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PROCEDURE AND PRACTICE

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48

Representing the Noncitizen Criminal Defendant

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I. [§48.1] INTRODUCTION; IMPORTANCE OF COMPLETE ADVICE; OTHER RESOURCES

For a noncitizen, the immigration consequences of a conviction can be far worse than the criminal penalties. Consequences can include deportation, permanent ineligibility for lawful immigration status, extended periods of immigration detention, and permanent separation from United States citizen family members. With proper planning, however, defense counsel representing the noncitizen in a pending criminal case may be able to obtain a disposition that creates no serious immigration consequences.

Because even relatively minor offenses (*e.g.*, possession of a small amount of narcotics) can carry drastic immigration consequences, an extremely aggressive defense may be required for a noncitizen. Defense counsel may need to bargain for an unusual plea or sentencing agreement, or take the case to trial. Some defendants are willing to risk or sacrifice all other considerations to avoid adverse immigration consequences.

Defense counsel who fail to investigate and advise a noncitizen defendant of the *specific* immigration consequences of a guilty plea may be found to have provided ineffective assistance of counsel. The court must advise a defendant pleading guilty or no-contest that the plea could result in deportation, denial of naturalization, or exclusion from reentry. Pen C §1016.5. A similar general warning, however, is not sufficient advice by counsel. Defense counsel are also required to advise their clients concerning the specific immigration consequences in the defendant's own case. See, *e.g.*, *People v Barocio* (1989) 216 CA3d 99, 264 CR 573

(failure to advise regarding JRAD is ineffective assistance at the sentencing stage); *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (counsel did not seek to negotiate favorable plea and failed to request JRAD; ineffective assistance).

This chapter will point out common problems and strategies for overcoming them. It cannot be overemphasized, however, that this area of the law changes very quickly and is very complex. This chapter is an overview only rather than an exhaustive discussion. Counsel should obtain expert advice and/or consult an in-depth guide on the subject. Some thorough texts in the area are listed below.

➢**Note:** Prosecutors should also become familiar with this material to better deal with the prosecution of undocumented persons.

Ideally, defense counsel should consult with an immigration attorney. For references, counsel should contact the American Immigration Lawyers Association, 1400 I St. NW, Ste. 1200, Washington DC 20005, (202) 371–9377, the local bar association, or the National Immigration Project of the National Lawyers Guild, (617) 227–9727. For a national directory of community agencies offering free or low-cost immigration assistance, write the National Immigration Law Center, 1636 W. 8th St., Ste. 205, Los Angeles, CA 90017, (213) 487–2531 ($5). While community agencies generally cannot advise criminal defense counsel on questions involving the immigration consequences of convictions, they may be able to accept an indigent defendant's immigration case, once the criminal issues have been resolved.

The Immigrant Legal Resource Center in San Francisco will provide consultation to attorneys and agencies on the immigration consequences of conviction, for a fee. There is a lower fee for public defenders. For information, call (415) 255–9499. The address is 1663 Mission St. Ste. 602, San Francisco, CA 94103.

➢**Note:** Some offices of the public defender recruit attorneys with immigration experience to hold in-staff training and to serve as resources to other public defenders.

Defense counsel should also consult an in-depth research guide, such as California Criminal Law and Immigration (1991), available from ILRC, 1663 Mission St., Ste. 602, San Francisco, CA 94103, (415) 255–9499 ($62.50), or Immigration Law and Crimes (1991), available from Clark Boardman & Co., 375 Hudson St., New York, N.Y. 10014, (212) 645–0215 ($95). Other research guides are listed in Update §1.19. See also Brady, *New Developments in Representation of Noncitizen Defendants,* 19–2 CACJ Forum 30.

II. MAJOR CONSIDERATIONS AND GOALS

A. [§48.2] Chart: Grounds for Deportation, Exclusion and Preclusion From Establishing Good Moral Character Related to Crimes

See Update §48.7 for explanation of deportation, exclusion, and good moral character.

Offense	*Deportation (8 USC §1251(a); INA 241(a))*	*Exclusion (8 USC §1182(a); INA 212(a))*	*Good Moral Character (8 USC §1101(f); INA 101(f))*
Narcotics	1 conviction (30 gm. marijuana exception). §1251(a)(2)(B)(i); INA 241(a)(2)(B)(i). Possible aggravated felony.[A]	1 conviction or admission of elements of one offense (30 gm. marijuana waivers). §1182(a)(2)(A)(i); INA 212(a)(2)(A)(i). "Reason to believe" was or is trafficker. §1182(a)(2)(C); INA 212(a)(2)(C).	Same as exclusion.
Crimes Involving Moral Turpitude	2 convictions, not single scheme; or 1 conviction within 5 yrs entry with sentence of 1 yr or more. §1251(a)(2)(A)(i), (ii); INA 241(a)(2)(A)(i), (ii).[B]	1 conviction or admission; petty offense exception for 1 conviction, 6 month or less sentence, with 1 yr maximum possible sentence, or admission of 1 conviction with 1 yr maximum possible sentence. §1182(a)(2)(A)(i) (I), (ii); INA (a)(2)(A)(i)(I).	Same as exclusion; convicted of murder.
Prostitution	None	Engaging in, procuring, supported by prostitution (not customers) within last 10 years. §1182(a)(2)(D); INA 212(a)(2)(D).	Same as exclusion.
Firearms Offenses	Convicted of purchasing, selling, using, carrying, etc., firearm or destructive device. §1251(a)(2)(C); INA 241(a)(2)(C).[C]	None	Aggravated felon (trafficking in firearms).

Offense	*Deportation (8 USC §1251(a); INA 241(a))*	*Exclusion (8 USC §1182(a); INA 212(a))*	*Good Moral Character (8 USC §1101(f); INA 101(f))*
Sentence	5 yr sentence for crime of violence is aggravated felony; (also, person who has actually served 5 years for one or more aggravated felonies is ineligible for 212(c) relief).	5 yr sentence for 2 or more convictions. §1182(a)(2)(B); INA 212(a)(2)(B).	Same as exclusion ground; or physically confined 180 days.
Alien Smuggling	Before, at time of, or within five years of entry, aid or encourage alien to enter U.S. illegally; waiver for some aliens. §1251(a)(1)(E); INA 241(a)(1(E).	At any time has encouraged, aided alien to enter illegally; waiver for some aliens. §1182(a)(6)(E); INA 212(a)(6)(E).	Same as exclusion.
Drug Addiction and Abuse; Alcoholism	Is or has been after entry a drug addict or abuser. §1251(a)(2)(B)(ii); INA 241(a).	Current drug addict or abuser; alcoholic and therefore person with mental or physical defect posing a threat. §1182(a)(1)(A)(ii), (iii); INA 212(a)(1)(A)(ii), (iii).	A habitual drunkard.
Aggravated Felony	Conviction of aggravated felony (certain drug offenses, crime of violence with five-year sentence, firearms trafficking, money laundering, murder). §1251(a)(2)(A)(iii); INA 241(a)(2)(A)(iii)	Aggravated felons excludable for 20 yrs after deportation. §1182(a)(6)(B); INA 212(a)(6)(B).	Aggravated felons ineligible.

[A] Conviction for most narcotics offenses beyond first conviction of simple possession is an aggravated felony. 8 USC 1101(a)(43); INA 101(a)(43).

[B] Murder conviction, money laundering, or conviction of crime of violence for which five-year sentence was imposed is an aggravated felony. 8 USC §1101(a)(43); INA 101(a)(43).

[C] Conviction of trafficking in firearms is aggravated felony. 8 USC §1101(a)(43), INA 101(a)(43).

This chart was prepared by the Immigrant Legal Resource Center, 1992, and reproduced with permission.

See also provisions relating to visa fraud, diplomatic immunity, child abduction in violation of a custody decree, AIDS, mental or physical defects, Communist and subversive beliefs, and gambling discussed in Update §48.15.

1. [§48.3] List: Quick Overview of Main Defense Goals

➢ **Note:** Counsel should determine what the defendant's immigration status is and review the defendant's entire criminal history before making a disposition.

This section highlights crimes and dispositions that usually have a significant impact on a defendant's immigration status. Defense counsel must research each individual defendant's case to determine the best outcome.

- □ Avoid conviction of an offense relating to firearms or of a drug-related offense other than simple possession of 30 grams of marijuana. See Update §48.9–48.10.
- □ Try to avoid a conviction by obtaining diversion (see Update §48.8), obtaining treatment as a juvenile (see Update §48.4), or pursuing a direct appeal (see Update §48.8).
- □ If first conviction of a crime involving moral turpitude is inevitable: Obtain suspended imposition of sentence or sentence under the one-year or six-month limits. Obtain a short period of probation so that the conviction can be expunged or plea withdrawn as quickly as possible. See Pen C §§1018, 1203.4, 1203.4a, 1203.45. Do not apply for a judicial recommendation against deportation (JRAD) except in certain limited circumstances. See Update §48.18.
- □ Avoid admissions of prostitution, drug use, trafficking, or addiction,. See Update §48.16.
- □ Avoid admissions relating to crimes involving moral turpitude, other than the crimes charged. See Update §§48.7, 48.11–48.12.
- □ Obtain a disposition in which the defendant will not actually serve 180 days or more jail time, to preserve eligibility to establish good moral character. See Update §48.7.
- □ Avoid a conviction of a felony or a third misdemeanor for lawful temporary residents or others in the amnesty program or for family members of amnesty recipient (who may be eligible for "Family Unity"). Avoid conviction of a felony or two misdemeanors for persons applying for

Temporary Protected Status (available at this writing to some persons from El Salvador, Lebanon, Liberia, and Somalia). See Update §48.17.

□ Avoid aggravated felon status. Any drug conviction beyond a first conviction for simple possession may be classed as an aggravated felony under immigration law, with the possible exception of manufacturing. See Update §48.13. Also avoid conviction for trafficking in firearms or destructive devices, any crime of violence for which a sentence of five years is imposed (obtain suspended sentence, or sentence for four years, 364 days), money-laundering offenses, or murder. Illegal reentry of an aggravated felon can result in a 15-year federal prison term. 8 USC §1326(b)(2). See Update §48.5.

□ Conviction of accessory after the fact under Pen C §32 may avoid immigration consequences of a drug offense or crime involving moral turpitude. See Update §48.13.

2. [§48.4] Main Goals When Representing Juveniles

Review defendant's entire criminal history before making a disposition. Dispositions in juvenile proceedings do not constitute convictions for immigration purposes. *Matter of C.M.* (BIA 1953) 5 I&N Dec. 327. Thus, admitting to a felony or misdemeanor crime involving moral turpitude or a firearms offense will not make a juvenile deportable or excludable, and will not count for purposes of the three-misdemeanor/one-felony bar to amnesty and other programs.

Juvenile dispositions, however, might be held to bring a noncitizen within a ground of exclusion or deportation that does not depend on a conviction. A noncitizen whom the INS has reason to believe is a drug trafficker is excludable. A noncitizen who has engaged in prostitution is excludable. 8 USC §§1182(a)(1)(A)(ii), 1251(a)(2)(B)(ii). More worrisome is the new ground of deportation and exclusion for persons who are or have been drug addicts or drug abusers. 8 USC §§1182(a)(1)(A)(ii), 1251(a)(2)(B)(ii). The definition of drug abuser has not been firmly established, but currently some U.S. consulates define it essentially as equal to more than one-time experimentation with an illegal drug. In juvenile proceedings the best result is not to admit to any drug offense. If an admission is inevitable, it is better to admit to possession than to possession for sale, or sale. Admissions of drug addiction might be held to be a basis for exclusion or deportation.

➢**Note:** It may be possible to avoid these immigration consequences by sealing the juvenile court record because the INS is thereby precluded from seeing the record. See Welf & I C §826. There may, however, be other sources of information concerning the case, in which event sealing the record may be ineffective. Juveniles who are tried as adults may also be eligible for sealing of records, under Pen C §1203.45, or Welf

& I C §§1772 and 1179. This may eliminate conviction of a drug offense as well as a crime involving moral turpitude. *Matter of Andrade* (BIA 1974), 14 I&N Dec. 651; *Matter of Lima* (BIA 1976) 15 I&N Dec. 661; see *Matter of Ozkok* (BIA 1988) 19 I&N Dec. 546. See 1 California Juvenile Court Practice §§13.7–13.20 (Cal CEB 1981). See Update §48.15.

B. [§48.5] Diagnostic Checklist for Determining Possible Effects of Conviction on Selected Categories of Persons

To determine the specific goals in the defense of a noncitizen criminal defendant, defense counsel first must determine the defendant's current immigration status and/or potential for obtaining status through future application. The goal of an immigration-minded defense is to avoid destroying current status, if any, and to avoid destroying eligibility for potential immigration relief, if any is possible.

The following checklist may assist in analyzing counsel's case. For more diagnostic aids, see California Criminal Law and Immigration, chap 10.

➢**Note:** Many kinds of immigration relief are described in this section. For definitions and discussion of those forms of relief, see §48.21.

□ *Is defendant a U.S. citizen (without knowing it)?*

No U.S. Citizen can be deported or excluded for any reason. All persons born in the United States are citizens (except for children of foreign diplomats); others may have acquired citizenship at birth in other countries. A defendant whose parent or grandparent was a U.S. citizen or who was a permanent resident under 18 when a parent was naturalized should be referred for immigration counseling to determine whether citizenship was passed on.

□ *Is defendant a currently undocumented person?*

Undocumented persons include those who entered surreptitiously or fraudulently; also included are those with expired visas. These undocumented persons are deportable for lack of lawful immigration status. 8 USC §1251(a)(1). As long as they do not become excludable or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from deportation. Examples of relief include suspension of deportation, or immigration through a relative's visa.

□ *Has defendant lived in the U.S. since January 1, 1972?*

The defendant may be eligible to apply for registry as a permanent resident. He or she must not be excludable, and must establish good moral character.

□ *Does defendant have a parent, spouse, sibling or child over 21 who*

is a U.S. citizen, or a spouse or a parent (if defendant is unmarried) who is a permanent resident?

The defendant may be eligible to immigrate through a visa petition at some point. Defendant must not be excludable. Defendant may also need to qualify for voluntary departure, which requires good moral character.

□ *Has defendant lived in the United States for at least seven years or ten years?*

The defendant may be eligible for suspension of deportation. Good moral character is required. Even a defendant convicted of a drug offense may be eligible to apply for suspension if he or she has maintained good moral character and presence in the United States for ten years since the conviction.

□ *Is defendant an applicant (although not yet a lawful temporary resident) for or a lawful temporary resident under an amnesty program?*

The defendant should be referred to a local immigration attorney or community agency to investigate the case. Defendant must not become excludable or acquire one felony or three misdemeanor convictions. In addition, family members of amnesty recipients can apply for "family unity" status.

Amnesty applicants may possess a laminated card marked I–688 or I–688A.

Participants in the amnesty and family unity programs will be disqualified and denied if they become excludable or convicted of three misdemeanors or one felony. This rule will not apply upon a lawful permanent resident.

□ *Is defendant a permanent resident or one with lawful immigration status?*

These include lawful permanent residents ("green card" holders), and persons holding lawful nonimmigrant visas, such as students, tourists, temporary workers, or business visitors. Noncitizens with lawful immigration status can lose their status and be expelled from the United States if they become deportable. However, permanent residents and some persons with nonimmigrant status can remain lawfully in the United States even if they are excludable, as long as they are not deportable. Excludable aliens should not leave the United States because they may be denied permission to reenter. Also, excludable aliens may be ineligible for years to establish good moral character.

□ *Has defendant been a lawful permanent resident for less than seven years?*

Defendant's first priority is not to become deportable. If defendant becomes deportable, this could cause loss of lawful status and deportation.

Defendant's second priority is not to become excludable or ineligible for establishing good moral character. An excludable alien who leaves the United States may be barred from reentry. A permanent resident who cannot establish good moral character is ineligible for U.S. citizenship.

➢**Note:** If defendant is close to the seven years, that is a factor in favor of going to trial and filing an appeal. The seven years may run while appeal is pending, before the conviction is final. See below.

□ *Has defendant been a lawful permanent resident for seven years or more?*

Lawful permanent residents of seven years are eligible to apply for a special waiver of most grounds of deportation and exclusion. 8 USC §1181(c); INA §212(c). This device is called a "212(c) waiver." It may excuse almost any conviction other than one relating to a firearm or destructive device, or one or more convictions of an aggravated felony resulting in a total period of imprisonment of five years.

□ *Does defendant come from a country of civil war or human rights abuses?*

Defendant may wish to apply for political asylum/withholding of deportation. Defendant must not be convicted of an aggravated felony or a "particularly serious crime."

In the alternative defendant will also benefit from applying for voluntary departure, in the alternative, which requires a showing of good moral character.

➢*Is defendant charged with a drug offense, a "crime of violence" with a sentence imposed of five years, trafficking in firearms, murder, or a money laundering offense?*

These offenses are "aggravated felonies" for immigration purposes. Conviction will make the defendant ineligible for most forms of relief, including political asylum, and subject to other penalties. See Update §48.13.

If defendant is convicted of one of the above aggravated felonies and deported, an illegal reentry can result in a 15-year federal prison term. 8 USC §1326(b)(2). If defendant is convicted of any other felony and deported, an illegal reentry can result in a federal prison term of five years. 8 USC §1326(b)(1). (An illegal reentry after deportation, but with no felony record, can result in a federal prison term of two years. 8 USC §1326(a).)

C. [§48.6] Checklist for Interview of Noncitizen Criminal Defendants

➢**Note:** Counsel should inform defendant of the right to refuse to speak

with INS officials, or to answer questions put by any authority about country of birth, nationality, immigration status, or manner of entry into the United States. This right is based on the fifth amendment, since certain immigration violations also carry criminal penalties. See, *e.g., Bong Youn Choy v Barber* (9th Cir 1960) 279 F2d 642; *Estes v Potter* (5th Cir 1950) 183 F2d 865. In addition, under Pen C §1016.5, judges cannot force a defendant to reveal immigration status.

- □ 1. What language (and dialect) does the defendant speak? Is an interpreter needed? See Update §48.23. Often, defendants who do not need an interpreter for office or jail interviews will need one for the more formal court sessions.
- □ 2. Where was the defendant born?
- □ 3. What is the defendant's immigration status? (*e.g.*, Is or has been a lawful permanent resident? Permanent resident for seven years? Lawful temporary resident? Lived in U.S. for seven years? Lived in U.S. since January 1, 1972? Undocumented?). If the defendant has any papers or documents from the INS, counsel should *make photocopies* of the documents. The copies may prove essential in analyzing the defendant's immigration status.
- □ 4. Were any of the defendant's parents or grandparents, spouse, child, brother, or sister U.S. citizens? Lawful permanent residents?
- □ 5. Is the defendant trying to qualify for amnesty?
- □ 6. Has the defendant been deported or excluded before?
- □ 7. Has there been any INS involvement with the defendant on this case or earlier? Does the defendant have a pending immigration case or application? Is there an immigration hold at the jail?
- □ 8. Is the charge related to controlled substances?
- □ 9. Is the charge for a crime involving moral turpitude?
- □ 10. Does the pending charge involve prostitution, gambling, or a firearm or explosives?
- □ 11. Is there evidence of or has the defendant made admissions relating to:
  - □ Communist or subversive activities, or illegal demonstrations?
  - □ Crimes involving moral turpitude?
  - □ Drug addiction or abuse?
  - □ Drug trafficking?
  - □ HIV positive status?
  - □ Insanity?

- □ Lying under oath to obtain immigration benefits?
- □ Prostitution?
- □ Smuggling of noncitizens, even family members?
- □ Visa fraud?

□ 12. What prior convictions does the defendant have in California or in other jurisdictions or countries?

III. [§48.7] Description of Deportation, Exclusion, and the Bar to Establishing Good Moral Character

See the chart in Update §48.2 for grounds for deportation, exclusion, and preclusion from establishing good moral character.

Under the Immigration and Nationality Act (INA), a noncitizen's criminal record may create adverse immigration consequences by bringing the noncitizen within a ground of deportation, exclusion from legal admission, or preclusion from establishing good moral character for citizenship and other purposes. As discussed in Update §48.16, not only convictions but other evidence of criminal acts may create adverse immigration consequences.

Deportation

The grounds for deportation provide the bases for expelling a noncitizen from the United States. See 8 USC §1251(a); INA 241(a). A noncitizen whom the Immigration and Naturalization Service (INS) has cause to believe is deportable may be brought before an immigration judge for deportation proceedings. Only an immigration judge can order deportation, although the INS can pressure an alien to accept "voluntary departure." Many noncitizens with criminal records are brought directly from jail to immigration detention via an immigration hold or detainer. Once before an immigration judge, the noncitizens may accept deportation, contest the charge of deportability, or concede deportability but apply for some form of relief from deportation.

Exclusion

The grounds for exclusion provide the bases for excluding a noncitizen from admission to the United States. See 8 USC §1182(a); INA 212(a). An excludable noncitizen who attempts physically to enter the United States can be refused admission or brought under exclusion proceedings, even if the person is a lawful permanent resident ("green card" holder) or has other lawful status. A noncitizen who manages to enter the United States despite being excludable may be found deportable.

Also important is the fact that a noncitizen who is excludable is not eligible for some means of immigrating (acquiring permanent resident status). These means include the amnesty or legalization programs, immigration through a relative's or employer's visa petition, adjustment of status, and registry. Any undocumented person applying for lawful perma-

nent resident status must at some point meet either the grounds of exclusion or the closely related good moral character requirement, discussed below.

Crossover between deportation and exclusion

Several grounds for exclusion are similar but not identical to grounds for deportation, *e.g.*, a noncitizen with one conviction of a crime involving moral turpitude is excludable if the sentence was more than six months, and excludable and deportable if the sentence was a year or more. Some grounds for exclusion and deportation may be waived in certain circumstances at the discretion of an immigration judge or officer.

Preclusion from establishing good moral character

A noncitizen's criminal record can result in statutory ineligibility to establish good moral character. See 8 USC §1101(f); INA 101(f). A noncitizen who cannot establish good moral character is ineligible to apply for U.S. citizenship, and is also ineligible for some means of immigration or relief from deportation, including suspension of deportation, registry, and voluntary departure. See Update §48.17.

Good moral character need only be established for a certain amount of time, for each benefit, *e.g.*, the preceding five years for U.S. citizenship and for voluntary departure, the preceding seven years for suspension of deportation, and a "reasonable time" for registry.

The bar to establishing good moral character has several elements in common with the grounds of exclusions. A noncitizen may not establish good moral character if he or she is excludable under specified grounds, including those relating to crimes involving moral turpitude, controlled substances, prostitution, a five-year sentence for two convictions, or smuggling of aliens. 8 USC §1101(f).

Other requirements are unique to the good moral character bar and are not grounds of exclusion. To be able to establish good moral character, a noncitizen may not have been actually confined as a result of a conviction for over 180 days in the period during which good moral character must be shown. The 180-day period is strictly calculated and depends on actual time in jail, not on suspended imposition or execution of sentence. Finally, a noncitizen who is a habitual drunkard, has been convicted of murder or of two or more gambling offenses, or has given false testimony to receive immigration benefits is barred from showing good moral character. 8 USC §1101(f).

IV. CONVICTIONS AND SENTENCES WITH ADVERSE IMMIGRATION CONSEQUENCES

A. [§48.8] Definition of Conviction for Immigration Purposes

➢**Note:** The best case resolution is usually one that does not constitute a conviction, *e.g.*, diversion and juvenile adjudications.

In many cases, a person must have a final conviction of an offense to suffer immigration penalties. This section discusses alternative dispositions that do not constitute a conviction for immigration purposes and thereby may avoid adverse consequences.

➢**Note:** Some activities have immigration consequences whether or not there is a conviction—in particular, prostitution and drug addiction, abuse, and trafficking. See Update §48.16.

In *Matter of Ozkok* (BIA 1988) 19 I&N Dec. 546, the Board of Immigration Appeals (BIA) defined conviction as a disposition in which (1) there is entry of a plea of guilty or nolo contendere or an admission of facts sufficient to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty; and (3) final judgment of guilt may be entered if the person violates the terms of probation or fails to comply with the court's requirements, without further proceedings regarding the person's guilt or innocence. See Criminal Law and Immigration §2.6.

Diversion under California law is not a conviction because there is no adjudication of guilt. See Pen C §1000.5. Dispositions under diversion, deferred adjudication, or first offender programs in other states must be carefully analyzed under the test provided in *Ozkok* to see if a conviction has occurred.

A plea of guilty or no contest constitutes a conviction, even when imposition of sentence is suspended and technically no judgment of conviction has been entered. *Gutierrez v INS* (9th Cir 1963) 323 F2d 593; *Matter of Ozkok, supra.*

A disposition in juvenile proceedings does not result in a conviction. *Matter of C.M.* (BIA 1953) 5 I&N Dec. 327; see also *Matter of Ozkok, supra.* For information on representing juveniles, see Update §48.4.

A conviction is not final for immigration purposes unless direct appeals have been waived or exhausted or the appeal period has lapsed, according to *Matter of Ozkok, supra.* In some cases the need to avoid adverse immigration consequences permanently or for some period of time is an important factor in deciding whether to take a case to trial or appeal a conviction.

B. [§48.9] Conviction of Offense Related to Controlled Substances

➢**Note:** This section discusses conviction of controlled substance offenses. There are also immigration penalties for noncitizens who are or were drug addicts or abusers, or whom the INS has reason to believe are or were drug traffickers, even absent a conviction. See Update §48.16.

With few exceptions, drug convictions permanently destroy current lawful

immigration status and prevent the person from ever obtaining such status in the future. A noncitizen convicted of any offense related to controlled substances is excludable under 8 USC §1182(a)(2)(A)(i)(II), deportable under 8 USC §1251(a)(2)(B)(i), and barred from establishing good moral character under 8 USC §1101(f). These noncitizen convictions include convictions under state and federal laws as well as under laws of other countries. Controlled substances are defined in 21 USC §802; the list includes almost all illegal drugs as well as precursor and "essential" chemicals.

Moreover, conviction of almost any drug offense beyond a first conviction of simple possession is an aggravated felony under immigration law. This kind of conviction brings additional severe penalties beyond making the person deportable and excludable, *e.g.*, it may prevent any release under immigration bond and destroy eligibility for political asylum. See Update §48.13

Even conviction of the most minor drug offenses such as use or presence in a place where drugs are used will make the person deportable and excludable. *Matter of Hernandez-Ponce* (BIA 1988) Int. Dec. No. 3055. There is one exception: one conviction of simple possession of 30 grams or less of marijuana is not a basis for deportation or preclusion from establishing good moral character, and in most other contexts is subject to discretionary waiver. Counsel should ensure that the record states that the quantity was 30 grams or less. In addition, a lawful permanent resident of seven years or more convicted of a drug offense may apply for a discretionary waiver of deportability or excludability under 8 USC §1182(c) (INA 212(c)) (as long as the person does not *serve* five years in prison), and a conviction that is ten years old or more may be excused in an application for suspension of deportation. See the discussion in Update §48.17.

Conviction as an accessory after the fact under Pen C §32 might avoid immigration consequences of a drug conviction. See California Criminal Law and Immigration §2.7; Update §48.11.

Strategy:

- Make every possible attempt to avoid conviction of any offense related to controlled substances.
- Consider going to trial and appealing a conviction. This strategy is especially important for a permanent resident who has not yet acquired seven years of residency. Permanent residents of seven years who are convicted of a drug offense can at least apply for discretionary relief under INA 212(c). See Update §48.17.
- Seek juvenile status or diversion. In juvenile court, seek to obtain a finding only of possession, not of trafficking.
- Conviction as an accessory after the fact rather than as a principal might avoid immigration consequences. See Update §48.11.

C. [§48.10] Conviction of Offenses Involving Firearms or Destructive Devices

Conviction of any offense related to guns has severe immigration effects. A noncitizen is deportable if convicted in the United States "under any law of purchasing, selling, offering for sale, exchanging, using, owning, possession, or carrying . . . any weapon, part or accessory which is a firearm or destructive device." 8 USC 1251(a)(2)(C); INA 241(a)(2)(C). Defined in 18 USC §921(a)(3)–(4), "firearm" generally includes all types of guns and firearms (except antique firearms), frames and receivers, and mufflers and silencers. "Destructive device" includes bombs, grenades, rockets, missiles, mines, or similar devices, and parts used to convert these objects. There is an exception for antiques and devices not intended to be used as weapons.

➢**Note:** Conviction of *attempt* to commit such acts is not a basis for deportation under this section, and is an alternative safe plea.

This expansive definition was added by the Immigration Act of 1990. Persons who were brought under deportation proceedings before March 1, 1991, for a gun conviction may face a more limited definition of the ground. See discussion in California Criminal Law and Immigration §6.1.

Conviction of a firearms offense can be even more damaging than a drug conviction because persons who are deportable under this section are not eligible for §212(c) relief (discretionary relief from deportation and exclusion available to persons who have maintained lawful permanent resident status for seven years). See discussion in Update §48.17.

Conviction of trafficking in firearms is conviction of an "aggravated felony." See Update §48.13.

D. Crimes Involving Moral Turpitude

1. [§48.11] Definition of "Crime Involving Moral Turpitude"

Many minor and serious offenses are held to be crimes involving moral turpitude and carry serious immigration consequences. If a noncitizen is charged with any crime, counsel should do the following:

- Determine whether the charged offense involves moral turpitude and, if so, whether it is possible to plead to an offense that does not involve moral turpitude.
- Review the person's entire criminal record in all states and countries to see if the person has convictions and what they are for.
- For a defendant's first offense, try to obtain a sentencing disposition such as suspended imposition of sentence or 364 days or less (deportation), or six months or less (exclusion), that might avoid immigration consequences.

- Keep in mind the possibility of postconviction relief, such as expungement under Pen C §1203.4 for persons completing probation.

The term "crime involving moral turpitude" is commonly defined by case law in vague terms as "an act of baseness, vileness or depravity in the private and social duties" owed to society. It does not depend on misdemeanor or felony classifications nor on the severity of the punishment. Murder, rape, voluntary manslaughter, robbery, burglary, theft (grand or petty), arson, aggravated forms of assault, and forgery consistently have been held to involve moral turpitude. On the other hand, involuntary manslaughter, simple assault, and driving under the influence (at least when no injury occurs) have not. California Criminal Law and Immigration §4.9 (1991).

Whether a crime is one of moral turpitude (sometimes called "turpitudinous") is determined by case law of the Board of Immigration Appeals and United States Courts of Appeals. Counsel should consult immigration texts to determine whether a particular crime is one of moral turpitude. For California convictions, see California Criminal Law and Immigration (1991), an annotated chart of 70 sections of the California Penal Code; for federal or out-of-state convictions, see Kesselbrenner & Rosenberg, Immigration Law and Crimes, Appendix E. Information on how to obtain these books is in Update §1.19.

Whether an offense is considered to be turpitudinous depends on the elements of the code section violated, not the individual behavior of the defendant. A code section is considered a "divisible statute" if its terms encompass both crimes of moral turpitude and those not involving moral turpitude. Unless the record of conviction (the indictment, complaint or information, plea or verdict, and the sentence) shows the defendant was convicted under the turpitudinous section, immigration and reviewing courts must rule in favor of the noncitizen. *Matter of C.* (BIA 1953) 5 I&N Dec. 65, 71. When a defendant is convicted under a divisible statute, counsel should attempt to keep the record of conviction clear of information that indicates that the defendant was convicted under the section involving turpitude. In some cases, bargaining for a substitute charge may be necessary.

➢**Note:** Conviction under Pen C §32 as an accessory after the fact to a drug or moral turpitude offense may not carry the same immigration penalties as conviction of the principal offense. This possible rule follows the reasoning in cases such as *Castaneda de Esper v INS* (6th Cir 1977) 557 F2d 79 (when principal offense involved drugs, misprision of felony under 18 USC §4 was not drug offense for immigration purposes). For further discussion, see California Criminal Law and Immigration §2.7.

2. [§48.12] Consequences of Conviction of Crime Involving Moral Turpitude

Deportation

A noncitizen is deportable under 8 USC §1251(a)(2)(A) if he or she has been convicted of:

- Two crimes involving moral turpitude not arising out of a single scheme of misconduct (see, *e.g., Gonzalez-Sandoval v INS* (9th Cir 1990) 910 F2d 614); *or*
- One crime involving moral turpitude when the conviction occurred within five years of last entry and the sentence imposed was one year or more.

➢**Note:** A suspended imposition of sentence, or a sentence of 364 days instead of one year, will prevent deportability under the second section. See below.

Exclusion

A noncitizen is excludable who is convicted of, or pleads guilty or no contest to, having committed one crime involving moral turpitude, unless the event comes within the petty offense or youthful offender exception. 8 USC §1182(a)(2)(A)(i). Under the petty offense exception, a noncitizen is not excludable who committed only one crime involving moral turpitude if the sentence actually imposed was six months or less and the maximum possible sentence for the offense was not more than one year.

➢**Note:** The petty offense exception to the moral turpitude exclusion ground is available to noncitizens who have committed only one crime. A previous conviction, even if expunged, will destroy eligibility for the benefit of the exception. *Matter of S.R.* (BIA 1957) 7 I&N Dec. 495. The Immigration Act of 1990 imposed the third requirement that the offense must have a maximum penalty of not more than one year. Thus a person convicted of a felony, with imposition of sentence suspended, is no longer eligible for the exception and will be found excludable. That person may, however, be found eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17.

The youth exception to the exclusion ground provides that a person who committed one such act while under the age of 18 is not excludable if the act or release from resulting imprisonment took place more than five years before the current application.

Effect of guilty plea

A guilty plea or plea of no contest results in a conviction, which triggers excludability. A guilty plea is also an admission. An admission of a crime

involving moral turpitude also is a basis for exclusion. See Update §48.11. It thus might appear that a plea of guilty, as an admission, would make the defendant excludable even if the conviction were eliminated. The INS, however, will generally accept the criminal court's dismissal or expungement of a moral turpitude conviction as binding both on the admission (plea) and the conviction. See *Matter of E.V.* (BIA 1953) 5 I&N Dec. 194.

➢**Note:** Noncitizens should also avoid admissions of turpitudinous offenses as part of a guilty plea, even to uncharged offenses. It is conceivable that the INS might obtain a record of these admissions and, because the criminal court had not disposed of a case relating to them, use them as a basis for exclusion.

Effect of suspending imposition of sentence or suspending execution of sentence

Both the exclusion and deportation grounds for crimes involving moral turpitude base penalties partly on the sentence *imposed.* One section of the deportation ground penalizes noncitizens who have *received* a sentence of a year or more, and the petty offense exception to the exclusion ground is not available if the sentence received was more than six months. *In cases of probation, counsel must seek suspended imposition of sentence,* rather than suspended execution of sentence, for these offenses. Suspended imposition of sentence is equivalent to zero sentence, even if the noncitizen spends time in jail as a condition of probation. *Matter of F.* (BIA 1942) 1 I&N Dec. 343. In contrast, when execution of sentence is suspended, the entire sentence is still counted, even if the noncitizen spends no time in jail. *Matter of Castro* (BIA 1988) Int. Dec. No. 3073.

When sentence is imposed for a *first offense* involving moral turpitude, counsel should seek one of the following as relevant:

- A sentence imposed of 364 days or less instead of a year to avoid deportability; or
- A sentence imposed of exactly 180 days or less to avoid exclusion if the maximum penalty for the offense was one year.

➢**Note:** Physically serving more than 180 days in jail as a result of any type of conviction, even if imposition of sentence was suspended, precludes defendant from establishing good moral character. See discussion in Update §48.7.

Consider prior record

Counsel must review the defendant's entire criminal history in the United States and other countries before fashioning a disposition. A prior moral turpitude conviction from another jurisdiction will be joined with

the instant conviction by the INS when calculating whether the person is deportable or excludable.

E. [§48.13] Aggravated Felons

The Anti-Drug Abuse Act of 1988 created a new deportation ground based on conviction of an aggravated felony.

Under 8 USC §1101(a)(43), aggravated felonies include:

- Murder;
- A drug trafficking offense, as defined under federal law;
- Trafficking in firearms or destructive devices (*e.g.,* bombs, grenades);
- Money laundering, as defined under federal law;
- A crime of violence resulting in a sentence of at least five years, if it was not a purely political offense;
- An attempt or conspiracy to commit any such act; and
- Offenses in violation of federal or state law. *Paxton v U.S. I.N.S.* (ED Mich 1990) 745 F Supp 1261. See also 8 USC §1101(a)(43) and *Matter of Barrett* (BIA 1990) Int Dec. No. 3131.

There is controversy over the effective date of 8 USC §1101(a)(43). Persons who committed offenses of money-laundering or crimes of violence before November 29, 1990, are not aggravated felons. IA 90, §501(b). Drug convictions received before November 18, 1988, arguably are not aggravated felonies. See discussion of this complex area in California Criminal Law and Immigration §9.3. But see *Alvarez-Mendez v Stock* (9th Cir 1991) 941 F2d 956 (without discussion, pre-November 18 1988 conviction considered to be aggravated felony).

Murder

There is not yet case law on this subject, but basic definitions in criminal law should apply. First and second degree murder should be held to be an aggravated felony, but manslaughter should not.

Drug offenses

Under 18 USC §924(c)(2), "drug trafficking crime" means any felony "punishable" under the Controlled Substances Act (21 USC §§801–904), the Controlled Substances Import and Export Act (21 USC §§951–966), or the Maritime Drug Law Enforcement Act (46 USC App §§1901–1904).

What California drug offenses are drug-trafficking crimes under the federal definition? The test is whether the California offense is exactly analogous to an offense punishable as a felony under one of the federal acts listed in the aggravated felony definition. Thus the California offense must contain the same elements as an offense listed in the federal laws; and the corresponding federal offense must be punishable as a felony. See *Matter of Barrett, supra.* Counsel should be alert for instances in which the federal and state offenses differ. California offenses that are

not aggravated felonies (although they still are grounds for deportation and exclusion) arguably include:

- A first conviction for simple possession of any controlled substance is not a drug-trafficking crime because, under federal law, the offense is punishable as a misdemeanor. 21 USC §844. It is irrelevant that possession of certain substances is punishable as a felony under California law; the test is whether the corresponding federal offense is a felony.
- A second conviction for possession may be an aggravated felony because it can be punished as a felony under federal law. 21 USC §844(a). Therefore, a second conviction of simple possession under California law may be an aggravated felony.

➢**Note:** Federal law requires that, in order for a second conviction of simple possession to be punishable as a felony, the prosecutor must file an information stating the previous convictions to be relied on. 21 USC §851(a)(1). Therefore, if a state prosecutor does not file such a warning of sentence enhancement, immigration counsel can argue that the conviction should not be deemed punishable under federal law and therefore is not an aggravated felony.

Manufacture

Federal law punishes a person who knowingly or intentionally manufactures drugs. However, the California statute proscribing manufacture does not require knowledge. Compare Health & S C §11379.6 with 21 USC §841(a)(1). See also *People v Telfer* (1991) 223 CA3d 1194, 28 CR 913. Therefore a conviction for manufacturing under the California statute arguably should not be held to be an aggravated felony.

➢**Note:** If immigration considerations are paramount, conviction of a trafficking offense inevitable, and conviction of being an accessory not available, then manufacture may be the best plea to avoid aggravated felon status.

Importing into the state

A federal offense punishes importation of drugs into the United States, but not into a state. The California offense punishes importation of drugs into the State of California. Arguably, the state offense is not an aggravated felony. Compare Health & S C §11379 ("imports into this state") with 18 USC §952.

Transporting

Transporting is a felony offense under California law but is not an offense listed under the three federal acts. A plea to this offense might prevent classification as an aggravated felon. See, *e.g.*, Health & S C §§11352, 11360.

➢**Note:** Because many statutes proscribe sales, furnishing, and transportation in the same sentence, the record should clearly reflect that the defendant was convicted specifically of transportation. However, if the record is genuinely unclear, it can be argued that this should be construed in defendant's favor.

Accessory

Being an accessory after the fact under Pen C §31 arguably is not a drug-related offense at all, under the same reasoning that federal misprision of felony has been held not to be. See discussion in §48.9. Conviction of accessory to an aggravated felony arguably should not itself be held to be an aggravated felony. This is the best alternative plea to a drug conviction.

Strategy: To analyze whether a state conviction may be punishable under federal law as a felony, carefully compare the elements of the state and federal offense. Consider elements that have been added by case law. Any significant discrepancy that permits the state to punish behavior not punishable under federal law is a basis for argument that the state offense is not an aggravated felony.

For further information in this complex area, see California Criminal Law and Immigration §9.6.

Trafficking in firearms or destructive devices

Conviction of illicit trafficking in firearms or destructive devices is an aggravated felony. See §48.10 for definition of firearms and destructive devices. (While only traffickers are aggravated felons, persons convicted of any offense related to firearms or destructive devices can be found deportable under 8 USC §1251(a)(2)(C).) Persons deportable under that ground are ineligible to apply for "212(c) relief" for permanent residents of seven years. See Update §48.17.

Crimes of violence

A person convicted of a crime of violence and sentenced to at least five years imprisonment is an aggravated felon. A crime of violence is broadly defined in 18 USC §16 as an offense that "has as an element the use, attempted use, or threatened use of physical force against" another person or their property, or any other felony that by its nature involves risk of such force. Assault with a deadly weapon, vehicular manslaughter, and burglary are crimes of violence (*U.S. v O'Neal* (9th Cir 1990) 910 F2d 663), while possession of a firearm (*O'Neal*) and drug trafficking (*U.S. v Cruz* (11th Cir 1986) 805 F2d 1464) are not.

To avoid aggravated felon status for a defendant, criminal defense counsel should obtain a sentence of less than five years—meaning suspended imposition of sentence or a sentence of four years plus 364 days or less—for any offense that might be classed as a crime of violence. (Crimes

of violence committed before November 29, 1990, are not aggravated felonies. IA90 §501(b)).

The Immigration Act of 1990, and technical amendments in 1991, have greatly expanded the definition of and penalties for conviction of an aggravated felony. The definition of aggravated felony, which includes most drug offenses and violent crimes with a five-year sentence, is discussed at the beginning of this section. In practice, most people convicted of an aggravated felony are already deportable under previously existing grounds, *e.g.*, the moral turpitude, controlled substances, or firearms grounds discussed in Update §48.13. However, aggravated felons also suffer restricted rights in deportation proceedings and preclusion from applying for immigration status. For example, persons convicted of aggravated felonies are:

- Ineligible for political asylum (8 USC §1158(d)), suspension of deportation, United States citizenship (8 USC §1101(f)), immigration within 20 years of deportation (8 USC §1182(a)(6)(B)), and other benefits. Persons who have served an aggregate five-year sentence for one or more aggravated felonies are ineligible for §212(c) relief for permanent residents of seven years. 8 USC §1182(c).
- Ineligible for release on bond from immigration detention (with some exceptions). 8 USC §1251(a)(2)(A). This means the person will remain in INS jails during the pendency of the hearing and any appeals, with little access to counsel and almost no possibility of obtaining pro bono counsel.
- Subject to a speeded up schedule for deportation hearings and appeals (8 USC §1105(a)(3)); ineligible for automatic stay of deportation pending review of deportation order by federal appeals court. 8 USC §1182(a)(6)(B).

➤**Note:** Aggravated felons who re-enter the United States illegally after having been deported face up to 15 years in prison if convicted under 8 USC §1326. Counsel should advise defendants accordingly.

For extended discussion of the immigration consequences of aggravated felonies, see California Criminal Law and Immigration §§9.8–9.17, or Immigration Law and Crimes. Potential consequences are significant, especially for potential political asylum and §212(c) applicants. For example, a person with a valid claim for political asylum who is convicted of an aggravated felony is statutorily ineligible to apply for political asylum (but might be able to convince a judge of eligibility for withholding of deportation). This defendant will remain in INS jails with no possibility of bond while the deportation hearing and appeals are pending. If the appeal goes to the Ninth Circuit, there will be no automatic stay of deportation until the circuit makes a decision. In short, the defendant is likely

to be deported or may even request deportation rather than endure further detention.

If instead the defendant were convicted of a drug offense that is not an aggravated felony, *e.g.*, a first conviction for simple possession, the picture would be entirely different. Although still deportable as an undocumented alien and a drug offender, the person would be eligible to apply for political asylum and for release on bond and employment authorization during the pendency of the case. There would be a greater chance of obtaining pro bono counsel. Deportation would be automatically stayed during all appeals, including appeal to the Ninth Circuit. In other words, the defendant is more likely to be able to pursue the asylum claim with some effectiveness.

F. [§48.14] Effect of Sentence

The type of sentence received can determine immigration consequences. Noncitizens who have been convicted of two or more offenses of any kind for which the aggregate sentences actually imposed equal five or more years are excludable under 8 USC §1182(a)(2)(B), and barred from establishing good moral character. Also, as discussed in Update §48.11, whether penalties flow from a conviction of a crime involving moral turpitude may depend on the sentence imposed. Suspended imposition of sentence equals no sentence, even if the person spends time in jail as a condition of probation. If execution of sentence is suspended, the entire sentence is counted, even if the defendant spent no time in jail.

A person is ineligible to show good moral character, discussed in Update §48.7, if he or she has been physically confined as a result of a conviction for six months (*i.e.*, 180 days) or more. Here the count is time physically spent in jail, whether as a condition of probation or under sentence. *Matter of Valdovinos* (BIA 1982) 18 I&N Dec. 343 . If the person is held for a few days and the charges are dismissed or the person is acquitted, the time in jail should not count as part of the 180 days. Also, if the person later receives a pardon or, arguably, if the conviction is expunged, the confinement should not count. *Matter of H.* (BIA 1956) 7 I&N Dec. 249 .

A person convicted of a crime of violence who receives a sentence of five years is an aggravated felon. A person who physically serves five years or more based on conviction of one or more aggravated felonies is ineligible for "212(c) relief" available to permanent residents of seven years.

V. [§48.15] EFFECT OF POSTCONVICTION RELIEF ON IMMIGRATION STATUS

California has a number of statutes providing postconviction relief in the form of pardon, certificates of rehabilitation, destruction or sealing

of records, vacation of judgment or dismissal of accusation, and reduction in charge. See, *e.g.*, (1) Pen C §§4800–4854; (2) Pen C §1203.45 (sealing misdemeanor records for person under 18 when crime committed); (3) Health & S C §11361.5 (automatic destruction of certain minor marijuana convictions records); (4) Pen C §1203.4 (vacation of judgment and dismissal of accusation for person successfully completing probation); (5) Pen C §1203.4a (same for misdemeanant not granted probation); (6) Welf & I C §§1179 and 1772 (dismissal of accusation for person honorably discharged from Youth Authority parole); (7) Pen C §17 (reduction of felony to misdemeanor under a variety of circumstances, including application of defendant after probation granted); (8) c.f. Welf & I C §§826–830 (destruction of juvenile records or release of them to the person). See Update chap 39.

The effect of each type of postconviction relief on immigration status depends on the underlying conviction and the state relief granted. Careful attention must be paid to the precise wording of the statute providing relief. For example, a statute destroying records may have a far different effect than one that vacates the judgment.

➢**Note:** The rules in this area are evasive and subject to change; counsel cannot make firm preconviction predictions to a defendant on the effect of postconviction relief.

As a general rule, a favorable result is far more likely if the underlying conviction was for an offense of moral turpitude (8 USC §1251(a)(4)), rather than for drugs (8 USC §1251(a)(11)). Thus, an executive pardon will eliminate a conviction of a crime involving moral turpitude, but not a drug conviction. 8 USC §1251(a)(2)(A)(iv). (There are insufficient decisions on firearms convictions to state firm rules for those.)

The Board of Immigration Appeals (BIA), the national administrative appeals body whose decisions control INS and immigration court, has long held that dismissal of charges under Pen C §1203.4 eliminates the immigration consequences resulting from conviction of a crime involving moral turpitude. See, *e.g.*, *Matter of Ozkok* (BIA 1988) 19 I&N Dec. 546; *Matter of G* (BIA, AG 1961) 9 I&N 159. Dicta in some Ninth Circuit cases suggests that the Ninth Circuit does not support that view. See, *e.g.*, *Garcia Gonzales v INS* (9th Cir 1965) 344 F2d 804; *Ocon-Perez v INS* (9th Cir 1977) 550 F2d 1153. The Ninth Circuit has not ruled against expungements, however, and the BIA's emphatic and consistent support of the effect of §1203.4 is controlling in immigration court. Section 1203.4 relief will also eliminate a conviction for purposes of a one-felony/three-misdemeanor rule in applications for amnesty, Family Unity, and Temporary Protected Status.

Penal Code §1203.4 relief will *not* eliminate the immigration consequences of a drug conviction. The BIA has held, however, that special

relief for youthful offenders under Welf & I C §§1179 and 1172 and Pen C §1203.45 will eliminate a drug offense. *Matter of Lima* (BIA 1976) 15 I&N 661; *Matter of Andrade* (BIA 1974) 14 I&N 651. But see *Hernandez Valensuela v Rosenberg* (9th Cir 1962) 304 F2d 639.

If all records of a marijuana conviction have been destroyed under Health & S C §11361.5, the conviction probably cannot be proven by INS. See, *e.g., Matter of Perez* (Simonet, IJ Dec. 12, 1989) No. 18–364–484, digested in Interpreter Releases p 67 (Jan. 12, 1990) (INS could not prove conviction because records sealed under similar Florida statute). However, if INS obtains records of conviction before they are destroyed, or obtains a transcript of court proceedings or appellate opinion not subject to destruction (Health & S C §11361.5(d)), perhaps it can be used anyway. See *Matter of Moeller* (BIA 1976) 16 I & N Dec. 65; but see Health & S C §11361.7 (records subject to destruction under §11361.5 are not considered accurate after they should have been destroyed).

A successful motion to withdraw a guilty plea for "good cause" before entry of judgment will probably eliminate any conviction. When judgment is suspended and probation is granted, this motion must be made within six months. Pen C §1018. Lack of knowledge of immigration consequences can be good cause. *People v Superior Court* (Giron) (1974) 11 C3d 793, 114 CR 596.

When a sentence is corrected or commuted by a judge, the reduced sentence is the one considered by immigration authorities. *Matter of Martin* (BIA 1982) 18 I&N Dec. 226 (correction of sentence); *Matter of J.* (BIA 1956) 6 I&N Dec. 562 (commutation).

A reduction of a felony to a misdemeanor under Pen C §17 may aid an alien who will be disqualified from relief by having a felony conviction, such as an applicant for an amnesty program, Family Unity, or Temporary Protected Status. See discussion in Update §48.17.

When a judgment is vacated, *e.g.,* on a writ of error coram nobis or habeas corpus, even a drug conviction has been held erased. *Matter of Sirhan* (BIA 1970) 13 I&N Dec. 592. See also Pen C §1016.5 (judgment automatically vacated when record does not reflect that judge advised defendant that guilty plea could result in deportation, exclusion, or denial of naturalization); *People v Wiedersperg* (1975) 44 CA3d 550, 118 CR 755 (writ can be granted when counsel did not know of defendant's noncitizen status when plea was entered). See chap 39. For extensive discussion of California postconviction relief and its effect on immigrants, see Brady, California Criminal Law and Immigration, chap 8.

VI. [§48.16] ADVERSE IMMIGRATION CONSEQUENCES NOT BASED ON CONVICTION OR SENTENCE

Noncitizens may be held deportable, excludable, or barred from estab-

lishing good moral character for reasons other than convictions and sentences in criminal cases.

➢**Note:** When a ground for exclusion, deportation, or preclusion from establishing good moral character does not require a conviction, it might be supported by a juvenile court finding (see Update §48.16), as well as by police records or other evidence. See *Matter of Rico* (BIA 1979) 16 I&N Dec. 181 (criminal charges dismissed but other evidence demonstrated trafficking).

- *Drug traffickers.* A noncitizen is excludable and barred from establishing good moral character if the INS has "reason to believe" that he or she is or has ever been a drug trafficker. 8 USC §§1182(a)(2)(C), 1101(f). No conviction is necessary, and one incident is sufficient. There is no analogous deportation ground. Not only sale or possession for sale, but giving away drugs for free, is considered to be "trafficking," as is maintaining a place where drugs are distributed. *Matter of Martinez-Gomez* (BIA 1972) 14 I&N Dec. 104. Importation or possession for one's own use is not trafficking. See *Matter of McDonald & Brewster* (BIA 1975) 15 I&N Dec. 203.
- *Drug addicts and abusers.* A noncitizen is excludable if currently a drug addict or abuser, and deportable if he or she has been a drug addict or abuser at any time since entry. 8 USC §§1182(a)(1)(A)(iii), 1251(a)(2)(B)(ii). Drug addiction is a medical determination. See *Matter of F.S.C.* (BIA 1958) 8 I&N Dec. 108. Drug abuser is a new category added by the Immigration Act of 1990 (Pub L 101–649, §601(a), 104 Stat 4978, 5067) (effective July 1, 1991). The definition is a matter of controversy. Some United States consulates abroad interpret current drug abuse to include anyone who has used an unlawful drug beyond one-time experimentation within the previous three years. That definition seems too strict.

➢**Note:** This controversy illustrates the dire consequences of almost any drug offense and shows the consequence of admitting to *any* involvement with drugs.

- *Prostitutes.* A noncitizen is excludable and barred from establishing good moral character if he or she has engaged in the business of prostitution within the last ten years. 8 USC §§1182(a)(2)(D), 1101(f). This definition includes prostitutes, procurers, and persons who receive proceeds, but not customers. No conviction is required, but a casual one-time encounter does not amount to engaging in prostitution. See *Matter of R.M.* (BIA 1957) 7 I&N Dec. 392.
- *Drunk driving convictions.* Under amendments made by the 1990 Act, chronic alcoholism is no longer a ground of exclusion. However, alco-

holics might be found excludable under a new ground relating to physical and mental disorders and behavior associated with them that poses a threat to property or persons. 8 USC §1182(a)(1)(A)(ii). At least one United States consulate has excluded persons on this ground, based on conviction for driving under the influence within the last two years.

- *Homosexuals and persons who test HIV positive.* Homosexuals formerly were excludable as "sexual deviants." That ground was eliminated under the Immigration Act of 1990, and homosexuals are no longer excludable. Persons who test HIV positive are excludable under 8 USC 1182(a)(1)(A)(i). They may apply for a discretionary waiver of exclusion.
- *Gamblers.* Persons who have been convicted of two or more gambling offenses or whose income is derived from illegal gambling are barred from establishing good moral character under 8 USC §1101(f).
- *Communists, subversives, nazis, "any other unlawful activity," and crimes relating to transfer of technology.* Several groups are excludable under 8 USC §1182(a)(3) and deportable under §1251(a)(4). The section relating to Communists and subversives actually was expanded under the 1990 Act. It includes a section referring to "any other unlawful activity." Noncitizens arrested for participating in political demonstrations or similar activity may need special immigration counseling. Contact the Visa Denial Project of the National Immigration Project of the National Lawyers Guild ((617) 227–9727) for advice on such cases.

  Persons who intend to engage or have engaged in illegal export of technology or sensitive information are excludable and deportable. While a literal reading of the statute would include any such offenses, legislative history shows that this should apply only to acts that might compromise national security. See Brady, California Criminal Law and Immigration §6.7 (1991).
- *Alien smuggling—"for gain" no longer required.* Under the 1990 Act, a person is excludable and deportable who encourages or helps any other alien to enter the United States illegally—even if the person helped is a family member and paid nothing for the help. 8 USC §§1182(a)(6)(E), 1251(a)(1)(E). Some waivers are available if the person smuggled was a parent, spouse, son, or daughter.

VII. [§48.17] FORMS OF IMMIGRATION RELIEF AVAILABLE FROM INS AND FEDERAL COURTS

INA "212(c)" relief

Persons who have been lawful permanent residents for seven years are eligible for an important discretionary waiver of exclusion and deportation under 8 USC §1182(c) (INA 212(c)). Whether the waiver will be granted depends on a showing of rehabilitation, the seriousness of the offenses, and other factors. With two exceptions, the waiver can excuse any ground of exclusion or deportation—including narcotics offenses.

The first exception is that a person deportable under 8 USC §1251(a)(2)(C) for conviction of an offense involving firearms or destructive devices is not eligible for §212(c) relief. *Cabasug v INS* (9th Cir 1988) 847 F2d 1321.

Second, a person who has served an aggregate five years for conviction of one or more aggravated felonies is ineligible for §212(c) relief.

The person must have completed seven years of permanent residency by the time he or she is brought before an immigration judge as a deportable alien. One factor in deciding whether to go to trial or appeal a conviction may be whether the person has yet completed the seven years. In some cases, the deportation hearing may be held in prison while the person is serving the sentence.

Suspension of deportation

Under 8 USC §1254(a)(1), a noncitizen who is in illegal status but has maintained "continuous" presence in the United States for at least seven years may ask an immigration judge to suspend deportation proceedings if deportation would result in extreme hardship. The noncitizen must demonstrate good moral character for the last seven years. This relief is discretionary.

A noncitizen convicted in the distant past of a narcotics, moral turpitude, or firearm possession offense may qualify for a second type of suspension of deportation under 8 USC §1254(a)(2). The noncitizen must demonstrate ten years of continuous presence and good moral character immediately following commission of the deportable acts.

Legalization

The Immigration Reform and Control Act of 1986 created two immigration amnesty programs. The general legalization program allowed undocumented persons residing in the United States since 1982 to apply for lawful status. 8 USC §1255a. The Special Agricultural Worker (SAW) program permitted persons who worked 90 days in agriculture in 1985–1986 to do the same. 8 USC §1160. Each program had two phases: the first phase, in which undocumented applicants applied for temporary residency, and the second phase, in which temporary residents applied for permanent residence.

With few exceptions, the application period has closed for both programs and it is no longer possible for persons to apply for "phase one" of amnesty. Participants already in the program must meet certain requirements to complete the two phases. Noncitizens will be disqualified from amnesty and lose lawful immigration status if they become excludable, are convicted of three misdemeanors, or are convicted of one felony. Some exclusion grounds are waivable, but not the narcotics or moral turpitude grounds.

Persons who applied for amnesty may carry a preliminary employment authorization card marked "I–688A" or a temporary resident card marked "I–688."

Most Special Agricultural Workers with the I–688 card have automatically converted to permanent resident status, although they may not be aware of it. Thousands of cases, especially for applicants holding an I–688A card under the Special Agricultural Worker program, remain unadjudicated because of INS backlogs. In other cases, the person may not have received notice of adjudication. Defense counsel should contact immigration counsel or a community agency for assistance in determining the status of a legalization case. See Update §48.1 for discussion of how to obtain referrals. Defense counsel also can attempt to reach the INS Western Service Center at (714) 258–1106, although it is difficult to get through to this number. If you reach an officer, and have the defendant's "A" number (eight-digit number beginning with A from the card) and the defendant present, the facility may tell you what is going on with the case. Unfortunately, cases sometimes have been reported denied that were unadjudicated.

Family members of amnesty recipients: "family unity."

The legalization programs have divided many families. For example, many parents qualified for amnesty but their children came to the United States too late to do so. The Family Unity program established by the Immigration Act of 1990 (IA 90, §301) provides temporary status and work authorization to qualifying relatives of amnesty recipients. A person who, as of May 4, 1988, was the spouse or the unmarried child under 21 of an amnesty recipient and who has resided in the United States since that date can apply. Many of these relatives will ultimately immigrate through family visa petitions, but rely on the Family Unity program for lawful status and work authorization during the years of waiting.

Persons who are deportable under any of the crimes related grounds or are convicted of three misdemeanors or one felony are ineligible for the Family Unity program.

Political asylum

Noncitizens who fear returning to their country may apply for political asylum and withholding of deportation. 8 USC §§1158, 1253(h). Conviction of a "particularly serious crime" can bar eligibility for asylum and withholding of deportation. The definition of a "particularly serious crime" depends on several factors, such as whether the offense was against property rather than people, the type of sentence imposed, and the underlying circumstances of the crime. *Matter of Frentescu* (BIA 1982) 18 I&N Dec. 244, 247. Burglary of an unoccupied house is not a particularly serious crime (*Matter of Frentescu, supra*), while armed robbery (*Matter of Rodriguez-Coto* (BIA 1985) 19 I&N Dec. 208) and possession of heroin for sale (*Matter of Gonzalez* (BIA 1988) 19 I&N Dec. 682) are. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *Matter of Juarez* (BIA 1988) 19 I&N Dec. 664.

A person convicted of an aggravated felony is statutorily ineligible for political asylum. 8 USC §1251(b). In addition, an aggravated felony is by definition a "particularly serious crime" and thus may bar withholding. 8 USC §1253(h). See further discussion in Brady, California Criminal Law and Immigration §11.4–11.5 (1991).

Temporary Protected Status (TPS)

Under the Immigration Act of 1990 (Pub L 101–649 §302, 104 Stat 4978, 5030) the Attorney General may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood or other disasters, or other extraordinary and temporary conditions. Citizens of that country will not be forced to return there from the United States for a period of time. 8 USC §1254a.

Congress designated El Salvador as the first TPS recipient. The application period for Salvadorans has closed. Salvadorans granted TPS can continue in protected status at least until June 30, 1993, under a similar program, Deferred Enforced Departure, if they meet registration requirements. The Attorney General has since designated Kuwait, Lebanon, Liberia, and Somalia, but dropped Kuwait. The region comprising the former Yugoslavia will probably be designated. See Interpreter Releases pp 120–122 (Jan. 27, 1992); pp 1191–1192 (Sept. 16, 1991); pp 969–970 (Aug. 10, 1992); p 680 (June 1, 1992). (For publishing information on Interpreter Releases, see Update §1.19, "Immigration Law.")

Persons are ineligible for TPS if they are excludable or have been convicted of *two* misdemeanors (as opposed to the three-misdemeanor rule in the amnesty programs) or one felony. 8 USC §1254a(c)(2)(B). In addition, the person must not come within the bars to withholding of deportation (persecution of others, conviction of a particularly serious crime, committing of serious nonpolitical crime outside the U.S., security threat to U.S.). 8 USC §1254a(c)(2)(B)(ii).

Registry. Under 8 USC §1259, a noncitizen who has resided continuously in the U.S. since January 1, 1972, can obtain permanent residence through registry. Other requirements are (1) having good moral character for a reasonable period, (2) not being excludable, and (3) not being ineligible for U.S. citizenship.

Immigration through a visa petition. Under 8 USC §1154, a person who is not excludable may obtain permanent resident status through a visa petition filed by a qualifying U.S. citizen or permanent resident relative. Some important waivers of exclusion are available, but none apply to drug convictions other than simple possession of 30 grams or less of marijuana. See 8 USC §1182(h) and (i). Persons classed as immediate relatives of U.S. citizens (the spouse, parent of a child over 21, or unmarried child under 21 years of age) may immigrate rapidly. Others—including adult or married children, siblings of citizens, and spouses and unmarried

children of permanent residents—must immigrate through the preference system. Depending on the relationship and country of origin this may involve a wait of from a few months to several years.

Certain valued employees can immigrate through an employer's labor certification. This device is most rapidly available to professional workers, but nonprofessionals such as in-home child monitors, health attendants, specialty chefs, and workers who must speak a foreign language may also qualify.

Voluntary departure. Under 8 USC §1254(e), a noncitizen with no other immigration relief may apply to leave the United States voluntarily instead of being deported. The alien must demonstrate good moral character for the preceding five years to qualify. This relief is valuable because in some cases the period of voluntary departure will be extended for several months, affording the noncitizen temporary lawful status in the United States. Also, persons who have been deported may not lawfully reenter the United States for five years unless a special waiver is obtained, but voluntary departure carries no such penalty.

United States citizenship. Lawful permanent residents may apply for U.S. citizenship after residing in the United States and demonstrating good moral character for five years. 8 USC §1427. Special procedures apply to spouses and minor children of U.S. citizens, military personnel, and religious workers. 8 USC §1430.

➤**Note:** Some defendants may be unaware that they inherited U.S. citizenship from their parents or grandparents. See Update §48.5.

VIII. [§48.18] THE FORMER JUDICIAL RECOMMENDATION AGAINST DEPORTATION (JRAD)

Until 1990, the judicial recommendation against deportation (JRAD) offered protection to persons convicted of a crime involving moral turpitude. The JRAD was an order, signed by a criminal court judge, requiring the INS to withhold immigration penalties based on conviction of a crime involving moral turpitude. The JRAD was eliminated by the Immigration Act of 1990 (IA 90) (Pub L 101–649, 104 Stat 4978). The Act stated that the change was retroactive, affecting even offenses committed before November 29, 1990 (the day the Act became law). IA 90 §505. See *U.S. v Murphey* (9th Cir 1991) 931 F2d 606. The INS has agreed to honor JRAD's that were actually signed by a judge before November 29, 1990. Memorandum by INS Commissioner Gene McNary, February 4, 1991, reprinted in Interpreter Releases p 220 (Feb. 25, 1991). (For publishing information on Interpreter Releases, see Update §1.19, "Immigration Law.")

Because of these changes, defense counsel should apply for a JRAD only if the defendant (a) committed the crime involving moral turpitude

before November 29, 1990, and (b) has already or surely will come to the attention of INS, and therefore has little to lose by filing for the JRAD and alerting INS to his or her existence. The point of timely filing for the JRAD in these circumstances is to preserve the defendant's potential right to benefit under lawsuits challenging the ex post facto application of the statute.

The regulation governing applications for a JRAD was repealed following repeal of the statute. The best course is for counsel who apply for a JRAD to follow the strict notice and timing requirements previously required and set out in former 8 CFR 241.1. The regulation can be found at 8 CFR (1991), at 55 Fed Reg 11,153 (Mar. 27, 1990), and reprinted in Interpreter Releases, p 389 (Apr. 2, 1990).

The following is a summary of the requirements in the now-repealed regulation, for use in the limited occasions when counsel might request a JRAD. The judge had to sign the order within 30 days of sentencing or conviction. Notice had to be provided to the INS District Director at least 15 calendar days before the hearing. Notice also had to be provided to the district attorney and the attorney general. Sixteen items of information had to be included in the notice. If some information was unavailable or not available in time to provide 15 calendar days' notice, counsel had to submit the notice timely with a declaration explaining why the information was unavailable, as described in the regulation.

The 16 items included: "(1) The true and complete name of the defendant; (2) The full name of the defendant as known to the court; (3) The full name of the defendant as known to the Immigration and Naturalization Service; (4) Any aliases by which he or she has been known or has himself or herself used; (5) Date of birth; (6) Place of birth including country; (7) Country of citizenship; (8) Alien registration number(s), if any; (9) Date, place and manner by which he or she last entered the United States. The manner of entry will include where applicable, the vehicle, vessel, or aircraft used to arrive in the United States; (10) Crime(s) for which defendant is being sentenced; (11) Statute(s) under which the defendant is being sentenced; (12) If already sentenced, or if the subject of a plea bargain, amount of time imposed to be incarcerated; (13) Whether the sentence renders the crime a felony, misdemeanor, petty offense, or undesignated crime under sentencing authority definition; (14) A court certified copy of the presentence report; (15) Date and time of sentencing; (16) A statement of the defendant's criminal convictions listing the sentencing jurisdiction and the information requested in paragraphs (a)(10), (11), and (12) of this section."

Notice to the INS was sent to the District Director, Immigration and Naturalization Service, at 630 Sansome St., San Francisco, CA 94111; 300 North Los Angeles St., Los Angeles, CA 90012; or 880 Front St., San Diego, CA 92188, depending on which office had jurisdiction over the criminal court site.

Once the judge signed the JRAD, defense counsel had to provide the INS District Director with a court-certified copy of the order.

IX. [§48.19] INTERPRETERS

Criminal defendants who do not understand English are entitled to an interpreter throughout the criminal proceedings. Cal Const art I, §14. The interpreter must be available exclusively for the defendant; the defendant cannot be required to share an interpreter with others, *e.g.*, witnesses. *People v Aguilar* (1984) 35 C3d 785, 200 CR 908.

A mere request for an interpreter does not necessarily mean that the defendant is entitled to one. The burden is on defendant to show that he or she does not understand English. *In re Raymundo B.* (1988) 203 CA3d 1447, 250 CR 812 (trial court has great discretion; its determination of need will not be disturbed on appeal absent abuse of discretion).

There is no right to a certified interpreter, only to a competent one. *People v Estrada* (1986) 176 CA3d 410, 221 CR 922.

Defendants do not have the right to their own interpreter for witnesses who testify in another language; the interpreter provided for that witness is sufficient for all parties, the attorneys, and the court. *People v Aranda* (1986) 186 CA3d 230, 230 CR 498. However, defendants may not be forced to share their interpreters with witnesses, thus depriving defendants of their ability to communicate with defense counsel. *People v Baez* (1987) 195 CA3d 1431, 241 CR 435 (case reversed, because error not harmless beyond reasonable doubt).

According to the court in *People v Rodriguez* (1986) 42 C3d 1005, 1013, 232 CR 132, 136, it is best for each defendant to have an interpreter assigned to him or her who remains with the defendant throughout the proceedings.

X. [§48.20] AVAILABILITY OF NONCITIZEN WITNESSES

"If state action has made a material witness unavailable (by deportation), dismissal is mandated. . . ." *People v Mejia* (1976) 57 CA3d 574, 129 CR 192. Today's courts generally hold that the *Mejia* standards for determining whether a witness was "material" have been superseded by federal standards. *People v Lopez* (1988) 198 CA3d 135, 243 CR 590; *People v Jenkins* (1987) 190 CA3d 200, 235 CR 268.

Conflicting authority exists on which federal standard to apply. *Lopez* held that the federal standard to apply is that of *California v Trombetta* (1984) 467 US 479, 104 S Ct 2528, 81 L Ed 2d 413. Under this standard, the lost evidence is material, for sanctions purposes, if its exculpatory value was apparent before it was destroyed. But *Jenkins* (in what may be considered dicta) said the federal standard to apply is that of *United States v Valenzuela-Bernal* (1982) 458 US 858, 102 S Ct 3440, 73 L Ed 2d 1193. Under that standard, which specifically concerned deported

witnesses, testimony is material, for sanctions purposes, if there is a "plausible" showing that it was material, was favorable to the defendant, and was not cumulative.

The *Lopez* court declined to follow *Valenzuela-Bernal* because that case is older than *Trombetta,* and, according to the *Lopez* court, *Valenzuela-Bernal* did not intend to announce a separate standard for loss of testimonial evidence as opposed to loss of other evidence. The *Jenkins* court did not discuss *Trombetta* at all. At this writing, the question of which federal standard to follow must be considered unsettled.

A person arrested along with undocumented persons may be given a form advising him or her of the right to have the noncitizen witnesses detained. The form also advises that if deported the witness could not be required to return, and that the person arrested has the right to consult with counsel before deciding if detention of the noncitizen is desired. This form is based on the decision in *U.S. v Lujan-Castro* (9th Cir 1979) 602 F2d 877. In *People v Acuna* (1988) 204 CA3d 602, 251 CR 387, the defendant was arrested and advised of his *Miranda* rights, and he asked for an attorney. Defendant was given the *Lujan-Castro* form, which he signed. On appeal, the defendant claimed that the waiver was improper because counsel had not been provided. This claim was rejected by the court of appeal. The court said the invocation of *Miranda* rights invoked the fifth amendment self-incrimination right only, not the sixth amendment right to counsel, which had not yet attached because no charges had been filed. Thus without a separate demand for counsel concerning the *Lujan-Castro* form, the defendant's waiver of having witnesses detained was valid.

XI. [§48.21] NONCITIZEN STATUS AS AFFECTING BAIL

A defendant's lack of citizenship may be a factor justifying high post-conviction bail. Bail on appeal of $200,000 was upheld in *People v Marghzar* (1987) 192 CA3d 1129, 239 CR 130, because, among other things, the defendant was not a citizen.

XII. [§48.22] NONCITIZEN STATUS AS AFFECTING DENIAL OF PROBATION AND COMMITMENT TO CALIFORNIA REHABILITATION CENTER

Trial courts may properly consider that a defendant is an illegal noncitizen when deciding whether to grant or deny probation. *People v Sanchez* (1987) 190 CA3d 224, 235 CR 264 (probation denied).

The California Rehabilitation Center (CRC) may properly exclude an illegal noncitizen because he or she would probably not be available to complete the outpatient component of the program. *People v Ariciga* (1986) 182 CA3d 991, 227 CR 611. For immigration purposes, such a commitment is adverse in any event because it defines the individual as a deportable "drug addict." See Update §48.16.