



NEWSLETTER

April 30, 2010

Dear Readers:

This edition of the ASISTA Newsletter includes the first of a two-part article on U Visa applicants with criminal histories by ASISTA consultants Annie Benson and Jonathan Moore of the Washington Defender's Immigration Project. This guide includes helpful practice pointers as well as an in-depth analysis of immigration law as it relates to potential criminal challenges to relief. In addition, we have included an annotated sample I-192 waiver of inadmissibility for a U Visa applicant, and a brief advisory on expert affidavits.

Our Updates section includes information on the Department of State's recent cable to all U.S. Consulates on U Visa processing abroad, as well as a brief advisory on HIV/AIDS updates as they relate to VAWA and U Visa applicants. Finally, our FAQ features a question on basic VAWA eligibility and evidentiary requirements.

We hope you find this information helpful. If you would like to contribute to our newsletter yourself; with samples, practice pointers, or articles, please let us know. We also would like to hear your suggestions for topics you'd like us to cover. As always, feel free to visit our website at any time at www.asistahelp.org for this and other newsletters, as well as information that you may find helpful as you advocate for immigrant survivors of domestic violence, sexual assault, stalking, and other crimes of violence. Remember, we always welcome technical assistance questions from OVW Grantees and ASISTA Members on issues you face in individual cases.

From the Co-Directors,

Gail Pendleton & Sonia Parras-Konrad

INSIDE THIS ISSUE:

Practice Guide to Representing U Visa Applicants With Criminal Convictions or Criminal History by Ann Benson & Jonathan Moore (Part 1 of a Two Part Article).....	2
Sample Request for Waiver of Inadmissibility.....	25
Victim of Crime Advocate (Expert) Declaration Guidelines on Substantial Abuse.....	29
Practice Updates:	
HIV and VAWA.....	30
DOS Cable on U Visa Processing Abroad.....	31
ASISTA's FAQ's, by ASISTA Staff.....	35
Announcements.....	38

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A Practice Guide for Representing U Visa Applicants With Criminal Convictions or Criminal History

By Ann Benson & Jonathan Moore¹

Editors' Note: Due to the length of this article, it has been divided into two parts. This is the first of these parts. The second installment will be published in the next ASISTA Newsletter. The entire Guide is also available on our website at www.asistahelp.org

I. Step One: Get the Criminal Records

To identify possible grounds of inadmissibility a client faces, you will need full information regarding the client's criminal proceedings and history.² If your client has ever been arrested or convicted, you need to get complete, accurate information about each incident before filing the U visa application (or any application).

The two most important sources of information will be your client and the court file (assuming charges were brought against your client). While your client is a critical source of information, it is also really important that you obtain any official records available regarding the incident. In addition to this information being essential to analyzing whether a conviction or incident triggers a statutory bar to eligibility for the U visa, it is also necessary to know what court records, police reports and rap sheets (criminal history compilations) say in order to work with the client so that her credibility is not undermined by contradictory information in her declaration. The importance of full disclosure of your client's criminal history cannot be over emphasized. Keep in mind that if your client is granted a U-visa and has failed to disclose prior criminal activity she risks having her U visa revoked and a subsequent adjustment of status application denied.

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.

² In addition to any criminal history, advocates should also routinely file Freedom of Information Act (FOIA) requests to DHS for every client. When possible FOIA requests should be done prior to submitting applications for relief. FOIA is an important way to obtain official information about a client's general immigration status. DHS maintains files on all noncitizens that have filed applications or been subject to some type of enforcement action (e.g., deportation or voluntary departure). These records often reveal and clarify important details about the client's immigration history.

The best way to get current information about FOIA procedures and access current FOIA forms is through the internet at the following address: <http://uscis.gov/graphics/aboutus/foia/request.htm>. Regulations governing FOIA requests are found at 8 CFR § 103.10. You do not need to (and generally should not) reveal the client's address; the information can be sent to your office. To avoid delay, the letter and envelope should be clearly marked "FREEDOM OF INFORMATION ACT REQUEST" circled in red. Provide the client's name, date of birth and "A" number (eightdigit number beginning with "A", found on INS documents), if the client has one. If the client does *not* have an "A" number, it is unwise and unnecessary to identify your client as an alien.

For more information on how to go about obtaining criminal records please consult our more detailed article on this issue: Step One In Representing Noncitizens With Criminal History: Obtaining Relevant Information About the Criminal Case, by Annie Benson, at: <http://asistahelp.org/Newsletter.08.01.08.pdf>

II. Understanding the Crime-related Grounds of Inadmissibility

A. How and When The Crime-related Inadmissibility Grounds Apply

U visa applicants, like any person seeking lawful admission (or lawful status), are subject to the grounds of inadmissibility³ set forth at section 212 of the Immigration & Nationality Act (The Act or INA). Most of the specific crime related inadmissibility grounds are located at INA § 212(a)(2). In short, your client must establish that she is entitled to be admitted to the U.S. by proving that none of these inadmissibility bars apply to her. Additionally, even if her criminal conviction/history does not trigger any of these statutory bars to admission, her criminal history will be a negative discretionary factor that she must overcome. The good news for U visa applicants is that even where an applicant does trigger one of the section 212 inadmissibility grounds, Congress included within the statute a broad, special inadmissibility waiver for U visa applicants at INA §212(d)(14).⁴ If your client is inadmissible for his criminal conviction/conduct (as with any other ground of inadmissibility), you will be submitting a request for an INA § 212(d)(14) waiver on Form I-192. It is important to identify all possible inadmissibility grounds and request that they be waived under section 212(d)(14). U visa applicants who later apply for adjustment of status will not be subject to the grounds of inadmissibility at the time of adjustment. The only applicable inadmissibility ground at that stage is for national security⁵ and it cannot be waived.

As outlined below, some of the inadmissibility grounds are triggered by the existence of a formal conviction. However, other grounds are triggered merely by evidence of the person's conduct. Still others can be triggered by certain qualifying admissions. For example, in the absence of a qualifying admission⁶, the controlled substances inadmissibility ground at INA § 212(a)(2)(A)(i)(II) will only be triggered by a conviction. The inadmissibility ground dealing with involvement in drug trafficking at INA § 212(a)(2)(C) can be triggered merely by evidence establishing a "reason to believe" that the applicant has been involved U-visas, INA 212(d)(14) waivers, and crimes in drug trafficking. When analyzing the impact of your client's criminal history it is important to read the INA's inadmissibility grounds carefully to determine exactly how any of the relevant inadmissibility bars are triggered.

B. Convictions Under Immigration Law

³Any non-citizen present in the United States who has not been legally admitted is considered an "applicant for admission." INA § 235(a)(1), 8 U.S.C. § 1225(a)(1).

⁴All grounds of inadmissibility are potentially waivable except the national security grounds. See INA § 212(d)(14), 8 USC § 1182(d)(14).

⁵INA 212(a)(3)(E), 8 USC § 1182(a)(3)(E)

⁶ See § II.C, *infra* this article.

1. The Definition of “Conviction.”

If your case deals with an inadmissibility ground that (in the absence of a qualifying admission) requires a conviction, such as the controlled substances violation ground or the crimes involving moral turpitude (CIMT) ground, it is essential to first understand how convictions are defined under immigration law. Added in 1996, the INA now has its own specific definition of what constitutes a criminal conviction for immigration purposes.⁷ How a particular state treats the disposition of the criminal offense is not controlling under immigration law.

The INA defines a conviction as follows.

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

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

Many state and local courts permit a first-time or minor offender to plead guilty but later withdraw the plea after completion of a jail sentence, probation or other requirements. However, the Board of Immigration Appeals (BIA) interpreted the INA’s definition of a conviction to not eliminate the conviction for immigration purposes. Thus, even where the state that imposed the conviction considers it to have been completely eliminated (including by expungement), it remains a conviction for immigration purposes as long as the offender pleaded guilty and the court imposed some type of restraint on the defendant.

2. Deferred Adjudications.

In many states and courts, there is often a process that allows for first-time offenders with minor criminal charges to resolve the case without incurring a criminal conviction. These are generally referred to as “deferred adjudications.”⁹ Dispositions that may avoid being a conviction could include a deferred prosecution in which the defendant does not make a formal plea (or admit or stipulate to facts) and the final resolution of the proceedings is deferred and the defendant agrees to meet conditions while the case is continued with the understanding that the prosecution may drop or reduce the charges based on the defendant’s good performance. This disposition is not a conviction because no guilty plea is taken and the defendant has not “admitted facts sufficient to warrant a finding of guilt.”

⁷ INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A). A statutory definition of conviction and sentence was enacted on September 30, 1996. Before that it was decided by case-law.

⁸ *Id.*

⁹ See <http://www.defensenet.org/immigration-project/immigration-resources/Immigration%20-%20Deferred%20Adjudications.pdf/view> for a discussion of how a disposition might be crafted that is not a conviction

If the records obtained in your client's case indicated that it was dismissed after some period of time after your client complied with conditions imposed by the court, you should consult with experienced practitioners to explore the possibility that your client's criminal case does not constitute a conviction under immigration law. To consider making such an argument you need copies of the entire court record. Additionally, even if your client's offense is not a conviction that triggers a statutory inadmissibility bar, you will need to disclose it on the application and provide relevant records.

3. Juvenile Dispositions.

It is well established that juvenile delinquency dispositions do not constitute convictions under the INA. If the court record indicates that the proceedings were in juvenile court, then the offense(s) will not be a conviction under immigration law.

Some juvenile dispositions that do not result in a conviction may nonetheless involve conduct that triggers an inadmissibility ground, and that ground must also be listed to be waived under INA § 212(d)(14). The clearest example of this would be a juvenile disposition related to drug-dealing. Such a juvenile disposition will not trigger inadmissibility as a controlled substance violation. It will, however, likely trigger the non-conviction-based ground of inadmissibility that requires mere knowledge or "reason to believe" that the offender engaged in drug trafficking.¹⁰

4. Convictions on Direct Appeal.

It has long been held that a conviction currently on direct appeal of right does not have sufficient finality to constitute a "conviction" for any immigration purpose.¹¹ As such, if your client's criminal conviction is on appeal there may be a strong argument that it does not trigger an inadmissibility bar where a conviction is required. However, that the First, Fifth and Seventh Circuits have held that the statutory definition of conviction erodes this requirement.¹² This

¹⁰ INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C)

¹¹ *Pino v. Landon*, 349 U.S. 901, 75 S.Ct. 576 (1955) (holding that an "on file" system in Massachusetts did not constitute sufficient finality to be a basis for deportation under the Act); *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), note 1.

¹² *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001)(deferred adjudication disposition did not require finality even though the right to appeal still possible at a later date); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007) (following *Renteria-Gonzalez v. INS* to hold a conviction on direct appeal is conviction for immigration purposes); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) ("deferred adjudication by guilt" under Texas law with limited appeal rights is final conviction); *Matter of Punu*, Int. Dec. 3364 (BIA 1998)(*en banc*)(same statute); *Montenegro v. Ashcroft*, 355 F. 3d 1035 (7th Cir. 2004) (noncitizen ordered removed even though a writ of certiorari to US Supreme Court and appeal of denied post-conviction petition (but neither of which were an "appeal of right,") both still pending). For further discussion of appeals and finality, see Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, § 2.18 (West Publishing). These cases deal with a complex Texas deferred adjudication law with limited appeal rights (even so, this decision has been heavily criticized), and situations where it has long been accepted that a conviction is final: petitions for certiorari, and appeals of request for post-conviction relief. The First, Fifth and Seventh Circuits have not yet ruled on a case where there is a clear appeal of right.

reasoning arguably violates well-established rules of statutory construction.¹³ In the Ninth Circuit, a conviction currently on direct appeal of right is not held a conviction for immigration purposes.¹⁴ Although some DHS attorneys have argued that under the new definition, a conviction on appeal can support deportation, it is unlikely that either the BIA or the Ninth Circuit would support this.

5. Post Conviction Relief

“Post-conviction relief” (PCR) is any legal effort to go back to the court of conviction and change what happened after the conviction has become final. For example, a motion to withdraw a guilty plea is a type of post-conviction relief. Most jurisdictions have rules about the filing of such motions, including time limits. In some cases, a time limit can be “tolled” if the person did not become aware of the consequence. A lawyer will need to return to the court of conviction and file a petition or motion.

Sometimes, you may seek to vacate a conviction or withdraw a guilty plea, or have the record of conviction expunged. In that case you are seeking to affect the actual judgment of guilt. The BIA has set up a rigorous standard for when such post-conviction relief is valid for immigration purposes. If it is due to a legal flaw in the original proceeding, the vacation of judgment is valid for immigration purposes. If, however, it was an expungement under a rehabilitative statute (one that allows an offender to vacate a conviction after a period of good behavior if there are no new crimes, or after probation or treatment, or one dismissed under a court’s pure equitable powers) or the PCR was granted by the criminal court purely to avoid a harsh immigration consequence, the BIA has ruled that the conviction remains for immigration purposes. To vacate a conviction for immigration purposes, the elimination of the judgment of guilt must be based on a legal error or deficiency in the original proceedings.¹⁵ For example, some states have a statutory requirement that there be a warning to defendants of possible immigration consequences. A violation of that requirement is a legal error, even though it pertains to immigration consequences.¹⁶ At other times, what the defendant is seeking is a modification of only the sentence. The judgment of guilt

¹³ See discussion in *Matter of Punu*, Int. Dec. 3364 (BIA 1998) (*en banc*), separate opinion of BIA member Rosenberg, *concurring and dissenting*.

¹⁴ See, pre-1996 case, *Morales-Alvarado v. INS* 655 F.2d 172, 175 (9th Cir 1981); treated as still valid in a post-1996 unpub. case, *McLeod v. Mukasey* 287 Fed.Appx. 562, 563 (9th Cir. 2008)

¹⁵ ¹⁵ See *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003) (“there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships”); see also *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000) (according full faith and credit to a New York court’s vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute). But see *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (reversing *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) in 6th Circuit). See also *Matter of Chavez-Martinez* 24 I. & N. Dec. 272 (BIA 2007) BIA ruled that, in a motion to reopen, it is the noncitizen’s burden to show why a conviction was vacated.

¹⁶ *Matter of Adamiak* 23 I. & N. Dec. 878 (BIA 2006) (conviction vacated under § 2943.031 of the Ohio Revised Code for failure of trial court to advise defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes.)

remains intact. For example, if an assault or theft conviction had a suspended sentence of 365 days and might be an aggravated felony, a sentence modification of one day could eliminate the aggravated felony. Or if a sentence for a “crime involving moral turpitude” like petty theft could be reduced to 180 days suspended from 365 or 364, if that were the only such conviction it might fit into the petty offense exception to inadmissibility for a single CIMT, and keep the client from being inadmissible at all. The BIA case law is less restrictive and says that a sentence modification ordered by a criminal court is valid.¹⁷

C. Qualifying Admissions That Can Trigger Certain Inadmissibility Grounds

Two key crime-related grounds of inadmissibility, drugs and crimes involving moral turpitude (CIMT), are introduced in the immigration statute at INA § 212(a)(2)(A)(i) by the phrase: “[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of [drugs or CIMT] is inadmissible.”¹⁸ The most important aspect of this language for advocates is to be aware that it does not implicate mere “garden variety” admissions. This may explain why it is seldom invoked by immigration officials. The information is included here, in part, to give advocates the necessary tools to guard against wrongful application of this provision by immigration authorities. In order for statements by an applicant to constitute an admission under INA § 212(a)(2)(A)(i), there are four requirements that must be met:

- a) **Conduct admitted to must be a crime under the laws of the place where it was allegedly committed.**¹⁹ However, an otherwise valid admission will trigger inadmissibility even where a noncitizen may have been found not guilty due to an available defense to the crime.²⁰
- b) **Admission must be to all elements of the crime contained in the criminal statute.** Partial admissions will not suffice, such as an admission to possession of a controlled substance but not to criminal intent (where the statute requires criminal intent). General admissions to broad or divisible statutes will not count. Where a noncitizen does not admit facts, a DHS or consular official cannot use inferences.²¹

¹⁷ *Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001); *Matter of Oscar Cota-Vargas* 23 I. & N. Dec. 849 (BIA 2005)

¹⁸ INA § 212 (a)(2)(A)(i), 8 USC § 1182(a)(2)(A)(i)

¹⁹ See *Matter of R-*, 1 I. & N. Dec. 118 (BIA 1941) (fraud in itself not a crime); see also *Matter of M-*, 1 I. & N. Dec. 229 (BIA 1942) (remarriage not punishable as bigamy); *Matter of DeS-*, 1 I. & N. Dec. 553 (BIA 1943) (attempt to smuggle not a crime).

²⁰ *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002). You can “admit the elements” even if what is called an “affirmative defense” was clearly available.

²¹ *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA, 1962). *Matter of G-M-*, 7 I. & N. Dec. 40 (Att’y Gen. 1956); *Matter of E-N-*, 7 I. & N. Dec. 153 (BIA 1956).

c) DHS or consular official must provide a noncitizen with an understandable definition of the crime at issue.²²

d) The noncitizen's admission must be free and voluntary.²³

The BIA has declined to find inadmissibility based on a guilty plea if the conviction is followed by effective post-conviction relief, pardon, or where no resolution amounting to a conviction is entered pursuant to the plea.²⁴ This is true even when the defendant has independently admitted the crime before a DHS officer or immigration judge.²⁵ However, it is not guaranteed that a person who is acquitted will be protected from independent admissions. In the most recent 9th Circuit decision on this issue, the court found that the noncitizen's admission to using marijuana during his medical examination for his immigrant visa was sufficient under the INA to establish that he committed acts which constituted the essential elements of the violation of Philippine controlled substance law.²⁶ Admissions by juveniles, when they are juveniles, should not trigger the inadmissibility under INA § 212(a)(2)(A) because such admissions are only to acts of juvenile delinquency-- civil, not criminal, law violations.²⁷

D. Crimes "involving moral turpitude" (CIMTs)

Under INA § 212(a)(2)(A)(i)(I) a U visa applicant who has been convicted of (or made a qualifying admission to committing) a crime involving moral turpitude (CMT) will be inadmissible. The first step is to understand what is, and is not, a CMT. There is no simple list of CMT offenses or easy definition. However, there are some guiding principles outlined here to analyze your client's offense. It's a good idea to get expert assistance in 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 CMT, will not trigger this ground of inadmissibility. And, again, keep in mind that, like the other crime-related grounds of inadmissibility, U visa applicants who trigger this ground can

²² *Matter of K-*, 9 I&N Dec. 715 (BIA 1962); *but compare US ex rel. De La Fuente v. Swing*, 239 F.2d 759 (5th Cir. 1956); *Matter of G-M-*, 7 I&N Dec. 40, 42 (AG 1956); *but see Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

²³ *Matter of G-*, 6 I. & N. Dec. 9 (BIA 1953); *Matter of G-*, 1 I. & N. Dec. 225 (BIA 1942); *Matter of M-C-*, 3 I. & N. Dec. 76 (BIA 1947).

²⁴ *Matter of E.V.*, 5 I&N 194 (BIA 1953) (P.C. § 1203.4 expungement); *Matter of G*, 1 I&N 96 (BIA 1942) (dismissal pursuant to Texas statute); *Matter of Winter*, 12 I&N 638 (BIA 1967, 1968) (case placed "on file" under Massachusetts statute); *Matter of Seda*, 17 I&N 550 (BIA 1980) (state counterpart of federal first provisions, no conviction); *but see also Matter of Ozkok*, Int. Dec. 3044 (BIA 1988), providing new definition for resolutions not amounting to a conviction.

²⁵ *See Matter of C.Y.C.*, 3 I&N 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); *see also Matter of E.V.*, *supra*, (expungement under P.C. § 1203.4 controls even where admission made to immigration judge). *But see Matter of I*, 4 I&N 159 (BIA, AG 1950) (independent admission supports exclusion where alien convicted on same facts of lesser offense not involving moral turpitude.)

²⁶ *Pazcoguin*, *supra*, at 1214-15.

²⁷ *See Matter of M-U-*, 2 I. & N. Dec. 92 (BIA 1944); *see also Matter of Devison*, 22 I. & N. Dec. 1362; (BIA 2000); *but see US v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997) (juvenile's guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant's minority status).

seek a section 212(d)(14) waiver.

PRACTICE POINT: Beware: the “reason to believe” drug-trafficker ground at INA § 212(a)(2)(C) is an entirely separate inadmissibility and is not limited by the requirements of a “qualifying admission” outlined above. It is not based on the “elements” of a crime and is subject to a much lower standard of proof.

1. Moral “Turpitude”²⁸ Defined: Crimes That Are and Are NOT CIMT Offenses

The definition of moral turpitude has been the subject of over a century of caselaw. Whether an offense can be classified as “involving moral turpitude” does not depend on classification as a felony or misdemeanor, or 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, 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

PRACTICE POINT: 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, authors of this advisory have significant expertise in this area and are available to assist you.

specific intent is not a prerequisite to finding that a crime involves moral turpitude. . . .”²⁹

As if that were not sufficiently nebulous, in a recent and controversial decision published less than three months prior to leaving office, the Attorney General (AG) attempted to expand the CIMT definition to include behavior he deemed “reprehensible conduct” that was committed with “some form of scienter,” (intent) whether specific intent, deliberateness, willfulness, or recklessness.³⁰ The impact of this decision (which advocates are requesting new Attorney General Holder to withdraw or at least reconsider) is unclear. However, even with this confusion, some general guidelines for determining crimes that are, and are not, CIMTs remain.

²⁸ 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.

²⁹ *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001)(most internal citations omitted)

³⁰ *Matter of Silva-Trevino* 24 I&N Dec. 687 (A.G. 2008)

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 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;³¹
- **Offenses of Morally Offensive Character.** Offenses that are “vile, base, or depraved” and violate societal moral standards involve moral turpitude.³² The offense also must be committed willfully or with evil intent.³³ This includes sex offenses in which “lewd” intent is an element;
- Crimes (typically felonies) in which there is an **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 because it is “depraved” and “morally indefensible.”³⁴

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 element)³⁵, 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 longestablished rule that simple driving under the influence (“DUI”) does not constitute a crime involving

³¹ *Jordan v. DeGeorge*, *supra* at 227-332.

³² See, e.g., in the 9th Circuit, *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, (9th Cir. 2007) and *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007).

³³ *Quintero-Salazar*, *id.*, quoting *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006).

³⁴ See, e.g., *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (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, suggested that solicitation to possess a very small amount of marijuana for sale might not constitute moral turpitude.

³⁵ *Matter of Franklin*, Int. Dec. 3228 (BIA 1994) (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) ; see also *Matter of Perez-Contreras*, Int. Dec. 3194 (BIA 1992) (third degree assault statute that involved criminal negligence but not recklessness is not turpitudinous).

moral turpitude (“CMT”) because it lacks the requisite intent element. This is true even if there are multiple DUI convictions.³⁶

- **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.³⁷ 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.³⁸ Battery or assault directed against a spouse will not be held to involve moral turpitude based solely on the fact that the 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.³⁹

- **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 crimes involving moral turpitude.⁴⁰ A conviction under federal law for knowingly possessing an altered immigration document does not involve moral turpitude unless an intent to use the document unlawfully is an element of the offense.⁴¹

2. How to Determine If The Offense Is a CMT: The Categorical Analysis

The categorical analysis is the established framework which a reviewing authority (e.g. an immigration judge, CIS examiner, or federal court) will use to decide whether or not your client’s conviction is a CMT under immigration law. The categorical analysis is one of the essential cornerstones of analyzing the immigration consequences of a criminal conviction. It governs the analysis for not only CMT offenses, but also determinations of what constitutes an aggravated felony under INA § 101(1)(43) as well as when a conviction triggers a ground of deportation under INA § 237(a)(2). It is currently the subject of extensive litigation at the BIA, in the federal courts, and at the U.S. Supreme Court. 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*,

³⁶ *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

³⁷ See *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006); see also *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (Calif. PC § 243(a), (e) are not crimes involving moral turpitude); and see *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 USC § 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 throughout this chapter is of the panel decision on remand, 468 F.3d 1159.

³⁸ *Fernandez-Ruiz v. Gonzales*, *supra*.

³⁹ *Galeana-Mendoza v. Gonzales*, *supra*; *Matter of Sanudo*, *supra*.

⁴⁰ *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000).

⁴¹ *Matter of Serna*, Int. Dec. 3188 (BIA 1992) (record of conviction under 18 USC § 1546 showed conviction was only for possession and not for use).

but rather, on 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?”

PRACTICE POINT: 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.

The categorical analysis, for CIMT purposes, begins with the elements of the crime as set forth in the criminal statute of conviction and the case law interpreting it. There may be many ways to

PRACTICE POINT: 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 POINT: The first step is always to include, where possible, in your cover letter accompanying the U visa application the legal arguments for why an offense is not a CIMT and the criminal inadmissibility ground does not apply. However, then, in the alternative, assert the reasons why, if CIS deems the offense a CIMT (or it is clearly a CIMT), granting the applicant a section 212(d)(14) waiver would be in the public and national interest and deserving of a favorable exercise of discretion.

violate the criminal statute; or, in other words, commit the crime. Under the categorical analysis, the “minimum conduct test” governs. This test states 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.⁴² The minimum or least offensive conduct to commit the offense requires a “realistic probability, not a theoretical possibility” that the conduct would fall under the statute.⁴³ If any of the elements required to sustain a conviction involve moral turpitude, the crime defined by the statute involves moral turpitude.

If neither the statute nor the record of conviction sufficiently defines the offense as one involving moral turpitude, the reviewing authority will not hold the offense to be turpitudinous. Thus, a

⁴² *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931).

⁴³ *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 822 (2007).

conviction of assault (generally not a CIMT) with intent to commit a felony in which the record of conviction did not identify the felony was held not to be a crime involving moral turpitude.⁴⁴

The Modified Categorical analysis.⁴⁵ 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 they are confronted with a criminal statute that encompasses numerous offenses (either because the statute lists multiple separate offenses within it, or because by the wording of the statute, there are numerous 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.⁴⁶ It may define the crime in the disjunctive, as where, for example, California Vehicle Code § 10851 defines “vehicle taking” as a taking with an intent to deprive the owner of possession “permanently” (turpitudinous) *or* “temporarily” (not turpitudinous). Finally, a section may be so broadly or vaguely drawn that it could include turpitudinous and non-turpitudinous conduct, as in Calif. PC § 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.⁴⁷ Where the record of conviction does not reveal whether turpitudinous conduct was involved, the court must decide in favor of the defendant, and a finding of moral turpitude cannot be made.⁴⁸ 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.⁴⁹

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.⁵⁰ The ROC does not include the trial record, pre-sentence report, the prosecutor's sentencing remarks, or the trial

⁴⁴ See *Matter of Short*, *supra* (reviewing authority will not look to co-defendant’s record of conviction to further define the offense).

⁴⁵ In older BIA cases these principles are referred to as the law governing divisible statutes and the record of conviction

⁴⁶ See, e.g., Calif. PC § 602, “criminal trespass.”

⁴⁷ See, e.g., *Matter of W*, 5 I&N Dec. 239 (BIA 1953); see also *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966). Most U.S.Circuit Courts permit themselves review of the record of conviction in any case, not merely those involving divisible statutes. See, e.g., *Wadman v. INS*, *supra*, at 814. However, these courts generally adhere in practice to the rule that turpitude is determined by the crime charged and not by the conduct of the particular defendant.

⁴⁸ *Matter of C*, 5 I&N Dec. 65, 71 (BIA 1953).

⁴⁹ *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 759 (2nd Cir. 1933).

⁵⁰ *Matter of Mena*, 7 I&N Dec. 38 (BIA 1979); *Wadman v. INS*, 329 F.2d 812, 814 at n. 63 (9th Cir., 1964).

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 her plea agreement as the evidence setting forth the factual basis for the plea. It may, however, include a defendant's admissions made while entering his plea.⁵¹ 51

Matter of Silva-Trevino. In a decision issued in November 2008, less than three months prior to his departure, the Attorney General (AG) certified a case and overrode the BIA's analysis of how to determine when a crime is a CIMT. In this decision, *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. Nov. 7, 2008) the AG attempts to establish a new approach to determining convictions for crimes involving moral turpitude. Basically this would allow an immigration judge (IJ) to go beyond the record of conviction, take testimony, and consider anything she thought relevant, in deciding if turpitude were involved. It's not clear how the decision would affect CIS adjudications, but presumably, at some point they would follow. The Attorney General's opinion in *Silva-Trevino* may be attempting to refashion a new, much broader definition of "crime involving moral turpitude" as merely "reprehensible" conduct with "some form of scienter."⁵² 52

While the overall implications of this decision are very serious, it may not have as much of an impact on U visa applicants because adjudication of the existence of the section 212(d)(14) waiver. Advocates should still strongly argue, where possible, that the offense is not a CIMT under the categorical analysis and, then, in the alternative why the applicant warrants the granting of a section 212(d)(14) waiver and a favorable exercise of discretion if CIS decides that her offense is a CIMT.

3. Exceptions to the CIMT Inadmissibility Ground

a. The Petty Offense Exception

Under INA § 212(a)(2)(A)(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 to qualify for this exception are:

- The noncitizen must have committed only one crime involving moral turpitude (ever);
- 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.⁵³ 53

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 the CIMT ground of inadmissibility even

⁵¹ See *Matter of Cassisi*, 10 I&N Dec. 136 (BIA 1963) (prosecutor's remarks); see also *Matter of Goodalle*, 12 I&N Dec. 106, 107-8 (BIA 1967); and see *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979); and see *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) (presentence report).

⁵² *Silva-Trevino* supra, at 706 & n.5, 707.

⁵³ INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II)

though it is defined as a CIMT. For example, a simple misdemeanor theft offense where the maximum possible sentence under the criminal statute is 90 days will never qualify as a CIMT. Offenses that fit within the petty offense exception do not require the U visa applicant to request a section 212(d)(14) waiver for the crime.

b. Juvenile Offenses

Statutory Exception. Under the “youthful offender” exception, a noncitizen will not be found inadmissible under the moral turpitude ground based on a conviction in adult court if he or she committed only the one offense involving moral turpitude, while under the age of eighteen, and if the commission of the offense and the release from any resulting imprisonment occurred over five years before the current application.⁵⁴

Effect of Juvenile Proceedings. Note that if the noncitizen under eighteen 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. There is an argument that immigration authorities should use the federal definition of who should be tried as a juvenile, rather than whether the noncitizen actually was tried as a juvenile in state court, as the measure of whether a conviction exists.

E. Controlled Substance (Drug) Offenses & Issues

1. Controlled Substance Inadmissibility Grounds

As outlined elsewhere in this advisory, a noncitizen can be found inadmissible even without a conviction, under the “conduct” based inadmissibility grounds. These are:

- A noncitizen who is a “current” **drug addict or abuser** is inadmissible. *See infra* § II.G.4.
- A noncitizen is inadmissible if immigration authorities 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. *See infra* § II.G.1.
- A less frequently used section provides that a noncitizen is inadmissible if she formally admits all of the elements of a controlled substance **conviction**. *See infra* § II.C.

A conviction for simple possession of a federally-defined controlled substance always is a deportable and inadmissible offense. Convictions for possession of drug paraphernalia are as well. Unlike the deportation ground relating to controlled substance convictions, the inadmissibility ground contains no statutory exception for simple possession of a small amount of marijuana or paraphernalia. Convictions involving drug trafficking will also trigger this ground of inadmissibility.

2. Possible Exceptions for Controlled Substance Offenses

a. Accessory after the fact, misprision of felony and related offenses

⁵⁴ INA § 212(a)(2)(A)(ii)(I), 8 USC § 1182(a)(2)(A)(ii)(I).

Accessory after the fact 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 accessory and misprision do not take on the character of the underlying offense and therefore, do not “relate to” drug enforcement per se, but to general law enforcement purposes. Therefore the conviction is not of a controlled substance offense for immigration purposes, even if the underlying principal offense had to do with drugs.

Whether these offenses “involve moral turpitude” is a separate question. The Ninth Circuit *en banc* held that accessory after the fact is not a crime involving moral turpitude.⁵⁵ 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,⁵⁶ and other courts have not ruled. DHS may find that the act of hiding a drug trafficker after he has completed the trafficking is aiding or colluding in the trafficking, and that an accessory-type conviction renders a person inadmissible under the “reason to believe” ground.⁵⁷

b. Ninth Circuit-Specific Exceptions

ii. An 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.⁵⁸ The court subsequently held that the *Lujan-Armendariz* benefit also applies to a first conviction of a controlled substance 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).⁵⁹ Foreign rehabilitative relief similarly will eliminate the immigration consequences of a foreign conviction for simple possession or a less serious offense.⁶⁰ Finally, a conviction for giving away a small amount of marijuana for free should be treated equally, under federal statute.⁶¹ “Rehabilitative relief” means any state disposition (e.g., deferred entry of judgment, expungement) that lets a defendant

⁵⁵ *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007).

⁵⁶ *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006), *see also* *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965). *Robles* is incompatible with *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1072 (9th Cir. 2007) (*en banc*). Note that California accessory after the fact, PC § 32, has a specific intent requirement greater than that of misprision, 18 USC § 4.

⁵⁷ *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).

⁵⁸ *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).

⁵⁹ *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

⁶⁰ *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001).

⁶¹ *See* 21 USC § 841(b)(4) and discussion at section 3.6(C).

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.”⁶² 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.⁶³ 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 its progeny in immigration proceedings that arise outside of the Ninth Circuit.⁶⁴ The Ninth Circuit ruled that, apart from the specific drug offenses treatable under *Lujan-Armendariz*, treatment under state rehabilitative relief will not eliminate a conviction for immigration purposes.

ii. Convictions under a Generic “solicitation” Statute

The controlled substance grounds of inadmissibility and deportability specifically include “attempt or conspiracy” to commit a drug offense, (as does the aggravated felony deportation ground definition). None of these mention solicitation.⁶⁵ 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.⁶⁶ California does not have such a generic solicitation statute, but several other states do, including Alaska, Arizona, Idaho, Montana, Oregon, and Washington.⁶⁷ California does not have a “generic” solicitation statute but 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. If your client is applying from within the 9th Circuit and has such a solicitation conviction, from any state, you should not concede that these make her

⁶² 18 USC § 3607(c).

⁶³ *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004). But

⁶⁴ *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002).

⁶⁵ See INA § 101(a)(43)(U), 8 USC § 1101(a)(43)(U) (aggravated felony); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (deportability ground); INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II), (inadmissibility ground).

⁶⁶ *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).

⁶⁷ 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; R.C.W. § 9A.28.030.

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). 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.⁶⁸

F. Multiple Convictions with Aggregate 5 Year Sentences

This ground of inadmissibility⁶⁹ 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.⁷⁰ Even if the applicant has a history of suspended sentences only for DUIs, driving with license suspended, and other offenses that do not by themselves trigger any grounds, 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 could be invisible to the advocate.

G. Crime-related Inadmissibility Grounds Based On Conduct

1. “Reason To Believe” Controlled Substance Traffickers

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.⁷¹ Specifically the spouse and/or children of a drug trafficker will trigger this ground , if the spouse or child knew or should have known that, within the last five years, he or she received a benefit from the drug trafficking. A U-visa is one of the very few forms of relief that a person who is inadmissible under this ground can obtain since, unlike other forms of relief, U visa applicants can have this ground of inadmissibility waived by a section 212(d)(14) waiver.

The “reason to believe” (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 of an immigration official. If immigration authorities only discover “reason to believe” the noncitizen has been a

⁶⁸ For a detailed discussion of these issues, consult *Defending Immigrants in the Ninth Circuit*, Kathy Brady, 10th Ed, Chapter 3

⁶⁹ INA § 212(a)(2)(B), 8 USC § 1182(a)(2)(B): “Multiple Criminal Convictions. Any alien convicted of two 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.”

⁷⁰ INA § 101(a)(48)(B), 8 USC § 1011(a)(48)(B)

⁷¹ INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C)

drug trafficker *after* 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 the INS had not yet learned of his trafficking activities could not later be found deportable for having been inadmissible at last entry.⁷²

An important requirement of the R2B inadmissibility ground to apply 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).⁷³ Additionally, there must be substantial and probative evidence that the noncitizen was engaged in the business of selling or dealing in controlled substances for this ground to apply.⁷⁴ Possession or importation of drugs for one's private use is not "trafficking."⁷⁵ The BIA definition is so broad that it encompasses a single incident.⁷⁶ DHS must also prove the essential element of intent, which is the specific intent to distribute controlled substances.⁷⁷ Counsel should consider carefully whether the evidence indicates that the R2B ground could apply and needs to be waived, either for a principal or a family member. In the case of a noncitizen who asserts that she did not participate in drug trafficking, her credibility is an issue that can and should be addressed by evidence. In *Lopez-Umanzor v. Gonzales*,⁷⁸ 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 trafficking transaction conducted by the abuser. Counsel had her pastor testify that she was a credible person and one who was not involved with 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 had prevented him from making a reasoned decision on the application for cancellation under VAWA ,⁷⁹ the court found that this also might have influenced his decision not to believe the woman about the fact that she was not a drug trafficker.

⁷² *Matter of Rocha-Ruiz*, Int. Dec. 3239 (BIA 1995).

⁷³ 8 USC § 1182(a)(2)(C)(i), INA § 212(a)(2)(C)(i).

⁷⁴ *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) (pled 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).

⁷⁵ *Matter of McDonald and Brewster*, 15 I&N Dec. 203, 204 (BIA 1975).

⁷⁶ *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

⁷⁷ 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)).

⁷⁸ *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1052 (9th Cir. 2005).

⁷⁹ Under VAWA provisions, a noncitizen can apply for lawful status based on abuse by a United States citizen or permanent resident parent or child. See discussion at § 11.10.

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.

2. Prostitution

Persons who “engage in prostitution” are inadmissible, even without a criminal conviction.⁸⁰ The ground has a ten-year cap: individuals who engaged in prostitution at least ten years ago are not inadmissible. Advocates should check to see if the behavior really fits the definition. For example, the Ninth Circuit held in *Kepilino v. Gonzales*⁸¹ that a State Department regulation defining prostitution for purposes of the inadmissibility ground will control. 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.⁸² Because a conviction is not required to establish that a person has engaged in prostitution a mere admission of engaging in prostitution by the person can be considered. However, a casual, one-time encounter does not amount to “engaging in” prostitution, according to BIA case law and State Department regulations.⁸³ 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. Legal prostitution is included. Non-citizens who have worked legally as prostitutes in countries or

⁸⁰ 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 USC § 1182(a)(2)(D).

⁸¹ *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006).

⁸² *Kepilino* at 1059-60, 1062-63.

⁸³ See *Matter of T.*, 6 I&N Dec. 474 (BIA 1955) and 22 CFR 40.24(b)

states where it is legal are still inadmissible.⁸⁴ 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, for example being convicted of patronizing a prostitute, has been interpreted as not "engaging in prostitution."⁸⁵ It is possible--but there is no case on point-- 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 probably also amount to a crime involving moral turpitude, and this should be listed as a possible ground of inadmissibility

3. Physical or Mental Disorder and Alcoholism

Under the health-related grounds of inadmissibility at INA § 212(a)(1)(A), noncitizens are inadmissible if they have a "physical or mental disorder and behavior associated with the disorder" that poses "a threat to the property, safety, or welfare of the noncitizen or others," or have "had such a disorder and history of such dangerous behavior in the past, which is "likely to recur or to lead to other harmful behavior."⁸⁶ This ground also includes persons determined to be drug abusers or addicts. However these determinations of inadmissibility cannot be made by DHS alone, but rather must be made "in accordance with regulations prescribed by the Secretary of Health and Human Services." While alcoholism is not specifically named, it has been identified as such a disorder.⁸⁷ On July 7, 2007, the Department of State issued a cable to provide guidelines to consular officials for cases where the applicant's criminal record shows an arrest or conviction for drunk driving or other alcohol related offenses.⁸⁸ The DOS cable provides that DUI convictions are insufficient to automatically find an applicant ineligible under the physical or mental disorder inadmissibility ground and requires a referral to a panel physician who must make certain findings to trigger inadmissibility. Since there is no requirement for a physical examination by U-visa holders, it would be hard for this ground to formally apply. However, the question about this inadmissibility ground is on form I-918 (Part 3., 22.) If the person has had multiple DUIs or other obvious alcohol-related criminal behavior, it might be wise to include this ground --"in the alternative"-- on the section 212(d)(14) waiver application.

4. Drug abuser or addict

⁸⁴ See *Matter of G*, 5 I&N Dec. 559 (BIA 1953), 22 CFR § 40.24(c).

⁸⁵ *Matter of R.M.*, 7 I&N Dec. 392 (BIA 1957); see also *Matter of Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549 (BIA June 25, 2008) (Congress did not consider someone who solicits another to engage in prostitution for himself to be a procurer under 212(a)(2)(D);

⁸⁶ INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii).

⁸⁷ "Technical Instructions for Medical Examinations of Aliens," published online by the Center for Disease Control. Go to <http://www.cdc.gov/ncidod/dq/technica.htm>; or go to www.cdc.gov and use the search function for "technical instructions aliens."

⁸⁸ This cable can be obtained at http://travel.state.gov/visa/laws/telegrams/telegrams_3267.html or in *Interpreter Releases*, 84 No. 27 Int. Rel 1610 (July 16, 2007).

Under this health-related ground, a noncitizen is inadmissible who is found to be a drug abuser or addict.⁸⁹ Those regulations define drug abuse as nonmedical use of proscribed drugs which has not necessarily resulted in physical or psychological dependence; and drug addiction as such use which has resulted in dependence. This health ground of inadmissibility is unwaivable for regular (i.e. non-U-visa) applicants for admission; but is phrased in the present tense only.

Definition of Drug Addict: The Public Health Service (PHS) regulation at 42 C.F.R. § 34.2(h) defines drug addiction as the nonmedical use of a substance listed in Section 202 of the Controlled Substances Act (21 U.S.C. § 802) that has resulted in physical or psychological dependence.

Definition of Drug Abuser: The PHS regulation at 42 CFR § 34.2(g) defines 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."⁹⁰ The current definition of "nonmedical use" in the technical instructions is "more than experimentation with the substance (e.g., a single use of marijuana or other non-prescribed psychoactive substances, such as amphetamines or barbiturates)".⁹¹

A person or who has not engaged in "more than experimentation" with drugs for the last three years, and who is not an addict at the time of application, is not inadmissible as an abuser.

5. Alien Smuggling

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).⁹² 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.⁹³ Mere harboring or transporting of others alone might not be enough to constitute alien

⁸⁹ INA(a)(1)(A)(iv), 8 USC 1182(a)(1)(A)(iv), A non-citizen "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict."

⁹⁰ Section 202 of the Controlled Substances Act is codified at 21 USC § 802, which lists hundreds of controlled substances in five schedules. Marijuana is included.

⁹¹ Amendments to p. III-14, 15 of Technical Instructions for Medical Examination of Aliens.

⁹² INA § 212(a)(6)(E)(i); INA § 237(a)(1)(E)(i).

⁹³ 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)

smuggling.⁹⁴ Mere presence during the actual act of alien smuggling with knowledge that it is being committed might also not enough.⁹⁵

The Next ASISTA Newsletter will contain the remainder of this practice guide, addressing specific waivers available for U Visa Recipients. In the mean time, we have included the following list of additional resources for your information.

III. Additional Resources

ASISTA Consultants

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 and crimes. Annie and Jonathan staff the Washington Defender Association's Immigration Project and are available to provide individual technical assistance to you on your case.

Written Materials

Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws, 10th Edition, by Kathy Brady with Norton Tooby, Michael K. Mehr and Angie Junck,⁹⁶ is a comprehensive and valuable treatise that has detailed discussions of every crime-related immigration issue, and is useful to practitioners outside the Ninth Circuit

Immigration Law and Crimes, Kesselbrenner and Rosenberg, National Immigration Project of the National Lawyers Guild, Thomson – West. This is the leading national treatise on the topic, <http://west.thomson.com/productdetail/2570/13514773/productdetail.aspx#>

Immigration Law and Procedure, Charles Gordon, Stanley Mailman, and Stephen Yale Loehr, (Matthew Bender) the main over-all, complete multi-volume treatise.

Kurzban's Immigration Law Sourcebook, 11th Edition by Ira J. Kurzban, a really useful, one-volume sourcebook on immigration law.

⁹⁴ *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 679 (9th Cir. 2005) (“Thus, Hernandez is correct that, unlike its criminal counterpart, INA § 274, 8 USC § 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 USC § 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).

⁹⁵ *Altamirano, supra*.

⁹⁶ Available from the Immigrant Legal Resource Center, at http://www.ilrc.org/pub_output.php?id=1

Online Resources

The Defending Immigrants Partnership (DIP) - DIP provides a wealth of resources to understand the immigration consequences of crimes. It has launched a free online resource for criminal defenders at <http://www.defendingimmigrants.org>.

Law Office of Norton Tooby publishes a comprehensive digest of holdings on different criminal grounds, including a list of CIMT decisions at a valuable, but paid membership site. <http://criminalandimmigrationlaw.com/~crimwcom/index.php>

The Immigration Advocates Network (IAN) is a free national online network that supports legal advocates working on behalf of immigrants' rights. [http:// www.immigrationadvocates.org/](http://www.immigrationadvocates.org/) IAN has materials, power-points, webinars, and training materials on crime –related issues. Such as http://www.immigrationadvocates.org/library/folder.180704-Introduction_and_Summary_of_Immigration_Consequences_of_Crimes

The Immigrant Legal Resource Center in the Bay Area provides technical assistance and information on criminal –immigration issues and has a number of free online resources <http://www.ilrc.org/criminal.php>

National Immigration Project is a national membership organization of lawyers, law students, legal workers, and jailhouse lawyers working to defend and expand the rights of all immigrants in the United States. They have on-line resources and provide technical assistance <http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html>

Sample Request for Waiver of Inadmissibility*

* Edited by Gail Pendleton; reprinted with permission of author Sonia Parras
Sample U waiver request

EDITOR'S NOTES IN ITALIC: This is NOT a template. You MUST tailor your arguments to your clients' facts.

**REQUEST FOR WAIVER OF INADMISSIBILITY UNDER
INA § 212 (d) (14) ON BEHALF OF APPLICANT NAME REDACTED
A# REDACTED**

I. U APPLICATION FILED

APPLICANT NAME REDACTED applied for a visa under INA § 101(a)(15)(U) on October 31, 2008, and that application is currently pending.

II. REQUEST FOR FEE WAIVER OF FORM I-192

FIRST NAME is requesting a **fee waiver** of the required cost of the form I-192 (\$545.00) as he is currently unemployed and does not have means to pay this amount. FIRST NAME has submitted a letter from the Church explaining that he is surviving due to the charity and donations from the church. He has also submitted a personal statement of income and expenses that goes to prove economic need.

III. INADMISSIBILITY GROUNDS REQUIRING WAIVER

APPLICANT NAME REDACTED may be inadmissible based upon INA Section 212(a)

<input type="checkbox"/> (1) Health-related-grounds	<input type="checkbox"/> (2) Criminal and related grounds
<input type="checkbox"/> (3) Security Grounds	<input type="checkbox"/> (4) Public Charge
<input type="checkbox"/> (5) Labor certification	<input checked="" type="checkbox"/> (6) Illegal entrants and immigration violators
<input type="checkbox"/> (7) Documentation requirements	<input type="checkbox"/> (8) Ineligible for citizenship
<input type="checkbox"/> (9)(A) Aliens previously removed	<input checked="" type="checkbox"/> (9)(B) Unlawful presence
<input checked="" type="checkbox"/> (9)(C) Unlawful presence and re-entry	<input type="checkbox"/> (10) Miscellaneous

FIRST NAME is requesting that your office waive these inadmissibility grounds under INA § 212(d)(14) because it is in the public and national interest.

FIRST NAME is requesting that your office also waives any other grounds of inadmissibility of which applicant is unaware, for the reasons noted below.

III. GRANTING THE WAIVER IS IN THE NATIONAL AND PUBLIC INTEREST

NOTE: If your client has only triggered (6)(A) you may not need arguments beyond the Congressional Intent argument.

Granting Furthers Congressional intent: To Encourage Undocumented Victims of Crimes to Access Justice

[How did the perpetrator use your client's lack of status against her? How did being undocumented prevent her from accessing justice?]

FIRST NAME was victimized because he was undocumented. His perpetrator knew and used his lack of status to keep him from reporting the crimes he suffered ***PROVIDE SPECIFICS and reference supporting documentation.*** In addition, he would be at increased risk of further victimization in the United States as he will be exposed without immigration status to the perpetrators of the crime. Denying the waiver will send the message to this applicant that his assistance to law enforcement is not valued and that there are indeed negative immigration consequences in so doing.

FIRST NAME's case is exactly the type of case Congress intended to benefit with the passage of the U Visa and the available waiver of inadmissibility.

Granting the waiver will encourage past, current and future immigrant victims of crimes of violence to report violent crimes and collaborate in the investigation and/or prosecution of perpetrators. The applicant's experience will demonstrate that our country treats violent crimes seriously regardless of the immigration status of the victim.

Ongoing Assistance to Law Enforcement

[How was your client helpful? Is she still needed?]

The United States has benefited from the information and collaboration that FIRST NAME provided to our law enforcement. FIRST NAME has been cooperating, is cooperating and will be cooperating with law enforcement, the Attorney General's office, and other state and federal agencies in the investigation of violations of the state's [list crimes] and other crimes of which he was a victim. FIRST NAME has been working and is currently working with law enforcement on investigations into other crimes against fellow employees at _____ in _____.

REFERENCE DOCUMENTATION

Currently, the Iowa Division of Employment, the Equal Employment Opportunity Commission, the Iowa Attorney General's office as well as the United States Attorney's office for the Northern District are still working on gathering evidence and testimony in preparation for upcoming trials and proceedings. ***REFERENCE DOCUMENTATION***

Denying the waiver will have a detrimental impact in all these cases and agencies because the applicant will not be available to continue collaborating with these agencies.

Need for Ongoing Access to Justice in US

[Does your client need access to the civil courts, for custody, e.g.? Any ongoing need for access to criminal or civil justice systems?]

Need for Services Here Unavailable in the Homeland

[What services does your client and children need and are using here? Why can't they get them in the homeland?]

APPLICANT NAME REDACTED was only 17 at the time his victimization started and was severely traumatized by his experiences. Due to the victimization endured in the United States, FIRST NAME needs access to services that are widely unavailable in his home country. FIRST NAME would have no access to services he needs to help him deal with the trauma he has experienced.

He regularly attends a support group held by REDACTED for youth impacted by the criminal activity at the Agriprocessors plant. and works with an advocate to help him with the defenses of denial and minimization and Post Traumatic Stress he suffers because of the abuse he suffered at Agriprocessors and the terror he experienced during the ICE raid. **REFERENCE DOCUMENTATION**

While the Guatemalan government has been taking steps to improve the conditions for women, and address the needs of survivors of these crimes, currently, the resources available in the form of shelters, police training, judicial training, and victim services are inadequate. (*Id.*, See also Yakin Ertürk, United Nations Economic and Social Council Commission on Human Rights *Integration of the Human Rights of Women and the Gender Perspective Violence Against Women Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum Mission to Guatemala*, Document E/CN.4/2005/72/Add.3, Feb 10, 2005. and the United Nations Committee on the Elimination of Discrimination Against Women Report pp. 134-41.)

Currently, FIRST NAME is working with victim advocates and meets with a support group to help him with the emotional issues he has dealt with as a result of her experiences. According to NAME REDACTED, Psy.D., a licensed psychologist, he suffers from developmental problems that could cause severe distress later in life as a result of his experiences at Agriprocessors.

REFERENCE DOCUMENTATION He has adopted a variety of fairly primitive defenses that have helped him get through the experiences, however, if he does not continue to receive services, his personal and emotional growth is likely to be stunted. FIRST NAME would not only be at risk of further victimization if returned to Guatemala, it is also unlikely that he would have access the services he needs to help him cope with his recent experiences.

Contributions to the Community

[How has your client contributed to her community or helped others? Minimally, is she a good mother and how can you show that, e.g., kids' teachers]

FIRST NAME has been an active participant in his adopted community and church. ***GIVE SPECIFICS AND REFERENCE DOCUMENTATION***

Extreme Hardship if Returned

[How would your client be harmed if returned? Remember that economic deprivation is not a persuasive extreme hardship factor since it's true for most undocumented immigrants]

Applicant will be exposed to further victimization in his home country in the event of having to return. FIRST NAME will be more vulnerable to predators and traffickers because of his traumatic experiences and need to survive and help his mother and siblings. According to the United States Department of State *Trafficking in Persons 2008 Report*, Guatemalan women and children are often trafficked within the country for commercial sexual exploitation, as well as forced labor in the agricultural and other commercial sectors. (U.S. Department of State, *Trafficking in Persons Report*, 2008.)

Currently, the Guatemalan government is not fully in compliance with the minimum standards for the elimination of trafficking, and is on the Department of State's Tier 2 Watch List. (*Id.*) In addition to this, the Department of State reports that rape reports have increased by 30 percent between 2003 and 2007. (U.S. Department of State, Country Report on Guatemala, 2007.) Only recently (2004) was the law changed so that rapists could no longer avoid charges by marrying the victim.

FIRST NAME will be exposed to further victimization as perpetrators of crimes against property in his home-town have been assaulting and stealing from co-workers from the Postville plant as they returned to their home country after being removed. The government has been unable or unwilling to protect them. Therefore, it is likely that applicant will endured the same treatment upon return.

CONCLUSION

FIRST NAME respectfully requests that the enclosed I-192 Waiver of Grounds of Inadmissibility be granted as to unlawful entry and unlawful presence, INA § 212(a)(6)(A) & (9)(B) & (C), as well as any and all grounds of inadmissibility your office may find applicable to him, because it is in the national or public interest that he be admitted to the United States.

Victim of Crime Advocate (Expert) Declaration Guidelines on Substantial Abuse*

All affidavits should include:

A paragraph providing your “credentials” : your experience with domestic violence, sexual assault, or the crime involved in the U case (how long you’ve worked with victims, how many you’ve served, etc.);

A paragraph or more describing in detail what the client told you about what she/he experienced, both the crime itself and how it affected the client. These are the factors the CIS regulations specifically mention

- the nature of the injury,
- the severity of the perpetrator’s conduct,
- the severity of the harm suffered,
- the duration of the infliction of harm,
- any permanent or serious harm to appearance,
- health and physical or mental soundness, and
- any aggravation of a victim’s pre-existing conditions

But they will consider any “impairment” of the client’s “client’s emotional or psychological soundness,” so please identify and explain any evidence you see in the client’s behavior, attitude or description of her experience that would show this. How does this substantially impede the client’s well-being and/or ability to navigate life successfully.

A paragraph explaining how this was credible to you given your experience with crime victims like the applicant; you can tell the difference between truth and fiction;

For Inadmissibility Waivers: Harm if counseling ended because of deportation

A final paragraph describing why the client needs ongoing counseling and the writer’s willingness to provide such counseling. Merely stating she needs counseling is not helpful: provide details on the client and why, based on your experience, this means she needs more counseling and support.

* Gail Pendleton, ASISTA Co-Director, prepared this guidance.

Practice Updates

HIV and VAWA

*by Ellen Kemp**

You may know that the HIV ground of inadmissibility has been removed both from immigration law and, most recently, from the regulations issued by the Department of Health and Human Services. The final rule took effect on January 4, 2010. Congratulations to all of you who advocated for an end to the ban.

Immigration law still contains a special health waiver provision for VAWA self-petitioners at INA 212(g), but VAWA self-petitioners living with HIV/AIDS no longer need this waiver for purposes of waiving the HIV condition, since it is no longer a ground of inadmissibility.

There are a number of guidance memoranda and other documents that various government agencies have distributed about this issue. Below please see a list of links to websites of the CDC, the Department of State, USCIS with relevant information. I've also attached the two USCIS guidance memoranda (Sept

2009 and Nov 2009) to this email, as well as a letter from USCIS to civil surgeons.

The USCIS guidance memoranda includes a provision for people whose cases were denied after 7/2/2009 based on HIV/AIDS grounds to file a motion to reopen.

The I-693 medical form and the corresponding medical forms for the Department of State are being revised to reflect this change in the law and regulations, but the current version still contains HIV-related questions. The attached letter to civil surgeons explains what physicians should do (essentially, write "no longer required" anywhere it talks about HIV testing, etc.)

ALERT: No HIV testing is REQUIRED for purposes of the immigration examination. However, there are still some potential hurdles for noncitizens living with HIV/AIDS of which you should be aware and should inform your clients and communities. The civil surgeons and panel

physicians are instructed by CDC to "record HIV infection disclosed by an applicant as a Class B Other condition on the DS 2053/2054 and I-693, respectively." Additionally, the Department of State HIV Q & A specifically references the "public charge" ground of inadmissibility with regard to people living with HIV/AIDS. Advocacy organizations are discussing different strategies for overcoming remaining obstacles and how to work with communities to keep accurate information flowing. We will keep you informed as to developments.

*Ellen Kemp works at National Immigration Project of the National Lawyers Guild, and is also a consultant for ASISTA.

For More Information related to the Practice advisory on HIV, the following resources may be helpful:

(CDC)
<http://www.cdc.gov/immigrantrefugeehealth/index.html> - news and

updates including guidance for HIV issue for panel physicians and civil surgeons performing medical examinations

(Dept. of State)

http://travel.state.gov/visa/questions/questions_4413.html, with link to HIV Q & A

(USCIS)

<http://www.uscis.gov/portal/site/uscis>, click on NEWS in the main menu line at top, then click on Questions & Answers to the left, then see HIV Q & A under January 2010.

Also, please see guidance memoranda from September 2009 and November 2009 and the USCIS letter to civil surgeons.

Immigration Equality, which has been a national leader in advocacy against the HIV ban, also has a very helpful website, specifically at <http://immigrationequality.org/template.php?pageid=5>. It contains commentary and links to relevant HIV guidance and documents all in one place.

DOS Cable on U Visa Processing Issued

The US Department of State issued a cable to all consular offices explaining the procedures for processing U Visas from abroad. This cable explains that U Visa adjudications are done by USCIS at the Vermont Service Center, including I-192 waivers of inadmissibility. Therefore, consular offices should not try to adjudicate these, but should go ahead and issue U Visas abroad for persons who have been approved. The text of the cable follows this advisory. In addition, it is available on our website at www.asistahelp.com.

I. Processing Abroad

After much input from CIS, the Department of State finally issued the attached cable on how it will process U visa principals and derivatives abroad. Two key features of the cable are the provision of multiple-entry visas and the recognition that it is not DOS' job to scrutinize Us abroad for inadmissibility.

Practice Pointers on DOS cable

Ongoing Processing Problems

Don't assume all consulates abroad have read the cable or understand its provisions, so provide a copy of it to them (or have your clients do so). If you are having trouble getting U visas processed abroad, CIS may be able to help. Try contacting the special VAWA/U number at the Vermont Service Center (VSC)--802-527-4888--or email us at questions@asistahelp.org and we will connect you with those at CIS who may be able to help.

Triggering Unlawful Presence

Many U holders or applicants may trigger unlawful presence when they leave the US. CIS will not pre-approve waivers for unlawful presence, but the U unit at VSC will entertain and waive such new inadmissibility as soon as someone triggers it by leaving. Before sending them the request in writing, use the same contact suggestions above, to ensure your waiver request doesn't get lost in the system. This is the best practice because, even if DOS allows someone

back in without scrutinizing for unlawful presence, it may affect your client later, at the adjustment phase. More importantly, it should ensure that consulates won't take it on themselves to make waiver determinations on U visas.

Breaking Continuous Presence

Remember that all U visa holders need three years of continuous presence in the US before they can adjust status, so warn U visa holders that long stays abroad may hamper their ability to gain lawful permanent residence. As

always, this is a risk/benefit decision for them to make, but they should understand that staying abroad for more than 90 days (or 180 days aggregate) will affect their status.

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UNCLAS SECTION 01 OF 02 STATE 011736

E.O. 12958: N/A
TAGS: CVIS, CMGT
SUBJECT: U NONIMMIGRANT VISAS FOR VICTIMS OF CRIMINAL
ACTIVITY

STATE 00011736 001.2 OF 002

1. SUMMARY: 9 FAM 41.85 has been updated to provide guidance about processing nonimmigrant visas in the U category. The U visa classification is available to qualified alien victims of designated criminal activities who assist with the investigation or prosecution of the qualifying criminal activities. Individuals self-petition USCIS directly, and U nonimmigrant status is granted by USCIS through an approved petition. Both U visa principal and derivative petitioners, granted U status, may apply for U visas in consular sections overseas. An individual may be both the petitioner and the applicant, because individuals may self-petition for U nonimmigrant status, as well as apply for a U nonimmigrant visa. In addition, consular officers at posts without a DHS presence may be approached to collect biometric information for security checks performed by DHS prior to petition approval. END SUMMARY.

2. The U nonimmigrant visa classification is for qualified alien victims of certain criminal activities who assist a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority with responsibility for the investigation or prosecution of the qualifying criminal activities. Qualifying aliens physically present in the United States, as well as aliens petitioning from overseas, are granted U nonimmigrant status by USCIS. If the qualifying alien is overseas, the alien needs a U nonimmigrant visa in order to enter the United States. U visas are a petition-based classification. U nonimmigrant visa petitions are filed using Form I-918 (principals) and Form I-929 (derivatives seeking U nonimmigrant status). Aliens petitioning for U nonimmigrant status either in the United States or from overseas must provide certification to USCIS from a Federal, State, or local law enforcement agency, prosecutor, judge, or other

authority with responsibility for the investigation or prosecution of the qualifying criminal activities, demonstrating that the petitioner "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of the qualifying criminal activity. This certification is only provided to USCIS and is required as part of the petition. Consular officers are not required to evaluate whether a petitioner is helpful in a law enforcement investigation or prosecution.

3. Although aliens may not file a Form I-918 or I-929 with a consular officer, there are five instances in which a U nonimmigrant visa applicant or a petitioner for U nonimmigrant status may require processing in a consular section overseas: 1) principal aliens abroad, who were accorded U nonimmigrant status by USCIS, applying for U nonimmigrant visas; 2) principal aliens accorded U nonimmigrant status in the United States who traveled abroad, applying for U nonimmigrant visas; 3) derivative aliens abroad, who were accorded U nonimmigrant status by DHS, applying for U nonimmigrant visas; 4) derivative aliens accorded U nonimmigrant status in the United States who traveled abroad, applying for U nonimmigrant visas; and 5) biometric collection, fingerprints, for principal and derivative aliens pending USCIS petition approval.

4. U nonimmigrant visa applicants should have an approved petition that is verifiable in the Petition Information Management System (PIMS). U visa applicants are required to pay the MRV fee and any applicable reciprocity fees.

U visas will be issued for multiple entries, valid for four years, until the petition expiration date, or based on reciprocity, whichever is less.

5. Aliens who were accorded U nonimmigrant status in the United States by USCIS are not required to obtain advance parole before traveling outside of the United States. In order to return to the United States in U nonimmigrant status, such aliens must obtain a U nonimmigrant visa. Aliens who were accorded U nonimmigrant status in the United States will have an I-918, I-929, I-797, or CLAIMS printout entered into PIMS and present Form I-94, "Arrival-Departure Record" indicating valid U nonimmigrant status. Only the I-918 and I-929 will be entered into PIMS. These documents constitute evidence that these applicants have been

STATE 00011736 002.2 OF 032

granted U nonimmigrant status.

6. An alien who has petitioned for or has been granted U-1 nonimmigrant status (principal alien) may petition for certain qualifying family members, including a spouse (U-2) and children (U-3). U-1 nonimmigrants who are under 21 years of age may petition for the parents

7. All petitioners for U nonimmigrant status, both principal and derivative, aged fourteen and over, who apply from overseas receive a Notice of Action instructing them to report to the nearest overseas USCIS office, U.S. Consulate, or U.S. military installation in order to have fingerprints taken for the FBI criminal record check. USCIS cannot adjudicate any U visa petition from abroad without first receiving the petitioner's biometric information. At overseas posts with no DHS presence that offers counter service (see 9 FAM Appendix N, 102), consular sections should take the fingerprints with ink and card. The consular officer shall not create a "dummy" case in the NIV system to transmit the fingerprints. Until CA develops a stand-alone system to take biometric fingerprints and submit them to DHS, the consular officer shall take the fingerprints with ink and card. There is no charge for the ink and card service. If there is a DHS presence at a post that offers counter service, the petitioner should be directed to that office for service. Posts may order fingerprint cards and inkless fingerprinting equipment.

Each edition of the ASISTA
Newsletter publishes answers

The procedures for taking requests were

criteria, including the

case, likelihood others will

that newsletter. If you use

helpful to others, let us

VAWA Eligibility

arriving, she married an Argentinian with no legal status in US. Then she got a divorce from them and in August 2009 married a USC.

She has had problems with the marriage, and he is

forwarded to the USGIS Vermont Unit for processing. USGS

on her, also to take her baby
(also his) when it is born.

Can she apply for VAWA

and if approved adjust status?

She has another issue of no proof he is USC. He took his

birth certificate, US passport
and social security number. So

she will have to work on that

part. So, for now---can she
file for VAWA?

A: There are several requirements for VAWA eligibility. So, we will go

through each one and discuss the requirements and any particular challenges your client may have.

PROOF OF HIS STATUS

The first requirement, is that the abusive spouse or parent be a Citizen of Lawful Permanent Resident. In this case, it sounds as though he is a US Citizen, but that proving it is turning into a bit of a challenge. Depending on the state you are in, a client may be able to get a copy of her spouse's birth certificate on her own. The CDC has a website that gives information from each state about the requirements to

request a birth certificate. That site can be accessed at <http://www.cdc.gov/nchs/>

Telegram
w2w.htm and also contains
links to the websites of the
individual states' pages as
well.
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If you are unable to get a copy of the birth certificate or proof of status that way, another option may be to request a copy during a family court or other court proceeding. For example during a protective order hearing, the client could request that she be provided a copy of the necessary document, as a part of a temporary order regarding property and children.

Another option is to request that CIS verify his status by providing his Social Security number, place of birth, and date of birth.

If none of these are an option, you may have to get creative to show his status...

MARRIAGE

The next thing that must be proven is that they were married within the past two years. For a traditional marriage, the proof would be a marriage certificate. The CDC link above has information on how to obtain a marriage certificate for a particular state. In some states, common law marriage may be an option, if a formal

marriage was never entered. States that provide for common law marriages are Alabama, Colorado, District of Columbia, Georgia (if created before 1/1/97), Idaho (if created before 1/1/96), Iowa, Kansas, Montana, Ohio (if created before 10/10/91), Oklahoma, Pennsylvania (if created before 1/1/05), Rhode Island, South Carolina, Texas, and Utah. Even if your client is living in a state without common law marriage, if she and her abuser lived in one of the states that does, there may still be an argument for common law marriage, depending upon the law of the specific state.

GOOD FAITH MARRIAGE

In addition to showing that they were, in fact, married, have must also show that the marriage was in good faith. This means that the marriage was for non-immigration purposes and that the parties intended to build a life together. As long as they intend to build a life together, nearly any non-immigration related reason for the marriage is fine.

Showing GFM can include evidence showing that: They lived together (mail with their joint address, affidavits

Page 4 of 4
from neighbors, a joint lease, etc.) they were building a life together (insurance, with each other as beneficiary, joint bank accounts, other joint property, joint credit or joint credit applications, etc.) Other documents that can be useful for showing this are the birth certificates of any children that they have together, photographs, invitations, and other memorabilia from the wedding, photos of them doing things together, such as vacations, family gatherings, etc., letters they exchanged during their courtship or even during the marriage, affidavits from friends, family, and others who knew the couple. Watch for future articles on Good Faith Marriage that will be coming out from ASISTA soon.

BATTERY AND EXTREME CRUELTY

The next element that must be shown is that she was the victim of battery and/or extreme cruelty by her spouse. In your case, it sounds as though there was little or no battery, which is often easier to show, with photographs, police reports, etc. However, if her experience rises to the level

of extreme cruelty, she is eligible to show that as well. She should see a DV counsellor to discuss the facts of her situation. That counselor can assess whether her husband's behavior rises to the level of extreme cruelty and whether there is a history of domestic abuse. It sounds as though he has, but a counselor with experience in Domestic Violence can confirm this and may also be able to provide evidence in the form of an affidavit. (See "Victim of Crime Advocate (Expert) Declaration Guidelines on Substantial Abuse" on page 32 of this newsletter, while this article references the "substantial abuse" requirement for a U Visa, it is similar to the "extreme cruelty" standard.) (See also: "Extreme Cruelty: What it is and How to Prove It" by Sally Kinoshita and published in ASISTA's Fall 2006 newsletter at www.asistahelp.org/fall2006.newsletter.pdf)

THE DECLARATION: THE MOST IMPORTANT EVIDENCE

You should make sure that your client's declaration includes discussion on the elements of her case. While

the client must tell her own story, it is important that she understand what parts of the story are important for purposes of her application. Otherwise, she may linger on things that happened that are not relevant to her case and skip or gloss over the things that are relevant. Therefore it is important that you or a domestic violence counsellor or advocate work with her when she writes her declaration, and that whoever works with her has an understanding of the elements that you are trying to show.

GOOD MORAL CHARACTER

Finally, you must show that your client is of Good Moral Character (GMC). You don't mention any problems proving this in your question. However, please note that it is a requirement. I am sending you some references to look at in case you have questions: "Analyzing Good Moral Character and Inadmissibility Issues in VAWA cases" by Sally Kinoshita, published in the Fall 2008 ASISTA Newsletter available at www.asistahelp.org/12.08.newsletter.pdf In addition, much of the

information regarding getting criminal records, included in "A Practice Guide for Representing U Visa Applicants With Criminal Convictions or Criminal History" by Ann Benson and Jonathan Moore, beginning on page 4 in this newsletter is relevant here as well. In addition, Ms. Benson also contributed an article entitled: Step One In Representing Noncitizens With Criminal History: Obtaining Relevant Information About the Criminal Case" to the Summer 2008 ASISTA Newsletter.

ANY CREDIBLE EVIDENCE STANDARD AND OTHER THINGS TO KNOW ABOUT ADJUDICATION

It is also important to remember that the adjudicators who will evaluate the case are trained in domestic violence, and should be able to use the evidence to help them determine what happened. They also understand that, due to the dynamics of these relationships, direct evidence of all of the elements may not be available in any given case. Therefore, they use the "Any

Credible Evidence” standard for showing the elements, as set forth by Congress. See Battered Immigrant Women Protection Act of 2000, P.L. 106-386 § 1502(a) Findings and Purposes, available on the ASISTA website at www.asistahelp.org/10492.pdf, as well as INS Memorandum from Office of Programs, *Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents of*

April 16, 1996 available at www.asistahelp.org/Aleinikoff_4-16-96.pdf and Virtue, Office of General Counsel, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O’Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), reprinted in 76 (4) Interpreter Releases 162 (Jan. 25, 1999) available at [www.asistahelp.org/INS Memo on Extreme Hardship.doc](http://www.asistahelp.org/INS_Memo_on_Extreme_Hardship.doc).

Remember to carefully read the statute and regulations for a better understanding of the requirements: INA 204(a) and 8 CFR 204.2.

For more information on eligibility for VAWA, go to <http://www.asistahelp.org/vawa.htm>. If you would like help on a specific case, you can contact us for technical support at questions@asistahelp.org.

Do you have an article or idea for a future ASISTA newsletter?

Contact us at questions@asistahelp.org

OVW Grantees:

Join us for Free Webinars

Each Month on the 3rd Wednesday

2:00 PM - 3:30 PM EST

Each month, Asista will be holding a free webinar for OVW grantees, sponsored by the US Department of Justice Office on Violence Against Women.

For more information or to ensure that you are on the invitation list, please contact us at questions@asistahelp.org.