

## Overview: Immigration and Criminal Law

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### A. Vocabulary and Case Analysis

1. Defense Goals
2. U.S. Citizen
3. Lawful Permanent Resident
4. Undocumented People
5. Inadmissible and Deportable

This section defines some basic terms and concepts. In these materials, a United States citizen is referred to as a USC, a lawful permanent resident (“green card” holder) is an LPR, and a person with no current lawful immigration status is referred to as an undocumented person.

#### 1. Defense Goals

Each immigrant defendant needs an individual case analysis, based on the person’s current or hoped-for immigration status, all prior convictions, and a basic account of their immigration history. To gather this information, use an [Immigrant Defendant Questionnaire](#).

Once you have the information, the best way for a defender to identify the defense goal is to get advice from an expert in immigration and crimes (“crim/imm”). This may be an in-house expert in your office or an outside expert who agrees to advise. They can tell you if the client needs to prioritize avoiding a deportable conviction, an inadmissible conviction, or some other disposition that would destroy eligibility to apply for some immigration “relief.” Immigration relief refers to a defense against removal or application for lawful status for which the client may be eligible.

If you are not the expert, you still want to understand the basics of what is happening. You will be the one to explain this to your client, and perhaps to the prosecutor or judge. You might want to review a

short guide like ILRC, *How to Analyze a Crim/Imm Case: Four Questions to Identify Case Goals* (March 2023).<sup>1</sup> It explains basic concepts and the reasoning and can help you explain them to others.

Along with trying to protect immigration status or potential status – the crim/imm analysis -- defense counsel provide other critical protections to their immigrant clients.

- Avoid a conviction that subjects the client to “**mandatory detention**,” which is ICE detention with no right to a bond hearing or release on bond. See **Part K**, below. If not subject to mandatory detention, then if they are detained by ICE they at least will have a bond hearing.
- Be aware of beneficial California law that restricts jailors, prosecutors, probation officers, and others from transferring someone directly from jail to ICE. Note the exceptions based on a person’s criminal history. See discussion of **SB 54** and other laws at **Part L**, below.
- Help clients understand their Fourth and Fifth Amendment rights when it comes to speaking with ICE and other law enforcement. This includes the **right to remain silent** and to not open a door. See more information and **free resources** for public defenders and immigration advocates in over 50 languages at <https://www.ilrc.org/redcards>.

## 2. United States Citizens (USC)

For citations and more information, see citizenship sections of the Immigration *Relief Toolkit* (2024) and other resources.<sup>2</sup>

Federal immigration law provides that a person who is a USC cannot be “removed” (legally deported or denied admission to the U.S.) or placed in removal proceedings. Generally, USC status is permanent unless the person relinquishes their citizenship or is found to have wrongfully obtained U.S. citizenship.

Anyone who is born in the U.S., Puerto Rico, Guam, or U.S. Virgin Islands, and many people born in Northern Mariana Islands, are USCs. People born in American Samoa and Swains Islands are U.S. nationals; they are not USCs, but they cannot be deported. There are exceptions for some children of foreign officials.

Important to our work, people who were born outside the U.S. might have become U.S. citizens automatically, without filing an application, if either: (a) at their birth, one or both parents was a USC, or (b) two events happened in either order and before their 18<sup>th</sup> birthday: they became or were going to become an LPR, and one or both of their parents was a USC. (For this purpose, “parents” includes biological and adoptive parents but not stepparents.) Many people born abroad are USCs and don’t know it. They even may have been deported and gone to federal prison for illegal entry. Good immigration questionnaires, including the above, contain basic questions to flag the possibility. Then someone must determine whether the person actually is a USC, because the rules vary based on date of birth.<sup>3</sup> The good news is that immigration nonprofits often can take on these cases.

## 3. Lawful Permanent Resident (LPR) Status

An LPR, or “green card”-holder, has the right to live and work permanently in the U.S. as long as they do not become “removable.” In most cases, an LPR is removable only if they become “deportable” under

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<sup>1</sup> See this and other crim/imm aides at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

<sup>2</sup> See sections 3 and 4 in the *Relief Toolkit* at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries) and see resources at <https://www.ilrc.org/citizenship-and-naturalization>. See also ILRC, *Naturalization and U.S. Citizenship, An Essential Legal Guide* (2025) at <https://store.ilrc.org/publications>.

<sup>3</sup> See the above resources as well as ILRC, *Acquisition and Derivation of Citizenship Charts* (2024), <https://www.ilrc.org/resources/acquisition-derivation-quick-reference-charts>.

INA 237(a), 8 USC 1227(a). If an LPR becomes deportable, they can be arrested, detained, and placed in removal proceedings. Unless they can apply for and are granted some defense or new immigration status, the deportable LPR can be stripped of their status and removed. After a specific period of time as an LPR, the person may be able to apply to naturalize and become a USC.<sup>4</sup>

*Note on travel:* If the client became an LPR and then traveled outside the U.S., they *might* have harmed their lawful status. See **Section 5.c.**, LPRs Who Travel, below.

#### 4. Undocumented People

Millions of people have lived in the United States for decades but still do not have lawful immigration status. They may have been admitted as a visitor or student and overstayed their visa, or entered without inspection (see discussion in **Part 5**, below). They may have USC children and spouses, but for legal or financial reasons are unable to obtain lawful status. Because they are undocumented, they can be placed in removal proceedings and removed, unless they are eligible to apply for lawful status or a defense to removal, referred to as immigration “relief.” A critical defense goal is (a) to identify what, if any, relief the person might be eligible for, and (b) to try to avoid a criminal disposition that will destroy that eligibility. One resource for this is the free ILRC *Immigration Relief Toolkit* (2024). It includes a two-page summary of each form of immigration relief (family visa, asylum, Temporary Protected Status, etc.), requirements for eligibility, and the types of crimes that will make the person ineligible.

You can provide undocumented clients with critical information about their rights under state and federal law, including the right to decline to talk to immigration and other law enforcement about place of birth. For **free** information and hand-outs in multiple languages, go to <https://www.ilrc.org/redcards>.

#### 5. Inadmissible and Deportable

The Immigration and Nationality Act (INA) sets out two lists of reasons that a noncitizen can be “removed” (colloquially, “deported”) from the U.S.: the grounds of “inadmissibility” and the grounds of “deportability.” These grounds are incorporated into other penalties, as well.

Distinguishing inadmissibility from deportability matters to criminal defenders because the criminal grounds are different, although overlapping. Some criminal offenses only affect inadmissibility, while others are only grounds for deportability. Some crimes, such as most controlled substance offenses, affect both. When a person is removable but is applying for relief, the grounds of inadmissibility and deportability, as well as other specific criminal bars, may apply, depending on the relief sought.

##### a. Seeking Admission: Inadmissibility Grounds

When people who are not “admitted” to the U.S. are placed in removal proceedings, they will be charged with being *inadmissible* under INA § 212(a), 8 USC § 1182(a).

Who is seeking admission? A noncitizen who asks to enter the U.S. at a port of entry (border, international airport, etc.) is seeking to be “admitted” and is subject to the grounds of inadmissibility. If border officials believe the person does not qualify for admission – for example, because they have a criminal conviction that is a ground of inadmissibility, or they lack a valid visa or other authorization for entry, authorities may deny admission and put the person in removal proceedings, charging them with being inadmissible.<sup>5</sup>

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<sup>4</sup> See section 4 in the [Relief Toolkit](#); resources at <https://www.ilrc.org/citizenship-and-naturalization>; and ILRC, [Naturalization and U.S. Citizenship, An Essential Legal Guide](#) (2025) at <https://store.ilrc.org/publications>.

<sup>5</sup> In many situations at the border, such a person may be subject to “expedited removal” which is a deportation ordered by a DHS agent without removal proceedings before a judge. For more about expedited removal, see ILRC,

This same process applies to a noncitizen who is *inside* the U.S. after they entered without inspection at a border (referred to as “EWI”). The person has not been “admitted,” so if they are placed in removal proceedings, they will be charged with being inadmissible – even if they have lived here for years. A person who was paroled, rather than admitted, into the U.S. also is still subject to the grounds of inadmissibility. These people can be found inadmissible just for EWI or lack of lawful status.

Example: In 1993, Flavia crossed the Rio Grande and entered the U.S. without inspection (she “EWI’d”). She has remained here ever since but has no lawful status. If she is placed in removal proceedings, she will be charged with being inadmissible under INA § 212(a) because she entered without inspection and lacks lawful status.

Example: Marcel EWI’d and later was granted Temporary Protected Status (TPS) for Haitians. Now TPS for Haitians has been terminated so Marcel has no lawful status. If he is placed in removal proceedings he will be charged with being inadmissible under INA 212(a) because he EWI’d and lacks lawful status.

A person who was admitted to the U.S. on any kind of visa is not in this category, because they have been admitted. If they ever are placed in removal proceedings in the U.S., they will be charged with being deportable under INA § 237(a), not inadmissible. See next section.

ICE can detain people who are placed in removal proceedings. If the person has certain criminal convictions, they may be subject to “mandatory detention” with no release on bond. See **Part K**, below.

#### **b. Already Admitted: Deportability Grounds**

A noncitizen who has been “admitted” to the U.S. in any status can be removed subject to the grounds of *deportability*. See [INA § 237\(a\)](#), [8 USC § 1227\(a\)](#). An “admission” to the U.S. is a legal term that includes (a) entering the country with a visa or lawful status, after inspection at a port of entry, or (b) “adjusting status” to an LPR (completing the process to get a green card while in the U.S.), even if the person earlier entered without admission. Note that some grants of lesser or temporary status, such as TPS and DACA, are not “admissions” and that in removal proceedings, these individuals would still be charged with inadmissibility if they were not previously admitted on a visa.<sup>6</sup>

If a person who has been admitted but comes within a deportation ground, they can be placed in removal proceedings and removed, unless they are eligible for some relief. If they have a criminal record, they might be subject to mandatory detention. See **Part K**, below.

Example: An LPR is convicted of selling fentanyl, a deportable offense under INA 237(a)(2), so they can be placed in removal proceedings.

Example: A person on a student, tourist or other non-immigrant visa who has stayed past their permitted time, or violated the terms of the visa, is deportable under § 237(a)(1) due to their lack of current lawful permission to be here, regardless of whether they have a criminal record.

#### **c. Special Case: LPRs Who Traveled Outside the U.S.**

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Expedited Removal Toolkit (Feb. 2025) at [https://www.ilrc.org/sites/default/files/2025-02/Toolkit%20to%20Assist%20People%20Facing%20Expanded%20Expedited%20Removal\\_0.pdf](https://www.ilrc.org/sites/default/files/2025-02/Toolkit%20to%20Assist%20People%20Facing%20Expanded%20Expedited%20Removal_0.pdf).

<sup>6</sup> See USCIS PA-2025-25 Admission for Adjustment of Status under INA 245(a), Nov. 3, 2025, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20251103-AOSAdmission.pdf> and *Sanchez v. Mayorkas*, 593 U.S. 409 (2021). However, people who have been admitted on a U visa from outside the country would be subject to deportability grounds as would individuals who hold TPS, left the country on TPS travel and were admitted on their return See also ILRC, [New Policy on TPS and Travel](#) (Mar. 2023).

Usually, LPRs have been admitted into the U.S. or adjusted status (become LPRs) within the U.S., which means that they can be removed only if they are **deportable**, not inadmissible. See above discussion. But this might change if the LPR takes a trip outside the U.S.

An LPR who leaves the U.S. on a trip usually enjoys a special legal benefit: unlike all other immigrants, LPRs are not considered to be seeking a new “admission” when they return to a U.S. port of entry, and they can reenter the U.S. without having to prove that they are “admissible.” But if the government can prove that the LPR comes within any of six exceptions – for example, that the LPR *traveled after they committed an offense listed in the criminal grounds of inadmissibility*, or if they just stayed outside the U.S. for more than six months<sup>7</sup> -- then upon their return at the border, the LPR will be treated like any other noncitizen: they are seeking a new admission, and either must prove that they are admissible or be granted a waiver of inadmissibility to be admitted.<sup>8</sup> They can be placed in removal proceedings charged with being inadmissible.

What if the LPR should have been stopped and charged with being inadmissible in removal proceedings, but the border officer wrongly let the LPR enter? In that case, the LPR can be placed in removal proceedings charged with being *deportable* for having been inadmissible at last entry, INA § 237(a)(1).

The moral is: if a client became an LPR and then took a trip outside the U.S., look carefully at what happened before they traveled. Analyze convictions that occurred before the person left the U.S.

Example: In 2019, Trey was convicted of a CIMT offense that made him inadmissible but not deportable. If Trey stays in the U.S., he will be safe. As an LPR, he has been “admitted” and can only be put in removal proceedings if he has a *deportable* offense, which he doesn’t have.

Trey travels to Costa Rica for a vacation. Upon his return, the border agent pulls his record and sees that Trey is inadmissible under INA 212(a)(2), **see part D**. He is found to be seeking a new admission. He is put in removal proceedings and charged with being inadmissible for the conviction.

What if upon Trey’s return to the U.S., the border agent hadn’t noticed anything and had just allowed him to re-enter? Now Trey is deportable under INA 237(a)(1), because he was inadmissible at his last U.S. entry. If he renews his green card or applies to naturalize, authorities may discover this and put him in removal proceedings charged with being deportable.

## **B. Aggravated Felony (AF)**

“Aggravated felony” (AF) is an immigration law term that refers to certain offenses that cause severe immigration damage. The AF definition at 8 USC § 1101(a)(43) includes twenty-one provisions that describe hundreds of offenses. Despite the name, the AF definition includes state offenses that are neither aggravated nor felonies. (In at least one case, it appears that a California infraction, H&S C 11358(a), is an immigration “aggravated felony.”) Some offenses only become an AF if a sentence of a year or more is imposed, such as a crime of violence, perjury, or obstruction of justice. Other offenses are AFs regardless of sentence, such as drug trafficking, sexual abuse of a minor, or a crime of deceit where the loss to the victim/s exceeds \$10,000. For an alphabetical list, see [§ N.6 Aggravated Felonies at www.ilrc.org/crimes-summaries](#).

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<sup>7</sup> The six exceptions that apply to a traveling LPR appear at INA 101(a)(13)(C), 8 USC 1101(a)(13)(C).

<sup>8</sup> See, e.g., *Matter of Guzman-Martinez*, 25 I&N Dec. 845 (BIA 2012); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); and discussion at ILRC manuals such as *Inadmissibility and Deportability* or *A Guide for Immigration Advocates*, <https://store.ilrc.org/publications>. Special rules apply if the LPR was inadmissible only due to a conviction from before April 1, 1997. See *Vartelas v. Holder*, 566 U.S. 257 (2012).

Do *not* simply go by the name of the California offense to make an AF determination. For example, under the federal “categorical approach” (see **Part H** below), offenses like California theft (PC 487) and burglary (PC 459/460) are not necessarily “theft” or “burglary” for AF purposes, because the state and federal offenses are defined differently. Instead, check the California Chart, talk to an expert, and/or do research to see if a California offense is an AF.

An AF conviction makes the person deportable, but even worse it destroys eligibility for many types of relief from deportation, including asylum and cancellation of removal. It also removes various due process protections. A few forms of relief remain available, especially if the conviction did not involve drugs. See chart of different forms of relief and their criminal bars in [§ N.17 Immigration Relief Toolkit](#) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

### C. Crime of Violence (COV)

A conviction for a federally defined “crime of violence” (COV) has two potential immigration penalties. First, if a sentence of a year or more is imposed, a COV conviction is an AF.<sup>9</sup> Second, regardless of sentence, if the COV was committed against a person protected under state or other domestic violence laws, the conviction is a deportable “crime of domestic violence.”<sup>10</sup> See **Part E**.

An immigration COV is not the same as a California “serious or violent” offense. Generally, the Chart will say whether an offense is an immigration COV, but here is a summary of the rules.

**Statutory definition of COV; elements test.** Under the categorical approach (see **Part H**), a California conviction is evaluated as a COV based on its elements and the minimum conduct required for guilt (the “categorical approach”), not the facts of the particular case.

The federal immigration definition of COV at [18 USC § 16\(a\)](#) is “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” It has been held to require intentional, oppositional, or violent physical force.<sup>11</sup>

**Physical force, offensive touching.** Generally, a COV does not include an offense that can be committed by *de minimis* force or an offensive touching, such as simple assault or battery under CA law. For that reason, no conviction of PC 243(a) or 243(e) is a COV, regardless of the underlying conduct.<sup>12</sup> (Still, best practice where possible is to put “offensive touching” in the record, which may help the client if the immigration judge does not know the law – especially since the client likely will be unrepresented.)

There is one exception, created by the Supreme Court in *Stokeling v. United States*. If “overcoming the resistance of the victim” is an element of the offense, then even *de minimis* force will be held a COV.<sup>13</sup> But *Stokeling* requires *some* use or threat of physical force. Sections 207 and 215 have been held not to be COV AFs partly because “force or fear” can be committed with no force at all, for example, with a (fraudulent) threat of arrest.<sup>14</sup> Similarly, 236/237 and arguably 243.4 also are not COVs; see Chart.

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<sup>9</sup> INA § 101(a)(43)(F), 8 USC 1101(a)(43)(F).

<sup>10</sup> See INA § 237(a)(2)(E)(i), 8 USC 1227(a)(2)(E)(i) and see **Part E**, Domestic Violence, below.

<sup>11</sup> The definition at 18 USC 16(a) is nearly identical to the definition of COV under the federal Armed Career Criminal Act (ACCA), at 18 USC [§ 924\(e\)\(2\)\(B\)\(i\)](#). Federal decisions interpreting that definition also are used to interpret a COV under immigration law, and vice versa.

<sup>12</sup> *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

<sup>13</sup> *Stokeling v. U.S.*, 586 US 73 (2019) (Florida robbery that can involve grabbing a cellphone from someone’s hand is a COV). *Stokeling* does not apply to simple assault and battery. See *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022).

<sup>14</sup> See, e.g., *Gutierrez v. Garland*, 106 F.4th 866 (9th Cir. 2024) (PC 215).

**Recklessness usually is not a COV, but see PC 192(a), 245(a).** A COV requires intentional conduct. Negligence or no *mens rea* is not a COV.<sup>15</sup> Recklessness that is defined as conscious disregard of “a substantial and unjustifiable risk” in “gross deviation” from accepted standards is not a COV.<sup>16</sup>

- **Section 192(a) is a COV.** The Ninth Circuit held that recklessness with a higher *mens rea* of “depraved heart” or “extreme recklessness” is a COV. It found that federal second-degree murder and voluntary manslaughter committed with that *mens rea* are COVs, and stated in dicta that California voluntary manslaughter, PC 192(a), is a COV as well. *U.S. v. Draper*, 84 F.4th 797 (9th Cir. 2023); *U.S. v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en banc). Removal defense advocates may investigate arguments against this statement in dicta, but defenders must conservatively assume that this is the rule.
- **Section 245(a)(1) is not a COV (at least for now).** In 2026, the Ninth Circuit *en banc* held that PC 245(a)(1) is not a COV because it can involve recklessness. *U.S. v. Gomez*, No. 23-435 (9th Cir. Jan. 13, 2026) (en banc) Where possible, defenders still should try to act conservatively and obtain a sentence of 364 days or less, in case the issue goes to the Supreme Court in future. However, if a year or more cannot be avoided, PC 245 is far better than a plea to, e.g., PC 32, 136.1(b)(1), 243(d), or 422. In removal proceedings in the Ninth Circuit, advocates should assert this final ruling.

**NOTE: 18 USC § 16(b) was struck down and precedent decisions reversed.** The immigration definition of a COV in 18 USC 16 sets out two subsections: sections 16(a) and 16(b). The Supreme Court struck down 18 USC 16(b) as unconstitutionally vague, so that only 16(a) can be used now.<sup>17</sup> Section 16(b) included any felony that “by its nature” involves a risk of violence. If you do legal research beyond what’s in the Chart, read cases from 2018 and before with care, because precedent based solely on 16(b) is overturned and some felonies that were held COVs under 16(b) are no longer COVs.<sup>18</sup>

#### D. Crimes Involving Moral Turpitude (CIMT)

**Definition of a CIMT.** An immigration CIMT has a different definition than the California law CIMT used for impeachment purposes. The Chart will analyze each offense as a CIMT and provide citations and discussion. The following is a summary of the rules in general. The categorical approach applies to CIMTs, so this analysis is based on the elements of the offense, not the facts of the case.

While “moral turpitude” is vaguely defined, immigration law generally provides that an offense is a CIMT if it has as an element the *intent* to defraud; to commit theft with intent to deprive permanently or “substantially,” but not temporarily (temporarily such as, e.g., joyriding); to cause great bodily injury or commit assault with a deadly weapon; or to commit sexual assault. An offense that requires an intentional act that necessarily creates great risk of death or serious bodily harm may be a CIMT, even if it has no element of intended or actual harm. See PC 246, VC 2800.4. An offense with an element of “reckless disregard” of a known risk of imminent death or serious injury is a CIMT, but recklessness without those elements, and criminal negligence, are not. Some but not all offenses that require lewd intent are CIMTs. Conspiracy and attempt to commit a CIMT is a CIMT, and a serious threat to commit a violent CIMT, e.g., PC 422, also is. See individual offenses in the chart.

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<sup>15</sup> *Leocal v. Ashcroft*, 543 U.S. 1 (2003) (Florida DUI with serious injury is not a COV).

<sup>16</sup> *Borden v. U.S.*, 593 U.S. 420, 427, 429 (2021).

<sup>17</sup> *Sessions v. Dimaya*, 584 U.S. 148 (2018).

<sup>18</sup> The same applies to the ACCA provision that corresponds to 18 USC 16(b), which also was struck down. *Johnson v. US*, 576 U.S. 591 (2015). See discussion of ACCA at the beginning of this section.

**Penalties for a CIMT.** The CIMT grounds of inadmissibility and deportability are unique in that a single CIMT conviction does not necessarily make the person deportable or inadmissible, or trigger the many other possible penalties such as being a bar to various kinds of relief, subjecting the person to mandatory detention, etc. *Each penalty may have different CIMT rules.* Check the rules at ILRC, [All Those Rules About Crimes Involving Moral Turpitude](#) (June 2021), [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

Here are the rules as to when one or more CIMTs cause a person to become deportable or inadmissible.

### **Deportable for CIMT**

Under INA 237(a)(2)(A)(i), (ii), 8 USC 1227(a)(2)(A)(i), (ii), a noncitizen is deportable who either:

- 1) is convicted of at least two CIMT's that did not arise out of the same incident (in a "single scheme of criminal misconduct"), at any time after being admitted to the U.S., *or*
- 2) is convicted of one CIMT that has a potential sentence of a year or more, *but only* if the offense was committed within five years of admission to the U.S. in any status (or if the person never was admitted, within five years of adjustment to LPR status).
  - Penal Code 18.5(a). A single California "one year" misdemeanor conviction from on or after January 1, 2015 cannot trigger this deportation ground, because under PC 18.5(a) the misdemeanor has a potential sentence of 364 days, not a year. A felony reduced to a misdemeanor should be treated the same way. However, federal courts, including in immigration proceedings, will *not* apply PC 18.5(a) to California misdemeanor convictions from before January 1, 2015 (despite the clear language on retroactivity in the statute). See **Part I**, Definition of Sentence.

### **Inadmissible for CIMT**

Under INA 212(a)(2)(A), 8 USC 1182(a)(2)(A), a noncitizen is inadmissible if they formally admit to, or are convicted of, just one CIMT. But if either of the following applies, the person is *not* inadmissible.

- 1) Petty offense exception: Must have committed only one CIMT, which carries a potential sentence of *one year or less*, and a sentence of six months or less was imposed. (Note that here a potential sentence of a year is fine; we do not have to worry about PC 18.5(a).)
- 2) Youthful offender exception: Must have committed only one CIMT, while under age 18, and the conviction (in adult criminal court) or release from imprisonment occurred at least five years ago. (This applies to youth convicted as adults. If instead the case was held in juvenile proceedings, there was no "crime" or "conviction" so the person is not inadmissible.)

## **E. Domestic Violence and Child Abuse (DV and COCA)**

1. **Deportable crime of domestic violence (DV)**
2. **Civil or criminal court finding of violation of a DV stay-away order**
3. **Crime of child abuse (COCA)**
4. **Stalking**
5. **Pending DV Bill**

The next four categories trigger deportability under the "domestic violence" ground at INA § 212(a)(2)(E), 8 USC § 1227(a)(2)(E). For this deportation ground only, the conviction, or the conduct that violated the protective order, must have occurred after admission and after September 30, 1996. For further information on the below four categories, see ILRC, [Case Update: Domestic Violence Deportation Ground](#) (2022) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

Note that victims of human trafficking, intimate partner violence, and sexual violence might qualify for a complete criminal defense and/or a vacatur effective for immigration purposes. See **Section M**, below, and see ILRC, *New Options for Survivors of Human Trafficking and Domestic Violence* (2022) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

### 1. Deportable crime of domestic violence (DV)

To be a deportable crime of DV, the offense: (a) must be a crime of violence (COV) as defined at 18 USC § 16(a) (see discussion at **Part C**, above) **and** (b) must be committed against a person protected from the defendant's acts under state domestic violence laws or similar standards set out at 8 USC § 1227(a)(2)(E)(i).

If the conviction lacks either of these factors – it is not a COV *or* there is no protected relationship -- it is not a deportable crime of DV. This creates two defenses. First, plead to an offense that is *not* a COV. This will not be a deportable crime of DV even if it involves a protected relationship. See, e.g., PC 243(e). Or second, plead to an offense that is a COV but lacks the relationship: it is either against property, or against a specific victim with whom the defendant does not share a protected domestic relationship, e.g., the police, a neighbor, the ex-girlfriend's new girlfriend. It is *not* a recommended defense to try to "hide" the relationship by pleading to a COV against a victim with a protected relationship, while creating a vague record of conviction that does not disclose the relationship. Immigration courts/DHS can look beyond the record of conviction to ascertain the identity and relationship of the victim. When pleading to a COV, do not take one year or more on a single count, or the conviction will become an aggravated felony.

### 2. Civil or criminal court finding of any violation of a DV stay-away order

A noncitizen is deportable if a civil or criminal court finds that they violated the portion of a DV protective order that is meant to protect against threats, injury, or repeated harassment. This includes a finding of *any* violation a DV stay-away order, no matter how minor the conduct. Do not plead to any violation of a DV stay-away order or probation condition. Instead, plead to a violation of a different part of the order (e.g., failure to attend probation meeting), or to a new offense rather than a probation violation. See discussion and defense strategies at **PC 166, 273.6** in the Chart.

### 3. Deportable Crime of Child Abuse (COCA)

Conviction of a "crime of child abuse, child neglect, or child abandonment" ("crime of child abuse" or "COCA") also causes deportability under this statute. The BIA's definition of COCA is extremely broad, but there are some clear limits.

-An *age-neutral offense is not COCA*. The offense must have the minor age of a victim as an element. For example, PC 243(a) committed against a 17-year-old is not a deportable COCA. But to provide extra protection against an incorrect immigration charge,<sup>19</sup> defenders should not permit evidence of the victim's minor age to appear in the record of conviction.

-*Not COCA if an adult can pose as the child victim*. The BIA held that an offense that permits guilt if an adult police officer posed as the child is not a COCA.<sup>20</sup> See, e.g., PC 288.2 – 288.4

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<sup>19</sup> The BIA once held that simple battery was a crime of child abuse under the categorical approach if the record of conviction showed the victim's minor age. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Subsequent Supreme Court rulings make clear that the minor age must be an *element* of the offense, but the old case still could cause confusion. See discussion at ILRC, *Case Update: Domestic Violence Deportation Ground*, cited above.

<sup>20</sup> *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782, 794 (BIA 2020).

-*DUI with child in the car.* DUI with VC 23572 likely will be charged as COCA. See Chart for alternatives, such as wet reckless (or, if necessary, DUI) plus 273a(b), which is a separate offense.

-*Explicit sexual conduct with a minor under age 16 is COCA.* Assume that 261.5(d), 287(b)(2) (oral sex), etc. is a COCA, and also is an AF as sexual abuse of a minor. Note that the Ninth Circuit held that PC 288(c) is not COCA, although PC 288(a) is.

-*Pending issues: PC 273a(a), and consensual sexual conduct with a minor under age 18, e.g., 261.5(c), 287(b)(1).* At this writing, it is not clear whether these offenses will be held COCA. Defenders should act conservatively and assume that they are COCA, while removal defense advocates should argue that they are not and should appeal adverse findings to preserve the issues. See discussion in the Chart.

#### 4. Stalking

Conviction of a crime that meets the definition of “stalking,” committed against any person (not just in a domestic situation), triggers this ground. The BIA found that conviction of California stalking, PC 646.9, does not trigger this deportation ground.

#### 5. Pending DV Bill

In January 2025, the U.S. House of Representatives passed the “Preventing Violence Against Women by Illegal Aliens Act,” H.R. 30, 119<sup>th</sup> Congress (2025) (“DV Bill”). The Senate did not act on this in 2025. *This bill may or may not become law, or it could be amended from the current version.* Stay alert for updates.

### F. Controlled Substance Offenses (CS)

1. Immigration penalties involving controlled substances
2. Defending immigrants charged with drug offenses

Even minor drug convictions bring very harsh immigration penalties. This section will discuss the immigration penalties that apply to controlled substance (CS) convictions, admissions, and conduct, and the possible defenses in criminal and immigration proceedings. For more information, see advisories on controlled substance offenses at N.8 in [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

This section will discuss 1) immigration penalties, such as the CS grounds of inadmissibility and deportability, and aggravated felonies, and 2) a quick review of defense strategies in criminal and immigration proceedings. For more defense information, see **11377** at the Chart.

#### 1. Immigration penalties involving controlled substances

Controlled Substance (CS) offenses have several immigration penalties. In each case, the California conviction or conduct must involve a CS that matches the federal definition of a CS at 21 USC § 802 (federal drug schedules). We refer to this as a “federally defined substance”; see discussions below.

##### a. Aggravated Felony (AF) Conviction

A person convicted of a so-called “drug trafficking aggravated felony” (AF) is deportable, but that is just the start. An AF conviction also is a bar to eligibility for almost any form of relief other than protection under the Convention Against Torture. See discussion in *Immigration Relief Toolkit* (2024) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries). In all cases, the conviction must involve a federally defined CS, so the “analog” or “khat” kind of defenses are appropriate; see Section 2, below.

A drug trafficking AF is defined at INA 101(a)(43)(B), 8 USC § 1101(a)(43)(B). It includes (a) any trafficking-type offense such as sale or possession for sale, and (b) state offenses that don’t involve trafficking but that are analogous to certain federal drug felonies. For example, growing more marijuana than permitted, **H&S C 11358**, and possession of a CS with priors, **H&S C 11395**, are AFs.

In the Ninth Circuit only, “offering” to commit an offense under **H&S C 11352, 11360, 11379** is *not* an AF. If one must plead to these statutes, plead specifically to *offering to distribute* (or if necessary, offering to sell). This does not avoid the CS grounds of deportability and inadmissibility, but in the Ninth Circuit it avoids an AF. In contrast, California possession for sale, **11351, 11359, 11378**, is worse for immigrants because it does not have the “offering” language and is automatically an AF. It is ineffective assistance of counsel to fail to point out to an immigrant defendant that pleading up from possession for sale can avoid an AF.

*Warning on H&S C 11395.* Even as a misdemeanor, a conviction is an AF. Also, even if DEJ is successfully completed, 11395 still is a “conviction” for immigration purposes; See **Part I**, Definition of Conviction. Alternatives include a plea to a felony under PC 370/372.5(c), discussed below.

**b. Inadmissible or deportable for a conviction of a controlled substance offense**

Conviction of any offense “relating to” a federally defined CS is a ground of inadmissibility and deportability.<sup>21</sup> There are limited exceptions or waivers relating to convictions for a single incident involving simple possession of 30 grams or less of marijuana.<sup>22</sup> (Also, immigration advocates at least can argue that any California cannabis conviction entered on or after November 9, 2016, does not meet the federal definition of cannabis and is not a removal ground. See Section 2, below.)

**c. Inadmissible for *admitting* having committed a controlled substance offense**

A person is inadmissible, but not deportable, if they make a qualifying admission to an immigration official that they committed an offense “relating to” a federally defined CS.<sup>23</sup> This is bad for immigrants who must apply for some immigration relief, which includes all undocumented people, deportable LPRs, and many others. Immigration authorities may pressure the applicant for relief to make an admission or may deny the relief if the person refuses to speak. If the person admits this, immigration advocates can assert that the person has not made a qualifying admission if the admitted conduct was brought before a criminal court judge and the result was less than a conviction (e.g., dropped charges, pre-trial diversion, a conviction that was vacated by qualifying PCR).<sup>24</sup> See discussion of admissions at ILRC, *Immigrants and Marijuana* (May 2021).

**d. Inadmissible because authorities have “reason to believe” the person ever has participated in drug trafficking**

This is a ground of inadmissibility (but not deportability), based on facts as opposed to an admission or elements of an offense. If immigration authorities amass sufficiently substantial and probative “reason to believe” that the person ever has participated or assisted in any way in trafficking in a federally defined CS or “listed chemical,” the person is inadmissible.<sup>25</sup> This ground can even apply where the underlying conviction was vacated<sup>26</sup> or the charge was dismissed.<sup>27</sup> There are almost no waivers for this ground, which also penalizes some family members.

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<sup>21</sup> INA §§ 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i), 8 USC §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i).

<sup>22</sup> For example, it is not a deportable offense, and while it is an inadmissible offense the person might be eligible for a waiver. It is a bar to some but not all forms of relief. See ILRC, *Immigrants and Marijuana* (May 2021), [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

<sup>23</sup> INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II).

<sup>24</sup> See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980).

<sup>25</sup> INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C).

<sup>26</sup> *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014).

<sup>27</sup> *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

**e. Inadmissible (and deportable) for being a current “drug abuser or addict”**

This “health” ground of inadmissibility comes up as people apply for LPR status, and especially in consular processing in another country.<sup>28</sup> There is also a deportation ground based on having been an addict or abuser at any time after admission,<sup>29</sup> but it is very rarely charged.

**f. Bars to relief**

Controlled substance offenses serve as bars to many forms of relief. A drug trafficking conviction is extremely dangerous, including for a refugee, asylee, person applying for asylum, or an LPR. A simple possession conviction is a bar to most other forms of relief for immigrants. See discussion of crimes bars to relief at *N.17 Immigration Relief Toolkit* (2024).

**g. Mandatory detention without bond**

For people in removal proceedings, any qualifying conviction of a CS, including possession, will subject every non-U.S. citizen, including LPRs, to mandatory ICE detention. For people who were not admitted to the U.S. (entry without inspection, parole), a qualifying admission of the CS offense is enough. For people who were admitted to the U.S. in any status, there must be a conviction and there is an exception for a single incident involving possession of 30 grams or less of marijuana. See **Part K**, Mandatory Detention.

**2. Defending Immigrants Charged with Drug Offenses**

Drug cases are extremely challenging for immigrants, but there are some effective defense strategies. These are further discussed at **H&S C 11377** in the Chart, and at ILRC advisories that appear at section §N.8 at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

**Victim of DV or Human Trafficking?** Many people are coerced to work in the illegal drug business as mules, dealers, or laborers. If your client *might* be a victim of human trafficking (forced work) or domestic violence, that could be the basis for a defense against criminal charges or for vacating prior convictions under California law, or for immigration status under federal law. See **Part M**, Survivors of Domestic Violence, Sexual Abuse, and Human Trafficking, and see ILRC, *New Options for Survivors of Trafficking and Domestic Violence* (Nov. 2022) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

**Plead to a non-drug offense.** Other than having all charges dropped, the most effective crim/imm defense strategy is to arrange for the drug charges to be dropped in exchange for pleading to a non-drug offense that is immigration-neutral, or at least less damaging than drugs. Depending on the individual situation, it may be worth it to plead to a serious non-drug offense. Several felony offenses do not have immigration consequences. As with all these defenses, consult with a crim/imm expert early in the case.

**Pretrial diversion** (where the defendant pleads “not guilty”) is not a conviction for immigration purposes. For a misdemeanor charge, consider judicial misdemeanor diversion, PC 1001.95. For a felony or misdemeanor charge – including **11395**<sup>30</sup> -- consider mental health diversion, PC 1001.36, because addiction is a mental health issue.<sup>31</sup> See also PC 1001.20, developmental disabilities. Pretrial diversion under PC 1000 (2018) also does not result in a conviction, but it has the disadvantage that if the

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<sup>28</sup> INA § 212(a)(1)(A)(iv), 8 USC §§ 1182(a)(1)(A)(iv). See ILRC, *Immigrants and Substance Use Disorders* (2023), <https://www.ilrc.org/crimes-summaries>.

<sup>29</sup> INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii).

<sup>30</sup> See *Reed v. Superior Court, Solano County*, No. A173339, 2025 WL 3764212 (Cal. Ct. App. Dec. 30, 2025)

<sup>31</sup> See discussion in Part II of ILRC, *Immigrants and Substance Use Disorder: A Legal and Medical Perspective* (Aug. 2023) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

defendant does not satisfactorily complete the program, they will return to face the original charges without the right to trial by jury. PC 1000.1(a)(3).

Note that the DEJ supplied by H&S C 11395 is an immigration conviction due to the guilty plea - even if the person successfully completes all requirements. The same is true for DEJ under PC 1210.1 and the former version of PC 1000 (1997-2017) See **Part I**, Definition of Conviction.

**Plead to a California CS that is not on federal drug schedules.** To be a conviction of a CS for immigration purposes, the offense must involve a substance found on federal drug schedules; see 21 USC 802. A plea to a California offense that involves a substance *not* found on federal drug schedules is not a CS conviction for immigration purposes. See discussion of khat, chorionic gonadotropin, and ioflupane at **11377** in the Chart.

**Plead to a California substance that is not *defined* the same way as federal law defines it: Analogs and isomers.** This is a very promising defense under the categorical approach (see **Part H**, below), but as of January 2026 there is no Ninth Circuit precedent. A plea to an offense that involves a CS that is defined more broadly under California law than it is under federal law can be a safe plea. Because there is not yet specific Ninth Circuit precedent on this issue, defenders should try to obtain other defense options – but where that is not possible, or simply to add another defense, use the below. In particular, rather than stating the substance, add “analog”, e.g., “I possessed a meth analog.” Removal defense advocates can make the following arguments that the person does not have a CS conviction.

**-Cannabis.** Despite state legalization legalizing it, cannabis remains a federal CS. But immigration advocates can argue that a California cannabis conviction entered on or after November 9, 2016 does not meet the federal definition of cannabis and is not a ground for removal.<sup>32</sup>

**-Plead to an “analog” of a California substance.** If the client must plead to a California CS offense, as of January 2026 a worthwhile defense is to plead specifically to an analog of the CS, e.g., “I possessed a methamphetamine analog.” **Defense counsel should fight to include the term “analog”** in the record of conviction. The plea should not be, e.g., to “meth” but to “a meth analog.”

The defense is based on the fact that California law defines a CS “analog” more broadly than federal law does.<sup>33</sup> This discrepancy creates a strong argument that a California conviction relating to a CS analog does not match the definition of a federal CS. Two federal district courts upheld this defense in published decisions, *U.S. v. Morales-Rodriguez* and *U.S. v. Verdugo*.<sup>34</sup> A 2026 Ninth Circuit published opinion states that the panel will find that a California analog is not a federal CS, *if* the case before it presents the issue. First, however, the panel certified to the California Supreme Court the question of whether defendants’ pleas to “meth” automatically included “meth analogs” under California law. See

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<sup>32</sup> See ILRC, [Template Brief on Why California Cannabis Convictions on or after November 9, 2016 are not Grounds for Removal](#) (2024). Note that in November 2025, Congress amended and narrowed the federal definition of legal hemp, changes to be effective Nov. 12, 2026. See the current and amended definitions of hemp at 7 USC 1639o. However, hemp is already specifically excluded from both the federal CSA definition of marijuana and from California’s definition of marijuana. California’s definition of marijuana is overbroad because it includes mature stalks, not because it includes hemp.

<sup>33</sup> Compare Cal. H&S § 11401(b) with 21 U.S.C. § 802(43)(a). The California definition requires an analog to have both a similar effect and similar chemical structure as the CS, while federal law only requires an analog to have one or the other. See *U.S. v. Morales-Rodriguez*, 744 F.Supp.3d 1036, 1052-53 (S.D. Cal. 2024).

<sup>34</sup> *U.S. v. Morales-Rodriguez*, *supra*; *U.S. v. Verdugo*, 682 F.Supp.3d 869, 872–73 (S.D. Cal. 2023).

further discussion at **11377** of *U.S. v. Soto /U.S. v. Reid*.<sup>35</sup> While the above cases involve meth, the analog defense should apply to a range of substances in California Schedules I, II. See H&S C 11401(a).

**-Isomers.** This defense likely is not as strong as the analog defense, partly because the BIA issued an opinion imposing new evidentiary requirements and this must be litigated. See Matter of Felix-Figueroa, 29 I&N Dec. 157 (BIA 2025). However, if a particular California CS is statutorily defined as having an isomer that the federal statutory definition of that CS does not include, and if the isomer named in the California definition actually exists, this should be a defense. See discussion at **11377**.

**Penal Code 32 or 370/372.5.** Beginning in 2023, PC 370/372.5 is an alternative plea to California drug charges. In a procedure similar to negotiating a “wet reckless” rather than a DUI offense, the defense can ask the prosecutor to accept a plea to “being a public nuisance” as an infraction, misdemeanor, or felony offense, rather than a plea to the drug offense. Section 370/372.5 can be used for charges ranging from marijuana infractions to felony trafficking offenses. As a 16/2/3 wobbler, 372.5(c) may be a substitute plea to avoid felony conviction of H&S C 11395, which is an immigration AF. Section 32 also is a 16/2/3 wobbler, but it will become an AF if a year is imposed.

Because PC 370/372.5 is not a CS conviction it will prevent a finding of deportability, so it is good for an LPR who is not deportable and is trying to avoid becoming deportable. It is not quite as safe for an undocumented person, already-deportable LPR, or other immigrant who will have to apply for relief. An immigrant becomes inadmissible under the CS ground if they make a qualifying admission that they committed a CS offense, even without a conviction. DHS may pressure an applicant for relief – who often must prove that they are admissible - to “admit” to the underlying drug conduct in a PC 372.5 (or a PC 32). Either the admission or the refusal to speak often is enough to block relief. There is a potential immigration defense<sup>36</sup>, but the threat is enough for defenders to try to find some other option. See **11377**.

**Vague record of conviction for LPRs:** For nearly 60 years, a key crim/imm defense has been to create a record of conviction that does not name a specific, federally defined CS, e.g., that refers to “a controlled substance” rather than “cocaine.” See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). Since the 2021 Supreme Court decision in *Pereida v. Wilkinson*, however, this only helps LPRs to contest deportability, and even that is insecure. Any of the other defense options are better, but if they are not available, creating an inconclusive record for an LPR contesting deportability is worthwhile. See ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021), [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

**Post-conviction relief.** It may be very possible to obtain post-conviction relief to eliminate a prior CS conviction. Generally, these must be based on a prejudicial legal error in the original proceedings (although relief such as PC 1203.4 may work for DACA purposes and for certain minor convictions from on or before July 14, 2011). California has special immigration-effective PCR vehicles for minor drug offenses. See ILRC, *Overview of California Post-Conviction Relief for Immigrants* (2023), [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries) and other resources at **Part N**.

## G. Firearms Offenses

A noncitizen is deportable under INA § 237(a)(2)(C), 8 USC § 1227(a)(2)(C), if at any time after admission they were convicted of an offense relating to a firearm. Also, convictions for sale of firearms, or certain

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<sup>35</sup> See, e.g., *U.S. v. Reid*, CA NO. 24-3903, No. 2:23-cr-00391-JAK-1 (9th Cir. Jan. 8, 2026).

<sup>36</sup> See discussion of the defense at Part I.C of *Overview of California Post-conviction Relief for Immigrants* (July 2022) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

state offenses that have the same elements as designated federal firearms felonies, are AF. INA § 101(a)(43)(C), 8 USC § 1101(a)(43)(C).

However, **no** California offense that exclusively uses the definition of firearm at PC 16520(a) carries these consequences. California and federal definitions of firearm are different, since California's definition includes antique firearms. This is true even if the conduct in the case did not involve an antique firearm. That means that some California firearms offenses are immigration neutral (e.g., 25400, 25850, 29800) while others are not (e.g., 26350, automatic weapon offenses) are not. Check the chart in each case, and see further discussion at [§ N.12 Firearms \(2024\)](#) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

## H. The Categorical Approach; The Death of *Chevron* Deference

### 1. The Categorical Approach

For further discussion see ILRC, [How to Use the Categorical Approach Now \(2021\)](#), [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries). The federal “categorical approach” is the analysis federal courts use to decide whether a state conviction constitutes a deportable or inadmissible offense. Defenders who represent noncitizens benefit from a basic grasp of how it works. The California Supreme Court has adopted the categorical approach for some purposes. *People v Gallardo* (2017) 4 Cal 5th 120).

The categorical approach compares the elements and the minimum conduct required for guilt of each California offense to the elements of the federal definition of the offense in the removal ground. The focus is on elements, not the defendant's conduct in their case. The U.S. Supreme Court has made several beneficial decisions on the categorical approach.<sup>37</sup> One of the most important is *Mathis v. United States*, 579 U.S. 500 (2016), which this section will cite.

The categorical approach applies to most “removal grounds” (grounds of inadmissibility and deportability, including aggravated felonies) that require a conviction. It has up to three steps, which we will consider one by one.

#### ***Step One: Is the California offense “overbroad” because it reaches some conduct that the federal “generic” offense in the removal ground does not reach?***

The Immigration and Naturalization Act (INA) is full of criminal law terms, e.g., crime of violence (COV), firearm, controlled substance (CS), perjury, crime involving moral turpitude (CIMT), and more. Each of these removal ground offenses has a federal definition, called the “generic” definition.

In Step One, we compare that federal generic definition to the elements of the California offense. If the California defense is defined more broadly – meaning that some conduct is punishable under the California statute but is *not* punishable under the generic definition -- the California statute is deemed “overbroad.” That means we win Step One. These “overbroad” statutes are many of the immigration-neutral pleas upon which we rely. Examples include:

- *PC 243(e)*. The generic definition of a COV does not include a mere offensive touching, but 243(e) does. Therefore, any conviction of 243(e) is *overbroad* compared to an immigration COV. This is true even if the defendant's own case involved violence. We do not look at the conduct, statements at plea, or other evidence of the incident, at least at this stage.
- *PC 459/460*. Conviction of generic “burglary” is an AF if a year or more is imposed. The federal generic definition of burglary requires an unlicensed entry into a building or structure. California

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<sup>37</sup> See also *Descamps v. United States*, 570 U.S. 254 (2013) and *Moncrieffe v. Holder*, 569 U.S. 184 (2013). The BIA accepted the Court's analysis in *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017).

burglary is overbroad because it includes a permissive entry, and it is not limited to a building or structure.

- *H&S C § 11377*. The generic definition of a CS appears at 21 USC 802, federal drug schedules and definitions. Section 11377 includes a few substances not on the federal list, such as khat and (until 2026) chorionic gonadotropin. It includes other substances that are not *defined* the same as at 21 USC 802. If defendant is convicted of “khat,” then regardless of the underlying conduct, the conviction is not of a federal CS offense.

If the California statute is overbroad, we will go on to Step Two to determine if it also is divisible.

If the California statute is *not* overbroad, we lose and any conviction of the offense will trigger the removal ground. For example, PC 422 (threatening to commit a crime resulting in death or great bodily injury) is categorically a COV. Every conviction, regardless of underlying facts, will be held a COV for immigration purposes.

**“Realistic Probability.”** We might have to prove that there is a “realistic probability” that the conduct that is prohibited by the California statute, but not by the generic definition, would actually be prosecuted in California. There are two ways to prove realistic probability: present published or unpublished cases, or one’s own case, where that conduct was prosecuted; or show that the plain language of the California statute sets out the conduct. The “plain language” test presents important defense strategies, for example in controlled substance cases.<sup>38</sup>

### ***Step Two: Is the Statute “Divisible”***

#### ***Into Separate Offenses with Separate Elements?***

In Step Two, we determine whether the overbroad statute sets out just one offense or is “divisible” into multiple offenses. The stakes are high. If the overbroad statute is just one offense (is *not* divisible, or is “indivisible”), we win entirely. No conviction of the offense triggers the removal ground, and the inquiry is over. But if the overbroad statute *is* divisible, we must go on to Step Three to see if evidence establishes which of the separate offenses was the subject of the conviction.

**What is a divisible offense?** There are two requirements. First, the statute must be phrased in the alternative (e.g., “intentionally *or* recklessly”). A single word such as “drug” or “weapon” is not divisible. Second, *these alternatives must set out separate offenses, each with their own elements*. A jury must unanimously decide between the statutory alternatives to find guilt.

Many overbroad California statutes are indivisible (not divisible), meaning the client wins. They may set out conduct in the alternative, but the alternatives are not separate offenses. See, e.g., VC 10851 (intent “to permanently or temporarily” deprive are not separate offenses); PC 242, 243 (“force or violence” are synonymous, both include an offensive touching, they are not separate offenses); PC 484 (the types of conduct are not separate offenses); PC 459 (“larceny or any felony” are not separate offenses). Please check each offense on the Chart.

Unfortunately, ***all California controlled substance offenses*** are divisible as to the substance. For example, H&SC 11377 is overbroad because it includes meth (listed on federal drug schedules) and khat (not on federal schedules). The Ninth Circuit found that 11377 is divisible: possession of each substance under 11377 is a separate offense. Therefore, the conviction record must specifically show “khat” to get

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<sup>38</sup> See also NIPNLG, IDP, [“Realistic Probability” in Immigration Categorical Approach Cases](https://www.nipnlg.org) (June 2021) at [www.nipnlg.org](http://www.nipnlg.org).

the khat benefit. See discussion at **Part F** here, and at **11377**. Other divisible California statutes include PC 118, 288.3, and VC 2001-2004. Always check the Chart.

**Step Three: The Modified Categorical Approach.  
Of which offense was the defendant convicted?**

If a statute is both overbroad and divisible into separate offenses, an immigration judge or officer will go to a third step called the modified categorical approach. The adjudicator can look at certain evidence to see if it shows of which offense in the statute the person was convicted. For an 11377 conviction, they can look at the person's conviction record to see if the substance was ecstasy (bad, a federally defined substance), or khat (good, not a federally defined substance), or if the evidence is *inconclusive*, e.g., the record does not refer to a specific substance, or all records have been destroyed.

What happens if the record is inconclusive? This depends on the burden of proof. The news is not good for immigrants who need to apply for relief, a group that includes all undocumented people or LPRs who already are deportable. In *Pereida v. Wilkinson*, the Supreme Court held that an applicant for relief must prove that their conviction under a divisible status is *not* a bar to relief.<sup>39</sup> In dicta, the *Pereida* majority stated that the applicant also could present evidence from outside the record of conviction to meet their burden of proof. In the 11377 example, the applicant must prove that the substance was khat or another specific non-federal substance. (This could include a California CS "analog"; see **Part F**.) If the applicant's record of conviction, plus evidence from outside the record that they are allowed to present, is not conclusive, and a federally defined CS conviction is a bar to relief, the relief is denied.

In contrast, ICE has the burden to prove that a conviction makes an LPR deportable. If the record of conviction is inconclusive, ICE cannot use it to meet its burden. For many years a crim/imm defense has been to create a truly inconclusive conviction record that mentions only "a controlled substance" to prevent ICE from being able to prove the specific substance in a deportation case. Now that defense is in doubt, as ICE may cite *Pereida* to argue that it can use other evidence besides the record of conviction to prove the substance. *Pereida* thus made the "inconclusive record of conviction" defense less of a guarantee for LPRs. See further discussion at ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries) and see **Part F**, Controlled Substance Offenses, above.

**2. Loper Bright: The Death of Chevron Deference**

Overturning 40 years of precedent, the Supreme Court held that federal courts will no longer defer to reasonable federal agency interpretations of ambiguities in statutes that the agency administers. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), overruling *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984). In immigration law, before *Loper Bright* Circuit Courts of Appeals often had to give *Chevron* deference to "reasonable" published Board of Immigration Appeals (BIA) precedent decisions that interpreted ambiguous sections of the Immigration and Nationality Act (INA). After *Loper Bright*, federal courts are instructed to base rulings on their own interpretation of statutory ambiguities, although they will consider agency decisions along with other input.

The Supreme Court stated that this new rule will not be applied retroactively to overturn past precedent decisions that were based on *Chevron* deference. *Loper Bright*, 603 U.S. at 412. While it appears that such precedent can be challenged, the legal standards are not clear at this time. But going forward, cases that were pending or had not yet been brought as of June 28, 2024, *Loper Bright's* date of

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<sup>39</sup> *Pereida v. Wilkson*, 592 U.S. 224 (2021).

publication, will be decided under *Loper Bright*, and courts are instructed not to defer under *Chevron*.<sup>40</sup> See online resources for more on *Loper Bright* and *Chevron*.<sup>40</sup>

## I. Immigration Definition of Conviction and Sentences

1. Definition of Conviction
2. Sentence imposed
3. Potential sentence, CIMTs, and PC 18.5(a)
4. Felony/misdemeanor, PC 17(b)(3), and Prop 47
5. Time Actually Served
6. Sentence Enhancements and CRC 4.420

For further discussion see [§ N.2 Definition of Conviction \(April 2019\)](#) and [§ N.4 Sentence \(Oct. 2020\)](#) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

### 1. Definition of Conviction.

Immigration law has its own definition of what constitutes a criminal "conviction." See INA 101(a)(48)(A), [8 USC 1101\(a\)\(48\)\(A\)](#). The BIA has held that if there is a guilty plea or finding of guilt, and the court imposes any probation, fine, or jail, there is a conviction for federal immigration purposes – even if there is no conviction for state purposes.<sup>41</sup> With very few exceptions, if there was a guilty plea or finding of guilt, there is a conviction - and the only way to eliminate the conviction is by vacatur based on legal error. Thus California DEJ, as in H&S C 11395, PC 1210.6, and former PC 1000 (1997-2017)), all are convictions for immigration purposes. And the "withdrawal of plea, dropping of charges" remedies contained in those statutes, as well as dismissals under, e.g., PC 1203.4, are called "rehabilitative relief" and do not eliminate the convictions for immigration purposes. (There are a few exceptions: see **Part N**, Post-Conviction Relief.

Dispositions that are *not* a conviction for immigration purposes include a juvenile adjudication; a "pretrial" diversion program where the person pleads not guilty; and a case on direct appeal of right. For more on what is or is not a conviction for immigration purposes, see [N.§2 Definition of Conviction](#).

### 2. Sentence Imposed ("Term of Imprisonment")

In some cases, the sentence that was *imposed* creates immigration consequences. Certain offenses become an aggravated felony (AF) only if a sentence of a year or more is imposed. Also, a first misdemeanor conviction of a crime involving moral turpitude (CIMT) can come within the "petty offense exception" to the CIMT inadmissibility ground only if a sentence of six months or less is imposed. See **Parts B, D** on AF, CIMT, above. A person convicted of two or more offenses of any type during their lifetime, for which an aggregate of five years or more sentence was imposed, is inadmissible.

For immigration purposes, an imposed sentence includes any sentence to custody, even if execution is suspended. If imposition of sentence is suspended, the sentence includes any period of custody ordered as a condition of probation. If additional custody is added to the original count due to a probation violation, the total imposed sentence includes that time. For example, a person who was sentenced to eight months as a condition of felony probation and is sentenced to an additional four months due to a probation violation, has been sentenced to one year for the offense. A *probation violation hearing can*

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<sup>40</sup> See, e.g., Nancy Morawetz, [Immigration Law After Loper Bright](#), 99 NYU L. Rev. 282, 284 (2024). See also [Ruiz v. U.S. Atty Gen.](#), 73 F.4th 852 (11th Cir. 2023) (Judge Newsom's concurrence). For introduction and background see ILRC [Who Decides? Overview of Chevron, Brand X, and Mead Principles](#) (2011).

<sup>41</sup> *Matter of Cabrera*, 24 I&N Dec. 459, 460–62 (BIA 2008), *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

*be a critical moment* in defending immigrants. Counsel should plead to a new offense rather than take additional time on an offense that will become an AF if a year or more is imposed.

The sentence must be imposed as a result of a conviction. To avoid an AF or other consequences, one strategy is to have the person spend time in custody before sentencing, then waive credit for the time served in exchange for a shorter imposed sentence. The waived pre-sentencing custody time does not count as an imposed sentence, but credited time does. Custody ordered for a delinquency disposition is not an imposed sentence, because delinquency is not a conviction for immigration purposes.

**Post-conviction relief to reduce or eliminate an imposed sentence.** With some exceptions, immigration authorities will not give effect to a criminal court order that reduces or eliminates an imposed sentence unless the ruling is based on legal error.<sup>42</sup> This means that vacatur for cause, such as PC 1473.7, should be used to reduce or vacate a sentence, rather than general motions or PC 18.5(b).

The exception is that legal error might not be required if the conviction/s occurred on or before October 25, 2019 and (a) the person had requested a sentence modification from a judge on or before that date and the judge granted it at any time, or (b) the person had reasonably and detrimentally relied on the availability of a sentence modification from the judge at the time of plea, on or before that date. The requirement of legal error also does not apply to a court's correction of a mistake, e.g., a clerical error. See 8 CFR § 1003.55 and see ILRC, *EOIR Regulation Limits Retroactivity of Matter of Thomas & Thompson Regarding Sentence Modifications* (Nov. 2024).

### **3. Potential Sentence, Crimes Involving Moral Turpitude, and PC 18.5(a).**

In cases involving crimes involving moral turpitude (CIMT), the *potential* sentence, meaning maximum possible sentence, is important. Having a potential sentence of 364 days rather than one year on a CIMT is required to (1) maintain eligibility for non-LPR cancellation, or (2) avoid deportability based on one CIMT conviction committed within five years of admission. (But to qualify for the petty offense exception to the CIMT inadmissibility ground, a potential sentence of up to one year / 365 days is sufficient.) See **Part D**, CIMTs.

Under PC 18.5(a), no California misdemeanor has a potential sentence of more than 364 days. But for immigration and other federal purposes, the 364-day maximum only applies to misdemeanor convictions received on or after January 1, 2015, while “one year” misdemeanor convictions from before that date still have a maximum possible sentence of a year.<sup>43</sup> If a client is at risk due to a pre-2015 CIMT that has a potential sentence of a year, they should try to vacate the conviction for cause under PC 1473.7 or other vehicle, and replead to a different offense (preferably a non-CIMT). See **Part N** for resources on California post-conviction relief.

### **4. Felony/Misdemeanor Designation, PC 17(b)(3), and Proposition 47.**

Conviction of a misdemeanor rather than a felony is critical in at least two immigration contexts. First, eligibility for Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) is barred by conviction of any felony; hopefully, reduction to a misdemeanor cures that. Second, as discussed above, for immigration purposes a California “one-year” misdemeanor has a potential sentence of 364 days if the conviction was on or after January 1, 2015, or 365 days if it was before that date. In some cases, getting a CIMT to a misdemeanor with 364 days will avoid triggering a CIMT penalty.

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<sup>42</sup> *Matter of Thomas, Matter of Thompson*, 27 I&N Dec. 674 (AG Oct. 15, 2019) (“*Thomas & Thompson*”).

<sup>43</sup> See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. Feb. 24, 2021).

**Section 17(b)(3).** In removal proceedings, some ICE attorneys are asserting that PC 17(b)(3) no longer has effect in immigration proceedings, despite the fact that the Ninth Circuit has long upheld its effectiveness. Immigration advocates have strong arguments against this,<sup>44</sup> but defenders should act conservatively: for new charges, they should seek alternative defense strategies that do not rely on a later reduction to a misdemeanor, and instead focus on attempting to get a misdemeanor designation at sentencing or relatively soon after. For prior convictions that pose harm, it is safer to seek a vacatur such as PC 1473.7 than to rely on PC 17(b)(3).

Assume that Prop 47 reductions to a misdemeanor **do not have immigration effect**. Based on the reasoning in federal cases,<sup>45</sup> ICE has a strong argument that the conviction remains a felony for immigration purposes even after reduction under Prop 47. If your client has a prior felony conviction that endangers them, try to vacate it pursuant to PC § 1473.7 or other vacatur vehicle, regardless of whether the offense already has been redesignated under Prop 47. See **Part N**, Post-Conviction Relief.

### 5. Time actually served

How much time the person physically spent in custody due to a conviction, regardless of the term imposed, is important in a few contexts. Significantly, it is a bar to establishing good moral character (GMC) to have actually served 180 days or more in custody as a result of a conviction during the period for which GMC must be shown. The period for which GMC must be shown varies depending on the relief.<sup>46</sup> Many undocumented people would be able to apply for cancellation of removal for non-permanent residents. For that, the person must not have served 180 days in jail within the ten years before applying for the relief. For naturalization, the person must not have served 180 days within the five years, or in some cases three years or less, before applying. Like an imposed sentence, the served sentence only includes time *as a result of a conviction*. It does not include pre-hearing custody time if credit for time served is waived and does not include time served in delinquency proceedings. But unlike the imposed sentence standard, time served does *not* include time the judge imposed but that the person did not serve, e.g., where execution was suspended, the person got early release, or other factors. If the person needs to establish GMC but has served over 180 days, those days could be erased if the underlying conviction is vacated for cause.

### 6. Sentence Enhancements, and CRC 4.420 and Upper Term

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<sup>44</sup> ICE has argued that *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (AG 2019) (“*Thomas / Thompson*”) compels immigration authorities *not* to give effect to a criminal court order reducing a felony to a misdemeanor under PC § 17(b)(3), unless the order is based on legal error. But in *Thomas/Thompson* the Attorney General interpreted INA § 101(a)(48)(B), which solely addresses the definition of an *imposed* sentence, e.g., a court order reducing an individual’s sentence from 201 days to 170 days. It does not govern potential sentence or offense level, and *Thomas/Thompson* says nothing about those issues. ICE quotes statements from *Thomas/Thompson* about “sentences,” wrongly claiming that they apply to potential sentence and offense level. This would also contradict federal law. Federal courts have declined to give effect to a state law that reduces offense level or potential sentence, but only in cases of a retroactive application of a new law, passed after the conviction occurred, that purports to change the law that existed at the time of conviction. This does not apply to PC 17(b)(3), which has been California law for decades. See, e.g., [Velasquez-Rios v. Wilkinson](#), 988 F.3d 1081, 1088 (9th Cir. 2021) (finding that immigration authorities may not give effect to retroactive application of PC 18.5(a), a new law that purported to apply retroactively to past convictions; but finding PC 17(b)(3) to be distinguishable because “the ‘wobbler’ statute permitted a range of possible classifications for the offense *at the time of conviction.*” (Emphasis supplied).

<sup>45</sup> See, e.g., discussion of *U.S. v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016) (federal criminal court refuses to give effect to Prop 47 felony reduction) at [Velasquez-Rios](#), *supra* at 1086.

<sup>46</sup> See discussion of GMC, as well as forms of relief that require it, at ILRC, [§ N.17 Immigration Relief Toolkit](#).

Two different sentencing factors might add damaging elements to the offense of conviction.

**-A “substantive” sentence enhancement** is a proven fact that can increase the defendant’s statutory punishment. See, e.g., PC 12022.7, providing an additional sentence of three years if the defendant inflicted great bodily injury, and PC 186.22(b), providing additional sentence if the defendant committed a felony to benefit a gang. In *Apprendi v. New Jersey*<sup>47</sup> the Supreme Court held that a substantive sentence enhancement that increases the defendant’s punishment must either be admitted by the defendant or proven beyond a reasonable doubt. The Board of Immigration Appeals (BIA) found that the level of proof required by *Apprendi* means that the basis for the sentence enhancement can be treated as a new element added to the original offense.<sup>48</sup> Adding a new element *might* change an offense that was not a CIMT, COV, AF, etc. into one that is. For example, the Board of Immigration Appeals (BIA) held that adding a PC 186.22 gang enhancement turned a conviction for vandalism into a CIMT. The Ninth Circuit declined to follow that, and found that 186.22 did not turn a conviction for possessing a weapon into a CIMT. See decisions at **PC 186.22(b)** in the Chart.

Defenders must try to avoid a substantive enhancement that may change an immigration neutral plea into a harmful one. One strategy is to try to avoid any enhancement by negotiating a plea to additional, immigration neutral offenses with consecutive sentences, to get to the required amount of time. Another strategy, best done with an expert, is to find some combination of enhancement and offense that remains immigration neutral.

**-California Rules of Court (CRC) and the upper term.** Most California felony offenses carry a “triad” of potential sentences: the upper, middle, and lower amount of time. Under CRC 4.420(b), a criminal court can sentence to the upper term only if (1) certain “circumstances in aggravation” justify this, and (2) the facts underlying those circumstances were stipulated to by the defendant or found true beyond a reasonable doubt in a jury or court trial. These circumstances in aggravation may relate to the crime itself (CRC 4.421(a)), the defendant’s history (4.421(b)), or factors set out in a vague residual clause (4.421(c)). For immigrant defendants, the concern is that the circumstances might be treated as additional elements of the offense, similar to a sentence enhancement under *Apprendi*. For immigrants, the best “circumstances” are those describing the defendant’s record (prior conviction or sentence, unsuccessful probation, etc.) because they do not add new information about the crime or new “elements” to the offense. Or, the defense can consider offering to plead to an additional immigration neutral offense (e.g., PC 415), with sentence to run concurrently, to qualify for 4.421(a)(7), getting a concurrent sentence. See discussion of other CRC factors at the beginning of the Chart.

#### **J. Adam Walsh Act: Crimes against a Minor that Block Family Visa Petitions**

An LPR or USC who is convicted of certain crimes against a minor, including if those crimes were committed abroad,<sup>49</sup> can be barred from obtaining lawful status for their immigrant spouse or child (from filing a “family visa petition.”) Certain juvenile delinquency findings also will qualify.<sup>50</sup> See [§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act](#) and see 8

<sup>47</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>48</sup> *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007).

<sup>49</sup> See 73 FR 38030, 38050-51 (July 2, 2008) (if conviction was obtained in a country where there were sufficient safeguards for fundamental fairness and due process that conviction will be recognized by the U.S. government).

<sup>50</sup> The definition of conviction for this purpose only includes certain juvenile delinquency dispositions. The juvenile must have been at least 14 years old at the time of committing the offense, and the offense must have been the same as or more severe than aggravated sexual abuse described in 18 USC § 2241, or attempt or conspiracy to commit that. 18 USC § 2241 prohibits crossing a state border to engage in a sexual act with someone under the age of 12, or sexual conduct by force or threat with a person between age 12 and 15.

USC § 1154(a)(1)(A)(viii) (bar) and 30 USC § 20911(7) (specified offenses). An offense can be a “specified offense against a minor” even if it involves an undercover police officer posing as a minor, rather than an actual minor.<sup>51</sup> The AWA can be applied to crimes committed prior to the enactment of the Act.<sup>52</sup> In determining whether a conviction falls under the Adam Walsh Act, the adjudicator uses the circumstance-specific approach.<sup>53</sup>

## K. Mandatory Detention without Bond

1. **Group 1: Admitted into the U.S. with a visa or as an LPR, subject to deportation grounds**
2. **Group 2: In the U.S. without having been admitted, subject to inadmissibility grounds (Group 2 includes the Laken Riley Act)**

For an in-depth discussion of mandatory detention, see ILRC, *Understanding Mandatory Detention* (Dec. 2025), at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

Our goal as defenders often is to craft a criminal disposition that does not hurt our client’s immigration status: it does not block them from applying for lawful immigration status or take away the lawful status or protections they already have. But there are other key goals as well. One is to avoid a disposition that will subject the client to a severe penalty: extended detention in ICE facilities throughout their removal proceeding, with *no right to a bond hearing*. This is called “mandatory detention.”

Federal law requires that certain non-U.S. citizens who are in removal (deportation) proceedings shall be detained by ICE throughout those proceedings, with no right to a bond hearing or release on bond. The detention can go on for weeks, months, or even years if an order is appealed. During this time the detained person can be held anywhere in the country, in inhumane conditions, and the great majority go through their removal case without counsel. Most immigrants subject to mandatory detention will give up their legal claim and ask for deportation.

Mandatory detention is generally triggered if the person has certain criminal convictions or comes within the “terrorism” removal grounds. See INA § 236(c), 8 USC § 1226(c). This discussion will focus on the criminal grounds. Defenders may be able to protect the person against mandatory detention by avoiding certain convictions.

***Defenders should consider mandatory detention triggers for all noncitizen clients, not just those who already are in removal proceedings.*** No one is subject to any ICE detention unless they are in removal proceedings, have a prior removal order, are in the process of expedited removal, or are deemed by DHS to be “seeking admission” (referred to as “arriving aliens”). But we see many clients who are not in removal proceedings now but could end up there in the future, because they lack lawful status or will end up losing the status that they have. Where possible, we want to avoid mandatory detention triggers now for all noncitizens.

To analyze what the client needs in terms of mandatory detention, first we need to determine which group the client is in. We will discuss them in terms of Group 1) Admitted to the U.S. and potentially deportable, and Group 2) In the U.S. without admission and potentially inadmissible. See **Part A**, above. Based on their group, we see which offenses will trigger mandatory detention and try to avoid those.

1. **Group 1: Admitted into the U.S. with a Visa or as an LPR, and Therefore Subject to Deportation Grounds**

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<sup>51</sup> *Matter of Izaguirre*, 27 I&N Dec. 67 (BIA 2017).

<sup>52</sup> *Matter of Jackson*, 26 I&N Dec. 314 (BIA 2014).

<sup>53</sup> *Matter of Introcaso*, 26 I&N Dec. 304, 309 (BIA 2014).

**a. Who is in this group?**

Individuals who entered the U.S. with a visa or as LPRs, or who “adjusted status” to LPR while they were in the U.S., have been admitted. In the Fifth and Ninth Circuits, some people who were “waved in” by officials at the border also are deemed to be admitted.<sup>54</sup>

People who were admitted and who are put in removal proceedings will be charged with being **deportable**, under INA § 237, 8 USC § 1227. See Section A, above.

**b. What triggers mandatory detention for people who are charged with deportability?**

If the person is in removal proceedings and charged with being deportable under INA § 237, they are subject to mandatory detention if they were *convicted* of any of the following deportable offenses (see INA § 237(a)(2)):

- Two or more crimes involving moral turpitude (CIMT) that did not arise as part of a single scheme;
- A single CIMT that the person committed within five years of admission, for which a sentence of one year or more was *imposed* (this is slightly different from the CIMT deportation ground, which penalizes such a conviction with a maximum *possible* sentence of a year or more);
- An aggravated felony;
- Any offense relating to a federally defined controlled substance, with an exception for one or more convictions arising from a single incident involving possession for personal use of 30 grams or less of marijuana;
- A qualifying firearm offense; and
- Federal convictions relating to espionage, sabotage, treason, and similar activities.

See INA 236(c)(1)(B), (C).

This list does not include two of the criminal grounds of deportability, which are the domestic violence ground (see **Part E**) and the human trafficking ground. See INA § 237(a)(2)(E), (F). A person who comes within these two grounds will be deportable but will not be subject to mandatory detention.

**2. Group 2: In the U.S. Without Having Been Admitted (Entry without Inspection, or Paroled in) and Therefore Subject to Inadmissibility Grounds**

Individuals who entered the U.S. without being admitted and who are put in removal proceedings will be charged with being **inadmissible** under INA § 212, 8 USC § 1182. These people are subject to mandatory detention in either of two ways: by coming within the crimes-based (or terrorism) grounds of inadmissibility, and/or having certain pending charges or convictions under the Laken Riley Act.

**a. Who is in this group?**

**The person was not “admitted”** to the U.S. This includes:

- People who entered without inspection (EWI), meaning entered surreptitiously, avoiding inspection at the border

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<sup>54</sup> See *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017) and see discussion at ILRC, [Mandatory Detention](#), at Part II.A.1. The BIA disagrees but will apply this rule in the Fifth and Ninth Circuits.

- People who were “paroled” into the U.S., including people who were given permission to physically enter the U.S. but were not technically “admitted”
- If the person was not admitted but then was granted some status or protection that is less than lawful permanent residence (e.g., Temporary Protected Status (TPS), DACA, asylum), they still have not been admitted.
  - If they traveled outside the U.S. on the status and were paroled back in, they still have not been admitted.
  - If they no longer qualify for that status or protection, they may be removable. See the next paragraph.
- The law is unsettled on people who were granted U or T visas. If a person entered the U.S. with a U, T, or some other visa, they were “admitted,” and therefore are subject to the grounds of deportability under INA § 237. But if they entered without a visa and were later granted a U or T visa while in the U.S., they might be found to be inadmissible, rather than deportable, if they lose their U or T visa status (due to expiration or revocation). See USCIS Policy Alert. But the law is unsettled, as the courts may disagree with USCIS’ interpretation. For U and T visa holders who entered without a visa, defenders should avoid a criminal disposition that might trigger either inadmissibility or deportability, since it is unclear at this time which removal ground would apply to this group of individuals.

***The person is in removal proceedings, charged with being inadmissible under INA § 212.*** This group includes people who EW’ed or were paroled in, and are removable now because:

- They never obtained lawful status or protection
- They did obtain limited lawful status or protection such as TPS, asylee status, DACA, or other, but they *no longer qualify* for that status - for example, because TPS was ended for their country, or they were convicted of a disqualifying conviction. They will go back to being treated as a person who was not admitted to the U.S. and who lacks lawful status.

**b. What Offenses Trigger Mandatory Detention for People Who Were Not Admitted?-**

There are two ways that these people can become subject to mandatory detention. The first way is if the person comes within the criminal (or terrorism) grounds of inadmissibility. The second way is if they come within the 2025 Laken Riley Act.

**i. Inadmissible under the criminal grounds**

A person in removal proceedings under INA § 212 is subject to mandatory detention if they come within any of the following crimes-based grounds of inadmissibility at INA § 212(a)(2):

- A conviction of, or qualifying admission to immigration authorities that they committed, one crime involving moral turpitude (CIMT), *unless* it comes within the petty offense or youthful offender exception (see **Part D**, CIMTs);
- A conviction of, or a qualifying admission to immigration authorities that they committed, an offense relating to a federally defined controlled substance (see **Part F**, Controlled Substances);
- Conviction of two or more offenses of any kind with a total sentence imposed of at least five years (see **Part I**, Sentencing);

- Being found to have engaged in prostitution in the last ten years or coming to the U.S. to engage in prostitution or commercialized vice.
- Immigration authorities know or have “reason to believe” that the person aided or participated in:
  - Trafficking in a controlled substance (plus certain family members who benefitted from this) (see **Part F**, Controlled Substances);
  - Severe trafficking in persons (plus certain family members who benefitted from this);
  - Money laundering;
- Foreign government officials who committed severe violations of religious freedom;

## ii. Conviction, arrest, or pending charges under the Laken Riley Act of 2025

This section will review the Laken Riley Act (LRA), its effect on California offenses, and suggestions for defense strategies in criminal and immigration proceedings. For further discussion, see the useful NIPNLG *Practice Alert* on the LRA and see ILRC, *Understanding Mandatory Detention*.<sup>55</sup>

**WARNING: LRA was enacted in 2025 and it is not yet clear how it will be interpreted. It imposes mandatory detention based on very minor factors such as being *charged with shoplifting, theft, or burglary*. The best defense will be if criminal court defenders can strategize with their clients about how to avoid these LRA triggers. Your client can try to fight a finding of mandatory detention based on a complex legal defense, but they will do it while detained by ICE and in many cases without access to counsel.**

As of January 29, 2025, certain immigrants are subject to mandatory detention if they come within provisions of the LRA. This applies to immigrants who are in the U.S. *without having been admitted*, for example because they entered without being inspected at the border (“entered without inspection”) or were paroled in. It applies to some people seeking entry at the border.<sup>56</sup> **The LRA does not apply to LPRs, nor to other individuals who have been admitted into the U.S.** who would be placed in removal proceedings charged with being deportable under INA § 237, as discussed above in (A)(5). It created a new subsection of the INA<sup>57</sup> that imposes mandatory detention if the person:

is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person.

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<sup>55</sup> See NIPNLG, *The Laken Riley Act’s Mandatory Detention Provisions* (February 5, 2025), <https://nipnl.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf> and see ILRC, *Understanding Mandatory Detention* (Dec. 2025) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

<sup>56</sup> INA § 236(c)(1)(E)(i) states that these provisions apply to a person who “is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title.” This may include people have sought admission at the border but have no valid passport or visa (e.g. many asylum seekers). This should not apply to someone who already has been admitted by using visa fraud. Because that person was admitted, even illegally, they are subject to removal based on a charge of deportability, i.e., they are in what we are calling Group 1. Additionally, although an LPR with certain convictions can be charged with inadmissibility after travel abroad, they would still not fall under LRA because they would not be inadmissible under these specific grounds.

<sup>57</sup> See INA § 236(c)(1)(E), 8 USC § 1226(c)(1)(E).

The above offenses have “the meanings given such terms in the jurisdiction in which the acts occurred.” INA § 236(c)(2). In other words, “burglary” for this purpose is defined by California PC § 459, not by a federal definition of burglary.

**(I) Defenses relating to specific California offenses that trigger mandatory detention under the LRA**

The named LRA offenses are “burglary, theft, larceny, shoplifting, or assault of a law enforcement officer, or any crime that results in death or serious bodily injury to another person.” When translated to the California penal code, this affects many different statutes; see the Chart for alerts on specific offenses that may trigger LRA. This section will recommend alternative pleas and provide ideas for arguments for removal defense activists.

Unfortunately, some of the LRA offenses are important “immigration-neutral” alternative pleas that defenders have used for years to avoid immigration consequences. For example, sections 459 (burglary), 191.5 (vehicular manslaughter), and 192(b) (involuntary manslaughter) all are offenses that do not make the person inadmissible, but now they will trigger mandatory detention. So, even though these offenses could be a good choice to keep the client eligible to apply for immigration relief, that must be weighed against the terrible effect of being detained throughout the proceedings. If there is a hard choice, consult an expert.

For more information on each of the below offenses, see the Chart.

**Note: If nothing else, a plea to attempt or conspiracy to commit the below offenses might avoid the LRA.** The LRA does not list “attempt,” and at least one district court has suggested that conviction for attempt does not cause mandatory detention under the LRA.<sup>58</sup> Conspiracy is another option. There are two caveats. First, if the offense is immigration-neutral because it can be committed by recklessness or negligence (see, e.g., PC 192(a)), a plea to attempt will destroy that defense by making the conduct intentional in the Ninth Circuit. Second, until there is a published decision on “attempt” or “conspiracy” and the LRA, each immigrant must litigate this defense. That may be impossible for detained, unrepresented people. So, a plea to attempt or conspiracy is far better than nothing, but it is no guarantee.

▪ **“Burglary, theft, larceny, shoplifting”**

Sections 459.5, 459, 484, and offenses that use the PC 484 definition such as PC 487, all come within the LRA. To avoid this, defenders should seek an alternative disposition. Removal defense advocates need to be able to argue that the alternative does not trigger the LRA.

**Plead to an unrelated offense.** The best alternative plea is an offense that has nothing to do with theft or burglary and clearly does not come within the LRA. Consider any misdemeanor or felony that does not come within the crimes inadmissibility grounds (because that also would trigger mandatory detention for this group) and that hopefully does not otherwise harm the person’s immigration situation. Likely options would be loitering or trespass as in PC § 647(h), 602, 602.5, 594, or (if the sentence will be under a year) PC 32. These alternatives also do not permit the jailer to transfer the person straight to ICE. See **Part L, Protections Against Law Enforcement Cooperation with ICE.**

**Plead to a similar but distinguishable offense.** These may ultimately not be subject to LRA, but ICE likely will allege that they trigger mandatory detention, so they will require litigation. Until there is a published

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<sup>58</sup> [Salgado v. Francis](#), No. 25-CV-6524 (VEC), 2025 WL 2806757 (S.D.N.Y. Oct. 1, 2025).

decision upholding the defense, they may be of little use to unrepresented detained immigrants. This section includes ideas for removal defense advocates who argue these cases.

The goal is to find offenses that avoid the California definition of theft at PC 484. (In California, larceny is defined as the same as theft. PC 490a.) Under PC 484, the essential elements of theft by larceny are: (1) the defendant took possession of personal property owned by someone else; (2) the defendant did so without the owner's consent; (3) when the defendant took the property, he or she intended to deprive the owner of it permanently or substantially; and (4) the defendant moved the property, even a small distance, and kept it for any period of time.<sup>59</sup>

**Receipt of stolen property, PC 496, 496d:** In California, PC 496 and related offenses (e.g. 496.5, 496.6) are listed in the larceny chapter of the penal code but describe receipt or possession of stolen property, which arguably is not a theft or larceny offense. Numerous California courts have clarified the distinction between PC 496 and theft/larceny.<sup>60</sup> Theft requires a taking and carrying away, not receiving, or possessing items that have been stolen.<sup>61</sup> Furthermore, theft under PC 484(a) requires an intent to deprive the owner permanently or substantially, while PC 496, 496d can be committed with intent to deprive the owner only temporarily. Immigration cases have long recognized this distinction.<sup>62</sup>

**Vehicle Taking, VC 10851** may be a taking, but it is not a “theft” offense because it can involve only a temporary taking or driving of a vehicle, while California theft requires intent to permanently or substantially deprive the owner of the property.<sup>63</sup>

**Identity theft, PC 530.5(a), (d)(2), or false personation, PC 529(a)(3):** Section 530.5(a) prohibits obtaining another’s personal identifying information and using it for any unlawful purpose. It does not require *any* intent to deprive or defraud the person or gain any tangible benefit, and it does not require that any resulted. Identity theft is not actually a theft offense: the information did not have to be unlawfully obtained, just unlawfully used.<sup>64</sup> Section 529(a)(3) has similar advantages. See discussion in the Chart.

- **“Assault of a law enforcement officer”**

Defenders should conservatively assume that any conviction of assault or battery against any law enforcement officer, including offensive touching without injury, triggers the LRA. Defenders can consider the following alternatives and immigration advocates can make the following arguments.

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<sup>59</sup> CalCrim No. 1800. See also *People v. Catley* (2007) 148 Cal.App.4th 500, 505.

<sup>60</sup> See e.g. *People v. Tyler* (1968) 258 Cal.App.2d 661, 667 (receiving stolen property is not within the offense of burglary); *People v. Moore* ((1963) 220 Cal.App.2d 737, 740; *In re Stanley* (1928) 90 Cal.App. 132, 134–136 (not the same as or included in larceny); *People v. Ward* (1895) 105 Cal. 652, 659–660 (same) *People v. Disperati* (1909) 11 Cal.App. 469, 481–482 (same); *People v. Hall* (1985) 168 Cal.App.3d 624, 626 (same).

<sup>61</sup> “‘Taking,’ as required for larceny, has two aspects: (1) achieving possession of the property, known as “caption,” and (2) carrying the property away, or “asportation.” *People v. Gomez* (2008) 74 Cal.Rptr.3d 123, 43 Cal.4th 249, 179 P.3d 917, habeas corpus dismissed 2009 WL 1481115.

<sup>62</sup> See *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009) (PC 496(a)); *Alvarez-Reynaga v. Holder*, 596 F.3d 534 (9th Cir. 2010) (PC 496d(a))

<sup>63</sup> See *People v. Bullard* (2020), 9 Cal.5th 94, 103-4 (VC 10851 is broader than theft and does not distinguish between intent to permanently or only temporarily deprive); *People v. Davis*, (1998) 19 Cal.4th 301, 305 (theft in CA requires intent to permanently deprive); *People v. Butler* (1967) 65 Cal.2d 569, 572–573, overruled on other grounds by *People v. Tufunga* (1999) 21 Cal.4th 935, 956, (“The taking of property is not theft in the absence of an intent to steal ... i.e., an intent to deprive an owner permanently of his property”).

<sup>64</sup> *People v. Jimenez* (2020) 9 Cal.5th 53, 63.

- Bargain to drop the assault offense and plead to other conduct that also occurred, e.g., PC 370, 415, 594. These are not within the LRA and should not require litigation.
- Plead to PC 148(a)(1), which can be committed without assault, threat, or touch – for example, by going limp during an arrest at a peaceful demonstration.<sup>65</sup> Hopefully this will not require litigation. Do not plead to PC 69.
  - Sections 148(a)(2), (3), removing an officer’s weapon, also do not require assault. These are felony offenses which may be useful in a plea - but avoid a sentence imposed of a year or more or they will become aggravated felonies.
- Plead to an offense that lists types of victims other than law enforcement officers, e.g., PC 241(c), 243(b), (c), and specify a different type of victim who is not a peace officer, for example an EMT.
- Plead to simple assault or battery against any person, PC 241(a), 243(a).<sup>66</sup> Under the categorical approach, the “law enforcement officer” victim must be an element of the offense to trigger the LRA, not just a fact. But to prevent litigation, try to identify on the record a specific victim other than a law enforcement officer.
- **“Any crime that results in death or serious bodily injury to another person”**

Any offense that has death or serious bodily injury to another as an element will trigger LRA penalties. See, e.g., PC 243(d), manslaughter.

Immigration advocates will argue that offenses without those elements do not trigger the LRA, because the LRA requires a) that death or serious bodily injury is an element of the offense, not merely a fact or incidental outcome; and b) that the offense must “result[ ] in death or “serious bodily injury” as defined under California law.

**Argue that death or injury must be an element of the offense:** Under the categorical approach, “any crime that results in death or serious bodily injury to another person” means that these must be *elements* of the offense. A factual finding that someone was injured during the incident does not suffice. However, DHS might assert that this phrase means that *any* conviction involving an incident that resulted in serious bodily injury or death will qualify, even if that was not an element of the offense. In federal law terms, DHS would be departing from the usual “categorical approach” (where the *elements* of the state offense must meet the federal statutory definition) and instead would apply the “circumstance-specific” approach (where some part of the federal definition can be shown by the underlying facts of the state conviction, not just the elements of the state offense) Immigration advocates should argue against this.<sup>67</sup>

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<sup>65</sup> *In re Bacon* (1966) 240 Cal. App. 2d 34, 53, (“We hold, therefore, that a person who goes limp and thereby requires the arresting officer to drag or bodily lift and carry him in order to effect his arrest” violates PC § 148.), disapproved of on other grounds by *In re Brown* (1973) 9 Cal. 3d 612.

<sup>66</sup> A plea to battery, PC 243, has no advantage over a plea to assault, PC 241. All batteries also include assault.

<sup>67</sup> Consider that immigration and federal criminal courts apply the categorical approach with only a few exceptions. Under Supreme Court precedent, the circumstance specific approach is an exception to be used only when “to apply a categorical approach .... would leave [the federal definition] with little, if any, meaningful application.” *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009). In *Nijhawan*, the Supreme Court considered an aggravated felony definition of “an offense that ... involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.” 8 USC 1101(a)(43)(M)(i). The Court found that Congress must not have meant the categorical approach to be applied, since there were no state or federal statutes relating to fraud or deceit with a \$10,000 threshold. Therefore, Congress must have intended the \$10,000 requirement to depend on the underlying facts of

**Argue that the term “results in death or serious bodily injury” must be construed precisely.** The statute makes clear that death or serious bodily injury must have *resulted*. An offense that creates a “**risk**” that this might result – for example, PC 246, 273a(a) – does not qualify. An “**attempt**” to cause this result does not qualify, so that attempted PC 243(d) should not. (But note that PC 243(d) has potentially serious immigration consequences as a COV and possible CIMT; see Chart.) “Attempt” may work for offenses that require intent like 243(d), but beware of adding it to offenses that can be committed by recklessness or negligence, like manslaughter.<sup>68</sup>

Removal defense advocates can argue that “**serious bodily injury**,” defined at PC 243(f)(4), is different from “**great bodily injury**,” defined in PC 12022.7(f)(1). Because the LRA requires “serious bodily injury” as defined under state law, arguably only PC 243(d) and 148.10, which use that specific term, qualify. See discussion in the chart at § 12022.7.

## (II) LRA defenses that apply to any offense: Dismissed charges, Convictions from before January 29, 2025; Delinquency charges and findings

Here is a summary of the defenses. Removal defense advocates should see further discussion of these and other defenses in the NIPNLG *Practice Alert* on the LRA, cited above.

**Dismissed charges.** The LRA states that a person who “is charged with, is arrested for ... or admits” any of the enumerated offenses is subject to mandatory detention. This targets people arrested by ICE early in the criminal law process.

If instead that charge is dismissed and, if needed, a new charge is instated and/or plea entered, LRA mandatory detention should not apply. The statute uses the present tense (says “is charged,” not “has been charged”). While there is no published precedent, some federal district courts have entered favorable decisions in petitions for habeas corpus on this question, finding that if charges relating to a qualifying LRA offense are dismissed, the noncitizen cannot be subject to mandatory detention for merely having been charged with the offense in the past.<sup>69</sup>

Example: Andrea is arrested for PC 459.5, released, and then picked up by ICE in a raid. Right now she is subject to the LRA and has no right to a bond hearing to get out of ICE detention. But if she and her defender can successfully move to dismiss the 459.5 and plead guilty to a new charge of a non-LRA offense, she should no longer be subject to LRA and should be entitled to a bond hearing.

There still is a hurdle: hopefully her family or immigration counsel (if any) knows where she is being held and can get the criminal record showing that the charge was dismissed before the immigration judge.

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the case. The opposite is true for the phrase “death or serious bodily injury.” This term is employed and defined in federal law (see 21 USC 802(25)) and in several state laws. See, e.g., Cal. PC 243(d), Texas PC 1.07(17), (30a), (46); Ariz. Rev. Code 28-6752 (serious physical injury). Therefore, there is no justification for applying a circumstance specific approach as was done in *Nijhawan*.

<sup>68</sup> For example, pleading to “attempt” to commit vehicular or involuntary manslaughter (if that were allowed) might prevent those offenses from triggering the LRA, but it also would severely increase their immigration consequences by adding a *mens rea* of intentional conduct rather than gross negligence.

<sup>69</sup> See in accord *Helbrum v. Williams*, No. 4:25-cv-00349-SHL-SBJ, 2025 WL 2840273, at \*1 (S.D. Iowa, Sept. 30, 2025) (finding the person is no longer subject to LRA mandatory detention: “After charges are dismissed, it is no longer accurate to say that a person ‘is charged with’ theft (present tense)”; *E.C. v. Noem*, No. 2:25-CV-01789-RFB-BNW, 2025 WL 2916264 (D. Nev. Oct. 14, 2025). See also discussion in the NIPNLG *Practice Advisory* on the LRA, cited above.

As you can see, by far the best result is to get the charge dismissed *before* the client goes into ICE custody, so that the client can quickly request a bond hearing. Vulnerable defendants charged with LRA enumerated offenses, in areas with aggressive ICE arrests, might consider remaining in criminal custody until the LRA charge can be dismissed and the case resolved in a better way.

**Committed before January 29, 2025.** There is a strong argument that the LRA should not be applied retroactively to offenses committed before (or at least convictions imposed before) the law's effective date of January 29, 2025. Congressional enactments are presumed to apply prospectively only, absent clear language showing Congress intended to apply the law retroactively, and especially if the new law may take away vested rights or impose new obligations that were not present under prior law.<sup>70</sup> That is the case with the LRA. See NIPNLG, *The Laken Riley Act's Mandatory Detention Provisions* (Feb. 2025).

**Should not apply to delinquency charges or dispositions.** The LRA refers to "offenses" and "convictions," which are criminal law terms. There is a very strong argument that it does not apply to civil delinquency, in alignment with longstanding precedent in immigration law that treats acts of juvenile delinquency as distinct from adult criminal acts. Still, because this is a new law with unclear drafting, and ICE (both prosecutor and police) is engaged in overreaching, juvenile defense attorneys also may wish to craft pleas to help their clients avoid dispositions that ICE would assert subject them to mandatory detention under the LRA. For further discussion, see ILRC, *The Laken Riley Act and Juvenile Delinquency* (Feb. 2025).

#### L. Protections Against Law Enforcement Cooperation with ICE

In California, state law restricts how local law enforcement agencies may engage with federal immigration enforcement agencies and activities. One of the most significant ways that CA law enforcement may interact with federal immigration issues is in responding to ICE detainers, which request that a jail or law enforcement agency transfer someone in their custody to ICE.

Jails and local police may cooperate with ICE detainers in limited circumstances. While the default rule is that law enforcement may not respond to ICE detainer requests, there is a long list of exceptions. If a defendant falls under one of the enumerated exceptions, the jail may contact ICE when that person would otherwise be released (whether on bail, when new case(s) are dismissed, to a program, when a sentence has concluded, or otherwise). In those circumstances the jail may also transfer the person directly to ICE custody if ICE shows up at the time of release. Although the detainer form requests that the jail keep holding the person to allow ICE time to arrive, the jail is never permitted to prolong detention based on an ICE detainer. If a person is transferred to ICE, they will most likely be detained in immigration detention and put in removal proceedings, although it depends on the nuances of their immigration and criminal history. For more advice and strategies on dealing with ICE detainers in a criminal case, see ILRC, *Immigration Detainers* (Dec. 2021), N.5A at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

California Govt Code § 7282.5 lays out the enumerated exceptions under which law enforcement may notify ICE of the release day/time and/or transfer someone from their custody to ICE under SB54. The exceptions include a long list of penal codes, enumerated in § 7282.5(a)(3). Generally, the exceptions apply when defendant has been:

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<sup>70</sup> Congressional enactments are presumed to be prospective only, *Vartelas v. Holder*, 566 U.S. 257, 273 (2012), and "will not be construed to have retroactive effect unless their language requires this result," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[W]hen a statute has no effective date," as is true of the LRA, "absent a clear direction by Congress to the contrary, [it] takes effect on the date of its enactment." *Johnson v. United States*, 529 U.S. 694, 702 (2000) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)).

- arrested and held to answer, or convicted, for a serious (PC1192.7(c)), violent (PC667.7(c)), or state prison felony;
- convicted within the past 5 years of a misdemeanor for certain enumerated wobbler offenses listed in §7282.5(a)(3)
- convicted within 15 years of a felony for certain enumerated wobbler offenses listed in §7282.5(a)(3)
- a current registrant on the California Sex and Arson Registry
- convicted of a federal crime that meets the definition of an aggravated felony or is the subject of an outstanding federal felony arrest warrant

The enumerated offenses may lawfully permit notification and transfer to ICE. Defenders should:

- 1) check whether a charge is listed in 7282.5(a)(3);
- 2) ensure that the charge is not a straight misdemeanor wrongly enumerated in 7282.5<sup>71</sup> and
- 3) advise clients accordingly.

Note that these rules do not apply to CDCR; individuals released from state prisons should expect to be transferred to ICE if they are subject to removal. For that reason, defenders should beware that state prison terms will be very likely to result in deportation, particularly for clients who have little or no chance at winning immigration relief. If a person has no avenues for relief in immigration court, their best immigration defense may be to stay out of ICE's custody entirely. For more detailed explanation of SB54 in general, see ILRC, *SB 54 and the California Values Act* (2018) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

#### **M. Survivors of Domestic Violence, Sexual Abuse, and Human Trafficking**

As defenders, we know that many of our clients encounter the criminal system because they have been victims of crimes themselves, including sometimes being exploited to commit crimes, known as “forced criminality.” For instance, some people who work as laborers unlawfully growing marijuana or in any other unlawful work (mules, drug dealers, sex workers, etc.), are victims of human trafficking and are committing crimes under duress – coerced either by the trafficker or as a direct result of their victimization (e.g., taking drugs due to despair).<sup>72</sup> California has passed laws to protect some criminal defendants who are survivors of human trafficking (HT) or of intimate partner or sexual violence (DV). Some of these people may be eligible for immigration status under federal law, as well. This section will provide basic information and resources. For further discussion see ILRC, *New Options for Survivors of Trafficking and Domestic Violence* (Nov. 2022) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

**Definitions:** For this purpose, “human trafficking” does not refer to taking people across national borders, but rather is broadly defined as labor or services obtained by overcoming the will of the victim. “Coercion” does not require direct coercion by the trafficker or attacker; one must only be “coerced to commit the offense as a direct result” of the victimization. For example, a trafficked juvenile who illegally carried a knife with the idea of preventing the trafficker from putting him into a car was

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<sup>71</sup> See AG Bonta's Clarification, <https://oag.ca.gov/publications#immigration>); see also ILRC, *SB 54 and the California Values Act* (2018) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).

<sup>72</sup> See, e.g., *Hope for Justice, The Nexus Between Drug Trafficking and Human Trafficking* (June 10, 2024), <https://hopeforjustice.org/news/the-nexus-between-drug-trafficking-and-human-trafficking/>.

potentially eligible for the defense, because he was “coerced to commit the offense as a direct result of being a human trafficking victim.”<sup>73</sup>

**Defense to a criminal charge.** See Cal. Pen. Code §§ [236.23](#), [236.24](#). This is a potential defense to any charged offense/s other than “violent felonies” as defined at PC § 667.5(c). Defendants must show that they were “coerced to commit the offense as a direct result of being a victim of [HT or DV] at the time of the offense and had a reasonable fear of harm.” For example, San Francisco public defenders have hung jury trials on behalf of Hondurans charged with drug sales, by showing the Hondurans were trafficked and coerced to sell fentanyl.

**Defense strategy:** Even if one cannot win a complete defense, availability of the defense may help to bargain for a plea that is immigration-neutral or otherwise beneficial. For example, a group of undocumented Chinese defendants who had worked in a marijuana grow house were charged with H&S C 11358 and 11359, which are immigration “aggravated felonies” even after Prop 64. By demonstrating that defendants fit the profile and were likely victims of human trafficking, Sacramento public defenders were able to negotiate pleas to misdemeanor PC 32, a far better plea for a noncitizen. This was accomplished even though the survivor defense itself could not go forward because the survivors were afraid to testify against their traffickers.

**Post-conviction relief.** There are post-conviction vacatur vehicles for those who committed an offense while being a victim of human trafficking, domestic violence, or sexual violence, if they committed the offense as a direct result of this. See PC 236.14, 236.15. These vacatur vehicles eliminate convictions for immigration purposes, in compliance with *Matter of Pickering*, because they are based on findings of legal invalidity due to the victims lacking the necessary mental state to commit the offenses. Consult with a PCR expert, if needed, and see a more detailed explanation of these vehicles and a sample vacatur order at ILRC, [New Options for Survivors of Trafficking and Domestic Violence](#) (Nov. 2022). For PCR generally see ILRC, [Overview of California Post-Conviction Relief](#) (July 2022).

**Immigration status/Pending applications:** One way to identify a client who may be eligible for this defense is to see if they may have or be seeking “U status,” “T status,” or relief under VAWA. See immigration remedies below. It is possible that the client will have already acquired evidence of the abuse and psychological evaluations for their immigration application, thereby easing the burden on defenders to obtain it for negotiation or trial.

**Immigration remedies:** Alternatively, if a defender realizes through their representation that the client might be eligible for one of these immigration forms of relief, the evidence gathered and findings obtained in criminal court can help their client acquire immigration status. In some cases, the defendant may be eligible for a “T visa” for sex or labor trafficking victims; a “U visa” for victims of certain crimes in the US, including violent or sexual assault; and VAWA relief, as victims of domestic violence by a USC/LPR parent, USC/LPR spouse, or USC child.<sup>74</sup> In this process, one first applies for a temporary, non-immigrant T or U visa and later for lawful permanent residence (a green card). It is possible that the person’s children and (innocent) spouse can obtain status as well. Some nonprofit agencies are experts in these applications and can offer free help to the defendant. For information on relief, see CAST materials as well as the brief summary of requirements for, and criminal record bars to, T visas, U visas, and VAWA in [§ N.17 Immigration Relief Toolkit](#), and see a variety of materials at <https://www.ilrc.org/u-visa-t-visa-vaawa>, which also has links to webinars and manuals.

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<sup>73</sup> See *In re D.C.*, 60 Cal. App. 5th 915, 919 (2021).

<sup>74</sup> See 8 USC §§ 1101(a)(43)(T), (U), 1229b(b)(2).

**Survivor benefits:** Additionally, those found to be survivors of human trafficking are also eligible for AB 629 victim compensation benefits for income loss compensation (up to \$20,000), record sealing, specialized social service support, and other benefits. See Clearing Criminal Records for Trafficking Survivors by Loyola Law School, Sunita Jain Anti-Trafficking Initiative (SJI).

**Resources:** For the criminal case, CAST (Coalition to Abolish Slavery and Trafficking) in Los Angeles is an excellent resource. See [www.castla.org](http://www.castla.org). They offer free technical assistance to California criminal defenders, immigration advocates, and others, as well as free training. They may refer you to nonprofits in your area that could take the person's immigration case.

#### **N. Post-Conviction Relief for Immigrants: California Resources**

Thousands of non-U.S. citizens living in California have prior, legally invalid convictions that could wrongly subject them to severe, automatic immigration penalties such as detention, deportation, and permanent family separation. Fortunately, California has some excellent post-conviction relief (PCR) laws, including for immigrants, that make it possible to return to criminal court to vacate invalid convictions.

More California lawyers are becoming experts in this field and literally saving lives. *This is specialized legal work*, so we strongly urge counsel to take advantage of these free specialized resources.

- For information about available PCR, see ILRC, Overview of California Post-conviction Relief for Immigrants (July 2022) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).
- For a worksheet and step-by-step guide to use to analyze your case, see ILRC, Worksheet: California Post-Conviction Relief for Immigrants (May 2024) at [www.ilrc.org/crimes-summaries](http://www.ilrc.org/crimes-summaries).
- See other resources at <https://www.ilrc.org/immigrant-post-conviction-relief>.

You also can purchase the in-depth ILRC manual, California Post-Conviction Relief for Immigrants: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes (August 2022) at <https://store.ilrc.org/>. This manual provides step-by-step guidance to successfully preparing for and litigating motions to vacate in criminal court to withstand legal challenges in immigration court and before the BIA, including sample motions to vacate, declarations, and orders, as well as immigration motions to reopen and terminate.

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**DISCLAIMER.** This chart does not constitute legal advice and is not a substitute for individual case consultation and research, as required by Pen. Code 1016.3. The law governing the immigration consequences of crimes can be complex and volatile. Some of the analyses are supported by on-point precedent (often cited in endnotes), while in other cases they represent the opinion of experts as to what is most likely to be held. Further, *the law is fast-changing*. An immigration case resolution that is the best option today might change for the worse (or become even better) in the future. Do research or consult experts for key updates in the law occurring after October 15, 2025. Advise defendants about these risks. The best protection for defendants is to see a qualified immigration expert as soon as they possibly can, so that they can apply for lawful immigration status or naturalization to U.S. citizenship as soon as they are advised that it is safe to do so, and/or get training on “Know Your Rights” when dealing with ICE.

Immigration advocates should note that the chart is written conservatively, to warn criminal defense counsel away from offenses that *might* be or become dangerous and toward those that are safer. Just because the chart identifies an offense as having a consequence, do not necessarily concede. Often there are strong immigration defenses or good precedent; these often are outlined in endnotes or in linked documents. The chart should be considered a starting, not an ending, point for investigating immigration defenses.