



California Prop 47 and SB 1310: Representing Immigrants

Katherine Brady, Immigrant Legal Resource Center¹

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A. Overview

In 2014, California adopted two new laws that can be very helpful to noncitizens convicted of California offenses.

- SB 1310 provides that the maximum possible sentence for a misdemeanor is 364 days. It takes effect on January 1, 2015.
- Prop 47 changes some wobbler and felony offenses to misdemeanors. It applies to simple possession of some controlled substances, and some property crimes where the amount taken is valued at \$950 or less. Persons with certain serious priors are disqualified from Prop 47. Prop 47 is in effect now, and can be applied retroactively to some prior felony convictions and sentences.

This memo will review the substance of the laws, with a focus on how defenders can use them to advise and assist immigrants. A few immediate points are:

- For some immigrants it is important to delay sentencing on a current criminal case, or re-sentencing or re-designating a prior felony conviction as a misdemeanor, until after January 1, 2015. See Part B, below.
- Misdemeanor classification doesn’t solve all immigration problems. The new shoplifting offense, PC § 459.5, is not the best alternative for some immigrants. Even a misdemeanor conviction for drug possession usually has very harsh immigration consequences – although a key *exception* to that are programs such as DACA and the new DAPA (discussed next). See Parts C, D.
- Under the new Deferred Action for Parental Accountability (DAPA) program, a person who is the parent of a U.S. citizen or permanent resident and meets other requirements can get some limited but important immigration benefits. Conviction of a felony is a bar to eligibility, so designation as a misdemeanor under PC § 17 or Prop 47 can remove that bar. See Part D.

1. How can Prop 47 and SB 1310 help immigrants convicted of crimes?

Changing a wobbler/felony to a misdemeanor, and in some cases having a misdemeanor with a potential sentence of just 364 days, can help immigrants in at least four ways. In some cases, prior convictions can be cured. Here is a summary of the types of immigrants these laws can help; see Parts B and C for further information.

Defendant has a single conviction of a crime involving moral turpitude (CIMT). Note that immigration law has its own definition of when an offense is a CIMT, which sometimes differs from California decisions. See discussion of specific offenses in this article, and other resources at www.ilrc.org/crimes and www.nortontooby.com. For information on how moral turpitude convictions affect immigrants, see online Note: Moral Turpitude.²

A single CIMT conviction with a *potential sentence of one year or more* can cause two immigration problems: it might make a permanent resident deportable, and it will bar an otherwise qualified undocumented person from applying for relief for called “cancellation of removal for non-permanent residents.” See Part B.

The fix: Under SB 1310, as of January 1, 2015 misdemeanors will have a potential sentence of just 364 days. After January 1, designating or reducing a prior conviction to a misdemeanor under P.C. § 17 or Prop 47 might result in a potential sentence of 364 days; see #3 below.

Second, a person is inadmissible (barred from getting some kinds of immigration status) for a single CIMT conviction, unless the offense is a *misdemeanor* (either 365 or 364 days) and a sentence of not more than six months was imposed.³ (Note, however, that the new DAPA relief has different sentence requirements; see Part D.)

The fix: Prop 47 makes some CIMT wobblers into misdemeanors. Reducing/designating a prior conviction as a misdemeanor under either Prop 47 or P.C. § 17 will work.

Sentence of a year or more was imposed: Aggravated Felony alert. Aggravated felonies cause the worst immigration consequences. Some felony and misdemeanor offenses – including receipt of stolen property, forgery, and theft -- are aggravated felonies if a sentence of a year or more is imposed.⁴

The Fix: As of January 1, 2015, SB 1310 will make 364 days the maximum sentence that can be imposed on a misdemeanor. See Part B. Prop 47 makes some offenses into misdemeanors, and permits some prior felony convictions to be re-sentenced as misdemeanors, hopefully to 364 days or less. See Part C.

Defendant has a felony conviction and wants to apply under new programs. Conviction of a felony of any kind, regardless of sentence, is a bar to a few key types of immigration benefits. These include the new Deferred Action for parents of U.S. citizens and permanent residents (DAPA) and the newly expanded Deferred Action for Childhood Arrivals (DACA) (both of which are barred by conviction of one felony, three misdemeanors, or one “significant” misdemeanor), as well as Temporary Protected Status (TPS) (barred by one felony or two misdemeanors).⁵

The Fix. Under Prop 47, some wobblers or felonies become misdemeanors. Conviction of a misdemeanor property crime *or drug possession* is not a bar to DAPA or DACA, as long as the person has not been ordered to custody of 90 days or more. Reducing a prior conviction to

a misdemeanor under Prop 47 or PC § 17 will work, with or without a 364-day maximum, as long as there is not the 90-day custody order. See Part D for a brief summary of DAPA, and see www.ilrc.org/dapa, www.ilrc.org/daca, and www.ilrc.org/crimes for more information.

Felony conviction is an enforcement priority. President Obama's revamped enforcement plan will prioritize the deportation of a removable noncitizen who has any felony conviction.⁶ Prop 47 may help immigrants by avoiding future felonies and re-categorizing prior felonies. Reduction of a felony to a misdemeanor under PC § 17 also may help.

2. Will immigration authorities accept changes made by Prop 47 and SB 1310?

It is extremely likely that immigration authorities will give effect to the changes made by Prop 47 and SB 1310, including their effect on past convictions. Immigration law has long accepted state designations of felony, misdemeanor, and actual or potential sentence. For example, the Ninth Circuit repeatedly has affirmed that reducing a California wobbler offense to a misdemeanor controls how immigration authorities may characterize the offense.⁷

3. Will Prop 47 and SB 1310 apply retroactively to older convictions?

That is a key question for immigrants. We will address it in more detail in a future memo, but here is a summary of the issues. As discussed above, immigration authorities are likely to accept changes that California courts or statutes make in re-characterizing a prior conviction as a misdemeanor, and/or in reducing the prior potential or imposed sentence. The issue is how California will decide this.

By its terms, Prop 47 is in effect now and applies retroactively to prior felony convictions. With some exceptions, a person currently serving a felony sentence for an offense that would have been a misdemeanor had Prop 47 been in force, may petition a court to recall the felony sentence and re-sentence as a misdemeanor. If the person's sentence is completed, he or she can petition a court to re-designate the felony offense as a misdemeanor. See P.C. § 1170.18. Courts are addressing a variety of questions in how to interpret and implement these provisions.

SB 1310 does not take effect until January 1, 2015, and it does not include an explicit retroactivity provision. However, generally when a statute is amended to mitigate an act's punishment, that amendment applies to all cases not yet final.⁸ Advocates will argue that the 364-day limit applies to a pre-January 1, 2015 conviction in several situations, including: where conviction and sentence occurred before January 1 but an appeal is pending, or the time for filing the appeal has not run, on January 1; where a misdemeanor sentence is imposed after January 1 even if the plea is taken before that date; where a felony or wobbler is designated as a misdemeanor under Prop 47, or a wobbler is reduced to a misdemeanor under P.C. § 17, after January 1; and other scenarios.

What should defenders do before January 1, 2015? Should they advise immigrants to wait until after January 1 to plead guilty, be sentenced, or change a prior felony conviction or sentence under Prop 47 or P.C. §17? What if waiting causes risk or hardship? The answer depends on individual circumstances. The best course is to get an accurate analysis of the immigration case, to see if getting to 364 days is truly important. Generally, if the person has or may have just one moral turpitude conviction, the difference between a *potential* 364 and 365 days might be important. If a person has a prior conviction of a felony that might be an "aggravated felony" for immigration purposes because a sentence of a year or more was *imposed*, the person should consider doing whatever might be necessary to be re-sentenced to 364 days or less. See Part B.

B. SB 1310: A Misdemeanor Has a Maximum 364-Day Sentence

SB 1310 creates PC § 18.5, which states: “Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.” This is effective January 1, 2015.

Thus, although California code sections -- including one-year misdemeanors, wobblers, and wobbler offenses amended by Prop 47 -- may continue to state that the penalty for the misdemeanor is “up to one year,” under P.C. § 18.5 such misdemeanors actually will have a maximum penalty of 364 days. (If no maximum penalty is provided for a misdemeanor offense, it has a potential sentence of six months under P.C. § 19. SB 1310 does not change that.)

A potential sentence of 364 rather than 365 days can help immigrants in three main ways.

Moral Turpitude: Deportable. A noncitizen is deportable for a single conviction of a crime involving moral turpitude committed within five years of first admission, if the offense has a potential sentence of one year or more.⁹ Under PC § 18.5, a single California misdemeanor conviction will not trigger this deportation ground because it will have a potential sentence of 364 days.

Moral Turpitude: Bar to Relief. Some undocumented people who have lived in the U.S. for ten years and meet other requirements can apply to “cancel” their deportation and get a green card. This is referred to as “cancellation of removal for non-permanent residents.” Conviction of a single crime involving moral turpitude is a bar to this relief if the offense has a potential sentence of a year or more.¹⁰ Under PC § 18.5, a single misdemeanor conviction will not bar this relief because it will have a potential 364 days.

Aggravated Felony. Certain types of offenses become an aggravated felony only if a sentence of a year or more is imposed. This includes a federally-defined crime of violence, theft, receipt of stolen property, forgery, etc.¹¹ Under PC § 18.5, California misdemeanors will not be aggravated felonies under these categories, because a sentence of a year cannot be legally imposed. (In addition, a RICO offense becomes an aggravated felony if it carries a potential sentence of a year.¹²)

C. Prop 47: Some Wobblers Now Are Misdemeanors

This section will discuss the specific provisions of Prop 47. Prop 47 may help immigrants in multiple ways. See also Part A.1, above.

First, conviction of a single felony is a bar to a few types of immigration benefits. By changing some felonies to misdemeanors Prop 47 may preserve eligibility for Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), and the new program for parents of U.S. citizens and permanent residents, Deferred Action for Parental Accountability (DAPA). See Part A.1 and Part D.

Second, when combined with SB 1310, Prop 47 will cause certain offenses to be misdemeanors that carry a potential sentence of 364 days or less. This may prevent the offense from being an aggravated felony or having certain consequences as a crime involving moral turpitude. See Part B, above, and see the discussion below of the specific offenses affected by Prop 47.

Third, a removable immigrant who has been convicted of a felony of any kind comes within the “top

priority” category for immigration enforcement. Reducing a felony to a misdemeanor under Prop 47 or PC § 17 might make the person less of a target and more able to argue that, as a matter of prosecutorial discretion, removal proceedings should not be instituted. See Part A.1.

1. What does Prop 47 do?

On November 4, 2014 California voters approved Proposition 47, known as the “Safe Neighborhoods and Schools Act.” The purpose of Prop 47 is to reduce criminal penalties for some relatively minor offenses, in order to make the penalty more appropriate to the crime and to save the state money by reducing incarceration levels.

Prop 47 changes the following offenses from felonies or “wobblers”¹³ to straight misdemeanors: (a) simple possession of a controlled substance, and (b) receipt of stolen property, passing bad checks, and certain forgery offenses, if the amount taken did not exceed \$950. See further details about each offense, below. These misdemeanors have a potential sentence of up to one year now, and after January 1, 2015 will have a potential sentence of up to 364 days under SB 1310.

Prop 47 also creates theft misdemeanors that have a potential sentence of six months. It provides that any theft of property or labor whose value does not exceed \$950 is “petty theft,” a six-month misdemeanor (P.C. § 490.2), rather than grand theft. It limits the application of the recidivist sentence enhancement to petty theft, Cal PC 666, to persons who have certain serious prior convictions.¹⁴ It creates “shoplifting,” a six-month misdemeanor that is an alternative to commercial burglary. See discussion below.

Prop 47 took effect on November 5, 2014. Its benefits apply retroactively to some past felony convictions and sentences. See discussion of retroactivity at Part A.3, above.

2. Is anyone disqualified from Prop 47 benefits?

Yes. Prop 47 provisions do *not* apply if a defendant has been convicted of either: (1) an offense requiring registration as a sex offender pursuant to PC § 290(c); or (2) an offense specified in PC § 667(e)(2)(C)(iv) (sometimes referred to as a “superstrike”). In addition, property crimes covered by Prop 47 must not involve a taking of goods or services valued at \$950 or more.

Even where the person does not qualify for Prop 47, he or she still might be able to get a misdemeanor conviction because most of the relevant offenses are wobblers. In some cases, a defendant might be able to reduce the offense to a misdemeanor under P.C. § 17.

3. How do the Prop 47 changes to Forgery, Passing a Bad Check, and Receipt of Stolen Property affect immigrants?

Prop 47 provides that if the amount taken or intended be taken does not exceed \$950, and the person is not disqualified by certain priors, a conviction for PC §§ 470 et seq. (certain forgery offenses, when not combined with identity theft¹⁵), 476a (fraudulently passing one or more checks with insufficient funds¹⁶), or 496 (receipt of stolen property) is a misdemeanor with a potential sentence of a year. Under SB 1310, after January 1, 2015 these misdemeanors will have a potential sentence of 364 days. (Note that where Prop 47 does not apply, either because the amount exceeds \$950 or the defendant has the serious priors described above, the offense remains a wobbler.) Prop 47 has the following potential immigration benefits for these offenses:

Aggravated felony. Misdemeanor PC §§ 470 and 496 are aggravated felonies if a sentence (including a suspended sentence) of a year is imposed.¹⁷ If a person has a prior felony conviction with a sentence of a year or more, successful re-sentencing under Prop 47 (after January 1, 2015) will result in a sentence imposed of 364 days, which will not be an aggravated felony. See A.3.

Regarding future pleas, after January 1, 2015 only 364 days may be imposed on a misdemeanor, so these offenses will not have the potential to be an aggravated felony based upon sentence.

Note that because PC §§ 470 and 476 involve deceit, in a non-Prop 47 situation they also may qualify as aggravated felonies if the loss to the victim/s exceeds \$10,000.¹⁸

Crime Involving Moral Turpitude. Sections 473, 476, and 496 have been held to be crimes involving moral turpitude (although § 496 arguably should not be¹⁹). A single conviction of a crime involving moral turpitude will not cause deportability or act as a bar to cancellation of removal for non-permanent residents, if it has a potential sentence of 364 days. See Part B.

Bar to DAPA. A single misdemeanor conviction of these offenses is not a bar to DAPA or DACA as a “significant misdemeanor,” as long as a sentence to custody of 90 days or more was not imposed. The conviction may count toward the bar based on conviction of three misdemeanors, however. See Part D.

4. How do the Prop 47 changes to Theft affect immigrants?

Petty theft. Prop 47 provides that a theft of money, labor, or property in an amount not exceeding \$950 is petty theft, a misdemeanor with a six-month maximum, rather than grand theft. See PC § 490.2.

Aggravated felony. A conviction of petty theft is not an aggravated felony, because a sentence of a year or more cannot be imposed.

Moral turpitude. Theft is a crime involving moral turpitude, but a *single* petty theft conviction will not cause deportability or act as a bar to cancellation of removal for non-permanent residents, because it does not have a potential one-year sentence. See Part B. The six-month maximum sentence is in effect now, under Prop 47, so there is no need to wait until January 1, 2015 to take action.

Alternative pleas that may not involve moral turpitude include shoplifting, receipt of stolen property, and burglary (although burglary is a bar to DAPA and DACA). See # 3 and 5.

Bar to DAPA. A single misdemeanor theft conviction is not a bar to DAPA or DACA as a “significant misdemeanor,” as long as a sentence to custody of at least 90 days was not imposed. It will count toward the bar based on conviction of three misdemeanors, however. See Part D.

Petty theft with a prior. Prop 47 significantly limits the application of PC § 666, the recidivist sentence enhancement for petty theft with certain priors. Before Prop 47, this section provided that a petty theft was punishable as a wobbler offense if the person previously had been convicted and ordered to jail for certain enumerated prior offenses, such as theft or burglary.

Under Prop 47, PC § 666 continues to punish petty theft as a wobbler, but only for a limited class of defendants: those who (a) previously were ordered to jail for conviction of one of the enumerated offenses such as theft or burglary, *but only if they* (2) also have more serious priors, either conviction

of an offense requiring registration as a sex offender pursuant to PC § 290, or conviction of an offense specified in PC §§ 368(d) or (e), or 667(e)(2)(C)(iv). Note that this list includes offenses that generally disqualify a defendant from Prop 47, plus some additional offenses.

If the above does not apply, a petty theft will not be sentenced under PC § 666. It will be punishable simply as a misdemeanor with a potential sentence of six months, and will have the same immigration consequences described above for petty theft. Of course, the person's priors must be analyzed for immigration consequences. But in terms of CIMTs, California burglary and vehicle taking arguably are not CIMTs,²⁰ so if these are the only priors the petty theft might be the sole turpitudinous offense.

5. *How do the Prop 47 changes to Burglary and Shoplifting affect immigrants?*

Shoplifting. Prop 47 removes the offense of shoplifting goods valued at \$950 or less from the definition of commercial burglary at PC § 459, and makes it into a six-month misdemeanor.

New PC § 459.5(a) defines shoplifting as entering a commercial establishment during business hours with intent to commit larceny, where the value of the goods taken or intended to be taken does not exceed \$950.

Crimes involving moral turpitude. At this moment, when offense analysis is undergoing a radical change based on recent Supreme Court precedent,²¹ it is hard to have a crystal ball and know exactly which crimes will be held to involve moral turpitude.

The main reason that shoplifting is risky as an immigration plea is that, while this offense is not a crime involving moral turpitude (CIMT) under current Ninth Circuit rulings, it is possible that the rule would change in the future.²² A conviction for receipt of stolen property or commercial burglary is more secure. However, shoplifting is a better plea than petty theft, which definitely is a CIMT.

Thus, if it is critical to avoid a CIMT, the hierarchy is: first, receipt of stolen property or burglary (or vehicle taking, Veh C § 10851), and then shoplifting. Theft is not good. Other offenses such as accessory after the fact or trespass also may avoid a CIMT.

On the good side, a *single* CIMT conviction does not trigger *any* CIMT consequences if it has a potential sentence of less than a year. Even if all the above offenses were held to involve moral turpitude, they all have, or will have after January 1, a potential sentence of less than a year.

Finally, misdemeanor commercial burglary has a significant disadvantage in that it is a bar to DAPA and DACA. In addition, if the amount taken is less than \$950, it may be difficult or impossible to “plead up” to misdemeanor burglary from a charge of shoplifting.²³

Shoplifting is Okay for DAPA and DACA. Assume that any burglary conviction will be a bar to DAPA and DACA, as a “significant misdemeanor.” If the defendant might apply for these forms of relief, he or she should plead to misdemeanor receipt of stolen property, shoplifting, or trespass if possible, rather than burglary, and avoid an order to custody of 90 days or more. See Part D and see www.ilrc.org/dapa.

Commercial burglary.²⁴ *Aggravated felony.* Under current law, no felony or misdemeanor conviction for commercial burglary is an aggravated felony, even with a sentence imposed of a year. Still, make every effort to obtain a sentence of 364 days or less on each count.

Moral turpitude. Under current law, no conviction for burglary – residential or commercial – ought to be held a CIMT. Still, if at all possible plead to burglary with a “safe” record of conviction: entry with intent to commit a non-CIMT (e.g., receipt of stolen property or vehicle taking, if possible with intent to temporarily deprive, or false imprisonment by menace).²⁵

DAPA. Assume that any burglary conviction is a bar to DAPA and DACA.

6. How do the Prop 47 changes to Possession of a Controlled Substance affect immigrants? (Hint: Eligibility for DAPA or DACA)

Prop 47 provides that a conviction for simple possession of certain controlled substances under H&S C §§ 11350(a), 11357(a), and 11377(a) is a misdemeanor punishable by up to one year (which after January 1, 2015 will be up to 364 days), rather than a wobbler or in some cases a felony.

However, for most immigration purposes it does not matter whether a conviction relating to a controlled substance is a felony or misdemeanor. The conviction has the same harsh consequences regardless of actual or potential sentence. Thus Prop 47 has no effect.

There is one important exception, which is that a misdemeanor conviction for drug possession (as opposed to drug trafficking) is not a bar to DAPA or DACA, as long as the person was not ordered to spend 90 days in custody. See Part D. In addition, a person will be less of an enforcement priority if he or she does not have a felony conviction. See Part A.1, above.

D. Prop 47 and the New Deferred Action for Parents (DAPA) Program

On November 20, 2014 President Obama announced a new program that will defer the deportation of, and supply employment authorization to, millions of parents of U.S. citizens and lawful permanent residents. Because applicants for the program are barred if convicted of a single felony, Prop 47 will provide much-needed help to these immigrants.

This memo will provide a very brief overview of the program, to show the potential effect of Prop 47. For further information, including a chart of criminal convictions or conduct that may act as a bar, go to www.ilrc.org (California and national) and www.adminrelief.org (national).

1. What is Deferred Action for Parental Accountability (DAPA)? What Benefits Does It Provide?

On November 20, 2015, the Obama Administration announced that it would not deport certain undocumented persons who are the parents of U.S. citizens (USC) or lawful permanent residents (LPR), if they qualify for an administrative category called Deferred Action for Parental Accountability (DAPA).

DAPA offers benefits similar to the Deferred Action for Childhood Arrivals (DACA) program that has existed since 2012. (In fact, on November 20, 2014 President Obama also extended DACA to reach more people. See www.ilrc.org/daca.) DAPA and DACA provide “deferred action” status, which means that even though the individual remains undocumented and subject to deportation, the government agrees to “defer” any actions to remove them. While deferred action does not provide a pathway to getting lawful permanent resident status (a green card) or citizenship, it will allow recipients to remain in the U.S. and obtain an employment authorization document that will entitle

them to work legally here. Deferred Action status will be granted for three years. After that period it may be renewed or canceled.

2. How Can Defenders Help Defendants Who Might Be Eligible for DAPA?

First, defenders can help noncitizen defendants by doing a quick screening to see if they might be eligible to seek DAPA, and by providing basic information about the program. There is likely to be a lot of misinformation in the community, and you may be the person's only source of correct information. See information at www.ilrc.org/dapa. Second, defenders then can attempt to resolve the criminal charges to preserve eligibility for DAPA.

3. Who is Eligible to Apply for DAPA?

To qualify, the individual must:

- on November 20, 2014, be the parent of a U.S. citizen or permanent resident (of any age, married or unmarried);
- have continuously resided in the United States since January 1, 2010;
- as of November 20, 2014, be physically present in the United States and have no lawful immigration status;
- not be an enforcement priority as reflected in a new enforcement memo dated November 20, 2014 (these are the crimes bars); and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

4. What Criminal Convictions or Conduct Bar DAPA? How Can Prop 47 Help?

The bars to DAPA are taken from the list of new enforcement priorities established by the Obama Administration. See Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014) (hereafter the "Enforcement Memo").²⁶ Prop 47 can help in two ways.

- DAPA is barred by conviction of ***any felony***. Prop 47 eliminates some felonies.
- DAPA is barred by conviction of an ***aggravated felony***, defined at 8 USC 1101(a)(43). Some, but not all, offenses will become an aggravated felony only if a sentence of a year or more is *imposed*. In fact, a misdemeanor conviction for receipt of stolen property, theft, or forgery is an aggravated felony if a sentence (including a suspended sentence) is imposed. (There is an argument against theft being included.) Under Prop 47, some of these offenses will be misdemeanors, and some prior felony sentences will be withdrawn.

That is how Prop 47 helps. The rest of this section will briefly review the other criminal bars to DAPA, but more comprehensive materials, including memoranda, a detailed chart, and other materials that discuss these bars in more detail, will be available at www.ilrc.org/dapa.

Besides conviction of any felony or an aggravated felony, bars to DAPA include:

Gangs: Some convictions or conduct relating to gangs.²⁷

Three Misdemeanor Convictions. The enforcement memo provides that DAPA is barred by conviction of “three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents.” A potential sentence of 364 versus 365 days is not relevant.

Remember that any misdemeanor where *a sentence to custody of 90 days or more* was ordered and executed is a significant misdemeanor, and as such is a bar all by itself. See next section.

Conviction of one “significant misdemeanor.” Please see additional materials that discuss a significant misdemeanor in detail, posted at www.ilrc.org/dapa. A “significant misdemeanor” is a standard that first appeared in the DACA program in 2012 and has been extended to DAPA. The enforcement memo provides that a significant misdemeanor is:

an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

Note that a misdemeanor conviction for simple possession is not a bar to DAPA, as long as the 90-day bar does not apply.

Regarding the 90-days bar, this is a different immigration standard from the usual “sentence imposed.” The person must be ordered to spend more than a 90-day sentence in jail, which does not include a wholly suspended sentence, but probably includes an order to jail as a condition of probation. The person might or might not come within the 90-day bar even if he or she does not spend all the whole 90 days in custody; look for updates on this at www.ilrc.org/dapa.

¹ Many thanks for invaluable information and insight on Prop 47 provided by Garrick Byers, Chris Gauger, Mark Harvis, Graciela Martinez, Casey Reagan, and Francisco Ugarte. Mistakes belong to the author. Copyright ILRC 2014. Defenders have permission to distribute this article.

² Note: Moral Turpitude is at www.ilrc.org/files/documents/n.7-crimes_involving_moral_turpitude.pdf

³ The person is inadmissible unless he or she comes within the “petty offense exception” described above. 8 USC § 1182(a)(2)(A), INA § 212(a)(2)(a).

⁴ Aggravated felony is an immigration law term that is defined at 8 USC § 1101(a)(43) [INA § 101(a)(43)]. For an brief overview, see Note: Aggravated Felonies at www.ilrc.org/files/documents/n.6-aggravated_felonies.pdf

⁵ For information on TPS and other established forms of relief see *Immigration Relief Toolkit*, at http://www.ilrc.org/files/documents/17_relieftoolkit_jan_2014_0.pdf. For information on DACA and DAPA see www.ilrc.org/daca or www.ilrc.org/dapa.

⁶ The new enforcement priorities (which also form the crimes bars to the new DAPA program), are described in a memorandum by DHS Secretary Johnson, entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” (Nov. 20, 2014) (hereafter Johnson Enforcement Memo) at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. See also materials that will be posted at www.ilrc.org/enforcement and www.adminrelief.org.

⁷ *Ceron v. Holder*, 747 F.3d 773, 777-778 (9th Cir. 2014) (*en banc*), partially overruling *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); see also *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

⁸ See, e.g., *In re Estrada* (1965) 63 Cal.2d 740; *People v. Nasalga* (1996) 12 Cal.4th 784, 796.

⁹ INA § 237(a)(2)(A), 8 USC § 1227(a)(2)(A).

¹⁰ See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), discussing INA 240A(b)(1), 8 USC § 1229b(b)(1). Immigration advocates contest the “less than one year” rule. For more information on non-LPR cancellation, see *Immigration Relief Toolkit*, *supra*.

¹¹ See INA § 101(a)(43), 8 USC § 1101(a)(43).

¹² INA § 101(a)(43)(J), 8 USC § 1101(a)(43)(J).

¹³ A California alternate felony/misdemeanor offense, a/k/a “wobbler,” can be punished either as a misdemeanor with a maximum possible sentence of one year (or after January 1, 2015, 364 days) or a felony. In some cases a wobbler designated as a felony can be reduced to a misdemeanor. See PC § 17.

¹⁴ These apply to persons who are required to register as sex offenders under Cal PC § 290, or who have prior convictions for an offense specified in Cal PC §§ 368(d) or (e), or 667(e)(2)(C)(iv) – a somewhat more encompassing category than the “regular” disqualifiers for Prop 47 benefits discussed in the text.

¹⁵ This includes a conviction under PC §§ 470, 475 and 476, and arguably 471, 472, 484f, and 484i(b), if the item forged is check, cashier’s check, traveler’s check or money order, and the amount does not exceed \$950, with the exception that if the forgery also involves identity theft per PC 530.5, the forgery can be charged as a felony. Presumably the amount in each instrument cannot be aggregated to exceed \$950. See P.C. § 473(b).

¹⁶ Checks presumably can be aggregated to exceed \$950.

¹⁷ Conviction of receipt of stolen property or forgery is an aggravated felony if a sentence of a year or more is imposed, under, respectively, 8 USC § 1101(a)(43)(G), (R), INA § 101(a)(43)(G), (R).

¹⁸ Under a separate provision, conviction of an offense that involves fraud or deceit is an aggravated felony if the loss to the victim/s exceeds \$10,000. 8 USC § 1101(a)(43)(M), INA § 101(a)(43)(M).

¹⁹ This is because the minimum conduct to commit the offense involves intent to deprive the owner temporarily. See discussion in Brady, *How to Apply the Categorical Approach Now*, Part III, at www.ilrc.org/crimes.

²⁰ This is based on two Ninth Circuit opinions, each of which might be re-heard *en banc*. See *Almanza-Arenas v. Holder*, --F.3d-- (9th Cir. 2014) (Veh C 10851 is not a crime involving moral turpitude) and discussion of burglary as a crime involving moral turpitude and *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014) in Brady, *How to Use the Categorical Approach Now* (November 2014, www.ilrc.org/crimes).

²¹ See discussion in Brady, *How to Use the Categorical Approach Now* (November 2014, www.ilrc.org/crimes).

²² The Ninth Circuit held that a lawful entry with intent to commit a crime involving moral turpitude (CIMT), without more, is not itself a CIMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011) Under *Hernandez-Cruz*, neither §§ 459 nor 459.5 is a CIMT because the minimum conduct for both offenses includes a lawful entry. See also *Descamps v. U.S.*, 133 S.Ct. 2277 (2013). The risk is that the Ninth Circuit has stated that it will defer to a reasonable, on-point, published Board of Immigration Appeals opinion as to what conduct constitutes a CIMT. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009). If in the future the Board of Immigration Appeals were to hold that a lawful entry with intent to commit larceny (i.e., PC § 459.5) is a CIMT, the Ninth Circuit might defer and withdraw *Hernandez-Cruz*. The risk of a change in the law is not as high in the case of receipt of stolen property or regular commercial burglary (which involves intent to commit “larceny or any felony”). See discussion of these offenses as CIMTs in Brady, *How to Use the Categorical Approach Now*, *supra*, at III.B. But see text regarding burglary as a bar to DACA or DAPA.

²³ Section 459.5(b) provides that “any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

²⁴ See discussion of the consequences of P.C. § 459 at Brady, *How to Use the Categorical Approach Now*, *supra*, at Part III.

²⁵ See Brady, *supra*.

²⁶ See Johnson Enforcement Memorandum, *supra*, and materials that will be posted at www.ilrc.org and www.adminrelief.org

²⁷ That bar applies to “aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang...” See Johnson Enforcement Memorandum, *supra*, at p. 4.