ALIENS IN THE UNITED STATES IMMIGRATION COURT

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Preface

The objective of this outline is to provide current, administrative, and judicial determinations that pertain to Federal immigration law. This body of law is governed by the Immigration and Nationality Act of 1952, as amended. In this outline it is cited as "the Act," rather than to Title 8 of the United States Code, because Title 8 has *not* been codified into positive law by Congress. Hence, the primary source of Federal immigration law is the Act.

This outline is *not* a primer on basic, Federal immigration law. Rather, it is a short-hand reference source for those who practice within the United States Court of Appeals for the Ninth Circuit on a regular basis. Hence, this outline is a "work in progress" intended to be a general summary of applicable BIA, Ninth Circuit and United States Supreme Court case law on immigration.

Caveat: There are countless grammatical, *Blue Book* and other editorial discrepancies in this outline. Remember: The objective of this outline is to serve as a case law source book on recent immigration decisions. Thus, the uninitiated practitioner may *not* find this outline particularly useful.

Acronyms Used in this Outline

ACA	Assimilative Crimes Act
ACCA	Armed Career Criminal Act
Act	Immigration and Nationality Act of 1952, as amended
ARS	Arizona Revised Statutes
Attorney General	Attorney General of the United States
BIA	Board of Immigration Appeals
BOP	Burden of Proof
CA	California
CBP	United States Customs and Border Protection, DHS
CFR	Code of Federal Regulations
CHSC/CH&SC	California Health and Safety Code
CIMT	Crime Involving Moral Turpitude
CPC	California Penal Code
CSA	Controlled Substances Act
Court	Immigration Court, unless otherwise noted
CVC	California Vehicle Code
DHS	United States Department of Homeland Security
DOJ	United States Department of Justice
DUI	Driving Under the Influence
EOIR	Executive Office for Immigration Review, DOJ
FFOA	Federal First Offender Act
Fifth Amendment	Fifth Amendment to the United States Constitution
FJDA	Federal Juvenile Delinquency Act
FRCP	Federal Rules of Criminal Procedure
GMC	Good Moral Character
Government	United States Government, unless otherwise noted
HRS	Hawaii Revised Statutes
ICA	Iowa Code Annotated
ICE	United States Immigration and Customs Enforcement, DHS
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of September 30, 1996, Public Law 104-208.
IJ	Immigration Judge
I-551	Lawful Permanent Resident Card
LPR	Lawful Permanent Resident
Ninth Circuit	The United States Court of Appeals for the Ninth Circuit

NRS	Nevada Revised Statutes
NTA	Notice to Appear
Nunc Pro Tunc	Acts allowed to be done after the time when they should have been, i.e., retroactive effect.
NYPC	New York Penal Code
ORC	Ohio Revised Code
ORS	Oregon Revised Statutes
OSC	Order to Show Cause
PSR	Pre-Sentence Report
REAL ID Act	Title I of Public Law No. 109-13 (May 13, 2005), aka "Preventing terrorists from obtaining relief from removal."
Supreme Court	United States Supreme Court, unless otherwise noted
TCCP	Texas Code of Criminal Procedure
TPC	Texas Penal Code
TPCR	Transition Period Custody Rules
USC	United States Code
USSG	United States Sentencing Guidelines
Writ of Audita Querela	A common law writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense *or* discharge arising since its rendition *and* which could not be taken advantage of otherwise.
Writ of Coram Nobis	A writ which serves as a procedural tool to correct errors of fact as to a prior judgment by a court.
WRC	Washington Revised Code
WSC	Wyoming State Code

I. Jurisdiction of the Court (Section 240 Removal Proceedings) 12
A. Charging Document. 12
1. Service of the Charging Document. 13
2. Grounds of Removal. 14
3. Expedited Removal. 15
B. Custody and Bond. 15
1. Mandatory Detention. 16
2. LPR Detention. 17
3. Habeas Petitions. 17
4. Detained Inadmissible Aliens. 20
5. National Security. 20
6. Order of Supervision - Violation Thereof. 21
C. Legal Framework for Section 240 Removal Proceedings. 21
1. Statute. 21
2. Implementing Regulations. 21
3. Local Operating Procedures. 22
4. Appeals. 22
5. Removal. 23
6. Reinstatement of Prior Order of Removal. 23
D. General Principles. 25
1. Accrual of Physical Presence. 25
2. Administrative Closure. 25
3. Administratively Final. 26
4. Administrative Notice. 26
5. Admission. 27
6. Assimilative Crimes Act. 29
7. Categorical versus Modified Categorical Approach. 29
8. Collateral Attack. 31
9. Consolidation. 31
10. Constitutionality. 31
11. Continuances. 32
12. Domicile 33
13. Double Jeopardy Clause/Collateral Estoppel. 33
14. Due Process Rights. 34
15. Fugitive Disentitlement Doctrine. 35
16. In Absentia. 36
17. Jurisdiction Over Motions. 37
18. Law of the Case Doctrine. 37
19. Misdemeanor. 37
20. Motion to Reopen versus Motion to Reconsider. 38
21. Nunc Pro Tunc. 39
22. Precedent Decisions. 39
23. Record of Conviction. 40

24. Remand of Proceedings. 42
25. Res Judicata. 43
26. Retroactivity of Statutes. 43
27. Statute of Repose versus Statute of Limitations. 44
28. Streamlining Procedures of the BIA. 44
29. Termination of Proceedings. 44
30. Testimony of Alien. 45
31. Venue of Proceedings. 45
32. Ultra Vires. 45
33. Year. 46
II. Jurisdiction of the Court Over Criminal Aliens 46
A. Aggravated Felonies 46
1. Section 238 Proceedings 46
2. Definition and Case Law by Section 101(a)(43) 46
B. LPRs v. Non-LPRs 48
1. Expedited Removal Proceedings under § 238 of the Act 48
2. Unlawful Presence Bars under § 212(a)(9) of the Act. 48
3. Mandatory Detention 50
4. Section 212(h) Waiver for LPRs 51
5. Section 212(h) Waiver for Non-LPRs 52
6. False Claim to US citizenship 52
7. Voting 54
8. Other Fraud 54
C. Illicit Trafficking in Controlled Substance Conviction 55
1. Stage Drug Offense 56
2. State Law Misdemeanor Offense 57
3. Punishable by More Than One Year Imprisonment 57
4. Criminal Sentencing Enhancement 58
5. First Offense 59
6. State Drug Conviction 60
7. Matching a State Drug Conviction to a Generic Offense 62
8. Indeterminate Sentence 62
D. Post Conviction Relief 63
1. Definition of Conviction 63
2. Foreign Conviction 64
3. Youthful Offenders 65
4. Vacated Conviction 66
5. Deferred Adjudication 67
6. Writs 67
7. Amended Sentence 68
8. Section 212(c) Caveat 69
9. Collateral Attack 69
10. Pickering and Immigration Hardships 70
11. State Court Expungement 71

III. Other Considerations Involving Criminal Aliens before the Court 72
A. Definitions 72
1. Accessory After the Fact 72
2. Admission 74
3. Aiding and Abetting 74
4. Armed Career Criminal Act (ACCA) 77
5. At Least One Year 79
6. Concurrent Sentences 79
7. Confinement 80
8. Conviction 80
9. Crime 81
10. Date of Admission 82
11. Drug Trafficking Crime 82
12. Good Moral Character 82
13. Illicit Trafficking in a Controlled Substance 85
14. Indeterminate Sentence 85
15. "Knowingly" in Criminal Statutes 86
16. Physical presence for purposes of possession of a firearm 87
17. Sentence 87
18. Prostitution 90
19. Term of Imprisonment 90
20. Undesignated Probationary Sentence 90
B. Crime of Violence 91
1. Section 101(a)(43)(F) 91
2. Other Considerations: mens rea element 92
3. State DUI Convictions in Light of *Leocal* 92
C. CIMTs 95
1. CIMT Defined 95
2. Charge of Removability 99
3. GMC/CIMT 100
D. Procedural Requirements in Representing Criminal Aliens in Removal Proceedings 100
1. Open to the Public 100
2. Right to Obtain Counsel 101
3. Document Translations 103
4. Interpreters 103
5. Authentication of Foreign, Public Documents 103
6. Civil Proceedings 105
7. Notice 106
8. Ineffective Assistance of Counsel 106
9. Professional Conduct 110
10. Pre-sentence Reports 112
11. Conviction Documents 112
12. Typographical Error 114

13. Other Evidence of Conviction 115
14. Access to Records 115
15. Sealed Conviction 116
16. Record of Deportable/Inadmissible Alien 116
17. DHS Officer Interview 117
18. Hearsay Evidence 117
19. Federal Rules of Evidence 118
20. Burden of Establishing a Basis for Exclusion of Evidence 118
21. Burden of Proof in Removal Proceedings 119
22. Right of Counsel to Withdraw 119
23. Non-profit and Accredited Representatives 120
E. Motions to Suppress Evidence 120
1. Reasonable Suspicion of Alienage 120
2. Reasonable Suspicion to Justify Vehicle Search 120
3. Reasonable Suspicion Not Required 122
4. Investigator's Prior Knowledge of Alien's Illegal Presence 123
5. United States International Border Search 123
6. Border Searches of Property 124
7. Voluntary Stop by Driver 125
8. Warrantless Searches 126
9. Egregious or Affirmative Misconduct 127
10. Equitable Estoppel 130
11. Sentence Enhancement 131
12. Sentence Enhancement Caveat 133
13. Reliability of Polygraph Evidence 134
14. Exclusionary Rule 134
15. Miranda Warnings and the Fifth Amendment 136
F. Criminal Waivers 137
1. Former 212(c) 137
2. 212(c) for Aggravated Felons 139
3. 240A(a) Waiver 139
4. Test for Comparability under § 212(c) 142
5. Firearms Conviction 143
6. Advising Aliens of the Immigration Consequences of Criminal Convictions 145
G. Particularly Serious Crime 145
1. Generally 145
2. Drug Offenses 149
3. Sexual Offenses 151
4. Theft Offenses 152
5. Miscellaneous Offenses 153
Attachment 1: General Overview of the Jurisdiction of the Courts/IJs 155
I. The Immigration and Nationality Act of 1952, as amended.[1] 155
A. Section 101(b)(4) 155
B. Section 240(a)(1) 155

II. The Administrative Procedures Act 155
III. Specific delegations of authority from the Attorney General to EOIR, the Office of the Chief Immigration Judge (OCIJ), the Immigration Court (Court) and IJs. 156
Attachment 2: Bond / Custody Issues 165
I. Jurisdiction of Immigration Court 165
II. Timeline for Court's Jurisdiction 165
III. Factors Considered in a Bond Determination 168
Attachment 3: Aggravated Felony Defined 170
I. Section 101(a)(43)(A). 170
II. Section 101(a)(43)(C) 174
III. Section 101(a)(43)(D) 174
IV. Section 101(a)(43)(E) 175
V. Section101(a)(43)(F) 175
VI. Section 101(a)(43)(G) 176
VII. Section 101(a)(43)(I) 181
VIII. Section 101(a)(43)(K)(ii) 182
IX. Section 101(a)(43)(M) 182
X. Section 101(a)(43)(N) 186
XI. Section 101(a)(43)(R) 188
XII. Section 101(a)(43)(S) 188
XIII. Section 101(a)(43)(S) and (T) 189
XIV. Section 101(a)(43)(U) 190
XV. Section 101(a)(43)(G) and (U) 190
Attachment 4: Controlled Substance Convictions 191
I. Sharing of Drugs 191
II. Under the Influence of a Controlled Substance 191
III. Under the Influence of THC 191
IV. Possession of Drug Paraphernalia 192
V. Reason to Believe 192
VI. Attempted Escape 192
VII. Conspiracy to Commit Money Laundering 192
VIII. Distribution Outside the United States 193
IX. Distribution Resulting in Death 193
X. Use of Firearm During Commission of Drug Trafficking Offense 194
XI. Mandatory Minimum Sentence of 10 years for Trafficking 194
XII. Felony Cultivation of Marijuana 195
XIII. Telephonic Facilitation Crime 195
XIV. Selling Marijuana 195
XV. Criminal Solicitation. 195
XVI. Controlled Substance versus Solicitation 196
XVII. Unidentified Controlled Substance 196
Attachment 5: Crimes of Violence 197
I. Evading a Police Officer. 197
II. Second-degree Manslaughter. 198

III. Threatened Use of Force 198
IV. General Battery. 198
V. Stalking 198
VI. Other Decisions Finding Crimes of Violence by Category and Date 199
A. Arson 199
B. Criminal contempt 199
C. Involuntary Manslaughter 199
D. Second Degree Robbery 199
E. Rape 200
F. Inflicting Corporal Injury 200
G. Battery Causing Bodily Harm 201
H. First degree manslaughter 201
I. Stalking/harassing conduct. 201
J. Mayhem 201
K. Resisting Arrest 201
L. Discharging Firearm 202
M. Unauthorized use of motor vehicle 202
N. Misdemeanor domestic violence assault 203
O. Sexual battery 203
P. Sexual intercourse with a minor 203
Q. Evading police officer and unlawful driving/taking of vehicle. 204
R. Lewd and lascivious acts with a child 205
S. Shooting at occupied motor vehicle 206
T. Statutory rape 206
U. Simple assault 206
V. Aiding and Abetting 207
W. Misdemeanor domestic violence of a child 207
X. Solicitation 207
Y. Attempted Kidnapping 207
VII. Sentencing Guidelines and Crimes of Violence by Crime and Date. 208
A. Unlawful possession of a destructive device 208
B. First degree burglary 208
C. Sexual intercourse with a person under age 16 209
D. Harassing telephone call. 210
E. Possession of an assault weapon 210
F. Statutory rape 210
G. Taking indecent liberties with a child under age 16 211
H. Discharging firearm at residential structure 211
I. False imprisonment 211
J. Sexual abuse in the second degree 212
K. Escape from jail or prison 212
L. Use or possession of a firearm 212
M. Assault with Deadly Weapon 213
N. Illegal reentry after crime of violence 213

O. Illegal reentry after assault with intent to commit rape 213
P. Retaliating against a Federal witness 213
Q. Vehicular manslaughter while intoxicated without gross negligence 214
R. Lewd and lascivious acts on a child under fourteen 214
S. Assault with a firearm. 214
Attachment 6: Crimes Involving Moral Turpitude (CIMTs) 216
A. Stalking 216
B. Section 240A Relief 216
C. Petty Offense Exception and § 240A(b)(1)(B) Relief 216
D. Petty Offense Exception and Grand Theft 217
E. Larceny 217
F. False Representation of Identity to a Police Officer 217
G. False Statement under 18 U.S.C. § 1001. 218
H. Failure to File Taxes 218
I. Shooting a Firearm at an Occupied Motor Vehicle 219
J. Original Date of Admission 219
K. Attempted Entry by False Statement 219
L. Burglary 220
M. Possession of Child Pornography 220
N. Accessory After the Fact 220
O. Domestic Battery 221
P. Misprison of a Felony 222
Q. Retail Theft and Unsworn Falsification to Authorities 222
R. Communicating with a Minor for Immoral Purposes 223
S. Money Laundering 223
T. Trafficking in Counterfeit Goods or Services 223
U. Willful Failure to Register as a Sex Offender 223
V. Aggravated DUI 224
W. Solicitation to Possess Marijuana for Sale 224
X. Leaving Scene of Accident Resulting in Bodily Harm or Death 225
Y. Conviction for False Identification to Border Patrol Agents 225
Z. Conviction for Possession and Use of Counterfeit Registered Mark 225
AA. Annoying or Molesting a Child under 18 226
BB. Making False Statement in Immigration Document 226
CC. Aggravated assault 227
DD. Receipt of Stolen Property 227
EE. Fraud in Connection with Identification Documents 227

I. Jurisdiction of the Court (Section 240 Removal Proceedings)

A. Charging Document.

Jurisdiction begins with the issuance of the charging document by one of the three entities[2] that were merged into the United States Department of Homeland Security (DHS) on March 1, 2003, and service of the charging document on the Immigration Court (Court). *Chaidez v. Gonzales*, 486 F.3d 1079, 1087 (9th Cir. 2007) (where an Order to Show Cause (OSC) is sent by certified mail, the Government must demonstrate by clear, unequivocal, and convincing evidence that a "responsible person" at the alien's address signed the return receipt for the alien's OSC, consistent with former § 242B(c)(1) of the Act); *see also Martinez-Garcia v. Ashcroft*, 366 F.3d 732 (9th Cir. 2004) (removal proceedings commence when the Notice to Appear (NTA) is served on the Court, not the alien); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002) (deportation proceedings–same rationale); *Kohli v. Gonzales*, 473 F.3d 1061 (9th Cir. 2007) (citing 8 C.F.R. §§ 1003.14 and 1239.1(a)) (holding that although the name and title of the DHS officer who issued the NTA was not legible, the alien did not demonstrate that this defect had any impact on her rights); *see also Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). However, service of an OSC on a juvenile (an alien under the age of 18) is inadequate notice; rather, service must be made on the adult who

[2] United States Citizenship and Immigration Services (CIS), United States Customs and Border Protection (CBP), and the United States Immigration and Customs Enforcement (ICE), hereinafter referred to collectively as "DHS." This was previously known as the Immigration and Naturalization Service or INS.

has custody of the minor. *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004). Finally, jurisdiction vests in the Court when the NTA (or other charging document) is filed with the Court coupled with a certificate showing service on the Court. *See Kohli v. Gonzales*, 473 F.3d 1061 (9th Cir. 2007); 8 C.F.R. § 1239.1(a).

1. **Service of the Charging Document.**

Generally, DHS issues an NTA against the alien (Applicant/Respondent). *See* INA § 239; 8 C.F.R. §§ 1003.14-1003.15, Part 103, and § 1239.1; *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002)(the charging document is deemed received if sent by certified mail to alien's correct address, but returned to the U.S. Postal Service marked "unclaimed."). However, while § 239(a)(1) of the Act provides for personal service or service by regular mail upon the alien, when DHS elects to use certified mail it must satisfy a three-part test to prove notice was properly sent: (1) properly addressed, (2) sufficient postage, and (3) properly deposited in the mails. DHS fails to meet its burden when the zip code used is erroneous. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008 (9th Cir. 2003); *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (per curiam) ("notice by certified mail sent to an alien's last known address can be sufficient under the Act, even if no one signed for it . . ."); *see also Singh v. Gonzales*, 469 F.3d 863 (9th Cir. 2006) (Service of BIA decision by regular mail satisfies statute and regulations as to certificate of service.).

Citing its earlier decision in *Salta v. INS*, 314 F.3d 1076, 1078-79 (9th Cir. 2002), on August 24, 2007, the Ninth Circuit held in *Sembiring v. Gonzales*, 499 F.3d 981 (9th Cir. 2007) that the "strong presumption" of

effective service of notice to an alien that applies when service is made by certified mail is inapplicable to service by regular mail; rather, less evidence is required to overcome the presumption of effective service such as circumstantial evidence of non-delivery, particularly where the evidence presented is credible, corroborated and wholly unrefuted by the Government.

On October 31, 2008, the BIA issued two published decisions, which reiterate applicable BIA and Ninth Circuit case law that service of an NTA by regular mail creates a weaker presumption than the presumption which applies to delivery by certified mail. Hence, the IJ must consider all relevant evidence submitted by the alien to overcome the weaker presumption of delivery by regular mail. In both decisions the BIA determined that the aliens had overcome the weaker presumption. *See Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008); *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008).

The Government is permitted to provide an NTA to an alien using the following two-step process: 1) sending an NTA which states that the date and time of the hearing will be provided at a later time; and 2) later sending such a notice of hearing. *See Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009).

2. **Grounds of Removal.**

Generally, in the case of an alien accused of having been convicted of one or more criminal convictions, the NTA will charge the alien with one or more grounds of inadmissibility under § 212(a)(2) of the Act or removability under § 237(a)(2) of the Act. Alternatively, DHS can charge an alien with § 237(a)(2) grounds that incorporate §212(a)(2) grounds by reference.

3. **Expedited Removal.**

If DHS issues a Notice of Intent to Issue a Final Administrative Deportation Order under § 238 of the Act, the Court lacks jurisdiction over the alien. *See* 8 C.F.R. § 1238.1; *Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001) (no Federal appellate jurisdiction to review DHS decision); **Attachment 1.**

B. **Custody and Bond.**

Custody and bond redeterminations for criminal aliens are governed by § 236 of the Act and implementing regulations at 8 C.F.R. § 1003.19 and § 1236.1, primarily. *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (*Joseph II*); *Matter of Noble*, 21 I&N Dec. 672 (BIA 1997) (addresses Transition Period Custody Rules (TPCR) custody issues); *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994) (not a threat to the community and likely to appear for any scheduled hearing); *Doan v. INS*, 311 F.3d 1160 (9th Cir. 2002) (It is lawful for DHS to impose a bond as a condition of supervised release); *see also Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (danger to the community). **Attachment 2.**

Furthermore, custody under 8 C.F.R. § 1236.1(d)(1) requires actual physical restraint or confinement within a given space. Hence, conditions placed by DHS on the alien's release from custody, including home confinement and an electronic monitoring device, constitute terms of release, as opposed to custody, within the meaning of § 236(a) of the Act and 8 C.F.R. § 1236.1(d)(1). Finally, the IJ lacked jurisdiction to redetermine the alien's custody status because the alien did not request a bond redetermination hearing within seven days after his release. *See Matter of Aquilar-Aguno*, 24 I&N Dec. 747 (BIA 2009).

1. **Mandatory Detention.**

A criminal alien released from non-DHS custody after October 8, 1998, is subject to the mandatory detention provisions of § 236(c) of the Act. *See Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); *but see Matter of West*, 22 I&N Dec. 1405 (BIA 2000) (section 236(c) does not apply to an alien convicted after October 8, 1998, but who was last released from physical custody of State authorities prior to October 8, 1998.); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) (section 236(c) does not apply to an alien whose most recent release from custody by an authority other than DHS occurred prior to October 8, 1998). More recently, on March 21, 2007, the BIA held than an alien apprehended at home while on probation for prior criminal convictions is subject to mandatory detention under § 236(c)(1) of the Act provided it can be determined that the alien was released from criminal custody after October 8, 1998; moreover, DHS need not charge the alien in the NTA with the ground of inadmissibility/removal that serves as the basis for mandatory detention under § 236(c)(1) of the Act, provided the alien is given notice by DHS of the circumstances or conviction(s) that provide the basis for mandatory detention and the opportunity to challenge the detention before an IJ during a bond redetermination hearing. *See Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

Citing *Matter of Kotliar, supra*, the BIA concluded that the language of § 236(c)(1) of the Act does not limit the non-DHS custodial setting solely to criminal custody tied to the basis for detention under § 236(c)(1). Thus, an alien's post-TPCR release from a non-DHS custodial setting after being arrested for failure to register as a sex offender on May 3, 2005, but where

the charge was later dismissed, does not preclude mandatory custody under § 236(c)(1) of the Act because of the alien's November 15, 1990 conviction for indecent assault and battery with a five year sentence. *See Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008).

2. **LPR Detention.**

During removal proceedings, DHS may detain a lawful permanent resident (LPR) pursuant to § 236(c)(1) of the Act if the alien is otherwise subject to mandatory custody and due process does not require that a bond/custody redetermination be conducted "with reasonable promptness" to determine whether the LPR is a flight risk or a danger to the community. *See Demore v. Kim*, 538 U.S.510 (2003).

3. **Habeas Petitions.**

Aliens subject to final orders of removal based upon their criminal records, but no country will accept, may file habeas petitions with the U.S. District Court or petition DHS for an Order of Supervision. *See Zadvydas v. Davis*, 533 U.S.678 (2001); 8 C.F.R. §§ 241.4, 241.5, 241.13, 241.14, and 241.15.[3] However, an alien ordered removed whose removal is not reasonably foreseeable cannot assert a colorable claim for release under the due process clause of the Fifth Amendment until at least 90 days of detention have lapsed. *See Khotesouvan v. Morones*, 386 F.3d 1298 (9th Cir. 2004). *See also Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) (The United States Supreme Court holding in *Zadvydas* applies to inadmissible aliens

[3] Caveat: The one-year limitation period of 28 U.S.C. §2243(d)(1) applies to all habeas petitions filed by defendants in State custody, even if the petition challenges an administrative decision rather than State court judgment. *See Shelby v. Bartlett*, 391 F.3d 1061 (9th Cir. 2004).

as well as deportable/removable aliens). Denial of habeas relief and parole in an immigration matter is reversed where: (1) the general detention statutes relied upon by the government do not authorize indefinite detention; (2) petitioner's detention was unreasonable, unjustified, and in violation of federal law; and (3) denial of parole during dependency of the proceedings was an abuse of discretion. *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006). A writ of habeas corpus under 28 U.S.C. § 2241 by a Somalian ordered removed from the United States due to his criminal convictions, challenging the length of his pre-deportation detainment is mooted upon his removal to Somalia, because the petitioner challenged the length of his detention, not the lawfulness of it. *See Abdala v. INS*, 488 F.3d 1061 (9th Cir. 2007); but see Tuan Thai v. Ashcroft, 366 F.3d 790 (9th Cir. 2004) (LPR who could not be removed to Vietnam was entitled to release from DHS custody after six months of detention, under *Zadvydas v. Davis, supra*).

An alien whose removal is administratively final, but whose removal is stayed pending the Ninth Circuit's resolution of the alien's petition for review, may be subject to continued detention under § 236(a) of the Act, but not § 241(a)(2) or § 241(a)(6) of the Act. Hence, the panel denied the habeas corpus petition even though the alien had been in DHS civil detention for more than three years and was an LPR. *See Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008). On July 28, 2008, three days after a panel of the Ninth Circuit decided *Prieto-Romero v. Clark, supra*, the Ninth Circuit held that the Government may not detain a LPR for a prolonged period without providing the alien a neutral forum in which to contest his

continued detention - more than seven years. While concluding that § 236(c) of the Act does not grant the Attorney General unlimited authority to detain an alien ordered removed, the panel concluded that § 236(a) of the Act does provide authority for the Attorney General to detain any alien, "pending a decision on whether the alien is to be removed from the United States." Nevertheless, the Government may not continue to detain an LPR for a prolonged period without providing the alien a neutral forum in which to contest the necessity of his continued detention, i.e., a flight risk or a danger to the community. *See* U.S. Const. Amend. V. Absent an adequate record of the procedural review that the alien was afforded, the Government must provide the alien with a hearing before an IJ to determine whether the alien is entitled to a bond, absent evidence that the alien is a flight risk, will be a danger to the community, or that he has already received such a bond hearing. *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005); *see Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 948 (9th Cir. 2008). The alien's detention was not "indefinite" and the U.S. District Court's issuance of a preliminary injunction requiring a hearing to determine whether the alien's prolonged detention of more than 22 months (due to numerous petitions that he filed for judicial review of prior BIA denials of his motions to reopen), was reversed and habeas relief was vacated. The panel ruled that the alien's detention by ICE was authorized under §241(a)(6) of the Act, because the alien had a final order of removal and he was inadmissible under §212 of the Act. However, the panel was not willing to decide whether the alien was entitled to a bond hearing regarding release from ICE custody. The panel relied on *Prieto-Romero v.*

Clark, 534 F.3d 1053 (9th Cir. 2008) and *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 948 (9th Cir. 2008). *See also Owino v. Napolitano*, 575 F.3d 952 (9th Cir. 2009).

Citing *Casas-Castrillon v. Dep't of Homeland Security*, *supra*, a panel of the Ninth Circuit held that while § 236 of the Act vests the Attorney General with the authority to detain an alien during removal proceedings, a petitioner who asserts a non-frivolous claim of United States citizenship need not wait until his removal proceedings are completed and a final removal order is issued before he can secure habeas review of his citizenship claim and his contention that he may not be detained under the Act. Hence, the United States District Court has jurisdiction over his habeas petition. *See Flores-Torres v. Mukasey, 548 F.3d 708 (9th Cir.2008)*.

4. **Detained Inadmissible Aliens.**

On January 12, 2005, the United States Supreme Court held that the statutory authority of DHS under § 241(a)(6) of the Act to detain inadmissible aliens beyond the 90-day removal period set forth in § 241(a)(1)(A) of the Act applies equally to all aliens whether or not those aliens have been admitted into the United States. Hence, the Court's earlier decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) applies to inadmissible aliens as well. *See Clark v. Martinez*, 543 U. S. 371(2005).

5. **National Security.**

The Attorney General of the United States–as head of the United States Department of Justice (DOJ)–and DHS have broad discretion in bond proceedings under § 236(a) of the Act to determine whether to release an alien on bond. In making such determinations with respect to

undocumented migrants who arrive by sea seeking to evade inspection, it is appropriate to consider national security interests that have been implicated to discourage further unlawful mass migrations as well as the release of undocumented alien migrants into the United States without adequate screening. *See Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003).

6. **Order of Supervision - Violation Thereof.**

A Conviction under § 243(b) of the Act for alien's willful failure to comply with the terms of release under supervision, (which requires that the alien not "commit any crimes") on the basis of two misdemeanor convictions via *nolo contendere* pleas, is reversed as such pleas are not an admission of factual guilt under Fed. R. Evid. 410 and 803(22). *See United States v Nguyen*,465 F.3d 1128 (9th Cir. 2006); *see also* INA § 241(a)(3)(D). **Attachment 2.**

C. ***Legal Framework for Section 240 Removal Proceedings.***

All Court proceedings are governed by the Act, implementing regulations, and the Immigration Court Practice Manual.

1. **Statute.**

The statutory procedures are found primarily at §§ 236, 239 and 240 of the Act.

2. **Implementing Regulations.**

The EOIR regulatory procedures are found primarily at 8 C.F.R. §§ 1003.12-1003.47; Part 1208; § 1211.4(b); §§1212.2(e) and (h), 1212.3, and 1212.7(d); §§ 1215.4-1215.5; §§ 1216.4(d)(2), 1216.5(f) and 1216.6(d)(2); §§ 1235.3(b)-(d); 1235.6 and 1235.8; Part 1236, § 1238.1(b)(2) and (e);

Part1239, Part 1240; §§ 1241.6(c), 1241.8(a), 1241.11(d)(2), 1241.14(a)(2) and (g)-(k); § 1244.18(b)(6); Part 1245; Part 1246; §§ 1249.1 and 1249.2; and §1287.4(a)(2)(ii). *See also* 8 C.F.R. §§1003.6(c)-(d) and 1003.19(i) (regarding DHS invoking an automatic stay of an Immigration Judge's bond order setting a bond for a detained alien). **Attachment 1.**

3. **Local Operating Procedures.**

Effective July 1, 2008, all local court rules were repealed and replaced by the Immigration Court Practice Manual, which can be downloaded from the EOIR website.

4. **Appeals.**

Appeals, whether interlocutory or final, must be filed with the BIA within 30 calendar days of the IJ's decision, whether oral or written. *See* INA § 240(c)(4); 8 C.F.R. § 1003.38; *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (The 30-day period for filing an appeal is mandatory and jurisdictional.); *Da Cruz v. INS*, 4 F.3d 721, 722 (9th Cir. 1993).[4]

[4] **Error! Main Document Only.** *See Matter of Patel*, 16 I&N Dec. 600 (BIA 1978) regarding the breadth of the Immigration Court's jurisdiction when a Record of Proceedings (ROP) is remanded by the BIA to the Immigration Court; *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007) (When a case is remanded by the BIA to the IJ for background checks–biometrics–the IJ reacquires jurisdiction over the proceeding and may consider additional evidence regarding new or previously considered relief if it meets the requirements for reopening proceedings.).

5. **Removal.**

Once an order of removal is final, DHS must act promptly to remove a criminal alien from the United States. *See* INA § 241; 8 C.F.R. Parts 241 and 1241; *Calcano-Martinez v. INS*, 533 U.S. 348 (2001).[5]

A Court of Appeal's denial of an alien-petitioner's motion to stay his removal pending judicial review of a BIA ruling is reversed, because traditional stay factors, not § 242 if the Act governs the Court of Appeal's authority to stay an alien's removal pending judicial review. The traditional factors are: (1) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the stay applicant will be irreparably injured absent the stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Nken v. Holder,* 129 S.Ct. 1749 (2009).

The Ninth Circuit Court of Appeals lacks jurisdiction over a petition for review of a BIA order granting a DHS motion to dismiss removal proceedings to enable DHS to reinstate a prior order of removal pursuant to § 241(a)(5) of the Act, because there is no final order of removal vis-a-vis § 242(a)(1)(D) of the Act. *See Alcala v. Holder*, 563 F.3d 1009 (9th Cir. 2009)

6. **Reinstatement of Prior Order of Removal.**

On November 18, 2004, the Ninth Circuit invalidated the regulations at 8 C.F.R. § 241.8, vesting final administrative authority in immigration officers to determine the applicability of §241(a)(5) of the Act -

[5] Caveat: However, DHS has no authority to deport or remove a U.S. citizen. *See Iasu v. Smith*, 511 F.3d 881 (9th Cir. 2007) (citing *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2005)).

reinstatement of prior order of removal - because the regulation is in conflict with §240(a) of the Act, which requires that IJs conduct all removal hearings. *See Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004). However, on June 22, 2006, the United States Supreme Court held in *Fernandez-Vargas v. Gonzales*, 546 U.S. 1074 (2006) that §241(a)(5) of the Act is applicable to a Mexican national who illegally reentered the United States in 1982 after having been deported because the new provisions text applies here, not because the alien reentered at any particular time, but because he chose to remain after the new statute because effective. As a result, on February 6, 2007, the Ninth Circuit, sitting en banc, reversed its 2004 holding in *Morales-Izquierdo v. Gonzales*, 486 F.3d 691 (9th Cir. 2007). *See also Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007) (An IJ has no authority to reinstate a prior order of deportation or removal.). On October 10, 2007, citing *Morales-Izquierdo*, a three-member panel of the Ninth Circuit held that the Mexican national respondent before the court could not challenge the reinstatement order by establishing a procedural defect in the underlying order of removal. *See Martinez-Merino v. Keisler*, 504 F.3d 1068 (9th Cir. 2007); *Martinez-Merino v. Mukasey*, 525 F.3d 801 (9th Cir. 2008). On August 21, 2008, a panel of the Ninth Circuit ruled that it lacked jurisdiction under § 241(a)(5) and (e) of the Act to consider an alien's challenge to a prior, expedited removal order, because of the jurisdiction-stripping provisions found at § 262(a)(2)(A) and (e) of the Act. The panel noted that REAL ID Act of 2005, Pub.L. 109-13, 119 Stat. 231, generally forecloses a Federal appellate court's ability to transfer an expedited habeas petition related to an expedited removal order

back to a U.S. District Court. *See Garcia de Rincon v. DHS*, 539 F.3d 1133 (9th Cir.2008).

D. ***General Principles.***

General principles that also apply to the Court's authority are summarized below.[6]

1. **Accrual of Physical Presence.**

Accrual of physical presence in the United States is cut-off on the date when the alien is served with a Notice to Appear, not the day before that date. *See Lagandaon v. Ashchroft*, 383 F.3d 983 (9th Cir. 2004) (Although decided in the context of § 240A(b)(1)(A) of the Act, this decision, arguably, has general applicability in the immigration context, absent explicit statutory language to the contrary.). However, for purposes of relief applications, physical presence time continues to accrue until a final administrative decision is made by the IJ. *See Matter of Ortega*, 23 I&N Dec. 793 (BIA 2005); *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007).

2. **Administrative Closure.**

Administrative closure does not result in a final order; it is merely a procedural convenience that authorizes the temporary removal of proceedings from the Court's calendar while retaining the proceedings on the Court's docket. This procedure is not available if either party to the proceedings objects. *See Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996);

[6] Caveat: This list is not exhaustive! Moreover, there are separate discussions of the terms "aggravated felony," "crime of violence," "crime involving moral turpitude," "illicit trafficking in a controlled substance," "motion to suppress evidence," "particularly serious crime," and certain other terms in conjunction with separate discussions of those topics within this Outline. See the Table of Contents for applicable page references.

Matter of Lopez-Barrios, 20 I&N Dec. 203 (BIA 1990); *Matter of Munoz-Santos*, 20 I&N Dec. 205 (BIA 1990); *see also Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114 (9th Cir. 2009).

3. **Administratively Final.**

8 C.F.R § 1003.1(d)(3) renders a BIA decision that has been referred to the Attorney General as non-final and without effect. *See Matter of E-L-H-*, 23 I&N Dec. 700 (A.G. 2004). After the matter was remanded to the BIA by the Attorney General for further consideration, the BIA reaffirmed its original decision and ruled that a precedent decision of the BIA applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the BIA, Congress, or a Federal court. *See Matter of E-L-H-*, 23 I&N Dec. 814 (BIA 2005). On September 27, 2006, the BIA ruled that when the Attorney General overrules or reverses only one holding in a precedent decision of the BIA and expressly declines to address any alternative holding(s) in the precedent decision, the remaining holdings retain their "precedential value." *See Matter of Robles*, 24 I&N Dec. 22 (BIA 2006).

4. **Administrative Notice.**

Administrative notice is a type of evidence in which the IJ or the BIA takes as established fact something not in evidence in the proceedings. It is considered to be broader in scope than judicial notice under Fed. R. Evid. 201(b), i.e., judicial notice may be taken of facts not subject to dispute. To satisfy due process of law, the alien must be given notice of and an opportunity to respond to such evidence before the IJ or BIA takes

administrative notice of the fact(s). *See generally Circu v. Gonzales*, 450 F.3d 999 (9th Cir. 2006) (en banc).

5. **Admission.**

An admission is defined under §101(a)(13) of the Act as inspection by an immigration officer coupled with authorization to enter the United States. *See Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir 2004). Adjustment of Status or change in status is also deemed an admission under the Act. *See Matter of Torres-Garcia*, 23 I&N Dec 866 (BIA 2006). Similarly, for purposes of a conviction under 18 U.S.C. § 922(g)(5)(A), an alien whose authorized period of stay has expired and whose application for adjustment of status was pending at the time of his conviction, is deemed an alien "illegally or unlawfully in the United States." *See United States v. Latu*, 479 F.3d 1153 (9th Cir. 2007).

On August 28, 2007, the Ninth Circuit held that former § 212(c) relief is available to an LPR who acted in reasonable reliance on pre-Public Law 104-208 (September 30, 1996) law prior to the enactment of new § 101(a)(13)(C)(v) of the Act, where the alien made a brief, casual and innocent departure to visit his ailing mother in the Republic of the Philippines for three weeks beginning in December 2000. *See Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007).

On September 4, 2007, the Ninth Circuit held that aliens who are "conditionally paroled" pursuant to § 236(a) of the Act are not necessarily paroled into the United States for purposes of eligibility for § 245(a) adjustment of status and thus are not eligible to adjust under § 245(a) of

the Act. *See Ortega-Cervantes v. Gonzales*, 501 F.3d. 1111 (9th Cir. 2007).

On March 25, 2008, the Ninth Circuit held that an alien who obtains entry into the United States by fraudulent means - he used the LPR card of another person whom he resembled - is statutorily ineligible for § 245(a) adjustment because an admission under § 101(a)(13)(A) of the Act requires lawful entry into the U.S. after inspection and authorization by an immigration officer. Nor is a § 212(i) waiver available to the alien. *See Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008). “On May 29, 2008, the respondent and the Department of Homeland Security (“DHS”) thereafter submitted with the Board a joint motion to reopen proceedings to ‘provide the parties with an opportunity to submit briefs.’ During the pendency of the motion before the Board, the Ninth Circuit, on October 20, 2008, granted the parties' ‘Joint Motion to Vacate and Motion to Dismiss Voluntarily’ its opinion in Orozco I. *Orozco v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008).” On May 12, 2009, the BIA remanded the case to the IJ. *Matter of Orozco*, A077981235, 2009 WL 1653717 (BIA 2009, unpublished).

An inadmissible alien convicted of a crime involving a controlled substance—a 1993 guilty plea to unlawful possession of cocaine—is statutorily ineligible for adjustment of status. Moreover, neither a State pardon by the Governor of the State of Washington for his 1993 conviction nor an Equal Protection Clause argument can overcome the explicit Congressional language at Section 212(a)(2)(A)(i)(II) of the Act. Section 212(a)(2) must be distinguished from Section 237(a)(2)(a)(v) of the Act. *See Aguilera-Montero v. Mukasey*, 548 F.3d 1248 (9th Cir. 2008).

Pursuant to 8 C.F.R. §245.2(a)(11) and §245.2(a)(11)(12), an IJ lacks jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Adjustment Act of November 2, 1966, as amended, with the limited exception of an alien placed in removal proceedings after returning to the U.S. pursuant to a grant of advance parole to pursue a previously filed application. *See Matter of Martinez-Montalvo*, 24 I&N Dec.778 (BIA 2009).

6. **Assimilative Crimes Act.**

A defendant's conviction in the United States District Court for Hawaii for unauthorized entry into a motor vehicle in violation of Haw. Rev. Stat. § 708-836.5 (2003), as assimilated into Federal law by the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, is proper because it satisfies the two-prong test established by the U.S. Supreme Court for analyzing whether a particular State criminal law is properly incorporated into Federal law under the ACA, i.e., (1) the defendant's act or omission is punishable by any enactment of Congress and (2) the applicable Federal law does not preclude application of the State law in question. *United States v. Souza*, 392 F.3d 1050 (9th Cir. 2004) (citing *Lewis v. United States*, 523 U.S. 155, 160-161 (1998)).

7. **Categorical versus Modified Categorical Approach.**

To determine whether an alien has been convicted of an aggravated felony, an analysis referred to as the "categorical approach" is generally applied. *See James v. United Sta*tes, 550 U.S. 192 (2007); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Under this approach, the Immigration Court examines

whether the full range of conduct covered by a criminal statute falls within the enumerated aggravated felony ground. The specific facts surrounding the conviction are not considered. By contrast, when it is not clear from the categorical approach whether an offense is a removable offense under the Act (e.g., the criminal statute is divisible (i.e., prohibits actions which are and are not aggravated felonies), or has disjunctive phrasing), then the Immigration Court may analyze the offense under the so-called "modified categorical" approach. Under the modified categorical approach, the Immigration Court may look at a narrowly defined set of court documents (commonly referred to as the "record of conviction") to determine whether the offense committed by the alien is contemplated by the enumerated aggravated felony ground under § 101(a)(43) of the Act. *See generally Gonzales v. Duanas-Alvarez*, *supra*; *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004). The record of conviction is typically comprised of the indictment/information, plea, verdict and sentence. *Matter of Madrigal*, 21 I&N Dec. 323, 325-26 (BIA 1996). Other documents which may sometimes be considered as part of the record of conviction include jury instructions, a plea agreement, the transcript of a plea colloquy, or some comparable judicial record of information about the factual basis of the plea. Thus, in the context of criminal sentencing, a minute order is not a judicial record that can be relied upon to establish the nature of a prior conviction. *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007) (§ 240A(a) relief available where a violation of CH&SC § 11379(a) is categorically broader than the definition of § 101(a)(43)(B) and the judicially noticeable documents satisfy the alien's burden of proof of establishing by a

preponderance of the evidence that the alien's conviction did not constitute an aggravated felony); *see also United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (indicating that an IJ can rely on "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, … any explicit factual finding by the trial judge to which the defendant assented," or other comparably reliable judicial record including minute orders, when applying the modified categorical approach).

8. **Collateral Attack.**

Neither the Court nor the BIA can entertain a collateral attack on a judgment of conviction or go behind the record of conviction to determine the guilt or innocence of the alien. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

9. **Consolidation.**

Two or more cases may be consolidated by the Court if necessary to promote administrative efficiency, subject to the requirements of administrative due process. *See Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA1977).

10. **Constitutionality.**

The constitutionality of the Act and the implementing regulations are not within the purview of the Court or the BIA. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992); *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1033 (BIA 1999).

11. **Continuances.**

An IJ has discretionary authority to grant written and oral motions for continuances "for good cause shown." *See* 8 C.F.R. § 1003.29; *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992); *Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988); *Matter of Perez-Andrade*, 19 I&N Dec. 433(BIA 1987); *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993); *see also Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004) regarding continuances to obtain post-conviction relief. However, two subsequent decisions restrict the IJ's discretion in denying a request for a continuance:

1. An IJ abuses his discretion in denying a continuance for adjudication of a pending visa petition where the petitioner had an approved labor certification at the time of the request for a continuance. *See Merchant v. United States Attorney General*, 461 F.3d 1375 (11th Cir. 2006) (persuasive authority only).

2. An IJ made a prejudicial error when she denied the alien's verbal motion for a continuance and violated his statutory right to counsel by proceeding with a merits hearing without his retained attorney being present. *See Hernandez-Gil v. Gonzales*, 476 F.3d 803 (9th Cir. 2007); *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074 (9th Cir.2007).

By contrast, on May 22, 2008, the Ninth Circuit held that there was no abuse of discretion by the IJ in denying a continuance to allow for the issuance of regulations under the Child Status Protection Act coupled with

the pending adjudication of the alien's father's pending labor certification application because no relief was then immediately available to the alien. *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243 (9th Cir. 2008).

In determining whether good cause exists to continue ongoing removal proceedings to await the adjudication by CIS of family-based visa petition, the IJ should consider the following factors: (1) The DHS response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the alien's statutory eligibility for adjustment of status; (4) whether the alien's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any relevant procedural factors. *See Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

When denying a request for a continuance the IJ/BIA must consider the following relevant factors: 1) the nature of the evidence excluded as a result of the denial; 2) the reasonableness of the alien's conduct; 3) the inconvenience to the court; and 4) the number of continuances previously granted. *See Ahmed v. Holder*, 569 F.3d 1009 (9th Cir. 2009).

12. **Domicile**

The term "domicile" at common law, as well as in the Act and implementing regulations, requires both a residence and an intent to maintain that residence for the foreseeable future. See Kyung Park v. Holder, 572 F.3d 619 (9th Cir. 2009).

13. **Double Jeopardy Clause/Collateral Estoppel.**

The double jeopardy clause of the U.S. Constitution bars the Government from bringing a second prosecution on the same charge of

which the defendant has been previously acquitted or convicted. Basic principles of collateral estoppel are inherent in the double jeopardy clause; hence, it also prevents the Government from prosecuting the same defendant on an issue determined in the defendant's favor in a prior prosecution, regardless of the particular offense involved in the prior trial, consistent with *Ashe v. Swenson*, 397 U.S. 436 (1970), which requires a three-step analysis: (1) identifying issues in the two prosecutions that are sufficiently similar and material so as to justify invoking collateral estoppel in the second trial; (2) examining the record in the prior trial to determine whether one or more of the identified issues was litigated in the first trial; and (3) examining the record in the prior trial to determine whether one or more of the identified issues was in fact decided in the first trial. See United States v. Castillo-Basa, 478 F.3d 1025 (9th Cir. 2007) (J. Trott dissenting) (citing *United States v. Hickey*, 367 F.3d 888, 891 n.3 (9th Cir. 2004)), *amended and superseded*, 483 F.3d 890 (9th Cir. 2007).

14. **Due Process Rights.**

The due process rights of an alien in removal proceedings are violated when an IJ fails to inform the alien of his/her eligibility to apply for relief from removal, resulting in prejudice to the alien; such a violation renders the underlying removal order fundamentally unfair. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004). Similarly, the Ninth Circuit later reiterated that the Fifth Amendment guarantees due process of law in immigration proceedings, including a neutral judge who does not prejudge the proceedings by denying the alien a full and fair opportunity to present evidence in the form of witnesses, expert witnesses,

and other evidence relevant to the alien's claim(s) for relief. *See Zolotukhin v. Gonzales*, 417 F.3d 1073 (9th Cir. 2005). More recently, in *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. 2006), the Ninth Circuit joined the Second and Fifth Circuits in holding that Due Process under the Fifth Amendment does not require inclusion of charges in the NTA that are not grounds for removal but are grounds for denial of relief from removal, e.g. § 240A(a) of the Act.

Where the IJ erroneously concluded that the LPR alien was not under arrest at the time of her interrogation, the two issues are: (1) whether the alien's rights under 8 C.F.R. § 287.3 were violated; and (2) whether the alien's statements to DHS were offered voluntarily? The Ninth Circuit panel remanded to determine whether her rights were infringed and whether her statements were freely given. *See Rodriguez-Echeverria v. Mukasey*, 543 F.3d 1047 (9th Cir. 2008).

In removal proceedings an IJ has a duty to inform an alien of the availability of relief where the circumstances of the case reasonably reflect the apparent eligibility of the alien for the particular form(s) of relief or where the alien expresses a fear of persecution or harm upon return to any of the countries to which the alien may be removed. *See Valencia v. Mukasey*, 548 F.3d 1261 (9th Cir. 2008).

15. **Fugitive Disentitlement Doctrine.**

An alien who fails to report for his deportation/removal or fails to keep the Government apprised of his current address may have his petition for appellate review by the Ninth Circuit dismissed under the fugitive disentitlement doctrine: "Like the fugitive in a criminal matter, the alien who

is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims." *See Zapon v. Department of Justice*, 53 F.3d 282, 285 (9th Cir. 1995); *see also Antonio-Martinez v. INS*, 317 F.3d 1089, 1091-93 (9th Cir. 2003) (alien had lost contact with his counsel and Government, and all efforts to contact alien over a two-year period were to no avail); *Armentero v. INS*, 412 F.3d 1088 (9th Cir. 2005) (alien's petition for review dismissed because alien was a fugitive from custody); *Bhasin v. Gonzales*, 423 F.3d 977, 987-88 (9th Cir. 2005) (a severe sanction not lightly imposed and denied where BIA had improperly applied it to motion to reopen where alien had not received agency documents critical to the order of removal); *Bello-Tobon v. Gonzales*, 224 Fed.Appx. 672 (9th Cir. 2007) (unpublished) (petition denied where alien had failed to provide a current address and was deemed a fugitive by DHS).

16. **In Absentia.**

An *in absentia* order of removal in § 240 proceedings cannot be appealed to the BIA; rather the alien must file a motion to reopen with the Court that issued the order. *See Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999); *Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993) (deportation proceedings). *See also Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008) (for a discussion of numerous Ninth Circuit cases on this subject).

Where an asylum applicant was denied the opportunity to confront the author of an adverse forensic evaluation of the applicant's documents through cross-examination, his right to a fair hearing was violated vis a vis due process of law. *See Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009).

17. **Jurisdiction Over Motions.**

An IJ has continuing jurisdiction to entertain motions regarding proceedings previously before the Court, including motions to reconsider, which contest the validity of a prior determination by the Court, until such time as an appeal on that determination is properly before the BIA. *See Matter of Patino*, 23 I&N Dec. 74 (BIA 2001).

18. **Law of the Case Doctrine.**

The law of the case doctrine is a concept recognized by Federal courts, the BIA, and the Chief Immigration Judge (CIJ) as requiring one judge to not overrule a prior determination by another judge presiding over the same case, absent: a supervening change of controlling law; compelling or unusual circumstances; new evidence now available to the transferee judge; or the need to correct a clear error in the previous determination to prevent manifest injustice. *See Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988), *cited favorably in United States v. Smith*, 389 F.3d 944 (9th Cir. 2004) (Application of the doctrine is discretionary and highly flexible.); 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478 at 790 (1996).

19. **Misdemeanor.**

Where an offense, under California Penal Code (CPC) § 487.2, is characterized by the State court as a misdemeanor and not a felony, that determination is binding on the Court and the BIA. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

20. **Motion to Reopen versus Motion to Reconsider.**

A motion to reopen before the BIA or an IJ is a request for a new hearing before the IJ based upon new or previously unavailable evidence; whereas, a motion to reconsider is a request that the BIA or the IJ reexamine the prior decision in light of: additional legal arguments; a change in the law; or possibly an argument or aspect of the prior proceeding which was overlooked by the BIA or the IJ. *See Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).

On June 16, 2008, by a five to four majority, the United States Supreme Court ruled that, when an alien is granted voluntary departure and then seeks to file a motion to reopen, "the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen." Here, two days before his voluntary departure period expired, the petitioner filed a motion to reopen (along with a motion to withdraw his request for voluntary departure), with the intention of applying for adjustment of status. The Board denied the motion to reopen because the petitioner had overstayed his voluntary departure period and thus was statutorily barred from adjustment of status. The Supreme Court rejected the government's argument that, in the Supreme Court's words, "by requesting and obtaining permission to voluntarily depart, the alien knowingly surrenders the opportunity to seek reopening." The Supreme Court also rejected the petitioner's argument that the voluntary departure period should be tolled while the motion to reopen is pending. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2316 (2008).

Pursuant to 8 C.F.R. §1003.2(d), the BIA lacks authority to reopen removal, deportation or exclusion proceedings - whether on motion by an alien or *sua sponte* - if the alien has been removed from the United States after those administrative proceedings have been completed. *See Matter of Armendariz-Mendez*, 24 I&N Dec. 646 (BIA 2008).

Similarly, §240B(d)(1) of the Act bars an alien from moving to reopen his removal proceedings after overstaying his voluntary departure period to apply for relief under §240A, §240B, §245, §248, and §249 of the Act for a period of 10 years. *See Granados-Oseguera v. Mukasey*, 546 F.3d 1011 (9th Cir. 2008).

A motion to reopen before the BIA is not tolled by filing a petition for review in the Circuit Court of Appeals. *See Dela Cruz v. Mukasey*, 532 F.3d 946 (9th Cir. 2008).

21. **Nunc Pro Tunc.**

Because *nunc pro tunc* permission to reapply for admission is an administrative practice not expressly authorized by the Act, it is available only in the limited circumstances where a grant of such relief would result in elimination of the only ground of deportability or inadmissibility or where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissibility. *See Matter of Garcia-Linares*, 21 I&N Dec. 254, 257-59 (BIA 1996); *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988).

22. **Precedent Decisions.**

Precedent decisions of one circuit court of appeals are not binding on another circuit; hence, within this circuit, only decisions of the Ninth Circuit

Court of Appeals are binding on the Court. *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).

23. **Record of Conviction.**

Neither the Court nor the BIA may look behind the record of conviction to determine whether the crime of which the alien was convicted is cognizable under the Act. For this purpose, the categorical approach, which requires an analysis of the statutory language of the Act with the statute of conviction, should be utilized. Where it is not clear from the categorical approach whether the offense is a removable offense under the Act, then the "modified" categorical approach must be used, in which only a specified set of court documents that are part of the record of conviction may be used: the indictment/information, the judgment of conviction, jury instructions, a signed plea agreement, or the transcript from the plea proceedings. *See Taylor v. United States*, 495 U.S. 1053 (1990); *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004), *cited by*, *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006); *Patao v. Gonazales*,131 Fed.Appx. 516 (9th Cir. 2005) (unpublished) (citing *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)) (holding that the IJ and the BIA may not look beyond the record of conviction to establish the nature of the defendant's relationship with the victim); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003); *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001); *Matter of Teixeira*, 21 I&N Dec. 316, 318-19 (BIA 1996). On March 7, 2005, the United States Supreme Court, citing *Taylor v. United States*, *supra*, held that a United States District Court inquiry under the Armed Career Criminal Act, 18 U.S.C. §924(e), to determine whether a plea of guilty to

burglary defined by a non-generic statute constitutes an admission to the requisite elements of the generic offense, is limited to the terms of the: (1) charging document; (2) the terms of a plea agreement or transcript of the colloquy between the sentencing judge and defendant in which the factual basis for the plea was confirmed by the defendant; or (3) “to some comparable judicial record of this information.” *Shepard v. United States*, 544 U.S. 13 (2005). This case involved analysis of a divisible statute encompassing burglary of a building, structure, boat, or vehicle. The Supreme Court reversed the First Circuit Court of Appeals. *See also Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (categorical versus modified categorical analysis of statutes); *James v. United Sta*tes, 550 U.S. 192 (2007). On October 28, 2008, an *en banc* panel of the Ninth Circuit issued a Per Curiam Opinion in *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. (2008) (en banc), overturning its earlier decision in 2007, as amended, holding that when applying the modified categorical approach, United States District Courts may rely on clerk minute orders that conform to the essential requirements that they are prepared by a court official at the time the guilty plea is taken (or shortly thereafter) and that official is charged by law with recording the proceedings accurately, consistent with *Shepard v. United States*, 544 U.S. 13 (2005). The issue in question arose within the context of sentence enhancement for a defendant’s prior burglary of a dwelling constituting a crime of violence.

Abstracts of judgment may be relied upon in combination with the charging document for purposes of determining whether a defendant has a qualifying conviction for sentencing purposes because an abstract of

judgment may be used to ascertain the length of sentence imposed in relation to that qualifying conviction for purposes of the United States Sentencing Guidelines (USSG). *See United States v. Sandoval*, 487 F.3d 1278 (9th Cir. 2007).

In 2009, the Ninth Circuit extended its holding in *United States v. Snellenberger*, *supra*, to asylum-based removal proceeding, when it ruled that an abstract of judgment, which is a common document in records of conviction in California, can be used to establish the factual basis for a criminal plea, the rationale is that the abstract is a contemporaneous, statutorily authorized and officially prepared clerical record of the underlying conviction and sentence prepared by the clerk of court. Moreover, the abstract is subject to amendment by the judge upon the filing of a motion by either party to the proceeding. *See Anaya-Ortiz v. Mukasey*, 553 F.3d 1266 (9th Cir, 2009).

Another note: The overwhelming majority of Federal courts of appeals hold that the literal language of § 101(a)(48)(A) of the Act eliminated the requirement that all direct appeals be exhausted or waived before a conviction is considered final. *See, e.g., United States v. Saenz-Gomez*, 472 F.3d 791, 794 (10th Cir. 2007). Within the Ninth Circuit, the issue is fluid. *See Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (a pre-IIRIRA to the contrary).

24. **Remand of Proceedings.**

Unless the BIA qualifies or limits it for a specific purpose, a remand of proceedings to the Court is effective for the stated purpose of the remand and for consideration of any and all matters which the Court deems

appropriate in the exercise of administrative discretion or other matters brought to the Court's attention in compliance with the Act and applicable regulations. *See Matter of Patel*, 16 I&N Dec. 600 (BIA 1978); *Matter of M-D-*, 24 I&N Dec. 138, 141 n.2 (BIA 2007).

25. **Res Judicata.**

Where DHS initiated deportation proceedings against a LPR with an extensive criminal history, resulting in a final administrative decision by the BIA, res judicata bars DHS from including in subsequent removal proceedings a charge of removability that could have been lodged in the earlier proceedings but was not so lodged, where, due to a change of law that occurred during the course of the first case, DHS lost the first proceedings. *See Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *see also Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir. 1987) (Where the appellate court held that INS could not reopen proceedings to admit a birth certificate, which was not newly discovered evidence, res judicata barred INS from issuing a new Order to Show Cause.); *Matter of Restubog*, 15 I&N Dec. 48 (BIA 1973) (A motion to reopen must be denied where the motion was filed after a Ninth Circuit review sustaining the finding of deportability and ordering a remand solely for the purpose of permitting the respondent to make a country designation.).

26. **Retroactivity of Statutes.**

Where Congress indicated a clear intent that former § 212(c) relief would foreclose access to § 240A(a) relief, this is not impermissibly retroactive because Congress' intent is clear: The relief now sought is prospective. *See Maldonado-Galina v. Gonzales*,456 F.3d 1064 (9th Cir.

2006); *Fernandez-Vargas v. Gonzales*, 546 U.S. 1074 (2006); *Matter of Gomez*, 20 I&N Dec. 957 (BIA 1995); *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002).

27. **Statute of Repose versus Statute of Limitations.**

Statutes of repose are not subject to equitable tolling, because there is a fixed, statutory cutoff date, usually independent of any variable such as the claimant's awareness of a violation. By contrast, a statute of limitation is primarily designed to assure fairness to defendants by putting the adversary on notice to defend within the period of limitation. Here, the alien was unable to adjust his status in the United States - he entered without inspection - because the petition and application to adjust his status was filed after April 30, 2001, when § 245(i) of the Act expired. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044 (9th Cir.2008).

28. **Streamlining Procedures of the BIA.**

A summary affirmance by the BIA of the IJ's decision does not violate due process. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003).

29. **Termination of Proceedings.**

Jurisdiction to terminate proceedings vests with DHS until the charging document is filed with the Court; once filed with the Court, only the IJ assigned the proceedings has authority to terminate proceedings. *See Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); 8 C.F.R. §§ 239.2 and 1239.2. However, because neither the BIA nor IJs have authority to adjudicate applications for naturalization, removal proceedings cannot be terminated unless DHS has served an affirmative communication on the

BIA or IJ attesting to the alien's prima facie eligibility for naturalization. *See Matter of Acosta-Hidalgo*, 24 I&N Dec. 103 (BIA 2007).

30. **Testimony of Alien.**

An alien in deportation/removal proceedings does not have an absolute constitutional right to testify at a time of the alien's choosing, because such proceedings are civil, not criminal in nature. Furthermore, IJs are empowered to exercise a reasonable degree of latitude in conducting the proceedings. Therefore, an IJ does not violate the alien's due process rights when ruling that the alien has to testify before her husband in a contested marriage fraud hearing. *See Ngongo v. Ashcroft*, 397 F.3d 821 (9th Cir. 2005).

31. **Venue of Proceedings.**

The authority of an IJ to change the venue of proceedings is dependent upon showing good cause. This requires a balancing of all relevant factors such as administrative convenience, expeditious treatment of the case, the location of pertinent witnesses, the cost of transporting witnesses or evidence to a new location, and factors commonly associated with the alien's place of residence. *See Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992); 8 C.F.R. §1003.20.

32. **Ultra Vires.**

The BIA acted *ultra vires* in issuing an order of removal against an alien instead of remanding the proceedings to the IJ because there is no statutory or regulatory authority that permits the BIA to issue such an order. *See Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), *overruled by Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc).

33. **Year.**

A year is defined as twelve calendar months beginning January 1 and ending December 31 or twelve calendar months beginning at any point in a month. Thus, the period from May 14, 1987, to May 13, 1988, constitutes one year for immigration purposes. *See Lagandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004). However, for purposes of the one-year filing deadline under § 108(a)(2)(B) of the Act, "one year" means within one year after the day on which the alien arrived in the United States. *See Minasyan v. Mukasey*, 553 F.3d 1224 (9th Cir. 2009).

II. **Jurisdiction of the Court Over Criminal Aliens**

A. **Aggravated Felonies**

Generally speaking, aliens convicted of aggravated felonies as defined in the Act have more limited avenues of relief before the Court than other aliens.

1. **Section 238 Proceedings**

An alien convicted of an aggravated felony who is placed in expedited, administrative removal proceedings under § 238 of the Act has very limited recourse to the Court. For example, under § 238 of the Act and the regulations at 8 C.F.R. § 1238.1, the Court has no jurisdiction over the proceedings unless DHS converts the proceedings to § 240 proceedings under 8 C.F.R. § 1238.1(d)(2)(iii). *See Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001).

2. **Definition and Case Law by Section 101(a)(43)**

The term “aggravated felony” is defined in § 101(a)(43) of the Act. Generalized cases are cited below, as illustrative of BIA and Ninth Circuit caselaw. More specific subtopics appear in Chapters II and III of this Outline, e.g., CIMTs, crimes of violence, illicit trafficking in controlled substances, and particularly serious crimes. *See* **Attachments 3-6.**

Definition: Congress intended these statutory definitions to be applied retroactively to all defined offenses, whenever committed. *See United States v. Maria-Gonzalez*, 268 F.3d 664 (9th Cir. 2001); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000); *United States v. Mendoza-Iribe*, 198 F.3d 942 (9th Cir. 1999).

Definition: Even convictions pre-dating the Act of November 29, 1990, are subject to § 101(a)(43) of the Act. *See Matter of Truong*, 22 I&N Dec. 1090 (BIA 1999). However, an alien who plead guilty to a “particularly serious crime” prior to October 1, 1990, is not automatically barred from asylum by 8 C.F.R. § 208.13(c)(2)(i)(A). *See Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) (citing *INS v. St. Cyr*, 533 U.S. 289 (2001)).

Definition: Moreover, a criminal offense as defined by State or foreign law may still be classified as an aggravated felony, as an offense “described in” a Federal statute enumerated in § 101(a)(43) of the Act, even if it lacks the jurisdictional element of the Federal statute, e.g., interstate commerce. *See Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002).

Definition: An offense classified as a misdemeanor under State law may be considered an aggravated felony if it meets the requirements of § 101(a)(43) of the Act. *See United States v. Gonzalez-Tamirez*, 310 F.3d 1168 (9th Cir. 2002); *but see* **Attachment 3** (discussing cases to the contrary and exceptions).

B. ***LPRs v. Non-LPRs***

LPRs of the United States with aggravated felony convictions are accorded different treatment under the Act than non-LPRs with aggravated felony convictions.

1. **Expedited Removal Proceedings under § 238 of the Act**

Expedited Removal Proceedings under § 238 of the Act do not apply to LPRs, and both IJs and Federal courts are generally without jurisdiction to review such determinations. *See* INA § 238(b)(1) and (2); 8 C.F.R. § 1238.1(b)(1)(ii); *United States v. Hernandez-Vermudez*, 356 F.3d 1011 (9th Cir. 2004).

2. **Unlawful Presence Bars under § 212(a)(9) of the Act.**

The Unlawful Presence Bars under § 212(a)(9) of the Act do not apply to LPRs. In contrast, an alien who reenters the United States without admission after having been previously removed is inadmissible under § 212(a)(9)(C)(i)(II) of the Act even if the alien obtained the Attorney General's permission to reapply for admission prior to reentering unlawfully. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). An alien is statutorily ineligible for a waiver of inadmissibility under 212(a)(9)(C)(ii) of the Act unless more than 10 years have elapsed since the date of the alien's last

departure from the United States. *Matter of Torres-Garcia, supra*. An alien found in the United States cannot be convicted under § 276 of the Act (Reentry of Removed Alien) unless the Government proves beyond a reasonable doubt that the alien entered the United States voluntarily and he had knowledge that he was committing the underlying act that made his conduct illegal, i.e., entering the U.S. without an admission or remaining in the United States after his order of removal became a final order. *See United States v. Salazar-Gonzales*, 455 F.3d 1022 (9th Cir 2005); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (similarly applying § 241(a)(5) of the Act).

On November 29, 2007, the BIA addressed violations of § 212(a)(9)(C)(i)(I) and § 212(a)(9)(B)(i)(II) of the Act in two successive decisions. The following day, a panel of the Ninth Circuit addressed a violation of § 212(a)(9)(C)(ii) of the Act. A summary of these three decisions follows.

In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), a BIA panel held that § 212(a)(9)(C)(i)(I) encompasses recidivist immigration violators who are inadmissible to the U.S., because of accruing more than one year of "unlawful presence" before departing the U.S. (Between April 1, 1997, and December 1998 in the instant case) and then illegally reentering the U.S. less than 10 years later (March 1999 in the instant case). Such an alien cannot be granted permission to reapply for admission under section 212(a)(9)(C)(ii) where the last departure occurred less than 10 years ago. Section 245(a) and §245(i) adjustment of status are not available to the alien.

In *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007), the same BIA panel held than an alien who: is unlawfully present in the U.S. for at least one year; departs the U.S.; and applies for admission to the U.S. within 10 years of the date of his prior departure may not adjust his status pursuant to § 245(a) and § 245(i) of the Act, by virtue of § 212(a)(9)(B)(i)(II) of the Act, even if the alien's prior departure was not made pursuant to an order of removal and/or was not made pursuant to a voluntary departure in lieu thereof.

The following day, a panel of the Ninth Circuit overruled *Perez-Gonzales v. Gonzales*, 379 F.3d 783 (9th Cir. 2004), citing *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) as dispositive precedent in a class action brought by a class of aliens for injunctive relief to enjoin DHS from denying certain applications for permission to reapply for admission into the U.S. The panel ruled that § 212(a)(9)(C)(i)(II) of the Act makes permanently inadmissible to the U.S. a previously removed alien who reenters the U.S. unlawfully. The panel cited *Fernandez-Vargas v. Gonzales, supra*, and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) as requiring the panel to overrule *Perez-Gonzales v. Gonzales, supra*, and to give deference to *Matter of Torres-Garcia, supra*.

3. **Mandatory Detention**

Despite § 236(c)(1) of the Act, an LPR convicted of a crime subject to mandatory detention is entitled to request a bond/custody redetermination

to determine whether the LPR is a flight risk or a danger to the community. *See Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994).

4. **Section 212(h) Waiver for LPRs**[7]

An LPR convicted of an aggravated felony or without seven years continuous lawful residence is not eligible for consideration for a criminal waiver under § 212(h) of the Act. *See Taniguchi v. Ashcroft*, 303 F.3d 950, 956-958 (9th Cir. 2002) (no violation of equal protection under U.S. Constitution because § 212(h) of the Act distinguishes between non-LPR aggravated felons and LPR aggravated felons by disallowing the waiver to LPRs), rehearing denied, *Taniguchi v. Ashcroft*, 332 F.3d 1205 (9th Cir. 2003) (en banc); *Matter of Ayala*, 22 I&N Dec. 398 (BIA 1998); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997); *Finau v. INS*, 277 F.3d 1146 (9th Cir. 2001). Caveat: A returning LPR seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with a § 212(h) waiver since the statutory language does not impose such a requirement on a returning LPR, consistent also with the language of § 101(a)(13)(C)(v) of the Act. *See Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

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[7] Caveat: No waiver is required under § 212(h) of the Act for a single offense of possession for one's own use of 30 grams or less of marijuana. *But see Matter of Moncada*, 24 I&N Dec. 62 (BIA2007) (The exception to deportability under § 237(a)(2)(B)(i) of the Act pertaining to a conviction for possession of 30 grams or less of marijuana for personal use is inapplicable where the statute under which the alien is convicted has as an element that the possession of the marijuana is in a prison or other correctional setting.). In addition, the exception under § 212(h) does not apply to an alien whose conviction was enhanced by virtue of his possession of marijuana in a "drug-free zone," where the enhancement factor increased the maximum penalty for the underlying offense and the enhancement factor had to be proved beyond a reasonable doubt to a jury. *See Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007).

5. Section 212(h) Waiver for Non-LPRs[8]

A non-LPR alien convicted of an aggravated felony is eligible for consideration for a criminal waiver for a non-controlled substance conviction under § 212(h) of the Act. *See Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998); *United States v. Arrieta*, 224 F.3d 1076 (9th Cir. 2000); 8 C.F.R. § 1212.7(d). [9]

On August 24, 2007, the Ninth Circuit held that the promulgation of a regulation imposing a higher legal standard for the grant of a § 212(h) waiver for aliens who have committed "violent or dangerous crimes"–8 C.F.R. § 212.7(d)–is a permissible exercise of the Attorney General's authority and the regulation may be applied to convictions that became final before the effective date of the regulation. *See Mejia v. Gonzales*, 499 F.3d 991 (9th Cir. 2007).

For purposes of a § 212(h) waiver, the term "lawfully resided" for a continuous period of not less than seven years immediately preceding the initiation of removal proceedings does not include any time periods when the alien: was an applicant for asylum, was granted work authorization, or was an applicant for adjustment of status. *See Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008).

6. False Claim to US citizenship

Section 212(a)(6)(C)(ii) of the Act renders any alien, including an LPR, inadmissible to the United States who falsely represents himself/herself to be an United States citizen is a non-waivable ground of inadmissibility if the false representation occurred on or after September 30, 1996. *See Pichardo v. INS*, 216 F.3d 1198 (9th Cir. 2000); *See* IIRIRA

[8] *Id.*

[9] This regulation establishes a higher evidentiary burden of proof for certain more serious offenses covered by this waiver, i.e., exceptional and extremely unusual hardship.

§ 344(a), Div. C, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); INA § 237(3)(D); *but see United States v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004) (An alien's execution of an I-9 Employment Eligibility Verification Form under penalty of perjury that he is "a citizen or national of the U.S." does not violate 18 U.S.C. § 911 because he merely represented that he was either a U.S. citizen or national.[10]) Similarly, § 237(a)(3)(D) of the Act is a corresponding ground of removal, which uses the words, "Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act...or any Federal or State law..." Although the BIA, to date, has not issued a published or indexed decision interpreting § 237(a)(3)(D) of the Act, in an unpublished decision issued in July 2005, a panel of the BIA found the words, "falsely represents" to require that the alien have "some awareness" when a false representation of citizenship has been made on his behalf. An alien who has made a false claim to U.S. citizenship in the completion of a Form I-9 (Employment Eligibility Verification) to obtain employment may be considered a person of good moral character (GMC) under the Act. However, such a finding does not automatically mandate such a determination under the "catch all" provision at the end of §101(f) of the Act. Thus, such an alien may still meet her BOP under §240A(b)(1)(B) of the Act to establish that she is a person of GMC. *See Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008).

On March 3, 2008, a Ninth Circuit panel ruled that an IJ/BIA determination that the alien made a false claim to U.S. citizenship when

[10] Note that this was a Federal criminal prosecution (beyond a reasonable doubt evidentiary standard) and the defendant did not testify

questioned by an immigration inspector and two Border Patrol agents while seeking admission to the U.S. from Mexico was supported by substantial evidence. *See Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008) (citing *Pichardo v. INS*, 216 F.3d 1198, 2000 (9th Cir. 2000))

An alien who willfully and knowingly makes a false representation of birth in the United States on a passport application and convicted under 18 U.S.C. § 1542 is inadmissible under § 212(a)(6)(C)(ii) of the Act. *See Matter of Barcenas-Barrera*, 25 I&N Dec. 40 (BIA 2009).

7. **Voting**

On March 2, 2005, the Ninth Circuit ruled that an LPR who voted in a Hawaiian election did not violate HRS § 19-3.5(2) ("any person who knowingly votes when the person is not entitled to vote" is guilty of a felony) and hence is not removable under § 237(a)(6)(A) of the Act. *See McDonald v. Gonzales*, 400 F.3d 684 (9th Cir. 2005). The Ninth Circuit ruled that the alien did not have the requisite mental state to have violated the State statute because she was not aware that she was ineligible to vote under Hawaiian law. *Id.*

8. **Other Fraud**

Finally, an alien who has acquired LPR status through fraud or misrepresentation is deemed to have never been lawfully admitted for permanent residence and is thus ineligible for a § 240A(a) waiver. *See Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003); M*onet v. INS*, 791 F.2d 752 (9th Cir. 1986); *but see Matter of Ayala*, 22 I&N Dec. 398 (BIA

1998) (holding for purposes of a § 212(h) waiver that the statute does not distinguish between those whose admission was lawful and those who were previously admitted for lawful permanent residence but are subsequently determined to have been admitted in violation of the law); *see also Notash v. Gonzales*, 427 F.3d 693 (9th Cir. 2005) (discussed in the CIMT portion of this outline).

The first paragraph of 18 U.S.C. §1546(a) prohibits possessing an otherwise authentic document that the possessor knows has been procured by means of a false claim or statement. Thus, an alien's failure to disclose on his I-590 refugee application and on his I-485 adjustment application, that he had served his prior foreign military service in the army of the Republika Srpska, which had been involved in the massacre of a large number of unarmed Muslim prisoners in 1995, violated the first paragraph of 18 U.S.C. §1546(a). *See United States v. Krstic*, 558 F.3d 1010 (9th Cir. 2009).

C. ***Illicit Trafficking in Controlled Substance Conviction***

An alien convicted of “illicit trafficking” in a controlled substance, including a drug trafficking crime (as defined in 18 U.S.C. § 924(c)(2)), is subject to removal from United States under § 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined at §

101(a)(43)(B) of the Act. For example, a single conviction for possession of more than 5 grams of cocaine is subject to a 5-20 year sentence under 21 U.S.C. § 844(a) and hence is a § 101(a)(43)(B) aggravated felony.

1. **Stage Drug Offense**

A State drug offense is an aggravated felony for immigration purposes only if it is punishable as a felony under:

a) the Controlled Substances Act (CSA), 21 U.S.C § 801 et seq.;

b) other Federal drug laws named in the definition of drug trafficking crime at 18 U.S.C. § 924(c)(2); or

c) is a crime involving a trafficking element within the meaning of § 101(a)(43)(B) of the Act.

See Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004) (A 4-month jail sentence for possession of methamphetamine in violation of CPC § 11377(a) does not meet this 3-part test and thus is not an aggravated felony under §101(a)(43)(B) of the Act.); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004). Note that the term “drug” is not defined at 21 U.S.C. § 821(g)(1); whereas, the term “felony drug offense” is defined at 21 U.S.C. § 802(44) as “an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, or depressant or stimulant substances.” On July 31, 2006, the Ninth Circuit ruled that, because a conviction under Cal. Health and Safety Code § 11366 required “purposeful” action, it required “knowing” action,

and under a categorical approach, a conviction under § 11366 constituted an "aggravated felony." *See Slaviego-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. 2006). More recently, in *United States v. Morales-Perez*, 467 F.3d 1219 (9th Cir. 2006), the Ninth Circuit held that the Federal crime of attempted possession of a controlled substance - cocaine - with intent to sell encompasses the California - defined crime of purchasing cocaine base for purposes of sale. Similarly, on February 15, 2008, a panel of the Ninth Circuit held that a Kansas felony conviction for possession of marijuana with intent to sell necessarily means that the alien possess the marijuana with the intent to engage in commercial dealing. Thus, under *Lopez v. Gonzales*, 549 U.S. 47 (2006), the conviction here is a trafficking offense within the meaning of § 101(a)(43)(B) of the Act. *See Rendon v. Mukasey*, 516F.3d 1087 (9th Cir. 2008).

2. **State Law Misdemeanor Offense**

For purposes of § 101(a)(43)(B) and (U) of the Act, a Maryland misdemeanor conviction for conspiracy to distribute marijuana constitutes a § 101(a)(43)(B) aggravated felony because the elements of the State offense correspond to the elements of an offense that carries a maximum penalty of five years imprisonment under the CSA. *See Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008).

3. **Punishable by More Than One Year Imprisonment**

For purposes of § 101(a)(43)(B) of the Act, a felony offense is one punishable by more than one year imprisonment under applicable Federal or State law. *See citations at paragraph 1. above*, and 18 U.S.C. § 3559(a)(5) (Federal definition of felony).

4. **Criminal Sentencing Enhancement**

By contrast, in the criminal sentencing enhancement context, a drug offense is an aggravated felony under § 101(a)(43)(B) of the Act if it is punishable under the CSA and is a felony. *See United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); 18 U.S.C. § 3559(a)(5) (sentencing classification for Federal offenses, i.e., misdemeanor, gross misdemeanor, felony, etc.). A prior Arizona conviction for attempted possession of over 8 lbs. of marijuana, where the offense is a State law felony, is an aggravated felony under sentencing guidelines. *See* 18 U.S.C. § 3551, et seq., regarding United States Sentencing Commission Guidelines.

On June 25, 2007, the Ninth Circuit ruled that a deferred, expunged or dismissed State court decision qualifies as a prior conviction under 21 U.S.C. § 841(b)(1)(A)-(D) because a dismissal based upon compliance with the terms and conditions of a sentence and judgment neither alters the legality of the conviction nor indicates that the defendant was actually innocent of the crime. *See United States v. Norbury*, 492 F.3d 1012 (9th Cir. 2007).

On July 24, 2007, the Ninth Circuit ruled that in the immigration context, simple possession of a controlled substance that is punishable as a felony under State law but a misdemeanor under the Controlled Substances Act is not an aggravated felony under § 101(a)(43)(B) of the Act. *See United States v. Figueroa-Ocampo*, 494 F.3d 1211 (9th Cir. 2007) (citing *Lopez v. Gonzalez*, 549 U.S. 41 (2006)).

5. **First Offense**

A State felony conviction for a first offense, simple possession of a controlled substance as defined under the CSA may nevertheless be considered an aggravated felony under § 101(a)(43)(B) of the Act if it satisfies the definition of "drug trafficking crime" as set forth in 18 U.S.C. § 924(c)(2). *See United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000) cert. denied 531 U.S. 1102 (2001); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) modified, *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002); *but see United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) (An Arizona drug conviction for which the maximum penalty is probation is not an aggravated felony for purposes of the Federal sentencing guidelines).

Similarly, an expunged conviction for simple possession that satisfies the requirements of the Federal First Offender Act (FFOA) at 18 U.S.C. § 3607 is not a conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728, 749-50 (9th Cir. 2000). Likewise, expungement of lesser offenses with no corresponding Federal analogue - such as possession of drug paraphernalia - may also qualify for FFOA treatment. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009), amended, 563 F.3d 800.

FFOA relief is not available for possession of pipe drug paraphernalia in violation of CHSC where the alien violated a condition of his probation. *See Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

6. **State Drug Conviction**

To determine whether a State drug conviction constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c)(2), and hence an aggravated felony under § 101(a)(43)(B) of the Act, the Court must apply the applicable Federal circuit court of appeals standard. Within the Ninth Circuit, the conviction must be punishable as a felony under the CSA at 21 U.S.C. § 801 et seq. or other Federal drug laws named in the definition of "drug trafficking crime" or is a crime involving a trafficking element within the meaning of § 101(a)(43)(B). *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002); *United States v. Ibarra-Galindo*, 206 F.3d 1137 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001); *Gonzalez-Vega v. INS*, 35 Fed. Appx. 607 (9th Cir. May 24, 2002, unpublished) (A conviction under § 11378 of the California Health and Safety Code (CHSC) is a felony conviction and an aggravated felony under § 101(a)(43)(B) of the Act). On December 5, 2006, the U.S. Supreme Court held that a State conviction for simple possession of a controlled substance that is a felony under State law but a misdemeanor under the CSA is not an aggravated felony for immigration purposes, with a few exceptions, e.g., 21 U.S. C. §844(a) where, for example, the defendant is in possession of more than five grams of cocaine base. *See Lopez v. Gonzales*, 549 U.S. 41 (2006); *see also United States v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007) (A sentencing case in which the court held that a violation of § 11378 for possession of a controlled substance for sale is categorically a drug trafficking offense for sentencing purposes.).

On December 13, 2007, the BIA issued two published decisions on this subject. In the first decision, *Matter of Carachuri-Rosendo*, 24 I&N Dec.

382 (BIA 2007), the BIA held that decisional authority of the U.S. Supreme Court and the applicable Federal circuit court of appeals determines whether a State drug offense is an aggravated felony within the meaning of § 101(a)(43)(B) of the Act, by virtue of its "correspondence" to the Federal felony offense of "recidivist possession," as defined in 21 U.S.C. § 844(a). In this case the BIA cited Fifth Circuit precedent as dictating that a Texas conviction for alprazolam possession committed after a prior State conviction for a "drug, narcotic, or chemical offense" became "final" within the meaning of 21 U.S.C. § 844(a). By contrast, the Ninth Circuit ruled in *Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2005) and in *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), rev'd, 128 S.Ct. 1783 (2008), that an adjudicator cannot consider recidivist sentencing enhancements at all when seeking to determine whether a state offense constitutes an aggravated felony.

However, in *United States v. Rodriguez*, 128 S.Ct. 1783 (2008) the Supreme Court overruled the Ninth Circuit precedent by finding that "when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history -100% of the punishment is for the offense of conviction."

In the second of the December 13, 2007, published decisions, the BIA held that the LPR alien's 2003 Florida offense involving simple possession of marijuana did not constitute an aggravated felony, even though it was committed after a prior drug conviction had become final within the meaning of 21 U.S.C. § 844(a), because the second conviction

did not arise from a State proceeding in which the alien's status as a recidivist drug offender was either admitted or determined by a judge or jury. *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007) (citing *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007)). Note that this case arose in the Eleventh Circuit, which had not issued any precedent decision with respect to the "recidivist possession" issue. By contrast, in *United States v. Norbury*, 492 F.3d 1012, 1014-15 (9th Cir. 2007), the Ninth Circuit concluded that a withheld or deferred adjudication remains a valid, prior conviction under the recidivism provisions of 21 U.S.C. § 844(a).

7. **Matching a State Drug Conviction to a Generic Offense**

The Ninth Circuit ruled that a conviction for possession or purchase of cocaine base for purposes of sale, in violation of California Health and Safety Code § 11351.5, is not categorically a drug trafficking offense within the meaning of USSG § 2L1.2(b)(1)(A) pertaining to the Federal Sentencing Guidelines. *See United States v. Morales-Perez*, 448 F.3d 1158 (9th Cir. 2006).

8. **Indeterminate Sentence**

A 1999 conviction under NRS § 453.336 for possession of a controlled substance, with an indeterminate, suspended sentence of 12 to 48 months is a drug trafficking crime as defined in 18 U.S.C § 924(c)(2), which is punishable under the Federal Controlled Substances Act at 21 U.S.C. § 844(a) and a felony as defined at 21 U.S.C § 802(44) ("an offense punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country"), because the instant conviction is a category E felony under Nevada law and therefore an

aggravated felony under § 101(a)(43)(B) of the Act. *See United States v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002). **Attachment 4**

D. ***Post Conviction Relief***

Under limited circumstances, post-conviction relief may ameliorate the immigration consequences of a foreign, Federal or State court conviction.

1. **Definition of Conviction**

The imposition of costs and surcharges under Florida law in the context of criminal sentencing constitutes "punishment" or "penalty" within the meaning of § 101(a)(48)(A) of the Act; thus, applying a uniform Federal definition, a conviction under Florida law where defendant was assessed $458 in costs and surcharges constitutes a form of punishment within the meaning of § 101(a)(48)(A) of the Act. *See United States v. Dubose*, 146 F.3d 1141(9th Cir. 1998); *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). However, the definition of conviction under § 101(a)(48)(A) of the Act did not repeal the Federal First Offender Act at 18 U.S.C. § 3607, which applies to first-time drug offenders guilty of simple possession of a controlled substance; hence, an alien whose conviction qualifies for expungement under comparable state rehabilitative statutes is not subject to removal from the United States pursuant to § 237(a)(2)(B)(i) of the Act. *See Lujan-Armendariz v. INS*; *Roldan-Santoyo v. INS*, 222 F.3d 728 (9th Cir. 2000), vacating on other grounds, *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999); *but see Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002) (reaffirming *Roldan* outside the Ninth Circuit). Moreover, in *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004), the Ninth Circuit distinguished *Lujan-Armendariz* under an Oregon rehabilitation statute for a first-time

simple controlled substance possession offense known as a “set-aside” or “vacatur” statute when: a defendant is found or pleads guilty; a formal judgment of conviction is entered against the defendant; and the defendant must first comply with and perform all terms and conditions of his sentence before he may apply to the court for an order setting aside the conviction. Accordingly, the Ninth Circuit held that the alien’s rights under the Due Process Clause of the Fifth Amendment to the U.S. Constitution was not violated when DHS ordered his removal to Mexico after his conviction but before he was eligible to apply to the State of Oregon for an order setting aside his controlled substance conviction.

The Fifth Circuit Court of Appeals held that a jury verdict finding an alien guilty of unlawful wounding in violation of Virginia Code Annotated § 18.2-51 on October 1987 constitutes a conviction for purposes of § 101(a)(48)(A) of the Act, because the alien was not officially convicted until the time of his sentencing in 1998—the alien had fled the U.S. before sentencing. *See Singh v. Holder*, 568 F.3d 525 (5th Cir. 2009) (persuasive authority only).

2. **Foreign Conviction**

Similarly, the expungement of a British conviction for possession of marijuana and cocaine, which would have qualified under the Federal First Offender Act, renders an alien admissible into the United States and hence eligible for § 245 adjustment of status. *See Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001), reversing *Matter of Dillingham*, 21 I&N Dec. 1001 (BIA 1997).

3. **Youthful Offenders**

Similarly, adjudication of youthful offender status under the Federal Juvenile Delinquency Act (FJDA) at 18 U.S.C. §§ 5031-5042 or an equivalent State statute does not constitute a conviction within the meaning of § 101(a)(48)(A) of the Act. *See Matter of Devison*, 22 I&N Dec. 1362 (BIA 2001). However, Federal courts and the BIA are bound by a State court's adjudication of a defendant as a juvenile or an adult, notwithstanding the definition of a juvenile under the FJDA at 18 U.S.C. § 5031. *See Vierira-Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (persuasive authority only); *Morasch v. INS*, 363 F.2d 30 (9th Cir. 1966).

On May 8, 2007, the Ninth Circuit ruled that an adjudication of delinquency of a 17 year-old Mexican national for transporting illegal aliens and related counts was reversed because the Government violated his rights under 18 U.S.C. § 5033 while in Federal custody. *See United States v. C.M.*, 485 F.3d 492 (9th Cir. 2007).

On August 3, 2007, the Ninth Circuit ruled that when a 16 year-old is prosecuted by the State of California as an adult, his conviction does not qualify for treatment as a juvenile offender; the Court cited § 101(a)(48)(A) of the Act and applicable circuit case law. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919 (9th Cir. 2007).

On June 12, 2008, a panel of the Ninth Circuit held that juveniles must be provided with the protections of 18 U.S.C. § 5033 whenever being taken into custody, regardless of the evidence available to arresting officers as to the individual's age. *See United States v. Juvenile Male*, 528 F.3d 1146 (9th Cir. 2008).

4. **Vacated Conviction**

In an anomalous decision, the BIA ruled that a conviction that has been vacated under Article 440 of the New York Criminal Procedure Law does not constitute a conviction within the meaning of § 101(a)(48)(A) of the Act. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). This decision is inapplicable in the Ninth Circuit because it conflicts with the *Lujan-Armendariz* v. INS, 222 F.3d 728 (9th Cir. 2000) and *Murillo-Espinoza v. INS*, discussed below. The Ninth Circuit, citing *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), ruled on August 14, 2001, that an LPR convicted of an aggravated felony theft offense under Arizona law whose conviction was vacated by an Arizona State court remains convicted of an aggravated felony and subject to removal from the United States. *See Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001); *see also Tse v. INS*, 22 Fed.Appx. 763 (9th Cir. Nov. 13, 2001, unpublished) (An alien is deportable pursuant to § 237(a)(2)(A)(iii) of the Act notwithstanding a State court's expungement of his conviction for kidnapping and inflicting great bodily harm);*Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002) (California court order issued pursuant to CPC §1203.4 expunging misdemeanor conviction of alien carrying a concealed weapon, after successful completion of probation, does not eliminate the immigration consequences of the conviction or prevent his deportation on that basis). However, on February 8, 2006, the BIA ruled that a conviction vacated pursuant to § 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006); *see also*

Matter of Cota-Vargas, 23 I&N Dec. 849 (BIA 2005) (discussed in paragraph 7, *infra*).

5. **Deferred Adjudication**

Deferred adjudication under Article 42.12, § 5 of the Texas Code of Criminal Procedure is a conviction within the meaning of § 101(a)(48)(A) of the Act. *See Matter of Punu*, 22 I&N Dec. 224 (BIA 1998).

6. **Writs**

With regard to writs, the Ninth Circuit has ruled that a State court issuance of a writ of *audita querela* or writ of *coram nobis* solely to prevent an alien's deportation based upon a drug trafficking conviction is ineffective for purposes of Federal immigration law. *See Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998); *see also Barajas v. State of Nevada*, 991 P. 2d 474, 115 Nev. 440 (Nev. S. Ct. 1999) ("The possibility of deportation is a collateral consequence which does not affect the voluntariness of a plea."); *United States v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002) (The immigration consequences of a conviction are collateral to a plea, and, as such, U.S. District Courts are not constitutionally required to warn alien defendants about potential removal in order to assure the voluntariness of a criminal plea.); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003) (Failure of client's attorney to advise alien of immigration consequences of guilty plea does not constitute ineffective assistance of counsel.); *United States v. Jeronimo*, 398 F.3d 1149 (9th Cir. 2005) (Criminal defendant's appeal of his drug conviction is dismissed where the appeal waiver in his plea agreement is unambiguous and the defendant made a knowing and voluntary waiver of his right to appeal);*but see United States v. Kwan*, 407

F.3d 1005 (9th Cir. 2005) (*Coram nobis* relief is appropriate in a petition collaterally attacking a guilty plea and the sentence imposed in previous conviction on the ground of ineffective assistance of counsel; moreover, the "Certificate of Appealability" requirement under the Anti-Terrorism and Effective Death Penalty Act of 1996 does not apply to *coram nobis* proceedings.).

7. **Amended Sentence**

However, a panel of the BIA ruled on September 5, 2001, that where a Maryland criminal court vacated the one-year prison sentence of an LPR convicted of an aggravated felony within the meaning of § 101(a)(43)(G) of the Act and revised that sentence downward to 360 days, the term of imprisonment, within the meaning of § 101(a)(48)(B) of the Act, has been reduced to less than one year for immigration purposes. *See Matter of Song*, 23 I&N Dec. 173 (BIA 2001). More recently, on November 18, 2005, the BIA clarified *Matter of Song*, ruling that a trial court's decision to modify or reduce an alien's criminal sentence *nunc pro tunc* is entitled to full faith and credit by the IJ and the BIA, and such a modified or reduced sentence is recognized as valid for purposes of immigration law without regard to the trial court's reasons for effectuating the modification or reduction. *Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005). In *Cota-Vargas*, the respondent was convicted for receipt of stolen property under California Penal Code § 496(a) and was sentenced to 365 days. Therefore, the conviction qualified as an aggravated felony. The sentencing judge reduced the sentence to 240 days *nunc pro tunc* solely for the purpose of affecting the immigration consequences of the conviction, and not to correct any substantive or

procedural defect in the original judgment. This decision is at least facially in conflict with *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), discussed *infra.*

8. **Section 212(c) Caveat**

A grant of relief under former § 212(c) of the Act is not akin to a pardon or expungement of the conviction and may be "alleged by the Service" in a second immigration proceeding as one of "two crimes involving moral turpitude," where the second crime alleged is either a subsequent conviction or a conviction "not disclosed by the alien in the prior proceeding." Furthermore, while the grant of relief is valid indefinitely, the grant covers only the specific crimes and grounds of exclusion/deportation described in the application for a waiver. *See Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991); *Becker v. Gonzales*, 473 F.3d 1000 (9th Cir. 2007) (A grant of § 212(c) relief merely waives the finding of deportability not the underlying ground of deportation, citing *Matter of Balderas*, *supra*.);*but see Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (A 1998 conviction could not serve as a predicate offense for removal of an alien after a subsequent offense where the alien had been granted § 240A(a) relief for the 1998 conviction.). Note that § 240A(a) replaces former § 212(c) of the Act and is more restrictive than former § 212(c) of the Act.

9. **Collateral Attack**

Furthermore, both the BIA and the Ninth Circuit Court of Appeals have consistently ruled that: post-conviction relief is collateral to immigration proceedings; criminal convictions cannot be collaterally

attacked in the Court; but continuances to obtain post-conviction relief are within the sound discretion of the IJ if good cause is shown. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004); *De La Cruz v. INS*, 951 F.2d 226 (9th Cir. 1991); *Matter of Luviano*, 21 I&N Dec. 235 (BIA 1996); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987).

10. **Pickering and Immigration Hardships**

If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, as opposed to a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). In *Pickering*, a Canadian citizen was convicted in 1980 in Canada for unlawful possession of LSD. In 1997, he requested a Canadian court to quash his conviction. An IJ found the Canadian court's action did not eliminate the immigration consequences of the 1980 conviction. On appeal, the BIA looked to the statutory definition of "conviction" at § 101(a)(48)(A) of the Act, which is not limited by its terms to judgments which have not been vacated, quashed, expunged, dismissed, or discharged. Citing a number of Federal court decisions, including *Beltran-Leon v. INS*, 134 F.3d 1379, 1380-81 (9th Cir. 1998), the BIA concluded that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains convicted for immigration purposes. Moreover, the BIA concluded that it was irrelevant that the conviction in question was a foreign conviction and not a

domestic conviction. *But see Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005), discussed *supra*. On November 3, 2006, citing *Matter of Pickering, supra, rev'd on other grounds, Pickering v. Gonzales,* 454 F.3d 525 (6th Cir. 2006), the Ninth Circuit held that where the judicial record is not clear as to the reason for vacating a prior judgment of conviction, the burden of proof (BOP) is on the Government to establish, by clear, unequivocal and convincing evidence, whether the reversal occurred because of a procedural or substantive defect or for equitable, rehabilitation or immigration hardship reasons; if the BOP is not met, then the vacated decision is not a conviction for immigration purposes. *See Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006).

11. **State Court Expungement**

The new definition of "conviction" in § 101(a)(48)(A) of the Act means that, for a drug conviction not involving a first-time simple possession of narcotics, an alien remains convicted and thus removable under § 237 of the Act the Act, notwithstanding a subsequent State court action to vacate or set aside the conviction. *See Matter of Marroquin,* 23 I&N Dec. 705 (A.G. 2005) (finding that expungement of conviction under section 1203.4 of the California Penal Code not involving first-time simple possession offense remains a "conviction" for immigration purposes); *Matter of Luviano*, 23 I&N Dec. 718 (A.G. 2005); *but see Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (discussed *supra*).

On June 25, 2007, the Ninth Circuit ruled that a deferred, expunged or dismissed State court decision qualifies as a prior conviction under 21

U.S.C. § 841(b)(1)(A)-(D) because compliance with the terms and conditions of a sentence and judgment neither alters the legality of the conviction nor indicates that the defendant was actually innocent of the crime. *See United States v. Norbury*, 492 F.3d 1012 (9th Cir. 2007); *Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007) (A subsequent conviction for possession of a controlled substance is a conviction for purposes of the Act, even if later expunged.); *see also United States v. Alba-Flores*, 577 F.3d 1104 (9th Cir. 2009) (holding in the context of a sentencing under the USSG that an expungement under CPC § 1203.4 may still be used at a later time in a variety of circumstances).

Expungement of a conviction under CPC § 1203.4 does not eliminate a State law conviction for immigration purposes, with the exception of the FFOA at 18 U.S.C. § 3607. *See Ramirez-Altamirano v. Holder*, 563 F.3d 800, 806 (9th Cir. 2009).

III. Other Considerations Involving Criminal Aliens before the Court

A. Definitions

For purposes of removal proceedings certain general definitions are uniformly applied by the BIA and the Ninth Circuit.

1. Accessory After the Fact

A conviction for the offense of accessory after the fact under CPC §32 is a CIMT barring the alien from §240A(b)(1) relief. The crime has four essential elements: (1) a principal must have committed a specific, completed felony; (2) the accused must have harbored, concealed or aided the principal; (3) the accused may have knowledge that the principal

committed the felony; and (4) the accused's action in hiding, concealing or harboring must be with specific intent to enable the principal to escape from arrest and trial. *See Navarro-Lopez v. Gonzales*, 455 F.3d 1055 (9th Cir. 2006), *opinion withdrawn by en banc court* on November 8, 2006 (pending); and *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005) (A conviction for the offense of being an accomplice to residential burglary is a CIMT under the modified categorical approach.).

However, on September 19, 2007, an *en banc* panel of the Ninth Circuit issued a new decision in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), ruling that the defendant/alien's conviction under CPC § 32 as an accessory after the fact was not a CIMT, because the generic definition of a CIMT is a crime involving conduct that is:

a) base, vile, or depraved and

b) violates accepted moral standards.

A conviction under CPC § 32 requires knowing interference with the enforcement of the law with the specific intent to help a principal avoid arrest or trial. Conduct underlying an accessory after the fact conviction "does not necessarily involve conduct that involves baseness or depravity." Moreover, CPC § 32 refers to a potential set of crimes broader than the generic definition of a CIMT.

On October 10, 2007, another *en banc* panel of the Ninth Circuit similarly held in the context of sentence enhancement under U.S.S.G. § 2L1.2(b)(1)(C), that a violation of CVC §10851(a), which criminalizes theft and unlawful driving or taking of a vehicle is not a §101(a)(43)(G)

aggravated felony *per se*, because it extends to accessories after the fact as well as principals and similar offenders. *See United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc).

2. **Admission**

The term "admission," as used in § 101(a)(13)(A) of the Act, refers not to the date of adjustment of status to that of a LPR but rather the date when the alien first lawfully entered the United States and maintained continuous lawful presence thereafter. *See Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004). By contrast, the term "adjustment of status" under § 210 of the Act (Special Agricultural Worker) refers to the date when the alien was granted lawful permanent resident status as opposed to the date when the alien is first granted temporary resident status. *See Enrique v. Gonzales*, 411 F.3d 1079 (9th Cir. 2005); *Matter of Shanu*, 23 I&N Dec. 759 (BIA 2005).

3. **Aiding and Abetting**

On January 17, 2007, the United States Supreme Court held in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) that a theft offense under § 101(a)(43)(G) of the Act includes the crime of "aiding and abetting" a theft offense.

A driver who transports a group of illegal aliens from a drop-off point in the United States to another destination in the United States commits only the offense of transporting aliens within the United States and is not guilty of the additional offense of aiding and abetting the crime of "bringing to" the United States illegal aliens within the meaning of §§ 274(a)(1)(A)(ii) and 274(a)(2) of the Act, in violation of 18 U.S.C. § 2 (aiding and abetting);

the rationale being that the offense of bringing an alien(s) to the United States under § 274(a)(2) of the Act is a continuing offense that does not terminate until the initial transporter drops off the alien(s) at a location within the United States, overruling all Ninth Circuit precedent to the contrary. *See United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (*en banc*). *Urzua Covarrubias v. Gonzales*, 487 F.3d 742 (9th Cir. 2007) (citing *United States v. Lopez*, *supra*) similarly held that a violation of § 212(a)(6)(E)(i) of the Act for alien smuggling is a continuing violation, which does not end until the initial transporter who brings the alien(s) to the United States ceases to transport the alien(s).

Aiding and abetting an assault with a deadly weapon under CPC § 245(a)(1) is an aggravated felony under § 101(a)(43)(F) as a crime of violence. *See Ortiz-Magana v. Mukasey*, 523 F.3d 1042 (9th Cir. 2008).

Citing *United States v. Lopez, supra*, a Ninth Circuit panel held that the defendant aided and abetted a human smuggling conspiracy originated by a Canadian-based organization, by bringing an alien to the United States for purposes of financial gain, in violation of § 274(a)(2)(B)(ii)of the Act. *See United States v. Singh*, 532 F.3d 1053 (9th Cir. 2008).

While the well-established meaning of “aiding and abetting” in the criminal context requires the individual to associate himself/herself with the venture, that individual must participate in and seek to bring it about by actions designed to make it succeed. In this instant, the respondent’s acquiescence in her father’s decision to use her son’s U.S. birth certificate to smuggle two undocumented, alien minors into the U.S. does not constitute alien smuggling within the meaning of § 212(a)(6)(E)(i) of the

Act. By contrast, the dissent argues that the respondent actively assisted her father by explicitly agreeing that her father could use her son's birth certificate. That is, the respondent engaged in some affirmative conduct designed to aid in the success of the commission of a crime with knowledge that her actions would assist the perpetrator. *See Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204 (9th Cir. 2008).

The offense of aiding and abetting does not require that a non-principal acted for profit. Only the principals must be smuggling illegal aliens for profit. *See United States v. Lopez-Martinez*, 543 F.3d 509 (9th Cir.2008)

On August 20, 2008, the Ninth Circuit addressed the question left open in *United States v. Lopez, supra*: What actions render a co-conspirator criminally liable for an alien smuggling conspiracy for profit, even though there is no evidence that the conspirator committed an actual overt act of smuggling aliens across the border but other co-conspirators did so? The panel ruled that a reasonable jury could have determined that the defendants participated in a conspiracy to bring aliens from Mexico to the United States for financial gain, in violation of 18 U.S.C. § 371 and § 274(a)(1)(A) of the Act. However, relying on its *en banc* decision in *United States v. Lopez,* the panel concluded that the Government failed to establish that the defendants were criminally liable for two counts of "bringing to" the United States within the meaning of § 274(a)(2)(B)(ii) of the Act. With respect to the conspiracy counts, the panel ruled that the defendants violated 18 U.S.C. § 371, because the Government proved that: (1) defendant's entered into an agreement to engage in criminal activity; (2)

defendant's took one or more over acts to implement the agreement; and (3) defendants had the requisite intent to commit the crime to bring aliens from Mexico to the United States for financial gain. *See United States v. Hernandez-Orellana*, 539 F.3d 994 (9th Cir.2008).

An alien's conviction for aiding and abetting other aliens to evade and elude examination and inspection by immigration officers in violation of 18 U.S.C. § 2(a) (2006) and 8 U.S.C. § 1325(a)(2) (2006) establishes that the convicted alien is removable under § 237(a)(1)(E)(i) of the Immigration and Nationality Act. *Matter of Martinez-Serrano*, 25 I&N Dec. 151 (BIA 2009).

4. **Armed Career Criminal Act (ACCA)**

To be a predicate offense under the ACCA, 18 U.S.C. §924(e), the prior conviction must be a felony and satisfy the language of §924(e) plus the Federal sentencing guidelines under 18 U.S.C. §3559. *See United States v. Ladwig*, 432 F.3d 1001 (9th Cir. 2005). This decision also discusses the conviction documents which the Court can rely upon in identifying a generic crime such as burglary. A sentence for being a felon in possession of a firearm after three, prior drug-related felony convictions is considered to have been convicted of "serious drug offenses" for purposes of ACCA 18 U.S.C. § 922(g)(1), where Oregon statutory law prescribed the maximum term of 10 years for Class B felonies. *See United States v. Parry*, 479 F.3d 722 (9th Cir. 2007). On April 18, 2007, the United States Supreme Court held in *James v. United Sta*tes, 550 U.S. 192 (2007) that attempted burglary as defined by Florida law is a "violent felony" under the residual provision of 18 U.S.C. § 924(e)(2)(B)(ii) because ". . . the conduct encompassed by the elements of the offense, in the ordinary case,

presents a serious potential risk of injury to another." Thus, the 15-year mandatory minimum sentence provided by 18 U.S.C. § 924(e) for an armed defendant with three prior violent felony convictions satisfies the ACCA. Similarly, the ACCA applies to a firearm conviction of a felon in possession of a firearm where the defendant had four prior felonies. *See* *United States v. Crampton,* 510 F.3d 1108 (9th Cir. 2007). A substituted opinion which revised the facts was filed on March 8, 2008, which also states that the Federal felon in possession law prohibits possession of any firearm or ammunition under 18 U.S.C. § 922(g). *See* *United States v. Crampton*, 519 F.3d 893 (9th Cir. 2008). However, on February 4, 2008, citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), a panel of the Ninth Circuit concluded (2 to 1 vote) that the modified categorical approach could not be used to conform the defendant's conviction to the generic definition of a "violent felony" under the ACCA because his 2002 conviction under Washington law for eluding police is not a crime of violence. This was decided because such action does not invariably involve "conduct that presents a serious potential risk of physical injury to another." Hence he had only two, not three predicate offenses for purposes of the ACCA. *See United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008).

A conviction and sentence for being a felon in possession of a firearm and ammunition subjects a defendant to the residual clause of the ACCA where there is a prior conviction for first-degree burglary - a violent felony - and two prior drug convictions are considered serious drug offenses. *See United States v. Mayer*, 530 F.3d 1099 (9th Cir. 2008).

The Federal Gun Control Act of 1968, as amended, 18 U.S.C. § 921 et seq. prohibits possession of a firearm by any person convicted of a felony. In 1996 the Congress extended the prohibition to include persons convicted of "a misdemeanor crime of domestic violence." See 18 U.S.C. § 922(g)(9). The definition of "misdemeanor crime of domestic violence" is set forth at 18 U.S.C. § 921(a)(33)(A). On February 24, 2009, the Supreme Court held that, although the domestic relationship must be established beyond a reasonable doubt under the 18 U.S.C. § 922(g)(9) firearms possession prosecution, it need not be a defined element of the predicate offense, because 18 U.S.C. § 921(a)(3)(A) incorporates only two elements: 1) the use or attempted use of physical force or the threatened use of a deadly weapon; and 2) the offense must be committed by a person who has a specified domestic relationship with the victim. *See United States v. Hayes*, 129 S.Ct. 1079 (2009); and *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003).

5. **At Least One Year**

The phrase "at least one year" in § 101(a)(43) of the Act means 365 days, or a sentence of exactly one year. *See United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002); *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001); *see also Lagandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004).

6. **Concurrent Sentences**

Where an alien is convicted of two or more aggravated felonies with "concurrent sentences," the Court must consider the longest concurrent sentence for purposes of eligibility for § 241(b)(3) relief. *See Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999); INA § 241(b)(3)(B).

7. **Confinement**

Incarceration in a county jail constitutes “confinement” in a penal institution for purposes of the Act in general and §101(f)(7) of the Act in particular. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882 (9th Cir. 2005).

8. **Conviction**

The term “conviction” is defined in § 101(a)(48)(A) of the Act, and it includes a deferred adjudication under Article 42-12, § 5 of the Texas Code Criminal Procedure. *See Matter of Punu*, 22 I&N Dec. 224 (BIA 1998). However, an alien found guilty of a “violation” under §153.076 of the Oregon Revised Statutes does not have a “conviction” for purposes of §101(a)(48)(A) of the Act because a “violation” is not a “crime” under Oregon Law and the evidentiary standard for a “violation” is by a preponderance of the evidence as opposed to beyond a reasonable doubt. *See Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004). However, any fact that serves to increase the maximum penalty for a crime *and* that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, is to be treated as an element of the underlying offense, so that the conviction is for the enhanced offense. *See Matter of Martinez-Zapata,* 24 I&N Dec. 424 (BIA 2007).

A judgment of guilt that has been entered by a general court-martial of the U.S. Armed Forces is deemed a conviction within the meaning of § 101(a)(48)(A) of the Act. *See Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).

Section 101(a)(48)(A) of the Act expanded the definition of “conviction” by eliminating the third prong of *Matter of Ozkok*, 19 I&N Dec.

546 (BIA 1988). The intent of Congress is clear: an alien who has a deferred adjudication with a finding of guilt and a punishment, penalty, or restraint on liberty has been convicted of the offense, regardless of the possibility for further ameliorative criminal proceedings to affect that determination of guilt. Hence, where an alien has failed to timely appeal such conviction until after his removal order was administratively final, he is deemed to have a conviction for immigration purposes. *See Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009) (en banc).

9. **Crime**

This term is not defined in the Act despite frequent usage of the term in the context of criminal offenses described in the Act. “A crime may be defined to be any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public.” Black’s Law Dictionary 334 (5th ed. 1979); *but see Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003) (interpreting the meaning of the word “crime” in the “only one crime” proviso of § 212(a)(2)(A)(ii) of the Act (petty offense exception) to mean another crime involving moral turpitude).

However, for purposes of § 237(a)(2)(E)(i) of the Act, the term “crime of child abuse” means any offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503 at 503 (BIA 2008).

10. **Date of Admission**

The phrase “date of admission” in § 237(a)(2)(A)(i) of the Act refers, “among other things,” to the date on which a previously admitted alien is lawfully admitted for permanent residence by means of adjustment of status. *Matter of Shanu*, 23 I&N Dec. 759 (BIA 2005); *Perez-Enrique v. Gonzales*, 411 F.3d 1079 (9th Cir. 2005).

11. **Drug Trafficking Crime**

The phrase “drug trafficking crime” in § 101(a)(43)(B) of the Act is defined in 18 U.S.C. § 924(c) to mean any felony punishable under the CSA at 21 U.S.C. § 801 *et seq*. *See United States v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002); *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). The federal crime of attempted possession of a controlled substance with intent to sell encompasses the California-defined crime of purchasing cocaine base for purposes of sale under California Health and Safety Code § 11351.5, and this offense falls within the definition of a drug trafficking offense. *United States v. Morales-Perez*, 448 F.3d 1158 (9th Cir. 2006).

12. **Good Moral Character**

Sections 101(f)(1) and (3)-(8) of the Act delineate classes of aliens who cannot establish good moral character (GMC) for purposes of the Act. Additionally, the paragraph following § 101(f)(9) contains additional statutory qualifiers to establishing GMC. *See Ramos v. INS*, 246 F.3d 1246 (9th Cir. 2001) (An asylum applicant’s false statements made orally under oath to an asylum officer constitutes false statements within the meaning of § 101(f)(6) of the Act.); *Bernal v. INS*, 134 F.3d 1020 (9th Cir. 1998) (similar finding where applicant made false statements orally under oath during a

naturalization examination); *Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999) (same factual scenario as in *Ramos v. INS*, *supra*, and cited favorably by the BIA); *Kungys v. United States.*, 485 U.S. 759 (1989) (This provision only encompasses oral statements not written statements.). A Mexican national confined to county jail in California for 365 days because of a conviction for vehicular manslaughter while under the influence of alcohol, in violation of CPC §192(c)(3), cannot establish GMC under §101(f)(7) of the Act for purposes of §§240A(b)(1)and 240B of the Act. *See Gomez-Lopez v. Ashcroft,* 393 F.3d 882 (9th Cir. 2005). Note that an IJ may also find an alien ineligible for relief in the exercise of discretion, due to specific conduct that militates against a favorable exercise of discretion. *See Matter of Rojas,* 15 I&N Dec. 492 (BIA 1975); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967). Further, to establish GMC under § 240A(b)(1) of the Act, an alien must show GMC for a 10-year period calculated backwards from the date on which the relief application is finally resolved by the IJ or the BIA, *i.e.*, administratively final. *See Matter of Ortega*, 23 I&N Dec. 793 (BIA 2005).

The alien pled guilty to misprison of a felony in violation of 18 U.S.C. § 4 and was sentenced to 21 months imprisonment, plus one year of supervised release. However, she was given credit for 18 months imprisonment pre-trial detention. The issue here was whether her pre-trial detention is considered to be a confinement for purposes of § 101(f)(7) of the Act, which states that serving 180 days or more in a penal institution is a GMC crime. A panel of the Ninth Circuit held that for purposes of § 101(f)(7) of the Act, pre-trial detention which is later credited as time served

for purposes of the sentence imposed after conviction constitutes confinement within § 101(f)(7) of the Act*. See Arreguin-Moreno v. Mukasey,* 511 F.3d 1229 (9th Cir. 2008). An alien who has made a false claim to U.S. citizenship in the completion of a Form I-9 (Employment Eligibility Verification) to obtain employment *may* be considered a person of good moral character (GMC) under the Act. However, such a finding does not automatically mandate such a determination under the "catch all" provision at the end of §101(f) of the Act. Thus, such an alien *may* still meet her BOP under §240A(b)(1)(B) of the Act to establish that she is a person of GMC. *See Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008).

On March 26, 2009, in a en banc decision, the Ninth Circuit held that the alien smuggling waiver of inadmissibility under § 212(a)(6)(E) of the Act applies to § 240A(b)(1)(B) of the Act, which addresses cancellation of removal for certain nonlawful permanent residents. Specifically, § 212(d)(11) limits such a waiver to defined classes of aliens, not including aliens without legal status in the United States. Hence, the violation in question constitutes a lack of good moral character within the meaning of § 101(f)(3) of the Act. This decision overrules *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005). *See Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc).

A conviction for simple possession of a controlled substance which was expunged under a California rehabilitative statute cannot constitute an admission of a drug offense vis a vis § 101(f)(3) of the Act. *See Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009).

13. **Illicit Trafficking in a Controlled Substance**

The phrase "illicit trafficking in a controlled substance" in § 101(a)(43)(B) of the Act includes any State, Federal, or qualified foreign felony conviction involving the unlawful trading or dealing of any controlled substance as defined in 21 U.S.C. § 802. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), *modified by Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002) (whether the conviction qualifies depends upon the applicable Federal circuit court of appeals standard); *Matter of De La Cruz*, 20 I&N Dec. 346 (BIA 1991); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004) (A State drug offense is not an aggravated felony for immigration purposes unless it is punishable under the CSA or other Federal drug laws included in the definition of drug trafficking crime or is a crime involving a trafficking element.); *see also United States v. Martinez-Rodriguez*, 468 F.3d 1182 (9th Cir. 2006) (Conviction for possession of marijuana for sale under CH & SC §11359 is a drug trafficking offense for sentencing purposes), *superseded and amended*, 472 F.3d 1087 (same result).

14. **Indeterminate Sentence**

An "indeterminate sentence," which is a sentence with a minimum term and a maximum term is deemed a sentence for the maximum term of imprisonment imposed by the Court. *In Matter of S-S-*, 21 I&N Dec. 900, 903 (BIA 1997), a suspended sentence for a prison term not to exceed five years under Iowa law was found to be a sentence for the maximum term imposed. In *Matter of D-*, 20 I&N Dec. 827, 829 (BIA 1994), the BIA similarly construed indeterminate sentences of four to seven years under

Massachusetts law as sentences for the maximum number of years imposed.

15. **“Knowingly” in Criminal Statutes**

In the context of criminal statutes, the term “knowingly” is not limited to positive knowledge. It includes the “. . . state of mind of one who does not possess positive knowledge only because he consciously avoided it.” To satisfy this element of a criminal offense, the defendant must have *deliberately* avoided learning the truth, such as where he failed to investigate the facts. *See United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc).

The crime of aggravated identity theft under 18 U.S.C. § 1828A(a)(1) requires “proof” that, among other things, the defendant - a Mexican national with no status in the United States - “knew” that the I-551 alien registration card in his possession when coming to the United States by vehicle from Mexico belonged to another person. It was not enough to prove only that the defendant knew he was using a false document. *See United States v. Miranda-Lopez,* 532 F.3d 1034 (9th Cir. 2008).

Similarly, the Supreme Court held on May 4, 2009, that to violate 18 U.S.C. Sec. 1028A (a)(1), the government must show that the alien-defendant "knew" that the numbers on his counterfeit Social Security and I-551 cards were assigned to other people. *See Flores-Figueroa v. Unites States*, 129 S.Ct. 1886 (2009).

16. **Physical presence for purposes of possession of a firearm**

With regard to possession of a firearm by a person illegally or unlawfully in the United States, an alien's physical presence in a port of entry does not satisfy the element of the crime of being illegally or unlawfully in the United States. *United States v. Lopez-Perera*, 438 F.3d 932 (9th Cir. 2006).

17. **Sentence**

"Term of imprisonment" and "sentence" are similarly defined in § 101(a)(48)(B) of the Act. *See United States of America v. Echavarria-Escobar*, 270 F.3d 1265 (9th Cir. 2001) (The "term of imprisonment" language in the Act includes those sentences actually imposed, even if subsequently suspended.); *Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997). The United States Sentencing Guidelines (USSG), which implement 18 U.S.C. § 3551 et seq., and are promulgated by the United States Sentencing Commission (Commission) in the United States Sentencing Guidelines Manual (Manual) dictate a range/level of punishment to be imposed by United States District Courts in sentencing convicted criminal defendants. In 2003, the Manual was amended by the Commission to mandate that, for sentence enhancement purposes, a prior sentence of imprisonment can only serve as a predicate conviction if the defendant actually served a period of imprisonment on the sentence. As a consequence, a previously deported/removed criminal alien who is subsequently prosecuted in Federal court for being an illegal alien found in the United States thereafter is *not* subject to sentence enhancement *if* the predicate conviction did not result in *any* period of imprisonment, *i.e.*, the

entire sentence was suspended. *See United States v. Alvarez-Hernandez*, 478 F.3d 1060 (9th Cir. 2007) (and citations therein by other Federal Courts of Appeal); *United States v. Ruiz-Chairez*, 493 F.3d 1089 (9th Cir. 2007) (Punishing an illegal reentrant for violating § 276(a) of the Act with a 16-level sentence enhancement under the Manual due to prior felony convictions for drug trafficking and domestic violence did not violate his equal protection rights because his sentence enhancement served a legitimate governmental interest and had a rational basis for deterring illegal reentry by those who had committed drug-related and violent crimes). *See United States v. Olmos-Esparza*, 484 F.3d 1111 (9th Cir. 2007) (holding that § 2L1.2 of the 2003 USSG contains *no time limitation* on the age of the convictions for purposes of calculating sentencing enhancements). Moreover, because recidivism does not relate to the commission of the offense, an IJ may include time served under a recidivist statute or any other sentencing enhancement when considering an alien's eligibility for relief under former § 212(c) of the Act. The rationale is that the IJ focus is on calculating the *amount* of time served in relation to felony convictions *not* the nature of the prior convictions. Therefore, the categorical/modified categorical analysis of each offense under *Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004) and *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (citing *Taylor v. United States*, 495 U.S. 575 (1990)) is not relevant to this determination. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007).

The defendant appealed his 120 months' imprisonment and 15 years of supervised release, after having pled guilty to coercing and enticing a

minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) and possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). A panel of the Ninth Circuit affirmed a two-level enhancement for misrepresentation of identity and for his conduct in seeking to coerce and entice a minor to engage in sexual activity and for possession of child pornography. *See United States v. Holt*, 510 F.3d 1007 (9th Cir. 2007).

However, a sentence for being an illegal alien found in the United States after a prior deportation cannot include the cost to society of imprisoning him as a factor to be considered in determining the appropriate length of his term of imprisonment under 18 U.S.C. § 3553(a) and § 3582(a). *See United States v. Tapia-Romero*, 523 F.3d 1125 (9th Cir. 2008).

A defendant's statement in his plea agreement admitting he made a false statement to a Federal official was properly used in calculating his sentence because this admission established the more serious offense of illegal reentry following his prior removal. *See United States v. Gutierrez, 559 F.3d 1088 (9th Cir. 2009).*

Respondent’s 46 month sentence for reentering the United States following his prior removal for assault with a firearm, a felony at the lower end of the Guidelines, is affirmed, because a crime of violence need not be an aggravated felony to qualify for a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii). *See United States v. Diaz-Argueta*, 564 F.3d 1047 (9th Cir. 2009) (citing *United States v. Pimentel-Flores*, 339 F.3d 959, 960-61 (9th Cir. 2003)).

18. **Prostitution**

A single act of solicitation of prostitution on one's own behalf does not violate § 212(a)(2)(D)(ii) of the Act, even if the offense was committed multiple times. The same is true for a conviction for disorderly conduct relating to prostitution under CPC § 647(b). *See Matter of Gonzalez-Zoquiapan,* 24 I&N Dec. 549 (BIA 2008).

Where a defendant enters into a plea agreement revealing that she imported a minor for purposes of prostitution, her offense is deemed a "specified offense against a minor" and thus she is a sex offender within the meaning of § 278 of the Act. *See United States v. Byun*, 539 F.3d 982 (9th Cir.2008)

19. **Term of Imprisonment**

The phrase "term of imprisonment" in § 101(a)(43) of the Act means the actual sentence imposed by the judge. *See United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001); and *Alberto-Gonzalez v. INS*, 215 F.3d 906 (9th Cir. 2000).

However, the term "maximum penalty possible" at § 212(a)(2)(A)(ii)(II) of the Act (petty offense exception) refers to the statutory maximum, *not* the maximum guideline sentence to which the alien was exposed under 18 U.S.C. § 201. *See Mendez-Mendez v. Mukasey*, 525 F.3d 828 (9th Cir. 2008).

20. **Undesignated Probationary Sentence**

An "undesignated probationary sentence," unlike an indeterminate sentence, is not a felony where the court has designated it a misdemeanor.

See LaFarga v. INS, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

B. **Crime of Violence**

Determining whether a criminal conviction is a crime of violence for purposes of Immigration Court proceedings requires a two-step analysis.

1. **Section 101(a)(43)(F)**

First, § 101(a)(43)(F) of the Act states that the definition of aggravated felony includes a crime of violence as defined in 18 U.S.C. § 16 for which the term of imprisonment imposed is at least one year. *See Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997) (Terrorism under Iowa Code Ann. § 708.6, shooting/discharging a firearm at or into a building where there are people or threatening to do so is a crime of violence under18 U.S.C. § 16(b)); and second, the term “crime of violence” is defined at 18 U.S.C. § 16 as:

a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. *See Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).

2. **Other Considerations: mens rea element**

On November 9, 2004, the United States Supreme Court held that an LPR convicted in year 2000 of driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)(2)(2003), was not subject to removal pursuant to § 237(a)(2)(A)(iii) of the Act, vis-a-vis §101(a)(43)(F) of the Act. This was true because State DUI offenses such as Florida's statute, which do not have a *mens rea* element or require only a showing of negligence in the operation of a vehicle, are not crimes of violence under 18 U.S.C. §16. Further, the Supreme Court held that both subsection (a) and (b) of 18 U.S.C. §16 contain the same legislative formulation: the use of physical force against another's person or property. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004).

3. **State DUI Convictions in Light of *Leocal***

a) Arizona aggravated DUI & felony endangerment

In *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), an aggravated DUI under ARS § 28-697(a)(2) was found not to be a crime involving moral

turpitude (CIMT) since there was no culpable mental state requirement in the criminal statute. (distinguishing *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 2000)). This decision did not directly address whether aggravated DUI under the Arizona statute is a crime of violence, whereas the concurring and dissenting opinions take opposite positions on whether the conviction in question is a crime of violence. *See United States v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002). There, a felony endangerment conviction under ARS § 13-1201 for driving under the influence in a vehicle missing its right front tire and with the driver's four minor children as passengers is not an aggravated felony within the meaning of 18 U.S.C. § 16(b) vis-a-vis § 101(a)(43)(F) of the Act. This was the conclusion because a "substantial risk of imminent death or physical injury" is not the same thing as a "substantial risk that physical force may be used." *See id (*citing *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001)) and holding that the offense must "require recklessness as to, or conscious disregard of, a risk that physical force will be used against another, not merely the risk that another might be injured."

b) California DUI

In *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001), a violation of California Vehicle Code (CVC) § 23153 (driving under the influence of alcohol with bodily injury) was not a crime of violence, because the statute encompasses conduct that is merely negligent; whereas, 18 U.S.C. § 16 requires a volitional act, as opposed to mere negligence. *See also United States v. Portillo-Mendoza*, 273 F.3d 1224 (9th Cir. 2001)(use of force requires a volitional act; cites *Trinidad-Aquino* as authority, despite

five convictions for DUI); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (citing *Trinidad-Aquino*, the Ninth Circuit ruled that a California conviction for DUI under § 23152(a) of the CVC, a statute providing enhanced penalties for multiple convictions, is not a crime of violence).

c) BIA Decision

Again, citing *Trinidad-Aquino* and similar decisions from three other circuits, the BIA overruled *Matter of Puente*, 22 I&N Dec. 1006 (BIA 1999), and *Matter of Magallanes*, 22 I&N Dec.1 (BIA 1998), in *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002), holding that, for a DUI offense to be considered a crime of violence; it must be committed at least recklessly and involve a substantial risk that the perpetrator may resort to the use of force to carry out the crime.

d) Nevada DUI

A criminal conviction for the offense of driving while intoxicated/under the influence in violation of NRS §§ 484.379 or 484.3795 is not a crime of violence subject to § 101(a)(43)(F) of the Act, in light of the recent Supreme Court decision and the BIA and Ninth Circuit decisions cited above. *See Bhatti v. INS*, 22 Fed.Appx. 770 (9th Cir. 2001, unpublished) (citing *Trinidad-Aquino* and finding that CVC § 23153, like NRS § 484.379, can be violated through negligence; hence such a violation is not a crime of violence under §101(a)(43)(F) of the Act).

e) Gross Vehicular Manslaughter

On May 23, 2005, the Ninth Circuit in *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005), ruled that the offense of gross vehicular

manslaughter while intoxicated, in violation of CPC § 191.5(a), is not a crime of violence because gross negligence is still negligence, however flagrant, and there is no requirement in the statute that the defendant intentionally used his vehicle to inflict injury. The Court noted that under *Leocal*, the defendant must actively employ force against another to violate 18 U.S.C. § 16. *See* **Attachment 5.**

C. **CIMTs**

Determining whether a criminal conviction is a CIMT for purposes of U.S. Immigration Court proceedings requires an analysis of the statute under which the alien has been convicted (as opposed to the alien's conduct that resulted in the conviction). *See Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993); *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

1. **CIMT Defined**

Historically, a CIMT has been generally defined as an act of baseness, vileness, or the depravity in private and social duties which one person owes to another, or to society in general, contrary to accepted and customary rule of right and duty between people." Black's Law Dictionary 1008 (8th ed. 2004). *In Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), the BIA stated that the phrase "CIMT" is a matter of Federal law for immigration purposes, which "refers generally to conduct that is inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or society in general . . ." Under this standard, the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society. Furthermore, although crimes involving moral turpitude often

involve an evil intent, a specific intent is not a prerequisite to finding that a crime involves moral turpitude . . .” *Id.* at 83; *see also Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (Neither the seriousness of the offense nor the severity of the sentence imposed is determinative as to whether the crime is a CIMT.). On April 2, 2007, the BIA found the offense of trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320(a) to be a CIMT because: (1) this offense is *analogous* to the offense of uttering or selling false or counterfeit papers relating to the registry of aliens under 18 U.S.C. § 1426(b); (2) both crimes require proof of an *intent* to traffic *and knowledge* that the items/objects are counterfeit; and (3) both crimes result in significant societal harm. *See Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007). As characterized by the Ninth Circuit, CIMTs are of essentially two types: those offenses characterized by grave acts of baseness or depravity and those involving fraud. *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007)(en banc). To fall under the second category, the crime must involve knowingly false representations made to gain something of value. A violation of CPC § 350(a) for willfully manufacturing, intentionally selling, or knowingly possessing for sale any counterfeit mark is a CIMT because the conduct in question is inherently fraudulent and thus involves knowingly false representations made in order to gain something of value. *See Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008).

On September 19, 2007, an *en banc* panel of the Ninth Circuit held that for a crime to be a CIMT, the generic definition imposes two elements:

a) base, vile, or depraved conduct; *and*

b) the conduct violates accepted moral standards.

Moreover, crimes involving fraud are not a *per se* category of CIMTs. In the case at bar, a violation of CPC § 32, involving the crime of accessory after the fact is *not* a CIMT, because conduct underlying an accessory after the fact conviction "does not necessarily involve conduct that involves baseness or depravity." Indeed § 32 of the CPC includes a potential set of crimes broader than the generic definition of a CIMT. *See Navarro-Lopez v. Gonzales*, 503 F.3d1063 (9th Cir. 2007) (en banc).

On October 9, 2007, a divided, three-member panel of the Ninth Circuit, citing *Navarro-Lopez v. Gonzales*, *supra*, added a third element for a crime to be a CIMT; it must be done, "willfully or with evil intent . . . ." *Quintero-Salazar v. Keisler,* 506 F.3d 688 (9th Cir. 2007). Factually, in 1998 the alien plead *nolo contendere* to contributing to the delinquency of a minor by engaging in intercourse with a female under the age of 16,whereas, the alien was over 21 years. The divided panel concluded that the conduct of the alien was statutorily prohibited rather then inherently wrong; hence, it was not a CIMT. It is unclear if this divided panel decision is consistent or inconsistent with *Navarro-Lopez v. Gonzales*, *supra*.

On November 7, 2008, the Attorney General of the United States (AG) issued a new CIMT standard establishing for the BIA and IJs an administrative framework for determining whether an alien has been convicted of a CIMT in *Matter of Silva-Trevino*. However, the decision was not available until November 19, 2008. Citing *Nat'l Cable &Telecomms.*

Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), as authority, the AG established a three-step approach for analyzing CIMTs:

> a) First, look to the statute of conviction under the categorical inquiry to determine whether there is a realistic probability—not a theoretical possibility—that the State or Federal criminal statute at issue would be applied to reach conduct that does not involve moral turpitude.
>
> b) If the categorical inquiry does not resolve the question, then engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment or information, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript.
>
> **c)** If the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the CIMT issue**.**

In making this three-step analysis, the adjudicator may depart from *Taylor v. United States*, 495 U.S. 13 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), because "moral turpitude" is a non-element aggravating factor that stands apart from the elements of the criminal offense. Here, the alien was convicted of indecency with a child in violation of Texas Penal Code § 21.11(a)(1), a second-degree felony punishable by a 2- to 20-year term of imprisonment. The AG stated that, to qualify as a

CIMT for the purposes of the Act, the crime must involve reprehensible conduct and some degree of scienter, including: specific intent, deliberateness, willfulness, or recklessness. Here, the AG concluded that the adjudicator must make an inquiry regarding the alien's knowledge of the victim's age, and that the burden of proof is on the alien to establish "clearly and beyond doubt" that he is not inadmissible within the meaning of § 240(c)(2)(A) of the Act. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

The lack of a specific intent requirement in 18 U.S.C. § 2252(a)(5)(B), which bars "knowing" as opposed to willful possession of child pornography, constitutes a CIMT where "such intent is implicit in the nature of the crime." *See Gonzales-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994); *Navarro-Lopez v. Gonzales*, 503 F.3d 1062, 1074 (9th Cir. 2007) (en banc); *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997 (9th Cir. 2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Thus, the alien's naturalization could be revoked by the United States District Court where during the five-year period before the alien applied for naturalization the alien was not a person of good moral character because of his 2001 conviction for possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B). *See United States v. Santacruz*, 563 F.3d 894 (9th Cir. 2009) (per curiam).

2. **Charge of Removability**

An alien charged with a CIMT is inadmissible under § 212(a)(2)(A)(i)(I) or deportable under § 237(a)(2)(A)(i) of the Act. *But see Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004) (relying on *United States v.*

Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2000) (en banc), holding that a felony conviction for petty theft with a prior conviction for burglary in violation of CPC §§ 484, 488, and 666 is not a crime for which a sentence of one year or longer may be imposed within the meaning of § 237(a)(2)(A)(i)(II) of the Act). An alien convicted of a CIMT under § 237(a)(2)(A)(i) of the Act is ineligible for § 240A(b)(1) relief, regardless of his status as an arriving alien or his eligibility for a petty offense exception under § 212(a)(2)(A)(ii)(II) of the Act. *See Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009); *see also* REAL ID Act of 2005.

3. **GMC/CIMT**

A person can be of GMC for ten years before applying for § 240A(b)(1) relief and yet have committed a CIMT more than ten years earlier, which bars the alien from such relief under § 240A(b)(1)(C), because that provision does not place any time limitation on when the crime was committed. *See Flores Juarez v. Mukasey*, 530 F.3d 1020 (9th Cir. 2008). *See* **Attachment 6.**

D. ***Procedural Requirements in Representing Criminal Aliens in Removal Proceedings.***

Nevada criminal lawyers should be aware of certain procedural requirements in representing criminal aliens in removal proceedings before the United States Immigration Court.

1. **Open to the Public**

With certain exceptions, hearings are open to the public. *See* 8 C.F.R. §1003.27.

2. **Right to Obtain Counsel**

The alien must be advised by the Court as to his right to obtain counsel, but at no expense to the Government of the United States, and given a reasonable opportunity to obtain counsel. Indeed, the right to counsel in removal proceedings is derived from the due process clause of the Fifth Amendment, and §§ 240(b)(4)(A) and 292 of the Act; hence, for an alien to appear *pro se*, there must be a knowing and voluntary waiver of the right to counsel by the alien before the IJ to satisfy these constitutional and statutory requirements. Indeed, in an April 14, 2005 decision, the Ninth Circuit emphasized that if the alien does not affirmatively waive his right to counsel, the IJ must inquire whether there is a good cause to grant the alien more time to obtain counsel. In this case, the Ninth Circuit found that allowing a detained alien only five working days to obtain counsel prejudiced the alien. *See Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005). Similarly, when the IJ banned an entire law firm from representing the aliens at their deportation proceedings the aliens were prejudiced by the denial of their right to counsel of their choice. *See Baltazar-Alcazar v. INS*, 386 F.3d 940 (9th Cir. 2004); *Tawadrus v. Ashcroft*, 364 F.3d 1099 (9th Cir. 2004); *United States v. Ahumada-Aguilar*, 295 F.3d 943 (9th Cir. 2002); *Rios-Berrios v. INS*, 776 F.3d 859, 862-63 (9th Cir.1985) (IJ must provide alien with reasonable time to obtain counsel *and* permit counsel to prepare for the hearing); *Matter of Michel*, 21 I&N Dec.1101 (BIA 1998). Further, where retained counsel for the alien is not present for the merits hearing and the alien verbally requests a continuance for the assistance of his counsel, the IJ committed prejudicial error and violated the alien's right to counsel by proceeding with the merits hearing without the presence of the

alien's counsel. *See Hernandez-Gil v. Gonzales*, 476 F.3d 803 (9th Cir. 2007); *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074 (9th Cir. 2007) (The IJ must take reasonable steps to ensure that the alien's right to counsel is honored.).

There was no ineffective assistance of counsel and an alien's due process rights were not violated by his lawyer's performance, because a lawyer in his counsel's position could have reasonably made the tactical decision to concede his client's alienage. *See Torres-Chavez v. Holder*, 567 F.3d 1096 (9th Cir. 2009).

Although there is no Sixth Amendment right to counsel in immigration proceedings it is encompassed within the Fifth Amendment guarantee of due process. As such IJs must:(1) inquire whether the alien wants counsel; (2) determine a reasonable period for obtaining counsel; and (3) assess whether any waiver of the right to counsel is knowing and voluntary. If the alien does not affirmatively waive his right to counsel, the IJ must inquire whether there is good cause to grant the alien more time to obtain counsel. To demonstrate prejudice and thus a denial of due process, the alien must demonstrate that the denial of his right to counsel potentially affected the outcome of the proceedings. *See Ram v. Mukasey*, 529 F.3d 1238 (9th Cir. 2008) (citing *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005)).

On January 7, 2009, the Attorney General ruled that aliens in removal proceedings have no right to counsel, including Government-appointed counsel, under the Sixth Amendment to the Constitution, because the Sixth Amendment applies only to criminal proceedings, whereas removal proceedings are civil in nature. *See Matter of Compean*, 24 I&N Dec. 710

(A.G. 2009). However, on June 3, 2009, Attorney General Eric Holder vacated these decisions pending the outcome of a rulemaking process and reinstated *Matter of Lozado, supra*, and *Matter of Assad, supra*. *See Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009).

3. **Document Translations**

Foreign language documents must be translated completely into English by a competent translator who has certified the completeness and accuracy of the translations. *See* 8 C.F.R. § 1003.33.

4. **Interpreters**

The Court must furnish interpreters for all, non-English speaking respondents and witnesses to interpret in a competent manner throughout the proceedings. *See Hartooni v. INS*, 21 F.3d 336 (9th Cir. 1994); *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980); *but see Khan v. Ashcroft,* 374 F.3d 825 (9th Cir. 2004) (hearing notice in English complied with Due Process Clause). Moreover, due process requires that an alien in removal proceedings be given competent interpretation services. *See He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003).[11]

5. **Authentication of Foreign, Public Documents**

In removal proceedings in the context of asylum-based relief, a panel of the Ninth Circuit, with a dissent, held on November 27, 2007, that an alien in proceedings may seek to authenticate a foreign, public document "by any established means - including through the petitioner's own testimony if consistent with the Federal Rules of Evidence - - and therefore

[11] Although the Ninth Circuit uses the term "translation services" in this case, the decision pertains to interpretation services. *See* 8 C.F.R. § 1003.33.

the IJ erred in requiring official certification." In the instant case, the three documents were: a 1999 letter allegedly from the Armenian Ministry of Internal Affairs and National Security; a 1999 death certificate of the alien's son; and a 2000 letter allegedly from the Ministry of Internal Affairs. In its analysis, the majority of the panel conceded that the established methods for authentication of foreign, public documents include: a government certification under 8 C.F.R. § 287.6(c); compliance with Fed. R. Civ. P. 44(a)(2); or Fed. R. Evid. 902(3). The majority of the panel then clarified that an alien could legitimately resort to any recognized procedure for such authentication, including those permitted under Fed. R. Evid. 901. The majority of the panel then noted that Fed. R. Civ. P. 44(a)(2) provides a reasonable opportunity to the parties to investigate the authenticity and accuracy of foreign, official documents. The majority of the panel relied primarily on the language of Fed. R. Evid. 902 (self-authentication) and Fed. R. Evid. 901 (authentication can be satisfied by . . . "evidence sufficient to support a finding that the matter in question is what its proponent claims"). Finally, the majority opinion concluded that, "we hold as a matter of law only that the IJ must consider Vatyan's testimony as evidence that is relevant to the issue of the document's authenticity." However, in footnote 4 to the opinion, the majority stated in pertinent part that, ". . . the IJ as the trier of fact retains discretion to weigh 'the evidence's credibility and probative force'." The dissent noted that the issue here was not whether the alien's testimony was sufficient to authenticate the documents, but rather that the IJ did not believe the alien's testimony. *See Vatyan v. Mukasey*, 508 F.3d 1179 (9th Cir. 2007).

6. **Civil Proceedings**

Deportation and removal proceedings are civil in nature. Thus, they are not subject to the full panoply of procedural safeguards accompanying criminal proceedings, including the right to counsel under the Sixth Amendment to the United States Constitution. “Instead, the extent to which aliens are entitled to effective assistance of counsel during these proceedings is governed by the Fifth Amendment due process right to a fair hearing . . . to establish a due process violation, the petitioners must make two showings: (1) the alleged ineffective assistance rendered ‘the proceeding . . . so fundamentally unfair that [they were] prevented from reasonably presenting [their] case,’ *Iturribarria*, 321 F.3d at 899; and (2) ‘substantial prejudice,’ which is ‘essentially a demonstration that the alleged violation affected the outcome of the proceedings,’ *Lata v. INS*, 204 F.3d 1231, 1246 (9th Cir. 2000).” *Lara-Torres v. Ashcroft*, 383 F.3d 968 (9th Cir. 2004), *amended*, 404 F.3d 1105 (9th Cir. 2005); *see also Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (Counsel for the alien was “woefully unprepared” to present the alien’s case and the quality of her representation denied the alien his Fifth Amendment due process right to a full and fair hearing.). Thus, absent egregious conduct by counsel, an alien is bound by the representations made by his/her counsel in the United States Immigration Court. *See Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986); *Garcia v. INS*, 222 F.3d 1208 (9th Cir. 2000); *Magallanes-Damian* v. INS 783 F.2d 931 (9th Cir. 1986). Because immigration proceedings are civil in nature, *i.e.*, quasi-judicial administrative proceedings, the doctrine of collateral estoppel – which precludes the relitigation of an issue of fact or law essential to the judgment in a subsequent action – is inapplicable to

prior State or Federal criminal proceedings because the burden of proof differs between civil immigration proceedings and criminal proceedings. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 364 (1984); *United States v. Meza-Soria*, 935 F.2d 166, 168-69 (9th Cir. 1991). Moreover, a prior deportation order may not be attacked at a subsequent hearing unless there was a gross miscarriage of justice in the prior proceedings. *See Hernandez-Almanza v. United States*, 547 F.2d 100 (9th Cir. 1976); *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000) (The alien has the burden of proof to demonstrate that an exceptional situation exists to warrant reopening by the BIA on its own motion.).

7. **Notice**

Personal service of a hearing notice on the alien's attorney is deemed notice on the alien. *See Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986); *Garcia v. INS*, 222 F.3d 1208 (9th Cir. 2000); *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986). Similarly, service by the Court of an order of removal on the alien's attorney of record, including permission to depart the United States voluntarily, constitutes notice to the alien of the order and adequate notice to her of the penalties for failure to depart the United States timely under §240B(b) of the Act. *See DeMartinez v. Ashcroft*, 363 F.3d 1022, 1025-1028 (9th Cir. 2004).

8. **Ineffective Assistance of Counsel**

Although aliens in removal proceedings have a statutory right to retain private counsel, it is at no expense to the Government, because this right is encompassed by the Fifth Amendment to the Constitution, *not* the Sixth Amendment. The DOJ may, as a matter of administrative grace,

reopen proceedings where an alien demonstrates that he was prejudiced by the actions of his counsel. Because there is a strong public interest in ensuring that an attorney's deficiencies do not affirmatively undermine the fairness and accuracy of the proceedings, these interests justify the BIA allowing the proceedings to be reopened where the lawyer's deficient performance likely changed the outcome of the proceedings. *See Matter of Compean*, 24 I&N Dec. 710 (AG 2009). However, on June 3, 2009, Attorney General Eric Holder vacated these decisions pending the outcome of a rulemaking process and reinstated *Matter of Lozado, supra*, and *Matter of Assad, supra*. *See Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009).

The Ninth Circuit has held in *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003), that counsel's failure to inform his alien client of the immigration consequences of his guilty plea did not constitute ineffective assistance of counsel. Similarly, in *Reyes v. Ashcroft,* 348 F.3d 1126 (9th Cir. 2003), the Ninth Circuit ruled that the alien's failure to file an affidavit detailing his complaints against his attorney did not comply with *Lozada*. However, in *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) and *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004), the Ninth Circuit ruled that equitable tolling of EOIR regulatory deadlines is required when the alien was prevented from filing timely due to deception, fraud, or error by prior counsel, so long as the alien acts with "due diligence" in discovering the deception, fraud or error. Further, in *Siong v. INS,* 376 F.3d 1030 (9th Cir. 2004), the Court ruled that where the alien demonstrated prejudice, *i.e.*, plausible grounds for relief (due to his former counsel's failure to timely file a notice of appeal), the alien was entitled to have his motion to reopen deportation proceedings

granted by the BIA. *See Lara-Torres v. Ashcroft*, 383 F.3d 968 (9th Cir. 2004) *amended*, 404 F.3d 1105 (9th Cir. 2005). On May 12, 2005, the Ninth Circuit ruled in *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) that prior defense counsel for an LPR provided "ineffective assistance of counsel" for purposes of a writ of *coram nobis*, when counsel informed the alien that he was not pleading guilty to a removable offense when in fact the alien had pled guilty to an offense which subsequently constituted an aggravated felony for immigration purposes as a result of the retroactive change in the definition of aggravated felony under IIRIRA.

On January 23, 2007, the Ninth Circuit reiterated its prior conclusion that equitable tolling of the time limits for motions to reopen is only available if diligence is shown, and "the party's ignorance of the necessary information must have been caused by circumstances beyond the party's control." *See Valeriano v. Gonzales*, 474 F.3d 669, 673 (9th Cir. 2007).

On November 19, 2007, the Ninth Circuit again addressed the issue of ineffective assistance of counsel in the context of a motion to reopen, citing numerous, earlier Ninth Circuit cases. In the case at bar the Court ruled that an Armenian asylum applicant had demonstrated ineffective assistance by former counsel, arguing that she was denied meaningful review and thus was entitled to a presumption of prejudice. *See Grigoryan v. Keisler*, 507 F.3d 1206 (9th Cir. 2007); *Grigoryan v. Mukasey*, 527 F.3d 791 (9th Cir. 2008).

Once again, on January 24, 2008, a panel of the Ninth Circuit ruled that an alien had established ineffective assistance by her prior counsel under *Matter of Lozada, supra*, even though she did not inform her counsel

of the accusations or file a bar complaint, because the attorney was suspended from the practice of law by California 12 days after the alien's Immigration Court hearing. Similarly, the alien established prejudice for purposes of her motion to reopen her removal proceedings, because she needed only to show "plausible grounds for relief . . . ." Here, she argued in her motion that the disbarred attorney's performance prevented her from presenting evidence to establish her eligibility for § 240A(b)(1) relief. *See Apolinar v. Mukasey,* 514 F.3d 893 (9th Cir. 2008).

However, on April 30, 2008, the Ninth Circuit held that "knowing reliance upon the advise of a non-attorney cannot support a claim for ineffective assistance of counsel in a removal proceeding." *See Hernandez v. Mukasey*, 524 F.3d 1014 (9th Cir. 2008). The alien's motion to reopen removal proceedings based on ineffective assistance of his prior counsel is granted where said counsel informed the alien before a master calendar hearing in the Immigration Court that counsel would withdraw as his attorney of record unless the alien accepted voluntary departure in lieu of submitting an asylum application before the IJ; this was a violation of the alien's right to due process of law. *See Nehad v. Mukasey*, 535 F.3d 962 (9th Cir.2008)

While an alien in removal proceedings has a right to due process of law under the Fifth Amendment to effective assistance of counsel, this right does not extend beyond the fairness of the hearing itself. The alien's prior counsel failed to timely file a visa petition with a § 245(i) waiver attached by the statutory deadline of April 30, 2001, but the alien was not placed in removal proceedings until May 10, 2004. Hence, the prior counsel's

deficiency did not relate to the substance of the subsequent removal proceedings against the alien. *Balam-Chuc v. Mukasey,* 547 F.3d 1044 (9th Cir.2008)

Citing earlier decisions included in this section, a Ninth Circuit panel held that ineffective assistance of counsel occurred when an alien's two prior attorneys unreasonably failed to investigate and present the factual and legal bases of the alien's claim(s). *See Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008).

Despite the petitioner falling short of the strict requirements for establishing ineffective assistance of counsel, she acted diligently in retaining new counsel and she is therefore entitled to the bnefit of the equitable tolling doctrine. *See Sun v. Mukasey, 555 F.3d 802 (9th Cir. 2009).*

An alien's due process rights were not violated by his lawyer's performance, because a lawyer in his counsel's position could have reasonably made the tactical decision to concede his client's alienage. Thus, there was no ineffective assistance of counsel. See *Torres-Chavez v. Holder*, 567 F.3d 1096 (9th Cir. 2009).

9. **Professional Conduct**

Professional conduct for practitioners in the Court is governed by EOIR regulations.[12] Moreover, an attorney who practices before the BIA, the Court, or DHS must be a member in good standing of a State bar. *See* 8 C.F.R. §§ 1003.101 - 1003.109; *Matter of Godda*, 23 I&N Dec. 645 (BIA

[12] 8 C.F.R. § 1001.1(f) defines "attorney" to mean a person who is a member in goodstanding of the Bar of the highest court of any "state, possession, territory, commonwealth, or theDistrict of Columbia . . . ."

2003). Further, a disbarment order issued against a practitioner by the highest court of a State creates a rebuttable presumption that disciplinary sanctions should follow as to practice before the Court, the BIA, and DHS. *See Matter of Ramos*, 23 I&N Dec. 843 (BIA 2005).

An attorney who knowingly made a false statement of material fact or law *or* who willfully misled the CIS by presenting an improperly obtained, certified labor certification application from the United States Department of Labor is subject to discipline by the BIA for a violation of 8 C.F.R. § 1292.3(b). *See Matter of Shah*, 24 I&N Dec. 282 (BIA 2007).

In another case, a motion for reinstatement before EOIR and DHS was denied, because the reinstated New York attorney failed to demonstrate by clear, unequivocal, and convincing evidence that he possessed the moral and professional qualifications to be reinstated to such practice and that his restatement would not be detrimental to the administration of justice, pursuant to 8 C.F.R. § 1003.107(b)(1). *See Matter of Krivonos,* 24 I&N Dec. 292 (BIA 2007).

Similarly, in *Matter of Jean-Joseph,* 24 I&N Dec. 294 (BIA 2007), a different panel of the BIA held that a previously-suspended Florida attorney who was reinstated by the Florida bar should be suspended for 120 days, because he appeared as counsel in at least five separate proceedings before the Miami Immigration Court while he was suspended from practice before the immigration courts. *See also Matter of Rosenberg*, 24 I&N Dec. 744 (BIA 2009).

10. **Pre-sentence Reports**

Pre-sentence reports (PSR) issued by the Nevada Department of Public Safety's Division of Parole and Probation are available to DHS. *See* NRS § 176.156(2). However, an IJ may not use a PSR to determine whether the alien's offense qualifies as an aggravated felony supporting the alien's removability from the United States. *See Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) *(en banc*); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883 (9th Cir. 2003); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003)). This would involve use of the categorical/modified categorical approach/analysis under *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) to determine whether a criminal offense satisfies a specific ground of removal under the Act. However, that same analysis is not applicable to the separate inquiry as to whether a violation of 18 U.S.C. § 2422(a) vis-a-vis § 101(a)(43)(K)(ii) of the Act was committed for "commercial advantage." Hence, an IJ may properly look beyond the record of conviction to make that determination and consider all of the evidence before the IJ, including a PSR, the alien's admissions, and any other relevant evidence. *See Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007).

11. **Conviction Documents**

On March 7, 2005, the United States Supreme Court, citing Taylor v. United States, supra, held that a United States District Court inquiry under the ACCA, 18 U.S.C. § 924(e), to determine whether a plea of guilty to burglary defined by a non-generic statute constitutes an admission to the

requisite elements of the generic offense is limited. It can only include the terms of the charging document, the terms of a plea agreement or transcript of the colloquy between the sentencing judge and defendant in which the factual basis for the plea was confirmed by the defendant, or "to some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13 (2005). This case involved analysis of a divisible statute encompassing burglary of a building, structure, boat, or vehicle. The Court reversed the First Circuit Court of Appeals. *But see James v. United Sta*tes, 550 U.S. 192 (2007) (citing *Shepard v. United States*, *supra*), the Court stated that in analyzing the ACCA at 18 U.S.C. § 924(e), the Court employed the "categorical approach" under *Taylor v. United States*, *supra*. Utilizing this approach, "we look only to the fact of conviction and the statutory definition of the prior offense," and do not generally consider the "particular facts disclosed by the record of conviction."

The Ninth Circuit has stated that the only documents the BIA and IJs may rely upon in determining whether a conviction under a divisible statute constitutes an aggravated felony are: the State charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment. *See Huerta-Guevara v. Ashcroft*, 321 F.3d 883 (9th Cir. 2003); *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (regarding the use of the categorical v. modified categorical analysis of the Act and the State statute to determine whether the alien's conviction constitutes a crime of domestic violence within the meaning of § 237(a)(2)(E)(i) of the Act); A guilty plea is an admission of the facts charged in the indictment. *U.S. v. Guerrero-Velasquez,* 434 F.3d 1193 (9th Cir.

2006). An *Alford* plea, in which the defendant enters a guilty plea while maintaining his innocence, nevertheless is a guilty plea under *Taylor v. United States*, 495 U.S. 575 (1990). Where there is insufficient documentation to establish that the alien's prior conviction was necessarily a crime of domestic violence, the IJ may not rely upon the administrative record to discern facts not present in the conviction documents to establish that the alien was convicted of the generically defined crime. *See Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (2006), *as amended at*, 465 F.3d 386 (9th Cir. 2006). Similarly, *see Morales v. Gonzales*, 472 F.3d 689 (9th Cir. 2007) (The IJ determination as to what constituted a particularly serious crime relied on information related to offenses for which the alien had been acquitted.).

On October 28, 2008, an *en banc* panel of the Ninth Circuit issued a Per Curiam Opinion in *United States v. Snellenberger, 548 F.3d 699 (9th Cir. 2008) (en banc),* overturning its earlier decision in 2007, *as amended,* holding that, within the context of sentence enhancement for a defendant's burglary of a dwelling constituting a crime of violence, while applying the modified categorical approach under *Shepard v. United States, 544 U.S. 13 (2005).* This was a sentence enhancement proceeding.

12. **Typographical Error**

However, where the certified copy of the judgment of conviction contains a typographical error as to the correct statutory citation but expressly names the crime of which the defendant was convicted, "the evident oversight of the incorrect statutory citation in no way negates the

effect (or existence) of the prior conviction." *See United States v. Bonilla-Montenegro*, 331 F.3d 1047 (9th Cir. 2003).

13. **Other Evidence of Conviction**

Moreover, DHS may prove an alien's prior conviction through many different types of evidence, *e.g.*, an indictment or information, a copy of the judgment of conviction, a guilty plea or *nolo contendere* (no contest) plea. Even a non-certified record of conviction may be submitted to prove the alien's prior conviction for sentencing purposes. *See United States v. Chavaria-Angel*, 323 F.3d 1172 (9th Cir. 2003); *Alibutod v. Ashcroft*, 70 Fed. Appx. 424 (9th Cir., Aug. 2003, unpublished) (A conviction is established where documentation or other judicially noticeable facts in the record indicate that the alien has been convicted of the elements of the generically defined theft offense.). A police report incorporated by reference into the criminal complaint underlying a prior conviction may be considered, consistent with *United States v. Espinoza-Cano*, 456 F.3d 1126 (9th Cir. 2006).

14. **Access to Records**

Access to DHS and DOJ/EOIR records and personnel is subject to the following:

a) 5 U.S.C. § 552 (FOIA)

b) 5 U.S.C. § 552a (Privacy Act),

c) 28 C.F.R. Part 16 (DOJ records and personnel),

d) 8 C.F.R. §§ 103.7-103.36 (DHS records and personnel),[13]

e) 8 C.F.R. § 1003.46 (regarding protective orders).

15. **Sealed Conviction**

A drug conviction sealed by a Nevada State court is admissible in removal proceedings. *See* NRS §§ 179.245, 179.255, and 453.3365; *Matter of Moeller*, 16 I&N Dec. 65 (BIA 1976); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139 (11th Cir. 1999) (persuasive authority only).

16. **Record of Deportable/Inadmissible Alien**

Absent evidence that a DHS I-213 Record of Deportable Alien contains incorrect information or was obtained by coercion or duress, it is admissible into evidence to prove alienage or deportability of an alien. *See Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999); Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988); *Kim v. INS*, 34 Fed. Appx. 581 (9th Cir. May 8, 2002, unpublished) (once properly authenticated, admissible to prove alienage); *Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1995).

[13] Information regarding detainees housed in non-DHS facilities is subject to 8 C.F.R. §§ 1236.6 and 1241.15.

Where three INS agents entered the home of an illegal alien without a warrant or consent, they violated the Fourth Amendment of the U.S. Constitution, absent exigent circumstances which would justify the entry. Here, reasonable officers of the INS should have known that they were violating the Fourth Amendment in entering the home without a warrant, consent or exigent circumstances. Because their conduct was egregious, the aliens' motion to suppress their respective I-213s and the sworn statement of one of the aliens should have been granted by the IJ. *See Lopez-Rodriguez v. Mukasey, 536 F.3d 1012(9th Cir. 2008), reh'g en banc denied,* 560 F.3d 1098 (9th Cir. 2009).

Where an alien is notified of his procedural rights before he is placed in removal proceedings by a Border Patrol Agent, the I-213 prepared by ICE is admissible. *See Samayoa-Martinez v. Holder,* 558 F.3d 897 (9th Cir. 2009).

17. **DHS Officer Interview**

Similarly, once a proper foundation is laid, a Form WR-424 used by a DHS officer to interview an alien is admissible to prove the alien's name, alienage, and date of entry. *See Lopez-Chavez v. INS*, 259 F.3d 1176 (9th Cir. 2001).

18. **Hearsay Evidence**

Hearsay evidence is admissible in removal proceedings if it is probative and its admission is fundamentally fair. *See Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003) (citing *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983)); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003) (In a due process analysis, problems of fundamental fairness associated

with hearsay testimony are dispelled when the testimony is subject to cross-examination and the alien is given the opportunity to present rebuttal testimony); *but see Gu v. Gonzales,* 454 F.3d 1014 (9th Cir. 2006) (hearsay evidence receives less weight in the asylum context). The United States District Court erred when it admitted into evidence the defendant's I-485 application for permanent resident status because it contained a hearsay statement and the Government failed to demonstrate any hearsay exception for the statement under Federal Rules of Evidence § 803(8). *See United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. March 27, 2009).

19. **Federal Rules of Evidence**

Removal proceedings are not subject to the Federal Rules of Evidence or Federal Rules of Civil Procedure. To be admissible, the evidence must be probative and its use fundamentally fair, so as not to deprive the alien of due process of law. Moreover, an alien's failure to testify allows the Court to draw a negative inference. *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003); *Cunanan v. INS*, 856 F.2d 1373 (9th Cir. 1988).

20. **Burden of Establishing a Basis for Exclusion of Evidence**

In the case of government records, the burden of establishing a basis for exclusion falls on the opponent of the evidence, who must come forward with sufficient negative factors to persuade the Court not to admit it into evidence. The rule is premised upon the reliability of authenticated immigration forms and the great inconvenience that would be caused to public business if public officers must be called to Court to verify in person every fact which they certify. *See Espinoza v. INS*, 45 F.3d 308, 310 (9th

Cir. 1992); *Matter of D*-, 20 I&N Dec. 827, 831 (BIA 1994); *United States v. Chavaria-Angel*, 323 F.3d 1172 (9th Cir. 2003) (Non-certified records can be used to prove an alien's prior conviction for sentencing purposes.).

21. Burden of Proof in Removal Proceedings

Finally, in removal proceedings, except as otherwise specified in the Act, certain burdens of proof (BOP) are assigned to DHS, §§ 240(c)(3)(A)-(C) of the Act, and certain BOP are assigned to the alien, § 240(c)(2) and § 291 of the Act. The REAL ID Act amended § 240 of the Act by adding a new provision at § 240(c)(4) of the Act entitled "Application for Relief from Removal," addressing BOP, sustaining BOP, and credibility determinations on applications for relief; however, § 240(c)(4) only applies to applications for relief filed on or after May 11, 2005. Implementing regulations are found at 8 C.F.R. §§ 1003.41 (proof of criminal convictions) and 8 C.F.R. § 1240.8 (BOP in removal proceedings). *See also* 8 C.F.R. §§ 1240.7(a)-(c), which specifies the three principles types of evidence (prior statements, testimony, and depositions, respectively) which may be introduced in removal proceedings. On February 22, 2007, the Ninth Circuit ruled, in the context of asylum applications, that Federal courts of appeal jurisdiction over questions of law under the REAL ID Act encompasses: issues of statutory construction; applications of law to undisputed facts; and mixed questions of law and fact. *See Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007).

22. Right of Counsel to Withdraw

Although 8 C.F.R. § 1003.17(b) permits withdrawal and substitution of counsel during proceedings orally or by written motion, a request to

withdraw as the attorney of record should include evidence that counsel has attempted to advise his/her client at his/her last known address of the date, time and place of the next scheduled court hearing, and articulate a legitimate rationale for making such a request. *See Matter of Rosales*, 19 I&N Dec. 635 (BIA 1988).

23. **Non-profit and Accredited Representatives**

See Matter of EAC, Inc., 24 I&N Dec. 556 (BIA 2008) and *Matter of EAC, Inc.* 24 I&N Dec. 563 (BIA 2008) regarding the recognition of certain non-profit organizations under 8 C.F.R. § 1292.2(a) and accredited representatives under 8 C.F.R. § 1292.2(d).

*E. **Motions to Suppress Evidence***

Within the Ninth Circuit, motions to suppress evidence are subject to special rules.

1. **Reasonable Suspicion of Alienage**

In an *en banc* decision, the Ninth Circuit ruled that Hispanic appearance is not a reliable basis for reasonable suspicion of alienage in a geographic area where there is a large concentration of Hispanics and most of the people passing through the checkpoint are Hispanic. *See United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000). *But see* paragraph 2, *infra*.

2. **Reasonable Suspicion to Justify Vehicle Search**

Nevertheless, in the same decision, the *en banc* panel upheld the conviction of one co-defendant for possession of marijuana with intent to distribute, and the conviction of a second co-defendant on the same charge

and for being an illegal alien in possession of ammunition. The court concluded that Border Patrol Agents had reasonable suspicion[14] to justify the stop of the vehicle and the ensuing search of the vehicle, where the evidence to support the subsequent conviction was discovered. *But see United States v. Arvizu*, 534 U.S. 266 (2002) (reversing a Ninth Circuit decision, wherein the U.S. Supreme Court ruled that under the totality of the circumstances test for investigatory stops, a Border Patrol Agent, relying on a combination of otherwise innocent observations to briefly pull over a suspect vehicle, had reasonable suspicion to make an investigatory stop of the defendant's vehicle); *see also United States v. Williams*, 419 F.3d 1029 (9th Cir. 2005) (A law enforcement officer may order a passenger who voluntarily gets out of a lawfully stopped vehicle to get back into the vehicle without violating the passenger's Fourth Amendment rights, particularly as it pertains to a motion to suppress as evidence the handgun which the passenger threw out of the vehicle after being ordered to get back into the vehicle.).

Relying on their experience, observations of two vehicles traveling together in a notorious smuggling area with known load sites for aliens, and their suspicions, two Border Patrol officers made an investigatory stop of the two vehicles. As a result of the stop, the officers arrested a passenger in one of the vehicles, charging him with unlawful re-entry into the United States after deportation, in violation of § 276 of the Act. During the prosecution in a U.S. District Court, the alien-defendant made a motion to

[14] Reasonable suspicion exists, "when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion." *UnitedStates v. Montero-Camargo*, 208 F.3d 1122,1129 (9th Cir. 2000).

suppress his statements and fingerprints taken at the time of his arrest. The alien argued that the officers lacked reasonable suspicion to stop him. The U.S. District Court denied his motion. On appeal, the Ninth Circuit affirmed, ruling that, under the totality of the circumstances, such as the officers' experience and reasonable deductions, they had a reasonable, particularized basis to suspect the vehicles of picking up illegal aliens. *See United States v. Berber-Tinoco*, 510 F.3d 1083 (9th Cir. 2007).

Where the defendant's arrest was not spatially related to the search of his vehicle, the search of the vehicle was not contemporaneous with the arrest, and there was no community caretaking rationale for the impoundment of the defendant's car justifying a subsequent inventory search of the vehicle; the search and seizure of defendant's vehicle occurred without probable cause, in violation of the Fourth Amendment. *See United States v. Caseres*, 533 F.3d 1064 (9th Cir. 2008).

By a 5-4 majority the Supreme Court on April 21, 2009, ruled that police cannot search the vehicle of a suspect arrested at the scene, unless the police officer's safety is threatened *or* there is reason to believe that the vehicle contains evidence related to the arrest. For example, if the driver of the vehicle was arrested on drug charges, the police can search the vehicle for drugs. *See Arizona v. Gant,* 129 S.Ct. 1710 (2009).

3. **Reasonable Suspicion Not Required**

Questioning by police officers of an occupant of residential premises about her immigration status during her detention did not violate her Fourth Amendment rights. *See Muehler v.* Mena, 544 U.S.93 (2005) (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991), which held that even when police

officers have no basis for suspecting a particular individual, they may generally: ask questions of that individual; request to examine the individual's identification; and request consent to search the individual's luggage). In *Mena*, the defendant, a LPR of the United States, was detained in handcuffs for two to three hours while a search of the premises she and several others occupied was ongoing, pursuant to the execution of a search warrant of the premises. Officers were looking for deadly weapons, *i.e.*, firearms and evidence of gang membership.

4. **Investigator's Prior Knowledge of Alien's Illegal Presence**

The investigator's prior knowledge of the alien's illegal presence in the US made the questioning reasonably likely to elicit incriminating statements and was therefore an interrogation for *Miranda* purposes. *See United States v. Chen*, 439 F.3d 1037 (9th Cir. 2006). However, where a Border Patrol Agent lacked reasonable suspicion that defendant and his co-workers were illegally in the U.S., the motion to suppress evidence should have been granted by the U.S. District Court under the circumstances of this stop. *See United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006).

5. **United States International Border Search**

Routine searches at United States international border points of entry do not require objective justification, probable cause, or a warrant. Hence, under circumstances where a customs inspector had reasonable suspicion to support his search of a toolbox on a truck, which contained 31 packages of marijuana, the alien's motion to suppress the seized drugs was denied. *See United States v. Bravo*, 295 F.3d 1002 (9th Cir. 2002); *United States v.*

Okafor, 285 F.3d 842, 845 (9th Cir. 2002). A defendant who moves to suppress evidence discovered during a border search of his vehicle bears the burden of demonstrating that the search damaged the vehicle and that the damage affected the vehicle's safety or operability. *United States v. Cortez-Rivera*, 454 F.3d 1038 (9th Cir. 2006).

Customs searches at a Federal Express regional facility at Oakland, California, for Philippines-bound packages take place at the functional equivalent of the international border and therefore a customs official acting under the authority of 31 U.S.C. § 5317(b) may legally search the full contents of any package, container or other object to be searched, even if such package/container includes smaller envelopes or other wrapped or sealed objects. *See United States v. Seljan*, 497 F.3d 1035 (9th Cir. 2007); *see also United States v. Abbouchi*, 502 F.3d 850 (9th Cir. 2007) (A customs inspection conducted at a United Parcel Service regional sorting hub at Louisville, Kentucky, takes place at the functional equivalent of the border and, hence, customs officials do not need reasonable suspicion to open and inspect the contents of randomly selected packages intended for overseas delivery.).

6. **Border Searches of Property**

Reasonable suspicion is not required for DHS officers to conduct non-destructive border searches of property. *See United States v. Cortez-Rocha*, 383 F.3d 1093 (9th Cir. 2004) (A Customs Inspector's search of defendant's vehicle's spare tire by cutting it open, thus revealing 42.22 kilograms of marijuana which the inspector seized, was not a particularly offensive border search requiring reasonable suspicion because a vehicle's

spare tire is not an operational component of the vehicle but rather is analogous to a closed suitcase or other container often found inside of a vehicle.). Citing *United States v. Flores-Montano*, 541 U.S. 149 (2004), the Court noted, “The government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.” *Cortez-Rocha*, 338 F.3d at 1098; *see also United States v. Camacho*, 368 F.3d 1182 (9th Cir. 2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004) (Addressing the scope of the Government’s authority to perform vehicular searches at the border without reasonable suspicion, the U.S. Supreme Court held that it “includes the authority to remove, dissemble, and reassemble a vehicle’s fuel tank.”). Similarly, the Ninth Circuit held in *United States v. Hernandez*, 424 F.3d 1056 (9th Cir. 2005), that border agents dismantling of the interior panels of the vehicle’s doors, revealing packages of marijuana was a reasonable search. Likewise, it was a reasonable search where border agents drilling of a 5/16-inch hole in the bed of a truck, revealing a blue plastic material, led them to several packages of marijuana located under a false truck bed. *United States v. Chaudhry*, 424 F.3d 1051 (9th Cir. 2005).

7. **Voluntary Stop by Driver**

When the driver of a vehicle transporting illegal aliens voluntarily stops of his own accord and the police officer does not order or request the driver to stop, there is no “stop” for Fourth Amendment purposes and thus no requirement of any “quantum of suspicion.” *See United States v. Nasser*, 479 F.3d 1166 (9th Cir. 2007).

8. **Warrantless Searches**

On February 21, 2008, the Ninth Circuit held that a warrantless protective sweep supported by specific and articulable facts supporting the belief that other dangerous persons may be in the building or elsewhere on the premises did not violate the Fourth Amendment, *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) (citing *Maryland v. Buie*, 494 U.S. 325, 333-34 (1990)). However, a warrantless search of the shared dwelling two hours later for evidence, over the express refusal of consent to search by a physically present resident cannot be justified as reasonable regarding the physically present resident since it was another person who had given the police consent. *See Murphy,* 516 F.3d at 1122 (citing *Georgia v. Randolph*, 547 U.S. 103, 107, 120 (2006)).

A motion to suppress will be denied where a Postal Inspector's visual inspection of a package sent to the Defendant did not violate the Fourth Amendment *and* the Defendant had no possessory interest in the package until its guaranteed delivery time has passed. *See United States v. Jefferson*, 566 F.3d 928 (9th Cir. 2009).

The defendant's motion to suppress a firearm discovered by the police incident to an arrest of the defendant when the police searched an area immediately adjoining the place of arrest is denied because the search was justified without probable cause or reasonable suspicion; arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety. *See United States v. Lemus*, 582 F.3d 958 (9th Cir. 2009).

9. **Egregious or Affirmative Misconduct**

Because removal proceedings are administrative/civil, not criminal proceedings, absent egregious or affirmative misconduct by a DHS officer, a motion to suppress evidence must establish a prima facie case and enumerate the specific evidence to be suppressed.

a) Absent egregious conduct by the Government, the Fourth Amendment exclusionary rule is inapplicable in removal proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979).

b) Similarly, absent evidence of coercion, duress or other conduct which violates the due process clause of the United States Constitution, evidence obtained by DHS is generally not excludable in removal proceedings on the basis of a motion to suppress. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975); *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971).

c) To demonstrate a due process violation an alien must satisfy two criteria: (1) articulate an identifiable due process violation; and (2) demonstrate prejudice as a result of that violation, such as showing a plausible ground for relief from deportation/removal for which the

alien is otherwise eligible to apply. *See United States v. Muro-Inclan*, 249 F.3d 1180 (9th Cir. 2001).

d) In a civil action seeking damages based on false arrest by an immigration inspector in violation of the Fourth Amendment, the Ninth Circuit cited *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in concluding that the immigration inspector was not entitled to qualified immunity. *See Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007).

e) The Act expressly requires that an alien be granted " a reasonable opportunity to examine the evidence against the alien, to present evidence in the alien's own behalf, and to cross-examine witnesses presented by the Government," pursuant to § 240(b)(4)(B) of the Act and the implementing regulations at 8 C.F.R. § 1240.90(a)(4). *See Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005). Thus, a single affidavit from a self-interested witness for the Government not subject to cross-examination by the alien does not rise to the level of clear and convincing evidence required to prove removability under the Act. Similarly, in the asylum context, hearsay evidence introduced by the alien should be given less evidentiary weight by the court. *See Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006).

f) A DHS agent conducting a jailhouse interview of an alien arrested on criminal charges unrelated to his immigration status need not provide the alien *Miranda* warnings. Hence, a motion to suppress statements made by the alien to the DHS agent during such an interview is not likely to succeed. *See United States v. Salgado*, 292 F.3d 1169 (9th Cir. 2002).

g) Where three INS agents entered the home of an illegal alien without a warrant or consent, they violated the Fourth Amendment of the U.S. Constitution, absent exigent circumstances which would justify the entry. Here, reasonable officers of the INS should have known that they were violating the Fourth Amendment in entering the home without a warrant, consent or exigent circumstances. Because their conduct was egregious, the aliens' motion to suppress their respective I-213s and the sworn statement of one of the aliens should have been granted by the IJ. *See Lopez-Rodriguez v. Mukasey,* 536 F.3d 1012, 1015 (9th Cir.2008)

h) Finally, if the alien refuses to testify regarding the motion to suppress, the Court may draw a negative inference from the refusal to testify when evaluating the merits of the motion. *See United States v. Solano-*

Godines, 120 F.3d 957, 962 (9th Cir. 1997); *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991).

10. **Equitable Estoppel**

The doctrine of equitable estoppel applies against the Federal Government only when affirmative misconduct has been demonstrated by the moving party. *See Cortez-Felipe v. INS*, 245 F.3d 1054 (9th Cir. 2001), *Sulit v. Schiltgen*, 213 F.3d 449 (9th Cir. 2001); *Williams v. INS*, 795 F.2d 738 (9th Cir.1986); *Matter of Hernandez-Puente,* 20 I&N Dec 335 (BIA 1991).

Estoppel requires that the party to be estopped must know the facts; must intend that the party's conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; the victim must be ignorant of the true facts; and the victim must rely on his conduct to his detriment/injury. *See Young Sun Shin v. Mukasey*, 519 F.3d 901, (9th Cir. 2008). The Government is not bound by the unauthorized acts of its agents. *See Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*). Here, the alien paid for the purchase ofa fraudulent I-551 card manufactured by a corrupt, Federal immigration employee. *See also Shin v. Mukasey*, 547 F.3d 1019 (9th Cir.2008) (A denial of relief from a removal order is affirmed where the alien purchased an I-551 card from a corrupt immigration employee; therefore the government is not stopped from asserting that the I-551 card is fraudulent.).

Citing *INS v. Pangilinan*, 486 U.S. 875, 882 (1988), the Ninth Circuit ruled on March 11, 2008, that Federal courts cannot employ equitable remedies such as estoppel to confer citizenship where the statutory

requirements for citizenship are not met. In this case, citing § 322 of the Act and the Child Citizenship Act of 2000, the Ninth Circuit held that because the alien was born outside the United States, he was required to satisfy all the statutory requirements, including applying prior to his 18th birthday. *See Mustanich v. Mukasey*, 518 F.3d 1084 (9th Cir. 2008).

11. **Sentence Enhancement**

To determine whether a prior, State court criminal conviction is an aggravated felony for purposes of the USSG it is necessary to review applicable Ninth Circuit case law. *See United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) (An Arizona State drug conviction for which the maximum penalty is probation is not an aggravated felony under §101 (a)(43)(B) of the Act triggering sentence enhancement); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) (A petty theft offense under CPC § 484(a) cannot qualify as an aggravated felony under § 101(a)(43)(G) because the maximum possible sentence is six months; hence, a conviction for petty theft with a prior jail term for a specific offense under CPC §§ 488 and 666 does not facially qualify as an aggravated felony under the USSG.); *United States v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002). (A prior conviction for the unlawful use of a vehicle (joyriding) in violation of ARS § 13-1803 is not a theft offense under § 101(a)(43)(G) of the Act and, hence, is not an aggravated felony for sentence enhancement purposes.); *United States v. Sandoval- Barajas*, 206 F.3d 853 (9th Cir. 2000); *United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000), *cert. denied*, 531 U.S. 1102 (2001). For sentencing purposes, a felon’s conviction for violating ORS § 166.382, for unlawful

possession of a destructive device (a pipe bomb), is not a crime of violence because it does not involve the use or attempted use of explosives. *United States v. Fish*, 368 F.3d 1200 (9th Cir. 2004) (citing *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003); 18 U.S.C. § 3559(a)(5)).

On October 10, 2007, an *en banc* panel of the Ninth Circuit addressed whether a prior conviction for a violation of §10851(a) of the CVC, which criminalizes "theft and unlawful driving or taking a vehicle" qualifies as an aggravated felony within the meaning of USSG § 2L1.2(b)(1)(C) and § 101(a)(43)(G) of the Act, as a theft offense. Citing its recent decision in *United States v. Grisel,* 488 F.3d 844, 847 (9th Cir. 2007) (en banc), this *en banc* panel held that the conviction of the respondent did not necessarily satisfy all the elements of a generic theft offense, because the statute in question applied to principals and accomplices as well as accessories after the fact. In reaching this conclusion the panel cited *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which established that the term "theft offense" in § 101(a)(43)(G) of the Act encompasses the crime of aiding and abetting a theft offense. However, the panel ruled that an accessory after the fact to theft cannot be culpable of the generic theft. *See United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc).

A defendant's drug sentence enhancement under the USSG was affirmed where a properly authenticated computer printout relating to his prior State court conviction could be relied upon in sentencing, and the U.S. District Court properly required the defendant to prove that his prior conviction had been expunged. *See United States v. Felix*, 561 F.3d 1036 (9th Cir. April 13, 2009).

12. **Sentence Enhancement Caveat**

On February 18, 2005, a panel of the Ninth Circuit distinguished the *Corona-Sanchez* rationale in the context of an Oregon statute which enhanced a Class A misdemeanor punishable by no more than one year in prison into a Class C felony punishable by up to five years in prison when the offense is committed in the presence of the victim's minor child. The Ninth Circuit stated: "Sentencing factors based on some aspect of the defendant's legal history, such as recidivist sentencing enhancements, are not considered in determining whether a state-law offense is a felony." *See, e.g., United States v. Pimentel-Flores*, 339 F.3d 959, 967-69 (9th Cir. 2003); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1208-11 (9th Cir. 2002) (en banc).

"Today, however, we decline to extend these precedents to cases such as this one, where the sentencing factor is based on circumstances of the crime itself. Substantive offense-based enhancements are inseparable from the underlying offense and must be considered in determining the maximum available sentence." *United States v. Moreno-Hernandez*, 397 F.3d 1248, 1249 (9th Cir. 2005); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007) (Because recidivism does not relate to the commission of the offense, an IJ may include time served when considering an alien's eligibility for relief under former § 212(c) of the Act because the analysis is on calculating the *amount* of time served *on account* of prior convictions *not* the nature of the prior convictions.).

13. **Reliability of Polygraph Evidence**

On June 14, 2007, the Ninth Circuit, citing *United States v. Scheffer*, 523 U.S. 303, 309 (1998) ("To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."), ruled that, "even if a polygraph report is reliable, it cannot establish *prima facie* eligibility for asylum. At most, the polygraph test results establish that Goel's fear of being persecuted is subjectively genuine." *See Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007).

14. **Exclusionary Rule**

A South Korean native and citizen was given a fraudulent I-551 card (LPR status). Once this was discovered, she was placed in removal proceedings and charged as an alien not in possession of a valid immigrant visa (I-551), but she was not charged with fraud or knowledge of the scheme that resulted in her obtaining LPR status. At a contested hearing before an IJ, she moved to exclude evidence provided to DHS by a former supervisory officer who had perpetrated the LPR scheme and destroyed incriminating Government files, but served a list of alien numbers ("A") identifying aliens - including the Respondent - who had obtained unwarranted changes in their status. In her motion to suppress this incriminating evidence, Respondent argued that the former INS official had unlawfully obtained "nonpublic information" and violated an INS regulation - 5 C.F.R. § 2635.703(a)-(b) - designed to protect Respondent's right to privacy. The IJ denied the motion to suppress/exclude such evidence, ruling that the Respondent was not prejudiced by the alleged violation of DOJ privacy regulations because the Respondent had no procedural or

substantive right to possess illegal residency documents or to have in her possession such documents. The BIA affirmed, holding that the respondent had no protected interest in an illegally obtained I-551 card. The BIA citing *Segura v. United States*, 468 U.S. 796, 797 (1984), also held that the exclusionary rule under the Fourth Amendment did not apply to the alien's motion to suppress because the Government obtained the incriminating evidence from an independent source. On appeal, a Ninth Circuit panel applied a two-prong test to determine whether an agency's violation of its regulations necessitates exclusion of evidence:

> 1) the regulation must serve a purpose of benefit to the alien, and
> 2) the regulatory violation will render the proceedings unlawful only if the violation prejudiced interests of the alien which were protect by the regulation. *See*

In applying these prongs, the Court ruled that because the alien's identifying A-number was available on public documents; and the alien had no protected interest in keeping from the Government the unlawful means by which she had obtained her LPR status, her due process rights were not violated, and the evidence was properly admitted. *See Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030 (9th Cir. 2008) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980)).

In *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), *reh'g en banc denied*, *Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (9th Cir. 2009), the Court ruled that a warrantless entry into a house without consent constitutes egregious conduct that reasonable officers would not have

thought it reasonable to push a door open simply because the occupant of the house did not tell them to leave or affirmatively refuse them entry.

15. **Miranda Warnings and the Fifth Amendment**

In a case of first impression, a panel of the Ninth Circuit ruled that: where a defendant being investigated on child pornography on his computer system at his home and subjected to an in-house interrogation in the presence of eight law enforcement officers representing three different law enforcement agencies, was subjected to a custodial interrogation for which the Miranda warnings should have been provided to the suspect, pursuant to the Fifth Amendment to the U.S. Constitution, because the defendant was effectively in custody for purposes of the Miranda warnings. The Ninth Circuit ruled that the suspect was in custody for purposes of Miranda, because:

> (1) eight law enforcement officers representing several Federal agencies were present in the suspect's home and were armed;
>
> (2) the suspect's freedom of action was restrained in a manner that increased the likelihood that the suspect would succumb to police pressure to incriminate himself;
>
> (3) the suspect was isolated from others, which would tend to lead the suspect to feel compelled to provide self-incriminating statements;
>
> (4) the suspect was informed that his questioning was "voluntary" and he was free to leave or terminate the interview; however, under the circumstances, a reasonable person would have felt that he was *not* at liberty to terminate his interrogation and leave; and

(5) thus, the suspect was not free to leave.

Under applicable case law, in consideration of the totality of the circumstances, he was in fact in custody for purposes of Miranda. Thus, the suspect's self-incriminating statements should have been suppressed by the U.S. District Court. *See United States v. Craighead*, 539 F.3d 1073 (9th Cir.2008)

F. **Criminal Waivers**

Within the Ninth Circuit, criminal waivers are subject to special rules in the Court.[15]

1. **Former 212(c)**

Although former § 212(c) of the Act was amended by § 440(d) of Pub. L. No. 104-132 (Apr. 24, 1996), and repealed by § 304(b) of IIRIRA, the United States Supreme Court held in *INS v. St. Cyr.*, 533 U.S. 289 (2001), that § 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for this relief at the time of their plea under the law then in effect, but prior to the enactment of Pub. L. 104-132 and Pub. L. 104-208. *See* 8 C.F.R. § 1003.44 and § 1212.3, for the regulations implementing the *St. Cyr*. decision; and the legislative history to the final rulemaking at 69 Fed. Reg. 57,826-57,833 (Sept. 28, 2004). *See also Alvarenga-Villalobos v. Ashcroft,* 271 F.3d 1169 (9th Cir. 2001); *Avila-Sanchez v. Mukasey*, 509 F.3d 1037 (9th Cir. 2007), which held that a special motion to reopen filed by a Mexican native for a § 212(c) waiver

[15] For a discussion of § 212(h) criminal waivers see Chapter II.B.4 and 5, and footnotes 7-9 of this outline.

was properly denied under 8 C.F.R. § 1003.44(b)(2), because the alien had a prior final order of deportation and then he illegally returned to the United States. However, the Ninth Circuit held in *Kelava v. Gonzales*, 410 F.3d 625 (9th Cir. 2005), that an alien was ineligible for a § 212(c) waiver because his removability did not hinge on his 1980 conviction for armed imprisonment of a foreign national, but rather, removability was established because he had "engaged in" terrorist activity at any time after his admission, pursuant to § 237(a)(4)(B) of the Act. Subsequently, a panel of the Ninth Circuit held in *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005) that a § 212(c) waiver is available to an LPR who plead guilty to an offense on May 30, 1996, which became an aggravated felony under IIRIRA as of September 30, 1996, because it violated the equal protection clause of the U.S. Constitution. The following day, a different panel of the Ninth Circuit reached a contrary result involving an LPR who plead guilty to an offense on May 27, 1996, which became an aggravated felony as of April 24, 1996, pursuant to Pub L 104-132. *See Alvarez-Barajas*, 418 F.3d 1050 (9th Cir. 2005).

On August 28, 2007, a panel of the Ninth Circuit held that former § 212(c) relief is available to an LPR who "acted in reasonable reliance" on former § 212(c) of the Act when he departed the United States in December 2000 for a brief, casual and innocent trip to visit his ailing mother after his January 1996 conviction for sexual battery under CPC § 243.4, and therefore his admission on January 2, 2001, was not subject to the strictures of new § 101(a)(13)(C)(v) of the Act. *See Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007).

There is a rational basis for former § 212(c) being limited to discretionary relief from grounds of inadmissibility as opposed to grounds of deportation. Thus, there is no equal protection violation in the denial of the relief. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009).

2. **212(c) for Aggravated Felons**

Similarly, § 212(c) relief is available to an aggravated felon who plead guilty prior to the enactment of the Act of November 29, 1990 (IMMACT), even though he was incarcerated for at least five years. *See Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003). However, the Ninth Circuit has reiterated that outstanding equities must be demonstrated by the alien where his criminal record reflects a pattern of serious criminal activity such as multiple crimes. In the case in question, the alien had been convicted of lewd acts on a child, spousal abuse, and resisting arrest. *See United States v. Gonzalez-Valerio*, 342 F.3d 1051 (9th Cir. 2003) (citing *Ayala-Chavez v. INS*, 944 F.2d 638 (9th Cir. 1991) and *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990)). Under § 306(a)(10) of the 1991 amendments to former § 212 of the Act pertaining to ineligibility for this relief for, “one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years,” an IJ may include in his calculation time served pursuant to a recidivist statute imposed on the alien as part of the sentencing for the conviction. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007).

3. **240A(a) Waiver**

Otherwise, relief under former § 212(c) of the Act is not available in removal proceedings, because it was repealed by § 304 (b) of IIRIRA,

which created a more restrictive criminal waiver, § 240A(a) of the Act, which is not available to aggravated felons. *See* INA § 240A(a)(3); *Matter of Sotelo*, 23 I&N Dec. 201 (BIA 2001); *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998); *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585 (9th Cir. 2005) (holding that an alien's theft conviction under ARS § 13-1802(A)(1) and (C) is an aggravated felony under § 101(a)(43)(G) and § 240A(a)(3) of the Act). In 2007, the Ninth Circuit ruled that § 240A(c)(6) of the Act bars an alien who received § 212(c) relief from subsequently receiving § 240A(a) relief. *See Garcia-Jimenez v. Gonzales*, 472 F.3d 679 (9th Cir. 2007); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (A 1998 conviction could not serve as a predicate offense for removal of an alien after a subsequent offense because the alien had been granted § 240A(a) relief for the earlier offense.); *Becker v. Gonzales*, 473 F.3d 1000 (9th Cir. 2007) (Alien's 1978 conviction for possession of marijuana for sale may be treated as a disqualifying aggravated felony conviction *vis-a-vis* a current request for a § 240A(a) waiver for a 2004 controlled substance conviction.).

Section 240A(a) relief is available and granted to an LPR who was admitted to the United States on March 2, 1992, but convicted on May 8, 2002, for violating CH&SC § 11379(a) and sentenced to three years imprisonment, because § 11379(a) is categorically broader than the § 101(a)(43)(B) definition of felony and the judicially noticeable documents satisfied the alien's burden of proof to establish by a preponderance of the evidence that the conviction is not an aggravated felony. *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007); *but see Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (finding that in a case governed by the REAL ID

Act, *Sandoval-Lua* does not apply, and that an alien "has the burden to establish that the conviction was not pursuant to any part of the statute that reaches conduct involving moral turpitude, including the burden to produce corroborating conviction documents, such as a transcript of the criminal proceedings, as reasonably requested by the Immigration Judge.").

A parent's period of LPR status cannot be imputed to a child for purposes of calculating the seven years of continuous residence after being admitted in any status pursuant to § 240A(a)(2) of the Act. Thus, an LPR from Mexico who was convicted of a controlled substance violation in less than seven years after he obtained LPR status is ineligible for a § 240A(a) waiver. Although contrary to *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), the BIA concluded that its decision in *Matter of Escobar*, 24 I&N Dec. 231, 233 (BIA 2007) should be given "Chevron deference" by the Ninth Circuit. See Matter of Ramirez-Vargas, 24 I&N Dec. 599 (BIA 2008).

A parent's status as an alien lawfully admitted for permanent residence may be imputed to an unemancipated minor residing with that parent for purposes of satisfying the five-year residence requirement for § 240A(a)(1) of the Act. *See Escobar v. Holder*, 567 F.3d 466 (9th Cir. 2009), *rev'g Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007). However, on July 15, 2009, the Ninth Circuit vacated its published decision and then issued an unpublished decision, which found that the Court lacked jurisdiction, because the BIA had granted reopening prior to the issuance of *Escobar v. Holder*, *supra*. *See Escobar v. Holder,* 329 Fed.Appx. 138 (9th Cir. 2009, unpublished). Nevertheless, the Court reiterated its position that its analysis in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005) applies

under both § 240A(a)(1) and (2) of the Act; *i.e.*, lawful admission *and* residence can be imputed to an unemancipated minor.

Citing *Cuevas-Gaspar v. Gonzales*, *supra*, the Ninth Circuit concluded that a parent's status as an LPR may be imputed to an unemancipated minor child residing with that parent, for purposes of § 240A(a)(1) and (2) of the Act. *See Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009).

On August 12, 2009, a panel of the Ninth Circuit held that a violation of Cal. Penal Code § 273a(b) is not categorically a "crime of child abuse" within the meaning of § 237(a)(2)(E)(i) of the Act. Thus, the proceedings were remanded to the BIA to perform a modified categorical analysis of the alien's conviction. *See Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009).

4. **Test for Comparability under § 212(c)**

In 2005, the BIA reiterated its long-standing precedent and cited recent regulations at 8 C.F.R. §1212.3(f)(5), that to be eligible for a § 212(c) waiver, the alien must identify a ground of exclusion/inadmissibility which is substantially equivalent to the criminal ground of deportability/removal. In this case the LPR plead guilty in 1992 to sexual abuse of a minor under the age of eleven, an aggravated felony under §101(a)(43)(A) of the Act. Using the Second Circuit test for comparable grounds of exclusion/inadmissibility, set forth in *Cato v. INS*, 84 F.3d 597, 600 (2d Cir. 1996), the BIA concluded that there is no ground of inadmissibility substantially equivalent to the sexual abuse of a minor category of aggravated felony offenses. The BIA also rejected the alien's argument that a crime of moral turpitude is a statutory counterpart to sexual

abuse of a minor. *See Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). More recently, in *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), the BIA held that an alien removable on the basis of his conviction for unauthorized use of a motor vehicle in violation of TPC § 31.07(a), a crime of violence under § 101(a)(43(F) of the Act, is not eligible for a § 212(c) waiver because his aggravated felony ground of removal has no statutory counterpart in the grounds of inadmissibility under §212(a) of the Act.

On July 9, 2007, the Ninth Circuit joined four other Circuit Courts of Appeal–as opposed to the Second Circuit–in following the BIA analysis in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). *See Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007).

5. **Firearms Conviction**

Similarly, a § 212(c) waiver is not available for a firearms conviction because it is a ground of deportation or removal for which there is no corresponding ground of exclusion or inadmissibility. *See Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995) (citing *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 288 (BIA 1990; A.G. 1991), *aff'd,* 983 F.2d 231 (5th Cir. 1993); *see also* INA § 237(a)(2)(C); *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002); *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000); *United States v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000). However, an LPR convicted of shooting a firearm at an occupied motor vehicle - an aggravated felony under California law - may seek a § 212(c) waiver in conjunction with an application for adjustment of status, because the offense is also a CIMT. *See Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (citing *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993)); *see also United*

States v. Brailey, 408 F.3d 609 (9th Cir. 2005) (holding that under Federal law, a prior conviction for a misdemeanor crime of domestic violence makes a subsequent possession of a firearm a violation of 18 U.S.C. § 922(g)(9)). More recently, the Ninth Circuit held in *United States v. Murillo*, 422 F.3d 1152 (9th Cir. 2005), that the maximum sentence making a prior State criminal conviction a predicate offense for purposes of a Federal prosecution under 18 U.S.C. § 922(g)(1) (a felon in possession of a firearm) is the potential maximum sentence defined by the applicable State criminal statute *not* the maximum sentence in the particular case set by the State's sentencing guidelines. Further, on January 25, 2008, the Ninth Circuit ruled that the defendant's conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) was affirmed, because the underlying felony was conviction – by guilty plea – for felony violation of a protective order and was therefore domestic violence under WRC § 26.50.110(5). *See United States v. Carr*, 513 F.3d 1164 (9th Cir. 2008).

Where the only conviction document made part of the deportation proceedings under former § 241(a)(2)(C), now § 237(a)(2)(C), is a Certificate of Disposition which does not identify the statutory subdivision under which the alien was convicted in a circumstance where the statute encompasses offenses that constitute firearms violations and offenses that do not, the conviction document(s) must contain clear, unequivocal, and convincing proof that, "possession of a firearm was an integral element of the offense . . . ." *See Matter of Pichardo*, 21 I&N Dec. 330, 333 (BIA 1996).

6. **Advising Aliens of the Immigration Consequences of Criminal Convictions**

Presently, Nevada lacks any State statute or rule of the Nevada Supreme Court which requires criminal counsel, public defenders, prosecutors, or judges to advise criminal, alien defendants of the immigration consequences of a plea of guilty or *nolo contendere*. However, Clark, Washoe and several other Nevada counties have added such advisories to their plea agreements. *See Barajas v. State of Nevada*, 991 P.2d 474, 115 Nev. 440 (Nev. S.Ct. 1999); *United States v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002).

G. **Particularly Serious Crime**

What constitutes a particularly serious crime for purposes of § 241(b)(3)(withholding of removal) and former § 243(h)(2)(B) of the Act (withholding of deportation)?

1. **Generally**

a) The analysis requires the Court to look at the facts on a case-by-case basis. The Court must examine the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

b) For purposes of former § 243(h)(2)(B) of the Act, an alien convicted of an aggravated felony is presumed to

have committed a particularly serious crime. *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996).

c) For purposes of § 241(b)(3)(B)(ii) of the Act, a criminal conviction with a sentence of five years or more is conclusively presumed to be a particularly serious crime. *Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999) (overruled in *Matter of Y-L- et. al*, 23 I&N Dec. 270 (A.G. 2002) (Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute particularly serious crimes and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible.). Moreover, on December 20, 2004, the Ninth Circuit reaffirmed its decision in *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) that §242(a)(2)(C) of the Act (final orders of removal against certain criminal aliens) strips the Federal judiciary of jurisdiction over particular determinations by the Attorney General (including the BIA and IJs through delegations of authority), in the exercise of discretion. The judiciary cannot determine that an aggravated felony conviction resulting in a sentence of less than five years constitutes a particularly serious crime under §241(b)(3)(B)(ii) of the Act. *See Unuakhaulu v. Ashcroft*, 398 F.3d 1085 (9th Cir.2005). More recently, the Ninth Circuit rejected the

BIA's summary affirmance of an IJ's particularly serous crime determination because the IJ relied (at least in part) upon information in the alien's criminal record beyond the scope of the record of conviction, including facts pertaining to offenses for which the alien had been acquitted. *See Morales v. Gonzales*, 472 F.3d 689 (9th Cir. 2007). In *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007), the Ninth Circuit upheld the Attorney General's authority to implement § 241(b)(3)(B) of the Act by creating a strong presumption that a drug trafficking conviction resulting in a sentence of less than five years is a "particularly serious crime." However, on August 29, 2007, the Ninth Circuit held that *Matter of Y-L-et al.*, *supra*, could not be applied retroactively to a drug trafficking conviction which predated its promulgation on March 5, 2002. *See Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007). An alien's three DUI offenses, although not aggravated felonies, qualified as "particularly serious crimes" for purposes of §§ 208(b)(2)(A)(ii) and 241(b)(3) of the Act, pursuant to the REAL ID Act as incorporated at § 242(a)(2)(B)(ii) of the Act. *See Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009).

d) Once the Court has determined that an alien has been convicted of a particularly serious crime, it need not make a separate finding that the alien constitutes a danger to

the community; the latter follows naturally from the former. *Urbina-Mauricio v. INS*, 989 F.2d 1085 (9th Cir. 1993); *Ramirez-Ramos v. INS*, 814 F.2d 1394 (9th Cir. 1987).

e) An alien was entitled to have the BIA examine the type of sentence imposed and the underlying facts of his conviction for felony sale of marijuana in order to determine whether the conviction was for a "particularly serious crime," for purposes of withholding of deportation under former § 243(h)(2)(B). *Beltran-Zavala v. INS*, 912 F.2d1027 (9th Cir. 1990).

f) A conviction for a particularly serious crime mandates a finding that the respondent is a danger to the community. *Matter of K-*, 20 I&N Dec. 418 (BIA 1991).

g) Former § 243(h)(2)(B) of the Act did not set forth classes of crimes that are *per se* particularly serious; the Court must look at each case on an individual basis. *Beltran-Zavala v. INS*, 912 F.2d 1027 (9th Cir. 1990).

h) An alien convicted of a particularly serious crime within the meaning of § 208(b)(2)(A)(ii) and (B) remains eligible to apply for asylum for a conviction by guilty plea entered prior to October 1,1990. *See Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003).

i) An offense need not be an aggravated felony under § 101(a)(43) of the Act to be considered a particularly serious crime under § 241(b)(3)(B)(ii) of the Act. However, “once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered . . . including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.” *See Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007). The Ninth Circuit defers to the BIA’s view that, for purposes of §241(b)(3)(B) of the Act, the statute permits the Attorney General to determine by adjudication that a crime is “particularly serious” without first so classifying it by regulation. Moreover, the Ninth Circuit is without jurisdiction to review the merits of such decisions. *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009). In making a particularly serious crime determination, the IJ may consider reliable evidence outside the record of conviction. Here, using a modified categorical approach, the panel concluded that the abstract of judgment could be relied upon as part of the record of conviction because it was prepared by a neutral officer of the court. *See Anaya-Ortiz v. Mukasey, 533 F.3d 1266 (9th Cir. 2009).*

2. **Drug Offenses**

a) Drug trafficking; two or more drug convictions; or one, felony drug conviction is deemed a particularly serious crime. *Feroz v. INS*, 22 F.3d 225 (9th Cir. 1994); *Mahini v. INS*, 779 F.2d 1419, 1421 (9th Cir. 1986) (Possession of commercial amounts of heroin with intent to distribute is a particularly serious crime.)

b) Conviction for possession of cocaine by a habitual drug trafficker is a particularly serious crime. *Ayala-Chavez v. INS*, 944 F.2d 638, 641 (9th Cir. 1991).

c) Conviction while in the U.S. Army for aiding and abetting the attempted smuggling of drugs, followed by a dishonorable discharge is a particularly serious crime. *Konstrol v. INS*, 978 F.2d 1265 (9th Cir. 1992, unpublished).

d) Possession of narcotics (large amounts of cocaine) is a serious crime for purposes of former § 212(c) relief. *Leon-Ruiz v. INS*, 52 F.3d 333 (9th Cir. 1995, unpublished table decision).

e) Possession of commercial amounts of heroin with intent to distribute is a particularly serious crime. *Mahini v. INS*, 779 F.2d 1419 (9th Cir. 1986); *Matter of Rivera-Rioseco*, 19 I&N Dec. 833 (BIA 1988) (possession with intent to distribute marijuana).

f) Sale of marijuana and lysergic acid diethylamide (LSD) is a particularly serious crime. *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991).

g) Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute particularly serious crimes within the meaning of § 241(b)(3)(B)(ii); only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible. *Matter of Y-L- et al.*, 23 I&N Dec. 270 (A.G. 2002). However, application of *Matter of Y-L-* must be prospective, not retroactive to convictions predating March 5, 2002, when the Attorney General issued this decision. *See Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007).

h) Conspiracy to intentionally and knowingly possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(B), with a three-year sentence, is a particularly serious crime but does not bar relief under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *Matter of G–A–*, 23 I&N Dec 366 (BIA 2002).

3. **Sexual Offenses**

a) Attempted rape is a particularly serious crime. *Gatalski v. INS*, 72 F.3d 135 (9th Cir. 1995, unpublished table decision).

b) Attempted sexual abuse is a particularly serious crime. *U.S. v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993) (persuasive authority only).

c) Sexual offenses committed against children are exceptionally serious crimes. *Pablo v. INS*, 72 F.3d 110, 114 (9th Cir. 1995).

d) Unlawful sexual intercourse with a person under 18 and lewd or lascivious acts with a child of 14 or 15 constitute particularly serious crimes. *Bogle-Martinez v. INS*, 52 F.3d 332 (9th Cir. 1995, unpublished table decision).

4. **Theft Offenses**

a) Robbery in the first degree with a weapon, coupled with threatened use of force against the victims, constitutes a particularly serious crime. *Tran v. INS*, 8 F.3d 30 (9th Cir. 1993, unpublished table decision). Armed robbery with a firearm is a particularly serious crime. *Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993).

b) The respondent's conviction for unlawful driving and taking of a vehicle in violation of § 10851(a) of the CVC is

a “theft offense” under § 101(a)(43)(G) of the Act, and when coupled with a five-year sentence, is a particularly serious crime. *Matter of V-Z-S-,* 22 I&N Dec. 1338 (BIA 2000).

c) An asylum applicant who has been convicted of robbery with a deadly weapon (handgun) and sentenced to 2.5 years has been convicted of a particularly serious crime. *Matter of L-S-J-*, 21 I&N Dec. 973 (1997); *Matter of D-*, 20 I&N Dec. 827 (BIA 1994).

d) A conviction for vehicle burglary does not qualify as an aggravated felony because it is neither a “burglary” nor a “crime of violence” as those terms are used in the definition of “aggravated felony,” and is therefore not a particularly serious crime. *Sareang Ye v. INS,* 214 F.3d 1128 (9th Cir. 2000).

e) Conspiracy to invade a home at night and commit armed robbery while masked is a particularly serious crime. *Luan v. INS*, 124 F.3d 212 (9th Cir. 1997, unpublished table decision).

5. **Miscellaneous Offenses**

a) A conviction for criminal contempt in the first degree and forgery in the second degree with a sentence of imprisonment of at least one year is an aggravated felony

under § 101(a)(43)(R) of the Act, but it is not *per se* a particularly serious crime. *Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999).

b) An alien convicted of bringing an illegal alien into the United States in violation of § 274(a)(2)(B)(iii) of the Act and sentenced to 3.5 months imprisonment, given the nature of the conviction and the sentence imposed, as well as the underlying facts and circumstances of the conviction, has not been convicted of a particularly serious crime. *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999).

c) Bank fraud is not a particularly serious crime. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

d) Aggravated battery is a particularly serious crime. *Matter of B-*, 20 I&N Dec. 427 (BIA 1991).

Attachment 1: General Overview of the Jurisdiction of the Courts/IJs

I. The Immigration and Nationality Act of 1952, as amended.[1]

A. **Section 101(b)(4)**

"The term 'immigration judge' means an attorney whom the Attorney General appoints as an administrative judge with the Executive Office for Immigration Review (EOIR), qualified to conduct specified classes of proceedings, including a hearing under section 240. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service."

B. **Section 240(a)(1)**

"An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."Except for Section 240(a)(1), Congress has not explicitly delegated authority to United States Immigration Judges (IJs) to conduct specified classes of proceedings. Rather, the authority has been delegated to the Attorney General.

II. The Administrative Procedures Act

The Administrative Procedures Act of 1946, as amended (APA), as codified at 5 U.S.C. Chapter 5, sets forth the rule-making requirements to delegate authority from the Attorney General to IJs. However, the APA

[1]Title 8 of the United States Code (U.S.C.) is not a codified title of the United States Code. Therefore, the Immigration and Nationality Act of 1952, as amended (Act), is the primary source of Federal immigration and nationality law, *not* U.S.C.

does not apply to the proceedings conducted by IJs. *See Ardestani v. INS*, 502 U.S. 129 (1991); *Marcello v. Bonds*, 349 U.S. 302 (1955).

III. Specific delegations of authority from the Attorney General to EOIR, the Office of the Chief Immigration Judge (OCIJ), the Immigration Court (Court) and IJs.

A. 8 C.F.R. Chapter V, Subpart A

1. Section 1001.1(l)–Defines IJs. [same as Section 101(b)(4) of the Act]
    1. Section 1003.1(a)–Delegates to the Director, EOIR, the authority to generally supervise the OCIJ.
    2. Section 1003.9–The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the IJs in the conduct of the various duties assigned to them.
    3. Section 1003.10–General delegation from Attorney General to IJs to conduct exclusion, deportation, removal, and asylum proceedings, and such other proceedings as the Attorney General may assign them to conduct.
    4. Section 1003.11–Defines an Administrative Control Immigration Court as one that creates and maintains records of proceedings (ROPs) in a given geographical area.
    5. Section 1003.12–Scope of rules of procedure before the Court.

6. Section 1003.13–Definitions of general applicability for 8 C.F.R. Chapter V, Subpart A.
7. Section 1003.14–General delegation of authority to IJs over proceedings.
8. Section 1003.15–Contents of OSCs and NTAs.
9. Section 1003.16–Representation in proceedings.
10. Section 1003.17(b)–General delegations of authority to IJs to permit withdrawal or substitution of an attorney or representative.
11. Section 1003.18–General authority of Court to schedule cases.
12. 1003.19–General delegation of authority to IJs regarding custody/bond determinations.
13. Section 1003.20–General authority of IJs to change venue of proceedings.
14. Section 1003.21–General authority of IJs to conduct pre-hearing conferences, to require any party to file a pre-hearing statement, and to require the parties to submit written evidentiary objections in advance of a hearing.
15. Section 1003.22-Interpreters in proceedings.
16. Section 1003.23–General authority of IJs to reopen and reconsider decisions.
17. Section 1003.24(d)–General authority of IJs to waive filing fees. *See also* 8 C.F.R. § 103.7(c)(1)(DHS); and 8 C.F.R. § 1003.8(c) (BIA).

18. Section 1003.25–General authority of IJs to waive the appearance of parties, approve stipulations, and conduct telephonic or video hearings.
19. Section 1003.26–General authority of IJs to conduct *in absentia* hearings.
20. Section 1003.27–General authority of IJs to limit public access to hearings.
21. Section 1003.28–Recording equipment in proceedings.
22. Section 1003.29–General authority of IJs to grant continuances for good cause shown.
23. Section 1003.30–Obligation of IJs to provide advisals to aliens.
24. Section 1003.31–General authority of Court regarding filing of documents/applications and general authority of IJs to set and extend filing deadlines.
25. Section 1003.32–General authority of Court and IJs over service and size of exhibits.
26. Section 1003.33–Translation of documents.
27. Section 1003.34–Obligation of IJs to take testimony of witnesses by oath or affirmation.
28. Section 1003.35–General authority of IJs over depositions and subpoenas. *See also* 8 C.F.R. § 287.4(a)(2)(ii) and (d).
29. Section 1003.36–Obligation of IJs to record proceedings.

30. Section 1003.37–General authority of IJs over form of decisions, orally or in writing.
31. Section 1003.38–Appeals of IJ decisions.
32. Section 1003.39–Finality of IJ decisions.
33. Section 1003.40–General authority of Court to establish local operating procedures (LOP).
34. Section 1003.41–Evidence of criminal convictions in proceedings.
35. Section 1003.42–General authority of IJs to review adverse, credible fear determinations by an asylum officer.
36. Section 1003.43(h) and (i)–General jurisdiction of IJs over Motions to Reopen (MTR) under Section 203 of NACARA and remands of appeals; and over MTR under Section 1505(c) of the LIFE Act Amendments and remands of appeals.
37. Section 1003.44(d), (e), (f), (g) and (j)–General jurisdiction of IJs over MTR to apply for former § 212(c) relief and remands of appeals.
38. Section 1003.46–General authority of IJs to issue protective orders.
39. Section 1003.47- Restrictions on authority of IJs to grant certain forms of relief in proceedings.
40. Part 1208–General jurisdiction of the Court and IJs over asylum applications.

41. Section 1209.1(e)–General authority of IJs to adjust status–in removal proceedings–of a refugee denied adjustment by DHS.
42. Section 1209.2(f)–General authority of IJs to adjust status–in removal proceedings–of an asylee denied adjustment by DHS.
43. Section 1211.4(b)-General authority of IJs to reconsider DHS denials of waiver of documents requirement for returning residents.
44. Section 1212.2(e)–General authority of IJs to approve Form I-212 requests for permission to reapply for entry into the United States in conjunction with an application for adjustment of status.
45. Section 1212.2(h)–General authority of IJs to approve Form I-212 requests for consent to reapply for admission into the United States denied by DHS under former § 242 of the Act.
46. Section 1212.3(a), (e)(1) and (2), (f), (g), and (h)–General jurisdiction of IJs over Form I-191 applications for a criminal waiver under former § 212(c) of the Act.
47. Section 1212.4(b)–General authority of IJs over Form I-192 applications under § 212(d)(3)(B) of the Act for temporary admission into the United States of certain nonimmigrants.

48. Section 1212.7(a)(1)(ii)–General jurisdiction of IJs over Form I-601 applications for a criminal waiver under § 212(h) of the Act and/or a fraud waiver under § 212(i) of the Act.
49. Section 1212.7(d)–Limitations on authority of IJs to favorably exercise discretion under § 212(h)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, as described in this provision.
50. Section 1212.10–General jurisdiction of IJs over waivers under § 212(k) of the Act for former § 212(a)(14), (20) and (21) exclusion grounds in exclusion proceedings.
51. Section 1214.1–General authority of IJs over voluntary departure bonds in removal proceedings.
52. Section 1214.2–General authority of IJs to administratively close immigration proceedings for victims of severe forms of trafficking in persons who apply for a T nonimmigrant visa, with the concurrence of ICE counsel.
53. Section 1214.3–General authority of IJs to administratively close immigration proceedings for certain spouses and children of LPRs who are eligible to apply for a V nonimmigrant visa.
54. Sections 1215.4-1215.5–General jurisdiction of IJs over certain aliens whose departure from the U.S. has been temporarily prevented.

55. Section 1216.4(d)(2)–General jurisdiction of IJs to review DHS denial of I-751s.
56. Section 1216.5(f)–General jurisdiction of IJs to review DHS denial of I-751s of alien spouses.
57. Section 1216.6(d)(2)–General jurisdiction of IJs to review DHS denial of I-829s filed by alien entrepreneurs.
58. Section 1235(b)-(d)–General jurisdiction of IJs over certain otherwise inadmissible aliens.
    [Note: On 8/11/04 DHS explicitly designated certain categories of aliens who are subject to expedited removal proceedings, as set forth at 8 C.F.R. § 235.3(b)(1)(ii).]
59. Section 1235.6–General jurisdiction of IJs over I-862 referrals for credible fear reviews.
60. Section 1235.8–Jurisdiction of IJs over arriving aliens inadmissible under § 212(a)(3)(A) of the Act.
61. Part 1236–General jurisdiction of IJs over detained aliens.
62. Section 1238.1(b)(2) and (e)–Limited jurisdiction of IJs over expedited removal of certain aggravated felons subject to § 238 of the Act.
63. Sections 1239.1-1239.3–Initiation of removal proceedings and authority of DHS/IJs to terminate removal proceedings.
64. Part 1240–General jurisdiction of the Court and IJs in removal, exclusion and deportation proceedings.

65. Sections 1241.6(c), 1241.8(a), 1241.11(d)(2), 1241.14(a)(2) and (g)-(k)–Limited jurisdiction of IJs over post-hearing detention and removal.
66. Section 1244.18(b) - IJ jurisdiction for *de novo* review of eligibility of certain aliens for temporary protected status.
67. Part 1245–General jurisdiction of IJs to adjudicate applications for adjustment of status.
68. Part 1246–General jurisdiction of IJs to preside over rescission of adjustment of status proceedings.
69. Section 1249.1 and 1249.2–General jurisdiction of IJs in registry proceedings.
70. Section 1287.4(a)(2)(ii)–General authority of IJs to issue administrative subpoenas in proceedings.

B. 28 C.F.R.

1. Part O (Organization of Department of Justice) at Subpart U–Delegations from Attorney General to EOIR.

    a) Section 0.117 (OCIJ)–Authority of the Chief Immigration Judge to provide general supervision to IJs.

2. Part 16

    a) Subpart A–FOIA regulations.

b) Subpart B–Production or disclosure in Federal and State judicial and administrative proceedings.

c) Subpart D–Privacy Act regulations.

d) Subpart E–Exemption of Records Systems Under the Privacy Act.

Attachment 2: Bond / Custody Issues

I. Jurisdiction of Immigration Court

A. A non-arriving, detained alien in DHS custody. See INA § 236; 8 C.F.R. §§ 1003.19 and 1236.1(d)(1).

B. Generally, venue attaches to the place where the alien is detained. See Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).

C. Otherwise, venue attaches to the Court with administrative control over the proceedings, unless otherwise designated by the Office of the Chief Immigration Judge. See 8 C.F.R.§ 1003.13.

D. An LPR will not be considered “properly included” in a mandatory detention category when an IJ or the BIA determines that it is “substantially unlikely” that DHS will prevail on a charge of removal specified in § 236(c)(1) of the Act. See Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (Joseph II).

E. An alien initially screened for expedited removal under §235(b)(1)(A) of the Act but subsequently placed in Section 240 removal proceedings following a positive, credible fear determination by DHS, is eligible for a custody redetermination hearing before an IJ, unless the alien is a member of the listed classes of aliens expressly excluded from the custody jurisdiction of IJs, pursuant to 8 C.F.R. §1003.19(h)(2)(i). See Matter of X-K-, 23 I&N Dec. 731 (BIA 2005).

II. Timeline for Court’s Jurisdiction

A. After DHS has made an initial bond/custody determination[1], but before an administratively final order of deportation or removal is issued. *See Matter of Sanchez*, *supra*; *Matter of Uluocha*, 20 I&N Dec. 133 (BIA 1989); 8 C.F.R. §§ 1003.19(a) and 1236.1(d)(1). However, IJs lack jurisdiction to redetermine the conditions of custody imposed by ICE with regard to aliens who have not been issued and served with an NTA. *See Matter of Werner*, 25 I&N Dec. 45 (BIA 2009). An IJ does have the authority to review and consider whether to modify the conditions of release imposed by DHS on the alien. *See Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009).

B. Subsequent redeterminations of bond/custody status are limited, as follows:

1. a written request, served on opposing counsel, demonstrating that the alien's circumstances (factually and/or legally) have changed materially since the initial, bond/custody redetermination hearing, consistent with 8 C.F.R. § 1003.19(e) and *Matter of Uluocha, supra*;

2. however, if the alien is no longer in DHS custody and seven days have elapsed since the alien's release, the Court lacks jurisdiction, consistent with 8 C.F.R. § 1236.1(d)(1), *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), and *Matter of Valles-Perez*, 21 I&N Dec. 769 (BIA 1997).

[1]Under 8 C.F.R. § 287.3(d), with certain exceptions, ICE must make this determination within 48 hours of the arrest.

a) only the alien or the alien's attorney or representative may submit the written request for a further redetermination, consistent with 8 C.F.R. § 1003.19(e) and *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1992);

b) an alien in exclusion proceedings or and arriving alien in removal or asylum-only proceedings is not eligible for such a redetermination by the Court, consistent with 8 C.F.R. §§ 217.4(a)(1) (Visa Waiver Program), 1001.1(q), 1003.19(h), 1208.2(c), 1236.1(c)(11), INA § 212(d)(5) of the, and *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998);

c) after the Court has entered an administratively final order of removal or deportation, only the BIA has jurisdiction to review DHS's custody determinations, consistent with 8.C.F.R.§ 1236.1(d)(3) and *Matter of Valles-Perez, supra*; or

d) if the alien is subject to removal on security, terrorist, foreign policy or related grounds under § 237(a)(4) of the Act, the Court lacks jurisdiction, as no delegation of authority has been granted to the Court.

e) to ensure the alien's timely departure from the United States when the alien has no other viable relief, the IJ may order the alien detained "under safeguards" coupled with voluntary departure, as discussed in *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009).

III. Factors Considered in a Bond Determination

A. Fixed address in the United States. See Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

B. Length of residency in the United States. See Matter of Shaw, 17 I&N Dec. 177 (BIA 1979).

C. Family ties in the United States, particularly parents, spouse, children, and siblings with legal status in the United States. See cases cited above.

D. Employment history in the United States, particularly the length and stability of such employment. See cases cited above.

E. Prior immigration history/record of the alien in the United States. See cases cited above.

F. Prior attempts to escape from legal authorities or flight to avoid prosecution. See cases cited above; Matter of San Martin, 15 I&N Dec. 167 (BIA 1967).

G. Prior failures to appear for scheduled court appearances/proceedings. See cases cited above.

H. Criminal record, particularly the extent and recency of arrests/convictions. See Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

I. Any other factor, such as early release from jail, prison, parole or probation which will aid the Court in determining whether the alien is

a danger to the community and/or a risk of flight.; *see also Matter of Drysdale, supra*; *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (danger to the community).

Attachment 3: Aggravated Felony Defined

I. Section 101(a)(43)(A).

A conviction for "murder, rape, or sexual abuse of a minor" constitutes an aggravated felony under § 101(a)(43)(A) of the Act, including a misdemeanor offense of sexual abuse of a minor, if the State offense otherwise conforms to the Federal definition at § 101(a)(43) of the Act. *See Matter of Small*, 23 I&N Dec. 448 (BIA 2002); *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); *United States v. Yanez-Saucedo*, 295 F.3d 1055 (9th Cir. 2002) (third-degree rape under Washington State law which does not require the offender to use force constitutes an aggravated felony under § 101(a)(43)(A) of the Act); *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003) (violation of CPC § 261.5(c) is an aggravated felony) citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (held that an alien's conviction for lewdness with a child under age14, in violation of Nevada Revised Statutes (NRS) § 201.230(1), is an aggravated felony under § 101(a)(43)(A) of the Act, notwithstanding its subsequent expungement); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005) (statutory seduction of a minor [14 years old] under NRS § 200.364, 368 is an aggravated felony for sentencing enhancement purposes even though the alien was sentenced to 12 months in jail, a gross misdemeanor under Nevada law); *Parrilla v. Gonzales*, 414 F.3d 1038 (9th Cir. 2005) (communication with a minor for immoral purposes under Washington Revised Code § 9.68A.090 constitutes sexual abuse of a

minor under the modified categorical approach where the certification for determination of probable cause revealed explicit conduct of a sexual nature and was expressly incorporated into the guilty plea).

Rape in the third degree under Oregon law, which criminalizes as felony "sexual intercourse with another person under 16 years of age," falls within ordinary, contemporary, and common meaning of the word "rape," because the statute prohibits sexual activity that is both (1) unlawful and (2) without consent as a matter of law. *Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006). It is thus an aggravated felony. *Id.* A victim of sexual abuse who is under the age of 18 is a "minor" for purposes of determining whether an alien has been convicted of sexual abuse of a minor within the meaning of § 1101(a)(43)(A) (2000). *Matter of V-F-D-,* 23 I&N Dec. 859 (BIA 2006). The offense of sexual intercourse with a minor more than three years younger under California law is an aggravated felony. The court may properly employ the "ordinary, contemporary, and common meaning" of the term "sexual abuse of a minor" when it relies on the dictionary definition of a minor as a person under 18 rather than the Federal definition at 18 U.S.C. §2243 (age 12-16, but is at least four years younger than the perpetrator). In overruling *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006) and its original decision in *Estrada-Espinoza v. Gonzales*, 498 F.3d 933 (9th Cir. 2007), an *en banc* panel of the Ninth Circuit ruled on October 20, 2008, that convictions under §§261.5(c), 286(b)(1), 288a(b)(1), or 289(h) of the CPC do not categorically constitute "sexual abuse of a minor," within the meaning of §101(a)(43)(A) of the Act, in circumstances where: there were no allegations of abuse or violence by the perpetrator; the perpetrator and

the victim were cohabitating with the consent of both sets of parents *and* the couple raised a child of that relationship together. *See Estrada-Espinoza v. Mukasey,* 546 F.3d 1147(9th Cir. 2008) (en banc).

Distinguishing *Estrada-Espinoza v. Mukasey*, *supra*, a Ninth Circuit panel held on May 28, 2009, that a sentence enhancement under the U.S.S.G. for illegal reentry after a removal for a prior conviction under CPC § 288(a) constitutes sexual abuse of a minor and thus qualifies as a crime of violence, because *Estrada-Espinoza* does not undermine the Ninth Circuit's conclusion in *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), that the use of young children for the gratification of sexual desires constitutes the sexual abuse of a minor. *See United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009).

In *Pelayo-Garcia v. Holder*, ___ F.3d ___ (9th Cir.2009), the Ninth Circuit held that unlawful sexual intercourse with a minor offense, CPC § 261.5(d), does not constitute sexual abuse of a minor. First, the Court concluded that § 261.5(d) is not categorically an aggravated felony under *Estrada-Espinoza*, because a defendant could be convicted under § 261.5(d) even if the government failed to prove beyond a reasonable doubt that the defendant "knowingly" engaged in a sexual act. The Court then compared the elements of § 261.5(d) with the elements of the federal generic crime of "sexual abuse of a minor" as defined in *Medina-Villa*. The Ninth Circuit found that § 261.5(d) criminalizes a broader range of conduct than the crime delineated in *Medina-Villa* because a defendant could be convicted under § 261.5(d) even if the government failed to prove beyond a reasonable doubt that the defendant's conduct constituted "abuse."

Furthermore, § 261.5(d) does not expressly include physical or psychological abuse of a minor as an element of the crime. Nor does it criminalize only conduct that is per se abusive, because it is not limited to conduct targeting younger children.

The BIA has adopted a broad definition of "sexual abuse" by looking at various Federal definitions of "sexual abuse of a child," the definition in Black's Law Dictionary, and the intent of Congress to remove aliens who are sexually abusive toward children. The BIA found the definition of "sexual abuse of a minor" under 18 U.S.C. § 3509 to be a reasonable interpretation, and expressly stated that this definition was not to serve as a definitive standard, but rather as a guide in identifying the types of crimes that would be considered sexual abuse of a minor. The BIA found 18 U.S.C. § 2243 to be "[in]consistent with Congress' intent to remove aliens who are sexually abusive toward children and to bar them from any relief." Additionally, it found § 2243 to be "too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it is commonly used." *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995-96 (BIA1999) (A conviction for violation of a Texas statute making it a felony for an adult to sexually expose himself to a child was, for purposes of § 101(a)(43)(A) of the Act, an aggravated felony of "sexual abuse of a minor.").

However, a misdemeanor conviction under CPC § 647.6(a) (annoying or molesting a child) is not an aggravated felony. *See United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004).

On November 2, 2007, a Ninth Circuit panel held that A.R.S. §§ 13-1001 and 13-1403(B), which defines and prohibits attempted public sexual indecency to a minor, includes conduct that falls outside the Federal definition of attempted sexual abuse of a minor at §101(a)(43)(A) and (U) of the Act. For example, the minor need not be touched or aware of the offender's conduct. Thus, the panel concluded that attempted public sexual indecency to a minor is not sexual abuse within the meaning of §101(a)(43)(A) and (U) of the Act under either the categorical or modified categorical approach. *See Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007). The Opinion was modified on May 16, 2008, to make clear that only the categorical analysis applied in rendering the opinion. *See Rebilas v. Mukasey*, 527 F.3d 783 (9th Cir. 2008).

II. Section 101(a)(43)(C)

A State conviction for being a felon in possession of a firearm does not require a Federal, commerce nexus as one of its elements (under18 U.S.C. § 921) to qualify as an aggravated felony under §101(a)(43)(C) of the Act. *See United States v. Castillo-Rivera*, 244 F. 3d 1020 (9th Cir. 2001), *cert. denied*, 534 U.S. 931 (2001).

III.Section 101(a)(43)(D)

The phrase "amount of funds" in § 101(a)(43)(D) of the Act pertaining to money laundering refers to the amount of money that was laundered, not the loss suffered by the victim of the crime. *See Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001).

IV. Section 101(a)(43)(E)

Possession of a firearm by a felon in violation of § 12021(a)(1) of the CPC is an aggravated felony under § 101(a)(43)(E)(ii) of the Act because it is described in 18 U.S.C. § 922(g)(1). *See Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002); *United States v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir. 2003) (State of Washington first degree unlawful possession of a firearm by a previously convicted felon is an aggravated felony under §101(a)(43)(E) of the Act); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001), *cert. denied*, 534 U.S. 931 (2001). Similarly, in *United States v. Delaney,* 427 F.3d 1224 (9th Cir. 2005), a defendant's sentence as a career offender is affirmed over the defendant's claim that a conviction for possession of a short-barreled shotgun is not a crime of violence under the United States Sentencing Guidelines. A convicted felon in possession of a firearm has violated 18 U.S.C. §922(g) even if he was only in possession of the firearm for a few seconds. This is a strict liability statute that has only three elements: (1) the defendant is a convicted felon; (2) the defendant was in knowing possession of the firearm; and (3) the firearm was in or was affecting interstate commerce. *See United States v. Johnson,* 459 F.3d 990 (9th Cir. 2006).

V. Section101(a)(43)(F)

Possession of an unregistered, sawed-off shotgun is a crime of violence. *See United States v. Dunn*, 946 F.2d 615 (9th Cir. 1991); *United States v. Diaz-Diaz*, 327 F.3d 410 (5th Cir. 2003) (persuasive authority only).

A conviction under CPC § 192(a) for voluntary manslaughter is a crime of violence under § 101(a)(43)(F) of the Act – for purposes of the USSG – because intentional use of force is not required, since recklessness is a sufficient *mens rea* to establish it. *See United States v. Bonilla-Montenegro*, 331 F.3d 1047 (9th Cir. 2003).

A 1995 conviction for assault with a deadly weapon with a one-year sentence in violation of § 245(a)(1) of the CPC is an aggravated felony under § 101(a)(43)(F) of the Act. *See Ocampo-Duran v. Ashcroft*, 254 F. 3d 1133 (9th Cir. 2001).

An Arizona conviction for aggravated assault, *i.e.*, assault with a deadly weapon or dangerous instrument, in violation of Arizona Revised Statute (ARS) § 13-1203 (A)(i)(2000), requires intentional, knowing or reckless conduct causing physical injury to another person. Thus, the use of force is a required element of the statute; it constitutes a crime of violence under 18 U.S.C. § 16(a); and, therefore, it is an aggravated felony within the meaning of 18 U.S.C. § 16(a). *See United States v. Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000).

A California Conviction for mayhem under CPC § 203 is a § 101(a)(43)(F) aggravated felony vis-a-vis 18 U.S.C. § 16(b). See *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219 (9th Cir. 2004).

VI. Section 101(a)(43)(G)

Because CPC § 484(a) is too broad to constitute a theft offense in all circumstances, a conviction under CPC §§ 488 and 666 does not “facially qualify” as an aggravated felony under § 101(a)(43)(G) of the Act. Indeed,

this section is inconsistent with the modern generic definition of the § 101(a)(43)(G) phrase, “theft offense including receipt of stolen property,” which 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. Nor can the pre-sentence report be used to establish the fact of the conviction. *See United States v. Corona-Sanchez*, 291 F. 3d 1201 (9th Cir. 2000) (*en banc*); and *Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004) (A conviction for petty theft with a prior conviction under CPC §§ 484, 488, and 666 is not a crime for which a sentence of one year or longer may be imposed vis-a-vis § 237(a)(2)(A)(i)(II) of the Act, citing *Corona-Sanchez*, *supra*).

Similarly, an alien’s 1992 conviction in California for receipt of stolen property with a two-year sentence constitutes an aggravated felony under § 101(a)(43)(G) of the Act. *See United States v. Maria-Gonzalez*, 268 F.3d 664 (9th Cir. 2001); *Randhawa v. Ashcroft*, 298 F.3d 1148 (9th Cir. 2002) (conviction for possession of stolen mail in violation of 18 U.S.C § 1708 is a theft offense and an aggravated felony); *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. 2009) (felony conviction under CPC § 496(a) categorically qualifies as a theft offense under section 101(a)(43)(G) of the Act).

Similarly, the BIA has held that a taking of property constitutes a theft offense within the meaning of § 101(a)(43)(G) of the Act where there is criminal intent to deprive the owner of the rights and benefits of ownership, even if the deprivation is less than total or permanent, *e.g.* unlawful driving and taking of a vehicle. *See Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *compare Nevarez-Martinez v. Ashcroft*, 326 F.3d 1053 (9th Cir.

2003) (Theft of a means of transportation under ARS § 13-1814 is not a theft offense for immigration purposes where there is no criminal intent to deprive the owner of his property). In *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005), the court ruled that CVC §10851(a) is not a *per se* theft offense statute that qualifies as a §101(a)(43)(G) offense. However, in *United States v. Vidal*, 453 F.3d 1114 (9th Cir. 2005), *Penuliar* is distinguishable in the case of an alien previously convicted for "aiding and abetting" the unlawful taking of a vehicle in violation of CVC §10851(a), within the meaning of 18 U.S.C. §2(a), because under California law an aider and abettor is one who acts with: (1) knowledge of the unlawful purpose of the perpetrator; (2) the intent or purpose of committing, encouraging or facilitating the commission of the offense; and (3) by act or advice aids, promotes, encourages or instigates the commission of the crime.

On January 17, 2007, the United States Supreme Court ruled that a "theft offense" includes the crime of aiding and abetting a theft offense. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), in which the United States Supreme Court overruled *Penuliar v. Ashcroft*, *supra*, in a decision also analyzing CVC § 10851(a). Both of these cases are cited in *Matter of Moncada*, 24 I&N Dec. 62 (BIA 2007) (The exception to deportability under § 237(a)(2)(B)(i) of the Act for a conviction for possession of 30 grams or less of marijuana for one's own use does not apply to a statute having as an element possession of the marijuana in a prison-related setting.).

More recently, on December 27, 2007, the Ninth Circuit cited *Gonzales v. Duenas Alvarez, supra,* favorably involving the taking of a vehicle in violation of CVC § 10851(a). *See Arteaga v. Mukasey*, 511 F.3d

940 (9th Cir. 2007). On January 17, 2008, a panel of the BIA clarified *Matter of V-Z-S-, supra*, by holding that a welfare offense under the General Laws of Rhode Island is not a theft offense under § 101(a)(43)(G) of the Act because a theft offense requires a taking of property without consent whenever there is a criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent; whereas, in a fraud scheme the theft occurs *with consent* that has been unlawfully obtained, e.g., § 101(a)(43)(M)(i). *See Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008).

A conviction under NRS §§193.330 and 205.275 for an attempted theft offense, including receipt of stolen property, is an aggravated felony under § 101(a)(43)(G) and (U) of the Act. *See Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000); and *Randhawa v. Ashcroft*, 298 F.3d 1148 (9th Cir. 2002).

In adding the words “receipt of stolen property” to § 101(a)(43)(G) of the Act, “theft” and “receipt of stolen property” can be separate offenses. Indeed, the phrase “theft offense” encompasses “a myriad of offenses.” The phrase “receipt of stolen property” encompasses the category of offenses that involve knowing possession, concealment, or retention of stolen property from its rightful owner after receipt. In the case of § 496(a) of the CPC, one who aids in the concealment of stolen property is deemed a second-degree principal and hence has committed a theft offense within the meaning of *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000); *see also Gonzales v. Duenas Alvarez*, 549 U.S. 183, 189 (2007). Further, receipt of extorted property is included under § 101(a)(43)(G) of the Act. Indeed, the generic, contemporary meaning of “receipt of stolen property” has a least

four elements: 1) the receiving of 2) stolen property 3) knowing it to be stolen and 4) the intent to deprive the owner of his or her property. More importantly, at least as it applies to California caselaw, a violation of § 496(a) of the CPC requires only a "general intent." Finally, § 496(a) prohibits the concealing, selling, or withholding of stolen or extorted property, or aiding in the same with the knowledge the property is stolen or obtained. Thus, the respondent's conviction under § 496(a) in which he was sentenced to more than one year of imprisonment constitutes the receipt of stolen property and is thus an aggravated felony under § 101(a)(43)(G) of the Act. *See Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009). However, committing theft of property by false pretenses under CPC § 484(a) with the consent of the owner is not an aggravated felony under § 101(a)(43)(G) of the Act. *See Carrillo-Jaime v. Holder*, 572 F.3d 747 (9th Cir. 2009).

Citing 18 U.S.C. § 924(e)(2)(B), the Supreme Court established a generic definition for burglary as "[1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime." *See Taylor v. United States*, 495 U.S. 575, 599 (1990). This generic definition was cited favorably by the Ninth Circuit on December 3, 2004, when it ruled that a defendant's conviction by plea to unlawfully entering an inhabited dwelling and taking personal property belonging to the inhabitant of the dwelling in violation of CPC § 459 encompassed the *Taylor* definition of generic burglary. *See United States v. Smith*, 390 F.3d 661 (9th Cir. 2004). Thus, first degree burglary under CPC §459, which is punishable by imprisonment in the State prison for two, four or six years under CPC

§461(1), is an aggravated felony under §101(a)(43)(G) of the Act. *See Nunes v. Ashcroft*, 348 F.3d 815 (9th Cir. 2003).

However, a conviction for burglary of a vehicle is not a burglary offense within the meaning of § 101(a)(43)(G) of the Act. *See Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000); and *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

Theft under ARS § 13-1802 (possession of stolen property) is not a theft offense under § 101(a)(43)(G) where intent is not shown. *See Huerta-Guerara v. Ashcroft*, 321 F.3d 883 (9th Cir. 2003).

Under the modified categorical approach, an alien's guilty plea to elements of a theft offense, as generically defined under § 487(c) of the CPC, qualifies as a theft offense within the meaning of § 101(a)(43)(G) of the Act. *See Martinez-Perez v. Ashcroft*, 393 F.3d 1018 (9th Cir. 2004), *opinion withdrawn*, *amended opinion at* 417 F.3d 1822 (9th Cir. 2005), holding that grand theft from a person under CPC §487(c) does not facially qualify as an aggravated felony because from the conviction documents it could not be determined that the alien plead to all elements of the generic offense of theft.

Identity theft under ORS § 165.800 is not categorically a conviction for an aggravated felony theft offense because the defendant's intent is to deceive a third party by using another person's address. *See Mandujano-Real v. Mukasey*, 526 F.3d. 585 (9th Cir. 2008).

VII. Section 101(a)(43)(I)

A conviction for violation Article 92 of the Uniform Code of Military Justice does not categorically involve a depiction of a minor engaging in

sexually explicit conduct. Hence, that conviction does not constitute an aggravated felony within the meaning of section 101(a)(43)(I) of the Act. *See Aguilar-Turcios v. Holder,* 582 F.3d 1093 (9th Cir. 2009).

VIII. Section 101(a)(43)(K)(ii)

An alien has been convicted of an aggravated felony under § 101(a)(43)(K)(ii) of the Act if he has been convicted of any offense described in 18 U.S.C. §§ 2421-2423 *and* committed for commercial advantage (here, a conviction for conspiracy to entice individuals to travel in interstate and foreign commerce to engage in prostitution). The categorical/modified categorical approach under *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) applies to the element of conviction of an offense described in 18 U.S.C. §§ 2421, 2422, or 2423. However, the determination as to whether the offense has been "committed for commercial advantage" requires an inquiry into the underlying conduct that preceded the conviction. Hence, in making this determination, an IJ may consider the pre-sentence report, the alien's admissions and any other relevant evidence. *See Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007).

IX. Section 101(a)(43)(M)

An LPR convicted after a jury trial of eight, fraud-related Federal offenses under 18 U.S.C §§ 2, 287, 371, and 1001 and sentenced to twenty-four months in prison is not subject to removal as an aggravated felon pursuant to §101(a)(43)(M)(i) and (U) of the Act because the amount of loss to the victim or victims (of more than $10,000) is not an element of the underlying crimes of conviction. Similarly, neither the superceding

information nor the judgment of conviction demonstrates unequivocally that the jury found the amount of loss arising from the alien's fraud to be greater than $10,000. *See Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004). In contrast, on December 1, 2004, the Ninth Circuit affirmed an LPR's conviction for welfare fraud in violation of §10980(c)(2) of the California Welfare and Institutions Code (WIC) as an aggravated felony within the meaning of §101(a)(43)(M)(i) of the Act because the plea agreement specifically set forth the amount of restitution to the State of California at $22,305, based upon the State's actual loss. The Court distinguished this case from *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002), noting that: the amount of loss specified in the Federal indictment directly contradicted the amount of loss set forth in the plea agreement, whereas, in the case at bar, the criminal complaint simply stated that the amount of loss exceeded $400; and the court in *Chang* relied upon the fact that the Federal Sentencing Guidelines allow for consideration of conduct not charged in an indictment or proven to a jury in setting an amount of restitution, whereas, in the case at bar, § 1204.4(f) of the CPC provides that a restitution order in favor of the State must be calculated on the actual loss to the State agency. *See Ferreira v. Ashcroft*, 390 F.3d 1091(9th Cir. 2004). In the context of removal proceedings, the offense of forgery under CPC § 476 requires knowledge of the fictitious nature of the instrument, and is therefore not broader than the Federal definition of "offense relating to forgery" for purposes of qualifying as an "aggravated felony." *See Morales-Alegria v. Gonzales*, 449 F.3d 1051 (9th Cir. 2006).

Where a defendant pleads guilty to fraudulently appropriating more than $10,000 but later makes the victims whole, the defendant has not paid

down the loss to the victims below the statutory threshold vis-a-vis § 101(a)(43)(M)(i) of the Act. *See Kharana v. Gonzales*, 487 F.3d 1280 (9th Cir. 2007).

On September 18, 2007, a panel of the Ninth Circuit ruled that a LPR's conviction for subscribing to a false statement on a Federal tax return in violation of 26 U.S.C. § 7206(1) was an aggravated felony within the meaning of § 101(a)(43)(M)(i) where the total, actual tax loss exceeded $245,000, because the violation in question included the two elements of "fraud and deceit" *and* the loss to the victim exceeded $ 10,000.00. However, in the case of his wife, the record of conviction consisted only of the information and her admission of the conviction of aiding and assisting the preparation of the false tax return. *See Kawashima v. Gonzales,* 503 F.3d 997 (9th Cir. 2007).

On September 28, 2007, a BIA panel decided *Matter of Babaisakov,* 24 I&N Dec. 306 (BIA 2007). Its holding as to offenses within the scope of §101(a)(43)(M)(i) of the Act is articulated as follows:

> Nevertheless, we conclude that the statute governing removal for an aggravated felony conviction involving fraud or deceit with a loss exceeding $10,000 demands two types of determinations. The first is a categorical inquiry into a conviction under a criminal statute with an element of fraud or deceit with a loss exceeding $10,000 demands two types of determinations. The first is a categorical inquiry into a conviction under criminal statute with an element of fraud or deceit. The second is an ordinary evidentiary inquiry into whether the loss associated with the fraudulent conduct

> encompassed by the conviction exceeds $10,000. The second inquiry cannot be confined to the categorical or modified categorical approach because it does not involve a search for the elements of the crime, even though conviction record information may suffice in making this independent 'loss determination'.

The Board panel also held that in analyzing the second element, an IJ "may consider any evidence, otherwise admissible in removal proceedings, including witness testimony, bearing on the loss to the victim in an aggravated felony case involving §101(a)(43)(M)(i) of the Act." *Id*. at 321. This recent BIA decision is in tension with Ninth Circuit case law discussed above, which considers the loss to the victim(s) to be a second *statutory* element.

On October 4, 2007, the BIA issued another published decision addressing §101(a)(43)(M)(i) of the Act. The alien in question had been convicted of conspiracy to commit fraud or deceit, where the loss to the victim was characterized as "potential loss," which must exceed $10,000.00 under §101(a)(43)(M)(i) and (U) of the Act. In 2004, the alien was convicted of conspiracy and mail fraud based upon offenses committed between 1998 and 2003, in violation of:18 U.S.C. §1035 (false statements relating to a health care program); mail fraud under 18 U.S.C. §1341; and health insurance fraud under 18 U.S.C. §1347. A panel of the BIA held that, because these offenses involved conspiracy to commit all three offenses, only the "potential" loss to the victim(s) must exceed $10,000.00. The BIA found that the plea agreement which was part of the Immigration Court record included a stipulation that the foreseeable loss arising from the three

offenses was between $70,000.00 and $120,000.00. Thus, the panel ruled that DHS had met its BOP under §101(a)(43)(M)(i) and (U) of the Act. In a footnote, the panel noted that because the conviction record contained evidence sufficient to establish the requisite amount of the potential loss, neither the IJ nor the BIA was required to consider evidence outside the conviction documents,. *See Matter of S-I-K-*, 24 I&N Dec. 324 (BIA 2007) (citing *Matter of Babaisakov, supra*).

Section 101(a)(43)(m)(i) of the Act has two mandatory elements: (1) the offense must involve fraud or deceit, and (2) the offense must have resulted in a loss to the victim(s) of more than $10,000. Where the aliens pled guilty to violations of 26 U.S.C. §§ 7206(1) and 7206(2), which do not require the government to prove the amount of loss their actions occurred, the convictions are not aggravated felonies. *See Kawashima v. Mukasey,* 530 F.3d 1111 (9th Cir. 2008).

On June 15, 2009, a unanimous Supreme Court held that the $10,000 loss provision in § 101(a)(43)(M) of the Act calls for a "circumstance-specific" interpretation, not a "categorical" one, thereby permitting the IJ to rely upon early sentencing-related material such as the sentencing stipulation and/or the court's restitution order. *See Nijhawan v. Holder*, 129 S.Ct. 2294 (2009).

X. Section 101(a)(43)(N)

Harboring illegal aliens in violation of §274(a)(1)(iii) of the Act constitutes an aggravated felony for purposes of §101(a)(43)(N) of the Act. *See Castro-Espinoza v. Ashcroft*, 257 F. 3d 1130 (9th Cir. 2001).

Transporting aliens is an offense related to alien smuggling and thus an aggravated felony under § 101(a)(43)(N) of the Act. *See United States v. Galindo-Gallegos*, 244 F. 3d 728 (9th Cir. 2001). Additionally, when the evidence demonstrates that the defendant acted in concert with others to bring an undocumented alien into the United States, the Government may charge the defendant as an aider and abettor. *United States v. Ramirez-Martinez*, 273 F.3d 903 (9th Cir. 2001). The Government need only show that defendant knowingly aided and abetted a principle. *United States v. Fimbres*, 49 Fed Appx 726 (9th Cir. October 23, 2002, unpublished).

However, an alien's mere presence in a vehicle with knowledge of a Mexican national in the trunk did not constitute alien smuggling under § 212(a)(6)(E)(i) of the Act because the alien did not perform an act of assistance or encouragement. *See Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005).

In *Guzman-Mata*, a USSG sentencing case, the alien had previously been convicted and removed for alien smuggling under § 274 of the Act, which constituted an aggravated felony under § 101(a)(43)(N) of the Act. Respondent had been previously deported 14 times and had 18 different criminal convictions over a 10 year period. As a result, he was given an enhanced sentence of 77 to 96 months under the USSG. The U.S. District Court imposed a sentence of 77 months. On appeal, the alien argued that the family exception to a § 274(a)(1)(A) conviction for alien smuggling is not merely an exception, but rather an element of the generic offense. Relying on *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), and its analysis of aggravated felony convictions within the meaning of § 101(a)(43) of the Act, the Ninth Circuit panel concluded that the family exception is *not* an

element of the crime. *See United States v. Guzman-Mata*, 579 F.3d 1065 (9th Cir. 2009)

XI. Section 101(a)(43)(R)

An alien's conviction for possession of counterfeit obligations of the United States is an act related to the act of counterfeiting (knowledge of the counterfeit nature of the currency and the intent to defraud) and hence an aggravated felony under § 101(a)(43)(R) of the Act. *See Albillo-Figueroa v. INS*, 221 F. 3d 1070 (9th Cir. 2000); *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006); *Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999) (criminal contempt in the first degree is a crime of violence for purposes of §101(a)(43)(F), and forgery in the second degree constitutes a § 101(a)(43)(R) aggravated felony).

The essential elements of the crime of forgery at common law are: (1) a false making of an instrument in writing; (2) a fraudulent intent; and (3) an instrument apparently capable of effecting fraud. In essence, forgery requires a lie relating to the genuineness of the document. A violation of CPC § 475(c) encompasses both genuine and fictitious instruments. Where the only record of an LPR's conviction for a violation of § 475(c) is an abstract of judgment which does not establish whether the conviction involved an altered or falsified document, DHS has not established that the conviction was for an offense relating to forgery under § 101(a)(43)(R) of the Act. *See Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008).

XII. Section 101(a)(43)(S)

A conviction for perjury in violation of Section 118(a) of the CPC constitutes a conviction for an aggravated felony under §101(a)(43)(S) of

the Act. *See Matter of Martinez-Recinos*, 23 I&N Dec. 175 (BIA 2001). However, misprision of felony under 18 U.S.C. § 4 is not an aggravated felony under § 101(a)(43)(S). *See Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999). By contrast, an accessory after the fact to a drug-trafficking crime under 18 U.S.C. § 3 is an aggravated felony under § 101(a)(43)(S). *See Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

A violation of 18 U.S.C. § 751 does not require the existence of a pending judicial proceeding, much less knowledge of or a specific intent to obstruct such a proceeding. This offense has three elements: (1) the defendant must act with knowledge that (2) his action have the natural and probable effect of interfering with (3) a pending judicial proceeding. *See Salavar-Luviano v. Mukasey*, 551 F.3d 857 (9th Cir. 2008).

XIII. Section 101(a)(43)(S) and (T)

A conviction for failure to appear in court in violation of 18 U.S.C. § 3146 is not categorically an aggravated felony. Hence, the modified categorical approach under *Taylor v. United States*, 495 U.S. 575 (1990), must be applied. Given the facts presented, defendant Rivera's conviction for being released and knowingly failing to appear before a court as required by the conditions of her release *and* her failure to obey a court order to surrender for service constitute active interference with the proceedings of a tribunal within the meaning of § 101(a)(43)(S) of the Act.

By contrast, defendant Renteria clearly established that the judicially noticeable documents did not establish that she was under a court order or that she was ordered to appear to answer to or dispose of a charge. Thus, her conviction under 18 U.S.C. § 3146(a)(1) does not constitute a

conviction under § 101(a)(43)(T) of the Act because only two of the four elements of the statute have been satisfied. *See Renteria-Morales v. Mukasey*, 551 F.3d 1076 (9th Cir. 2008), *superseding original decision at* 532 F.3d 949 (9th Cir. 2008).

XIV. Section 101(a)(43)(U)

A conviction for submitting a false claim to an insurance company with the intent to defraud the insurer out of $15,000 is deemed an aggravated felony, for an attempt to commit a fraud in which the loss to the victim exceeded $10,000, within the meaning of § 101(a)(43)(U) of the Act, vis-a-vis former § 241(a)(2)(A)(iii) of the Act and 26 U.S.C. § 7201. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).

XV. Section 101(a)(43)(G) and (U)

A conviction for entering a locked vehicle with the intent to commit theft therein is a attempted theft offense under §459 of the CPC. The panel noted that in the sentencing context, the Ninth Circuit defines “attempt” as containing two elements: “(1) an intent to engage in criminal conduct, coupled with (2) an overt act constituting a substantial step toward the commission of the crime.” The panel cited *United States v. Morales-Perez*, 467 F.3d 1219, 1222 (9th Cir. 2006). Agreeing with the reasoning of the Fifth and Seventh Circuits, the panel held that the offense in question constitutes an attempted theft offense for purposes of §101(a)(43) of the Act. *See Ngaeth v. Mukasey*, 545 F.3d 796, 800 (9th Cir.2008).

Attachment 4: Controlled Substance Convictions

I. Sharing of Drugs

A Sharing of methamphetamine with a defendant's cohabitant constitutes a distribution within the meaning of 21 U.S.C. §841(a)(1). Hence, defendant is guilty of possession of methamphetamine with the intent to distribute it within the meaning of 21 U.S.C. §§841(a)(1) and 846. *See United States v. Pearson*, 391 F.3d 1072 (9th Cir. 2004) (citing, *United States v. Ramirez*, 608 F.2d 1261, 1264 (9th Cir 1979)).

II. Under the Influence of a Controlled Substance

A conviction under §11550 of the CHSC for using and being under the influence of a controlled substance, *i.e.*, opiates, cocaine, methamphetamine, or a combination thereof, is deemed a violation of any law or regulation relating to a controlled substance for purposes of the Act. *See Matter of Esqueda*, 20 I&N Dec. 850 (BIA 1994) (citing *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993)).

III. Under the Influence of THC

An alien convicted for attempt to be under the influence of THC-carboxylic acid is not removable pursuant to § 237(a)(2)(B)(i). *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005). Additionally, the exception in § 212(h) of the Act for a single conviction involving marijuana possession for personal use of 30 grams or less includes an "implicit exception" for a single conviction of *actual* personal use of marijuana. *Id*.

IV. Possession of Drug Paraphernalia

A conviction for possession of drug paraphernalia under ARS §13-3415 is conviction for a violation of a law related to a controlled substance as defined under the CSA and therefore is a violation of § 237(a)(2)(B)(i) (controlled substance violation) of the Act. *See Luu-Lee v. INS*, 224 F. 3d 911 (9th Cir. 2000).

V. Reason to Believe

For purposes of § 212(a)(2)(C)(i) of the Act, there was a "reason to believe" that the alien was an illicit trafficker in a controlled substance where he negotiated with an undercover agent for the purchase of five kilograms of cocaine. *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003).

VI. Attempted Escape

Similarly, evidence of an alien's attempted escape and subsequent arrest for driving a vehicle containing 147 pounds of concealed marijuana supported the IJ's determination that an immigration officer had reason to believe the alien was involved in drug trafficking within the meaning of § 212(a)(2)(C) of the Act. *See Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004); *but see Matter of Rocha*, 20 I&N Dec 944 (BIA 1995).

VII. Conspiracy to Commit Money Laundering

An alien's conviction for conspiracy to commit money laundering was not an aggravated felony of trafficking in a controlled substance where he was convicted of activities related to "racketeering proceeds" because the Arizona statute was not specifically targeted at regulating controlled

substances. More importantly, this case stands for the proposition that: “In cases where a state statute criminalizes both conduct that does and does not qualify as an aggravated felony, we review the conviction using a modified categorical approach. ‘Under the modified categorical approach, we conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generally defined crime even though his or her statute was facially over inclusive’. . . . Under the old categorical approach, a PSR [pre-sentence report] does not ‘unequivocally establish’ the elements of a conviction where the statute of conviction is not a categorical match . . . ‘[A] presentence report reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition’.” *See Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003).

VIII. Distribution Outside the United States

An alien’s convictions for conspiracy to possess cocaine with the intent to distribute and attempted possession of cocaine with the intent to distribute the cocaine *outside* the United States constitutes a violation of 21 U.S.C. §§ 846 and 841(a)(1). *See United States v. Holler*, 411 F.3d 1061 (9th Cir. 2005).

IX. Distribution Resulting in Death

An alien’s conviction for distribution of a controlled substance resulting in death to the user pursuant to 21 U.S.C. § 841(a)(1) is subject to a heightened minimum sentence under 21 U.S.C. § 841(b)(1)(C) where the

alien: knowingly delivered methadone to the user; the alien knew it was a prohibited drug; and the Government proved that the methadone so delivered actually caused the user's death. The Ninth Circuit noted that the Government was not required to prove foreseeability as an element of the crime. *United States v. Houston*, 406 F.3d 1121(9th Cir. 2005).

X. Use of Firearm During Commission of Drug Trafficking Offense

As 18 U.S.C. §924(c)(1)(A) criminalizes the use of a firearm during the commission of a drug trafficking offense, this constitutes a "single offense." *See United States v. Arreola,* 446 F.3d 926 (9th Cir. 2006). To prove that the defendant possessed a firearm in furtherance of a drug trafficking crime within the meaning of 18 U.S.C.§ 924(c)(1)(A), the Government must prove that the defendant: (1) possessed a controlled substance (crack cocaine) with the intent to distribute it; (2) possessed the firearm (several handguns); and (3) possession of the firearm(s) was in furtherance of the drug trafficking crime. *See United States v. Mosley*, 465 F.3d 412 (9th Cir. 2006).

XI. Mandatory Minimum Sentence of 10 years for Trafficking

The mandatory minimum sentence of 10 years prescribed by 21 U.S.C. § 841(b)(1)(A)(iii) is applicable to a conviction for conspiracy with intent to distribute 50 grams or more of methamphetamine, even when no contraband was actually involved in the commission of the offense. *See United States v. Macias-Valencia,* 510 F.3d 1012, 1014 (9th Cir.2007).

XII. Felony Cultivation of Marijuana

On April 15, 2008, the Ninth Circuit held that a violation of CHSC § 11358 is an aggravated felony as a drug trafficking crime because the statute criminalized planting, cultivating, harvesting, drying, or processing marijuana. *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir.2008) (per curiam).

XIII. Telephonic Facilitation Crime

An offense(s) covered by 21 U.S.C. § 843(b), including a telephonic facilitation crime, qualifies as a drug trafficking offense(s) under § 2L1.2(b)(1)(A)(i) of the USSG. Hence, where as here the alien had two prior convictions for unlawful use of a communication facility, a sixteen-level enhancement for the two, prior convictions is justified. *See United States v. Jimenez*, 533 F.3d 1110 (9th Cir. 2008).

XIV. Selling Marijuana

Where counsel for the alien stipulated during the plea colloquy that the police reports contained a factual basis for the alien's guilty plea to selling marijuana in violation of CHSC § 11360(a), the U.S. District Court properly relied on the police reports in determining that the alien's prior conviction was a drug trafficking offense for purposes of the USSG, justifying an offense-level enhancement under the Guidelines. *See United States v. Almazan-Becerra*, 537 F.3d 1094, (9th Cir.2008)

XV. Criminal Solicitation.

Outside the jurisdiction of the Ninth Circuit, a conviction for criminal solicitation for delivery of cocaine, in violation of Florida Statutes §

893.13(11)(a)(1), is a violation of a law relating to a controlled substance under § 237(a)(2)(B)(i) of the Act. *See Matter of Zorilla-Vidal*, 24 I&N Dec. 768 (BIA 2009).

XVI. Controlled Substance versus Solicitation

A conviction under CHSC § 11352(a) for "offering" to transport heroin supported a violation under § 237(a)(2)(B)(i) of the Act, because the State law at issue related to controlled substances rather than a solicitation statute, as argued by the alien. *See Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009).

XVII. Unidentified Controlled Substance

Although the NTA charged the Respondent with having been convicted of a § 237(a)(2)(B)(i) and a § 237(a)(2)(A)(iii) charge, the Court reversed and remanded, because the IJ relied solely on the Respondent's judicial admissions and an unidentified document to conclude that Respondent's CHSC § 11379(a) conviction for sale or transportation of an unidentified controlled substance and *hence, there were no documents in the record to support the IJ's conclusion. See Cheuk Fung S-Yong v. Holder*, 578 F.3d 1169 (9th Cir. 2009).

Attachment 5: Crimes of Violence

I. Evading a Police Officer.

In 2005, the Ninth Circuit dealt with a legal permanent resident who was charged as removable based on a conviction for violation of CVC § 2800.2(a) (driving in willful or wanton disregard for safety of persons or property while fleeing from pursuing police officers). Relying on the U.S. Supreme Court decision in *Leocal*, the Ninth Circuit found that a conviction under CVC § 2800.2(a) is not categorically a crime of violence because under CVC § 2800.2(b) (defining the term "willful or wanton disregard") it is possible for a person to engage in willful or wanton conduct within the meaning of the CVC § 2800.2(a) by negligently committing three Vehicle Code violations. Using the modified categorical approach, the information and abstract of judgment were insufficient to establish that alien's conviction for evading officers was for a "crime of violence." *See Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005), reissued on April 22, 2008, with the same result, i.e., not a crime of violence or theft offense under § 101(a)(43)(F) and (G) of the Act, and amended on June 10, 2008, 523 F.3d 963 (9th Cir. 2008); *see also United States v. Kelly*, 422 F.3d 889 (9th Cir. 2005) (finding that a conviction under a Washington state statute for eluding a police vehicle is not a crime of violence because the statute does not include a requirement that anyone must be actually endangered by the conduct). This case involves a sentence enhancement under the USSG.

II. Second-degree Manslaughter.

Arguably, second-degree manslaughter under NYPC § 125.15(1), where the alien recklessly caused the death of a 19-month old infant, is a crime of violence for purposes of § 101(a)(43)(F) of the Act. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

III. Threatened Use of Force

Alien convicted under CPC § 422 for the threatened use of force, which includes as an element "wilfulness," has been convicted of a crime of violence vis-a-vis 18 U.S.C. §16(a), and hence is subject to removal as an aggravated felon within the meaning of §101(a)(43)(F) of the Act. *See Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003).

IV. General Battery.

Battery under CPC § 242 is not categorically a crime of violence, and therefore an alien's conviction for battery is not categorically a crime of domestic violence under § 237(a)(2)(E)(i) of the Act. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (mere offensive touching does not rise to the level of a crime of violence) cited favorably in *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008); *see also Matter of Sanudo,* 23 I&N Dec. 968 (BIA 2006).

V. Stalking

Stalking as defined by CPC § 646.9 is not a crime of violence where the alien harassed the victim from long-distance and hence the alien's conduct created no substantial risk of application of physical force against

his victim or her property. *See Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007).

VI. Other Decisions Finding Crimes of Violence by Category and Date

Decisions which have held that specific criminal offenses under State law are crimes of violence include, but are not limited to, the following cases

A. Arson

Arson in the first degree under Alaska statute is a crime of violence under 18 U.S.C. §16(b). *Matter of Palacios*, 22 I&N Dec. 434 (BIA 1998). However, a conviction for recklessly setting fire to a structure or forest land under CPC § 452(c) is not a crime of violence because an incendiary can violate this section by setting fore to one's own structure or forest land. *Jordison v. Gonzales*, 501 F.3d 1134 (9th Cir. 2007).

B. Criminal contempt.

Criminal contempt in the first degree under NYPC is a crime of violence within the meaning of 18 U.S.C. § 16(b). *Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999).

C. Involuntary Manslaughter

Involuntary manslaughter is a crime of violence under 18 U.S.C. § 16(b). *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987)

D. Second Degree Robbery

Second degree robbery under CPC § 211 is a crime of violence within the meaning of 18 U.S.C. § 16(b). *United States v. Valladares*, 304 F.3d 1300 (9th Cir. 2002); *see also United States v. Bercerril Lopez*, 528

F.3d 1133 (9th Cir. 2008); *United States v. Saavedra-Velazquez*, 578 F.3d 1103 (9th Cir. 2009) (Attempted robbery under California law is coextensive with the same offense at common law and, hence, a crime of violence under the USSG); *United States v. Rivera-Ramos*, 578 F.3d 1111 (9th Cir. 2009) (NY's definition of attempted robbery is no broader than the common law definition and, hence, a crime of violence under the USSG.).

E. Rape

Rape under CPC § 261 is a crime of violence*. Castro-Baez v. Reno*, 217 F. 3d 1057 (9th Cir. 2000); *but see Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (finding the crime of engaging in an act of unlawful sexual with a minor who is more than three years younger than the perpetrator under CPC § 261.5(c) is not categorically a crime of violence). However, a violation of CPC §§ 220 and 261(a)(2) for the crime of assault with intent to commit rape is a crime of violence for sentence enhancement purposes. *See United States v. Bolanos-Hernandez*, 492 F.3d 1140 (9th Cir. 2007). On October 22, 2007, a Ninth Circuit panel held that, although CPC § 261.5(c) generally qualifies as a *per se* crime of violence under the USSG, it is overly inclusive and thus cannot be applied categorically to enhance a sentence under the USSG where the criminal record is insufficient to establish that the alien's conviction satisfies the USSG definition of statutory rape. *See United States. v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007).

F. Inflicting Corporal Injury

Inflicting corporal injury on a spouse is a crime of violence. *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001). However, the necessary

elements of the Oregon crime of harassment (intentionally harasses or annoys another person by subjecting such other person to offensive physical contact) under ORS § 166.065(1)(a)(A) do not require sufficient force to constitute a crime of violence under 18 U.S.C. §16(a). *See Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004).

G. Battery Causing Bodily Harm.

Battery causing bodily harm under NRS § 200.481, a gross misdemeanor, is a crime of violence. *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002).

H. First degree manslaughter

Manslaughter in the first degree under NYPC § 125.20 is a crime of violence. *Matter of Vargas*, 23 I&N Dec. 651 (BIA 2004).

I. Stalking/harassing conduct.

A stalking offense for harassing conduct in violation of CPC § 646.9(b) is a crime of violence. *Matter of Malta*, 23 I&N Dec. 656 (BIA 2004).

J. Mayhem

Mayhem under CPC § 203 is a crime of violence under 18 U.S.C. § 16(b). *Mayhem. Ruiz-Morales v. Ashcroft*, 361 F.3d 1219 (9th Cir. 2004).

K. Resisting Arrest

Exhibiting a deadly weapon with the intent to resist arrest in violation of CPC § 417.8 is a crime of violence under 18 U.S.C. § 16(a). *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937 (9th Cir. 2004). Similarly, resisting arrest under ARS § 13-2508 involves a risk that physical force might be required during the commission of the crime and thus categorically qualifies as a

crime of violence under 18 U.S.C. § 16(b), consistent with *Leocal v. Ashcroft*, 543 U.S. 1 (2004). *See Estrada-Rodriguez v. Mukasey*, 512 F.3d 517 (9th Cir. 2007).

Assault on a Federal officer--in this case a Border Patrol Officer--in violation of 18 U.S.C. § 111 is a crime of violence under 18 U.S.C. § 5032. *See United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009).

L. Discharging Firearm

Discharging a firearm in a grossly negligent manner which could result in injury or death to a person, in violation of CPC §246.3, is a crime of violence under 18 U.S.C. §16(b) and §101(a)(43)(F) of the Act, consistent with *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and applicable Ninth Circuit case law. *Matter of Figre*, A092348604 (BIA March 18, 2005) (unpublished decision); *but see United States v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007), which states that a conviction under CPC § 246 for the malicious and willful discharge of a firearm at an inhabited or occupied structure or vehicle is no longer a categorical crime of violence under USSG under *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), unless the offense was committed through the intentional use of force against the person of another rather than reckless or grossly negligent conduct.

M. Unauthorized use of motor vehicle

The offense of unauthorized use of a motor vehicle in violation of TPC § 31.07(a) is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under § 101(a)(43)(F) of the Act because the nature of the offense involves a substantial risk that force would be

used to cause property damage during the commission of the offense. *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005).

N. Misdemeanor domestic violence assault

An Arizona domestic violence assault conviction under § 13-1203(A)(1) does not categorically qualify as a "crime of domestic violence" under § 237(a)(2)(E)(i) of the Act, as it does not require willful intent nor the type of injury required to violate the State statute. *Fernandez-Ruiz v. Gonzales*. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc)

O. Sexual battery

Sexual battery under CPC § 243.4(a) is a crime of violence under 18 U.S.C. §16(b) and hence an aggravated felony under § 101(a)(43)(F) because the crime requires the intimate touching of another person while that person is under unlawful restraint. *Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005). Battery under CPC § 242 is not categorically a crime of violence under 18 U.S.C. §16. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

P. Sexual intercourse with a minor

Absent aggravating circumstances, such as incest or a substantial age difference, a violation of section 261.5(c) of the California Penal Code, which prohibits sexual intercourse with a person under 18 by a perpetrator who is more than 3 years older than the victim, is not a crime of violence, because the crime does not, by its nature, involve a substantial risk that violent physical force will be used in the course of committing the offense. *Valencia v. Gonzales,* 431 F.3d 673 (9th Cir. 2005), *withdrawn and*

superseded, 439 F.3d 1046 (9th Cir. 2006); *see also United States v. Gomez-Mendez*, 486 F.3d 599 (9th Cir. 2007) (finding an alien's prior conviction for unlawful intercourse with a minor under age 16 in violation of CPC § 261.5(2) to be a crime of violence for sentence enhancement purposes).

Q. Evading police officer and unlawful driving/taking of vehicle.

On January 23, 2006, the Ninth Circuit panel that decided *Penuliar v. Gonzales*, 395 F.3d 1037 (9th Cir. 2005), issued an amended decision making minor changes to its 2005 opinion and denied petitions for panel and *en banc* rehearing. *See Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006). In its amended opinion, the Ninth Circuit held that crimes of evading an officer, unlawful driving, and taking of a vehicle are not categorically aggravated felonies because the convictions could be for aiding and abetting under California law. Further, when using the modified categorical approach, a record of conviction containing only the abstract of judgment and the charging document is insufficient, because California law permits an accusatory pleading against an aider and abettor to be drafted in the same form as an accusatory pleading against a principal. Therefore, DHS must include in the record of conviction either the actual plea agreement or a transcript of the plea proceeding reflecting that the respondent's guilty plea incorporated allegations in the charging document in order to rule out the possibility that the plea was to activity as an accomplice only. The *Penuliar* decision is not consistent with *US v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002) (when the information charges all the elements of generic burglary in a particular count and the abstract of judgment indicates that a guilty plea was entered on that count, the defendant admits the facts

alleged in that count of the indictment). *Velasco-Medina* may be distinguishable, however, in that it involved sentencing enhancement guidelines that, unlike immigration law, include aiding and abetting aggravated felonies within the definition of "aggravated felony" for sentence enhancement purposes. More importantly, on January 17, 2007, the United States Supreme Court reversed a later Ninth Circuit case that cited *Penuliar v. Gonzales*, *supra*, holding that the crime of "aiding and abetting" a theft offense is itself a theft offense. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). On April 22, 2008, the Ninth Circuit reissued its decision, concluding that evading a police officer under CVC § 2800.2(a) is not a crime of violence and the respondent's conviction under CVC § 10851(a) is not a theft offense under § 101(a)(43)(G) of the Act. *See Penuliar v. Mukasey*, 528 F.3d 603, 611-12 (9th Cir.2008).

R. Lewd and lascivious acts with a child

Anytime an adult engages in sexual contact with a four year old child, there is a serious potential risk of physical injury and a substantial risk that physical force will be used to ensure the child's compliance. *United States v. Teeples*, 432 F.3d 1110, 1111 (9th Cir. 2006) (citing *United States v. Wood*, 52 F.3d 272, 275 (9th Cir. 1995)). The Ninth Circuit held that Teeple's conviction under CPC § 288(a) for lewd and lascivious acts with a child under fourteen was a crime of violence. The panel reasoned that, "while Teeples's victim was twelve rather than fourteen, the risk of violence is implicit in the size, age and authority position of the adult in dealing with a child." *Teeples*, 432 F.3d at 1111 (internal quotations omitted). Also, Teeple's victim was his daughter, and the Ninth Circuit recognized that a parent-child relationship and factors such as the offender's age and

authority position contribute to the risks inherent in the sexual abuse of a minor. *Teeples*, 432 F.3d at 1111 (citing *United States v. Melton*, 344 F.3d 1021, 1029 (9th Cir. 2003)).

S. Shooting at occupied motor vehicle

A conviction for shooting at an occupied motor vehicle under CPC § 246 is categorically a crime of violence for purposes of sentence enhancement. *United States v. Lopez-Torrez*, 443 F.3d 1182 (9th Cir. 2006).

T. Statutory rape

Statutory rape is not *per se* a crime of violence for sentencing purposes. *United States v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006).

U. Simple assault

A conviction for simple assault by intentionally spitting on a patient while outside a Veterans Administration Medical Center is deemed an attempted battery under 18 U.S.C. § 113(a)(5). However, it is not a crime of violence *per se*. *See United States v. Lewellyn*, 481 F.3d 695 (9th Cir. 2007). By contrast, a conviction for second-degree assault under Wash. Rev. Code § 9A.36.021(1)(f), which punishes the knowing infliction of bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture is a crime of violence for purposes of the USSG career offender enhancement provision at section 4B1.1 of the USSG. *See United States v. Carson*, 486 F.3d 618 (9th Cir. 2007).

An alien's conviction for fourth degree domestic violence assault under Washington law is not a crime of violence because it includes

nonconsensual, offensive touching. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2008).

V. Aiding and Abetting

Aiding and abetting an assault with a deadly weapon in violation of CPC § 245(a)(1) is an aggravated felony under § 101(a)(43)(F) of the Act. *See Ortiz-Magana v. Mukasey*, 523 F.3d 1042 (9th Cir. 2008).

W. Misdemeanor domestic violence of a child

Because §237(a)(2)(E) of the Act was added by IIRIRA, a 1990 conviction under CPC §273d is not a violation of §237(a)(2)(E). The Ninth Circuit cited *Matter of Gonzales-Silva*, 24 I&N Dec. 218, 220 (BIA 2007). *See Mota v. Mukasey*, 543 F.3d 1165 (9th Cir.2008)

X. Solicitation

A violation of CPC §§ 653f(a) and (c) for soliciting another to commit assault by means of force to produce great bodily harm/injury *with* the intent that the crime be committed, *and* soliciting another to commit rape by force and violence *with* the intent that the crime be committed constituted two crimes of violence under § 101(a)(43)(F) of the Act where a two-year sentence was imposed. *See Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009).

Y. Attempted Kidnapping

A conviction under CPC § 207(a) is categorically a crime of violence under § 101(a)(43)(F) of the Act as defined by 18 U.S.C. § 16(b). *See Delgado-Hernandez v. Holder*, 582 F.3d 930 (9th Cir. 2009).

VII. Sentencing Guidelines and Crimes of Violence by Crime and Date.

For a conviction to be a crime of violence within the meaning of the USSG, it need only be a felony, not an aggravated felony within the meaning of the Act. However, applying the Federal definition of felony at 18 U.S.C. § 3559(a)(5), the Ninth Circuit has ruled that the felony must be punishable by imprisonment for a term exceeding one year. *See United States v. Pinentel-Flores*, 339 F.3d 959 (9th Cir. 2003); 18 U.S.C. § 3559(a)(5).

A. Unlawful possession of a destructive device

In a 2004 decision, citing a 2003 decision involving the USSG, the Ninth Circuit ruled that a United States citizen's violation of ORS § 166.382 for unlawful possession of a destructive device (a metal pipe bomb) is not a crime of violence because mere possession does not demonstrate use (or attempted use) of explosives. *See United States v. Fish*, 368 F.3d 1200 (9th Cir. 2004) (citing favorably *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003)).

More recently, on November 3, 2004, the Ninth Circuit ruled in another USSG case that a deported alien's 1987 jury conviction for "Child Abuse and/or Neglect Causing Substantial Bodily Harm" under NRS § 200.508 was not a crime of violence because the statute criminalizes negligent conduct which does not involve the use of force. *See United States v. Contreras-Salas*, 387 F.3d 1095 (9th Cir. 2004).

B. First degree burglary

On December 3, 2004, the Ninth Circuit concluded that the United States District Court did not err in determining that the defendant's prior

conviction(s) for a first degree burglary in violation of CPC § 459 qualified as a “violent felony” for purposes of sentence enhancement under the ACCA at 18 U.S.C. § 924(e) for a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Moreover, the Ninth Circuit ruled that under Taylor v. United States, 495 U.S. 575 (1990), the Court could examine any documentation or judicially noticeable facts that clearly establish that the conviction is a predicate conviction for sentence enhancement purposes, such as the indictment, judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings. *See United States v. Smith*, 390 F.3d 661 (9th Cir. 2004); *see also Shepard v. United States*, 544 U.S. 13 (2005) (another ACCA decision); *James v. United Sta*tes, 550 U.S. 192 (2007) (attempted burglary under ACCA).

Similarly, on April 28, 2008, the Ninth Circuit held that first degree residential burglary under CPC § 459 constitutes a crime of violence under the USSG sentencing guidelines. *See United States v. Aguila-Montes*, 523 F.3d 1071 (9th Cir. 2008).

C. Sexual intercourse with a person under age 16.

On January 11, 2005, the Ninth Circuit ruled that a conviction for sexual intercourse with a person under the age of 16 by a person at least four years older is a crime of violence for sentencing purposes. *See United States v. Asberry*, 394 F.3d 712 (9th Cir. 2005) (citing *United States v. Grandois*, 376 F.3d 993, 995-96 (9th Cir. 2004)).

D. Harassing telephone call.

On December 27, 2005, the Ninth Circuit ruled that a felony conviction for making a harassing telephone call under Washington state law R.C.W. § 9.61.230(3)(b) (2002), where the caller made a phone threat to kill the victim of the call, is a predicate offense under the ACCA for purposes of sentencing and is a crime of violence. *United States v. Ladwig,* 435 F.3d 1147 (9th Cir. 2005).

E. Possession of an assault weapon

On January 23, 2006, the Ninth Circuit vacated a defendant's sentence for being a felon in possession of a firearm since defendant's previous conviction for possession of an assault weapon in violation of California Penal Code §12280(b) was not a "crime of violence" under the USSG for purposes of sentence enhancement. United States v. Serna, 435 F.3d 1046 (9th Cir. 2006).

F. Statutory rape

Statutory rape is not per se a crime of violence for sentencing purposes. *See United States v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006).

On October 22, 2007, a Ninth Circuit panel again addressed the issue as to whether statutory rape is a *per se* crime of violence under the USSG in the context of CPC § 261.5(c). While acknowledging that the laws of most states, Federal law, and the Model Penal Code set the age of consent at 16 when defining statutory rape, CPC § 261.5(c) is overly inclusive and thus cannot be applied categorically to enhance a sentence under USSG § 2L1.2(b)(1)(A)(ii). *See United States v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007).

G. Taking indecent liberties with a child under age 16

A conviction under North Carolina General Statute § 14-202.1, for taking indecent liberties with a child under the age of 16, such as indecent and improper conduct, does not rise to the level of "abuse" and hence is not necessarily a crime of violence for Federal sentencing purposes. *See United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006).

H. Discharging firearm at residential structure

A conviction under ARS §13-1211 with a one year sentence for discharging a firearm at a residential structure is not a crime of violence for purposes of sentencing enhancement under the USSG where the State statute is overly broad and includes structures that are not an occupied dwelling/structure, and where the police report to the contrary has not been incorporated into the criminal complaint underlying the prior conviction. *See United States v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006). Similarly, the Ninth Circuit ruled on June 6, 2007, that a conviction under CPC § 246 involving malicious and willful discharge of a firearm at an inhabited or occupied structure or vehicle is no longer a categorical crime of violence under the USSG, unless intentional force was used against the person of another as opposed to reckless or grossly negligent conduct. *See United States v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007) (citing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc)).

I. False imprisonment

For sentence enhancement purposes, a conviction under Florida Statute § 787.02(1)(a) for false imprisonment is not a crime of violence because the false imprisonment can be effectuated without the use of

force, e.g., “secretly.” *See United States v. Gonzalez-Perez*, 472 F.3d 1158 (9th Cir. 2007).

J. Sexual abuse in the second degree

For purposes of sentence enhancement under § 2L1.2 of the USSG, a felony conviction under ORS § 163.425 for sexual abuse in the second degree is not a crime of violence because force, whether used, attempted, or threatened is not an element of the crime. Rather, the victim’s lack of consent is the crime’s defining characteristic. *See United States v. Beltran-Munquia*, 489 F.3d 1042 (9th Cir. 2007).

K. Escape from jail or prison

Where the appropriate convictions reveal that a defendant was previously convicted under Montana law for escaping from jail or prison, under the modified categorical approach, the earlier conviction constitutes a crime of violence for sentence enhancement under the USSG because such an escape presents a serious potential risk of physical harm or injury to another. *See United States v. Savage*, 488 F.3d. 1232 (9th Cir. 2007).

L. Use or possession of a firearm

In order to establish that a criminal defendant had “knowledge, intent, or reason to believe” that he would at some time in the future commit another felony offense for purposes of sentence enhancement under the USSG, the Government must produce sufficient evidence the defendant intended to use or possess firearms in connection with a contemplated felony. *See United States v. Jimison*, 493 F.3d 1148 (9th Cir. 2007).

M. Assault with Deadly Weapon

A prior conviction for a violation of CPC § 245(a)(1) (assault with a deadly weapon or by means likely to produce great bodily injury) qualifies as a crime of violence within the meaning of U.S.S.G. § 2L1.2(b)(1)(A)(ii). *See United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009).

N. Illegal reentry after crime of violence

The maximum sentence for illegal reentry in violation of § 276 of the Act increases significantly if the alien was previously removed after having been convicted of certain crimes such as a crime of violence (conviction for assault with intent to commit felony rape under CPC § 220); thus, the alien's illegal reentry into the United States based upon a reinstated removal order after a crime of violence remains one of the bases for sentence enhancement under the USSG at § 2L1.2. *See United States v. Diaz-Luevano*, 494 F.3d 1159 (9th Cir. 2007).

O. Illegal reentry after assault with intent to commit rape

A sentence enhancement for illegal reentry into the United States is affirmed where the defendant's prior conviction for assault with intent to commit rape, in violation of CPC §§ 220 and 261(a)(2), is a crime of violence within the meaning of USSG section 2L1(b)(1)(A)(ii). *See United States v. Bolanos-Hernandez*, 492 F.3d 1140 (9th Cir. 2007).

P. Retaliating against a Federal witness

When someone is convicted of retaliating against a Federal witness in violation of 18 U.S.C. § 1513(b), the eight-level enhancement in the USSG for the offense of causing or threatening to cause physical injury to a person to obstruct the administration of justice may be imposed, even if no

judicial proceeding was pending at the time of the offense. The Ninth Circuit panel's rationale was that intending to physically harm someone due to their service as a witness "fundamentally contravenes and undermines the administration of justice." *See United States v. Calvert*, 511 F.3d 1237 (9th Cir. 2008).

Q. Vehicular manslaughter while intoxicated without gross negligence

A 2003 conviction under §192(c)(3) of the CPC does not satisfy the contemporary definition of manslaughter as enumerated in USSG §2L1.2 cmt.1(B)(iii), which requires recklessness as an element. More importantly, the panel identified the four approaches for defining a crime of violence as the: element test, substantial risk/use of force test, serious risk of injury test, and enumerated offenses approach. *See United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir.2008)

R. Lewd and lascivious acts on a child under fourteen

A conviction under CPC § 288(a) for sexual abuse of a minor under fourteen years of age qualifies as a crime of violence for purposes of sentencing under the U.S.S.G. *See United States v. Medina-Villla*, 567 F.3d 507 (9th Cir. 2009) (distinguishing *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc)).

S. Assault with a firearm.

A conviction under CPC § 245 categorically qualifies as a crime of violence and an aggravated felony for sentencing under the U.S.S.G. *See United States v. Heron-Salinas*, 566 F.3d 898 (9th Cir. 2009); *see also United States v. Estrada-Eliverio* 583 F.3d 669 (9th Cir. 2009) (finding CPC § 245(a)(1) to be a crime of violence under the U.S.S.G.).

Attachment 6: Crimes Involving Moral Turpitude (CIMTs)

A. **Stalking**

A conviction for stalking in violation of CPC § 646.9(b) is a CIMT. *Zavaleta-Gallegos v. INS*, 261 F. 3d 951 (9th Cir. 2001); *see also United States v. Baron- Medina*, 187 F. 3d 1144 (9th Cir. 1999) (sexual abuse of a minor is a CIMT); *but see Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007) (stalking is not *per se* a crime of violence).

B. **Section 240A Relief**

An alien convicted of two misdemeanor CIMTs is not precluded from establishing the requisite seven years of continuous residence for cancellation of removal under § 240A(a)(2) where his first CIMT was a petty offense, and he had accrued seven years of physical presence before the second offense was committed. *See Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003).

C. **Petty Offense Exception and § 240A(b)(1)(B) Relief**

An alien convicted of a CIMT that falls within the "petty offense" exception in § 212(a)(2)(A)(ii)(II) of the Act remains eligible for cancellation of removal for purposes of § 240A(b)(1)(B) and (C) of the Act. *See Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003); *but see Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (holding that an alien who has been convicted of a crime involving moral turpitude in an application governed by the REAL ID Act of 2005 is ineligible for cancellation of removal even if the offense falls within the "petty offense" exception).

D. **Petty Offense Exception and Grand Theft**

An alien who pled guilty to grand theft in violation of CPC § 487.2, where the Court suspended proceedings, ordered probation for three years and sentenced the alien to 180 days in county jail, is subject to the petty offense exception under § 212(a)(2)(A)(ii)(II) of the Act. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

E. **Larceny**

The Nevada Supreme Court as well as the Ninth Circuit have long held that larceny–which requires an intent to permanently deprive the owner of his/her property–is a CIMT. *See Grant v. State*, 24 P.3d 761, 766 (Nev.S.Ct. 2001); *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999) (larceny is a CIMT, including petty theft).

F. **False Representation of Identity to a Police Officer**

False representation of identity to a police officer under CPC § 148.9(a) is not a CIMT because it is neither an act of baseness or depravity contrary to accepted moral standards or a crime involving evil intent. *See Rodriquez-Herrera v. INS*, 52 F.3d 238, 239 (9th Cir. 1995); *Matter of S-*, 2 I&N Dec. 353 (BIA 1945). However, citing other Board and Ninth Circuit citations, the Board concluded in a July 2004 unpublished decision that a conviction for false representation of identity to a police officer in violation of CPC § 148.9(a) is a CIMT because the elements of the offense require the offender to provide a false identity to a police officer in an effort to evade the process of a court or to evade proper identification by the investigating officer. That is, the statute in question involves the intent to commit fraud upon an officer of the government. *See Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (requiring a showing of intent to defraud);

McNaughton v. INS, 612 F.2d 457, 459 (9th Cir.1980) (intent to defraud is a CIMT); *Bisaillon v. Hogan*, 257 F.2d 435 (9th Cir. 1958) (false statements on passport application are a CIMT); *Matter of Adetiba*, 20 I&N Dec. 506 (BIA1992) (false representation of social security number is a CIMT); *Matter of Acostoa*, 14 I&N Dec. 338 (BIA 1973) (false statements on firearms application are a CIMT); and *Matter of S-*, 2 I&N Dec. 353 (BIA 1945) (false statements in an application for registration are a CIMT).

The California crimes of providing false information to a police officer *and* leaving the scene of an accident in which injury to another or death results does not constitute a CIMT. *See Blanco v. Mukasey*, 518 F.3d 714, (9th Cir. 2008); *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (felony hit and run is *not* categorically a CIMT).

Citing *Cerezo v. Mukasey, supra,* the Ninth Circuit ruled that HRS *§* 291 C-14, which is similar to CVC *§§* 2003-2004, can be violated by a vehicle driver merely failing to provide all information that is required at the accident scene; hence, such a violation falls outside the Federal definition of a CIMT. *See Latu v. Mukasey*, 547 F.3d 1070 (9th Cir.2008).

G. **False Statement under 18 U.S.C. § 1001.**

A false statement under 18 U.S.C. § 1001 is not a CIMT. *See Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); *Matter of S-*, 2 I&N Dec. 353 (BIA 1945).

H. **Failure to File Taxes**

The willful failure to file California tax returns with intent to evade taxes involves fraud, and thus constitutes a crime of moral turpitude for

purposes of § 237(a)(2)(A)(ii) of the Act. *See Carty v. Ashcroft*, 395 F.3d 1081 (9th Cir. 2005).

I. **Shooting a Firearm at an Occupied Motor Vehicle**

On March 9, 2005, the BIA ruled that shooting a firearm at an occupied motor vehicle is a CIMT. *See Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005).

J. **Original Date of Admission**

Where an alien has received an "admission" within the meaning of § 101(a)(13)(A) of the Act as an F-1 nonimmigrant student and maintains continuous lawful presence thereafter, the original date of admission rather than the subsequent admission as a LPR constitutes the triggering date for purposes of the five-year CIMT bar at § 237(a)(2)(A)(i) of the Act. *See Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004). However, the BIA ruled in *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005) that "Congress intended with respect to aliens who have been admitted to the United States more than once-that each and every date of admission qualifies as potentially 'relevant' date of admission under § 237(a)(2)(A)(i) of the Act." *See also Matter of Carrillo*, 25 I&N Dec. 99 (BIA 2009) (finding that for purposes of section 1 of the Cuban Adjustment Act, the date of admission is deemed the first date of entry rather than the date adjustment of status was granted).

K. **Attempted Entry by False Statement**

A conviction under 18 U.S.C. § 542 for the offense of attempted entry by means of a false statement is not a CIMT because the record fails to disclose whether the defendant was convicted under paragraph one (a

CIMT) or paragraph two (not a CIMT). *See Notash v. Gonzales,* 427 F.3d 693 (9th Cir. 2005).

L. **Burglary**

The respondent's admission in a plea statement that he intended to commit theft during the burglary is sufficient to prove that his crime was a CIMT. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005). In addition, in *Cuevas-Gaspar*, an accomplice to residential burglary was found to be a CIMT under the modified categorical approach. Burglary of a dwelling is also a burglary for sentence enhancement purposes. *See United States v. Reina-Rodriguez*, 468 F.3d 1147 (9th Cir. 2006); s*ee also James v. United States*, 549 U.S. 192 (2007) (attempted burglary as a crime of violence under 18 U.S.C. § 924(e)(2)(B)(ii)).

A conviction for burglary of an occupied dwelling in violation of § 810.02(3)(a) of the Florida Statutes is categorically a CIMT, because the state statute requires three essential elements; 1) knowing entry into a dwelling; 2) knowledge that such entry is without permission; and 3) criminal intent to commit an offense within the dwelling. *See Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009).

M. **Possession of Child Pornography**

The offense of possession of child pornography in violation of § 827.071(5) of the Florida Statutes is a crime involving moral turpitude. *See Matter of Olquin*, 23 I&N 896 (BIA 2006).

N. **Accessory After the Fact**

An accessory after the fact conviction under CPC § 32 is not a CIMT, because the moral turpitude, the requisite baseness or depravity, is lacking.

Moreover, CPC § 32 refers to a potential set of crimes which is broader than the generic definition of a CIMT, i.e., vile, base or depraved conduct *and* the conduct violates societal moral standards. *See Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007) (*en banc*).

O. **Domestic Battery**

An alien's conviction for domestic battery in violation of §§ 242 and 243(e)(1) of the California Penal Code does not qualify categorically as a conviction for a crime involving moral turpitude within the meaning of section 237(a)(2)(A)(ii) of the Act. *See Matter of Sanudo*, 23 I&N Dec. 968 (BIA (2006). Nor is it a crime of violence. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006) (CPC § 243(e) lacks any injury requirement and does not include an inherent element evidencing grave acts of baseness and depravity).

On July 25, 2007, the BIA decided two cases involving assault/assalt and battery in the context of "domestic assault." In *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007), the BIA held that the offense of assault in the third degree in violation of NYPC § 120.00(1) is a CIMT because it requires specific intent to cause physical injury *and* such physical injury actually occurs. By contrast, a violation of Virginia Code § 18.2-57.2 (assault and battery against a family or household member) is not categorically a CIMT because it does not require the actual infliction of physical injury and may include any touching, however slight. *See Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007).

On September 3, 2008, a panel of the Ninth Circuit held that a conviction under CPC § 273.6 for violating a protective order, pursuant to §

6320 of the California Family Code categorically qualifies as a violation of a "protection order" under § 237(a)(2)(E)(ii) of the Act, despite the generality of the protective order. Thus, the conviction qualifies as a conviction for purposes of § 237(a)(2)(E)(i) of the Act. *See Alanis-Alvarado v. Mukasey,* 541 F.3d 966 (9th Cir. 2008), as amended on March 3, 2009.

A conviction under CPC § 273a(b) for misdemeanor child endangerment is not categorically a crime of child abuse under § 237(a)(2)(E)(i) of the Act, because the full range of conduct under § 273a(b) is broader than a crime of child abuse under the Act. *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009) (citing *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008)).

A conviction under CPC § 273.5(a) for corporal injury in not categorically a CIMT. *See Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009).

P. **Misprison of a Felony**

A conviction under 18 U.S.C. § 4 for misprison of a felony is a CIMT. *See Matter of Robles*, 24 I&N Dec. 22 (BIA 2006). However, such a conviction does not constitute a conviction for an aggravated felony within the meaning of § 101(a)(43)(S) of the Act as an offense related to obstruction of justice. *See Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999).

Q. **Retail Theft and Unsworn Falsification to Authorities**

Convictions under title 18, section 3929(a)(1) of the Pennsylvania Consolidated Statutes, for retail theft and under section 4904(a) of the same title 18 for unsworn falsification to authorities are both CIMTs. *See Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006).

R. **Communicating with a Minor for Immoral Purposes**

A violation of § 9.68A.090 of the WRC is a CIMT because the State crime requires: (1) communication through words or conduct; (2) with a minor or someone the perpetrator believes to be a minor; (3) for immoral purposes of a sexual nature. Since this conduct is "inherently wrong and contrary to the accepted rules of morality and the duties owed between persons," it is a CIMT. *See Morales v. Gonzales*, 472 F.3d 689 (9th Cir. 2007).

S. **Money Laundering**

The offense of money laundering in violation of § 470.10(1) of the NYPC is a CIMT because the crime in question involves the exchange of monetary instruments that are known to be the proceeds of "any criminal conduct" *with the intent* to conceal those proceeds. *See Matter of Tejwani*, 24 I&N Dec. 97 (BIA 2007).

T. **Trafficking in Counterfeit Goods or Services**

The offense of trafficking in counterfeit goods or services by using a spurious trademark, in violation of 18 U.S.C. § 2320(a), is a CIMT. *See Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007).

U. **Willful Failure to Register as a Sex Offender**

Under the categorical approach, the BIA does not look to whether the "actual conduct constitutes a crime involving moral turpitude, but rather, whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude." *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 144-46 (BIA 2007) (citing *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1163 (9th Cir. 2006)). Because a violation of CPC § 290(g)(1) requires actual

knowledge of the registration requirement *and* a wilful failure to register, the offense in question is a CIMT even if the statute does not require proof of evil intent. Moreover, a principal objective of the statute is to, " . . . safeguard children and other citizens from exposure to danger from convicted sex offenders, a high percentage of whom are recidivists." *See Matter of Tobar-Lobo*, *supra*. However, failing to register as a sex offender in violation of NRS § 179D.550 is not a CIMT because it is the sexual offense that is reprehensible, not the failure to register. Like the accessory crime at issue in *Navarro-Lopez*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*), the requisite baseness or depravity element is missing. *See Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008).

V. **Aggravated DUI**

In an *en banc* decision issued on March 4, 2009, the Ninth Circuit gave deference to the BIA determination's in *Matter of Lopez-Meza,* 22 I&N Dec. 1188 (BIA 1999) that DUI offenses committed with the knowledge that one's driver license has been suspended or restricted are CIMTs. *See Marmolejo-Campos v. Holder,* 558 F.3d 903 (9th Cir. 2009) (en banc).

W. **Solicitation to Possess Marijuana for Sale**

A conviction for solicitation to possess at least four pounds of marijuana for sale in violation of ARS §§ 13-1002 (A) and (B)(2), and § 13-3405(A)(2) and (B)(6) constitutes a CIMT. Rationale: By pleading guilty to solicitation to possess at least four pounds of marijuana for sale, the defendant admitted that he had the specific intent to promote or facilitate the commission of a CIMT. *See Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007).

X. **Leaving Scene of Accident Resulting in Bodily Harm or Death**

A violation of CVC § 20001(a) for leaving the scene of an accident resulting in bodily injury or death is not a CIMT under § 237(a)(2)(A)(ii) of the Act, citing *Navarro-Lopez*, 503 F.3d 1063, 1067 (9th Cir. 2007) (*en banc*), because the California statute is divisible into several crimes, some of which may involve moral turpitude and some of which do not. The abstract of judgment was inconclusive. *See Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008).

Y. **Conviction for False Identification to Border Patrol Agents**

A violation of CPC § 148.9(a)(false identification to a peace officer) is not a CIMT because the crime does not require fraudulent intent. More specifically, in 2001, traveling back to the U.S. with his wife and a co-worker and applying for admission, the alien presented a California driver's license, Social Security card, and various membership cards and asserted he was a U.S. citizen. A panel of the Ninth Circuit held that the conviction in question is not a CIMT because CPC § 148.9(a) requires a showing that the individual knowingly misrepresented his identity, but does not require that he knowingly attempted to obtain anything of value. *See Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008). By contrast, the panel ruled that the alien's false claim to citizenship was supported by substantial evidence within the meaning of § 212(a)(b)(C)(ii) of the Act.

Z. **Conviction for Possession and Use of Counterfeit Registered Mark**

A conviction under CPC § 350(a)(2) for use of a registered mark is a CIMT within the meaning of § 212(a)(2)(A)(i)(I) of the Act because fraud is

"inextricably woven into the statute." *See Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008).

AA. **Annoying or Molesting a Child under 18**

A conviction under CPC § 647.6(a) is not categorically a CIMT because there was a "realistic probability, not a theoretical possibility" that a misdemeanor conviction under this statute could be based on conduct that is not deemed a CIMT under the Act. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, (9th Cir. 2008).

BB. **Making False Statement in Immigration Document**

A violation of 18 U.S.C. *§* 1015(a), which criminalizes the making of a false statement in an immigration document - here, an I-485 application to adjust status - does not require that the false statement be "material" as an element of the offense. Here, the respondent swore under penalty of perjury on an I-485 adjustment application that he had never been "arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations," even though, at the time when he executed the I-485 he had been convicted of knowingly disobeying or resisting the lawful order, process, or mandate of the court, in violation of 18 U.S.C. 1015(a). The Ninth Circuit panel held that disobeying or resisting the lawful order, process, or mandate of the court, in violation of *§* 13-2810(A)(2) of the ARS, does not have a materiality requirement. Hence, the conviction in question is deemed a conviction within the meaning of 18 U.S.C. *§* 1015(a). *See United States v. Youssef*, 547 F.3d 1090 (9th Cir. 2008).

CC. **Aggravated assault**

Section 268 of the Canadian Criminal Code, when read together with § 265 thereof, establishes that a violation of § 268 may only be applied to intentional conduct which wounds, maims, disfigures, or endangers the life of another. Hence, such a violation may be considered "morally turpitudinous" because it requires "intentional conduct that results in a meaningful level of harm." *See Upppal v. Holder*, 576 F.3d 1014 (9th Cir. 2009) (citing *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007)).

DD. **Receipt of Stolen Property**

A violation of CPC § 496(a) lacks the specific intent to deprive the victim of his property permanently, and hence, does not qualify as a CIMT. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009).

EE. **Fraud in Connection with Identification Documents**

The maker of fraudulent Social Security and alien registration cards has committed a CIMT. *See Lagunas-Salgado v. Holder*, 584 F.3d 707 (7th Cir. 2009) (persuasive authority).