CHAPTER FOUR

Washington State Crimes and the Grounds of Deportation and Inadmissibility

Table of Contents

4.1 CONVICTIONS CLASSIFIED AS "AGGRAVATED FELONIES"............... 3
A. Consequences of Aggravated Felony Classification... 3
B. Record of Conviction Often Determines Aggravated Felony Classification.......... 3
C. Qualifying Misdemeanors Will Be Classified as Aggravated Felony Offenses..... 4
D. Categories of Offenses Classified as Aggravated Felonies 5

4.2 OFFENSES CLASSIFIED AS CRIMES INVOLVING MORAL TURPITUDE (CIMT) 6
A. Grounds of Deportation for Crimes Involving Moral Turpitude (CIMT) 6
B. Ground of Inadmissibility for Crimes Involving Moral Turpitude (CIMTs).......... 7
C. Important: The "Petty Offense" Exception 8
D. Determining Whether a Conviction Is a Crime Involving Moral Turpitude 9

4.3 GOOD MORAL CHARACTER DETERMINATIONS..................................... 12

4.4 CRIMES OF DOMESTIC VIOLENCE... 13
A. The Domestic Violence (DV) Ground of Deportation 13
B. Assault Offenses as Crimes of Domestic Violence.. 16
C. Domestic Violence Offenses as Aggravated Felonies 17
D. Domestic Violence Offenses as Crimes Involving Moral Turpitude.................... 17
E. Violations of Domestic Violence No-Contact/Protection Orders......................... 18
F. Stalking and Harassment Offenses 18

4.5 CRIMES INVOLVING MINOR VICTIMS 19
A. Immigration Consequences for Crimes Involving Minors 19
B. Washington Crimes Regarding these Immigration Consequences 21

4.6 CRIMES AGAINST PERSONS (ADULTS) THAT ARE NOT DOMESTIC VIOLENCE- RELATED.. 23
A. Homicide Offenses... 23
B. Assault Offenses... 23
C. Kidnapping Offenses.. 24
D. Sex Offenses 25
E. Disorderly Conduct 25

4.7 CONTROLLED SUBSTANCE VIOLATIONS... 26
A. Possession Offenses 26
B. Drug Trafficking Offenses 30

C. Drug Courts, Drug Addiction & Drug Abuse 32

4.8 FIREARMS OFFENSES 32
A. The Deportation Ground for Firearms Offenses 32
B. Firearms Offenses as Aggravated Felonies 33

4.9 DRIVING AND VEHICLE-RELATED OFFENSES 35
A. DUI and Other Misdemeanor Driving Offenses 35
B. Attempting to Elude Police Vehicle 35
C. Reckless Driving 35
D. Making a False Statement 36
E. "Hit and Run" Offenses 36
F. Vehicular Assault and Vehicular Homicide 36

4.10 PROPERTY OFFENSES 37
A. Identity Theft 37
B. Burglary Offenses 38
C. Trespass Offenses 40
D. Theft, Stolen Property and Robbery Offenses 40
E. Taking a Motor Vehicle Without Permission (TMVWP) & Vehicle Prowl 41
F. Arson, Reckless Burning and Malicious Mischief Offenses 42

4.11 PROSTITUTION OFFENSES 44
A. The Inadmissibility Ground Related to "Engaging In" Prostitution 44
B. Owning a Prostitution Business as an Aggravated Felony 44
C. Prostitution Offenses as Crimes Involving Moral Turpitude (CIMT) 45
D. Washington Prostitution Crimes Under R.C.W. 9A.88 45

4.12 CRIMINAL CONVICTIONS AS NEGATIVE DISCRETIONARY FACTORS 46

Chapter Four provides criminal court judges with general familiarity with the most common grounds of deportation and inadmissibility that are triggered by criminal convictions and criminal conduct, as well as the immigration consequences that can be triggered in regard to the most common Washington criminal statutes.

4.1 CONVICTIONS CLASSIFIED AS "AGGRAVATED FELONIES"

A. Consequences of Aggravated Felony Classification

A conviction for an offense classified as an aggravated felony under 8 U.S.C. § 1101(a)(43) of the immigration statute triggers the most severe immigration consequences for a noncitizen (see categories below).

- Lawful permanent residents (LPRs) – triggers deportation grounds[1] and renders an LPR ineligible for most forms of discretionary relief from removal, regardless of their length of residence, family ties or any other equities;[2]

- Noncitizens who are not LPRs (including refugees, other lawfully present noncitizens and undocumented persons) – Qualifies them for "expedited removal" proceedings which, if ICE initiates (rather than formal removal proceedings), will result in unreviewable removal order without a hearing before an immigration judge to pursue avenues for relief from removal.[3]

- Undocumented Persons - Triggers some statutory bars to obtaining lawful immigration status and bars eligibility for many forms of relief from removal ;[4]

- All noncitizens – Triggers mandatory immigration detention for the duration of removal proceedings, including any appeals.[5]

- A <u>permanent</u> bar to lawful reentry into the U.S. after deportation;[6]

- Significant sentence enhancements for noncitizens criminally prosecuted for illegal reentry after deportation/removal.[7]

B. Record of Conviction (ROC) Often Determines Aggravated Felony Classification

A Washington State criminal conviction for a crime that sufficiently matches one of the offenses listed in the categories below will be classified as an aggravated felony under immigration law. Whether or not a state (or federal) criminal conviction sufficiently matches a provision of the aggravated felony definition under immigration law is

---

[1] 8 U.S.C. § 1227(a)(2)(A)(iii).

[2] *See, e.g.*, 8 U.S.C. §1229b(a) (LPR cancellation); 8 U.S.C. § 1229b(b) (10-year cancellation); 8 U.S.C. § 1182(h) (212(h) waiver); 8 U.S.C §§ 1158(b)(2)(A)(ii) & (2)(B)(I). See Relief from Removal Chart at §1.5(E).

[3] 8 U.S.C. § 1228(b)(1).

[4] *See, e.g.*, 8 U.S.C. § 1229b(b)(2)(A)(iv) (aggravated felony renders noncitizen survivor of domestic violence ineligible for special DV-related cancellation of removal).

[5] 8 U.S.C. § 1226(c)(1).

[6] 8 U.S.C. §§ 1182(a)(9)(A)(i),(ii)(II).

[7] U.S.S.G. § 2L1.2(b)(1)(C)

governed by an analytical framework called the "categorical approach", which is explained in Chapter Five.

Generally, for most provisions of the aggravated felony definition (as well as other deportation and inadmissibility grounds), application of the categorical approach framework has been an "elements-based" test. This means that where the elements of the criminal conviction sufficiently match the elements of the aggravated felony provision at issue, the offense will be classified as an aggravated felony.[8]

However, in many cases the immigration judge will consult the record of conviction from the criminal proceedings to determine the specific elements necessary to convict the defendant. As outlined in more detail in Chapter Five, this means that whether a noncitizen's conviction is classified as an aggravated felony (or triggers other grounds) will depend upon the information contained in the criminal record, specifically, the defendant's plea statement.

C. Qualifying Misdemeanors Will Be Classified as Aggravated Felony Offenses

Although the immigration statute specifies that this provision defines aggravated *felonies*, circuit courts have extended its reach to misdemeanor offenses that fall within the scope of its provisions.[9]

The 2011 amendments to the Washington misdemeanor sentencing statutes eliminated the possibility that Washington misdemeanor offenses can be classified as aggravated felonies where such classification was dependent upon imposition of one year sentences. There are only a handful of Washington misdemeanor offenses that now risk aggravated felony classification under the other provisions of this definition.

Misdemeanor convictions, particularly for Theft 3rd degree and certain Assault 4th degree, that were committed prior to the effective date (July 22, 2011) of these amendments and where a sentence of 365 days was imposed (regardless of suspended time) will still be classified as aggravated felonies under immigration law and prosecuted by ICE as such.

---

[8] *See Taylor v. United States*, 495 U.S. 575, 599, 601 (1990) (introducing the "categorical" and "modified categorical" approach in the sentencing context); *but see Nijhawan v. Holder*, 129 S.Ct. 2294, 2300 (2009) (introducing a "circumstance-specific" approach that applies to certain components of specific removal grounds that are based on non-record facts about a specific criminal incident).

[9] *See, e.g.*, *United States v. Gonzalez-Tamariz,* 310 F.3d 1168, 1170 (9th Cir. 2002) (holding that a Nevada misdemeanor battery conviction with a 365 day sentence imposed constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)); *Matter of Small,* 25 I&N Dec 448 (BIA 2002).

D. Categories of Offenses Classified as Aggravated Felonies[10]

The aggravated felony definition includes the following categories of crimes:

Offenses Against Persons that can be Classified as Aggravated Felonies

- Murder;[11]
- Rape;[12]
- Convictions that qualify as "sexual abuse of a minor" offenses;[13]
- Any crime of violence, per 18 U.S.C. § 16, with a sentence of 1 year or more;[14]
- Demand of or receipt of ransom;[15]
- Child pornography;[16]
- Federal alien smuggling convictions;[17]
- Involuntary servitude and human trafficking;[18]
- RICO convictions;[19]

Offenses Against Property that can be Classified as Aggravated Felonies

- Theft, burglary, or possession of stolen property, with sentence of one year or more;[20]
- Commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers, with a sentence of one year or more;[21]
- Money laundering, as defined by federal law, in an amount exceeding $10,000;[22]
- Fraud, including theft and forgery, where the loss to victim exceeds $10,000;[23]
- Tax fraud;[24]

---

[10] 8 U.S.C. § 1101(a)(43) (definition of "aggravated felony).
[11] 8 U.S.C. § 1101(a)(43)(A).
[12] *Id*.
[13] *Id*.
[14] 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16 defines "crime of violence" as: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. *Leocal v. Ashcroft*, 125 S.Ct. 377, 383 (2004) (Negligent causation of injury is not a crime of violence); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-30 (9th Cir. 2006) (*en banc*)(A *mens rea* of recklessness is also too low to be a crime of violence.)
[15] 8 U.S.C. § 1101(a)(43)(H).
[16] 8 U.S.C. § 1101(a)(43)(I).
[17] 8 U.S.C. § 1101(a)(43)(N).
[18] 8 U.S.C. § 1101(a)(43)(K)(iii).
[19] 8 U.S.C. § 1101(a)(43)(J), described in 18 U.S.C. 1962 (racketeer influenced corrupt organizations).
[20] 8 U.S.C. § 1101(a)(43)(G). Convictions for receipt of stolen property must include an element that the person knew that the property was stolen or intended to divest the true owner of his or her property rights, to be an aggravated felony. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-87 (9th Cir. 2003).
[21] 8 U.S.C. § 1101(a)(43)(R).
[22] 8 U.S.C. § 1101(a)(43)(D).
[23] 8 U.S.C. § 1101(a)(43)(M). The loss in excess of $10,000 does not need to be an element of the crime charged, but can be proven in immigration proceedings through a variety of mechanisms. *Matter of Babaisakov*, 24 I&N Dec. 306, 316 (BIA 2007).

Other Offenses that can be Classified as Aggravated Felonies

- Trafficking, sale, manufacture, or delivery (and PWI) of a controlled substance;[25]
- Trafficking in firearms or explosives;[26]
- Other firearms offenses, including felon-in-possession;[27]
- Owning, managing, or supervising a prostitution business or providing transportation for the purpose of prostitution for commercial advantage;[28]
- Forgery of an immigration document with a sentence of one year or more;[29]
- Failure to appear for service of a sentence where the underlying offense was punishable by five years or more;[30]
- Failure to appear to answer to a felony charge with a possible sentence of two years or more;[31]
- Obstruction of justice, perjury, subordination of perjury, or bribery of a witness with a sentence of one year or more.[32]

4.2 OFFENSES CLASSIFIED AS CRIMES INVOLVING MORAL TURPITUDE (CIMT)

The immigration consequences of a conviction that is classified as a CIMT under immigration law will vary depending on a noncitizen's immigration status, criminal history and whether he or she is subject to the CIMT grounds of deportation or the CIMT grounds of inadmissibility.

A. Grounds of Deportation for Crimes Involving Moral Turpitude (CIMT)

These grounds of deportation apply to noncitizens who have been lawfully admitted.[33] They will also bar undocumented persons from seeking certain forms of discretionary relief in removal proceedings, which would permit them to remain lawfully in the U.S.[34]

---

[24] *Id.*
[25] 8 U.S.C. § 1101(a)(43)(B).
[26] 8 U.S.C. § 1101(a)(43)(C).
[27]8 U.S.C. § 1101(a)(43)(E).
[28] 8 U.S.C. § 1101(a)(43)(K)(i),(ii). The element of "commercial advantage" in § (K)(ii) does not need to be included as an element of the crime of which the person is convicted and can be established through the presentence report, the respondent's own convictions, or other evidence admitted in the criminal case. *Matter of Gertsenshteyn*, 24 I&N Dec. 111, 115-16 (BIA 2007).
[29] 8 U.S.C. § 1101(a)(43)(P).
[30] 8 U.S.C. § 1101(a)(43)(Q).
[31] 8 U.S.C. § 1101(a)(43)(T).
[32] 8 U.S.C. § 1101(a)(43)(S).
[33] 8 U.S.C. § 1101(a)(13)(A); 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).
[34] *See, e.g.*, 8 U.S.C. § 1229b(b)(1)-(2).

There are two grounds of deportation related to CIMT convictions:

- **One CIMT Conviction**: Convicted of one CIMT offense committed within five years of being admitted to the US and the *possible* sentence for the crime is one year or more,[35] or

- **Multiple CIMT Convictions:** Convicted of two crimes involving moral turpitude, not arising out of a single scheme of misconduct, at any time after being admitted, regardless of the sentence and regardless of whether the convictions occurred as the result of a single trial.[36]

EXAMPLE: David is an LPR from Guatemala who was lawfully admitted on April 8, 2006 following marriage to U.S. citizen spouse. He is convicted of Theft. Theft is a CIMT offense under immigration law. If David's crime was committed after April 8, 2011 (five years after admission), his conviction will not trigger deportation, even if it was a felony, since it was not within five years of his admission. If committed prior to April 8, 2011, David's conviction will trigger the "one CIMT offense" deportation ground if it was for a felony (maximum possible sentence of more than one year), but not if it were for a gross or simple misdemeanor (maximum possible sentence only 364 days). If David has a prior conviction for patronizing a prostitute (or any other offense deemed as a CIMT), then his theft conviction will trigger the "multiple CIMT offenses" deportation ground, regardless of his date of entry or the possible sentence.

B. Ground of Inadmissibility for Crimes Involving Moral Turpitude (CIMTs)

A noncitizen convicted of a CIMT offense will trigger the CIMT inadmissibility ground, which can cause the following consequences:

- Trigger an additional ground of removal for undocumented persons;
- Bar undocumented persons and refugees from obtaining LPR status and other forms of relief from removal.[37]
- Although it will not trigger removal for LPRs and refugees (for removal purposes refugees are subject to the CIMT *deportation* ground outlined

[35] 8 U.S.C. § 1227(a)(2)(A)(i). After the 2011 passage of SB 5168 in Washington, lowering the maximum available sentence for misdemeanors from 365 to 364 days, no Washington State misdemeanor conviction for an offense committed on or after July 22, 2011, will satisfy this element of the deportation ground. *See also Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011) ("Possible sentence" refers to the statutory maximum, not to the standard range of sentencing under the state sentencing guidelines).
[36] 8 U.S.C. § 1227(a)(2)(A)(ii). The term "single scheme" is interpreted narrowly to include only acts that are part of a "complete, individual, and distinct crime." *Matter of Islam*, 25 I&N Dec. 637, 639 (BIA 2011).
[37] 8 U.S.C. § 1182(a)(2)(A)(i)(I); s*ee e.g*., 8 U.S.C. § 1255(a); 8 U.S.C. § 1229b(b)(1)(C). Certain qualifying applicants for LPR status can seek discretionary waivers of this inadmissibility ground in conjunction with their application. *See* 8 U.S.C. § 1182(h) (undocumented persons); 8 U.S.C. § 1159(c)(refugees).

above), it will bar them from being lawfully readmitted to the U.S. if they depart.[38]

- Bar LPRs from seeking U.S. citizenship.[39]

C. Important: The "Petty Offense" Exception

Unlike the CIMT deportation ground, there are no additional requirements (such as date of admission or possible sentence) to triggering the CIMT inadmissibility ground other than a conviction for a CIMT offense. [40] However, there is an important exception to the CIMT inadmissibility ground that will keep qualifying noncitizens from triggering it.[41] Known as the "petty offense" exception, a noncitizen will not trigger this inadmissibility ground if he meets the following requirements listed below. The petty offense exception is particularly relevant to criminal courts as the sentence imposed (regardless of time suspended) is a key factor.

- Only one CIMT conviction;
- The maximum *possible* sentence was not more than one year; and
- The *actual* sentence imposed (regardless of time suspended) **was not more than 180 days**.[42]

EXAMPLE: Continuing with the example from above regarding David, an LPR charged with a theft offense. If David is convicted of a misdemeanor Theft 3rd degree, Theft 3rd degree *and* he received a sentence of 180 days with 179 suspended, he will qualify for the petty offense exception and will not trigger this ground of inadmissibility. So he would be able to be lawfully re-admitted to the U.S. if he departs and, importantly, remain eligible for U.S. citizenship. If David were undocumented, this scenario would permit him to remain eligible to seek lawful immigration status. If David is convicted of felony Theft 1st or 2nd degree, or if he received a sentence of more than 180 days (e.g., 364 days) he will not qualify for the petty offense exception.

---

[38] 8 U.S.C. § 1101(a)(13)(C); 8 U.S.C. § 1182(a)(2)(A)(i)(I).

[39] 8 U.S.C. § 1427(a)(3). LPRs who apply for U.S. citizenship are required to show "good moral character" for a period of five years (three if they obtained LPR status based upon marriage to a U.S. citizen) prior to their application. An applicant who triggers any of the crime-related grounds of inadmissibility (e.g., the CIMT ground) during the requisite period are statutorily barred from establishing good moral character during this period. *See* 8 U.S.C. § 1101(f).

[40] 8 U.S.C. § 1182(a)(2)(A)(i)(I). This ground can also be triggered by admissions to acts constituting the essential elements of a CIMT offense. However, such admissions are subject to significant procedural protection, such that immigration officials generally focus on convictions. *Matter of K-,* 9 I&N Dec. 715 (BIA 1957); *but see Pazcoguin v. Radcliff*, 292 F.3d 1209 (9th Cir. 2002).

[41] 8 U.S.C §1182(a)(2)(A)(ii)(II) (the so-called "petty offense exception" to inadmissibility for one CIMT).

[42] 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

D. Determining Whether a Conviction Is a Crime Involving Moral Turpitude (CIMT)

- **Analytical Framework for Determining CIMT Offenses**

Whether or not a state (or federal) criminal conviction constitutes a CIMT has traditionally been governed by an analytical framework known as the "categorical approach" which is outlined further in Chapter Five. Traditionally this has been an "elements-based" approach such that where the elements of the criminal conviction fall within the case law definitions of what constitutes a CIMT offense, the offense will be deemed a CIMT. Under this framework, the reviewing immigration judge or immigration examiner looks first to the underlying criminal statute and, if necessary, to the actual record of the noncitizen's conviction.[43]

Under the traditional categorical approach, the focus of the inquiry is not on what the defendant actually did, rather, it is to identify the elements of the crime for which she was convicted and compare them to the CIMT definitions. However, recent decisions from the Ninth Circuit and the Board of Immigration Appeals have attempted to erode the categorical approach's focus on the nature of the crime as defined by the elements of conviction.[44] These decisions have shifted the focus in many cases away from identifying the elements of the conviction to focus on the facts upon which the conviction "necessarily rests" as outlined in the reviewable criminal record.[45]

What this means for criminal courts. The important "take-away" is that, despite the current dynamic state of the law, in many cases the record of conviction created in the criminal proceedings will be the determinative factor as to whether a particular conviction is deemed to be a CIMT offense under immigration law that triggers removal (or denial of lawful status or U.S. citizenship). Given the court's participation in the development of the record of conviction that is created at plea and sentencing hearings (or trial) it is important for the court to be aware of the immigration context and consequences that may be influencing the creation of the criminal record. See Chapter Five for an overview of how the criminal record of conviction is used in immigration proceedings.

- **Definition of a "Crime Involving Moral Turpitude"**

Unlike the aggravated felony definition outlined at §4.1, the immigration statute does not provide a definition or enumerated list of crimes involving moral turpitude. Moral

---

[43] *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006). A statute that includes both removable and non-removable offenses and so requires examination of the record of conviction, is often referred to as "divisible."
[44] *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 937 (9th Cir. 2011)*; Aguilar-Turcios v. Holder,* __ F.3d __ (Aug. 15, 2012); *Sanchez-Avalos v. Holder*, __ F.3d __ (Sept. 4, 2012); *Matter of Lanferman,* 25 I&N Dec. 721, 729 (BIA 2012); *Matter of Silva- Trevino*, 24 I&N Dec. 687, 704 (A.G. 2008); *Matter of Ahortalejo-Guzman,* 25 I. & N. Dec. 465 (BIA 2011).
[45] *Id.*

turpitude is generally defined as conduct that "is inherently base, vile, depraved, and contrary to accepted rules of morality and the duties owed to other persons, either individually or to society in general."[46]

In the 2008 decision *Matter of Silva-Trevino*, the Attorney General put forth a broad "rearticulation" of the existing case-law, defining a CIMT as any "reprehensible conduct" that involves any form of *scienter.*[47] This summary reaffirmed that crimes involving a negligent *mens rea* do not constitute CIMT offenses but crimes of recklessness can.[48]

Despite the lack of a clear definition, however, it remains well-settled that the key test for moral turpitude is the presence of evil intent.[49] The designation of a crime as "infamous" or "*malum in se*" (intrinsically wrong), does not necessarily make a crime turpitudinous.[50] However, a crime that is only *malum prohibitum,* or purely regulatory, is generally not considered a CIMT (especially where there is no requirement of an intentional, knowing, or reckless *mens rea).* [51]

---

[46] *Knapick v. Ashcroft*, 384 F.3d 84, 89 (3d. Cir. 2004); *see also Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2009); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1169 (9th Cir. 2006).

[47] *See Silva-Trevino*, 24 I&N Dec. at 706. According to Atty. Gen. Ashcroft: "[T]he definition in existing Board precedent merits judicial deference . . . [T]his opinion rearticulates the Department's definition of the term [and] makes clear that, to qualify as a crime involving moral turpitude. . . , a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. This definition rearticulates with greater clarity the definition that the Board (and many courts) have in fact long applied." *id*. at n.1

Unfortunately, summarizing moral turpitude with the adjective "reprehensible" creates "a blanket definition at such an elevated level of generality as to retrospectively encompass virtually every BIA decision that has come before or will come afterward [and] cannot fairly be said to add clarity to definitions created by earlier case-law." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 922, n.4 (9th Cir. 2009) (Berzon, J., dissenting). However, the proposed *methodology* was radically new.

[48] *Id.* See earlier case-law on recklessness: *Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (aggravated assault a CIMT even where *mens rea* may be as low as recklessness); *Matter of Wojtkow*, 18 I&N Dec. 111, 113 (BIA 1981) (reckless homicide a CIMT); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1166-1168 (9th Cir. 2006).

[49] *Marmolejo-Campos v. Holder*, 558 F.3d 903, 923-24 (9th Cir. 2009) (Berzon, J., dissenting) (summarizing inconstant BIA case law on turpitude and "evil intent"); *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (noting that the Ninth Circuit has "held only that without an evil intent, a statute does not necessarily involve moral turpitude"); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) (noting that "[a] crime involving the willful commission of a base or depraved act is a crime involving moral turpitude, whether or not the statute requires proof of evil intent"); *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969) (a crime requiring even non-sinister willful conduct may involve turpitude because "[w]hen the crime is heinous, willful conduct and moral turpitude are synonymous terms").

[50] *See United States ex rel. Griffo v. McCandless*, 28 F.2d 287, 288 (E.D. Pa. 1928)*; Matter of Y-*, 2 I&N Dec 600 (BIA 1946); *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) ("While it is generally the case that a crime that is 'malum in se' involves moral turpitude and that a 'malum prohibitum' offense does not, this categorization is more a general rule than an absolute standard.").

[51] *Matter of Torres-Varela,* 23 I. & N. Dec. 78 (BIA 2001); *Matter of K-*, 7 I. & N. Dec. 178, 181 (BIA 1956).

The following generalizations can be applied in determining if a crime is a CIMT:

- Crimes that include an element of fraudulent intent are almost universally considered to involve moral turpitude.[52] An offense can be fraudulent in one of two ways: either the intent to defraud is an element of the offense, or the nature of the offense itself is "inherently fraudulent."[53] To be "inherently fraudulent," the offense must involve making knowingly false representations or using affirmative deceit to gain something of value.[54] Dishonesty or evasion alone does not necessarily amount to fraud.[55]

- Theft crimes, whether they are felonies or misdemeanors, almost always involve moral turpitude where they involve intent to permanently deprive an owner of property.[56]

- Crimes in which there is intent to cause or threaten great bodily harm, or in some cases if such harm is caused by a willful act or recklessness, involve moral turpitude.[57] Note, however, simple assault is generally not a crime of moral turpitude because only general intent is required and *de minimis* harm is usually sufficient for a conviction.[58]

- Offenses that are vile, base, or depraved and violate societal moral standards involve moral turpitude.[59] The offense also must be committed willfully or with evil intent[60] and "involve some level of depravity or baseness 'so far contrary to the moral law' that it gives rise to moral outrage."[61]

---

[52] *Jordan v. De George*, 341 U.S. 223, 229 (1951) ("[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.").
[53] *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1076 (9th Cir. 2007), *overruled on other grounds by U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (citing *Goldeshtein v. INS*, 8 F.3d 645, 647-50 (9th Cir. 1993))*; see also Carty v. Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005) ("Intent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes.")
[54] *See Navarro-Lopez*, 503 F.3d at 1076.
[55] *Id.* at 1077 ("Most crimes involve dishonesty of some kind, but our precedents require more for an offense to be considered fraudulent.… 'Fraud' is a term with a specific meaning in the law- it is not synonymous with 'dishonesty.'").
[56] *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012) (noting that crimes of theft or larceny are CIMTs); *U.S. v. Exparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999), *cert. denied*, 531 U.S. 842 (2000) (California petty theft is CIMT); *See also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009) (receipt of stolen property is not categorically a CIMT because it does not require intent to permanently deprive the owner of property); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); *cf. State v. Komok*, 113 Wn.2d 810, 816–17, 783 P.2d 1061 (1989) (the "intent to deprive" element of theft in Washington does not require an intent to deprive permanently).
[57] *Matter of Solon*, 24 I&N Dec. 239, 241-42 (BIA 2007).
[58] *Matter of Danesh,* 19 I&N Dec. 669, 670 (BIA 1988).
[59] *See, e.g.*, *Navarro-Lopez*, 503 F.3d at 1074.
[60] *Quintero-Salazar*, 506 F.3d at 693 (quoting *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006)). However, some offenses have been found to involve moral turpitude because they are "morally

- Offenses involving sexual conduct with a minor are crimes of moral turpitude.[62]

- Sex offenses involving abusive conduct or "lewd" intent are crimes of moral turpitude.[63]

4.3 GOOD MORAL CHARACTER DETERMINATIONS

LPRs who apply for U.S. citizenship are required to show that they are persons of "good moral character" (GMC) for a period of at least five years prior to the date of their application.[64] Additionally, a showing of GMC for specified periods prior to the date of application is required in order to be granted lawful status under any of the following avenues:

- LPR status as the spouse or child of a U.S. citizen/LPR spouse from whom the applicant is a survivor of domestic violence (a.k.a., the VAWA self-petitioning process);[65]
- LPR status after obtaining a T Visa as a victim of trafficking;[66]
- Cancellation of removal (and thereby, a grant of LPR status), a form of relief that the immigration judge may grant in removal proceedings to long-time undocumented persons, as well as certain undocumented domestic violence survivors.[67]

"Good moral character" itself has no affirmative statutory definition. Instead, the immigration statute defines certain classes of persons as barred from establishing "good moral character."[68] If the applicant is statutorily barred because of criminal conduct or a conviction from showing "good moral character" during the required period, her application will be denied, and depending on the criminal conviction, removal proceedings may be instituted against her.[69] The relevant crime-related GMC bars are:

---

reprehensible and intrinsically wrong," without much attention to *mens rea*. *Matter of Olquin-Rufino* 23 I&N Dec. 896 (BIA 2006) (knowing possession of child pornography).

[61] *Navarro-Lopez*, 503 F.3d at 1071 (quoting *Jordan v. DeGeorge*, 341 U.S. 223, 236 n.9 (1951) (Jackson, J., dissenting)).

[62] *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705-07 (A.G. 2008) (sexual conduct with a minor whom the defendant knew or should have known was under 16 is a CIMT); *Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011) (same) *but see Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007).

[63] *Matter of Macias-Leon,* 2008 WL 5537792, at *2 (BIA Dec. 19, 2008); *Matter of Coronado Orozco,* 2008 WL 4722691 (BIA Oct. 3, 2008) (citing *Matter of Alfonzo-Bermudez,* 122 I&N Dec. 225 (BIA 1967)); *Matter of Alfonzo-Bermudez*, 12 I&N Dec. 225, 227 (BIA 1967); *Matter of Lambert*, 11 I&N Dec. 340, 342 (BIA 1965).

[64] 8 U.S.C. § 1427(a)(3). LPRs who obtained status via marriage to a U.S. citizen can seek U.S. citizenship after 3 years. 8 U.S.C. § 1430. LPRs serving in the military become eligible after 1 year. 8 U.S.C. § 1439.

[65] 8 U.S.C. § 1154(a)(1)(A).

[66] 8 U.S.C. § 1255(l)(1)(B).

[67] 8 U.S.C. § 1229b(b)(1)(B).

[68] 8 U.S.C. 1101(f), incorporating 8 USC §§ 1182(a)(2)(A)-(D), (6)(E),(10)(A).

[69] Note, however, that if the applicant shows exemplary conduct during the required period, his application cannot be denied based solely on his prior criminal record. *See Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir. 1996).

- Triggering any of the crime-related grounds of inadmissibility outlined at §1.1(C);[70]
- Serving 180 days or more in jail during the requisite GMC period;[71]
- A conviction for a crime classified as an aggravated felony.[72]

Two statutory exceptions in the inadmissibility and removal grounds also apply to GMC determinations:[73]

- The "petty offense" exception, outlined at §4.2(C) will apply to exempt one qualifying CIMT offense from barring a showing of GMC; and

- The GMC statute contains a specific exception for a single conviction for simple possession of less than 30 grams of marijuana.[74]

4.4 CRIMES OF DOMESTIC VIOLENCE

As outlined, domestic violence-related offenses create a significant risk of removal for noncitizen defendants, both those lawfully present as well as undocumented persons, regardless of their family ties, length of residence or other equities. Domestic violence offenses can trigger removal under any of the following grounds.

A. The Domestic Violence (DV) Ground of Deportation

- **When the DV Deportation Ground Applies**

A conviction, or a deferred disposition that constitutes a conviction under immigration law[75] (e.g., a stipulated order of continuance), for a DV-related offense can trigger the ground of deportation related to DV offenses (there is no corresponding DV ground of inadmissibility applying to noncitizens seeking admission). This will result in an order of removal for LPRs, refugees and others who have been lawfully admitted unless they qualify for one of the limited forms of discretionary relief from removal.[76]

[70] 8 U.S.C. § 1101(f)(3). There is also a bar for two or more gambling offenses during the period, at §(f)(5).
[71] 8 U.S.C. § 1101(f)(7).
[72] 8 U.S.C. § 1101(a)(8).
[73] *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008). Note, however that the affirmative waivers contained in the inadmissibility statute are not available to overcome statutory GMC bars. *Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009).
[74] 8 U.S.C.§ 1101(f)(3). The Good Moral Character *statutory exception* for one small marijuana possession coincides with the only statutorily *waivable* drug offense in the inadmissibility grounds, and with the only *statutory exception* to deportability in the deportation grounds. 8 USC 1101(f)(3); *compare* 8 USC §1182(h) *and* 8 USC § 1227(a)(2)(B)(i).
[75] 8 USC § 1101(a)(48)(A). See Chapter Six for information regarding what constitutes a conviction under immigration law.
[76] See §1.5(E) for more information regarding avenues for discretionary relief from removal that permit the immigration judge to allow otherwise removable noncitizens to remain lawfully in the U.S.

The DV-related deportation ground does not impact removal determinations for undocumented person who are already present without admission. However, triggering the DV-related deportation ground will render undocumented persons ineligible for important forms of discretionary relief that would otherwise permit the immigration judge to cancel their removal and allow them to obtain lawful status to remain in the U.S.

- **Elements of the DV Deportation Ground**

An offense must meet the following criteria in order to trigger the DV-related ground of deportability.[77]

- **The noncitizen must have been <u>convicted</u> for purposes of immigration law** - Deferred adjudication agreements, such as Stipulated Orders of Continuance (SOCs) will constitute convictions (in perpetuity and regardless of subsequent compliance and dismissal) under immigration law, and thus trigger this ground of deportation, where they satisfy the immigration statute's definition of conviction (e.g., where they include a defendant's stipulation to facts sufficient); [78]

- **The offense must be a <u>crime of violence</u> (COV) as defined by 18 U.S.C. 16**[79] - 18 U.S.C. § 16 defines "crime of violence" as: (a) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (b) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[80]

- **The offense must be a crime <u>against a person</u>** – Even though 18 U.S.C.'s COV definition includes offenses against both persons and property, the DV-related deportation statute's language is specifically limited to crimes "against a person[]."[81] Thus, property-related DV convictions such as Malicious Mischief should not result in removal orders premised on this ground;

---

[77] 8 U.S.C. § 1227(a)(2)(E)(i).
[78] See 8 U.S.C. § 1101(a)(48) for the definition of the term "conviction" for immigration purposes.
[79] This is the same statute that defines "crimes of violence" for purposes of the aggravated felony provision at 8 U.S.C. § 1101(a)(43)(F).
[80] *Flores-Lopez v. Holder* 685 F.3d 857,__ (9th Cir. 2012) ("[A] conviction[]is not a crime of violence because it requires only the use of *de minimis* force, as opposed to the "physical force" necessary to constitute a crime of violence. We agree."); *Singh v. Ashcroft,* 386 F.3d 1228, 1234 (9th Cir. 2004) (Oregon harassment not a categorical crime of violence because it may be violated just by " 'causing spittle to land on the person' of another") (citation omitted); *Sareang Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) ("[T]he force necessary to constitute a crime of violence [] must actually be violent in nature.") (internal citations omitted).
[81] 8 U.S.C. § 1227(a)(2)(E)(i).

- **The offense must have been committed against a person with whom the noncitizen has <u>the requisite domestic relationship.</u>**[82]

  - Under the immigration statute, this includes anyone covered by Washington's domestic violence laws: a current or former spouse of the person, an individual with whom the person shares a child in common, an individual who is cohabiting with or has cohabited with the person as a spouse, 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 any other individual who is protected from the person's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

  - R.C.W. 10.99.040(1)(d) requires the court to "identify by any reasonable means on docket sheets those criminal actions arising from acts of domestic violence."[83] Whether or not the state's DV designation is deemed an element of the offense does not control whether it provides the relationship element of the deportation ground.[84]

  - Documents in the criminal record of conviction, such as a charging document related to a guilty plea, or judgment and sentence, which identify the case as a "domestic violence" case pursuant to these statutes, will satisfy the domestic relationship element of the DV deportation ground. However, removing a DV designation does not necessarily prevent a noncitizen from being subject to this deportation ground since admissions in the defendant's plea statement or on the record that establish the requisite relationship to the victim will suffice.[85]

  - In some Assault 4th degree cases, defense counsel may try to eliminate the name of the victim. The name of the victim is not a requirement for conviction of this crime under Washington law.[86]

---

[82] *Id.*

[83] "Domestic violence" means a crime "committed by one family or household member against another," RCW 10.99.020(3). "Family or household member" is defined at 10.99.020(1).

[84] *See Matter of Velasquez*, 25 I&N Dec. 278, 280 n.1 (BIA 2010) (citing *United States v. Hayes*, 129 S.Ct. 1079 (2009) (domestic or family relationship need not be an element of the predicate offense to qualify as a deportable crime of domestic violence). Under Ninth Circuit law the domestic relationship must be proved up from record of conviction documents using the modified categorical approach . *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *contra Bianco v. Holder,* 624 F.3d 265, 269 (5th Cir.2010).

[85] *Tokatly v. Ashcroft*, 371 F.3d at 622- 623. *See also, Cisneros-Perez v. Gonzalez*, 465 F. 3d 386, 392 (9th Cir. 2006) (immigration judge may look to limited record of conviction to determine existence of requisite domestic relationship that is not an element of the criminal offense).

[86] *See State v. Plano*, 67 Wn.App. 674, 678-80 (1992); *State v. Johnston*, 100 Wash App. 126, 134 (2000); *State v. Larson*, 178 Wn.App. 227, 228-229 (1934).

B. Assault Offenses as Crimes of Domestic Violence

- **Assault 4th Degree**

Whether Assault 4th degree triggers the DV deportation ground for a noncitizen will be determined by the information contained in the record of conviction. Specifically, immigration authorities will review the record of conviction to determine whether the factual basis for the defendant's conviction rests on an assault that was committed with the requisite use of force.[87] Where the record reveals that the assault was for an offensive touching (or lacked the requisite use of force), a charge of removal pursuant to the DV ground cannot be sustained (regardless of whether the case is designated DV).[88] Conversely, a record of conviction revealing that the conviction rests upon the use or threat of use of force will trigger this deportation ground, if the other elements are satisfied.

- **Other Assault Offenses**

Intentional assaults with an element of "intent to cause physical injury," [89] of reckless causing of substantial harm, [90] or assault with a deadly weapon,[91] such as Assault 2nd Degree, will be classified as crimes of violence.[92] Offenses involving the *threatened* use of force are also likely to be deemed crimes of violence under immigration law. As such, where these crimes are designated DV offenses they will trigger the deportation ground.[93]

[87] *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1225-26 (9th Cir. 2008). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("Interpreting [18 U.S.C.] § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes."); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) (quoting *Singh v. Ashcroft*, 385 F.3d 1228, 1233 (2004) ("The force necessary to constitute a crime of violence [under 18 U.S.C. § 16(b)] must actually be violent.")).

[88] *Matter of Sanudo*, 23 I&N Dec. 968, 974-75 (BIA 2006).

[89] *Matter of Martin*, 23 I&N Dec. 491, 499 (BIA 2002).

[90] *United States v. Lawrence*, 627 F. 3d. 1281, 1284 (9th Cir. 2010) (holding that RCW 9A.36.021(1)(a) was a COV pursuant to the Armed Career Criminal Act's definition of "violent felony," the relevant part of which, 18 USC § 924(e)(2)(B)(i), is nearly identical to 18 U.S.C. § 16(a) as far as the existence of the element of physical force); *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1089 (9th Cir.2005) (ruling that RCW§ 9A.36.021(1)(a) has the use of force as an element); *see, e.g.,In re Phyra Norng* 2008 WL 5537842 (BIA 2008) (same).

[91] *U.S. v. Grajeda* 581 F.3d 1186, 1192 (9th Cir.2009); *Aragon-Ayon v. INS*, 206 F.3d 847, 851 (9th Cir. 2000).

[92] No case addresses if a conviction for Assault 2 under RCW 9A.36.021(1)(e) ("[w]ith intent to commit a felony, assaults another") would automatically be a COV, as a common-law assault if the intended felony were specified as nonviolent and not against a person. *Cf. Matter of Juan Ramon Martinez,* 25 I. & N. Dec. 571, 574 (BIA 2011) (Assault with intent to commit a felony *against a person* is an aggravated felony).

[93] *Lisbey v. Gonzales*, 420 F.3d 930, 934 (9th Cir. 2005) (sexual battery is COV because by its nature it involves a substantial risk that physical force against a person might be used); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) ("Making terrorist threats" is a COV because it has as an element the threatened use of physical force against the person or property of another); *United States v. De La Fuente*, 353 F.3d 766, 770 (9th Cir. 2003) ("Mailing a threat to injure" may be COV because "creation and use of a 'fear of…unlawful injury' includes the elements of 'threatened use of physical force.'").

Assault offenses with a negligent *mens rea*, such as Assault 3rd Degree under R.C.W. 9A.36.031(d),(f) cannot currently be classified as COV offenses under immigration law; nor can offenses with a reckless *mens rea* such as Reckless endangerment under R.C.W. 9A.36.050; and thus will not trigger the crime of DV deportation ground, regardless of DV designation.[94]

- **Disorderly Conduct**

Disorderly conduct under R.C.W. 9A.84.030 is not deemed to be a deportable offense under the DV deportation ground or any other ground of inadmissibility or deportability.

C. Domestic Violence Offenses as Aggravated Felonies

All noncitizens, lawfully admitted as well as those who entered illegally, can be ordered removed for convictions classified as "aggravated felonies" under 8 U.S.C. § 1101(a)(43). In addition to rendering noncitizens removable, a conviction for an aggravated felony offense will eliminate virtually all avenues for a person to obtain discretionary relief from removal.[95]

Specifically, DV offenses that qualify as crimes of violence under 18 U.S.C. § 16 will also be classified as aggravated felonies under immigration law where a sentence of one year or more is imposed (regardless of time suspended).[96] This includes Assault 4th degree convictions committed prior to July 22, 2012, where sentences of 365 days were imposed. DV offenses that qualify as "sexual abuse of a minor" and "rape" offenses will also be classified as aggravated felonies.[97]

D. Domestic Violence Offenses as Crimes Involving Moral Turpitude

Convictions for domestic violence offenses may also trigger the grounds of deportation and of inadmissibility relating to crimes involving moral turpitude (see §4.2).[98] However, simple assault as under RCW 9A.36.041, has traditionally not been classified as a crime involving moral turpitude even if it is committed against a person with whom the defendant has a domestic relationship.[99]

---

[94] *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (force cannot be used negligently or accidentally); *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1130 (9th Cir. 2006) (reckless *mens rea* is insufficiently volitional as "use" of force to be a crime of violence under 18 USC 16); *Covarrubias Teposte v. Holder* 632 F.3d 1049, 1053 (9th Cir. 2011) (same); *contra Aguilar v. Attorney General of U.S.* 663 F.3d 692, 700 (3d. Cir. 2011).

[95] *See* §1.5(E).

[96] *See* 8 U.S.C. § 1101(a)(48)(B).

[97] *See* 8 U.S.C. § 1101(a)(43)(A).

[98] 8 U.S.C. § 1182(a)(2)(A)(i)(I). *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 2003) ("willful infliction of corporal injury on spouse or cohabitant" is a CIMT), *declined to follow by Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009)(assault not generally a CIMT unless it involves either intentional infliction of serious harm or infliction of harm on a protected class of victim; cohabitant distinguished from spouse).

[99] *See Matter of Danesh* 19 I. & N. Dec. 669, 671 (BIA 1988); *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). Note, however, the Attorney General's subsequent decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), has left this area of law unsettled. *See e.g.*, *Matter of Ahortalejo-Guzman,* 25 I. & N. Dec. 465 (BIA 2011).

E. Violations of Domestic Violence No-Contact/Protection Orders

This is a specific deportation ground that is distinct from the DV deportation ground outlined at §4.4(A). This ground is triggered where there has been a civil or criminal court finding that a noncitizen has violated a protection or no-contact order designed to protect against credible threats of violence, repeated harassment, or bodily injury.[100]

- No conviction is required to trigger the violation of a protection order ground (but a conviction will suffice). Rather, the government need only prove that there has been a judicial determination that the protection or no-contact order was violated and that the order was related to domestic violence.[101]

- The statute encompasses both civil and criminal protection/no-contact orders.

- A violation finding will trigger deportability under this ground even if the conduct that constituted the violation of the order was innocuous and did not in itself threaten "violence, repeated harassment or bodily injury" as outlined in the immigration statute.[102]

F. Stalking and Harassment Offenses

The DV ground of deportation also includes convictions related to stalking.[103] Although there are no decisions defining the term "stalking" for this deportation ground yet, offenses such as at R.C.W. 9A.46.110 will likely be deemed to qualify as "stalking" under this provision. It is possible for stalking offenses to be charged as aggravated felonies (as crimes of violence offenses) under immigration law where a sentence of one year or more is imposed.[104] Harassment offenses, such as those under R.C.W. 9A.46.020, Malicious harassment (R.C.W. 9A.36.080) and Telephone harassment (R.C.W. 9.61.230), risk triggering deportation as DV offenses (§4.4(A)), and where a sentence of one year is imposed, as aggravated felonies, if the record of conviction establishes that they involved the use or threat of use of force (e.g. if they fall within 18 U.S.C. § 16's COV definition). These offenses are also likely to risk being charged or deemed CIMTs.[105]

---

[100] 8 U.S.C. § 1227(a)(2)(E)(ii). There is no corresponding ground of inadmissibility.
[101] *Id*.
[102] *Alanis-Alvarado v. Holder*, 558 F.3d 833, 839-40 (9th Cir. 2009)*; Szalai v. Holder*, 572 F.3d 975, 978 (9th Cir. 2009); *Matter of Strydom,* 25 I&N Dec.507, 510 (BIA 2011).
[103] 8 U.S.C. 1227(a)(2)(E)(i).
[104] *See Malta-Espinoza v. Gonzalez*, 478 F.3d. 1080, 1084 (9th Cir. 2007) ("Harassing can involve conduct of which it is impossible to say that there is a substantial risk of applying physical force to the person or property of another"), *reversing Matter of Malta-Espinoza,* 23 I. & N. Dec. 656, (BIA 2004*). But see Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012). Such a determination may depend on the factual basis for the stalking conviction, as reflected in the record of conviction.
[105] See §4.2 for additional information regarding crimes of moral turpitude. The BIA has found that "threatening behavior can be an element" of a CIMT and that "intentional transmission of threats is evidence of a vicious motive or a corrupt mind." *See Matter of Ajami*, 22 I&N Dec. 949, 952 (BIA 1999) (aggravated stalking involving credible threat to kill or injure as part of a course of conduct, is a CIMT). In

4.5 CRIMES INVOLVING MINOR VICTIMS

A. Immigration Consequences for Crimes Involving Minors

Criminal convictions that involve a minor victim will trigger, or risk triggering, one of the following removal grounds. As highlighted throughout these materials, the consequences of doing so are most often, removal proceedings, mandatory detention, denial of eligibility for relief from removal and expulsion from the United States.

- **Domestic Violence Ground of Deportation**

While not *per se* related to minors, offenses involving minors (as well as adults) that are designated as DV crimes under Washington law that qualify as COVs under federal law will trigger this ground of removal. *See* § 4.4(A).

- **The "Crimes of Child Abuse, Abandonment or Neglect" Deportation Ground**

Noncitizens that have been lawfully admitted and are convicted of a crime of child abuse will trigger this specific ground of deportation.[106] Like the DV deportation ground, there is no corresponding ground of inadmissibility. However, convictions triggering this ground of deportation can bar undocumented persons from discretionary relief from removal that would grant them lawful status to remain in the U.S.[107]

The terms "crimes of child abuse, child neglect, or child abandonment" under this provision have been interpreted by the Board of Immigration Appeals broadly to encompass:

> "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… this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight [and] mental or emotional harm, including acts injurious to morals...."[108]

---

the case of harassment under RCW 9A.46.020, which has four different subsections, the one most likely to risk being charged as a crime of violence or a CIMT is 9A.46.020(1)(a)(i) (threat to bodily injure). A threat to only damage property under 9A.46.020(1)(a)(ii) should not be deemed a threat to use force "against a person," which the DV deportation ground requires.

[106] 8 U.S.C. § 1227(a)(2)(E)(i).

[107] *See, e.g.*, 8 USC 1229b(b)(1)(C) (cancellation of removal for undocumented residents); *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).

[108] *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008). *See also Matter of Soram*, 25 I&N Dec. 378, 380-81 (BIA 2010) (child endangerment can be a crime of child abuse for immigration purposes, even if actual harm or injury to the victim is not required).

- **Classification as an Aggravated Felony**

Classification of a conviction as an aggravated felony triggers the most severe consequences under immigration law. See §4.1 for more on aggravated felonies.

➢ **Rape**

Rape is per se an aggravated felony and encompasses child rape offenses. The courts have not decided whether it also includes statutory rape offenses such as Rape of a Child 3rd degree under R.C.W. 9A. 44.079.[109]

➢ **Sexual Abuse of a Minor (SAM)**

The plethora of Ninth Circuit case law grappling with how to define this term under the immigration statute is complex and remains volatile (particularly regarding consensual sexual contact with adolescents 15 years or older). The following are guidelines gleaned from current law: (1) The conduct prohibited by the criminal statute is sexual; (2) The statute protects a minor; and (3) The statute requires abuse. A criminal statue includes the element of abuse if it expressly prohibits conduct that causes "physical or psychological harm in light of the age of the victim in question."[110]

➢ **Crimes of Violence (COV)[111]**

While not per se related to minors, any conviction that meets the federal definition of a COV at 18 U.S.C. 16[112] will be deemed an aggravated felony if a sentence of one year or more is imposed (regardless of suspended time). As with many Washington offenses, it will often be the record of conviction from criminal proceedings that determines whether or not the conviction at issue involved the requisite use of force and can, thus, be classified as a COV.

➢ **Child Pornography Crimes[113]**

A Washington conviction where the reviewable criminal record reveals that a conviction rests on facts indicating that the crime involved child pornography, including

---

[109] *See Rivas-Gomez v. Gonzales,* 441 F.3d 1072, 1075 (9th Cir. 2006) (statutory rape in form of consensual sex with person under 16 is "rape."). This opinion was withdrawn for jurisdictional reasons, *see Rivas-Gomez v. Gonzales*, 2007 U.S. App. LEXIS 6606 (9th Cir. Mar. 22, 2007), and the court remanded the case to the BIA. Although there is no published case making this holding, DHS may re-assert this argument in the future.

[110] *Pelayo-Garcia v. Holder* 589 F.3d 1010 (9th Cir. 2009); *U.S. v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009); *See also Estrada-Espinoza v. Mukasey*, 546 F. 3d 1147, 1158 (9th Cir. 2008) (en banc), *abrogated on other grounds by U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc); *U.S. v. Baron-Medina*, 187 F.3d 1144, 1146-47 (9th Cir. 1999) (any sexual contact with a minor under 14 is *per se* abuse).

[111] 8 U.S.C. § 1101(a)(43)(F).

[112] See §18 U.S.C. 16 for the federal definition of COV offenses.

[113] 8 U.S.C. § 1101(a)(43)(I) (crimes described in 18 USC §§ 2251, 2251A, or 2252 are aggravated felonies).

possession, is likely to be deemed an aggravated felony as a crime "relating to child pornography."[114]

- **Crimes with Minor Victims as Crimes Involving Moral Turpitude**

The grounds of inadmissibility and deportation for crimes of moral turpitude can be, and often are, also triggered by offenses related to child abuse or minor victims.[115] See §4.2 for more on CIMT offenses under immigration law. Although the definition of "crimes of child abuse" outlined above does not specifically govern CIMT determinations, offenses involving physical harm to, or neglect of, a minor victim will generally be deemed CIMT offenses.[116] Note that all sexual contact offenses with minors also either qualify or be prosecuted by ICE as CIMT offenses.

B. Washington Crimes Regarding these Immigration Consequences

Offenses under R.C.W. 9A.36 and 9A.44 that specify "child" or "minor" as an element will clearly qualify as a "child" under the removal grounds outlined in §4.5(A) above. The same is true for whether or not the crime involves the requisite abuse, violence, moral turpitude or child pornography.

Offenses that do not specify the victim's minor status as an element arguably do not satisfy this element, and, as such, cannot trigger these removal grounds.[117] However, given the current volatility in the Ninth Circuit and Board of Immigration Appeals (BIA) case law, whether or not the victim's minor status is identified in the reviewable record of conviction is likely to be an important, and possibly determinative, factor in subsequent removal proceedings (regardless of whether it is an element of the statute of conviction).[118]

---

[114] *Aguilar-Turcios v. Holder*, --- F.3d ----, 2012 WL 3326618 (9th Cir. 2012) In *Aguilar-Turcios*, the Ninth Circuit held that a violation of Uniform Military Code of Justice directive prohibiting uses of government computer "involving pornography" is not categorically an aggravated felony relating to child pornography because (1) it lacks an element requiring that the pornography depict a minor and (2) there were no factual admissions mentioning child pornography or minors in the reviewable record of the count of conviction. In addition, the factual basis from a different charge could not be used under modified categorical approach.

[115] 8 U.S.C. § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i),(ii). *See e.g.*, *Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011) (any intentional sexual conduct by an adult with a child involves moral turpitude, if perpetrator knew or should have known that the victim was under the age of 16); *but see Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) (consensual intercourse between a 15 year–old and 21 year–old is not automatically a CIMT) (this decision was not followed by the BIA).

[116] *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) ("cruel or inhuman corporal punishment or injury" upon a child is a CIMT); *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 2003) ("willful infliction of corporal injury on spouse " is a CIMT); *Matter of Sanudo*, 23 I. & N. Dec. 968, 971 - 72 (BIA 2006) ("infliction of bodily harm upon a person[] deserving of special protection, such as a child []has been found a CIMT], because the intentional or knowing infliction of injury on such persons reflects a degenerate willingness [ ] to prey on the vulnerable or to disregard his social duty.").

[117] *E.g.*, RCW 9A.36.041(f) (Assault 3rd degree or Assault 4th degree).

[118] *Compare Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 515 (2008) (where criminal record shows conviction rests on fact that establishes the immigration statute definition, offense satisfies the removal ground only if fact is element of the criminal statute) *with Sanchez-Avalos v. Holder*, --- F.3d ----, 2012 WL 3799665 (9th Cir. 2012). *See also U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 927-28 (9th Cir. 2011)

Where the statute has a specific element of abuse, violent use of force or child pornography it will be deemed categorically to fall within the immigration statute provision at issue.[119] Where the statute is less clear or lacks such elements (e.g. Assault 4th degree), it will turn on the facts upon which the conviction rests as outlined in the record of conviction. **See Chapter Five for further explanation regarding the analysis of state convictions under immigration law and the importance of the record of conviction.**

In light of the importance of the record of conviction in determining the immigration consequences of numerous convictions involving minors, judges might encounter defense counsel trying to comply with his Sixth Amendment duties by carefully focusing on specific language and facts in creating the record of conviction that will follow his/her client into removal proceedings. In addition to **Assault 4th degree**, this is particularly true for the following offenses:

- **Child Molestation 3rd, R.C.W. 9A.44.089** – although certain to be prosecuted by ICE as an aggravated felony, where the record indicates that the conviction is based an otherwise consensual contact there are still unresolved issues as to whether Child Molestation 3rd will be classified as an aggravated felony by the courts.[120]

- **Communicating with a Minor for Immoral Purposes (CMIP) R.C.W. 9.68A.090 -** While it will always be deemed a crime involving moral turpitude, the Ninth Circuit has held that whether a CMIP offense will be classified as an aggravated felony as a sexual abuse of a minor offense will be determined by whether the conduct identified as the basis for the conviction in the record of criminal proceedings qualifies as "abuse" under immigration law.[121]

(where criminal record shows conviction necessarily rests on fact that establishes the immigration statute definition, offense satisfies the removal ground *even if criminal statute lacked this specific element*); *Matter Of Lanferman*, 25 I. & N. Dec. 721 (BIA 2012).

[119] *E.g.*, RCW 9A.44.076 (Rape of Child 2nd degree).

[120] RCW 9A.44.089 is broader than the aggravated felony definition of "sexual abuse of a minor." Although it contains two elements of the generic crime – sexual conduct with a minor – it covers conduct that is not necessarily abusive under Ninth Circuit case law. If an offense is not *per se* abusive, then Ninth Circuit case law requires, *inter alia,* a "sexual act." *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008), *abrogated on other grounds by United States v. Aguila–Montes de Oca,* 655 F.3d 915 (9th Cir. 2011).

[121] *Parrilla v. Gonzales*, 414 F.3d 1038, 1043-44 (9th Cir. 2005). (Immigration court was permitted to review the police reports to determine the conduct of conviction, which it found sexually abusive, because Parilla had entered an *Alford* plea and stipulated in his plea agreement that the criminal court could rely on the police report as the factual basis for his plea).

4.6 CRIMES AGAINST PERSONS (ADULTS) THAT ARE NOT DOMESTIC VIOLENCE-RELATED

A. Homicide Offenses

Crimes of murder have been included within the aggravated felony definition since its inception in 1988. Both **Murder 1st degree** and **Murder 2nd degree** under R.C.W. 9A.32 fall *per se* within the scope of its definition regardless of sentence imposed.[122]

- **Manslaughter 1st degree** under R.C.W. 9A.32.060 and **Vehicular Homicide** under R.C.W. 46.61.520 are not likely not to be classified as aggravated felonies under either the murder or crime of violence (or any other) provisions.[123] Convictions under the "recklessness" prongs of these statutes will, however, be deemed crimes involving moral turpitude (CMIT) offenses.[124]

- Regardless of the sentence imposed, **Manslaughter 2nd Degree** under R.C.W. 9A.32.070 will not trigger grounds of inadmissibility or deportability (assuming the victim is not a minor) as it cannot be classified as an aggravated felony offense (under either the murder or crime of violence provisions); nor can it be classified as a CIMT offense.[125]

B. Assault Offenses

- **Assault 1st Degree** under R.C.W. 9A.36.011 will trigger inadmissibility grounds (as a CIMT offense) and deportability grounds as both an aggravated felony (crime of violence)[126] and as a CIMT.[127]

- **Assault 2nd Degree** under R.C.W. 9A.36.021 will almost always be deemed a "crime of violence" under immigration law and, thus, almost always classified as an

---

[122] *Matter of M-W-,* 25 I&N Dec. 748, 758 (BIA 2012) ("murder" under 8 U.S.C. § 1101(a)(43)(A) includes a violation of any statute requiring that the individual acted with extreme recklessness or a malignant heart, regardless of whether the requisite mental state was due to voluntary intoxication and no intent to kill was established); RCW 9A.32.030 (requiring intent to cause death or circumstances manifesting an extreme indifference to human life); RCW 9A.32.050 (requiring intent to cause death).

[123] *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) ("Neither recklessness nor gross negligence is a sufficient mens rea to establish that a conviction is for a crime of violence under [18 U.S.C.] §16."). *See also Leocal v. Ashcroft,* 543 U.S.A. 1 (2004).

[124] *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 n.5 (A.G. 2008) (a CIMT must "involve[] some form of scienter" such as willfulness or recklessness); *Matter of Solon,* 24 I&N Dec. 239,__ (BIA 2007) ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.").

[125] *Id.*

[126] *U.S. v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009) (California assault with a deadly weapon is categorically a COV).

[127] *See Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon is CIMT).

aggravated felony, especially where a sentence of one year or more is imposed.[128] It will also always be considered CIMT.[129]

- Convictions for **Assault 3rd Degree under §(f) and §(d)** of 9A.36.031 (negligent felony assault) cannot be classified as aggravated felony crimes of violence or CIMT offenses since they are crimes of negligence.[130] As such, they will not trigger the corresponding inadmissibility or deportation grounds. Note that where the record indicates that the conviction "necessarily rests" on the crime having been committed with a firearm, convictions under these statutory provisions can trigger the firearms-related deportation ground.[131]

C. Kidnapping Offenses

- **Kidnapping 1st Degree** under R.C.W. 9A.40.020 and **Kidnapping 2nd Degree** under R.C.W. 9A.40.030 will prosecuted by ICE as a crimes of violence under 18 U.S.C. § 16, and therefore as aggravated felonies, when there is a sentence imposed of one year or more.[132] Kidnapping will be considered a CIMT.[133]

- **Unlawful Imprisonment** R.C.W. 9A.40.040 is likely to be prosecuted as an aggravated felony crime of violence where a sentence of one year or more is imposed or as a deportable crime of domestic violence if the requisite relationship is established in the record. [134] Unlawful Imprisonment will also likely be prosecuted as a CIMT if the record of conviction shows the use of force, threats or intimidation. Because there is no intent to harm or intent to use force as a required element, a

---

[128] *See Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (assault offenses are CIMTs if they necessarily involve aggravating factors that significantly increase their culpability, such as use of a deadly weapon, intentional infliction of serious bodily harm or intentional or knowing infliction of bodily harm on a person deserving of special protection).

[129] *Matter of Martin*, 23 I&N Dec. 491, 494 (BIA 2002) (an assault involving the intentional infliction of physical injury has as an element the use of physical force within the meaning of 18 U.S.C. § 16). *See also United States v. Lawrence*, 627 F. 3d. 1281, 1284 (9th Cir. 2010) (holding that RCW 9A.36.021(1)(a) constitutes a COV pursuant to the Armed Career Criminal Act's definition of "violent felony," the relevant portion of which, 18 U.S.C. § 924(e)(2)(B)(i), is nearly identical to 18 U.S.C. § 16(a) as far as the existence of the element of physical force).

[130] *Leocal v. Ashcroft,* 543 U.S. 1, 11 (2004) (negligent crimes are not COVs). *Matter of Silva-Trevino*, 24 I&N Dec. at 706 n.5 (negligent crimes are not CIMTs); *Matter of Perez-Contreras* 20 I&N Dec 615 (BIA 1992).

[131] *United States v. Aguila–Montes de Oca,* 655 F.3d 915 (9th Cir. 2011).

[132] 8 USC § 1101(a)(43)(F) (crime of violence); 8 USC § 1101(a)(43)(H) (crimes described in USC "relating to the demand for or receipt of ransom"); 8 USC § 1101(a)(43)(S) (offense relating to obstruction of justice).

[133] *Matter of Nakoi*, 14 I&N Dec. 208 (BIA 1972); *Matter of P--,* 5 I&N Dec. 444 (BIA 1953).

[134] The Ninth Circuit has not ruled on whether restraint *only through deception* or because a minor or incompetent victim acquiesces is a categorical crime of violence under 18 USC § 16. *See* RCW 9A.40.010(6); *U.S. v. Osuna-Armenta*, 2010 WL 4867380, at *6 (E.D.Wash. 2010) (Washington Unlawful Imprisonment includes elements not requiring the use or threat of force.) *but c.f. Dickson v. Ashcroft*, 346 F.3d 44, 49-51 (2d Cir. 2003) (unlawful imprisonment of competent adult, even if accomplished by deception, involves substantial risk of violence, whereas unlawful imprisonment of an incompetent person or a child under sixteen, could occur without satisfying the crime of violence definition of 18 USC § 16).

decision as to whether it is a CIMT may depend on the plea language and the facts established by the record of conviction.[135]

D. Sex Offenses

- **Rape** is *per se* an aggravated felony.[136]

- **Indecent Liberties R.C.W. 9A.44.100(1)(a)** by forcible compulsion will be an aggravated felony as a crime of violence (since the sentence will always be one year or more.)

- **Voyeurism 9A.44.115** will qualify as an aggravated felony unless the pleadings, record of conviction or factual basis establish that the conviction *necessarily rests* on sexual abuse of a minor or is linked to child pornography. Voyeurism is likely to be deemed a crime involving moral turpitude, but there is as of yet no immigration case-law addressing the issue.[137]

E. Disorderly Conduct

Disorderly Conduct under R.C.W. 9A.84.030 does not trigger any grounds of inadmissibility or deportation under immigration law. Like all convictions, it will be a negative discretionary factor in any application for immigration benefits, such as lawful permanent residence, U.S. citizenship or discretionary relief from removal.

---

[135] *Cf. Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010) (California misdemeanor false imprisonment was not a necessarily a conviction for a CIMT, and record held no facts narrowing it to a CIMT).

[136] 8 USC § 1101(a)(43)(F). *See U.S. v. Yanez Saucedo* 295 F.3d 991, 996 (9th Cir. 2002) (Rape 3rd degree under § 9A.44.060(1)(a) "fits within a generic, contemporary definition of rape, which can, but does not necessarily, include an element of physical force."). There is no case saying if a conviction for Rape 3rd Degree under RCW 9A.44.060(1)(b) is an aggravated felony as "rape" where the record of conviction shows it was exclusively by "threat of substantial unlawful harm to property rights of the victim." *See Yanez Saucedo*, 295 F.3d at 994 n.5 ("We need not address Yanez-Saucedo's arguments concerning § 9A.44.060[1](b), which defines rape as sexual intercourse under a substantial threat to the victim's property rights. Yanez-Saucedo argues that part (b) does not fit within the "classical definition" of rape because "theoretically" a person could be found guilty even if he had consensual sexual intercourse.").

[137] *See, e.g.*, *State v. Glas*, 147 Wn.2d 410 (2002) (holding that the part of the body the accused views doesn't have to be a part that would normally be concealed). In addition, the court held that "[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance" applies to locations where a person may not normally disrobe, but if he or she did, he or she would expect a certain level of privacy. . ." *Id* at 416.

4.7 CONTROLLED SUBSTANCE VIOLATIONS[138]

A. Possession Offenses

1. Lawfully Admitted Noncitizens & Possessory Controlled Substance Violations

Noncitizens who have been lawfully admitted to the U.S. (e.g. permanent residents and green card holders) and who are convicted of "a violation of (or conspiracy or attempt to violate) a law or regulation of a State, the United States, or a foreign country relating to a controlled substance" will trigger both the controlled substances violations grounds of removal[139] and inadmissibility.[140] See §1.1(B) and (C) for the immigration consequences of triggering these grounds.

- **Exception: Solicitation to Possess**

Offenses for solicitation to possess a controlled substance under R.C.W. § 9A.28.030 do not qualify as controlled substance offenses under immigration law and, thus, will not trigger this ground of deportation.[141]

- **Exception and Waiver: Simple Possession Less Than 30g of Marijuana**

The **controlled substances deportation ground** contains an explicit exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana."[142] Note, however, that misdemeanor simple possession under R.C.W. § 69.50.4014 encompasses possession of 40 grams or less of marijuana. Thus, in order to safely qualify for the exception, the defendant's record of conviction must clearly state that the amount actually possessed was less than 30 grams.

The corresponding **controlled substances inadmissibility ground** does not contain this exception. Rather it permits a limited universe of qualifying noncitizens that have marijuana possession offenses involving less than 30 grams to apply for a discretionary waiver of this ground. Like the deportation ground exception, in order to safely qualify for this waiver, the defendant's record of conviction must clearly state that the amount actually possessed was less than 30 grams.

---

[138] For immigration purposes, the federal definition of a controlled substance at 21 U.S.C. § 802 applies.
[139] 8 U.S.C. § 1227(a)(2)(B)(i).
[140] 8 U.S.C. § 1182(a)(2)(A)(II).
[141] *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9th Cir. 1997) (unlike "attempt" and "conspiracy" Congress did not include "solicitation" offenses in the deportation or inadmissibility grounds). This exception is recognized only in the Ninth Circuit.
[142] 8 U.S.C. § 1227(a)(2)(B)(i).

- **Eligibility for Relief From Removal For Longtime Permanent Residents**

Although conviction for possession of a controlled substance will trigger this ground of deportation (unless for solicitation or for less than 30 grams of marijuana as stated above), unlike conviction for a drug offense that qualifies as a drug-trafficking crime, LPRs who have lawfully resided in the U.S. for seven years will be eligible to request "cancellation of removal" from the immigration judge in removal proceedings. If granted they will be permitted to retain their lawful permanent residence.[143]

2. Undocumented Persons and Possessory Controlled Substance Violations

A conviction for possession of a controlled substance will trigger the controlled substances ground of inadmissibility for undocumented people.[144] In addition to establishing another basis of removal (beyond simply being undocumented), such a conviction will render a noncitizen ineligible for most legal avenues to obtain lawful immigration status, regardless of the person's equities.[145]

- **Exception: Solicitation to Possess**

Offenses for solicitation to possess a controlled substance under R.C.W. § 9A.28.030 do not qualify as controlled substance offenses under immigration law and, thus, will not trigger this ground of inadmissibility.[146]

- **No Marijuana Exception; Limited Waiver**

Unlike the deportation ground, the controlled substance violations inadmissibility ground does not include an automatic exception for first-time marijuana convictions involving 30 grams or less. Rather it permits a limited universe of qualifying noncitizens who have marijuana possession offenses involving no more than 30 grams to apply for a discretionary waiver of this ground. In order to safely qualify for the exception, the defendant's record of conviction must clearly state that the amount actually possessed was less than 30 grams.[147]

---

[143] 8 U.S.C. § 1229a(a).

[144] 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[145] *See, e.g.*, 8 U.S.C. § 1229b(b)(1)(C) (cancellation of removal for longtime undocumented persons); 8 U.S.C. § 1229b(b)(2)(A)(iv) (cancellation of removal for immigrant survivors of domestic violence); 8 U.S.C. § 1255(a) (adjustment of status to that of lawful permanent resident due to marriage to a U.S. citizen).

[146] *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9th Cir. 1997) (unlike "attempt" and "conspiracy" Congress did not include "solicitation" offenses in the deportation or inadmissibility grounds). This exception is recognized only in the Ninth Circuit.

[147] 8 U.S.C. § 1182(h) ("212(h) waiver" of inadmissibility). The § 212(h) waiver is available to the spouse, parent, son or daughter of a United States citizen or permanent resident, an applicant under the Violence Against Women Act's immigration provisions, or to anyone if the waivable conviction occurred at least fifteen years before the waiver application. There are restrictions for persons who committed the offense

3. Attempt and Conspiracy Convictions Trigger Inadmissibility & Deportation

Both the controlled substances ground of deportation and the ground of inadmissibility outlined above include convictions for any attempt or conspiracy to commit a controlled substance violation.[148] As such, unlike convictions for solicitation to possess, noncitizens who plead guilty to any attempt or conspiracy offense related to controlled substances will trigger this ground of inadmissibility and, if they have been lawfully admitted, trigger this ground of deportation.[149]

4. Paraphernalia Violations Constitute Controlled Substance Violations

Simple misdemeanor convictions related to drug paraphernalia under R.C.W. 69.50.412 are offenses related to a controlled substance under immigration law. As such, they trigger the controlled substance violation grounds of inadmissibility and deportation.[150] The exception and waiver for marijuana outlined above will apply if the paraphernalia conviction relates to one single simple possession of 30 grams or less of marijuana for personal use.[151]

Use of paraphernalia where the record of conviction and admitted factual basis establish that the paraphernalia involved manufacture of a controlled substance or other drug trafficking purpose, will be treated as a drug-trafficking crime and an aggravated felony.[152]

5. Simple Possessory Offenses Do Not Constitute Aggravated Felonies or Crimes Involving Moral Turpitude

Generally speaking, state simple possessory offenses will not be classified as drug-trafficking aggravated felony offenses under immigration law (absent specific prosecution for and findings of recidivism that correspond to federal recidivism procedures).[153] Simple possessory offenses are generally not prosecuted under immigration law as crimes involving moral turpitude.[154]

---

after becoming a permanent resident. The § 212(h) waiver can waive a CIMT or a single marijuana possession offense involving less than 30 grams (and no other drug crime).

[148] 8 U.S.C. § 1227(a)(2)(B)(i).

[149] 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C § 1227(a)(2)(B)(i).

[150] *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009) (possession of drug paraphernalia is offense relating to a controlled substance); *Bermudez v. Holder*, 586 F.3d 1167, 1168-69 (9th Cir. 2009); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786, 797 (9th Cir. 2009) (state conviction for possession of drug paraphernalia equivalent to drug possession); *Luu-Le v. INS*, 224 F.3d 911, 915-16 (9th Cir. 2000); *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

[151] *See Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009) (The 212(h) inadmissibility waiver is available if the applicant demonstrates by a preponderance of the evidence that his possession of paraphernalia "relates to" a single offense of simple possession of 30 grams or less of marijuana).

[152] 8 USC § 1227(a)(2)(A)(iii); 8 USC § 1101(a)(43)(B); 18 USC § 841.

[153] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010); *see also U.S. v. Munoz-Camarena*, 631 F.3d 1028, 1029-30 (9th Cir. 2011) (per curiam) (applying *Carachuri-Rosendo* to the illegal reentry sentencing context); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 391-94 (BIA 2007) (outlining

6. Deferred Sentence Resolutions

Imposition of a deferred sentence under R.C.W. 3.66.067 is a common resolution for first-time simple possessory (and other) offenses. As outlined in greater detail in Chapters Six and Seven, a plea entered in a case where a deferred sentence was granted remains a conviction ***in perpetuity*** even if the defendant complies with all conditions and subsequently withdraws her plea and the case is dismissed under state law. [155]

Consequently, noncitizens who plead guilty and are granted a deferred sentence for simple possession of a controlled substance will be deemed to permanently have a controlled substance conviction under immigration law that will trigger grounds of deportation and inadmissibility and render them ineligible for discretionary relief from removal regardless of any compliance and future dismissal.[156]

7. Expedited or Fast-Track Drug Proceedings

Numerous jurisdictions throughout Washington engage in "expedited" or fast-track procedures when dealing with first-time simple possessory offenses. In general, in these proceedings, the defendant agrees early on to plead guilty to the lesser offense of attempted possession (or conspiracy to possess). Unless such convictions qualify for one of the exceptions outlined above, such as solicitation to possess rather than attempted possession, convictions obtained through expedited procedures will trigger the controlled substances grounds of deportation and inadmissibility.

8. Legend Drug Convictions are broader than the drug removal grounds.

A negotiated plea to an offense involving a legend drug that is not identified in the pleadings, factual basis or the record of conviction as being a controlled substance will not trigger the controlled substance removal grounds.[157]

---

requirements for state recidivism prosecutions to sufficiently correspond to federal law to make the conviction qualify as an aggravated felony under immigration law). Washington does not have a qualifying recidivist possession drug offense. *See* RCW 69.50.408.

[154] *See Matter of Khourn,* 21 I&N Dec. 1041, 1046 n.5 (BIA 1997) (collecting circuit courts of appeal and state court cases).

[155] *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001); *Matter of Marroquin*, 23 I&N Dec. 705, 706 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 521 (BIA 1999) (state rehabilitative actions, such as dismissal after deferred sentence, have no effect on whether an individual is "convicted" for immigration purposes. *Matter of Boldan-Santoya* was vacated in part by *Lujan-Armendariz v. INS*, 222 F.3d 728, 743 (9th Cir. 2000), where the Ninth Circuit held that a first-time simple possession offense expunged under state law is not an immigration "conviction". That decision was later overruled for offenses committed after July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d 684, (9th Cir. 2011).

[156] The exception to this would be if there were a deferred sentence with a plea entered, but *no penalty, punishment or restraint of any kind*. This would not meet the definition of a conviction in the Immigration Act. *See Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010) (suspended non-incarceratory penalties do not meet the penalty or restraint requirements of conviction definition for deferred adjudications at 8 USC §1101(a)(48)(A)(ii)).

[157] "Legend drug" is defined in RCW § 69.41.010(9), (12); *see* RCW 69.41.030 (possession prohibited). *But see* RCW 69.41.072 (violations of chapter 69.50 not to be charged under chapter 69.41).

B. Drug Trafficking Offenses[158]

1. Drug Trafficking Offenses Under Immigration Law Generally

- **Drug Trafficking Defined Under Immigration Law**

Drug trafficking offenses qualify as drug trafficking crimes under immigration law if they are an "illicit trafficking" offense or a "drug trafficking crime."

- The term "illicit trafficking" offense is broadly defined and includes any offense with a commercial element.[159] Possession for sale and possession with intent to sell qualify as "illicit trafficking" offenses.[160]

- The term "drug trafficking crime" refers to any state offense that is sufficiently analogous to a federal drug felony as defined in 18 U.S.C. § 924(c)(2). [161] That inquiry almost always turns on whether the offense is a "felony punishable under" the Controlled Substances Act.

2. Immigration Consequences of Drug Trafficking Offenses

Convictions for drug trafficking offenses, such as R.C.W. 69.50.401, will render noncitizens both deportable and inadmissible under the grounds relating to a controlled substance conviction described.[162] Convictions for "illicit trafficking in a controlled substance," will always be classified as aggravated felonies under immigration law.[163] As such they will trigger certain removal for virtually all noncitizens, regardless of their immigration status and regardless of any family considerations or other equities.[164]

Exception: Solicitation to Deliver Under R.C.W. 9A 28.030. Like the controlled substances violation grounds of deportation and inadmissibility, a solicitation conviction based on a drug trafficking offense will not fall within the scope of the drug trafficking aggravated felony.[165]

3. Exception: Solicitation Convictions Under R.C.W. 9A.282.030

Convictions under Washington's generic solicitation statute, even if it is for solicitation to sell, manufacture or deliver a controlled substance, will not trigger the

---

[158] 8 U.S.C. § 1101(a)(43)(B); 8 USC § 1227(a)(2)(A)(iii); 8 USC §1228(b); 8 USC §1182(a)(2)(C).
[159] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).
[160] *Rendon v. Mukasey*, 520 F.3d 967, 975-76 (9th Cir. 2008).
[161] 8 USC § 1101(a)(43)(B); 21 U.S.C. § 841(a)(1); *Matter of Davis* 20 I&N Dec. 536 (BIA 1992).
[162] 8 U.S.C. § 1227(a)(2)(B)(i); 8 U.S.C. § 1182(a)(2)(A)(i)(II).
[163] 8 U.S.C. § 1101(a)(43)(B). Pursuant to the statute, this classification applies to convictions involving controlled substances as defined at 21 U.S.C. § 802, and includes drug trafficking crimes as defined at 18 U.S.C. § 924(c).
[164] *See e.g.*, 8 U.S.C. § 1229b(a)(3) (aggravated felony bar to cancellation of removal for longtime lawful permanent residents).
[165] *Leyva-Licea v. INS*, 187 F.3d 1147, 1149 (9th Cir. 1999).

controlled substance violations grounds of inadmissibility or deportability. They also will not be classified as drug trafficking aggravated felonies.[166]

4. Attempt and Conspiracy Convictions Related To Drug Trafficking

Both the aggravated felony definition and the controlled substance violation grounds of deportation and inadmissibility specifically include convictions for any attempt or conspiracy to commit a drug trafficking offense.[167] As such, noncitizens who plead guilty to any attempt or conspiracy offense related to drug trafficking will be classified as aggravated felons under immigration law and deemed deportable and inadmissible.

5. Ground of Inadmissibility for "Reason to Believe" Drug Trafficking

An undocumented noncitizen whom the government "knows" or has "reason to believe" has participated in drug trafficking is inadmissible (there is no corresponding "reason to believe" ground of deportation for noncitizens who have been lawfully admitted).[168] No conviction is required to trigger this ground. Rather the government can sustain its burden by any "clear, substantial, and probative evidence."[169] Drug trafficking has been defined under this provision as "some sort of commercial dealing,"[170] and "the unlawful trading or dealing of any controlled substance."[171] Evidence such as police reports, police testimony, admissions by non-citizens, delinquency adjudications, adult convictions, and other evidence of involvement in manufacture, sale or possession with intent to distribute have all been held to supply "reason to believe."[172]

This "reason to believe" inadmissibility ground also applies to anyone who has knowingly aided, abetted, or assisted in drug trafficking.[173] Any spouse, son, or daughter of a drug trafficker who has received some "financial or other benefit" from the trafficking is also inadmissible if the benefit was received in the previous five years.[174]

With the exception of U and T visa applicants, there are no exceptions or waivers to this ground of inadmissibility.

---

[166] *Coronado-Durazo v. INS,* 123 F.3d 1332 (9th Cir. 1997); *Leyva-Licea*, .187 F.3d 1147 (9th Cir 1999).
[167] 8 U.S.C. § 1101(a)(43)(U).
[168] 8 U.S.C. § 1182(a)(2)(C).
[169] *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977). *See also Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence").
[170] *Lopez v. Gonzales*, 549 U.S. 47, 47 (2006).
[171] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).
[172] *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979); *Matter of Rico*, 16 I&N Dec. 181, n. 160 (1977) ("reason to believe" found based on testimony of Border Patrol agents that respondent frequently drove a car in which 162 pounds of marijuana was found).
[173] 8 U.S.C. § 1182(a)(2)(C)(i).
[174] 8 U.S.C. § 1182(a)(2)(C)(ii).The standard is "knew or reasonably should have known" the illicit source.

C. Drug Courts, Drug Addiction & Drug Abuse

As outlined in Chapter 6, a drug court agreement entered into by a noncitizen will constitute a conviction in perpetuity under immigration law where there is a finding of guilt, entry of a guilty plea, or where the noncitizen admits facts sufficient to support a finding of guilt.[175] Drug court agreements, such as those presently in use in King County, do not require any of these conditions to be met in order for the defendant to enter into and complete drug court and, as such, do not constitute convictions under immigration law.[176] **See Appendix K for the "Immigration Safe" King County Drug Court Agreement.**

Both lawfully admitted as well as undocumented noncitizens will trigger a ground of inadmissibility where it is established that they are a *current* drug addict or abuser.[177] A noncitizen who has been lawfully admitted (e.g. a refugee, permanent resident or foreign student) can be found deportable for having been a drug addict or abuser at *any time since being admitted to the United States*.[178] Drug addiction is defined as use "which has resulted in physical or psychological dependence."[179] The definition of drug "abuser" is defined as nearly synonymous with "use" as it is generally deemed to include conduct beyond a single use of a controlled substance.[180]

Despite the inherent risks of admitting to a substance abuse problem, drug court agreements that do not constitute convictions under immigration law can, depending on an individual's circumstances, be less likely to result in removal or a bar to admission than an outright conviction for a controlled substance offense since this ground is infrequently invoked.

4.8 FIREARMS OFFENSES

A. The Deportation Ground for Firearms Offenses

Convictions for crimes related to firearm possession or sale trigger a ground of deportation for noncitizens who have been lawfully admitted to the U.S. (there is no

---

[175] 8 U.S.C. § 1101(a)(48)(A).

[176] *See* Appendix K for a copy of the King County Drug Court agreement, *available at* http://www.kingcounty.gov/courts/DrugCourt.aspx. .

[177] 8 U.S.C. § 1182(a)(1)(A)(iv). A lawful permanent resident will not become subject to the inadmissibility ground unless she makes a departure and a new admission. A departure of 180 days or less and return by an LPR who has no triggering criminal convictions is not considered a new admission. 8 U.S.C. § 1101(a)(13)(C).

[178] 8 U.S.C. § 1227(a)(2)(B)(ii). This specific ground as applied to LPRs has fallen generally into disuse.

[179] 42 C.F.R. § 34.2(h).

[180] The relevant regulations define drug abuse as "the non-medical use of a substance listed in section 202 of the Controlled Substances Act … which has not necessarily resulted in physical or psychological dependence." 42 C.F.R. § 34.2(g). "Non-medical use" is "more than experimentation with the substance (e.g., a single use of marihuana or other non-prescribed psychoactive substances, such as amphetamines or barbiturates). Technical Instructions for Medical Examination of Aliens, Amendments to p. III-14, 15.

corresponding ground of inadmissibility).[181] This provision encompasses any offense of "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying…any weapon, part, or accessory which is a firearm or destructive device" as well as attempt or conspiracy to do so.[182] This deportation ground is triggered by a conviction for a simple possession offense such as an Alien in Possession of Firearm (License violation) under R.C.W. 9.41.171, as well as many of the other offenses contained under R.C.W. 9.41 that include firearms as an element.

Statutes that contain the use of a "weapon" as an element, such as R.C.W. 9.41.300 (Weapons prohibited in certain places) will trigger deportation under the firearms ground where the ROC indicates that the weapon related to the conviction was, in fact, a firearm.[183] Even where an offense does not have a gun or a weapon as a statutory element, such as commission of negligent assault under R.C.W. 9A.36.031(f), where the record of conviction indicates that the conviction "necessarily rests" on having been committed with a firearm, it will trigger this deportation ground.[184]

The firearm offense provision, likewise, encompasses the use of a firearm in the commission of another crime, where the presence of a firearm is an element of that crime.[185] Firearms and weapons sentencing enhancements will also trigger deportability if the element of the use of a firearm was either admitted by the noncitizen or proven to a jury beyond a reasonable doubt.[186]

B. Firearms Offenses as Aggravated Felonies

Trafficking In Firearms.[187] Offenses under R.C.W. 9.41 (and any other Washington firearms-related offense) must meet the common-sense definition of "trafficking" in order to qualify as aggravated felonies under this provision. Most do not.

Federal Analogues. Firearms offenses that do not necessarily involve trafficking can also be designated as aggravated felonies under 8 U.S.C. § 1101(a)(43)(E) if they are sufficiently analogous to one of the many commonly prosecuted federal firearms offenses.[188] The most common Washington firearms offense that risks aggravated felony classification under these analogous federal statutes is Unlawful Possession of a Firearm.[189]

---

[181] 8 U.S.C. § 1227(a)(2)(C).

[182] 18 U.S.C. § 921 (a)(3)-(4). For deportation purposes the definition of a firearm is that found at 18 U.S.C. § 921(a), basically requiring a projectile "propelled by action of an explosive."

[183] *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 323 (BIA 1996) (transcript of respondent's plea and sentencing hearing where he admitted possession of a firearm was held to be part of the ROC and, thus, sufficient to establish that he was deportable for a firearms offense).

[184] *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 927-28 (2011) (en banc).

[185] *Matter of Lopez-Amaro*, 20 I&N Dec. 668, 674 (BIA 1993); *Matter of P-F-*, 20 I&N Dec. 661, 665 (BIA 1993); *Matter of K-L-*, 20 I&N Dec. 654, 757 (BIA 1993).

[186] *Matter of Martinez-Zapata*, 24 I&N Dec. 424, 426 (BIA 2007).

[187] 8 U.S.C. § 1101(a)(43)(C). This includes trafficking in explosives.

[188] *Id.* (See, for example, 18 U.S.C. § 922(g)(1)-(5)).

[189] 8 U.S.C.§ 1101(a)(43)(E)(ii), specifying an offense "described in" 18 USC § 922(g)(1).

- **Unlawful Possession of a Firearm (UPFA) R.C.W. 9.41.040**
    - Convictions under this statute will always trigger the firearms ground of deportation.
    - **UPFA 1st Degree R.C.W. 9.41.040(1)(a**) has been classified as an aggravated felony.[190]
    - **UPFA 2nd Degree R.C.W. 9.41.040(2)** will be prosecuted as an aggravated felony when the predicate prior conviction is a felony covered under R.C.W. 9.41.040(2)(a)(i). Where the prior conviction is one of the domestic violence misdemeanors or other non-felonies specified by that section or in §(ii), UPFA 2nd degree will not be an aggravated felony under the felon-in-possession provision.
    - R.C.W. 9.41.040 is not a clear match to the firearms-related aggravated felony definition because it punishes mere ownership without possession. A conviction under either UPFA 1st or 2nd degree for felon-in-possession that is limited to "owns" but is clearly not a conviction for possessing or having in control may not be classified as an aggravated felony firearms conviction.[191]
- **R.C.W. 9.41.171 Alien Possession of Firearms**
    - This offense is always considered a deportable firearms offense.[192]
    - The courts have not yet ruled on whether the current version of this statute is an aggravated felony.[193] Where the record establishes only that the accused is not a citizen of the United States or an LPR, has not obtained a valid alien firearm license pursuant to R.C.W. 9.41.173, and does not meet the requirements of R.C.W. 9.41.175 it will likely not be classified as an aggravated felony.

---

[190] *U.S. v. Mendoza-Reyes* 331 F.3d 1119 (9th Cir. 2003), *as amended, certiorari denied* 124 S.Ct. 33 ,(2003).(RCW 9.41.040(1)(a) addresses the full range of conduct described in 18 U.S.C. § 922(g)(1) and referenced in 8 U.S.C. § 1101(a)(43)(E)(ii)."

[191] 18 USC § 922(g)(1) covers only shipping, transporting, possessing or receiving. *U.S. v. Casterline*, 103 F.3d 76,78 (9th Cir.1996) *certiorari denied* 118 S.Ct. 106, 522 U.S. 835 (1997) (For purposes of felon-in - possession of a firearm statute, while ownership may be circumstantial evidence of possession, it cannot amount to, or substitute for, possession; possession, actual or constructive, must be proven. Ownership without physical access to, or dominion and control over, firearm does not constitute possession.)

[192] 8 USC § 1227(a)(2)(C).

[193] 8 USC § 1101(a)(43)(E)(ii); 18 USC § 922(g)(5).

4.9 DRIVING AND VEHICLE-RELATED OFFENSES

A. DUI and Other Misdemeanor Driving Offenses

- Neither felony nor misdemeanor convictions for alcohol-related **Driving Under the Influence** in violation of R.C.W. 46.61.502[194] trigger any criminal conviction-based grounds of inadmissibility or deportation.

- **Driving While License Suspended** under R.C.W. 46.20.342 and **No Valid Operator's License** under R.C.W. § 46.20.015 do not fall under any enumerated ground of deportation or inadmissibility in the immigration law.

B. Attempting to Elude Police Vehicle

- **Attempting to Elude As A Crime Involving Moral Turpitude**

The Board of Immigration Appeals held that the pre-2003 version of R.C.W. 46.61.024 does constitute a crime involving moral turpitude under immigration law. [195] The 2003 amendments lowering the *mens rea* to require only "reckless" conduct[196], rather than "wanton or willful disregard for the lives or property" of others, is not likely to change the CIMT classification.[197]

- **Attempting to Elude as an Aggravated Felony**

This offense will not be classified as a "crime of violence" aggravated felony crime of violence. Where a sentence of one year or more is imposed, an attempt to elude conviction is likely to be deemed an "obstruction of justice" aggravated felony.[198]

C. Reckless Driving

Reckless Driving has traditionally not been prosecuted by the government or classified by the courts as crime involving moral turpitude under immigration law. It also does not fall within any of the provisions of the aggravated felony definition. As such,

---

[194] Alcohol-related DUI offenses are not crimes involving moral turpitude. *Matter of Torres-Varela*, 23 I&N Dec. 78, 86 (BIA 2001). Alcohol-related DUIs are also not classified as aggravated felony "crimes of violence." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). DUIs involving controlled substances risk triggering the controlled substances grounds of deportation and inadmissibility.

[195] *Matter of Ruiz-Lopez* 25 I&N Dec. 551 (BIA 2011),*pet. for rev. denied,* 682 F.3d 513 (6th Cir. 2012).

[196] *See State v. Ridgley*, 141 Wn.App. 771, 781–82 (2007) (the "reckless manner" standard, effective as of 7-27-2003, in the attempting to elude statute involves a lesser mental state than the previous "wanton or willful" standard).

[197] *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (crimes committed with recklessness can be classified as CIMT offenses).

[198]*Matter of Valenzuela-Gallardo*, 25 I&N Dec. 838, 841-42 (BIA 2012) (Any offense that has as an element an "affirmative and intentional attempt, with specific intent, to interfere with the process of justice" may be an obstruction of justice aggravated felony under 8 U.S.C. § 1101(a)(43)(S), irrespective of the existence of an ongoing criminal ongoing criminal investigation or proceeding).

convictions under RCW. 46.61.500 will not trigger any grounds of inadmissibility or deportability.

D. Making a False Statement

Making a False Statement to an officer under R.C.W. 9A.76.175 is not classified as a crime involving moral turpitude as the Ninth Circuit has found that such offenses lack the requisite "fraudulent intent."[199]

E. "Hit and Run" Offenses

Whether or not convictions under RCW. 46.52.010 and RCW. 46.52.012 are deemed to be CIMTs will depend upon what is contained in the record of conviction as the specific basis for the conviction. [200] Since R.C.W. 46.52.010 only relates to failure to report the requisite information for an accident involving an unattended vehicle, and does not involve injury to a person, it is even less likely to be a CIMT offense if the conviction involves a conviction for minimum culpable conduct.

Since the criminalized conduct included in both RCW 46.52.010 and RCW 46.52.012 does not involve the use of force, whether intentional or not, but rather a failure of a duty to provide information or assistance, neither offense can be classified as a crime of violence aggravated felony. In addition, neither offense falls within the scope of any other provisions of the aggravated felony definition at 8 U.S.C. § 1101(a)(43).

F. Vehicular Assault and Vehicular Homicide

Vehicular Homicide R.C.W. 46.61.520

- Convictions under the DUI prong for vehicular homicide, RCW 46.61.520(1)(a), "while under the influence of intoxicating liquor or any drug," will not trigger removal as either crimes involving moral turpitude (CIMTs) or aggravated felony offenses. [201]

---

[199] *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). However, the Board of Immigration Appeals (BIA) has found that unsworn, false misleading *written* statements to a public official involved turpitude even if materiality was not an element, if there was intent to mislead or disrupt the performance of the official's duties. *Matter of Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006).

[200] *Cerezo v. Mukasey,* 512 F.3d 1163, 1169 (9th Cir. 2007); *Latu v. Mukasey*, 547 F.3d 1070, 1074 (9th Cir. 2008).

[201] *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (negligence (or strict liability) offenses cannot constitute crime of violence aggravated felonies). *See also Matter of Silva –Trevino*, 24 I&N Dec. 687, 698 n.1 (A.G. 2008) (to be classified as a CIMT, a crime must carry a *mens rea* more culpable than negligence). DUIs involving controlled substances risk triggering the controlled substances grounds of removal at 8 U.S.C. §§ 1182(a)(2)(A(i))(II), 1227(a)(2)(B)(i).

- Convictions under R.C.W. 46.61.520(1)(b), the recklessness prong for vehicular homicide, *will* be considered CIMT offenses,[202] but *will not* be considered aggravated felonies.[203]

- Convictions under R.C.W. 46.61.520(1)(c), the "disregard" prong for vehicular homicide, *will not* be considered aggravated felonies and should not be considered CIMT offenses, since they are crimes of negligence.[204]

Vehicular Assault R.C.W. 46.61.522

- Convictions under R.C.W. 46.61.522(1)(b), the DUI prong, for vehicular assault, "while under the influence of intoxicating liquor or any drug," will not trigger removal as either crimes involving moral turpitude (CIMTs) or aggravated felony offenses.

- Convictions under the recklessness prong for vehicular assault under R.C.W. 46.61.522(1)(a) *will* be considered CIMT offenses, but *will not* be considered aggravated felonies.

- Convictions under the "disregard" prong for vehicular assault under R.C.W. 46.61.522(1)(c) *will not* be considered aggravated felonies and should not be considered CIMT offenses, since they are crimes of negligence. Conscientious defense counsel may seek to make explicit for immigration purposes that, in pleading to a "disregard" prong, the offender is pleading to a crime of negligence.

4.10 PROPERTY OFFENSES

A. Identity Theft

ID Theft 1st Degree R.C.W. 9.35.020

- Convictions under R.C.W. 935.020(2), Identity Theft (ID Theft) 1st Degree, will be classified as a CIMT under immigration law.[205]

[202] *See Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994) (involuntary manslaughter with recklessness is a CIMT). *Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (aggravated assault found to be a CIMT even where *mens rea* may be as low as recklessness); *Matter of Wojtkow*, 18 I&N Dec. 111, 113 (BIA 1981) (reckless homicide found to be a CIMT)
[203] *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121 (9th Cir 2006) (en banc) (crimes of recklessness cannot be crime of violence aggravated felonies).
[204] *State v. Eike*, 72 Wn.2d 760, 765-766, 435 P.2d 680, 684 (1967) (disregard prong is of a negligence greater than ordinary negligence but "falling short of recklessness."); *State v. May*, 68 Wn.App. 491, 496 843 P.2d 1102, 1104 -1105 (1993) (same); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (negligence is not moral turpitude).
[205] *Juarez-Romero v. Holder*, 2009 WL 4913912, at *1 (9th Cir. 2009) (unpublished opinion)(Washington ID Theft 1st degree is always a CIMT, since it is a fraud crime.)

- A conviction for ID Theft 1st degree risks being classified as an aggravated felony theft offense if a sentence of one year or more is imposed *and* the record of conviction establishes that the intended crime is a theft, or that the means of identification of another person was itself stolen from a living person. [206]

- A conviction for ID Theft 1st degree also risks classification as an aggravated felony offense if the record of conviction establishes that the means of identification or financial information of another person was obtained by fraud or deceit or the intended crime involved fraud or deceit, and the loss to the victim is $10,000 or more. [207]

ID Theft 2nd Degree R.C.W. 9.35.020(3)

- ID Theft 2nd degree risks being classified as a CIMT unless the record of conviction indicates that the intended crime was not a CIMT, nothing of value was obtained, and the ID was not obtained by theft. [208]

- A conviction for ID Theft 2nd degree will be classified as an aggravated felony where a sentence of one year or more is imposed and the record of conviction establishes an unconsented taking from a living person. [209]

- Although it lacks the element of fraudulent intent, ID Theft 2nd degree could be charged as an aggravated felony "fraud or deceit" offense if the record of conviction establishes that the offense necessarily involved, or rests on facts that establish fraud or deceit, and there was a loss or attempted loss to the victims of $10,000 or more.[210]

B. Burglary Offenses

1. Burglary Convictions As Aggravated Felonies

In order for a burglary conviction to be classified as an aggravated felony under the "burglary offenses" provision, the Washington State statute must sufficiently match the immigration statute's definition of burglary, which is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[211]

[206] 8 U.S.C. § 1101(a)(43)(G).
[207] 8 U.S.C. § 1101(a)(43)(M)(i), (U)
[208] *See Matter of Hernandez-Leon*, 2011 WL 891906, at *1 n.1 (BIA 2011) (upholding immigration judge's bond ruling that DHS is *likely to prevail* that Arizona ID theft is a CIMT, although "the respondent raises some serious questions concerning whether the [] offense is . . . a crime involving moral turpitude").
[209] 8 U.S.C. § 1101(a)(43)(G); *Mandujano-Real v. Mukasey* 526 F.3d 585, 590 (9th Cir. 2008) (using identity of a dead person cannot be with intent to "deprive [an] owner of the rights and benefits of ownership,"); *Mandujano-Real*, 526 F.3d at 590 (" the Oregon law . . . encompasses conduct that is broader than that proscribed by the generic theft definition- conduct that does not constitute theft. For example, a person may be convicted under the law even if the owner of the identity consents").
[210] 8 USC § 1101(a)(43)(M)(i). Loss amount for this particular purpose is "circumstance-specific."
[211] 8 U.S.C. § 1101(a)(43)(G); *Taylor v. United States*, 495 U.S. 575, 598 (1990).

Since Washington's definition of a "building" under R.C.W. 9A.04.110 is broader than this generic definition (it includes, e.g., fenced areas and railway cars), immigration officials will look to the record of conviction to determine whether the noncitizens conviction matches the immigration statute's generic definition. Burglary convictions can also be classified as aggravated felonies under the "crime of violence" provision.

Where a sentence of one year or more is imposed:

- **Burglary 1st degree** (RCW 9A.52.020) – will always be deemed an aggravated felony under both the burglary and crime of violence provisions.[212]

- **Residential Burglary** (RCW 9A.52.025) has been definitively classified as an aggravated felony as a crime of violence, regardless of whether the conviction record establishes that it qualifies under the aggravated felony "burglary" provision.[213]

- **Burglary 2nd Degree** (RCW 9A.52.030) – Unlike Burglary 1st degree and Residential Burglary, in order for Burglary 2nd degree convictions to constitute aggravated felonies the record of conviction must clearly indicate that the defendant unlawfully entered or remained in a "building" or "structure" (versus, e.g., a cargo container or railway car).[214]

2. Burglary Offenses As Crimes Involving Moral Turpitude

- **Burglary 1st degree** will always be deemed a CIMT.

- **Residential Burglary** - Burglary of an occupied dwelling has been deemed to categorically be a CIMT, regardless of the underlying intended crime.[215]

- **Burglary 2nd degree** will be classified as a CIMT offense where the record of conviction reveals that the underlying intended crime is a CIMT offense.[216] For example, where the plea statement reveals that the intended crime was theft (generally a CIMT), the offense will be classified as a CIMT. However, a conviction wherein the plea statement shows that the intended crime was Malicious Mischief (not a CIMT), or the plea statement does not specify the crime the defendant intended to commit, the offense should not be classified as a CIMT.

---

[212] Even where the record of conviction does not show that the conviction squarely falls within the immigration statute's generic definition of "burglary," burglary of a dwelling will constitute a crime of violence under 18 U.S.C. § 16(b) as an offense that "by its nature involves a substantial risk that physical force against persons or property of another may be used in the course of committing the offense." *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).
[213] 8 USC § 1101(a)(43)(G); *United States v. Becker*, 919 F.2d at 571. .
[214] *See Taylor*, 495 US at 599-602.
[215] *Matter of Louissaint*, 24 I&N Dec. 754, 758-59 (BIA 2009).
[216] *Cuevas-Gaspar v. Ashcroft*, 430 F.3d 1013, 1020 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012); *Matter of M,* 2 I. & N. Dec. 721, 723 (BIA 1946); *Matter of G,* 1 I. & N. Dec. 403, 404-406 (BIA 1943)

Consequently, the record of conviction established during the criminal proceedings will determine whether the conviction is designated as a CIMT.

3. Burglary Offenses Designated as Domestic Violence Crimes.

- **Burglary 1st degree** and **Residential Burglary** constitute crimes of violence under immigration law. If the offenses are designated DV, they will trigger this ground of deportation.[217]

- **Burglary 2nd degree** convictions will trigger this ground of deportation where the record of conviction shows actual use of violent force and the conviction rests on an intended crime that qualifies as a crime against a person (e.g. assault). [218]

C. Trespass Offenses

Convictions for trespass under RCW 9A.52, even if designated as domestic-violence-related, will not trigger any grounds of deportation or inadmissibility.[219]

D. Theft, Stolen Property and Robbery Offenses

1. Aggravated Felony Classification

- A **theft** conviction will be classified as an aggravated felony under immigration law where a sentence of one year or more is imposed (regardless of time suspended).[220]

- **Theft** offenses can also be aggravated felonies, regardless of the sentence imposed under a separate provision of the aggravated felony definition where the record of conviction indicates that the conviction was for "theft by deception" and the loss to the victim was $10,000 or more. [221]

- **Robbery** offenses with a one year sentence will also be classified as aggravated felony crimes of violence.[222]

- **Receipt of stolen property** is also an aggravated felony where a sentence of one year or more is imposed.[223] However, convictions under R.C.W. 9A.56.150-170

[217] *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).
[218] *Ye v. I.N.S.*, 214 F.3d 1128, 1134 (9th Cir. 2000).
[219] *See Cuevas-Gaspar v. Ashcroft*, 430 F.3d 1013, 1020 (9th Cir. 2005) *abrogated by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012) (on other grounds); *Matter of M-,* 2 I&N Dec. 721, 723 (BIA 1946) (third degree burglary is only CIMT if crime intended to be committed within is turpitudinous).
[220] 8 U.S.C. § 1101(a)(43)(G).
[221] RCW 9A.56.020(1)(b) (theft "[b]y color or aid of deception"); 8 U.S.C. § 1101(a)(43)(M)(i) (crimes involving fraud or deceit where the loss to the victim is $10,000 or more).
[222] *United States v. David H.,* 29 F.3d 489, 494 (9th Cir. 1994).

will constitute aggravated felonies where the record of conviction makes clear that the conviction was for receiving, retaining or possessing the stolen property.[224] Where the record of conviction does not clearly specify, or indicates the conduct of conviction was for concealment or disposal of the stolen property, it is unclear whether the government would be able to sustain aggravated felony charges in removal proceedings.[225]

- **Trafficking in Stolen Property R.C.W. 9A.82.050-055** is also an aggravated felony where a sentence of one year or more is imposed.[226]

2. Classification As Crimes Involving Moral Turpitude

Theft, stolen property and robbery offenses have generally been deemed by the courts to be CIMT offenses.[227] Notably, theft in the CIMT context is defined differently than for purposes of aggravated felony classification. Specifically, theft is considered to involve moral turpitude only where a permanent taking is intended.[228]

E. Taking a Motor Vehicle Without Permission (TMVWP) & Vehicle Prowl

- **Taking a Motor Vehicle**

It is well-established that theft crimes inhere moral turpitude and as such constitute CIMT offenses under immigration law.[229] As such, TMVWP 1st degree under R.C.W. 9A.56.070 will always be a CIMT offense. However, TMVWP 2nd degree under R.C.W. 9A.56.075 is arguably not a CIMT where the record of conviction reveals only that the defendant was just riding in the vehicle, or even that the vehicle was driven away or taken, without the intent to permanently deprive. Such conduct can be analogized to "joyriding," which does not have the requisite intent to permanently deprive the owner of property to constitute a CIMT offense.[230]

---

[223] 8 U.S.C. § 1101(a)(43)(G) (a theft offense (including receipt of stolen property) for which the term of imprisonment is at least one year).

[224] *Compare Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000) *with Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887-88 (9th Cir. 2003).

[225] *Matter of Fernando Salas-Lopez*, 2007 WL 1724884, at *2 (BIA May 22, 2007).

[226] 8 U.S.C. § 1101(a)(43)(G) (a theft offense (including receipt of stolen property) for which the term of imprisonment is at least one year).

[227] *Matter of H-N-*, 22 I&N Dec. 1039, 1049 (BIA 1999) (California conviction for robbery 2nd degree is CIMT); *Wadman v. I.N.S.*, 329 F.2d 812, 814 (9th Cir. 1964) (receipt of stolen property is a CIMT).

[228] *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (PSP where intent to permanently deprive is not an element is not automatically a CIMT); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

[229] *See, e.g.*, *Cuevas-Gaspar v. Ashcroft*, 430 F.3d 1013, 1020 (9th Cir. 2005) *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012); *U.S. v. Exparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999); *Rahstabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994).

[230] *See e.g.*, *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161-62 (9th 2009); *Matter of M-*, 2 I&N Dec. 686, (BIA 1946); *Matter of P-*, 2 I&N Dec. 887, (BIA 1947); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941) (all

Where a sentence of one year or more is imposed on a TMVWP 1st or 2nd degree conviction it will be classified as an aggravated felony under immigration law.[231]

- **Vehicle Prowling**

➢ **Vehicle Prowling 1st Degree, R.C.W. 9A.52.095** (vehicle burglary) is highly likely to be charged as an aggravated felony where the sentence is one year or more.[232] If the record shows the conviction was for entry into an occupied motor home or dwelling, or if the intended crime is theft or some other CIMT, it will be charged as a CIMT as well.[233]

➢ **Vehicle Prowling 2nd degree R.C.W. 9A.52.100** will not be an aggravated felony unless there is a sentence of 12 months or more, *and* (1) if either the intended crime is a theft offense or the intended crime is a crime of violence, or (2) if the record of conviction shows that violent force was necessarily used in committing the offense. [234] Vehicle Prowling 2nd Degree will be a CIMT if the intended crime is a CIMT.[235]

F. Arson, Reckless Burning and Malicious Mischief Offenses

- **Arson in the 1st & 2nd Degree**

Arson 1st degree convictions will be classified as aggravated felonies unless the defendant did damage to structures only belonging to the arsonist, or the arson did not involve danger to another human being.[236] Arson 2nd degree will be an aggravated felony crime of violence where a sentence of one year or more is imposed. Arson will be classified as a CIMT.[237]

---

holding that offenses committed without the intent to permanently deprive an owner of his or her property are not categorically crimes of moral turpitude).

[231] 8 U.S.C. § 1101(a)(43)(G). *See U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc).

[232] 8 U.S.C. § § 1101(a)(43)(G), (U); *United States v. Becker,* 919 F.2d 568, 571 (9th Cir.1990); *Sareang Ye v. INS,* 214 F.3d 1128, 1133 (9th Cir. 2000) (vehicle burglary is outside the aggravated felony definition of a "burglary."); *but see Ngaeth v. Mukasey*, 545 F.3d 796 (9th Cir. 2008) (entering a locked vehicle with intent to commit theft is an attempted "theft offense.").

[233] *Cf. Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009) (burglary of occupied dwelling always a CIMT).

[234]*Cf. Sareang Ye v. INS,* 214 F.3d 1128, 1134 (9th Cir. 2000) (entry into a locked non-residential vehicle not essentially violent in nature). *But see Matter of Brieva,* 23 I&N Dec. 766 (BIA 2005) (felony unauthorized use of a motor vehicle is by its nature a crime of violence), *overturned on other grounds by Judulang v. Holder,* 132 S.Ct. 476, 481-482 (2011).

[235] *See, e.g.*, *Casas-Castrillon v. Mukasey* 265 Fed.Appx. 659, 661 (9th Cir. 2008) (applying rule of *Cuevas-Gaspar, supra*, that burglary is only inherently a CIMT when intended crime is a CIMT.)

[236] RCW 9A.48.010(2)(Arson can be to your own property); *Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007) (setting fire only to own property did not necessarily involve substantial risk of using force against person or property); *but see Matter of Palacios*, 22 I&N Dec. 434 (BIA 1998) (Felony arson is a crime of violence because of substantial risk that physical force may be used against the person or property of another, because of risk that fire may spread or that responders may be injured).

[237]The Ninth Circuit said that it was "undisputed" that arson is a CIMT in *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 2005). The BIA has long held that even attempted arson is a CIMT. *Matter of S-,* 3 I&N Dec. 617 (BIA 1949). If the conviction is a crime of violence and involves DV, it will also be a deportable

- **Reckless Burning R.C.W. 9A.48.040-50**

Reckless burning offenses are unlikely to be classified as aggravated felonies since the use of force against property to cause the damage is reckless and not intentional.[238] Reckless burning is only arguably a CIMT as the courts have not ruled on the issue.[239] What the criminal court record shows as the conduct of conviction will likely be determinative.

- **Malicious Mischief**

The Ninth Circuit has specifically ruled that Malicious Mischief 2nd Degree under R.C.W. 9A.48.080(1)(a) is *not* a CIMT. [240] While this decision is still good law, subsequent case law developments now mean that the immigration judge might review the ROC.[241] Where the ROC reveals that the requisite physical damage occurred due to conduct such as theft that is generally deemed to involve moral turpitude, the malicious mischief offense could now be designated a CIMT offense under immigration law. Conversely, where the ROC indicates only that the defendant caused a "diminution in the value of the property" or that the physical damage occurred in a manner that would not generally be deemed to involve moral turpitude (e.g. putting valuables out in the rain; by commission of a prank; or done merely to annoy), the conviction will not be classified as such.

Malicious Mischief convictions that receive a sentence of one year or more risk classification as aggravated felony crimes of violence where the conviction necessarily rests on facts that indicate that the defendant committed the property destruction by the use or threatened use of force as defined under 18 U.S.C.§ 16.[242] If identified as DV, a disposition where the conviction necessarily rests on facts that indicate that the unlawful property devaluation was brought about by the use or threatened use of force risks being charged as a deportable DV crime.[243]

---

crime of domestic violence; if it involves a specified minor victim it is likely to also be charged as a deportable crime of child abuse.

[238] *Cf Matter of Palacios-Pinera*, 22 I&N Dec 434 (BIA 1998) (arson requiring intentional property damage and reckless endangerment to other person is crime of violence under 18 USC 16(b)).

[239] A crime of recklessness can involve turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008). But Reckless Burning does not seem to entail the serious consequences contemplated in such cases, especially since the damaged property can be one's own. *Compare Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994) (reckless manslaughter a CIMT) *and Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (reckless aggravated assault a CIMT) *with Matter of Solon*, 24 I&N Dec. (BIA 2007) ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required [for crime to be CIMT].") *and Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996) (for assault to be a CIMT the element of a recklessness "must be coupled with an offense involving the infliction of serious bodily injury.").

[240] *Rodriguez-Herrera v. I.N.S.*, 52 F.3d 238, 240 (9th Cir.1995); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1019 -1020 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez-Gutierrez*, 132 S. Ct. 2011 (2012); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1169 (9th Cir. 2006).

[241] *See U.S. v. Aguila-Montes de Oca,* 655 F.3d 915 (9th Cir. 2011) (en banc); *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012); *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008).

[242] 8 U.S.C. § 1101(a)(43)(F).

[243] 8 U.S.C. § 1227(a)(2)(E)(i).

4.11 PROSTITUTION OFFENSES

A. The Inadmissibility Ground Related to "Engaging In" Prostitution

Noncitizens found to have "engaged in" prostitution will trigger a specific prostitution-related to inadmissibility grounds. [244] There is no corresponding ground of deportation. This is a *conduct-based* ground of inadmissibility that does not require a conviction. However, evidence of a prostitution-related conviction can suffice. This ground applies to acts by prostitutes and procurers ("pimps"), but not by customers.[245]

Prostitution is defined under immigration law as engaging in promiscuous sexual intercourse for hire.[246] To be found to have "engaged in" prostitution, a noncitizen must be found to have engaged in conduct that indicates a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value, or to have engaged in a pattern or practice of sexual intercourse for financial or other material gain.[247] A finding of a pattern or practice of prostitution requires that there be evidence of "continuity and regularity," as distinguished from "casual or isolated acts." The prostitution inadmissibility ground is not triggered by "casual or isolated acts,"[248] and does not penalize conduct less than intercourse.

B. Owning a Prostitution Business as an Aggravated Felony

Convictions for offenses related to owning, controlling, managing, or supervising a prostitution business, or for transporting for the purpose of prostitution when committed for commercial advantage, all qualify as aggravated felonies under immigration law. [249] The courts have held that the "commercial advantage" element of this provision is "circumstance specific," meaning that it does not need to be an element of the criminal offense. Thus, the government can meet its burden to establish this element of the removal ground by any substantial, credible and probative evidence (including testimony from the noncitizen).[250]

[244] 8 U.S.C. § 1182(a)(2)(D).
[245] *Matter of R-M-*, 7 I&N Dec. 392, 396 (BIA 1957).
[246] 22 C.F.R. § 40.24.(b); *Kepilino v. Gonzales*, 454 F.3d 1057, 1058 (9th Cir. 2006).
[247] *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th[t] Cir. 2006); *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008); 22 C.F.R. § 40.24(b).
[248] 22 C.F.R. 20.40(b).
[249] 8 U.S.C. § 1101(a)(43)(K).
[250] *Matter of Gertsenshteyn*, 24 I&N Dec. 111, 114 (BIA 2007); *rev'd by Gertsenshteyn v. U.S. Dept. of Justice*, 544 F.3d 137 (2d Cir. 2008); *but see Nijhawan v. Holder*, 557 U.S. 29, 38 (2009), (calling *Gertsenshteyn v. U.S. Dept. of Justice* into severe doubt).

C. Prostitution Offenses as Crimes Involving Moral Turpitude (CIMT)

All prostitution-related convictions under RCW 9A.88 will be charged as crimes involving moral turpitude (CIMTs) under immigration law. Thus, convictions for these offenses can trigger the applicable inadmissibility and deportation grounds for noncitizens unless they qualify for the exceptions outlined in §4.2, or some other form of discretionary relief from removal.[251]

D. Washington Prostitution Crimes Under R.C.W. 9A.88

RCW 9A.88.70-85 - Promoting Prostitution & Travel for Prostitution. A conviction under any of these statutes will or is highly likely to be classified as an aggravated felony under immigration law, especially where the government can prove that the person committed the crime for "commercial advantage." A noncitizen convicted for one of these offenses will also be determined to have engaged in prostitution and, as such, trigger the inadmissibility ground outlined. These offenses will also be classified as CIMTs.

RCW 9A.88.090 – Permitting Prostitution. Although only a simple misdemeanor under Washington law, this statute risks being classified as an aggravated felony under immigration law and triggering the related inadmissibility ground described, where the government can prove that the activity "related to" the *owning, controlling, managing, or supervising* of a prostitution business; or that the activity involved travel for prostitution and the individual factually derived a commercial advantage from her conduct. This offense will be deemed a CIMT.[252]

RCW 9A.88.110 – Patronizing a Prostitute. While a conviction for this offense cannot be classified as an aggravated felony and will not fall within the prostitution-related inadmissibility ground described, it will be deemed a CIMT offense and, as such, can trigger deportation or inadmissibility grounds that result in removal and denial of lawful status and citizenship.[253]

---

[251] *Rohit v. Holder*, 650 F.3d 1085, 1089-91 (9th Cir. 2012) (holding California statute penalizing solicitation of prostitution is a CIMT offense and providing overview of case law related to classification of prostitution offenses as (or as not) CIMT offenses); *Matter of Cordoba*, 2011 WL 400449 (BIA Jan. 25, 2011) (soliciting a prostitute is a crime of moral turpitude); *Matter of Peckoo*, 2010 WL 2846299 (BIA Jun. 21, 2010) (it is well-settled that soliciting prostitution inheres moral turpitude); *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965) (soliciting a prostitute constitutes a crime of moral turpitude); *Matter of W-*, 3 I&N Dec. 231 (BIA 1948) (keeping a "bawdy house" is a crime of moral turpitude); *Matter of W-*, 4 I&N Dec. 401, 402 (BIA 1951) ("It is well established that the crime of practicing prostitution involves moral turpitude.").

[252] *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965).

[253] *Rohit v. Holder*, 650 F.3d 1085, 1089-91 (9th Cir. 2012); *but see Matter of Gonzalez-Zoquiapan*, 24 I&N Dec 549, __ (BIA 2008) (there is a question if merely soliciting prostitution is a CIMT).

4.12 CRIMINAL CONVICTIONS AS NEGATIVE DISCRETIONARY FACTORS

Almost all applications for immigration status, relief from removal or other immigration benefits (e.g., U.S. citizenship) have a discretionary component. This means that in addition to establishing statutory eligibility for the immigration benefit that the noncitizen is seeking, the applicant must also convince the immigration judge or immigration examiner that s/he deserves, as a matter of discretion, to be granted the benefit.

So, even where a criminal conviction does not trigger statutory ineligibility for an immigration benefit, it will constitute an adverse discretionary factor that a noncitizen must overcome to warrant the favorable exercise of discretion. With regard to convictions and criminal conduct, this will almost always include a showing of compliance with conditions of probation, payment of court costs and rehabilitation, or certainly no meaningful recidivism.

Discretion is only exercised after statutory eligibility is determined. Thus, if the criminal disposition does not trigger a per se bar to eligibility, the applicant will be allowed to present evidence and provide explanations. Such an application can still be denied in the exercise of discretion.[254]

---

[254] *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 924 -925 (9th Cir. 2007) (Even if eligible to "adjust status" to LPR, the IJ and the BIA can consider criminal conviction in application for discretionary relief or adjustment of status); *Matter of Marchena,* 12 I&N Dec. 355 (BIA 1967) (conviction a non-CIMT did not trigger inadmissibility but applicant had failed to pay court-ordered restitution and LPR status was denied as matter of discretion); *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978) (factors deemed adverse to a waiver application include[]"the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability."); *Matter of Thomas*, 21 I&N Dec 20 (BIA 1995) (non-final conviction can be considered in exercise of discretion).