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REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

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Note on Recent Legislation

The Antiterrorism and Effective Death Penalty Act (Pub L 104-132, 110 Stat 1214) became law on April 24, 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub L 104-208, Div C, 110 Stat 3009-546) became law on September 30, 1996. Together, they have dramatically altered the structure of immigration law in general, and have had particular effect regarding who is barred from admission or rendered removable due to the commission of or conviction for crimes. Some provisions currently lack implementing regulations; others are being challenged in the federal courts. Even experienced immigration attorneys are grappling with the practical consequences of the myriad of new provisions. Moreover, strategic decisions made by an alien's criminal defense attorney are becoming increasingly crucial, because it appears that strategic pleading or amelioration of criminal convictions may soon be the only avenue that remains for many noncitizen defendants to avoid removal or permanent bars to immigration.

Because of these recent changes and possible changes yet to come, practitioners should not rely exclusively on this chapter as written. Guidance should be sought from experienced immigration attorneys, or from the Immigrant Legal Resource Center, 1663 Mission Street, Suite 602, San Francisco, CA 94103 (415–255–9499, ext. 427), which provides consultation and materials for a fee.

◇ §48.1 I. OVERVIEW

For a noncitizen, the immigration consequences of a conviction can be far worse than the criminal penalties. Consequences can include deportation, removal, permanent ineligibility for lawful immigration status, extended periods of immigration detention, and permanent separation from United-States-citizen family members. No matter how long one has lived in the United States, and regardless of whether that residence has been in accordance with the law, convicted noncitizens can be ordered deported and will sometimes be permanently ineligible to return. With proper planning, however, defense counsel representing a noncitizen in a pending criminal case may be able to obtain a disposition that avoids serious immigration consequences.

Certain legal concepts in immigration law may greatly surprise attorneys who are not familiar with that law. Of extreme importance in the context of criminal convictions is the "reentry doctrine," applicable to all noncitizens. All noncitizens, whether or not legally admitted to the United States on either a temporary or permanent basis, are subject to the Immigration and Naturalization Service's (INS) grounds for inadmissibility. Any trip outside the United States has the potential of bringing the existence of one or more of these grounds to the attention of the INS, thereby subjecting the individual to removal proceedings. In addition, corollary (but not identical) grounds of deportability exist and can render removable any noncitizen, regardless of the legality of his or her

latest admission to the United States. Moreover, generally speaking, there are no statute of limitations or laches defenses applicable in immigration law.

Due to the structure of immigration law, a defense attorney's goal is always to seek a result that avoids creating a ground of inadmissibility or deportability, or an outcome that could result in a bar to potential future immigration relief.

Because even relatively minor offenses (*e.g.,* possession of a small amount of a controlled substance) can carry drastic immigration consequences, an especially vigorous 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. In essence, the defense may have to be conducted completely differently from the typical criminal defense of a United States citizen.

The court must advise a defendant pleading guilty or no contest that, if he or she is a noncitizen, the plea could result in deportation, denial of naturalization, or exclusion from reentry. Pen C §1016.5. Defense counsel must go beyond this general warning, however, and advise his or her client of the specific potential immigration consequences in the defendant's case. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328. (Note that the Judicial Recommendations Against Deportation (JRADs) discussed in *Barocio* and *Soriano* are no longer available; see discussion in §48.11.)

Counsel must investigate the client's immigration status, research the immigration law, and inform the client very specifically about potential consequences. In addition, counsel must actively attempt to avoid unfavorable consequences if possible. Anything less constitutes ineffective assistance of counsel. Prosecutors may request that a defendant stipulate to deportation as part of a plea bargain. A stipulation to deportation made by a defendant in state or federal criminal proceedings will be considered a deportation for purposes of enhancing his or her sentence following a subsequent conviction for the federal offense of illegal re-entry after conviction of an aggravated felony and deportation. 8 USC §1326(b)(4). See discussion in §48.8.

The first step in analyzing a case is to find out the defendant's current or potential immigration status; this information is necessary to identify the specific immigration effect of a disposition. If the defendant has any immigration documents, counsel should photocopy them and check with immigration counsel if necessary. Sometimes people believe they have a green card when in reality they possess only a preliminary work document.

This chapter will point out common problems and the strategies for overcoming them. It cannot be overemphasized, however, that this area of the law changes very quickly and is very complex. In 1996, Congress made profound and encompassing changes in the Immigration Act, and it will almost certainly do so again within the next few years.

This chapter is an overview rather than an exhaustive discussion. It is advisable for counsel to obtain expert advice on individual cases. For referrals to immigration attorneys, contact the American Immigration Lawyers Association, 1400 I Street NW, Suite 1200, Washington, DC 20005, 202-371-9377; the local bar association; or the National Immigration Project of the National Lawyers Guild,

1400 Beacon Street, Suite 602, Boston, MA 02108, 617–227–9727. For a national directory of community agencies offering free or low-cost immigration assistance, write to the National Immigration Law Center, 1102 S. Crenshaw Blvd., Suite 101, Los Angeles, CA 90019, 213–938–6452 ($12.00). Although community agencies generally cannot advise criminal defense counsel on questions involving the adverse immigration consequences of convictions, they may be able to accept an indigent defendant's immigration case after 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 reduced fee for public defenders. For information, call 415–255–9499, ext. 427. The address is 1663 Mission Street, Suite 602, San Francisco, CA 94103.

Defense counsel should also consult an in-depth research guide, such as Brady, California Criminal Law and Immigration (1997), available from the Immigrant Legal Resource Center in San Francisco at the above address ($77.00), or Kesselbrenner & Rosenberg, Immigration Law and Crimes (1997), available from Clark Boardman Callaghan, 375 Hudson Street, New York, NY 10014, 212–645–0215 ($95). Other research guides are listed in §2.22.

▶ **Note:** Recent legislation has changed much of the terminology of immigration law, often gratuitously. The new term for "deportation" is "removal." The process of excluding someone from the United States now also occurs during a "removal" hearing. The new term for "excludable" is "inadmissible."

II. UNIQUE ASPECTS OF NONCITIZEN DEFENDANT CASES

§48.2 A. Checklist: Basic Procedure for Criminal Defense of Immigrants

The starting point for criminal defense of immigrants is always to ascertain and verify the client's nationality. This can be done by obtaining a reliable answer to the question, "Are you a citizen of the United States?" He or she may be Canadian or may have immigrated to the United States as a child and grown up here, and thus be visually indistinguishable from a native-born "American." About 20 percent of the time, the client will not be a citizen of the United States, and will need the special defense outlined in this chapter.

It is critical to obtain reliable evidence of nationality. Many clients may give an incorrect answer to the question because they misunderstand it (they may believe that their green cards make them "citizens") or because they believe they are safer saying they are citizens even if they are not. Counsel should explain the importance of obtaining a correct answer and ask where the client was born and how he or she obtained United States citizenship. Counsel must be satisfied that he or she has accurate information on the client's nationality.

❒ **Obtain from the client the information necessary to formulate a strategy to avoid unnecessary immigration consequences.**

The client can provide initial information concerning immigration status that counsel will need to determine what immigration effect various possible convictions and sentences will have. For a suggested "Basic Immigration Status Question-

naire," see §48.3. Counsel will also need the client's rap sheet, as well as information on the current charges, likely plea bargains, and likely sentences.

❒ **Call an immigration expert or research the exact immigration consequences of any proposed plea or option.**

Calling an expert is the easiest way to obtain up-to-date information on the immigration consequences of the various possible alternative dispositions and sentences. Unless counsel has researched the specific immigration questions facing the individual client, using up-to-date resource material, expert immigration advice is absolutely necessary.

Potential adverse immigration consequences may be eliminated or ameliorated through a variety of techniques, often without sacrificing traditional criminal defense goals. Ample resources exist to assist counsel in obtaining answers to the immigration questions that arise during the course of the case. See §48.1.

It is advisable for criminal defense counsel to establish an ongoing relationship with an office such as the Immigrant Legal Resource Center (see §48.1) or a specific immigration attorney in order to receive consistent advice in this area as needed.

❒ **Explain the specific immigration consequences to the client in an understandable manner.**

Counsel must find out the specific potential immigration consequences—*e.g.*, disqualification from political asylum or naturalization, loss of lawful permanent resident status, deportation, permanent ineligibility for lawful status, disqualification from waivers—and clearly explain them to the client. A general or uninformed presentation is insufficient. See, *e.g.*, *People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (client given general Pen C §1016.5 advice; conviction vacated for failure to warn about *actual* consequences).

❒ **Find out how high a priority the immigration consequences are to the client.**

Once the client understands what the actual immigration consequences can be, he or she may or may not make them a defense priority. Some clients are not willing to risk more time in jail in an effort to safeguard their immigration status. Others place the right to remain with their families in the United States as their highest priority and will sacrifice almost any other consideration. The latter clients may be willing to plead to additional counts, or serve an extra six months in custody, for example, in order to alter the conviction to one that will not trigger deportation. These difficult choices must be made by the client, once he or she is fully informed.

❒ **If immigration consequences are a high priority, conduct the defense with this in mind.**

Placing a high priority on immigration consequences may cause a drastic change in defense strategy. First, counsel must determine precisely what disposition will minimize or eliminate immigration consequences. This requires a good knowledge of the immigration law or expert advice. Some ideas for safe disposition are discussed in this chapter. They can include bargaining for a short probation period to allow for quick expungement, diversion without a guilty plea (see §48.12), dismissal, acquittal, delay of a conviction, a carefully-framed

sentencing disposition, or a plea to some other "safe" offense, even one only tenuously connected, or not connected at all, to the offense charged.

▶ **Note:** Drug diversion under Pen C §1000 constitutes a conviction under immigration law even after dismissal if a guilty plea is entered. 8 USC §1101(a)(48)(A). It is arguable, however, that the very first "conviction" may be eliminated by an expungement under Pen C §1203.4. See *Garberding v INS* (9th Cir 1994) 30 F3d 1187; *In re Manrique* (BIA 1995) Int Dec 3250; §48.12. If this view prevails, new diversion of such a conviction would no longer trigger deportation or exclusion after successful completion.

Vigorous criminal defense work—including strategies not normally used in defense of a minor charge—may be required. For example, clients may choose to take minor cases to trial, even if there is only a slim possibility of acquittal, if the alternative is certain deportation, or to delay the finality of the conviction by appeal and thus spend more time with their families.

▶ **Note:** Counsel should advise the defendant not to volunteer or admit to noncitizen status when speaking with anyone, particularly court personnel. See *In re Adolfo M.* (1990) 225 CA3d 1225, 1230, 275 CR 619, 622 (juvenile court found that minor was noncitizen based on his mother's statements to probation officer; minor transferred to Mexican juvenile authorities).

☑ §48.3 B. Checklist: Interviewing Noncitizen Criminal Defendants

Defense counsel should inform the noncitizen criminal defendant of the following rights:

- The right to refuse to speak with INS officials or to answer any questions about country of birth, nationality, immigration status, or manner of entry into the United States. This right is based on the privilege against self-incrimination, because 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. Persons who have reentered the United States after deportation for criminal convictions should especially decline to speak with the INS, which may interview them in jail if they are incarcerated for another offense. The INS conducts interviews to identify detainees for federal criminal prosecution for unlawful reentry under 8 USC §1326(b)(2), which carries a potential 20-year federal prison sentence (see §48.22).
- The right not to reveal the defendant's immigration status to a judge. Pen C §1016.5(d).

BASIC IMMIGRATION STATUS QUESTIONNAIRE

Purpose: To obtain the facts necessary for an immigration lawyer to determine immigration consequences of a criminal conviction.

Documents: Photocopy any immigration documents or passport. [See §48.27]

Criminal History: Rap sheets, current charges, and possible dispositions needed before calling immigration counsel.

_____ _____ _____

Client's name Date of interview Date of birth

_____ _____

Client's immigration attorney Attorney's phone no.

Immigration hold? YES ___ NO ___ [See §4.42.]

1. *Entry*: Date first entered U.S.: _____ Visa Type: _____

Significant departures: Date: _____ Length: _____

Purpose: _____

Date last entered U.S.: _____ Visa Type: _____

2. *Nationality*: Country of birth: _____ Would client have any fear about returning? YES ___ NO ___ If yes, why? _____

_____

What language (and dialect) does client speak? _____

_____

Is an interpreter needed? YES ___ NO ___ [See §48.7.] (Often, defendants who do not need an interpreter for office or jail interviews will need one for formal court sessions.)

3. *Immigration Status*: Lawful permanent resident? YES ___ NO ___ If yes, date client obtained green card: _____

Other special immigration status: (refugee) (asylee) (temp. resident) (work permit) (TPS) (Family Unity) (ABC) (undocumented) (visa type: _____). Date obtained: _____

Did anyone ever file a visa petition for client? YES ___ NO ___
Name and number: _____ Date: _____.

Type of visa petition: _____ Was it granted? YES ___ NO ___

Has the INS been involved with client in this case or earlier?
YES ___ NO ___

Does client have a pending immigration case or application?
YES ___ NO ___

4. *Prior Deportations*: Has client ever been deported?
YES ___ NO ___ Date: _____

Reason: _____

Has client ever been excluded? YES ___ NO ___

Date: _____ Reason: _____

Does client have an immigration court date pending? YES ___ NO ___

Reason: _____
_____ Date: _____

5. *Prior Immigration Relief*: Has client ever before received a waiver of deportability (§212(c) relief or cancellation of removal) or suspension of deportation?
YES ___ NO ___ Which: _____ Date: _____

6. *Relatives With Status*: Does client have a U.S. citizen: (parent) (spouse) (child(ren) (DOB(s) _____)), (brother) or (sister)?
YES ___ NO ___

Does client have a lawful permanent resident (spouse) or (parent)?
YES ___ NO ___

7. *Employment*: Would client's employer help client immigrate?
YES ___ NO ___

Occupation: _____

Employer's name and number: _____

8. *Possible Unknown U.S. Citizenship*: Was client's or spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES ___ NO ___

Was client a permanent resident under age 18 when a parent naturalized to U.S. citizenship? YES ___ NO ___

9. *Abuse:* Has client been abused by his or her spouse or parents?
YES ___ NO ___

10. *Criminal Record*: What prior convictions does client have in California or in other jurisdictions or countries? _____
_____

(Counsel should consider whether these convictions will have an impact on the client's immigration status.)

§48.4 C. Main Defense Goals in Representing Juveniles

Dispositions in juvenile proceedings do not constitute convictions for immigration purposes. *Matter of C.M.* (BIA 1953) 5 I&N 327; *Matter of Ramirez-Rivero* (BIA 1981) 18 I&N 135. Thus, admitting in juvenile court to a felony or misdemeanor involving moral turpitude or firearms will not make a juvenile deportable or inadmissible, and a finding will not constitute a conviction for purposes of the three-misdemeanor/one-felony bar to amnesty and other programs.

In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, however, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104-208, 110 Stat 3009) denies Family Unity benefits to persons who commit an act of juvenile delinquency that if committed by an adult would be a violent felony involving the use or attempted use of physical force against another or a felony involving a substantial risk of physical force against another. IIRIRA §383. (Although the statute does not require a juvenile court finding that the person committed such an act, immigration counsel can argue that such a disposition is required.)

In the future, Congress may well single out drug trafficking as a juvenile offense that triggers special immigration penalties and apply that provision retroactively. Consequently, whenever possible, juvenile defenders should, as with crimes involving violence, avoid dispositions finding trafficking.

Effective date. The statute applies the new Family Unity rule to benefits "granted or extended" after September 30, 1996. See IIRIRA §383, amending the Immigration Act of 1990 (Pub L 101–649, §301(e)(3), 104 Stat 4978) (see 8 USC §1255a Note). Arguably the new rule applies only to acts of juvenile delinquency *committed* after September 30, 1996, because there is a general presumption against retroactive application of laws.

Juvenile dispositions might be held to bring a noncitizen within a ground of inadmissibility or deportability that does not depend on a conviction. A noncitizen whom the INS has reason to believe is a drug trafficker is inadmissible. 8 USC §1182(a)(2)(C). A noncitizen who has engaged in prostitution is inadmissible. 8 USC §1182(a)(2)(D). More troublesome is the ground of deportation and inadmissibility for persons who are or have been drug addicts or drug abusers. 8 USC §§1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii). The definition of "drug abuser" has not been firmly established, but some United States consulates currently define it as anything more than a one-time experimentation with an illegal drug. In juvenile proceedings, the best course is not to admit any drug offense. If an admission is inevitable, it is better to admit possession than sale or possession for sale. Admissions of drug addiction might be held to be a basis for inadmissibility or deportation. Although no published decision has yet held that a juvenile court disposition is a basis for inadmissibility or deportation, INS attorneys have made that argument.

A finding in juvenile court of a moral-turpitude offense would bar the immigrant from later receiving the benefit of the petty-offense exception to inadmissibility, based on a later adult moral-turpitude conviction, because the petty-offense exception is available only to those who have *committed* only one crime (*i.e.*, the current adult conviction) involving moral turpitude. 8 USC §1182(a)(2)(A)(ii)(II). See §48.19.

Juveniles bound over after a hearing under Welf & I C §707 and tried in

adult court will suffer convictions under immigration law, although there are new arguments that the federal standard (*i.e.*, 21 years of age) should apply. See Brady, California Criminal Law and Immigration §2.3(B) (1997).

▶ **Note:** Review the defendant's entire criminal history before making a disposition.

It may be possible to avoid these immigration consequences by having the juvenile court record sealed, because the INS is thereby precluded from seeing the record. See Welf & I C §826. The INS may, however, have other sources of information on 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. Sealing the records may eliminate evidence that the defendant has suffered a conviction of a drug offense as well as a crime involving moral turpitude. *Matter of Lima* (BIA 1976) 15 I&N 661; *Matter of Andrade* (BIA 1974) 14 I&N 651. See *Matter of Ozkok* (BIA 1988) 19 I&N 546; 1 California Juvenile Court Practice §§13.7–13.20 (Cal CEB 1981). See also §48.12.

▶ **Note:** Juveniles in dependency proceedings and, possibly, delinquency proceedings may be eligible for permanent residency as "special immigrant juveniles." 8 USC §1101(a)(27)(J). Juveniles who have been abused by a permanent-resident or United-States-citizen parent may be eligible for permanent residency under the 1994 Violence Against Women Act (8 USC §§1154(a)(1)(A)(iv), 1154(b)(iii), 1254(a)(3)), even if they are not in dependency proceedings. See §48.27.

D. Noncitizen Status

§48.5 1. Noncitizen Status as Affecting Bail

A defendant's lack of citizenship may be a factor justifying high postconviction 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.

▶ **Note:** The INS has the authority to place immigration holds on certain noncitizens. See 8 USC §1228(a). See also §4.42.

§48.6 2. Noncitizen Status as Affecting Other Issues

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

California Rehabilitation Center (CRC). The California Rehabilitation Center may properly exclude an undocumented noncitizen because he or she would probably not be available to complete the outpatient component of the program. *People v Arciga* (1986) 182 CA3d 991, 227 CR 611. For immigration purposes, such a commitment is adverse in any event because it defines the individual, in effect, as a "drug addict" and thus deportable. See §48.23.

Illegal detention. Border stops are deemed reasonable. *U.S. v Ramsey* (1977) 431 US 606, 619, 52 L Ed 2d 617, 628, 97 S Ct 1972. Stops by border agents at reasonably located, fixed checkpoints are deemed reasonable. *U.S. v Martinez-*

Fuerte (1976) 428 US 543, 562, 49 L Ed 2d 1116, 1131, 96 S Ct 3074. Other immigration detentions, however, *e.g.,* stops by roving patrols of border patrol agents, must be supported by specific, articulable facts giving rise to a reasonable suspicion. *U.S. v Brignoni-Ponce* (1975) 422 US 873, 884, 45 L Ed 2d 607, 618, 95 S Ct 2574; *U.S. v Gardia-Camacho* (9th Cir 1995) 53 F3d 244; People *v Valenzuela* (1994) 28 CA4th 817, 33 CR2d 802 (stop at agricultural station must be supported by probable cause; single factor of Mexican appearance insufficient to support belief that person is illegal alien).

§48.7 E. Interpreters

Criminal defendants who do not understand English are entitled to have 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 (conviction reversed; trial court "borrowed" interpreter to translate state witnesses' testimony); *People v Baez* (1987) 195 CA3d 1431, 241 CR 435 (conviction 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.

A mere request for an interpreter does not necessarily mean that the defendant is entitled to one. The burden is on the defendant to show that he or she does not understand English. *In re Raymundo B.* (1988) 203 CA3d 1447, 250 CR 812.

There is no right to a certified interpreter, only to a competent one. *People v Estrada* (1986) 176 CA3d 410, 221 CR 922. See Evid C §§750–755.5 for special rules on interpreters and translators. See also CCP §§68560.5, 68566; Govt C §§65860.5, 68561–68562, 68565–68566 (requirements for court interpreters).

English-speaking defendants do not have the right to have their own interpreter, separate from the court interpreter, for witnesses who testify in another language. *People v Aranda* (1986) 186 CA3d 230, 230 CR 498. Counsel who believes that an interpreter has erred or is not interpreting correctly should request an evidentiary hearing and request appropriate relief, *e.g.,* a motion for mistrial or replacement of the interpreter with a new interpreter, contemporaneous with the violation if possible, but at least with counsel's discovery of the violation. See *People v Cabrera* (1991) 230 CA3d 300, 281 CR 238. The trial court also has the option of appointing a "check interpreter." See *People v Aranda, supra.*

§48.8 F. Requirements Concerning Immigration Status When Pleading Guilty or No Contest

Before a defendant pleads guilty or no contest to a misdemeanor or felony offense, the court taking the plea must ensure that the defendant is warned that conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization. Pen C §1016.5(a). Failure to warn of any of

the three required potential consequences is grounds to vacate the judgment, and failure to maintain a record that the required warning has been given creates a presumption that the warning was in fact not given. Pen C §1016.5(b); *People v Gontiz* (1997) 58 CA4th 1309, 68 CR2d 786. A similar general warning, however, is not sufficient advice by counsel. Defense counsel must also advise a client of the specific immigration consequences that will be triggered in the defendant's own case. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (note that the JRADs discussed in *Barocio* and *Soriano* are no longer available; see §48.11). Defense counsel who fails to investigate and advise the defendant of the specific immigration consequences of a plea of guilty may be found to have provided ineffective assistance of counsel. See *People v Quesada* (1991) 230 CA3d 525, 281 CR 426.

▶ **Note:** Prosecutors should also become familiar with this material to better deal with the prosecution of noncitizens. On the one hand, the prosecution may be convinced that the defendant should be deported, and may wish to become aware of the nature of the conviction and sentence necessary to achieve this result. On the other hand, prosecutorial discretion is very broad. Because immigration laws now trigger drastic and mandatory immigration consequences for an increasing number of minor convictions and sentences, the interests of the community and innocent family members in retaining certain immigrants should be reflected in the discretion exercised by prosecutors. As an example, a second offense misdemeanor simple possession of any drug is considered an "aggravated felony" and would trigger mandatory deportation, even for an immigrant who has lived lawfully in this country for 30 years, is married to a United States citizen, and has many children and numerous other family members who are all United States citizens. Prosecutorial discretion is legally broad enough to allow postconviction relief under these circumstances. See §7.12.

There is as yet no requirement that judges advise defendants of the possible immigration consequences of a "slow plea" (see §10.19; *People v Limones* (1991) 233 CA3d 338, 343, 284 CR 418, 421).

Attorneys in state as well as federal criminal proceedings soon may face having to advise their clients whether to stipulate to deportation before the criminal court judge. The definition of "deportation" for criminal penalties for reentry of certain deported aliens includes "any agreement in which an alien stipulates to deportation during (or not during) a criminal trial under either Federal or State law." 8 USC §1326(b). United States Attorneys are requesting stipulations to deportation, and there are plans for state prosecutors to begin doing so as well. Criminal defense counsel will be in the position of advising clients whether to accept such a condition. This requires an accurate understanding of the defendant's immigration position. If the defendant truly has nothing to lose by conceding deportability, he or she may gain valuable concessions in the criminal sentence. On the other hand, if the defendant has family or an established life in the United States and some possible defense to deportation, the defendant may be gravely harmed by giving up the right to contest deportation and apply for or maintain lawful status. Federal district court judges are permitted to decide whether a defendant is deportable and to order deportation. 8 USC §1228(c).

The person must be deportable under 8 USC §1227(a)(2) for conviction of

crimes involving moral turpitude, aggravated felonies, controlled substance offenses, or offenses involving firearms and destructive devices. The judge may choose to exercise jurisdiction over the deportation only if the United States Attorney requests it with the concurrence of the INS. The Commissioner of the INS wrote a memorandum, including sample forms, to INS District Directors on the subject of judicial deportations on February 22, 1995, reprinted in 72 Interpreter Releases 462 (Mar. 31, 1995).

▶ **Note:** If the defendant is pleading guilty or no contest to an "aggravated felony," the plea will trigger very negative and surprising consequences if the client is deported and thereafter reenters the country illegally. In former years, if an alien returned to the United States under these circumstances and was arrested by the INS, he or she would merely have been deported again, and that is what many immigrants expect. After recent changes in immigration law, however, illegal reentry after conviction and deportation of an aggravated felony triggers federal criminal prosecution carrying a maximum sentence of 20 years in federal prison on conviction. 8 USC §1326(b)(2). Under the Federal Sentencing Guidelines, the minimum may be six or seven years, depending on criminal history. U.S.S.G. §2L1.2 (West 1998). See also 8 USC §1325(a). Federal prosecutors usually demand at least two years in prison as part of plea negotiations. The defendant pleading to an aggravated felony, or with a prior conviction for an aggravated felony, must therefore be informed that he or she will be required to serve between two and twenty years in federal prison if apprehended in the United States after his or her deportation.

▶ **Note:** It has become almost certain that a criminal alien will be detected and apprehended by the INS after conviction and a sentence involving any incarceration, because the INS now has expensive systems that support its efforts to identify the immigration status of every single person admitted to county jail or state prison.

California state courts are required to cooperate with the INS in identifying and placing a deportation hold on defendants convicted of felonies who are determined to be undocumented noncitizens subject to deportation. Govt C §68109. In addition, the Department of Corrections and the Department of the Youth Authority are required to identify undocumented noncitizens subject to deportation. Within 48 hours of identifying such a person, these departments are to transfer the inmate to the custody of the United States Attorney General. Pen C §5025(c). The departments must also make their case files available to the INS for purposes of investigation. Pen C §5025(a).

§48.9 G. 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, 579, 129 CR 192, 196. Today's courts generally hold that the *Mejia* standards for determining whether a witness was "material" have been superseded by federal standards. *People v Valencia* (1990) 218 CA3d 808, 819, 267 CR 257, 264; *People v Lopez* (1988) 198 CA3d 135, 243 CR 590; *People v Jenkins* (1987) 190 CA3d 200,

235 CR 268. See *People v Fauber* (1992) 2 C4th 792, 829, 9 CR2d 24 (assuming but not deciding that federal standard applies to destruction of evidence cases).

Conflicting authority exists on which federal standard to apply. *People v Lopez, supra*, held that the federal standard to apply is that of *California v Trombetta* (1984) 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528. Under this standard, the lost evidence is material for purposes of sanctions if its exculpatory value was apparent before it was destroyed. But *Jenkins* (in what may be considered dicta) and *Valencia* said that the federal standard to apply is that of *U.S. v Valenzuela-Bernal* (1982) 458 US 858, 73 L Ed 2d 1193, 102 S Ct 3440. Under that standard, which specifically concerned deported witnesses, testimony is material for purposes of sanctions if a "plausible" showing is made 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, because *Valenzuela-Bernal* did not intend to announce a separate standard for loss of testimonial evidence as distinguished from 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 whether detention of the noncitizen is desired. This form is based on *U.S. v Lujan-Castro* (9th Cir 1979) 602 F2d 877.

Mejia error is waived by a plea of guilty. *People v McNabb* (1991) 228 CA3d 462, 279 CR 11.

§48.10 H. Consequences of Sentence in Criminal Case

The sentence received in a criminal case can have very significant immigration consequences, and counsel can sometimes exert a great influence over the immigration process by controlling the length and nature of the sentence received. Obtaining a certain sentence may be sufficient to avoid adverse immigration results for the client. It is important to identify whether or not the sentence is important, and, if so, exactly what the sentence requirements are for the client's particular situation. Sentences can be especially important for aggravated felonies and crimes involving moral turpitude.

General definition of "sentence" for immigration purposes. For immigration purposes, "sentence" includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution . . . in whole or in part." 8 USC §1101(a)(48)(B).

Thus, "sentence" includes a state prison sentence that has been imposed with execution suspended. *Matter of Castro* (BIA 1988) 19 I&N 692.

It includes court-ordered confinement as a condition of probation.

It does *not* include potential state prison or county jail sentences when imposition of sentence has been suspended, because the court has not ordered any specific term to be served. See *Matter of F.* (BIA 1942) 1 I&N 343.

It does *not* include any noncustody period of probation, because that does

not qualify as "incarceration or confinement." 8 USC §1101(a)(48)(B). See discussion of suspending imposition and execution of sentence in §§36.5, 45.25–45.27.

▶ **Note:** For immigration purposes, all sentences refer to the nominal sentences ordered by the court, rather than the actual time spent incarcerated, except for the 180-day bar to establishing good moral character referred to below. That bar refers to actual days spent in custody.

Examples: If the client receives imposition of sentence suspended and no custody as a condition of probation, that counts as zero sentence for immigration purposes. If the client receives imposition of sentence suspended and six months custody as a condition of probation, that counts as six months. If the client receives a five-year sentence, execution of which is suspended, and is placed on probation with no custody time as a condition of probation, that counts as a five-year sentence.

Concurrent sentences are evaluated as the length of the longest sentence, and consecutive sentences are added together. *Matter of Fernandez* (BIA 1972) 14 I&N 24.

Deportation. If the client is here legally, he or she is concerned about becoming deportable. Many common offenses become aggravated felonies and trigger deportation only if a court orders one year or more of custody, either as part of the judgment and sentence or as a condition of probation. These are (8 USC §1101(a)(43)(F), (G), (J), (R), (S)):

- A "crime of violence" as defined in 18 USC §16;
- A theft offense (including receipt of stolen property);
- Burglary;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered;
- Offenses relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness; and
- Using fraudulent documents to obtain an immigration benefit (except for a first offense to help an immediate family member).

Strategy. For these offenses, a sentence of 364 days or less (either as part of a judgment or condition of probation) will prevent the offense from becoming an aggravated felony. Conviction of three counts of theft, with a 364-day sentence for each to run consecutively, for example, would not result in any aggravated felony conviction, because each count is assessed separately to determine whether it carries a one-year sentence imposed. It is necessary to obtain imposition of sentence suspended, because a state prison sentence, with execution suspended, counts as a sentence for most immigration purposes, including deportability.

Inadmissibility. If the client is not here legally, he or she is concerned about becoming inadmissible, *i.e.*, becoming ineligible to immigrate lawfully through a United-States-citizen spouse or otherwise. Two grounds of inadmissibility depend on the sentence:

- A noncitizen is inadmissible under 8 USC §1182(a)(2)(B) if he or she is convicted of two or more offenses of any kind for which the aggregate sentences actually imposed equal five or more years; and

• A noncitizen who is inadmissible because of one conviction of a crime involving moral turpitude is *not* inadmissible if the offense qualifies under the "petty offense exception." To qualify, the sentence actually imposed must be six months or less and the maximum possible sentence for the offense be no more than a year. 8 USC §1182(a)(2)(A)(ii)(II).

▶ **Note:** The petty offense exception to the moral turpitude exclusion ground is available to noncitizens who have *committed* only one crime involving moral turpitude. A previous conviction, even if expunged, will destroy eligibility for the benefit of this exception. *Matter of S.R.* (BIA 1957) 7 I&N 495. Because the offense cannot have a potential penalty of more than one year, a person convicted of a felony, with imposition of sentence suspended, is not eligible for the exception and will be found inadmissible. That person may, however, be found eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17. See §48.18.

Bar to establishing good moral character. In order to obtain many immigration benefits, including naturalized citizenship, voluntary departure, cancellation of removal for nonpermanent residents, suspension of deportation, and registry, a noncitizen must establish "good moral character." The immigration law bars certain persons from establishing good moral character, and two of these bars depend on sentence:

• Physically serving more than 180 actual days in jail, as a total from all convictions, precludes the defendant from establishing good moral character under 8 USC §1101(f). *Matter of Valdovinos* (BIA 1982) 18 I&N 343. See §48.13.

• If the person is held in custody for a few days and the charges are dismissed or the person is acquitted, the time in jail does not count as part of the 180 days, because it was not served "as a result of conviction." 8 USC §1101(f)(7). In fact, anyone trying to avoid the 180 days who has served significant pretrial time might waive credit for that time as time served in an attempt to lower the total below 180 days actual custody "as a result of conviction." A pardon or, probably, expungement should erase the effect of time served for that conviction. *Matter of H.* (BIA 1956) 7 I&N 249. For further discussion of showing good moral character, see §48.13. Pardons are discussed in §§39.19–39.20. Expungements are discussed in §§39.13, 39.18. Their immigration effects are discussed in §48.12.

Bar to restriction of removal. Restriction of removal, like political asylum, is available to some noncitizens who face death threats and similar perils if deported to their home countries. A noncitizen is barred from receiving this status if he or she has been convicted of one or more aggravated felonies for which an aggregate sentence of five or more years has been imposed. 18 USC §1227(b)(3)(B); *Matter of Q-T-M-T* (BIA 1996) Int Dec 3300; 8 CFR §208.16(c)(3).

§48.11 I. 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 JRADs that were actually signed by a judge before November 29, 1990. Memorandum by INS Commissioner Gene McNary, Feb. 4, 1991, reprinted in Interpreter Releases, p 220 (Feb. 25, 1991). Now that JRADs have been abolished, it is an open question what the proper remedy would be for a defendant whose counsel rendered ineffective assistance by failing to request a JRAD at sentencing. One possibility is for the court to grant a JRAD nunc pro tunc dated before November 29, 1990. Another possibility would be to vacate the conviction entirely. See *People v Barocio* (1989) 216 CA3d 99, 264 CR 573. The constitutional right to effective assistance of counsel requires that the defendant should be placed in the same position he or she would have occupied if the error had not been committed.

§48.12 J. Effect of Postconviction Relief on Immigration Status

California has several statutes providing postconviction relief in the form of pardons, certificates of rehabilitation, destruction or sealing of records, vacation of judgment, dismissal of accusation, and reduction of charge:

- Pen C §§4800–4854 (reprieves, pardons, commutations of sentence, certificates of rehabilitation);
- Pen C §1203.45 (sealing misdemeanor records for persons under age 18 when crime committed);
- Health & S C §11361.5 (automatic destruction of certain marijuana conviction records);
- Pen C §1203.4 (vacation of judgment and dismissal of accusation for probationer who successfully completed probation, often referred to as "expungement");
- Pen C §1203.4a (vacation of judgment and dismissal of accusation for misdemeanant not granted probation, often referred to as "expungement");
- Welf & I C §§1179, 1772 (dismissal of accusation for person honorably discharged from Youth Authority parole);
- Pen C §17 (reduction of felony to misdemeanor under various circumstances, including application of defendant after probation granted); and
- Welf & I C §828 (destruction of juvenile records or their release to the person).

The effect of each type of postconviction relief on immigration status depends on the underlying conviction and the state relief granted. (State relief is discussed in chap 39.) 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.

As a general rule, a favorable result is far more likely if the underlying conviction was for an offense of moral turpitude (8 USC §1227(a)(2)(A)) than if it involved drugs (8 USC §1227(a)(2)(B)). An executive pardon, or expungement

under Pen C §1203.4, will eliminate a conviction of a crime involving moral turpitude, and possibly a firearms conviction (see discussion below), but not any controlled substances conviction other than first-offense, simple possession (*e.g.*, Health & S C §11350).

The Board of Immigration Appeals (BIA) and the Ninth Circuit held until recently that an expungement under Pen C §1203.4 did not remove the immigration consequences of a drug conviction. In *Garberding v INS* (9th Cir 1994) 30 F3d 1187, followed by the BIA in *In re Manrique* (BIA 1995) Int Dec 3250, the Ninth Circuit carved out an important exception. It held that, as a matter of equal protection, a state drug conviction of the type that would be amenable to expungement under the Federal First Offender Act (FFOA) if the case had been brought in federal court can be effectively expunged under a general state expungement statute, despite the fact that the state statute is not an exact counterpart of the FFOA. The FFOA permits the expungement of a federal conviction for simple possession of a controlled substance if the person has never before been convicted of a state or federal drug offense. 18 USC §3607. Because Congress has no power to repeal the equal protection clause, any argument that the new definition of "conviction" in 8 USC §1101(a)(48)(A) altered this result must fail until Congress repeals 18 USC §3607. In *In re Manrique* (BIA 1995) Int Dec 3250, the BIA was somewhat sloppy in listing the requirements for obtaining an effective expungement in a first-offense simple possession case, stating that the offender must not previously have received first offender treatment "under any law." That is not the test. The test is whether the offender would have qualified for FFOA treatment if prosecuted in federal court. If so, he or she is entitled to an effective expungement. If not, the INS need not ignore the expunged conviction. The FFOA does not disqualify someone who has received first offender treatment "under any law." It requires only that a person must "not previously [have] been the subject of a disposition under this subsection." 18 USC §3607(a)(2). Therefore, someone who has received a prior diversion dismissal, with no guilty plea, would not be disqualified from an effective expungement under *Garberding* and *Manrique* under the FFOA, and should not be disqualified from equal treatment under immigration laws.

New diversion. Beginning January 1, 1997, drug diversion under Pen C §§1000-1000.5 generally requires entry of a guilty plea, and thus constitutes a conviction under current immigration law. 8 USC §1101(a)(48)(A). It is arguable, however, that the very first simple-possession "conviction" may be eliminated by an expungement under Pen C §1203.4. See *Garberding v INS* (9th Cir 1994) 30 F3d 1187; *In re Manrique* (BIA 1995) Int Dec 3250. This reasoning should apply to first-offense "deferred adjudication" following guilty pleas under the new version of Pen C §1000 diversion, because a dismissal after successful completion of "deferred adjudication" is equivalent to an expungement under *Garberding*.

Expungements are currently effective in removing the immigration consequences of firearms convictions (with the possible exception of aggravated-felony firearms convictions). *Matter of Luviano-Rodriguez* (BIA 1996) Int Dec 3267. In a decision rendered several months after the BIA resolved this issue, however, the Ninth Circuit held that (a) it must defer to the agency interpretation, and (b) expungements do not eliminate firearms convictions, citing unpublished

earlier BIA decisions. *Carr v INS* (9th Cir 1996) 86 F3d 949, 951 ("We give . . . deference to the Board's interpretation of the Act"). Although *Luviano* was brought to the court's attention via a petition for rehearing, the Ninth Circuit panel adhered to its decision. Not wishing to be misunderstood, the BIA promptly rendered another en banc decision, this one unpublished, reaffirming its earlier decision that expungements eliminate firearms convictions. *In re Marroquin-Garcia* (BIA 1997) No. A90 509 015 (unpublished opinion). The Attorney General has certified both *Luviano* and *Marroquin* for reconsideration, but has not yet rendered a decision in those cases. Two conclusions are possible. First, the *Carr* decision is no longer good law because of the unmistakable tenor of "the Board's interpretation of the Act." *Carr v INS* (9th Cir 1996) 86 F3d 949, 951. Therefore, in the Ninth Circuit as in the rest of the nation, expungements eliminate firearms convictions for immigration purposes at least for the time being. Second, because BIA decisions are binding unless specifically set aside or modified (see, *e.g.*, *Matter of N.J.B.* (BIA 1997) Int Dec 3309, specifically providing that the BIA decision is vacated pending a new decision by the Attorney General), expungements currently eliminate firearms convictions unless and until the Attorney General alters current law. This situation could change, however, at any time. Immigration attorneys are entitled to have immigration courts respect firearms expungements until the Attorney General acts, but criminal defense counsel should steer clear of deportable firearms convictions if at all possible, because the effectiveness of expungements to eliminate them may disappear at any moment. Before relying on an expungement in this situation, counsel should check to determine the current state of the law.

The INS is currently arguing that the new definition of "conviction" contained in 8 USC §1101(a)(48)(A) eliminated the effectiveness of expungements under Pen C §1203.4(a). The new definition, however, requires a guilty or no contest plea in order for a conviction to be found. But under Pen C §1203.4(a) the plea of guilty or no contest is set aside, a plea of not guilty entered, and all charges are dismissed. Thus, there is no longer any guilty or no contest plea in the case. Therefore, under the plain language of the statute, there is arguably no conviction. It is true that the legislative history indicates that Congress intended "deferred adjudication" cases to constitute convictions, even after successful completion of those programs. However, the only "deferred adjudication" program in California is the new drug diversion under Pen C §§1000-1000.5. All reasonable doubts concerning the interpretation of deportation statutes are resolved in favor of the immigrant. *Barber v Gonzales* (1954) 347 US 637, 642, 98 L Ed 1009, 1013, 74 S Ct 822; *Fong Haw Tan v Phelan* (1948) 333 US 6, 10, 92 L Ed 433, 436, 68 S Ct 374. Therefore, expungements should continue to be effective in all cases except those drug cases in which the defendant would not have been eligible for FFOA treatment under 18 USC §3607, if prosecuted in federal court.

Special relief exists for youthful offenders under Welf & I C §1772 and Pen C §1203.45; those statutes 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 (contrary ruling).

The BIA has long held that expungement or dismissal of charges under Pen C §1203.4 eliminates the adverse immigration consequences stemming from

conviction of a crime involving moral turpitude. See, *e.g., Matter of Ozkok* (BIA 1988) 19 I&N 546; *Matter of G.* (BIA 1961) 9 I&N 159.

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. See *Matter of A. F.* (BIA 1959) 8 I&N 429.

If all records of a marijuana conviction have been destroyed under Health & S C §11361.5, the conviction probably cannot be proved by the INS. See, *e.g., Matter of Rodriguez-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 the INS obtains records of conviction before they are destroyed, or obtains a transcript of court proceedings or an appellate opinion not subject to destruction (Health & S C §11361.5(d)), perhaps it can still be used. See *Matter of Moeller* (BIA 1976) 16 I&N 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 plea of guilty for "good cause" before entry of judgment will eliminate any conviction. When entry of judgment is suspended and probation is granted, this motion must be made within six months after probation was granted. Pen C §1018. The defendant's lack of knowledge of immigration consequences can constitute good cause to withdraw a guilty plea. *People v Superior Court* (Giron) (1974) 11 C3d 793, 114 CR 596. Withdrawal of a guilty plea is discussed in §10.10.

When a sentence is corrected (see chap 34, §§38.5, 38.30–38.34) or commuted by a judge (see §38.5), the reduced sentence is the one considered by immigration authorities. *Matter of Martin* (BIA 1982) 18 I&N 226 (correction); *Matter of J.* (BIA 1956) 6 I&N 562 (commutation).

Reduction of a felony to a misdemeanor under Pen C §17 (see §22.40) may aid a noncitizen who would be disqualified from relief by having a felony conviction, *e.g.*, an applicant for an amnesty or Family Unity program, or Temporary Protected Status. See §§48.33-48.34, 48.38. Also, a noncitizen is eligible for the petty-offense exception to the moral turpitude ground of inadmissibility only if the conviction is a misdemeanor. See §48.19.

When judgment is vacated, *e.g.*, on a writ of error coram nobis (see §35.38) or habeas corpus (see §35.38), even a drug conviction has been held erased. *Matter of Sirhan* (BIA 1970) 13 I&N 592. See also Pen C §1016.5 (judgment vacated on defense motion when record does not reflect that judge advised defendant that plea of guilty could result in deportation, exclusion, or denial of naturalization); *People v Gontiz* (1997) 58 CA4th 1309, 68 CR2d 786 (statute requires no showing of prejudice); *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). For extensive discussion of obtaining California postconviction relief for immigrants, see Brady, California Criminal Law and Immigration, chap 8 (1997).

Responsibilities of original counsel when client seeks postconviction relief. Original counsel is free to assist the client in obtaining postconviction relief absent an active conflict of interest. For example, counsel may assist the client to obtain an expungement, writ of coram nobis, order vacating the conviction,

pardon, and similar relief as long as the grounds for relief do not include an allegation that the original counsel rendered ineffective assistance of counsel.

If a potential ineffective assistance claim is present, however, counsel should declare a conflict of interest and refer the client to independent counsel, *i.e.*, counsel who is not employed by the same law office as the original counsel. *Cuyler v Sullivan* (1980) 446 US 335, 64 L Ed 2d 333, 100 S Ct 1708; *U.S. v Miskinis* (9th Cir 1992) 966 F2d 1263; *People v Bailey* (1992) 9 CA4th 1252, 12 CR2d 339.

New and old counsel share a common professional obligation to act in their mutual client's best interests. Original counsel has a legal duty to cooperate with successor counsel and promptly return the client's papers (*i.e.*, the entire case file) on termination of the representation. The original client file, including every piece of paper, investigative report, and item of work product, physically belongs to the client and must be turned over to the client on request. Cal Rules of Prof Cond 3-700(A)(2); *Finch v State Bar* (1981) 28 C3d 659, 665, 170 CR 629 (duty to forward file to client or successor counsel); *Kallen v Delug* (1984) 157 CA3d 940, 950, 203 CR 879; State Bar Formal Opinion No. 1992–127 (original counsel must turn over entire file (which belongs to client), including attorney's notes, and must answer all oral questions if failure to do so would prejudice client). Absent contrary instructions from the client, counsel must retain the file indefinitely. LA County Bar Ass'n Legal Ethics Committee Formal Opinion No. 420.

Although it is certainly difficult to balance the desire to protect oneself against a finding of ineffective assistance of counsel against the obligation to ensure that the client does not suffer from counsel's mistakes, the better view is that professional integrity and enlightened self-interest combine to motivate counsel to aid the client as much as the truth will allow. Certainly, nothing counsel says can be used against him or her in a malpractice action. *Smith v Lewis* (1975) 13 C3d 349, 118 CR 621. It is also wise for counsel to attempt to mitigate any damage suffered by the client. Finally, the State Bar has never taken, and presumably never will take, disciplinary action against counsel solely on the basis of a mistake. It is simply not an ethical violation. A candid admission of a mistake, if one has been made, is professionally less damaging, and personally less distasteful, than being cross-examined and having one's credibility assailed by new counsel for a former client.

III. APPLICABLE IMMIGRATION LAW

§48.13 A. Description of Deportation, Inadmissibility, Removal, and Bar To Establishing Good Moral Character

▶ **Note:** See the chart in §48.14 for grounds for deportation, inadmissibility 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 establishing a ground for deportability or inadmissibility or by precluding the noncitizen from establishing good moral character for citizenship or other purposes. As discussed in §48.26, not only convictions but other evidence of criminal acts may lead to dire immigration consequences.

Since April 1, 1997, removal proceedings provide the mechanism to keep inadmissible noncitizens out of the United States and to remove those who are deportable. This combines what previously was encompassed by two separate proceedings: exclusion and deportation.

American immigration law is based on the premise that certain individuals are "undesirables." The INS's grounds of inadmissibility (called grounds of excludability under prior law, create a bar to both initial and later admissions to the United States. Such admissions can include actual attempts to enter the United States as well as requests for benefits under the INS to obtain lawful status, either temporary or permanent. Moreover, these grounds are applicable to all noncitizens, whether or not documented. These grounds can result in an otherwise eligible applicant being denied temporary or lawful status in the United States and can provide a basis to terminate status that was legally obtained.

The grounds of deportability form the legal basis to remove individuals, despite the fact that their last admission to the United States was lawful and regardless of the length of their legal residence.

Removal based on deportability. Removal is the expulsion of a noncitizen from the United States. See 8 USC §§1227, 1228(b), 1229a. With two exceptions, only an immigration judge can order removal based on deportability. The exceptions are:

- A federal district court judge can order removal of a noncitizen convicted of certain crimes (8 USC §1228(c)(1); see discussion in §48.8); and
- The INS can order removal of a nonpermanent resident who is convicted of an aggravated felony and has no form of relief available (8 USC §1228(b)).

Otherwise, a noncitizen whom the INS has cause to believe is deportable may be brought before an immigration judge for removal proceedings or the INS can pressure the noncitizen to accept "voluntary departure" before the institution of removal proceedings.

▶ **Note:** A mere stipulation to deportation or removal as part of a plea bargain in federal or state court is a deportation or removal for purposes of federal prosecution for illegal reentry after conviction of an aggravated felony and deportation or removal. 8 USC §1326(b)(2). See discussion in §48.8.

Many noncitizens with criminal records are brought directly from jail to immigration detention via an immigration hold or detainer. Once before an immigration judge, a noncitizen may accept removal, contest the charge of removability, or concede removability but apply for some form of relief from removal.

"Inadmissibility" means that a noncitizen is an "undesirable" who cannot enter the United States. See 8 USC §1182(a). An inadmissible noncitizen who attempts to physically enter the United States can be refused admission or brought under removal 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 inadmissible may be charged in removal proceedings as being deportable for having been inadmissible at his or her last entry. In addition, a noncitizen who is inadmissible is not eligible for most means of immigration (acquiring lawful permanent resident status). Without obtaining a waiver of the ground of inadmissibility, an inadmissible noncitizen is ineligible to immigrate through legalization (amnesty) programs,

a relative's or employer's visa petition, registry, or adjustment of status. A noncitizen who is inadmissible for a criminal problem is also ineligible to establish good moral character, which is a requirement for cancellation of removal for nonpermanent residents, registry, voluntary departure, and naturalized U.S. citizenship. See discussion of those forms of relief in §§48.28–48.38.

Crossover between deportability and inadmissibility. Several grounds of inadmissibility are similar but not identical to grounds of deportability, *e.g.*, a noncitizen with one conviction of a crime involving moral turpitude is inadmissible if the sentence was more than six months and is both inadmissible and deportable if the maximum sentence was one year or more and the offense occurred within five years after the date of admission. See §48.19. Some grounds of inadmissibility and deportability may be waived in certain circumstances at the discretion of an immigration judge or INS officer. For example, a noncitizen immigrating through a relative's visa petition may be able to apply, under 8 USC §1182(h), for a discretionary waiver of the moral turpitude ground of inadmissibility. A permanent resident with five years in that status and at least seven years continuous residence following lawful admission may apply for a discretionary waiver (now called "cancellation of removal") of all grounds of inadmissibility and almost all grounds of deportability (except conviction of an aggravated felony) under 8 USC §1229b(a).

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). A noncitizen who cannot establish good moral character is ineligible to apply for United States citizenship and is ineligible for some means of immigration or relief from removal, including cancellation of removal for certain nonpermanent residents, registry, and voluntary departure. See §§48.30-48.31, 48.35-48.36.

Good moral character need only be established for a specific amount of time for each benefit, *e.g.*, the ten years preceding an application for cancellation of removal for a ground of inadmissibility, and a reasonable period of time for registry. Conviction of an aggravated felony on or after November 29, 1990, is a permanent bar to establishing good moral character. Immigration Act of 1990 (Pub L 101–649, §509, 104 Stat 4978).

The bar to establishing good moral character incorporates several grounds for inadmissibility. A noncitizen may not establish good moral character if he or she is inadmissible on grounds, *e.g.*, relating to crimes involving moral turpitude, controlled substances, prostitution, a five-year sentence for two or more convictions, or smuggling of aliens. 8 USC §1101(f).

Other requirements are unique to the good moral character bar and are not grounds of inadmissibility. To be able to establish good moral character, a noncitizen must not have been actually confined as a result of a conviction for 180 days or more during the period for 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, or nominal sentence that includes good time or work time or other conduct credits that were not actually served. (Contrast this with measurement of "sentence imposed" for moral turpitude convictions, which depends on the nominal custody ordered by the court and not on time actually spent in jail. See §48.19.)

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 under oath to receive immigration benefits is barred from showing good moral character. 8 USC §1101(f).

§48.14 B. Chart: Grounds for Deportation, Exclusion, and Preclusion From Establishing Good Moral Character

This chart, prepared by the Immigrant Legal Resource Center in 1995 and reproduced with permission, has been updated by the authors.

See §48.13 for explanation of deportation, exclusion, and the bar to establishing good moral character. 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 §48.26.

Offense	*Deportation (8 USC §1227(a))*	*Exclusion (8 USC §1182(a))*	*Preclusion From Establishing Good Moral Character (8 USC §1101(f))*
Controlled substances	1 conviction (unless 30 gms. or less of marijuana). 8 USC §1227(a)(2)(B)(i). Possible aggravated felony: conviction for most controlled substance offenses beyond first conviction of simple possession is aggravated felony. 8 USC §1101(a)(43)(B).	1 conviction or admission of elements of one offense (single offense involving 30 gms. or less of marijuana for personal use can be waived). 8 USC §1182(a)(2)(A)(i). "Reason to believe" was or is drug trafficker. 8 USC §1182(a)(2)(C).	Same as Exclusion.
Moral turpitude	2 convictions, not single scheme; or 1 conviction within 5 years entry with sentence of 1 year or more. 8 USC §1227(a)(2)(A)(i)–(ii).[1]	1 conviction or admission; petty offense exception for 1 conviction, 6-month sentence or less, with 1-year maximum possible sentence, or admission of 1 offense with 1-year maximum possible sentence. 8 USC §1182(a)(2)(A)(i)(I)–(II).	Same as Exclusion.
Prostitution	None.	Engaging in, procuring, supported by prostitution (not customers) within last 10 years. 8 USC §1182(a)(2)(D).	Same as Exclusion.

Offense	*Deportation (8 USC §1227(a))*	*Exclusion (8 USC §1182(a))*	*Preclusion From Establishing Good Moral Character (8 USC §1101(f))*
Firearms offenses	1 conviction of any offense related to firearm or destructive device. 8 USC §1227(a)(2)(C).[2]	None.	Some can be aggravated felonies.[2]
Sentences	1-year sentence for violent crime, theft, receiving, burglary, document fraud, forgery, perjury, and a few less common offenses is aggravated felony.[1]	5-year total sentence for 2 or more convictions of any kind. 8 USC §1182(a)(2)(B).	Same as Exclusion, or physically confined 180 days.
Noncitizen smuggling	Before, at time of, or within five years after entry, aid or encourage alien to enter U.S. illegally; waiver for some noncitizens. 8 USC §1227(a)(1)(E).	At any time has encouraged or aided alien to enter illegally; waiver for some noncitizens. 8 USC §1182(a)(6)(E).	Same as Exclusion.
Drug addiction and abuse	Is or has been after admission a drug addict or abuser. 8 USC §1227(a)(2)(B)(ii).	Is drug addict, or abuser; or is alcoholic, and therefore person with mental or physical defect who poses threat. 8 USC §1182(a)(1)(A)(iv.	Habitual drunkard ineligible.
Aggravated felony	Conviction after November 11, 1988. 8 USC §§1101(a)(43) (definition of aggravated felony), 1227(a)(2)(A)(iii). See §§48.10, 48.12, 48.20–48.25.	Aggravated felons excludable for 20 years after deportation. 8 USC §1182(a)(9)(A)(ii).	Aggravated felons ineligible.

[1] Some moral turpitude offenses (*e.g.*, murder and certain offenses with a one-year sentence imposed) are also aggravated felonies. See 8 USC §1101(a)(43)(F)-(G), (P), (R)-(S).

[2] Conviction of trafficking in firearms and certain federal firearms offenses (*e.g.*, ex-felon in possession) are aggravated felonies. 8 USC §1101(a)(43)(C), (E).

C. Convictions and Sentences With Adverse Immigration Consequences

§48.15 1. Definition of "Conviction" for Immigration Purposes

▶ **Note:** The best case resolution is usually one that does not constitute a conviction. This includes acquittal, dismissal or diversion (with no plea of guilty or no contest), or a juvenile adjudication. An appeal of a conviction can delay its finality, and thus delay the beginning of deportation proceedings, until direct appeal has been exhausted or waived. *Pino v Landon* (1955) 349 US 901, 99 L Ed 1239, 75 S Ct 576 (per curiam); *Morales-Alvarado v INS* (9th Cir 1981) 655 F2d 172; *Will v INS* (7th Cir 1971) 447 F2d 529.

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

▶ **Note:** Some activities have adverse immigration consequences whether or not a conviction occurs—particularly prostitution, alien smuggling, or using false documents (under state or federal law), and drug addiction, abuse, or trafficking. See §48.26. Avoiding or eliminating a conviction may not avert those consequences that do not require a conviction.

The INA now defines "conviction" as a formal judgment of guilt, or, when adjudication has been withheld, when an alien has been found or pleaded guilty or no contest and some form of punishment has been imposed. 8 USC §1101(a)(48)(A). See Brady, California Criminal Law and Immigration, §2.1 (1997).

▶ **Note: 1997 diversion with guilty or no contest plea *does* constitute a conviction for immigration purposes, even after dismissal.** Diversions granted in 1996 and earlier involved no plea of guilty or no contest, and thus do not constitute "convictions" even under the new, broader INS definition. 8 USC §1101(a)(48)(A). Effective January 1, 1997, however, drug diversion under Pen C §1000 now requires a plea of guilty or no contest, and thus does constitute a conviction under the new INS standard.

Even after 1996, however, courts continue to grant diversions with no plea in four circumstances:

- When courts are slow to learn of or implement the new procedure;
- When the offense occurred in 1996 or earlier, ex post facto requires granting old-style diversion with no guilty plea (see *Collins v Youngblood* (1990) 497 US 37, 111 L Ed 2d 30, 110 S Ct 2715);
- When counties exercise their authority under the new diversion law to establish drug courts that can continue to grant old-style diversions with no plea (Pen C §1000.5); and
- When diversion programs that pertain to other types of cases, *e.g.*, mentally retarded defendants under Pen C §1001.20, do not require a plea.

▶ **Note:** For diversions granted in 1997 and later, counsel should check the record. If there was a plea, the diversion is a conviction for INS purposes. But if

there was no plea, it is not. Dispositions under diversion, deferred adjudication, or first-offender programs in other states must be carefully analyzed to ascertain whether a conviction has occurred.

Federal cases resolved under 18 USC §3607 (special probation and expungement procedures for first-offense drug possession) have been held not to constitute a conviction. *Matter of Deris* (BIA 1989) Int Dec 3102. See *Garberding v INS* (9th Cir 1994) 30 F3d 1187; *In re Manrique* (BIA 1995) Int Dec 3250.

A plea of guilty or no contest with imposition of sentence suspended constitutes a conviction even though technically no judgment of conviction is entered. *Gutierrez v INS* (9th Cir 1963) 323 F2d 593; *Matter of Ozkok* (BIA 1988) 19 I&N 546.

A disposition in juvenile proceedings does not constitute a conviction. *Matter of C.M.* (BIA 1953) 5 I&N 327. On representing juveniles, see §48.4.

A conviction is not final for immigration purposes unless direct appeals have been waived or exhausted or the appeal period has lapsed. *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 to appeal a conviction.

§48.16 2. Offenses Involving Controlled Substances

▶ **Note:** This section discusses *conviction* of controlled substance offenses. Drug addicts and abusers are deportable and inadmissible, and those whom the INS has reason to believe are or were drug traffickers are inadmissible, even without a conviction. See §48.26.

With few exceptions, drug convictions permanently destroy current lawful immigration status and prevent the person from obtaining that status in the future. A noncitizen who is convicted of an offense related to controlled substances is inadmissible under 8 USC §1182(a)(2)(A)(i)(II), deportable under 8 USC §1227(a)(2)(B), and barred from establishing good moral character under 8 USC §1101(f). Convictions under state or federal law as well as laws of other countries incur these penalties. Controlled substances are defined in 21 USC §802 to include almost all illegal drugs as well as precursor and "essential" chemicals. The federal and state lists are not the same. California's list prohibits certain drugs that are not on the federal list. Unless the record of conviction specifies a drug that is prohibited by the federal law, the conviction will not trigger deportation. *Matter of Paulus* (BIA 1965) 11 I&N 274.

Moreover, conviction of almost any drug offense, other than a first conviction of simple possession, is an aggravated felony under immigration law. 8 USC §1101(a)(43)(B). Conviction of an aggravated felony brings additional severe penalties beyond making the person deportable and inadmissible, *e.g.,* it may prevent any release under immigration bond, destroy eligibility for political asylum, and subject an aggravated felon who reenters the United States after deportation to severe federal criminal sanctions. See §48.22.

Even conviction of the most minor drug offense, such as presence in a place where drugs are used, will make a person deportable and inadmissible. *Matter of Hernandez-Ponce* (BIA 1988) 19 I&N 613. Conviction of driving under

the influence of drugs, or alcohol and drugs, should not be ruled an offense "relating to a controlled substance" unless a specific controlled substance is identified in the record of conviction, because driving while impaired as the result of legal or prescribed drugs is prohibited by the statutes. Veh C §23201; *People v Keith* (1960) 184 CA2d Supp 884, 7 CR 613 (insulin). See Veh C §312 (definition of drug).

There is an 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 is subject to discretionary waiver of inadmissibility under 8 USC §1182(h) if the person has certain United States citizen or permanent resident relatives. The plea or sentence transcript should contain a stipulation or finding that the quantity was 30 grams or less. In addition, a lawful permanent resident of five years, with seven years or more lawful unrelinquished domicile before one offense was committed, who is then convicted of a minor first-offense simple possession may apply for discretionary cancellation of removal under 8 USC §1229b (as long as the person does not have one or more aggravated felony convictions). See §48.29.

A conviction of being an "accessory after the fact" (see 18 USC §3) to a controlled substances offense does not itself constitute a controlled substances offense. *In re Batista-Hernandez* (BIA 1997) Int Dec 3321. The federal offense consists of aiding a criminal to escape arrest, trial, or punishment, and is so similar to the California offense defined in Pen C §32 that the same result should follow for the California offense. The BIA held that such a conviction could constitute "obstruction of justice," and therefore would be an aggravated felony conviction under 8 USC §1101(a)(43)(S), if the term of imprisonment ordered by the court is one year or more, whether as a condition of probation or as a state prison sentence, suspended or not. This latter holding, however, seems dubious. Compare *U.S. v Aguilar* (1995) 515 US 593, 132 L Ed 2d 520, 115 S Ct 2357 (obstruction of justice requires intent to influence existing judicial or grand jury proceeding; therefore, giving false statements to FBI agent who might or might not testify before grand jury is not sufficient). See §48.12.

▶ **Note:** Arresting agencies must notify the appropriate United States agency whenever they arrest a suspected noncitizen of violation of Health & S C §§11350, 11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368, or 11550. Health & S C §11369.

Strategy:

• Expunge a first conviction for simple possession of a drug. The adverse immigration consequences of this type of conviction have been held to be eliminated by state expungement, *e.g.*, under Pen C §1203.4. See *Garberding v INS* (9th Cir 1994) 30 F3d 1187; *In re Manrique* (BIA 1995) Int Dec 3250. See §48.12.

• Make every conceivable attempt to avoid conviction of any offense—even a minor one—related to controlled substances.

• Consider going to trial and appealing a conviction. This can delay the beginning of removal proceedings until direct appeal is over. See §48.15. Although no published case supports this approach, in practice proof that a late-filed appeal was accepted by an appellate court has been accepted as evidence

that no final conviction exists. But see *Matter of Polanco* (BIA 1994) Int Dec 3232 (court did not accept late-filed appeal because of failure to present paper work and other problems).

• Try to keep the record of conviction (charge, plea, judgment) free of the name of any specific controlled substance, so that immigration counsel can argue that the conviction does not establish that it involves a federally-listed controlled substance.

• Seek juvenile status or old-style diversion (with no plea), because they do not result in "a conviction." See §48.22. In juvenile court, seek to obtain a finding of possession only, not of trafficking, because the juvenile conceivably could be held inadmissible if the INS has "reason to believe" that he or she is or was a drug trafficker even though no conviction exists for immigration purposes.

• Favor conviction as an accessory after the fact over conviction as a principal when the former may avoid adverse immigration consequences.

• Note that conviction for soliciting commission of a drug offense has been held not to be deportable. *Coronado-Durazo v INS* (9th Cir 1997) 123 F3d 1322.

§48.17 3. Offense 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, possessing, or carrying . . . any weapon, part or accessory which is a firearm or destructive device" or for conspiracy or attempt to commit such an act. 8 USC §1227(a)(2)(C). Defined in 18 USC §921(a)(3)–(4), "firearm" generally includes all guns and firearms, frames and receivers, and mufflers and silencers, and "destructive device" includes bombs, grenades, rockets, missiles, mines, or similar items, and parts used to convert them. There is an exception for antique firearms and devices not intended to be used as weapons. (Alternative pleas that avoid immigration consequences are discussed under "Strategy" below.)

Firearms convictions could be even more damaging than drug convictions for those charged with being deportable in immigration court before April 1, 1997, because no waiver of deportability under 8 USC §1182(c) (INA §212(c)) was available in those cases. For deportation proceedings begun on or after April 1, 1997, however, the new discretionary "cancellation of removal" under 8 USC §1229b is now available to those convicted of firearms offenses at any time.

Conviction of trafficking in firearms or felon in possession of a firearm (Pen C §12021) is an "aggravated felony." Under 1994 amendments to 8 USC §1101(a)(43)(E), several other federal firearms offenses are also aggravated felonies. See §48.24. Conviction of conspiracy or attempt to commit a firearms offense triggers deportability under 8 USC §1227(a)(2), regardless of the date of the conviction. *Matter of Saint John* (BIA 1996) Int Dec 3295.

Strategy:

A conviction of a nonfirearms offense coupled with a sentence enhancement

based on use of a firearm is not a firearms conviction for immigration purposes. *Matter of Rodriguez-Cortes* (BIA 1992) Int Dec 3189 (defendant convicted of second-degree attempted murder under Pen C §§664 and 187(a) with sentence enhancement under Pen C §12022(a) for use of firearm found not deportable under firearms ground).

▶ **Note:** Offenses involving intent to cause great bodily harm will be held to be crimes involving moral turpitude, which have their own immigration effect (see §48.19), but they generally have less harmful immigration consequences than firearms offenses.

A conviction under a statute that does not explicitly involve a weapon does not incur deportability under the firearms ground even if the record reveals that a firearm was used. *Matter of Perez-Contreras* (BIA 1992) Int Dec 3194 (conviction under Washington statute of "criminal negligence causing . . . substantial . . . pain" not firearms offense, although record showed that defendant shot victim). Conviction under a statute that has as an element use of a weapon, but not necessarily a firearm, is not a basis for deportation under the firearms ground—especially if the record of conviction (charge, plea, verdict, sentence) is cleared of any reference to firearm use. *In re Madrigal-Calvo* (BIA 1996) Int Dec 3274; *In re Teixeira* (BIA 1996) Int Dec 3273; *In re Pichardo-Sufren* (BIA 1996) Int Dec 3275.

Expungement under Pen C §1203.4 eliminates a firearms conviction for immigration purposes. *Matter of Luviano-Rodriguez* (BIA 1996) Int Dec 3267. The Attorney General has certified this case for decision, so the current rule may change at any time. Until superseded, however, the BIA decision is binding. Thus, bargaining for a short probation period or early termination of probation in either a misdemeanor or a felony case and obtaining an expungement may resolve the problem more quickly. It is not clear, however, whether the INS will continue to honor expungements in firearms cases. Pending resolution of this question, vacation of judgment is the better strategy.

Conviction for accessory after the fact or solicitation to commit a firearm offense should not be considered deportable. See §48.16.

A person who could immigrate through a relative's or employer's visa petition but is deportable under the firearms ground is still eligible to apply for an adjustment of status or, possibly, immigration through consular processing. *Matter of Rainford* (BIA 1992) Int Dec 3191; *Matter of Gabryelsky* (BIA 1993) Int Dec 3213. For more information on firearms convictions and strategies, see Brady, California Criminal Law and Immigration §§6.1, 9.7, 11.10 (1997).

4. Crime Involving Moral Turpitude

§48.18 a. Definition

Many offenses, both minor and serious, are held to be crimes involving moral turpitude and carry serious immigration consequences. This is a term defined by federal immigration law, and is completely different from the same term as used in California criminal law to determine whether a witness may be impeached with a prior conviction. Counsel should review each noncitizen client's entire criminal record in all states and countries to learn whether the

person has convictions, and, if so, what they are for. If a noncitizen is charged with any crime, counsel should do the following:

- Ascertain 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.
- If it is the defendant's first commission of a crime involving moral turpitude, try to obtain a suspended imposition of sentence or a sentence of six months or less (to avoid exclusion, if the offense is a misdemeanor) or a plea to an offense with a *potential* sentence of less than one year (to avoid deportation). See §48.19.
- Keep in mind the possibility of postconviction relief, such as expungement under Pen C §1203.4, for persons completing probation. See §48.12.

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." The definition does not depend on misdemeanor or felony classifications or 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 or battery, and driving under the influence (at least when no injury occurs) have not. For further discussion, see Brady, California Criminal Law and Immigration §4.9 (1997).

Whether a crime is one of moral turpitude (sometimes called a "turpitudinous" crime) is decided by case law of the BIA and United States Courts of Appeals. Counsel should consult immigration texts to ascertain whether a particular crime constitutes a crime of moral turpitude. For California convictions, see Brady, California Criminal Law and Immigration, *Table: Crimes Involving Moral Turpitude Under the California Penal Code* (1997), an annotated chart of 70 common violations of the California Penal Code; for federal or out-of-state convictions, see Kesselbrenner & Rosenberg, Immigration Law and Crimes, App E (1997). See also 23 ALR Fed 480 (what constitutes "crime involving moral turpitude").

Whether an offense is considered turpitudinous depends on the statutory elements of the code section violated, not on the defendant's individual behavior. A code section is considered a "divisible statute" if its terms encompass both crimes of moral turpitude and crimes not involving moral turpitude. Unless the record of conviction (the indictment, complaint or information, plea or verdict, and the sentence) shows that the defendant was convicted under the turpitudinous portion of the divisible statute, immigration and reviewing courts must rule in favor of the noncitizen. *Hamdan v INS* (5th Cir 1996) 98 F3d 183 (Louisiana simple kidnap not crime involving moral turpitude because it covered parental nonransom kidnaps, was broader than federal kidnap definition, and record of conviction did not show federal elements); *Matter of C.* (BIA 1953) 5 I&N 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 portion of the statute involving moral 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 incur the same immigration penalties as conviction of the principal offense. This possible rule follows the reasoning in cases such as *In re Batista-Hernandez* (BIA 1997) Int Dec 3321, and *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). See Brady, California Criminal Law and Immigration §2.7 (1997). It is necessary under *Batista-Hernandez* to avoid court-ordered confinement of one year or more in order to avoid having the conviction considered to be an "obstruction of justice" aggravated felony under 8 USC §1101(a)(43)(S).

§48.19 b. Consequences of Conviction of Crime Involving Moral Turpitude; Remedies

Consider prior record. Counsel must review a defendant's entire criminal history in the United States and other countries before setting a disposition goal. A prior conviction of a crime involving moral turpitude (CMT) from another jurisdiction will be joined with the instant conviction by the INS when it is calculating whether the person is deportable or inadmissible.

Deportation. A noncitizen is deportable under 8 USC §1227(a)(2)(A) if he or she is convicted of:

- Two crimes involving moral turpitude not arising from a single scheme of misconduct (see, *e.g., Gonzalez-Sandoval v INS* (9th Cir 1990) 910 F2d 614; see also 19 ALR Fed 598); or
- One crime involving moral turpitude when the person committed the offense within five years after the last "admission" (8 USC §1101(a)(13)(A)) into the United States and the maximum possible sentence was one year or more. 8 USC §1227(a)(2)(A)(i).

▶ **Note:** The definition of the one-CMT deportation ground is more favorable for deportation proceedings begun before April 1, 1997. See Brady, California Criminal Law and Immigation, Update §4.5 (1997).

▶ **Note:** Because the one CMT must have been committed after admission to trigger deportability, a person who committed the CMT before admission (and was admitted because the offense was waived, or was not a basis for inadmissibility at the time) is not deportable; nor is a person who entered without inspection and was never lawfully admitted. See Brady, California Criminal Law and Immigration, Update §§1.2, 4.5(C)(1) (1997).

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

▶ **Note:** The petty-offense exception to the moral turpitude exclusion ground is available to noncitizens who have committed only one crime involving moral turpitude. A previous moral turpitude conviction, even if expunged, will destroy

eligibility for the exception. *Matter of S.R.* (BIA 1957) 7 I&N 495. Because the offense cannot have a maximum penalty of more than one year, a person convicted of a felony, with imposition of sentence suspended, is not eligible for the petty-offense exception and will be found inadmissible. That person will be eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17, because the offense then has a maximum of only one year. To qualify for the petty offense exception, the sentence imposed must be no greater than six months incarceration, either as part of a judgment (even if execution is suspended) or as a condition of probation. This refers to the nominal sentence ordered by the court, rather than the actual time spent incarcerated. See §48.10.

The youthful-offender exception to the CMT ground of imadmissibility provides that a person who committed one such act while under the age of 18 is not inadmissible if the act or release from resulting imprisonment took place more than five years before the current application. 8 USC §1182(a)(2)(A)(ii)(I).

Effect of plea of guilty; expungement. A plea of guilty or no contest results in a conviction, which triggers inadmissibility.

A plea of guilty is also an admission, and an admission of a crime involving moral turpitude is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I). It might appear that a plea of guilty, as an admission, would make a defendant inadmissible 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 194. Moreover, the INS faces a host of technical difficulties in attempting to remove someone on the basis of an admission as opposed to a conviction. See Kesselbrenner & Rosenberg, Immigration Law and Crimes §3.2 (1997).

▶ **Note:** Noncitizens should also avoid unnecessary admissions of any uncharged turpitudinous offenses as part of a plea of guilty. 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 inadmissibility.

5. Aggravated Felonies

§48.20 a. What Constitutes Aggravated Felony

Congress continues to expand the list of offenses that qualify as "aggravated felonies," some of which are neither "aggravated" nor "felonies." The current definition comprises 21 paragraphs, some containing many offenses. 8 USC §1101(a)(43). The offenses include:

- Murder (in the authors' opinion, this includes first and second degree murder, but not manslaughter);
- An offense generally considered to be "drug trafficking" or one of several enumerated federal drug offenses and state analogues (see §48.23);
- Trafficking in or specific federal offenses relating to firearms or destructive devices (*e.g.,* bombs, grenades) and ex-felon in possession of a firearm (see definition in §48.24 and related "safe" convictions in §48.17);

- Money laundering (as defined in 18 USC §1956 or a state analogue) or monetary transactions in property derived from unlawful activity (as defined in 18 USC §1957 or a state analogue), if the amount of the funds exceeded $100,000;
- A "crime of violence" resulting in a sentence imposed of one year (counsel should obtain suspended imposition of sentence, and a sentence or custody as a condition of probation of 364 days or less); see §48.25;
- Theft or burglary if the sentence imposed is one year;
- Alien smuggling for commercial gain;
- Trafficking in false documents if the sentence imposed is at least five years (note that Proposition 187 (Pen C §113) made document fraud a state criminal offense with a mandatory sentence of five years);
- Various offenses, such as demand for ransom, child pornography, and RICO offenses punishable with a one-year sentence; running a prostitution business; slavery; offenses relating to national defense, sabotage, or treason; and failure to appear to serve a sentence if the underlying offense is punishable by a term of five years or more.

▶ **Note:** These offenses are aggravated felonies regardless of the date of conviction. However the provision that attaches a consequence to the aggravated felony conviction may have an effective date. See §48.21.

These types of offenses are included whether in violation of federal or state law (*Paxton v INS* (ED Mich 1990) 745 F Supp 1261; *Matter of Barrett* (BIA 1990) Int Dec 3131), or in violation of foreign law if release from the resulting imprisonment occurred within the last 15 years. See 8 USC §1101(a)(43).

Analysis of aggravated felony issue. First, criminal counsel should stay as far away as possible from any offense that might be an aggravated felony. Failing that, some state offenses might not constitute aggravated felonies under the federal definition. Counsel should check the essential elements of the state offense carefully to determine whether the offense is described in any subdivision of the statutory definition. If not, there may be an argument in immigration court that the offense is not an aggravated felony. The federal courts are using *federal* definitions of the terms used. Locate the federal offense involved, and check the elements of the analogous state offense against the federal elements. If the elements are significantly different, then proof of the state conviction (with state elements) will not establish by clear and convincing evidence that the essential elements of the *federal* language of this definition are met, and immigration counsel has an argument in immigration court. This argument is analogous to the "divisible statute" analysis used by the BIA to determine whether an offense is a firearms offense or a crime of moral turpitude. See, *e.g.*, *Hamdan v INS* (5th Cir 1996) 98 F3d 183 (Louisiana simple kidnap conviction did not constitute crime of moral turpitude because it included conduct—parental taking of child not for ransom—that was not included in federal definition of crime). The elements are analyzed in the abstract, in terms of the minimum conduct necessary to violate the statute, and not in terms of the actual conduct of the accused. *U. S. v Gonzalez-Lopez* (11th Cir 1990) 911 F2d 542; *Matter of Alcantar* (BIA 1994) 20 I&N 801. For ideas concerning specific offenses, see

Taylor v U. S. (1990) 495 US 575, 109 L Ed 2d 607, 110 S Ct 2143 (burglary under federal definition may exclude certain state burglary convictions for federal sentence enhancement purposes); *U.S. v Nardello* (1969) 393 US 286, 21 L Ed 2d 487, 89 S Ct 534 (uniform federal definition of extortion employed in Travel Act case); *Dickerson v New Banner Institute, Inc.* (1983) 460 US 103, 74 L Ed 2d 845, 103 S Ct 986 (unless statute specifically refers to state law definition, it is presumed Congress intended to use uniform federal definition).

Second, the aggravated felony statute contains two classes of definition: (1) plain-language definitions (*e.g.*, 8 USC §1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"), and (2) definitions framed in terms of specific federal statutes (*e.g.*, 8 USC §1101(a)(43)(D) ("an offense described in section 1956 of title 18, United States Code" (money-laundering)). When the statute provides in the unnumbered paragraph immediately following 8 USC §1101(a)(43)(U) that "[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law," it is obvious that the statute encompasses the first class, such as state "murder" and other plain-language offenses, but not so obvious that it includes the second class, *e.g.*, state offenses "described in section 1956 of title 18, United States Code." As is the case with criminal statutes, the immigration statutes should be strictly consuetude because of the effect on the immigrant. *Barber v Gonzales* (1954) 347 US 637, 642, 98 L Ed 1009, 1014, 74 S Ct 822; *Fong Haw Tan v Phelan* (1948) 333 US 6, 10, 92 L Ed 433, 436, 68 S Ct 374. This argument is therefore available in immigration court for all aggravated felonies specifically defined in terms of federal statutes.

Sentence requirements for aggravated felonies. Many of the most common generic offenses require that a sentence of one year or more must be imposed before the offense will be considered an aggravated felony: a crime of violence (8 USC §1101(a)(43)(F)); theft, receiving stolen property, or burglary (8 USC §1101(a)(43)(G)); passport or document forgery (8 USC §1101(a)(43)(P)); commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered (8 USC §1101(a)(43)(R)); and obstruction of justice, perjury, subornation of perjury, or bribery of a witness (8 USC §1101(a)(43)(S)). For this purpose, the offense is an aggravated felony if (a) a state prison sentence of one year or more is imposed, even if execution is suspended, or (b) the court ordered 365 days or more of custody as a condition of probation. 8 USC §1101(a)(48)(B). To avoid an aggravated felony in this context, counsel should obtain "imposition of sentence suspended" and a maximum custody, as a condition of probation, of 364 days. Even if several consecutive 364-day terms of custody as a condition of probation are imposed, no single offense is punished by one year or more, and therefore none of the offenses constitutes an aggravated felony.

▶ **Note:** Felony driving under the influence, even without accident or injury, was held to be a crime of violence under 8 USC §1101(a)(43)(F) and thus an aggravated felony if a sentence of one year or more was imposed. *In re Magallanes-Garcia* (BIA 1998) Int Dec 3341.

§48.21 b. Effective Dates of Aggravated Felonies

Generally, a listed offense constitutes an "aggravated felony" regardless of

the date of conviction (8 USC §1101(a)(43)), but the separate immigration provision creating the particular disability in question (*i.e.*, saying an aggravated felon *is deportable*) must be examined to determine whether *it* contains an effective date.

The BIA has held that determining whether to apply an aggravated felony bar is a two-pronged test. *Matter of Reyes* (BIA 1994) 20 I&N 789; *Matter of A-A-* (BIA 1992) 20 I&N 492. First, the court must determine whether the offense fits the definition of aggravated felony. Second, it must examine whether the specific statutory penalty applies. *Matter of A-A-, supra*. Under the second prong of the BIA's test, if there is a specific statutory effective-date limitation on whether an aggravated felony in fact causes a certain disability, *e.g.*, deportation, then that effective date must be considered in deciding whether the admitted aggravated felony results in, *e.g.*, deportability. See *Matter of A-A-, supra* (applying two-part test to deportability under 8 USC §1227(a)(2)(A)(iii)).

Some of the most important effective dates for criminal practitioners are the following:

(1) An aggravated felony conviction does not create a ground of deportability if the conviction occurred before November 18, 1988. See Brady, California Criminal Law and Immigration, Update §9.2 (1997). When it created the aggravated felony deportation ground (8 USC §1227(a)(2)(A)(iii)), Congress specified that only a noncitizen with an aggravated felony conviction occurring on or after November 18, 1988, was deportable as an aggravated felon. The Anti-Drug Abuse Act of 1988 (Pub L 100–690, §7344(b), 102 Stat 4181), enacted November 18, 1988, provides that the deportation ground applies to a noncitizen convicted on or after the date of enactment of the statute. In *Matter of A-A-, supra*, the BIA held that the alien was therefore not deportable as an aggravated felon because the conviction predated the effective date.

(2) An aggravated felony conviction does not create a ground of deportability if the conviction occurred before the most recent "admission." See 8 USC §1227(a)(2)(A)(iii). This could help persons who became permanent residents *after* their aggravated felony convictions, either because the convictions were waived or because they were not grounds of inadmissibility at the time the persons immigrated. There is a statutory argument that adjustment of status is not considered to be an "admission." See 8 USC §1101(a)(13) (definition of "admission" as entry following inspection and authorization). Some aliens might wish to argue that they are seeking admission, and are subject to grounds of inadmissibility rather than deportability in removal proceedings, because they might be deportable but not inadmissible for a conviction for aggravated felony, domestic violence, firearms, or crime of moral turpitude deportation grounds.

(3) An aggravated felony conviction on or after November 29, 1990, creates a permanent bar to showing good moral character. Good moral character must be shown to obtain certain immigration benefits, *e.g.*, voluntary departure, suspension of deportation, registry, and naturalization. An aggravated felony conviction creates a permanent bar to showing good moral character. Pub L 101-649, §509, 104 Stat 4978; 8 CFR 316.10, 329.2; 8 USC §1101(f)(8) (bar created for "one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section)".

Because of the effective date of the statute that added this bar, however,

only an aggravated felony conviction that occurred on or after November 29, 1990, will create this bar. Immigration Act of 1990 (Pub L 101-649, §509(a), 104 Stat 4978). Conviction of murder is a permanent bar regardless of the date of conviction. See 8 USC §1101, note re amendment effective November 29, 1990; *Castiglia v INS* (9th Cir 1997) 108 F3d 1101. Compare *Castiglia* with *Santamaria-Ames v INS* (9th Cir 1996) 104 F3d 1127 (non-murder case in which Ninth Circuit did not consider impact of §1101(f)(8)).

This could be important for naturalization applicants, even those who may be deportable under other grounds. Some veterans are permitted to naturalize despite being deportable. Other immigrants could apply for discretionary termination of deportation or removal proceedings to seek naturalization. See Brady, California Criminal Law and Immigration, Update §11.20 (1997).

(4) For purposes of enhancing the sentence for the federal crime of illegal reentry, the new definition of aggravated felony applies only to reentries occurring on or after September 30, 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) (Pub L 104-208, Div C, §321(c), 110 Stat 3009-627) provides that "[t]he amendments made by this section [including the expanded definition of "aggravated felony"] shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred, and shall apply under section 276(b) of the Immigration and Nationality Act only to violations of section 276(a) of such Act occurring on or after such date." Pub L 104-208, Div C, §321(c), 110 Stat 3009-627. This leaves intact the federal decisions that provide that the aggravated felony must have been listed as such on the date of the illegal reentry before the enhanced penalties can be imposed for the federal criminal offense of illegal reentry, after deportation and after the aggravated felony conviction, under 8 USC §1326(b)(2).

(5) In illegal-reentry prosecutions, the specific offense must have been on the aggravated felony list before the date of its commission. In *U. S. v Gomez-Rodriguez* (9th Cir 1996) 96 F3d 1262, the Ninth Circuit held that a conviction for assault with a deadly weapon (a crime of violence) did not constitute an aggravated felony for purposes of illegal reentry under 8 USC §1326(b)(2), because it had not been committed on or before November 29, 1990, the effective date of the statute adding it to the definition of aggravated felony.

The Anti-Drug Abuse Act of 1988 (ADAA) (Pub L 100–690, §7344(b), 102 Stat 4181), enacted November 18, 1988, provides that the deportation ground for aggravated felons applies to a noncitizen convicted on or after the date of enactment of the statute. Pub L 100-690, §7344(b), 102 Stat 4470. The BIA held that an alien was therefore not deportable if the conviction predated the statute's effective date. *Matter of A-A-* (BIA 1992) 20 I&N 492. The ADAA amended the Immigration and Nationality Act by adding 8 USC §1101(a)(43) to define an aggravated felony as follows:

- Murder;
- Any drug trafficking crime as defined in 18 USC §924(c), or §102 of the Controlled Substances Act; and
- Any illicit trafficking in any firearms or destructive devices as defined in 18 USC §921.

The BIA and federal courts of appeal have held that these three offenses

are aggravated felonies for many immigration purposes, regardless of the date of commission or conviction of the offense. See, *e.g.*, *Arthurs v INS* (9th Cir 1992) 959 F2d 142.

The Immigration Act of 1990 (Pub L 101-649, §501(b), 104 Stat 4978), applicable only to offenses committed on or after November 29, 1990, added:

- Money laundering;
- Any crime of violence as defined in 18 USC §16 for which the term of imprisonment is at least five years; and
- The inclusion of certain foreign convictions as aggravated felonies.

See also Matter of A-A- (BIA 1992) 20 I&N 492.

The Immigration and Nationality Technical Corrections Act of 1994 (Pub L 103-416, 108 Stat 4305), applicable only to convictions entered on or after the enactment date of October 25, 1994, added:

- Trafficking in certain firearms, destructive devices, or explosive materials;
- Theft and burglary offenses for which the term of imprisonment is at least five years (regardless of whether any of the sentence was suspended);
- Certain ransom offenses;
- Certain offenses related to child pornography or running a prostitution business;
- Certain offenses relating to the Racketeer Influenced and Corrupt Organizations Act (RICO), *e.g.*, income tax evasion in which revenue loss to the government is in excess of $200,000; and
- Certain offenses related to peonage, slavery, involuntary servitude, espionage, sabotage, or national security.

The Anti-Terrorism and Effective Death Penalty Act of 1996 §440(e) (Pub L 104-132, 110 Stat 1214), applicable to convictions on or after the date of enactment of April 24, 1996, added:

- Offenses described in 18 USC §1084 (if a second or subsequent offense) or 18 USC §1955, relating to gambling offenses;
- Transportation for the purposes of prostitution as defined in 18 USC §§2421-2423;
- Alien smuggling under 8 USC §1324(a)(1) for which the term of imprisonment imposed (regardless of time suspended) is at least five years (this provision alone was made retroactive to convictions occurring on or after October 24, 1994);
- Falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 USC §1543 or §1546(a) relating to document fraud for which the term of imprisonment imposed (regardless of any time suspended) is at least 18 months;
- An offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more;
- An offense described in 8 USC §1325(a) (entry at improper time or place), or 1326 (reentry of removed alien) committed by an alien who was previously deported on the basis of a conviction for an offense described in 8 USC §1101(a)(43);

• An offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered, for which a sentence of five years of imprisonment or more may be imposed;

• An offense relating to obstruction of justice, perjury, subornation of perjury, or bribery of a witness for which a sentence of five years' imprisonment or more may be imposed;

• An offense relating to failure to appear before a court under a court order to answer to or dispose of a charge of a felony for which a sentence of two years imprisonment or more may be imposed; and

• Any attempt or conspiracy to commit any offense described in 8 USC §1101(a)(43).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 §322, effective September 30, 1996, added the following offenses and amendments:

• Rape and sexual abuse of a minor (8 USC §1101(a)(43)(A));

• The amount of funds laundered must exceed $10,000 (8 USC §1101(a)(43)(D)); and

• The loss to the government from tax evasion must exceed $10,000 (8 USC §1101(a)(43)(M)(ii));

• The term of imprisonment required to make a crime of violence (8 USC §1101(a)(43)(F)), theft offense (8 USC §1101(a)(43)(G)), RICO offense (8 USC §1101(a)(43)(J)), document fraud offense (8 USC §1101(a)(43)(P)), forgery offense (8 USC §1101(a)(43)(R)), or obstruction of justice offense (8 USC §1101(a)(43)(S)) into an aggravated felony was lowered from five years to one year, and the definition of sentence was broadened to include custody as a condition of probation (8 USC §1101(a)(48)(B));

• Violation of anonymity of undercover intelligence agents under 50 USC §421; and

• A defense in the case of alien smuggling (8 USC §1101(a)(43)(N)) and document fraud (8 USC §1101(a)(43)(P)) was created for those who assist only their spouse, child, or parent (and no other individual).

For other immigration disabilities, *e.g.*, political asylum, cancellation of removal for certain nonpermanent residents, and suspension of deportation, it is important to check with immigration counsel to determine whether there is an effective date issue. For further discussion of this complex area see Brady, California Criminal Law and Immigration §9.2 (1997).

§48.22 c. Consequences of Conviction of Aggravated Felony

Conviction of an aggravated felony under 8 USC §1101(a)(43) is a basis for deportation. 8 USC §1227(a)(2)(A)(iii). Other penalties from this type of conviction include:

• Ineligibility for political asylum (8 USC §1158(d)).

• Ineligibility to establish good moral character (8 USC §1101(f)), a requirement for cancellation of removal for certain nonpermanent residents, suspension of deportation, voluntary departure, and United States citizenship (see §48.13).

• Ineligibility for immigration within 20 years after deportation (8 USC §1182(a)(9)(A)(ii)).

• Restricted eligibility for release on bond from immigration detention (8 USC §1226(c)), with some exceptions for permanent residents and persons who were lawfully admitted to the United States. A person who cannot secure an immigration bond will remain in INS jails during the pendency of the hearing and any appeals, with little access to counsel and almost no means of obtaining pro bono immigration counsel.

• Being subject to a speeded-up schedule for deportation hearings and appeals (8 USC §1228(a)(3)).

• Ineligibility for automatic stay of deportation pending review of deportation order by federal appeals court (8 USC §1105a(3)).

▶ **Note:** Aggravated felons who reenter the United States illegally after deportation face up to 20 years in prison if convicted under 8 USC §1326(b)(2). Counsel should advise defendants accordingly.

An INS officer can deport a nonpermanent resident without permitting the person a hearing before an immigration judge if, in the officer's opinion, the person is a noncitizen who has been convicted of an aggravated felony and is not eligible for immigration relief. 8 USC §1228(b). As an apparent nod to due process, the same INS officer who enters the charges cannot be the officer who signs the deportation order. Appeal of the order is limited to habeas corpus under 8 USC §1105a. See Brady, California Criminal Law and Immigration §9.19 (1997).

§48.23 d. Drug Offenses

Drug trafficking. An offense that meets either of two tests will be considered a drug-trafficking aggravated felony (8 USC §1101(a)(43)(B)), which subjects the person convicted of it to the penalties and restricted rights discussed in §48.22. The two tests are:

• Any felony offense that is typically considered to be trafficking, *e.g.* sale or possession for sale, is an aggravated felony; and

• Conviction of any state or federal felony that could be considered "punishable" under major federal drug statutes listed in 18 USC §924(c)(2) is also considered to be trafficking, even if—like second-offense simple possession—it is a state misdemeanor or an offense that is not actually related to sales.

The three major federal drug statutes listed in 18 USC §924(c)(2) include the Controlled Substances Act (21 USC §§801–904), the Controlled Substances Import and Export Act (21 USC §§951–970), and the Maritime Drug Law Enforcement Act (46 USC App §§1901–1904).

Determining which California drug offenses are "punishable" under federal law. The test to decide whether a California drug offense is punishable under a major federal drug statute 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* (BIA 1990) Int Dec 3131.

Counsel should be alert to differences between the federal and state offenses. For example, a defendant's first conviction of simple possession, generally a felony under California law, is not an aggravated felony because the corresponding federal offense is only punishable as a misdemeanor. 21 USC §844. See *Matter of L-G* (BIA 1994) Int Dec 3234. A second conviction for possession has been held to be an aggravated felony, however, even though it might be a state-law misdemeanor, because it can be punished as a felony under federal law. 21 USC §844(a); *U.S. v Garcia-Olmedo* (9th Cir 1997) 112 F3d 399; *U.S. v Zarate-Martinez* (9th Cir 1998) 133 F3d 1194. If the first simple-possession conviction is expunged, arguably the second would become the "first," and no longer qualify as an aggravated felony. Note that many minor drug offenses, *e.g.*, Health & S C §11550 (under the influence) and Pen C §647(f) (under the influence), have no federal analogue. Transportation (*e.g.*, Health & S C §11352(a)) has no exact federal analogue, and there are excellent arguments that it should not be an aggravated felony. But see *U.S. v Lomas* (9th Cir 1994) 30 F3d 1191, 1193. See also Brady, California Criminal Law and Immigration §9.6 (1997).

A conviction of driving under the influence of drugs that does not identify the drug as one on the federal list of controlled substances is not a deportable or excludable conviction. See §48.16.

▶ **Note:** For a second conviction of simple possession to be punishable as a felony, federal law requires the prosecutor to file an information charging the prior convictions. 21 USC §851(a)(1). Therefore, if a state prosecutor does not file charging the priors, defense counsel can argue that the conviction would not be punishable as a felony under federal law and should therefore not be an aggravated felony. But see *U.S. v Lomas* (9th Cir 1994) 30 F3d 1191.

Manufacturing. Federal law punishes anyone who knowingly or intentionally manufactures drugs. The California statute proscribing manufacture, however, does not require knowledge. Compare Health & S C §11379.6 with 21 USC §841(a)(1). See also *People v Telfer* (1991) 233 CA3d 1194, 284 CR 913. Thus, it could be argued that a conviction for manufacturing under the California statute should not be considered an aggravated felony.

Being an accessory. Being an accessory after the fact under Pen C §32 is not a drug-related offense at all. See §48.16. Conviction of being an accessory to an aggravated felony should not itself be held to be an aggravated felony. This is a better plea than to a drug conviction. In some cases, vigorous negotiation can result in a plea bargain to being an accessory even when the original charge did not involve this act.

▶ **Note:** A plea to accessory after the fact must carry a sentence to confinement no greater than 364 days of custody, either in state prison or jail as a condition of probation, in order to avoid being considered an aggravated felony under the obstruction of justice provision. 8 USC §1101(a)(43)(S); *In re Batista-Hernandez* (BIA 1997) Int Dec 3321 (18 USC §3). There are excellent arguments that *Batista-Hernandez* was wrongly decided in this respect. See §48.16.

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 offenses. 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. Remember that, regardless of discrepancies between state and federal law, a state felony offense that meets the common definition of trafficking, *e.g.*, sale or possession for sale, is an aggravated felony. See Brady, California Criminal Law and Immigration §9.6 (1997).

§48.24 e. Trafficking in and Other Offenses Involving Firearms or Destructive Devices

Persons convicted of any offense related to firearms or destructive devices can be found deportable under 8 USC §1227(a)(2)(C). For removal proceedings filed on or after April 1, 1997, the immigration court has discretionary power to grant cancellation of removal under 8 USC §1229b if the conditions are met. See §§48.17, 48.29. Counsel should use caution, however, because certain firearms offenses are aggravated felonies, for which cancellation is barred.

Any state or federal offense involving trafficking in firearms or destructive devices is an aggravated felony under 8 USC §1101(a)(43)(C). Under 8 USC §1101(a)(43)(E) (added in 1996), a host of specific federal offenses concerning firearms and destructive devices are aggravated felonies (*e.g.*, receiving stolen weapons, communication of threat to damage property by weapons, ex-felon in possession, interstate shipment). Most of these do not appear to have an exact analogue under California law. See discussion in Brady, California Criminal Law and Immigration §9.7 (1997).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104-208, Div C, 110 Stat 3009-546) made the definition of aggravated felony retroactive in that convictions for offenses listed in 8 USC §1101(a)(43) now constitute aggravated felonies regardless of when they occurred. IIRIRA §321(c). However, one must still look further to ascertain if any relief is available, because the law does not purport to eliminate the effective dates that govern the consequences that flow from such a conviction. The statute provides that the new lack of effective date applies to "actions taken" after September 30, 1996. This term is not defined, and thus it can be argued that the proper interpretation would be to apply this rule to cases commenced after that date. See, *e.g.*, *Valderrama-Fonseca v INS* (9th Cir 1997) 116 F3d 853. In addition, the old effective dates for classifying what convictions constitute aggravated felonies still apply in federal criminal prosecutions for illegal reentry into the United States after conviction of an aggravated felony and deportation or removal, under Congress' explicit provision for this in IIRIRA §321(d).

The firearms and explosives offenses described in 8 USC §1101(a)(43)(E) are:

- 18 USC §842(h) (receiving stolen explosives);
- 18 USC §842(i) (shipping or receiving explosives in interstate or foreign commerce by indictee, felon, fugitive, addict, or mental defective or committee);
- 18 USC §844(d) (transportation or receipt of explosives in interstate or foreign commerce with intent to injure, intimidate, or damage property);

- 18 USC §844(e) (communication of threat or false information concerning attempt to injure, intimidate, or damage property by fire or explosive);
- 18 USC §844(f) (malicious damage by fire or explosive of property of United States or organization receiving federal funds);
- 18 USC §844(g) (illegal possession of explosive in airport);
- 18 USC §844(h) (use or carrying of explosive in commission of federal felony);
- 18 USC §844(i) (malicious destruction by fire or explosive of property used in or affecting commerce);
- 18 USC §922(g)(1)–(5) (possession of firearms or ammunition by felon, fugitive, addict, mental defective, committee, alien unlawfully in United States, dishonorable dischargee, or person who renounced United States citizenship);
- 18 USC §922(j) (receiving stolen arms or ammunition);
- 18 USC §922(n) (shipping or receipt of arms or ammunition by felony indictee);
- 18 USC §922(o) (possession of machine gun);
- 18 USC §922(p) (possession of undetectable firearm);
- 18 USC §922(r) (assembly of illegal rifle or shotgun from imported parts);
- 18 USC §924(b) (shipping or receipt of firearm or ammunition with intent to use in commission of felony); and
- 18 USC §924(h) (transfer of firearm with knowledge it will be used to commit crime of violence or drug trafficking offense).

See also IRC §5861 (*e.g.*, failure to pay firearms tax, possession of unregistered firearm or one with serial number altered).

§48.25 f. Crimes of Violence

A person convicted of a crime of violence and sentenced to at least one year's imprisonment is an aggravated felon (8 USC §1101(a)(43)(F)), subject to the penalties and restricted rights discussed in §48.22. 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 person's 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), whereas possession of a firearm (*U.S. v O'Neal, supra*,) and drug trafficking (*U.S. v Cruz* (11th Cir 1986) 805 F2d 1464) are not.

A felony conviction of driving under the influence is a "crime of violence." See §48.20.

To avoid aggravated felon status for his or her client, defense counsel should obtain a sentence of less than one year—meaning suspended imposition of sentence or a sentence of 364 days or less (either directly imposed or ordered as a condition of probation)—for any offense that might be classified as a crime of violence.

▶ **Note:** Crimes of violence committed before November 29, 1990, are not aggra-

vated felonies. Immigration Act of 1990 (Pub L 101-649, §501(b), 104 Stat 4978). See discussion regarding effect on available relief in §48.24.

§48.26 D. Conduct-Based Immigration Consequences

Noncitizens may be held deportable, inadmissible, or barred from establishing good moral character for reasons other than convictions and sentences in criminal cases. See the chart in §48.14 for grounds for these actions. The most common forms of conduct that can trigger adverse immigration consequences without a conviction are prostitution, alien smuggling, document fraud, and drug trafficking, abuse, and addiction. This section discusses grounds not requiring a conviction or sentence.

▶ **Note:** When a ground for inadmissibility, deportation, or preclusion from establishing good moral character does not require a conviction, the conduct triggering it might be established by a juvenile court finding (see §48.15) or by police reports or other evidence. See *Matter of Rico* (BIA 1979) 16 I&N 181 (criminal charges dismissed but other evidence demonstrated trafficking and triggered exclusion).

Drug traffickers. A noncitizen is inadmissible 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 drugs away, is considered trafficking, as is maintaining a place where drugs are distributed. *Matter of Martinez-Gomez* (BIA 1972) 14 I&N 104. Importation or possession for one's own use is not "trafficking." See *Matter of McDonald & Brewster* (BIA 1975) 15 I&N 203. Similarly, transportation for personal use should not be considered "trafficking." But see *U.S. v Lomas* (9th Cir 1994) 30 F3d 1191, 1193.

Drug addicts and abusers. A noncitizen is inadmissible if he or she is 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), 1227(a)(2)(B)(ii). Drug "addiction" and "abuse" are medical determinations. See *Matter of F.S.C.* (BIA 1958) 8 I&N 108. The definition of "drug abuser" is a matter of controversy, and the definition may differ depending on which government agency makes the determination. United States consulates under the Department of State handle family visas and other cases processed abroad, whereas the INS, under the Department of Justice, handles immigration matters in the United States. Both consulates and the INS obtain information about casual drug use from the interviews between noncitizens and government-approved physicians that are required in applications for permanent residency. Current instructions to these physicians, which are followed in at least some consulates abroad, interpret "current drug abuse" to include anyone who has used an unlawful drug beyond experimentation (one-time use) within the previous three years.

The current definition of "drug abuser" seems too strict under currently accepted medical standards; counsel may wish to challenge it in deportation proceedings in the United States. Challenges to exclusion by consulates abroad, however,

are virtually impossible because no judicial review is available. Persons with consular appointments abroad should be warned of the interviews and, if necessary, delay the application until three years after using any drugs.

▶ **Note:** This controversy illustrates the dire consequences of almost any drug offense and shows the consequences of admitting to any involvement with drugs. Counsel should advise the defendant not to discuss his or her history of illegal drug use with police or probation department, to avoid triggering deportation or inadmissibility under these grounds.

Prostitutes. A noncitizen is inadmissible and barred from establishing good moral character if he or she has engaged in the business of prostitution within the previous 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. See *Matter of R.M.* (BIA 1957) 7 I&N 392. In addition, persons who engage in prostitution, and possibly customers, can be found to have committed a crime involving moral turpitude. See, *e.g., Matter of Lambert* (BIA 1965) 11 I&N 340.

Persons convicted of drunk driving. As of 1990, chronic alcoholism is not a ground of inadmissibility. However, alcoholics can be found inadmissible under a ground relating to physical and mental disorders and associated behavior that pose 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 a conviction of driving under the influence within the previous two years.

Homosexuals and persons who test HIV-positive. Homosexuality has not been a basis for inadmissibility since 1990. Persons who test HIV-positive are inadmissible under 8 USC §1182(a)(1)(A)(i), a medically based ground of inadmissibility. They may apply for a discretionary waiver of inadmissibility only if they have certain citizen or permanent resident relatives. 8 USC §1182(g).

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)(5).

Communists, subversives, Nazis, "other unlawful activity," and crimes relating to transfer of technology. Several groups are inadmissible under 8 USC §1182(a)(3) and deportable under 8 USC §1227(a)(4). The section relating to Communists and subversives is quite extensive and includes a section referring to "any other unlawful activity." Noncitizens arrested for participating in political demonstrations or similar activity may need special immigration counseling. For advice on such cases, contact the Visa Denial Project of the National Immigration Project of the National Lawyers Guild at 617–227–9727.

Persons who intend to engage or who have engaged in illegal export of technology or sensitive information are inadmissible and deportable. 8 USC §§1182(a)(3)(A)(i), 1227(a)(4)(A)(i). Although a literal reading of the statute would include such offenses, legislative history shows that it should apply only to acts that might compromise national security. See HR Conf Rep No. 101–955, 101st Cong, 2d Sess 131, 132 (1990), reprinted in (1990) US Code Cong & Admin News 6784, 6796.

Noncitizen smugglers. Anyone who at any time has encouraged or helped any other noncitizen to enter the United States illegally—even if the person

helped was a family member and paid nothing for the help—is inadmissible. A person who committed such an act within five years after his or her last entry into the United States is deportable. 8 USC §§1182(a)(6)(E), 1227(a)(1)(E). Some waivers are available if the person smuggled was a parent, spouse, son, or daughter. The waiver under 8 USC §1229b (INA §240A(a)) (see §48.29) is available even if persons outside that group were smuggled, unless it constitutes an aggravated felony under 8 USC §1101(a)(43)(N). Conviction under 8 USC §1324 for noncitizen smuggling thus provides a basis for inadmissibility and deportation, whereas conviction under that section for harboring should avoid the penalty. See *In re Batista-Hernandez* (BIA 1997) Int Dec 3321 (18 USC §3).

Document fraud. A noncitizen who is the subject of a civil administrative court finding that he or she has possessed, used, or sold false documents for immigration benefits, is deportable and inadmissible. 8 USC §§1227(a)(3)(C), 1182(a)(6)(F). Although a conviction is not required for these immigration penalties, conviction under Pen C §113 or 18 USC §1546(a) can be a basis for the civil finding.

Civil court finding of violation of domestic violence temporary restraining order. Another ground of deportation, but not inadmissibility, is a civil court finding that the alien has violated a domestic violence temporary restraining order (on or after September 30, 1996). See 8 USC §1227(a)(2)(E). This does not require a criminal conviction to trigger deportability. Cancellation of removal under 8 USC §1229b (INA §240A) may be available for long-term lawful permanent residents.

☑ §48.27 E. Checklist: Defendant's Eligibility for Immigration Relief

To establish specific goals in defending a noncitizen criminal defendant, defense counsel first must ascertain the defendant's current immigration status and potential for a change of status through future application. The goals of an immigration-minded defense are to avoid the loss of the defendant's current status and to avoid forfeiting his or her eligibility for possible future immigration relief.

The following checklist may assist in analyzing counsel's case. It is intended as a brief overview of the most commonly encountered statuses and factual situations. This overview is far from exhaustive and should be used only as a guide and starting point for your case analysis. For more diagnostic aids, see Brady, California Criminal Law and Immigration, chap 10 (1997). Often the defendant does not know his or her exact status. For example, many people mistakenly think that marriage to a United States citizen brings automatic citizenship or permanent residency status, without the need for filing an application. Similarly, people who have received employment authorization based on filing an application of some kind with the INS may mistakenly believe that their application has been granted and that they have permanent resident status, or asylum. Counsel should photocopy all immigration documents and check with immigration counsel if necessary to verify status.

❒ **Is the defendant a United States citizen without knowing it?**

No United States citizen can be deported, excluded, or removed for any

reason. All persons born in the United States are citizens (except for children of foreign diplomats); others may have acquired United States citizenship at birth in other countries. A defendant whose parent or grandparent was a citizen or who was a permanent resident under age 18 when a parent was naturalized should be referred for immigration counseling to learn whether citizenship was passed on.

❒ Is the defendant a permanent resident or does he or she have current lawful immigration status of some kind?

Such persons include lawful permanent residents ("green card" holders) and persons holding lawful nonimmigrant visas, *e.g.*, students, tourists, temporary workers, or business visitors. In this case, it is important to keep in mind the distinction between removal due to deportability (expulsion from the United States as well as loss of any present lawful immigration status) and inadmissibility (which bars future admissions to the United States and acquisition of lawful immigration status). Noncitizens with lawful immigration status can lose that status and be removed from the United States if they become deportable. 8 USC §1227. Inadmissible noncitizens who leave the United States may be denied permission to reenter, even if they are lawful residents. Also, inadmissible noncitizens may be ineligible to establish good moral character. See §48.13.

Some persons who immigrate through a spouse are conditional permanent residents who must report to the INS within two years after receiving residency. 8 USC §1186a(d)(2). Although there is no formal FBI check of criminal record at the two-year interview conducted at the present time, the person might be asked questions under oath about grounds for deportation.

❒ Is the defendant a lawful permanent resident with fewer than five (or seven) years of lawful unrelinquished domicile?

A permanent resident who comes within a ground of deportation can lose lawful status and be removed under 8 USC §1228, no matter how long he or she has been a lawful resident. Thus, the defendant's first priority is not to become deportable.

The defendant's second priority is not to become inadmissible or ineligible to establish good moral character (see §48.13). An inadmissible alien who leaves the United States is barred from re-admission under 8 USC §1182(a)(9). A permanent resident who cannot establish good moral character is ineligible for naturalization as a United States citizen. 8 USC §1427(a)(3).

❒ Has the defendant been a lawful permanent resident for five years, with a total of seven years continuous residence after any lawful admission?

Lawful permanent residents who have held that status for at least five years and who have resided continuously in the United States for seven years after having been admitted in any status are eligible to apply for a special waiver of most grounds of deportability and inadmissibility under 8 USC §1229a. This form of immigration relief is called "cancellation of removal." It will excuse any conviction except for an aggravated felony. 8 USC §1229b. Cancellation cuts off the accrual of seven years at the time of issuance of a Notice to Appear or commission of an act rendering a person deportable or inadmissible. Cancellation of removal for lawful permanent residents is discussed in §48.29.

▶ **Note:** If the defendant is a permanent resident with close to the five or seven

years of lawful unrelinquished domicile required for cancellation of removal as described above, the defendant should try to avoid conviction for an aggravated felony to preserve eligibility for cancellation. Although the statute indicates that lawful residence terminates on the commission of the criminal act, this matter will likely be subject to litigation on the ground that a conviction is nevertheless required. See Brady, California Criminal Law and Immigration, Update §11.10, p. 11 (1997). Thus, this may be a factor that favors going to trial and filing an appeal to postpone any conviction date. The defendant may acquire the seven years of domicile while the appeal is pending and before the conviction is final.

❒ **Has the defendant lived in the United States for at least ten years?**

The defendant may be eligible to apply for cancellation of removal for nonpermanent residents if he or she has ten years residence, good moral character (see §48.13), and can establish that removal would cause the defendant's United States citizen or lawful permanent resident spouse, parent or child, exceptional and extremely unusual hardship. See §48.31 on cancellation of removal.

❒ **Has the defendant lived in the United States since January 1, 1972?**

The defendant may be eligible to apply for registry as a permanent resident (see §48.36). He or she must not be inadmissible and must establish good moral character (see §48.13).

❒ **Is the defendant a lawful temporary resident or an applicant (though not yet a lawful temporary resident) under an amnesty program?**

Although the amnesty programs ended years ago, some cases have not been adjudicated. The defendant should be referred to a local immigration attorney or community agency to investigate the case. In addition, family members of amnesty recipients can apply for the Family Unity program (see §48.38). Amnesty applicants may possess a laminated card marked I-688 (lawful temporary residence) or I-688A (employment authorization preliminary to grant of temporary residency).

Participants in the amnesty and Family Unity programs will be disqualified and denied if they become inadmissible or convicted of three misdemeanors or one felony. See §48.38. This rule applies only to family unity and other kinds of applications for amnesty applicants; it does not apply generally to all permanent residency applicants.

❒ **Is the defendant a currently undocumented person?**

Undocumented persons include those who entered the United States surreptitiously or fraudulently, or who hold an expired visa; all are deportable for lack of lawful immigration status. 8 USC §1227(a)(1). As long as they do not become inadmissible or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from removal or permanent residency if they qualify for a particular benefit. Or, they may qualify for voluntary departure.

❒ **Does the defendant have a United States citizen parent or spouse (of any age), a sibling or child (over age 21), or a permanent resident spouse or parent (if defendant is unmarried)?**

The defendant may be eligible to immigrate through a visa petition at some point (see §48.32). The defendant must not be inadmissible and may also need to qualify for voluntary departure, which requires good moral character.

❒ Does the defendant come from a country of civil war or human rights abuses?

The defendant may apply for political asylum or for restriction on removal (see §48.33) as long as he or she has not been convicted of an aggravated felony, a particularly serious crime, or a terrorist act.

As an alternative, the defendant may wish to apply for voluntary departure (see §48.35), which requires a showing of good moral character.

❒ Is the defendant an abused or abandoned child or abused spouse?

A noncitizen can apply for permanent residency as a Special Immigrant Juvenile if a juvenile court judge makes a written finding that the noncitizen is a dependent of the court and eligible for long-term foster care (meaning that the court has found family reunification not to be a viable option) and that it would not be in the child's best interest to return to the home country. 8 USC §1101(a)(27)(J). Although this has been applied most commonly to children and young people in dependency proceedings, it might be applicable to some persons in delinquency proceedings. For more information, see Special Immigrant Status for Children in Foster Care (1992, 1993, ILRC, $15).

A spouse or child who has been abused by a United States citizen or permanent resident spouse or parent can apply for permanent residency under provisions of the 1994 Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without the cooperation of the abusing citizen or permanent resident. 8 USC §§1154(a)(1)(A)(iv), 1154(a)(1)(B). Or, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only three years of good moral character and physical presence in the United States. 8 USC §1229b.

❒ Can the defendant provide valuable information to law enforcement authorities about criminal or terrorist activity?

The 1995 Crime Bill created a new "S" nonimmigrant classification for certain witnesses who supply "critical reliable information" to law enforcement authorities relating to terrorism or criminal activity. 8 USC §1101(a)(15)(S). The person and his or her family may become eligible for permanent residency. Only 125 such visas will be distributed nationally each year.

§48.28 F. Forms of Immigration Relief Available From Immigration and Naturalization Service (INS) and Federal Courts

Even if a noncitizen is undocumented or inadmissible or deportable (or all of these), he or she may nevertheless qualify for certain waivers or immigration benefits that will allow him or her to gain or retain legal status. In order to safeguard a defendant's opportunity to apply for such benefits, certain outcomes must be avoided. Criminal counsel's strategy will depend on his or her client's documented or undocumented status and the potential eligibility for affirmative immigration benefits. To assist counsel in prioritizing and setting goals, §§48.29-48.38 provide a general overview of the most commonly encountered forms of relief in removal proceedings and explain the most widely available immigration benefits.

§48.29 1. Lawful Permanent Residents: Cancellation of Removal

❒ Is the defendant a lawful permanent resident with seven years (or almost seven years) of unrelinquished lawful domicile?

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104-208, Div C, §304, 110 Stat 3009-546) created INA §240A(a) (8 USC §1229b(a)), which allows the discretionary cancellation of removal of inadmissible or deportable permanent residents. Anyone who has been a lawful permanent resident for five years and has maintained seven years of lawful unrelinquished domicile in the United States is eligible for an important discretionary waiver of removal under INA §240A(a). This waiver can excuse any ground of removal except aggravated felonies. See §48.20. This form of cancellation will now waive all grounds of inadmissibility and deportability, including firearms offenses and entry without inspection, that were not previously waivable under INA §212(c). On the other hand, with the increasingly broad definition of aggravated felony, cancellation of removal is likely to be much less useful than its predecessor provision.

▶ **Note:** Remember that the noncitizen will not be able to elect between §212(c) relief and §240A(a) relief in order to optimize the availability of relief. To be eligible for a §212(c) waiver, he or she must be in deportation or exclusion proceedings (*i.e.*, in proceedings instituted before April 1, 1997). To apply for cancellation of removal under §240A(a), he or she must be in removal proceedings (*i.e.*, proceedings instituted on or after April 1, 1997).

Whether the waiver will be granted depends on a showing of rehabilitation, the seriousness of the offenses, and other factors. The person must have completed seven years of unrelinquished domicile, the last five of which were as a permanent resident, by the time he or she is brought before an immigration judge as a removable noncitizen. INA §240A(a). Unrelinquished domicile includes time spent in permanent resident status, as well as time in some other forms of lawful immigration status, *e.g.*, temporary permanent residency and asylee status. *De Robles v INS* (9th Cir 1995) 58 F3d 1355. Thus a person who applied for the immigration amnesty program of the 1980s and spent two years as a temporary resident and five years as a permanent resident would be eligible to apply. One factor in deciding whether to go to trial or to appeal a conviction may be whether the person already has completed the seven years or needs more time to become eligible for the waiver. In some cases, the removal hearing may be held in prison while the person is serving the sentence.

In addition, INA §240A(a) cuts off the accrual of seven years at the time of issuance of the charging document for removal proceedings or commission of an act rendering the respondent removable.

▶ **Note:** There is a possible argument that, under the plain language of the statute, the accrual of residence in this context is stopped only by the commission of the few acts listed in INA §212(a)(2) (8 USC §1182(a)(2)) that would, without a conviction, render the person inadmissible under that subsection or deportable under INA §237(a)(2) or (4) (8 USC §1227(a)(2), (4)). Hence, delaying a conviction date may prove beneficial to the client. However, under traditional rules of statutory construction, it could be argued that Congress has shown its ability

to distinguish between commission and conviction and has deliberately used the more encompassing term. See, *e.g.*, INA §237(a)(2)(A)(i)(I) (8 USC §1227(a)(2)(A)(i)(I)), requiring a conviction within five years of admission for deportability.

In addition, counsel should attempt to keep the aggregate *sentence* for one or more aggravated felony convictions below five years, because of the effect such a sentence has on eligibility for restriction on removal. See §48.33.

§48.30 2. United States Citizenship

❒ Is the defendant a permanent resident of three (or five) years who wishes to apply for U.S. citizenship?
❒ Does or did the defendant have a parent or grandparent who is or was a U.S. citizen?
❒ Was the defendant a permanent resident under the age of 18 when a parent naturalized?

Lawful permanent residents may apply for citizenship after residing in the United States and demonstrating good moral character (see §48.13) for five years. 8 USC §1427. Special procedures apply to spouses and minor children of United States citizens (who need show only three years of permanent residency), military personnel, and religious workers. 8 USC §1430.

▶ **Note:** Some defendants may be unaware that they inherited United States citizenship from their parents or grandparents, or that they became United States citizens when their parents naturalized at a time when the defendant was a permanent resident under age 18. See Swanson, Challenging Alienage--Is Your Client a U.S. Citizen? Appendix 9-B, Part Two, in Brady, California Criminal Law and Immigration (1997).

§48.31 3. Suspension of Deportation or Cancellation of Removal for Certain Nonpermanent Residents

❒ Has the defendant lived in the U.S. for at least ten years in lawful or unlawful immigration status?

United States Code Title 8 §1229b(b) (INA §240A(b)) provides that an immigration judge may "cancel the removal" of certain aliens who have resided in the United States at least ten years. The grant of this relief bestows lawful permanent resident status. To be eligible, an applicant must have been physically present in the United States for a "continuous "period (which is not broken by statutorily specified brief absences) of not less than ten years immediately preceding the date of application, have been of good moral character during that period, not have been convicted of any crimes that would render him or her inadmissible or deportable, and not be deportable for failure to register as an alien, falsification of documents, or a false claim to United States citizenship. A newly added, extremely restrictive requirement is that the applicant must demonstrate that deportation would cause a United States citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship.

As with 8 USC §1229b(a), the accrual of residence is cut off at the time of issuance of the charging document for removal proceedings or commission of an act rendering the respondent removable. 8 USC §1229b(d). See §48.29.

▶ **Note:** Under the Nicaraguan Adjustment and Central American Relief Act (NACARA) (Pub L 105-100, 111 Stat 2193), special rules regarding eligibility apply to several nationalities. A separate, new basis for adjustment to lawful permanent resident status applies to nationals of Nicaragua and Cuba who, among other requirements, have been physically present in the United States continuously since on or before December 1, 1995. Nationals of El Salvador, Guatemala, the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia and their spouses and children may be eligible for special, more relaxed rules relating to continuous physical presence for suspension of deportation or cancellation of removal for nonpermanent residence based on their dates of entry and dates of prior filing of applications for asylum. Because this change has occurred so close to the time of this writing, regulations have not yet been published and expert immigration advice should definitely be obtained.

▶ **Note:** Noncitizens who have been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident may apply for cancellation of removal under 8 USC §1229b(b)(2). This provision reduces to three years the periods of physical presence and good moral character required for this benefit and allows for qualification based on the previous, more generous standard of extreme hardship to the applicant, the applicant's child, or, if the applicant is a child, the applicant's parent.

§48.32 4. Immigration Through Visa Petition

❒ Does the defendant have a close relative who is a permanent resident or United States citizen?

A person who is not inadmissible (see §48.13) may obtain permanent resident status through a visa petition filed by a qualifying United States citizen or permanent resident relative. 8 USC §1154. A person who is inadmissible under the grounds relating to moral turpitude, two convictions with a five-year sentence, or one conviction for simple possession of 30 grams or less of marijuana can apply for a discretionary waiver of inadmissibility if he or she has a United States citizen or lawful permanent resident spouse, parent, or son or daughter or, lacking such relatives, if the offense occurred more than 15 years previously. Anyone inadmissible for prostitution can apply for a waiver. See 8 USC §1182(h).

Persons classified under 8 USC §1151(b) as immediate relatives of United States citizens (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. 8 USC §1153(a). Depending on the relationship and country of origin, this system may involve a wait of from a few months to several years.

▶ **Note:** Certain valued employees can immigrate through an employer's labor certification. See 8 USC §1153(b). Although this device is primarily available to professional workers, nonprofessionals such as in-home child monitors, health attendants, specialty chefs, and workers who must speak a foreign language may also qualify. The person must not be inadmissible but can apply for a waiver of certain crime-related grounds of inadmissibility under 8 USC §1182(h), which provides for a waiver of certain crimes when the applicant is the spouse, parent, son, or daughter of a United States citizen or lawful permanent resident who will be caused extreme hardship if the applicant is not admitted or the actions giving rise to the ground of inadmissibility occurred more than 15 years before the application for admission and the applicant can show rehabilitation.

§48.33 5. Political Asylum

❒ Does the defendant fear returning to his or her home country, or come from a country of human rights abuses or civil war?

▶ **Note:** Noncitizens who were already subject to deportation or exclusion proceedings before April 1, 1997, must qualify for withholding of deportation under 8 USC §1253(h). This section was modified by AEDPA to permit the Attorney General to grant withholding to a person convicted of an aggravated felony or other particularly serious crime in order to avoid violation of international norms against the return of refugees to countries where they are likely to be persecuted.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104-208, Div C, 110 Stat 3009-546) eliminated withholding of deportation and re-enacted it as "restriction on removal" under 8 USC §1231(b)(3)(B) (INA §241(b)(3)(B)). This provision applies to removal proceedings commenced on or after April 1, 1997. The IIRIRA provision eliminated AEDPA's reference to international norms and instead imposed an arbitrary bar when the applicant has been convicted of an aggravated felony or felonies with sentence or sentences imposed of five years.

▶ **Note:** The AEDPA modified withholding of deportation under 8 USC §1253(h) to bring it into compliance with international law obligations by adding a new subparagraph permitting the Attorney General to grant withholding to any alien if necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees. This permits the Attorney General to grant withholding to a person convicted of an aggravated felony or other particularly serious crime in order to avoid violation of international norms against nonrefoulement. This standard applies to all cases in deportation proceedings regardless of the date of application if "final action" was not taken on them as of April 24, 1996, the effective date of AEDPA.

Six months later, the IIRIRA eliminated withholding of deportation and re-enacted it as "restriction on removal" or "withholding of removal" under 8 USC §1231(b)(3)(B) (INA §241(b)(3)(B)), effective April 1, 1997. The new provision applies to cases in removal proceedings commenced on or after that date.

See also 8 CFR §208.16. The IIRIRA provisions eliminated the AEDPA reference to the United Nations Protocol, and instead imposed an arbitrary bar when the applicant has been convicted of an aggravated felony or felonies with sentence or sentences imposed of five years.

Noncitizens who fear returning to their country may apply for political asylum and restriction on removal (relief similar to asylum). 8 USC §1158. Conviction of a "particularly serious crime" can bar eligibility for asylum, and withholding of deportation and restriction on removal. 8 USC §1253(h); 8 CFR §208.8. The definition of "particularly serious crime" depends on several factors, *e.g.*, 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 244, 247. Burglary of an unoccupied house has been held not to be a particularly serious crime (*Matter of Frentescu, supra*), whereas armed robbery (*Matter of Rodriguez-Coto* (BIA 1985) 19 I&N 208) and possession of heroin for sale (*Matter of Gonzalez* (BIA 1988) 19 I&N 682) have been so held. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *Matter of Juarez* (BIA 1988) 19 I&N 664. IIRIRA redefined "particularly serious crime" with regard to restriction on removal as including any aggravated felony or felonies for which the noncitizen has been sentenced to an aggregate term of at least five years. 8 USC §1253(h) (INA §241(b)(3)(B)). Note that aggravated felony as a particularly serious crime is defined differently for purposes of asylum. 8 USC §1158(b)(2)(B)(i) (INA §208(a)(2)(B)(i)). Also remember that IIRIRA amended the INA so that custody ordered as a condition of probation after a suspended imposition of sentence constitutes a sentence to a term of imprisonment. 8 USC §1101(a)(48)(B) (INA §101(a)(48)(B)).

A person convicted of an aggravated felony is not eligible for political asylum. 8 USC §1227(b). However, the BIA has held that an applicant for withholding of deportation (and presumably restriction on removal) who has been convicted of an aggravated felony and sentenced to less than five years' imprisonment is subject to a rebuttable presumption that he or she has been convicted of a particularly serious crime. *Matter of Q-T-M-T* (BIA 1996) Int Dec 3300. Thus, conviction of any aggravated felony (including first-time sale of a small amount of drugs) will almost surely eliminate the most compelling asylum applicant's ability to avoid deportation back to the country of persecution. Because the stakes are so high in this type of case, criminal defense counsel should immediately involve immigration counsel and should present the most vigorous case possible.

§48.34 6. Temporary Protected Status (TPS)

❒ Does the defendant come from a country designated for special status because of ongoing catastrophe?

The Attorney General may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events, *e.g.*, 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 §1254.

As of January 1998, the Attorney General designated continuing TPS programs for nationals of Bosnia-Hercegovina (Aug. 11, 1997, to Aug. 10, 1998) (62 Fed Reg 41420-01), Burundi (Nov. 4, 1997, to Nov. 3, 1998) (62 Fed Reg 59735-03), Liberia (Mar. 29, 1998, to Sept. 28, 1998, final extension) (63 Fed Reg 15437-02), Montserrat (Aug. 28, 1997, to Aug. 27, 1998) (62 Fed Reg 45685-03), Sierra Leone (Nov. 4, 1997, to Nov. 3, 1998) (62 Fed Reg 59736-01), Sudan (Nov. 4, 1997, to Nov. 3, 1998) (62 Fed Reg 59737-01), and Somalia (Sept, 18, 1997, to Sept. 17, 1998) (62 Fed Reg 41421-01).

Persons are ineligible for TPS if they are inadmissible (see §48.13) or have been convicted of *two* misdemeanors (as opposed to the three-misdemeanor rule in the amnesty programs) or one felony. 8 USC §1254(c)(2)(B). In addition, the person must not come within the bars to restriction on removal (*i.e.*, persecution of others, conviction of a particularly serious crime, committing a serious nonpolitical crime outside the United States, constituting a security threat to the United States). 8 USC §1254(c)(2)(B)(ii).

§48.35 7. Voluntary Departure

❒ Is the defendant currently an undocumented person?

Undocumented persons include those who entered the United States surreptitiously or fraudulently or who hold an expired visa; they are deportable for lack of lawful immigration status. 8 USC §1227(a)(1)(A). Working without authorization or conviction of a crime may also constitute a violation of an otherwise valid nonimmigrant status. 8 USC §1227(a)(1)(C). As long as they do not become inadmissible or barred from establishing good moral character because of a criminal record, such persons may be able to apply for relief from deportation, permanent residency, or both, if they qualify for a particular application, or they may qualify for voluntary departure.

A noncitizen with no other immigration relief may apply to leave the United States voluntarily instead of being deported. The noncitizen must demonstrate good moral character (see §48.13). This relief is valuable because the period of voluntary departure allows the noncitizen to wrap up his or her personal affairs and leave the United States without the stigma of deportation. In contrast, persons who have been deported may not lawfully reenter the United States for five years unless a special waiver is obtained (8 USC §1182(a)(2)), and can be criminally charged for illegal reentry.

§48.36 8. Registry

❒ Has the defendant lived in the United States continuously since January 1, 1972?

A noncitizen who has resided continuously in the United States since January 1, 1972, can obtain permanent residence through registry. 8 USC §1259. Other requirements under 8 USC §1259 are:

- Good moral character (see §48.13) for a reasonable period;
- Not inadmissible (although this requirement is called into question by *Matter of Sanchez-Linn* (BIA 1991) Int Dec 3156); and

• Not ineligible for United States citizenship (through convictions for draft evasion or desertion; see 8 USC §1425).

§48.37 9. Legalization (Amnesty Programs)

❒ Is or was the defendant an applicant for temporary residency or a temporary resident under one of the amnesty programs of the 1980s?

The Immigration Reform and Control Act of 1986 (8 USC §§1160, 1255a) 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(a)(1)(B)(ii). Each program had two phases: the first phase, in which undocumented applicants applied for temporary residence, and the second, in which temporary residents applied for permanent residence.

With few exceptions, the application period is closed for both programs. Because of INS backlog, there still may be some persons who applied but have not completed both phases of the program. Such persons will be disqualified from amnesty and lose lawful immigration status if they become excludable or are convicted of three misdemeanors or one felony. For both programs, some exclusion grounds are waivable, but not the narcotics or moral turpitude grounds. See 8 USC §§1255a(d)(2) (legalization), 1160(c)(2) (SAW).

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. Defense counsel should contact immigration counsel or a community agency for assistance in ascertaining the status of a legalization case. See §48.1 for discussion of how to obtain referrals.

§48.38 10. Family Members of Amnesty Recipients: "Family Unity" Program

❒ Is the defendant a spouse or child of someone who obtained permanent residency through amnesty?

The legalization programs discussed in §48.37 have divided many families. For example, many parents have qualified for amnesty but have children who came to the United States too late to do so. The Family Unity program established by the Immigration Act of 1990 §301 provides temporary lawful status and work authorization to qualifying relatives of amnesty recipients. A person who, as of May 5, 1988, was the spouse or the unmarried child under age 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 (see §48.32) but rely on this program for lawful status and work authorization during their years of waiting. New provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104-208, Div C, 110 Stat 3009-546) make family unity eligibility even more important than before because it partially exempts such persons from new provisions

that bar adjustment to lawful permanent resident status for three, or ten, years if the applicant has been unlawfully present in the United States for 180 days or more, or 365 days or more, respectively.

Persons who are deportable under any of the crime-related grounds or are convicted of three misdemeanors or one felony are not eligible for the Family Unity program. Immigration Act of 1990 §301. However, IIRIRA added a significant new bar denying Family Unity benefits to persons who "commit an act of juvenile delinquency which if committed by an adult" would be a felony involving violence or the threat of physical force. IIRIRA §383, amending the Immigration Act of 1990 (Pub L 101–649, §301(e)(3), 104 Stat 4978) (see 8 USC §1255a Note). This change applies only to benefits granted or extended after September 30, 1996, and it can be argued that it should only apply to acts of juvenile delinquency committed after September 30, 1996, because there is a general presumption against retroactive application of the laws.

▶ **Note:** See §48.4 for discussion of defense of noncitizens in juvenile court.