# § N.11 Burglary, Theft and Fraud

*(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 9, §§ 9.10, 9.13 and 9.35, www.ilrc.org/crimes)*

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## I. OVERVIEW

Burglary, theft and fraud convictions have two potential immigration consequences. They could constitute an ***aggravated felony*** conviction, in the categories of burglary, theft, or a crime of violence with a year's sentence imposed, or fraud with a loss to the victim/s exceeding $10,000.[1] In addition they can and frequently do constitute a conviction of a ***crime involving moral turpitude*** ("CIMT").[2] Including in felony cases, an informed criminal defender often can avoid conviction of an aggravated felony, the more serious immigration penalty, and sometimes can avoid a CIMT.

A single offense has the potential to come within multiple adverse immigration categories, e.g. be an aggravated felony as burglary *and* as attempted theft. Check the offense against all immigration categories in this Note.

The main defense strategies to avoid an aggravated felony in this area are:

- To avoid an aggravated felony for burglary or theft offenses, avoid a sentence imposed of one year or more on any single count. It is possible to accept more than one year of actual custody time while avoiding a one-year sentence for immigration purposes.

- To avoid an aggravated felony for an offense that involves fraud or deceit, avoid pleading to a single offense where the victim/s loss exceeded $10,000.

- Even with a sentence of a year or more, or a loss exceeding $10,000, counsel may be able to avoid an aggravated felony conviction through careful control of the elements of the offense in the record of conviction.

[1] See 8 USC § 1101(a)(43)(F) (crime of violence), (G) (theft, burglary), and (M)(fraud or deceit).
[2] A CIMT may cause inadmissibility and/or deportability, depending on factors such as number of offenses, sentence, when offense was committed. See *§ N.7 Crimes Involving Moral Turpitude*, and 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), (ii).

**The Reviewable Record of Conviction.** Sometimes your defense strategy will depend upon putting information into, or at least keeping information out of, the record of conviction that immigration authorities are permitted to consider. This reviewable record consists of the plea agreement, plea colloquy, judgment, the charging document where there is adequate evidence the defendant pled to the charge, some information from a minute order or abstract, and any document that is stipulated to as the factual basis for the plea. It does not include a police or pre-sentence report (unless they are stipulated to as the factual basis for the plea), prosecutor's comments, etc. See Part V for a discussion of the effect of a vague versus specific record of conviction. For more information on using the record of conviction see *§ N.3 Record of Conviction.*

**Don't Let Your Work Go To Waste – Photocopy the Legal Summary Provided and Hand it to the Defendant!** The **Appendix** following this Note contains short legal summaries of defense arguments based on the strategies set out in these notes. *Please copy the paragraph/s from the Appendix that applies to the defendant and hand it to him or her*, with instructions to give it to a defense attorney, or to the immigration judge if there is no defense attorney. The great majority of noncitizens have no counsel in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes. This piece of paper is the next best thing to your client having counsel to assert these technical defenses.

## II. BURGLARY

Part A provides instructions for how to plead to a burglary offense and avoid an aggravated felony conviction, which generally carries the worst immigration consequences. Part B provides instructions for how to avoid a conviction of a crime involving moral turpitude; this can be challenging with burglary.

Defenders interested in a more in-depth discussion of these instructions and the underlying law should see Yi, Brady, "How to Plead a Non-Citizen Defendant to a California Burglary Charge" at www.ilrc.org/crimes (scroll down).

### A. How to Avoid an Aggravated Felony Conviction on a Calif. P.C. §§ 459/460 charge

#### *1. Avoid a sentence of a year or more imposed on any single count* of P.C. §§ 459/460

The most secure way to plead to burglary while avoiding an aggravated felony conviction of any type is to avoid a sentence imposed of one year or more, on any single count.

There is room for creative and effective defense work in negotiating sentence. A defendant can accept actual custody time far greater than one year, while negotiating a "sentence" that is

less than a year for immigration purposes. For example, the defendant can take 364 days on each of several counts, to be served consecutively; waive credit for time served in exchange for a lower official sentence; designate the burglary as a subordinate term and designate an offense that will not become an aggravated felony with a year's sentence as a base 16-month term. Note, however, that for immigration purposes "sentence" includes the full time of a sentence where execution is suspended. If imposition of sentence is suspended it includes any custody time ordered as a condition of probation. Thus, misdemeanor § 459 where imposition of sentence is suspended and 365 days jail are ordered as a condition of probation is an aggravated felony, if the conviction meets the definition of "burglary," a "crime of violence," or "attempted theft." See other strategies and discussion at *§ N.4 Sentence Solutions.*

In an unusual case, a burglary offense could be an aggravated felony even without a one-year sentence imposed. For that the *intended* crime must be an aggravated felony regardless of sentence, e.g. entry with intent to sell cocaine, commit sexual abuse of a minor, or defraud someone of over $10,000. If the record shows a substantial step – which includes any unlicensed entry – toward committing the intended aggravated felony, the offense will be held *attempt* to commit the aggravated felony, which itself is an aggravated felony. To prevent this, check the intended offense in the *California Quick Reference* Chart to see if it is an aggravated felony regardless of sentence. If it is, see defense strategies in the instructions below.

### *2.* How to avoid an aggravated felony even if a sentence of a year or more is imposed

Even if a sentence of a year or more is imposed, a plea to § 460(b) according to the below instructions should avoid an aggravated felony. The instructions may look complex, but about ten minutes of work should let you know if an immigration-neutral plea is possible in your case. *Any conviction of § 460(a), or of § 459 "residential burglary," with a sentence imposed of at least one year is an aggravated felony.*

This section provides a summary of the definitions one must avoid; instructions for how to avoid them; and examples of safer pleas that comport with these instructions.

***Definitions underlying the instructions.*** A burglary conviction with a sentence imposed of at least a year has the potential to be an aggravated felony in any of three ways: as burglary, as a crime of violence, or as attempted theft (or other attempted aggravated felony). To avoid this, the plea must avoid *all* of the following three definitions.

- "Burglary" is an entry that is unprivileged or without consent into a building or structure, with intent to commit a crime. If at all possible, state on the record that the entry was permitted, licensed or privileged. If that is not possible, leave the record vague, or if necessary state "unlawful" (but not "unlicensed," etc.) entry.[3]

[3] *Taylor v. United States*, 494 U.S. 575 (1990) (definition of burglary); *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 944-946 (9th Cir. 2011) (under California law an "unlawful" entry encompasses even an entry with consent or privilege, if there was felonious intent; therefore a California record showing "unlawful" entry does not prove unlicensed or unprivileged entry.)

- A "crime of violence" (in the context of burglary) is any burglary of a residence,[4] or potentially any felony burglary that actually uses violence, e.g. to destroy a window,[5] or involves intent to commit a crime of violence.

- An "attempted aggravated felony" (in the context of burglary) is burglary with intent to commit an offense that is an aggravated felony, e.g. theft, coupled with evidence in the reviewable record that the person took a substantial step toward committing the offense. Making an unlicensed entry always is a substantial step.[6]

***Instructions***. Follow these instructions to avoid an aggravated felony conviction despite a sentence of a year or more. Remember to give the defendant the Legal Summary (Burglary) from **Appendix I** that corresponds to the relevant instruction:

- Do not plead to residential burglary and do not specify that a burglary was of a dwelling or its curtilage (yard). This will be held an aggravated felony as a crime of violence.

- Do not admit facts that establish that the entry or any other aspect of the burglary was accomplished by violent force. This is likely to be held a crime of violence. Provide the defendant with the text of Burglary 4 from **Appendix I.**

- Avoid a plea to an entry that is "unprivileged" or "without consent," including entry into a closed business. If possible, plead to a privileged/consented entry. If necessary, plead to an "unlawful" entry, because the Ninth Circuit held that an unlawful entry under California law is not necessarily unprivileged or without consent, and thus does not necessarily meet the generic definition of burglary. Provide Burglary 1, **Appendix I.**

- *If* the record must establish that the entry was unprivileged or without consent, then: (a) the entry must be into a non-building, e.g., car, commercial yard (provide Burglary 2, **Appendix I**) *and* (b) the intended offense must not be identified as theft or another offense that is an aggravated felony.[7]

- Try not to plead specifically to intent to commit larceny, or some other aggravated felony. If possible specify an intended offense that is not an aggravated felony; otherwise leave the record vague, e.g. intent to commit "larceny or any felony."

  If it is necessary to plead to larceny, then cleanse the record of facts establishing that the defendant took a "substantial step" towards committing the larceny, because the offense will be an aggravated felony as "attempted theft." Provide Burglary 3, **Appendix I.**

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[4] See *James v. U.S.*, 127 S.Ct. 1586, 1600 (U.S. 2007); see also *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (§ 460(a) is a "crime of violence" even where entry is by consent) (petition for rehearing pending).
[5] *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).
[6] *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011) (entering an open commercial building does not constitute a substantial step), distinguishing *Ngaeth v. Mukasey*, 545 F.3d 796, 801 (9th Cir. 2008).
[7] This is because an unprivileged entry into a building or structure meets the generic definition of "burglary," and an unprivileged entry also is the "substantial step" required to make the § 459 conviction equivalent to attempt to commit the intended offense, e.g. to amount to the aggravated felony "attempted theft."

Assume that an unprivileged or nonconsensual entry will be held a substantial step, as will leaving with unpaid-for goods.

- Again, if you can avoid a sentence of a year or more imposed on any single count, a burglary is not an aggravated felony and you can ignore all of the above instructions. See *§ N.4 Sentence Solutions.*

***Examples*** of pleas that are not aggravated felonies under current law, despite a sentence of a year or more:

- A plea to "permissive entry into a [non-residence building or non-building] with intent to commit [theft or some other offense]." The record must not establish that the defendant took a "substantial step" toward committing a theft, which might establish the aggravated felony "attempted theft"; *or*

- An unlicensed entry into a non-building, non-residence with intent to commit [an offense that, unlike theft, is not itself an aggravated felony];

- A privileged entry into a building or non-building with intent to commit "theft," where the record does not establish a substantial step toward committing the theft.

**NOTE: The law on burglary might change for the better.** In spring 2013 the U.S. Supreme Court will decide *Descamps v. United States*, a case involving Cal. P.C. § 459. The Court may hold that only the elements of a criminal statute – and not additional details admitted in the plea -- can be used to characterize a prior conviction. In that case, § 459 never would come within the federal definition of "burglary," because it has no element relating to an unlicensed entry. This also might mean that California burglary cannot constitute an "attempt" to commit the intended crime, since the required "substantial step" also is not an element of § 459.

Until *Descamps* is decided, what should defense counsel do if a sentence of a year or more will be imposed for § 459? The best course is to get a judgment that is not "burglary" under current law, i.e. a record that specifically states the entry was permissive. If that is not possible, counsel might decide to delay the plea hearing, which would delay the defendant's removal hearing, to give the Court time to make its decision. Note that residential burglary, P.C. § 460(a), will remain an aggravated felony as a "crime of violence" if a year's sentence is imposed, regardless of the decision in *Descamps*.

**Note: A Vague (Inconclusive) Record of Conviction Has Very Limited Use.** Some criminal statutes are "divisible" in that they include some crimes that do and others that do not cause an immigration penalty. For example, at least until *Descamps* is decided (see box above), a § 459 conviction by an unlicensed entry can be burglary, while a conviction by a permissive entry cannot.[8]

In creating a record of conviction it is *always* best to plead specifically to the "good" crime like permissive entry, rather than to create a vague record that merely avoids specifying the bad crime, e.g. "entry" with no qualifier. In fall 2012 *Young v Holder*[9] drastically limited the effectiveness of a vague record. Now, regardless of the date of conviction:

- If a permanent resident is not already deportable (e.g., does not have a prior conviction that makes her deportable), a vague record *will* prevent the new conviction from making her deportable. This might also help a refugee.
- In contrast, an undocumented person, a permanent resident who already is deportable, or any other immigrant who needs to apply for relief or status needs a specific plea to a "good" offense. A vague plea will just trigger the immigration consequence.
- A specific "good" plea is always necessary to avoid the conviction being a crime involving moral turpitude. See Part B, below.

For more information, see *§ N.3 Record of Conviction* and *§ N.7 Moral Turpitude.*

## B. How to Avoid a Crime Involving Moral Turpitude (CIMT) with a P.C. § 460 Charge

***Test 1: Burglary is a CIMT if the intended crime is a CIMT.*** Since breaking and entering alone is not a CIMT, burglary is a CIMT only by virtue of the intended offense. Burglary is not a CIMT if the intended offense is not one, and is if the intended offense is.

Under current law, a vague record showing intent to commit an undesignated offense ("a felony" "larceny or any felony") will not avoid a CIMT. For CIMT purposes only, an immigration judge may look beyond the record of conviction to identify the conduct. If possible, counsel should review the *California Quick Reference Chart* to locate a specific offense that is not a CMT and plead to entry with intent to commit that. Finding an intentional felony that definitely is not a CIMT and that fits the fact scenario may be difficult. An example is theft or receipt of stolen property with intent to temporarily deprive, under Calif. Veh. Code § 10851 or Calif. P.C. § 496(a). Another is felony P.C. § 243(e) that involved offensive touching rather than actual violence. See *§ N.7 Crimes Involving Moral Turpitude.*

If that is not possible, *if the defendant is an LPR who is not deportable, it still is important to create a vague record of conviction* such as intent to commit "larceny or any

[8] The U.S. Supreme Court may issue a ruling in spring 2013 that would mean that § 243(e) never is a "crime of violence" or "crime of domestic violence," regardless of the record of conviction or burden of proof. See discussion of *Descamps v. United States*, § 243(e), and possible strategies in *§ N.3 Record of Conviction*, Part C, *supra.*
[9] See discussion of *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) *(en banc)* at § *N.3 Record of Conviction, supra*.

felony." There is a real possibility that the Ninth Circuit will overturn the *Silva-Trevino* evidentiary rules for CIMTs. In that case, a vague record of conviction would be sufficient to protect against deportability. A vague record would not preserve eligibility for relief, however; see Box above.

***Test 2: Residential burglary, entry without consent.*** First, with any residential burglary, *avoid a sentence imposed of a year or more* on any single count in order to avoid a "crime of violence" aggravated felony. Regarding moral turpitude, an entry without consent or privilege into a dwelling with intent to commit a crime is an automatic CIMT, regardless of the intended offense.[10] Under the current rule in *Silva-Trevino*, in order to avoid the CIMT the plea would have to be specifically to entry *with* consent or privilege, in order to commit a specific offense that is *not* a CIMT. If that is not possible, and if the defendant is an LPR who is not yet deportable, create a vague record such as "entry" into a residence to commit "larceny or any felony." If the Ninth Circuit overturns *Silva-Trevino*, that plea will protect the conviction from being used as a basis for deportation under the CIMT ground.

***Plea Instructions.*** Where it is imperative to avoid a CIMT, try to plead to something other than burglary, such as trespass, loitering, or even possession of burglary tools under P.C. § 466. If you do this, eliminate any extraneous admissions that would indicate that these offenses were committed with intent to commit a CIMT. To prevent a burglary plea from being a CIMT:

- Avoid pleading to an unprivileged entry into a dwelling. Try to avoid pleading to an unlawful entry, but if that is not possible, at least avoid specifying entry without consent;

- Try to create a record that specifically identifies the intended offense as one that is not a CIMT. This will prevent the burglary from being a CIMT, even under the current *Silva-Trevino* evidentiary rules;

- If you cannot create a record that specifically identifies a non-CIMT, create a vague record such as burglary with intent to commit "larceny or any felony." Be sure the entire record of conviction is sanitized in this way. This might help an LPR who is not already deportable: if the Ninth Circuit overturns *Silva-Trevino*, the conviction will not be a CIMT for purposes of deportability.

- Where applicable, provide the defendant with a copy of Burglary 5 at **Appendix I.**

**NOTE: Not every CIMT conviction will make an immigrant inadmissible or deportable.** It depends upon potential and imposed sentence, number of CIMTs, and other factors. See discussion of the rules at Part V, *infra*, and at *§ N.7 Crimes Involving Moral Turpitude.*

## III. THEFT AND RECEIPT OF STOLEN PROPERTY

[10] *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

Part A provides instructions for how to plead to a theft offense without creating an aggravated felony conviction, which generally carries the worst immigration consequences. Part B provides instructions for alternative pleas to theft that may avoid a crime involving moral turpitude.

## A. How to Avoid an Aggravated Felony Conviction with a Theft or Receipt of Stolen Property Charge

### 1. Avoid a sentence of a year or more imposed on any single count

The most secure way to plead to theft or receipt of stolen property charge and avoid an aggravated felony conviction is to avoid a sentence of one year or more imposed on any single count.[11] Sentence includes suspended sentences, or if imposition of sentence is suspended it includes any custody time ordered as a condition of probation. Even a misdemeanor grand theft or petty theft with a prior is an aggravated felony if a sentence of at least a year is imposed. [12]

Defense counsel can accomplish great things for immigration purposes in negotiating sentence. One can accept actual custody that far exceeds one year, while obtaining a "sentence" of less than a year for immigration purposes. Examples of strategies include: taking 364 days on multiple counts to be served consecutively; waiving credit for time served in exchange for a lower official sentence; designating the theft as a subordinate term and designating as the base term an offense that will not become an aggravated felony with a year sentence. See additional strategies and discussion at *§ N.4 Sentence Solutions*.

### 2. If a sentence of a year or more is imposed, plead to an offense that does not meet the federal definition of "theft"

Even if a sentence of a year or more is imposed, with careful pleading counsel can avoid an aggravated felony by avoiding an offense that meets the federal generic definition of "theft." That definition is "a taking of *property* or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights and benefits of ownership even if such deprivation is less than total or permanent." [13]

***Note: A Vague Plea and Record Has Limited Use.*** See Box on vague pleas in Part I, *supra*. A vague record of conviction, e.g. to the language of § 484, will help in only two ways. First, if the only way that an LPR or refugee will become deportable is under the aggravated felony deportation ground, a vague record of conviction will prevent this, because ICE will not be able to prove that the conviction was for "theft." But if the person already is deportable, or if the plea will make him or her deportable under the CIMT ground (see Part C, below), then the person must apply for some relief in order to stay in the country. At that point the person must

[11] INA § 101(a)(43)(G), 8 USC § 1101(a)(43)(G).
[12] *U.S. v. Rodriguez*, 553 U.S. 377 (2008), overturning in part *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc).* In *Corona-Sanchez* the Ninth Circuit had held that a conviction for petty theft with a prior under P.C. §§ 484, 666 is not an aggravated felony, regardless of sentence imposed, because it would not consider sentence imposed pursuant to a recidivist enhancement. The Supreme Court disapproved this approach in *Rodriquez.*
[13] *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002)(*en banc*) (partially reversed on other grounds). The Supreme Court approved this definition. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 820 (2007).

prove the conviction is *not* an aggravated felony, and the vague record will not support this. The second way that a vague record can help is that in a prosecution for illegal re-entry after removal, the federal prosecutor will not be able to prove that the offense is a sentence enhancement as an aggravated felony. See further discussion in *§ N.3 Record of Conviction.*

If a vague plea will be beneficial, the entire record, including the factual basis for the plea, must be sanitized of mention of the "bad" offense. Note that Cal. P.C. § 952 permits a vague charge, noting that the charge "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

The following ***specific*** pleas should prevent an aggravated felony for all purposes, despite a sentence imposed of a year or more.

***Fraud, embezzlement, or other offenses committed by deceit, as opposed to without consent.*** Immigration law acknowledges that theft is a taking accomplished without consent, while fraud is a taking accomplished by deceit.[14] Unlike theft offenses, fraud offenses do not become an aggravated felony by virtue of a one-year sentence. Instead, a crime of fraud or deceit is an aggravated felony if the loss to the victim/s exceeds $10,000. See Part III, *infra*. If the sentence will be over a year, but the amount taken is less than $10,000, try to negotiate a plea specifically to an offense involving fraud or deceit – including theft by fraud, embezzlement, or similar offenses within § 484 -- rather than theft. (Note that any fraud offense is a CIMT.)

> **Example:** Jack is convicted of theft of $11,000 and sentenced to 364 days. He does not have an aggravated felony. Jill is convicted of fraud involving $9,000 and sentenced to 16 months. She does not have an aggravated felony. Under what circumstances would Jack or Jill have an aggravated felony?
>
> (Answer: if Jack had a one-year sentence for the theft, or if Jill were convicted of fraud of more than $10,000, the offense would be an aggravated felony.)

***Theft of services, not property.*** The definition of "theft" is limited to theft of property. Since P.C. § 484 also includes theft of labor, it is a divisible statute for aggravated felony purposes.[15] The plea should specifically state theft of labor or services; make sure the record of conviction is consistent. (Note that this is a CIMT.)

***Commercial burglary.*** A carefully constructed plea to commercial burglary under § 460(b) can avoid being an aggravated felony. See Part II.A.2, *supra*.

***Not good: Accessory after the fact.*** The Board of Immigration Appeals has held that accessory after the fact under Cal. P.C. § 32 always is an aggravated felony if a year's sentence is imposed, under the obstruction of justice category.

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[14] *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).
[15] *Corona-Sanchez, supra* at 1205.

***Not good: Receipt of Stolen Property.*** A conviction for receipt of stolen property under P.C. § 496(a) categorically qualifies as a receipt of stolen property aggravated felony conviction, if a sentence of a year or more is imposed.[16] (Like V.C. § 10851, P.C. § 496(a) is divisible as a crime involving moral turpitude, because it includes intent to deprive the owner temporarily.)

***Theft as an Aggravated Felony and Crime Involving Moral Turpitude (CIMT).*** The next section will discuss theft as a CIMT. Note that some theft convictions will be an aggravated felony but not a CIMT, and vice versa.

| **Theft as an Aggravated Felony** | **Theft as a CIMT (Moral Turpitude)** |
|---|---|
| Any intent to deprive is aggravated felony theft | Intent to deprive permanently is a CIMT, while intent to deprive temporarily is not. |
| Theft is an aggravated felony only if a sentence of a year is imposed.<br>Fraud is an aggravated felony only if loss to the victim/s exceeds $10,000 | Theft with intent to deprive permanently and fraud (material misrepresentation to gain a benefit) always are CIMTs |
| The theft must be of property not labor to be an aggravated felony in several circuits, including Ninth Circuit | Theft of either property or labor can be a CIMT. |

## C. How to Try to Avoid a Crime Involving Moral Turpitude ("CIMT") on a Charge of Theft or Receipt of Stolen Property

Theft with intent to permanently deprive the owner is a crime involving moral turpitude ("CIMT"), while taking with a temporary intent such as joyriding is not.[17] Note that while the aggravated felony definition turns on the difference between theft of services and property, this is not relevant to the CIMT determination. Intent to commit fraud always is a CIMT.

**NOTE: Not every CIMT conviction will make an immigrant inadmissible or deportable.** It depends upon potential and imposed sentence, number of CIMTs, and other factors. See discussion of the rules at Part V, *infra*, and at *§ N.7 Crimes Involving Moral Turpitude.*

***California theft under P.C. 484, and any offense involving fraud, is a CIMT.*** Courts are likely to hold that all offenses listed in P.C. § 484 offenses involve either a permanent taking or fraud. The fact that the offense involves theft of services is not relevant to moral turpitude, only to the aggravated felony "theft" definition.

[16] *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009), *Verduga-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. 2009).
[17] See, e.g., discussion of cases in *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009).

***California theft (appropriation of lost property) under P.C. § 485 ought to be held divisible as a CIMT*** because it does not have the element of intent to permanently deprive. See discussion of § 485 in *Sheikh v. Holder*, 379 Fed.Appx. 697, 2010 WL 2003567 (9th Cir. May 20, 2010) (unpublished).

***California receipt of stolen property under P.C. § 496(a) has been held divisible as a CIMT***. The Ninth Circuit found that § 496(a) includes intent to *temporarily* deprive the owner of the property.[18] If counsel pleads specifically to temporary intent, a § 496(a) offense should not be held to involve moral turpitude for any purpose. If a that plea is not possible and if there is evidence of permanent intent, it is worthwhile to create a vague record of conviction as long as the defendant is an LPR, asylee or refugee who otherwise is not deportable. Under the current rule for CIMTs in *Silva-Trevino*, ICE may be able to present evidence from beyond the record of conviction to prove that the intent was permanent and the conviction can be a deportable CIMT. If *Silva-Trevino* is overturned in the future, however, ICE will not be able to use the vague record to prove that an LPR or other person with lawful status is deportable for a CIMT

***California auto taking under P.C. § 10851 is divisible as a CIMT,*** because it includes intent to temporarily deprive the owner. It is best to plead specifically to a taking with intent to temporarily deprive the owner, but if that is not possible a vague record, or "temporary or permanent intent," is worth it for the reasons stated above.

***It is possible, but not guaranteed, that a plea to an infraction under P.C. § 490.1 is not a "conviction"*** for immigration purposes. See *§ N.2 Definition of Conviction,* on infractions.

## IV. FRAUD OR DECEIT

### A. Summary: Defense Strategies to Avoid Immigration Consequences of an Offense Involving Fraud or Deceit

- The first priority is to avoid a conviction for an ***aggravated felony***.

  - If the amount of loss to the victim/s does not exceed $10,000, a fraud or deceit conviction is not an aggravated felony. Nor does a year's sentence make it an aggravated felony.

  - If the amount of loss exceeds $10,000, avoid pleading to an offense that has fraud or deceit as an element. Note that "deceit" is defined more broadly than fraud. Consider a straight theft offense, and take no more than a 364-day sentence on any single theft count.

  - If theft is not possible, plead to a divisible statute – including both theft and fraud/deceit element – in the disjunctive. For example, a plea to P.C. § 484 for feloniously taking *or* fraudulently obtaining another's personal property with a restitution order of over $10,000 is not a deportable aggravated felony if the sentence is under one year.

[18] *Ibid.*

(However, the law is not clear as to whether it will be held an aggravated felony for purposes of being a bar to an application for relief or status). See next instruction.

- If it is necessary to plead to fraud/deceit where the loss exceeded $10,000, create a written plea to one or more counts with an aggregate loss of *less than* $10,000, even if at sentencing the defendant will be ordered to pay restitution of more than $10,000. Do the same thing if creating a vague record of a plea to a divisible statute that includes fraud/deceit. See additional suggestions at Part B, *infra*.

➢ All fraud offenses are ***crimes involving moral turpitude***:

- Fraud is a false material statement knowingly made in order to receive a benefit. Offenses with fraud as an element or that are inherently fraudulent are automatically CIMTs. Some false statement crimes involve deceit but are divisible as CIMTs; consider P.C. § 529(3), false personation.[19]

- If you must plead to fraud/deceit offense, and this is the person's first CIMT conviction, apply the CIMT rules to see if it actually will make the person inadmissible or deportable. See Part V, *infra*, or *§ N.7 Crimes Involving Moral Turpitude*.

## B. How to Avoid an Aggravated Felony Conviction

A crime involving fraud or deceit must have a loss to the victim/s exceeding $10,000 in order to be an aggravated felony.[20] Tax fraud where the loss to the government exceeds $10,000, and money laundering or illegal monetary transactions involving $10,000, also are aggravated felonies.[21]

In *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) the Supreme Court loosened the evidentiary rules that govern how the government may prove that the amount of loss exceeded $10,000. The Court held that the more expansive "circumstance specific" approach, rather than the categorical approach, applies to prove the amount.

Under *Nijhawan*, how can counsel protect a noncitizen defendant who, for example, committed credit card fraud or welfare fraud of over $10,000? Be sure to ***give the defendant a copy of the legal summary that sets out the applicable defense, from*** **Appendix I** (Fraud Section) following this Note:

### *1. Plead specifically to theft or some other offense that does not involve fraud or deceit*

A plea to theft or another offense that does not involve "fraud or deceit" should protect the defendant from conviction of this particular aggravated felony, where restitution of over

[19] In *People v. Rathert* (2000) 24 Cal.4th 200 the California Supreme Court noted that the offense did not require intent to cause liability or incur a benefit.
[20] 8 USC §§ 1101(a)(43) (M)(ii), INA § 101(a)(43) (M)(ii).
[21] 8 USC §§ 1101(a)(43)(D), (M)(i), INA § 101(a)(43)(D), (M)(i). See *Kawashima v. Holder ("Kawashima IV")*, 615 F.3d 1043 (9th Cir. 2010) (considering tax fraud under 26 USC § 7206(1), (2)), withdrawing prior opinions.

$10,000 is ordered. The BIA has acknowledged that theft (taking property *without consent*) and fraud or deceit (taking property *with consent* that has been unlawfully obtained) "ordinarily involve distinct crimes."[22] The Board left open the precise meaning of "consent," and did not discount that certain offenses such as "theft by deception" might fit into both categories.[23]

A theft conviction is an aggravated felony if a sentence of a year or more was imposed,[24] but is not an aggravated felony based on the amount of loss to the victim. Therefore, if you can negotiate it, a theft plea with a sentence of 364 days or less should protect the defendant from an aggravated felony conviction, even if loss to the victim/s exceeded $10,000.

**Example:** Maria was charged with credit card fraud of over $14,000. If she pleads generally to theft under Calif. P.C. § 484 and is sentenced to 364 days or less, she will not be convicted of an aggravated felony, even if she is ordered to pay restitution of $14,000.

Note that she should not plead guilty to theft by fraud, embezzlement, or other offenses listed in P.C. § 484 that could be held to involve fraud or deceit. She should plead to a "straight" theft or to the entire language of § 484 in the disjunctive.

To sum up:

- Where a sentence of less than a year will be imposed, but the loss to the victim/s exceeds $10,000, a plea to a theft offense should prevent conviction of an aggravated felony. While it is best to designate straight theft, a plea to P.C. § 484 in the disjunctive will work. The plea must not be specifically to theft by fraud, embezzlement, or other theft offense that involves deceit or fraud. In addition, the record of convictions should be sanitized of such facts.

- Conversely, where the loss to the victim/s is less than $10,000, but a sentence of more than a year will be imposed, a plea to an offense involving fraud or deceit should prevent conviction of an aggravated felony. If the plea is to P.C. § 484, while it is best to designate an offense involving fraud, a plea to the statute in the disjunctive should work.

    - ✓ Warning: A conviction for an offense involving forgery, perjury, or counterfeiting is an aggravated felony if a sentence of a year or more is imposed.[25] If the fraud or deceit offense also constitutes one of these offenses, a sentence of a year or more will make the conviction an aggravated felony.

If a plea to theft is not possible, counsel may attempt to plead to some other offense that is not fraud or deceit and pay restitution as a sentence requirement of this offense. Remember, however, that while fraud has a specific definition, authorities might define "deceit" broadly.

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[22] *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), substantially adopting the analysis in *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).
[23] *Id.* at 440.
[24] 8 USC §1101(a)(43)(G); INA § 101(a)(43)(G).
[25] 8 USC §1101(a)(43)(R), (S); INA § 101(a)(43)(R), (S).

The ***full categorical approach*** applies to the question of whether the offense involves fraud, deceit, or theft. This gives counsel a great deal of control over defining the substantive offense. For example, if the complaint charges theft by fraud and there is a written plea agreement to straight theft by stealth, the immigration judge is not allowed to consider information from the original complaint. Where possible, amend the charge or add another Count, orally or in writing, with the language that you want; where that is not possible, make a very specific plea that makes it clear whether the theft is by stealth or fraud, and if possible plead to the statute rather than the Count.

### *2. Pleading to Fraud Or Deceit Where Loss To The Victim/s Exceeds $10,000*

If you must plead to an offense involving fraud or deceit, defense strategies focus on creating a record that shows a loss to the victim/s of $10,000 or less.

*Nijhawan* reversed some beneficial Ninth Circuit precedent, but it did not remove all procedural protection for how the $10,000 must be established. In particular, the Court held that the loss must "be tied to the specific counts covered by the conviction," and that the finding "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan*, 129 S.Ct. at 2305-06. The following strategies may protect the client.

- In all cases, create a written plea agreement stating that the aggregate loss to the victim/s *for the count/s of conviction* was less than $10,000. Do this even if the restitution amount at sentencing is more than $10,000. This step is necessary, and it ought to protect the defendant: other payment amounts will be based on dropped charges, which *Nijhawan* stated may not be considered. However, in case ICE challenges this, include as many of the following additional protections as is possible.
- Arrange for the defendant to pay down the amount before the plea (not after plea and before sentencing), so that the restitution amount is less than $10,000. If that is not possible, consider the following ways to further protect the defendant from a restitution requirement of over $10,000.
- Include a *Harvey* waiver in order to establish that the particular restitution order is for conduct that did not result in a conviction and therefore is not directly tied to the conviction. *People v. Harvey* (1979) 25 Cal.3d 754.
- Distance repayment of any restitution above $10,000 from the fraud/deceit conviction by ordering payment pursuant to a separate civil agreement or to a plea to an additional offense that does not involve fraud or deceit.
- Attempt to obtain a court statement or stipulation that restitution ordered on probation is for repayment of loss and other costs, with the calculation based upon a "rational and factual basis for the amount of restitution ordered." [26] (Note that even without this statement, immigration attorneys will argue that restitution under P.C. § 1202.4 permits payment for collateral costs beyond direct loss (e.g., audit, travel, attorneys fees, etc.) and that the standard of proof for calculating the amount is less than the "clear and convincing evidence" required to prove deportability.)

[26] *People v. Gemelli*, 161 Cal. App. 4th 1539, 1542-43 (Cal. Ct. App. 2008).

Counsel always should make a written plea agreement as described above. Before *Nijhawan* was published, the Ninth Circuit held in *United States v. Chang* that where a written guilty plea to a fraud offense states that the loss to the victim is less than $10,000, the federal conviction is not of an aggravated felony under subparagraph (M)(i), even if a restitution order requires the defendant to pay more than $10,000.[27] This is consistent with the statement in *Nijhawan* that the loss must "be tied to the specific counts covered by the conviction" and "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan* at 2306.

### *3. Pleading to Welfare Fraud Exceeding $10,000*

California welfare fraud presents challenges because Cal. Welf. & Inst. Code § 10980(c) provides that in setting restitution to the state agency, the agency's "loss" should be calculated as the amount the government overpaid. If there is any means of pleading to a different fraud offense, or theft, perjury, forgery, etc. without a one-year sentence on any single count, or if there is a way to show that restitution under this statute is not equal to loss, counsel should do so.

If a plea must be taken to welfare fraud, counsel should write a written plea agreement to count/s of fraud where the government lost less than $10,000 in the aggregate, while if necessary accepting restitution of more than $10,000 at sentencing. Immigration counsel have a strong argument that the other funds were based on dropped charges and cannot be counted toward the $10,000 under *Nijhawan*. If that is not possible, the defendant might avoid an aggravated felony by pleading to multiple counts, with no single count reflecting a loss of $10,000. Note that in a pre-*Nijhawan* case, the Ninth Circuit found that welfare fraud was an aggravated felony when the defendant *stated in the guilty plea* that restitution exceeded $10,000.[28]

## V. WHEN DOES A MORAL TURPITUDE CONVICTION HURT AN IMMIGRANT?

Because burglary, theft and fraud so often are crimes involving moral turpitude (CIMTs), this section briefly reviews when a CIMT will not cause adverse consequences. For more information on CIMTs see *§ N.7 Crimes Involving Moral Turpitude*, or see Brady et. al, *Defending Immigrants in the Ninth Circuit*, Chapter 4 (www.ilrc.org ).

### *1. Two or more convictions of a CIMT: Inadmissible and Usually Deportable*

Two convictions of a CIMT always will make a noncitizen ***inadmissible.***

Two convictions of a CIMT will make a noncitizen ***deportable,*** if both convictions occurred after the person was admitted to the U.S. There are two ways to be admitted for this purpose: the person was admitted at the border with any kind of visa or card, or the person adjusted status to lawful permanent residency (LPR) through processing within the U.S. There is an exception: multiple CIMT convictions that arose from a "single scheme of criminal misconduct" do not cause deportability as "two or more convictions" after admission. Assume that to meet the single scheme test they must have arisen from the very same incident.

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[27] *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002).
[28] *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098 (9th Cir. 2004).

### *2. Single Conviction of a CIMT: Sometimes Deportable*

A single conviction of a CMT *committed within five years of admission* will make a noncitizen deportable only if the offense has a *maximum possible sentence of a year or more*. See 8 USC § 1227(a)(2)(A).

*Prevent a potential sentence of a year or more.* You can prevent a single conviction from causing deportability for CIMT by pleading to an offense with a potential sentence of less than a year. To do this, plead to a six-month misdemeanor, or to *attempt* to commit a wobbler which is designated or later reduced to a misdemeanor. Both have a six-month maximum sentence. The reduction to a misdemeanor will be given immigration effect regardless of when it occurs, even after initiation of removal proceedings.[29]

*Plead to an event outside the five years.* Or, plead to an offense that the person committed five years after his or her "date of admission." This date is usually the date that the person was admitted to the U.S. in any status. For example, if Rhonda was admitted to the U.S. as a tourist in 2002, spent some years illegally here after her permitted time expired, adjusted status to permanent residence in 2007, and was convicted of a single CIMT that she committed in 2010, she is not deportable under the CIMT ground. Her date of admission was 2002, and she committed the offense eight years later. In contrast, if instead of being admitted Rhonda had entered the U.S. without inspection and later adjusted status to lawful permanent residency, the date of adjustment starts the five years.[30]

### 3. *Single Conviction of a CIMT: Inadmissible Unless It Fits the Petty Offense or Youthful Offender Exceptions*

A single conviction of a CMT will make a noncitizen inadmissible for moral turpitude, unless he or she comes within an exception. Under the "petty offense" exception, the noncitizen is not inadmissible if (a) she has committed only one CMT in her life and (b) the offense has a maximum sentence of a year and (c) a sentence of six months or less was imposed. 8 USC § 1182(a)(2)(A). To create eligibility for the exception, reduce felony grand theft to a misdemeanor under PC § 17. Immigration authorities will consider the conviction to have a potential sentence of one year for purposes of the petty offense exception.[31]

Under the "youthful offender" exception, a noncitizen is not inadmissible if convicted (as an adult) of just one CIMT, committed while under the age of 18, and the conviction and resulting imprisonment ended five years or more before the current application.

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[29] *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).
[30] *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011). See Practice Advisory at www.ilrc.org/crimes.
[31] See *LaFarga, Garcia-Lopez, supra.*

## Appendix 13-I:

## FOR THE DEFENDANT, WITH INSTRUCTIONS TO PRESENT THIS TO AN IMMIGRATION DEFENSE ATTORNEY, OR IF THERE IS NO ATTORNEY, TO THE IMMIGRATION JUDGE

*The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes. Please copy the paragraph below that applies to the defendant and hand it to him or her, with instructions to give it to a defense attorney, or to the immigration judge if there is no defense attorney.*

### BURGLARY

* * * * * * * * *

Burglary 1

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction of burglary under Calif. P.C. § 459/460 is ***not the aggravated felony "burglary" if the record does not establish that the entry was unprivileged or without consent***. If the record does not describe the type of entry, or states merely that the entry was "unlawful," the conviction is not an aggravated felony as a burglary. *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 946 (9th Cir. 2011) (*en banc*) (under Calif. P.C. § 459/460 an "unlawful" burglary does not meet the generic definition of burglary, because it includes a privileged entry or one with consent; reverses prior cases to the extent they are inconsistent).

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Burglary 2

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction of burglary under Calif. P.C. § 459/460 is ***not the aggravated felony "burglary" if the record does not establish that the burglary was of a building or structure***. *Taylor v. United States*, 495 U.S. 575, 598 (1990). Section 459/460 is divisible because the burglary can be of many other targets, e.g. car, commercial yard, etc. See, e.g., *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (car); *United States v. Wenner*, 351 F.3d 969, 972 (9th Cir. 2003) (commercial yard, train car is not burglary).

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Burglary 3

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction of burglary with intent to commit larceny (or any other offense) is ***not an aggravated felony as "attempted theft" (or any other category) unless the record of conviction establishes that the defendant took a "substantial step"*** toward committing the offense. *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011), distinguishing *Ngaeth v. Mukasey*, 545 F.3d 796, 801 (9th Cir. 2008).

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Burglary 4

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***A burglary conviction is not an aggravated felony as a crime of violence unless*** it is (a) burglary of a residence where the homeowner might surprise the burglary, or (b) the record of conviction shows that actual violence occurred. Simply moving objects, such as using a slim jim or other tool to open a locked door or window, is not a crime of violence. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

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Burglary 5

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Burglary has been held to be a crime involving moral turpitude only if*** (a) there is proof of intent to commit an offense that is itself a crime involving moral turpitude, or (b) it involves an unlawful entry into a dwelling. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). Under California law, an "unlawful" entry into a dwelling can refer to an entry with consent of the owner, with intent to commit a crime. To be an "unlawful" entry, a record of conviction for Calif. P.C. § 459/460 must show that the entry was unprivileged or without consent. See *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 946 (9th Cir. 2011) (*en banc*).

## THEFT

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***To be an aggravated felony, theft must involve a taking of property.*** *Matter of V-Z-S-*, 22 I&N Dec. 1362, 1346 (BIA 2000); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (partially overruled on other grounds); *Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 820 (2007). Because theft as defined under Calif. P.C. § 484 reaches taking of property *or labor*, it is divisible for purposes of the aggravated felony "theft." *Corona-Sanchez, supra*. Section 484 also is divisible as a "theft" aggravated felony because it reaches taking by *deceit* (e.g., embezzlement, theft by fraud) as opposed to taking by stealth (theft). *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

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I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***A theft offense is an aggravated felony only if a sentence of a year is imposed, while a fraud offense is an aggravated felony only if the loss exceeds $10,000. Theft with a $ 10,000 loss, or fraud with a one-year sentence imposed, is not an aggravated felony.*** "The offenses described in sections 101(a)(43)(G) and (M)(i) of the Act ordinarily involve distinct crimes. Whereas the taking of property without consent is required for a section 101(a)(43)(G) "theft offense," a section 101(a)(43)(M)(i) "offense that involves fraud or deceit" ordinarily involves the taking or acquisition of property with consent that has been fraudulently obtained." *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005), finding that a fraud offense is not "theft" and is not an aggravated felony based upon a one-year sentence imposed.

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I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

To be a crime involving moral turpitude, a taking must be made with intent to permanently, not temporarily, deprive the owner. ***Section 10851(a) of Calif. Vehicle Code is a divisible statute for moral turpitude purposes,*** because it includes auto taking with an intent to temporarily deprive the owner. See, e.g., *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (§ 10851 predecessor); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009).

***Section 10851 also is a divisible statute as a "theft" aggravated felony***, because it includes the offense of accessory after the fact, which is not theft and not an aggravated felony even with a sentence imposed of a year or more. *U.S. v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*).

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I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Receipt of stolen property, P.C. § 496(a) is not categorically a crime involving moral turpitude*** because it includes intent to *temporarily* deprive the owner of the property. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009).

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I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

An offense that reaches a taking with intent to deprive the owner temporarily as well as permanently, such as Calif. P.C. § 496(a) or Veh. C. § 10851, is divisible for moral turpitude purposes. ***Where the defendant pleads specifically to intent to temporarily deprive the owner, the offense is defined as not being a crime involving moral turpitude under the modified categorical approach***, and the immigration judge may not proceed to a fact-based inquiry beyond the record. See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008); *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (evidence outside of the record of conviction may not be considered where the conviction record itself conclusively demonstrates whether the noncitizen was convicted of engaging in conduct that constitutes a crime involving moral turpitude.).

## FRAUD

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction for a fraud or deceit offense in which the loss to the victim or victims was over $10,000 is an aggravated felony. ***A theft offense under P.C. § 484 is not an offense involving fraud or deceit.*** Therefore a theft offense where the loss to the victim/s exceeded $10,000 is not an aggravated felony. A theft offense is an aggravated felony only if a sentence of a year was imposed. *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

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I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

An offense that involves fraud or deceit is an aggravated felony only if evidence conclusively shows that the loss to the victim/s exceeded $10,000. The Supreme Court stated that the loss exceeding $10,000 must "be tied to the specific counts covered by the conviction." ***The finding of the amount of loss by fraud or deceit "cannot be based on acquitted or dismissed counts or general conduct."*** *Nijhawan v. Holder*, 129 S.Ct. 2295, 2305-06 (2009). Therefore a plea to one or more counts of a fraud or deceit crime where the loss is specified as less than $10,000 is not an aggravated felony. This remains true even if additional restitution is ordered based on dismissed counts or other factors.

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I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

An offense that involves fraud or deceit is an aggravated felony only if evidence conclusively shows that the loss to the victim/s exceeded $10,000. The Supreme Court stated that the loss exceeding $10,000 must "be tied to the specific counts covered by the conviction." ***The finding of the amount of loss by fraud or deceit "cannot be based on acquitted or dismissed counts or general conduct."*** *Nijhawan v. Holder*, 129 S.Ct. 2295, 2305-06 (2009).

A ***"Harvey waiver"*** in a conviction explicitly establishes that a particular restitution order is for conduct that did not result in a conviction. *People v. Harvey* (1979) 25 Cal.3d 754. Therefore a plea to one or more counts of a fraud or deceit crime where the loss is specified as less than $10,000 is not an aggravated felony. This remains true even if additional restitution is ordered based on dismissed counts or other factors.