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Immigration Consequences of Criminal Activity

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Summary

Congress's power to create rules governing the admission of non-U.S. nationals (aliens) has long been viewed as plenary. In the Immigration and Nationality Act (INA), as amended, Congress has specified grounds for the exclusion or removal of aliens, including on account of criminal activity. Some criminal offenses, when committed by an alien who is present in the United States, may render that alien subject to removal from the country. And certain criminal offenses may preclude an alien outside the United States from being either admitted into the country or permitted to reenter following an initial departure. Further, criminal conduct may disqualify an alien from certain forms of relief from removal or prevent the alien from becoming a U.S. citizen. In some cases, the INA directly identifies particular offenses that carry immigration consequences; in other cases, federal immigration law provides that a general category of crimes, such as "crimes involving moral turpitude" or an offense defined by the INA as an "aggravated felony," may render an alien ineligible for certain benefits and privileges under immigration law.

The INA distinguishes between the treatment of aliens who have been lawfully admitted into the United States and those who are either seeking admission into the country or are physically present in the country without having been lawfully admitted. Aliens who have been lawfully admitted into the country may be removed if they engage in conduct that renders them *deportable*, whereas aliens who have not been legally admitted into the United States—including both aliens seeking initial entry into the United States as well as those who are physically present in the country but were never lawfully admitted—may be excluded or removed from the country if they have engaged in conduct rendering them *inadmissible*. Although the INA designates certain criminal activities and categories of criminal activities as grounds for inadmissibility or deportation, the respective grounds are not identical. Moreover, a conviction for a designated crime is not always required for an alien to be disqualified on criminal grounds from admission into the United States. But for nearly all criminal grounds for deportation, a "conviction" (as defined by the INA) for the underlying offense is necessary. Additionally, although certain criminal conduct may disqualify an alien from various immigration-related benefits or forms of relief, the scope of disqualifying conduct varies depending on the particular benefit or form of relief at issue.

This report identifies the major criminal grounds that may bar an alien from being admitted into the United States or render an alien within the country removable. The report also discusses additional immigration consequences of criminal activity, including those that make an alien ineligible for certain relief from removal, including cancellation of removal, voluntary departure, withholding of removal, and asylum. The report also addresses the criminal grounds that render an alien ineligible to adjust to lawful permanent resident (LPR) status, as well as those grounds barring LPRs from naturalizing as U.S. citizens. The report also discusses the scope of several general criminal categories referenced by the INA, including "crimes involving moral turpitude," "aggravated felonies," and "crimes of violence."

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Congress's power to establish rules for the admission of non-U.S. nationals (aliens[1]) has long been viewed as plenary.[2] In the Immigration and Nationality Act (INA), as amended,[3] Congress has specified various grounds for the exclusion or removal of aliens, including grounds related to the commission of criminal conduct.[4] Some criminal offenses committed by an alien who is present in the United States may render that alien subject to removal from the country.[5] And certain offenses may preclude an alien outside the United States from either being admitted into the country or being permitted to reenter following an initial departure.[6] Further, committing certain crimes may disqualify an alien from many forms of relief from removal,[7] prevent an alien from adjusting to lawful permanent resident (LPR) status,[8] or bar an LPR from naturalizing as a U.S. citizen.[9]

This report provides an overview of the major immigration consequences of criminal activity. The report begins by briefly discussing the laws governing the immigration consequences of criminal conduct and the government entities charged with administering U.S. immigration laws. Next, the report enumerates specific crimes and categories of crimes that may render an alien inadmissible or deportable. Then, the report discusses the potential impact criminal activity may have for an alien's eligibility to obtain various forms of relief from removal or exclusion, including relief through a waiver of application of certain grounds for removal, cancellation of removal, voluntary departure, asylum, or withholding of removal. Next, the report discusses criminal activity affecting an alien's ability to adjust to LPR status or naturalize as a U.S. citizen. Finally, the report examines select legal issues related to the intersection of criminal law and immigration, including the responsibilities of criminal defense attorneys representing alien defendants, as well as judicial interpretation of particular INA provisions that may render aliens who have been convicted of certain crimes removable.

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[1] The Immigration and Nationality Act (INA) uses the term "alien" to describe "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

[2] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established."); Boutilier v. INS, 387 U.S. 118, 123 (1967) ("It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."). *But see* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (noting that Congress's plenary power in enacting immigration laws "is subject to important constitutional limitations"). *See generally* CRS Report R44969, *Overview of the Federal Government's Power to Exclude Aliens*, by Ben Harrington (discussing the scope of congressional authority over immigration).

[3] *See* 8 U.S.C. § 1101, *et seq.*

[4] *See id.* §§ 1182(a)(2), 1227(a)(2).

[5] *See, e.g., id.* § 1227(a)(2).

[6] *See, e.g., id.* § 1182(a)(2), (a)(9) (criminal grounds for inadmissibility, including for aliens previously removed on account of committing an aggravated felony); *see also id*. § 1101(a)(13)(C) (providing that an alien with lawful permanent resident status who departs from the United States and thereafter seeks to return shall not be considered an applicant for admission except in certain cases, including when the alien has committed conduct falling under the criminal grounds for inadmissibility or engaged in illegal activity after departing the United States).

[7] *See, e.g., id.* §§ 1158(b)(2), 1182(h)(2), 1229b(a), 1229c(b)(1).

[8] *See, e.g., id.* § 1255. An LPR is authorized to live permanently in the United States and may obtain many benefits unavailable to other categories of aliens. *See* Dep't of Homeland Security, *Lawful Permanent Residents (LPR)*, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents (last visited Mar. 27, 2018).

[9] *See, e.g.*, 8 U.S.C. §§ 1101(f), 1427(a).

Administration of Immigration Laws

The INA primarily governs the administration of U.S. immigration laws.[10] Originally enacted in 1952, the INA unified the country's immigration laws under one umbrella framework.[11] A number of federal agencies possess distinct responsibilities relating to the administration of the country's immigration laws, including the Department of Justice, the State Department, and, following the enactment of the Homeland Security Act of 2002, the Department of Homeland Security (DHS).

Before Congress enacted the Homeland Security Act most U.S. immigration laws—particularly as they related to enforcement activities and providing relief or services to aliens within the United States—were primarily administered by the Attorney General, who largely delegated his power to two agencies within the Department of Justice (DOJ): the Immigration and Naturalization Service (INS), which carried out enforcement and service activities, and the Executive Office for Immigration Review (EOIR), which carried out adjudication activities.[12]

The Homeland Security Act, as relevant here, dismantled the INS, created DHS, and transferred many of the Attorney General's immigration administration responsibilities to the DHS Secretary.[13] Thus, the DHS Secretary is now "charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General" and other executive officers.[14]

Three components of DHS—Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS)—carry out the major functions of the former INS.[15] In particular, ICE is the primary investigative arm of immigration enforcement within the United States.[16] When ICE determines that an alien located within the U.S. interior has violated the immigration laws—for example, by committing certain crimes—DHS typically apprehends the alien and initiates removal proceedings against him before an immigration judge (IJ) within DOJ's EOIR.[17] CBP, on the other hand, is authorized to enforce immigration laws at the border, which involves responsibilities including the inspection

[10] P.L. 107-296, 116 Stat. 2135 (2002).

[11] *See generally* USCIS History Office & Library (2012), *Overview of INS History*, at 9, *available for download at* https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-naturalization-service; USCIS, *Immigration & Nationality Act*, https://www.uscis.gov/laws/immigration-and-nationality-act (last visited Feb. 13, 2018).

[12] Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, § 103 (June 27, 1952) (charging the Attorney General with administering and enforcing the INA and "all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers").

[13] USCIS History Office & Library, *supra* note 11, at 11. Other agencies in addition to the DHS, the DOJ, and the State Department play a role in immigration administration. For example, the Department of Health and Human Services is responsible for housing and caring for unaccompanied alien children, 8 U.S.C. § 1232(b)(1), and the Department of Labor provides labor certification to employers seeking to sponsor foreign nationals to work in the United States, *id.* § 1182(a)(5)(A); 20 C.F.R. § 656.

[14] 8 U.S.C. § 1103(a)(1); *see also* 8 C.F.R. § 2.1.

[15] GORDON & MAILMAN, ET AL., IMMIGRATION LAW & PROCEDURE, § 1.02, Scope, Agencies, and Sources.

[16] 8 C.F.R. § 100.1.

[17] 8 U.S.C. §§ 1229(a), 1229a(b)(4)(A).

and admission of aliens seeking entry into the United States and the expedited removal of certain inadmissible aliens apprehended at or near the border while seeking entry to the United States.[18]

DHS, through USCIS, also plays a role in determining eligibility and approving applications for certain forms of relief and immigration benefits (e.g., granting asylum, adjusting status, or naturalizing).[19]

Despite the transfer of most enforcement functions to DHS, removal proceedings are primarily conducted by EOIR within DOJ.[20] During those proceedings, an IJ typically assesses an alien's removability and eligibility for relief from removal.[21] At the removal hearing—a civil proceeding[22]—aliens generally have a right to legal counsel at their own expense.[23]An IJ makes an initial removability determination, which may be appealed to the Board of Immigration Appeals (BIA), the highest administrative body charged with interpreting and applying federal immigration laws.[24] (The Attorney General is vested with discretion to review those appeals as well.)[25] Additionally, as was the case before enactment of the Homeland Security Act, Attorney General rulings "with respect to all questions of law shall be controlling."[26]

Federal circuit courts of appeals have exclusive jurisdiction to adjudicate petitions for review of final removal orders issued in proceedings before EOIR.[27] However, the INA limits what issues the appellate courts may review. For instance, the INA limits federal courts' jurisdiction over cases involving an alien ordered removed based on certain criminal activity, unless the alien raises a constitutional claim or question of law (e.g., whether particular conduct an alien allegedly committed is of the type of conduct covered by a particular removal ground in the INA).[28]

Another executive branch agency, the State Department, takes the lead role in processing the visas that aliens must generally obtain (with notable exceptions)[29] to travel to, and be admitted

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[18] *See id*. § 1225(b)(1)(A) (authorizing expedited removal of certain aliens at or near the border); 8 C.F.R. § 235.3(b) (regulations implementing expedited removal procedures); 6 U.S.C. § 211(setting forth CBP's functions).

[19] *See* 6 U.S.C. § 271(b) (describing USCIS's adjudicatory functions); 8 C.F.R. § 100.1 (delegating authority to USCIS).

[20] P.L. 107-296, 116 Stat. 2135, § 1102; 8 C.F.R. § 1003.

[21] *See* 8 C.F.R. § 1003.9-1003.10.

[22] *See, e.g.,* Arizona v. United States, 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal matter.").

[23] *See* 8 U.S.C. § 1229(a)(1)(E).

[24] 8 C.F.R. §§ 1003.1-1003.8.

[25] *Id*. § 1003.1(h).

[26] 8 U.S.C. § 1103(a)(1).

[27] *Id*. § 1252(a)(5). In addition, federal district courts have jurisdiction to review habeas corpus petitions by aliens challenging the legality of their detention pending their removal. *See* 28 U.S.C. § 2241 (authorizing federal courts to grant writs of habeas corpus to prisoners in federal custody); INS v. St. Cyr, 533 U.S. 289, 305 (2001) ("The writ of habeas corpus has always been available to review the legality of Executive detention."); Leonardo v. Crawford, 646 F.3d 1157, 1160 (9th Cir. 2011) (providing that aliens held in custody may file habeas corpus petitions in federal district court).

[28] 8 U.S.C. §§ 1252(a)(2)(C), (D); *see* Estrada-Ramos v. Holder, 611 F.3d 318, 321 (7th Cir. 2010) ("We lack jurisdiction to review removal orders of aliens removable under [INA] § 242(a)(2)(C) unless there is a valid constitutional claim or question of law.") (citing Zamora–Mallari v. Mukasey, 514 F.3d 679, 693–94 (7th Cir.2008)); James v. Mukasey, 522 F.3d 250, 253 (2d Cir. 2008) ("[W]e lack jurisdiction to review any final order of removal against an alien who is deportable because he or she was convicted of an aggravated felony, save for constitutional claims and questions of law.") (citing 8 U.S.C. § 1252(a)(2)(C)).

[29] *See id*. §§ 1181, 1184; *What is a U.S. Visa*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/us-visas.html (last visited Feb, 13, 2018). One notable exception to this general requirement is for persons travelling to the United States under the Visa Waiver Program. For more information on that

into, the United States.[30] Immigrant visas are granted to aliens seeking lawful permanent residency in the United States, whereas nonimmigrant visas are issued to aliens seeking temporary admission into the United States.[31] In both cases, the alien seeking a visa must submit supporting documentation to, and interview with, a consular official[32] who generally must be located in the country where the alien resides.[33] Eligibility for a particular visa depends on specified criteria set forth in the INA.[34] And, as will be discussed in further detail below, certain criminal activity may render an alien ineligible to obtain a visa to enter the United States.

Criminal Grounds for Inadmissibility and Deportation

Aliens who commit certain crimes may be ineligible to enter or remain in the United States. The term "inadmissible" is used to describe aliens who are generally ineligible to receive visas or otherwise be lawfully admitted into the United States.[35] "Deportable" refers to aliens who have been lawfully admitted to the United States, but have engaged in proscribed activities that render them removable from the country.[36]

program, under which citizens and nationals of 37 countries and Taiwan typically are not obligated to obtain a visa to visit the United States for business or tourism for 90 days or less, see *Visa Waiver Program*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html (last visited Feb. 13, 2018); *see generally* CRS Report RL32221, *Visa Waiver Program*, by Jill H. Wilson. Another exception is for Canadian and Bermudan citizens, who do not need a visa for temporary travel to the United States for most purposes. *See* U.S. VISAS, *Citizens of Canada & Bermuda*, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/citizens-of-canada-and-bermuda.html (last visited Feb. 13, 2018).

[30] *See* 8 U.S.C. § 1104(c) (creating a Visa Office within the State Department).

[31] *See id*. § 1202; *Immigrant Visas vs. Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT., https://help.cbp.gov/app/answers/detail/a_id/72/~/immigrant-visas-vs.-nonimmigrant-visas (last visited Feb. 13, 2018). *See also supra* note 29 (describing some exceptions to visa requirements).

[32] A consular official is "any consular, diplomatic, or other officer or employee of the United States" who issues immigrant or nonimmigrant visas to aliens overseas or determines nationality of aliens. 8 U.S.C. § 1101(a)(9).

[33] *See id*. § 1202; *The Immigrant Visa Process*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/content/visas/en/immigrate/immigrant-process.html (last visited Feb. 13, 2018); *Tourism & Visit*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/us-visas/tourism-visit.html (last visited Feb. 13, 2018); *Business*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/us-visas/business.html (last visited Feb. 13, 2018); *Employment*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/us-visas/employment.html (last visited Feb. 13, 2018); *Study & Exchange*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/us-visas/study.html (last visited Feb. 13, 2018). In some circumstances, however, an alien may submit a visa application in a country where he is not a resident if he is physically present there and the consular office has agreed to accept the alien's application. *See* 22 C.F.R. §§ 41.101(a)(1)(ii), 42.61(a).

[34] *See, e.g.*, 8 U.S.C. §§ 1101(a)(15), (a)(20), 1182.

[35] *Id*. § 1182(a).

[36] *Id.* § 1227(a). Additionally, an alien may be deportable on the ground that he was inadmissible at the time he entered the United States or adjusted status. *Id.* § 1227(a)(1)(A).

Criminal Grounds of Inadmissibility Under INA § 212(a)(2)

The criminal grounds for inadmissibility are primarily set forth in INA § 212(a)(2).[37] The criminal grounds are a mix of specific crimes and categories of crimes with varying levels of proof required for the crime to render an alien inadmissible.[38]

Table 1. Criminal Grounds of Inadmissibility Under INA § 212(a)(2)

Ground of Inadmissibility	Covered Aliens	Exceptions
Crimes involving moral turpitude	An alien who has been convicted of, admitted to having committed, or admitted to committing acts that constitute the essential elements of a "crime involving moral turpitude," unless the crime was a purely political offense (or an attempt or conspiracy to commit such a crime)	Does not apply to an alien who committed only one crime if (1) the crime was committed when the alien was under 18 and the crime was committed (and the alien released from confinement) more than five years before applying for admission; or (2) the maximum penalty for the crime of conviction does not exceed imprisonment for more than one year and the alien was sentenced to no more than six months' imprisonment.
Controlled substance offenses	An alien who has been convicted of, admitted to having committed, or admitted to committing acts that constitute the essential elements of a violation of any federal, state, or foreign controlled substance law (or an attempt or conspiracy to commit such a crime)	None
Multiple criminal convictions	An alien who has been convicted of two or more offenses for which the aggregate sentences were five or more years of confinement	None
Drug trafficking	An alien who immigration authorities know, or have reason to believe, has been involved in drug trafficking (includes alien's spouse, son, or daughter if they have, within the previous five years, obtained any financial or other benefit from the drug trafficking activity and knew or reasonably should have known that the financial or other benefit resulted from such activity)	None

[37] *Id.* § 1182(a)(2). Other provisions of INA § 212 also address criminal conduct, but they are not listed within § 212(a)(2). For example, INA § 212(a)(3) covers "Security and Related Grounds" of inadmissibility, such as terrorist activities, genocide, and acts of torture, which would likely involve conduct that is criminal in nature. *Id.* § 1182(a)(3). In addition, INA § 212(a)(6) includes provisions relating to entering the United States without authorization and alien smuggling, which may be subject to separate criminal sanction. *See id.* § 1182(a)(6)(A)(i), (E)(i); *id.* §§ 1324 (crime of unlawful entry), 1325(a) (criminal offenses related to alien smuggling and harboring).

[38] *Id.* § 1182(a)(2).

Ground of Inadmissibility	Covered Aliens	Exceptions
Prostitution and commercialized vice	An alien who is coming to the United States to engage in prostitution, has engaged in prostitution within 10 years of applying for admission or adjustment of status, has procured or attempted to procure or import prostitutes or persons for the purpose of prostitution within that 10-year period, has received the proceeds of prostitution during that 10-year period, or is coming to the United States to engage in another unlawful commercialized vice	None
Serious criminal activity	An alien who has been involved in serious criminal activity[a] in the United States, gained immunity from prosecution, and, as a result, departed the United States	None
Human trafficking	An alien who has committed or conspired to commit a human trafficking offense in the United States or abroad, or who the U.S. government knows or has reason to believe has been involved in severe forms of human trafficking[b] (includes alien's spouse, son, or daughter if they have, within the previous five years, obtained any financial or other benefit from that activity, and knew or reasonably should have known that such benefit resulted from the activity)	Does not apply to a son or daughter of human trafficker who was a child at the time of receiving benefit from human trafficking activity
Money laundering	An alien who relevant immigration authorities know, or have reason to believe, has engaged in, is engaging in, or seeks to enter the United States to engage in money laundering[c] (including aiding or conspiring in money laundering)	None

Source: 8 U.S.C. §§ 1182(a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(2)(E), (a)(2)(H), (a)(2)(I).

Notes:

a. The INA defines a "serious criminal offense" as any felony, a "crime of violence," or any crime of reckless driving or driving while under the influence of alcohol or a prohibited substance that results in personal injury to another person. 8 U.S.C. § 1101(h).

b. *See* 22 U.S.C. § 7102(9) (defining "severe forms of trafficking in persons").

c. *See* 18 U.S.C. §§ 1956-1957 (money laundering offenses).

Criminal Grounds of Deportability Under INA § 237(a)(2)

Criminal grounds for deportation are primarily listed in INA § 237(a)(2).[39] Like the inadmissibility grounds, criminal deportation grounds also consist of specific crimes and categories of crimes. One main difference between the criminal grounds for inadmissibility and deportability is that the deportability grounds largely require the alien to have been convicted of the listed offense, whereas the inadmissibility grounds for certain crimes may only require that the alien admitted committing the offense or that immigration authorities have "reason to believe" the alien committed the proscribed conduct.[40]

Table 2. Criminal Grounds of Deportation Under INA § 237(a)(2)

Ground of Deportability	Covered Aliens	Exceptions
Crimes involving moral turpitude	Aliens convicted of a crime involving moral turpitude (committed within 10 years of admission in the case of an LPR, or five years after admission for other categories of aliens) for which a sentence of imprisonment for one year or longer may be imposed	Does not apply if the alien is granted a full and unconditional pardon following the criminal conviction
Multiple criminal convictions	Aliens convicted of two or more crimes involving moral turpitude that did not arise out of a single scheme of criminal misconduct	Does not apply if the alien is granted a full and unconditional pardon following the criminal conviction
Aggravated felonies	Aliens who were convicted of an aggravated felony	Does not apply if the alien is granted a full and unconditional pardon following the criminal conviction
High speed flight	Aliens convicted of engaging in a high-speed flight from an immigration checkpoint[a]	Does not apply if the alien is granted a full and unconditional pardon following the criminal conviction
Failure to register as a sex offender	Aliens convicted for failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA)[b]	None
Controlled substance offenses	Aliens convicted of violating any federal, state, or foreign controlled substance[c] law or regulation (including a conspiracy or attempt to violate such law or regulation)	Does not apply if conviction is for a single offense of possessing for personal use 30 grams or less of marijuana

[39] *Id.* § 1227(a)(2). Aliens who were inadmissible at the time of their entry to the United States because of the criminal grounds mentioned above (among other grounds) are also removable. *Id.* § 1227(a)(1)(A). Other provisions of INA § 237 also address criminal conduct, but they are not listed within § 237(a)(2). For example, INA § 237 covers alien smuggling, marriage fraud, falsification of documents, terrorist activities, genocide, and acts of torture, which may be subject to separate criminal sanction. *Id.* § 1227(a)(1)(E), (a)(1)(G), (a)(3)(B), (a)(4).

[40] *See e.g.*, Lopez-Molina v. Ashcroft, 368 F.3d 1206, 1209 (9th Cir. 2004) (observing that INA § 212(a)(2)(C)'s ground of inadmissibility for drug trafficking "does not require a conviction in order for the alien to be deemed removable," and only requires a "reason to believe" that the alien has been involved in drug trafficking).

Ground of Deportability	Covered Aliens	Exceptions
Certain firearm offenses	Aliens convicted of unlawfully purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying a firearm or destructive device[d] (including an attempt or conspiracy to engage in such activity)	None
Miscellaneous crimes	Aliens convicted of offenses related to espionage, sabotage, treason, or sedition for which a term of imprisonment of five or more years may be imposed; or offenses involving threats against the President, participation in a military operation against a United States ally, a violation of any provision of the Military Selective Service Act or the Trading with the Enemy Act, a violation of certain restrictions and prohibitions relating to United States entry and departure, or the importation of an alien into the United States for prostitution[e]	None
Domestic violence offenses	Aliens convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment	None
Violators of protective orders	Aliens who have violated a protective order related to harassment or domestic violence	None
Human trafficking offenses	Aliens who have committed human trafficking offenses as described in 8 U.S.C. § 1182(a)(2)(H)	Does not apply to a son or daughter of human trafficker who was a child at the time of receiving benefit from human trafficking activity

Source: 8 U.S.C. §§ 1227(a)(2)(A)(i), (a)(2)(A)(ii), (a)(2)(A)(iii), (a)(2)(A)(iv), (a)(2)(A)(v), (a)(2)(B)(i), (a)(2)(C), (a)(2)(D), (a)(2)(E).

Notes:

a. *See* 18 U.S.C. § 758 (high speed flight offenses).

b. *See id*. § 2250.

c. *See* 21 U.S.C. § 802 (defining a "controlled substance").

d. *See* 18 U.S.C. § 921(a) (defining "firearm" and "destructive device").

e. *See* 8 U.S.C. § 1227(a)(2)(D) (describing offenses under 18 U.S.C. §§ 791-799, 2151-2157, 2381-2391; 8 U.S.C. §§ 1185 and 1328; 18 U.S.C. §§ 871 and 960; and 50 U.S.C. App. §§ 1 and 451).

Crime Involving Moral Turpitude

Both the criminal grounds of inadmissibility and deportability under the INA reference a "crime of moral turpitude" as one of the bases for denying admission or deporting an alien from the United States. The federal courts and legal community have long grappled over the meaning of the term "crime involving moral turpitude" (alternatively referred to as "crime of moral

turpitude").[41] Neither the INA nor any earlier immigration law defines the term.[42] Some federal appellate courts have opined that the term's legislative history, or lack thereof, "leaves no doubt ... that Congress left the term 'crime involving moral turpitude' to future administrative and judicial interpretation."[43] According to the BIA, moral turpitude "refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons and to society in general."[44] In addition, moral turpitude, according to the BIA, involves "malicious intention" and actions "contrary to justice, honesty, principle, or good morals."[45]

The federal courts generally agree that a crime that is inherently fraudulent or involves an intent to defraud is a crime involving moral turpitude.[46] It is less settled, however, when other, nonfraudulent crimes constitute crimes involving moral turpitude. Indeed, before Attorney General Michael Mukasey's 2008 opinion in *Matter of Silva-Trevino* (*Silva-Trevino I*), which set forth a standard for assessing whether a crime involved moral turpitude, there had been an "absence of an authoritative administrative methodology for resolving moral turpitude inquiries [which had] resulted in different approaches across the country."[47] In *Silva-Trevino I,* the Attorney General ruled that a crime involving moral turpitude must involve both reprehensible conduct and a culpable mental state, such as specific intent, deliberateness, or recklessness.[48] Since then, the

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[41] *See, e.g.,* In re Ajami, 22 I. & N. Dec. 949, 950 (BIA 1999) ("We have observed that the definition of a crime involving moral turpitude is nebulous."); De Leon v. Lynch, 808 F.3d 1224, 1228 (10th Cir. 2015) ("The phase 'crime involving moral turpitude' is not defined in the INA; instead, its contours have been shaped through interpretation and application by the Attorney General, the Board [of Immigration Appeals], and federal courts. It is perhaps the quintessential example of an ambiguous phrase.") (internal quotation marks and citation omitted); Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress,* 15 GEO. IMMGR. L.J. 259, 259-60 (2001) ("No court has been able to define with clarity what 'crimes involving moral turpitude' means."); Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens,* 25 N.Y.U. REV. L. & SOC. CHANGE 357, 362 (1999) ("Because the classification 'crimes of moral turpitude' is not clearly defined in the INA, courts have struggled to create a definition.") The term "moral turpitude" first appeared in federal immigration law in 1891. *See* Act of March 3, 1891, ch. 551, 26 Stat. 1084; *see also* Arias v. Lynch, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring); Harms, *supra* at 262.

[42] *See* Cabral v. INS, 15 F.3d 193, 194-95 (1st Cir. 1994).

[43] *See id.* at 195; *see also* Estrada-Rodriguez v. Lynch, 825 F.3d 397, 403 (8th Cir. 2016).

[44] Matter of Zaragoza-Vaquero, 26 I. & N. Dec. 814, 815 (BIA 2016); *see also Ajami*, 22 I. & N. Dec. at 950 (collecting BIA decisions containing definition of moral turpitude).

[45] Matter of Awaijane, 14 I. & N. Dec. 117, 118-19 (BIA 1972); *see also* Avendano v. Holder, 770 F.3d 731, 734 (8th Cir. 2014) (noting that the court applies the BIA's "'longstanding general definition' of a crime involving moral turpitude, which included 'acts accompanied by 'a vicious motive or a corrupt mind'"").

[46] *See Zaragoza-Vaquero,* 26 I. & N. Dec. at 816; In re Kochilani, 24 I. & N. Dec. 128, 130-31 (BIA 2007) ("It is true that crimes that have a specific intent to defraud as an element have always been found to involve moral turpitude, but we have also found that certain crimes are inherently fraudulent and involve moral turpitude even though they can be committed without a specific intent to defraud."); Jordan v. De George, 341 U.S. 223, 229 (1951) ("[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude."); Palma-Martinez v. Lynch, 785 F.3d 1146, 1148 n.1 (7th Cir. 2015) ("Crimes involving fraud have always been considered crimes of moral turpitude.").

[47] Matter of Silva-Trevino [hereinafter *Silva-Trevino I*], 24 I. & N. Dec. 687, 693 (A.G. 2008). *See* 8 C.F.R. § 1003.1(h)(1)(i) (providing that the Attorney General may direct the BIA to refer cases to him "for review of [the BIA's] decision"); Matter of E-L-H-, 23 I. & N. Dec. 814, 825 (BIA 2005) (noting that "the Attorney General retains ultimate authority over the meaning of immigration laws and regulations"); Matter of D-J-, 23 I. & N. Dec. 572, 575 (BIA 2003) (stating that, when the Attorney General reviews BIA decisions, "the delegated authorities of the IJ and BIA are superseded and [the Attorney General] [is] authorized to make the determinations based on [his] own conclusions on the facts and the law.").

[48] *Silva-Trevino I*, 24 I. & N. Dec. at 706 (ruling that indecency with a child in violation of a Texas statute constituted a crime involving moral turpitude).

BIA has adopted this formulation as the standard for determining whether an offense constitutes a crime involving moral turpitude.[49]

Aggravated Felony

INA § 101(a)(43) provides a list of crimes deemed to be aggravated felonies for immigration purposes; a list which Congress has repeatedly expanded over the years to cover additional crimes.[50] The list includes many specific offenses, as well as several broad categories of crimes.[51] Moreover, the "aggravated felony" definition is not limited to offenses that are punishable as felonies (i.e., offenses punishable by at least a year and a day imprisonment); certain misdemeanors are also defined as aggravated felonies for INA purposes.[52]

INA § 101(a)(43) defines the term aggravated felony by designating certain crimes and categories of crimes as aggravated felonies.[53] Specific crimes include the following:

Table 3. Aggravated Felony Offenses Under INA § 101(a)(43)(F)

Enumerated Offense	Enumerated Offense	Enumerated Offense
Murder	Theft or burglary offenses for which the term of imprisonment is at least one year	Tax evasion with a revenue loss to the government exceeding $10,000
Rape	Offenses related to demanding or receiving ransom	Alien smuggling (but not if it is a first offense and the alien has shown that the offense was committed to help the alien's spouse, child, or parent)
Sexual abuse of a minor	Child pornography offenses	Unlawful reentry into the United States by an alien previously removed on the basis of a conviction for an aggravated felony

[49] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 834 (BIA 2016) [hereinafter *Silva-Trevino III*] ("To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state"); *see* Bobadilla v. Holder, 679 F.3d 1052, 1054 (8th Cir. 2012) (observing that the BIA's "basic definition" of a crime involving moral turpitude "has generated little if any disagreement by reviewing circuit courts"). While the BIA in *Silva-Trevino III* adopted a definition for a "crime involving moral turpitude," the litigation in that case was centered on the extent to which an adjudicator may consider the factual evidence underlying a criminal conviction in order to assess whether an alien was convicted of a crime involving moral turpitude. *See Silva-Trevino III*, 26 I. & N. Dec. at 830; Matter of Silva-Trevino, 26 I. & N. Dec. 550, 550-51 (A.G. 2015) [hereinafter *Silva-Trevino II*]; *Silva-Trevino I*, 24 I. & N. Dec. at 688-90.

[50] 8 U.S.C. § 1101(a)(43).

[51] *Id.*

[52] *See Felony*, BLACK'S LAW DICTIONARY (defining "felony" as a "serious crime usu[ally] punishable by imprisonment for more than one year or by death") (10th ed. 2014); Lopez v. Gonzales, 549 U.S. 47, 52-60 (2006) (analyzing, for the purposes of determining whether a particular crime is an aggravated felony under the INA, "the proper understanding of conduct treated as a felony by the State that convicted a defendant of committing it, but as a misdemeanor under the [Controlled Substances Act]").

[53] 8 U.S.C. § 1101(a)(43).

Enumerated Offense	Enumerated Offense	Enumerated Offense
Illicit trafficking in a controlled substance as defined in 21 U.S.C. § 802 (including a "drug trafficking crime," which is defined in 18 U.S.C. 944(c) as any felony punishable under the Controlled Substances Act)	Racketeering or gambling offenses for which a sentence of one year of imprisonment or more may be imposed	Falsely making, forging, counterfeiting, mutilating, or altering a passport or immigration document for which the term of imprisonment is at least twelve months (but not if it is a first offense for the purpose of aiding or assisting the alien's spouse, child, or parent)
Illicit trafficking in firearms, destructive devices, or explosive materials	Offenses involving a prostitution business (including offenses involving the transportation of persons for the purpose of prostitution or unlawful sexual activity as described in 18 U.S.C. §§ 2421 to 2423, if committed for commercial advantage)	Failing to appear to serve a sentence if the underlying offense is punishable by imprisonment for five years or more
Money laundering or engaging in monetary transactions in property derived from specific unlawful activity, if the amount of funds exceeded $10,000	Offenses related to peonage, slavery, involuntary servitude, or human trafficking	Commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers, if the term of imprisonment is at least one year
Offenses related to firearms or explosive materials	Gathering or transmitting national defense information, disclosing classified information, unlawfully identifying undercover agents, sabotage, or treason	Obstruction of justice, perjury, subornation of perjury, or bribery of a witness for which the term of imprisonment is at least one year
A crime of violence (as defined in 18 U.S.C. § 16) for which the term of imprisonment is at least one year	Fraud offenses in which the loss to the victim(s) exceeds $10,000	Failing to appear in court pursuant to a court order to answer or dispose of a felony charge for which a sentence of two years' imprisonment or more may be imposed

Source: 8 U.S.C. §§ 1101(a)(43)(A), (B), (C) (describing conduct in 18 U.S.C. §§ 921, 841(c)), (D) (describing conduct in 18 U.S.C. §§ 1956 to 1957), (E) (describing conduct in 18 U.S.C. §§ 842(h), (i), or 844(d) to (i), 922(g)(1) to (g)(5), 924(b), (h); 26 U.S.C. § 5861), (F), (G), (H) (describing conduct in 18 U.S.C. §§ 875 to 877, 1202), (I) (describing offenses in 18 U.S.C. §§ 2251, 2251A, 2252), (J) (describing offenses in 18 U.S.C. §§ 1962, 1084, 1955), (K)(i), (K)(ii), (K)(iii) (describing offenses in 18 U.S.C. §§ 1581 to 1585 or 1588 to 1591), (L) (describing offenses in 18 U.S.C. §§ 793, 798, 2153, 2381, 2382, 50 U.S.C. §3121), (M)(i), (M)(ii) (describing 26 U.S.C. § 7201), (N) (describing offenses in 8 U.S.C. §§ 1324(a)(1)(A), (a)(2)), (O) (describing conduct in 8 U.S.C. §§ 1325(a), 1326), (P) (describing offenses in 18 U.S.C. §§ 1543, 1546(a)), (Q), (R), (S), (T).

Note: When the INA references a "term of imprisonment," that means the term of imprisonment ordered by the court, not the time actually served by the defendant. 8 U.S.C. § 1101(a)(48)(B).

The offenses described above include violations of state or federal law, as well as violations of foreign law if the term of imprisonment was completed within the prior 15 years.[54] Additionally, an attempt or conspiracy to commit any of the above offenses qualifies as an aggravated felony.[55]

An alien convicted of a crime that falls within the scope of the aggravated felony definition may be subject to serious immigration consequences. A conviction for an aggravated felony is a

[54] *Id*. § 1101(a)(43).

[55] *Id*. § 1101(a)(43)(U).

ground for deportation.[56] Additionally, an alien who has committed an aggravated felony and is removed from the United States will become inadmissible indefinitely,[57] and may be ineligible for various forms of relief from removal.[58]

Crimes Affecting "Good Moral Character"

As discussed in detail below, aliens must demonstrate good moral character for a certain period to qualify for various forms of relief from removal[59] and for naturalization.[60] The INA specifies many criminal activities that would preclude an adjudicator from finding that an alien has good moral character.[61] In most cases, the relevant criminal activity precludes a finding of good moral character only if it is committed within a particular statutory period; in some cases, however, criminal conduct may permanently bar a finding of good moral character. The table below lists major criminal bars to finding good moral character.

Table 4. Criminal Bars to Good Moral Character

If Occurring During Statutory Period	Occurring at Any Time
Acts related to prostitution and other commercialized vices	Conviction for an aggravated felony (for naturalization applications, the aggravated felony conviction must have occurred on or after November 29, 1990; but murder convictions will bar good moral character if they occurred at any time)
Crimes involving moral turpitude (other than a purely political offense), unless (1) the crime was committed before the alien turned 18 and more than five years before relief application; or (2) the maximum possible penalty for the crime did not exceed imprisonment for one year	Participation in genocide
Violations of any law or regulation relating to a controlled substance	Commission of acts of torture or extrajudicial killings
Two or more offenses for which the aggregate sentences of confinement were five years or more	

[56] *Id.* § 1227(a)(2)(A)(iii).

[57] *Id.* § 1182(a)(9)(A).

[58] *See id.* §§ 1158(b)(2) (barring aliens convicted of an aggravated felony from asylum), 1229b(a)(3) (barring LPRs convicted of an aggravated felony from cancellation of removal), 1229b(b)(1)(C) (barring non-LPRs from cancellation of removal if they have been convicted of certain enumerated offenses including aggravated felonies), 1229c(b)(1)(C) (barring aliens from voluntary departure if they have aggravated felony convictions), 1231(b)(3)(B) (providing that an alien who has been convicted of an aggravated felony for which the term of imprisonment is at least five years is statutorily ineligible for withholding of removal).

[59] *See id.* §§ 1229b(b)(1)(B) (requiring showing of good moral character for at least ten years to qualify for cancellation of removal and adjustment of status for nonpermanent residents), 1229b(b)(2)(A)(iii) (requiring showing of good moral character for at least three years to qualify for cancellation of removal and adjustment of status for aliens who have been battered or subjected to extreme cruelty); 1229c(b)(1)(B) (requiring good moral character for at least five years to be eligible for voluntary departure).

[60] *See id.* § 1427 (requiring showing of good moral character for at least five years preceding date of application for naturalization, but not precluding USCIS from considering applicant's conduct and acts at any time before that period).

[61] *Id.* § 1101(f).

If Occurring During Statutory Period	Occurring at Any Time
Engaging in, assisting in, or conspiring to commit a drug trafficking offense (except for simple possession of 30 grams or less of marijuana)	
Deriving income principally from illegal gambling activities	
Convictions for two or more gambling offenses	
Confinement for an aggregate period of 180 days or more in a corrections facility (regardless of whether offense was committed within statutory period)	

Source: 8 U.S.C. §§ 1101(43)(f)(3) (referencing conduct described in *id.* §1182(a)(2)(A)(i), (B), (C), (D)), (f)(4), (f)(5), (f)(7), (f)(8), (f)(9) (referencing conduct described in *id.* § 1182(a)(3)(E)(ii)-(iii)); 8 C.F.R. §§ 316.10(b)(1)(i)-(ii).

The list above is not exhaustive, and so an adjudicator may find that an alien lacks good moral character for other criminal activities not listed in the statute.[62]

Relief from Removal and Obtaining Certain Immigration Benefits

If an alien commits conduct that falls under a ground for inadmissibility or deportability, it does not necessarily follow that the alien cannot enter or remain in the United States. The INA provides several grounds for relief—mandatory and discretionary—from exclusion or removal. These forms of relief include adjustment of status, waivers of certain grounds of inadmissibility by immigration authorities, cancellation of removal, voluntary departure, withholding of removal, and asylum, among others. However, certain criminal activity may bar an alien from being eligible for some types of relief. The Attorney General, with authority typically delegated to EOIR, adjudicates applications for relief from removal.[63] In addition, the DHS Secretary, with authority delegated to the agency's adjudicatory component, USCIS, has the authority to adjudicate applications for immigration benefits, including asylum, refugee admissions, and adjustment of status.[64] Some of these forms of relief and adjustment are discussed below.[65]

Waiver for Criminal Inadmissibility Grounds

The INA provides that immigration authorities have discretion to waive certain grounds of inadmissibility in qualifying circumstances. Concerning the criminal grounds for inadmissibility, the scope of this waiver authority differs depending on whether the alien is seeking admission as an LPR, or whether the alien is, instead, seeking admission into the country temporarily as a nonimmigrant.

[62] *Id.* § 1101(f) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.").

[63] *Id.* § 1103(g); 8 C.F.R. § 1240.1(a)(1)(ii).

[64] 6 U.S.C. § 271(b); 8 U.S.C. § 1103(a)(1); 8 C.F.R. §§ 2.1, 103.2.

[65] While this report describes some of the principal avenues of relief for aliens who may be subject to removal, it does not provide an exhaustive list of all immigration-related relief.

Aliens Seeking Admission as LPRs

INA § 212(h) grants the Attorney General and the DHS Secretary[66] discretion to waive the application of specified criminal grounds for inadmissibility for aliens seeking admission as an LPR if certain conditions are met.[67] In particular, the Attorney General or DHS Secretary may waive the inadmissibility grounds relating to

- crimes involving moral turpitude;
- multiple criminal convictions;
- prostitution and other commercialized vices;
- involvement in serious criminal activity for which immunity from prosecution was granted; or
- drug crimes relating to a single offense of simple possession of 30 grams or less of marijuana.[68]

But for the Attorney General and the DHS Secretary to exercise their discretion, the alien must establish that (1) he is inadmissible solely on the basis of prostitution-related crimes, *or* the activities for which he is inadmissible took place more than 15 years before applying for admission; (2) his admission would not be contrary to the national welfare, safety, or security of the United States; and (3) he has been rehabilitated.[69]

For an alien who is the spouse, parent, son, or daughter of a U.S. citizen or LPR, the Attorney General and the DHS Secretary may also waive inadmissibility if the alien establishes that the denial of admission would result in "extreme hardship" to the qualifying family member.[70] Additionally, under the Violence Against Women Act of 1994, as amended (VAWA), the Attorney General and DHS may waive the criminal inadmissibility grounds if the alien is a battered spouse or child of a U.S. citizen or LPR.[71]

Notwithstanding the Attorney General's and DHS Secretary's discretion noted above, INA § 212(h) bars waivers for aliens convicted of murder or criminal acts involving torture, or an attempt or conspiracy to commit those crimes.[72] Additionally, a waiver may not be granted to an alien previously admitted as an LPR if, since the date of admission, the alien has been convicted of an aggravated felony, or has not lawfully resided continuously in the United States for at least seven years before removal proceedings have been initiated against the alien.[73]

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[66] As discussed in the summary of this report, *supra* at 2, the Homeland Security Act dismantled the former INS, created DHS, and transferred many of the Attorney General's immigration administration responsibilities to the DHS Secretary; DHS, through USCIS, has the authority to adjudicate and approve applications for certain forms of relief such as adjustment of status. 6 U.S.C. § 271(b); 8 U.S.C. § 1103(a)(1); 8 C.F.R. §§ 2.1, 103.2.

[67] 8 U.S.C. § 1182(h).

[68] *Id.*

[69] *Id.* § 1182(h)(1)(A).

[70] *Id.* § 1182(h)(1)(B).

[71] *Id.* § 1182(h)(1)(C); VAWA, P.L. 103-322. VAWA, as relevant here, allows an alien who is the spouse or child of a U.S. citizen or LPR, and who has been battered or subject to extreme cruelty by the U.S. citizen or LPR spouse or parent, to apply for LPR status without the involvement of the abusive relative. *See* 8 U.S.C. §§ 1154(a)(1)(A), 1186a(c)(4)(C), 1229b(b)(2).

[72] 8 U.S.C. § 1182(h). This bar also applies to aliens who admit committing acts that constitute murder or criminal acts involving torture (or an attempt or conspiracy to commit those offenses). *Id.*

[73] *Id.* Initially, the BIA interpreted this bar to apply to all LPRs who have been convicted of aggravated felonies (or otherwise failed to accrue the seven years of continuous residence), regardless of the manner in which they acquired

Aliens Seeking Admission as Nonimmigrants

For an alien seeking admission as a nonimmigrant (e.g., students, athletes, temporary workers),[74] DHS may exercise its discretion to authorize the nonimmigrant visa if the Secretary of State or consular officer recommends that the alien be temporarily admitted despite a criminal ground for inadmissibility.[75] This waiver, however, is not available if the alien is inadmissible because (1) he seeks to enter the United States to engage in espionage or sabotage; (2) he seeks to enter the United States to engage in any other unlawful activity; (3) he seeks to enter the United States to engage in activity with the purpose of opposing, controlling, or overthrowing the U.S. government through force or other unlawful means; (4) the Secretary of State has reasonable grounds to believe that the alien's entry "would have potentially serious adverse foreign policy consequences for the United States"; or (5) the alien has participated in Nazi persecution or genocide.[76]

Cancellation of Removal

INA § 240A authorizes cancellation of removal, another form of discretionary relief available to certain LPRs and nonimmigrants in removal proceedings.[77] For non-LPRs, this relief is available to up to 4,000 aliens each year.[78] Cancellation of removal allows the Attorney General to cancel the removal of qualifying LPRs and nonpermanent residents (including both those lawfully admitted as nonimmigrants and aliens who do not possess a lawful immigration status) who are inadmissible or deportable.[79] But some criminal activity may bar the Attorney General from exercising that discretion.

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their LPR status – in other words, the bar applied to both aliens who were initially admitted into the United States as LPRs and aliens who later adjusted their status to LPRs post-entry. Matter of Rodriguez, 25 I. & N. Dec. 784, 789 (BIA 2012); Matter of Koljenovic, 25 I. & N. Dec. 219, 224-25 (BIA 2010). The majority of the federal circuit courts of appeals disagreed with this interpretation and held that the bar applies only to aliens who were initially admitted as LPRs. Medina-Rosales v. Holder, 778 F.3d 1140, 1145 (10th Cir. 2015); Husic v. Holder, 776 F.3d 59, 66 (2d Cir. 2015); Stanovsek v. Holder, 768 F.3d 515, 517 (6th Cir. 2014); Negrete-Ramirez v. Holder, 741 F.3d 1047, 1053-54 (9th Cir. 2014); Papazoglou v. Holder, 725 F.3d 790, 794 (7th Cir. 2013); Hanif v. Att'y Gen. of the United States, 694 F.3d 479, 487 (3d Cir. 2012); Bracamontes v. Holder, 675 F.3d 380, 389 (4th Cir. 2012); Lanier v. United States Att'y Gen., 631 F.3d 1363, 1366-67 (11th Cir. 2011); Hing Sum v. Holder, 602 F.3d 1092, 1101 (9th Cir. 2010); Martinez v. Mukasey, 519 F.3d 532, 544 (5th Cir. 2008). *But see* Roberts v. Holder, 745 F.3d 928, 932-33 (8th Cir. 2014) (deferring to BIA's interpretation that § 212(h) bar applies to LPRs regardless of the manner in which they acquired LPR status). Ultimately, "[g]iven the overwhelming circuit court authority in disagreement" with its prior rulings, the BIA revisited the issue in *Matter of J-H-J-*, and held that the § 212(h) bar applies only to aliens who entered the United States as LPRs. Matter of J-H-J-, 26 I. & N. Dec. 563, 564-65 (BIA 2015).

[74] *See* 8 U.S.C. § 1101(a)(15) (listing classes of nonimmigrants).

[75] *Id.* § 1182(d)(3)(A). The Seventh Circuit, however, has ruled that an alien could apply for a nonimmigrant visa waiver even after she was already in removal proceedings, on the grounds that the government's "ineffective screening methods" prevented the consular officer who had issued the alien's nonimmigrant visa from discovering that the alien was inadmissible and would need a waiver to overcome her inadmissibility, and the alien, who was detained upon arriving at Chicago O'Hare International Airport, was still seeking admission into United States at the time of her removal proceedings. Atunnise v. Mukasey, 523 F.3d 830, 838-39 (7th Cir. 2008).

[76] 8 U.S.C. § 1182(d)(3)(A). In addition, DHS, in consultation with the Attorney General and the State Department (or the State Department, in consultation with the Attorney General and DHS) may allow the admission of nonimmigrants who are inadmissible on the basis of terrorist activities in certain limited circumstances. *Id.* § 1182(d)(3)(B).

[77] *Id.* § 1229b(a), (b).

[78] *Id.* § 1229b(e)(1).

[79] *Id.* § 1229b.

Eligibility for cancellation of removal differs for LPRs and non-LPRs. For LPRs, the Attorney General may exercise discretion to cancel removal if the alien

1. has been an LPR for at least five years;
2. has resided in the United States continuously for seven years after having been admitted to the United States in any status; and
3. has not been convicted of an aggravated felony.[80]

For non-LPRs, the Attorney General may exercise discretion to cancel the removal of an alien who is inadmissible or deportable *and* adjust the alien's status to LPR if the alien

1. has been physically present in the United States for a continuous period of at least 10 years immediately preceding the application for relief;
2. has been a person of good moral character during that 10-year period;
3. has not been convicted of an offense described in INA § 212(a)(2) (criminal grounds of inadmissibility), § 237(a)(2) (criminal grounds of deportability), or § 237(a)(3) (failure to register and falsification of documents); and
4. establishes that his removal would result in "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or LPR.[81]

Thus, LPRs who have been convicted of an aggravated felony cannot receive cancellation of removal.[82] But this statutory bar does not preclude the Attorney General from canceling the removal of LPRs who have been convicted of other types of offenses. Conversely, non-LPRs may be rendered ineligible to obtain cancellation of removal by committing any offense described within the criminal grounds for inadmissibility or deportability.[83]

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[80] *Id.* § 1229b(a). Previously, under former INA § 212(c), the Attorney General could grant discretionary relief to an LPR subject to deportation proceedings if he had "a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c) (1995). Notably, § 212(c) relief was available to an LPR even if he had been convicted of an aggravated felony, as long as he did not serve a term of imprisonment of at least five years. *Id.* Ultimately, § 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) in favor of the new cancellation of removal provision (which categorically bars relief to aliens convicted of any aggravated felony). *See* IIRIRA, P.L. 104-208, § 304, 110 Stat. 3009 (1996). However, in *INS v. St. Cyr*, the Supreme Court ruled that § 212(c) relief remained available to aliens whose criminal convictions resulted from plea agreements and who would have been eligible for § 212(c) relief at the time of their plea. 533 U.S. 289, 326 (2001). Therefore, although § 212(c) relief has been superseded by statute, there is a small (and decreasing) category of aliens who may still be eligible for such relief.

[81] 8 U.S.C. § 1229b(b).

[82] *Id.* § 1229b(a). An LPR with an aggravated felony conviction will be barred from cancellation of removal even if he has not been charged and found removable based on the aggravated felony conviction. *See* Becker v. Gonzales, 473 F.3d 1000, 1002 (9th Cir. 2007) ("A conviction for an aggravated felony precludes eligibility even absent a charge and finding of removability on that ground.").

[83] 8 U.S.C. § 1229b(b). The BIA has held that this criminal bar applies to any offense *described* within INA §§ 212(a)(2), 237(a)(2), or 237(a)(3), regardless of whether the alien was charged with removal as an inadmissible alien (§ 212) or a deportable alien (§ 237). Matter of Almanza-Arenas, 24 I. & N. Dec. 771, 776 (BIA 2009); *see also* Coyomani-Cielo v. Holder, 758 F.3d 908, 915 (7th Cir. 2014) (upholding BIA's interpretation); Gonzalez-Gonzalez v. Ashcroft, 390 F.3d 649, 652 (9th Cir. 2004) ("The plain language of [8 U.S.C.] § 1229b indicates that it should be read to cross-reference a list of offenses in three statutes, rather than the statutes as a whole."). Further, a non-permanent resident seeking cancellation of removal cannot receive a waiver of the criminal conviction bar under INA § 212(h). *See* Matter of Bustamante, 25 I. & N. Dec. 564, 567 (BIA 2011) (explaining that § 212(h) waives grounds of inadmissibility only arising from a conviction and other actions involving criminal conduct but does not waive recognition of the fact of a conviction itself); Guerrero-Roque v. Lynch, 845 F.3d 940, 943 (9th Cir. 2017) (same); Barma v. Holder, 640 F.3d 749, 752-53 (7th Cir. 2011) (same).

Additionally, an alien who is not an LPR cannot receive cancellation of removal if he has not been a person of good moral character for at least 10 years immediately preceding the date of the application.[84] As listed above, the INA provides many additional criminal activities—aside from convictions for crimes listed in INA §§ 212(a)(2) and 237(a)(2)—that would preclude a finding of good moral character.[85]

Voluntary Departure

INA § 240B authorizes relevant immigration authorities to allow an otherwise removable alien to voluntarily depart the United States at his own expense within 60 to 120 days of being granted that permission, instead of being formally removed by the government.[86] Voluntary departure is sometimes viewed as a quid pro quo: The government benefits by avoiding the costs of formal removal and, in exchange, the alien may depart to any country of his choosing at any time within the statutory period, while also avoiding bars to reentry that attach to a formal order of removal.[87]

There are two forms of voluntary departure. First, an alien may be granted voluntary departure instead of being subject to formal removal proceedings or before those proceedings are completed.[88] The INA bars voluntary departure for an alien deportable on account of being convicted of an aggravated felony or under the terror-related grounds of INA § 237(a)(4)(B).[89]

Alternatively, an alien may be granted voluntary departure at the conclusion of removal proceedings.[90] To qualify for this form of voluntary departure, the alien must, among other things, (1) have been a person of good moral character for at least five years immediately preceding the application for voluntary departure and (2) not have committed any aggravated felony.[91]

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[84] 8 U.S.C. § 1229b(b). The period for good moral character is calculated backward from the date on which the application is finally resolved before the immigration judge or the BIA. *See* Matter of Ortega-Cabrera, 23 I. & N. Dec. 793, 798 (BIA 2005) ("[W]e conclude that, in line with long-standing practice, an application for cancellation of removal remains a continuing one for purposes of evaluating an alien's moral character, and that the 10-year period during which good moral character must be established ends with the entry of a final administrative decision."); Rodriguez-Avalos v. Holder, 788 F.3d 444, 455 (5th Cir. 2015) (deferring to the BIA's interpretation of the good moral character requirement); Duron-Ortiz v. Holder, 698 F.3d 523, 527-28 (7th Cir. 2012) (same).

[85] 8 U.S.C. § 1101(f). A non-LPR alien applying for cancellation of removal as a battered spouse or child has to show good moral character for at least three years immediately preceding the date of the application. *Id.* § 1229b(b)(2)(A)(iii). Notably, for a battered spouse or child seeking cancellation, an act or conviction that does not otherwise bar the alien from relief will not foreclose a finding of good moral character if the Attorney General determines that the act or conviction "was connected to the alien's having been battered or subjected to extreme cruelty" and that a waiver is otherwise warranted. *Id.* § 1229b(b)(2)(C).

[86] *Id.* § 1229c(a)(1), (a)(2)(A), (b)(1), (b)(2). If the alien fails to depart within the sixty-day period, the alien will be ineligible for certain forms of relief for ten years. *Id.* § 1229c(d)(1). An exception exists for aliens seeking to exercise their statutory right to file a motion to reopen the removal proceedings. *Id.* § 1229a(c)(7); Dada v. Mukasey, 554 U.S. 1, 5-6 (2008). In that case, the alien may withdraw the motion for voluntary departure within the sixty days to pursue the motion to reopen. *Dada,* 554 U.S. at 5-6.

[87] 8 U.S.C. § 1229c(a)(1), (a)(2); *see also* David S. Rubenstein, *Restoring the Quid Pro Quo of Voluntary Departure,* 44 HARV. J. ON LEGIS. 1, 1-2 (2007).

[88] 8 U.S.C. § 1229c(a)(1). An arriving alien seeking admission into the United States is not eligible for this form of voluntary departure. *Id.* § 1229c(a)(4).

[89] *Id.* § 1229c(a)(1). EOIR regulations are somewhat more stringent, precluding the granting of voluntary departure to aliens described in any of the security-related grounds found in INA § 237(a)(4), not simply those concerning terrorism. 8 C.F.R. § 1240.36(b)(1)(i)(E).

[90] 8 U.S.C. § 1229c(b)(1).

[91] *Id. See also* Griffiths v. INS, 243 F.3d 45, 56 (1st Cir. 2001) (ruling that alien must show good moral character for 5-year period "immediately preceding" his *application* for voluntary departure, noting that it is "immaterial" whether the

Withholding of Removal

INA § 241(b)(3) bars DHS from removing an alien to a country if the alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion (i.e., a protected ground).[92] Unlike the forms of relief discussed above, withholding of removal is mandatory if an immigration judge[93] determines that the alien is eligible. To obtain this relief, the alien must establish a "clear probability that his life or freedom will be threatened upon return to his country" (i.e., that "it appears more likely than not that he will suffer persecution if removed").[94]

Certain conduct renders an alien ineligible to obtain withholding of removal. Proscribed conduct includes not only the commission of certain crimes, but also activity that, while not clearly identified as a criminal offense (e.g., the commission of genocide), is typically subject to criminal sanction. An alien is ineligible for withholding of removal, however, if, among other things, the alien

- participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing;[95]
- ordered, incited, assisted, or otherwise participated in the persecution of an individual on account of a protected ground;[96]
- is "a danger to the community of the United States" as a result of having been convicted of "a particularly serious crime";[97]
- committed a serious nonpolitical crime outside the United States before arriving in the United States;[98]
- or is otherwise a danger to the security of the United States.[99]

An alien is considered to have committed a "particularly serious crime" if, among other things, the alien has been convicted of an aggravated felony (or felonies) for which the aggregate term of imprisonment is at least five years.[100] However, the Attorney General is authorized to determine,

alien accrued five years of good moral character while his removal proceedings were pending).

[92] 8 U.S.C. § 1231(b)(3).

[93] Applications for withholding of removal are typically considered only in removal proceedings before an immigration judge. 8 C.F.R. §§ 208.16(a), 1208.16(a).

[94] Lozano-Zuniga v. Lynch, 832 F.3d 822, 826-27 (7th Cir. 2016); *see also* INS v. Stevic, 467 U.S. 407, 413 (1984) (analyzing the former INA § 243(h) governing withholding of removal); Cambara-Cambara v. Lynch, 837 F.3d 822, 824 (8th Cir. 2016); Hernandez-Lima v. Lynch, 836 F.3d 109, 113 (1st Cir. 2016); Gonzalez v. U.S. Attorney Gen., 820 F.3d 399, 403 (11th Cir. 2016); Htun v. Lynch, 818 F.3d 1111, 1121 (10th Cir. 2016); Zheng v. Lynch, 819 F.3d 287, 294 (6th Cir. 2016); Sesay v. Attorney Gen. of U.S., 787 F.3d 215, 219 (3d Cir. 2015); Hernandez-Avalos v. Lynch, 784 F.3d 944, 948 n.4 (4th Cir. 2015).

[95] 8 U.S.C. §§ 1231(b)(3)(B), 1227(a)(4)(D).

[96] *Id.* § 1231(b)(3)(B)(i).

[97] *Id.* § 1231(b)(3)(B)(ii).

[98] *Id.* § 1231(b)(3)(B)(iii).

[99] *Id.* § 1231(b)(3)(B)(iv). The Attorney General has reasonable grounds to believe an alien is a danger to the security of the United States if the alien has participated in terrorist activities or has been associated with a terrorist organization. 8 U.S.C. §§ 1182(a)(3)(B), 1182(a)(3)(F), 1227(a)(4)(B), 1231(b)(3)(B).

[100] *Id.* § 1231(b)(3)(B).

on a case-by-case basis, that an alien has been convicted of a particularly serious crime regardless of the length of sentence imposed for an offense.[101]

Convention Against Torture

An alien who fears torture in the country of his removal may apply for protection under the Convention Against Torture (CAT).[102] There are two forms of CAT protection: withholding of removal and deferral of removal.[103] To qualify for CAT-based relief, an alien must show that it is more likely than not that he would be tortured by the government or a person acting with the consent or acquiescence of that government in the country of removal.[104] If the Attorney General[105] determines that the alien has met that burden, the alien may not be removed to the country of removal, but DHS may still remove the alien to a different country where he would not more likely than not face torture.[106]

An alien who establishes eligibility for withholding of removal under CAT may not be afforded its protection if he falls within one of the criminal-related grounds that bar applications for withholding of removal under INA § 241(b)(3).[107] Nevertheless, deferral of removal under CAT is available to *all aliens* who would likely face torture if removed to a particular country, regardless of whether they have been convicted of a crime.[108] Unlike withholding of removal under CAT, deferral of removal is a more temporary form of protection that may be terminated if (1) DHS produces evidence that the alien might not be tortured, and, following a hearing, the alien fails to meet his burden of proving that he likely faces torture; or (2) U.S. authorities obtain adequate assurances from the government of the country of removal that the alien would not be tortured.[109]

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[101] *Id.* The BIA has held that, under this catch-all provision, the Attorney General is not limited to considering aggravated felony offenses, and may designate other offenses (including non-aggravated felonies) as particular serious crimes through case-by-case adjudication. Matter of N-A-M-, 24 I. & N. Dec. 336, 338-41 (BIA 2007). Several federal appellate courts have adopted this interpretation. *See* Flores v. Holder, 779 F.3d 159, 167 (2d Cir. 2015); Delgado v. Holder, 648 F.3d 1095, 1105 (9th Cir. 2011); Gao v. Holder, 595 F.3d 549, 555 (4th Cir. 2010); N-A-M v. Holder, 587 F.3d 1052, 1056 (10th Cir. 2009); Ali v. Achim, 468 F.3d 462, 470 (7th Cir. 2006). *But see* Alaka v. Att'y Gen. of the United States, 456 F.3d 88, 105 (3d Cir. 2006) (holding that an offense must be an aggravated felony in order to qualify as a "particularly serious crime"). In determining on a case-by-case basis whether an offense is a "particularly serious crime," the Attorney General considers "the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Matter of N-A-M-*, 24 I. & N. Dec. at 342.

[102] *See* Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, § 2242, 112 Stat. 2681, 2681-821 (1998) (implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

[103] 8 C.F.R. §§ 1208.16(c), 1208.17(a).

[104] *Id.* §§ 1208.16(c)(2), 1208.18(a)(1).

[105] CAT protection claims are typically considered only in removal proceedings before an immigration judge. *Id.* §§ 208.16(a), 1208.16(a).

[106] *Id.* §§ 1208.16(c)(4), (f). *See* Huang v. Ashcroft, 390 F.3d 1118, 1121 n. 2 (9th Cir. 2004) ("[N]either withholding nor deferral of removal prevents the government from removing an alien to a third country other than the country to which removal was withheld or deferred").

[107] 8 U.S.C. § 1231(b)(3)(B); 8 C.F.R. §§ 1208.16(c)(4), (d)(2).

[108] 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a).

[109] *Id.* §§ 1208.17(d), (f).

Asylum

INA § 208 allows aliens to apply for asylum within one year of entering the United States, regardless of the alien's immigration status.[110] Once in the United States, an alien may affirmatively apply for asylum with USCIS, or, alternatively, the alien may defensively apply for asylum as a form of relief from removal after removal proceedings have been initiated.[111] An alien may be eligible for asylum if he is unable or unwilling to return to his country because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[112] In other words, the Attorney General or DHS has the discretion to grant an alien asylum if the alien can establish that he suffered past persecution in his home country or has a well-founded fear of future persecution in that country on account of belonging to a protected group.[113] The well-founded fear standard for asylum is less demanding than the clear probability standard for withholding of removal.[114]

Certain criminal activity may preclude an alien from receiving a grant of asylum. As in withholding of removal, asylum may not be granted to an alien who

1. is a danger to the United States community because of a conviction for a particularly serious crime;[115]
2. has committed a serious nonpolitical crime outside the United States before arriving in the country;[116]
3. has participated in the persecution of a person in a protected group;[117]
4. has engaged in or is associated with terrorist activities;[118]
5. is otherwise a danger to the security of the United States.[119]

Unlike withholding of removal, a conviction for *any* aggravated felony is considered a particularly serious crime in asylum determinations, regardless of the term of criminal incarceration.[120]

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[110] 8 U.S.C. § 1158(a)(1), (a)(2)(B). An asylum applicant may file his application more than one year after arriving in the United States if he establishes (1) changed circumstances materially affecting his eligibility for asylum, or (2) extraordinary circumstances relating to the delay in timely filing the application. *Id.* § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(4), (5).

[111] *See* 8 C.F.R. § 208.2; Regina Germain, *Seeking Refuge: The U.S. Asylum Process*, 35-OCT COLO. LAW. 71, 74-75 (2006). Applying for asylum is different from applying for refugee status, which occurs *before* the alien arrives in the United States. For more information on the U.S. refugee program and policies, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[112] 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

[113] *Id.* § 1158(b)(1)(A); Legal v. Lynch, 838 F.3d 51, 54 (1st Cir. 2016).

[114] *See* Tang v. Lynch, 840 F.3d 176, 183 (4th Cir. 2016); Gaye v. Lynch, 788 F.3d 519, 533 (6th Cir. 2015); Rodas-Orellana v. Holder, 780 F.3d 982, 986-87 (10th Cir. 2015); Vanegas-Ramirez v. Holder, 768 F.3d 226, 237 (2d Cir. 2014).

[115] 8 U.S.C. § 1158(b)(2)(A)(ii).

[116] *Id.* § 1158(b)(2)(A)(iii).

[117] *Id.* § 1158(b)(2)(A)(i).

[118] *Id.* § 1158(b)(2)(A)(v).

[119] *Id.* § 1158(b)(2)(A)(iv).

[120] *Id.* § 1158(b)(2)(B)(i). In addition, for purposes of asylum, additional crimes may be defined as "particularly serious crimes" or "serious nonpolitical crimes" by regulation. 8 U.S.C. § 1158(b)(2)(B)(ii). Further, courts have held that the Attorney General may designate a specific offense as a "particularly serious crime" through case-by-case adjudication. *See* Delgado v. Holder, 648 F.3d 1095, 11057 (9th Cir. 2011); Gao v. Holder, 595 F.3d 549, 556-57 (4th Cir. 2010);

Refugee Status

Under INA § 207, an alien may apply for refugee status from outside the United States.[121] As with asylum, a person seeking refugee status must show that he suffered past persecution or has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion.[122] DHS has the discretion to admit a refugee if he (1) has not been firmly resettled in another country, (2) is determined to be "of special humanitarian concern to the United States," and (3) is generally admissible as an immigrant.[123] Certain inadmissibility grounds, however, do not apply to an alien seeking admission as a refugee, and DHS may waive most grounds of inadmissibility under INA § 212, including those related to criminal offenses (except for drug trafficking offenses) if the agency determines that a waiver is warranted "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[124]

An alien who has been admitted as a refugee may adjust to LPR status after being physically present in the United States for at least one year.[125] In adjudicating the adjustment application of a refugee, the relevant immigration authorities must determine whether, among other things, the alien is admissible for permanent residence.[126] At this stage, DHS has the authority to waive most criminal grounds of inadmissibility—other than drug trafficking—under the same standard that applies to the inadmissibility waivers for refugees seeking admission (humanitarian purposes, family unity, or public interest).[127]

Adjustment of Status

Both the DHS Secretary and the Attorney General have the discretion to adjust the status of certain nonimmigrants and other categories of aliens if certain criteria are met.[128] The primary statute governing adjustment of status is INA § 245. But nearly all inadmissibility grounds—including all of the criminal grounds listed in INA § 212(a)(2)—preclude an alien from adjusting status under that section.[129] However, as discussed previously, INA § 212(h) grants the Attorney General and the DHS Secretary discretion to waive the application of specified criminal

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Nethagani v. Mukasey, 532 F.3d 150, 156 (2d Cir. 2008); Ali v. Achim, 468 F.3d 462, 469 (7th Cir. 2006).

[121] 8 U.S.C. § 1157(c)(1).

[122] *Id.* § 1101(a)(42).

[123] *Id.* § 1157(c)(1).

[124] *Id.* § 1157(c)(3). In addition, waivers may not be granted to refugee applicants who are inadmissible on the basis of security and related grounds (e.g., seeking to enter the United States to engage in espionage or any other unlawful activity); terrorist activities; foreign policy concerns; or participation in Nazi persecution, genocide, or acts of torture or extrajudicial killings. *Id.* (referencing 8 U.S.C. § 1182(a)(2)(C), (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(E)).

[125] *Id.* § 1159(a). Likewise, an alien who has been granted asylum in the United States may seek adjustment to LPR status one year after being granted asylum. *Id.* § 1159(b).

[126] *Id.* §§ 1159(a)(2), 1159(b)(5).

[127] *Id.* § 1159(c). As with refugee admissions under INA § 1157(c)(3), a waiver is also unavailable to aliens who are inadmissible on security and related grounds, terrorist grounds, foreign policy grounds, or on the basis of Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. *Id.* (referencing 8 U.S.C. §§ 1182(a)(2)(C), (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(E)).

[128] INA §§ 245(a), 245(i); 8 U.S.C. §§ 1255(a), 1255(i).

[129] 8 U.S.C. §§ 1255(a), 1255(i); *see also id.* § 1182(a) (grounds of inadmissibility).

inadmissibility grounds in certain circumstances.[130] Therefore, the presence of a criminal ground of inadmissibility does not always foreclose an alien from adjusting status.

Temporary Protected Status

Under INA § 244, the Attorney General or DHS may grant Temporary Protected Status (TPS) relief to certain aliens from designated countries that are (1) afflicted with ongoing armed conflict posing a serious threat to the nationals of those countries; (2) disrupted by natural disasters or an epidemic; or (3) otherwise experiencing "extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety."[131]

However, certain criminal activity can make an alien ineligible to receive TPS relief. Although the relevant immigration authorities have the discretion to waive most inadmissibility grounds in granting TPS relief,[132] they may not waive inadmissibility for aliens who have

1. committed a crime involving moral turpitude other than a purely political offense (including an attempt or conspiracy to commit such a crime);[133]
2. violated any federal, state, or foreign drug law (including an attempt or conspiracy to commit such a violation);
3. engaged in drug trafficking (other than a single offense of simple possession of 30 grams or less of marijuana); or
4. been convicted of two or more offenses (other than purely political offenses) for which the aggregate sentences were five or more years of imprisonment.[134]

In addition to those nonwaivable criminal inadmissibility grounds, the relevant immigration authorities may not grant TPS relief to an alien who (1) has been convicted of any felony or two or more misdemeanors committed in the United States; or (2) falls within the categories of aliens who are statutorily ineligible for asylum, as described above.[135]

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[130] *Id.* § 1182(h); *see also,* Palma-Martinez v. Lynch, 785 F.3d 1147, 1149 (7th Cir. 2015) ("Under INA § 212(h) the Attorney General may waive the ground of inadmissibility applicable to Palma–Martinez (the crime of moral turpitude) if the denial of admission would result in extreme hardship to a lawfully resident family member and he is applying or reapplying for a visa, admission, or an adjustment of status."); Roberts v. Holder, 745 F.3d 928, 931 (8th Cir. 2014) ("As the BIA noted, Roberts must receive a § 1182(h) waiver of his aggravated felony conviction before he may adjust his status."). But as previously discussed, no waiver is available for an alien convicted of murder or criminal acts involving torture, or an attempt or conspiracy to commit such crimes; nor is a waiver available for an alien who has previously been admitted as an LPR if, since the date of admission, the alien was convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for at least seven years immediately preceding the commencement of removal proceedings against the alien. 8 U.S.C. § 1182(h).

[131] 8 U.S.C. § 1254a(a), (b). For more information on TPS, including the designated countries from which aliens may receive TPS, see CRS Report RS20844, *Temporary Protected Status: Overview and Current Issues,* by Jill H. Wilson.

[132] 8 U.S.C. § 1254a(c)(2)(A)(ii). A waiver may be granted "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.*

[133] Exceptions exist for an alien who committed only one crime if (1) the crime was committed before the alien turned eighteen and the crime was committed (and the alien released from confinement) more than five years before applying for admission; or (2) the maximum penalty possible for the crime committed did not exceed more than one year of imprisonment and, if convicted, the alien was not sentenced to a term of imprisonment of more than six months. *Id.* § 1182(a)(2)(A)(ii).

[134] *Id.* § 1254a(c)(2)(A)(iii). Further, a TPS relief applicant cannot receive a waiver of inadmissibility based on security and related grounds, terrorist activities, and adverse foreign policy reasons; or for participation in Nazi persecution, genocide, and acts of torture or extrajudicial killings. *Id.* § 1254a(c)(2)(A)(iii)(III).

[135] *Id.* § 1254a(c)(2)(B).

Naturalization: Impact of Criminal Activity

In general, LPRs may naturalize as U.S. citizens after residing continuously in the United States for five years and satisfying other qualifications.[136] But to be eligible to naturalize, an LPR (among other things) must have been a person of good moral character for at least five years preceding his application for naturalization.[137] As discussed above, the INA provides a nonexhaustive list of criminal activity that—if committed during the relevant period—would preclude a finding of good moral character and thus bar an LPR from naturalizing.[138] However, some types of criminal activity permanently bar an alien from showing good moral character if they were committed at any time, including a conviction for an aggravated felony.[139]

The Intersection of Criminal Law and Immigration: Select Legal Issues

Although immigration proceedings are civil matters, criminal proceedings are often linked to immigration proceedings because of the many immigration consequences of criminal activity. This section examines select legal issues related to criminal proceedings as they relate to immigration law, including the constitutional obligations of criminal attorneys representing alien defendants, what constitutes a "conviction" under the INA, and how adjudicatory bodies determine when a criminal conviction will trigger immigration consequences.

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[136] *Id*. § 1427(a).

[137] *Id*. Under DHS regulations, the agency may consider conduct and acts that occurred before the five-year period if the applicant's conduct during the statutory period "does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character." 8 C.F.R. § 316.10(a)(2). Further, the statutory period for good moral character includes the period between the examination of the applicant and the administration of the oath of allegiance. *Id.* § 316.10(a)(1).

[138] *See supra* section, "Crimes Affecting Good Moral Character." In addition, the DHS regulations include a separate list of enumerated criminal activity that would preclude a showing of good moral character for naturalization applicants, some of which overlap the conduct referenced in INA § 1101(f). *See* 8 C.F.R. § 316.10(b).

[139] *See* 8 U.S.C. § 1101(f)(8) (aggravated felony), (f)(9) (Nazi persecution, genocide, acts of torture or extrajudicial killings, or severe violations of religious freedom); 8 C.F.R. § 316.10(b)(1)(i) (murder). For naturalization applicants, an aggravated felony will bar a good moral character finding if the conviction occurred on or after November 29, 1990. 8 C.F.R. § 316.10(b)(1)(ii). Reviewing courts have held that an aggravated felony conviction will preclude a showing of good moral character even if the crime was not considered an aggravated felony at the time of the conviction, or the alien had previously been granted discretionary relief from deportation. *See* Alocozy v. U.S. Citizenship and Immigration Servs., 704 F.3d 795, 797-98 (9th Cir. 2012) ("There is nothing in this record even remotely suggesting that when a removable alien is granted discretionary relief in the form of a waiver of deportation, the Government waives any objection based on the ground for which he was removable to his naturalization as a citizen"); Chan v. Gantner, 464 F.3d 289, 294 (2d Cir. 2006) ("We agree with the District Court that no authority supports the proposition that the government is foreclosed by a waiver of deportation from considering a conviction when determining the unrelated question of fitness for naturalization."); Dar v. Olivares, 956 F. Supp. 2d 1287, 1293-99 (N.D. Okla. 2013) (retroactively applying good moral character bar to alien's 1994 attempted rape conviction even though rape was not added to the list of aggravated felonies until 1996, and rejecting claim that previous grant of relief under former INA § 212(c) barred USCIS from applying the good moral character bar). However, for naturalization applicants with aggravated felony and murder convictions, the good moral character bar does not apply if the alien "has received a full and unconditional pardon prior to the beginning of the statutory period," and the alien "demonstrates that reformation and rehabilitation occurred prior to the beginning of the statutory period." 8 C.F.R. § 316.10(c)(2)(i).

The Duty to Inform about Immigration Consequences from a Criminal Conviction

Criminal proceedings involving aliens may carry additional consequences for an alien defendant beyond criminal sanction, including potentially rendering the alien subject to removal from the country. Immigration proceedings are civil, not criminal, and so aliens facing removal charges have no Sixth Amendment right to counsel.[140] But aliens facing criminal charges in federal and state court *do* have a constitutional right to effective assistance of counsel.[141] This right applies throughout all "critical" stages of criminal proceedings, including pretrial stages when the defendant must make crucial decisions, like whether to plead guilty.[142] In *Padilla v. Kentucky,* the Supreme Court held that the Sixth Amendment guarantee to effective counsel requires a lawyer representing an alien in criminal proceedings to advise the alien client if the offense to which the alien is pleading guilty could result in removal from the United States.[143] The Court noted that under current immigration law, removal is "nearly an automatic result for a broad class of noncitizen offenders."[144] Thus, the Court reasoned, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important."[145] Recognizing that "[i]mmigration law can be complex, and ... some members of the bar who represent clients facing criminal charges ... may not be well versed in it," the Court added that "[w]hen the law is not succinct and straightforward ... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[146] But when the INA is clear about the deportation consequences of a particular crime, the Court admonished, "the duty to give correct advice is equally clear."[147]

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[140] *See* Zambrano-Reyes v. Holder, 725 F.3d 744, 750 (7th Cir. 2013); Contreras v. Attorney Gen. of U.S., 665 F.3d 578, 584 (3d Cir. 2012); Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004). The federal circuit courts are divided over whether the due process guarantees in the Fifth Amendment provide aliens with a right to effective assistance of counsel during their removal proceedings. *See Contreras,* 665 F.3d at 584 & n.3 (collecting cases). And though some courts have held that aliens have a Fifth Amendment right to effective representation during their removal proceedings, there is no right to government *appointed* counsel in those proceedings. *See* United States v. Loaisiga, 104 F.3d 484, 485 (1st Cir. 1997) ("There is no constitutional right to appointed counsel in a deportation proceeding. But Congress has provided that a respondent may obtain his own counsel."); 8 U.S.C. § 1362 (providing that aliens in removal proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose").

[141] U.S. CONST., amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("[A] provision of the Bill of Rights which is fundamental and essential to a fair trial," like the Sixth Amendment, "is made obligatory upon the States by the Fourteenth Amendment") (internal quotation marks omitted).

[142] *See* Lafler v. Cooper, 566 U.S. 156, 165 (2012); *see also* Padilla v. Kentucky, 559 U.S. 356, 364 (2010) ("Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.") (internal quotation marks and citations omitted); Loden v. McCarty, 778 F.3d 484, 494 (5th Cir. 2015) ("The decision to plead guilty is a critical stage of criminal proceedings.").

[143] *Padilla,* 559 U.S. at 360.

[144] *Id.* at 366.

[145] *Id.* at 364.

[146] *Id.* at 369.

[147] *Id.* The Supreme Court later ruled in *Chaidez v. United States* that the rule announced in *Padilla* would not be applied retroactively, meaning that the holding would not apply to aliens whose criminal convictions became final before the *Padilla* opinion was published. 568 U.S. 342 (2013).

What Constitutes a Conviction?

Numerous criminal grounds for inadmissibility and deportability require the rendering of a conviction for a particular crime to be applicable. INA § 101(a)(48)(A) provides two definitions for what constitutes a conviction for INA purposes. First, INA § 101(a)(48)(A) defines a conviction as a formal judgment of guilt entered by a court.[148] Generally, in federal cases, the final judgment ordered by the district judge contains the formal judgment of guilt.[149] A state court's written judgment and sentence would qualify as well.[150] If a conviction is vacated or set aside because of substantive or procedural defects in the criminal proceedings, the conviction no longer qualifies as a "conviction" under INA § 101(a)(48)(A).[151] However, a conviction that is vacated or set aside for rehabilitative purposes[152] (e.g., under state laws that permit a judge to expunge convictions for simple drug possession) or solely for the purpose of avoiding immigration consequences, still qualifies as a conviction under the INA.[153] The same is true for expunged convictions: INA § 101(a)(48)(A) has been interpreted to exclude expunged convictions, unless the expungement was allowed solely for rehabilitative purposes.[154]

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[148] INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A).

[149] *See e.g.,* FED. R. CRIM. P. 32(k)(1); Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."); Planes v. Holder, 652 F.3d 991, 995 (9th Cir. 2011) ("Under the first definition, a 'conviction' for purposes of § 1101(a)(48)(A), exists once the district court enters judgment, notwithstanding the availability of an appeal as of right.").

[150] *See* United States v. Saenz-Gomez, 472 F.3d 791, 794 (10th Cir. 2007). The INA's definition of "conviction" controls regardless of how a state designates a conviction. *See, e.g.,* Gonzalez v. O'Connell, 355 F.3d 1010, 1018 (7th Cir. 2004).

[151] *See, e.g.,* Estrada v. Holder, 611 F.3d 318, 321 (7th Cir. 2010); Alim v. Gonzales, 446 F.3d 1239, 1248 (11th Cir. 2006).

[152] For example, some state laws allow a judge to expunge certain convictions for rehabilitative purposes. *See e.g.,* ARIZ. REV. STAT. ANN. § 13-907 (authorizing a judge to set aside a criminal defendant's conviction following the completion of probation or sentence, except for convictions for certain serious criminal offenses); OR. REV. STAT. ANN. § 137.225 (permitting a person to request an order setting aside a conviction for certain crimes, such as unlawful possession of a controlled substance, if three years have elapsed since the date of the conviction, and the person has fully complied with the terms of his sentence). Such laws are similar to the provisions of the Federal First Offender Act (FFOA), which permit a federal judge to order first-time simple drug possession offenders to probation without entering a judgment of conviction. 18 U.S.C. § 3607(a). If the defendant successfully completes the period of probation, the judge must dismiss the proceedings against the defendant. *Id.* Additionally, if the defendant committed the relevant offense before turning twenty-one, the court—at the defendant's request—shall expunge the criminal record. *Id.* § 3607(c). A disposition of a criminal offense under the FFOA "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." *Id.* § 3607(b).

[153] *See, e.g.,* Rodriguez v. Att'y Gen. United States, 844 F.3d 392, 396 (3d Cir. 2016) (distinguishing between convictions vacated on the basis of substantive or procedural defects and convictions vacated for reasons "such as for rehabilitation or to allow a petitioner to avoid the immigration effects of the conviction"); Nunez-Reyes v. Holder, 646 F.3d 684, 689-90 (9th Cir. 2011) (holding that "the constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA," and assuming, without deciding, that a conviction under the INA includes expunged state convictions) (overruling Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000)); Wellington v. Holder, 623 F.3d 115, 120 (2d Cir. 2010) (adopting BIA's interpretation that relief from a state conviction for rehabilitative purposes still qualifies as a "conviction" under the INA); Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006) (collecting cases); In re Pickering, 231 I. & N. Dec. 621, 624-25 (BIA 2003), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006) ("[W]e find that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships.").

[154] *See, e.g.,* Gradiz v. Gonzales, 490 F.3d 1206, 1208 (10th Cir. 2007); *Alim*, 446 F.3d at 1249.

A second definition of conviction exists for situations in which adjudication of guilt has been withheld: There is also a "conviction" if (1) a judge or jury has found the alien guilty, or the alien pleaded guilty or nolo contendere,[155] or the alien has admitted sufficient facts to be found guilty, and (2) the judge has ordered some sort of punishment, penalty, or restraint on the alien's liberty.[156] Qualifying nonconfinement judicial orders can include probation[157] and restitution.[158] Thus, even for crimes requiring a conviction for immigration consequences to attach, there need not be, necessarily, a formal judgment of guilt or a sentence of imprisonment imposed.[159]

Approaches to Determine Whether a Criminal Conviction Triggers Immigration Consequences

Although the INA, on some occasions, expressly identifies conduct referenced in a criminal statute that would render an alien removable or ineligible for certain relief, in many instances the INA simply refers to a general category of criminal behavior that carries immigration consequences.[160] Accordingly, reviewing courts and immigration authorities must sometimes determine whether the range of conduct covered by an alien's criminal conviction falls within the scope of criminal conduct proscribed by the INA.

The Supreme Court has instructed that, to make such a determination, reviewing courts should apply a "categorical approach," in which they compare the elements of the offense of conviction to the generic federal definition of the predicate crime.[161] Under this approach, reviewing courts may look only to the statutory elements of the crime of conviction, rather than the particular facts of the case, in analyzing whether the crime "categorically fits" within the corresponding federal generic offense.[162] In doing so, the courts must presume that the conviction was based on the least culpable conduct under the criminal statute.[163] If the crime of conviction "sweeps more broadly"

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[155] A nolo contendere plea is one in which the defendant does not admit guilt but submits to punishment, nonetheless. *See Nolo Contendere*, BLACK'S LAW DICTIONARY; *Plea*, BLACK'S LAW DICTIONARY; Julian A. Cook, III, *Crumbs from the Master's Table: The Supreme Court, Pro Se Defendants & the Federal Guilty Plea Process,* 81 NOTRE DAME L. REV. 1895, 1938 (2006); Mark Gurevich, *Justice Dep't's Policy of Opposing Nolo Contendere Pleas: A Justification,* 6 CAL. CRIM. L. REV. 2, 5 (2004).

[156] 8 U.S.C. § 1101(a)(48)(A). This includes suspended sentences. *Id.* § 1101(a)(48)(B); Dung Phan v. Holder, 667 F.3d 448, 452 (4th Cir. 2012) ("That Phan's prison sentence was suspended in favor of probation is irrelevant because the conditions of probation, backed by the specter of a suspended prison sentence, are most certainly a form of punishment or penalty and a restraint on one's liberty.").

[157] *See* Reyes v. Lynch, 834 F.3d 1104, 1108 (9th Cir. 2016) (concluding that order of probation included a limitation on freedom to associate with certain categories of persons and thus restrains liberty); Jeff Joseph, *Immigration Consequences of Criminal Pleas & Convictions,* 35-OCT COLO. LAW. 55, 56 (2006).

[158] *See* De Vega v. Gonzalez, 503 F.3d 45, 49 (1st Cir. 2007).

[159] *See* Acosta v. Ashcroft, 341 F.3d 218, 222 (3d Cir. 2003) (recognizing that, in the absence of a formal judgment of guilt, an alien will be considered to have been convicted of an offense for purposes of the INA as long as the disposition of the criminal proceeding meets the two-part test set forth in INA § 1101(a)(48)(A)).

[160] *Compare, e.g.,* 8 U.S.C. § 1101(a)(43)(D) (defining an "aggravated felony" to include "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000)," *with* 8 U.S.C. § 1101(a)(43)(M)(i) (defining an "aggravated felony" as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000").

[161] Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); Taylor v. United States, 495 U.S. 575, 599-600 (1990).

[162] *Moncrieffe*, 569 U.S. at 190 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)).

[163] *Id.* at 190-91 (citing Johnson v. United States, 559 U.S. 133, 137 (2010)).

than the generic offense identified by the INA as grounds for an alien's removal, the criminal conviction cannot serve as a basis for removal.[164]

In some cases, however, the courts may look beyond the statutory definition of a criminal offense when the statute lists multiple, alternative elements of a crime, and only some of those alternatives correspond to the generic offense identified by the INA as carrying immigration consequences.[165] Under this "modified categorical approach," courts may examine the underlying conviction documents, such as the charging papers or plea agreement, to determine which statutory elements a defendant was convicted of, and compare those elements to the federal generic offense.[166] The Supreme Court has held, though, that a court may not apply this approach merely when a statute contains a "single, indivisible set of elements" that cover "a broader swath of conduct than the relevant generic offense."[167] Instead, "[a] court may use the modified approach only to determine which alternative element in a *divisible* statute formed the basis of the defendant's conviction."[168]

The strict limitations of the categorical and modified categorical approaches do not apply, however, when a comparison between the criminal statute and a generic offense requires an examination of the "particular circumstances in which an offender committed the crime on a particular occasion."[169] Applying this "circumstance-specific" exception, a number of reviewing courts have held that an adjudicator may consider evidence *outside* the conviction record to determine whether a criminal conviction involved factors specified in a generic offense that are not tied to the elements of a criminal statute. For example, the courts have considered evidence as to whether a fraud offense met a $10,000 loss threshold (a monetary threshold that must be exceeded for the offense to constitute an aggravated felony under the INA), or whether a drug conviction involved the personal use of 30 grams or less of marijuana (in which case the drug conviction would not be a deportable offense).[170]

In practice, the BIA employs the categorical and modified categorical approaches to determine whether a criminal conviction meets the definition of a predicate offense for immigration purposes.[171] Following the Supreme Court's guidance, the BIA generally limits its analysis of

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[164] Descamps v. United States, 570 U.S. 254, 261 (2013); *see also* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (noting that if the criminal statute "covers any more conduct than the generic offense," it does not meet the generic definition, "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries").

[165] *Descamps*, 570 U.S. at 260-64 (citing *Taylor*, 495 U.S. at 602).

[166] *Id.*; Shepard v. United States, 544 U.S.13, 26 (2005).

[167] *Descamps*, 570 U.S. at 258.

[168] *Id.* at 278 (emphasis added). In addition, the Supreme Court has held that a court may not use the modified categorical approach where a statute lists different ways of committing a *single* element of a crime (as opposed to listing multiple alternative elements of a crime), and, in doing so, the statute covers more conduct than the relevant generic offense. *Mathis*, 136 S. Ct. at 2253-54 (reasoning that the modified categorical approach may only be used to identify the elements of a crime, but not the means by which a person committed the crime).

[169] Nijhawan v. Holder, 557 U.S. 29, 38 (2009).

[170] *See e.g.*, *id.* (whether conviction is for an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"); Rojas v. Att'y Gen. of the U.S., 728 F.3d 203, 215-16 (3d Cir. 2013) (whether an offense is one "relating to a controlled substance"); Mellouli v. Holder, 719 F.3d 995, 1001 (8th Cir. 2013) (whether conviction is a "single offense involving possession for one's own use of 30 grams or less of marijuana"); Varughese v. Holder, 629 F.3d 272, 274-75 (2d Cir. 2010) (whether conviction is a money-laundering offense where the "amount of the funds exceeded $10,000"); Bianco v. Holder, 624 F.3d 265, 270-73 (5th Cir. 2010) (whether the victim of a crime of violence had a qualifying "domestic" relationship to the offender for purposes of the "crime of domestic violence" charge).

[171] *See e.g.*, Matter of Alvarado, 26 I. & N. Dec. 895, 897 (BIA 2016); Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382, 389 (BIA 2007); Matter of Puente-Salazar, 22 I. & N. Dec. 1006, 1011 (BIA 1999); Matter of Pichardo, 21 I. & N.

criminal convictions to the statutory elements of the crime, rather than the specific facts underlying the conviction. The BIA will turn to the record of conviction only in cases in which the statute has a divisible structure that lists alternative elements of an offense, only some of which categorically match the generic offense identified by the INA as carrying immigration consequences.[172]

Previously, however, in analyzing whether a criminal conviction is a crime involving moral turpitude, the BIA adopted a less restrictive form of the categorical approach that merely examines "whether there is a 'realistic probability,' as opposed to a 'theoretical possibility,' that the statute under which the alien was convicted would be applied to reach conduct that does not involve moral turpitude."[173] Under that analysis, if the criminal statute realistically could reach conduct not involving moral turpitude, an adjudicator could look to the record of conviction as well as "any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."[174]

Ultimately, after several reviewing courts rejected this formulation,[175] the BIA ruled that the categorical and modified categorical approaches—as outlined by the Supreme Court—are the proper methods for determining whether an alien was convicted of a crime involving moral turpitude.[176] The BIA, however, stated that it would continue using the realistic probability test when applying the categorical approach analysis; but, noting the circuit disagreement as to its appropriateness, announced that it would apply the controlling law of circuits that have expressly disavowed that approach.[177] The BIA also held that application of the modified categorical approach was limited to circumstances in which the statute is divisible and lists offense elements

Dec. 330, 335 (BIA 1996); Matter of Madrigal, 21 I. & N. Dec. 323, 325 (1996); Matter of Short, 20 I. & N. Dec. 136, 137-38 (BIA 1989).

[172] *See* Matter of J-G-D-F-, 27 I. & N. Dec. 82, 83-86 (BIA 2017); Silva-Trevino III, 26 I. & N. Dec. 826, 831-33 (BIA2016); Matter of Chairez-Castrejon, 26 I. & N. Dec. 819, 820 (BIA 2016). The BIA has also recognized the "circumstance-specific" exception to the categorical approach in cases where comparing the criminal statute to a generic offense in the INA necessarily involves considering factors beyond the elements of the offense. *See* Matter of Garza-Olivares, 26 I. & N. Dec. 736, 739-40 (BIA 2016); Matter of Dominguez-Rodriguez, 26 I. & N. Dec. 408, 412-13 (BIA 2014); Matter of Davey, 26 I. & N. Dec. 37, 39 (BIA 2012); Matter of Babaisakov, 24 I. & N. Dec. 306, 322 (2007); Matter of Gertsenshteyn, 24 I. & N. Dec. 111, 115-16 (BIA 2007).

[173] Matter of Louissaint, 24 I. & N. Dec. 754, 757 (BIA 2009) (quoting *Silva-Trevino I*, 24 I. & N. Dec. at 698) (internal quotations omitted). In *Silva-Trevino I*, Attorney General Michael Mukasey, who had directed the BIA to refer its decision to him for review pursuant to 8 C.F.R. § 1003.1(h)(1)(i), established this approach for analyzing whether a criminal conviction is a crime involving moral turpitude. *Silva-Trevino I*, 24 I. & N. Dec. at 698.

[174] *Matter of Louissaint*, 24 I. & N. Dec. at 757 (citing *Silva-Trevino I*, 24 I. & N. Dec. 687, 698-704 (A.G. 2008)).

[175] *See* Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014); Olivas-Motta v. Holder, 746 F.3d 907 (9th Cir. 2013); Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011); Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462 (3d Cir. 2009). Two circuits, however, deferred to the Attorney General's instructions in *Silva-Trevino I*. *See* Bobadilla v. Holder, 679 F.3d 1052 (8th Cir. 2012); Mata-Guerrero v. Holder, 627 F.3d 256 (7th Cir. 2010). Given "the variance between Attorney General Mukasey's binding opinion and the contrary controlling precedent in some circuits," as well as "intervening Supreme Court decisions that cast doubt on the continued validity of the opinion," Attorney General Eric Holder in 2015 vacated *Silva-Trevino I* and directed the BIA to develop a new uniform standard to determine whether an alien has been convicted of a crime involving moral turpitude. *Silva-Trevino II*, 26 I. & N. Dec. 550, 552-530 (A.G. 2015).

[176] *Silva-Trevino III*, 26 I. & N. Dec. 826, 830 (BIA 2016).

[177] *Id.* at 832-33.

in the alternative.[178] And using this approach, the BIA clarified, adjudicators may look to only the record of conviction to determine which element formed the basis for the alien's conviction.[179]

Interpreting the INA Predicate Offense

In many instances Congress did not incorporate a statutory definition when defining a predicate offense that carries immigration consequences, leaving it up to the courts to carve out a generic definition. For example, the INA includes as an aggravated felony "a theft offense (including receipt of stolen property)" for which the term of imprisonment is at least one year, but does not define that phrase.[180] To fill that gap, the appellate courts have generally eschewed the more restrictive, common law definitions of "theft" or "larceny"[181] for a broader and more modern construction: The "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent."[182]

In defining the scope of other undefined predicate offenses, the courts have been less consistent. For example, the INA also includes as an aggravated felony "murder, rape, or sexual abuse of a minor."[183] Until the Supreme Court's decision in *Esquivel-Quintana v. Sessions*, there was some disagreement among reviewing courts and the BIA over the scope of offenses constituting "sexual abuse of a minor" under the INA, with the BIA broadly interpreting the phrase to cover any sexually explicit conduct with a person under 18.[184] In *Esquivel-Quintana*, however, the Supreme Court construed the phrase as having a more limited scope and held that, for statutory rape offenses based solely on the age of the participants, the term "sexual abuse of a minor" requires the age of the victim to be less than 16.[185]

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[178] *Id.* at 833

[179] *Id.*

[180] 8 U.S.C. § 1101(a)(43)(G).

[181] For example, the crime of larceny was traditionally limited to the permanent taking of property that was in another person's possession (or deemed to be in his possession). Bell v. United States, 462 U.S. 356, 358-59 (1983); Almeida v. Holder, 588 F.3d 778, 783-84 (2d Cir. 2009).

[182] *See* United States v. Medina-Torres, 703 F.3d 770, 774 (5th Cir. 2012); United States v. Venzor-Granillo, 668 F.3d 1224, 1232 (10th Cir. 2012); Ramirez-Villalpando v. Holder, 645 F.3d 1035, 1039 (9th Cir. 2011); Jaggernauth v. U.S. Att'y Gen., 432 F.3d 1346, 1353 (11th Cir. 2005); Soliman v. Gonzales, 419 F.3d 276, 283 (4th Cir. 2005); Abimbola v. Ashcroft, 378 F.3d 173, 176 (2d Cir. 2004); Hernandez-Mancilla v. INS, 246 F.3d 1002, 1009 (7th Cir. 2001).

[183] 8 U.S.C. § 1101(a)(43)(A).

[184] Matter of Esquivel-Quintana, 26 I. & N. Dec. 469, 477 (BIA 2015); Matter of V-F-D-, 23 I. & N. Dec. 859, 862 (BIA 2006); Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 995-96 (BIA 1999). The Second, Third, Sixth, and Seventh Circuits have upheld the BIA's broad interpretation of "sexual abuse of a minor." *See* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1025-27 (6th Cir. 2016); Velasco-Giron v. Holder, 773 F.3d 774, 776-77 (7th Cir. 2014); Restrepo v. Att'y Gen. of the United States, 617 F.3d 787, 796 (3d Cir. 2010); Mugalli v. Ashcroft, 258 F.3d 52, 60 (2d Cir. 2001). The Ninth Circuit has held, however, that for statutory rape crimes, "sexual abuse of a minor" requires a person to knowingly engage in a sexual act (defined to involve direct physical contact) with a child under sixteen, and who is at least four years younger than the perpetrator. United States v. Medina-Villa, 567 F.3d 507, 514 (9th Cir. 2009).

[185] Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572-73 (2017). The Supreme Court based its decision on the legal dictionary definition of the term "age of consent," the structure of the INA, and the language of similar federal and state criminal statutes that set the age of consent at sixteen. *Id.* at 1569-72. The Court left unresolved whether sexual abuse of a minor requires a particular age differential between the victim and the perpetrator, or whether the offense includes sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants. *Id.* at 1572.

Even in cases that involve interpreting an INA provision in which Congress has expressly incorporated a federal statutory provision to define a predicate offense, the courts sometimes have struggled to interpret that definition consistently. As mentioned above, INA § 101(a)(43) includes as an aggravated felony a "crime of violence" as that term is defined in 18 U.S.C. § 16, and for which the term of imprisonment is at least one year.[186] 18 U.S.C. § 16 defines a crime of violence as either (1) "an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (2) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[187]

Initially, a question raised was whether a "crime of violence," as defined in 18 U.S.C. § 16, requires a particular *mens rea*, or mental state. Lower courts had reached varying conclusions over the state of mind that a person must possess in order to commit a crime of violence. Some courts, for example, had ruled that grossly negligent behavior was sufficient to meet the definition, whereas other courts required a showing of recklessness or specific intent.[188] Eventually, in its 2004 ruling in *Leocal v. Ashcroft*, the Supreme Court held that a crime of violence requires an "active employment" of force with "a higher degree of intent than negligent or merely accidental conduct."[189]

More recently, in October 2017, the Supreme Court heard oral argument in *Sessions v. Dimaya* to address the circuit split about whether the second clause in the definition of a crime of violence—"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person of property of another may be used in the course of committing the offense"[190]—is unconstitutionally vague.[191]

[186] 8 U.S.C. § 1101(a)(43)(F).

[187] 18 U.S.C. § 16.

[188] *Compare* Jobson v. Ashcroft, 326 F.3d 367, 373-74 (2d Cir. 2003) (requiring intentional use of force), *and* Bazan-Reyes v. INS, 256 F.3d 600, 611 (7th Cir. 2001) (same), *with* Tapia Garcia v. INS, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (gross negligence), *and* United States v. Ceron-Sanchez, 222 F.3d 1169, 1172-73 (9th Cir. 2000) (recklessness causing physical injury), *and* United States. v. Chapa-Garza, 243 F.3d 921, 926-27 (5th Cir. 2001) (requiring intentional use of force).

[189] Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). The Court did not address whether the reckless use of force qualified as a crime of violence. *Id.* at 13.

[190] 18 U.S.C. § 16(b).

[191] Sessions v. Dimaya, No. 15-1498, 137 S. Ct. 31 (2016); Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015). In *Dimaya*, the Supreme Court is reviewing the Ninth Circuit's conclusion that the clause is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. In so holding, the Ninth Circuit had relied on the Supreme Court's ruling in *Johnson v. United States* that the Armed Career Criminal Act's (ACCA) "residual clause" defining a "violent felony" is unconstitutionally vague. *Dimaya,* 803 F.3d at 1111 (citing Johnson v. United States, 135 S. Ct. 2551 (2015)). Under the ACCA, a defendant convicted of firearm offenses in violation of 18 U.S.C. § 922(g) will face harsher punishment if that defendant has three or more previous convictions for a violent felony, which is defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §§ 924(e)(1), (2)(B)(ii). In *Dimaya,* the Ninth Circuit ruled that the INA's definition of crime of violence—bearing language similar to the ACCA's residual clause—likewise is unconstitutionally vague. *Dimaya*, 803 F.3d at 1111, 1115. The Sixth, Seventh, and Tenth Circuits, applying *Johnson*, had reached the same conclusion. The Fifth Circuit, however, reached the opposite conclusion in United States v. Gonzalez-Longoria, 831 F.3d 670, 676-77 (5th Cir. 2016). For more information on the ACCA and *Johnson*, see CRS Report R41449, *Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview*, by Charles Doyle.

Issues for Congress

Congress has repeatedly amended the INA to expand, curtail, or otherwise modify the immigration consequences of criminal conduct, and legislative proposals to alter the current framework are regularly introduced. For instance, Congress may legislate to expand or constrict criminal grounds for inadmissibility and deportability. Congress also could add or subtract crimes from those listed as aggravated felonies and clarify what crimes involve moral turpitude. Additionally, Congress could modify the number of crimes that would render an alien statutorily ineligible for relief from removal or those that preclude a finding of good moral character. Further, Congress could clarify certain terminology in the INA that some courts have deemed ambiguous, like crime of moral turpitude and crime of violence. In short, given the immigration consequences that may follow from criminal activity, Congress may consider various legislative options that would modify the standards employed by the courts and relevant immigration authorities to determine whether an alien may be excluded or deported from the United States due to criminal conduct.

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