913, 914 (8th Cir. 2010).

93. *See supra* notes 91–92.

94. INA § 275(a), 8 U.S.C. § 1325(a) (2011); INA § 276, 8 U.S.C. § 1326 (2011).

95. INA § 245(i), 8 U.S.C. § 1255(i) (2011).

96. *See* INA § 245(i)(1)(B)–(C), 8 U.S.C. § 1255(i)(1)(B)–(C) (2011).

97. *See id.*

D. Other Temporary Legal Status

Aliens may also have some type of temporary or semi-permanent legal status. For instance, individuals who had asserted a credible fear of return to their home countries, may have been granted a form of refuge or aslyee status.[98] Aliens can lawfully enter with refugee documents[99] or seek protection in the form of asylum[100] after entering the U.S. in any status. Individuals may also be granted Temporary Protected Status (TPS) due to unsafe or uncertain country conditions.[101] Aliens with these types of legal statuses must clearly understand that certain criminal convictions will prevent the continuation of this discretionally protected status. For instance, aliens with TPS will have their protected status revoked after a felony conviction or after any three or more misdemeanor convictions.[102] Aliens granted asylum or refugee status can forfeit this protected status with certain criminal convictions, and aliens must reapply and demonstrate compelling reasons why some form of protected status should be maintained.[103]

An alien may also be paroled into the U.S.[104] Parole is granted for a limited time and purpose, and is not considered an admission, as the alien has not been determined to be admissible.[105] Therefore, an alien who was paroled into the U.S. is subject to removal proceeding as an inadmissible alien under Section 212.[106] Individuals who are permitted to enter in a parole status may already be in removal proceedings, which were initiated at the same time the parole was granted.[107]

It is important to note that relief from removal options will vary significantly based on an alien's immigrant status. However, all aliens, no matter what their immigration status or criminal convictions, have other forms of mandatory relief that can still be sought. If an alien can demonstrate by a clear probability that his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion or that the alien would be tortured, pursuant to the terms of the Convention Against Torture (CAT)[108] the alien will be permitted to

98. *See supra* notes 21–22 and accompanying text.

99. *See* INA § 207, 8 U.S.C. § 1157 (2011) (setting annual admission of refugees and admission of emergency situation refugees).

100. *See* INA § 208, 8 U.S.C. § 1158 (2011).

101. INA § 244, 8 U.S.C. § 1254a (2011).

102. 8 C.F.R. § 245a.2 (u)(1)(iii) (2011).

103. *See* INA § 208(c)–(d), 8 U.S.C. § 1158(c)–(d) (2011).

104. *See* 8 C.F.R. § 212.5 (2011).

105. *See* 8 C.F.R. § 212.5(e)(2)(i) (2011) ("[U]pon accomplishment of the purpose for which parole was authorized . . . parole shall be terminated . . . and he or she shall be restored to the status that he or she had at the time of parole.").

106. *See In re* M-B-, 8 I. & N. Dec. 406, 407 (B.I.A. 1959).

107. *See* 8 C.F.R. § 212.5(e)(2)(i) (2011).

108. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2011); *see also* I.N.S. v. Stevic, 467 U.S. 407, 409–11 (1984). *See generally* 8 C.F.R. § 1208.16 (2011); 8 C.F.R. part 208 (2011).

remain in the U.S. in a protected status, or be removed to a safe third country.[109] There is however, no guarantee that ICE will release a dangerous criminal, rather only that the alien will not be removed to the persecuting country until the country conditions have changed.[110]

III. Implications of a Conviction for Immigration Purposes

Prior to an alien entering into an agreement for a criminal disposition or facing a conviction after a crime, it is critical that he or she understands that a conviction and sentence for immigration purposes may significantly differ from what is generally considered a conviction in the criminal law context. Congress codified said definitions pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[111]

A. Conviction for Immigration Purposes

What constitutes a conviction for immigration purposes has been a matter of significant legal debate. An alien is convicted for immigration purposes when a court makes a final adjudication of guilt, or, if adjudication is withheld, when the alien has been found guilty or has pled guilty or nolo contendere, and has received some form of punishment by the court.[112] In general, a juvenile or youth offender disposition is not a conviction for immigration purposes.[113] State statutes with youthful offender dispositions comparable to the Federal Juvenile Delinquency Act (FJDA) are also not deemed a conviction for immigration purposes. [114]

Immigration consequences attach as a result of a penalty in the criminal sentencing context. For instance, the imposition of cost and surcharges will constitute a punishment or penalty for immigration purposes.[115] Rehabilitative statutes, expungements and deferred adjudications, which erase a determination of guilt, do not necessarily protect the alien from immigration consequences.[116] An alien remains convicted for immigration purposes even if the alien is not considered convicted under state law.[117] For instance, offenses that qualify as expunged under state statute analogues to the Federal First Offender Act (FFOA) constitute a "conviction"

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109. 8 C.F.R. § 1208.16 (2011); *see also In re* J-E, 23 I. & N. Dec. 291, 292 (B.I.A. 2002).

110. *See* 8 C.F.R. § 1208.17(b)(1)(ii) (2011); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2011).

111. Pub. L. No. 104-208, 110 Stat. 3009. The immigration definition for a conviction is found at INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2011). The immigration definition for term of imprisonment is set forth in INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2011).

112. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2011).

113. *In re* Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (B.I.A. 1981).

114. *In re* Devison-Charles, 22 I. & N. Dec. 1362, 1375–77 (B.I.A. 2000).

115. *In re* Cabrera, 24 I. & N. Dec. 459 (B.I.A. 2008).

116. *See, e.g.*, *In re* Luviano-Rodriguez, 23 I. & N. Dec. 718, 720 (B.I.A. 2005); *In re* Salazar, 23 I. & N. Dec. 223, 233–34 (B.I.A. 2002).

117. *In re* Roldan-Santoyo, 22 I. & N. Dec. 512, 521 (B.I.A. 1999); *see also Salazar*, 23 I. & N. Dec. at 235.

within the meaning of the INA.[118] At the same time, this decision has not been uniformity followed in the past, as in the case of the Ninth Circuit.[119] A presidential or gubernatorial pardon only waives certain grounds of removal and may not waive grounds of inadmissibility.[120]

The BIA has also reviewed convictions that have been vacated because of post conviction events, such as immigration hardship. In *Matter of Pickering*, the Board of Immigration Appeals (BIA) held that if a court vacates a conviction, for reasons unrelated to the merits of the underlying criminal proceedings, the alien will continue to have a conviction for immigration purposes.[121] The *Padilla* decision's impact on cases like *Pickering* has yet to be determined. However, it is likely that *Pickering* is no longer relevant, since cases under *Padilla* are being vacated for a direct constitutional violation.[122]

Even if counsel is careful when recommending that a client plea to a certain charge that may not look removable, evidence outside of the conviction may also be considered to determine whether the conviction makes the alien subject to removal proceedings. The Attorney General recently ruled in *Silva-Trevino,* that the Immigration Court may look beyond the record of conviction and evaluate the facts of the case to determine whether a crime involving moral turpitude (CIMT) has been committed when the record of conviction documents were ambiguous.[123] Evidence generally viewed to determine the nature of a conviction may include the indictment, the judgment of conviction, a signed guilty plea, and the plea transcript.[124] The BIA recently clarified the *Silva-Trevino* decision in *Ahortalejo-Guzman*, by holding that Immigration Judges may not look beyond the record of conviction when the record of conviction provides conclusive evidence.[125]

B. Term of Imprisonment

The term of imprisonment ordered is another important factor in any plea consideration or trial outcome. Specifically, "the period of incarceration

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118. *See Salazar*, 23 I. & N. at 233.

Lujan-Armendariz v. INS, 222 F.3d 728, 735–36 (9th Cir. 2000) *overruled* by *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (applying the decision prospectively only.)

120. *See In re* Suh, 23 I. & N. Dec. 626, 627 (B.I.A. 2003).

121. *In re* Pickering 23 I. & N. Dec. 621, 625 (B.I.A. 2003).

122. *See, e.g.*, *In re* Adamiak, 23 I. & N. Dec. 878, 881 (B.I.A. 2006).

123. *In re* Silva-Trevino, 24 I. & N. Dec. 687, 709 (B.I.A. 2008). The AG set the following standard: "[T]o determine whether an alien's prior conviction triggers application of the Act's moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction . . . (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction . . . and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."

Id. at 704.

124. *See id.* at 704.

125. *In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465, 467–68 (B.I.A. 2011).

or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part,"[126] is what matters for immigration purposes. Therefore, the actual length of confinement ordered by the court is the determining factor, not the time actually served.[127] As such, even if the execution of a sentence is suspended and the defendant does not serve any actual time in jail, the time is counted for immigration purposes.[128] Probation does not constitute a period of imprisonment, yet jail time imposed with probation, or with a violation of probation, does constitute a sentence.[129]

Consecutive sentences must also be examined when evaluating possible removal consequences. For instance, an aggravated felony offense requiring a minimum one-year sentence of imprisonment is not obtained by combining a consecutive sentence.[130] Consequently, consecutive sentences are irrelevant to this category of offenses. However, aliens whose consecutive (or separate) sentences add up to five years or more are ineligible for relief from withholding of removal[131] and are inadmissible.[132] Unlike the conviction modification in *Matter of Pickering*, the BIA held in the *Matter of Cota-Vargas*, that if only an alien's criminal sentence was modified, as opposed to the entire plea, the modified or reduced sentence was recognized for immigration purposes, even if the sole reason for the modification was to eliminate the immigration consequences of the conviction.[133]

IV. Crimes Making an Alien Removable

Many criminal convictions make an alien subject to being removed from the U.S. An alien who has been lawfully admitted as a LPR or a nonimmigrant is subject to being deported pursuant to grounds articulated in INA § 237(a)(2). Aliens seeking admission or permission to lawfully remain in the U.S. who have criminal convictions and are generally considered ineligible to receive visas are barred for admission for criminal acts pursuant to INA § 212(a)(2). Significant post-conviction relief options to seek a sentence modification may be limited based on the jurisdiction.[134]

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126. INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2011).

127. *See, e.g.*, *In re* Esposito, 21 I. & N. Dec. 1, 6 (B.I.A. 1995).

128. *See, e.g.*, *id.*

129. *See In re* Perez-Ramirez, 25 I. & N. Dec. 203, 205 (B.I.A. 2010).

130. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2011).

131. *See, e.g.*, INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2011) (sentencing an alien to an aggregate term of imprisonment of five years or more constitutes "a particularly serious crime" which precludes relief from removal that would otherwise be available on the grounds that the alien's life or freedom would be threatened if removed to their home country).

132. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (2011) (making an alien inadmissible if convicted of two or more offenses for which the aggregate sentence of imprisonment is five years or longer).

133. *In re* Cota-Vargas, 23 I. & N. Dec. 849, 852–53 (B.I.A. 2005); *see also In re* Song, 23 I. & N. Dec. 173 (B.I.A. 2001).

134. *See, e.g.*, People v. Carrera, 940 N.E.2d 1111, 1121–22 (Ill. 2010) (holding that the defendant

Removal proceedings may differ based on the alien's residence status, the crime committed, and the court in which a criminal proceeding is initiated. Criminal aliens seeking to enter the U.S. at the border are subject to being detained and denied entry to the U.S.[135] Not all classifications of aliens are entitled to a hearing, such as an alien who was previously removed from the U.S.,[136] crewmembers,[137] and stowaways.[138] There are three general classifications in which a criminal alien, who is physically present in the U.S., can be subject to removal.

First, the U.S. District Court has jurisdiction to enter a judicial order of deportation at the time of a criminal sentence if such a request has been made by the U.S. Attorney's Office, and in concurrence with ICE, pursuant to authority in INA § 238(c)(1). The deportation order can be appealed by either party.[139] The denial by a U.S. District Court Judge to issue a deportation order does not prevent ICE from initiating removal proceeding pursuant to INA § 240.[140] Consequently, neither the U.S. Attorney's Office nor the U.S. District Judge have jurisdiction to prevent ICE from initiating removal proceedings. At the same time, the alien defendant can also stipulate to an order of deportation as part of the plea agreement.[141] A stipulated order of removal can significantly benefit an alien when there are no possible relief options, as the alien's in-custody time may be significantly reduced by having a final order of removal prior to entering ICE custody.

Second, an expedited removal order can be obtained when an alien is not an LPR[142] and has a conviction for an aggravated felony offense.[143] An alien is served by ICE with a Notice of Intent to Expedite Removal and the alien has "10 calendar days from service . . . or 13 calendar days if service is by mail, to file a response to the Notice of Intent".[144] Aliens in expedited removal are ineligible to seek discretionary relief from the Attorney General.[145] The only relief from removal an alien can seek is protection from harm if the alien can demonstrates a credible fear that the alien's life or

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was ineligible to attain post-conviction relief because he was not imprisoned in the penitentiary at the time he filed his petition—as required by the applicable statute).

135. *See* INA § 235, 8 U.S.C. § 1225 (2011) (giving immigration officers authority to inspect, detain, and remove inadmissible aliens applying for admission); INA § 212(a)(2), 8 U.S.C. 1182 (a)(2) (2011) (including applicant aliens convicted of certain crimes as inadmissible).

136. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2011); *see also* 8 C.F.R. § 241.8 (2011).

137. INA 252(b), 8 U.S.C. § 1282(b) (2011) (denying application of the removal procedures of INA § 240 to such cases); *see also* 8 C.F.R. § 252.2 (2011).

138. INA § 235(a)(2), 8 U.S.C. § 1225(a)(2) (2011) (denying application of the removal procedures of INA § 240 to such cases); *see also* 8 C.F.R. § 241.11.

139. INA § 238(c)(3), 8 U.S.C. § 1228(c)(3) (2011).

140. INA § 238(c)(4), 8 U.S.C. § 1228(c)(4) (2011).

141. INA § 238(c)(5), 8 U.S.C. § 1228(c)(5) (2011).

142. *See* INA § 238(b)(2), 8 U.S.C. § 1228(b)(2) (2011) (includes a permanent resident who was admitted on a conditional basis pursuant to INA § 216).

143. *See id.*; INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011).

144. *See* INA § 238(b)(3), 8 U.S.C. § 1228(b)(3) (2011); 8 C.F.R. 238.1(c)(1) (2011).

145. INA § 238(b)(5), 8 U.S.C. § 1228(b)(5) (2011).

freedom would be threatened if removed to the alien's country of citizenship.[146] If a credible fear is demonstrated, the alien's relief application will be removed to the Immigration court for a hearing to determine whether the alien is eligible for any forms of mandatory relief. In demonstrating such a threat, the alien carries the burden of proof.[147]

Third, all other alien removal cases are held in the Immigration courts pursuant to INA § 240. An alien may stipulate to removal and skip the removal proceeding in front of an Immigration Judge which may facilitate a faster return and/or release.[148] An alien may seek any and all relief options available to them during removal proceedings.[149] General applications for relief from removal include adjustment of status, cancellation of removal, and protection from harm if removed, as previously discussed.[150]

There are several categories of crimes that directly affect criminal aliens. The common categories of crimes include CIMTs, controlled substances, and aggravated felonies.[151] It is important to note that even multiple minor criminal convictions can trigger removal proceedings.[152] In some cases, a serious act alone, subject to criminal prosecution or not, will subject the alien to removal proceeding.[153] A single conviction may also result in multiple removal charges under different provisions of the INA.[154]

A. Crimes Involving Moral Turpitude (CIMT)

The term "moral turpitude" has been part of U.S. Immigration law for over 100 years,[155] and its interpretation continues to evolve even in recent BIA cases. The Supreme Court has held that the term "crime involving moral turpitude" is not unconstitutionally vague.[156] The federal courts and the BIA continue to clarify which state and federal laws fall within this "nebulous concept."[157] Determining which crimes qualify as CIMTs is not an easy determination, as similar crimes may have different statutory definitions that

146. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2011); 8 C.F.R. § 238.1(f)(3) (2011), 8 C.F.R. § 208.31 (2011).

147. INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C) (2011).

148. INA § 240(d), 8 U.S.C. § 1229a(d) (2011); *see also* 8 C.F.R. § 1003.25(b).

149. *See* 8 C.F.R. § 1240.11 (2011).

150. *See supra* notes 19–22 and accompanying text.

151. *See supra* notes 13–15 and accompanying text.

152. *See supra* notes 130–132 and accompanying text; *see also* INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2011).

153. *See, e.g.*, INA § 237(a)(3)–(4), 8 U.S.C. § 1227(a)(3)–(4) (2011) (listing numerous grounds for removal that do not require a criminal conviction).

154. For instance, there is significant overlap between CIMTs and aggravated felonies. *Compare infra* Part IV.A. *with* Part IV.C.

155. *See* Jordan v. De George, 341 U.S. 223, 230 n. 14 (1951) (noting that "[t]he term 'moral turpitude' first appeared in . . . 1891").

156. *Jordan,* 341 U.S. at 232.

157. *See* Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995) (denying appellant's petition for review of the BIA's decision in *In re* Franklin, 20 I. & N. Dec. 867 (B.I.A. 1994)).

may or may not make the crime a CIMT.[158] Even rather minor offenses can be found to be removable CIMT offenses.[159]

The concept of moral turpitude commonly refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[160] When trying to determine whether a particular crime involves moral turpitude, it is essential to look at the statutory definition of the crime of which the alien was convicted and not the specific conduct that resulted in the conviction.[161] The BIA has held that a requisite element for a CIMT is an "evil intent."[162] Identifying the commission of a CIMT does not take into consideration the seriousness of the offense nor the severity of the sentence, but rather focuses on "the offender's evil intent or corruption of the mind."[163] For immigration purposes, a CIMT offense includes both convictions for conspiracy to commit an offense that would be a CIMT and an attempt to commit a crime that would be a CIMT.[164]

When a criminal statute contains multiple violations, some of which are CIMTs and some that are not CIMTs, the full record of conviction must be examined.[165] Evidence presented to determine the nature of a conviction may include the indictment, the judgment of conviction, a signed guilty plea, and the plea transcript.[166] When conviction documents are ambiguous, the Immigration Court may evaluate the facts in the case to make a determination as to whether a CIMT has been committed.[167] The BIA recently clarified this point by stating that Immigration Judges may not look beyond the record of conviction when the record of conviction provides conclusive evidence.[168]

Every state and federal criminal statute must be researched by counsel to determine whether the statute constitutes a CIMT under the BIA or circuit court's current analysis. Most theft or fraud related charges are CIMTs, however there are numerous exceptions.[169] The determination of which criminal statute constitutes a CIMT is heavily litigated. The following

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158. Justice Alito notes that: "determining whether a particular crime is . . . a 'crime involving moral turpitude [(CIMT)] is not an easy task." Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring).

159. *See Padilla*, 130 S. Ct. at 1489 (Alito, J., concurring).

160. *In re* Torres-Varela, 23 I. & N. Dec. 78, 82–83 (B.I.A. 2001).

161. *Id*. at 84. *See also In re* Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989) (noting that in order to determine whether the offense involved moral turpitude, the court must look to the controlling statute).

162. *In re* Khourn, 21 I. & N. Dec. 1041, 1046 (B.I.A. 1997).

163. *In re* Serna, 20 I. & N. Dec. 579, 581–82 (B.I.A. 1992).

164. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I) (2011). *See also, e.g., In re* Bader, 17 I. & N. Dec. 525, 529 (B.I.A. 1980) (holding that conspiracy to defraud constitutes a CIMT); *In re* Vo, 25 I. & N. Dec. 426, 430 (B.I.A. 2011) (holding that attempted grand theft constitutes a CIMT).

165. *See, e.g.*, *In re* Esfandiary, 16 I. & N. Dec. 659, 660 (B.I.A. 1979).

166. *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 704 (B.I.A. 2008).

167. *See id.*

168. *In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465, 468–69 (B.I.A. 2011).

169. *See, e.g.*, *In re* Garcia, 11 I. & N. Dec. 521, 523 (B.I.A. 1966); Jordan v. De George, 341 U. S. 223, 227–31 (1951).

statutes, recently reviewed by the BIA and determined to be CIMT offenses, demonstrate that a CIMT analysis is not a simple task: trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320;[170] money laundering in violation of N.Y. PENAL LAW § 470.10(1);[171] retail theft in violation of 18 PA. CONS. STAT. § 3929(a)(1);[172] unsworn falsification to authorities in violation of 18 PA. CONS. STAT. § 4904(a);[173] misprision of a felony in violation of 18 U.S.C. § 4;[174] and a conviction for burglary of an occupied dwelling in violation of FLA. STAT. § 810.02(3)(a).[175]

Crimes involving violence are also a large category that may constitute a valid CIMT charge.[176] Generally, a conviction for simple assault and battery is not a CIMT.[177] However, the BIA found that a charge of third degree assault under N.Y. PENAL LAW § 120.00(1) constituted a CIMT offense because the statute required both specific intent and physical injury.[178] On the other hand, the BIA has also ruled that the offense of assault and battery against a family or household member in violation of VA. CODE ANN. §18.2-57.2 is not categorically a CIMT offense because the statute does not require the infliction of actual injury.[179]

For statutes addressing driving under the influence (DUI) situations, a simple DUI is not likely to be a CIMT.[180] A DUI conviction with two or more prior DUI convictions is also not necessarily a CIMT.[181] However, the BIA has determined that the offense of aggravated driving under the influence as defined in ARIZ. REV. STAT. ANN. §§ 28-697(A)(1) and 28-1383(A)(1) is a CIMT.[182] For a DWI offense to constitute a CIMT, these statutes require the driver to know that he or she is prohibited from driving under any circumstances.[183]

Sex related crimes are another category of crime for which a CIMT finding is likely and in which case law is still very much evolving. For instance, statutory rape, which, in California, is the intentional sexual conduct by an adult with a child under the age of 16 in violation of CAL.

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170. *In re* Kochlani, 24 I. & N. Dec. 128, 132 (B.I.A. 2007).

171. *In re* Tejwani, 24 I. & N. Dec. 97, 99 (B.I.A. 2007).

172. *In re* Jurado-Delgado, 24 I. & N. Dec. 29, 33–34 (B.I.A. 2006).

173. *Id.* at 34–35.

174. *In re* Robles-Urrea, 24 I. & N. Dec. 22, 28 (B.I.A. 2006).

175. *In re* Louissaint, 24 I. & N. Dec. 754, 760 (B.I.A. 2009).

176. *See, e.g., In re* Tran, 21 I. & N. Dec. 291, 294 (B.I.A. 1996).

177. *See*, *e.g.*, *In re* Sejas, 24 I. & N. Dec. 236, 237–38 (B.I.A. 2007).

178. *In re* Solon, 24 I. & N. Dec. 239, 246 (B.I.A. 2007).

179. *Sejas*, 24 I. & N. Dec. at 238 ("conviction for assault and battery in Virginia does not require the actual infliction of physical injury and may include any touching, however slight"). *Id*. *See also* Adams v. Commonwealth, 534 S.E.2d 347, 351 (Va. App. 2000).

180. *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (B.I.A. 1999).

181. *See, e.g.*, *In re* Torres-Varela, 23 I. & N. Dec. 78, 85–86 (B.I.A. 2001).

182. *Lopez-Meza*, 22 I. & N. Dec. at 1195 ("[T]he serious misconduct described in either of these statutes involves a baseness so contrary to accepted moral standards that it rises to the level of a crime involving moral turpitude.").

183. *See id.* at 1189–91.

PENAL CODE § 261.5(d), can be a CIMT.[184] In 2007, the U.S. Court of Appeals for the Ninth Circuit used a categorical approach and determined that this charge was not a crime involving moral turpitude.[185] In response to a split in the circuits, the Attorney General, pursuant to his legal authority to make determinations concerning questions of immigration law, put forth a two part categorical analysis to address which crimes involved moral turpitude.[186] Applying the Attorney General's decision, the BIA rejected the Ninth Circuit's prior reasoning.[187] The BIA justified its ruling in this case by stating: "since the Ninth Circuit has . . . acknowledged that the phrase 'crime involving moral turpitude' is quintessentially ambiguous, the Attorney General's interpretation of the term must take precedence over that of the Ninth Circuit."[188] Also under California Law, the BIA has ruled that the willful failure to register by a sex offender in violation of CAL. PENAL CODE § 290(g)(1) is a CIMT.[189]

After determining that the possible conviction in question is a CIMT for immigration purposes, the next step is to evaluate whether a criminal conviction would be a removable CIMT for this particular alien. This step of the process requires knowledge of the alien's immigrant status and last lawful entry date. Under INA § 240 removal proceedings, the alien receives a Notice to Appear (NTA) stating the immigration charges against the alien.[190] The immigration charges on the NTA will contain either a Section 212 charge or a Section 237 charge, but not both.[191] Removal from the U.S. based on a CIMT charge is significantly different depending on whether the CIMT charge is under Section 212 or 237.[192]

1. Aliens Seeking Admission and Aliens Unlawfully Present

All aliens seeking admission and all aliens found illegally present in the U.S. will be charged as seeking admission under INA§ 212. Separate from any criminal charges, all aliens including LPRs, visa holders, and EWI's, must seek permission to lawfully enter.[193] A criminal charge may

184. *See In re* Guevara Alfaro, 25 I. & N. Dec. 417, 424 (B.I.A. 2011) (holding that statutory rape is not *categorically* a CIMT, but remanding the case to determine whether the accused had knowledge of his victim's age). *See also In re* Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008) ("[W]hether the perpetrator knew or should have known the victim's age is a critical factor in determining whether his or her crime involved moral turpitude for immigration purposes.").

185. *Id*.

186. INA §103(a), 8 U.S.C. § 1103(a) (2011); Silva-Trevino, 24 I. & N. Dec. at 698-99.

187. Quintero-Salazar v. Keisler, 506 F.3d 688, 694–95 (9th Cir. 2007) (holding that the conviction under the California statute "does not qualify as a crime involving moral turpitude").

188. *In re* Guevara Alfaro, 25 I. & N. Dec. at 420.

189. *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 144–46 (B.I.A. 2007).

190. INA § 239(a), 8 U.S.C. § 1229(a) (2011); Form I-862.

191. *See id.*; INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2) (2011).

192. *Compare* INA § 212, 8 U.S.C. § 1182 (2011) (regarding inadmissibility), *with* INA § 237, 8 U.S.C. § 1227 (2011) (regarding deportability); *see also supra* note 87 and accompanying text.

193. Aliens lawfully in the U.S. will only be charged under section 212 if they depart the U.S. and attempt to lawfully reenter. *Compare* INA § 212 (listing the grounds upon which aliens are "ineligible to

have no present effect on an alien's ability to lawfully remain in the U.S. All aliens subject to Section 212 charges have the burden to demonstrate admissibility.[194] For example, EWI's are automatically subject to a Section 212 removal charge for being unlawfully present in the U.S. Therefore, it is relevant to understand that all aliens seeking lawful status bear the burden of proof to establish eligibility to lawfully enter. A criminal conviction is only one of many hurdles that must be evaluated to determine admissibility.

The CIMT charge under INA § 212(a)(2)(A)(i) states, "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible."[195] There are two exceptions to this CIMT provision for a single crime: an offense committed when the alien was under the age of eighteen or a petty crime.[196] The petty crime exception requires that the maximum penalty possible for the crime convicted was one year of imprisonment and the alien was not sentenced to a term of more than six months.[197] This amounts to a one-time petty offense exception, but only under Section 212.

With or without a CIMT conviction, an unlawfully present alien is automatically subject to removal proceedings unless the alien can demonstrate admissibility.[198] Counsel should not make any assurances to an alien that the alien would not face potential removal proceedings based on the illegal presence. Although the alien may be eligible to seek discretionary or mandatory relief from removal, the alien is still in the U.S. unlawfully and could even face potential prosecution for this illegal entry.[199]

2. Aliens Lawfully Admitted

Aliens who lawfully entered but are now subject to removal are charged under Section 237.[200] A conviction for a CIMT will result in removal charges under Section 237 unless the crime falls within an exception.[201] It is important to recognize that lawful admission does not necessarily result in continued lawful status. For instance, an alien who lawfully entered on a tourist visa but unlawfully overstayed may have legally entered, but would

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be admitted to the United States"), *with* INA § 237 (applying only to aliens "in and admitted to the United States").

194. INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A) (2011).

195. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2011).

196. INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2011).

197. INA § 212(a)(2)(A)(i)(I) (A)(ii) (2011), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (A)(ii) (2011).

198. INA § 237(a)(1)(A) (2011), 8 U.S.C. § 1227(a)(1)(A) (2011).

199. *See, e.g.*, INA § 275, 8 U.S.C. § 1325 (2011).

200. INA § 237(a), 8 U.S.C. § 1227(a) (2011).

201. *See, e.g.*, INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (2011) (providing a waiver to aliens who have been granted a pardon by the President of the United States or by the Governor of any of the several states).

no longer have permission to remain in the U.S.[202] In order to evaluate possible relief options for an alien, it is imperative that counsel understand the alien's current legal status and last lawful entry.

Unlike Section 212 cases,[203] there is not an exception for committing only one CIMT in Section 237 cases. However, a single conviction for a CIMT will only facilitate removal proceedings if the possible sentence, not the actual sentence, for the crime could have been one year or longer:

> (i) Crimes of moral turpitude. Any alien who—
> (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.
> (ii) Multiple criminal convictions. Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.[204]

In addition to examining the actual crime that would result in a conviction for the alien defendant, it is imperative to focus on the alien's last lawful entry into the U.S. to determine whether the CIMT would make the alien removable. In *Matter of Alyazji,* the BIA found that "the most natural reading of Section 237(a)(2)(A)(i) is that the phrase 'the date of admission' refers to the date of the admission by virtue of which the alien was present in the United States when he committed his crime."[205]

The analysis to find the correct date—the day from which the five years of entry commence—can be rather complicated, and is far from the "succinct, clear, and explicit" nature that the Supreme Court attributes to the immigration statutes.[206] If the alien is an LPR, the last relevant date of admission is when the alien lawfully entered the country originally as an LPR or as a nonimmigrant in possession of a valid visa and then became an LPR during that admission, even if the alien had violated the terms of the visa as an overstay.[207] If an alien is not an LPR, then the relevant date would be the

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202. Overstay violators are charged under INA§ 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (2011).

203. *See* INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i).

204. INA § 237(a)(2)(A)(i)–(ii), 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (2011).

205. *In re* Alyazji, 25 I. & N. Dec. 397, 406 (B.I.A. 2011). This decision overruled the B.I.A.'s previous findings in *In re Shanu*, 23 I. & N. Dec. 754 (B.I.A. 2005), that "an alien's conviction for a crime involving moral turpitude supported removal under that section so long as the crime was committed within 5 years after the date of *any* admission made by the alien." *Alyazji*, 25 I. & N. Dec. at 397–98.

206. Padilla v. Kentucky*,* 130 S. Ct. 1473, 1483 (2010).

207. INA § 101(a)(13)(A); 8 U.S.C. § 1101(a)(13)(A) (2011) (defining the term "admission). *See*

last date of lawful entry.[208] Complications may arise in attempting to analyze the likely implications of whether a CIMT makes an alien removable if the alien is not aware of the date on which a consideration must be made.[209]

This examination is further complicated by the fact that a CIMT conviction may not trigger removal proceedings under Section 273, but will trigger a ground of inadmissibility if the alien seeks to reenter the U.S. at a later date. For instance, an LPR who previously lawfully entered over five years prior to the conviction can plead guilty to a CIMT if the maximum time possible under the statute is less than one year. Under this sentence, the LPR would not be removable under Section 237.[210] However, after a brief departure from the U.S., the LPR must seek admission and would be inadmissible under Section 212.[211] The LPR may or may not be eligible to apply for a discretionary waiver, depending on whether the LPR has the required residential time, qualifying relative, and/or demonstrated hardship.[212]

Section 237 must also be examined when an alien's actions, subject to the same or unrelated criminal proceedings, will result in two unrelated CIMT convictions.[213] Under the multiple criminal conviction section, the alien's date of entry is not a factor, nor is the length of the actual or potential sentence a factor in the determination.[214] When the alien has a previous conviction, there is generally no dispute as to whether the convictions are related. The complicated analysis in this provision involves what constitutes the concept of the "single scheme," when an alien is facing possible convictions on multiple CIMT counts.[215] Further complicating this analysis is a split between the BIA's decisions and the decisions of the Second, Third, and Ninth Circuit Courts.[216]

In immigration proceedings, the concept of what constitutes a "single scheme" is often litigated. The initial burden of proof is on the

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also INA § 212(a)(9)(B); 8 U.S.C. § 1182(a)(9)(B) (2011) (stating that unlawful presence, including a visa overstay, potentially creates a future bar for an individual prevent any return to the United States for a set number of years).

208. *In re* Alyazji, 25 I. & N. Dec. at 407–408. ("first 'date of admission' is irrelevant because the alien was not in the United States pursuant to that first admission when he committed his crime").

209. *See* INA § 237(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2011) (determining an aliens date of entry can significantly affect whether the conviction of a crime of moral turpitude may potentially cause an alien to be found deportable).

210. *See* INA § 237 (a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2011).

211. *See* INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) (2011) (making inadmissible an alien that admits to committing a CIMT). However, the alien may still fall into a relevant exception. *See supra* notes 196–199 and accompanying text.

212. *See* INA § 212(h), 8 U.S.C. § 1182(h) (2011).

213. *See, e.g.*, *In re* Adetiba, 20 I. & N. Dec. 506, 506, 512 (B.I.A. 1992); Pacheco v. INS, 546 F.2d 448, 452 (1st Cir. 1976).

214. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2011).

215. *See, e.g.*, *Adetiba*, 20 I. & N. Dec. at 506, 512; *Pacheco*, 546 F.2d at 452.

216. *Compare supra* note 209, *with* Nason v. INS, 394 F.2d 223, 226 (2d Cir. 1968), Sawkow v. INS, 314 F.2d 34, 37–38 (3d Cir. 1963), *and* Gonzalez-Sandoval v. INS, 910 F.2d 614, 616–17 (9th Cir. 1990).

government.[217] In general, a determination can be made by the court based on the facts as set forth in conviction related documents.[218] Most often, a "single scheme" is not found when there are different victims with events occurring on different days.[219] The best outcome for an alien in this type of case is to negotiate a criminal plea to only one CIMT with a sentence of less than a year to cover all the criminal acts associated with the multiple criminal acts.

Finally, even if the CIMT offense does trigger a removal, an LPR may seek discretionary relief to have the removal order cancelled.[220] Prior to seeking this relief, a criminal conviction will nonetheless effectively terminate an LPR's continuous physical presence time clock,[221] as a required seven year element is necessary for an application for Cancellation of Removal.[222] In *Matter of Garcia*, the BIA clarified this "stop time" rule.[223] A conviction for a CIMT offense that qualifies as a petty offense under Section 212 does not trigger the "stop time" rule, even if the CIMT renders the alien deportable under Section 237.[224] Once the clock has been stopped based on a conviction, continuous residence is not restarted simply because an alien departed and returned to the U.S.[225]

As illustrated by this section, the determination of whether an offense is a CIMT and whether possible relief options exist from a conviction or multiple convictions requires significant knowledge of the INA and immigration proceedings. The Court's reasoning in *Padilla* that in some cases, counsel "specify what the removal *consequences* of a conviction would be" is a potentially difficult task when counsel must also examine possible relief options which would mitigate such consequences.[226]

B. Controlled Substance Offenses

Unlike the vague nature of the CIMT offenses, the INA clearly states that the commission of a controlled-substance offense will result in

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217. Nason v. INS, 394 F.2d 223, 226 (2d Cir. 1968) ("[I]t is a part of the Government's burden to establish that the convictions did not arise out of a single scheme of criminal misconduct.").

218. *See, e.g.*, *id.* at 226 (noting that the record of conviction "itself supports a strong inference" that the criminal acts were separate).

219. *See, e.g., In re* S--, 9 I. & N. Dec. 613, 621 (B.I.A. 1962); *In re* McLean, 12 I. & N. Dec. 551, 553–54 (B.I.A. 1967); *In re* Vosganian, 12 I&N Dec. 1, 6–7 (B.I.A. 1966); *In re* Z--, 6 I. & N. Dec. 167, 170–71 (B.I.A. 1954).

220. *See generally* INA § 240A, 8 U.S.C. § 1229b (2011).

221. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2011) (stating that a continuous physical presence or residence will be deemed to end when the alien has committed an offense referred to in INA § 212(a)(2)).

222. INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2) (2011) (stating that eligibility for cancellation of removal requires seven years of continuous legal residence).

223. *In re* Garcia, 25 I. & N. Dec. 332, 334–36 (B.I.A. 2010).

224. *Id.* at 335–36.

225. *In re* Nelson, 25 I. & N. Dec. 410, 415–16 (B.I.A. 2010).

226. Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J. concurring).

immigration consequences.[227] An alien is both inadmissible and deportable for "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . ."[228] There is only one exception for a single offense involving the possession of thirty grams or less of marijuana for personal use.[229] The possession of or use of drug paraphernalia also constitutes a controlled substance violation,[230] as does the possession or transportation of a "simulated controlled substance"[231] and a counterfeit substance.[232]

An alien who lawfully entered will not face removal proceedings for the first personal use marijuana possession offense under Section 237 provided the amount of marijuana is clear on the conviction records, as the exception is written into the statute.[233] However, an alien who seeks admission with the same marijuana offense must seek a waiver and may need to demonstrate extreme hardship to a qualifying relative.[234] An alien who departs the U.S. and seeks to reenter will be considered to be seeking admission.[235] Therefore, a lawfully admitted alien with a qualifying personal use marijuana conviction should be advised that departing the U.S. and attempting to reenter could result in the alien being detained, placed in immigration proceedings, and potentially removed permanently from the U.S.[236]

It should be made clear to all non-citizen defendants, in any legal or illegal status, that a conviction for any other controlled-substance violation defined in Section 102 of the Controlled Substances Act will result in immigration consequences.[237] Prior to April 1, 1997, aliens placed in removal proceedings had additional relief options available with which to seek relief from removal.[238] Current law dictates that only an LPR can request that a qualifying controlled substance conviction be cancelled for

227. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2011); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2011).

228. *Id*.

229. INA § 212(h)(1), 8 U.S.C. § 1182(h)(1) (2011); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2011).

230. *In re* Martinez Espinoza, 25 I. & N. Dec. 118, 118–19 (B.I.A. 2009).

231. *In re* Sanchez-Cornejo, 25 I. & N. Dec. 273, 275–76 (B.I.A. 2010) (delivery of a simulated controlled substance is a violation of a law relating to a controlled substance).

232. *Id.*

233. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2011).

234. INA § 212(h)(1), 8 U.S.C. § 1182 (h)(1) (2011).

235. *See supra* note 193 and accompanying text.

236. Aliens seeking admission with criminal convictions are generally not released from ICE custody until the termination of the immigration proceedings or the alien is removed from the U.S. *See* INA § 236(c)(1)(A), 8 U.S.C. § 12265a(c)(1)(A) (2011).

237. *See supra* note 227–232 and accompanying text.

238. *See* former INA § 212(c) (1995), 8 .U.S.C. § 1182(c) (1995). Repeal of subsection (c) by Sec. 304(b) of the ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT of 1996 (IIRIRA); *see also* INS v. St. Cyr, 533 U.S. 289, 307–08 (2001). *See also* 8 C.F.R. § 1212.3 (2011) (application for the exercise of discretion under former section 212(c)).

immigration purposes.[239] The LPR must also meet the required qualifications for cancellation: having five years as a LPR; demonstrating continuous residence in the U.S. for seven years after having been lawfully admitted; and not having an aggravated felony conviction.[240] An alien who does not have the required status and qualifications will be barred from seeking certain discretionary relief to remain in the U.S., although mandatory relief is always a possible option.[241]

C. Aggravated Felony Offenses

Aliens with aggravated felony convictions have very limited relief options in Immigration Court, so it is critical that aliens facing potential aggravated felony charges understand the consequences of any plea disposition or conviction after trial. Justice Alito's concurrence notes that determining whether a particular crime constitutes an aggravated felony offense is not "easily ascertained"[242] especially since the crime does not even have to constitute an actual felony under the jurisdiction in which the conviction is obtained.[243] To aid counsel in making a determination as to whether a crime constitutes an aggravated felony offense, professional reference materials are made available by the government and private sources to aid in making a legal analysis as to whether a crime has the necessary elements.[244]

An aggravated felony conviction is only a deportable offense under Section 237,[245] and not a ground of inadmissibility under Section 212. That does not mean that an alien, who would normally be charged under Section 212, cannot be removed as an aggravated felon.

A non-LPR alien with an aggravated felony conviction, an alien who entered lawfully or unlawfully, is subject to expedited removal proceeding pursuant to INA § 238.[246] The statute contains a presumption of deportability: "An alien convicted of an aggravated felony shall be conclusively presumed

239. INA § 240A(a), 8 U.S.C. § 1229b(a) (2011). Non-permanent residents who are convicted of offenses under INA § 212(a)(2)) are precluded from seeking relief. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2011). A waiver of inadmissibility under INA § 212(h) may separately be available for aliens seeking admission. 8 U.S.C. § 1182(h) (2011).

240. INA § 240A(a), 8 U.S.C. § 1229b(a) (2011). The "stop time" rule will apply for controlled substance violations. *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2011) (continuous physical presence or residence will be deemed to end when the alien has committed an offense referred to in INA § 212(a)(2)).

241. *See, e.g.*, *supra* notes 19–22 and accompanying text.

242. Padilla v. Kentucky, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring).

243. *See, e.g.*, *In re* Martin, 23 I. & N. Dec. 491, 491–92, 499 (B.I.A. 2002).

244. *See, e.g.*, JUDGE BERTHA A. ZUNIGA, AGGRAVATED FELONY CASE SUMMARY (2010), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/Aggravated_Felony_Outline.pdf.

245. INA § 237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii) (2011).

246. INA § 238(b), 8 U.S.C. § 1228(b) (2011). Non LPR aggravated felons may also be placed in section 240 removal proceedings.

to be deportable from the United States."[247] As such, an alien's right to contest the proceedings and seek relief is extremely limited once placed in expedited removal.[248]

In Section 240 removal proceedings, an alien convicted of an aggravated felony offense who was lawfully admitted—as an LPR or either a nonimmigrant—is subject to a ground of deportability.[249] However, only LPRs and conditional LPRs with aggravated felony convictions are guaranteed the right to their removal in Section 240 proceedings.[250] Aggravated felony offenses are defined in INA § 101(a)(43) and apply to federal, state, and foreign convictions.[251] A conviction for an attempt or a conspiracy to commit a crime described as an aggravated felony offense also makes the alien removable.[252]

> INA § 101(a)(43) defines the term 'aggravated felony' means—
> **(A)** murder, rape, or sexual abuse of a minor;
> **(B)** illicit trafficking in a controlled substance (as defined in section 802 of title 21)), including a drug trafficking crime (as defined in section 924(c) of title 18);
> **(C)** illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);
> **(D)** an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;
> **(E)** an offense described in—
> **(i)** section 842(h) or (i) of title 18 or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
> **(ii)** section 922 (g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18 (relating to firearms offenses); or
> **(iii)** section 5861 of Title 26 (relating to firearms offenses);
> **(F)** a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;
> **(G)** a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

247. INA § 238(c), 8 U.S.C. § 1228(c) (2011).

248. *See* INA § 238(b)(3), 8 U.S.C. § 1228(b)(3) (2011) (stating that removal can occur fourteen days after service of the expedited removal order if the alien does not properly challenge the order by applying for judicial review).

249. *See* INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2) (2011).

250. INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2011); 8 C.F.R. 1240.10 (2011).

251. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011).

252. INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U) (2011). *See also In re* Richardson, 25 I. & N. Dec. 226, 230 (B.I.A. 2010).

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

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

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

(K) an offense that—

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

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

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

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

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

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[;]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that

> the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;
> **(Q)** an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;
> **(R)** an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;
> **(S)** an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
> **(T)** an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and
> **(U)** an attempt or conspiracy to commit an offense described in this paragraph.
> The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.[253]

An offense which is defined as an aggravated felony offense may also constitute an additional ground of inadmissibility[254] or deportability.[255] At the same time, a crime that may not be defined as an aggravated felony may very well still constitute a separate charge of removal.[256] Whether a particular statute constitutes an aggravated felony offense is not straight forward and may often be the subject of litigation.[257] An example of the challenge is demonstrated in examining crimes of violence[258] and illicit

253. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011).

254. *See* INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2011); *see also* Hing Sum v. Holder, 602 F.3d 1092, 1093 (9th Cir. 2010) (holding an alien ineligible for an INA § 212(h) waiver because he committed an aggravated felony after fraudulent admission to the United States).

255. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2011); *see also* Lettman v. Reno, 207 F.3d 1368, 1369–70 (11th Cir. 2000) (upholding BIA's decision finding alien deportable for commission of an aggravated felony after his entry).

256. INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2011); *see also* Mehboob v. Attorney General, 549 F.3d 272, 274 (3d Cir. 2008) (holding that misdemeanor indecent assault is a crime of moral turpitude, making an alien eligible for deportation under 8 U.S.C. § 1227(a)(2)(A)(i)).

257. *See supra* notes 237–239 and accompanying text. E.g., Ghanzi v. Holder, 624 F.3d 23, 25–26 (2d Cir. 2010) (holding that a sexual misconduct conviction qualifies as "sexual abuse of a minor," an aggravated felony).

258. *Compare* Garcia v. INS, 237 F.3d 1216, 1222–23 (10th Cir. 2001) (holding that a DUI offense constitutes a crime of violence and therefore an aggravated felony), *with* Jobson v. Ashcroft, 326 F.3d

trafficking in controlled substances.[259]

First, the term "crime of violence" requires an intricate analysis of how the term is applied to the statute in question. The term "crime of violence" is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[260]

The applicability of any state, federal, or foreign criminal statute must be examined under both Sections 16(a) and 16(b).[261] Under Section 16(a), a crime may be a felony or a misdemeanor.[262] However, under Section 16(b), the crime must constitute a felony under federal law.[263]

The BIA's recent analysis in *Matter of Velasquez* concluded that violent physical force is a required element of Section 16(a) and that the force is "capable of causing physical pain or injury to another person."[264] The court explained "[t]he key inquiry is not the alien's intent for purposes of assault, but rather whether battery, in all cases, requires the intentional use of 'violent force.'"[265] Therefore, an offense must include "the actual, attempted, or threatened use of violent force that is capable of causing pain or injury."[266] The BIA concluded that Virginia's assault and battery statute is not an aggravated felony offense because the statute does not require the actual use, attempted use, or threatened use of violent physical force for a conviction in all cases.[267] Under a similar analysis, the BIA found that a conviction with a one year sentence for third degree assault, a misdemeanor under CONN. GEN. STAT. § 53a-61(a)(1), constituted an aggravated felony offense because the

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367, 375–76 (2d Cir. 2003) (holding that second-degree manslaughter is not a crime of violence, and is therefore not an aggravated felony).

259. *See, e.g.,* Rendon v. Mukasey, 520 F.3d 967, 975–77 (9th Cir. 2008) (holding that possession of marijuana with intent to sell contains a trafficking element and therefore qualifies as an aggravated felony).

260. 18 U.S.C. § 16 (2011).

261. *See* Leocal v. Ashcroft, 543 U.S. 1, 8–11 (2004) (analyzing a Florida DUI statute under both Section 16 (a) and (b)).

262. *See* Chrzanoski v. Ashcroft, 327 F.3d 188, 196–97 (2d Cir. 2003) ("[O]ur interpretation of § 16(a) honors Congress' intent to expand the list of crimes that constitute aggravated felonies by defining as crimes of violence only those misdemeanors that include as an element the use of force.").

263. *In re* Martin, 23 I. & N. Dec. 491, 493 (B.I.A. 2002) (explaining that § 16(b) "is confined to felony offenses by its terms").

264. *In re* Velasquez, 25 I. & N. Dec. 278, 283 (B.I.A. 2010).

265. *Id*.

266. *Id.*

267. *Id*.

statute involved the intentional infliction of physical injury.[268]

For an analysis under Section 16(b), the overall determining factor is whether an offense "by its nature," involves a substantial risk of the use of physical force.[269] For example, first degree manslaughter under N.Y. PENAL LAW § 125.20(1) or § 125.20(2) is an aggravated felony conviction because the statute requires proof of intent to cause serious injury or death, and there is a substantial risk that intentional force will be used.[270] Even if there is a substantial risk of causing serious bodily injury, such as in the case of an impaired driver, DUI statutes that do not have a mens rea component or a showing of negligence are not aggravated felony offenses.[271]

Second, crimes related to the illicit trafficking of a controlled substance[272] may also require significant analysis. A state misdemeanor or a felony offense may qualify as a removable offense. Regardless of whether the offense is a misdemeanor or a felony under state law, the conduct must be punishable as a felony under the Controlled Substances Act.[273] Possession of a small amount for personal use is not a felony under the CSA[274] and neither is assisting another to possess a controlled substance—even if a felony under state law.[275] At the same time, a state misdemeanor offense for the conspiracy to distribute marijuana can qualify as an aggravated felony.[276] Determining whether a state drug offense qualifies as an aggravated felony, especially in cases of a recidivist, is determined by the Supreme Court and the controlling Federal Circuit Court of Appeals.[277] Complicating matters further, an aggravated felony conviction involving unlawful trafficking will presumptively constitute a "particularly serious crime" and therefore bar the

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268. *Martin*, 23 I. & N. Dec. at 499. *But see* Chrzanoski v. Ashcroft, 327 F.3d 188, 197 (2d Cir. 2003) (holding that "third degree intentional assault under Connecticut law is not a crime of violence under § 16(a)" because force is not an element of the crime).

269. *E.g*. *In re* Vargas-Sarmiento, 23 I. & N. Dec. 651, 652 (B.I.A. 2004).

270. *Id.* at 653–54.

271. Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (holding that § 16(b) requires "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense").

272. INA § 101(a)(43)(B), 8 U.S.C. §1101(a)(43)(B) (2011).

273. *See* Lopez v. Gonzales, 549 U.S. 47, 50 (2006).

274. 21 U.S.C. § 844(a) (2011); *see also* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580, 2589 (2010); *Lopez*, 549 U.S. at 52, 61*; In re* Thomas, 24 I. & N. Dec. 416 (B.I.A. 2007).

275. *Lopez*, 549 U.S. at 53–54; 21 U.S.C. § 846 (2011) ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy"). As such, all those who assist in an attempt or conspiracy to possess a small amount of controlled substance are charged at an equal to or lower than criminal or civil violation prescribed by the federal law.

276. *In re* Aruna, 24 I. & N. Dec. 452, 453, 458 (B.I.A. 2008) (holding a conspiracy to distribute a controlled dangerous substance—marijuana—qualified as an aggravated felony).

277. *See In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 393–94 (B.I.A. 2007) (holding that controlling precedent of the United States Court of Appeals for the Fifth Circuit dictates an alien's state conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism). *See also In re* Sanchez-Cornejo, 25 I. & N. Dec. 273 (B.I.A. 2010) (holding that delivery of a simulated controlled substance in violation of Texas law is not an aggravated felony).

alien from almost all possible relief options.[278]

D. Other Removable Offenses

In addition to the grounds of removal stated above, there are numerous other criminal offenses and acts not criminally prosecuted that facilitate grounds of inadmissibility or removability. In some instances, certain offenses may only be a ground of deportability under Section 237 and not under Section 212. For example, deportable offenses include: crimes of domestic violence, stalking, violation of a protection order, crimes against children,[279] high speed flight,[280] firearm offenses,[281] espionage, treason,[282] and certain criminal immigration related offenses.[283] Although the above offenses may not be grounds for inadmissibility directly, an alien's actions can still fall into other categories such as a CIMT offense or an aggravated felony.[284] Additionally, there is nothing barring an otherwise admissible alien from being admitted under Section 212 and then placing the alien in removal proceeding pursuant to a Section 237 charge.[285] Other important grounds of removal not requiring a criminal conviction include document fraud;[286] a false claim to U.S. citizenship;[287] security;[288] and terrorist activities.[289]

The complicated task of seeking to determine whether a statute constitutes a removable offense can amount to "a maze of hyper-technical

278. INA § 241(b)(3)(B)(iii) (2011), 8 U.S.C. § 1231(b)(3)(B)(iii) (2011); *see also In re* Y-L-, 23 I. & N. Dec. 270, 274 (B.I.A. 2002) ("[I]t is my considered judgment that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes' within the meaning of section 241(b)(3)(B)(ii)."); *see also* INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2011) (limiting relief to aliens who the Attorney General decides have been convicted "of a particularly serious crime" and are dangerous).

279. INA § 237(a)(2)(E), 8 U.S.C. 1227(a)(2)(E) (2011). *See e.g. In re* Strydom, 25 I. & N. Dec. 507, 511 (B.I.A. 2011); *In re* Soram, 25 I. & N. Dec. 378, 385–86 (B.I.A. 2010); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 517 (B.I.A. 2008).

280. INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv) (2011).

281. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) (2011).

282. INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i) (2011).

283. *See, e.g.*, INA § 237(a)(1)(E), 8 U.S.C. § 1227(a)(1)(E) (2011); INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv) (2011). *See also In re* Martinez-Serrano, 25 I. & N. Dec. 151, 155 (B.I.A. 2009).

284. *See supra* Parts IV.A.1, IV.C.

285. *See* INA § 237(a), 8 U.S.C. § 1227(a) (2011) (listing grounds for removal applying to *any* alien in and admitted to the United States).

286. INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i) (2011); INA § 237(a)(3)(C), 8 U.S.C. § 1227(a)(3)(C) (2011).

287. INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (2011); INA § 237(a)(3)(D), 8 U.S.C. §1227(a)(3)(D) (2011). *See also In re* Barcenas-Barrera, 25 I. & N. Dec. 40, 44 (B.I.A. 2009).

288. INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A) (2011); INA § 237(a)(4)(A), 8 U.S.C. § 1227(a)(4)(A) (2011).

289. INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2011); INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (2011).

statutes and regulations that engender waste, delay, and confusion."[290] As such, significant efforts may need to be devoted to understand the complicated nature of the removal process.

V. Aliens and the Criminal Justice System

The Court's ruling in *Padilla* states very clearly and distinctly that defense counsel must inform a client concerning whether a criminal plea carries a risk of deportation.[291] The American Bar Association (ABA) Criminal Justice Advisory Standards also articulates the duty counsel has in advising a client facing criminal charges.[292] In addition to providing advice concerning possible immigration risks, it is now clear that "affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance."[293] The complicated legal analysis required to adequately determine which criminal statutes make an alien removable will only fuel a new wave of alien appeals asserting misadvice—thereby allowing aliens a new avenue to avoid the immigration consequence of committing a crime.

In *Strickland v. Washington,* the Supreme Court established a two-part test to determine whether a criminal defendant has established a claim for ineffective assistance of counsel: (1) whether the attorney's representation to the client "fell below an objective standard of reasonableness,"[294] and (2) whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[295] Since guilty pleas can be invalidated when counsel's deficient performance undermines the voluntariness of the defendant's decision to plead guilty, prosecutors should take affirmative steps on the record to insure compliance with *Padilla's* requirements so that already limited judicial resources are not overwhelmed by future appeal claims. The Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[296] Prosecutors must use this critical phase properly and assure that cases are not overturned on appeal when defense counsel

290. Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003).

291. Padilla v. Kentucky, 130 S. Ct. 1473, 1486–87 (2010).

292. *Pleas of Guilty, Standard 14-3.2(f)*, AM. BAR ASS'N, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html (last visited Jan. 5, 2012) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."). *See also*, Kokabani v. United States, No. 5:08-CV-177-FL, 2010 U.S. Dist. LEXIS 110724, at *8 (E.D.N.C. Jul. 30, 2010) (holding that "simply referring clients to an immigration attorney is not—in most cases—objectively reasonably representation").

293. *Padilla*, 130 S. Ct. at 1492 (Alito, J., concurring).

294. Strickland v. Washington, 466 U.S. 668, 688 (1984).

295. *Id.* at 698.

296. *Padilla*, 130 S. Ct. at 1486.

provides incorrect advice or makes assurances to an alien in the plea bargaining process.

Many jurisdictions already have a process in place to advise criminal defendants of possible immigration consequences.[297] The process in certain jurisdictions specifies that the defendant is not required to disclose the defendant's legal status in the United States to a court.[298] However, this does not prevent the prosecutor from insisting on obtaining this information in exchange for negotiating a favorable plea. This was clearly the intent of the Court: "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."[299]

The Immigrant Defense Project (IDP), a legal resource and training center for criminal defense attorneys, recommends that judges "should refrain from asking about [a] defendant citizenship/immigration status."[300] However, the courts have an obligation: "under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'"[301] As such, the court should permit the prosecution to put plea negotiations, which include an evaluation of defendant's immigration status, on the record. In any event, the court would not need to have the defendant's exact immigration status as articulated under the INA. Rather, the court would only need to understand if the defendant's legal status may be compromised by the proposed plea and, as such, insure that the defendant understands that the plea may result in detention and deportation by immigration officials.[302]

In general, there are only a few different categories in which an alien

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297. *Id*. at 1491 (Alito, J., concurring) ("28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas."). The following statutes were current as of 2010: Alaska R. Crim. P. 11(c)(3); Ariz. R. Crim. P. 17.2(f); CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. ANN. § 54-1J (West 2009); D.C. CODE. § 16-713 (2001); Fla. R. Crim. P. 3.172(c)(8); GA. CODE ANN. § 17-7-93(c) (1997); HAW. REV. STAT. ANN. § 802E-2 (LexisNexis 2007); Idaho Crim. R. 11; Ill. Code. Crim. P. 725 ILCS 5/113-8; Iowa R. Crim. P. 2.8(2)(b)(3), (5); Me. R. Crim. P. 11(h); Md. Rule 4-242(e); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 2009); Minn. R. Crim. P. 15.01; MONT. CODE ANN. § 46-12-210 (2009); NEB. REV. STAT. ANN. § 29-1819.02 (LexisNexis 2010); N.M. Dist. Ct. R. Cr. P. 5-303(F)(5); N.Y. CRIM. PROC. LAW §220.50(7) (McKinney 2009); N.C. GEN. STAT. ANN. § 15A-1022(A)(7) (West 2007); OHIO REV. CODE ANN. § 2943.031 (West 2006); OR. REV. STAT. § 135.385(2)(D) (2007); P.R. LAWS ANN. tit. 34, App. II, Rule 70; R.I. GEN. LAWS § 12-12-22 (2008); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2009); VT. STAT. ANN. tit. 13, § 6565(c) (2009); WASH. REV. CODE § 10.40.200 (2008); and WIS. STAT. § 971.08(1)(C) (2006).

298. *See, e.g.,* Ariz. R. Crim. P. 17.2(f).

299. *Padilla,* 130 S. Ct. at 1486.

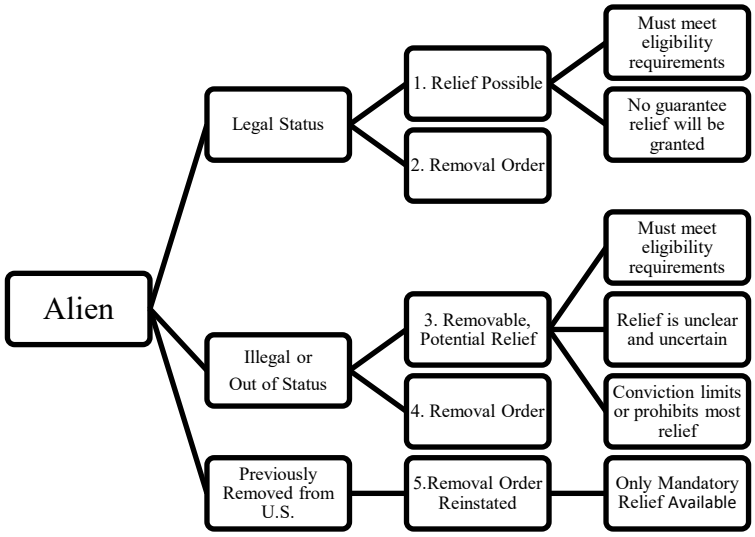
300. NIKKI REISCH & SARA ROSELL, IMMIGRANT DEFENSE PROJECT, ENSURING COMPLIANCE WITH PADILLA V. KENTUCKY WITHOUT COMPROMISING JUDICIAL OBLIGATIONS 1 (2010), *available at* http://www.immigrantdefenseproject.org/docs/2011/IDP_Judicial_Inquiry_Into_Status_Nov2010[1].pdf.

301. *Padilla*, 130 S. Ct. at 1486.

302. *See, e.g.*, *Padilla*, 130 S. Ct. at 1486.

defendant's legal immigration status would be affected. The first basic premise is whether the alien is in the country legally or illegally. Second, whether the alien may have possible relief options still available after a conviction for the proposed plea. The question that needs to be addressed is what options will the alien have to remain legally in the U.S. after taking the proposed plea. These general categories need to be broken down into five distinct parts: (1) the alien has legal status and may have relief available for removable offenses (including a legal attack on whether the offense actually makes the alien removable); (2) the alien has legal status and will not have any relief options; (3) the alien does not have legal status, but seeks to remain legally in the U.S. and may be eligible to seek discretionary or mandatory relief from removal; (4) the alien does not have legal status and has no options of legally remaining or reentering the U.S.; and (5) the alien was previously removed from the U.S.

Figure 1: Assessing the Alien's Legal Status and Possible Immigration Options



In addressing these categories, the best approach may be to view them in reverse order. An alien without legal status cannot presume to have any legal right to remain in the U.S. legally, nor does the INA provide one.[303] Starting with Category 5, an alien previously removed from the U.S., who illegally reentered, is subject to reinstatement of the original order of

303. *See supra* Part II.C.

removal.[304] The only form of relief eligible to reentering illegal aliens is if the alien's life or freedom would be threatened or if they would be tortured if returned.[305] Since a Category 5 alien is already subject to automatic removal, any criminal conviction received by the alien will not directly affect the alien's immigration status or removal eligibility.[306] It is unlikely an alien in this category will prevail on a *Padilla* claim.[307]

In Category 3 and 4 cases, the INA already provides for the alien's removal based on a failure to obtain or maintain a legal status.[308] The Court in *Padilla* stated: "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear."[309] As such, an alien not in legal status is subject to removal for that unlawful status. Therefore, counsel's only obligation is to inform the alien that there is no guarantee that an alien may be permitted to legally reside in the U.S., with or without a criminal conviction. Advising an alien of possible relief options was not addressed in the *Padill*a decision. This is a crucial factor in future *Padilla* claims: if one does not have legal status, then there is no future consequence of losing a legal status that the alien did not have a right to in the first place.

In cases involving a Category 4 alien, counsel's role should be focused on getting the best possible criminal disposition, while notifying the alien that immigration will likely detain and remove the alien in due course. Counsel should also notify the client that illegal reentry into the U.S. will subject the alien to federal criminal charges and the possibility of a lengthy prison sentence depending on the nature of the client's present and prior convictions.

Category 3 alien cases are often far more complicated and should be broken down further into two separate categories: (a) the alien has an immediately available immigrant petition or the alien may have valid fear of returning to the alien's country of citizenship; and (b) the alien has U.S. citizen or LPR relatives and may be eligible for an immigrant petition in the future. An unlawful alien, or a member of the alien's family, may have already spent a significant amount of money on legal fees and spent years waiting to permit the alien to seek lawful status. However, all Category 3 aliens will have speculative relief, options that are unclear or uncertain

304. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2011).

305. 8 C.F.R. § 1208.16–.17 (2011); INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2011).

306. There is one important note concerning guilty pleas for individuals who have a genuine fear of returning to their home countries: individuals who have committed a "particularly serious" crime or an aggravated felony offense may not be eligible for withholding of removal under 8 C.F.R. § 1208.16 and may be only eligible for deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2011). Deferral of removal requires the alien demonstrate that it is more likely than not that the alien would be tortured if returned. *See* 8 C.F.R. § 1208.17 (2011).

307. *See* United States v. Bacchus, No. 93-0835, 2010 U.S. Dist. LEXIS 139583, at *3–*6 (D.R.I. Dec. 8, 2010) (discussing how the *Padilla* rule does not apply retroactively).

308. *Id*. at 1483.

309. *Padilla,* 130 S. Ct. at 1483.

without a clear understanding of alien's full circumstances and immigration law. As such, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences,"[310] such as failure to obtain lawful status in the future, while reminding the alien they are already subject to removal for the illegal presence. A criminal or unlawful act, even one that does not automatically render the alien inadmissible or deportable, has potential consequences such as in the case of an alien who wishes to seek non-LPR cancellation of removal.[311]

Counsel may also recommend that the unlawful alien engage the services of an immigration attorney to properly evaluate and recommend the best possible means of preserving the alien's future ability to seek lawful status in the U.S. prior to removal, especially aliens in the 3(a) category. Even if an alien is eligible for a waiver or has a genuine fear of return, there is still a large difference between the eligibility to file a relief application and the standard for being granted that application. Counsel may also advise the alien that even if a future application may be possible, once removed from the U.S., it is possible the alien will not be permitted to return. If deported under a Section 240 proceeding, an alien is inadmissible for at least ten years from the date of removal; this period is extended to twenty years for an aggravated felony offense.[312] In addition to this ground of inadmissibility, impediments for reentry also include a ten-year bar to reentry for aliens who have been unlawfully present in the U.S for over one year.[313] And the actual criminal conviction may require a hardship waiver which will be very difficult to demonstrate if the alien is already barred for at least ten years.

The decision in *Padilla* appears primarily directed at safeguarding aliens in Categories 1 and 2 from receiving defective immigration advice concerning the alien's continued lawful status in the U.S. Aliens in a lawful status, such as Padilla,[314] have the most to lose as any removal charges will be based on the criminal conviction, alone or in conjunction with prior convictions.[315] Even with lawful status, aliens in Categories 1 and 2 may or may not be eligible for relief from removal.[316] Together, these factors give Category 1 and 2 defendants the most reason to seek post conviction relief on the grounds of ineffective assistance of counsel. When the facts and circumstances were evaluated by counsel prior to the plea, Padilla should have been advised that he would have been in Category 2 by agreeing to plead guilty to transporting a large amount of marijuana in his tractor trailer.

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310. *Id.*

311. *See* INA § 240A(b)(1)(B) (2011), 8 U.S.C. § 1229b(b)(1)(B) (2011); INA § 101(f) (2011), 8 U.S.C. § 1101(f) (2011) (listing a class of individuals who do not have good moral character).

312. *See* § 212(a)(9)(A)(ii), 8 U.S.C. 1182(a)(()(A)(ii) (2011).

313. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2011).

314. *Padilla*, 130 S. Ct. at 1477.

315. *See supra* Part II.A.

316. *See supra* notes 56–58 and accompanying text.

Although a long term LPR with potentially significant equity and mitigating factors, a conviction for trafficking in a controlled substance would have labeled him an aggravated felon without any possible relief options.[317] Based on these facts, Padilla's only options were to take the aggravated felony conviction and receive a reduced sentence or go to trial.

Padilla's success at trial appeared dim. His truck was stopped for failing to display a weight and distance tax identification sticker.[318] After Padilla consented to a search of the truck, police officers found over 1,000 pounds of marijuana.[319] Padilla's counsel made a motion to suppress the search, but the trial court upheld the validity of the consensual search.[320] Over 1,000 pounds of marijuana is clearly in excess of the personal use exception and indicative of a trafficking offense.[321] Since the prosecution had a strong case and had already won a pretrial hearing, the offer to plea to a trafficking offense with a five year sentence was really the best criminal option Padilla had.

Even if the prosecution generously offered a plea to possession of a controlled substance, Padilla would still be in Category 1. Padilla would be subject to removal and the likelihood that his relief application would be granted would still be very "unclear or uncertain."[322] During a cancellation-of-removal hearing, Padilla would still have to be granted relief as a matter of discretion, and relief is never certain.[323] The facts and circumstances of the arrest could be examined in light of any mitigating favorable factors. Padilla could not hide the facts of the arrest: transporting a very large amount of a controlled substance.

The IDP is encouraging defense counsel to leave the "record of conviction vague as to what was the underlying crime intended" and to "keep out of [the] record of conviction [the] identification of the controlled substance involved."[324] Informing a client of the potential consequences of a criminal plea is very different from subverting the true nature of the crime committed. Prosecutors should not be agreeing to hide the true nature of an alien's crime. Criminal cases involving aliens should be handled and recorded in the normal course. Criminal acts and convictions are public records. If U.S. citizens with similar convictions records have the nature of

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317. *See Padilla,* 130 S. Ct. at 1477. Padilla was a citizen of Honduras. The record does not indicate that Padilla had any fear of being returned to Honduras.

318. Brief for the United States as Amicus Curiae Supporting Affirmance, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2509223, at *2.

319. *Id*. at *2–*3.

320. *Id*.

321. *Id*.

322. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

323. *See supra* notes 57–59 and accompanying text.

324. IMMIGRANT DEFENSE PROJECT, APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES A-29, A-53 (2006), *available at* http://www.immigrantdefenseproject.org/docs/06_QuickReferenceChartforNewYorkStateOffenses.pdf. *See also In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465, 468 (B.I.A. 2011) (holding that the Immigration Judge was not permitted to examine evidence outside of the record of conviction in that case).

their crime in the record, then so should aliens.

ICE has prepared a "Tool Kit for Prosecutors" to assist prosecutors in understanding the potential consequences of a criminal conviction in the immigration process.[325] The document addresses situations in which witnesses, victims, or defendants may be facing removal based on their legal or illegal residence status in the U.S.[326] Unlike the IDP, ICE encourages prosecutors to include the factual information concerning the crime in the record of conviction.[327] For example, aliens are removable for crimes of domestic violence, and as such, "[i]nclusion of information such as the victim-perpetrator relationship may need to be present in the record of conviction to render an alien removable."[328] However, as in many domestic violence cases, prosecutors who work with victims may recognize that compliance from the victim may be significantly limited if the crime makes the defendant removable. Consequently, inclusion of this information in the record can and should be used in the negotiation process to achieve the best form of justice for all.

VI. Clarifying Potential Immigration Consequences

Even at the most basic as these five categories appear, the reality is that the justice system needs some form of uniformity in its instructions to limit future claims resulting from the *Padilla* decision. Jurisdictions may wish to consider modifying or adding new instructions which should be read to every defendant prior to a criminal plea, unless the defendant asserts a claim to U.S. citizenship. Notifying an alien that there may be possible immigration consequences for a guilty plea may no longer simply be adequate.[329]

Based on the Court's recent decision and various jurisdictions current required language, instructions should be updated to include the following minimum requirements:

> If you are not an U.S. citizen, there may be potentially severe immigration consequences. Immigration consequences may include, but are not limited to:
>
> - removal from the U.S.;
> - mandatory detention during the immigration proceedings;
> - a limited ability to seek discretionary relief to remain in the

325. *See* ICE, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS (2011), *available at* http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

326. *Id*. at 2.

327. *Id.* at 30–31.

328. *Id*.

329. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

U.S;

- a limitation on your ability to travel outside of the U.S.;
- a permanent bar to reentering the U.S. legally;
- enhanced criminal penalties for illegally reentering the U.S.; and
- a limitation on your ability to naturalize as a U.S. citizen.

Furthermore, legal counsel in immigration proceeding is not provided for free by the government. Your criminal attorney is required to explain the possible immigration consequences of your plea, specifically whether this plea may alter your immigration status. However, immigration law is complicated and you may need to consult an immigration attorney at your own expense to fully discuss any possible options you may have to remain lawfully in the U.S.

The defendant needs to acknowledge these potential consequences on the record and be given an adjournment if necessary so that the general immigration consequences of any plea are known to the defendant prior to acceptance of the plea.

Even if jurisdictions do not update this language, defense attorneys should review all these possible points with their clients to preempt future appeals seeking ineffective assistance of counsel for failure to warn of these consequences. Prosecutors should also consider adding similar language to written and oral plea agreements to ensure alien defendants are on notice of all the possible immigration consequences. Aliens will face a much greater burden in seeking to withdraw pleas if these consequences are on the record at the time of the plea.

VII. Conclusion

Until the courts have further clarified the full range of obligations under *Padilla,* affirmative steps must be taken to limit future alien appeals. The *Padilla* decision may also need to be reviewed and limited in that providing free immigration advice by government-appointed counsel is contrary to Congress' intention of not providing immigration services to aliens at tax payers' expense.[330] Immigration law is a specialty of its own and even many qualified immigration attorneys may have a hard time deciphering which crimes make an alien removable. The implications of this decision are clearly far-reaching beyond what the Supreme Court had contemplated as is born out in recent lower court decision. The Court's requirement that a criminal defense attorney competently interpret the relevant immigration law is akin to asking an immigration attorney (or any other non-tax attorney) to decipher the tax code. As for the tax code, the best

330. *See* INA § 292, 8 U.S.C. § 1362 (2011).

advice a non-tax attorney should provide to a client is clear common sense: accurately file and pay taxes due on time. As for aliens, the best advice a criminal attorney can give a client arrested for a crime is to be prepared for potentially severe adverse immigration consequences—consequences that may be significantly more harsh than a criminal sentence.