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PRACTICE TIPS

This manual contains many “practice tips” for avoiding resolutions of criminal charges that impact the status of non-citizens. Below is a list of these tips and the pages where they appear:

1.	PRACTICE TIPS FOR AVOIDING CATEGORICAL AGGRAVATED FELONY CONVICTIONS	7.9
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INTRODUCTION

I am a Public Defender. I am the guardian of the presumption of innocence, due process, and fair trial. . . . Let none who oppose me forget that with every fibre of my being I will fight for my clients. . . . There is no one to speak for them but me. . . . This will be my credo: this and the Golden Rule. I will seek acclaim and approval only from my own conscience.

“Defender’s Credo,” James Doherty (1957)

No intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction In some defendants’ cases the consequences of conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance.

A. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (1988), at 343.

Although Illinois law currently does not compel counsel to inform a criminal defendant of the immigration consequences of a criminal conviction, the American Bar Association’s (ABA’s) standards for criminal justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel “should fully advise the defendant of these consequences.” ABA Standards 14-3.2 Comment 75 (2d ed. 1982). The purpose of this manual, and the trainings that will accompany it, is to give you accurate, practical information to help you fulfill those goals when your clients are non-citizens.

Non-citizens, who include lawful permanent residents (LPRs) or “green card” holders, holders of non-immigrant visas, asylees, refugees, and people without proof of lawful status, are a significant portion of the population of Illinois. As a result, you cannot assume that you can tell which of your clients are non-citizens. You have to ask.

Many non-citizens are indistinguishable in speech and appearance from native-born U.S. citizens, and some may even mistakenly believe they have become U.S. citizens because they have lived most of their lives in the U.S. and have strong family ties to U.S. citizens. The reality is that immigration status almost never changes automatically. At the least, the Immigration and Naturalization Service (INS) must receive and grant an application to obtain lawful status.

Non-citizens who come into the criminal justice system are afraid, and with good reason. They will probably come to INS’s attention in the lockup, during their initial custodial intake, at the prison or jail to which they eventually go, or even at their probation office. If not, INS may become aware of a non-citizen’s criminal history years later, when the non-citizen submits to fingerprinting by the INS as part of an application for an immigration benefit.

You can help by assuring non-citizen clients that you will represent them regardless of their immigration status, and that if they disclose their lack of U.S. citizenship or other legal status to you, you will not pass this sensitive information along to the State's Attorney, the court, or the INS unless you and your client agree that it will help his or her case. Non-citizens often fear that revealing their own lack of status will subject their undocumented relatives to INS enforcement, that they will receive a heavier sentence because of their immigration status, or that they'll be deported right from the courtroom.

You also need to help your non-citizen clients understand the immigration consequences of a possible conviction.

Many criminal convictions will lead your non-citizen clients to be removed from the U.S., i.e., deported, even though they:

- have lived here legally nearly all their lives;
- have citizen parents, spouses, children, and siblings;
- have no relatives remaining in their country of origin;
- have never returned there;
- do not speak or understand that country's language;
- have a fear of persecution upon return there; or
- have special medical needs that would go unmet outside the U.S.

Some criminal convictions result in the INS commencing proceedings to have a non-citizen removed from the U.S. Nevertheless, a non-citizen may still be eligible to apply for some form of relief from removal, and have special and compelling factors considered and weighed by an immigration judge which, ultimately may be sufficient to permit the non-citizen to remain in the U.S. Other convictions, the most serious of which are what the immigration laws call "aggravated felonies," will lead swiftly and inexorably to mandatory removal from the U.S. A client who is removed on "aggravated felony" grounds is barred from ever coming back to the U.S.

Before making a decision whether to go to trial or enter a guilty plea, your non-citizen clients need to know which consequences are likely to attach to a particular disposition.

Many convictions will bar non-citizens from obtaining immigration benefits such as lawful permanent residency or citizenship. As criminal defense attorneys, you will not be providing zealous representation to your non-citizen clients unless you make an effort to understand these consequences and the serious effect they will have on a non-citizen and his or her family. In addition, unless your non-citizen clients understand the consequences of conviction vis-a-vis their immigration status, they cannot participate intelligently in key decisions, such as whether to accept a plea bargain.

Ninety percent of criminal convictions today are obtained by plea bargain. While defense counsel may not be in a position to seek acquittal or dismissal in the case of every non-citizen, this manual intends to advise you on how to fashion plea bargain agreements that will avoid removal proceedings altogether or place a non-citizen in a

position to seek discretionary or other relief from removal in immigration court.

As front-line defenders, you are in the best position to provide to your non-citizen clients the information they need to make decisions that may radically change their lives. You should therefore put these clients on notice of potential removal or other immigration problems – and do so as early as possible in the course of your representation, when this piece of information will be most meaningful. It is a pyrrhic victory to win a relatively light jail sentence or probation for your non-citizen client, only to have the INS strip the client of legal status and remove him or her from the country where all his work, family, and community ties are. In many cases, a plea to a different charge, or a slightly different sentence, can make all the difference.

Some non-citizen defendants are so eager to plead that they have no interest in hearing about immigration consequences. Others hope that a good immigration lawyer can resolve their problems later on, unaware that a non-citizen may lose all chances of immigration relief once a conviction is entered.

Immigration law is highly technical and changes as frequently as the political climate. It has very little underlying logic and uses familiar terms in wholly unexpected ways. This manual is not designed to make you immigration law experts. But this manual will give you the tools to discern which of your clients have immigration issues, what are the likely immigration effects of various dispositions of their criminal charges, and how to ameliorate those effects if possible. The authors of this manual, practitioners who represent indigent clients in immigration proceedings, are eager to work with you to get the best results for our common clients.

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WORKING WITH NON-CITIZEN CLIENTS

As criminal defense counsel, you need to be familiar with the crime-based grounds of removal under the Immigration and Nationality Act (INA), so that you can work to prevent the removal of your non-citizen clients, or at least obtain a disposition that maintains their eligibility for discretionary relief from removal in the future.

To understand how a conviction can affect a non-citizen's immigration status, it is important to get as much information as possible about your client's immigration status early in the proceedings. Once you know that status, you should advise him or her to seek immigration counsel before making any decisions on his or her criminal case.¹

In addition to having a non-citizen seek advice about the consequences of a conviction, criminal defense counsel should also seek immigration law advice to determine whether a particular conviction will jeopardize or protect a non-citizen's status. Such advice should be sought regardless of whether the charge is a misdemeanor or a felony. Defense counsel can work hand-in-hand with immigration counsel to see if a favorable resolution can be reached to protect the non-citizen's status.

Like many criminal defendants, some non-citizens may be eager to accept a plea bargain because they believe it will result in getting out of jail sooner. In reality, just one conviction can bar a non-citizen from gaining or maintaining status in the U.S., and lead to the INS taking custody of the non-citizen as soon as the criminal case is final. Given this, criminal defense counsel must stress to their non-citizen clients the importance of seeking immigration-related advice. Once informed of the potential consequences of conviction, which in some cases will be as severe as mandatory deportation, many non-citizens will choose to seek resolution of the criminal charge even if it means more time in custody. Defense counsel's role is pivotal in this respect.

There are two free legal services agencies in Chicago that have expertise in the immigration consequences of criminal convictions: the Legal Assistance Foundation of Metropolitan Chicago and the Midwest Immigrant & Human Rights Center. The addresses and phone numbers of these agencies are provided in Appendix A of this manual. Both agencies can provide defense counsel with advice about cases.

Following is a glossary of basic terms that will appear in this manual. Reviewing these terms before proceeding further will familiarize you with the terms used throughout.

¹ While consular officers can provide some immigration information, they are not likely to be aware of all the nuances of U.S. immigration law, and thus cannot substitute for good immigration counsel. A list of the various consulates in Chicago is included in this manual as Appendix B.

A GLOSSARY OF COMMON IMMIGRATION TERMS

Aggravated felony

A statutory term encompassing a broad array of criminal offenses. If a non-citizen is deemed an "aggravated felon," he or she will be subject to removal proceedings, ineligible for almost all forms of relief from removal, ordered removed (deported) from the U.S., and will face a permanent bar to ever returning. As defined in immigration law, an "aggravated felony" is not necessarily a felony that includes an "aggravating" factor. An "aggravated felony" is not only a felony, but can be a misdemeanor under Illinois law.

Alien

Any non-citizen, regardless of immigration status. This term is synonymous with "non-citizen."

Asylum

Asylum is a form of relief granted to non-citizens in the U.S. who demonstrate a well-founded fear of persecution (or having been persecuted in the past) in their native country on account of their race, religion, nationality, membership in a particular social group, or political opinion. A person granted asylum in the U.S. is called an "asylee," and can apply for lawful permanent residency one year after being granted asylee status.

Board of Immigration Appeals (BIA)

The administrative review body to which non-citizens or the INS may appeal immigration judges' decisions in removal proceedings. The BIA is not part of the INS, but is within the Executive Office for Immigration Review (EOIR), a branch of the Department of Justice responsible for reviewing actions of the INS, and making decisions on removal of non-citizens.

Crime involving moral turpitude (CMT)

Immigration law does not define this term. However, administrative decisions have interpreted a crime of moral turpitude to be any "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality." A conviction for a CMT can subject a non-citizen to removal proceedings.

Deportation

The process by which a person is removed from the U.S. for violations of the immigration laws, including criminal offenses.

Derivative citizen

A derivative citizen is one who automatically becomes a citizen upon the naturalization of one or both parents. A derivative citizen has all the rights and privileges of a native-born citizen. He or she cannot be deported from the United States, even if convicted of a criminal offense.

Discretionary relief

Any application to the immigration judge by which a non-citizen seeks to avoid removal from the U.S., and which requires not only proving up the statutory requirements, but also winning the judge's favorable exercise of discretion. Most applications filed with the INS are also discretionary in nature.

Divisible statute

In criminal law, a statute that permits the State to charge one offense in various ways, e.g., Illinois' mob action statute. In immigration law, the same statute can include some conduct that can result in removability, and some that will not. Where acquittal or dismissal cannot be avoided, criminal defense counsel will work to avoid a conviction under any provision of the criminal statute that can result in removability.

Immigrant

An immigrant is a lawful permanent resident of the U.S. See "Lawful permanent resident," below.

Immigration judge

Immigration judges (IJs) are employees of the Executive Office for Immigration Review (EOIR), a branch of the Department of Justice, whose job it is to review actions by the INS, and to make decisions on removal of non-citizens. IJs and the immigration courts are not part of the INS. Decisions of the IJs can be appealed to the Board of Immigration Appeals (BIA).

Immigration and Nationality Act (INA)

The Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., is the statute that sets forth the immigration and nationality (citizenship) laws of the U.S.

Immigration and Naturalization Service (INS)

The agency within the Department of Justice with the dual role of adjudicating affirmative applications for immigration benefits, including legal admission to the U.S., and enforcing the immigration laws, including removal from the U.S.

Lawful permanent resident (LPR)

A lawful permanent resident is entitled to live and work in the U.S., and to travel outside the U.S., but can be subject to removal proceedings if convicted of certain criminal offenses. This manual will refer to a lawful permanent resident as an "LPR."

Naturalization

The administrative process by which an LPR becomes a U.S. citizen.

Non-citizen

An immigrant, non-immigrant, or undocumented individual. This term is synonymous with "alien."

Non-immigrant

A non-immigrant holds a valid visa to remain in the U.S. for a certain period of time and for a certain purpose that does not include immigrating to the U.S. permanently. Some of the most common non-immigrant visas include student, visitor, and temporary worker visas. A non-immigrant can be subject to removal for violating the terms of his or her visa.

Refugee

A refugee has been determined by U.S. authorities abroad to have a well-founded fear of persecution in his or her native country on account of race, religion, nationality, membership in a particular social group, or political opinion. A refugee is granted "refugee status" abroad and is admitted to the U.S. as a "refugee." He or she can apply for LPR status one year later.

Removal

The process by which a person is deported or expelled from the U.S. for violations of the immigration laws, including criminal offenses.

Removal proceedings

The administrative proceeding by which an immigration judge determines whether a non-citizen is removable as charged by the INS, whether he or she is eligible for any relief from removal, and whether that relief will be granted or denied.

Undocumented non-citizen

An individual who has no lawful status in the U.S. He or she may have originally entered lawfully, but overstayed his or her visa, or may have originally entered without any documents and "without inspection," i.e., by evading the normal port of entry or border checkpoint where documents are checked by an immigration agent.

Waiver

A discretionary application to the immigration judge (or in some circumstances, to the INS) to overcome the immigration law charges related to a criminal conviction.

FINDING OUT THE IMMIGRATION STATUS OF YOUR CLIENT

There are various statuses held by non-citizens. Below is a description (followed by a table) of the statuses non-citizens can hold, the documents they carry, and the risk of removal if they are convicted of a criminal offense. Samples of several of these documents are provided in Appendix C.

United States citizens

Although a U.S. citizen cannot be deported from the U.S. for a criminal conviction, finding out if your client is a U.S. citizen may not be as easy as it appears. There are several ways of obtaining U.S. citizenship. While citizenship by virtue of birth in the U.S. is the most common way to gain U.S. citizenship, other ways also exist, such as birth abroad to a U.S. citizen parent, or the naturalization of a parent before the child reaches a certain age. These latter ways of gaining citizenship involve various statutes, and a claim to citizenship on these grounds can be very complex.

It is crucial that defense counsel refer a client promptly to a competent immigration attorney if he or she appears to have a citizenship claim, particularly in cases where, if convicted, the non-citizen would be subject to mandatory deportation.

Citizenship at birth	
Birth in the U.S.	U.S. defined as the 50 states, Puerto Rico, Guam and the U.S. Virgin Islands.
Birth abroad to a U.S. citizen parent.	Children born outside the U.S. to a citizen parent may have acquired citizenship at birth.

Derivative citizenship	
<p>Since February 27, 2001, a child (under 18) living in the U.S. as an LPR in the custody of his or her parents automatically becomes a citizen upon the naturalization of either parent.</p> <p>Prior to 2001, if the child's parents were married, both were required to naturalize for citizenship to be passed. One parent could pass citizenship only if the other was deceased or the naturalizing parent had legal custody of the child after divorce. Children born out of wedlock could derive citizenship from their mother, or from their father if in his legal custody and legitimated before turning 16.</p>	<p>Derivative citizenship occurs by operation of law if all the requirements are met before the child turns 18.</p>

Citizenship by naturalization	
After five years of LPR status.	Naturalization requires a discretionary administrative application with INS and is not automatic, unlike citizenship acquired at birth or derived through a citizen parent or parents.
After three years of LPR status if LPR is married to a U.S. citizen.	Same as above.

U.S.-born citizens have a birth certificate or a passport as proof of U.S. citizenship. Naturalized citizens are first given a certificate of naturalization, and can also apply for a passport. Children who automatically become citizens because they were born abroad to a U.S. citizen parent may have a registration of citizenship filed at a U.S. Embassy, a certificate of citizenship (which is different from a certificate of naturalization), or a passport. Ironically, many derivative citizens or citizens by virtue of their birth abroad to a U.S. citizen have no documents at all because most are unaware they are citizens until advised by an immigration attorney. They must then file an application with the INS to establish their status.

LPRs

LPRs gain their status in a variety of ways. Many have close family members (parents, spouses, adult children, or siblings) file paperwork for them. Other LPRs gain their status through employment, special programs for citizens of particular countries, a one-time legalization program based on the length of time they had lived in the U.S., or in a number of other ways. LPRs are provided with a laminated card commonly referred to as the "green card," though it is no longer green. Newer cards say "PERMANENT RESIDENT CARD" across the top; older cards say "RESIDENT ALIEN." The card has a photo, a fingerprint, the LPR's date of birth, and the date the LPR gained status.

Refugees and asylees

Individuals who have established that they fear persecution and have been granted refugee or asylee status will have certain documents of their status. They may have a stamp in their passport showing the date they entered as a refugee, or a written decision from the INS or from an immigration judge, showing the date their application for asylum status was granted. In addition, both classes of non-citizens are authorized to work, and they may have an "employment authorization document" (EAD), a card that reflects their legal status in the U.S. This laminated card bears the person's photo and is coded according to his or her status. An experienced immigration attorney can identify the individual's status by examining the EAD.

Though refugee and asylee status is indefinite, individuals in these statuses may apply to become an LPR one year after obtaining refugee or asylee status. Once approved, they will carry a permanent resident card like all LPRs.

Non-immigrants

Non-immigrants in the U.S. commonly arrive as students, visitors, temporary workers, and exchange visitors. Non-immigrants can be subject to removal from the U.S. if they violate the terms of their visas. For many years, the U.S. Embassy simply press-stamped the visa into the non-immigrant's passport. Today, most visas are laminated into the passport and include the visa-holder's photo. Some non-immigrants will also have a white "I-94 Arrival/Departure" card stamped with the date of entry, type of visa or other admission, and the date to which admission was granted. An experienced immigration attorney will be able to identify the specific visa category noted on the visa or the I-94, and for how long the non-citizen is entitled to remain in the U.S.

Documented non-citizens

Many people come to the U.S. illegally or overstay a non-immigrant visa but later become eligible to gain immigrant status. They obtain their LPR status while in the U.S. through a process called "adjustment of status." While an adjustment of status application is pending, the INS issues EAD cards as described above. The card will designate on which basis the INS has granted permission to work. The EAD card permits the individual to live and work in the U.S. while awaiting a decision on the adjustment of status application.

Undocumented non-citizens

An undocumented non-citizen has either entered the U.S. without proper documentation or entered the U.S. on a valid non-immigrant visa but did not leave after the visa expired. An individual who entered by crossing the border without being inspected by an immigration officer will have no documentation. One who entered lawfully may still have a passport with the original visa used to enter the U.S.

The following table reviews the various citizen and non-citizen statuses and what documentation establishes each status:

Immigration Status				
Undocumented non-citizen	Non-immigrant	Documented non-citizen	LPR	Citizen
Entered the U.S. "without inspection," i.e., crossed the border without documents by evading the checkpoint; or entered lawfully, but stayed on in the U.S. after a valid visa expired ("overstay")	Has a valid visa to study, work, travel, or visit the U.S. for a limited period of time	Admitted to the U.S. as a refugee or Granted asylum in the U.S. or Has a pending application for LPR status with the INS	Lawful permanent resident of the U.S.	Born or naturalized in the U.S. or Born abroad to a U.S. citizen parent or One or both parents naturalized before client turned 18
Documents				
Undocumented non-citizen	Non-immigrant	Documented non-citizen	LPR	Citizen
None, or an expired visa stamped or laminated into passport or indicated on white I-94 card which states visa type, entry date and time permitted to remain in the U.S.	Valid U.S. visa stamped or laminated into passport and/or white I-94 card which states visa type, entry date and time permitted to remain in the U.S.	Employment authorization card (EAD) based on pending application for LPR status or I-94 card which states visa type, entry date and time permitted to remain in the U.S.	Resident Alien Card or Permanent Resident Card, also known as "green card": includes photo, date of birth, fingerprint, and signature	U.S. birth certificate or U.S. passport or Certificate of naturalization or citizenship or Consular Report of Birth Abroad
Risk of Deportation Without a Criminal Conviction				
Undocumented non-citizen	Non-immigrant	Documented non-citizen	LPR	Citizen
High if comes into contact with INS or law enforcement	Very low, as long as complied with terms of visa	Very low	Very low	None
Risk of Deportation With a Criminal Conviction				
High	High	High	High	None

QUESTIONS TO ASK YOUR CLIENT

Possible citizens:

- Were you born in the U.S.?
- If not, is either of your parents a U.S. citizen?
- How old were you when your parent(s) became citizens?
- In what year did your parent(s) become citizens?
- Were you living in the U.S. with your parent(s) when they became citizens?
- Are you a lawful permanent resident?
- When did you become a permanent resident?

Non-citizens:

- How did you come to the U.S.?
 - Did you cross over the border without being inspected?
 - Did you come to the U.S. on a visa?
What kind of visa?
Is your visa still valid, or did it expire?
 - Did you enter the U.S. with refugee status?
Were you granted asylum after entering the U.S.?
- Are you presently applying for permanent residency or any other immigration benefit with the INS?
 - Do you have an employment authorization document (EAD) from the INS?
- What documentation do you have of your status in the U.S.?
- Are you married?
 - Is your spouse a U.S. citizen/LPR?
 - Do you have any children? Were they born in the U.S.?
 - Do you have any brothers/sisters who are U.S. citizens?

THE EFFECTS OF A CRIMINAL CONVICTION ON A NON-CITIZEN'S STATUS

The outline below examines how a conviction will affect the various types of immigration statuses. The specific crimes that can affect a non-citizen's status are discussed later in this manual.

LPRs with criminal convictions

Lawful permanent residents who are convicted of certain criminal offenses are subject to removal proceedings. Once a non-citizen is placed in removal proceedings, waivers are available for very few crimes.

Applicants for LPR status with criminal convictions

In general, most criminal convictions which render an LPR removable will also render a non-citizen ineligible for LPR status. More crimes (though not all) are waivable for LPR *applicants* than for LPRs in removal proceedings.

When a non-citizen applies to become an immigrant, the INS requires that he or she be fingerprinted for an FBI background check. The INS will inform the non-citizen if the FBI report reveals any arrests or convictions, and the non-citizen must then produce certified court dispositions to show how the incidents were resolved. If a conviction is not waivable, the LPR applicant will be placed in removal proceedings.

Applicants for naturalization with criminal convictions

For LPRs applying to naturalize, various criminal convictions can lead to denial of an application for naturalization and can even trigger removal proceedings. As with LPR applicants, citizenship applicants must also provide fingerprints to the INS and certified court dispositions of any criminal charges. Once granted, citizenship can be revoked if it is discovered that an LPR concealed a criminal conviction or willfully misrepresented past criminal conduct when applying for citizenship.

REMOVAL PROCEEDINGS FOR NON-CITIZENS WITH CRIMINAL CONVICTIONS

A non-citizen with a criminal conviction may be subject to removal from the U.S. The forum for seeking a non-citizen's removal is a "removal proceeding," which is held before an IJ in Chicago. The three entities involved in a removal proceeding are the IJ, the INS attorney (similar to a prosecutor), and the non-citizen "respondent" (who may or may not have an attorney). Indigent respondents have no right to appointed counsel to represent them in removal proceedings.

INS detainers

The INS may place a detainer on any non-citizen who is subject to removal from the U.S. for criminal convictions or other violations of the immigration laws (e.g., unlawful presence, visa violations, etc.). The detainer requests that state prison officials notify INS if they intend to release the individual or that the prison official or any other state official hold the individual for the INS. State officials can hold non-citizens under the INS detainer for 48 hours.

Once a detainer has been placed on a non-citizen, he or she will not be able to get out of state custody on bond. If a non-citizen tries to pay his or her criminal bond, it may not be accepted because of the INS detainer. Even if the non-citizen is also eligible for an immigration bond, the INS will not come to take the non-citizen into custody or bring him or her before an IJ to seek a bond hearing, until the criminal case is resolved.

The INS usually issues a detainer only once the non-citizen is convicted, but may also do so as soon as the non-citizen has been charged with a criminal offense. The INS detainer significantly impacts a non-citizen's sentence. For example, if a non-citizen is sentenced to prison with a recommendation for "boot camp," the INS detainer disqualifies the non-citizen from boot camp; he or she will have to serve the prison sentence instead. However, in settings where the INS does not routinely issue detainers, like the Cook County "boot camp" program, non-citizens may be able to complete a boot camp program.²

Issuance of the charging document (Notice to Appear)

The INS begins the removal process by serving the non-citizen with a "Notice to Appear" (NTA). The NTA is the charging document, much like a complaint or indictment in the criminal context. The NTA alleges that the individual is not a U.S. citizen, has been convicted of a criminal offense, and is subject to removal for his or her crime under the specific provisions of the INA. These provisions are also referred to as "grounds," or "charges," of removability. The INS must file the NTA with the immigration court to commence removal proceedings before the immigration judge.

² The issue of County and State boot camp programs is discussed in greater detail below.

Detention while proceedings are pending

For almost all types of convictions, the INA mandates detention of all non-citizens – even LPRs – throughout their removal proceedings, without any consideration of release on bond. This is the case even if the non-citizen has a viable defense to the charges placed by the INS. A non-citizen's sentence is rarely material in determining whether mandatory detention applies. As a result, many non-citizens who were sentenced to probation, with no sentence of incarceration or jail time, will still be subject to mandatory detention throughout their removal proceedings.

Non-citizens are generally picked up by the INS on their release date from the Illinois Department of Corrections (IDOC) and placed in INS custody. Because the INS does not have a central detention facility in the Midwest, INS detainees are held in county jails throughout Illinois, Wisconsin and Indiana. INS has the authority to move detainees to an INS detention facility anywhere in the U.S. without notice.

Detainees who fight their removal case may well spend many months longer in INS detention than the time already served for the criminal conviction.

Video hearings while in the custody of the Illinois Department of Corrections

In most cases, the INS commences removal proceedings against non-citizens while they are serving a criminal sentence in IDOC. These proceedings are conducted by video-conferencing. The non-citizen is transported to an IDOC facility with video-conferencing capacity. IJs use IDOC's video-conferencing facilities at the State of Illinois building to hold the hearing from Chicago.

Removal hearings in immigration court

Removal proceedings for non-citizens whose hearings were not held while in IDOC are held in Chicago. The Chicago immigration court has jurisdiction over cases arising in Illinois, Indiana, and Wisconsin. The immigration court is located at 55 E. Monroe Street, Suite 1900, for non-detained individuals, and in the basement of the INS building at 10 W. Jackson Boulevard, for detained individuals.

At the first hearing before the IJ, known as the "Master Calendar Hearing," the IJ will ask the non-citizen whether he or she admits or denies the factual allegations and the charges of removability in the NTA, and whether he or she is seeking any relief from removal. Where relief appears to be available, the matter is continued to a "Merits Hearing," also known as an "Individual Calendar Hearing."

"Individual Calendar Hearings" are held to determine whether the non-citizen is eligible for and warrants relief from removal. Most forms of relief are discretionary; and the type and length of sentence the non-citizen received for his or her criminal conviction can be crucial. Behavior while in IDOC ("efforts at rehabilitation") and successful completion of probation are also important. Merits hearings are similar to trials. The non-citizen nearly always testifies, and relatives and expert witnesses may also testify. All witnesses are subject to cross-examination by the INS and direct questioning by the IJ.

Appeals

If the non-citizen loses before the IJ, he or she may appeal to the Board of Immigration Appeals (BIA). If the non-citizen loses at the BIA, he or she may appeal to the U.S. Court of Appeals for the Seventh Circuit.

CRIMINAL CONVICTIONS AFFECTING IMMIGRATION STATUS

There are fundamental differences between criminal law and immigration law. One of the most basic is that Illinois rules defining a "conviction" do not apply in the immigration context. For example, under Illinois law, a sentence of supervision is not a conviction. Under the Immigration and Nationality Act (INA), it is. Similarly, Illinois' "first-offender probation" for drug possession cases can result in a discharge and the dismissal of proceedings without a judgment of conviction ever being entered. Under the INA, first-offender probation is a conviction for immigration purposes. This is because the INA's definition of conviction includes cases where no judgment is ever entered but the non-citizen admits guilt. Compare the two definitions:

"Conviction" under Illinois law

Judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury. 720 ILCS 5/2-5.

"Conviction" under the INA

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. 8 U.S.C. § 1101(a)(48)(A).

Under Illinois law, a conviction requires a *formal judgment* to be entered. Thus, neither supervision nor first-offender probation is a conviction in Illinois despite the defendant's admission of guilt. Under the INA, by contrast, the non-citizen is considered to have a conviction because of the admission of guilt alone.

Due to significant differences between criminal and immigration law, defense counsel must apply a different set of rules when representing non-citizen criminal defendants. The following section outlines the criminal grounds of removability under the INA and highlights the many points where they differ from Illinois criminal law.

Aggravated felonies

The most harmful crimes for non-citizens are the crimes defined as “aggravated felonies” under the INA. Congress has amended these provisions repeatedly, always with retroactive effect. The list of aggravated felonies is extensive.

LPRs convicted of an aggravated felony have *no* means of maintaining permanent residency status after conviction. Deportation is mandatory. Non-citizens who are not LPRs will also be subject to mandatory deportation, with few exceptions. The criminal defense attorney’s goal is to avoid an aggravated felony conviction for a non-citizen if at all possible. Where dismissal or acquittal is not likely, the best result is to fashion a plea bargain that avoids a conviction for an aggravated felony.³

The term “aggravated felony” is a misnomer. First, an aggravated felony can be either a felony or a misdemeanor under Illinois law. Second, the crimes need not involve any “aggravating” factors. Aggravated felony crimes range from murder to possession of a stolen motor vehicle.

Many aggravated felonies are defined by reference to a specific federal statute, but some reference no federal statute at all. In either case, both state and federal crimes can be aggravated felonies. Where the aggravated felony provision references a federal crime, there is likely to be a comparable Illinois crime.

a. “Categorical” and “sentence-based” aggravated felonies.

Because aggravated felony crimes include a broad range of offenses, it is difficult to classify them. However, aggravated felony crimes can be divided into two general types: (a) “categorical” aggravated felonies, where the crime alone (regardless of the sentence) meets the definition; and (b) “sentence-based” aggravated felonies, where both the offense *and* a specific sentence imposed, or in some instances, a specific potential sentence, are required to meet the definition.

1. Categorical aggravated felonies

For categorical aggravated felonies, only the definition of the crime matters; the sentence is irrelevant. The following crimes, their federal definition (if one is included in the INA), and their likely state counterparts,⁴ are aggravated felonies:

³ Ironically, non-citizens *without* LPR status who apply for LPR status in the future may qualify for a discretionary waiver in some cases, even if they have been convicted of an aggravated felony. Where an undocumented non-citizen may have a possibility of seeking LPR status in the future, defense counsel should find out which crimes can be waived, and try to fashion a plea bargain that maintains eligibility for a waiver.

⁴ The Illinois crimes included on the lists appearing in this manual are representative only; they do not include every Illinois crime that meets the federal definitions.

CATEGORICAL AGGRAVATED FELONIES		
Aggravated Felony (INA)	Federal definition	Illinois crime(s)
Murder	No federal definition referenced	720 ILCS 5/9-1, 9-2, 9-3 (first- and second-degree murder, and involuntary manslaughter)
Rape	No federal definition referenced	720 ILCS 5/12-13, 14 (criminal and aggravated criminal sexual assault)
Sexual abuse of a minor	18 USC 3509(a)(8) (includes misdemeanor sex offenses as well)	720 ILCS 5/12-13(a)(3), (4) (criminal sexual assault of minor) 720 ILCS 5/12-15(b) (criminal sexual abuse of a minor) 720 ILCS 5/12-14.1 (predatory criminal sexual assault of a child)
Illicit trafficking in a controlled substance	18 USC 924(c), which references section 102 of the Controlled Substances Act for the definition of a "drug trafficking crime" Defined by case law to include any <u>felony</u> possessory offense, regardless of amount or type of drug, and regardless of whether defendant is sentenced to and has completed "first-offender" probation Also includes felony or misdemeanor offenses that have trafficking element: possession with intent to deliver, etc.	720 ILCS 570/401 (manufacture, delivery, and possession with intent to deliver) and 402 (felony possession) 720 ILCS 570/405 (calculated drug conspiracy) 720 ILCS 570/410 and 550/10 (simple possession of a controlled substance with first-offender probation, if underlying offense is a felony)

CATEGORICAL AGGRAVATED FELONIES (continued)		
Aggravated Felony (INA)	Federal definition	Illinois crime(s)
Offense related to money laundering if amount of funds exceeds \$10,000	18 USC 1956 and 1957	720 ILCS 5/29B-1 (money laundering if over \$10,000)
Illicit trafficking in firearms, destructive devices, or explosive materials	18 USC 841(c) and 921 (importing, manufacturing, or dealing in explosive materials)	720 ILCS 5/24-3 (unlawful sale of firearms) 225 ILCS 210/2001, 5010 (unlawful transfer of explosive materials without a license)
Offense relating to explosive materials	18 USC 844, 842, 922	225 ILCS 210/2001, 5010 (unlawful possession of explosive materials without a license)
Certain firearms offenses	18 USC 922, 924, Internal Revenue Code of 1986, Sec. 5861 (importing, manufacturing, dealing in firearms in interstate commerce)	720 ILCS 5/24-3A (gunrunning)
Fraud or deceit where loss to victim exceeds \$10,000	No federal definition in statute	720 ILCS 5/17-1 (deceptive practices) 720 ILCS 5/17-6 (benefits fraud) 720 ILCS 5/46-1 et seq. (insurance fraud) <u>provided</u> loss to victim exceeds \$10,000
Ransom	18 USC 875-877, 1202	720 ILCS 5/10-2(a)(1) (aggravated kidnapping for purpose of obtaining a ransom)

CATEGORICAL AGGRAVATED FELONIES (continued)		
Aggravated Felony (INA)	Federal definition	Illinois crime(s)
Child pornography	18 USC 2251, 2252	720 ILCS 5/11-20.1 (child pornography)
Offense relating to owning, controlling, managing, or supervising a prostitution business	18 USC 2421, 2422 or 2433	720 ILCS 5/11-15 to 19 (prostitution offenses related to owning, controlling, managing, a prostitution business)
Peonage, slavery, and involuntary servitude	18 USC 1581-85 or 1588	None
Sabotage, treason, acts against the national defense	18 USC 793, 798, 2153, 2381, 2382	720 ILCS 5/30-1 (treason)
Violation of the protection of the identity of undercover agents	National Security Act, Sec. 601	None
Tax Evasion	Title 26, Internal Revenue Code of 1986, Sec. 7201, where revenue loss to government over \$10,000	35 ILCS 5/1301 (Illinois income tax fraud), where revenue loss to government is over \$10,000
Alien smuggling	INA 274(a)	None
Reentry after being deported	INA 275(a) or 276	None

2. One-year-sentence-based aggravated felonies

Sentence-based aggravated felonies require both a particular crime *and* a particular sentence in order to meet the aggravated felony definition and to make a non-citizen subject to removal. The most common sentence-based aggravated felonies require conviction of a particular crime and a sentence of incarceration of one year or more to trigger an aggravated felony charge.⁵

Under the aggravated felony provisions, a term of imprisonment includes the whole period of incarceration or confinement ordered by a court without regard to any sentence credit.

With one-year-sentence-based aggravated felonies, defense counsel should work to avoid a one-year-sentence of incarceration, or avoid a conviction for the particular crime found in the aggravated felony sentence-based provisions.

Below is a list of the one-year-sentence-based aggravated felonies, all of which require both a conviction for the crime and a one-year sentence of incarceration:

ONE-YEAR-SENTENCE-BASED AGGRAVATED FELONIES		
Aggravated felony (INA)	Federal definition	Illinois crime(s)
Crime of violence	18 USC 16 (1) Any crime that has, as an element of the offense, the use of force or threatened use of force; or (2) Any felony where there is a substantial risk that force against person or property will be used in commission of offense	Any Illinois crime that meets federal definition and has an element of intent, but not negligence or recklessness 720 ILCS 5/2-8 (forcible felony)
Burglary offense	No federal statute referenced, but defined by case law as entry into residential or commercial building with intent to commit a felony	720 ILCS 5/19-1 (burglary) 720 ILCS 5/19-3 (residential burglary)

⁵ Where a federal crime is referenced, the sentence of incarceration refers not only to the federal crime, but to any analogous state crime as well.

ONE-YEAR-SENTENCE-BASED AGGRAVATED FELONIES (continued)

Aggravated felony (INA)	Federal definition	Illinois crime(s)
Theft offense (including receipt of stolen property)	No federal statute referenced, but defined by case law as taking of property with intent to deprive permanently or temporarily	720 ILCS 5/16-1 (felony theft) 720 ILCS 5/16A-3 (retail theft, 2nd offense) 720 ILCS 5/16G-10 (financial identity theft, felony) 625 ILCS 5/4-103 (possession, receipt, transfer of stolen motor vehicle)
Falsely making, forging, counterfeiting, mutilating, or altering passport or instrument (document fraud)	18 USC 1543 and 1546(a) Exception: first offense committed to assist, abet, or aid only the alien's spouse, child, or parent (and no other individual) is not an aggravated felony	720 ILCS 5/17-3 (forgery) See 15 ILCS 335/14A (includes knowing manufacture or altering of identification cards, second violation only)
Commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered	No reference to federal statute	720 ILCS 5/17-3 (forgery) 625 ILCS 5/4-103.2 (aggravated offenses related to motor vehicles, including alteration of VIN numbers), <u>provided</u> found to be "trafficking" under INA
Obstruction of justice Perjury or subornation of perjury Bribery of a witness	18 USC 1501-1518 Must have element of interference with judicial process or intent to harm or retaliate against others who are cooperating in the process	720 ILCS 5/31-4 (obstruction of justice), <u>provided</u> found to be "obstruction of judicial process" under INA 720 ILCS 5/32-2 (perjury) 720 ILCS 5/32-3 (subornation of perjury) 720 ILCS 5/32-4a (harassment of jurors) 720 ILCS 5/33-1 (bribery)

3. Potential sentence-based aggravated felonies.

A few other aggravated felony provisions are based on the *potential* sentence of incarceration, rather than the sentence imposed. Three aggravated felony offenses that reference a particular crime and a *potential* sentence, are listed below:

POTENTIAL SENTENCE AGGRAVATED FELONIES			
Aggravated felony (INA)	Potential sentence	Federal definition	Illinois crime(s)
Racketeering or gambling offense	Sentence of at least one year incarceration <i>may</i> be imposed	18 USC 1962, 1084, 1955	See 725 ILCS 175/4 (narcotics racketeering)
Failure to appear before a court pursuant to court order to answer or dispose of felony charge	Sentence of at least two years incarceration <i>may</i> be imposed	No federal definition in statute	720 ILCS 5/32-10 (violation of bail bond)
Failure to appear to serve a sentence	Sentence of at least five years incarceration <i>may</i> be imposed for underlying offense	No federal definition in statute	720 ILCS 5/31-6 (failure to report to serve sentence)

b. Attempts and conspiracies to commit an aggravated felony

The aggravated felony provision also includes any attempt or conspiracy to commit an aggravated felony. While the INA does not define either term, "attempt" has been defined by case law as having two essential elements: (1) the intent to commit the offense, and (2) a substantial act done in furtherance of commission of the offense. *U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001). This definition is similar to the definition of "attempt" under Illinois statutes. 720 ILCS 5/8-4.

In the area of "attempted theft," for example, the offense of "burglary of a motor vehicle" in Illinois has been found to be an "attempted theft" offense because entry into a motor vehicle coupled with the intent to commit theft satisfies both elements of the "attempt" definition.⁶

⁶ A non-citizen would also have to be sentenced to a year or more incarceration for the offense to be an aggravated felony.

Because the INA treats attempts and conspiracies to commit aggravated felony offenses as completed aggravated felonies, having your client plead guilty to an attempt is not helpful where the underlying crime is also an aggravated felony. Conversely, as long as the underlying offense is not an aggravated felony, an attempt or conspiracy conviction cannot support an aggravated felony charge.

**PRACTICE TIPS FOR AVOIDING
CATEGORICAL AGGRAVATED FELONY CONVICTIONS**

If conviction cannot be avoided through dismissal or acquittal, you can prevent a categorical aggravated felony by:

- ▣ negotiating a plea to a crime that is not a categorical aggravated felony:
 - E.g., plead to assault rather than felony or misdemeanor sexual abuse of a minor.
 - E.g., accept drug school rather than a conviction for felony possession of a controlled substance.
 - E.g., plead to possession of a firearm instead of felony unlawful sale of firearms.

**PRACTICE TIPS FOR AVOIDING
ONE-YEAR-SENTENCE-BASED AGGRAVATED FELONY CONVICTIONS**

If conviction cannot be avoided through dismissal or acquittal, you can prevent a one-year-sentence-based aggravated felony by:

- ▣ fashioning a sentence that will not trigger an aggravated felony charge:
 - E.g., plead to burglary of a motor vehicle, but get probation rather than a sentence of incarceration.
 - E.g., where jail time cannot be avoided, seek **county** boot camp program, or plead to misdemeanor with 364 days of jail time, rather than a one-year sentence of incarceration.

Crimes of moral turpitude (CMTs)

A "crime of moral turpitude" is another ground of removability that is less serious than an "aggravated felony." A non-citizen convicted of a crime of moral turpitude can usually avoid mandatory deportation, seek to maintain lawful permanent residency (unless the offense was committed within the first seven years of permanent residency), apply for permanent residency, or apply for citizenship.

a. "Moral turpitude" defined

Moral turpitude is a nebulous concept, with ample room for differing definitions. *Franklin v. INS*, 72 F.3d 571, 573 (8th Cir. 1995). The INA does not define "moral turpitude." As a result, the term has been subject to extensive agency and judicial construction and has been applied to a host of crimes.

Generally, "moral turpitude" refers to conduct which is inherently base, vile, or depraved; or to an act which is *per se* morally reprehensible, is intrinsically wrong, or gravely violates accepted moral standards of the community. While some crimes have been consistently held to be crimes of moral turpitude (fraud), other crimes involving acts of baseness or depravity have been found to be crimes of moral turpitude even though they have no element of fraud. Thus, although a particular criminal statute may contain no explicit element of "evil intent," it may still be found to be a crime of moral turpitude.

Determining whether a crime is one of moral turpitude requires an examination of the statute in question to determine whether the inherent nature of the crime involves moral turpitude. In this analysis, the *nature* of the crime as defined by the statutory element is controlling, *not the specific conduct* that resulted in the conviction.⁷

Though moral turpitude is a flexible concept, the best hard-and-fast rule for determining whether a crime is one of moral turpitude is whether there is an *element of intent* in the statute. In most cases, where the statute has such an element of intent, moral turpitude has been found. But this rule is not ironclad. Certain crimes that involve recklessness and negligence have been also been found to be crimes of moral turpitude.

⁷ In some cases, a statute is "divisible," meaning it encompasses a range of behaviors, some of which constitute a crime of moral turpitude, and some of which do not. In such cases, a non-citizen's record of conviction may be at issue. Divisible statutes are discussed below.

Some common examples⁸ of moral turpitude and non-moral turpitude crimes are:

1. Crimes against the person

Involving moral turpitude	Not involving moral turpitude
Assault with intent to rob or kill, assault with a deadly weapon, aggravated assault	Assaults that do not involve a dangerous weapon, evil intent, or criminally reckless conduct
Corporal injury to a spouse, child abuse	Simple battery
Murder and voluntary manslaughter so long as statute includes intent, willfulness, or recklessness	Murder and manslaughter where statute or relevant subsection lacks intent, willfulness, or recklessness

2. Crimes against property

Involving moral turpitude	Not involving moral turpitude
Fraud, whether against person or property	Passing bad checks where intent is not a necessary element
Theft where intent to deprive is permanent	Possession of stolen property where guilty knowledge is not an essential element
Robbery, burglary, extortion, malicious destruction of property	Breaking and entering or unlawful entry where no intent is required
Arson	n/a

3. Sex offenses

Involving moral turpitude	Not involving moral turpitude
Rape	Indecency
Adultery	Mailing an obscene letter
Prostitution	n/a
Lewdness	n/a

⁸ These interpretations examined criminal law statutes from various jurisdictions, not necessarily Illinois.

4. Other crimes

Involving moral turpitude	Not involving moral turpitude
Driving under the influence where driver has knowledge that he or she is prohibited from driving under any circumstances	Driving under the influence of alcohol or drugs where knowledge is not an element
Driving on a suspended or revoked license where knowledge is an element of the statute	First offense for suspension or revocation of license
Drug-related offenses where knowledge or intent is an element of the offense (possession with intent to distribute)	Drug crimes without element of intent
Firearms offenses where weapon is used in commission of a moral turpitude offense	Firearms offenses that have no element of intent

There are two grounds of removal for moral turpitude:

- (1) One crime of moral turpitude within five years after the date of admission to the United States, where a sentence of at least one year incarceration *may be* imposed; or
- (2) Two crimes of moral turpitude not arising out of a single scheme of criminal misconduct, regardless of whether the individual is confined therefor, regardless of whether the convictions were in a single trial, and regardless of sentence.

In Illinois, one crime of moral turpitude can result in removability only if it is a felony, since the maximum sentence for a misdemeanor in Illinois is less than one year incarceration. In other words, because a sentence of at least one year incarceration *cannot* be imposed, no single misdemeanor can result in removability for a crime of moral turpitude in Illinois.

By contrast, there is no sentencing requirement in the INA's "two crimes of moral turpitude" removability ground. Under that provision, any two misdemeanor crimes can trigger removability where both crimes involve moral turpitude and did not arise out of a single scheme of criminal conduct.

Like the aggravated felony definition, the moral turpitude category also includes convictions for attempts and conspiracies to commit crimes of moral turpitude.

PRACTICE TIPS FOR AVOIDING CRIME OF MORAL TURPITUDE CONVICTIONS

If conviction cannot be avoided through dismissal or acquittal, you can prevent a moral turpitude conviction by:

- ▶ dropping the charge from a felony to a misdemeanor, since maximum sentence for Illinois misdemeanor is less than one year:

E.g., reduce charge of burglary of a motor vehicle to criminal trespass to vehicle.

- ▶ negotiating a guilty plea to a crime that has no intent as a mental state:

E.g., reduce a charge of domestic battery to reckless conduct.

Firearms offenses

A non-citizen can be charged with removability for a conviction of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying – or attempting or conspiring to do any of the above – any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 USC 921(a)).

The most common firearms crimes in Illinois that will result in a charge of removability are 720 ILCS 5/24-1 (unlawful use of a weapon) and 720 ILCS 5/24-1.1 (unlawful use of a weapon by a felon). Two other crimes, though less commonly seen in immigration proceedings, are possession or aggravated possession of a stolen firearm (720 ILCS 5/16-16 and 16.1). A conviction under any of these statutes renders the non-citizen removable, no matter what the sentence.

Some crimes can render a non-citizen removable under more than one ground of removability. For example, the crime of aggravated discharge of a firearm, 720 ILCS 5/24-1.2, may render a non-citizen removable both under the firearms ground and under the aggravated felony “crime of violence” ground if a sentence of at least one year incarceration results.

Crimes of domestic violence or stalking, crimes against children, and violation of a protection order

These grounds of removability, based either on convictions or on certain civil findings, are relatively new to the INA. Though many crimes related to domestic violence and child abuse and neglect could also fall under the aggravated felony or moral turpitude provisions, they now give rise to independent grounds of removability as well.

CRIMES RELATED TO DOMESTIC VIOLENCE	
Immigration ground of removability	Illinois crime(s)
Domestic violence	720 ILCS 5/12-3.2 (domestic battery) 720 ILCS 12-4.3 (aggravated battery of child)
Stalking	720 ILCS 5/12-7.3 (stalking) 720 ILCS 5/12-7.4 (aggravated stalking)
Child abuse	720 ILCS 5/12-3.2, 3.3, 4.3 (domestic battery and aggravated battery of child)
Child neglect	705 ILCS 405/2-3 (child neglect) 720 ILCS 130.2 (contributing to child neglect)
Child abandonment	720 ILCS 5/12-21.5 (child abandonment)

In addition, violation of a civil or criminal order of protection can also be grounds for initiating removal proceedings.

Order of protection under the INA

The INA defines an order of protection as any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions), whether obtained by filing an independent action or as a pendente lite order in another proceeding.

8 U.S.C. § 1227(a)(2)(E)(ii).

In Illinois, 750 ILCS 60/217 *et seq.* relates to both civil and criminal enforcement of orders of protection.

Under the INA, this ground of removability applies to a person who, at any time after admission, is enjoined under a protection order issued by a court *and* who is found by a court to have engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person(s) for whom the protection order was issued.

Persons protected under the INA include a current or former spouse, a person with whom the non-citizen shares a child in common, a person who is cohabiting with or has

cohabited with the non-citizen as a spouse, a person similarly situated to a spouse of the non-citizen under the domestic or family violence laws of the jurisdiction where the offense occurs, or any other person who is protected from the non-citizen's acts under the domestic or family violence laws of the U.S., State, or unit of local government.
 8 U.S.C. § 1227(a)(2)(E)(i).

Driving and related vehicular offenses

Although traffic and vehicular offenses are not grounds of removability per se, they often can place the status of a non-citizen in jeopardy. Traffic-related offenses such as tickets for speeding or moving violations will not make a non-citizen removable, but many other driving-related offenses do trigger removability if they constitute aggravated felonies or crimes of moral turpitude.

The following is a list of misdemeanor and felony offenses found in the Illinois Vehicle Code that may result in removability:

- a. Vehicular offenses that can result in removability

DRIVING AND VEHICULAR OFFENSES			
Offense	Classification	Aggravated Felony	CMT
Possession of a stolen motor vehicle, 625 ILCS 5/4-103	Class 2 felony	Theft offense if sentenced to at least one year incarceration Possibly forgery offense if charged under 5/4-103.2's "forgery" section	Possible but not certain; no intent in statute
Vehicle theft conspiracy, 625 ILCS 5/4-103.1	Class 2 felony	Theft offense if sentenced to at least one year incarceration	Yes
Reckless driving, 625 ILCS 5/11-503	Class A misdemeanor	No	No

DRIVING AND VEHICULAR OFFENSES (continued)

Offense	Classification	Aggravated felony	CMT
Aggravated offenses relating to motor vehicle and other vehicles, 625 ILCS 5/4-103.2	Class 1 felony	Theft offense if sentenced to at least one year incarceration Possibly trafficking in vehicles, the identification numbers of which have been removed	Possible but not certain; no intent in statute
Aggravated fleeing or attempting to elude a police officer, 625 ILCS 5/11-204.1	Class A misdemeanor for first offense Class 4 felony for second violation	Felony conviction could be considered crime of violence if under provision related to causing bodily injury to person or property	Possible but not certain; no intent in statute
Offenses relating to motor vehicles and other vehicles, 625 ILCS 5/4-102 (vehicular damage, removal of parts, tampering)	Class A misdemeanor, first offense Class 4 felony, 2 or more offenses	No aggravated felony for misdemeanor conviction Not likely to be aggravated felony even if sentenced to a year or more incarceration because not theft, burglary, or crime of violence	Possible but not certain; no intent in statute

b. DUIs and suspension or revocation of a license

Driving under the influence and driving on a revoked license are two of the most common crimes of which non-citizens are convicted. These offenses have different effects on a non-citizen's status:

DUI AND SUSPENSION OR REVOCATION OF LICENSE			
Offense	Classification	Aggravated Felony	CMT
Driving under the influence, 625 ILCS 5/11-501	Class A misdemeanor for first and second offense	No	No
	Class 4 felony for third or subsequent offense, or where accident results in great bodily harm	No	No
Driving while driver's license suspended or revoked, 625 ILCS 5/6-302	Class A misdemeanor	No	Yes
	Class 4 felony, second or subsequent conviction	No	Yes

DIVISIBLE STATUTES AND PLEAS

Divisible statutes are those that include a variety of conduct, some of which can support a charge of “aggravated felony” or “crime of moral turpitude,” and some of which cannot. For example, Illinois’ burglary of a motor vehicle statute has been found to be a “divisible statute” for purposes of the “crime of violence” type of aggravated felony. Breaking a car window to enter a vehicle would involve the use of force (“crime of violence” conduct), but merely reaching into an open window or the back of a truck and taking property out of it would not (no use of force, so no “crime of violence” conduct). *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000). As a result, if the record of conviction does not indicate whether force was used in the commission of the offense, removability can be headed off.

In immigration law, the record of conviction includes the charging document, the plea or judgment, and the sentencing order. Police reports are not part of the record of conviction. The INS always submits a certified disposition of the conviction, which includes the information or indictment, as evidence of a non-citizen’s conviction. Because the plea agreement is also considered part of the record of conviction, a non-citizen’s defense counsel sometimes seeks a transcript of the plea agreement to defend against a charge of removability by establishing that a particular stipulation does not sustain the INS’s charge. For this reason, the admission to certain facts of a stipulation – and not others – can be very important for a non-citizen’s defense later on in removal proceedings.

Where the criminal charge rests on a divisible statute, defense counsel should plead to a provision that does not involve aggravated felony conduct, e.g., use of force; or a necessary element of a crime of moral turpitude, e.g., the element of intent. Also, avoid any admissions during a guilty plea to conduct that would support such elements, and in turn support a charge of removability. For example, in the case of motor vehicle burglary described above, if the non-citizen did break a window prior to entering a vehicle, but the criminal information does not state this, the non-citizen should not admit to such facts when pleading guilty. In this manner, the INS will have no evidence in the record to establish “crime of violence” conduct and a non-citizen may avoid removability for an aggravated felony.

Another example of a divisible statute is the crime of mob action under 720 ILCS 5/25-1:

(a) Mob action consists of any of the following:

- (1) The use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law; or
- (2) The assembly of 2 or more persons to do an unlawful act; or
- (3) The assembly of 2 or more persons, without authority of law, for the purpose of doing violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person by violence.

Mob action as defined in paragraph (1) is a Class 4 felony, but under paragraphs (2) and (3), it is only a Class C misdemeanor.

Under this statute, paragraph (1) is the most problematic because it includes the use of force as an element of the offense, and can also result in a sentence of incarceration. Less problematic are paragraphs (2) and (3). Because they are misdemeanors, neither can result in a sentence of a year or more incarceration and thus cannot lead to an aggravated felony charge. Since paragraph (2) has no element of intent, it is not likely to support a crime of moral turpitude charge. By contrast, a plea to paragraph (3) might be found to be a crime of moral turpitude due to its "use of violence" element.

Like Illinois' mob action statute, many other statutes are divisible. It is therefore important to review the statute under which a non-citizen is charged to see whether it is divisible in any way, and whether pleading to a particular provision in the statute can avoid or diminish the risks of removability.

Even if your client is convicted, fashioning a sentence can be critical. A sentence that avoids removability or that preserves a non-citizen's eligibility for discretionary relief in the future can be the difference between your client's remaining in the U.S. and banishment.

One of the most difficult areas in sentencing is that the shorter, less burdensome sentence – which most criminal defendants naturally want – can have disastrous immigration consequences. For example, many first-time offenders are offered a choice of boot camp coupled with an alternative term of incarceration. An alternative sentence to probation rather than incarceration protects the non-citizen from sentence-based aggravated felony charges, even if the INS issues a detainer on other grounds.

Similarly, many defendants prefer a sentence of incarceration to intensive probation, since they will likely be paroled far sooner than it would take to complete probation. However, a sentence of intensive or other probation can avoid an aggravated felony finding altogether, if the aggravated felony is of a type that turns on imposition of a sentence of incarceration.

Unless criminal defense counsel raises the stark reality of removal, most non-citizens will balk at a plea with a more onerous sentence. It is important to convince a non-citizen to accept such a sentence in order to protect his or her ability to remain in the U.S.

Aggravated felony convictions and sentencing

Sentence-based aggravated felony charges can be avoided by securing a sentence other than incarceration – or even one day less than a full year of incarceration. In most cases, this will involve probation, with or without some form of jail time. Other sentences may work to avoid deportation as well. Be creative with the various sentencing options available, and, whenever possible, consult with an immigration practitioner to fashion a sentence that protects the non-citizen.

Boot camp and sentencing options

A recommendation for *state* boot camp has two distinct results, both highly detrimental. First, a recommendation *will not* avoid an aggravated felony finding because non-citizens are *never* eligible for boot camp once they reach IDOC. Non-citizen defendants will always end up serving the sentence of incarceration. Second, judges often impose a lengthy sentence of incarceration precisely to encourage defendants to choose and then complete boot camp – so, ironically, non-citizen defendants will ultimately serve more time than they might have if boot camp were not recommended.

For many non-citizens, a better option than IDOC boot camp may be *county* boot camp because INS often does not issue detainers in county boot camp programs. In

addition, as mentioned above, where a non-citizen is found ineligible for county boot camp, an alternative sentence of probation, rather than incarceration, will protect against removability on “sentence-based aggravated felony” grounds. Defense counsel should therefore seek county boot camp as an alternative to a sentence of incarceration wherever possible.

PRACTICE TIPS FOR FELONY SENTENCING OF NON-CITIZENS

A non-citizen who would be recommended for **state** boot camp may avoid removability for an aggravated felony by any of the following:

- ▶ pleading to a Class A misdemeanor and taking 364 days of jail time, rather than a class 4 felony and a one-year sentence;
- ▶ seeking **county** boot camp with probation; or
- ▶ seeking probation of any sort.

Felony drug possession offenses and sentencing options

Recently, the BIA reversed a long-standing set of decisions holding that felony possession of a controlled substance is not a “drug trafficking offense,” and thus is not an aggravated felony. In May of 2002, the BIA held that *one felony drug possession is an aggravated felony “drug trafficking offense”* under the INA. Prior to this recent decision, a felony possession conviction would render an LPR removable under the INA’s controlled substance ground of removability, but LPRs could still seek a discretionary waiver because the conviction was not an aggravated felony. Now, mandatory deportation will result even if a non-citizen was sentenced to first-offender probation.

Because of this significant change in the law, non-citizens charged with felony possessory offenses will be found removable as “drug traffickers” unless they are acquitted or the case is dismissed. A conviction can also be avoided if drug school is available. If these dispositions are not obtainable, a non-citizen may still benefit from the lightest possible sentence (first-offender probation, or probation). If the Court of Appeals for the Seventh Circuit finds that the BIA’s recent decision is incorrect, LPRs may still be eligible for discretionary relief from removal, and a light sentence will again become relevant.

**PRACTICE TIPS FOR SENTENCING OF
CONTROLLED SUBSTANCE POSSESSION OFFENSES**

If a non-citizen is charged with felony possession,⁹ seek

- ▶ dismissal or acquittal if at all possible;
- ▶ drug school, if available;
- ▶ first-offender 710/410 probation (judgment discharged upon completion) (still a conviction under INA);
- ▶ treatment alternatives for addicts and alcoholics (20 ILCS 301/40-5, 40-10, conviction vacated upon completion) (still a conviction under INA); or
- ▶ probation.

These possibilities are listed in order of preference.

Violations of probation (VOPs)

Keeping a non-citizen on probation is essential. Non-citizens facing probation violations should defend their cases vigorously, since a one-year sentence of incarceration could result in a sentence-based aggravated felony charge. Many non-citizens are not placed in removal proceedings on initial receipt of probation but only on pleading guilty to a VOP with a new sentence of incarceration. Working to keep a non-citizen's VOP from resulting in a sentence of incarceration could make all the difference in preventing removal from the U.S.

VOPs can range from obvious violations (conviction for another offense) to more ambiguous ones (when and whether a non-citizen has completed community service). While the former violation is more difficult to defend than the latter, defense counsel must vigorously employ any strategy that will keep the probationer from getting sentenced to incarceration.

⁹ In the case of cannabis, possession with intent to deliver can be charged as a misdemeanor. But this crime would be a "drug trafficking offense" under the INA even though it is a misdemeanor because it has a "trafficking" element. As a result, the only way to avoid an aggravated felony charge where a non-citizen is charged with misdemeanor possession with intent to deliver cannabis is to have the charges dropped to simple misdemeanor cannabis *possession* because this offense has no trafficking element.

PRACTICE TIPS FOR VIOLATIONS OF PROBATION

Keep a probationer away from a sentence of incarceration by agreeing to any of the following:

- ▶ extend the probation;
- ▶ increase the community service;
- ▶ intensive probation for a limited period; or
- ▶ jail time with continued probation instead of a sentence of incarceration.

Misdemeanors and sentencing

Unlike the aggravated felony category, most misdemeanors are not serious enough to result in mandatory removal with no possibility of discretionary relief. But the sentence received can have an impact on a non-citizen's future dealings with the INS. Therefore, the lowest possible sentence should be sought for any misdemeanor, starting with supervision, followed by the range of sentences that avoid any jail time.

COMMON PITFALLS FOR DEFENSE ATTORNEYS WITH NON-CITIZEN CLIENTS IN ILLINOIS, AND HOW TO AVOID THEM

Because the rules for immigration law are often counterintuitive to criminal lawyers, defense attorneys need to avoid common pitfalls that can result in a non-citizen's removal. Various charges that make non-citizens removable can be avoided by following some simple rules:

Pitfall	Remedy
Some LPRs may be citizens, but the rules are complex.	Non-citizens whose parent(s) were born or naturalized in the U.S. may be U.S. citizens. Defense counsel must refer client immediately to an immigration attorney.
LPRs will lose their residency if convicted of an "aggravated felony."	Where charged with a categorical aggravated felony, seek dismissal or acquittal, or plead to a different charge. Where charged with a sentence-based aggravated felony, avoid one-year sentence of incarceration by seeking sentence that does not include incarceration, but could include jail time of some sort.
Sentence-based aggravated felonies turn on the sentence imposed, not the time served.	Seek <i>county</i> boot camp with probation, probation with jail time, intensive probation, or periodic imprisonment of less than one year.
Attempts or conspiracies to commit an aggravated felony are also aggravated felonies.	Where dismissal or acquittal is not possible, seek to plead to a different charge (if a categorical aggravated felony) or obtain a sentence of less than one year incarceration (if a one-year-sentence-based aggravated felony).

Pitfall	Remedy
<p>Non-citizens are not eligible for boot camp once an INS detainer is lodged and must serve the alternative sentence of incarceration.</p>	<p>Do not seek a recommendation to <i>state</i> boot camp.</p> <p>Avoid a sentence of one year incarceration by accepting <i>county</i> boot camp (if available), probation, probation with jail time, or a sentence of 364 days.</p>
<p>Burglary of a motor vehicle and possession of a stolen motor vehicle with a one-year sentence of incarceration are both aggravated felonies under "attempt theft" (burglary) and "theft" (possession of a stolen motor vehicle) aggravated felony provisions.</p>	<p>If dismissal or acquittal is not possible;</p> <p>plead to criminal trespass to a vehicle or property, or criminal damage to property;</p> <p>if impossible to avoid conviction on initial or original charge, avoid one-year sentence of incarceration;</p> <p>maintain probation if the non-citizen is charged with violation of probation; or</p> <p>where charge is burglary of a motor vehicle, plead only to "intent to commit a <i>felony</i>," not "intent to commit a <i>theft</i>," to avoid "attempted theft" aggravated felony provision.</p>
<p>Taking a sentence of one year or more of incarceration after a violation of probation can result in an aggravated felony charge for any one-year-sentence-based aggravated felony .</p>	<p>Increase the length or conditions of probation, or take jail time instead of a sentence of one year incarceration.</p>
<p>Pleading to crimes that have an element of intent or an element of the use of force can result in crimes of moral turpitude or crimes of violence. Examine whether the statute involved is a "divisible" statute, where the crime can be charged under various provisions.</p>	<p>If the statute is divisible, plead to a provision that has no element of intent and no element of the use of force.</p>

Pitfall	Remedy
<p>Felony possession of a controlled substance is a "drug trafficking" "aggravated felony" offense regardless of the sentence.</p>	<p>Seek dismissal or acquittal if at all possible.</p> <p>Otherwise, seek (in this order):</p> <p>drug school (which will not result in a conviction), or;</p> <p>first-offender probation or probation (both of which will still result in a conviction, but if the felony possession/drug trafficking rule is later overturned, the lightest sentence possible will be best).</p>
<p>First-offender probation is a "conviction" under the INA.</p>	<p>Where a conviction would render a non-citizen removable without the possibility of relief, seek acquittal or dismissal.</p>
<p>Possession of cannabis with supervision is a "conviction" under the INA.</p>	<p>Where possible, get the case dismissed. If not, a non-citizen may still maintain eligibility for some relief if the amount is 30 grams or less. In that case, seek to have the record of conviction clarify that the non-citizen possessed 30 grams or less of cannabis.</p>
<p>Not all misdemeanor cannabis charges avoid the felony possession/drug trafficking aggravated felony ground.</p>	<p><i>Simple</i> misdemeanor cannabis possession will avoid a drug trafficking charge, but misdemeanor <i>possession with intent to deliver</i> will not. Where possible, get misdemeanor cannabis possession with intent to deliver dismissed, or get charges reduced to <i>simple</i> misdemeanor possession.</p>
<p>Crimes of moral turpitude generally have an element of intent or knowledge.</p>	<p>If the statute is divisible, plead to conduct that does not involve these elements.</p>
<p>A domestic battery conviction results in removability, regardless of the sentence.</p>	<p>Simple battery is not a crime of moral turpitude.</p>

JUVENILE OFFENSES

Juvenile offenses are not grounds for removal. An act of juvenile delinquency is not considered a crime, and an adjudication of delinquency is not a conviction for immigration purposes. Adjudications of delinquency, therefore, will not be grounds for removal. This is not to say, however, that juvenile cases raise no immigration concerns. Non-citizens in the juvenile system encounter a number of immigration risks.

For example, juvenile offenders who are undocumented may have problems when they apply for LPR status. An LPR applicant can be turned down for having admitted to the elements of a crime of moral turpitude or a drug-trafficking offense. Once an application for permanent residency is denied, the applicant is placed in removal proceedings. Theoretically, the INS should not have access to juvenile court records, which are sealed. However, the seal is subject to many exceptions. To be on the safe side, counsel should seek to avoid letting a non-citizen juvenile admit to any activity that has the elements of a crime of moral turpitude or a drug-trafficking crime.

Juveniles tried in adult court and/or receiving adult sentences will be treated as adults for immigration purposes. Thus, it is important to counsel non-citizen juveniles about the consequences of agreeing to proceedings in adult court. Though they may receive a more appealing sentence in adult court, they risk being automatically removed from the U.S. for their offenses and, in many cases, being forever barred from returning legally.

Wherever possible, defense counsel should try to keep a case in juvenile court or try to get it back into juvenile court once it has been transferred. For example, recent legislation allows a juvenile automatically transferred to adult court for certain drug offenses to be waived back to juvenile court for adjudication and disposition.

Also, if the crime charged is a mandatory transfer crime, but the juvenile is convicted of a lesser included offense that is not, it is worth seeking a sentence based on the Juvenile Court Act. This will preserve the argument that, although the conviction is an adult conviction for immigration purposes, the sentence is not. The immigration attorney can argue that a "term of incarceration" under the INA does not include a sentence to a juvenile detention facility. If successful, these arguments could prevent the juvenile from having an aggravated felony conviction.

In Extended Juvenile Jurisdiction (EJJ) proceedings, the court imposes a juvenile sentence and an adult sentence, with the adult sentence stayed. If the youth violates the juvenile sentence by committing a second offense, the adult sentence is imposed. (Other violations of the juvenile sentence may not trigger the adult sentence.) In EJJ proceedings, counsel should either admit to an offense that is not an aggravated felony, or attempt to secure an adult sentence that avoids aggravated felony consequences.

Finality of convictions

A conviction is final for immigration purposes when all direct appeals have been exhausted or waived. Only then can it support a charge of removability.

Removal proceedings are often commenced while a non-citizen is still serving a sentence of incarceration. If removal proceedings are concluded before the criminal sentence is completed, the non-citizen is taken directly into INS custody on release from state custody, and the removal order is executed immediately. If the removal proceedings have not concluded, the non-citizen is taken into INS custody and the hearing resumes in the immigration court for detained individuals.

Under 725 ILCS 5/122-1(c), a post-conviction petition can be filed up to three years after conviction, or six months after the denial of a petition for leave to appeal. As a result, individuals may complete their sentence before the post-conviction petition has been either filed or decided. Once the sentence is served, the person can be placed in removal proceedings and removed. A discretionary appeal or post-conviction motion does not automatically stay a removal order (as a direct appeal does). Non-citizens who have a final removal order and are seeking post-conviction relief must therefore seek a stay of removal from the INS and/or from a federal court while awaiting a decision on the post-conviction petition. For a stay to be granted, the non-citizen will have to show some likelihood of succeeding on the merits of his or her post-conviction petition.

Removal proceedings for people who are still in jail or in INS detention can move very quickly. If the INS does not complete removal proceedings while the non-citizen is in state custody, it usually completes them within a few months of his or her release.

Appeals

A conviction is not final for immigration purposes while the case is on direct appeal. A conviction is final, however, where a petition for leave to appeal has been filed. If the petition for leave is approved it may undo the finality of the conviction. But until then, the conviction will be treated as final for immigration purposes. *Matter of Polanco*, Int. Dec. 3232 (BIA 1994).

As a practical matter, the INS may not know whether your client's conviction is on direct appeal when it initiates removal proceedings. If the INS starts removal proceedings while your client's case is on direct appeal, advise the client to tell the immigration judge (IJ) on his or her first appearance that the case is on direct appeal, and to present some proof that the appeal has been filed. The IJ should then terminate proceedings, forcing INS to wait until the appeal is decided and then re-charge the non-citizen with removability. Sometimes, especially if the appeal is close to being final, the IJ will not want to terminate. Instead, the IJ has the option to close the case administratively, which means that the INS does not have to re-file and the client remains in INS detention. Faced with the prospect of administrative closing, the immigration attorney

will want to contact the appellate attorney to verify when the appeal was filed and find out what the appellate attorney thinks about its merits and how soon it may be decided. The immigration attorney's goal is to convince the IJ to terminate proceedings based on the appeal's likelihood of success. If a conviction is reversed on appeal, then it cannot be the grounds for removal proceedings.

If neither the IJ nor the INS is made aware of the pending appeal, removal proceedings could be completed before the appeal is decided. However, a conviction or sentence that is overturned on appeal is a basis for re-opening immigration proceedings after a removal order is issued.

If only the sentence is appealed, and is reduced on appeal so that the crime is no longer a removable offense, e.g., the sentence is reduced from one year to less than one year, or is reduced from incarceration to probation, then the conviction cannot be grounds for removal. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982).

Post-conviction remedies

Post-conviction remedies can be a helpful tool in eliminating the immigration consequences of a criminal offense. If a post-conviction petition is granted and the conviction is vacated, then the conviction cannot be used as the basis for removal proceedings. If removal proceedings have already begun, they must be terminated.

Unlike direct appeals, pending discretionary appeals or post-conviction petitions do not impair the finality of a conviction. As a result, the INS can execute a removal order before a pending petition for leave to appeal, or post-conviction petition, is decided. If either is subsequently granted, it is unclear whether a non-citizen can file a motion to reopen immigration proceedings from abroad, or can legally return to U.S. without first obtaining permission from the Attorney General. In order to avoid this outcome, where defense counsel has been appointed to represent a non-citizen in post-conviction proceedings, the attorney should coordinate with an immigration attorney who can promptly move to re-open removal proceedings and request a stay of execution of the removal order once the petition is granted.

Some post-conviction and direct appeal claims relevant to non-citizens are:

a. Vienna Convention On Consular Affairs

Article 36 of The Vienna Convention states in pertinent part:

- (b) If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed by a consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay of his right under this sub-paragraph.

- (c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending state who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison custody or detention if he opposes such action.

The failure to advise a non-citizen in custody of his or her rights under Article 36 of the Vienna convention can be the basis for a post-conviction petition. However, this claim will only succeed if the non-citizen can prove prejudice.

- b. Ineffective Assistance of Counsel

Defense counsel's giving inaccurate advice regarding immigration consequences of a plea, failure to investigate mitigating factors for sentencing, or failure to appreciate the client's maximum exposure could render assistance representation of a non-citizen client ineffective.

- c. Involuntary plea

Failure to translate plea proceedings, or misinformation by court or counsel regarding the immigration consequences of a plea may make a plea involuntary.

REMEDIES FOR IMMIGRANTS WITH CRIMINAL CONVICTIONS: REQUIREMENTS AND BARS

Even if a conviction makes a non-citizen removable, he or she may nevertheless remain eligible to apply for relief from removal. Nearly all forms of relief require *both* statutory eligibility *and* a favorable exercise of discretion by the immigration judge.

This section outlines the various forms of relief from removal in immigration court, and sets forth the effects of the non-citizen's criminal record on each. The purpose of this section is to give you a better understanding of how your criminal defense work may affect a non-citizen client later.

Relief for LPRs to keep their permanent residency status

a. Cancellation of removal for certain permanent residents

Since 1997, certain longtime LPRs in removal proceedings can apply through "LPR cancellation" to waive nearly all criminal grounds *but not* a conviction for an aggravated felony.¹⁰ An applicant must have lived in some lawful status in the U.S. for 7 or more years, 5 of which must be as a lawful permanent resident, before the date they *committed* the crime that renders them removable. If the non-citizen is statutorily eligible for this relief, the immigration judge will consider favorable factors related to the non-citizen's life (family ties, efforts at rehabilitation, work history) and balance them against any negative factors (the circumstances of the conviction or any other negative information about the non-citizen). A favorable exercise of discretion by the immigration judge effectively waives the criminal conviction and permits the LPR to remain in the U.S.

¹⁰ Before 1997, there was a different and more expansive waiver for longtime permanent residents with criminal convictions. This "212(c)" waiver was the precursor to cancellation of removal, and remains available to non-citizens who were convicted on a guilty plea before April 24, 1996, and who did not serve 5 years or more in prison. As in cancellation of removal, the immigration judge weighs the positive and negative factors in determining whether the non-citizen will maintain his or her LPR status. Because you will be dealing only with criminal charges that are now pending, the only way you can help LPRs who already have a conviction that predates April 24, 1996 is to avoid a new conviction. You may thereby maintain your LPR client's eligibility to waive the old conviction.

**PRACTICE TIPS FOR LPRS WHO MAY BE ELIGIBLE
FOR CANCELLATION OF REMOVAL**

- ▶ Avoid a conviction that will result in an aggravated felony charge;
- ▶ If the non-citizen has more than one criminal charge and one offense was committed before the non-citizen would have acquired 7 years of lawful status in the U.S., consider getting the first charge dropped and pleading to the second charge instead; and
- ▶ Contact an immigration specialist to see if your client is eligible for this relief.

Relief for non-permanent residents

- a. Adjustment of status to lawful permanent residency

Having a conviction – even an aggravated felony – does not in itself bar a non-citizen from adjusting to LPR status. Some of the criminal grounds are waivable and some are not.

The most common means for a non-citizen to adjust status is through a close family member (spouse, parent, adult child, or sibling) who files a “petition” on his or her behalf. Other means of adjusting are through special provisions of the INA keyed to a non-citizen’s nationality, or the length of time they have lived here. You should contact an immigration practitioner to determine whether your client may be able to adjust his or her status.

As a general rule, *one* misdemeanor conviction that is a crime of moral turpitude will not be held against a non-citizen applying for permanent residency and thus *will not* require a waiver. This is known as the “petty offense” exception. However, *one* felony moral turpitude conviction or *two* misdemeanor convictions for crimes of moral turpitude *will* require a waiver.

A waiver with adjustment of status applications that are based on a family-based petition requires the non-citizen to have a U.S. citizen or LPR spouse, parent, or child, and to demonstrate that denial of the application would cause that relative “extreme hardship.”

Below is a list of those crimes for which a waiver is available, and those for which one is not:

ADJUSTMENT OF STATUS WAIVERS FOR CERTAIN CRIMES	
Waiver available	No waiver available
Any felony conviction that is a crime of moral turpitude	Any conviction for a controlled substance offense except simple possession 30 grams of marijuana or less
More than one misdemeanor conviction for a crime of moral turpitude	A reasonable belief that the non-citizen is or has been involved in drug trafficking
Simple possession of 30 grams of marijuana or less	n/a
Any aggravated felony that is not a drug crime, except simple possession of 30 grams of marijuana or less	n/a
A belief that the non-citizen is coming to the U.S. to engage in prostitution (this ground would most likely to be applied to a non-citizen with more than one conviction for prostitution)	n/a

b. Waivers for refugees or asylees later adjusting to LPR status

A refugee or asylee has a different waiver ground than an individual applying through a family member. All criminal grounds can be waived by the refugee/asylee except being an illicit trafficker in any controlled substance, whether convicted or not. The waiver may be granted if it would serve humanitarian purposes, assure family unity, or be otherwise in the public interest. If the crime is "violent or dangerous," the applicant must also show that denial of the waiver would cause him or her, or certain U.S. citizen or LPR relatives, exceptional or extremely unusual hardship sufficient to overcome the gravity of the crime.

c. Special waivers for victims of domestic violence

Non-citizens who are convicted of a crime of domestic violence or stalking, or who are found to have violated a protection order, can seek a waiver of removability where they can establish that they were not the primary perpetrator of violence in the relationship. This must be established by demonstrating that (1) the non-citizen was acting in self-defense, (2) the non-citizen was found to have violated a protection order intended to protect the non-citizen, (3) the non-citizen committed, was arrested for, was convicted of, or pled guilty to a crime that did not result in serious bodily injury, and (4) there was a connection between the crime and the non-citizen's having been battered or subjected to extreme cruelty.

d. Cancellation of Removal for non-lawful permanent residents

This path to legal residence is available only for non-citizens in removal proceedings. A non-citizen must meet a 10-year residency requirement and demonstrate that he or she has been a person of "good moral character" throughout that period, as defined by the INA (see below). Additionally, the non-citizen must demonstrate "exceptional or extremely unusual hardship" to a U.S. citizen or LPR spouse, parent or child if ordered removed.¹¹

e. Special cancellation of removal for battered spouses and children

To qualify for this path to legal residence, non-citizens in removal proceedings must prove that (1) they have been physically present in the U.S. for 3 years before applying to the immigration judge; (2) they have had good moral character throughout the statutory 3-year period (see below); (3) they are or were married to, or are or were the child or stepchild of, a U.S. citizen or LPR; (4) during the marriage, that relative battered them or subjected them (or their child) to extreme cruelty; and (5) their deportation would cause "extreme hardship" to themselves, and/or to their parent, or child (neither of whom needs to be a U.S. citizen or lawful permanent resident). As a general matter, refer to the good moral character definition to assess whether a conviction would disqualify a non-citizen from this relief, but call an immigration specialist for assistance as well.

"Good moral character" as defined in the INA

Some forms of relief reference both the criminal grounds of removal and the INA's "good moral character" definition in the INA. This provision is broader than the criminal grounds, referring both to actual convictions and other bad acts.

¹¹ "Suspension of deportation" was the precursor to cancellation of removal, and is available only to individuals in proceedings that commenced before April 1, 1997. Criminal defense attorneys will likely see very few such individuals with criminal charges. If you do, contact an immigration practitioner, as the criteria for suspension of deportation vary from those of cancellation of removal.

An alien cannot meet the “good moral character” requirement if any of the following occurs:

BARS TO “GOOD MORAL CHARACTER”

- ▶ the alien was convicted of an aggravated felony at any time;
- ▶ the alien is inadmissible on criminal grounds set out in the removal section of the INA (during the 10-year or 3-year statutory period)¹²:
 - a. convicted of a controlled substance offense (except a single offense of simple possession of 30 grams or less of marijuana);
 - b. convicted of a crime involving moral turpitude (unless a “petty offense”);
 - c. confined as a result of conviction to a penal institution for an aggregate period of 180 days or more, at any time;
 - d. convicted of two or more offenses of any type with aggregate sentence of 5 years or more of imprisonment;
- ▶ the alien was convicted of two or more gambling offenses committed during the statutory period; or
- ▶ the alien has engaged in prostitution or received proceeds of prostitution within 10 years before application, or has procured or attempted to procure, prostitutes or persons for the purpose of prostitution.

Relief available to both lawful permanent residents and undocumented non-citizens

There are three forms of relief that are based on a non-citizen’s fear of persecution or torture if returned to his or her native country. An LPR convicted of an aggravated felony will lose his or her permanent residency status, but may nevertheless remain eligible to apply for one of these three forms of relief. An undocumented non-citizen with a criminal conviction has the same possibilities.

¹² The “10-year” statutory requirement refers to cancellation of removal for non-lawful permanent residents. The “3-year” statutory requirement refers to special cancellation for battered spouses and children.

a. Asylum

Non-citizens who fear persecution if returned to their country of origin may be granted asylum if they can demonstrate that their fear is reasonable and that the persecution would be on account of their race, religion, political opinion, national origin, or membership in a social group.

There are two criminal grounds that bar an application for asylum: (1) a conviction for an aggravated felony; and (2) any other conviction found to be "particularly serious" by the INS or the immigration judge.

Whether a crime is "particularly serious" is based on the nature of the crime, the sentence received, and other circumstances to be considered by the INS or the immigration judge. Burglary, drug trafficking, and armed robbery have been found to be "particularly serious" crimes.

PRACTICE TIPS FOR MAINTAINING A NON-CITIZEN'S ELIGIBILITY FOR ASYLUM

- ▶ Prevent a conviction for an aggravated felony;
 - ▶ Plead the non-citizen to a non-violent felony
- E.g., a conviction for disorderly conduct would likely be better than criminal damage to property.

b. Withholding of Removal

Like asylum, withholding of removal is based on a fear of persecution, but an applicant must establish a "clear likelihood" of persecution, not just a reasonable possibility. While a grant of withholding forbids the INS from deporting a non-citizen to the designated country, it neither mandates release from custody, nor prevents the INS from attempting to deport the non-citizen to any other country that will accept him or her.

Certain convictions bar an applicant from applying for withholding of removal:

- conviction of a "particularly serious crime";
- conviction of an aggravated felony with a sentence of five years or more, which is *per se* a particularly serious crime;
- conviction of an aggravated felony with a sentence less than five years, unless the non-citizen successfully rebuts the presumption that the crime was not particularly serious; or

- any other conviction found to be “particularly serious” by the immigration judge.

PRACTICE TIPS FOR MAINTAINING A NON-CITIZEN'S ELIGIBILITY FOR WITHHOLDING OF REMOVAL

- ▣ Seek the lowest possible sentence under 5 years; and
- ▣ Plead to a charge that does not involve use of force or violence, if possible.

c. Deferral of Removal under the Convention Against Torture (CAT)

Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), non-citizens can seek deferral of removal if they establish that they will be tortured upon return to their country of origin. Granting this relief does not mandate the non-citizen's release from custody, and also does not prevent the INS from attempting to deport the non-citizen to any other country that will accept him or her. *There are no criminal bars to an application for protection under the Convention Against Torture.*

d. Voluntary Departure

Non-citizens in removal proceedings, whether detained or out on bond, may seek voluntary departure from the immigration judge as an alternative to deportation, so long as they have not been convicted of an aggravated felony. Accepting voluntary departure, whether before or during court proceedings, avoids one of the harshest consequences of removal or deportation. A person who departs voluntarily and pays for the trip is not subject to criminal charges if he or she re-enters and, if eligible to legalize in the future, will not need a waiver for having been previously deported.

e. Naturalization

Once LPRs have held that status for a certain number of years, they can apply to become naturalized U.S. citizens. The applicant must provide certified court dispositions of all criminal arrests that have taken place within the statutory period.

If the INS determines that a naturalization applicant is removable on criminal grounds, it can elect to ignore those grounds in the exercise of prosecutorial discretion. However, it rarely does so, and usually commences removal proceedings instead. This is true even for longtime LPRs, and for those people whose convictions occurred long ago.

A naturalization applicant must establish that he or she has been a person of good moral character (defined above) throughout the statutory period that qualifies a permanent resident for naturalization. This period is five years, generally, but only three

years for those who have lived for the past three years with a U.S. citizen spouse.

BIBLIOGRAPHY AND RESOURCES

Reference Materials

The immigration laws are contained in the Immigration and Nationality Act, which is codified in Volume 8 of the United States Code. The regulations of the INS are contained in Volume 8 of the Code of Federal Regulations. Administrative decisions are reported in the Administrative Decisions Under Immigration and Nationality Laws [I&N Dec.]. Prior to their publication as bound volumes, they appear as slip opinions and are called "Interim Decisions."

Two comprehensive treatises on immigration law are the twenty-volume, frequently updated Immigration Law and Procedure by Gordon, Mailman and Yale-Loehr, and Immigration Law Service, by the Lawyers Cooperative Publishing Company/Bancroft-Whitney Company.

Two condensed discussions of immigration law, Immigration Law and Defense, and Immigration Law and Crimes, both updated regularly, are available from the National Immigration Project of the National Lawyers Guild. These volumes are especially useful for deportation and removal hearings, defenses to deportation and removal, and criminal grounds of exclusion or inadmissibility.

A basic text on immigration law is the Immigrant Legal Resource Center's Guide for Immigration Advocates: A Comprehensive Practice Manual Written Especially for Paralegals, 2001 ed.

Criminal Defense of Immigrants, by Norton Tooby and Katherine Brady. This is a thorough examination of the INA's criminal grounds of removability, and a discussion of how defense counsel can help to avoid removability for non-citizen clients.

Kurzban's Immigration Law Source Book is a comprehensive treatise on immigration law. It provides detailed outlines and references to case law.

Articles and Publications

Interpreter Releases, a weekly publication by West Group, includes updates of federal case law and reporting and analysis of changes to immigration law.

"*Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*," by William R. Maynard (published in the June 1999 issue of NACDL's Champion)

"*Aliens, Guilty Pleas, and the Risk of Deportation: Time for Legislative Action*," Moira Moran and Patrick Kinnally, Illinois Bar Journal Vol. 89 (April 2001). This article calls for legislation requiring judges to admonish all non-citizen defendants of the risk of removal upon pleading guilty.