IMMIGRATION CONSEQUENCES OF MASSACHUSETTS CRIMINAL CONVICTIONS[1]

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[1] Prepared by the Committee for Public Counsel Services Immigration Impact Unit (IIU). The IIU provides training, litigation support and advice on individual cases regarding the immigration consequences of criminal conduct to all court-appointed attorneys in Massachusetts. This discussion is based on an article originally written by Daniel Kanstroom, Professor of Law and Associate Director of the Boston College Center for Human Rights and International Justice.

Introduction

Removal of noncitizens from the United States due to criminal convictions has skyrocketed in recent years due to changes in U.S. immigration law and a dramatic increase in immigration enforcement. Convictions for minor criminal offenses can have disastrous and irrevocable consequences to noncitizen clients; dispositions that appear innocuous or even favorable in terms of incarceration or criminal penalty may cause far worse immigration consequences. In March 2010, the U.S. Supreme Court found in *Padilla v. Kentucky* that deportation "is a particularly severe 'penalty'" and so "intimately related to the criminal process" that defense attorneys are required under the Sixth Amendment to advise their noncitizen clients of potential immigration consequences prior to resolving criminal cases. The Court thus held that failure to properly advise noncitizen clients of immigration consequences constitutes ineffective assistance of counsel.[2] In Massachusetts, the Supreme Judicial Court has held that trial counsel's failure to accurately advise a defendant about immigration consequences, in a manner they understand, is a violation of the Sixth Amendment of the U.S. Constitution and Article 12 of the Declaration of Rights.[3] The duty to advise applies before deciding to go to trial, before pleading guilty or before admitting to sufficient facts.[4] Counsel has a related obligation to attempt to mitigate immigration consequences at sentencing.[5] As a result, criminal practitioners must either develop a sufficient understanding of the immigration consequences of criminal convictions as to be able to properly advise their clients, or they must consult with an immigration expert who can analyze the potential consequences. Because even the most minor of criminal offenses can have serious consequences in immigration proceedings, criminal practitioners should consult with someone who is knowledgeable about the interplay between criminal and immigration law if they do not have expertise in this area of law.

In Massachusetts, we have a number of resources available to criminal defense practitioners. All Committee for Public Counsel Services (CPCS) staff attorneys and court-appointed private attorneys may seek advice on individual cases from the CPCS Immigration Impact Unit (IIU). In addition, there are many local and national resources available for assistance in this area. For information please see the IIU website at www.publiccounsel.net/iiu.

The following discussion is designed to assist criminal defense attorneys in analyzing the potential immigration consequences of criminal conduct. This is a starting point and should not be used in place of individual research. Moreover, because this discussion is intended for criminal defense attorneys, it presents the most conservative analysis of the ramifications of criminal conduct; therefore, the conclusions are not intended for use by immigration attorneys or judges in determining consequences of criminal conduct.

[2] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[3] *Commonwealth v. Sylvain*, 466 Mass 422 (2013); *Commonwealth v. DeJesus*, 468 Mass 174 (2014).
[4] *Commonwealth v. Marinho*, 464 Mass. 115, 124-126 (2013).
[5] *Id.*.

This guide does not address immigration enforcement. For more information on issues such as ICE detainers, enforcement priorities and executive actions, please see our website at https://www.publiccounsel.net/iiu/.

Governing Law

The primary statute is the Immigration and Nationality Act of June 27, 1952, as amended ("INA"). The Act in its current form is codified at 8 U.S.C. § 1101 *et seq.* Most immigration practitioners tend to refer to the INA by its more informal section numbers, rather than by citation to the United States Code (e.g., INA § 208); however, for ease of reference this document will use the U.S. Code citations. Most regulations pertaining to immigration law are found at Title 8 of the Code of Federal Regulations (8 C.F.R.), though some matters are also covered in titles 20, 22, 28, and 42 of the C.F.R. and elsewhere. Effective March 1, 2003, the responsibilities of the former Immigration and Naturalization Service ("INS") were divided among three new agencies within the Department of Homeland Security ("DHS"): 1) U.S. Citizenship and Immigration Services ("USCIS") administers visa petitions, work authorizations, and other forms of immigrant and nonimmigrant status; 2) U.S. Immigration and Customs Enforcement ("ICE") oversees immigration and customs investigations and enforcement (including detention and removal); and 3) U.S. Customs and Border Protection ("CBP") oversees borders and other ports of entry. The Immigration Court remained under the control of the Department of Justice, and it oversees all removal proceedings.

In addition to statutory law, immigration case law is developed by the Board of Immigration Appeals ("BIA"). The BIA issues appellate administrative decisions that are binding nationwide on all Immigration Judges unless modified or overruled by the Attorney General or a federal court. Some BIA decisions are subject to judicial review in the federal courts.[6] Administrative decisions designated as precedential by the BIA are referred to by a citation such as *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). These decisions are published and are available on Lexis, Westlaw, and on the BIA's website at http://www.justice.gov/eoir/ag-bia-decisions.

U.S. Citizens and Noncitizens: Types of Immigration Status

Citizens

With only a few exceptions, such as some children of diplomats, citizenship is obtained automatically by birth on U.S. soil pursuant to the Fourteenth Amendment to the U.S. Constitution. Thus, if your client was born in the U.S., Puerto Rico or U.S. territories they are probably a U.S. citizen. This would be true even if they left the U.S. soon after birth and have

[6] Judicial review is governed by 8 U.S.C. § 1252.

lived abroad for many years.[7] Since the late eighteenth century, U.S. statutes have also provided for the grant of U.S. citizenship to the children of U.S. citizens born abroad. The rules, however, have changed dramatically over the years, and such cases are notoriously complex. If your client had even one U.S. citizen parent or grandparent or was adopted by a U.S. citizen, it is very important to research this question thoroughly. The law in force at the time of birth will generally control.[8]

U.S. citizenship may also be conferred by the government through "naturalization proceedings."[9] Generally, in order to be naturalized, the noncitizen must have been a lawful permanent resident continuously for the five years preceding her application, physically present in the U.S. for at least half that time, and in a particular state or region for at least three months.[10] A client who is a naturalized U.S. citizen will have been given a certificate evidencing this fact. Naturalization records may be verified by checking with the clerk of the U.S. District Court where the swearing-in ceremony took place. The minor lawful permanent resident children of a person who naturalizes may automatically derive citizenship. This may be true even if the child does not become aware that they have derived citizenship until they are an adult.[11] Children who derived U.S. citizenship will not have documentation of that fact unless they affirmatively applied for a U.S. passport or citizenship certificate. In addition to the client's own immigration history, every client should therefore be asked about the complete immigration history of his/her parents and grandparents.

With a very few, extremely rare exceptions, a U.S. citizen client will not face any immigration consequences as a result of criminal proceedings.[12] An applicant for naturalization, however, may be denied naturalization on the basis of a criminal conviction. Immigration law requires applicants for naturalization to be of "good moral character" for the five years preceding the date of application.[13] Issues surrounding citizenship and good moral character will be discussed in more detail below.

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[7] It is possible, however, that a client who was born in the U.S. has lost citizenship through voluntary expatriation. *See* 8 U.S.C. § 1481(a); *see also Vance v. Terrazas*, 444 U.S. 252 (1980) (finding that intent to relinquish citizenship must be proven by preponderance of the evidence).

[8] The current rules are set forth in 8 U.S.C. §§ 1401, 1408, and 1409. Some immigration treatises include charts setting forth the statutory requirements according to birthdate. *See, e.g.*, Ira J. Kurzban, Kurzban's Immigration Law Sourcebook (17th ed. 2020).

[9] *See* 8 U.S.C. § 1421 *et seq.*

[10] *See* 8 U.S.C. § 1427. The statute requires only three years of permanent residence if the applicant is married to a U.S. citizen, under certain circumstances. *See* 8 U.S.C. § 1430; 8 C.F.R. § 319.1(a). Note also that there are a wide variety of exceptions to these rules. For example, a person who served honorably in the U.S. military may apply for naturalization without becoming a permanent resident. *See* 8 U.S.C. § 1440(a).

[11] *See* 8 U.S.C. § 1431, which codifies the Child Citizenship Act of 2000. The Act came into effect on February 27, 2001, and persons 18 or over on that date are subject to prior versions of the law. *See also* 8 U.S.C. § 1433 (setting forth procedure for naturalization of children on application of U.S. citizen parent).

[12] An individual who has committed an illegal act resulting in the unlawful procurement of naturalization faces criminal prosecution and automatic denaturalization. 18 U.S.C. § 1425(a); 8 U.S.C. § 1451(e); *Maslenjak v.United States*,137 S. Ct. 1918 (2017).

[13] 8 U.S.C. § 1427(a).

Lawful Permanent Residents

Noncitizens who attain the status of U.S. lawful permanent residents (so-called "LPR" status) are among the most likely to be affected by criminal proceedings in the United States. (Unfortunately, many people are unaware of this fact and believe incorrectly that long-term lawful permanent residents will not be deported for minor crimes such as simple possession of a controlled substance or shoplifting.) Most such persons will likely be aware of their status as LPRs and will have in their possession a so-called "green card" (technically known as a "Permanent Resident Card"), which, in keeping with the anomalous nature of much of immigration practice, is not necessarily green.[14] While lawful permanent resident status does not expire,[15] a green card is only valid for ten years at a time, and should be renewed.

The main concern for an LPR in criminal proceedings should be whether they will be deported as a result of actions taken in the criminal case. As discussed more fully below, grounds of deportability are described quite specifically in the INA. It is also crucial, however, to advise the client that each time they leave the United States they may be subject, as a noncitizen, to all grounds of "inadmissibility" as well.[16] Though there are similarities, the grounds of deportability and those for inadmissibility differ in significant and subtle ways.[17] Thus, it is not uncommon that a criminal disposition is structured in such a way that it avoids deportation but renders the client subject to inadmissibility upon re-entry. The consequences of the failure to advise one's client of this fact could be truly disastrous. A client may be permitted to live in the United States but may be denied re-entry and could very well be arrested at an airport or border and subject to long-term incarceration upon their return from a trip abroad.[18]

Lawful Non-Immigrants

All noncitizens that enter the United States are presumed to be "immigrants," which means that the government presumes that they are entering with the intention of living permanently in the United States.[19] So called "non-immigrants" are those noncitizens who are admitted within one

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[14] It is also possible for a person to be a permanent resident and not to have a green card. Sometimes these cards take a long time to process. In the interim, most permanent residents will have a stamp in their passports as evidence of their status. The card is evidence of status, not a precondition of status, so a person remains a permanent resident even after the card expires.

[15] The spouse of U.S. Citizens, in a marriage less than two years old at the time of approval of the residence, is eligible for conditional residence which expires after two years, unless it is extended. *See* 8 U.S.C. § 1186a. Conditional residents can petition to remove the conditions on their residence after two years. *See* 8 U.S.C. § 1186a(c).

[16] *See* 8 U.S.C. §§ 1101(a)(13)(C), 1182. An exception to this rule was the so-called *Fleuti* doctrine which provided that an "innocent, casual, and brief" departure which is not "meaningfully interruptive" of permanent resident status will not subject a permanent resident to the entry doctrine upon return to the United States. *Rosenberg v. Fleuti*, 374 U.S. 449, 462-63 (1963). The U.S. Supreme Court has upheld the *Fleuti* doctrine for lawful permanent residents convicted of offenses prior to the 1996 changes in the immigration laws. *Vartelas v. Holder*, 132 S.Ct. 1479 (2012).

[17] *See* Appendix 2

[18] Inadmissibility also means that the individual is statutorily barred from naturalizing for a period of five years

[19] 8 U.S.C. § 1101(a)(15).

of a number of specifically defined categories in the INA.[20] Each category has a letter designation. In general, the noncitizen who enters in one of these categories must have demonstrated both a specific non-immigrant purpose for entry and an intention not to remain in the United States permanently.[21] The most common categories of non-immigrants are business visitors and tourists (B-1 and B-2), students and exchange visitors (F, M, or J), and temporary workers (H). Non-immigrants will generally have a visa in their passports evidencing their status as well as a stamp evidencing their date of entry into the U.S.[22] (Noncitizens from certain countries, including most Western and some Eastern European countries, Chile, Australia, New Zealand, Singapore, Brunei, South Korea, Taiwan, and Japan, may be admitted for ninety days under the "Visa Waiver" program in which case they will not have a visa in their passports.)[23]

Non-immigrants are subject to removal if they violate the limits of their category (e.g., tourists are not permitted to work in the U.S.), or if they are convicted[24] of a crime of violence (as defined under 18 U.S.C. §16) for which a sentence of one year or longer *may be imposed* are removable for failure to maintain status.[25] Non-immigrants are also subject to the grounds of deportability for criminal convictions. As non-immigrants are likely to leave the United States with the intention of returning in the future, it is important to consider the grounds of inadmissibility as well. The grounds of inadmissibility and deportability are discussed below in detail.

Refugees and Asylum-Seekers

One of the most poignant and significant consequences of a criminal conviction or admission to sufficient facts can be the denial of an application for asylum[26] or for "withholding of removal,"[27] an asylum-like status sometimes given to immigrants who are ineligible for asylum. If there is *any possibility* that your client has applied or may apply for one of these forms of relief due to political or other persecution, it is critically important that you evaluate any action taken in the criminal case with this in mind. A noncitizen convicted of a so-called "aggravated

[20] *Id.*
[21] In some categories, such as the H-1B category for professional workers ("specialty occupations") the concept of "dual intent" is recognized. "Dual intent" means that the noncitizen can still be recognized and treated as a nonimmigrant without being penalized even though the noncitizen may also have the intention to remain in the United States and become an immigrant.
[22] Prior to April 30, 2013, individuals would also have received an I-94 card stapled into the passport. This card would indicate that they were admitted in the proper category by immigration officials at the border or airport. This system was automated in 2013 and now I-94 cards are only available online at www.cbp.gov/I94.
[23] Note that citizens of Canada traveling to the U.S. do not require a nonimmigrant visa except in specific circumstances. Citizens of Bermuda do not require a nonimmigrant visa for travel to the U.S. up to 180 days except in specific circumstances, *See* U.S. DEPT. OF STATE – BUREAU OF CONSULAR AFFAIRS, VISA WAIVER PROGRAM, (last visited Oct. 19, 2021), https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html.
[24] Note that "conviction" is an immigration term of art. *See* 8 U.S.C. § 1101(a)(48)(A).
[25] 8 C.F.R. § 214.1(g).
[26] *See* 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B).
[27] *See* 8 U.S.C. § 1231(b)(3)(B)(ii).

felony" is ineligible for asylum.[28] Similarly, asylum and withholding of removal may be denied to those convicted of a "particularly serious crime."[29]

Undocumented and Out of Status Persons[30]

Immigration status is a fluid continuum, and individuals may fall in and out of status. For example, an individual in the United States on a student visa who remains after the conclusion of an academic program is out of status or undocumented. If the same individual marries a U.S. citizen, they may be granted lawful permanent residence based on that marriage. Noncitizens who are out of status due to overstaying their periods of legal admission, violating the terms of admission, entering the United States without documentation or with false documentation or any other reason are subject to removal as soon as they come to the attention of immigration officials.[31] This does not mean, however, that criminal proceedings are irrelevant to their immigration status. Such noncitizens must be "admissible" in order to obtain lawful status; therefore, they are subject to the criminal grounds of inadmissibility, discussed below. Moreover, most defenses to removal or waivers for which they may be eligible are barred by certain types of criminal convictions.[32]

Other Designations

Temporary Protected Status (TPS)

The Secretary of Homeland Security may designate a country for TPS based upon ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. Noncitizens present in the U.S. with or without documentation, whose home country is designated as a TPS nation, may apply to remain in the U.S. legally and obtain work authorization for two years, for as long as the TPS designation continues. A noncitizen who is

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[28] 8 U.S.C. § 1158(b)(2)(B)(i).

[29] An aggravated felony (or felonies) for which a noncitizen has been sentenced to an aggregate term of at least five years is automatically considered to be a "particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). With respect to aggravated felony convictions for which a lesser sentence has been imposed, Congress explicitly empowered the Attorney General to determine what constitutes a "particularly serious crime." *Id.* In the absence of a decision by the Attorney General, the BIA has made this determination on a case by case basis. In *Matter of Y-L-, A-G- & R-S-R-*, the Attorney General spoke for the first time on the issue of what constitutes a "particularly serious crime." 23 I. & N. Dec. 270 (A.G. 2002) (holding that aggravated felonies involving unlawful trafficking in controlled substances constitute "particularly serious crimes" and only the most extenuating circumstances that are both extraordinary and compelling would permit departure from this interpretation). Another important BIA decision on "particularly serious crimes" is *Matter of N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007) (holding that an offense need not be an aggravated felony to be a particularly serious crime, and that the court may examine any reliable evidence to determine whether a crime is particularly serious). *See also Matter of Frentescu* 18 I. & N. Dec. 244 (BIA 1982), *Matter of G- G- S-*, 26 I. & N. Dec. 339 (BIA 2014).

[30] Individuals without lawful status have long been disparagingly referred to as "illegal aliens." This term does not address the fluidity of immigration status or the fact that in many cases the lack of immigration status is a civil violation, not a criminal one. In addition, the term is experienced as derogatory and dehumanizing by individuals who do not have status, and is an inappropriate way to refer to clients.

[31] They usually have the right to a removal hearing, though certain classes of immigrants are subject to expedited removal without an Immigration Court hearing. *See* 8 U.S.C. § 1225(b)(1).

[32] *See infra* Relief from Removal (Defenses to Deportation) at p. 26.

granted TPS must re-apply for this status every two years and must meet the eligibility requirements at each renewal. Currently, the nations designated as TPS countries are Burma (Myanmar), El Salvador, Haiti, Honduras, Nepal, Nicaragua, South Sudan, Sudan, Syria, Venezuela and Yemen though some of those designations are scheduled to end. Aside from the criminal grounds of inadmissibility, additional criminal grounds exist that bar an individual from TPS eligibility.[33] For more information see: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/TPS-Criminal-Bars-Aug-2021.pdf

Deferred Action

Deferred action is a formal decision by DHS, in the exercise of prosecutorial discretion, not to remove a person or class of people who would otherwise be subject to removal. It does not provide a path to citizenship or lawful permanent resident status, but it generally includes authorization to work in the U.S. for the period of the deferred action.

Deferred Action for Childhood Arrivals (DACA)

In 2012, DHS announced that it would defer the removal of certain undocumented individuals brought to the U.S. as children. Such individuals will be allowed to remain in the U.S. and work lawfully for two years, with the possibility of renewal. There are numerous eligibility requirements for DACA, including specific criminal bars. For more information see: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/DACA-update-August-2020.pdf

On July 16, 2021, a U.S. district court in *State of Texas, et al., v. United States of America, et al*, 1:18-CV-00068, (S.D. Texas, July 16, 2021) ("Texas II") held that DACA is unlawful, but allowed it to continue for current recipients and for continued renewals. This means that people who have DACA will not lose it, but the decision prohibits the federal government from approving any first-time DACA requests after July 16, 2021. Defense counsel representing clients who have DACA status should continue to advise those clients about how those pending charges would impact DACA eligibility. Moreover, the state of DACA is fluid. The Biden-Harris administration has appealed the court's ruling and on Sept. 27, 2021, DHS announced a notice of proposed rulemaking to preserve and fortify DACA. The possibility remains that the DACA program will be fully reinstated as the result of litigation, legislation, or policy changes.

[33] An applicant is ineligible for TPS if they have been convicted of one felony, 8 U.S.C. §1254a(c)(2)(B)(i); one misdemeanor, as defined under Massachusetts law, if the sentence actually imposed is more than one year of incarceration, either suspended or committed, 8 C.F.R. §244.1; two misdemeanors, 8 U.S.C. §1254a(c)(2)(B)(i); or a "particularly serious crime" that makes him a danger to the community, 8 U.S.C. §§ 1254a(c)(2)(B)(ii); 208(b)(2)(A)(ii). For a discussion of the types of offenses that constitute particularly serious crimes, please refer to *Matter of G- G- S-*, 26 I. & N. Dec. 339, 343 (BIA 2014); *Matter of N-A-M-*, 24 I.&N. Dec. 336 (BIA 2007); *Matters of Y-L-, A-G, and R-S-R-*, 23 I.&N. Dec. 270 (A.G. 2002); *Matter of Frentescu* 18 I. & N. Dec. 244 (BIA 1982).

Terminology

Removal

A noncitizen may be subject to an order of removal due to either grounds of inadmissibility or grounds of deportability. Proceedings in Immigration Court to remove a noncitizen from the U.S. are referred to as removal proceedings. If an order of removal is issued against a noncitizen, it may be months or even years before such individual is physically removed from the U.S. This depends on various factors, such as an appeal of the order or the ability of immigration officials to obtain the travel documents necessary to return the individual to their home country. A noncitizen who is removed by virtue of a criminal conviction will also be excluded from admission to the U.S. for at least five years, and for life in the case of a noncitizen convicted of a so-called "aggravated felony."[34]

Deportability

A noncitizen who is in the United States subsequent to a lawful admission is subject to the grounds of deportability listed at 8 USC § 1227. These grounds, described in detail below, apply no matter how long the noncitizen has been in the U.S. and even if their lawful status has expired.

Inadmissibility

A noncitizen seeking physical entry or re-entry into the U.S. may be subject to the grounds of inadmissibility, detailed at 8 USC § 1182 and discussed below. Noncitizens already present in the U.S. may also seek immigration benefits, such as a green card or defense to removal, that require them to be "admissible."[35] Note that "admission," as defined by 8 U.S.C. § 1101(a)(13), is a term of art under immigration law. Determining the date of a noncitizen's last admission and understanding its significance may be quite complex.[36]

For some noncitizens, both the grounds of inadmissibility and deportability may be relevant to their ability to lawfully remain in the U.S.

[34] 8 U.S.C. §1182(a)(9).
[35] Any adjustment of status is treated as if it were an "admission." Thus, a noncitizen cannot adjust status if convicted of a crime that would render her inadmissible, unless a waiver is available.
[36] *See Matter of Alyazji*, 25 I. & N. Dec. 397 (BIA 2011).

Good Moral Character

Naturalization, as well as a number of forms of relief from removal or exclusion from the U.S., require a finding of "good moral character." The statutory definition[37] specifically *precludes* a finding of good moral character for a person who, during the relevant period,[38] is or has been:

1. a habitual drunkard;
2. a member of the class of persons described in 8 U.S.C. § 1182(a)(2)(D) (prostitution and commercialized vice); (6)(E) (alien smugglers); (10)(A) (polygamy) or (2)(A) (crime of moral turpitude or controlled substance offense, except for single offense of simple possession of 30 grams or less of marijuana); or (B) (multiple criminal convictions); or (C) (controlled substance trafficker, including a person who the "immigration officer has reason to believe" is or was an "illicit trafficker in a controlled substance");[39]
3. one whose income is derived principally from illegal gambling activities, or who has been convicted of two or more gambling offenses;
4. found to have given false testimony to gain any immigration benefits;
5. confined to a penal institution, as a result of a conviction, for an aggregate period of 180 days or more; or
6. convicted of an aggravated felony after November 29, 1990.

Even if a criminal disposition can be structured to avoid the enumerated grounds, DHS may, in its discretion, find a person not to be of good moral character based upon convictions or even admissions to criminal conduct.[40] Some guidance on this question may be found in the USCIS Policy Manual.[41] The BIA has held, however, that "good moral character does not mean moral excellence" and that it is not necessarily destroyed by a single incident.[42]

Conviction

Most criminal grounds of deportability and inadmissibility require a conviction. What constitutes a conviction for immigration purposes is a question of federal law, and the definition differs from what is considered a conviction under Massachusetts state law.

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[37] 8 U.S.C. § 1101(f).
[38] The relevant period for which the petitioner must be found to have good moral character is generally five years for naturalization, five years for voluntary departure, and ten years for cancellation of removal depending upon the client's legal status, period of residence in the U.S., basis of removal and other factors. *See infra* Relief from Removal (Defenses to Deportation) at 26.
[39] Note that 8 U.S.C. § 1182(a) does not require a conviction. An "admission" may be enough.
[40] *See, e.g., Matter of Turcotte*, 12 I. & N. Dec. 206 (BIA 1967).
[41] *See* INS Interpretations § 316.1(e)-(g), available at USCIS Policy Manual, Part F – Good Moral Character, https://www.uscis.gov/policy-manual/volume-12-part-f.
[42] *Matter of Sanchez-Linn*, 20 I. & N. Dec. 362 (BIA 1991).

The INA contains the statutory definition of conviction.[43] 8 U.S.C. § 1101(a)(48) states as follows:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The First Circuit – even before this definition was codified in 1996 – applied the federal conviction standard rather strictly. For example, the Court held that a plea of *nolo contendere* which included a probationary term was a conviction for immigration purposes even though it was not considered a conviction under state law after successful completion of probation.[44]

The federal statutory definition of a conviction supports DHS' position that a Massachusetts Continuance Without a Finding ("CWOF") is a conviction for immigration purposes. Since 1996, several courts have analyzed "deferred adjudication" procedures in other states, similar to *post de novo* CWOFs, and found such adjudications to be convictions under 8 U.S.C. § 1101(a)(48)(A) because the conditions imposed or the probation on which the defendant was placed during the continuance was found to be punishment or a "restraint on liberty."[45]

In contrast, pretrial probation is not considered a conviction for immigration purposes, because there has been no admission or finding of guilt as required under the federal definition.[46] The First Circuit has held that a Massachusetts "guilty filed" disposition is not a conviction for immigration purposes *if* the disposition was not in consideration for a term of probation already

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[43] Prior to enactment of 8 U.S.C. § 1101(a)(48)(A) in 1996, this question was controlled by *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). Under *Matter of Ozkok*, a conviction existed if:

(1) There has been a formal adjudication of guilt or entry of a judgment of guilt or;
(2) An adjudication of guilt has been withheld, but
  (a) There has been a finding of guilt by a judge or jury, or an entry of a plea of guilty or *nolo contendere*, or an admission to sufficient facts;
  (b) The judge has ordered some form of punishment, penalty, or restraint on the person's liberty, and
  (c) A judgment or adjudication of guilt may be entered if the person violates the terms of probation or fails to comply with the requirements of the court's order, without further proceedings regarding the person's guilt or innocence of the original charge.

See Matter of Ozkok, 19 I. & N. Dec. at 551-52.

[44] *See Molina v. INS*, 981 F.2d 14, 16, 18 (1st Cir. 1992) (finding that a "nolo plea plus probation" under Rhode Island law amounts to a "conviction").

[45] *See Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005); *cf. Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001).

[46] Similarly, a disposition under G.L. c. 276A (pretrial diversion), G.L. c. 111E (drug treatment), G.L. c. 276, §55 (accord and satisfaction) or G.L. c. 277, §70C (conversion from criminal to civil offense) would not be considered a conviction, because there is no admission or finding of guilt.

served.[47] The case must be limited to its facts, however, as it is the only published case discussing the issue from an immigration standpoint.

Another consideration of whether a disposition is a "conviction" is the issue of finality. In a *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018), the Board of Immigration Appeals (BIA) clarified that a conviction pending on direct appeal – assuming that appeal challenges the merits of the underlying conviction – is not sufficiently final for immigration consequences to attach. In other words, a conviction cannot provide the basis for deportation or bar any relief from removal (i.e. from a defense to deportation) until the right to direct appellate review on the merits has been exhausted or waived.[48] For more information see https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/Direct-Appeal-Practice-Advisory.September-2018.pdf

Crime Involving Moral Turpitude (CIMT)

An extensive and complicated body of case law has developed as to whether a particular offense is one of moral turpitude. One common, if somewhat florid, definition is "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."[49] In 2008, in *Matter of Silva-Trevino*, the Attorney General expanded the definition of CIMT to encompass offenses that include "reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."[50] While portions of *Silva-Trevino* have been vacated, that articulation remains good law.[51]

While this area of immigration law requires significant research, there are many examples of offenses that have long been considered crimes involving moral turpitude. The following are some examples of crimes that have already been considered by the BIA and federal courts:

Examples of Crimes Involving Moral Turpitude:

- Serious crimes against the person such as murder, manslaughter, kidnapping, attempted murder, assault with intent to rob or kill, assault with a deadly weapon, and aggravated

[47] *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001). However, a guilty-filed disposition with any penalty, such as a fine or a consideration of past time served, would be considered a conviction for immigration purposes.
[48] *But see*, *Matter of Abreu*, 24 I. & N. Dec. 795 (BIA 2009) (pending late-reinstated appeal does not undo finality of conviction). *Note* also that collateral attacks on a conviction – such as motions for new trial – do not have the same effect. *See Matter of Onyido*, 22 I. & N. Dec. 552, 555 (BIA 1999).
[49] *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 83 (BIA 2001); *see also Matter of Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007).
[50] *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 689 n.1 (A.G. 2008).
[51] *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 828 n.2 (BIA 2016) (*Silva-Trevino III*); *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 n.3 (A.G. 2015) (*Silva-Trevino II*).

assault are generally considered CIMTs.[52] In Massachusetts, accessory to murder is a CIMT.[53] Involuntary manslaughter in Massachusetts is most likely a CIMT.[54]

- In Massachusetts, simple assault and battery has commonly been held not to involve moral turpitude.[55] In contrast, most aggravated assault crimes are considered CIMTs.[56]

- Most sex offenses, including rape, prostitution and indecent assault and battery, are CIMTs. Failure to register as a sex offender is also considered a CIMT.[57]

- Among crimes against property, arson, robbery, larceny, and malicious destruction of property have been found to be CIMTs.[58]

- Crimes involving theft or fraud as an essential element are almost always held to be CIMTs.[59]

Violations of regulatory laws and laws that involve strict liability or negligence generally do not involve moral turpitude.[60] For example, operating under the influence, aggravated OUI and second or subsequent OUI are not CIMTs.[61]

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[52] *See, e.g., Matter of Wu*, 27 I. & N. Dec. 8 (BIA 2017) (finding that a California assault with a deadly weapon or force offense was a crime involving moral turpitude); Matter *of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976) (finding that an Illinois aggravated assault offense was a crime involving moral turpitude); *Matter of Sanchez-Marin*, 11 I. & N. Dec. 264, 266, 267 (BIA 1965) (finding that Massachusetts convictions for voluntary manslaughter and accessory after the fact to manslaughter were crimes involving moral turpitude).

[53] *See Cabral v. INS*, 15 F.3d 193, 197 (1st Cir. 1994).

[54] In examining a Missouri statute, the BIA held that involuntary manslaughter is a crime of moral turpitude if the statute includes criminally reckless behavior as an element. *See Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994), *cited in Matter of Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007); *compare* G.L. c. 265, § 13 *and Commonwealth v. Atencio*, 345 Mass. 627, 629 (1963).

[55] *Matter of Sejas*, 24 I. & N. Dec. 236, 241 (BIA 2007) (observing that simple assault is generally not considered a crime involving moral turpitude); *Matter of Short*, 20 I. & N. Dec. 136, 137-38, 139 (BIA 1989) (holding that assault with intent to commit a felony is turpitudinous only if underlying felony is a crime of moral turpitude).

[56] *See, e.g., Matter of D-*, 20 I. & N. Dec. 827, 830 (BIA 1994) (assault with a dangerous weapon), *Maghsoudi v. INS*, 181 F.3d 8, 15 (1st Cir. 1999) (indecent assault and battery).

[57] *See Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (BIA 2007); 8 U.S.C. § 1227(a)(2)(A)(v) (failure to register as a sex offender is also a separate deportable offense).

[58] *See Neto v. Holder*, 680 F.3d 25 (1st Cir. 2012); *Onwuamaegbu v. Gonzales*, 470 F.3d 405, 407 n.2 (1st Cir. 2006); *Matter of S--*, 3 I. & N. Dec. 617 (BIA 1949); *Matter of G -- R--*, 2 I. & N. Dec. 733 (BIA 1946).

[59] *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (holding that any offense that has fraud as an element is a crime involving moral turpitude); *see also Matter of Zaragoza-Vaquero*, 26 I. & N. Dec. 814 (BIA 2016) (holding that an offense of criminal copyright infringement is a crime involving moral turpitude); *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) (holding that a theft offense involving intent to permanently deprive an owner of her property or substantially erode her property rights is a crime involving moral turpitude).

[60] *See Silva-Trevino*, 24 I. & N. Dec. at 689 n.1 (requiring a scienter of specific intent, deliberateness, willfulness or recklessness for the crime to involve moral turpitude). *But see Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 782 (BIA 2020) (holding that despite strict liability of statutory rape charge, where the victim is particularly young or the age differential between the victim and perpetrator is significant is a crime involving moral turpitude).

[61] *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 86 (BIA 2001). *But see Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1195-96 (BIA 1999) (involving Arizona offense for aggravated driving under the influence in which the

Please note that this list is not conclusive and that this is a constantly evolving area of law. Before advising a noncitizen about the immigration consequences of *any* offense, it is essential to research the question of moral turpitude thoroughly or consult with an expert on the intersection of immigration and criminal law.[62]

Immigration Consequences of Criminal Conduct

Grounds of Deportability

Aggravated Felonies[63]

Any alien who is convicted of an aggravated felony at any time after admission is deportable.[64] "Aggravated felony" is a ground of deportability which results in virtually automatic deportation, mandatory detention and permanent exile from the U.S. Though the category was originally quite limited, it has expanded tremendously to the point where virtually any crime may be an aggravated felony.[65] Some categories of offenses require merely a conviction to constitute an aggravated felony. Others require a conviction *and* a sentence of imprisonment, suspended or committed, of one year or more, or a conviction involving a certain amount of monetary loss, to be considered an aggravated felony. The definition of aggravated felonies is retroactive.[66]

aggravating factor is that the driver's license had been suspended due to a prior DUI. Offense found to be a CIMT because of the driver's knowledge that they were prohibited from driving).

[62] A conviction *or an admission* to the commission of a crime of moral turpitude is a ground of inadmissibility, while the deportability grounds are triggered only by a conviction. *Compare* 8 U.S.C. § 1182(a)(2)(A)(i) *with* 8 U.S.C. § 1227(a)(2)(A)(i) & (ii).

[63] IIRIRA, Division C of Pub. L. No. 104-208, 110 Stat. 3009; the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"); and the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4311 ("INTAC") substantially broadened the definition of an aggravated felony. The current statutory definition is at 8 U.S.C. § 1101(a)(43).

[64] 8 U.S.C. § 1227(a)(2)(A)(iii).

[65] The definition of an aggravated felony, found at 8 U.S.C. § 1101(a)(43), includes twenty-one broad subcategories. *See Matter of Small*, 23 I. & N. Dec. 448, 450 (BIA 2002).

[66] *See Matter of Lettman*, 22 I. & N. Dec. 365, 378 (BIA 1998), *aff'd*, 207 F.3d 1368 (11th Cir. Mar. 31, 2000) (finding that a noncitizen convicted of an aggravated felony is deportable regardless of the date of conviction), *Matter of Truong*, 22 I. & N. Dec. 1090, 1094-96 (BIA 1999) (holding that the aggravated felony definition is retroactive).

Notably, offenses classified by state law as misdemeanors can be aggravated felonies. For example, a theft offense or "crime of violence" (as defined under 18 U.S.C. §16(a))[67] for which a sentence[68] of one year or more is imposed or suspended is considered an aggravated felony.

Many controlled substance offenses are considered aggravated felonies, in addition to being an independent ground of deportability, as discussed below.[69] Under 8 U.S.C. § 1101(a)(43)(B), "illicit trafficking" in controlled substances and "drug trafficking" crimes are both aggravated felonies. Generally speaking, "illicit trafficking" refers to offenses involving remuneration.[70] A "drug trafficking" crime is an offense punishable as a felony under the federal Controlled Substances Act and therefore includes virtually all distribution-related offenses[71] as well as convictions for subsequent possession of controlled substances.[72]

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[67] What constitutes a crime of violence has produced extensive litigation and is therefore constantly evolving. For example, though the immigration statute incorporates the entire crime of violence definition at 18 U.S.C. § 16, the Supreme Court struck down clause (b) as void for vagueness. *Sessions v. Dimaya*, 584 U.S. __ , 138 S.Ct. 1204 (2018). In 2019, the Court found that an offense which requires merely force sufficient to overcome a victim's resistance was categorically a crime of violence regardless of whether the victim suffered pain or injury. *Stokeling v. U.S.*, 139 S.Ct. 544 (2019). Recently, the Court held that a crime of violence excludes crimes with a reckless mens rea, effectively abrogating existing case law in several circuits. *Borden v. United States*, __, U.S. __, No. 19-5410 (June 10, 2021). This footnote will attempt to provide the current First Circuit case law on common Massachusetts offenses, but as always counsel should do independent research to confirm. **Assault and Battery.** First Circuit case law at the time of this writing suggests that assault and battery should never be considered a crime of violence, because the intentional form is not divisible and punishes de minimis touching, and the reckless form does not require a sufficient degree of intent. *See Johnson v. U.S.*, 130 S.Ct. 1265 (2010); *United States v. Whindley*, 864 F.3d 36, 39 (1st Cir. 2017); *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017); *United States v. Martinez*, 762 F.3d 127 (1st Cir. 2014); *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014). **Assault with a Dangerous Weapon.** ADW is considered a crime of violence under § 16(a). *United States v. Whindleton*, 797 F.3d 105, 114 (1st Cir. 2015). **Assault and Battery with a Dangerous Weapon**. The intentional form of ABDW is considered a crime of violence, *United States v. Fields*, 823 F.3d 20, 34-35 (1st Cir. 2016), *United States v. Tavares*, 843 F.3d 1, 12-13 (1st Cir. 2016), while under current First Circuit law, the reckless form of ABDW is not a crime of violence, *Whindley*, 864 F.3d at 39, *Fish*, 758 F.3d at 9-10. Whether ABDW is divisible between the intentional form and the reckless form is subject to dispute, *compare Tavares*, 843 F.3d at 13-18, *with Faust*, 853 F.3d at 55-58. Even if divisible, it may be difficult for immigration authorities to prove that a defendant was convicted of the intentional, rather than reckless, form of ABDW. *See United States v. Kennedy*, 881 F.3d 14, 21 (1st Cir. 2018).

[68] A "sentence" under federal immigration law includes any period of incarceration that is imposed or suspended. *See* 8 U.S.C. § 1101(a)(48)(B).

[69] *See* 8 U.S.C. §§ 1227(a)(2)(B) (controlled substance ground); 1101(a)(43)(B) (aggravated felony definition); *see also Mellouli v. Lynch*, 135 S.Ct. 1980 (2015)(finding that an offense does not fall within the controlled substance ground of deportability under 8 U.S.C 1127(a)(2)(B)(i) unless the particular controlled substance is identified as an element of the offense of conviction and is a substance included in the federal controlled substance schedules).

[70] *See Matter of Davis*, 20 I. & N. Dec. 536, 541 (BIA 1992).

[71] However, the U.S. Supreme Court has held that possession with intent to distribute a small amount of marijuana for no remuneration is not always an aggravated felony. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); s*ee also Commonwealth v. Keefner*, 461 Mass. 507 (2012) (upholding the viability of the Massachusetts offense of possession with intent to distribute one ounce or less of marijuana in light of the decriminalization of simple possession of one ounce or less of marijuana). For more information, see the following practice advisory: www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/07/Moncrieffe-and-Jackson-Practice-Advisory-6.24.13.pdf.

[72] The Supreme Court has held that simple possession of a controlled substance is *not* a "drug trafficking" crime unless it would be treated as a felony if prosecuted under federal law. *Lopez v. Gonzales*, 549 U.S. 47 (2006). Flunitrazepam (commonly referred to as "roofies" or a "date rape" drug) is the only controlled substance for which

The practitioner representing a noncitizen, especially a lawful permanent resident, should attempt to avoid a conviction for an aggravated felony, because the consequences are devastating. Noncitizens convicted of aggravated felonies are detained without bond[73] and will be deported as expeditiously as possible. An aggravated felon is conclusively presumed to be deportable and is also rendered ineligible for virtually all forms of relief from removal, including asylum. *See infra* Relief from Removal (Defenses to Deportation) at p. 26. A person deported who has an aggravated felony is banned from the United States for life.[74]

Crimes Involving Moral Turpitude (CIMT)

An [noncitizen]is deportable if he–

(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) of this title) after the date of admission, and
(II) is convicted of a crime for which a sentence of one year or longer *may be* imposed,

8 U.S.C. § 1227(a)(2)(A)(i).

In addition, 8 U.S.C. § 1227(a)(2)(A)(ii) provides that:

> Any [noncitizen]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 therefor and regardless of whether the convictions were in a single trial, is deportable [emphasis added].

Both of these sections of the INA raise the same issues of conviction and moral turpitude. Cases under 8 U.S.C. § 1227(a)(2)(A)(ii) also raise the important issue of whether the convictions arose out of a "single scheme of criminal misconduct." There is a fairly extensive and rather fact-

possession constitutes a federal felony; therefore, simple possession of all other controlled substances are not considered aggravated felonies. *See* 21 U.S.C. § 844(a). Moreover, a second conviction for drug possession is not a drug trafficking crime, and therefore not an aggravated felony, unless the record of conviction establishes that it was prosecuted as a "subsequent offense", with notice to the defendant and an opportunity to be heard on the fact of the prior conviction. *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006). A conviction for subsequent possession is treated as a felony under federal law; thus, it would qualify as a drug trafficking aggravated felony.

[73] The Supreme Court upheld the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) in *Demore v. Kim*, 538 U.S. 510 (2003). In *Jennings v. Rodriguez*, 138 S.Ct. 830, 851 (2016), the Court held that mandatory detention does not implicitly require a custody determination hearing after six-months of confinement. Since Jennings, the First Circuit has held that that "mandatory detention…without a bond hearing violates the Due Process Clause when it becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal noncitizens" *Reid v. Donelan*, No. 19-1787, 2021 WL 4958251 (1st Cir. Oct. 26, 2021).

[74] *See* 8 U.S.C. § 1182 (a)(9)(A)(ii).

specific body of case law on this point.[75] The First Circuit has held that a single scheme involves acts that take place at one time, with no substantial interruption that allows the perpetrator to reflect on his actions.[76] The BIA has held that convictions for multiple charges of possession of a stolen credit card and forgery stemming from purchasing goods with the credit card at multiple stores on the same day do not constitute a "single scheme."[77] The BIA stated that acts occur in a "single scheme" when they are performed "in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct."[78]

Controlled Substance Offenses

A noncitizen is deportable under 8 U.S.C. § 1227(a)(2)(B) who:

> . . . at any time after admission has been convicted of 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)), *other than a single offense involving possession for one's own use of thirty grams or less of marijuana* [.] [emphasis added][79]

Inchoate offenses generally will be considered controlled substance offenses when the underlying substantive crime involves a drug offense.[80] However, a conviction for accessory after the fact to a drug offense (G.L. c. 274, § 4) is probably not a deportable offense, at least under this section of the statute as it is a distinct crime from the substantive offense.[81]

Controlled substance offenses that were expunged or vacated under various state and federal rehabilitative statutes are still considered convictions under immigration laws.[82]

Firearm Violations

8 U.S.C. § 1227(a)(2)(C) provides for the deportation of:

> [a]ny alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or

[75] *See, e.g., Nguyen v. INS*, 991 F.2d 621, 623-25 (10th Cir. 1993).
[76] *See Balogun v. INS*, 31 F.3d 8, 9 (1st Cir. 1994); *Pacheco v. INS*, 546 F.2d 448, 451 (1st Cir. 1976).
[77] *Matter of Islam*, 25 I. & N. Dec. 637 (BIA 2011).
[78] *Id.* at 639; *Matter of Adetiba*, 20 I. & N. Dec. 506, 511 (BIA 1992).
[79] *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015)(finding that an offense does not fall within the controlled substance ground of deportability under 8 U.S.C 1127(a)(2)(B)(i) unless the particular controlled substance is identified as an element of the offense of conviction and is a substance included in the federal controlled substance schedules).
[80] *See, e.g., Matter of Beltran*, 20 I. & N. Dec. 521, 527 (BIA 1992) (solicitation); *Matter of Del Risco*, 20 I. & N. Dec. 109, 110 (BIA 1989) (facilitation); 8 U.S.C. § 1227(a)(2)(B)(i) (attempt and conspiracy).
[81] *See Matter of Batista*, 21 I. & N. Dec. 955, 960 (BIA 1997).
[82] *See Matter of Roldan*, 22 I. & N. Dec. 512, 528 (BIA 1999).

> carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law[.]

It is important to note this section's breadth (virtually any firearms offense will qualify) and the inclusion of attempt and conspiracy offenses.[83] However, recent case law holds that a conviction cannot be considered a firearms offense under 1227(a)(2)(C) unless the possession, sale, use, etc. is an element of the offense. For example, in Massachusetts, an ABDW to wit: "firearm," cannot be a firearms offense under the immigration code because the firearm is not an element of the offense.[84] In addition, possession of ammunition is not considered a firearms offense under this ground of deportability.[85]

It is also important to note that in 2018 the Massachusetts definition of a firearm changed to include a stun gun, where a stun gun is defined as:

> a portable device or weapon, regardless of whether it passes an electrical shock by means of a dart or projectile via a wire lead, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily, injure or kill may be directed.[86]

While as of the time of the printing of this guide there was no case law interpreting whether stun guns are firearms under the federal generic definition, the addition of stun guns may make the state statute overbroad, since a stun gun will never require having a bullet fired,[87] and a noncitizen may no longer be deportable under a firearms violation.

Please consult with the attorneys at the IIU on this changing area of law.

Domestic Violence; Child Abuse, Abandonment, and Neglect; Stalking

8 U.S.C. § 1227(a)(2)(E) provides for the deportation of noncitizens who are convicted of crimes of domestic violence, stalking, child abuse, child neglect, child abandonment, or certain violations of protective orders. This is a very broad statute which so far has been the subject of only limited analysis by the BIA and the courts. Its full text should, however, be read closely as it applies to a very wide variety of cases. *It is important to note that this category of deportable offenses encompasses both domestic and non-domestic crimes*:

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[83] For cases interpreting this deportation ground, see *Matter of Flores-Abarca*, 26 I. & N. Dec. 922 (BIA 2017); *Matter of Chow*, 20 I. & N. Dec. 647 (BIA 1993), *aff'd*, 12 F.3d 34 (5th Cir. 1993); *Matter of K-L-*, 20 I. & N. Dec. 654 (BIA 1993); *Matter of P-F-*, 20 I. & N. Dec. 661 (BIA 1993).

[84] *See Descamp v. United States*, 133 S.Ct. 2276 (2013); *Campbell v. Holder*, 698 F.3d 29 (1st Cir, 2012); *Matter of Chairez*, 26 I. & N. Dec. 349 (BIA 2014), *vacated in part by Matter of Chairez*, 26 I. & N. Dec. 478 (BIA 2015).

[85] *See Dulal-Whiteway v. DHS*, 501 F.3d 116, 123 (2d Cir. 2007).

[86] M.G.L. c. 140 §121; *see also Ramirez v. Commonwealth*, 479 Mass. 331 (2018).

[87] A firearm is defined in 18 USC 921(a) as: (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to **expel a projectile by the action of an explosive**; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(i) Domestic violence, stalking, and child abuse – Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders – Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

It is important to note that section (ii) can be satisfied for removal purposes by violating the "no contact" portion of a restraining order.[88]

In 2016, the BIA decided that a domestic or family relationship need not be an element of a statute of conviction for an offense to constitute a crime of domestic violence under 8 U.S.C. §1227(a)(2)(E)(i).[89] Rather, the BIA concluded that any reliable evidence, whether from within or outside the official record of conviction, may be used to determine whether a qualifying relationship existed between the defendant and alleged victim.[90] The elements-based categorical approach must still be applied, however, to determine whether a conviction is for a crime of violence.[91] Therefore, an offense that is not categorically a crime of violence cannot be a crime of domestic violence, notwithstanding evidence proving the existence of a domestic relationship.

[88] *Matter of Strydom,* 25 I. & N. Dec. 507 (BIA 2011) (holding that a conviction for violating a no contact order which was violated by a phone call to the protected person constituted a violation of a protective order and this a ground of deportability).
[89] *Matter of H. Estrada,* 26 I. & N. Dec. 749, 753 (BIA 2016); *see also Hernandez-Zavala v. Lynch,* 806 F.3d 259 (4th Cir. 2015); *Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010); *but see Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).
[90] *Estrada,* 26 I. & N. at 753.
[91] *Id.* at 750.

In contrast to offenses discussed above that require a domestic relationship, the BIA has held that in order for an offense to be considered "child abuse, neglect or abandonment," a "child" must be an element of the underlying offense that is pled and proven in the underlying conviction.[92] Note that a "child" is defined under immigration law as anyone less than eighteen years of age.[93] The BIA set forth a definition of "child abuse" in *Matter of Velazquez-Herrera*. Based on the policies behind the provision, the BIA interpreted the term "broadly to mean any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation."[94] As mentioned above, it is also critical to note that child abuse, abandonment, and neglect, and stalking do not require there to be a domestic relationship to fall under this ground of deportability.

Other Grounds of Deportability

The grounds discussed above do not provide an exhaustive list of all bases for deportation. Less common grounds involving criminal conduct include smuggling (of aliens), marriage fraud, espionage, sabotage, treason, sedition, Selective Service violations, falsification of documents and "terrorist activities."

Grounds of Inadmissibility

Crimes Involving Moral Turpitude (CIMT)

8 U.S.C. § 1182 (a)(2)(A)(i) states in pertinent part that any noncitizen is inadmissible to the United States who has been:

> convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime[.]

Note first that *a conviction is not required under this section of the statute*. A voluntary and knowing admission to the essential elements of a crime involving moral turpitude alone may well suffice to render a person inadmissible to the United States.[95]

It is also important to note that the statute itself provides that this inadmissibility section will not apply if:

- The noncitizen committed only one CIMT; and
- The crime was committed when the alien was under 18 years of age; and

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[92] *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008).
[93] *Id*. at 512.
[94] *Matter of Velazquez-Herrera*, 24 I. & N. Dec. at 512; *see also Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016) (holding that an offense of endangering the welfare of a child constitutes child abuse); *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010) (holding that an offense involving reckless endangerment to a child constitutes child abuse).
[95] *See* Gordon, Mailman & Yale-Loehr, 5-63 Immigration Law and Procedure § 63.03 (Matthew Bender 2012).

- The crime was committed (and the alien was released from any confinement) more than five years before the date of applying for admission to the US.[96]

Similarly, a noncitizen will not be inadmissible under this section if:

- The noncitizen committed only one CIMT; and
- The maximum penalty possible for the crime did not exceed imprisonment for one year; and
- The noncitizen was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).[97]

Controlled Substances

Inadmissibility for controlled substance violations is governed by 8 U.S.C. § 1182 (a)(2)(A)(i)(II) which renders inadmissible any noncitizen:

> . . . convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . 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))[.]

This section is very broadly construed and will include virtually any controlled substance offense the practitioner is likely to encounter.[98] Further, 8 U.S.C. § 1182 (a)(2)(C) excludes from the United States any person whom the government knows or has "reason to believe" is an illicit trafficker in any controlled substance or is or has been a "knowing aider, abettor, assister, conspirator or colluder" in such trafficking. The "reason to believe" standard is generally understood to be a probable cause standard and so relatively easy to meet. Thus, in some circumstances, even a disposition that is not a conviction could cause a noncitizen to be inadmissible as someone the government has "reason to believe" is a drug trafficker.

Multiple Offenses

8 U.S.C. § 1182 (a)(2)(B) renders inadmissible any noncitizen:

> convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single

[96] *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(I).
[97] *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Note that a Massachusetts suspended sentence is considered a term of imprisonment under the INA. *See* 8 U.S.C. § 1101(a)(48)(B).
[98] The Supreme Court decision in *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) may provide a basis to avoid a finding of inadmissibility, even for a drug-related conviction, but issues of burden of proof complicate the analysis. See *Pereida v. Wilkinson*, 141 S. Ct. 754, 209 L. Ed. 47 (2021). Counsel should consult the IIU or an immigration expert for assistance.

> scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more[.]

Note that for this section to apply a "conviction" is required, but moral turpitude is not.

Prostitution

8 U.S.C. § 1182 (a)(2)(D) bans from the United States any noncitizen:

> who . . . is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status, [or who] directly or indirectly procures or attempts to procure, or [within that period] procured or attempted to procure or to import, prostitutes or . . . received . . . the proceeds of prostitution, or . . . is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution[.]

Both the federal regulations and the BIA have stated that this ground of inadmissibility is for a pattern of continuous conduct; isolated acts of prostitution or solicitation of a prostitute are not enough to make a noncitizen inadmissible.[99] However, case law suggests that prostitution is a CIMT, so one conviction may still make a noncitizen inadmissible.[100]

Other Grounds of Inadmissibility

8 U.S.C. § 1182 contains a number of other grounds of inadmissibility which should be consulted if they appear even potentially applicable. For example, 8 U.S.C. § 1182 (a)(3), entitled "Security and Related Grounds," contains very broad bases of inadmissibility including "any other unlawful activity" and "Terrorist Activities" which are defined rather loosely. 8 U.S.C. § 1182 (a)(2)(E) relates to certain noncitizens who have asserted immunity from criminal prosecution. 8 U.S.C. §1182 (a)(1)(A)(iii) relates to individuals with mental disorders and behavior associated with such mental disorder that pose a threat to the property, safety, or welfare of the individual or others. This may become an issue for persons found not guilty by reason of insanity or clients involuntarily committed for psychiatric treatment.

[99] 22 C.F.R. § 40.24 ("A finding that an alien has 'engaged' in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts"). *See also Matter of T-*, 6 I. & N. Dec. 474 (BIA 1955); *Matter of Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549 (BIA 2008).

[100] *Matter of Lambert*, 11 I. & N. Dec. 340 (BIA 1965).

Juvenile Offenses

A finding of delinquency in a juvenile proceeding is not considered a conviction for immigration purposes.[101] A finding of delinquency may, however, preclude a finding of good moral character. A delinquent act also might fall under a ground of inadmissibility or deportability that is based on conduct rather than convictions – for example, prostitution, drug abuse, or "reason to believe" that a noncitizen is a drug trafficker.[102] Similarly, violation of a restraining order is a deportable offense that does not require a conviction, and a determination by a civil court may trigger deportability.[103]

If a juvenile is tried and convicted as an adult, they would most likely be treated as having an adult conviction in immigration proceedings.[104] It is uncertain at this time whether a Massachusetts "youthful offender" adjudication would be deemed a conviction for immigration purposes, though there are strong arguments that it should not be considered a conviction.[105] The BIA has held that a "youthful offender" adjudication under New York law did not constitute a conviction for immigration purposes.[106] The Sixth Circuit and the BIA have held that Michigan's "youthful trainee" designation amounted to a conviction because the procedure was more similar to a deferred adjudication than a delinquency finding.[107] The Massachusetts YO statute has similarities to both the New York and Michigan statute. Thus, until the BIA rules, the immigration effects of a YO finding are not clear. The exact nature of the proceedings and the ultimate sentence would, however, be important factors for the BIA to consider.

Final Note

When the Department of Homeland Security initiates removal proceedings against a noncitizen, it is not required to include all possible grounds of removability or all of the criminal offenses that make him removable.[108] Instead, DHS will list the minimum number of offenses that it needs to meet its burden of proving removability.[109] If the listed convictions are vacated, or if a judge finds that they are not removable offenses, DHS is free to amend its charging document to include additional offenses.[110] As long as a criminal offense makes a noncitizen removable,

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[101] *See Matter of C-M-*, 5 I. & N. Dec. 327 (BIA 1953); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (BIA 1981).
[102] *See* 8 U.S.C. § 1182(a)(2)(C) (controlled substance traffickers) & (D) (prostitution); 8 U.S.C. § 1227(a)(2)(B)(ii) (drug abuse).
[103] *See* 8 U.S.C. § 1227(a)(2)(E)(ii).
[104] *See Viera Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (holding that 17 year old charged and convicted in Rhode Island as an adult was not entitled to have his offense treated as one of juvenile delinquency for purposes of INS proceedings).
[105] See *Matter of V-X-*, 26 I. & N. Dec. 147, 152-53 (BIA 2013)(finding that where a youthful offender conviction is not a deferred adjudication and cannot ripen into a criminal conviction, it is not a conviction for immigration purposes).
[106] *Matter of Devison*, 22 I. & N. Dec. 1362 (BIA 2000) (reasoning by analogy to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1994 & Supp. II 1996)).
[107] *Uritsky v. Gonzales*, 399 F.3d 728 (7th Cir. 2005); *Matter of V-X*, 26 I. & N. Dec. 147, 152-53 (BIA 2013).
[108] *See Magasouba v. Mukasey*, 543 F.3d 13, 16 (1st Cir. 2008).
[109] 8 U.S.C. § 1229a(c)(3) (DHS must establish removability by clear and convincing evidence).
[110] 8 C.F.R. § 1003.30; 8 C.F.R. § 1240.10(e).

DHS is free to include it initially on the charging document (known as the Notice to Appear), add it later, or even use it as a basis for reopening proceedings after the Immigration Judge has decided the case.[111]

[111] *See De Faria v. INS*, 13 F.3d 422, 424 (1st Cir. 1993) (Government motion to reopen proceedings allowed to amend charging document after criminal conviction listed on original charging document was vacated).

Relief from Removal (Defenses to Deportation)

Even where a noncitizen is already subject to removal – either because of their prior criminal record or because they do not presently have a lawful immigration status – they may be eligible for one of the narrow forms of relief from removal if placed in removal proceedings. Moreover, whether or not they are not placed in removal proceedings, they may be able to affirmatively apply for lawful immigration status via some of the avenues descried below. Virtually all forms of relief from removal include criminal bars. Even where a conviction does not absolutely bar relief, most defenses listed below involve an element of discretion and a criminal disposition may weigh negatively in the determination of whether the client merits the relief in the exercise of discretion. For these reasons, avoiding conviction or negotiating favorable outcomes can still be important and beneficial for individuals without status or who are already subject to removal.

This section is designed to provide only a brief overview of some (but not all) forms of relief. It should not be used as the sole tool for determining eligibility for relief.[112]

Cancellation of Removal for Lawful Permanent Residents

Who is eligible? 8 U.S.C. § 1229b(a)
A noncitizen who:

(1) Has been a lawful permanent resident for at least five (5) years AND

(2) Who has resided in the United States continuously for at least seven (7) years after having been lawfully admitted in any immigration status; AND

(3) Has not been convicted of an aggravated felony; AND

(4) Who the immigration judge determines merits relief, after weighing all the equities, in the exercise of discretion.[113]

What are the criminal bars?

- Any aggravated felony conviction.

- A conviction for an offense that occurred before the noncitizen has resided in the U.S. for at least seven (7) years, if that offense makes the person inadmissible (a conviction for an

[112] For more comprehensive resources, *see* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook (17th ed. 2020); Kesselbrenner & Rosenberg, Immigration Law and Crimes (Thomson West, updated regularly); Immigrant Legal Resource Center, Immigration Relief Toolkit for Criminal Defenders, *available at* http://www.ilrc.org/sites/default/files/resources/n.17_questionnaire_jan_2016_final.pdf.
[113] For the factors an immigration judge may consider when determining whether a lawful permanent resident merits a grant of cancellation of removal, *see Matter of C-V-T-*, 22 I. & N. Dec. 7, 10 (BIA 1998).

offense that makes a noncitizen inadmissible will "stop-the-clock" on the accrual of the necessary seven years of residence). 8 U.S.C. § 1229b(d)(1).

Cancellation of Removal for Non-Lawful Permanent Residents

Who is eligible? 8 U.S.C. § 1229b(b)(1)
A noncitizen who:

(1) Has been continuously physically present in the United States for not less than ten (10) years; AND

(2) Has been a person of good moral character (defined at 8 U.S.C. § 1101(f)) for those ten (10) years; AND

(3) Has not been convicted of a criminal offense that makes them deportable or inadmissible; AND

(4) Establishes that removal would result in exceptional and extremely unusual hardship to the noncitizen's LPR or U.S. citizen spouse, parent, or child. Note that this is an extremely high standard and usually requires showing that the qualifying relative suffers from a significant physical or mental illness.[114]

What are the criminal bars?

- All criminal grounds of inadmissibility and deportability.
- Any criminal disposition that bars a finding of good moral character as defined at 8 U.S.C. § 1101(f) during the relevant ten year period.[115]

VAWA Cancellation 8 U.S.C. § 1229b(b)(2)
Under certain circumstances, a noncitizen who has been battered or subject to extreme cruelty by an LPR or U.S. citizen spouse or parent, or the noncitizen parent of a child who has been abused by an LPR or U.S. citizen parent, may be eligible for a more generous form of non-LPR cancellation. This form of relief requires only three years residence and involves establishing hardship to the noncitizen herself or her children or parents, but has the same criminal bars.

Adjustment to Lawful Permanent Resident Status

A noncitizen with a temporary form of immigration status or no lawful immigration status may be eligible to apply to become a lawful permanent resident (LPR – "green card" holder) in the United States. This process is called adjustment of status.

Who is eligible?

[114] See *Matter of Monreal-Aguinaga*, 23 I. & N. Dec. 56 (2001).
[115] See *Matter of Castillo Perez*, 27 I&N Dec. 664 (A.G. 2019) (finding that two DUI convictions within a certain period creates a rebuttable presumption that a noncitizen lacks "good moral character.")

As a general rule,[116] the basic requirements for becoming an LPR are:[117]

- You belong to a particular category of people that may apply for LPR status (e.g. you are the beneficiary of a petition filed by a qualified U.S. citizen or LPR family member; you are the beneficiary of a petition filed by your employer; etc.); AND
- You were lawfully inspected and admitted or paroled into the U.S.; AND
- You have an LPR visa immediately available for you (e.g. for family-based adjustments, only spouses, unmarried children under 21, and parents of U.S. citizens have LPR visas immediately available – all other categories of family members must wait for a visa to become available in a process that takes years); AND
- You are admissible.

Violence Against Women Act (VAWA) 8 U.S.C. § 1154(a)(1)(A)
The noncitizen spouse or child of a U.S. citizen or LPR who battered or subjected the noncitizen to extreme cruelty may "self-petition" in order to become an LPR. Likewise, the noncitizen parent of a child who was subjected to battery or extreme cruelty by a U.S. citizen or LPR parent may "self-petition." This means that the noncitizen victim of domestic violence can apply for LPR status without the assistance of the abusive spouse or parent.

Victims of domestic violence who are inadmissible are still barred from becoming lawful permanent residents, unless eligible for and granted a discretionary waiver of inadmissibility.

212(h) Waiver of Inadmissibility. 8 U.S.C. § 1182(h)
The only general waiver of inadmissibility available for new criminal convictions is found in Section 212(h) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182(h).

What grounds of inadmissibility can be waived?

- Crimes involving moral turpitude
- Single offense of possession of 30 grams or less of marijuana for personal use
- Multiple convictions with an aggregate sentence of five years
- Prostitution
- Certain noncitizens who have asserted immunity

[116] Certain noncitizens, such as those granted Special Immigrant Juvenile status, those who have obtained status as victims of domestic violence, and refugees and asylees, benefit from more lenient requirements to become an LPR. These general adjustment rules apply primarily to those seeking to adjust based on a family relationship or employment.
[117] 8 U.S.C. § 1255.

Note that the controlled substance and the drug trafficking grounds of inadmissibility cannot be waived, except for a single offense of possession of 30 grams or less of marijuana for personal use. Murder, attempt or conspiracy to commit murder, and "criminal acts involving torture" likewise cannot be waived.
However, in certain circumstances 212(h) may be used to waive aggravated felony convictions that fit into the above waivable grounds.

What is required for the waiver?

- Under current Board of Immigration Appeals law, the noncitizen must have a pending application to adjust to LPR status (i.e. they cannot apply for this waiver unless they are otherwise eligible to become an LPR); AND

- Unless the only ground of inadmissibility is prostitution or the noncitizen is self-petitioning as the victim of domestic violence (see above), the noncitizen must establish that a U.S. citizen or LPR spouse, parent, or child would suffer extreme hardship if the noncitizen were deported[118] OR if the offense is considered "violent or dangerous" the noncitizen must show exceptional and extremely unusual hardship[119] to a qualifying relative; AND

- Immigration authorities must find after weighing the equities that the noncitizen merits a waiver in the exercise of discretion.

  Note: Current LPRs may be eligible to re-adjust to LPR status as a defense to deportation, if they are eligible to waive the criminal ground of inadmissibility. Current LPRs may have additional bars to the 212(h) waiver.[120]

209(c) Waiver of Inadmissibility. 8 U.S.C. § 1159(c)
Persons granted asylee or refugee status, who apply to adjust their status to LPR, are eligible for a generous waiver of inadmissibility that waives more criminal grounds and does not require establishing the substantial hardship necessary under 212(h).
https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Refugee_and_Asylee_Adjustment_Toolkit.pdf.

212(c) Relief

Prior to April 1, 1997, there existed a generous form of discretionary relief from removal for LPRs. This relief, known as a "212(c) waiver" after the former provision of the Immigration and Nationality Act, allowed an LPR to waive even certain aggravated felony convictions. An LPR who is subject to removal for a conviction that occurred prior to April 1, 1997 *may* be eligible to

[118] For more information about establishing extreme hardship, *see Matter of Cervantes*, 22 I. & N. Dec. 560 (BIA 1999).
[119] 8 C.F.R. § 212.7(d).
[120] *See Matter of N-V-G-*, 28 I. & N. Dec. 380 (BIA 2021); *Matter of J-H-J-*, 26 I. & N. Dec. 563 (BIA 2015).

apply for 212(c). An LPR cannot apply for both 212(c) relief and cancellation of removal. And 212(c) cannot be used to defend against deportation based on convictions that occurred after April 1, 1997. Therefore, a client with an old aggravated felony conviction (which would bar most of the current defenses to deportation, but could possibly be waived under 212(c)) who picks up a new criminal charge that would make him deportable may be left again with no defense to deportation.[121]

Asylum and Withholding of Removal

Who is eligible?
A noncitizen who can establish a fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion in their home country may be eligible to seek asylum or withholding of removal (withholding of removal is a lesser benefit that does not provide a path to LPR status and requires a higher level of proof, but has fewer criminal bars).[122]

What are the criminal bars?
Anyone convicted of an aggravated felony is barred from asylum.[123] Anyone convicted of an aggravated felony with a sentence of imprisonment of five years or more is barred from withholding of removal.[124] In addition, anyone convicted of a "particularly serious crime," a category of offenses which includes almost all drug distribution offenses and "dangerous or violent" crimes, but has been interpreted broadly enough to include possession of child pornography, mail fraud, and unauthorized access to a computer, is barred from both asylum and withholding.[125] The particularly serious crime analysis is done on a case-by-case basis.

NOTE: One year after a grant of asylum or admission as a refugee, asylees and refugees may apply for LPR (green card) status. Refugees, in fact, are required to do so. Asylees and refugees are subject to fewer grounds of inadmissibility and benefit from a more generous waiver of many of the remaining grounds of inadmissibility, as discussed above under **209(c) Waiver**.

Convention Against Torture

The only defense to deportation that has no criminal bars and does not involve the exercise of discretion is relief under the Convention Against Torture. To win this relief, a noncitizen must meet the extraordinarily high standard that it is "more likely than not" that they will be tortured

[121] For more information about 212(c) eligibility, see *Matter of Abdelghany*, 26 I. & N. Dec. 254 (BIA 2014).
[122] 8 U.S.C. §§ 1158, 1231(b)(3).
[123] 8 U.S.C. § 1158(b)(2)(B)(i).
[124] 8 U.S.C. § 1231(b)(3)(B).
[125] *Supra* p. 7 n.29; *see Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012) (mail fraud); *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009) (unauthorized access to a computer); *Matter of R-A-M-*, 25 I. & N. Dec. 657 (BIA 2012) (possession of child pornography).

by the government, or with governmental acquiescence, if returned to their home country.[126] This form of relief does not provide a path to LPR status (and will cause an LPR to lose his LPR status), does not allow for travel outside of the U.S., and may lead to indefinite detention if the person is found to be especially dangerous.

U and T Visas

Individuals who have been victims of crime and cooperate in the prosecution of the offenses may be eligible for U visas. See 8 U.S.C. §1101(a)(15)(U). Individuals who have been subject to human trafficking may be eligible for T visas. See 8 U.S.C. §1101(a)(15)(T).[127] To be granted a U or T visa, a noncitizen must be admissible. Any criminal conviction that makes the U or T visa applicant inadmissible would require the applicant to be eligible for and granted a discretionary waiver of inadmissibility. In addition, after receiving such visas, noncitizens are required to be eligible for and granted lawful permanent resident status within several years in order to remain lawfully in the U.S.[128]

Special Immigrant Juvenile Status

Who is eligible?
SIJ is a pathway for undocumented children to pursue LPR status based on the child's "abuse, abandonment, or neglect" by one or both parent(s). Though only immigration authorities can grant a child SIJ status, in order to be eligible for this relief, a state juvenile court (which could be a probate or delinquency court) must issue an order finding[129]:

- Noncitizen meets definition of child (under 21 and unmarried);
- Child is dependent upon a juvenile court;[130]

[126] 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).
[127] The availability of a U visa or a T visa to an alleged victim in exchange for cooperation with law enforcement may be evidence of bias that defense counsel will wish to explore and possibly introduce at trial.
[128] "The U Visa" CPCS Immigration Impact Unit (March 2022) available at: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/U-visa-overview-and-discovery.pdf
[129] 8 USC § 1101(a)(27)(J). For more information about obtaining an order from a state juvenile or probate court, see "Update on Special Immigrant Juvenile Classification," CPCS Immigration Impact Unit (January 2020) available at: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/SIJ_-legal-practice-tip_Final.pdf
[130] Pursuant to a recently enacted statute, "dependent on the court" in Massachusetts means "subject to the jurisdiction of a court competent to make decisions concerning the protection, well-being, care and custody of a child, for findings, orders or referrals to support the health, safety and welfare of a child or to remedy the effects on a child of abuse, neglect, abandonment or similar circumstances," where "court" is defined to include the probate and family court and the juvenile court departments of the trial court. M.G.L. c. 119 s. 39M. In other words, any youth before a juvenile court in Massachusetts, whether for a C&P, CRA, delinquency or PYA, can be found to be "dependent on the Court" and the juvenile court may issue a legally valid predicate order for these youth until the youth reaches the age of 21 where the court maintains jurisdiction over the youth past the age of majority.

- Reunification with one or both parents is not viable due to abuse, neglect, abandonment, or other similar grounds;

- Not in the child's best interest to be returned to previous country of nationality (or parent's country of nationality).

What are the criminal bars?
In order to become an LPR through SIJ, the noncitizen must be admissible. Although not all grounds of inadmissibility apply to those with SIJ status, most SIJ applicants are not eligible for a waiver of inadmissibility where the inadmissibility is a result of a criminal conviction. In most cases, criminal conviction that trigger inadmissibility will bar a special immigrant juvenile from adjusting status to lawful permanent resident.

Deferred Action for Childhood Arrivals (DACA)

See DACA discussion, *supra* at 9. For more information see: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/DACA-update-August-2020.pdf.

Post-Conviction Relief

A conviction that has been vacated pursuant to state or federal law generally does not constitute a conviction for immigration purposes, unless it was vacated on purely discretionary grounds only to avoid immigration consequences.[131] Once a noncitizen has been convicted of a crime that would render him/her removable, there are two common immigration-based grounds in Massachusetts for a motion for new trial or motion to vacate a guilty plea: (1) the defense attorney's failure to properly advise the client of immigration consequences constituting ineffective assistance of counsel, and (2) the court's failure to provide the statutory judicial immigration warning.

Of course, there exist numerous non-immigration related grounds for motions for new trial and motions to vacate guilty pleas.[132] Trial transcripts and plea colloquies should be scoured thoroughly for possible grounds for appeals or other new trial motions. In addition, the defendant may seek a pardon, although the granting of one is exceedingly rare. Finally, in

[131] *Matter of Pickering*, 23 I. & N. Dec. 621, 625 (BIA 2003) (vacatur for "a procedural or substantive defect" not a conviction for immigration purposes, but vacatur "because of post-conviction events, such as rehabilitation or immigration hardships" remains a conviction); *Matter of Roldan*, 22 I. & N. Dec. 512, 521 (BIA 1999) (state rehabilitative statutes do not eliminate convictions for immigration purposes); *Compare Matter of Adamiak*, 23 I. & N. Dec. 878, 881 (BIA 2008) (Ohio conviction vacated for failure to administer noncitizen warning was no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378, 1380 (BIA 2000) (according full faith and credit to New York judgment vacating criminal conviction).
[132] For a general discussion of post-conviction motions, see Blumenson et al., Massachusetts Criminal Practice, ch. 44 (4th Ed. 2011), available at https://www.suffolk.edu/-/media/suffolk/documents/law/faculty/mcp/ch44postconvictionremedies_pdftxt.pdf?la=en&hash=C02ADBCB4E058172596F02803060C3A6168AD507.

certain circumstances relief in the federal courts may be sought by Writs of Error, *Coram Nobis*, *Audita Querela*, or *Habeas Corpus*.[133]

Motion to Vacate Guilty Plea Pursuant to G.L. c. 278, § 29D

In Massachusetts, as in many other states, the judge must warn a defendant who is pleading guilty or admitting sufficient facts of the immigration consequences of that plea or admission.[134] Failure to provide such warning accurately may provide grounds for a motion to vacate the conviction.[135] In Massachusetts, the burden to so advise the defendant is on the court.[136] The burden to provide a record which shows that the advisement has been given is on the Commonwealth,[137] and the presumption of regularity does not apply to motions based on this statute.[138] The lack of a record of such advisement, coupled with a showing of prejudice, requires a new trial. As a result of appellate decisions diluting the requirements and effectiveness of the statutory protections afforded by the statute, G.L. c. 278, § 29D was amended in 2004.[139] The amendments are not retroactive and, therefore, apply only to pleas or admissions that occur on or after August 28, 2004.

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[133] For a fuller discussion of these remedies, see Kesselbrenner & Rosenberg, Immigration Law and Crimes (Thomson West, updated regularly).

[134] *See* G.L. c. 278, § 29D (amended by 2004 Mass. Acts 225; amendments effective Oct. 27, 2004); *Commonwealth v. Nsubuga*, 88 Mass. App. Ct. 788 (2015) (determining effective date of amendment to G.L. c. 278, § 29D).

[135] *See Commonwealth v. Petit-Homme*, 483 Mass. 775, 784 (2019); *Commonwealth v. Grannum*, 457 Mass. 128, 134 (2010); *Commonwealth v. Berthold*, 441 Mass. 183, 186 (2004).

[136] *See Commonwealth v. Hilaire*, 437 Mass. 809 (2002) (holding that Legislature intended that judge orally advise defendant of immigration consequences of guilty plea; thus, written advisement of warnings contained in the "Tender of Plea or Admission/Waiver of Rights" form is insufficient).

[137] But see, for pleas prior to Aug. 28, 2004, *Commonwealth v. Rzepphiewski*, 431 Mass. 48 (2000) (holding that although tape recording of plea hearing had been destroyed and docket sheet did not indicate administration of immigration warning, there was sufficient evidence of advisement where judge found that defendant had admitted to sufficient facts after a hearing, judge had taken notes on specific details of the hearing, and judge's practice was to include deportation advisement in plea colloquy); *Commonwealth v. Pryce*, 429 Mass. 556, 557-58 (1999) (finding sufficient evidence of advisement where docket sheet included the notation "Defendant offers to plead guilty – after hearing" and motion judge found that the notation referred to his court's standard plea colloquy which included the deportation advisement); *cf. Commonwealth v. Ciampa*, 51 Mass. App. Ct. 459 (2001) (holding that general affidavit of judge was insufficient to reconstruct the record, where affidavit neither referred to a practice of giving warnings in the court during the relevant time period, nor specified that the plea judge's practice was to administer all three required warnings).

[138] *Commonwealth v. Grannum*, 457 Mass. at 134.

[139] In addition to strengthening the language regarding remedies for a court's failure to provide the required warnings, the amendment to G.L. c. 278, § 29D requires a judge to warn that a "plea of guilty, plea of nolo contendere, or admission to sufficient facts" may result in specific immigration consequences, whereas the prior version of the statute only required warnings regarding the consequences of a "conviction". *See Commonwealth v. Lobodepina*, 90 Mass. App. Ct. 1111 (Oct. 21, 2016) (unpublished) (motion for new trial denied where judge warned of consequences of a CWOF rather than an admission to sufficient facts); *Commonwealth v. Nsubuga*, 88 Mass. App. Ct. 788 (2015) (motion for new trial denied, despite defendant not being warned of consequences of admission to sufficient facts, because plea occurred prior to effective date of amendment to G.L. c. 278, § 29D).

There is no statutory or regulatory time limit for filing a § 29D motion. However, for pre-2004 convictions, the passage of time may be a consideration.[140] The case law implies that the more time that passes, the less likely the court will find a failure of the judge to provide the proper statutory warning. In contrast, the 2004 amendments require "an official record or a contemporaneously written record . . . that the court provided the advisement,"[141] so the passage of time has less impact on the determination as to whether the judge provided the proper warning.[142]

It should be noted that the statute requires more than notifying a defendant of the possibility of deportation—it also requires a warning about "exclusion from admission to the United States, or denial of naturalization." The Supreme Judicial Court held in *Commonwealth v. Soto*[143] that a criminal defendant who was advised of the possibility of deportation and denial of naturalization, but not exclusion from the United States, was entitled to have his plea vacated as "the Legislature has put the three required warnings in quotation marks, and each of them is required to be given so that a person pleading guilty knows exactly what immigration consequences his or her guilty plea may have."[144]

If a defendant was not properly warned under the statute, they also must prove that they face the "actual[] prospect" of a consequence that the judge failed to include in the plea colloquy.[145] Indeed, the Supreme Judicial Court has stated that a defendant must show that the Federal government has "taken some step toward deporting him"; that the government has an express written policy of initiating deportation proceedings against immigrants like the defendant; that the defendant intends to travel and faces a "substantial risk" of exclusion from the U.S.; or that

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[140] *See Commonwealth v. Jones*, 417 Mass. 661 (1994) (reversing denial of defendant's 1992 motion to withdraw his 1981 admission to sufficient facts, and rejecting Commonwealth's contention that defendant was manipulating the criminal justice system as there was no finding on when the defendant learned of his rights under G.L. c. 278, § 29D).

[141] G.L. c. 278, § 29D.

[142] *See Commonwealth v. Marques*, 84 Mass. App. Ct. 203 (2013) (notation on docket sheet "alien warning given," and "green sheet" (tender of plea form) signed by judge attesting to warning of immigration consequences for conviction but not for admission to sufficient facts is insufficient to overcome presumption that defendant did not receive required warning under 2004 amended statute). But for admissions prior to Aug. 28, 2004, *see Commonwealth v. Villalobos*, 437 Mass. 797 (2002) (defendant could not withdraw admission to sufficient facts after receiving warnings required by pre-2004 statute which warned about convictions but not admissions, even though statutory language failed to apprise him of change in federal immigration law converting his admission to sufficient facts into a conviction, and even though the statutory language was misleading and might in some cases impact the voluntariness of a plea).

[143] 431 Mass. 340 (2000).

[144] *See id.* at 342 (allowing motion to vacate where the defendant was not warned about the risk of denial of admission, a consequence they subsequently faced); *Petit-Homme*, 482 Mass. at 778 (denial of motion to vacate plea overturned where judge did not give 29D warning but instead read only language from Mass. R. Crim. P. 12 (c) (3) (A) (iii) (b) (since rescinded) during plea colloquy).

[145] *Grannum*, 457 Mass. at 134; *Commonwealth v. Berthold*, 441 Mass. at 185-186; *see also Commonwealth v. Cartagena*, 71 Mass. App. Ct. 907, 908-09 (2008); *Commonwealth v. Casimir*, 68 Mass. App. Ct. 257, 259-60 (2007); *Commonwealth v. Rodriquez*, 70 Mass. App. Ct. 721, 725-27 (2007); *Commonwealth v. Barreiro*, 67 Mass. App. Ct. 25, 26-27 (2006); *Commonwealth v. Agbogun*, 58 Mass. App. Ct. 206, 208 (2003).

the conviction would "doom" an application for naturalization.[146] Criminal counsel should consult with an immigration expert to determine the full extent of immigration consequences flowing from a conviction, because some of the case law misinterprets federal immigration law and correspondingly misconstrues the nature of the consequences listed in the alien warning statute.[147]

Note also that for pleas occurring prior to August 28, 2004, "[t]here is a strong suggestion . . . that the remedy afforded by G.L. c. 278, § 29D, to vacate the judgment and enter a plea of not guilty, is not available after" the noncitizen client has been physically deported.[148] For pleas and admissions occurring on or after August 28, 2004, the amended statute specifically states otherwise.[149]

Ineffective Assistance of Counsel

In *Padilla v. Kentucky*, the U.S. Supreme Court held that defense counsel has a duty under the Sixth Amendment to advise a noncitizen client of the immigration consequences of pleading guilty and that failure to do so constitutes ineffective assistance of counsel.[150] This decision has significantly impacted noncitizen defendants who resolved criminal cases without understanding that the convictions could cause drastic immigration consequences, even for long-term lawful permanent residents (LPRs – "green card" holders). The *Padilla* decision, however, left open numerous issues as to its scope and its retroactive application, resulting in continuing litigation around the country. The Massachusetts Supreme Judicial Court (SJC) has been in the forefront of state appellate courts to address the scope and application of *Padilla*, and in providing guidance to both trial and appellate counsel as to the right envisioned in *Padilla*.

Retroactivity

The SJC first addressed the retroactive application of *Padilla* in *Commonwealth v. Clarke*[151], in which the Court found that *Padilla* was retroactive under federal law to April 1, 1997[152].

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[146] *Grannum*, 457 Mass. at 135, 136. Where the consequence faced is inadmissibility or exclusion, this burden is met when the defendant (1) has a bona fide desire to leave the country and reenter, and (2) faces a substantial risk that if they do so, they will be excluded because of their conviction. *Commonwealth v. Valdez*, 475 Mass. 178 (2016).
[147] *See, e.g.*, *Commonwealth v. Cartagena*, 71 Mass. App. Ct. 907, 908-09 (2008) (failing to recognize that adjustment to permanent residency amounts to an "admission" under immigration law, and thus incorrectly concluding that the alien warning statute does not "contemplate[]" the "denial of permanent residency"); *Commonwealth v. Casimir*, 68 Mass. App. Ct. 257, 259 (2007) (similarly misunderstanding that adjustment to permanent residency is an "admission," and therefore failing to recognize that the defendant apparently faced an enumerated consequence – the denial of admission).
[148] *Commonwealth v. DeSorbo*, 49 Mass. App. Ct. 910, 910-11 (2000).
[149] *See* G.L. c. 278, § 29D.
[150] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[151] 460 Mass. 30 (2011).
[152] This is the effective date of the second of two major immigration bills that were passed in 1996, which greatly expanded the categories of offenses that cause deportability and severely curtailed judicial discretion and forms of relief from removal [the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April 24, 1996, resulting in virtually certain removal for convictions of offenses contained in the greatly expanded category of

However, the Supreme Court abrogated the SJC's finding on retroactivity in *Chaidez v. U.S.*[153], holding that *Padilla* was not retroactive under federal law. Shortly thereafter, the SJC reconsidered *Padilla*'s retroactivity under state law. In *Commonwealth v. Sylvain*[154], the SJC held that the Sixth Amendment right to advice about immigration consequences as defined in *Padilla* is retroactive to April 1, 1997, that a similar right also exists under Article 12 of the Massachusetts Declaration of Rights, and that the state constitutional right under Article 12 is also retroactive. In *Commonwealth v. Mercado*[155], the SJC held that this right under the Sixth Amendment and article 12 of the Massachusetts Declaration of Rights is retroactive to April 24, 1996 (the effective date of AEDPA) for noncitizens barred from relief as a result of the new federal immigration laws.[156] The SJC was the first state highest appellate court to hold that *Padilla* is retroactive; it remains in the minority today, as many other state appellate courts have merely rested on the Supreme Court's decision in *Chaidez*.[157]

Ineffective Assistance of Counsel

Both the Supreme Court and the SJC have held that failure to properly advise a noncitizen defendant of immigration consequences stemming from a criminal case constitutes ineffective assistance of counsel. In *Padilla*, the Court said that if the immigration consequences are "succinct, clear and explicit," defense counsel has a duty to provide complete and accurate advice to her client about such consequences; if the consequences are "not succinct and straightforward," trial counsel must, at a minimum, inform the defendant that immigration consequences may result.[158] In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that:

1. Trial counsel's "representation fell below an objective standard of reasonableness (deficient performance);" and
2. The defendant was prejudiced as a result of trial counsel's deficient performance (prejudice).[159]

<u>Deficient Performance</u>

The SJC has opined in several cases on the scope of what constitutes effective representation of trial counsel when representing noncitizen criminal defendants. The Court has held that trial

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"aggravated felonies," and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) went into effect on April 1, 1997].

[153] 133 S.Ct. 1103 (2013).

[154] 466 Mass. 422 (2013).

[155] 474 Mass. 80 (2016).

[156] *Mercado* specifically holds that the retroactivity affirmed in *Sylvain* extends to April 24, 1996 "for convictions of offenses for which AEDPA eliminated the then available protections (or discretionary waivers) for noncitizens." *Id.* at 81.

[157] For a fuller discussion of state court decisions concerning Padilla retroactivity, see Lasch, Christopher, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DePaul L. Rev. 959 (2014).

[158] *Padilla*, 559 U.S. at 368-369.

[159] *Strickland v. Washington*, 466 U.S. 668 (1984); *Commonwealth v. Saferian*, 366 Mass. 89 (1974).

counsel must advise noncitizen defendants of immigration consequences prior to deciding whether to go to trial, admit sufficient facts or plead guilty.[160] Failure to inquire about or determine a defendant's immigration status can constitute deficient performance, since it is impossible to advise about immigration consequences without knowing the immigration status of the defendant.[161] Moreover, defense counsel's failure to advocate at sentencing or in plea negotiations to minimize immigration consequences can constitute deficient performance, thereby satisfying the first prong under *Strickland* and *Saferian*.[162]

When representing a noncitizen criminal defendant, counsel must provide complete and accurate advice as to the immigration consequences resulting from the criminal case, in language the client understands.[163] Because it is counsel's duty to provide the advice, simply directing a client to consult with an immigration attorney is deficient performance. Telling a defendant whose deportation will be virtually certain if they plead guilty to an "aggravated felony" that they will be "eligible for deportation" also does not constitute effective representation.[164] No standard warning will satisfy counsel's duty to advise about immigration consequences, however, as each case presents different circumstances regarding the defendant's immigration status and the consequences of the pending criminal charges.[165]

Prejudice

The Supreme Court found in *Padilla* that defense counsel had provided deficient performance and remanded the case to the Kentucky trial court to determine whether the defendant was prejudiced in satisfaction of the second prong of *Strickland* without any discussion of what constitutes prejudice in this context.[166] In *Commonwealth v. Clarke*, however, the SJC discussed three different ways a noncitizen defendant can establish that they have been prejudiced by their attorney's failure to properly advise them about immigration consequences.[167]

Based on settled case law regarding ineffective assistance of counsel, the Court in *Clarke* stated that, at a minimum, the defendant must assert that had they been properly advised about immigration consequences, they would have insisted on going to trial and that this would have been rational under the particular circumstances of the case.[168] *Clarke* described three ways a defendant can show that their decision would have been rational:

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[160] *Commonwealth v. Marinho*, 464 Mass. 115, 124-126 (2013).
[161] *Commonwealth v. Clarke*, 460 Mass. at 46.
[162] *Marinho, 464 Mass.* at 127-128.
[163] *Commonwealth v. DeJesus*, 468 Mass. 174, 181 (2014).
[164] *Id*. at 181-182.
[165] *Id*. at 181 n.5.
[166] 599 U.S. at 360. In *Jae Lee v. U.S.*, the Supreme Court revisited the issue of prejudice under the Sixth Amendment following its earlier decision in *Padilla*, and held that defendants who plead guilty as a result of erroneous or inadequate advice regarding immigration consequences may be prejudiced regardless of strong evidence of guilt and/or no reasonable probability that the outcome at trial would have been different, particularly where deportation is the "determinative issue" in a defendant's choice of whether to plead guilty. 137 S. Ct. 1958, 1963 (2017).
[167] 460 Mass. at 47-48.
[168] *Id*. at 47.

> 1) he had an available, substantial ground of defense, that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain;
> 2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or
> 3) the presence of "special circumstances" that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether or not to plead guilty.[169]

In addition to laying out three ways of meeting the prejudice requirement for an ineffective assistance of counsel claim, *Clarke* further held that neither the judicial immigration warning, as required by G.L. c. 278, §29D, nor a waiver of rights form which includes a general immigration warning is "an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise" from a criminal case, though they may be relevant to the determination of prejudice.[170]

In the context of a case that went to trial, the first and third ways of establishing prejudice in *Clarke* are clearly inapplicable. In such cases, the SJC has stated that the defendant must show "a reasonable probability that the result of the plea would have been more favorable than the outcome of the trial."[171]

As further evidence of its appreciation for the drastic impact that criminal convictions have on noncitizen defendants, the SJC recently elaborated on the determination as to whether "special circumstances" existed to establish prejudice, such that a defendant would have placed particular emphasis on avoiding immigration consequences and risked going to trial even if it may not have been rational for a U.S. citizen defendant to make that choice. In *Commonwealth v. DeJesus*, in response to the Commonwealth's argument that the defendant could not show prejudice because he "got a very good deal," the SJC stated that "[i]f an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen. For a noncitizen defendant, preserving his 'right to remain in the United States may be more important to [him] than any jail sentence.'"[172] Additionally, in *Commonwealth v. Lavrinenko*[173], the SJC explained that a defendant's refugee or asylee status constitutes a special circumstance which is entitled to "particularly substantial weight" in evaluating the "totality of the circumstances" relevant to a finding of prejudice.[174]

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[169] *Id*. at 47-48 (internal citations omitted).
[170] *Id.* at 48 n.20.
[171] *Marinho*, 464 Mass. at 129.
[172] 468 Mass. at 184 (internal citation omitted).
[173] 473 Mass. 42 (2015).
[174] *Id*. at 59.

Sealing, Expungement and Pardon

Sealing or Expungement

The BIA has effectively precluded the use of sealing or expungements to defeat deportability, except in very limited circumstances which do not apply to sealing or expungements under Massachusetts state law.[175] This is due to the creation in 1996 of a federal statutory definition of "conviction" that redefined the term for immigration purposes, precluding the effectuation of any state rehabilitative actions that do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding.[176]

For many noncitizens, sealing or expunging a record can do more harm than good. It is typically the noncitizen's burden to demonstrate they are eligible when applying for an immigration benefit, including naturalization, or when applying for a defense to removal. Immigration officials can require that an applicant provide all underlying evidence regarding a record, including arrests for charges that are *nolle prossed* or dismissed outright. Sealing or expunging may only make it harder for the noncitizen to later meet their burden when applying for an immigration benefit or relief from removal.

Pardons

Only full and unconditional executive pardons may be used to defeat deportability, *although these will not assist narcotics offenders*. Legislative pardons may not be used. Pardons can be used for noncitizens convicted of crimes of moral turpitude and aggravated felonies.[177] A noncitizen pardoned of a crime will not be precluded from showing good moral character.[178]

Massachusetts Post-Conviction Motions, Writs, Etc.

Post-conviction motions based on violations of G.L. c. 278, § 29D and *Padilla v. Kentucky* should not be viewed as the only remedies under Massachusetts law for a noncitizen client. Counsel should always consider post-conviction motions pursuant to Rules 25, 29, or 30 of the Massachusetts Rules of Criminal Procedure.[179] There are a wide variety of situations in which such motions may be useful and the entire history of the client's prior proceedings must therefore be fully examined. For example, for a criminal conviction that constitutes an aggravated felony due to the length of the sentence (i.e., a crime of violence or theft offense), a successful motion to revise the sentence pursuant to Rule 29 may drastically reduce the immigration consequences

[175] *See Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999); *see also Matter of Marroquin*, 23 I. & N. Dec. 705 (A.G. 2005); *Matter of Luviano*, 23 I. & N. Dec. 718 (A.G. 2005).
[176] *See Roldan*, 22 I. & N. Dec. 512.
[177] *See* 8 U.S.C. § 1227(a)(2)(A)(vi); *see also Matter of Suh*, 23 I. & N. Dec. 626 (BIA 2003) (discussing what grounds of removability may be waived by presidential or gubernatorial pardons).
[178] *See Matter of H-*, 7 I. & N. Dec. 249 (BIA 1956).
[179] *Supra* p. 33 n.133.

of the conviction,[180] if it is based on procedural, statutory or constitutional grounds unrelated to minimizing immigration consequences.[181] Counsel may also consider bringing a removal case (based upon a criminal conviction) before a federal court on a Writ of Error *Coram Nobis* or a Writ of *Audita Querela*.[182]

[180] Prior case law that forbid consideration of immigration consequences in sentencing has been either explicitly overruled or abrogated by the SJC in *Marinho*, 464 Mass. at 128 n.19.
[181] *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019).
[182] *Supra* p. 33 n.1330.

Appendix 1: Analyzing the Immigration Consequences

In each case in which a client is a noncitizen, defense counsel should consult the following "road map," to assist in determining the immigration consequences of criminal conduct:

1. Determine the immigration status of the client. If a U.S. citizen, stop – (**but verify**). The immigration laws do not apply to U.S. Citizens. If not:
2. Determine the client's exact immigration status and all potential routes to U.S. citizenship or any other immigration status;
3. **Discuss the client's goals related to immigration** (e.g. does the client care more about the immigration consequences or more about avoiding jail time);
4. Obtain the client's complete prior criminal record, from every jurisdiction;
5. Make sure you are aware of and understand all pending charges;
6. Determine if any prior criminal charges, even if they did not result in conviction, could affect the client's current or potential immigration status; if so, consider all possible ways to vacate, withdraw pleas, appeal, attack collaterally, revise, revoke, etc.;
7. Analyze the potential effects of pending charges on immigration status, making sure to think about the specific threats of inadmissibility and removal from the United States as well as denial of future benefits like other immigration status and U.S. citizenship;
8. Consider a plea or otherwise structured disposition that would avoid immigration consequences. Some examples include: 1) Is there a possible disposition that is not a conviction (e.g., pretrial probation); 2) Can the complaint/indictment be amended to an offense that causes less severe immigration consequences; 3) Can the defendant negotiate a sentence with less drastic immigration consequences (e.g., less than a one year sentence on a theft offense or crime of violence, or consecutive (on and after) sentences of less than one year on multiple such offenses); or, 4) Are there multiple charges, only some of which cause immigration consequences? If so, can a disposition be negotiated in which convictions and/or sentences of one year or more are only received on the offenses that do not carry immigration consequences for such convictions and/or sentences;
9. Always try to avoid an "aggravated felony" conviction;
10. Consider whether any waivers are or will be available to the client in immigration court to mitigate immigration consequences;
11. Consider all possible post-conviction strategies;
12. Advise the client not to leave the U.S., apply for any immigration benefit or attempt naturalization without consulting with an immigration specialist.

Appendix 2: Summary Chart of Inadmissibility and Deportability

Grounds of Inadmissibility 8 U.S.C. §1182(a)(2)	**Grounds of Deportability** 8 U.S.C. §1227(a)(2)
CRIME INVOLVING MORAL TURPITUDE Conviction or admission of sufficient facts for one CIMT makes one inadmissible *unless* • 1 crime committed under 18 and at least 5 years before admission, OR • 1 crime with maximum *possible* penalty of 1 year or less AND *sentence* is 6 months or less	CRIME INVOLVING MORAL TURPITUDE Conviction for one CIMT makes one deportable if • Committed within 5 years of admission where a *sentence* of at least one year *may* be imposed Conviction for 2 CIMTs at any time, not arising out of a single scheme of criminal conduct makes person deportable. NB: the definition of conviction for immigration law differs from state law.
CONTROLLED SUBSTANCES • Conviction or admission of any crime/acts relating to a controlled substance as defined by 21 USC § 802. • Reason to believe person is a drug trafficker • Currently a drug abuser or addict as found by a doctor	CONTROLLED SUBSTANCES • Conviction of any drug offense except 1 offense of 30 grams or less of marijuana for personal use • Includes conspiracy or attempt • If found to be a drug abuser or addict at ANY time after admission.
MULTIPLE OFFENSES • One is inadmissible if CONVICTED of 2 or more crimes (of any type – even if in a common scheme) in which the aggregate sentence was 5 years or more	N/A
PROSTITUTION See 8 USC 1182(a)(2)(D)	Not separate deportable charge, but check CIMT.
Not a separate inadmissible offense	FIREARM OFFENSES

	• Conviction for any crime of buying, selling, using, owning, possessing or carrying any firearm or destructive device (18 USC § 921). • Includes conspiracy and attempt • May include crimes for which possession or use is an element
Not a separate inadmissible offense	DOMESTIC VIOLENCE – conviction for: • crime of violence (as defined by 18 USC §16) against a person protected by state family law • Stalking • Child abuse, neglect, abandonment • Violation of criminal or civil protective orders (conviction not necessary)
	AGGRAVATED FELONY – 8 U.S.C. § 1227 (a)(2)(A)(iii) [agg. fel. is defined at 8 U.S.C. 1101(a)(43)] **Common Aggravated Felonies:** <u>Requires only a conviction</u>: • murder, rape, sexual abuse of a minor • drug trafficking • firearms trafficking • running a prostitution business • fraud or tax evasion where the loss is $10,000 • failure to appear by a defendant for service of sentence (underlying crime must be punishable by 5 years or more) • failure to appear in court to answer/dispose of a felony charge. <u>Requires a conviction and a sentence of imprisonment for 1 year or more</u>: • crime of violence (as defined by 18 USC §16) • theft offense • obstruction of justice • document (passport) fraud

MISC (8 U.S.C. §1182) • aliens involved in serious criminal activity who have asserted immunity from prosecution. • Mental disorder • Human trafficking • Money laundering • Security related grounds • Aliens previously removed • Etc…	MISC (8 U.S.C. §1227) • Smuggling of aliens • Marriage fraud • Espionage, sabotage, treason, sedition • Terrorist activities • Selective service violations • Falsification of docs

WARNING: Previous versions of the IIU Guide included a section entitled “Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart.” Appendix 3 was last published and last updated in 2018. We are no longer including an equivalent reference chart. If practitioners are using the old Appendix 3 chart, please know that it is no longer accurate.