

IMMIGRATION CONSEQUENCES OF MASSACHUSETTS CRIMINAL CONVICTIONS¹

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¹ Prepared by the Committee for Public Counsel Services Immigration Impact Unit (IIU). The IIU provides training, litigation support and advice on individual cases regarding the immigration consequences of criminal conduct to all court-appointed attorneys in Massachusetts. This discussion is based on an article originally written by Daniel Kanstroom, Professor of Law and Associate Director of the Boston College Center for Human Rights and International Justice. Appendix 3: *Immigration Consequences of Selected Massachusetts Offenses Reference Chart* was originally written in 2006 with Dan Kesselbrenner, Executive Director of the National Immigration Project of the National Lawyers Guild. We thank both of these individuals for their continued input, drafting and support on this project.

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Introduction

Removal of noncitizens from the U.S. due to criminal convictions has skyrocketed in recent years due to changes in U.S. immigration law and a dramatic increase in immigration enforcement. Convictions for minor criminal offenses can have disastrous and irrevocable consequences to noncitizen clients; dispositions that appear innocuous or even favorable in terms of incarceration or criminal penalty may cause far worse immigration consequences. In March 2010, the U.S. Supreme Court found in *Padilla v. Kentucky* that deportation “is a particularly severe ‘penalty’” and so “intimately related to the criminal process” that defense attorneys are required under the Sixth Amendment to advise their noncitizen clients of potential immigration consequences prior to resolving criminal cases. The Court thus held that failure to properly advise noncitizen clients of immigration consequences constitutes ineffective assistance of counsel.² As a result, criminal practitioners must either develop a sufficient understanding of the immigration consequences of criminal convictions as to be able to properly advise their clients, or they must consult with an immigration expert who can analyze the potential consequences which they can use to advise their clients. Because even the most minor of criminal offenses can have serious consequences in immigration proceedings, in most cases, criminal practitioners should consult with someone who is knowledgeable about the interplay between criminal and immigration law.

In Massachusetts, we have a number of resources available to criminal defense practitioners. All Committee for Public Counsel Services (CPCS) staff attorneys and court-appointed private attorneys may seek advice on individual cases from the CPCS Immigration Impact Unit (IIU). In addition, there are many local and national resources available for assistance in this area. For information please see the IIU website at http://www.publiccounsel.net/Practice_Areas/immigration/links_to_other_resources.html.

² *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

The following discussion and appendices are designed to assist criminal defense attorneys in analyzing the potential immigration consequences of criminal conduct. They are a starting point and should not be used in place of individual research. Moreover, because these documents are meant for criminal defense attorneys, they present the most conservative analysis of the ramifications of criminal conduct; therefore, the conclusions are not intended for use by immigration attorneys or judges in determining consequences of criminal conduct.

Governing Law

The primary statute is the Immigration and Nationality Act of June 27, 1952, as amended (“INA”). The Act in its current form is codified at 8 U.S.C. § 1101 *et seq.* Most immigration practitioners tend to refer to the INA by its more informal section numbers, rather than by citation to the United States Code (*e.g.*, INA § 208); however, for ease of reference this document will use the U.S. Code citations. Most regulations pertaining to immigration law are found at Title 8 of the Code of Federal Regulations (8 C.F.R.), though some matters are also covered in titles 20, 22, 28, and 42 of the C.F.R. and elsewhere. Effective March 1, 2003, the responsibilities of the former Immigration and Naturalization Service (“INS”) were divided among three new agencies within the Department of Homeland Security (“DHS”): 1) U.S. Citizenship and Immigration Services (“USCIS”) administers visa petitions, work authorizations, and other forms of immigrant and nonimmigrant status; 2) U.S. Immigration and Customs Enforcement (“ICE”) oversees immigration and customs investigations and enforcement (including detention and removal); and 3) U.S. Customs and Border Protection (“CBP”) oversees borders and other ports of entry. The Immigration Court remained under the control of the Department of Justice, and it oversees all removal proceedings.

In addition to statutory law, immigration case law is developed by the Board of Immigration Appeals (“BIA”). The BIA issues appellate administrative decisions that are binding nationwide on all Immigration Judges unless modified or overruled by the Attorney General or a federal court. Some BIA decisions are subject to judicial review in the federal courts.³ Administrative decisions designated as precedential by the BIA are referred to by a citation such as *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). These decisions are published and are available on Lexis, Westlaw, and on the BIA’s website at http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html.

³ Judicial review is governed by 8 U.S.C. § 1252.

U.S. Citizens and Noncitizens: Types of Immigration Status

Citizens

With only a few exceptions, such as some children of diplomats, citizenship is obtained automatically by birth on U.S. soil pursuant to the 14th Amendment to the U.S. Constitution. Thus, if your client was born in the U.S., she is probably a U.S. citizen. This would be true even if she left the U.S. soon after birth and has lived abroad for many years.⁴ Since the late eighteenth century, U.S. statutes have also provided for the grant of U.S. citizenship to the children of U.S. citizens born abroad. The rules, however, have changed dramatically over the years, and such cases are notoriously complex. If your client had even one U.S. citizen parent or grandparent or was adopted by a U.S. citizen it is very important to research this question thoroughly. The law in force at the time of birth will generally control.⁵

Citizenship may also be conferred by the government through “naturalization proceedings.”⁶ Generally, in order to be naturalized, the noncitizen must have been a lawful permanent resident continuously for the five years preceding her application, physically present in the U.S. for at least half that time, and in a particular state or region for at least three months.⁷ A client who is a naturalized U.S. citizen will have been given a certificate evidencing this fact. Naturalization records may be verified by checking with the clerk of the U.S. District Court where the swearing-in ceremony took place. The minor children of a person who naturalizes may automatically derive citizenship. This may be true even if the child becomes aware that his or her parent naturalized many years ago.⁸ Children who derived U.S. Citizenship will not have documentation of that fact unless they affirmatively applied for a U.S. passport or citizenship certificate. In addition to the client’s own immigration history, every client should therefore be asked about the complete immigration history of his/her parents and grandparents.

With a very few, extremely rare exceptions, a U.S. citizen client will not face any immigration consequences as a result of criminal proceedings. An applicant for naturalization, however, may be denied naturalization on the basis of a criminal conviction. Immigration law requires applicants for naturalization to be of “good moral character” for the five years preceding the date

⁴ It is possible, however, that a client who was born in the U.S. has lost citizenship through voluntary expatriation. See 8 U.S.C. § 1481(a); see also *Vance v. Terrazas*, 444 U.S. 252 (1980) (finding that intent to relinquish citizenship must be proven by preponderance of the evidence).

⁵ The current rules are set forth in 8 U.S.C. §§ 1401, 1408, and 1409. Some immigration treatises include charts setting forth the statutory requirements according to birthdate. See, e.g., Ira J. Kurzban, *Kurzban’s Immigration Law Sourcebook* (13th ed. 2012).

⁶ See 8 U.S.C. § 1421 *et seq.*

⁷ See 8 U.S.C. § 1427. The statute requires only three years of permanent residence if the applicant is married to a U.S. citizen, under certain circumstances. See 8 U.S.C. § 1430; 8 C.F.R. § 319.1(a). Note also that there are a wide variety of exceptions to these rules. For example, a person who served honorably in the U.S. military may apply for naturalization without becoming a permanent resident. See 8 U.S.C. § 1440(a).

⁸ See 8 U.S.C. § 1431, which codifies the Child Citizenship Act of 2000. The Act came into effect on February 27, 2001, and persons 18 or over on that date are subject to prior versions of the law. See also 8 U.S.C. § 1433 (setting forth procedure for naturalization of children on application of U.S. citizen parent).

of application.⁹ Issues surrounding citizenship and good moral character will be discussed in more detail below.

Lawful Permanent Residents

Noncitizens who attain the status of U.S. legal permanent residents (so-called “LPR” status) are among the most likely to be affected by criminal proceedings in the United States. (Unfortunately, many people are unaware of this fact and believe incorrectly that long-term legal residents will not be deported for minor crimes such as simple possession of marijuana or petty larceny.) Most such persons will likely be aware of their status as LPRs and will have in their possession a so-called “green card” (technically known as a “Permanent Resident Card”), which, in keeping with the anomalous nature of much of immigration practice, is not necessarily green.¹⁰ While legal permanent residence status does not expire,¹¹ a green card is only valid for ten years at a time, and should be renewed.

The main concern for an LPR in criminal proceedings should be whether he will be deported as a result of actions taken in the criminal case. As discussed more fully below, grounds of deportability are described quite specifically in the INA. It is also crucial, however, to advise the client that each time he leaves the United States he may be subject, as a noncitizen, to all grounds of “inadmissibility” as well.¹² Though there are similarities, the grounds of deportation and those for inadmissibility differ in significant and subtle ways.¹³ Thus, it is not uncommon that a criminal disposition is structured in such a way that it avoids deportation but renders the client subject to inadmissibility upon re-entry. The consequences of the failure to advise one’s client of this fact could be truly disastrous. A client may be permitted to live in the United States but may be denied re-entry and could very well be arrested at an airport or border and subject to long-term incarceration upon her return from a trip abroad.

⁹ 8 U.S.C. § 1427(a).

¹⁰ It is also possible for a person to be a permanent resident and not to have a green card. Sometimes these cards take a long time to process. In the interim, most permanent residents will have a stamp in their passports as evidence of their status. The card is evidence of status, not a precondition of status, so a person remains a permanent resident even after the card expires.

¹¹ Conditional residence expires after two years, unless it is extended. *See* 8 U.S.C. § 1186a. This status is most typically conferred on spouses of U.S. Citizens in situations in which the marriage was less than two years old at the time of approval of the residence. Conditional residents can petition to remove the conditions on their residence after two years. *See* 8 U.S.C. § 1186a(c).

¹² *See* 8 U.S.C. §§ 1101(a)(13)(C), 1182. An exception to this rule was the so-called *Fleuti* doctrine which provided that an “innocent, casual, and brief” departure which is not “meaningfully interruptive” of permanent resident status will not subject a permanent resident to the entry doctrine upon return to the United States. *Rosenberg v. Fleuti*, 374 U.S. 449, 462-63 (1963). The U.S. Supreme Court has upheld the *Fleuti* doctrine for lawful permanent residents convicted of offenses prior to the 1996 changes in the immigration laws. *Vartelas v. Holder*, 132 S.Ct. 1479 (2012).

¹³ *See* Appendix 2.

Lawful Non-Immigrants

All noncitizens that enter the United States are presumed to be “immigrants,” which means that the government presumes that they are entering with the intention of living permanently in the United States.¹⁴ So called “non-immigrants” are those noncitizens who are admitted within one of a number of specifically defined categories in the INA.¹⁵ Each category has a letter designation. In general, the noncitizen who enters in one of these categories must have demonstrated both a specific non-immigrant purpose for entry and an intention not to remain in the United States permanently.¹⁶ The most common categories of non-immigrants are business visitors and tourists (B-1 and B-2), students and exchange visitors (F, M, or J), and temporary workers (H). Non-immigrants will generally have a visa stamp in their passports evidencing their status as well as an I-94 card (a white card about the size of an index card that is often stapled into the person’s passport). This card shows that they were admitted in the proper category by immigration officials at the border or airport. (Noncitizens from certain countries, especially most Western European countries, Canada, and Japan, may be admitted for ninety days under the “Visa Waiver” program in which case they will not have a visa in their passports but will have a green I-94W card.)

Apart from being subject to removal if they violate the limits of their category (e.g., tourists are not permitted to work in the U.S.), non-immigrants are also subject to the grounds of deportability for criminal convictions. In addition, any non-immigrant who is convicted¹⁷ of a crime of violence (as defined under 18 U.S.C. §16) for which a sentence of one year or longer *may be imposed* is removable for failure to maintain status.¹⁸ As non-immigrants are likely to leave the United States with the intention of returning in the future, it is important also to consider the grounds of inadmissibility. The grounds of inadmissibility and deportability are discussed below in detail.

Refugees and Asylum-Seekers

One of the most poignant and significant consequences of a criminal conviction or admission to sufficient facts can be the denial of an application for political asylum¹⁹ or for “withholding of removal,”²⁰ an asylum-like status sometimes given to immigrants who are ineligible for asylum. If there is *any possibility* that your client has applied or may ever apply for one of these forms of relief due to political or other persecution, it is critically important that you evaluate any action taken in the criminal case with this in mind. A noncitizen convicted of a so-called “aggravated

¹⁴ 8 U.S.C. § 1101(a)(15).

¹⁵ *Id.*

¹⁶ In some categories, such as the H-1B category for professional workers (“specialty occupations”) the concept of “dual intent” is recognized. “Dual intent” means that the noncitizen can still be recognized and treated as a nonimmigrant without being penalized even though the noncitizen may also have the intention to remain in the United States and become an immigrant.

¹⁷ Note that “conviction” is an immigration term of art. See 8 U.S.C. § 1101(a)(48)(A).

¹⁸ 8 C.F.R. § 214.1(g).

¹⁹ See 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B).

²⁰ See 8 U.S.C. § 1231(b)(3)(B)(ii).

felony” is ineligible for asylum.²¹ Similarly, withholding of removal may be denied to those convicted of a “particularly serious crime.”²²

Other Designations

Temporary Protected Status (TPS)

The Secretary of Homeland Security may designate a country for TPS based upon ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. Noncitizens present in the U.S. without documentation, whose home country is designated as a TPS nation, may apply to remain in the U.S. legally, but only for the duration of the TPS designation. Currently, the nations designated as TPS countries are Haiti, El Salvador, Honduras, Nicaragua, Sudan, Somalia, and Syria. Aside from the criminal grounds of inadmissibility, additional criminal grounds exist that bar an individual from TPS eligibility.²³ A noncitizen who is granted TPS must re-apply for this status periodically and must meet the eligibility requirements at each renewal.

Deferred Action for Childhood Arrivals (DACA)

In 2012, DHS announced that it would defer the removal of certain undocumented individuals brought to the U.S. as children. Such individuals will be allowed to remain in the U.S. and work lawfully for two years, with the possibility of renewal. There are numerous eligibility requirements for DACA, including specific criminal bars. For more information, see www.uscis.gov/childhoodarrivals.

²¹ 8 U.S.C. § 1158(b)(2)(B)(i).

²² An aggravated felony (or felonies) for which a noncitizen has been sentenced to an aggregate term of at least five years is automatically considered to be a “particularly serious crime.” 8 U.S.C. § 1231(b)(3)(B). With respect to aggravated felony convictions for which a lesser sentence has been imposed, Congress explicitly empowered the Attorney General to determine what constitutes a “particularly serious crime.” *Id.* In the absence of a decision by the Attorney General, the BIA has made this determination on a case by case basis. In *Matter of Y-L-, A-G- & R-S-R-*, the Attorney General spoke for the first time on the issue of what constitutes a “particularly serious crime.” 23 I. & N. Dec. 270 (A.G. 2002) (holding that aggravated felonies involving unlawful trafficking in controlled substances constitute “particularly serious crimes” and only the most extenuating circumstances that are both extraordinary and compelling would permit departure from this interpretation). Another important BIA decision on “particularly serious crimes” is *Matter of N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007) (holding that an offense need not be an aggravated felony to be a particularly serious crime, and that the court may examine any reliable evidence to determine whether a crime is particularly serious).

²³ An applicant is ineligible for TPS if he has been convicted of one felony, 8 U.S.C. §1254a(c)(2)(B)(i); one misdemeanor, as defined under Massachusetts law, if the sentence actually imposed is more than one year of incarceration, either suspended or committed, 8 C.F.R. §244.1; two misdemeanors, if the sentences actually imposed are one year or less, 8 U.S.C. §1254a(c)(2)(B)(i); or a “particularly serious crime” that makes him a danger to the community, 8 U.S.C. §§ 1254a(c)(2)(B)(ii); 208(b)(2)(A)(ii). For a discussion of the types of offenses that constitute particularly serious crimes, please refer to *Matter of N-A-M-*, 24 I.&N. Dec. 336 (BIA 2007); *Matters of Y-L-, A-G, and R-S-R-*, 23 I.&N. Dec. 270 (A.G. 2002).

U and T Visas

Individuals who have been victims of crime and cooperate in the prosecution of the offenses may be eligible for U visas. *See* 8 U.S.C. §1101(a)(15)(U). Individuals who have been subject to human trafficking may be eligible for T visas. *See* 8 U.S.C. §1101(a)(15)(T).

Undocumented and Out of Status Persons (so-called “Illegal Aliens”)

Noncitizens that overstay their periods of legal admission, violate the terms of admission, or enter the United States without documentation or with false documentation are subject to removal as soon as they come to the attention of immigration officials.²⁴ This does not mean, however, that criminal proceedings are irrelevant to their immigration status. Such noncitizens must be “admissible” in order to obtain lawful status; therefore, they are subject to the criminal grounds of inadmissibility, discussed below. Moreover, most defenses to removal or waivers for which they may be eligible are barred by certain types of criminal convictions.²⁵

Terminology

Removal

A noncitizen may be subject to an order of removal due to either grounds of inadmissibility or grounds of deportability. Proceedings in Immigration Court to remove a noncitizen from the U.S. are referred to as removal proceedings. If an order of removal is issued against a noncitizen, it may be months or even years before such individual is physically removed from the U.S. This depends on various factors, such as an appeal of the order or the ability of immigration officials to obtain the travel documents necessary to return the individual to her home country. A noncitizen who is removed by virtue of a criminal conviction will also be excluded from admission to the U.S. for at least five years, and for life in the case of a noncitizen convicted of a so-called “aggravated felony.”²⁶

Deportability

A noncitizen who is in the United States subsequent to a lawful admission is subject to the grounds of deportability. These grounds, described in detail below, apply no matter how long the noncitizen has been in the U.S. and even if her lawful status has expired.

²⁴ They usually have the right to a removal hearing, though certain classes of immigrants are subject to expedited removal without an Immigration Court hearing. *See* 8 U.S.C. § 1225(b)(1).

²⁵ These include relief formerly known as “INA § 212(c) relief” and Suspension of Deportation, now both subsumed and substantially restricted under 8 U.S.C. § 1229b (setting forth the requirements for “Cancellation of Removal”).

²⁶ 8 U.S.C. §1182(a)(9).

Inadmissibility

A noncitizen seeking physical entry or re-entry into the U.S. may be subject to the grounds of inadmissibility, discussed below. Noncitizens already present in the U.S. may also seek immigration benefits that require them to be “admissible.”²⁷ Note that “admission,” as defined by 8 U.S.C. 1101(a)(13), is a term of art under immigration law and that determining the date of a noncitizen’s last admission and understanding its significance may be quite complex.²⁸

For some noncitizens, both the grounds of inadmissibility and deportability may be relevant to their ability to lawfully remain in the U.S.

Good Moral Character

Naturalization, as well as a number of forms of relief from removal or exclusion from the U.S., require a finding of “good moral character.” The statutory definition²⁹ specifically *precludes* a finding of good moral character for a person who, during the relevant period,³⁰ is or has been:

1. a habitual drunkard;
2. a member of the class of persons described in 8 U.S.C. § 1182(a)(2)(D) (prostitution and commercialized vice); (6)(E) (alien smugglers); (10)(A) (polygamy) or (2)(A) (crime of moral turpitude or controlled substance offense, except for single offense of simple possession of 30 grams or less of marijuana); or (B) (multiple criminal convictions); or (C) (controlled substance trafficker, including a person who the “immigration officer has reason to believe” is or was an “illicit trafficker in a controlled substance”);³¹
3. one whose income is derived principally from illegal gambling activities, or who has been convicted of two or more gambling offenses;
4. found to have given false testimony to gain any immigration benefits;
5. confined to a penal institution, as a result of a conviction, for an aggregate period of 180 days or more; or
6. convicted of an aggravated felony after November 29, 1990.

Even if a criminal disposition can be structured to avoid the enumerated grounds, DHS may, in its discretion, find a person not to be of good moral character based upon convictions or even admissions to criminal conduct.³² Some guidance on this question may be found in the INS

²⁷ Any adjustment of status is treated as if it were an “admission.” Thus, a noncitizen cannot adjust status if convicted of a crime that would render her inadmissible, unless a waiver is available.

²⁸ See *Matter of Alyazji*, 25 I. & N. Dec. 397 (2011).

²⁹ 8 U.S.C. § 1101(f).

³⁰ The relevant period for which the petitioner must be found to have good moral character is generally five years for naturalization, five years for voluntary departure, and either seven or ten years for cancellation of removal depending upon the client’s legal status, period of residence in the U.S., basis of removal and other factors.

³¹ Note that 8 U.S.C. § 1182(a) does not require a conviction. An “admission” may be enough.

³² See, e.g., *Matter of Turcotte*, 12 I. & N. Dec. 206 (BIA 1967).

Interpretations.³³ The BIA has held, however, that “good moral character does not mean moral excellence” and that it is not necessarily destroyed by a single incident.³⁴

Conviction

Most criminal grounds of deportability require a conviction. What constitutes a conviction for immigration purposes is a question of federal law, and the definition differs from what is considered a conviction under Massachusetts state law.

The INA contains the statutory definition of conviction.³⁵ 8 U.S.C. § 1101(a)(48) states as follows:

The term “conviction” means, with respect to an alien, 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.

The First Circuit – even before this definition was codified in 1996 – applied the federal conviction standard rather strictly. For example, the Court held that a plea of *nolo contendere* which included a probationary term was a conviction for immigration purposes even though it was not considered a conviction under state law after successful completion of probation.³⁶

The federal statutory definition of a conviction supports DHS’ position that a Massachusetts Continuance Without a Finding (“CWOFF”) is a conviction for immigration purposes. Since 1996, several courts have analyzed “deferred adjudication” procedures in other states, similar to *post de novo* CWOFFs, and found such adjudications to be convictions under 8 U.S.C. §

³³ See INS Interpretations § 316.1(e)-(g), available at <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-45077/0-0-0-46756.html>.

³⁴ *Matter of Sanchez-Linn*, 20 I. & N. Dec. 362 (BIA 1991).

³⁵ Prior to enactment of 8 U.S.C. § 1101(a)(48)(A) in 1996, this question was controlled by *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). Under *Matter of Ozkok*, a conviction existed if:

- (1) There has been a formal adjudication of guilt or entry of a judgment of guilt or;
- (2) An adjudication of guilt has been withheld, but
 - (a) There has been a finding of guilt by a judge or jury, or an entry of a plea of guilty or *nolo contendere*, or an admission to sufficient facts;
 - (b) The judge has ordered some form of punishment, penalty, or restraint on the person’s liberty, and
 - (c) A judgment or adjudication of guilt may be entered if the person violates the terms of probation or fails to comply with the requirements of the court’s order, without further proceedings regarding the person’s guilt or innocence of the original charge.

See *Matter of Ozkok*, 19 I. & N. Dec. at 551-52.

³⁶ See *Molina v. INS*, 981 F.2d 14, 16, 18 (1st Cir. 1992) (finding that a “nolo plea plus probation” under Rhode Island law amounts to a “conviction”).

1101(a)(48)(A) because the conditions imposed or the probation on which the defendant was placed during the continuance was found to be punishment or a “restraint on liberty.”³⁷

In contrast, pretrial probation is not considered a conviction for immigration purposes, because there has been no admission or finding of guilt as required under the federal definition.³⁸ The First Circuit has held that a Massachusetts “guilty filed” disposition is not a conviction for immigration purposes *if* the disposition was not in consideration for a term of probation already served.³⁹ The case must be limited to its facts, however, as it is the only published case discussing the issue from an immigration standpoint.

Another consideration of whether a disposition is a “conviction” is the issue of finality. In addition to the factors listed in the statute, the BIA and many courts have historically held that a disposition must attain “finality” in order to be a conviction.⁴⁰ Thus, the rule in Boston Immigration Court has long been that a criminal conviction cannot be used as a ground of deportability until the direct appeal of the conviction is exhausted.⁴¹

Crime Involving Moral Turpitude (CIMT)

An extensive and complicated body of case law has developed as to whether a particular offense is one of moral turpitude. One common, if somewhat florid, definition is “conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”⁴² It has also been articulated as “reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”⁴³ Prior to 2008, Courts generally did not look at the facts of a particular case to determine if the offense involved moral turpitude; rather, it analyzed the “inherent nature of the

³⁷ See *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005); cf. *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001).

³⁸ Similarly, a disposition under G.L. c. 276A (pretrial diversion), G.L. c. 111E (drug treatment), G.L. c. 276, §55 (accord and satisfaction) or G.L. c. 277, §70C (conversion from criminal to civil offense) would not be considered a conviction, because there is no admission or finding of guilt.

³⁹ *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001). However, a guilty-filed disposition with any penalty, such as a fine or a consideration of past time served, would be considered a conviction for immigration purposes.

⁴⁰ In *Matter of Polanco*, 20 I. & N. Dec. 894, 896 (BIA 1994), the BIA held that “an alien who has either waived or exhausted his right to a direct appeal of his conviction is subject to deportation, and that the potential for discretionary review on direct appeal will not prevent the conviction from being considered final for immigration purposes.” See also *Matter of Thomas*, 21 I. & N. Dec. 20, 21 n.1, 23 (BIA 1993) (observing that a non-final conviction can neither support a charge of deportability nor trigger a statutory bar to relief under a section of the INA premised on the existence of a conviction, but even a non-final conviction may be considered relevant to certain forms of discretionary relief); *but see Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999) (holding that the new statutory definition of conviction eliminated the requirement of finality).

⁴¹ *But see, Matter of Abreu*, 24 I. & N. Dec. 795 (BIA 2009) (pending late-reinstated appeal does not undo finality of conviction). Note also that collateral attacks on a conviction – such as motions for new trial – do not have the same effect. See *Matter of Onyido*, 22 I. & N. Dec. 552, 555 (BIA 1999).

⁴² *Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001); see also *Matter of Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007).

⁴³ *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689, n.1 (BIA 2008).

crime as defined by statute and interpreted by the courts as limited and described by the record of conviction.”⁴⁴

In the last days of the Bush administration, former Attorney General Mukasey scrapped decades of case law in announcing a new formula for determining whether a given crime involved moral turpitude. Under this new formula, if the nature of the offense is not clear from the statute or the “record of conviction”⁴⁵, an adjudicator is allowed to look at “any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.”⁴⁶ As a result, in some circumstances, an immigration judge is now allowed to look at other documents, such as police reports, to determine whether a particular criminal offense involved moral turpitude. It remains to be seen whether *Matter of Silva-Trevino* will alter which crimes are considered CIMTs and which are not.⁴⁷

While this area of immigration law is fluid and frequently ambiguous, following are some examples of crimes that have already been considered by the BIA and federal courts:

*Examples of Crimes Involving Moral Turpitude:*⁴⁸

- Serious crimes against the person such as murder, manslaughter, kidnapping, attempted murder, assault with intent to rob or kill, assault with a deadly weapon, and aggravated assault are generally considered CIMTs.⁴⁹ In Massachusetts, accessory to murder is a CIMT.⁵⁰ Involuntary manslaughter in Massachusetts is most likely a CIMT.⁵¹

⁴⁴ *U.S. ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931). See also *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999); *Montero-Ubri v. INS*, 229 F.3d 319, 321 (1st Cir. 2000).

⁴⁵ The record of conviction includes documents such as the complaint or indictment, plea colloquy and transcript, a signed plea agreement, docket sheet, jury instructions, and the judgment and sentence.

⁴⁶ *Silva-Trevino*, 24 I&N Dec. at 704. But see *Matter of Ahortalejo*, 25 I&N Dec. 465 (BIA 2011) (holding that if the record of conviction “conclusively demonstrates” the nature of the offense, a judge may not look at additional evidence).

⁴⁷ *Silva-Trevino*, 24 I&N Dec. at 689, n.1. In this case, the Attorney General held that reprehensible conduct with scienter forms a crime involving moral turpitude. He did not discuss which offenses would rise to the level of “reprehensible conduct,” and the BIA has not shed much light on the meaning of this phrase since *Silva-Trevino* was published.

⁴⁸ See Appendix 3, *Immigration Consequences of Certain Massachusetts Offenses*.

⁴⁹ See, e.g., *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976) (finding that an Illinois aggravated assault offense was a crime involving moral turpitude); *Matter of Sanchez-Marin*, 11 I. & N. Dec. 264, 266, 267 (BIA 1965) (finding that Massachusetts convictions for voluntary manslaughter and accessory after the fact to manslaughter were crimes involving moral turpitude).

⁵⁰ See *Cabral v. INS*, 15 F.3d 193, 197 (1st Cir. 1994).

⁵¹ In examining a Missouri statute, the BIA held that involuntary manslaughter is a crime of moral turpitude if the statute includes criminally reckless behavior as an element. See *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994), cited in *Matter of Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007); compare G.L. c. 265, § 13 and *Commonwealth v. Atencio*, 345 Mass. 627, 629 (1963).

- In Massachusetts, simple assault and battery has commonly been held not to involve moral turpitude.⁵² In contrast, most aggravated assault crimes are considered CIMTs.⁵³ Assault and battery on a public official has historically only involved moral turpitude if the public official suffered physical injury; however, the broader definition of moral turpitude articulated in *Silva-Trevino* suggests that this offense is more likely to be considered a crime involving moral turpitude.⁵⁴
- Most sex offenses, including rape, prostitution and indecent assault and battery, are CIMTs. Failure to register as a sex offender is also considered a CIMT.⁵⁵
- Among crimes against property, arson, robbery, larceny by check, and malicious destruction of property have been found to be CIMTs. In Massachusetts, in addition, the crime of breaking and entering would be considered a CIMT if the intended felony or misdemeanor involved moral turpitude.⁵⁶
- Crimes involving theft or fraud as an essential element are almost always held to be CIMTs (e.g., larceny, shoplifting).⁵⁷
- Weapons offenses generally are held to involve moral turpitude. However, simple gun possession (i.e., G.L. c. 269, § 10) is not a crime of moral turpitude, although it is a separate ground of deportability.⁵⁸

Violations of regulatory laws and laws that involve strict liability or negligence generally do not involve moral turpitude.⁵⁹ For example, driving under the influence, aggravated DUI or conviction for a second or subsequent DUI are not CIMTs.⁶⁰

⁵² *Matter of Sejas*, 24 I. & N. Dec. 236, 241 (BIA 2007) (observing that simple assault is generally not considered a crime involving moral turpitude); *Matter of Short*, 20 I. & N. Dec. 136, 137-38, 139 (BIA 1989) (holding that assault with intent to commit a felony is turpitudinous only if underlying felony is a crime of moral turpitude).

⁵³ See, e.g., *Matter of D-*, 20 I. & N. Dec. 827, 830 (BIA 1994) (assault with a dangerous weapon), *Maghsoudi v. INS*, 181 F.3d 8, 15 (1st Cir. 1999) (indecent assault and battery).

⁵⁴ See *Ciambelli ex. rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926); see also *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008) (overturning BIA ruling that an Illinois battery of a peace officer was a crime of moral turpitude); *Matter of Danesh*, 19 I. & N. Dec. 669 (analyzing BIA cases addressing assaults on public officers).

⁵⁵ See *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (2007); 8 U.S.C. § 1227(a)(2)(A)(v).

⁵⁶ See *Matter of Moore*, 13 I. & N. Dec. 711, 712 (BIA 1971); *Matter of W-*, 4 I. & N. Dec. 241, 247 (BIA 1951); *Matter of G-*, 1 I. & N. Dec. 403, 406 (BIA 1943).

⁵⁷ *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (holding that any offense that has fraud as an element is a crime involving moral turpitude).

⁵⁸ *Matter of Rainford*, 20 I. & N. Dec. 598 (BIA 1992) (stating that firearms possession is not a ground of inadmissibility); 8 U.S.C. § 1227(a)(2)(C) (listing firearms possession as a ground of deportability).

⁵⁹ See *Silva-Trevino*, 24 I&N Dec. at 689, n.1 (requiring a scienter of specific intent, deliberateness, willfulness or recklessness for the crime to involve moral turpitude).

⁶⁰ See *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 86 (BIA 2001). But see *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1195-96 (BIA 1999) (involving Arizona offense for aggravated driving under the influence in which the aggravating factor is that the driver's license had been suspended due to a prior DUI. Offense found to be a CIMT because of the driver's knowledge that he was prohibited from driving).

Please note that this list is not conclusive and that this is a constantly evolving and shifting area of law. Before advising a noncitizen about the immigration consequences of any offense, it is essential to research the question of moral turpitude thoroughly.⁶¹

Immigration Consequences of Criminal Conduct

Grounds of Deportability

Aggravated Felonies⁶²

Any alien who is convicted of an aggravated felony at any time after admission is deportable.⁶³ “Aggravated felony” is a ground of deportability which results in virtually automatic deportation, mandatory detention and permanent exile from the U.S. Though the category was originally quite limited, it has expanded tremendously to the point where virtually any crime may be an aggravated felony.⁶⁴ Some categories of offenses require merely a conviction to constitute an aggravated felony. Others require a conviction *and* a sentence of imprisonment of one year or more, or a conviction involving a certain amount of monetary loss, to be considered an aggravated felony. The definition of aggravated felonies is retroactive.⁶⁵

Notably, offenses classified by state law as misdemeanors can be aggravated felonies. For example, a theft offense or crime of violence (as defined under 18 U.S.C. §16) for which a sentence of one year or more is imposed or suspended is considered an aggravated felony.⁶⁶ The BIA has held that a Massachusetts conviction for OUI (G.L. c. 90, § 24(1)(a)(1)) is not an aggravated felony because violation of the statute is not, by its nature, a crime of violence.⁶⁷ The

⁶¹ A conviction *or an admission* to the commission of a crime of moral turpitude is a ground of inadmissibility, while the deportability grounds are triggered only by a conviction. Compare 8 U.S.C. § 1182(a)(2)(A)(i) with 8 U.S.C. § 1227(a)(2)(A)(i) & (ii).

⁶² IIRIRA, Division C of Pub. L. No. 104-208, 110 Stat. 3009; the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (“AEDPA”); and the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4311 (“INTAC”) substantially broadened the definition of an aggravated felony. The current statutory definition is at 8 U.S.C. § 1101(a)(43).

⁶³ 8 U.S.C. § 1227(a)(2)(A)(iii).

⁶⁴ The definition of an aggravated felony, found at 8 U.S.C. § 1101(a)(43), includes twenty-one broad subcategories.. See *Matter of Small*, 23 I. & N. Dec. 448, 450 (BIA 2002).

⁶⁵ See *Matter of Lettman*, 22 I. & N. Dec. 365, 378 (BIA 1998), *aff’d*, 207 F.3d 1368 (11th Cir. Mar. 31, 2000) (finding that a noncitizen convicted of an aggravated felony is deportable regardless of the date of conviction), *Matter of Truong*, 22 I&N Dec. 1090, 1094-96 (BIA 1999) (holding that the aggravated felony definition is retroactive).

⁶⁶ A “sentence” under federal immigration law includes any period of incarceration that is imposed or suspended. See 8 U.S.C. § 1101(a)(48)(B).

⁶⁷ See *Matter of Ramos*, 23 I. & N. Dec. 336, 347 (BIA 2002). However, pending legislation is attempting to make a third offense of OUI an aggravated felony as a subcategory of crimes of violence. Violence Against Women Reauthorization Act of 2011, S. 1925, § 1008 (as modified by Amendment MDM 12037 (Grassley)).

Massachusetts crime of assault and battery (G.L. c. 265, § 13A), though a misdemeanor offense, has long been considered a crime of violence and thus an aggravated felony if a sentence of one year or more is imposed.⁶⁸ However, involuntary manslaughter, if based on a theory of reckless failure to act, may not be a crime of violence.⁶⁹ The chart found in Appendix 3 contains a listing of common Massachusetts criminal offenses that are considered aggravated felonies.

Some controlled substance offenses are considered aggravated felonies, in addition to being an independent ground of deportability, as discussed below.⁷⁰ Under 8 U.S.C. § 1101(a)(43)(B), “illicit trafficking” in controlled substances and “drug trafficking” crimes are both aggravated felonies. Generally speaking, “illicit trafficking” refers to offenses involving remuneration, such as distribution or possession with intent to distribute, both of which are considered aggravated felonies.⁷¹ Two Supreme Court cases have clarified which crimes meet the definition of the more disputed category of “drug trafficking” offenses. In *Lopez v. Gonzales*, the Supreme Court held that simple possession of a controlled substance is *not* a “drug trafficking” crime unless it would be treated as a felony if prosecuted under federal law.⁷² Flunitrazepam (commonly referred to as “roofies” or a “date rape” drug) is the only controlled substance for which possession constitutes a federal felony; therefore, simple possession of all other controlled substances are not considered aggravated felonies. In *Carachuri-Rosendo v. Holder*, the Supreme Court held that a second conviction for drug possession is not a drug trafficking crime, and therefore not an aggravated felony, unless the record of conviction establishes that it was prosecuted as a “subsequent offense”, with notice to the defendant and an opportunity to be heard on the fact of the prior conviction.⁷³ A conviction for subsequent possession is treated as a

⁶⁸ Simple assault and battery is not categorically a crime of violence. See *Johnson v. U.S.*, 130 S.Ct. 1265 (2010) (holding that an assault and battery statute that criminalized an unwanted touching was not categorically a “violent felony” under the Armed Career Criminal Act, which contains language functionally identical to 18 U.S.C. §16(a)). The BIA similarly found that a domestic assault and battery statute that criminalizes *de minimis* physical contact is not categorically a crime of violence under 18 U.S.C. §16(a). *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). In Massachusetts, the First Circuit applied the *Johnson* reasoning to simple assault and battery, finding that it was not categorically a violent felony. *U.S. v. Holloway*, 630 F.3d 252 (1st Cir. 2011). But the First Circuit also held that assault and battery on a police officer was a violent felony, *U.S. v. Dancy*, 640 F.3d 455 (1st Cir. 2011), and that the Rhode Island simple assault statute constituted a crime of violence. *Lopes v. Keisler*, 505 F.3d 58, 62 (1st Cir. 2007). Notwithstanding this analysis, it is possible that assault and battery in Massachusetts could be considered a felony under federal law, in which case the more expansive 18 U.S.C. §16(b) would apply and this offense is more likely to be considered a crime of violence. The First Circuit has not yet ruled on whether assault or assault and battery in violation of G.L. c.265, §13A is a crime of violence under 18 U.S.C. §16(b), though the Second Circuit has held that assault and battery on a public official in violation of G.L. c. 265, §13D is a crime of violence under 18 U.S.C. §16(b). See *Blake v. Gonzales*, 481 F.3d 152, 162-63 (2d Cir. 2007).

⁶⁹ See *Matter of Vargas*, 23 I&N Dec. 651, 651 (BIA 2004); *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).

⁷⁰ See 8 U.S.C. §§ 1227(a)(2)(B) (controlled substance ground); 1101(a)(43)(B) (aggravated felony definition).

⁷¹ See *Matter of Davis*, 20 I. & N. Dec. 536, 541 (BIA 1992). However, the BIA has held that possession with intent to distribute a small amount of marijuana for no remuneration is not an aggravated felony. *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012). See also *Commonwealth v. Keefner*, 461 Mass. 507 (2012) (upholding the viability of the Massachusetts offense of possession with intent to distribute one ounce or less of marijuana in light of the decriminalization of simple possession of one ounce or less of marijuana).

⁷² See *Lopez v. Gonzales*, 549 U.S. 47 (2006).

⁷³ *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010).

felony under federal law; thus, it would qualify as a drug trafficking aggravated felony. This ruling followed a First Circuit case with the same holding.⁷⁴

The practitioner representing a noncitizen should attempt to avoid a conviction for an aggravated felony, because the consequences are devastating. Noncitizens convicted of aggravated felonies may be detained without bond⁷⁵ and will be deported as expeditiously as possible. An aggravated felon is conclusively presumed to be deportable and is also rendered ineligible for virtually all forms of relief from removal. A person deported as an aggravated felon is banned from the United States for life.⁷⁶

Crimes Involving Moral Turpitude

An alien is deportable if he–

- (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) after the date of admission, and
- (II) is convicted of a crime for which a sentence of one year or longer *may be* imposed,

8 U.S.C. § 1227(a)(2)(A)(i).

In addition, 8 U.S.C. § 1227(a)(2)(A)(ii) provides that:

Any alien who *at any time after admission* is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable [emphasis added].

This section of the INA raises the same issues of conviction and moral turpitude as does 8 U.S.C. § 1227(a)(2)(A)(i). Another important issue in cases under this section, however, may be whether the convictions arose out of a “single scheme of criminal misconduct.” There is a fairly extensive and rather fact-specific body of case law on this point.⁷⁷ The First Circuit has held that a single scheme involves acts that take place at one time, with no substantial interruption that

⁷⁴ See *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006).

⁷⁵ The subject of mandatory detention is beyond the scope of this work. However, there are exceptions to the general rule of which the practitioner should be aware. In particular, most respondents (other than those who have traveled abroad and are charged with inadmissibility on criminal grounds) who were released from criminal custody prior to October 9, 1998 are not subject to mandatory detention. See, e.g., *Matter of Rojas*, 23 I. & N. Dec. 117, 120 (BIA 2001), *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009). The Supreme Court upheld the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) in *Demore v. Kim*, 538 U.S. 510 (2003).

⁷⁶ See 8 U.S.C. § 1182 (a)(9)(A)(ii).

⁷⁷ See, e.g., *Nguyen v. INS*, 991 F.2d 621, 623-25 (10th Cir. 1993).

allows the perpetrator to reflect on his actions.⁷⁸ The BIA recently held that convictions for multiple charges of possession of a stolen credit card and forgery stemming from purchasing goods with the credit card at multiple stores on the same day do not constitute a “single scheme.” The BIA stated that acts occur in a “single scheme” when they are performed “in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct.”⁷⁹

Controlled Substance Offenses

A noncitizen is deportable under 8 U.S.C. § 1227(a)(2)(B) who:

... at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)), *other than a single offense involving possession for one’s own use of thirty grams or less of marijuana* [...] [emphasis added]

Inchoate offenses generally will be considered controlled substance offenses when the underlying substantive crime involves a drug offense.⁸⁰ However, a conviction for accessory after the fact to a drug offense (G.L. c. 274, § 4) is probably not a deportable offense, at least under this section of the statute as it is a separate and distinct crime from the substantive offense.⁸¹

Controlled substance offenses that were expunged or vacated under various state and federal rehabilitative statutes are still considered convictions under immigration laws.⁸² Even if it is possible to avoid a conviction for a controlled substance violation, the practitioner must also avoid the consequences of 8 U.S.C. § 1227(a)(2)(B)(ii) which renders an alien deportable if, at any time after admission, she becomes a drug addict or drug abuser.

Firearm Violations

8 U.S.C. § 1227(a)(2)(C) provides for the deportation of:

[a]ny alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or

⁷⁸ See *Balogun v. INS*, 31 F.3d 8, 9 (1st Cir. 1994); *Pacheco v. INS*, 546 F.2d 448, 451 (1st Cir. 1976).

⁷⁹ *Matter of Islam*, 25 I&N Dec. 637 (BIA 2011); *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992).

⁸⁰ See, e.g., *Matter of Beltran*, 20 I. & N. Dec. 521, 527 (BIA 1992) (solicitation); *Matter of Del Risco*, 20 I. & N. Dec. 109, 110 (BIA 1989) (facilitation); 8 U.S.C. § 1227(a)(2)(B)(i) (attempt and conspiracy).

⁸¹ See *Matter of Batista*, 21 I. & N. Dec. 955, 960 (BIA 1997).

⁸² See *Matter of Roldan*, 22 I. & N. Dec. 512, 528 (BIA 1999).

carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law[.]

It is important to note this section's breadth (virtually any firearms offense will qualify) and the inclusion of attempt and conspiracy offenses.⁸³ Decisions of the BIA have further broadened offenses covered by this section to include those in which possession or use of a firearm is an essential element of another charge.⁸⁴ However, possession of ammunition probably does not fall under this ground of deportability.⁸⁵

Domestic Violence

8 U.S.C. § 1227(a)(2)(E) provides for the deportation of noncitizens who are convicted of crimes of domestic violence, stalking, child abuse, child neglect, child abandonment, or certain violations of protective orders. This is a very broad statute which so far has been the subject of only limited analysis by the BIA and the courts. Its full text should, however, be read very closely as it applies to a very wide variety of cases. *It is important to note that this category of deportable offenses encompasses both domestic and non-domestic crimes:*

- (i) Domestic violence, stalking, and child abuse – Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.
- (ii) Violators of protection orders – Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has 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 or

⁸³ For cases interpreting this deportation ground, see *Matter of Chow*, 20 I. & N. Dec. 647 (BIA 1993), *aff'd*, 12 F.3d 34 (5th Cir. 1993); *Matter of K-L-*, 20 I. & N. Dec. 654 (BIA 1993); *Matter of P-F-*, 20 I. & N. Dec. 661 (BIA 1993).

⁸⁴ See, e.g., *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012) (holding that the New York offense of menacing is a firearm offense where an element of the offense involves use of a firearm); *Matter of Lopez-Amaro*, 20 I. & N. Dec. 668, 672-73 (BIA 1993) (finding that enhancement provision for firearm possession in murder statute is possession conviction for deportation purposes), *aff'd*, 25 F.3d 986, 990 (11th Cir. 1994); *Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 617 (BIA 1992) (finding that an assault conviction was not a firearms offense where use of the firearm was not an element of the offense).

⁸⁵ See *Dulal-Whiteway v. DHS*, 501 F.3d 116, 123 (2d Cir. 2007).

persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means 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.

In 2010, the BIA stated *in dicta* that a “domestic or family relationship need not be an element of the predicate offense to qualify as...a crime of domestic violence under [8 U.S.C. §1227(a)(2)(E)(i)].”⁸⁶ While neither the BIA nor the First Circuit has directly addressed what can be presented to prove the domestic nature of an offense, it appears that an immigration judge or fact finder may look beyond the record of conviction to police reports and other documents containing hearsay to establish a crime of domestic violence.⁸⁷

In contrast to offenses discussed above that require a domestic relationship, the BIA has held that in order for an offense to be considered child abuse, neglect or abandonment, a “child” must be an element of the underlying offense that is pled and proven in the underlying conviction to qualify. An immigration judge or fact finder is limited, therefore, to the record of conviction and cannot consider outside sources.⁸⁸ Note that a “child” is defined under immigration law as anyone less than eighteen years of age.⁸⁹ The BIA set forth a definition of “child abuse” in *Matter of Velazquez-Herrera*. Based on the policies behind the provision, the BIA interpreted the term “broadly to mean any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child’s physical or mental well-being, including sexual abuse or exploitation.”⁹⁰

Other Grounds of Deportability

The grounds discussed above do not provide an exhaustive list of all bases for deportation. Less common grounds involving criminal conduct include smuggling (of aliens), marriage fraud, espionage, sabotage, treason, sedition, Selective Service violations, falsification of documents and “terrorist activities.”

⁸⁶ *Matter of Velasquez*, 25 I. & N. Dec. 278, fn 1(BIA 2010).

⁸⁷ *Id.*; see also *Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010) (holding that the language in 8 U.S.C. 1227(a)(2)(E)(i) describes the circumstances in which a crime of violence is committed and should not be considered elements of the offense so that the government may prove the identity of the victim by using the kind of evidence generally admissible before an immigration judge.)

⁸⁸ *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (2008).

⁸⁹ *Id.* at 512.

⁹⁰ *Id.* See also *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (holding that an offense involving reckless endangerment to a child constitutes child abuse).

Grounds of Inadmissibility

Crimes involving Moral Turpitude

8 U.S.C. § 1182 (a)(2)(A)(i) states in pertinent part that any alien is inadmissible to the United States who has been:

convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime[.]

Note first that *a conviction is not required under this section of the statute*. A voluntary and knowing admission to the essential elements of a crime involving moral turpitude alone may well suffice to render a person inadmissible to the United States.⁹¹

It is also important to note that the statute itself provides that this inadmissibility section will not apply if:

- The alien committed only one crime;
- The crime was committed when the alien was under 18 years of age; and
- The crime was committed (and the alien was released from any confinement) more than five years before the date of applying for admission to the US.⁹²

Similarly, an alien will not be inadmissible under this section if:

- The maximum penalty possible for the crime did not exceed imprisonment for one year; and
- The alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).⁹³

Controlled Substances

Inadmissibility for controlled substance violations is governed by 8 U.S.C. § 1182 (a)(2)(A)(i)(II) which renders inadmissible any alien:

. . . convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802))[.]

⁹¹ See Gordon, Mailman & Yale-Loehr, 5-63 Immigration Law and Procedure § 63.03 (Matthew Bender 2012).

⁹² See 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

⁹³ See 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Note that a Massachusetts suspended sentence is considered a term of imprisonment under the INA. See 8 U.S.C. § 1101(a)(48)(B).

This section is very broadly construed and will include virtually any controlled substance offense the practitioner is likely to encounter. Further, 8 U.S.C. § 1182 (a)(2)(C) excludes from the United States any person whom the government knows or has reason to believe is an illicit trafficker in any controlled substance or is or has been a “knowing aider, abettor, assister, conspirator or colluder” in such trafficking. Thus, a disposition that is not a conviction could cause a noncitizen to be inadmissible.

Multiple Offenses

8 U.S.C. § 1182 (a)(2)(B) renders inadmissible any alien:

convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more[.]

Note that for this section to apply a “conviction” is required, but moral turpitude is not.

Prostitution

8 U.S.C. § 1182 (a)(2)(D) bans from the United States any noncitizen

who . . . is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status, [or who] directly or indirectly procures or attempts to procure, or [within that period] procured or attempted to procure or to import, prostitutes or . . . received . . . the proceeds of prostitution, or . . . is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution[.]

Both the federal regulations and the BIA have stated that this ground of inadmissibility is for a pattern of continuous conduct; isolated acts of prostitution or solicitation of a prostitute are not enough to make a noncitizen inadmissible.⁹⁴

Other Grounds of Inadmissibility

8 U.S.C. § 1182 contains a number of other grounds of inadmissibility which should be consulted if they appear even potentially applicable. For example, 8 U.S.C. § 1182 (a)(3), entitled “Security and Related Grounds,” contains very broad bases of inadmissibility including

⁹⁴ 22 C.F.R. § 40.24 (“A finding that an alien has ‘engaged’ in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts”). See also *Matter of T-*, 6 I&N Dec. 474 (BIA 1955); *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008).

“any other unlawful activity” and “Terrorist Activities” which are defined rather loosely. 8 U.S.C. § 1182 (a)(2)(E) relates to certain aliens who have asserted immunity from criminal prosecution.

Juvenile Offenses

A finding of delinquency in a juvenile proceeding is not considered a conviction for immigration purposes.⁹⁵ A finding of delinquency may, however, preclude a finding of good moral character. A delinquent act also might fall under a ground of inadmissibility or deportability that is based on conduct rather than convictions – for example, prostitution, drug abuse, or “reason to believe” that a noncitizen is a drug trafficker.⁹⁶ Similarly, violation of a restraining order is a deportable offense that does not require a conviction, and a determination by a civil court may trigger deportability.⁹⁷

If a juvenile is tried and convicted as an adult, then she would most likely be treated as having an adult conviction in immigration proceedings.⁹⁸ It is uncertain at this time whether a Massachusetts “youthful offender” adjudication would be deemed a conviction for immigration purposes. The BIA has held that a “youthful offender” adjudication under New York law did not constitute a conviction for immigration purposes.⁹⁹ The Sixth Circuit has held that Michigan’s “youthful trainee” designation amounted to a conviction because the procedure was more similar to a deferred adjudication than a delinquency finding.¹⁰⁰ The Massachusetts YO statute has similarities to both the New York and Michigan statute. Thus, until the BIA rules, the immigration effects of a YO finding are not clear. The exact nature of the proceedings and the ultimate sentence would, however, be important factors for the BIA to consider.

Final Note

When the Department of Homeland Security initiates removal proceedings against a noncitizen, it is not required to include all possible grounds of removability or all of the criminal offenses that make him removable.¹⁰¹ Instead, DHS will list the minimum number of offenses that it needs to meet its burden of proving removability.¹⁰² If the listed convictions are vacated, or if a judge finds that they are not removable offenses, DHS is free to amend its charging document to

⁹⁵ See *Matter of C-M-*, 5 I. & N. Dec. 327 (BIA 1953); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (1981).

⁹⁶ See 8 U.S.C. § 1182(a)(2)(C) (controlled substance traffickers) & (D) (prostitution); 8 U.S.C. § 1227(a)(2)(B)(ii) (drug abuse).

⁹⁷ See 8 U.S.C. § 1227(a)(2)(E)(ii).

⁹⁸ See *Viera Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (holding that 17 year old charged and convicted in Rhode Island as an adult was not entitled to have his offense treated as one of juvenile delinquency for purposes of INS proceedings).

⁹⁹ *Matter of Devision*, 22 I. & N. Dec. 1362 (BIA 2000) (reasoning by analogy to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1994 & Supp. II 1996)).

¹⁰⁰ *Uritsky v. Gonzales*, 399 F.3d 728 (7th Cir. 2005).

¹⁰¹ See *Magasouba v. Mukasey*, 543 F.3d 13, 16 (1st Cir. 2008).

¹⁰² 8 U.S.C. § 1229a(c)(3) (DHS must establish removability by clear and convincing evidence).

include additional offenses.¹⁰³ As long as a criminal offense makes a noncitizen removable, DHS is free to include it initially on the Notice to Appear, add it later, or even use it as a basis for reopening proceedings after the Immigration Judge has decided the case.¹⁰⁴

Post-Conviction Relief

A conviction that has been vacated pursuant to state or federal law generally does not constitute a conviction for immigration purposes, unless it was vacated specifically to avoid immigration consequences.¹⁰⁵ Once a noncitizen has been convicted of a crime that would render him/her removable, there are two common immigration-based grounds in Massachusetts for a motion to withdraw the guilty plea and to vacate the conviction: (1) the defense lawyer's failure to explain the immigration consequences; and (2) the court's failure to explain the immigration consequences or to conduct an otherwise proper colloquy.

Of course, if a trial took place, transcripts should be scoured thoroughly for possible grounds for appeals or other new trial motions. In addition, the defendant may seek a pardon. Finally, in certain circumstances relief in the federal courts may be sought by Writs of Error *Coram Nobis*, *Audita Querela*, or *Habeas Corpus*.¹⁰⁶

Motion to Vacate Guilty Plea Pursuant to G.L. c. 278, § 29D

In Massachusetts and some other states, judges must warn a defendant who is pleading guilty or admitting sufficient facts of the immigration consequences of that plea or admission.¹⁰⁷ Failure to provide such warning may provide grounds for a motion to vacate the conviction.¹⁰⁸ In Massachusetts, the burden to so advise the defendant is on the court.¹⁰⁹ The burden to provide a

¹⁰³ 8 C.F.R. § 1003.30; 8 C.F.R. § 1240.10(e).

¹⁰⁴ See *De Faria v. INS*, 13 F.3d 422, 424 (1st Cir. 1993) (Government motion to reopen proceedings allowed to amend charging document after criminal conviction listed on original charging document was vacated).

¹⁰⁵ See *Matter of Adamiak*, 23 I. & N. Dec. 878, 881 (BIA 2008) (holding that Ohio conviction vacated for failure to administer alien warning was no longer a valid conviction for immigration purposes); *Matter of Pickering*, 23 I. & N. Dec. 621, 625 (BIA 2003) (holding that a conviction vacated solely in order to avoid immigration consequences remains a conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378, 1380 (BIA 2000) (accord full faith and credit to New York judgment vacating criminal conviction); *but cf. Matter of Roldan*, 22 I. & N. Dec. 512, 521 (BIA 1999) (holding that state rehabilitative statutes do not eliminate convictions for immigration purposes).

¹⁰⁶ For a fuller discussion of these remedies, see Kesselbrenner & Rosenberg, Immigration Law and Crimes (Thomson West 2007).

¹⁰⁷ See G.L. c. 278, § 29D (amended by 2004 Mass. Acts 225; amendments effective Aug. 28, 2004).

¹⁰⁸ See *Commonwealth v. Grannum*, 457 Mass. 128, 134 (2010); *Commonwealth v. Berthold*, 441 Mass. 183, 186 (2004).

¹⁰⁹ See *Commonwealth v. Hilaire*, 437 Mass. 809 (2002) (holding that Legislature intended that judge orally advise defendant of immigration consequences of guilty plea; thus, written advisement of warnings contained in the "Tender of Plea or Admission/Waiver of Rights" form is insufficient).

record which shows that the advisement has been given is on the Commonwealth,¹¹⁰ and the presumption of regularity does not apply to motions based on this statute.¹¹¹ The lack of a record of such advisement, coupled with a showing of prejudice, requires a new trial. As a result of appellate decisions diluting the requirements and effectiveness of the statutory protections afforded by the statute, G.L. c. 278, § 29D was amended in 2004.¹¹² The amendments are not retroactive and, therefore, apply only to pleas or admissions that occur on or after August 28, 2004 (the effective date of the amending legislation).

There is no statutory or regulatory time limit for filing a § 29D motion. However, the passage of time may be a consideration.¹¹³ The case law implies that the more time that passes, the less likely the court will find a failure to advise. In contrast, the amended statute requires “an official

¹¹⁰ But see, for pleas prior to Aug. 28, 2004, *Commonwealth v. Rzepphiewski*, 431 Mass. 48 (2000) (holding that although tape recording of plea hearing had been destroyed and docket sheet did not indicate administration of immigration warning, there was sufficient evidence of advisement where judge found that defendant had admitted to sufficient facts after a hearing, judge had taken notes on specific details of the hearing, and judge’s practice was to include deportation advisement in plea colloquy); *Commonwealth v. Pryce*, 429 Mass. 556, 557-58 (1999) (finding sufficient evidence of advisement where docket sheet included the notation “Defendant offers to plead guilty – after hearing” and motion judge found that the notation referred to his court’s standard plea colloquy which included the deportation advisement); cf. *Commonwealth v. Ciampa*, 51 Mass. App. Ct. 459 (2001) (holding that general affidavit of judge was insufficient to reconstruct the record, where affidavit neither referred to a practice of giving warnings in the court during the relevant time period, nor specified that the plea judge’s practice was to administer all three required warnings).

¹¹¹ *Commonwealth v. Grannum*, 457 Mass. 128, 134 (2010).

¹¹² As amended, G.L. c. 278, § 29D states:

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: ‘If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.’ The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission to sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

¹¹³ See *Commonwealth v. Jones*, 417 Mass. 661 (1994) (reversing denial of defendant’s 1992 motion to withdraw his 1981 admission to sufficient facts, and rejecting Commonwealth’s contention that defendant was manipulating the criminal justice system as there was no finding on when the defendant learned of his rights under G.L. c. 278, § 29D).

record or a contemporaneously written record . . . that the court provided the advisement.”¹¹⁴ Notwithstanding these considerations, the statute clearly states that a defendant may file a motion to vacate on this basis at any time.

It should be noted that the statute requires more than notifying a defendant of the possibility of deportation—it also requires a warning about “exclusion from admission to the United States, or denial of naturalization.”¹¹⁵ The Supreme Judicial Court held in *Commonwealth v. Soto*¹¹⁶ that a criminal defendant who was advised of the possibility of deportation and denial of naturalization, but not exclusion from the United States, was entitled to have his plea vacated as “the Legislature has put the three required warnings in quotation marks, and each of them is required to be given so that a person pleading guilty knows exactly what immigration consequences his or her guilty plea may have.”¹¹⁷ However, there is a growing body of case law holding that a defendant cannot prevail in a motion for a new trial if he “has been warned under the statute of the very consequence with which he must subsequently contend.”¹¹⁸ Put differently, the defendant must prove that she faces the “actual[] prospect” of a consequence that the judge failed to include in the plea colloquy.¹¹⁹ Indeed, the Supreme Judicial Court has stated that a defendant must show that the Federal government has “taken some step toward deporting him”; that the government has an express written policy of initiating deportation proceedings against immigrants like the defendant; that the defendant intends to travel and faces a “substantial risk” of exclusion from the U.S.; or that the conviction would “doom” an application for naturalization.¹²⁰ Criminal counsel should consult with an immigration attorney to determine the full extent of the consequences flowing from a conviction, because some of the case law misunderstands federal immigration law and correspondingly misconstrues the nature of the consequences listed in the alien warning statute.¹²¹

¹¹⁴ G.L. c. 278, § 29D.

¹¹⁵ For admissions prior to Aug. 28, 2004, see also *Commonwealth v. Villalobos*, 437 Mass. 797 (2002) (holding that defendant could not withdraw admission to sufficient facts after receiving the warnings required by c. 278, § 29D, even though statutory language failed to apprise him of change in federal immigration law converting his admission to sufficient facts into a conviction, and even though the statutory language was misleading and might in some cases have affected the voluntariness of a plea).

¹¹⁶ 431 Mass. 340 (2000).

¹¹⁷ See *id.* at 342 (allowing motion to vacate where the defendant was not warned about the risk of denial of admission, a consequence he subsequently faced).

¹¹⁸ *Commonwealth v. Berthold*, 441 Mass. at 186 (2004); see also *Commonwealth v. Cartagena*, 71 Mass. App. Ct. 907, 908-09 (2008); *Commonwealth v. Casimir*, 68 Mass. App. Ct. 257, 259-60 (2007); *Commonwealth v. Rodriquez*, 70 Mass. App. Ct. 721, 725-27 (2007); *Commonwealth v. Barreiro*, 67 Mass. App. Ct. 25, 26-27 (2006); *Commonwealth v. Agbogun*, 58 Mass. App. Ct. 206, 208 (2003).

¹¹⁹ *Grannum*, 457 Mass. at 134; *Commonwealth v. Berthold*, 441 Mass. at 185 (2004).

¹²⁰ *Grannum*, 457 Mass. at 135, 136.

¹²¹ See, e.g., *Commonwealth v. Cartagena*, 71 Mass. App. Ct. 907, 908-09 (2008) (failing to recognize that adjustment to permanent residency amounts to an “admission” under immigration law, and thus incorrectly concluding that the alien warning statute does not “contemplate[]” the “denial of permanent residency”); *Commonwealth v. Casimir*, 68 Mass. App. Ct. 257, 259 (2007) (similarly misunderstanding that adjustment to permanent residency is an “admission,” and therefore failing to recognize that the defendant apparently faced an enumerated consequence – the denial of admission).

For pleas occurring prior to August 28, 2004, “[t]here is a strong suggestion . . . that the remedy afforded by G.L. c. 278, § 29D, to vacate the judgment and enter a plea of not guilty, is not available after” the noncitizen client has been physically deported.¹²² For pleas and admissions occurring on or after August 28, 2004, the amended statute specifically states otherwise.¹²³

Ineffective Assistance of Counsel

The Supreme Court has held, in *Padilla v. Kentucky*, that defense counsel has a duty under the Sixth Amendment to advise a client of the immigration consequences of pleading guilty.¹²⁴ The Court held that *Strickland v. Washington* applied to such cases; thus, a defendant must prove that:

- his attorney’s “representation fell below an objective standard of reasonableness;” and
- he was prejudiced as a result of defense counsel’s performance.¹²⁵

Failure to warn about the immigration consequences of a guilty plea, or misadvising a client about those immigration consequences, constitutes ineffective assistance of counsel and can form the basis for a motion to vacate the plea. The Court held that if the immigration consequences are “succinct, clear and explicit,” defense counsel has a duty to provide substantive advice to her client about those consequences.¹²⁶ Even if the consequences are “not succinct and straightforward,” the attorney still has an obligation to notify a client that a plea may result in immigration consequences.¹²⁷ Once a client is able to prove that his counsel failed to warn or misadvised of immigration consequences, he must also prove that the outcome of his criminal case would have been different.¹²⁸

In 2011, the Supreme Judicial Court of Massachusetts (SJC) decided *Commonwealth v. Clarke*, interpreting the U.S. Supreme Court decision in *Padilla v. Kentucky* and clarifying a number of issues left unresolved by *Padilla*.¹²⁹ In *Clarke*, the Court found that *Padilla* is retroactive to April 1, 1997.¹³⁰ The Court also enumerated what the defendant is required to show to prove prejudice.¹³¹ The decision provides a clear framework for *Padilla* motions filed in Massachusetts state courts.

¹²² *Commonwealth v. DeSorbo*, 49 Mass. App. Ct. 910, 910-11 (2000).

¹²³ See G.L. c. 278, § 29D.

¹²⁴ *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

¹²⁵ *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984); *Padilla*, 130 S.Ct. at 1482.

¹²⁶ *Padilla*, 130 S.Ct. at 1483.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1482, citing *Strickland*, 466 U.S. at 694.

¹²⁹ 460 Mass. 30 (2011).

¹³⁰ *Clarke*, 460 Mass. at 31 (concluding that *Padilla* should be applied retroactively to guilty pleas obtained after enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)). The retroactivity of *Padilla* has been the subject of an evolving nationwide split in state and federal appellate courts. The Supreme Court recently granted *certiorari* in *Chaidez v. U.S.*, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 3335 (April 30, 2012) and will decide the issue during the 2012-13 term.

¹³¹ *Id.* at 47-48.

Expungement and Pardon

Expungement

The use of expungements to ameliorate deportation consequences of a criminal conviction evolved from case law. An expungement has been defined in this manner:

It is not simply the lifting of disabilities attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect. It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication and thereby restoring to the regenerative offender his original status ante.¹³²

Unfortunately, the BIA has precluded the use of expungements to defeat deportability.¹³³ The BIA reasoned that the 1996 federal definition of “conviction” redefined the term for immigration purposes, precluding the effectuation of any state rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding.¹³⁴

Pardons

Only full and unconditional executive pardons may be used to defeat deportability, *although these will not assist narcotics offenders*. Legislative pardons may not be used. Pardons can be used for noncitizens convicted of crimes of moral turpitude and aggravated felonies.¹³⁵ A noncitizen pardoned of a crime will not be precluded from showing good moral character.¹³⁶

Massachusetts Post-Conviction Motions, Writs, Etc.

One should not view G.L. c. 278, § 29D and *Padilla v. Kentucky* as the only remedies under Massachusetts law for a noncitizen client. Counsel should always consider post-conviction motions pursuant to Rules 25, 29, or 30 of the Massachusetts Rules of Criminal Procedure.¹³⁷ There are a wide variety of situations in which such motions may be useful and the entire history of the client’s prior proceeding must therefore be fully examined. For example, it may be possible pursuant to Rule 29 to have a sentence revised below the current aggravated felony threshold.¹³⁸ Counsel may also consider bringing an inadmissibility or removal case (based upon

¹³² Grough, *Expungement of Records*, 1966 Wash. U.L.Q. 147, 149 (1966).

¹³³ See *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999); see also *Matter of Marroquin*, 23 I. & N. Dec. 705 (A.G. 2005); *Matter of Luviano*, 23 I. & N. Dec. 718 (A.G. 2005).

¹³⁴ See *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

¹³⁵ See 8 U.S.C. § 1227(a)(2)(A)(vi); see also *Matter of Suh*, 23 I. & N. Dec. 626 (BIA 2003) (discussing what grounds of removability may be waived by presidential or gubernatorial pardons).

¹³⁶ See *Matter of H-*, 7 I. & N. 249 (BIA 1956).

¹³⁷ See Blumenson, Fisher & Kanstroom, eds. *Massachusetts Criminal Practice*, ch. 44 (LEXIS 2003).

¹³⁸ See *Matter of Cota-Vargas*, 23 I. & N. Dec. 849, 852-53 (BIA 2005) (holding that receipt of stolen property offense was no longer an aggravated felony following revision of sentence from 365 to 240 days, even though defendant’s motion was premised on immigration consequences); *Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001)

a criminal conviction) before a federal court on a Writ of Error *Coram Nobis* or a Writ of *Audita Querela*.

(finding that noncitizen no longer had an aggravated felony theft offense after criminal court vacated 1 year sentence and imposed a sentence of 360 days); *but see Commonwealth v. DeJesus*, 440 Mass. 147 (2003) (“The possibility that the defendant would be subject to action by the [United States Immigration and Naturalization Service] is a collateral consequence and cannot be the basis for the judge’s decision as to the disposition of...any...case.”) (quoting *Commonwealth v. Quispe*, 433 Mass. 508, 513 (2001)). *DeJesus* is likely abrogated by the ruling in *Padilla v. Kentucky*.

Appendix 1: Analyzing the Immigration Consequences

In each case in which a client is a noncitizen, defense counsel should consult the following “road map,” to assist in determining the immigration consequences of criminal conduct:

1. Determine the immigration status of the client. If a U.S. citizen, stop – (**but verify**). The immigration laws do not apply to U.S. Citizens. If not:
2. Determine the client’s exact immigration status and all potential routes to U.S. citizenship or any other immigration status;
3. Obtain the client’s complete prior criminal record, from every jurisdiction;
4. Make sure you are aware of and understand all pending charges;
5. Determine if any prior criminal charges, even if they did not result in conviction, could affect the client’s current or potential immigration status; if so, consider all possible ways to vacate, withdraw pleas, appeal, attack collaterally, revise, revoke, etc.;
6. Analyze the potential effects of pending charges on immigration status, making sure to think about the specific threats of inadmissibility and removal from the United States as well as denial of future benefits like other noncitizen status and U.S. citizenship;
7. Consider a plea or otherwise structured disposition that would avoid immigration consequences. Some examples include: 1) Is there a possible disposition that is not a conviction (e.g., pretrial probation); 2) Can the complaint/indictment be amended to an offense that causes less severe immigration consequences; 3) Can the defendant negotiate a sentence with less drastic immigration consequences (e.g., less than a one year sentence on a theft offense or crime of violence, or consecutive (on and after) sentences of less than one year on multiple such offenses); or, 4) Are there multiple charges, only some of which cause immigration consequences? If so, can a disposition be negotiated in which convictions and/or sentences of one year or more are only received on the offenses that do not carry immigration consequences for such convictions and/or sentences;
8. **Always try to avoid an “aggravated felony” conviction;**
9. Consider whether any waivers are or will be available to the client in immigration court to mitigate immigration consequences;
10. Consider all possible post-conviction strategies;
11. **Discuss the client’s goals related to immigration** (e.g. does the client care more about the immigration consequences or more about avoiding jail time);
12. Advise the client not to leave the U.S., apply for any immigration benefit or attempt naturalization without consulting with an immigration specialist.

Appendix 2: Summary Chart of Inadmissibility and Deportability

Grounds of Inadmissibility 8 U.S.C. §1182(a)(2)	Grounds of Deportability 8 U.S.C. §1227(a)(2)
<p>CRIME INVOLVING MORAL TURPITUDE</p> <p>Conviction or admission of sufficient facts for one CIMT makes one inadmissible <i>unless</i></p> <ul style="list-style-type: none"> • 1 crime committed under 18 and at least 5 years before admission, OR • Maximum <i>possible</i> penalty is 1 year or less AND <i>sentence</i> is 6 months or less 	<p>CRIME INVOLVING MORAL TURPITUDE</p> <p>Conviction for one CIMT makes one deportable if</p> <ul style="list-style-type: none"> • Conviction is within 5 years of admission where a <i>sentence</i> of at least one year <i>may</i> be imposed <p>Conviction for 2 CIMTs at any time, not arising out of a single scheme of criminal conduct makes person deportable.</p> <p>NB: the definition of conviction for immigration law differs from state law.</p>
<p>CONTROLLED SUBSTANCES</p> <ul style="list-style-type: none"> • Conviction or admission of any crime/acts relating to a controlled substance as defined by 21 USC §802. • Reason to believe person is a drug trafficker • Currently a drug abuser or addict as found by a doctor 	<p>CONTROLLED SUBSTANCES</p> <ul style="list-style-type: none"> • Conviction of any drug offense except 1 offense of 30 grams or less of marijuana • Includes conspiracy or attempt • If found to be a drug abuser or addict at ANY time after admission.
<p>MULTIPLE OFFENSES</p> <ul style="list-style-type: none"> • One is inadmissible if CONVICTED of 2 or more crimes (of any type – even if in a common scheme) in which the aggregate sentence was 5 years or more 	N/A
<p>PROSTITUTION See 8 USC 1182(a)(2)(D)</p> <p>Not a separate inadmissible offense</p>	<p>Not separate deportable charge, but check CIMT.</p> <p>FIREARM OFFENSES</p> <ul style="list-style-type: none"> • Conviction for any crime of buying, selling, using, owning, possessing or carrying any firearm or destructive device (18 USC §921). • Includes conspiracy and attempt • May include crimes for which possession or use is an element

<p>Not a separate inadmissible offense</p>	<p>DOMESTIC VIOLENCE – conviction for:</p> <ul style="list-style-type: none"> • DV • Stalking • Child abuse • Child neglect • Child abandonment • Violation of criminal or civil protective orders (conviction not necessary) • Applies to spouses, household members, children, and others.
	<p>AGGRAVATED FELONY – 8 U.S.C. § 1227 (a)(2)(A)(iii) [agg. Fel. is defined at 8 U.S.C. 1101(a)(43)]</p> <p>Common Aggravated Felonies:</p> <p><u>Requires only a conviction:</u></p> <ul style="list-style-type: none"> • murder, rape, sexual abuse of a minor • drug trafficking • firearms trafficking • running a prostitution business • fraud or tax evasion where the loss is \$10,000. • failure to appear by a defendant for service of sentence (underlying crime must be punishable by 5 years or more) • failure to appear in court to answer/dispose of a felony charge. <p><u>Requires a conviction and a sentence of imprisonment for 1 year or more:</u></p> <ul style="list-style-type: none"> • crime of violence (as defined by 18 USC §16) • theft offense • obstruction of justice • document (passport) fraud
<p>MISC (8 U.S.C. §1182)</p> <ul style="list-style-type: none"> • aliens involved in serious criminal activity who have asserted immunity from prosecution. • Human trafficking • Money laundering • Security related grounds • Terrorist activity • Aliens previously removed • Etc... 	<p>MISC (8 U.S.C. §1227)</p> <ul style="list-style-type: none"> • Smuggling of aliens • Marriage fraud • Espionage, sabotage, treason, sedition. • Terrorist activities • Selective service violations • Falsification of docs

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

DISCLAIMER: This document is meant for **criminal defense attorneys ONLY** and is not intended for use by immigration practitioners, Homeland Security attorneys, or Immigration Judges. The analysis of offenses is deliberately conservative, because criminal defense practitioners must be conservative in their immigration advice to their noncitizen clients. For some offenses, viable arguments may exist to contest removability in immigration proceedings that are contrary to our analysis, but it is beyond the scope and purpose of this chart. In order to protect defendants to the fullest extent, the most conservative analysis is required.

Furthermore, this chart analyzes individual offenses in a vacuum. The actual impact of an offense will vary dramatically depending on the client's immigration status, prior criminal record, and other pending charges. Because immigration consequences of crimes is a complex and ever-evolving area of law, practitioners should use this chart in conjunction with the attached article, "*Immigration Consequences of Massachusetts Criminal Convictions*" and only as a starting point. These documents are not a substitute for legal research.

© Committee for Public Counsel Services Immigration Impact Unit, August 2012. The original version of this chart was published by Dan Kesselbrenner and Wendy Wayne in July 2006. Dan Kesselbrenner, Executive Director of the National Immigration Project of the National Lawyers Guild, contributed significantly to this version and we thank him for his invaluable input.

HOW TO USE THIS CHART:

For each criminal offense listed, the chart is divided into three categories: aggravated felony, crime involving moral turpitude (CIMT) and other grounds of inadmissibility or deportability. The chart then indicates the likelihood that an offense would be deemed to be an aggravated felony, CIMT, and/or some other specified crime-related ground of inadmissibility or deportability under immigration law.

To clarify the likelihood of an offense being an aggravated felony, CIMT or other ground, we will use the terminology as defined below:

1. **YES**—The immigration statute and/or case law clearly deem this offense to constitute an aggravated felony, CIMT and/or any additional grounds identified under column 5.
2. **LIKELY**—The immigration statute and/or case law may not be directly on point or clearly indicate that this offense is an aggravated felony, CIMT, etc. However, analyzed in the context of relevant immigration case law, the offense is likely to be deemed as such by immigration officials and/or the immigration courts.
3. **POSSIBLE**—The immigration statute and/or case law are unclear as to whether this offense would constitute an aggravated felony, CIMT, etc., and there are unresolved legal issues both for and against such classification. Such a finding may be avoidable, depending upon such factors as how defense counsel structures a plea agreement, or under which particular prong of the offense defendant is convicted.
4. **UNLIKELY**—The immigration statute and/or case law may not be directly on point or clearly indicate that this offense is *not* an aggravated felony, CIMT, etc. However, analyzed in the context of relevant immigration case law, the offense is not likely to be deemed as such by immigration officials and/or immigration courts.
5. **NO**—The statute and/or case law clearly indicate that this offense is *not* an aggravated felony, CIMT, etc.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Motor Vehicle Offenses					
Operating a motor vehicle after suspension	MGL c.90, §23	No	No	No	Avoid pleading to this offense and OUI at the same time.
Operating under influence (alcohol)	MGL c.90, §24	No	No	No	Pending legislation may make OUI- 3 rd an aggravated felony.
Operating under influence (controlled substance)	MGL c,90, §24	No	No	Inadmissible and deportable offense as crime related to a controlled substance.8 U.S.C. §1182(a)(2)(A); 8 U.S.C. § 1227(a)(2)(B).	Not deportable offense if record of conviction does not identify drug. There is an exception to deportability for a single conviction for possessing 30 g or less of marijuana for own use. If relevant, make clear on record. See pp. 18, 21

¹³⁹ For a general discussion of aggravated felonies, see *“Immigration Consequences of Massachusetts Criminal Convictions”* at p. 15

¹⁴⁰ For information on crimes involving moral turpitude and their consequences, see *“Immigration Consequences of Massachusetts Criminal Convictions”* at pp. 12-14, 17, and 21.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Leaving the Scene after causing personal injury	MGL c.90, §24(a1/2)	Unlikely, but try to avoid sentence of one year or more under 8 U.S.C. §1101(a)(43)(F) (crimes of violence).	Likely, if record of conviction or police report show knowledge that D had caused injury.	No	See p. 16, fn. 68 For information on the record of conviction see p.13, fn. 45
Negligent operation of a motor vehicle	MGL c.90, §24(2)(a)	No	No	No	
Using a motor vehicle without authority	MGL c.90, §24(h)(2)(a)	Likely, if sentence of one year or more under 8 U.S.C. §1101(a)(43)(F) (crimes of violence).	No	No	See p. 16, fn. 68
Motor vehicle homicide (negligently)	MGL c.90, §24G	No	No	No	
Motor vehicle homicide (recklessly)	MGL c.90, §24G	Unlikely	Yes	No	Pleading to negligently causing death rather than recklessly causing death is much safer plea.

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
OUI with serious injury	MGL c.90, §24L	No	No	No	Pending federal legislation may make OUI-3 rd an aggravated felony.
Controlled Substance Offenses¹⁴¹					
Sale of Drug Paraphernalia	MGL c. 94C § 32I (a) and (b)	Yes, unless charged with possession with intent to sell/distribute.	Yes	Inadmissible and deportable offense as crime related to a controlled substance. 8 U.S.C. §1182(a)(2)(A); 8 U.S.C. § 1227(a)(2)(B).	See pp. 16, 18, 21 To avoid the aggravated felony, plead to possession with intent to distribute.
Possession of a controlled substance	MGL c. 94C, § 34	No, unless prosecuted as a subsequent offense (prior offense is pled and proven), or if possession of flunitrazepam, under 8 U.S.C. §1101(a)(43)(B).	No	Inadmissible and deportable offense as crime related to a controlled substance. 8 U.S.C. §1182(a)(2)(A); 8 U.S.C. § 1227(a)(2)(B).	Not deportable offense if record of conviction does not identify drug. There is an exception to deportability for a single conviction for possessing 30g or less of marijuana for own use. See pp. 16, 18, 21

¹⁴¹ For a general discussion of the consequences of controlled substance offenses see *“Immigration Consequences of Massachusetts Criminal Convictions”* at pp. 18, 21.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Trafficking, distribution, possession with intent to distribute a controlled substance	MGL c. 94C, §§ 32-32E	Yes, under 8 U.S.C. §1101(a)(43)(B).	Yes	Inadmissible and deportable offense as crime related to a controlled substance. 8 U.S.C. §1182(a)(2)(A); 8 U.S.C. § 1227(a)(2)(B). May also form basis for inadmissibility for controlled substance traffickers, 8 U.S.C. §1182(a)(2)(C).	Reduce to straight possession (but see possession, above). See pp. 16, 18, 21
Presence where heroin kept	MGL c. 94C, § 35	No	No	Inadmissible and deportable offense as crime related to a controlled substance. 8 U.S.C. §1182(a)(2)(A); 8 U.S.C. § 1227(a)(2)(B).	May be marginally less risky than pleading to simple possession. Because this offense does not involve distribution or trafficking, it is one option for avoiding an aggravated felony. See pp. 18, 21

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Crimes against the Person¹⁴²					
Violation of restraining order	MGL c. 209A, §7	Unlikely	Yes	Yes, ground of deportability under 8 U.S.C. §1227 (a)(2)(E)(violation of a protective order).	See pp. 19-20
Murder, 1 st or 2 nd degree	MGL c.265, §1	Yes, under 8 U.S.C. §1101(a)(43)(A) (murder) OR, if sentence of 1 year or more, §1101(a)(43)(F) (crime of violence).	Yes	Deportable offense <u>if</u> crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	
Manslaughter (voluntary)	MGL c.265, §13	Yes, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable offense <u>if</u> crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	
Manslaughter (involuntary)	MGL c.265, §13	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable <u>if</u> crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	If possible, make the record of conviction clear that conviction was based on a reckless failure to act. This may avoid an aggravated felony conviction. See p. 16, fn. 69

¹⁴² Many offenses in this category can cause a noncitizen to be deportable if domestic in nature. For a discussion of crimes of domestic violence, see p. 19-20.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Assault	MGL c.265, §13A(a)	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crimes of violence).	Unlikely	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	May preserve arguments in imm. court if record shows no physical force used, attempted or threatened. See p. 16, fn. 68
Assault and battery (A&B)	MGL c.265, §13A(a)	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence). May preserve arguments for imm. court if record of conviction shows no physical force used, attempted or threatened. Try to plead to de minimus touching. See p. 15, fn. 68	Unlikely	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	NOTE: Although case law indicates that A&B with de minimus touching may not be a crime of violence, it is still regularly charged as such in immigration court and thus currently may still be an aggravated felony despite the case law.
Aggravated A&B	MGL c.265, §13A(b)	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence). See p. 15, fn.68	Likely	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	
Indecent A&B under 14	MGL c.265, §13B	Yes, under 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor).	Yes	Deportable as crime of child abuse under 8 U.S.C. §1227 (a)(2)(E).	Amend to simple assault and battery, see A&B above. If amended, keep sentence under a year.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Assault and battery on a public official	MGL c.265, §13D	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F)(crime of violence).	Likely	No	
Indecent A&B over 14	MGL c.265, §13H	Yes, if victim is under 18 under 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor) . Yes if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable <u>if</u> crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	If victim is under 18, keep this out of the “record of conviction.” See p. 13, fn. 45 Amend to simple assault and battery, see A&B above. If amended, keep sentence under a year.
A&B on a child	MGL c.265, §13J	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F)(crime of violence) unless convicted of wantonly or recklessly permitting injury to child.	Likely	Deportable as a crime of child abuse under 8 U.S.C. §1227 (a)(2)(E).	Amend to simple assault and battery, see A&B above. If amended, keep sentence under a year. OR Make clear on record of conviction that client was convicted of wantonly or recklessly permitting injury.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Reckless endangerment of children	MGL c.265, §13L	Possibly, if crime involves sexual abuse. 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor). Likely, if sentence is 1 year or more and based on conduct, not a failure to act. 8 U.S.C. §1101(a)(43)(F) (crime of violence),	Likely	Deportable as crime of child abuse/neglect/ abandonment under 8 U.S.C. §1227 (a)(2)(E).	
Mayhem	MGL c.265, §14	Yes, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	
Assault with intent to murder	MGL c.265, §15	Yes, under 8 U.S.C. §1101(a)(43)(U) (attempted murder); if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	
A&B with a dangerous weapon	MGL c.265, §15A	Yes, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Likely	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E). (continued...)	Amend to simple assault and battery, see A&B above. If amended, keep sentence under a year.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
				If record shows weapon was a firearm, deportable under 8 U.S.C. §1227(a)(2)(C).	See p. 19, fn. 85
Assault with a dangerous weapon	MGL c.265, §15B	Yes, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E). If record shows weapon was a firearm, deportable under 8 U.S.C. §1227(a)(2)(C).	Amend to simple assault, see assault above. If amended, keep sentence under a year. See p. 19, fn. 85
Attempted murder	MGL c.265, §16	Yes, under 8 U.S.C. §1101(a)(43)(U) (attempt), or if sentence is 1 year or more, under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	Note that assault to murder is treated as attempted murder.
Armed robbery	MGL c.265, §17	Yes, if sentence of 1 year or longer, under 8 U.S.C. §1101(a)(43)(F) (crime of violence) or 8 U.S.C. §1101(a)(43)(G) (theft).	Yes	If firearm involved, deportable under 8 U.S.C. §1227 (a)(2)(E).	
Unarmed robbery	MGL c.265, §19(b)	Yes, if sentence of 1 year or longer, under 8 U.S.C. §1101(a)(43)(F) (crime of violence) or 8 U.S.C.	Yes	No	

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
		§1101(a)(43)(G) (theft).			
Rape	MGL c. 265, § 22(b)	Yes, under 8 U.S.C. §1101(a)(43)(A) (rape).	Yes	Deportable if crime of domestic violence under 8 U.S.C. §1227(a)(2)(E).	Digital rape may not be an aggravated felony.
Rape of child with force	MGL c. 265, § 22A	Yes, under 8 U.S.C. §1101(a)(43)(A) (rape, sexual abuse of a minor).	Yes	Deportable as crime of child abuse under 8 U.S.C. §1227 (a)(2)(E).	
Statutory rape	MGL c. 265, § 23	Yes, under 8 U.S.C. §1101(a)(43)(A) (rape, sexual abuse of a minor).	Yes	Deportable as crime of child abuse under 8 U.S.C. § 1227(a)(2)(E). Depending on victim's identity, may also be deportable under domestic violence ground at 8 U.S.C. § 1227(a)(2)(E).	
Assault with intent to commit rape	MGL c. 265, § 24	Yes, under 8 U.S.C. §1101(a)(43)(A) (rape), and 8 U.S.C. §1101(a)(43)(F) (crime of violence) if sentence is 1 year or more.	Yes	Depending on victim's identity, may also be deportable under domestic violence ground at 8 U.S.C. § 1227(a)(2)(E).	Amend to simple assault and battery, see A&B above. If amended, keep sentence under a year.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Kidnapping, no ransom demand	MGL c.265, §26	Yes, if sentence of 1 year or longer, under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Likely	Deportable if crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	
Kidnapping, ransom demand	MGL c. 265, §26	Yes, under 8 U.S.C. § 1101(a)(43)(H) (extortion), OR if sentence of 1 year or longer, under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable if crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	
Custodial interference by relative	MGL c.265, §26A	Unlikely	Unlikely	Deportable as crime of child abuse under 8 U.S.C. §1227 (a)(2)(E).	Could fall under petty offense exception to inadmissibility. See p. 21
Assault with intent to commit a felony	MGL c.265, §29	Likely, if sentenced to 1 year or more, under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable if crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	
Stalking and stalking in violation of a restraining order	MGL c.265, §43(a) and (b)	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Likely	Crime of stalking under 8 U.S.C. § 1227(a)(2)(E)(i). If violated restraining order, then also deportable as violator of protection order, 1227(a)(2)(E)(ii).	

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Threat to commit a crime	MGL c.275, §2	No, because cannot get sentenced to a year or more of imprisonment under this statute.	Yes, if the crime threatened involved any type of bodily harm or is otherwise a CIMT.	Deportable if crime of domestic violence or child abuse under 8 U.S.C. §1227 (a)(2)(E).	Meets the petty offense exception to inadmissibility and deportability if it is the only CIMT. See pp. 17, 21
Crimes against Property					
Arson of a dwelling house	MGL c. 266, §1	Yes, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (a crime of violence).	Yes	No	Amend to negligence in cases of fire, MGL c.266, §8. Keep sentence less than a year.
Negligence in cases of fire	MGL c. 266, §8	No	No	No	
Armed Burglary with person therein	MGL c.266, §14	Yes, if sentence of 1 year or more. 8 U.S.C. §1101(a)(43)(F) (crime of violence).	Yes	Deportable offense if weapon is a firearm.	See p. 19, fn. 85

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Breaking & Entering in the night time with intent to commit a felony	MGL c.266, §16	Yes, if building broken into and sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(G) (theft offense)	Yes, if intent to commit offense that is a CIMT.	No	Keep sentence less than a year and plead affirmatively to a non-turpitudinous underlying crime.
Breaking and Entering with intent to commit a misdemeanor	MGL c.266. §16A	No	Yes, if intent to commit offense that is a CIMT.		Meets the petty offense exception for inadmissibility and deportability if it is the only CIMT. See pp. 17, 21
Larceny in a building	MGL c. 266, §20	Yes, if sentence of one year or more under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	
Larceny from the person	MGL c.266, §25	Yes, if sentence of one year or more under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	
Receiving stolen motor vehicle	MGL c. 266, §28	Yes, if sentence of one year or more under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	
Larceny of a motor vehicle	MGL c. 266, §28	Yes, if sentence of one year or more under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	Try to plead to use without authority instead of this offense, but in either case, keep sentence less than a year

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Larceny	MGL c. 266, §30	Yes, if sentence of one year or more under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	Larceny under \$250 can fall into petty offense exception to inadmissibility if it is the only CIMT and sentence is 6 months or less. See p. 21
Shoplifting	MGL c.266, §30A	Yes, if sentence of one year or more, under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	1 st offense, if under \$100, falls under the petty offense exception to inadmissibility and deportability. See pp. 17, 21
Larceny by check	MGL c. 266, §37	Yes, where loss to the victim exceeds \$10,000. 8 U.S.C. §1101(a)(43)(M)(i). This offense is unlikely to be a theft offense, but it is safest to keep sentence below a year to avoid aggravated felony classification under 8 U.S.C. §1101(a)(43)(G).	Yes	No	Plead to a specific amount that is \$10,000 or less. Larceny under \$250 may fall within petty offense exception to inadmissibility if it is the only CIMT and sentence is 6 months or less. See p. 21

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Possession of burglarious tools	MGL c.266, §49	Yes as an attempted theft under 8 U.S.C. §1101(a)(43)(U) if defendant receives a sentence of 1 year or more AND if record of conviction indicates that the underlying offense was to steal.	Yes, if record reveals an intent to commit an offense that is a CIMT (i.e. stealing).	No	Plead to possession of burglarious tools with intent to commit an unnamed offense. Keep record of conviction clear of evidence that the underlying offense was a theft offense. See p. 13, fn. 45
Receiving stolen property	MGL c.266, §60	Yes, if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(G) (theft offense).	Yes	No	
Carrying a dangerous weapon	MGL c. 266, §102A	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) (crime of violence).	No	Deportable offense if weapon is a firearm.	See p. 19, fn. 85
Trespassing	MGL c.266, §120	No	No	No	
Vandalism	MGL c.266, §126A	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F)(crime of violence).	Yes	No	

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Willful and malicious destruction of property	MGL c.266, §127	Likely, if sentence of 1 year or more under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence).	Yes	No	If under \$250 and the only CIMT, falls within petty offense exception to inadmissibility and deportability. See pp. 17, 21
Wanton destruction of property	MGL c.266, §127	Possibly, if sentence of one year or more under 8 U.S.C. § 1101 (a)(43)(F) (crime of violence).	Likely	No	If under \$250 and the only CIMT, falls within the petty offense exception to inadmissibility and deportability. See pp. 17, 21
Removing a vehicle identification number	MGL c.266, §139	Likely, if the sentence is 1 year or more, under 8 U.S.C. §1101 (a)(43)(R) (forgery, etc) OR, If the loss to the victim exceeds \$10,000, under 8 U.S.C. §1101 (a)(43)(M)(i).	Yes, for those offenses involving fraud.	No	Plead to a specific loss finding of \$10,000 or less.

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Forgery and Crimes Against Currency					
Forgery of records	MGL c.267, §1	Yes, if sentence to 1 year or more under 8 U.S.C. §1101(a)(43)(R) (forgery, etc).	Yes	No	If defendant pleads to intent to injure rather than intent to defraud, there is small chance that it would no longer be a crime involving moral turpitude. See p. 14, fn. 57
Passing counterfeit note	MGL c.267, §10	Yes, if sentenced to a year or more under 8 U.S.C. §1101(a)(43)(R) (counterfeiting).	Yes	No	
Crimes Against Public Justice					
Failure to Register as a Sex Offender	MGL c.6, §178H	No	Yes	No	Is better to plead to this offense rather than a substantive sex offense.
Perjury	MGL c.268, §1	Yes, if sentence 1 year or more, under 8 U.S.C. §1101(a)(43)(S) (obstruction of justice).	Yes	Inadmissible and deportable offense if perjury is related to immigration fraud.	
Providing False Name or Social Security Number to Police	MGL c.268, § 34A	No	Likely	No	If the only CIMT may fall within the petty offense exception to inadmissibility only.

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
					See pp. 21
Intentional or knowing False report of a crime.	MGL c.269, §34A	Yes, under 8 U.S.C. §1101(a)(43)(S) (obstruction of justice),	Likely	No	
Escape	MGL c.268, §16	Likely, if: a) defendant escaped while serving a sentence for an underlying offense punishable by five years, 8 U.S.C. §1101 (a)(43)(Q); or b) if the defendant escaped before trial and is facing felony charges for which a sentence of two or more years may be imposed, §1101(a)(43)(T); or c) if sentenced to a year or more, §1101(a)(43)(F) or (S) (crime of violence; obstruction of justice).	No	No	
Resisting arrest	MGL c. 268, §32B	Likely, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(F) crime of violence).	Possibly Keep any injury to the police officer out of the record of	No	

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OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
			conviction. See p. 13, fn. 54		
Witness intimidation	MGL c. 268, §13B	Yes, if sentence is 1 year or more under 8 U.S.C. §1101 (a)(43)(F) (crime of violence) or (S) (obstruction of justice).	Yes	Deportable offense <u>if</u> crime of domestic violence under 8 U.S.C. §1227 (a)(2)(E).	
Failure to appear	MGL c. 276, §82A	Yes, if: a) failed to appear to serve sentence on offense punishable by 5 years or more (8 U.S.C. §1101(a)(43)(Q)); or b) failed to appear before trial for felony with potential sentence of 2 years or more (§1101(a)(43)(T)); or c) sentenced to 1 year or more imprisonment, under §1101(a)(43)(S) (obstruction of justice).	No	No	

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Crimes against Public Peace¹⁴³					
Possession of firearm	MGL c. 269, §10(a)	No, unless charged under MGL c. 269, §10(d) for subsequent possession of a firearm.	No	Yes, under firearm ground of deportability. 8 U.S.C. §1227 (a)(2)(C).	
Possession of a machine gun	MGL c. 269, §10(c)	Yes, under 8 U.S.C. §1101(a)(43)(E) (firearms).	No	Yes, under firearm ground of deportability. 8 U.S.C. §1227 (a)(2)(C).	
Possession of a sawed-off shotgun	MGL c.269, §10(c)	No	No	Yes, under firearm ground of deportability. 8 U.S.C. §1227 (a)(2)(C).	
Possession of firearm; possession of firearm without FID	MGL c. 269, §10(h)(1)	No	No	Yes, under firearm ground of deportability. 8 U.S.C. §1227 (a)(2)(C).	

¹⁴³ For a discussion of firearms offenses, see *“Immigration Consequences of Massachusetts Criminal Convictions”* at p. 18.

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Possession of ammunition	MGL c. 269, §10(h)	No	No	Unlikely a firearm offense under 8 U.S.C. § 1227(a)(2)(C). See p. 18, fn.85	Pleading to this offense instead of possession of a firearm may avoid deportability.
Crimes against Morality, Decency, etc.					
Maintaining a house of prostitution	MGL c. 272, §6	Yes, under 8 U.S.C. §1101(a)(43)(K) (managing a prostitution business).	Likely	Engaging in prostitution or procuring prostitutes is also a ground of inadmissibility under 8 U.S.C. §1182(a)(2)(D) that does not require a criminal conviction.	See pp. 22 and fn. 94

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Open and gross lewdness and lascivious behavior	MGL c.272, §16	Unlikely, but if minor involved, keep age of the victim out of the record of conviction.	Yes	No	Try to plead to indecent exposure instead.
Dissemination of harmful matter to minors	MGL c. 272, § 28	Possibly, under 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor).	Likely	A deportable offense under child abuse ground at 8 U.S.C. § 1227(a)(2)(E).	<p>Pleading to possession with intent to disseminate may reduce the risk of triggering the aggravated felony ground and the child abuse ground.</p> <p>Preferable to plead to an offense under MGL c. 272, § 29; still a CIMT, but not an aggravated felony.</p>

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
Dissemination of obscene matter	MGL c. 272, § 29	No	Likely	No	The pornography aggravated felony ground relates to child pornography only.
Possession of child pornography	MGL c. 272, § 29C	Yes, under 8 U.S.C. §1101(a)(43)(I) (child pornography).	Yes	No	
Disturbing the peace, disorderly person, disorderly house	MGL c. 272, §53	No	No	No	Plead to this instead of other offenses that have adverse immigration consequences.
Lewd, wanton and lascivious person	MGL c. 272, §53	Unlikely, but if minor involved, keep age of the victim out of the record of conviction.	Yes	No	Try to plead to indecent exposure instead.
Indecent exposure	MGL c. 272, §53	Unlikely, but if minor involved, keep age of the victim out of the record of conviction.	Unlikely	No	
Engaging in sexual conduct for a fee	MGL c. 272, § 53A(a)	No	Yes	Engaging in prostitution is also a conduct-based ground of inadmissibility under 8 U.S.C. §1182(a)(2)(D) that	Falls within the petty offense exception to inadmissibility. See pp. 22 and fn. 94

Appendix 3: Immigration Consequences of Selected Massachusetts Offenses Reference Chart

OFFENSE	STATUTE	AGGRAVATED FELONY? ¹³⁹	CRIME INVOLVING MORAL TURPITUDE? ¹⁴⁰	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?	NOTES & REFERENCE
				does not require a conviction, however, a single act is insufficient for “engaging.”	
Attempts, Conspiracies					
Attempt	MGL c.274,§6	If substantive offense is aggravated felony then conviction for attempt to commit the offense will be an aggravated felony under 8 U.S.C. §1101(a)(43)(U).	Yes, where underlying offense involves moral turpitude or where offense involves fraud.	Firearm, controlled substance, or other criminal ground where underlying offense would make a noncitizen deportable.	If possible, plead to attempt to commit an offense that does not involve fraud or trigger other immigration consequences.
Conspiracy	MGL c.274,§7	If substantive offense is an aggravated felony then a conviction for conspiracy to commit the offense will be an aggravated felony under 8 U.S.C. §1101(a)(43)(U).	Yes, where underlying offense involves moral turpitude or where offense involves fraud.	Firearm, controlled substance, or other criminal ground where underlying offense would make a noncitizen deportable.	If possible, plead to conspiracy to commit an offense that does not involve fraud or trigger other immigration consequences.