



NEWSLETTER

JULY 2012

IN THE NEWS

Our purpose is to centralize assistance for advocates and attorneys facing complex legal problems in advocating for immigrant survivors of domestic violence and sexual assault.

In This Issue:

A Practice Guide for Representing Self-Petitioning Applicants With Criminal Convictions or Criminal History (Part 2 of 3)

3. Crimes Involving Moral Turpitude (CIMTs)
 4. Controlled Substance (Drug) Offenses & Issues
 5. Multiple Convictions with Aggregate 5 Year Sentences
 6. Alien Smuggling
 7. Prostitution
 8. Practicing Polygamists
- B. Other Crime-Related Statutory Bars to Establishing Good Moral Character
1. Gambling Offenses
 2. False Testimony
 3. Aggregate Jail Time Served Of More Than 180 Days
 4. Aggravated Felonies

A Practice Guide for Representing Self-Petitioning Applicants With Criminal Convictions or Criminal History (Part 2 of 3)

By Ann Benson & Jonathan Moore¹

Editor's Note: Due to the length of this article, it has been divided into three parts. This is the second of these parts. The third installment will be published in the next ASISTA Newsletter. The forthcoming portions of this practice advisory will further discuss the exceptions to the Good Moral Character requirement. The entire Advisory is also available on our website at www.asistahelp.org.

Crimes Involving Moral Turpitude (CIMTs)

Under INA § 101(f)(3), classes of persons, whether inadmissible or not, described in INA § 212(a)(2)(A)(i)(I), relating to crimes of moral turpitude, do not meet the good moral character requirement. The first step is to understand what is, and is not, a CIMT. There is no simple list of CIMT offenses or easy definition. However, there are some guiding principles outlined here. It is a good idea to get expert assistance in

¹ Ann Benson and Jonathan Moore staff the Washington Defenders Immigration Project in Seattle, WA. They also serve as consultants to the ASISTA network. Additionally, they collaborate with Kathy Brady and Angie Junck of the Immigrant Legal Resource Center, authors of *Defending Immigrants in the Ninth Circuit (DINC)*, a comprehensive manual on the immigration consequences of crimes available from the ILRC at www.ilrc.org. Portions of these materials were adapted from the DINC manual and used here with permission. Thanks also to Cindy Lin, law student at the University of Washington School of Law for research and drafting contributions.

making these determinations, particularly in light of recent developments in the law.

Additionally, there are important exceptions contained in the statute, and outlined here, for when a conviction, even if it is a CIMT, does not trigger this ground of inadmissibility. And, keep in mind that, as with the other crime-related grounds of inadmissibility, self-petitioners who trigger this ground can seek a § 204(a)(1)(C) finding that GMC is not barred.

PRACTICE POINTER: Analyzing your client's offense to determine whether it is a CIMT can involve a complicated legal analysis. ASISTA consultants Ann Benson and Jonathan Moore have expertise in this area and are available to assist you.

Moral "Turpitude"² Defined: Crimes That Are and Are NOT CIMT Offenses

The definition of moral turpitude has been the subject of over a century of case law. Whether an offense can be classified as "involving moral turpitude" does not depend on classification as a felony or misdemeanor, nor on the severity of punishment allowable or actually imposed. The BIA has defined it as follows:

We have held that moral turpitude refers generally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . . Under this standard,

² "What error leads must err; O, then conclude / Minds sway'd by eyes are full of turpitude." Shakespeare, *Troilus and Cressida*, Act 5, Scene 2

the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society . . . [A]lthough crimes involving moral turpitude often involve an evil intent, such a specific intent is not a prerequisite to finding that a crime involves moral turpitude . . .”³

As if that were not sufficiently nebulous, in a controversial 2008 decision published less than three months prior to leaving office, the Attorney General (AG), without briefing, issued a decision that seems to radically broaden the methodology immigration judges use to determine if a conviction “involves moral turpitude.” The AG claimed to merely restate and clarify the traditional definition of a CIMT, but used an even vaguer and more ill-defined description: “reprehensible conduct” committed with “some form of scienter,” (intent) whether specific intent, deliberateness, willfulness, or recklessness.⁴ The ultimate impact of this is unclear. However, even with this confusion, some general guidelines for determining crimes that are, and are not, CIMTs remain.

³ *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 83 (BIA 2001)(most internal citations omitted).

⁴ *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, n. 1 (A.G. 2008) (“[T]his opinion rearticulates the Department’s definition of the term in a manner that responds specifically to the judicial criticism. As detailed . . . this opinion makes clear that, to qualify as a crime involving moral turpitude for purposes of the Act, 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.”). Offenses with a negligence *mens rea* should be indisputably outside of any CIMT definition.

In general, the following types of crimes have been held to involve moral turpitude:

- **Theft, Fraud & Deceit.** The U.S. Supreme Court and other authorities have long held that these offenses are crimes of moral turpitude. Crimes, whether felony or misdemeanor, in which either an intent to defraud or an intent to steal (with intent to permanently deprive) is an element;⁵
- **Offenses of Morally Offensive Character.** Offenses that are “vile, based, or depraved” and violate societal moral standards involve moral turpitude.⁶ The offense also normally must be committed willfully or with evil intent.⁷ This includes sex offenses in which “lewd” intent is an element;
- Crimes, (typically felonies) in which there is **intent to cause or threaten great bodily harm**, or in some cases if it is caused by a willful act or recklessness.
- **Drug Trafficking.** The Federal Circuit Courts and BIA have held that knowing or intentional participation in illegal drug trafficking, including solicitation to do so, involves moral turpitude

⁵ *Jordan v. DeGeorge*, 341 U.S. 223, 227-332 (1951).

⁶ See, e.g., in the 9th Circuit, *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1072 (9th Cir. 2007) and *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007).

⁷ *Quintero-Salazar, id.*, quoting *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006).

because it is “depraved” and “morally indefensible.”⁸

Thus, murder, rape, voluntary manslaughter, robbery, burglary with intent to commit larceny, theft (grand or petit), arson, certain aggravated forms of assault, and forgery all have been consistently held to involve moral turpitude.

On the other hand, crimes that involve none of the above elements have been held not to involve moral turpitude, including involuntary manslaughter (except where criminal recklessness is an element⁹), simple assault, “breaking and entering” or criminal trespass, simple assault or battery, “joyriding,” and various weapons possession offenses.

Specific types of crimes that have been held *not* to involve moral turpitude include:

- **Drunk Driving.** The federal courts and BIA *en banc* reaffirmed the long-established rule that simple driving under the influence (“DUI”) does not constitute a CIMT. This is true even if there are multiple DUI convictions.¹⁰

⁸ See, e.g., *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 904 (9th Cir. 2007) (holding that solicitation to possess more than four pounds of marijuana for sale involves moral turpitude for purposes of the moral turpitude deportability ground. The Ninth Circuit in this case, however, did not address whether possession of a very small amount of marijuana for sale might constitute moral turpitude.)

⁹ The BIA held that where criminally reckless conduct is an element of the offense under the penal code, involuntary manslaughter is a crime involving moral turpitude. *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994); see also *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992) (third degree assault statute that required criminal negligence but not recklessness is not turpitudinous).

¹⁰ *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001). However, one exception to this is an

- **Crimes of Negligence** are not CIMTs.¹¹ In general, regulatory offenses and strict liability offenses are not CIMTs,¹² although this is not an absolute rule.
- **Assault and/or Battery.** Simple battery and assault are not categorically crimes involving moral turpitude, unless actual infliction of tangible harm or intent to do serious bodily harm is shown in the record of conviction.¹³ Acts of recklessness, physical contacts that result in minor or insignificant injuries, or threats that cause no injury at all will not suffice to characterize these offenses as involving moral turpitude.¹⁴ Battery or assault directed against a spouse will not be held to involve moral turpitude based solely on the fact that the

aggravated DUI conviction under Arizona’s 28-697(A)(1) and 28-1383 (A) (1), for a DUI with the added element of knowingly driving on a suspended license. *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999) affirmed by *Marmolejo-Campos v. Holder*, 558 F.3d 903, 914 (9th Cir. 2009) (en banc).

¹¹ *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992).

¹² See, e.g., *Matter of Abreu-Semino*, 12 I. & N. Dec. 775, 776-777 (BIA 1968).

¹³ *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006), *Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006) (Calif. PC §§ 242, 243(e) are not crimes involving moral turpitude); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006) (same for A.R.S. § 13-1203(A)). Note that the Ninth Circuit *en banc* held that A.R.S. § 13-1203(A) is not a crime of violence under 18 U.S.C. § 16. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). It then remanded the case to the panel to consider the issue of moral turpitude; the citation used hereafter in this chapter is of the panel decision on remand, 468 F.3d 1159.

¹⁴ *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006).

victim was a person with whom the defendant has a domestic relationship. In *Galeana-Mendoza v. Gonzales* and *Matter of Sanudo*, the Ninth Circuit and BIA held that battery against a spouse under Calif. PC § 243(e) is not categorically a crime involving moral turpitude, because the offense does not require an injury or an intent to injure.¹⁵

- **Immigration Form and Document Violations.** The Ninth Circuit ruled that illegally completing an I-9 form in violation of 18 USC § 1546(b)(3), and making a false attestation about a social security card in violation of 42 USC § 408(a)(7)(B), are not necessarily crimes involving moral turpitude.¹⁶ Other Circuits disagree, however.¹⁷ In the past a conviction under federal law for knowingly possessing an altered immigration document was not held to involve moral turpitude unless intent to use the document unlawfully was an element of the offense.¹⁸

On the other hand, the BIA more recently found turpitude where the conviction requires “ ‘intent to mislead a public servant

in performing his official function’ through the use of a false written statement or other writing that he or she believes or knows is not true.”¹⁹ To “make misleading statements with an intention to disrupt the performance of a public servant’s official duties” was said to involve turpitude because the BIA has held that “impairing and obstructing a function of a department of government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means is a crime involving moral turpitude.”²⁰

Offenses involving false statements should always be viewed cautiously and analyzed carefully, starting with the required elements for conviction.

How to Determine If the Offense Is a CIMT: The Categorical Analysis

The Categorical Analysis. The categorical analysis is the established framework that a reviewing authority (e.g. an immigration judge, CIS examiner, or federal court) should use to decide whether or not your client’s conviction is a CIMT under immigration law. The categorical analysis is the cornerstone of the analysis of the immigration consequences of criminal convictions. It

¹⁵ *Galeana-Mendoza v. Gonzales*, *supra* note 13; *Matter of Sanudo*, *supra* note 13.

¹⁶ *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000).

¹⁷ *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), declined to follow by *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007); *Serrato-Soto v. Holder*, 570 F.3d 686 (6th Cir. 2009); *Lateef v. Dep’t of Homeland Sec.*, 592 F.3d 926 (8th Cir. 2010).

¹⁸ *Matter of Serna*, 20 I. & N. Dec. 579 (BIA 1992) (record of conviction under 18 U.S.C. § 1546 showed conviction was only for possession and not for use).

¹⁹ *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 34-35 (BIA 2006), treating 18 Pa. Cons. Stat. § 4904(a) (unsworn falsification to authorities is a crime involving moral turpitude). *See also Matter of B-*, 7 I. & N. Dec. 342 (BIA 1956) (willfully and knowingly making false statements in an application for a passport constitutes a crime of moral turpitude).

²⁰ *Jurado-Delgado*, 24 I. & N. Dec. at 35.

PRACTICE POINTER: In order to determine if your client’s conviction is a CIMT, you will need a copy of the criminal statute under which she was convicted. You will almost always need the court file as well.

PRACTICE POINTER: Reading the BIA decision in *Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006), provides a good overview for understanding the categorical analysis as applied to determinations of what constitutes a CIMT offense.

PRACTICE POINTER: The first step is always to include, where possible, in your cover letter accompanying the self-petition application, any legal argument why an offense is not a CIMT and the criminal inadmissibility ground does not apply. However, if CIS deems the offense a CIMT (or if it is clearly a CIMT), consider whether a § 204(a)(1)(C) exception may be applicable to the self-petitioner’s case. If an argument can be made in the affirmative, assert the reasons why a finding of GMC under the § 204(a)(1)(C) exception is in the public and national interest and deserving of a favorable exercise of discretion.

governs the analysis for not only CIMT offenses, but also determinations of what constitutes an aggravated felony under INA § 101(a)(43), and when a conviction triggers a ground of deportation under INA § 237(a)(2). It is also the subject of ongoing litigation at the BIA, and the federal courts. A detailed treatment is beyond the scope of these materials. However, in light of the frequency of clients with criminal convictions and the importance of this

analysis to immigration law, it is critical that advocates try to grasp the basic framework.

In sum, under the categorical analysis to determine whether a given crime involves moral turpitude, the focus is *not on the conduct of the defendant*, but rather, at how the crime is defined under the criminal statute of conviction. The essential question is, “Do the *elements of the crime for which this defendant was convicted* involve moral turpitude?”

The categorical analysis begins with the elements of the crime as set forth in the statute of conviction and the case law that interprets it. There may be many ways to violate the criminal statute or, in other words, commit the crime. Under the categorical analysis, the “minimum conduct test” governs. This test is that the minimum or least offensive conduct that could violate the statute must involve moral turpitude in order for a conviction under that statute to involve moral turpitude.²¹ The minimum or least offensive conduct to commit the offense requires a “realistic probability, not a theoretical possibility” that the conduct would fall, or be prosecuted, under the statute.²² If any of the elements *required* to sustain a conviction involve moral turpitude, the crime defined by the statute “categorically” involves moral turpitude.

If neither the statute nor the record of conviction sufficiently narrows

²¹ *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931).

²² *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Ninth Circuit holds that a “reasonable probability” exists *per se* when a statute explicitly includes conduct outside the generic federal definition, even if not prosecuted that way. See *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007); also *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008).

the offense to one involving moral turpitude, the reviewing authority should not hold the offense to be turpitudinous. Thus, a conviction of assault (generally not a CIMT without an aggravating factor) with intent to commit a felony, where the record of conviction did not identify the intended felony was held not to be a crime involving moral turpitude.²³

The Modified Categorical Analysis.²⁴

The modified categorical analysis, also known as “divisible statute analysis” is the second step in the process. This is the process that the authorities use when confronted with a criminal statute encompassing numerous offenses (either because the statute lists multiple separate offenses within it, or because by the wording of the statute, there are numerous distinct ways in which a person’s conduct could be found to violate it). For example, a code section may contain multiple subsections, some of which involve moral turpitude and some of which do not. *See, e.g.*, Calif. PC § 602, “criminal trespass.” It may define the crime in the disjunctive, as where, for example, California Vehicle Code § 10851 defines “vehicle taking” as a taking with intent to deprive the owner of possession “permanently” (turpitudinous) *or* “temporarily” (not turpitudinous). The connector “or” makes it a disjunctive list of separate offenses. Finally, a section may be so broadly or vaguely drawn that it could include turpitudinous and non-turpitudinous conduct, as is Calif. PC §

²³ *See Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989) (reviewing authority will not look to co-defendant’s record of conviction to further define the offense).

²⁴ In older BIA cases these principles are referred to as the law governing divisible statutes and the record of conviction.

272, “contributing to the delinquency of a minor.”

Where a conviction under a divisible statute creates an ambiguity as to whether the alien violated the section involving moral turpitude, the immigration authorities or the courts will look to information contained in the record of conviction in an attempt to resolve the question.²⁵ Where the record of conviction does not reveal whether the conviction involved turpitudinous conduct, the decision heretofore has been in favor of the defendant, and a finding of moral turpitude cannot be made.²⁶ Under the established model of this analytical framework, the reviewing authority will not consider facts outside the record of conviction to decide whether a given conviction involves moral turpitude.²⁷

The BIA has held that the record of conviction (ROC) consists of the indictment or information (the document filed by the prosecutor with the court charging the person with the crime), the defendant’s plea agreement or the jury’s verdict, the judgment and the sentence.²⁸ The ROC does not include the trial record, presentence report, the prosecutor’s sentencing remarks, or the trial judge’s opinion as to whether a given crime is turpitudinous. Importantly, it does not include the police report, unless the defendant agreed that the police report could be included in his or her plea agreement as the evidence setting forth

²⁵ *See, e.g., Matter of W*, 5 I. & N. Dec. 239 (BIA 1953); *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966); *Matter of Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999); *Matter of Short*, 20 I. & N. Dec. 136, 137-38 (BIA 1989).

²⁶ *Matter of C*, 5 I. & N. Dec. 65, 71 (BIA 1953).

²⁷ *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 759 (2d Cir. 1933).

²⁸ *Matter of Mena*, 17 I. & N. Dec. 38 (BIA 1979); *Wadman v. INS*, 329 F.2d 812, 814 (9th Cir. 1964).

the factual basis for the plea. It does, however, include a defendant's admissions made while entering his or her plea.²⁹

Matter of Silva-Trevino. In a controversial decision issued in November 2008, shortly before leaving office, outgoing Attorney General (AG) Mukasey certified a case to himself and, without allowing briefing, overrode the BIA's analysis of how to determine when a conviction is for a CIMT. In this decision, *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008) the AG attempted to establish a new approach to determining if convictions are for CIMTs. Basically, if, after applying the categorical and modified categorical approaches, the question was "unresolved," *Silva-Trevino* allows an immigration judge (IJ) to go beyond the record of conviction, take testimony, and consider anything he or she thought "necessary and appropriate," in deciding if turpitude were involved. In a recent case, the BIA ruled that where the conviction record establishes the conduct of conviction, immigration judges are not to go further and look behind the record or undermine plea agreements.³⁰

In addition to changing the *method* of determination, the AG's opinion in *Silva-Trevino* may be an attempt to refashion a broader definition of "crime involving moral turpitude," by recasting it as merely "reprehensible" conduct with "some form of scienter." The decision is

going through the courts and may ultimately arrive at the Supreme Court.³¹

While the overall implications of *Silva-Trevino* are very serious, it may not have as much of an impact on self-petitioners because of the possibility of a finding of GMC through the exception at INA § 204(a)(1)(C). Advocates should still strongly argue first, where possible, that the offense is not a CIMT under the categorical analysis and, then, in the alternative, why the applicant warrants a § 204(a)(1)(C) finding, and an overall favorable exercise of discretion should CIS decide that the offense is a CIMT.

Exceptions to the CIMT Inadmissibility Ground

The Petty Offense Exception

Under INA § 212(a)(2)(A)(ii)(II), there is a general statutory exception to inadmissibility for a *single* crime involving moral turpitude. This exception is known as the "petty offense exception." The requirements of the exception are:

- The noncitizen must have committed only one crime involving moral turpitude (ever);

²⁹ *Matter of Cassisi*, 10 I. & N. Dec. 136 (BIA 1963) (prosecutor's remarks); *Matter of Goodalle*, 12 I. & N. Dec. 106, 107-8 (BIA 1967); *Matter of Mena*, 17 I. & N. Dec. 38 (BIA 1979); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (*en banc*) (pre-sentence report).

³⁰ *Matter of Ahortalejo-Guzman*, 25 I. & N. Dec. 465, 468-9 (BIA 2011).

³¹ As of August 2012, the Seventh Circuit supports this approach; the Eighth Circuit will not follow it if it conflicts with Eighth Circuit precedent; the Third, Fourth, and Eleventh Circuits reject it; and the Ninth Circuit had not yet ruled. *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009); *Prudencio v. Holder*, No. 10-2382, slip op. (4th Cir. Jan 30, 2012); *Sanchez Fajardo v. Holder v. Att'y Gen.*, Nos. 09-12962 and 09-14845, slip op. (11th Cir. Oct. 12, 2011). In *Matter of Guevara Alfaro*, 25 I. & N. Dec. 417, 423 (BIA 2011) the BIA held that it is "bound to apply the methodology mandated by *Silva-Trevino*, absent otherwise controlling authority" in the Ninth and other Circuits.

- The noncitizen must not have been “sentenced to a term of imprisonment in excess of six months” (regardless of the amount of time she actually served in jail); and
- The offense must have a maximum *possible* sentence of not more than one year.³²

Most states classify felony offenses as crimes that carry a potential sentence of more than one year. This means that, in most states, a CIMT that is a felony cannot be a “petty offense.” An offense that qualifies as a petty offense will not trigger inadmissibility –and therefore not need a 204(a)(1)(C) finding, or bar GMC--even though it may clearly be a CIMT.³³ For example, a single simple misdemeanor theft offense where the maximum possible sentence is 90 or 180 days will never make a person inadmissible by itself.

Juvenile Offenses

Statutory Exception: Under the “youthful offender” exception, a noncitizen will not be found inadmissible under the moral turpitude ground, for an *adult* conviction if: 1) he or she committed (only the one) CIMT while under eighteen; and, 2) the commission of the offense and release from imprisonment occurred over five years before the current application.³⁴

Effect of Juvenile Proceedings. Note that if the noncitizen under eighteen

³² 8 U.S.C. § 1182(a)(2)(A)(ii)(II), INA § 212(a)(2)(A)(ii)(II).

³³ *Matter of Garcia- Hernandez*, 23 I. & N. Dec 590 (BIA 2003).

³⁴ 8 U.S.C. § 1182(a)(2)(A)(ii)(I), INA § 212(a)(2)(A)(ii)(I).

was tried in juvenile proceedings in the U.S. or abroad, he or she does not need to use this exception because there was never any “conviction” or “admission” of a crime for immigration purposes.³⁵

Controlled Substance (Drug) Offenses & Issues

INA § 101(f)(3) also incorporates the following drug-related criminal grounds of inadmissibility as statutory bars to a finding of good moral character:

Violation of a Controlled Substance Law

INA § 212(a)(2)(A)(i)(II) makes a noncitizen inadmissible if he or she has been convicted of, or admits to having committed, or admits to committing acts which constitute the essential elements of a violation (or a conspiracy or attempt to violate) of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21). A person who is a member of the “class of persons described within” this inadmissibility ground “during the period for which good moral character is required to be established” is barred from establishing good moral character, except in the case of a single offense of simple possession of 30 grams or less of marijuana.

Because no other drug conviction is waivable at adjustment of status, no other drug conviction can be waived under INA § 204(a)(1)(C) as a bar to good

³⁵ “We therefore reaffirm that an adjudication of youthful offender status or juvenile delinquency is not a conviction for a crime for purposes of the immigration laws.” *Matter of Devison*, 22 I. & N. Dec. 1362 (BIA 2000).

moral character. A self-petitioner with only a single offense of simple possession of 30 grams or less of marijuana does not need a finding under the § 204(a)(1)(C) GMC exception, but will need a § 212(h) waiver at adjustment.

In the rare case where a conviction record does not specify what the specific drug was, there may be a technical argument that it does not count as a conviction relating to a controlled substance under 21 USC § 802.³⁶

Controlled Substance Traffickers

INA § 212(a)(2)(C) provides that a noncitizen is inadmissible if immigration authorities “know” or have probative and substantial “**reason to believe**” that she ever has been or assisted a drug trafficker in trafficking activities, or if she is the trafficker’s spouse or child, and benefited from the trafficking within the last five years. The bar to good moral character under this inadmissibility ground cannot be waived under INA § 204(a)(1)(C).³⁷ The best strategy—really the only one -- in such cases, is to argue that this

inadmissibility ground factually does not apply to the self-petitioner’s case, either because the evidence indicates that “reason to believe” does not apply.

This ground of inadmissibility does not require a conviction. A noncitizen is inadmissible if immigration authorities have “reason to believe” (R2B) that the person is, has been or has assisted a drug trafficker in trafficking, or is a family member of a drug trafficker who has benefited from this activity within the last five years.³⁸ Specifically the spouse or children of an drug trafficker will trigger this ground if the spouse or child knew or should have known that, within the last five years, they received a benefit from the drug trafficking.³⁹ Because § (ii) of R2B only creates inadmissibility for 5 years, there can be a benefit to persuading DHS that the person is only inadmissible under § (ii) as a spouse who should have known where the money came from, rather than as an aider or abettor under § (i).

The R2B ground, is unique in that it depends not upon reality (e.g., upon the person actually having been or helped a trafficker) but upon the knowledge or reasonable belief of an immigration official. If immigration authorities only discover “reason to believe” the noncitizen has been a drug trafficker *after* he or she has been admitted, the person was not inadmissible when admitted. Thus the BIA held that a noncitizen drug trafficker who entered the United States at a time when ICE had not yet learned of his or her trafficking activities could not

³⁶ *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965).

³⁷ That is to say: INA § 204(a)(1)(C) can lift the GMC bar if there is a connection between the act or conviction and abuse, *and* if a potential waiver of inadmissibility for that act or conviction exists. Because there is no waiver for the “reason to believe” inadmissibility ground, there is no § 204(a)(1)(C) GMC exception for it, even if it were connected to abuse. Since § 101(f)(3) seems to require the commission of an offense “during such period” and “reason to believe” does not exactly require “commission” as such, if there is no conviction and no admission to the elements of a drug crime by the applicant, it may be possible to argue that “reason to believe” alone does not statutorily bar GMC under §101(f)(3). However, under INA § 212(a)(2)(C)(i) the person is nonetheless permanently inadmissible and can never adjust. Under INA § 212(a)(2)(C)(ii) the person is not inadmissible after 5 years from the last receipt of ‘benefits’ from a spouse’s trafficking.

³⁸ 8 U.S.C. § 1182(a)(2)(C)(i), INA § 212(a)(2)(C)(i).

³⁹ 8 U.S.C. § 1182(a)(2)(C)(ii), INA § 212(a)(2)(C)(ii).

later be found deportable for having been inadmissible at last entry.⁴⁰

An important requirement of the R2B inadmissibility ground is that there is evidence that shows that the applicant was *knowingly and consciously* connected to the drug trafficking in some way (e.g. aider, abettor or beneficiary).⁴¹ Additionally, there must be *substantial and probative evidence* that the noncitizen was engaged in the business of selling or dealing in controlled substances for it to apply.⁴² Possession or importation of drugs for one's own use is not "trafficking."⁴³ The BIA definition is so broad that it encompasses a single incident.⁴⁴ DHS must also prove the essential element of intent, which is the specific intent to distribute controlled substances.⁴⁵

⁴⁰ *Matter of Rocha*, 20 I. & N. Dec. 944 (BIA 1995). The 1997 extension of the former exclusion grounds to all non-citizens who had entered the US but were present without admission vastly increased the scope and impact of this ground of inadmissibility.

⁴¹ 8 U.S.C. § 1182(a)(2)(C)(i), INA § 212(a)(2)(C)(i).

⁴² *Matter of Davis*, 20 I. & N. 536, 541 (BIA 1992), using Black's Law Dictionary definition of "trafficking" meaning "commerce; trade; sale or exchange of merchandise, bills, money and the like." However, distribution for free when connected to drug sales could be held trafficking. Contrast *Matter of Martinez-Gomez*, 14 I. & N. Dec. 104 (BIA 1972) (alien pled guilty to maintaining place where drugs dispersed, current H&S § 11366; although sale was not required, the statute was aimed at preventing trafficking of drugs in such premise).

⁴³ *Matter of McDonald and Brewster*, 15 I. & N. Dec. 203, 205 (BIA 1975).

⁴⁴ *Matter of Rico*, 16 I. & N. Dec. 181 (BIA 1977).

⁴⁵ See, e.g., *Matter of Rico*, *supra* at 186 (1977) (finding that the petitioner was a "knowing and conscious participant" in an attempt to smuggle drugs into the United States which "brings him within the provisions of section 212(a)(23) of the Act relating to 'illicit trafficker'"); *Matter of Favela*, 16 I. & N. Dec. 753, 755 (1979) (upholding the IJ's finding that the alien was a "conscious participant" in an attempt to smuggle drugs into the United States and thereby excludable under section 212(a)(23)).

You should look carefully at whether R2B really exists. In the case of a noncitizen who asserts that she did not participate in drug trafficking, her credibility is likely to be an issue that can and should be addressed by evidence. In *Lopez-Umanzor v. Gonzales*,⁴⁶ the Ninth Circuit considered the case of a domestic violence victim who asserted that, contrary to a police detective's testimony, she did not participate in a drug transaction conducted by the abuser. Counsel called her pastor to testify that she was a credible person and not involved in trafficking, and attempted to have experts in domestic violence testify to corroborate her story of abuse. After finding that the IJ's erroneous preconceptions about domestic violence kept him from making a reasoned decision on VAWA cancellation, the court found that this also might have influenced his decision not to believe that the woman was not a drug trafficker. The court remanded the case to the IJ to hear the expert testimony about domestic violence and to reconsider his decision about her credibility with respect to the trafficking accusation.⁹¹

Possible Exceptions for Controlled Substance Offenses

Accessory After The Fact, Misprision & Other Miscellaneous Offenses

Accessory after the fact (AATF) and misprision of felony (a federal crime) are committed when an individual in some way acts to help a criminal avoid arrest, prosecution or punishment. Courts and the BIA have found that AATF

⁴⁶ *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005).

⁹¹ *Id.* at 1058-1059.

and misprision do not take on the character of the underlying offense and therefore, do not “relate to” drugs *per se*, but to general law enforcement purposes. Therefore such a conviction is not a drug crime for immigration purposes, even if the underlying offense had to do with drugs. Whether these offenses “involve moral turpitude” is a separate question. The Ninth Circuit *en banc* held that AATF is not a crime involving moral turpitude.⁴⁷ This rule might not be applied outside the Ninth Circuit, however, since the BIA found that misprision of felony, a similar offense, is a crime involving moral turpitude even though it is not a drug crime,⁴⁸ and most other courts have not ruled.⁴⁹ DHS may argue that an accessory-type conviction still renders a person

⁴⁷ *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007).

⁴⁸ *Matter of Robles*, 24 I. & N. Dec. 22 (BIA 2006). *Robles* is seemingly incompatible with *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1072 (9th Cir. 2007) (*en banc*). See also *Matter of Sanchez-Marin*, 11 I. & N. Dec. 264 (BIA 1965) (AATF to manslaughter is a CIMT). Note that California AATF, PC § 32, has a specific intent requirement greater than that of misprision, 18 U.S.C. § 4. Under *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (*en banc*) “the BIA’s [published] determination that such offense constitutes a ‘crime of moral turpitude is governed by . . . administrative deference [of Courts to administrative agencies],” and under *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008) an immigration judge (IJ) can inquire beyond the record of conviction, so it is hard to tell how these kinds of offenses will ultimately be categorized as far as moral turpitude. *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997) (AATF not a drug-trafficking crime but is an offense ‘relating to obstruction of justice’)

⁴⁹ See *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (federal misprision of a felony is a CIMT that requires “an affirmative act of concealment or participation.”); also *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005) (false information & DL to police is CIMT).

inadmissible under the “reason to believe” ground.⁵⁰

Finally, a conviction for giving away a small amount of marijuana for free should be treated like simple possession, and not as an aggravated felony, under the federal statute.⁵¹

Ninth Circuit-Specific Drug Exceptions

Expunged or Dismissed First-time Simple Possession Offense: In *Lujan-Armendariz v. INS*, the Ninth Circuit held that as a matter of equal protection, state “rehabilitative relief” to eliminate a conviction will eliminate the immigration effect of a first conviction for simple possession of a controlled substance.⁵² The court subsequently held that the *Lujan-Armendariz* benefit also applies to a first conviction of a drug offense that is less serious than simple possession and that is not analogous to a federal drug offense (in that case, possession of paraphernalia under an Arizona statute).⁵³ Foreign rehabilitative relief

⁵⁰ *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004) (meetings between noncitizen and other suspects, several of whom were arrested with several thousand dollars in cash, noncitizen’s attempt to escape when police stopped the vehicle he was driving, discovery of 147 pounds of marijuana in the trunk, and guilty plea to failure to disclose to authorities his knowledge of a conspiracy to distribute marijuana, constituted sufficient evidence to support reason to believe he was inadmissible as a drug trafficker).

⁵¹ See 21 U.S.C. § 841(b)(4); in *Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008) the BIA held that it was the defendant’s burden to prove she was within this exception. *id.* at 457.

⁵² *Lujan-Armendariz v. INS*, (with *Roldan-Santoyo v. INS* joined) 222 F.3d 728 (9th Cir. 2000), partially overruling *Matter of Roldan*, 22 I. & N. Dec. 547 (BIA 1999).

⁵³ *Cardenas-Urriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786, 793-4 (9th Cir. 2009).

similarly will eliminate the immigration consequences of a foreign conviction for simple possession or a less serious offense.⁵⁴

“Rehabilitative relief” means any state disposition (e.g., deferred entry of judgment, expungement) that lets a defendant withdraw a guilty plea or otherwise erase a disposition, based on successful completion of probation or other requirements, rather than on legal error. A noncitizen whose state conviction is handled under the *Lujan-Armendariz* rule receives the same all-encompassing benefit as if the case had been handled under the Federal First Offender Act (FFOA). That statute provides that a disposition “shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.”⁵⁵

The noncitizen will not be protected until the conviction actually is erased under rehabilitative relief, e.g. until the plea is withdrawn or charges dropped, *at least in a case that involves a final judgment of conviction followed by expungement, as opposed to a deferred entry of judgment statute.*⁵⁶ FFOA protection may be available where the anticipated state rehabilitative relief is pursuant to a deferred entry of judgment, where the state considers that there never was a conviction, as opposed to a judgment followed by expungement.

The Board of Immigration Appeals declined to apply *Lujan-Armendariz* or cases following its guidance in immigration proceedings that arise

outside of the Ninth Circuit.⁵⁷ The dismissed possession offense must not be preceded an earlier rehabilitative disposition, even if that would not have been a conviction under the regular rule;⁵⁸ and a probation violation invalidates a later dismissal.⁵⁹ The Ninth Circuit ruled that, apart from the specific first offense drug offenses treatable under *Lujan-Armendariz*, state rehabilitative relief will not eliminate a conviction for immigration purposes.⁶⁰

A Ninth Circuit panel found that the crime of being under the influence of a controlled substance is covered by the exception; however in that case *en banc* review was granted by the Court and was argued in December 2010.⁶¹ In July 2011, the *en banc* decision overruled the *Lujan-Armendariz* exception.⁶² The court held that “the constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA.”⁶³ The decision applies prospectively, so a first conviction for a minor drug offense after July 14, 2011 will not be eliminated for immigration purposes through rehabilitative relief.⁶⁴ Convictions prior

⁵⁷ *Matter of Salazar*, 23 I. & N. Dec. 223 (BIA 2002).

⁵⁸ *de Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007)

⁵⁹ *Estrada v Holder*, 560 F.3d 1039, 1041 (9th Cir 2009). The FFOA limits relief to cases where “the person has not violated a condition of his probation.” 18 U.S.C. § 3607(a).

⁶⁰ *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).

⁶¹ *Nunez-Reyes v. Holder*, 602 F.3d 1102 (9th Cir. 2010), reh’g en banc granted by *Nunez-Reyes v. Holder*, 631 F.3d 1295 (9th Cir 2010).

⁶² *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*).

⁶³ *Id.* at 690.

⁶⁴ *Id.* at 693-94.

⁵⁴ *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001).

⁵⁵ 18 U.S.C. § 3607(b).

⁵⁶ *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004).

to July 14, 2011, however, may still benefit from the *Lujan-Armendariz* exception.⁶⁵ So advocates in the nine western states of the Ninth Circuit should be aware of this, and look for other solutions.

Convictions under a Generic “solicitation” Statute in the 9th Circuit:

The controlled substance grounds of inadmissibility specifically include “attempt or conspiracy” to commit a drug offense. None of these mention solicitation.⁶⁶ The Ninth Circuit therefore held that conviction of solicitation under a generic Arizona solicitation statute (ARS §13-1002, solicitation to commit a crime) is neither a deportable drug conviction nor a drug trafficking aggravated felony conviction, even where the record establishes that the crime solicited involved drug trafficking.⁶⁷ By “generic” solicitation is meant a statute that mentions only the general crime of solicitation, but not drugs. California does not have such a generic solicitation statute, but several other states do, including Alaska, Arizona, Idaho, Montana, Oregon, and Washington.⁶⁸ California does have “specific” drug solicitation statutes, which include “offering to” sell, distribute or transport controlled substances. The Ninth Circuit

held that “offering” to commit a controlled substance offense under these California statutes is not a drug trafficking aggravated felony. However, if it is not a “generic” statute it will still be a conviction for a non-aggravated-felony drug crime.⁶⁹ If your client is applying from within the Ninth Circuit and has such a solicitation conviction, from any state, you should not concede that these make her inadmissible under the 212(a)(2)(A)(i)(II) controlled substance ground.

Solicitation to possess ought not to be considered a crime involving moral turpitude, but soliciting to traffic will be so considered, and will also probably evoke the “reason to believe” ground at INA 212(a)(2)(C).⁷⁰

Within the nine states of the Ninth Circuit, solicitation to possess should trigger neither the § 212(a)(2)(A)(i)(II) controlled substance inadmissibility ground, because it parallels the deportation ground in mentioning attempt and conspiracy but not solicitation; nor the CIMT ground; nor-- by itself-- the “reason to believe” suspected trafficker ground.⁷¹

Multiple Convictions with Aggregate 5 Year Sentences

Another inadmissibility ground that is incorporated into the statutory bar to good moral character is at INA § 212(a)(2)(B). This ground of

⁶⁵ *Id.*

⁶⁶ See INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U) (aggravated felony); 8 U.S.C. § 1227(a)(2)(B), INA § 237(a)(2)(B) (deportability ground); 8 U.S.C. § 1182(a)(2)(A)(i)(II), INA § 212(a)(2)(A)(i)(II) (inadmissibility ground).

⁶⁷ *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997) (deportability ground); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (aggravated felony).

⁶⁸ AS § 11.31.110; I.C. §§ 18-2001, 18-2004; MT ST 45-4-101; A.R.S. § 13-1002; O.R.S. § 161.435; RCW § 9A.28.030.

⁶⁹ *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

⁷⁰ For a Ninth Circuit plea to solicitation to possess, a defense attorney should make it explicit that it was solicitation to possess *for personal use only*.

⁷¹ For a detailed discussion of these issues, consult Defending Immigrants in the Ninth Circuit, Katherine Brady, 10th Ed, Chapter 3.

inadmissibility⁷² is straightforward. A person with two or more criminal convictions *of any kind*— including two separate counts, from the same event—who has been sentenced to a total period of confinement of five years is inadmissible. A sentence to confinement counts for immigration purposes regardless of suspension.⁷³ A history of suspended sentences only for misdemeanors like driving with license suspended can still bar GMC. You may need to get out a calculator and start adding. This is an example of the need to get as complete as possible criminal record information: without knowing the suspended sentence for every past misdemeanor, this inadmissibility ground is invisible.

Fortunately, this GMC bar may qualify for a § 212(h)(1)(C) waiver, if the acts or convictions are connected to the abuse or extreme cruelty suffered by the self-petitioner.

Alien Smuggling

INA § 101(f)(3) also incorporates the inadmissibility grounds at INA § 212(a)(6)(E), relating to alien smugglers. A person will be found to be inadmissible as an “alien smuggler” if he or she knowingly has “encouraged, induced, assisted, abetted, or aided” any other person to enter the U.S. (or to try to enter).⁷⁴ Some convictions and behavior

relating to transporting or harboring undocumented people *within* the United States may not amount to “smuggling” depending on the law of your Circuit.⁷⁵ Mere harboring or transporting of others alone might not be enough to constitute alien smuggling.⁷⁶ Mere presence during the actual act of alien smuggling with knowledge that it is being committed might also not be enough.⁷⁷ It is advisable to argue first that the conviction does not amount to “smuggling” under the law of your Circuit. In the alternative, a waiver for this inadmissibility grounds may be available at the time of adjustment of status under INA § 212(d)(11), if the act of smuggling is connected to the abuse or extreme cruelty.⁷⁸

⁷⁵ See, e.g. *Altamirano v. Gonzales*, 427 F.3d 586, 591-96 (9th Cir. 2005) (reversing finding of inadmissibility for alien smuggling solely on presence in vehicle knowing someone was hiding in the trunk). See also *Tapucu v. Gonzales*, 399 F.3d 736, 737 (6th Cir. 2005) (presenting person at border with accurate identification and citizenship papers not enough to equal smuggling).

⁷⁶ *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 679 (9th Cir. 2005) (“Thus, Hernandez is correct that, unlike its criminal counterpart, INA § 274, 8 U.S.C. § 1324(a)(1)(A)(i), the civil provision that makes smuggling a deportable offense does not cover mere transportation or harboring of aliens within the United States.”) See also *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007)(reversing conviction under 8 U.S.C. § 1324(a)(2) because evidence shows that defendant did not aid and abet initial transportation but just transported undocumented aliens within the United States and did so only after the initial transporter had dropped the aliens off inside the country); *Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 n. 3 (5th Cir. 1995) (conviction for illegally transporting undocumented immigrants does not trigger inadmissibility because the statute only refers to aiding and abetting); *Matter of I-M-*, 7 I. & N. Dec. 389 (BIA 1957) (transporting undocumented persons within the U.S. does not necessarily create inadmissibility).

⁷⁷ *Altamirano*, *supra* note 75.

⁷⁸ INA § 212(d)(11) will waive the alien smuggling inadmissibility ground in the case of a non-citizen

⁷² 8 U.S.C. § 1182(a)(2)(B), INA § 212(a)(2)(B): “Multiple Criminal Convictions. Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.”

⁷³ 8 U.S.C. § 1011(a)(48)(B), INA § 101(a)(48)(B).

⁷⁴ INA § 212(a)(6)(E)(i); INA § 237(a)(1)(E)(i).

Prostitution

Under INA §212(a)(2)(D), people who engaged in prostitution within the past ten years are inadmissible, and are presumed to lack GMC under INA § 101(f)(3). Legal prostitution is included. Inadmissibility for “engaging in prostitution” may apply even without a criminal conviction, but an arrest is an obvious potential trigger of this inadmissibility ground.⁷⁹

Advocates should check, to see if the convicted behavior really fits the definition. For example, the Ninth Circuit held that a State Department regulatory definition of prostitution for purposes of

“seeking admission or adjustment of status as an immediate relative or immigrant under § 203(a)” (note: siblings of U.S.C.s are not covered), if the person has “encouraged, induced, assisted, abetted, or aided” only a person who at the time was their “spouse, parent, son, or daughter (and no other individual)” to enter the United States unlawfully. The Ninth Circuit ruled that the phrase “whether inadmissible or not” in INA § 101(f)(3) means that “alien smuggling” bars GMC for cancellation of removal, whether or not the person were eligible for a § 212(d)(11) waiver. *Sanchez v. Holder*, 560 F.3d 1028, 1031-2 (9th Cir. 2009). However because a § 212(d)(11) waiver is available at adjustment, it will not bar GMC for a self-petition if the connection to the abuse can be shown. So it is important to analyze if the person who was “smuggled” came within the waiver terms.

⁷⁹ The following persons are inadmissible:

(i) Those who are “coming to the United States solely, principally or incidentally, to engage in prostitution,” or who have done so within ten years of the current application;

(ii) Those who attempt to procure or import prostitutes, or receive the proceeds of prostitution, or who have done so within ten years of the application for a visa, entry or adjustment of status; and

(iii) Those who are “coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.” INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

the inadmissibility ground will control.⁸⁰ That regulation, at 22 C.F.R. 40.24(b), provides:

b) Prostitution defined. The term “prostitution” means engaging in promiscuous sexual intercourse for hire. A finding that an alien has “engaged” in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts.

In *Kepilino*, the court held that a Hawaii law, which includes both intercourse and “sexual contact” for a fee, is a divisible statute for this purpose because “sexual contact” in Hawaii includes intimate touching apart from intercourse. Note that to prove a *conduct-based* inadmissibility ground, the DHS doesn’t need a conviction at all. However, when the government relied *only* on the conviction to establish that the person had engaged in prostitution, the court required the government to prove under the “modified categorical” analysis, with documents from record of conviction, that the offense involved actually was prostitution.⁸¹

Because a conviction is not required to establish that a person has engaged in prostitution, a mere admission of having engaged in prostitution by the person can be considered. However, a casual, one-time encounter does not

⁸⁰ *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006).

⁸¹ *Id.* at 1059-60, 1062-63.

amount to “engaging in” prostitution, according to BIA case law and State Department regulations.⁸² So any statement or finding that the event was a casual or one-time occurrence can help persuade DHS that the person has not “engaged in” prostitution. Non-citizens who have worked as prostitutes in countries or states where it is legal are still inadmissible.⁸³ Since a conviction is not required, a juvenile proceeding on a prostitution charge could be a basis for inadmissibility.

Note that having been a prostitute’s customer, being convicted of patronizing a prostitute, has been interpreted as not “engaging in prostitution.”⁸⁴ It is possible--but there is no case on point⁸⁵-- that customers would be found to have committed a crime involving moral turpitude, which brings its own immigration consequences. A conviction whose elements did amount to proof of having “engaged in prostitution,” either as a prostitute or a procurer, *would* surely amount to a CIMT, and this should be listed as a possible ground of inadmissibility.

If the self-petitioner’s conduct does fit the local jurisdiction’s and the BIA/State Department definition of “engaging in prostitution,” the conduct may be eligible for a waiver under INA §

212(h)(1)(C) if it is connected to the abuse or extreme cruelty. For example, an exception to the GMC bar could be made (at the discretion of the adjudicator) if the self-petitioner can establish that she was forced or intimidated to engage in prostitution.

Practicing Polygamists

A final group of persons presumed to lack GMC under INA § 101(f)(3) are practicing polygamists, who are inadmissible under INA § 212(a)(10)(A). INA § 212(a)(10)(A) reads, “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.” Polygamy is the historical custom or religious practice of having more than one spouse. It is distinguishable from “bigamy,” which is the criminal act of having more than one spouse at a time without having obtained a prior divorce.⁸⁶ The State Department interprets the phrase “coming to the United States to practice polygamy” to refer to any noncitizen who intends to practice polygamy when he or she enters the U.S.⁸⁷ This provision focuses on the intent to “practice” polygamy, rather than advocacy of the practice,⁸⁸ or a history of past practice of polygamy. A noncitizen would not be inadmissible under this section unless the available facts would lead a reasonable person to conclude that the noncitizen intends to engage in the practice of polygamy after arrival in the U.S.⁸⁹

Because no waiver is available at adjustment for this GMC bar, advocates

⁸² See *Matter of T.*, 6 I. & N. Dec. 474 (BIA 1955); 22 C.F.R. 40.24(b).

⁸³ See *Matter of G.*, 5 I. & N. Dec. 559 (BIA 1953); 22 C.F.R. § 40.24(c).

⁸⁴ *Matter of R.M.*, 7 I. & N. Dec. 392 (BIA 1957); see also *Matter of Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549 (BIA 2008) (Congress did not consider someone who solicits another to engage in prostitution for himself to be a procurer under 212(a)(2)(D));

⁸⁵ See *Matter of Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549, 554 (BIA 2008) (“[T]here is a question whether the respondent’s offense [of patronizing a prostitute] would constitute a crime involving moral turpitude”).

⁸⁶ Gallagher, Anne Marie. *Immigration Law Service*, 2nd ed. Updated Feb., 2009.

⁸⁷ 9 FAM Note to 22 C.F.R. § 40.101.

⁸⁸ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5067 (1990).

⁸⁹ 9 FAM Note to 22 C.F.R. § 40.101.

should focus on demonstrating that the self-petitioner's conduct does not fall into the statutory definition of "practicing polygamist." A past history of practice of support of the practice should be overcome with convincing evidence that the self-petitioner does not intend to practice polygamy in the United States. The most direct evidence of this will be the self-petitioner's own affidavit and any supporting documentation to demonstrate that he or she has not practiced polygamy since entering the U.S., or minimally, for the three year period that is the focus of GMC determinations.

Other Crime-Related Statutory Bars to Establishing Good Moral Character

Gambling Offenses

INA § 101(f)(4)-(5) provides that no person will be found to be a person of good moral character whose income derives principally from illegal gambling activities, or who has been convicted of two or more gambling offenses during the period for which good moral character must be established.

No waiver is available for these categories of individuals.

False Testimony

INA § 101(f)(6) makes having given false testimony for the purpose of obtaining benefits under the INA a bar to showing good moral character (GMC) within the required period. False testimony to procure an immigration benefit also makes the applicant inadmissible,⁹⁰ but a waiver of

⁹⁰ INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

inadmissibility may be available at INA § 212(i), 8 USC § 1182(i).⁹¹

The false testimony GMC bar is adjudicated differently from the misrepresentation or fraud inadmissibility ground, which applies to those who seek to procure an immigration benefit by fraud or willfully representing a material fact.⁹² Generally, the GMC bar—which requires actual "false testimony"—is narrower than the inadmissibility ground.

The Supreme Court has held that the GMC bar at § 101(f)(6), unlike the visa fraud inadmissibility ground, does not require that false testimony be "material," because it is primarily concerned with the subjective intent to deceive. But on the other hand, the GMC bar at § 101(f)(6), is limited to "oral statements made under oath . . . with the subjective intent of obtaining immigration benefits."⁹³ (emphasis added) Thus, false statements on an application or other written material, even those materials bearing a statement of oath, do not constitute false testimony within the meaning of INA § 101(f)(6).⁹⁴ Likewise, an oral statement where no oath was administered does not rise to "testimony" under this section.

This GMC bar does apply, not only to oral statements made in official court proceedings, but also in a variety of other scenarios in which adjudication of immigration issues and immigration

⁹¹ The 212(i) waiver also requires a showing of "extreme hardship" to self-petitioner or her U.S.C. or LPR parent or child.

⁹² Although this section does not explicitly incorporate the inadmissibility grounds for willful misrepresentation of material fact at INA § 212(a)(6)(C)(i), the exceptions that may be available for this bar to GMC are the same that are available for waiver of the INA § 212(a)(6)(C)(i) ground of inadmissibility.

⁹³ *Kungys v. US*, 485 U.S. 759, 780 (1988).

⁹⁴ *Matter of L-D-E*, 8 I. & N. Dec. 399 (BIA 1959).

determinations are made, including false statements under oath to an asylum officer,⁹⁵ other administrative proceedings, or before an immigration officer.⁹⁶ Although the Ninth Circuit has formally required such oral statements under oath to occur before a “court or tribunal,”⁹⁷ the term “tribunal” has been defined broadly to include any body that has the fundamental attributes of an administrative tribunal, namely, the authority to hear and decide, and to render judgments in accordance with the facts and the law.⁹⁸

Therefore, if your client might come within this “false testimony” bar to GMC it is important to obtain information relating to the circumstances surrounding the testimony. If it is established that the testimony was in fact false, and made orally to a tribunal or DHS adjudicator under oath, then the alternative argument, that a waiver may be available

⁹⁵ *Medina v. Gonzales*, 404 F.3d 628, 635 (2d Cir. 2005) (deferring to *Matter of R-S-J-*, 22 I. & N. Dec. 863 (BIA 1999)).

⁹⁶ *Matter of Namio*, 14 I. & N. Dec. 412, 414 (BIA 1973); *Liwanag v. INS*, 872 F.2d 685 (5th Cir. 1989).

⁹⁷ *Phinpathya v. INS*, 673 F.2d 1013, 1018-19 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 183 (holding that the “term testimony does not encompass all statements, or even all statements made under oath,” but refers to “a statement made by a witness under oath for the purpose of establishing proof of a fact to a court or tribunal.”).

⁹⁸ *Matter of R-S-J-*, 22 I. & N. Dec. 863 (BIA 1999). In *Bernal v. INS*, 154 F.3d 1020, 1023 (9th Cir 1998), the Court ruled that “[a]n INS officer is authorized ‘to take testimony concerning any matter touching or in any way affecting the admissibility of any applicant for naturalization, [and] to administer oaths.’ . . . , [T]he statements made by an applicant in a naturalization examination are ‘testimony’ within the meaning of 8 U.S.C. § 1101(f)(6). An applicant's false oral statements made under oath in a question-and-answer statement before an INS officer in connection with any stage of the processing of a visa constitute false testimony within the meaning of 8 U.S.C. § 1101(f)(6).” *Id.*

under INA § 212(i) must be used. A self-petitioner seeking this waiver has a lighter burden than non-VAWA applicants, since she can use extreme hardship to herself or to her USC/LPR child to qualify.⁹⁹

For the purpose of a finding under the § 204(a)(1)(C) GMC exception, note the conundrum that if it is not *material* it does not render the person inadmissible, and so no waiver of inadmissibility is required or available; but it can still bar GMC if it meets the definition of oral “false testimony” under oath.¹⁰⁰ If the

⁹⁹ INA § 212(i), 8 U.S.C. 1182(i): “Admission of Immigrant Inadmissible for Fraud or Willful Misrepresentation of Material Fact (1)The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C)[which reads: ‘Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible’] in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.”

¹⁰⁰ On “false testimony,” see *Authorities Affecting False Testimony Determinations, Attachment 2 to Yates Character Memo*, at http://asistahelp.org/VAWA/GMC_authorities.pdf; see also U.S.C.I.S. chart at: http://asistahelp.org/VAWA/GMC_chart.pdf Page 3 of that chart states that “False testimony that is NOT material does not render an alien inadmissible under INA § 212(a)(6)(C)(i). However, such non-material false testimony DOES statutorily bar U.S.C.I.S. from making a finding of good moral character – i.e., such an “act or conviction” is not “waivable” for purposes of INA § 204(a)(1)(C). Therefore, adjudicators will need to determine two things: 1) whether the self-petitioner has ever given

connection to the abuse can be shown, advocates may need to argue—if challenged-- that false testimony was material to qualify under the § 204(a)(1)(C) exception. If there is no connection to the abuse, or if the oral false testimony was not material, advocates may need to simply argue that no § 204(a)(1)(C) GMC finding is needed because the false testimony occurred more than three years ago or that the person is now of good moral character, and show that through extra supportive documentation.

Aggregate Jail Time Served Of More Than 180 Days

INA § 101(f)(7) bars GMC to someone who has actually been in jail for at least 180 days as a result of criminal conviction(s) during the period for which GMC must be established, regardless of what the crimes were. Jail time before conviction does not count (unless credited as time served.) There is also presumably no VAWA exception for this statutory bar to GMC, because it is not also a ground of inadmissibility, only a bar to GMC.

Note that this statutory bar is different from the inadmissibility ground and GMC bar for convictions of two or more offenses with an aggregate sentence to confinement of five years or more, which is waivable. The differences between the two categories include both the source of the GMC bar, and the time during which the confinement takes place. INA § 101(f)(7) refers to actual 180 days confinement as a bar to GMC, within the period for which the GMC determination is based, i.e. the presumed

“false testimony”; and 2) if so, whether such testimony was “material.” (emphasis added)

three-year period preceding filing of the self-petition. The confinement must be “as a result of conviction.” Jail time before conviction does not count unless credited later in the sentence as time served.

The INA § 212(a)(2)(B) inadmissibility ground, which is incorporated into the GMC bar at § 101(f)(3), on the other hand, refer to convictions with total sentences of five years that occur during the three-year period, regardless of how much time was actually served.¹⁰¹ Although the aggregate sentences covered in that section far exceed 180 days, a GMC exception is still available for acts or convictions in this case, as long as they were not actually for more than 180 days in the three years prior to filing a self-petition.

Aggravated Felonies

Per INA § 101(f)(8), anyone who has been convicted of an aggravated felony is also barred from a finding of GMC. The aggravated felony provision at INA § 101(a)(43) incorporates hundreds of offenses. It is important to note that certain misdemeanor offenses, such as assault and theft offenses, where a sentence of at least one year has been imposed, will be treated as an aggravated felony.¹⁰² No GMC exception is available

¹⁰¹ The definition of “sentence” for immigration purposes, at INA § 101(a)(48)(B), refers to the period of incarceration ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment.

¹⁰² Among other offenses that become aggravated felonies with only a one year sentence are burglary of a building; receipt of stolen property; a state “RICO” conviction; certain federal document fraud crimes; a crime “relating to” forgery, counterfeiting or commercial bribery; a crime “relating to” perjury, bribing a witness, or obstruction of justice. 8 U.S.C. § 1101(a)(43), INA § 101(a)(43).

for aggravated felonies as such, unless the offense also is one that comes under INA § 204(a)(1)(C). It is important to note that INA § 204(a)(1)(C) clearly covers an aggravated felony *that is also a CIMT*. At adjustment, a non-citizen who has never previously been admitted as an LPR can seek a waiver for a CIMT, regardless of the fact that it may also be categorized as an aggravated felony.¹⁰³ For example, an applicant with a misdemeanor theft conviction who was sentenced to 365 days in jail (regardless of time suspended) would likely have a conviction classified as an aggravated felony “theft offense” under INA § 101(a)(43)(G). However, since such a conviction is also a CIMT that is waivable under INA § 212(h), he or she would be eligible for a § 204(a)(1)(C) finding (assuming he or she can also establish a connection to the abuse).¹⁰⁴

¹⁰³ *Matter of Michel*, 21 I. & N. Dec. 1101 (BIA 1998).

¹⁰⁴ Since the generic definition of an aggravated felony “theft offense” requires a taking of property, if a state statute of conviction covers theft of labor or theft of services, it may be possible to argue that it is not an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S. Ct. 815, 820 (2007); *U.S. v. Espinoza-Cano*, 456 F.3d 1126, 1131 (9th Cir. 2006). It’s another reason why you must get the complete court file of a conviction.

Getting Help on Your Case

Understanding the immigration consequences of your client's criminal conviction(s) or criminal history can, at first, appear daunting. In light of the complexities in trying to understand the immigration consequences of crimes, the ASISTA team includes Annie Benson and Jonathan Moore, two nationally recognized experts in the area of immigration law & crimes. They are available to provide individual technical assistance to you on your case.

For assistance on crime-related issues please contact:

- **Jonathan Moore:** jonathan@defensenet.org **206-623-4321**
- **Annie Benson:** abenson@defensenet.org **360-385-2538**

UPCOMING EVENTS AND TRAININGS

CONTACT ASISTA

Phone: 515.244.2469

Address: ASISTA
2925 Ingersoll Ave., Ste 3
Des Moines, IA 50312

Fax: 515.868.0089

Email: questions@asistahelp.org

<http://www.asistahelp.org/>

This publication is supported by Grant No. 2009TAAXK009 awarded by the United States Department of Justice, Office on Violence Against Women. The opinions, findings, and recommendations expressed in this document are those of the author(s) and do not necessarily reflect the views of the United States Department of Justice, Office on Violence Against Women.