

§ N.1 Overview

Establishing Defense Goals; Immigration Status; Deportability, Inadmissibility, and an Aggravated Felony; The Problem of Illegal Re-entry; and The Ten-Step Checklist for Defending a Non-Citizen

(For more information, see *Defending Immigrants in the Ninth Circuit, Chapter 1*,
www.ilrc.org/criminal.php)

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A. Introduction; Gathering Facts, Using Resources

The Quick Reference Chart details which California offenses may make a noncitizen inadmissible, deportable or an aggravated felon. These three categories cover *most* of the ways that a conviction can hurt immigration status. (They don’t cover all, however. For example, a TPS applicant must not be inadmissible and *also* cannot be convicted of two misdemeanors or one felony. See Part C.5 below.)

This section discusses how criminal defense counsel can use the analysis you get from the Chart, combined with information about the client’s particular immigration status and history to

¹ This Note has been re-organized and rewritten to provide more specific advice to defenders. Parts of the Note borrow liberally from the public defender manual *Immigration and Washington State Criminal Law*, found at www.defensenet.org. We are grateful to Ann Benson, Jonathan Moore and the Washington Defender Association Immigration Project for their kind permission to use the materials.

establish defense goals for individual noncitizen clients. The more information that you have about the client's immigration and criminal history, the better the advice you will be able to give.

Gather the Client's Entire Criminal Record. To correctly identify a noncitizen's defense goals in terms of immigration, defense counsel must have a complete record of all past convictions in the United States and sentences imposed. (Foreign convictions are relevant as well, but gathering information on these may be beyond your resources.)

Copy Immigration Documents, Complete an Immigration Questionnaire. If the client has any type of card, letter, or document pertaining to immigration status, photocopy it. This will provide immigration counsel with a treasure trove of information. Also, have the client complete an immigration intake form. See § N.16 *Client Immigration Questionnaire*. Assistance from paralegal staff or law clerks could expedite the fact gathering process. Even if the client is not able or willing to answer all of the questions, any information that you gain will be of help.

Expert Assistance. To complete the analysis, ideally defense counsel should look at more comprehensive works and/or consult with an expert on crimes and immigration. See § N.18 *Resources*. See especially consultation services offered by the Immigrant Legal Resource Center (on a contract basis), the U.C. Davis Law School Immigration Clinic (limited free consultation for public defenders), special free consultation for Los Angeles Public Defenders, and the National Immigration Project of the National Lawyers Guild. A comprehensive manual on this subject, *Defending Immigrants in the Ninth Circuit*, is published by the group that writes this Chart and Notes. It contains extensive discussion of California offenses, immigration status and applications for relief, and other topics. See www.ilrc.org/crimes.

B. What is the Meaning of "Inadmissible," "Deportable," and "Aggravated Felony"?

1. Overview

The Immigration and Nationality Act (INA) contains three main lists of offenses that damage immigration status or potential status. These are:

- **Grounds of deportability**, at 8 USC § 1227(a). A noncitizen who has been admitted to the United States but is convicted of an offense that makes her **deportable** can lose her lawful status and be "removed" (deported), unless she can apply for some relief from removal.

Lawful permanent residents and others who have *secure lawful immigration status* that they might lose fear becoming deportable. In contrast, a deportable conviction usually² does not affect an undocumented person, who has no lawful status to lose.

Example: Lila is a lawful permanent resident and Uma is an undocumented person. Both are charged with possession of an unregistered firearm, which is a deportable offense under 8 USC § 1227(a)(2)(c), but is not an inadmissible offense (see definition of "inadmissibility" below).

² The exception is that such a conviction will prevent an undocumented person from applying for some type of non-permanent resident "cancellation of removal," as under 8 USC § 1229b(b)(1). See § N. 17 *Relief*.

Lila wants to avoid this plea, because a deportable conviction like this could cause her to be put in removal proceedings, stripped of her LPR status, and removed. In contrast, this is not a bad plea for Uma, since she has no lawful status to lose.

- **Grounds of inadmissibility**, at 8 USC § 1182(a). A noncitizen who is **inadmissible** for crimes may be unable to get any *new* status, admission to the U.S., waiver of a crime, or other new benefit you apply for from the government. However, being inadmissible will not take away the lawful status that one already has. The only exception is if the person with lawful status *leaves* the United States after becoming inadmissible for crimes. In that case the person can be denied admission back into the U.S. for being inadmissible.

Example: Assume that instead of the firearms offense, Lila and Uma are charged with misdemeanor engaging in prostitution, a six-month maximum offense and the first criminal offense for each of them. This conviction would make them both inadmissible under the “engaging in prostitution” ground of inadmissibility, but would not make them deportable.

Uma wants to avoid this plea, because as an undocumented person she may want to apply for lawful status now or in the future, and for that she needs to avoid inadmissibility. In contrast, Lila could take the plea if necessary. The conviction would mean that she would have to delay any application for naturalization, and that she should not travel outside the U.S. until she became a citizen. But at least she would not be deportable, and therefore she is not at risk of being put in removal proceedings and removed from the U.S. so long as she remains in the U.S.

- The multi-part definition of **aggravated felony**, at 8 USC § 1101(a)(43). Aggravated felony convictions bring the most severe immigration consequences. Everyone wants to avoid this type of conviction. The conviction is a ground of deportability and also a bar to almost every application or relief. “Aggravated felony” is a misnomer; currently the category includes many misdemeanors and other offenses that are not particularly “aggravated.”

These three categories comprise the most common, but not all, of the adverse immigration consequences that flow from convictions. In particular, see Part C Asylee and Refugee Status, and Temporary Protected Status.

2. Offenses Listed in the Grounds of Inadmissibility and Deportability

The following chart shows the types of convictions or evidence of criminal activity that come up in state court proceedings that can make a noncitizen deportable or inadmissible. The third list of offenses, aggravated felonies, is discussed separately below.

| Grounds of Deportability Based on Crimes, 8 USC § 1227(a)(2) (Conviction or conduct must be after admission to U.S.) | Grounds of Inadmissibility Based on Crimes, 8 USC § 1182(a)(2) (Offenses committed anytime) |
|---|--|
| Conviction of crime of domestic violence, child abuse/neglect, or stalking; judicial finding of a violation of certain DV protection orders. Conviction or violation must occur after 9/30/96 | No per se domestic violence, child abuse, or stalking inadmissibility ground. (But check to see if the offense also constitutes a crime involving moral turpitude (“CIMT”), which can cause inadmissibility) |
| Firearms offense | No per se firearms ground (But see if offense is also a CIMT) |
| Conviction/s of a crime involving moral turpitude (CIMT): --Two convictions after admission, unless they were part of a single scheme; or --One conviction with maximum sentence of at least 1 yr, committed within 5 years after first admission | One conviction of a crime involving moral turpitude (CIMT), except automatically <i>not</i> inadmissible if it comes within: --Petty Offense Exception (only CIMT ever committed, has a maximum possible sentence of one year or less, sentence imposed was 6 months or less) or --Youthful Offender Exception (convicted as an adult of only one CIMT, committed while under 18, conviction or resulting imprisonment occurred at least five years ago) |
| N/A | Formally admit committing a CIMT, even with no conviction |
| Conviction of offense relating to a controlled substance, with automatic exception for single conviction 30 gms marijuana | Conviction of offense relating to a controlled substance, with possible discretionary waiver in certain cases for single conviction 30 gms marijuana, under INA § 212(h) (but do <i>not</i> rely on the client winning this waiver) |
| N/A | Formally admit committing a controlled substance offense, even with no conviction |
| Drug addict or abuser at any time after admission | Current drug addict or abuser (8 USC § 1182(a)(1)) |
| N/A | Government has “reason to believe” person was or helped a trafficker; conviction not required |
| N/A | 5 yr aggregate sentence for two or more convictions of any type |
| Conviction for running non-USC prostitution business | Engaging in prostitution (conviction not required) |
| Convicted of an aggravated felony | No per se aggravated felony bar (but many AF offenses also are a CIMT, drug offense, or other inadmissibility category) |

Comparing the offenses in grounds of deportability and inadmissibility. The lists of offenses in the grounds of deportability and inadmissibility are not identical. Certain types of convictions appear on both lists, while others will make a noncitizen deportable but not inadmissible, or vice versa. In many cases it is crucial for counsel to understand the immigration situation and identify priorities. You don't want to use all your resources to avoid a plea to a deportable offense, when in fact that won't affect the defendant, whose key goal is to avoid conviction of an inadmissible offense. Here are some differences between the two lists:

- **There are different rules for when a moral turpitude conviction makes a noncitizen deportable versus inadmissible.** Check the person's entire criminal record against the formulae discussed above and in § N.7 *Crimes Involving Moral Turpitude*, and discussed in greater detail at *Defending Immigrants in the Ninth Circuit*, Chapter 4.
- **Key "conduct-based" grounds make a noncitizen inadmissible, but not deportable.** These include engaging in a pattern and practice of **prostitution**, and where the government has "**reason to believe**" (but no conviction) that the person aided in drug trafficking.
- **There is no inadmissibility ground based on conviction of a domestic violence, child abuse, or firearms offense, *per se*.** If a defendant's primary goal is to avoid *deportability*, she must avoid conviction even for minor offenses that come within these grounds, such as possession of an unregistered firearm. In contrast, if a defendant only needs to avoid *inadmissibility*, an unregistered firearm conviction is not harmful.

Note, however, that if the firearms or domestic violence offense *also* is a crime involving moral turpitude—e.g., if the firearms offense is not possession of an unregistered weapon, but assault with a firearm—counsel also must analyze whether the plea according to the moral turpitude grounds, where the conviction might cause inadmissibility.

Example: Sam, a noncitizen, is facing tough charges and is offered a chance to plead to possession of an unregistered firearm. His defender must understand his immigration status to competently deal with the offer. If Sam must avoid becoming deportable, he has to refuse this plea, which will make him deportable under the firearms ground. If instead he only must avoid becoming inadmissible, he can safely accept the firearm plea. This is because there is no "firearms" ground of inadmissibility. (Possessing a firearm is not a moral turpitude offense, so he doesn't have to worry about that ground of inadmissibility.)

- **Conviction of an aggravated felony is not a *per se* ground of inadmissibility.** In limited situations, and where the conviction also does not come within the controlled substance or perhaps moral turpitude grounds, this can aid a defendant who is eligible to immigrate through a relative. See Chapter 9, § 9.2, *Defending Immigrants in the Ninth Circuit*.

3. Aggravated Felonies

Aggravated felonies are discussed in detail at § N.6, *infra*. Defense counsel must become very familiar with the list, which includes dozens of categories and is not limited to felonies or

aggravated offenses. *A few examples* of commonly charged offenses that are also aggravated felonies include:

- Misdemeanor theft with a sentence imposed of one year, even if the entire sentence is suspended; burglary or a crime of violence with a suspended one-year sentence;
- Any drug trafficking offense, e.g. possession for sale of a small amount of marijuana;
- “Sexual abuse of a minor,” which includes some convictions under P.C. § 261.5 and all convictions under § 288(a);
- Felon in possession of a firearm; failure to appear to face a felony charge or sentence.

Conviction of an aggravated felony has three major immigration consequences. First, it is a deportable offense, and therefore grounds to remove lawful status for those who have it.

Second, aggravated felonies are worse than other triggers of deportability because they bar most forms of relief from removal. An aggravated felony conviction therefore results in virtually **mandatory deportation** in the great majority of cases. If a person is “merely” deportable based on a ground of deportability that is not an aggravated felony, she might be able to seek a waiver of deportability and remain in the United States. If a person is convicted of an aggravated felony, however, almost all forms of relief are barred, including asylum and the waiver for long-time permanent residents, cancellation of removal. In some cases, some noncitizens with a non-drug aggravated felony will be able to adjust, or re-adjust, their status to lawful permanent residency with a § 212(h) waiver, or apply for a “U” or “T” visa as

Third, a noncitizen who is deported (“removed”) and who re-enters illegally has committed a federal offense. If the noncitizen was convicted of an aggravated felony before being removed, he or she is subject to a greatly enhanced sentence for the re-entry. 8 USC § 1326(b)(2). In northern California, a federal defendant with a prior aggravated felony conviction, but not of a highly serious crime, typically may serve 2 ½ years in federal prison just for the illegal re-entry. Federal officials troll the jails looking for aggravated felons who have illegally re-entered. Note, however, that conviction of certain offenses that are less serious than aggravated felonies can cause an even greater sentence enhancement. See discussion at Part D, below, “The Problem of Illegal Re-entry.”

C. Determining Your Client’s Immigration Status and Particular Defense Goals

The term “immigration status” refers to a person’s classification under United States immigration laws. Criminal convictions affect noncitizens differently depending on their status, as noted in the above discussion of deportability versus inadmissibility. Therefore, to determine defense goals for a noncitizen, you must find out, if possible, the client’s immigration status. This section explains the possible classifications of immigration status under U.S. immigration law, and discusses defense priorities based on the classification.

A person who is not a U.S. citizen and falls within one of the categories listed below is a noncitizen. While a U.S. citizen never can be deported/removed, ***anyone who is not a U.S. citizen is always subject to the possibility of removal, regardless of her circumstances.*** This includes, for example, a person who is married to a U.S. citizen and has had a green card for twenty years.

For in-depth information about any of these categories, see resources such as Chapter 1, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org).

Note: In choosing defense strategies, remember that a vague record of conviction will not help an immigrant who must apply for status or relief from removal. See *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*) discussed at § N.3 Record of Conviction

1. The United States Citizen (“USC”) or United States National Defendant

a. Who is a U.S. Citizen?

Citizenship by Birth in the United States or Other Areas. Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. Persons born in Puerto Rico, Guam and U.S. Virgin Islands, as well as those born after November 4, 1988, and in many cases before, in the Northern Mariana Islands also are U.S. citizens.

Naturalization to U.S. Citizenship. A noncitizen may apply to become a U.S. citizen through naturalization. A naturalization applicant must establish that he or she has been of “good moral character” for a certain period; often the period is three or five years, but certain military personnel require less. In almost every case, except for certain Armed Services members, an applicant for naturalization must be a lawful permanent resident.

Most crimes that trigger the *inadmissibility grounds* also statutorily bar the person from establishing good moral character. This is not so dangerous: the noncitizen simply must wait for the, e.g., three or five years to pass since the conviction before filing the naturalization application, and take care not to travel outside the U.S. until she is a citizen. It is far more damaging for a noncitizen who is *deportable* for a crime to apply for naturalization. It is likely that the naturalization application will be denied and the person quickly will be referred to removal/deportation proceedings, and no passage of time will eliminate the deportability. For further discussion of naturalization, see books such as *Defending Immigrants in the Ninth Circuit*, Chapter 11 or *Naturalization: A Guide for Advocates* (www.ilrc.org).

Derivative or Acquired Citizenship. Your client might be a U.S. citizen and not know it. Many persons born in other countries unknowingly inherit U.S. citizenship from their parents under one of a few provisions of nationality law. In this case, criminal convictions are not a bar and good moral character is not a requirement; the person received the status automatically and is already a citizen.

There are two threshold questions. If the answer to either question is yes, more research needs to be done to determine whether the person actually is a U.S. citizen, based on date of birth and other factors. As the law of derivative and acquired citizenship is quite technical, it would be best to consult a non-profit agency or immigration lawyer. The threshold questions are:

- At the time of his or her birth in another country, did your client have a grandparent or parent who was a U.S. citizen? If so, your client might have inherited U.S. citizenship at birth, called “acquired citizenship.”
- Might your client have been under the age of 18 when, in either order, she became a permanent resident and a parent naturalized to U.S. citizenship? If so, your client might have automatically become a citizen at the moment the second condition was met, in a process called “derivative citizenship.”

Regarding the second question, 8 USC § 1431 provides that a person automatically acquires citizenship regardless of any criminal convictions (or other considerations) if the following four conditions are met:

- At least one parent becomes a U.S. citizen by naturalization;
- The child is under 18;
- The child is a lawful permanent resident; and
- The child is in the legal and physical custody of the citizen parent.

This version of the law only applies to those who were under 18 as of February 27, 2000.³ Those who were over 18 as of that date are subject to a prior version of this provision⁴ that required *both* parents to become U.S. citizens, or proof that the child was in the legal custody of the citizen parent if there had been divorce or separation

Because a person with derivative or acquired citizenship is already automatically a USC, there is no need to apply for naturalization. The derivative or acquired USC will benefit, however from obtaining *proof* that he or she is a citizen. The best, most efficient way to obtain proof of U.S. citizenship is to apply for a U.S. passport. See http://travel.state.gov/passport/passport_1738.html for an application and information on how to do this.

b. Who is a U.S. National?

Persons born in an outlying possession of the United States, for example in American Samoa and Swains Islands, are U.S. nationals.⁵ A national of the United States is not a U.S. citizen, but cannot be deported based upon a conviction.

³ *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001); *Matter of Rodrigues-Tejedor*, 23 I. & N. Dec. 153 (BIA 2001).

⁴ 8 USC 1432; INA 321 [repealed].

⁵ See INA §§ 308, 8 USC § 1408 and INA § 101(a)(29), 8 USC § 1101(a)(29). For a complete description of who can be non-citizen nationals, please see INA § 308, 8 USC § 1408 and Chapter 3, Noncitizen Nationals, Daniel Levy, *U.S. Citizenship and Naturalization Handbook* (West Group).

c. Defense Goals for U.S. Citizens and Nationals

Cannot be deported. A U.S. citizen or national never can be legally deported or excluded (“removed”), held in immigration detention, or otherwise come under the jurisdiction of immigration enforcement procedures, regardless of their criminal history.

However, U.S. citizens still can be hurt by a badly formed criminal plea: they can lose the ability to submit a family visa petition for an immigrant relative. Part of the Adam Walsh Act passed in 2006 imposes immigration penalties on *U.S. citizens and permanent residents* who are convicted of certain crimes relating to minors, by preventing them from filing a visa petition on behalf of a close family member. The specified offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct, where the victim is a minor. See Note 11, *infra*.

Example: Harry is a U.S. citizen who is charged with soliciting a 17-year-old girl to engage in sexual conduct. If he pleads guilty, he may not be permitted to file a visa petition for an immigrant relative, unless he is able to obtain a waiver.

2. The Lawful Permanent Resident or “Green Card” Holder Defendant

a. What is Lawful Permanent Residency?

A Lawful Permanent Resident (LPR) is not a U.S. citizen but is permitted to live and work legally in the U.S. permanently. However, LPRs are still subject to removal at any time if they violate the immigration laws. There are two types of permanent residents: Lawful Permanent Residents (LPR’s) and Conditional Permanent Residents (CPR’s).⁶ Permanent residents are given “green cards” which state “Resident Alien” across the top of the card. Green cards actually are pink or white in color, not green. **LPR status does not expire, although the green card itself must be renewed.** LPR status can only be revoked by an immigration judge or by leaving the U.S. for such a long period of time that it is deemed abandoned.

b. Defense Priorities for Lawful Permanent Residents

Consider the following five steps in determining defense priorities.

1. **Is my LPR client already deportable?** Obtain and analyze the LPR client’s entire criminal record to determine if the client is already deportable based on a past conviction. If so, investigate what waivers or relief, if any, are available. If the LPR is already deportable, the first priority is to avoid a conviction that would be a bar to eligibility for some waiver or relief from removal. See Step 3. If the LPR is not yet deportable for a conviction, counsel must attempt to avoid a plea that will make the LPR deportable.

⁶ A conditional permanent resident (CPR) is a lawful permanent resident who gains status through marriage to a U.S. citizen where the marriage is less than 24 months old at the time of adjudication of the application for residence. CPR status expires after two years and an additional petition must be filed to become a regular permanent resident. 8 USC § 1186a and INA § 216.

2. **Highest priority: avoid an aggravated felony conviction.** The highest defense goal for a lawful permanent resident is to avoid a conviction for an aggravated felony, because this will not only subject him/her to removal proceedings, but will eliminate eligibility for virtually all forms of relief from removal, resulting in virtually mandatory deportation for most clients.
3. **Next priority for non-deportable LPR: avoid deportability under any other ground.** After avoiding deportation for aggravated felony, an LPR's next highest priority is to avoid becoming deportable under some other ground (and, in particular, under a ground relating to controlled substances).
4. **Goals for LPR client who is or will become deportable.** If, due to the current charges or past convictions, the LPR will be deportable for a conviction, the LPR is in a very serious situation. A permanent resident who becomes deportable can be placed in removal proceedings, where an immigration judge can take away the person's status and order her deported ("removed") from the United States. If the deportable LPR has not been convicted of an aggravated felony, she might be able to apply for some relief that would allow her to keep her green card and remain in the United States.

Criminal defense counsel must understand what, if any defenses against removal exist for the individual, and how to preserve eligibility for the defense. This may require consultation with an immigration expert; see N. 17: Resources, and see Chapter 11, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org). A common form of relief for deportable permanent residents who have lived in the U.S. for several years and have not been convicted of an aggravated felony is "cancellation of removal."⁷ Or, if not deportable for a drug offense, the resident might be able to "re-immigrate" through a U.S. citizen or LPR family member.

5. **Avoiding inadmissibility.** An LPR also has an interest in avoiding a conviction that would make him **inadmissible**. An LPR who is deportable might be able to apply for some waiver or relief – for example, to "re-immigrate" through a family member -- as long as he remains admissible. Also, if an LPR who is inadmissible for crimes leaves the U.S. even for a short period, he can be barred from re-entry into the U.S. Even if he manages to re-enter, he can be found deportable for having been inadmissible at his last admission. However, an LPR who is inadmissible but *not* deportable based on a conviction is safe, **as long as he does not leave the United States.** Inadmissible LPR clients need to be warned of the consequences of leaving the United States.
6. **The LPR client who appears to be mandatorily deportable should avoid custody time.** If the LPR is deportable and has no possible form of relief from removal at this time, her biggest priority is to avoid encountering immigration authorities, and that is best done by getting out of jail before an immigration hold is placed, or by avoiding jail time if the client is already out of custody. You should advise the person that once she is out of jail, she must avoid any contact with immigration authorities. She should not travel outside the U.S., apply to renew a

⁷ For more information, please see Part II, Section C of this manual – Quick Guide to Cancellation of Removal for Legal Permanent Residents.

10-year green card, apply for naturalization, or make other contact with authorities. See “The Absolutely Removable Defendant,” below.

7. Finally, certain convictions where the victim is a minor will bar a permanent resident (or U.S. citizen) from being able to file papers for an immigrant family member in the future. The specified offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct. For more information see Note 11 on the Adam Walsh Act, *infra*.

3. The Undocumented or “Illegal Alien” Defendant

a. Who are undocumented persons?

An undocumented person is someone who does not have legal status under the immigration laws to be present in the U.S. There are two⁸ main categories of undocumented persons. The first is a “visa overstay,” meaning a nonimmigrant visa holder whose visa has expired or been terminated, e.g., a foreign student who drops out of school or a tourist who overstays a visa. The second is someone who “entered without inspection” (“EWI”), meaning a noncitizen who entered the United States without permission and has never had lawful immigration status.

There are technical legal differences between the two groups,⁹ but they have important similarities. Both are in the United States unlawfully and can be removed on that basis even without a criminal conviction. Both will have to apply for some sort of relief or status if they are to remain in the United States. Note that millions of persons are presently undocumented but may be eligible to apply for lawful status, such as someone who is married to a U.S. citizen.¹⁰ If the undocumented person has a U.S. citizen or permanent resident parent, spouse, and/or child over 21, see

b. Defense Goals for an Undocumented Client

Undocumented person who may be eligible for relief now or in the near future. An undocumented person is already subject to removal because she has no lawful status. However, she might be able to acquire lawful status and remain in the U.S. if she is entitled to request immigration status through one of several legal avenues (e.g., marriage to a U.S. Citizen, asylum, non-permanent resident cancellation, or some other form of relief from removal).¹¹ Usually, to

⁸ People who used to have status, but who now have a final order of removal (and are not under an “order of supervision”) are also undocumented.

⁹ Technically, a visa overstay is removed for being deportable, while an EWI is removed for being inadmissible. This makes a difference in the crimes analysis in only a few cases, however. More importantly, a visa overstay who will immigrate through a close U.S. citizen relative may “adjust status” in the United States, while an EWI must go to a U.S. consulate in the home country to do so.

¹⁰ Marriage to a U.S. citizen does not automatically confer any lawful status on someone. It simply entitles a person to apply for lawful permanent resident status. This is a complex process involving numerous applications where in the noncitizen must prove, inter alia, that he is not subject to any of the grounds of inadmissibility at 8 USC § 1182, including the crime related grounds at 8 USC § 1182(a)(2).

¹¹ For a summary of avenues of “relief from removal” and avenues for obtaining lawful status, please see the section on “Relief from Removal” at the “online resources” link of the WDA’s Immigration Project website at www.defensenet.org.

qualify for such relief the applicant must not be **inadmissible**. Thus for undocumented noncitizens, avoiding a conviction that creates grounds of inadmissibility is the highest priority.

In the majority of cases, the grounds of **deportability** are irrelevant to an undocumented person. The main exception is if the person will apply for non-permanent resident cancellation of some kind, for example based upon 10-years residence in the U.S. and exceptional hardship to citizen or permanent resident relatives, or cancellation under the Violence Against Women Act. See 8 USC § 1229b(b).

The person will want to avoid conviction of an **aggravated felony**. Such a conviction is likely to bar him from applying for lawful status or relief. If he is deported/removed and then tries to re-enter the U.S. illegally, having an aggravated felony is one of the types of prior convictions that will trigger a severe sentence enhancement. Other kinds of priors will enhance this sentence as well; see important information the problem of illegal re-entry at Part D, below.

Staying or getting **out of jail** is also a priority to avoid detection by immigration authorities. However, counsel should be careful to advise this group of clients not to accept a plea to a conviction that would eliminate their options for lawful status just to get out of jail without clearly understanding the long-term consequences.

Example: Tamara is a Canadian citizen who entered the U.S. as a tourist and later married a U.S. citizen. They have not yet filed papers to apply for Tamara's lawful permanent resident (LPR) status based upon her marriage, but she is eligible to apply immediately. Because she is eligible for relief, her highest priority – even higher than avoiding immigration authorities -- is to avoid a conviction that is a ground of inadmissibility and thus will interfere with her application for LPR status.

Undocumented with no current options for obtaining lawful immigration status, who are likely to be removed/deported. Undocumented persons who don't have any way to defend against removal or apply for lawful status have a priority that may at times compete with the defense of a criminal case: they may decide that they need *to avoid contact with immigration authorities at any cost* – even to the point of accepting any plea just to get out of jail immediately. This may be a complex decision that requires accurate immigration advice. See “The Absolutely Removable Defendant,” below.

Where a client has not yet been removed, but will or might be, counsel must consider the possibility that the person will attempt to re-enter illegally. Counsel must (a) warn about the severe federal penalties for illegal re-entry after removal; (b) attempt to avoid an aggravated felony, which would bar the person from voluntary departure which is an alternative to removal, and (c) attempt to avoid an aggravated felony or other conviction that would cause an enhanced sentence should the client be prosecuted for an illegal re-entry. See Part D, The Immigration “Strike,” below.

Undocumented with a Prior Order of Deportation or Removal. A person who was deported/removed and then re-entered the United States illegally is in an extremely dangerous situation. The key goal is to avoid contact with immigration officials, or with federal criminal

officials. In immigration proceedings, the person's prior order of removal will be immediately reinstated without opportunity to apply for relief. Further, he faces the very real risk of being prosecuted for the federal crime of illegal reentry after deportation/removal.¹² Worse yet are the severe sentence enhancements for an illegal reentry conviction when the defendant has prior convictions of certain crimes.

Note that a person who accepted voluntary departure is not in the same situation with regard to illegal re-entry. It is a far less serious crime to illegally re-enter after a voluntary departure than after a deportation/removal. Sometimes it is difficult to discern from the client's memory whether he was deported or received voluntary departure, and consultation with an immigration expert is required.

4. The Refugee or Asylee Defendant, or the Applicant for Asylum

a. Who is a Refugee or Asylee, or an Asylum Applicant?

Refugees and asylees have been granted lawful immigration status because they have established that they would suffer or have suffered persecution in their country of origin.¹³ Refugees receive refugee status abroad before relocating to the U.S. An asylee is someone who came to the U.S. and received a grant of asylum here.

An asylum *applicant* is a person who has entered the United States, whether admitted or not, and who has applied for asylum. With some exceptions for exigent or changed circumstances, an asylum applicant must file the application within one year of entering the United States. The person may apply affirmatively by filing an application, or apply as a defense to removal. If the one-year deadline is passed or the person has been convicted of an aggravated felony or certain other offenses (see below), the person instead may apply for *withholding of removal*, which requires a higher showing regarding persecution, and which does not lead to a green card.¹⁴

b. What Are Defense Priorities?

Refugees and asylees who are not yet permanent residents. The law governing crimes and asylees and refugees is unstable. If the defendant is a refugee or asylee and the charge is potentially dangerous based on the criteria discussed below, we recommend that you consult with a local, expert immigration attorney or a resource center. See also § N.17 *Relief*, materials on asylees and refugees.

Refugees are directed, and asylees are permitted, to apply for lawful permanent resident status (LPR status, a green card) beginning one year after they were admitted as a refugee or granted asylum. But both are vulnerable to being placed in removal proceedings based on certain convictions.

¹² 8 USC § 1326; INA § 276.

¹³ INA § 101(a)(42)(A), 8 USC § 1101(a)(42)(A) requires a well-founded fear of persecution based upon race, religion, national origin, political opinion, or social group.

¹⁴ INA § 241(b)(3), 8 USC § 1231(b)(3) requires a "clear probability" of persecution based on the above grounds.

Avoiding removal proceedings. An asylee can be placed in removal proceedings if convicted of a “*particularly serious crime*” (“PSC”). This includes any aggravated felony conviction, as well as any conviction for drug trafficking unless it was a very small transaction with which the defendant was only peripherally involved. (If that is the case, put these good facts in the record of conviction, but note that a plea to trafficking will mean that the person never will become an LPR. See next section.). Other offenses also will be classed as PSC’s on a case-by-case basis, based upon sentence, circumstances, whether the offense involves a threat to persons, etc.¹⁵ For example, robbery is almost certain to be held a PSC, whereas theft usually is not. However, non-violent offenses such as mail fraud for two million dollars, and possession of child pornography, have been held PSC’s, and it is possible that a DUI would be. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a PSC.¹⁶

Under current law a refugee, but not an asylee, can be placed in removal proceedings if she becomes *deportable* for crimes.¹⁷

An asylee or refugee in removal proceedings can apply for adjustment of status to permanent residence as a defense to removal, if not barred by crimes. See next section. If the person is not granted adjustment or some other form of relief, he or she can be removed to the home country.

Refugee and asylee adjustment to permanent residency. In order to be granted LPR status, refugees and asylees must prove that they are not inadmissible, or if they are they must be granted a waiver of the inadmissibility ground. The available waiver is very liberal, but there is no guarantee of a grant. It can waive any inadmissibility ground, including convictions that are aggravated felonies, with two exceptions. First, it will not waive inadmissibility where the government has probative and substantial “reason to believe” that the person as participated in drug trafficking.¹⁸ Second, if a conviction involves a “violent or dangerous” offense, the waiver will be denied absent “exceptional and extremely unusual hardship” or pressing foreign policy reasons.¹⁹

Undocumented persons or others who have applied, or may want to apply, for asylum or withholding. An applicant for asylum is barred if convicted of a “particularly serious crime” (“PSC”). See discussion of PSC definition, above. For asylum, a PSC includes any aggravated felony conviction. For withholding, it includes an aggravated felony for which a sentence of five years was imposed. It also includes drug trafficking, and other offenses on a case-by-case basis, as discussed in the asylee-refugee section above. In addition, an application for asylum will be denied as a matter of discretion if the applicant is convicted of a “violent or dangerous offense”²⁰

Alternatives: Withholding of Removal, the Convention Against Torture. If the person cannot apply for asylum due to criminal record or the one-year deadline, she may want to apply for withholding of removal, a remedy that requires a higher level of proof that the person will be

¹⁵ See *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

¹⁶ *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (misdemeanor assault with a deadly weapon).

¹⁷ *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012).

¹⁸ See waiver of inadmissibility in application for refugee or asylee adjustment at INA § 209(c), 8 USC § 1159(c). The “reason to believe” drug trafficking inadmissibility ground appears at 8 USC 1182(a)(2)(C), INA § 212(c).

¹⁹ See *Matter of Jean*, *supra*.

²⁰ See *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

persecuted and does not lead to a green card, but which has a less strict criminal record requirement and no one-year deadline.²¹ Or, the person can apply for protection under the Convention Against Torture, which has no criminal record bars. The person must prove that the government or a government-like group in the home country will torture her *for any reason*, or is unwilling or unable to intervene in another group torturing her.²² See §§ 11.14, 11.15 in *Defending Immigrants in the Ninth Circuit*.

5. **The Defendant who has or will apply for Temporary Protected Status (TPS)**

a. **What is Temporary Protected Status?**

The U.S. government may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood or other disasters, or other extraordinary and temporary conditions. Nationals of that country will not be forced to return there from the U.S. for a designated period of time, can travel outside the U.S. with special permission, and will receive employment authorization.²³

The applicant must have been in the United States as of a designated date. TPS usually is granted for only a year at a time, but often with several renewals. Generally the national must have filed during the initial registration period in order to benefit from TPS.

Example: The Department of Homeland Security Secretary determined that an 18-month designation of TPS for Haiti is warranted because of the devastating earthquake which occurred on January 12, 2010. The TPS applicant must be a national of Haiti, or a person without nationality who last habitually resided in Haiti; must have continuously resided in the U.S. since January 12, 2010; and must meet criminal record and other requirements. The person must apply within a 180-day period beginning January 21, 2010.

Since TPS is a temporary designation, the list of countries granted TPS changes frequently. For up to date information about which countries currently are designated for TPS, and specific requirements for each country's nationals, go to www.uscis.gov, and click on Temporary Protected Status in the "Humanitarian" box. As of January 2010, the following countries have an ongoing TPS program: Haiti (where registration to join TPS is open at least through July 21, 2010), El Salvador, Nicaragua, Honduras, Somalia and Sudan.

b. **What Are Defense Priorities for a person who already has, or hopes to apply for, Temporary Protected Status?**

An applicant will be denied a grant of TPS, or may lose the TPS status he or she already has,²⁴ if he or she has the following criminal record²⁵:

²¹ INA § 241(b)(3), 8 USC § 1231(b)(3) requires a "clear probability" of persecution based on the above grounds. It is barred by conviction of a PSC, but for withholding, as opposed to asylum, purposes not every aggravated felony is a PSC.

²² See, e.g., discussion in *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

²³ INA § 244A, 8 USC § 1254a, added by IA90 § 302(b)(1).

²⁴ See 8 CFR 244.14(a)(1), (b)(2).

- is *inadmissible* under the crimes grounds
- Has been convicted of *any two misdemeanors or one felony*.
- Has been convicted of a “particularly serious crime” (determined on a case by case basis depending on sentence, violence to persons, etc.; includes all drug trafficking offenses)

For further discussion see “Advisory for Haitian Nationals Considering Applying for TPS” (Jan. 20, 2010) at www.immigrantdefenseproject.org.

6. The Defendant with Close U.S. Citizen or Permanent Resident Relatives

Some, but by no means all, noncitizens who have close U.S. citizen or permanent resident family members are able to get a green card based on the relationship, either by making an affirmative application or by asserting this as a defense to being removed. See Part a below, on family immigration. In addition, if a family member could submit such a petition, but refuses to do so and further has abused the immigrant, see Part b below regarding VAWA relief for victims of domestic abuse.

a. Regular Family Immigration

Family immigration is a complex field, and the following is only basic information. However, help may be available, because many local immigration non-profit agencies or private attorneys have expertise in handling family visa petitions and adjustment of status. Or, an immigration attorney or a backup center like the Immigrant Legal Resource Center may be able to quickly evaluate a case to see if family immigration is a possibility. See resources and books on the subject at § N.18 *Resources*, and see materials on Family Immigration at § N.17 *Relief*.

There are two basic categories of family members who may be able to submit a family visa petition for the defendant.

- A U.S. citizen who is (a) the parent of an unmarried person under the age of 21, (b) the spouse, or (c) the child over the age of 21 of the person, can file an “immediate relative” family visa petition for their relative. This is the best type of petition, which has no legally mandated waiting period before the person can apply for a green card based upon it.
- A lawful permanent resident spouse or a parent of an unmarried child, or a U.S. citizen parent of a child over 21, can file a “preference” family visa petition for their relative. However, the relative can’t use this petition to get a green card until at least a few years after it was filed with the government, so unless it was filed years ago it is not useful as an immediate defense to removal.

If the defendant was admitted to the U.S. in any status -- even including, e.g., admission years ago on a tourist visa, followed by years of living here illegally – *and* if he or she has

²⁵ In addition, an applicant for TPS may be denied based on actions in the home country (persecution of others, conviction of a “serious non-political offense”).

willing relatives who can submit an “immediate relative” visa petition, it is likely that the defendant could apply for adjustment of status to lawful permanent residency as a defense to removal. A permanent resident who is deportable for a crime but eligible to get an immediate relative visa petition also can file for adjustment as a defense to removal. In all cases, the defendant must be *admissible*, or if inadmissible, eligible to apply for a *waiver* of inadmissibility.

If instead the defendant entered the U.S. without inspection, *and/or* only has the possibility of someone filing a new “preference” family visa petition, with some exceptions the person will not be able to adjust status.

b. Where the Citizen or Permanent Resident Family Member is Abusive: VAWA

If the defendant or the defendant’s child has been subject to physical or emotional abuse by a U.S. citizen or lawful permanent resident parent or spouse, the defendant may be eligible to apply for status under the Violence Against Women Act (“VAWA”). This law was passed to address the situation where a citizen or permanent resident family member could file a visa petition for the noncitizen, but is an abuser and is essentially using immigration status as a weapon. For other requirements and information on VAWA see books and resources at § N.18 *Resources*, and basic info at www.ilrc.org/info-on-immigration-law/vawa.

Despite its name, this VAWA relief is available to men and women. Where abuse was by a parent, it must have taken place when the child was under 21. VAWA is better than regular family visa petitions, as it can work as a defense to removal regardless of whether the defendant was admitted or not, and regardless of whether the defendant would have qualified for a “preference” versus an “immediate relative” visa petition. There also is a VAWA cancellation of removal.

In terms of criminal record requirements, the applicant must be *admissible* or eligible for a *waiver of inadmissibility*, and must be able to show *good moral character*. Special provisions for VAWA applicants relax some of the rules pertaining to these requirements.

7. The Defendant with a Nonimmigrant Visa

A nonimmigrant visa holder is a person who obtained a temporary visa allowing them to enter and remain in the United States legally for a specific period of time under specific conditions. Some examples of nonimmigrant visas are: tourist visas, student visas, temporary work visas (e.g., H1-B) and diplomatic visas.

Nonimmigrant visa holders who violate the terms of their visa (e.g., students who drop out of school or visitors who stay longer than permitted) become “undocumented,” meaning they no longer have lawful status in the U.S. As such, they are subject to removal from the country. They also are subject to the criminal grounds of deportability.

8. The Defendant with an Employment Authorization Document (Work Permit)

Immigration authorities issue work permits, or employment authorization documents (EAD), of temporary duration to certain categories of noncitizens. Clients may be confused on this point, but a “work permit” is **not** an immigration status; work permits do not confer lawful status. They do mean that the government temporarily is not moving to remove the person. Some examples of noncitizen categories for which work permits are issued include: (1) persons who are in the process of applying for some status, for example adjustment through a family visa petition, or an asylum application, and (2) persons who have some lawful temporary status, such as certain nationals of countries designated for “temporary protected status” or TPS (e.g., persons from Haiti following the 2010 earthquake, or from Honduras following Hurricane Mitch).

A work permit means that the person may be in the process of acquiring status, and counsel must proceed carefully to try to avoid a plea that will destroy the application. *If a person has a work permit, photocopy it and immediately contact an expert immigration attorney or resource center.* Note that in many cases, no one has explained the meaning of the employment document to the immigrant. He or she may believe that it is a lawful permanent resident card or some other secure status instead of just a permit.

9. The Mystery Status Defendant

Some clients may think that they have, or are in the process of getting, some kind of immigration status, but do not know what it is. In this case, photocopy any documentation they do have, and try to obtain as much immigration history as possible. See § N.16 Client Immigration Intake Questionnaire. Contact an immigration expert to assist in determining the client’s status. In some cases, unscrupulous immigration consultants (“notaries”) or attorneys have provided clients with “letters” and told them that this is an immigration document, when it is not.

Until you understand the immigration case you should continue the criminal case, or, if forced to plead, try to avoid a conviction that will trigger any of the grounds of inadmissibility, deportability, or constitute an aggravated felony. The most important of these three is to avoid a conviction for an aggravated felony offense.

10. The Absolutely Removable Defendant: Avoid Custody Time

Some clients are deportable with no possibility of relief, for example an undocumented person with no possible application to stop removal, or a permanent resident with a conviction that bars any possible relief. If they come in contact with immigration authorities, these persons will be deported (“removed”), or at best, permitted to depart the U.S. voluntarily (see below).

If they wish to avoid this, their goal is to avoid contact with immigration authorities. The best way to do this is to avoid being in jail, where an immigration hold is likely to be placed on the person, who is then likely to be taken into immigration custody upon release from jail. After informed consideration, such a defendant with no defenses may decide that it is in her best interest to accept a plea that gets or keeps her out of jail before she encounters immigration officials, even if the plea has adverse immigration consequences. The defendant must make the decision after understanding the long and short-term life consequences (e.g., that such a conviction is likely to render her permanently ineligible to ever obtain lawful status).

A permanent resident who is removable must continue to avoid any contact with immigration authorities. The person must not travel outside the U.S., apply to renew a 10-year green card, apply for naturalization, submit a visa petition for a family member, or make any other contact with authorities.

An absolutely removable person may want to apply for immediate “**voluntary departure**” to avoid formal removal. For one thing, *illegal entry* into the U.S. following a voluntary departure is a far less serious offense than illegal re-entry following a removal. Federal regulation provides that an aggravated felony conviction will bar a request for pre-hearing voluntary departure.²⁶ Therefore *counsel should attempt to avoid a plea to an aggravated felony, and should advise the defendant to attempt to obtain voluntary departure rather than removal.* Unfortunately, immigration officers commonly offer detainees the opportunity to sign a paper agreeing to “voluntary removal,” while leaving detainees with the impression that this is a “voluntary departure.” The only sure ways for detainees to take voluntary departure is to read the paper very carefully, get assistance from a lawyer or other advocate, or wait to see an immigration judge for a master calendar hearing – which could take as long as a few weeks. Since you, the criminal defense attorney, are likely to be the last lawyer a detainee ever sees, if you can get this advice across you may prevent the detainee from spending a few years in federal prison later on. See below and Part D, *infra*.

Many persons who are deported/removed re-enter the U.S. illegally. This is especially true if they have close family here. Counsel must warn the defendant that this “illegal re-entry,” especially where there are prior convictions, is a very commonly prosecuted federal offense, which can result in years in federal prison. See Section D.

The client with a prior deportation or removal order. You may have a client who has already been ordered deported, or even already deported. A person who has previously departed the United States under a removal order is subject to *reinstatement of removal*, in which ICE reinstates the prior removal order and removes the person pursuant to that. In this process, the client does not have the right to appear before an immigration judge and contest deportation. Moreover, this client will be subject to federal prosecution for illegal reentry. As with other absolutely removable clients, the person wishes to avoid immigration authorities.

Clients who have been ordered removed, but who cannot be removed. Some clients who are deportable or even have prior removal orders cannot physically be removed, because United States and that client’s home country do not have a repatriation agreement in effect. For example, persons from Cuba, or from Vietnam if they entered the United States prior to July 12, 1995, cannot be removed. Several other countries, including Iran, Iraq, Somalia and Liberia,

²⁶ 8 CFR 240.25. This is “voluntary departure prior to completion of hearing,” meaning that the noncitizen does not request any relief other than the departure. (In fact, under the statute a noncitizen who entered without inspection is eligible for this type of voluntary departure despite conviction of an aggravated felony, and the regulation appears to be *ultra vires*. 8 USC § 1229c(a) provides that a noncitizen who is *deportable* for an aggravated felony is barred from pre-hearing voluntary departure. A person who entered without inspection is not “deportable.” See discussion at Chapter 11, § 11.22, *Defending Immigrants in the Ninth Circuit*.)

either issue documents very slowly or impose requirements that often cannot be met at all.²⁷ Once ordered removed, these people may still be detained by ICE for up to 6 months, are subject to re-detention any time they have a new criminal case, and are on something akin to an indefinite probation with the Department of Homeland Security.

11. The Defendant who has previously received relief from removal

You may encounter a client who has been through removal proceedings in the past and received some form of relief from removal, such as Cancellation of Removal for Lawful Permanent Residents. While this person may be an LPR, the analysis of that person's immigration consequences will often differ from other LPRs. Some applications are no longer available, and the prior convictions will be considered waived for some immigration purposes but not for others. It is advisable to consult an immigration expert or a more in-depth resource such as *Defending Immigrants in the Ninth Circuit* or other treatises on immigration law and crimes.

D. The Immigration Strike: Avoiding a conviction that will cause a severe sentence enhancement if the defendant re-enters the U.S. illegally after being deported/removed.

Many persons who are deported/removed re-enter the U.S. illegally in order to join family members here or other connections. If the re-entrant is caught at the border, or picked up for any reason once inside, it is very likely that he or she will be prosecuted for a serious federal offense. ***Illegal re-entry following removal is the number one federal charge brought today, comprising roughly 30% of all new criminal charges brought in federal court nationally.***²⁸ Federal agents troll county jails looking for "foreigners" or persons with Spanish surnames, especially if the person was convicted of certain priors. To assist the defendant, counsel must do two things:

- ***Warn the defendant***, before he or she is removed, of the danger of illegal re-entry and the real possibility of doing federal prison time;
- Where possible ***avoid an aggravated felony conviction*** for a defendant who has not been deported before, so that the defendant may be able to obtain voluntary departure rather than removal (see discussion at Part C.9, *supra*); and
- ***Attempt to avoid conviction of one of the several particular offenses*** that will constitute priors causing a seriously enhanced sentence in any prosecution for a future illegal-re-entry. See below.

²⁷ See, e.g., discussion from the Immigration Customs and Enforcement (ICE) point of view in Statement to House Judiciary Committee by Gary Meade of ICE, May 24, 2011, at www.ice.gov/doclib/news/library/speeches/110524mead.pdf

²⁸ When other immigration-related charges are added in, such as simple illegal entry and alien smuggling, immigration crimes constitute over 50% of new criminal charges in federal court. See, e.g., statistics at <http://trac.syr.edu/tracreports/bulletins/overall/monthlynov09/fil/>.

Illegal re-entry after removal (deportation) is a more serious and more commonly prosecuted offense than illegal re-entry when there was no removal, for example when there was voluntary departure. As discussed in Part C.9, *supra*, a noncitizen who has not been convicted of an aggravated felony can apply for voluntary departure rather than removal, although this may require effort and sacrifice on the part of a detained noncitizen.

Assuming that there is a charge of illegal re-entry following removal, two types of prior convictions cause the most serious sentence enhancement: conviction of an aggravated felony, and conviction of certain other felony offenses.²⁹ Federal law employs a complex sentencing system under the “advisory” U.S. Sentencing Guidelines. Guidelines provide for an increase in the length of sentence as levels determined by prior convictions increase. To give a general idea of the seriousness of a prior conviction, consider that the base level for an illegal reentry sentence is eight. That will be increased between four and sixteen levels for prior convictions. In California prosecutions, a typical sentence for illegal re-entry plus a prior is around *30 months* in federal prison. See story of “Luis” at the end of this section.

Crimes That Mandate an Enhanced Sentence for Illegal Reentry

Certain Felonies: Increase by 16 levels:

- Drug trafficking, and the sentence is more than 13 months;
- Crime of violence (see definition below);
- Firearms offense;
- Child pornography offense;
- National security of terrorism offense;
- Alien smuggling offense.³⁰

A crime of violence is defined in the federal sentencing guidelines as including the following felony offenses:

Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.³¹

Note that the USSG “crime of violence” definition used here is different from the definition of “crime of violence” under 18 USC §16, used to define an aggravated felony. Note also that while a “crime of violence” under 18 USC § 16 is an aggravated felony (bringing an 8 level increase) only if a sentence of a year or more imposed, under this “crime of violence” definition (bringing a 16-level increase), there is ***no sentence requirement***; the only requirement is that the offense is a felony.

²⁹ 8 USC § 1326; INA § 276. Section 1326(b)(1) penalizes re-entry after “any felony” conviction, which is the section under which the “felony crime of violence” and other offenses discussed here are charged. Section 1326(b)(2) penalizes re-entry after an aggravated felony.

³⁰ U.S. Sentencing Commission Guidelines Manual, USSG § 2L1.2(b)(1)(A)(2004).

³¹ USSG § 2L1.2, comment (n.1)(B)(iii) (2004).

Increase by 12 levels: Drug trafficking if the sentence is less than 13 months.

Increase by 8 levels: Aggravated felony

Increase by 4 levels: Any other felony; or three or more misdemeanors that are crimes of violence (see definition above) or drug trafficking offenses.

The following example, based on a real case, shows how a conviction for a “violent offense” that is not an aggravated felony will affect a client later charged with illegal reentry.

Example: Luis is an undocumented worker who has lived in the U.S. for some years and has two U.S. citizen children. He has no current means of getting lawful immigration status. He has been convicted of his first offense, felony assault, and is sentenced to one month in jail and placed on three years’ probation. This is not an aggravated felony. Immigration authorities pick up Luis once his jail term is over, and he is removed to Mexico based on his unlawful status.

Luis immediately re-enters the United States to return to his family. He is detected by authorities and charged in federal proceedings with illegal re-entry after removal and a prior conviction, not of an aggravated felony, but of a separately defined “felony crime of violence.” While an aggravated felony (e.g., his assault if a one-year sentence *had* been imposed) would only have rated a sentence increase of 8 levels, under the felony “crime of violence” category he receives an increase of 16 levels. Luis is sentenced to *forty-one months of federal prison* for the illegal re-entry.³²

E. Checklist: Ten Steps in Representing a Non-Citizen Defendant, from Interview through Appeal

- 1. *If there is no immigration hold, get the noncitizen out of jail.*** The first defense task is to try to get the defendant out of jail before an immigration detainer or hold is placed. Advise the defendant not to speak to anyone but defense counsel about any matter, whether the criminal case, or immigration status, the home country (even place of birth), or family history.
- 2. *If there is already a hold, stop and analyze whether or not you should obtain release from criminal custody.*** If an immigration hold has been placed, do not attempt to bond or O.R. the defendant out of jail without analyzing the situation. The defendant might end up in immigration detention, which could be worse. Consult §N.5 Immigration Holds and Detainers, *infra*, and Chapter 12, *Defending Immigrants in the Ninth Circuit*.

If your client has signed a “voluntary departure” request (agreement to leave the country without being removed) you can revoke it, but you should consult an immigration attorney before doing this. (For example, if the client has no relief and an aggravated felony conviction, voluntary departure instead of removal may be a very good option.)

³² See discussion of similar facts, *U.S. v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003).

3. ***Gather facts about the defendant's criminal record history and immigration situation.*** See if the defendant's family can retain expert immigration counsel with whom you can confer. Many immigration attorneys will set up monthly payment plans. Determine whether special translation is needed, and if competent translation is available.
4. ***Analyze the immigration consequences of the criminal case and determine defense priorities,*** using all resources available including consultation with experts. What is the defendant's immigration status now? What would cause her to lose her current status? What new status or application might she be eligible for? Is the biggest priority to get release from jail under any circumstances? What effect would the proposed plea have on the above, and what are better alternatives? Don't forget to warn a removable defendant about the dangers of illegal re-entry; try to avoid a plea that would serve as a severe sentence enhancement in the event of an illegal re-entry prosecution.
5. ***Try to obtain a disposition that is not a conviction,*** such as juvenile delinquency disposition, pre-plea disposition, and possibly infraction. See further discussion at § N.8 *Drug Charges*, Part II.A. A conviction that is on direct appeal of right is a final conviction for immigration purposes, at least in the Ninth Circuit.
6. ***Thoroughly advise the defendant*** of the specific criminal and immigration penalties involved in various defense options. Immigration penalties may include
 - extended detention (*even for persons accepting the deportation*, if they do not already have identifying documentation sufficient for travel to the home country),
 - loss of current lawful status (by becoming "deportable")
 - loss of ability to get lawful status in the future (by becoming "inadmissible," or coming within some other bar to status or relief)
 - extra penalties for an aggravated felony conviction (deportable and permanently barred from status, immigration detention until removal, extra penalty for illegal re-entry)
 - in some cases certain removal, in others being put into removal proceedings but with a possibility of obtaining a discretionary waiver or application
 - *federal prison sentence if after removal the person re-enters the U.S. illegally.* If the person *already* has re-entered illegally and remains in jail, he or she is likely to be detected by immigration authorities and transferred for federal prosecution.
7. ***If trade-offs must be made between immigration and criminal case concerns, ascertain the defendant's priorities.*** Is this a case where the defendant would sacrifice the criminal outcome to get a better immigration outcome? Is this a case where the defendant only is worried about amount of jail time? (But advise the client that immigration detention may follow criminal custody.) Once you and the client have identified the priorities and specific defense goals, defend the case accordingly.

- 8. If you obtain a good immigration outcome in criminal court, don't let it go to waste! Give the defendant or immigration counsel, if any, the "Legal Summaries for Defendant" that are provided in these materials. Check court documents to make sure that they accurately reflect the changes you made to create a safe record. If a court document proves something beneficial to the client, give him or her a copy of it.**

Most immigrants are unrepresented in removal proceedings, and many immigration judges are not expert in this area. Make sure that they realize that your client has a defense. If the defendant has an immigration hold, give the defendant, and either the defendant's attorney or a friend/relative, a statement of how the disposition avoids an immigration consequence. **Pre-written summaries of various defenses, which you can photocopy and give to defendants, can be found at the end of the relevant Note.**

If your client does *not* have an immigration hold and does not appear to be going into immigration custody, it may be better to mail such a statement to the defendant's address. Advise him to take it to an immigration lawyer at the first opportunity.

Review the *charging document including any written amendments, written plea agreement, the minute order (e.g., showing charge was amended) and the abstract of judgment*. Make sure that these records correctly reflect the disposition you worked out, and do not contain any inconsistent information. In particular, ensure that the plea to a Charge refers to the charge as amended, if applicable, and not to the original charge. If a document will be helpful in immigration proceedings, *give a copy to the client* and to the client's immigration counsel, or friend or relative.

Document in your file the advice given to the defendant. In particular, note that the defendant relied on a particular understanding of the law in taking the plea. This may provide evidence later on, if immigration laws change (which they often do), that your client justifiability relied on the law in agreeing to take the plea.

- 9. Give the defendant specific warning about future risks.** A noncitizen who is removed and returns illegally to the United States faces a significant federal prison sentence if apprehended (see Part D, *supra*). A noncitizen with a conviction who is not removed should not leave the U.S. without expert advice, because she might be inadmissible and may lose her status. A noncitizen who might be deportable should avoid any contact with the immigration authorities, including renewing a green card, applying for a citizenship, and pursuing a pending application, until an expert immigration practitioner advises him.

- 10. A conviction remains in existence for immigration purposes while on direct appeal, but is eliminated if the appeal is sustained.** Unfortunately, the Ninth Circuit held that a conviction remains a final "conviction" for immigration purposes while pending on direct appeal, unless or until that conviction is actually reversed.³³ Because of the possibility that this decision would be withdrawn in the future, and because of the possibility that the appeal

³³ *Planes v. Holder*, 652 F.3d 991(9th Cir. 2011).

would be sustained, it still is important for immigration purposes to file a direct appeal of the conviction in appropriate cases.