§ N.8 Controlled Substances

Table of Contents

WARNING: Even a first conviction for simple possession can be fatal for many immigrants. There are few easy answers, and the law changes frequently. Please carefully consider the information in this chapter, and get advice if needed, before pleading a noncitizen to any offense relating to illegal drugs.

I. Immigration Penalties for Drug Offenses

Drug offenses can cause extremely serious immigration consequences, including making the person deportable, inadmissible, convicted of an aggravated felony, and barred from eligibility for relief. For a review of how deportability, inadmissibility, and aggravated felonies work, see *§ N.1 Overview* at www.ilrc.org/chart.

Note: Some immigration penalties require a conviction, and immigration law has its own definition of conviction. For example, Pen C § 1000 pretrial diversion, a conviction that was vacated for cause or is on direct appeal of right, and juvenile dispositions are not convictions for immigration purposes, but (with important exceptions) withdrawal of plea under Pen C § 1203.4 is. See further discussion of the definition of "conviction" in the immigration context at Section II below. Other penalties are based on conduct, with no need for a conviction. See Section V, below.

A. Conviction for Trafficking

A conviction of drug trafficking triggers the worst possible immigration consequences – even if the trafficking offense itself is relatively minor, like sale of a small amount of marijuana. In addition, see penalties for drug trafficking even without a conviction, at subsection C, below. This includes, with some important exceptions, any conviction under H&S C §§ 11351, 11352, 11358-60, 11378, 11379, and several other offenses.

1) A conviction for drug trafficking, or for some non-trafficking offenses that are analogous to federal drug offenses, is an "**aggravated felony**" if it involved a federally-defined substance. (But a conviction for "offering" to do this is not an aggravated felony, in the Ninth Circuit only.) See subsection 1, below.
2) A conviction for selling or giving away any controlled substance is a **crime involving moral turpitude**. See subsection 2, below.
3) With only a narrow exception, a conviction for selling any controlled substance is a "**particularly serious crime,**" dangerous for asylum-seekers, asylees, and refugees. See subsection 3, below.

1. "Drug Trafficking" Aggravated Felony

What is it? An aggravated felony is a term of art in immigration law, which is unrelated to concepts in California criminal law. It is defined at 8 USC § 1101(a)(43). A misdemeanor and potentially even an infraction (see discussion of H&S C § 11358, below) can be an aggravated felony. When we're talking about controlled substances, we're most concerned about one definition of aggravated felony, the so-called "drug trafficking" aggravated felony. [1]

An offense qualifies as a drug trafficking aggravated felony if it has as an element a controlled substance that is listed on federal drug schedules, *and* it meets either of two tests:

[1] See 8 USC § 1101(a)(43)(B), INA § 101(a)(43)(B).

1) Its elements meet the general definition of drug trafficking, such as sale, or possession or transport for sale. For example, conviction for possession for sale of $10 of marijuana is an aggravated felony; *or*

2) Its elements are analogous to those of certain federal drug felonies. Some of the federal felonies do not involve trafficking, such as cultivation of marijuana, distribution without remuneration, or obtaining a prescription by fraud.

   - Possession. A possession conviction never is an aggravated felony, with two exceptions: possession of flunitrazepam (a date-rape drug), and possession where a prior drug offense was pled or proved for recidivist sentencing purposes.

   - PRACTICE TIP: In the Ninth Circuit only, *offering* to sell a controlled substance is not a drug trafficking aggravated felony.[2] A specific plea to "offering" is an important defense to avoid a drug trafficking aggravated felony for conviction of §§ 11352 and 11379.

How is an aggravated felony conviction harmful? For immigration purposes, a drug trafficking aggravated felony (AF) conviction is perhaps the single most damaging type of conviction after murder. It is a ground of deportability as well as a bar to almost all forms of relief. An AF conviction is worse than a "mere" deportable or inadmissible conviction. An AF is an absolute bar to relief such as asylum and cancellation for lawful permanent residents, while a drug conviction that is not an AF is serious, but is not a bar to those particular kinds of relief. See *§N.17 Toolkit* at www.ilrc.org/chart.

2. Conviction for Trafficking Is a Crime Involving Moral Turpitude

What is it? Trafficking, but not simple possession, of a controlled substance is a crime involving moral turpitude (CIMT). Assume this includes sale, offer to sell, possession for sale, transport for sale, and the like. Defenders must assume that distribution without remuneration also is a CIMT, although immigration counsel may argue against this.[3] Assume that the offense need not involve a federally-defined controlled substance.

Transportation for one's own use is not a CIMT. This was included in §§ 11352 and 11379 before January 1, 2014, and in § 11360 before January 1, 2016. That means that convictions for conduct from before those dates are divisible as CIMTs. Advocates can explore arguments that giving away or even selling small amounts of marijuana is not a CIMT, since it is lawful in so many states.[4]

How is it harmful? Because a drug trafficking offense has such serious consequences, the fact that it also is a CIMT often has no impact. But in some cases, it does matter. For example, we can avoid many consequences of a drug trafficking conviction by using a non-federally defined substance defense (see Section II, below). But the conviction still may cause serious problems as a CIMT.

---

[2] *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001). The Ninth Circuit held that the statute was "divisible" between offering and other conduct, so it is critical to plead specifically to offering. See *U.S. v Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (en banc) (H&S C § 11379).

[3] At least one older published decision makes this holding. See *Matter of Khourn*, 21 I&N Dec 1041, 1046 (BIA 1997) (citing H.R. Rep. No. 84-2388 (1956)). That decision is cited in other unpublished BIA decisions holding that distribution is a CIMT.

[4] There may be an argument that a statute controlling or prosecuting marijuana is in fact "regulatory" and not criminal, and therefore an offense prosecuted under the statute should not be a crime involving moral turpitude. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). See also *Matter of Khourn*, 21 I&N Dec 1041 (BIA 1997) and cases cited therein.

3. Conviction for Trafficking Is a "Particularly Serious Crime"

What is it? Almost any conviction for trafficking in any controlled substance, including a non-federally defined substance, will be a "particularly serious crime" for immigration purposes. There is a narrow exception for peripheral involvement in trafficking a very small amount of drugs where no juveniles were involved. This requires a commercial element and should not include distribution without remuneration.

How is it harmful? This hurts people applying for asylum, and those who are asylees and refugees (people who have been granted asylum or refugee status, but are not yet permanent residents). It is a bar to a grant of asylum and withholding. It can cause an asylee or refugee to lose their status. This makes any trafficking conviction, including an "offering" offense that is not an aggravated felony, very dangerous to asylees, refugees, or people who want to apply for asylum. See *§N.17 Immigration Relief Toolkit* at www.ilrc.org/chart for more on criminal defense of asylees and refugees.

4. Controlled Substance Deportability Grounds

What is it? The crimes-related "grounds of deportability" is a list of offenses at 8 USC § 1227(a)(2), some of which involve controlled substances.

1) ***Convicted of a controlled substance offense.*** Conviction of any drug offense, including simple possession, being under the influence, and possession of paraphernalia, can make the person deportable as long as it is adequately established that the offense involved a federally-defined controlled substance. Dispositions that are not a "conviction" for immigration purposes – such as Pen C § 1000 pretrial diversion, a conviction vacated for cause or that is on direct appeal of right, or a juvenile disposition – do not trigger deportability.

   - **Marijuana**: There is an automatic exception to the deportation ground for one or more convictions arising from a first, single incident that involved simple possession of 30 grams or less of marijuana, or certain related offenses.[5] See Section III.

2) ***Drug addict or abuser.*** A noncitizen who has been a drug addict or abuser at any time since admission to the United States is deportable, even without a conviction.[6] To date, this deportation ground has rarely been charged, but that always could change. See Section V.

How is it harmful? Among other things, conviction of a deportable offense can cause a lawful permanent resident (LPR, green card-holder) to be stripped of their green card and permanently removed (deported) from the United States. As long as the person was not convicted of an aggravated felony, however, it is possible that some discretionary relief is available to forgive the offense. See section III, below.

Note: *Some* Noncitizens Can Accept a Minor Drug Conviction That Does Not Involve Trafficking. This is an individualized determination, but you or a non-attorney staff person can quickly check the possibilities by working with the client to complete the *§ N.16 Client Questionnaire*, at www.ilrc.org/chart.

[5] 8 USC § 1227(a)(2)(B)(i).
[6] 8 USC § 1227(a)(2)(B)(ii).

5. Controlled Substance Inadmissibility Grounds

What is it? The crimes-related "grounds of inadmissibility" is a list of offenses at 8 USC § 1182(a)(2), some if which involve controlled substances. There is some overlap with the crimes-related grounds of deportability, but not all are the same and the inadmissibility list is more expansive than the deportability list.

There are four ways to be inadmissible that relate to controlled substances. For all of these, the substance must be one that is identified on federal drug schedules.

1) ***Convicted of a controlled substance offense.*** The inadmissibility ground includes the same wide range of drug offenses, and definition of conviction, as the deportation ground, except for marijuana.

   - **Marijuana**: A person convicted of one or more offenses that arose out of a single incident involving simple possession of 30 grams or less of marijuana *is* inadmissible. (They are not deportable, however; see subsection 4, above). In some cases, the person can apply for a discretionary waiver of inadmissibility, but the waiver is often denied. [7]

The next three inadmissibility grounds are based on conduct, and do not require a conviction. They are discussed in more detail at Section V, below.

2) ***Admitted committing a controlled substance offense.*** A noncitizen is inadmissible, but not deportable, who formally admits all of the elements of a controlled substance offense that they committed as an adult (not as a juvenile). This ground should not apply if the offense was charged in criminal court and the result was something less than a conviction (e.g., dismissed charges, vacation of judgment, pretrial diversion).[8]

   - **Marijuana:** If the admission involved a single incident relating to possession of 30 grams or less of marijuana, the person is inadmissible, but might be eligible for a discretionary waiver, the same as if the person had been convicted of the marijuana offense.

3) ***Current drug addict or abuser***. A noncitizen who is a current addict or abuser is inadmissible,[9] if the addiction or abuse involves a federally-defined controlled substance.

4) ***"Reason to believe" drug trafficking.*** A person is inadmissible if immigration authorities have probative and substantial "reason to believe" that the person has ever participated in drug trafficking, or if they are the immigrant spouse or child of an immigrant drug trafficker and benefited from the trafficking within the last five years.[10] Authorities gain sufficient "reason to believe" if the person confesses to them, or if they can locate substantial evidence.

How is being inadmissible harmful? This depends partly on the person's immigration status. An undocumented person who is inadmissible because of a drug conviction or one of the drug conduct grounds is barred from applying for many types of relief or lawful status. For example, such a person:

- ✓ Cannot get a green card through a family member (unless the offense involved possessing 30 grams or less of marijuana and the person can apply for a waiver), and

---

[7] 8 USC § 1182(h). See also ILRC, "Update on Waiver under INA § 212(h)" (2011) at www.ilrc.org/crimes. The conviction is not a statutory bar to establishing good moral character. 8 USC § 1101(f)(3).

[8] 8 USC § 1182(a)(2)(A)(i) provides that admission of a drug offense creates inadmissibility. This does not apply, however, if a charge in criminal court resulted in something less than a conviction. See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges) and discussion in § 4.4 of *Defending Immigrants in the Ninth Circuit.*

[9] 8 USC § 1182(a)(1)(A)(iv).

[10] 8 USC § 1182(a)(2)(C).

- ✓ Cannot apply for non-LPR cancellation (even if the offense involved 30 grams or less of marijuana).

A *lawful permanent resident* who is inadmissible but not deportable because of a drug conviction or drug conduct ground can keep their lawful status, but they *cannot* safely travel outside the U.S. After some years, they may apply for naturalization to U.S. citizenship.

REASON TO BELIEVE. It's not a pop song, it is the worst inadmissibility ground in immigration law. A noncitizen is inadmissible as of the moment that immigration authorities gain substantial and probative "reason to believe" the noncitizen has ever participated in drug trafficking.[11] A conviction is not necessary, and ICE can use evidence from outside the record of conviction. Typically, ICE gets its "reason to believe" from either a trafficking conviction (even if it is later vacated, if there remains substantial evidence), an admission by the immigrant to an immigration judge or official, a credible report of an incident that did not result in a conviction but where there was strong evidence (e.g. drugs in the trunk of the car at the border), and potentially a plea to trafficking in delinquency proceedings.[12]

This Note provides strategies for how to try to avoid giving ICE reason to believe. You can't block ICE's ability to locate factual evidence, but you can avoid pleading a defendant -- especially a non-permanent resident -- to any offense that would give ICE automatic "reason to believe." For example, a plea to possession, or, if nothing else is available, to "offer to give away" rather than offer to sell will provide some protection.

"Reason to believe" destroys eligibility to get almost any relief or status.[13] In particular, it is a very damaging plea for a non-permanent resident.

"Reason to believe" is not a ground of deportability, so an LPR who stays within the U.S. cannot be put in removal proceedings based solely on this. But if the LPR leaves the U.S., they can be refused admission back in and permanently lose their green card -- unless they qualify for one of the forms of relief that "reason to believe" does not block.

[11] 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).

[12] Much better is a plea to possession. See also ILRC, *The Impact of Drug Trafficking on Unaccompanied Minor Cases* (2018) at https://www.ilrc.org/impact-drug-trafficking-unaccompanied-minor-immigration-cases.

[13] Being inadmissible for "reason to believe" trafficking is a bar, with no possible waiver, to family immigration, VAWA relief for domestic abuse survivors, or an asylee or refugee's ability to become a permanent resident. It might not destroy eligibility for LPR cancellation, a T or U visa for victims of crime or human trafficking, the Convention Against Torture, and possibly, asylum and withholding (if no trafficking conviction) – but all of these but LPR cancellation will be very difficult.

II. Defense Strategies: Avoid a "Conviction"

Subsections A and B, below, describe how to avoid a conviction for immigration purposes. Subsection A describes what dispositions do not amount to a conviction in the first place, and B describes when post-conviction relief can eliminate an existing conviction. For further discussion of the immigration definition of conviction and California drug offenses, see online practice advisory.[14]

Avoiding a conviction is a great result, but note that some immigration penalties do not require a drug "conviction." A person is inadmissible if immigration authorities have "reason to believe" they participated in or benefitted from drug trafficking, and inadmissible or deportable based on abuse or addiction, and inadmissible if the person formally admits committing a drug offense that was not brought before a court. See section V, below.

A. Obtain a Disposition That Is Not a "Conviction" for Immigration Purposes

Generally, a conviction occurs if in adult criminal court there is an admission or a judicial finding of guilt and some form of penalty or restraint is imposed, including court costs or probation. 8 USC 1101(a)(48)(A). A disposition that lacks these elements does not become a drug "conviction" for immigration purposes.

1. Juvenile Delinquency Disposition

A juvenile delinquency disposition is not a conviction for immigration purposes, because it is a civil finding. It is not a deportable or inadmissible conviction or aggravated felony.[15] This is good. The only concerns are the conduct-based grounds, which do not require a conviction.

Warning: juvenile trafficking pleas. A noncitizen is inadmissible if immigration authorities have "reason to believe" the person is or helped a drug trafficker. A plea to a trafficking offense in juvenile proceedings might provide this evidence.[16] Make every effort to plead a juvenile to possession or a non-drug offense, rather than a trafficking offense such as possession for sale or sale. This is especially critical if the person is undocumented: a drug trafficking finding may prevent an undocumented juvenile from ever immigrating through a family member or through the Special Immigrant Juvenile process.

If you must plead to a trafficking statute, plead to distribution without remuneration. This will avoid handing the government with automatic "reason to believe" the person trafficked, although the government may seek other evidence to show trafficking was involved. (In adult proceedings, a conviction for giving away a drug (except for giving away a small amount of marijuana; see Section IV) is an aggravated felony conviction. Because a juvenile disposition is not a conviction, an aggravated felony conviction is not a risk.)

2. Formal or Informal Pretrial Diversion, Drug Court

Pretrial diversion: Pen C § 1000. A conviction for immigration purposes requires a plea of guilty or no contest, or a formal finding of guilt by the court. If the defendant does not enter a guilty or no contest plea before being diverted, this is not a conviction and it is an excellent disposition (as long as the person successfully completes the diversion).

---

[14] See ILRC, *What Qualifies as a Conviction for Immigration Purposes* (2018), www.ilrc.org/crimes.

[15] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

[16] But see arguments in ILRC, *The Impact of Drug Trafficking on Unaccompanied Minor Cases* (2018) at https://www.ilrc.org/impact-drug-trafficking-unaccompanied-minor-immigration-cases.

As of January 1, 2018, California offers pretrial diversion to qualified defendants charged with certain non-trafficking drug offenses. See Pen C § 1000(a). The prosecution must notify defendants who are eligible for pretrial diversion. By accepting the diversion program, the person gives up the right to trial by jury in the event the person fails diversion.

People who successfully complete diversion will not have a drug conviction for immigration purposes.[17] People who fail at diversion must return to court to face the original charges, and without the right to a jury trial they have somewhat less leverage at plea bargaining. For this reason, it is important to carefully weigh the likelihood that the defendant will successfully complete diversion before accepting this option. See practice advisory for more information.[18]

Pretrial diversion: Drug court. A few California counties have drug court programs where no guilty plea is required. This, too, can potentially lead to a good result. The only complication is if the defendant is required to admit to being in danger of becoming an addict in the drug court setting. Being an addict or abuser at any time since admission makes a permanent resident deportable. Being a current addict or abuser makes a noncitizen inadmissible.[19] While in many cases ICE does not charge people under the addiction/abuse grounds, a notation indicating a person was referred to drug court may alert them to the possibility. Whether a drug conviction or a charge of addiction/abuse is more dangerous for a particular noncitizen may depend on the individual's specific circumstances; check with an immigration lawyer if a decision between those options must be made, and see Section V for more on abuse/addiction.

Informal pre-plea diversion. Sometimes non-statutory pre-plea diversion is available through local court programs. With the client out of custody, ask the prosecution to defer the plea hearing so that the defendant can meet set goals such as community service, drug counseling, restitution, etc. – including goals beyond what normally might be required. Waive speedy trial, and consider waiving trial by jury. In exchange, ask the prosecution to agree to an alternate plea (e.g. to a non-drug offense) or to no plea if the defendant is successful. (To see a sample written agreement, see Washington state "Stipulations of Continuance."[20])

3. California Infraction – Act Conservatively

Both now, and before Proposition 64 passed in 2016, some minor marijuana dispositions have been classed as infractions. See, e.g., current H&S C §§ 11357(a)(2) and 11358, if the person is between 18 and 21 years of age. California defenders should conservatively assume that a California infraction is a drug "conviction," because at least some DHS officers treat it as one. If it is not possible to have the charges dismissed, the best resolution to this charge would be to plead to a non-drug, immigration-neutral offense, or to seek pretrial diversion pursuant to Pen C § 1000 (2018). See subsection 2, above.

> **Practice Tip:** If an unrepresented defendant pled guilty to a marijuana infraction, counsel can provide a tremendous service to this person by helping them vacate the conviction pursuant to Pen C § 1473.7 on the grounds that due to the lack of counsel, the defendant did not understand the immigration consequences of the plea. (Section 1473.7 can be used in other circumstances

[17] Those people who successfully completed former Pen C § 1000, deferred entry of judgment (1997-2017), and entered a plea of guilty before participating in the program should seek post-conviction relief under Pen C §1203.43 to withdraw the plea and erase the conviction for immigration purposes. See discussion in subsection B below.

[18] See ILRC, *Practice Advisory: New California Pretrial Diversion for Minor Drug Charges* (Jan. 2018), www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges.

[19] 8 USC § 1227(a)(2)(B)(ii).

[20] See, e.g., Seattle Municipal Court agreement at www.defensenet.org/immigration-project/immigration-resources/deferred-adjudication-agreements-e.g.-socs-and-other-deferred-dispositions.

where the defendant did not understand the consequences of the plea, including bad translation, defendant's mental condition, ineffective assistance of counsel, or other reasons.)

Immigration advocates can argue that an infraction is not a conviction for immigration purposes.[21] If the infraction is held a conviction, note that important immigration benefits apply to a first-time drug incident involving simple possession of 30 grams or less of marijuana. It does not make a permanent resident deportable, and while it is an inadmissible conviction, in some cases a discretionary waiver may be available. See Section III, below.

B. Seek Post-Conviction Relief to Eliminate a Drug Conviction

1. Rehabilitative Relief like Pen C § 1203.4 Eliminates a Conviction in Only Limited Instances

Immigration law considers a conviction to have occurred if there is a plea or finding of guilt, plus any form of punishment or restraint. A criminal court order eliminating a conviction will be given effect in federal immigration proceedings only if it was based on a ***legal defect*** (a problem in the underlying proceeding), as opposed to ***rehabilitative or humanitarian*** factors (e.g., the person can withdraw their plea because they completed probation or a drug program).

For that reason, withdrawing a plea or dismissing charges pursuant to Proposition 36, former DEJ (unless there also is relief under Pen C § 1203.43), or Pen C § 1203.4 generally does not eliminate a conviction for immigration purposes, because the basis for the order was that the defendant successfully completed some rehabilitative requirement. But it *is* effective in two specific circumstances:

- ✓ Rehabilitative relief may eliminate a conviction of possession or any substance, of possession of paraphernalia, or of giving away a small amount of marijuana, if the conviction occurred on or before July 14, 2011 and the immigration case is in the Ninth Circuit. See Subsection 5, below.[22]
- ✓ Rehabilitative relief will eliminate a conviction as an absolute bar to Deferred Action for Childhood Arrivals (DACA), which, at this writing, continues to exist. See materials at www.ilrc.org/daca. It might also be of some use in discretionary decisions generally.

2. Vacating a Judgment for Cause Eliminates the Conviction

A judgment vacated for legal defect will eliminate the conviction for immigration purposes. This includes but is not limited to vacation of judgment based on ineffective assistance of counsel for any reason, including failure to warn of immigration consequences (writ of habeas corpus); lack of proof that the judicial immigration warning required by Pen C § 1016.5 was given; withdrawal of plea for good cause under Pen C § 1018; or other order in which the court states that the conviction is vacated for cause.

A person who is no longer in custody or on probation or parole may bring a motion under Pen C § 1473.7 to vacate a conviction for cause, when the person did not meaningfully understand the actual or potential immigration consequences of the conviction. This can, but is not required to, include a claim for ineffective assistance of counsel. (Also, any defendant can use § 1473.7 if there is qualifying new evidence of innocence). Beneficial amendments to § 1473.7 take effect on January 1, 2019.[23]

---

[21] See ILRC, *Arguing that a California Infraction is Not a Conviction* (Oct. 15, 2012), www.ilrc.org/resources/arguing-that-a-california-infraction-is-not-a-conviction-test-for-non-misdemeanor-offenses.

[22] *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (*en banc)*, overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) as applied to convictions after July 14, 2011.

[23] See advisories and other materials on obtaining post-conviction relief at www.ilrc.org/immigrant-post-conviction-relief. Pen C § 1473.7 is amended effective January 1, 2019 by AB 2867.

Vacation of judgment based *solely* on sympathetic factors or completion of probation or required counseling does not eliminate the conviction for immigration purposes, other than in the limited circumstances addressed at subsection 1, above.[24]

3. Withdrawing a DEJ Plea Pursuant to Pen C § 1203.43 Should Eliminate the DEJ "Conviction"

From 1997 through December 31, 2017, California offered qualifying defendants charged with certain minor drug offenses a program known as Deferred Entry of Judgment ("DEJ"). See former Pen C § 1000. Under the former DEJ, the defendant agreed to enter a guilty plea and was given from 18 to 36 months to complete a drug program. The statute provided that if the defendant successfully completed the requirements, the court would dismiss the charges, there would be no arrest or conviction for any purpose, and no denial of any license, employment, or benefit could flow from the incident. See former Pen C §§ 1000.1(d), 1000.3, 1000.4. Unfortunately, this statutory promise was untrue for all noncitizens. DEJ is considered a conviction for immigration purposes, in that there was a plea and some form of punishment and restraint. To eliminate this conviction for immigration purposes, the plea would have to be withdrawn for cause, due to a legal defect in the underlying case.

Section 1203.43 permits people who successfully completed DEJ to withdraw the guilty plea based on legal error. The error is that the DEJ statute misinformed defendants about the real consequences of the guilty plea. Section 1203.43(a) provides that the promise in § 1000.4 "constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants… Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid."

For information about how to withdraw a plea pursuant to Pen C § 1203.43, see online practice advisories.[25] This is a simple application. There is no fee to submit Form CR-180. Section 1203.43(b) provides that the motion can be granted without a hearing, and also sets out a procedure for cases where there no longer is a record of the defendant completing the DEJ conditions.

While several unpublished Board of Immigration Appeals (BIA) decision have held that Pen C § 1203.43 eliminates a DEJ "conviction" for immigration purposes, in some areas ICE continued to contest this. In August 2018, the BIA indicated that it will publish a ruling on the effect of Pen C § 1203.43. Because the law is clear, advocates expect the BIA to make a positive ruling. However, nothing is guaranteed, and defendants who are concerned and who can afford to wait may decide to wait for the published opinion before applying for relief that depends on § 1203.43 to eliminate a conviction.

In addition, the Ninth Circuit held that California DEJ did not amount to a conviction in the first place if the only consequence was an unconditionally suspended fine.[26] If this is your client's situation, immigration authorities must find that there is no conviction, even if the client did not complete DEJ, or did but did not obtain § 1203.43, or if immigration authorities don't want to give effect to § 1203.43.

Effective January 1, 2018, Pen C § 1000 was amended to eliminate DEJ and substitute a pretrial diversion program that does not require a guilty plea. See discussion at Subsection A, above.

---

[24] See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (vacation of judgment for cause, but not for rehabilitative or humanitarian purposes, is given effect); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); see also *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

[25] See ILRC, *What is a Conviction for Immigration Purposes* (March 2018) and ILRC, *Withdrawal of Plea after Completion of Deferred Entry of Judgment* (March 2016), www.ilrc.org/crimes.

[26] *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).

4. Filing a Direct Appeal Prevents a Conviction from Becoming Final for Immigration Purposes

A conviction must have a sufficient degree of finality before immigration consequences can attach. The Board of Immigration Appeals (BIA) held that a conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review of the merits of the conviction has expired or been waived.[27] The BIA set out the following rules: once the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes; "[t]o rebut that presumption, a respondent must come forward with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court. He or she must also present evidence that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings."[28]

The BIA asserted that federal courts should defer to this ruling, and it distinguished the holdings of some federal courts that had come to a contrary conclusion, including the Ninth Circuit in *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011), on the grounds that the decisions did not address a direct appeal of right on the merits of a conviction. At this writing, the Ninth Circuit has not had an opportunity to respond to the BIA's ruling in *Acosta*. Despite this uncertainty, it is worthwhile to file direct appeals or "slow pleas" in appropriate cases, because (a) according to the BIA, a pending direct appeal means that a conviction is not final for the purposes of removal or disqualification from relief, and (b) the conviction may be overturned on appeal. But when possible, defense counsel should have an additional back-up strategy in case the Ninth Circuit does not accept this ruling.

5. First, Minor Drug Conviction from on or before July 14, 2011

Usually a withdrawal of plea pursuant to "rehabilitative relief" – e.g., because the person completed probation – is not given immigration effect. See Subsection 1, above. However, a first conviction for certain minor drug offenses from on or before July 14, 2011 *can* be eliminated for immigration purposes by withdrawing the plea or dismissing the charges pursuant to "rehabilitative relief" such as Proposition 36, the former DEJ, Pen C § 1203.4, or similar vehicle, if the client meets the requirements set out below.

This benefit exists because the Ninth Circuit held that state rehabilitative relief must be given the same effect as a federal expungement under the Federal First Offender Act (FFOA). That provides an expungement that removes a first qualifying drug conviction for any purpose "imposed by law." *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). This benefit has a cut-off date of July 14, 2011, because on that date, eleven years after it first decided *Lujan-Armendariz*, the Ninth Circuit published a decision overruling it – but it applied the ruling prospectively only, to pleas entered after the date of publication. See *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. July 14, 2011).

This section will summarize the benefits and restrictions set out by these cases. For further discussion, see ILRC, *Practice Advisory: Lujan and Nunez* (2011).[29]

The *Lujan-Armendariz* benefit only applies to immigration proceedings ***within the Ninth Circuit.*** But it applies to a conviction and expungement under the law of any U.S. jurisdiction, or any country.

> **Example:** In March 2010, Marta was convicted in Michigan of simple possession of cocaine, her first drug offense. In March 2013, after completing probation with no violations, Marta was permitted to withdraw the plea pursuant to rehabilitative relief. If Marta is placed in removal proceedings in

[27] *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018).

[28] *Id.* at 432.

[29] Available at www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011.

California, which is within the Ninth Circuit, she will not have a conviction. But if the removal proceedings take place in Michigan (or anywhere else outside the Ninth Circuit), she will have a deportable and inadmissible drug conviction.

The requirements for *the Lujan-Armendariz* benefit are:

- **The conviction was for possession or possession of paraphernalia relating to any substance, or for giving away a small amount of marijuana, but *not* for being under the influence.**[30] Giving away marijuana under H&S C §11360(a) and (b) (as it was in effect in July 2011) should qualify because under federal law, giving away a small amount of marijuana is subject to the FFOA.[31]

- **Arguably the *Lujan-Armendariz* benefit applies to more than one qualifying drug offense taken at the same hearing**, e.g., if multiple pleas are taken at the person's first hearing relating to drug offenses. This is because the FFOA applies to a qualifying offense as long as the person "has not, prior to the commission of such offense, been convicted" of a drug offense. See 18 USC § 3607(a)(1).

- **The plea must be withdrawn and/or charges dismissed,** pursuant to former DEJ, Prop 36, Pen C § 1203.4, or similar vehicles in other states or other countries.[32] While the conviction must have occurred on or before July 14, 2011, the rehabilitative relief may have occurred at any time.

- **No violation of probation.** The benefit is not available if the criminal court found that the defendant violated probation before ultimately being granted the relief.[33]

- **No prior pretrial diversion.** The Ninth Circuit held that the existence of a prior pretrial diversion prevents a first possession conviction from qualifying for this benefit.[34]

  - ✓ The pretrial diversion and probation violation disqualifiers might not apply if the **defendant was under 21** when they committed the offense for which they violated probation, or for which they received pre-plea diversion.[35]

- **The benefit only applies in immigration proceedings held within the Ninth Circuit.**[36] If your client is arrested within the Ninth Circuit, they might be detained elsewhere, such as in the Fifth Circuit, and immigration proceedings might be held there under that law.

---

[30] Regarding possession of paraphernlia, see *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (Cal H&S C § 11364(a)). *Nunez-Reyes*, supra, held that this benefit does not cover a conviction for being under the influence, because that is not a "less serious" offense than possession.

[31] 21 USC § 841(b)(4) provides that a conviction for giving away a "small amount" of marijuana is not a felony, and also can be expunged under the FFOA, 18 USC § 3607. Before Proposition 64 passed in 2016, California H&S C § 11360(a) and (b) punished giving away marijuana for free. Because the minimum conduct to violate both §§ 11360(a) and (b) involved less than 30 grams of marijuana (for § 11360(b), it could involve 29 grams), all convictions under the statute qualify for the FFOA, under the categorical approach. See discussion of 21 USC § 841(b)(4) and the minimum conduct standard in *Moncrieffe v. Holder*, 569 U.S. 184, 192-196 (2013).

[32] See *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (foreign expungement).

[33] *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009) (expungement under Pen C § 1203.4 has no immigration effect where criminal court found two probation violations before ultimately granting the expungement).

[34] *Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

[35] See discussion of 18 USC § 3607(c) versus (a), in the ILRC Practice Advisory on *Nunez-Reyes*, cited above.

[36] *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (en banc).

- The client may be ***vulnerable to removal proceedings until the plea actually is withdrawn***, although immigration counsel have strong arguments that this should not be the case with California relief.[37]

C. Plead to a Non-Drug Offense, Including Pen C §§ 32, 136.1(b)(1)

A plea to a non-drug offense will avoid inadmissibility and deportability under the controlled substance grounds. Of course, one must analyze the immigration consequences of the non-drug offense, but these may be far less severe than for a drug conviction. This requires an individual analysis: for example, one defendant may be able to take a substitute plea to a crime involving moral turpitude (CIMT), while another cannot. See the *California Quick Reference Chart* for suggestions of alternative, non-drug offenses.[38]

Accessory after the fact, Pen C § 32, is a very good alternative to a drug offense. Being an accessory to a drug offense is not considered an offense "relating to controlled substances" even if the principal committed a drug offense.[39] Two caveats: First, avoid a sentence imposed of a year or more on any single count of Pen C § 32, to avoid a possible charge as an aggravated felony.[40] See *§ N.4 Sentence* at www.ilrc.org/chart for suggested strategies. Second, although the Ninth Circuit held that § 32 never is a CIMT, the BIA held that § 32 is a CIMT if the principal's offense is, and this rule may apply if the person is placed in immigration proceedings outside the Ninth Circuit.[41] When possible, designate a non-CIMT as the principal's offense. Even if § 32 were treated as a CIMT, however, a CIMT is likely to be far less harmful than a drug conviction.

A plea to Pen C § 136.1(b)(1), non-violent attempt to persuade a victim or witness not to call the police, also is not a drug offense. Because a felony is a strike, a prosecutor might be willing to consider it in a more serious case. Again, avoid a sentence imposed of a year or more on any single count because of the danger that it will be charged as an aggravated felony as "obstruction of justice." The Ninth Circuit held that § 136.1(b)(1) is not a CIMT,[42] but outside the Ninth Circuit the BIA might hold differently.

Making the Case: Explain to Judge and Prosecutor What a First, Minor Drug Conviction Does to an Immigrant. This box is about how to argue for a sympathetic client with no drug priors. Consider the situation: A permanent resident, undocumented person with close family here, person from a country with terrible conditions, or other sympathetic noncitizen is charged with a first drug offense. They might be offered little or no jail time, but the truth is, this minor conviction can destroy their life and the life of their family.

- They will become ***automatically deportable and inadmissible***.[43]
- The conviction will subject them to ***mandatory immigration detention***[44] ***(incarceration) for weeks, months, or even years, usually hundreds of miles from home***. Even if they are

[37] But see *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004).

[38] Available at www.ilrc.org/chart.

[39] *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

[40] See *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 822 (9th Cir. 2016) and *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018).

[41] Compare *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) with *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

[42] *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir 2017).

[43] 8 USC § 1227(a)(2)(B)(ii); 8 USC 8 USC §§ 1182(a)(2)(A)(i)(II).

[44] See 8 USC § 1226(c)(1), proving that a drug conviction requires mandatory detention without bond.

eligible to apply for some kind of discretionary relief from removal, waiting for the hearing in detention will take months, and they will remain detained during any appeals. Losing their job or house is just the beginning. Children may be put in foster care, and many parents have permanently lost parental rights due to immigration detention. California residents often are detained in isolated areas in Arizona or Texas, far from family or counsel.

- Many persons will not be eligible for relief. For example, the undocumented spouse or parent of a U.S. citizen never can get lawful status through family if they have a drug conviction. They will be ***deported to their country of origin***. With this conviction, they ***never will be permitted to enter the U.S. again***.

Your goal is simply to get a plea to a non-drug offense or some other safer option set out in these materials, or if they appear capable of completing it, pre-trial diversion under Pen C § 1000. In some cases this may require aggressive or unusual advocacy, but if you win you can save a family. In immigration court, it is common to bring church members or relatives to a hearing, present petitions from neighbors, bring in the children's small school awards (or the U.S. citizen children themselves), and any other steps to illustrate the stakes. Would that help in persuading a D.A. or judge? Tell the defendant that if there ever is a second drug charge, they won't get this consideration again.

D. Use Defenses Based on a Non-Federally Defined Substance

Immigration law defines a controlled substance as one listed in *federal* drug schedules, at 21 USC § 802. This definition applies to all controlled substance removal grounds, including a deportable or inadmissible conviction, a "drug trafficking" aggravated felony conviction, being a drug addict or abuser, and the inadmissibility ground based on the government having "reason to believe" the person participated in drug trafficking.[45] If at the time of the person's state conviction, a state offense involved a substance not listed in these federal schedules, the state offense will not trigger these immigration penalties. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015). For an in-depth discussion of *Mellouli* and these defenses, plus a list of state laws that include non-federal substances, see online practice advisory.[46]

California statutes such as H&S C §§ 11350-11352 and 11377-79 include some substances that are not on the federal schedules.[47] This disparity gives rise to the defenses discussed in subsections 1 and 2, below. Subsection 3 discusses the consequences that these defenses do not prevent, such as being a crime involving moral turpitude or particularly serious crime.

---

[45] See 8 USC §§ 1227(a)(2)(B)(i) (deportability for controlled substance conviction), 1182(a)(2)(A)(i)(II) (inadmissibility for same), 1101(a)(43)(B) (drug trafficking aggravated felony).

[46] See National Immigration Project and Immigrant Defense Project, *Practice Advisory: Mellouli v. Lynch* (June 2015) at http://nipnlg.org/practice.html.

[47] See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), and for H&S C §§ 11377-79 see, e.g., *Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. Aug. 29, 2018). (California's definition of methamphetamine is not a match to the federal definition); *Quijada-Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014), *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007). The Ninth Circuit also has upheld the defense for H&S C §§ 11350-52 (*Esquivel-Garcia v. Holder*, 593 F.3d 1025 (9th Cir. 2010) (§ 11350); *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) (§ 11352)) but §§ 11377-79 is the better choice.

1. Unspecified Substance Defense

Benefits. The unspecified substance defense requires the defender to create an entire record of conviction that never mentions a specific drug, but only mentions "a controlled substance." See instructions below. Under current law, this defense only works if the issue is whether the immigrant is deportable. That means that creating this inconclusive record will prevent a permanent resident who is not already deportable from becoming deportable, because ICE has the burden of proving that the conviction involved a substance on the federal list. It also may protect a permanent resident who travels abroad, if the person refuses to answer any border official's questions about the incident.[48] (As always, any noncitizen with any conviction should be strongly advised to consult with a crim/imm expert before leaving the United States, even for one day.)

In the Ninth Circuit, the unspecified substance defense does *not* work for a defendant who is undocumented, a permanent resident who already is deportable, or other immigrants who need to apply for relief. Under current law, to be eligible for relief, the *noncitizen* has the burden of proving that a conviction involves a substance that is *not* on the federal lists.[49] If the record just says "a controlled substance," the immigrant cannot meet their burden. This person will need a different defense: a record showing a specific, non-federal substance (see Subsection 2 below), or a non-drug offense.

How to do it. To set up the unspecified substance defense, you must sanitize the entire reviewable record of conviction so that it contains no mention of a specific controlled substance (e.g., heroin), but refers only to "a controlled substance." The record of conviction (ROC) includes the charge pled to; the plea colloquy or any plea agreement or form signed by the defendant; the judgment; and the factual basis for the plea. *Shepard v. U.S.* (2005) 544 U.S. 13, 16. You may need to bargain for a new or amended charge, and must take care with any factual basis (see below). Beware of written notations on documents, including abstracts of judgment or minute orders, that refer to the substance.

Make sure that no document in the reviewable record identifies the drug, including any iteration of the factual basis. Penal Code § 1192.5 provides that where a *felony* is charged, the court must satisfy itself "that there is a factual basis for the plea." There is no such requirement for a misdemeanor charge. The California Supreme Court has held that § 1192.5 can be satisfied without the defense having to stipulate to specific facts. In *People v. French* (2008) 43 Cal.4th 36, 50-51, the Court found that it was sufficient for defense counsel to affirm that she had discussed the facts of the case with defendant, and to state, "I believe the People have witnesses lined up for this trial that will support what the D.A. read in terms of the factual basis, and that's what they'll testify to." In *People v. Palmer* (2013) 58 Cal.4th 110, 118, the Court held that a trial court can satisfy § 1192.5 "by accepting a stipulation from counsel that a factual basis for the plea exists without also requiring counsel to recite facts or refer to a document in the record where, as here, the plea colloquy reveals that the defendant has discussed the elements of the crime and any defenses with his or her counsel and is satisfied with counsel's advice."

If you do stipulate to facts, then rather than have the court interview the defendant, stipulate to a document that you have reviewed or created that does not provide damaging information, for example a plea agreement you have written, or a sanitized complaint. See *People v. Holmes* (2004) 32 Cal.4th 432,

---

[48] A permanent resident who returns from a trip abroad has an advantage: they are not considered to be seeking a new admission unless *the government can prove* that they come within an exception at 8 USC §1101(a)(13)(C). One of these exceptions is being inadmissible for either admitting or being convicted of an offense relating to a federally-defined controlled substance. If the record of conviction is vague, and the person does not formally admit the substance, the government cannot meet its burden of proof.

[49] See *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*). It is possible that the court will abandon the *Young* rule in the pending en banc review of *Marinelarena v. Sessions*, 886 F.3d 737 (9th Cir. 2018), and hold that an inconclusive record is sufficient to prove eligibility for relief.

441 ("counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement.").

> **Example:** Your client is charged in Count 1 where the substance was opium, and the police report states that she admitted the opium was hers. Count 1 must be amended by thoroughly blacking out "opium" and writing in "controlled substance," or, even better, Count 1 should be dropped and a new count added. If this is a misdemeanor, Pen C § 1192.5 should not apply and a factual basis should not be necessary. But if it makes sense to agree to court's demands, you could make the kind of stipulations set out in *Palmer* and *French*, above. If a factual stipulation is required, Or, if needed, counsel. But if it makes sense to submit one, identify, e.g., a written plea agreement that provides sufficient detail to show that the defendant understands the facts to which she is pleading, e.g., "On June 3, 2018 at 8 p.m., at 940 A Street in Fresno, I knowingly possessed a controlled substance in violation of H&S C § 11377." See *Holmes, supra.* If you cannot obtain a sufficiently sanitized charging document, you can ask for your client to plead to the statute rather than the count, and submit the same kind of plea agreement.

Make sure that the court clerk who records that the count was amended to "controlled substance" does not write the specific substance on the minute order, and does not do anything else inconsistent with the plea. *Give a copy of the key papers to the defendant and if possible to defendant's family or attorney* (in case defendant is detained and their legal papers seized).

2. Specified Non-Federal Substance Defense

This plea may be difficult to obtain (although see discussion of methamphetamines, below), but it will protect *all* noncitizen defendants, including those who need to apply for relief or lawful status, from having a controlled substance conviction for immigration purposes. The person must plead to conduct relating to a specific California substance that is not on the federal list, such as § 11377-79 involving chorioinic gonadotropin or, if that is not possible, khat.[50] If this plea is taken, the conviction is not an inadmissible or deportable controlled substance conviction, or a drug trafficking aggravated felony, for any immigration purpose, regardless of whether the person is undocumented or a permanent resident. The defense should remain effective even if the substance later is added to the federal list.[51]

Methamphetamine and Lorenzo v. Sessions. The Ninth Circuit held that methamphetamine as defined under H&S C § 11378 is not a federally-defined controlled substance. *Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. Aug. 29, 2018). Under the language of the state and federal statutes, the court found that California's definition of methamphetamine is broader than the federal definition, because it includes geometric isomers while the federal definition does not. It also held that an immigration authority may not look to information from the person's record of conviction to identify the type of isomer, because the statute is not divisible for that purpose. Therefore, the court held that when the substance involved is identified on the record specifically as methamphetamine, § 11378 is not an offense related to a controlled substance for immigration purposes in the Ninth Circuit. This decision also should apply to §§ 11377, 11379, and other California statutes that include this definition of methamphetamine.[52]

While the *Lorenzo* decision offers tremendous defense opportunities, counsel must proceed with caution. The government will challenge the decision and it could be overturned in the future. For this reason, for a lawful permanent resident who is not yet deportable, the safer route may be to plead to an

---

[50] See *Quijada-Coronado v. Holder*, 759 F.3d 977, 983 and n.1 (9th Cir. 2014).

[51] See *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988 (2015) (the standard is the federal list at the time of conviction).

[52] Methamphetamine is prosecuted by the statute if the statute includes drugs specified in H&S C § 11055(d)(2) or if it specifies methamphetamine directly.

offense with a vague record of conviction, using the unspecified substance defense described in Subsection 1, above. That defense is settled law, and it will prevent the permanent resident from becoming ***deportable***.

But for undocumented defendants, permanent residents who are already deportable, and others who must apply for ***relief*** to stay in the United States, the choice of defense is harder. On the one hand, the unspecified substance defense does not offer these noncitizens protection under current law, but we might get a better ruling in the future. On the other hand, a plea specifically to methamphetamine does protect them now and is obtainable, but we might lose this defense in the future. With no truly safe options, counsel should advise the defendant that a plea to methamphetamine can help now but might hurt later if the rule should change. The best strategy in all cases involving noncitizens is to try very hard to avoid any drug conviction. For further discussion see ILRC, *Practice Advisory: Lorenzo v. Sessions and California Methamphetamine* (August 2018).[53]

3. Limits of These Defenses

These defenses prevent the conviction from being a deportable or inadmissible drug conviction, or conviction of a drug trafficking aggravated felony. However, they do not protect against some other immigration consequences that do not require a conviction involving a federally-defined substance.

Conviction of trafficking in any controlled substance is a crime involving moral turpitude. Assume that a conviction for "distribution" also is a crime involving moral turpitude (CIMT). Trafficking in a non-federally listed substance is likely to be a CIMT. Assume that the unspecified and specific non-federal substance defenses will *not* prevent an offense from being held a CIMT. See Section I, above.

For persons fearing persecution in their home country, almost any conviction of trafficking in any controlled substance is a "particularly serious crime." Conviction of a particularly serious crime (PSC) is a basis for the denial of asylum and for revocation of asylee or refugee status. Assume that a trafficking conviction is a PSC even if it does not involve a a federally-defined substance. Giving a substance away for free (distribution) may not be a PSC, whereas practically any offense relating to sales is a PSC (unless the defendant had only peripheral involvement, a small amount of substance was involved, and no juveniles were involved).[54] See Section I, above.

To adjust status to permanent residence, an asylee or refugee must be admissible or be granted a special waiver of inadmissibility under 8 USC § 1159(c). The one inadmissibility ground that cannot be waived is if the government has "reason to believe" that the asylee or refugee trafficked in a federally-defined substance. See next paragraph. For further discussion of applying for asylum or withholding, or representing persons who are asylees or refugees, see *§N.17 Relief Toolkit* at www.ilrc.org/chart.

Immigration authorities may seek evidence to support inadmissibility based on their having "reason to believe" the person trafficked in a federally-defined substance. This inadmissibility ground is based on conduct, so it is a factual question that is not limited to information in the record of conviction. A vague record of conviction is not guaranteed protection, because the government may simply seek evidence to prove the identity of the drug. To try to prevent this, try hard to plead to a non-trafficking offense. Warn the defendant that the government may seek other evidence.

---

[53] Available at www.ilrc.org/advisory-about-immigration-consequences-california-methamphetamine-convictions-lorenzo-v-sessions .

[54] See discussion of the rule and exception at *Matter of Y-L-, A-G-, and R-S-R*, 23 I&N Dec. 270 (A.G. 2002).

III. Defense Strategies: Possession and Similar Offenses

A. Conviction/s "Relating to a Single Offense Involving Possession for One's Own Use of Thirty Grams or Less of Marijuana" (And Some Similar Offenses)

What are the benefits of this category? Certain convictions relating to a small amount of marijuana or hashish have some immigration advantages. The person *automatically is not deportable* for "a conviction of a controlled substance," without the need to apply for any waiver.[55] Thus a permanent resident, refugee, or other person with secure status who is not otherwise deportable will not become deportable based on the conviction/s.

The person *will be inadmissible* due to a controlled substance conviction, but at least they might be eligible for a waiver of inadmissibility for this type of marijuana offense. Many people immigrating through family can apply for a "section 212(h)" discretionary waiver, although it can be difficult to actually win a grant. (A refugee or asylee applying for asylum can apply for an easier-to-win discretionary waiver for any drug possession offense.)[56] In addition, this conviction is not a bar to establishing good moral character.[57] These benefits also apply to the inadmissibility ground based on admitting having committed a drug offense, if the admission is of a single incident involving simple possession of 30 grams or less of marijuana or the qualifying similar offenses. See Section V, below. For more information on Section 212(h) waiver, see *§ N.17 Immigration Relief Toolkit* at www.ilrc.org/chart.

What offenses qualify? The conviction must meet several requirements:

- ✓ It is the person's first controlled substance conviction.
- ✓ It is for simple possession of marijuana or hashish, *or* certain similar offenses.

  These include possession of paraphernalia for use with the 30 grams or less,[58] or -- according to the Ninth Circuit but not the BIA -- being under the influence of marijuana or hashish.[59] The BIA held that possession of marijuana in a jail or near a school does not qualify for the exception.[60]
- ✓ The BIA held that the categorical approach, which evaluates a conviction based on the minimum conduct required for guilt, does not apply in this context. Instead an immigration judge can look at facts tied to the count of conviction, under the "circumstance-specific" test.[61]

  A conviction under current § 11357(a)(2) (infraction) or former (pre-Proposition 64) § 11357(b) should come within the good category, because the statute specifies possession of 28.5 grams or less of cannabis. (Also, *arguably* an infraction is not a conviction; see subsection II. A, above).

---

[55] INA § 237(a)(2)(B)(i), 8 USC § 1227(a)(2)(B)(i).

[56] See the regular "section 212(h)" waiver for possession of 30 grams or less or marijuana at 8 USC § 1182(h), INA § 212(h). See the broad waiver for refugees and asylees applying for adjustment, which can waive any possession conviction, at 8 USC § 1159(c), INA § 209(c).

[57] INA § 101(f)(3), 8 USC § 1101(f)(3).

[58] *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

[59] See *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (extends to under the influence); see also *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (extends to attempt to be under the influence of THC). But see *Matter of Davey*, 26 I&N Dec. 37, n. 2 (BIA 2012), stating in dicta that under the influence should not be included.

[60] See *Martinez-Espinoza*, 25 I&N at 125.

[61] See *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012) and see Advisory cited in next footnote.

A conviction under current § 11357(b), former § 11357(c), which specify possession of more than 28.5 grams, requires more care. The defendant should plead specifically to possessing 29 grams. That ought to control even if the evidence shows a greater amount could have been charged.[62]

The BIA held that if the issue is whether a permanent resident is deportable, the government must prove that the amount was over 30 grams, so the immigrant could win if no amount was stated on the record. Nonetheless, the best practice by far is to expressly put 30 grams or less on the record.

See online practice advisory for further discussion of the issue of proving 30 grams.[63]

✓ The substance can be any form of marijuana, including hashish.

For the § 212(h) waiver, the policy is that the amount of hashish should be the equivalent of 30 grams of marijuana (i.e., only a few grams of hashish). While that amount always is preferable, advocates will argue that up to 30 grams of hashish qualify for the deportation exception. [64]

✓ The exception can cover more than one conviction, as long as each conviction qualifies and all convictions arose from the same incident.[65]

For example, convictions for possession of hashish and for possession of paraphernalia (H&S C § 11364) to use with hashish should come within this category, if they arose from the same event.

Practice Tip: A person with a prior conviction for simple possession of marijuana or hashish that was greater than 30 grams or undefined might be able to qualify for the marijuana advantage through the use of post-conviction relief. This might be achieved by reducing the prior to a misdemeanor or infraction through the petition process available through Proposition 64,[66] and then stating specifically on the record that the amount was 29 grams. More securely, the person could vacate the conviction under Pen C §§ 1016.5, 1473.7, or other post-conviction relief vehicle. See Section I, above.

Based on the above requirements, it appears that a conviction for the following offenses will qualify for the marijuana beneficial category if it is the person's first controlled substance conviction, and multiple convictions will qualify if they arose from the same first incident, for:

- Possession of no more than 28.5 grams of marijuana (H&S C § 11357(a)(2) (infraction), former § 11357(b));
- Possession of more than 28.5 grams of marijuana (H&S C § 11357(b), former § 11357(c)) when the record explicitly states the amount was 29 or 30 grams;
- Possession of paraphernalia (H&S C § 11364) when the record shows the paraphernalia was for use with a small amount of marijuana or hashish;[67] or

---

[62] Under the circumstance-specific test, the Supreme Court held that evidence from outside the record can be considered, but all evidence must be tethered to the conviction. Arguably a specific plea will define the conviction. See discussion at National Immigration Project of the National Lawyers Guild, *Practice Advisory: Matter of Davey* (2013) at http://nipnlg.org/PDFs/practitioners/practice_advisories/crim/2013_15Jan_davey-categor-apprch.pdf.

[63] See NIPNLG, *Practice Advisory: Matter of Davey* (2013), *supra.*

[64] It extends to hashish, although for the § 1182(h) waiver purposes it may only be as much hashish as is equivalent to 30 grams or less marijuana. See INS General Counsel Legal Opinion 96-3 (April 23, 1996). See also 21 USC § 802(16), defining marijuana to include all parts of the Cannabis plant, including hashish.

[65] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).

[66] See H&S C § 11361.8(e).

[67] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).

- Being under the influence (H&S C § 11550) when the record shows that the substance was marijuana or hashish[68] (according to the Ninth Circuit but not the BIA, so this is *not* optimal).

B. Prop 47, Immigrants, and Drug Offenses

Proposition 47 makes possession of a controlled substance a misdemeanor. Unfortunately the conviction still will cause deportability and inadmissibility under the controlled substance grounds. But the fact that it is a misdemeanor does help in two specific immigration contexts, which are:

✓ *Deferred Action for Childhood Arrivals (DACA*). A misdemeanor simple drug possession where the sentence was not more than 90 days is not a bar to eligibility for DACA, whereas any felony is a bar. Also, withdrawal of plea under Pen C § 1203.4 or other rehabilitative relief may eliminate the conviction for DACA purposes. See www.ilrc.org/daca.

✓ *SB 54 Protections.* A misdemeanor drug offense does not destroy the limited protection that SB 54 provides to prevent local law enforcement from facilitating direct transfer to ICE or giving ICE information about a defendant's release date.[69] Note, however, that even if ICE does not arrest the person from jail, it still may go to the person's home, work release program, or court hearings.

C. Drug Paraphernalia

Possession of paraphernalia, H&S C § 11364, is a deportable and inadmissible drug conviction *if* the paraphernalia involved a federally-defined substance. Thus the non-federal substance defenses described in Section II. D, above, will work as a defense.[70] For prior § 11364 convictions, the type of substance often was not identified on the record of conviction. A record that is inconclusive as to the substance will prevent ICE from proviung that the offense is a deportable drug crime, but under current law, it also prevent an immigrant from qualifying for relief that is barred by a drug conviction.

For current charges, H&S C § 11377 may be a better vehicle than § 11364 for asserting a defense based on a federally-defined substance. Better yet, consider B&P C § 4140 (possession of a syringe), which has no element relating to a controlled substance and should have no immigration consequences.

Sale, possession for sale, or offer to sell drug paraphernalia might be charged as an aggravated felony, while simple possession of paraphernalia cannot be.[71] In the alternative consider B&P C § 4141, sale of syringe without a license, which should have no immigration consequences.

A conviction for possession of paraphernalia will receive the same benefits as conviction for possession of 30 grams or less of marijuana, if the immigrant can prove that the paraphernalia was intended for use with 30 grams or less of marijuana or hashish.[72] See Subsection A, above. A single conviction for possession of paraphernalia relating to any controlled substance, from on or before July 14, 2011, might be eliminated for immigration purposes by rehabilitative relief. See Section I.B, above.

---

[68] *Flores-Arellano v. INS*, 5 F.3d 360, 363 (9th Cir. 1993), *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005).

[69] See SB 54 and the California Values Act, Govt C §§7282.5, 7284, 7284.2 and see ILRC, *SB 54 and the California Values Act: A Guide for Criminal Defenders* (Feb. 2018), www.ilrc.org/sb-54-and-california-values-act-guide-criminal-defenders.

[70] *Mellouli v. Lynch, supra* (Kansas possession of paraphernalia is not a deportable controlled substance offense unless it involves a federally-defined substance).

[71] If an offense does not involve trafficking, then it is an aggravated felony only if it is analogous to a federal drug felony. 8 USC 1101(a)(43)(B). Possession of paraphernalia is not a federal drug felony. See 21 USC § 863(a).

[72] *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

D. A Drug Conviction, But at Least Not an Aggravated Felony

As long as an offense is not a drug trafficking aggravated felony, some but not all immigrants can survive having one or more federally-defined controlled substance convictions.

The conviction will destroy any possibility of family immigration, unless it qualifies as a single incident involving 30 grams of marijuana, and then the person actually wins a discretionary waiver of inadmissibility under INA § 212(h). See Part A, above. Even then, the conviction will destroy eligibility for cancellation of removal for non-permanent residents, and for humanitarian relief such as the Violence Against Women Act (VAWA) and Special Immigrant Juvenile Status (SIJS) provisions.

However, a drug conviction that is not an aggravated felony, e.g., for simple possession, does not *automatically* destroy eligibility for cancellation of removal for permanent residents; asylum and asylum-like relief; DACA (as long as it is a misdemeanor with 90 days or less sentence); or a U or a T visa for victims of certain crimes or of human trafficking. For more on all of these forms of relief and their criminal record bars, see *§N.17 Relief Toolkit* (2018) at www.ilrc.org/chart.

IV. Defenses: Drug Trafficking and Other Drug-Related "Aggravated Felonies"

A. How to Plead to H&S C § 11360

The bad news is that because marijuana is a federally-defined controlled substance, *every* conviction under H&S C § 11360 is a deportable and inadmissible drug conviction. Conservatively assume this is true even though § 11360(b) was made an infraction, and arguably California infractions are not a conviction for immigration purposes.[73] One option to avoid a drug conviction is to plead up to §§ 11377-79 with a non-federal substance defense, as described in Section II, above.

The good news is that with careful pleading to § 11360, one can at least avoid an aggravated felony conviction:

Giving away a small amount of marijuana, or offering to do so, is not an aggravated felony in any jurisdiction, because that offense is treated as a misdemeanor under federal law. See discussion of 21 USC §841(b)(4) in *Moncrieffe v Holder*, 569 U.S. 184 (2013). This is the best option for H&S C § 11360. It is critical to plead specifically to giving away or offering to give away, and not to the language of § 11360 as a whole, because the statute is divisible between the types of listed conduct.

To avoid an aggravated felony (AF), one should also plead specifically to giving away a "small amount" (say, 30 grams or less) of marijuana, although legally this is less critical than pleading to "giving away." Current § 11360(b) makes it an infraction to give away 28.5 grams or less. This never is an AF. Current § 11360(a) makes it a potential misdemeanor to give away more than that. Here, have your client allocute to giving away 29 or 30 grams. But even if this was not done, legally the offense is not an AF as long as there is evidence that anyone has been, or is likely to be, prosecuted under the statute for giving away 29 or 30 grams. This is because the categorical approach applies to this ground, and it is based on the minimum conduct required for guilt, not the conduct in the instant case. See *Moncrieffe, supra* (under the categorical approach, conviction under a Georgia statute that prohibits giving away any amount of marijuana is not an aggravated felony because the minimum conduct required for guilt includes giving away a small amount). While a "small amount" is not defined, the Court noted that 30 grams or less has been used in other contexts, so it is safest to go by this amount.

[73] See, e.g., Yi, "Arguing that a California Infraction is not a Conviction" at www.ilrc.org/resources/arguing-that-a-california-infraction-is-not-a-conviction-test-for-non-misdemeanor-offenses.

Offering to commit any of the § 11360 offenses. "Offering to" commit an offense in §§ 11360, 11352, or 11379 is not an aggravated felony, in cases arising in the Ninth Circuit only.[74] The best plea would be offering to give away a small amount of marijuana, which is not an aggravated felony in any jurisdiction. See above.

An older plea to transportation, for conduct that occurred before January 1, 2016, is not an aggravated felony because at that time the minimum conduct required for guilt was transportation for personal use, not for sale. As of January 1, 2016, transportation under § 11360 means transportation for sale, which is an aggravated felony.

Inadmissible for "reason to believe" trafficking; Asylees, refuges, and conviction of "particularly serious crimes." While not an aggravated felony, a plea to offering to sell marijuana will provide the government with automatic "reason to believe" the person is a trafficker, one of the most pernicious inadmissibility grounds. Offering to sell will be held a "particularly serious crime" for asylees and refugees (unless, perhaps, it is a very small amount of marijuana). Giving away a small amount of marijuana (or offering to give away) is better.

B. How to Plead to H&S C §§ 11352, 11379

California drug trafficking statutes contain some reasonable options for immigrant defendants.

Avoid a drug trafficking aggravated felony in immigration proceedings held within the Ninth Circuit by pleading to "offering" to distribute. The Ninth Circuit held that "offering" to commit an offense under §§ 11352, 11360, or 11379 is not an aggravated felony (AF), because the definition of aggravated felony does not include solicitation.[75] This defense only works in immigration proceedings arising within the Ninth Circuit. If the person is placed in immigration proceedings outside of the Ninth Circuit, this offense will be an AF.

This is such a strong defense that it has been held to be ineffective assistance of counsel to fail to advise a noncitizen defendant who is charged with possession for sale (which has no "offering" component and always is an AF) about the option of pleading up to offering to sell or distribute (which is not an AF in the Ninth Circuit). See subsection C, below.

The best possible plea is offering to distribute, instead of offering to sell or to transport for sale. A conviction for offering to sell or transport is a "particularly serious crime" (which hurts people who apply for asylum and related relief) and a basis for inadmissibility because it provides "reason to believe" the person trafficked. While a conviction for offering to distribute (give away) may well prompt an investigation into whether commercial trafficking was involved, at least it is not automatic proof. See discussion at Section II, above. However, a plea to *offering* to sell or transport is not an aggravated felony in the Ninth Circuit.

Plead specifically to offering; do not plead to "sale *or* offer to sell" or to the language of the entire statute as stated in the disjunctive ("or"). The Ninth Circuit held that these California drug statutes are "divisible" as to the different types of conduct, which means that an immigration authority can review the person's record to see which conduct was the basis for the conviction.[76]

A transportation conviction based on conduct from before January 1, 2014 is not an aggravated felony. Before 2014, the minimum conduct to commit transportation under H&S C §§ 11352

[74] *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc).

[75] *Id.*

[76] See *U.S. v Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (en banc) (H&S C § 11379).

and 11379 was transportation for personal use, which is not an aggravated felony. As of January 1, 2014, transportation was amended to mean transportation for sale, which is an aggravated felony and has the same immigration effect as a conviction for sale. (For § 11360, the effective date was January 1, 2016.)

Avoid a deportable and inadmissible drug offense by using a non-federal substance defense. The non-federal substance defenses are discussed in Subsection II. D, above. Theu include the unspecified controlled substance defense for permanent residents who are not already deportable, and the specified non-federal substance defense for other immigrants. If you can negotiate a plea that includes this defense, a conviction of §§ 11352(a) or 11379(a) will not be an aggravated felony *or* a deportable or inadmissible drug offense. If you cannot obtain a non-federal substance defense, a conviction of §§ 11352(a) and 11379(a) will be a deportable and inadmissible drug offense—but a plea to "offering" still will avoid an aggravated felony in cases held within the Ninth Circuit.

Crimes involving moral turpitude. Any offense that involves trafficking and, perhaps, distribution is a crime involving moral turpitude. A non-federal substance defense, or the "offering" defense, will not prevent this consequence. Transportation for personal use, for conduct from before January 1, 2014, is not a crime involving moral turpitude.

C. Possession for Sale is an Aggravated Felony

Possession for sale of a federally-listed controlled substance is a bad plea. See H&S C §§ 11351, 11359, 11378. It is a deportable and inadmissible conviction and an aggravated felony (AF). It lacks the crucial option present in §§ 11352, 11360, 11379 of avoiding an AF by pleading to "offering" to commit an offense (and in older offenses, the option of transportation for personal use). For this reason, a California court of appeals held that it is ineffective assistance of counsel to fail to advise a noncitizen defendant that for immigration purposes, if there is no other option it is better to "plead up" to a non-aggravated felony under these sections, rather than plead to possession for sale.[77]

The unspecified substance and specific non-federal substance defenses do apply to possession for sale, and that is a reasonable alternative. See discussion at Section II. D. Still, for immigration purposes it is worth it to plead up to §§ 11352 or 11379, as described in subsection B above.

D. Other, Non-Trafficking Aggravated Felonies

A state offense that is analogous to a federal drug felony will be an aggravated felony, even if the state offense does not involve trafficking. See 8 USC § 1101(a)(43)(B). The below offenses may be classed as aggravated felonies as federal drug analogues.

1. Possession as an Aggravated Felony

Generally, simple possession is treated as a misdemeanor under federal law, and so is not an aggravated felony.[78] There are two exceptions to this. First, a single conviction for possession of ***flunitrazepam*** (a date-rape drug) is an aggravated felony, because it is a felony under federal law. Second, if a ***prior drug offense is pleaded or proved*** in a possession case for recidivist sentencing purposes, this may be an aggravated felony.[79] If the prosecution wants a drug recidivist plea, find a different way to accept the desired jail time, or get assistance.

---

[77] See *People v. Bautista*, (2004) 115 Cal.App.4th 229, 8 Cal.Rptr. 3d 862.

[78] *Lopez v. Gonzales*, 549 U.S. 47 (2006).

[79] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007). For further discussion, see Vargas, "Practice Advisory: Multiple Drug Possession Cases after *Carachuri-Rosendo v. Holder*" (June 21, 2010), https://immigrantdefenseproject.org/wp-content/uploads/2011/02/Carachuri.pdf.

Some minor offenses are not federal felonies, or not punished under federal law at all. These include being under the influence, possessing paraphernalia, being in a place where drugs are used, and transporting for personal use. These never are aggravated felonies.

2. Other Aggravated Felonies that Do Not Involve Trafficking

As always, these offenses have immigration effect only if they involve federally-defined substances.

Giving away a controlled substance for free is an aggravated felony as an analogue to a federal drug felony (unless it involves giving away a small amount of marijuana; see subsection A above).

Forged or fraudulent prescriptions. Obtaining a controlled substance by a forged or fraudulent prescription is an aggravated felony to the extent it matches the elements of the federal felony, 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, etc.). Section 11368, obtaining a controlled substance by forgery, is a potential aggravated felony. Try to plead to B&P C § 4324, obtaining a "drug" by forged prescription, which should not be a controlled substance offense at all.[80] Or, try to plead to simple possession *and/or* a straight fraud or forgery offense, as two separate offenses. These convictions can have other effects. Avoid a sentence of a year or more on any single count of forgery or counterfeiting, in order to avoid an aggravated felony under 8 USC § 1101(a)(43)(R). Any forgery or fraud offense will be a crime involving moral turpitude.

Cultivation, including marijuana. Section 11358, cultivation of marijuana, has been held to be an automatic aggravated felony as a federal analogue, even if it is for personal use.[81] Because some immigration authorities treat a California infraction as a conviction, this might even be true for the current version of § 11358(b), which is an infraction. Try to plead to a non-drug offense, or try to get pretrial diversion under Pen C § 1000, or try to plead to simple possession.

Sale of paraphernalia is a federal drug felony under 21 USC § 863(a), which also prohibits offering to sell or transporting (in interstate commerce) paraphernalia. ICE may charge that H&S C § 11364.7 is an aggravated felony as a federal analogue. Consider B&P C § 4141, selling a syringe without a license, which should have no immigration consequences.

Maintaining a place where drugs are sold under H&S C § 11366.5 may be charged as an aggravated felony as an analogue to 21 USC § 856. In contrast, presence in a place where drugs are used, H&S C § 11365, is a deportable and inadmissible drug offense if it involves a federally-defined substance, but is not an aggravated felony.

Possession of a listed chemical having reason to believe it will be used to manufacture a controlled substance is a federal felony under 21 USC § 841(c)(2).[82]

V. Conduct-Based Drug Grounds

A noncitizen can become inadmissible or deportable based on conduct, with no requirement of a conviction. As a criminal defense attorney, you cannot control whether there is evidence of conduct, but you can avoid structuring pleas that admit to the conduct, and you can try to define the incident by

[80] The term "drug" is overbroad (it includes non-controlled substances) and indivisible (it is a single word) and so under the categorical approach never should be held to involve a federally-defined controlled substance offense.

[81] *U.S. v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008) (analogous to 21 USC § 841(a)(1), (b)(1)(D)).

[82] *Daas v. Holder*, 198 F.3d 1167 (9th Cir. 2010).

pleading specifically to different conduct (e.g., possession, or a non-drug offense, rather than trafficking). Note that an aggravated felony is not a "conduct-based" ground; it always requires a conviction.

A. "Reason to Believe" Drug Trafficking

What it is. A noncitizen is inadmissible if immigration authorities have "reason to believe" that the person ever have engaged, aided, abetted, or conspired in trafficking in a federally-defined controlled substance. 8 USC § 1182(a)(2)(C)(i). A conviction is not necessary, but a plea to sale, offer to sell, transport with intent to sell, possession for sale, and similar offenses will prove the person is inadmissible under this ground. Because "reason to believe" does not depend upon proof by conviction, the categorical approach does not apply: the government is not limited to a record of conviction and may seek out other evidence or use defendant's own statements.

The trafficker's family also is punished. A noncitizen is inadmissible if authorities have reason to believe they are the spouse, son, or daughter of someone who is inadmissible for trafficking, and they have gained a benefit from that trafficking within the last five years. 8 USC § 1182(a)(2)(C)(ii).

Extent of immigration harm depends on status. For undocumented persons, this inadmissibility ground is extraordinarily severe: it is nearly impossible ever to obtain permanent residency or any lawful status once inadmissible under this ground, even if the person has strong equities such as being married to a U.S. citizen or a strong asylum case.

A permanent resident who becomes inadmissible faces less severe penalties: the person cannot travel outside the United States, and will have to delay applying to become a U.S. citizen, but will not lose their green card based solely on being inadmissible. (A permanent resident who does not travel outside the U.S. will only lose their green card if they become deportable.)

Defense strategies. To avoid being inadmissible under this ground, follow instructions above for pleading to a non-drug-related offense, a disposition that is not a conviction, or at least a non-trafficking offense.

The person also should know that when applying for immigration status they will be questioned by authorities about whether they have been a participant in drug trafficking. They can remain silent, but this may be used as a basis to deny the application. However, a person who can assert that they actually did not participate or assist in trafficking often can win against this charge, if they have counsel.

B. Drug Addict or Abuser

A noncitizen is inadmissible if they currently are a drug addict or abuser, and deportable if they have been an addict or abuser at any time after admission into the U.S.[83] The abuse must relate to a federally-defined controlled substance, and one that is not supplied by prescription.

Criminal defenders should consider this ground where a defendant might have to admit, or be subject to a finding, about addiction or abuse in order to participate in a "drug court" or therapeutic placement like CRC. This might alert immigration authorities and provide a basis for a finding of addiction or abuse. However, addiction is not proved by an acceptance of drug counseling, e.g. as a condition of probation, where there is no admission or finding of addiction or abuse.

[83] 8 USC § 1182(a)(1)(A)(iv) (inadmissibility ground); 8 USC § 1227(a)(2)(B)(ii) (deportation ground).

C. Formally Admit Committing a Controlled Substance Offense

A noncitizen is inadmissible "who admits having committed, or who admits committing acts that constitute the essential elements" of any offense relating to a federally-defined controlled substance, even if they were never charged with or convicted of a controlled substance offense in criminal proceedings.[84] This requires a formal admission of all of the elements of a crime under the jurisdiction where the act was committed. However, the Ninth Circuit held that an admission at a visa medical appointment qualifies as an admission.[85]

There is an important exception. Where a conviction by plea was eliminated for immigration purposes by any means, such as under *Lujan-Armendariz,* or Pen C §§ 1016.5, 1203.43, 1473.7 or other post-conviction relief, the old guilty plea may not serve as an "admission" for this purpose. Neither can a later admission, for example to an immigration judge. This is also true if drug charges were brought before a judge but dismissed. The Board of Immigration Appeals has held that if a criminal court judge has heard charges relating to an incident and the result was less than a conviction, immigration authorities will defer to the criminal court resolution and will not charge inadmissibility based on a formal admission of the underlying facts.[86] However, counsel should guard against formal admissions to a judge or other official of a crime that is not resolved in criminal court.

Warning on admitting to "lawful" use of marijuana. Immigrants who have used marijuana – even in accordance with California law, including within their home and pursuant to a doctor's letter – are at risk if they discuss this use with any immigration official. While marijuana is legal in various forms in 29 states and the District of Columbia, it remains a federal controlled substance. Even without a conviction, simply admitting to having possessed marijuana can make a noncitizen inadmissible.

Tell your clients that (a) use of marijuana is dangerous for noncitizens, (b) so is working in the legitimate marijuana industry, whether in the fields, office, or delivery systems, and (c) if they truly need marijuana for medical reasons, they should get legal advice. Downloadable community flyers in English, Spanish, and Chinese, and a legal advisory about immigrants and marijuana, are available online.[87]

---

[84] 8 USC § 1182(a)(2)(A)(i)(II).

[85] *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1214-15 (9th Cir. 2002).

[86] See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953) (Pen C § 1203.4 expungement); *Matter of G*, 1 I&N Dec. 96 (BIA 1942) (dismissal pursuant to Texas statute).

[87] Go to https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana