

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

**By Ann Benson & Jonathan Moore<sup>1</sup>**

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

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## **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.<sup>2</sup> 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.

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<sup>2</sup> 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](http://asistahelp.org/Newsletter.08.01.08.pdf), 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 inadmissibility<sup>3</sup> 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).<sup>4</sup> 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 security<sup>5</sup> 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 admission<sup>6</sup>, 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

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<sup>3</sup> Any 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).

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

<sup>5</sup> INA 212(a)(3)(E), 8 USC § 1182(a)(3)(E)

<sup>6</sup> See § II.C, *infra* this article.

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**

### **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.<sup>7</sup> 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.<sup>8</sup>

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."

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<sup>7</sup> 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.

<sup>8</sup> *Id.*

<sup>9</sup> 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."

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.<sup>10</sup>

### **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.<sup>11</sup> 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

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<sup>9</sup> 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

<sup>10</sup> , INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C)

<sup>11</sup> *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.

conviction is required. However, that the First, Fifth and Seventh Circuits have held that the statutory definition of conviction erodes this requirement.<sup>12</sup> This reasoning arguably violates well-established rules of statutory construction.<sup>13</sup> In the Ninth Circuit, a conviction currently on direct appeal of right is not held a conviction for immigration purposes<sup>14</sup>. 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.

## Post Conviction Relief

**What is “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

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<sup>12</sup> *Griffiths v. INS*, 243 F.3d 45 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (7<sup>th</sup> 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.

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

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

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.<sup>15</sup> 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.<sup>16</sup>

At other times, what the defendant is seeking is a modification of only the sentence. The judgment of guilt 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.<sup>17</sup>

### **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.”<sup>18</sup>

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.

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<sup>15</sup> 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 6<sup>th</sup> 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.

<sup>16</sup> *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.)

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

<sup>18</sup> INA § 212 (a)(2)A(i), 8 USC § 1182(a)(2)A(i)



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.**<sup>19</sup> 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.<sup>20</sup>
- 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.<sup>21</sup>
- c) **DHS or consular official must provide a noncitizen with an understandable definition of the crime at issue.**<sup>22</sup>
- d) **The noncitizen's admission must be free and voluntary.**<sup>23</sup>

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.<sup>24</sup> This is

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<sup>19</sup> 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).

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

<sup>21</sup> *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).

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

<sup>23</sup> *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).

<sup>24</sup> *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.

true even when the defendant has independently admitted the crime before a DHS officer or immigration judge.<sup>25</sup>

However, it is not guaranteed that a person who is acquitted will be protected from independent admissions. In the most recent 9<sup>th</sup> 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.<sup>26</sup> 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.<sup>27</sup>

**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.

#### **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 (CIMT) will be inadmissible. The first step is to understand what is, and is not, a CIMT. There is no simple list of CIMT offenses or easy definition. However, there are some guiding principles outlined here 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 CIMT, 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 seek a section 212(d)(14) waiver.

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<sup>25</sup> 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.)

<sup>26</sup> *Pazcoquin*, *supra*, at 1214-15.

<sup>27</sup> 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 (9<sup>th</sup> 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).

**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.

### 1. Moral “Turpitude”<sup>28</sup> 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 specific intent is not a prerequisite to finding that a crime involves moral turpitude. . .”<sup>29</sup>

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.<sup>30</sup> 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.

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,

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<sup>28</sup> “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.

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

<sup>30</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)

whether felony or misdemeanor, in which either an intent to defraud or an intent to steal (with intent to permanently deprive) is an element;<sup>31</sup>

- **Offenses of Morally Offensive Character.** Offenses that are “vile, based, or depraved” and violate societal moral standards involve moral turpitude.<sup>32</sup> The offense also must be committed willfully or with evil intent.<sup>33</sup> 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.”<sup>34</sup>

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<sup>35</sup>), 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:

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<sup>31</sup> *Jordan v. DeGeorge*, *supra* at 227-332.

<sup>32</sup> *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).

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

<sup>34</sup> *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.

<sup>35</sup> *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).

- **Drunk Driving.** The federal courts and BIA *en banc* reaffirmed the long-established rule that simple driving under the influence (“DUI”) does not constitute a crime involving moral turpitude (“CMT”) because it lacks the requisite intent element. This is true even if there are multiple DUI convictions.<sup>36</sup>
- **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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>
- **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.<sup>40</sup> 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.<sup>41</sup>

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

<sup>37</sup> See *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.

<sup>38</sup> *Fernandez-Ruiz v. Gonzales*, *supra*.

<sup>39</sup> *Galeana-Mendoza v. Gonzales*, *supra*; *Matter of Sanudo*, *supra*.

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

<sup>41</sup> *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).

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

**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.

**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.

**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 CIMT 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 CIMT 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*, 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?”

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 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.<sup>42</sup> The minimum or least offensive conduct to commit the offense requires a “realistic probability, not a theoretical

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

possibility” that the conduct would fall under the statute.<sup>43</sup> 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 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.<sup>44</sup>

**The Modified Categorical analysis.**<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Under the established model of this analytical framework, the reviewing

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

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

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

<sup>46</sup> See, e.g., Calif. PC § 602, “criminal trespass.”

<sup>47</sup> 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.

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

authority will not consider facts outside the record of conviction to decide whether a given conviction involves moral turpitude.<sup>49</sup>

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.<sup>50</sup> The ROC does not include the trial record, pre-sentence report, the prosecutor's sentencing remarks, or the trial judge's opinion as to whether a given crime is turpitudinous. Importantly, it does not include the police report, unless the defendant agreed that the police report could be included in 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.<sup>51</sup>

**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."<sup>52</sup>

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

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

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

<sup>51</sup> 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*) (pre-sentence report).

<sup>52</sup> *Silva-Trevino* supra, at 706 & n.5, 707.



### 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 and 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.<sup>53</sup>

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 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.<sup>54</sup>

**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.

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<sup>53</sup> INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II)

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

## 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

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.<sup>55</sup> 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,<sup>56</sup> 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.<sup>57</sup>

## **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.<sup>58</sup> 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).<sup>59</sup> Foreign rehabilitative relief similarly will eliminate the immigration consequences of a foreign conviction for simple possession or a less serious offense.<sup>60</sup> Finally, a conviction for giving away a small amount of marijuana for free should be treated equally, under federal statute.<sup>61</sup>

“Rehabilitative relief” means any state disposition (e.g., deferred entry of judgment, expungement) that lets a defendant withdraw a guilty plea or otherwise

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

<sup>56</sup> *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.

<sup>57</sup> *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).

<sup>58</sup> *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).

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

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

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

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.”<sup>62</sup>

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.*<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> California does not have such a generic solicitation

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<sup>62</sup> 18 USC § 3607(c).

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

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

<sup>65</sup> 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).

<sup>66</sup> *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9<sup>th</sup> Cir. 1997) (deportability ground); *Leyva-Licea v. INS*, 187 F.3d 1147 (9<sup>th</sup> Cir. 1999) (aggravated felony).

statute, but several other states do, including Alaska, Arizona, Idaho, Montana, Oregon, and Washington.<sup>67</sup>

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 9<sup>th</sup> Circuit and has such a solicitation conviction, from any state, you should not concede that these make her inadmissible under the 212(a)(2)(A)(i)(II) controlled substance ground.

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

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.<sup>68</sup>

#### **F. Multiple Convictions with Aggregate 5 Year Sentences**

This ground of inadmissibility<sup>69</sup> 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.<sup>70</sup> 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**

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<sup>67</sup> 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.

<sup>68</sup> For a detailed discussion of these issues, consult [Defending Immigrants in the Ninth Circuit](#), Kathy Brady, 10<sup>th</sup> Ed, Chapter 3.

<sup>69</sup> 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.”

<sup>70</sup> INA § 101(a)(48)(B), 8 USC § 1011(a)(48)(B)

## 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.<sup>71</sup>

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 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.<sup>72</sup>

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) .<sup>73</sup> 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.<sup>74</sup> Possession or importation of drugs for one’s private use is not “trafficking.”<sup>75</sup> The BIA definition is so broad that it

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<sup>71</sup> INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C)

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

<sup>73</sup> 8 USC § 1182(a)(2)(C)(i), INA § 212(a)(2)(C)(i).

<sup>74</sup> *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).

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

encompasses a single incident.<sup>76</sup> DHS must also prove the essential element of intent, which is the specific intent to distribute controlled substances.<sup>77</sup>

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*,<sup>78</sup> 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,<sup>79</sup> 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. 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.<sup>80</sup> The ground has a ten-year cap: individuals who engaged in prostitution at least ten years ago are not inadmissible.

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

<sup>77</sup> 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)).

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

<sup>79</sup> 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.

<sup>80</sup> 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).

Advocates should check to see if the behavior really fits the definition. For example, the Ninth Circuit held in *Kepilino v. Gonzales*<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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 states where it is legal are still inadmissible.<sup>84</sup> 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.”<sup>85</sup> It is possible—but there is no case on point—that customers would

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

<sup>82</sup> *Kepilino* at 1059-60, 1062-63.

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

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

<sup>85</sup> *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));



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.”<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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**

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<sup>86</sup> INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii).

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

<sup>88</sup> This cable can be obtained at [http://travel.state.gov/visa/laws/telegrams/telegrams\\_3267.html](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.<sup>89</sup> 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."<sup>90</sup> 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)".<sup>91</sup>

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).<sup>92</sup> 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.<sup>93</sup> Mere harboring or transporting of others alone might not be enough to constitute

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<sup>89</sup> 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."

<sup>90</sup> 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.

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

<sup>92</sup> INA § 212(a)(6)(E)(i); INA § 237(a)(1)(E)(i).

<sup>93</sup> See, e.g., *Altamirano v. Gonzales*, 427 F.3d 586, 591-96 (9<sup>th</sup> Cir. 2005) (reversing finding of inadmissibility for alien smuggling solely on presence in vehicle knowing someone was hiding in the trunk).

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

## II. INA § 212(d)(14) Waivers of Inadmissibility for U-visa applicants

### A. Scope of the Waiver

The discretionary waiver of inadmissibility for U-visa applicants is potentially one of the broadest possible in the Immigration and Naturalization Act (INA).

8 USC § 1182(d)(14), INA § 212(d)(14) The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(U). The Secretary of Homeland Security, in the Secretary of Homeland Security's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(U), if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

In that passage “subsection a” is a reference to 8 USC § 1182(a), INA § 212(a) which are all the statutory grounds of inadmissibility. The only unwaivable ground is at “paragraph (3)(E).”<sup>96</sup>

### B. Regulatory Language

Regulations pertaining to “the exercise of discretion relating to U nonimmigrant status” are at 8 CFR § 212.17. Several key points are:

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<sup>94</sup> *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).

<sup>95</sup> *Altamirano*, *supra*.

<sup>96</sup>INA § 212(a)(3)(E), 8 USC § 1182(a)(3)(E), covers “Participants in Nazi Persecution, Genocide, or the Commission of Any Act of Torture or Extrajudicial Killing “

- “There is no appeal of a decision to deny a waiver. However, nothing in this paragraph is intended to prevent an applicant from re- filing a request for a waiver of ground of inadmissibility in appropriate cases.”<sup>97</sup> and
- DHS may “at any time, may revoke a waiver previously authorized under section 212(d)” and “[u]nder no circumstances will the alien or any party acting on his or her behalf have a right to appeal from a decision to revoke a waiver.”<sup>98</sup> and
- “In the case of applicants inadmissible on criminal or related grounds, in exercising its discretion USCIS will consider the number and severity of the offenses of which the applicant has been convicted. In cases involving violent or dangerous crimes or inadmissibility based on the security and related grounds in section 212(a)(3) of the Act, USCIS will only exercise favorable discretion in extraordinary circumstances.”<sup>99</sup>

### **C. Applying for a Section 212(d)(14) Waiver for Criminal Conduct**

You should address the applicant’s crime-related issues in both your cover letter to USCIS and in the applicant’s declaration. USCIS has listed the I-192 in the interim regulations *as initial evidence* to be filed concurrently with Form I-918.

The cover letter should give all the possible reasons why a grant of a U-visa and, if necessary, of a waiver of inadmissibility for her criminal conduct would be in the public interest and national interest. It should provide any non-frivolous legal arguments and reasoning as to why specific conduct or criminal dispositions listed on the I-918 and other I-192 do not trigger specific inadmissibility grounds. But it should include any possible grounds triggered by that conduct or those convictions, “in the alternative,” if CIS disagrees with your reasoning that they do not fit the ground. And it should develop every possible positive factor that could support a positive exercise of discretion.

Even though the I-192 is submitted together with the I-918, you should make it a complete separate application, with its own copies of all relevant documents, such as criminal judgments; a declaration covering every incident, act or conviction that may need to be waived; and a separate cover letter and legal memo if necessary.

You do not have to concede that a conviction squarely fits into the inadmissibility ground. Exposing the adjudicators to cogent, well-supported reasoning about why certain convictions may not trigger inadmissibility grounds may help to accustom them to accepting and understanding legal arguments generally. You can say that you think it does not fit, and “here’s why.” In case

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<sup>97</sup> 8 CFR § 212.17 (b)(3)

<sup>98</sup> 8 CFR § 212.17 (b)(3)(c)

<sup>99</sup> 8 CFR § 212.17 (b)(2)

USCIS, however, comes to believe that it does trigger an inadmissibility ground, give the reasons why the waiver should be granted.

Whether or not you think a conviction fits into a criminal inadmissibility ground you want to present all the positive discretionary factors that support a grant, since the CIS adjudicator can disagree with you about whether or not a crime “involves turpitude” but still decide that it would be both in the public interest to grant a waiver and that it deserves a positive exercise of discretion. The standard for the section 212(d)(14) waiver is that it be “in the national or public interest” to grant it, and DHS can grant it in the exercise of discretion. The regulatory preamble discussing waivers of inadmissibility notes that waiver grants are discretionary and involve balancing adverse with social and humane factors, citing to the 212(h) case *Matter of Mendez-Morales*.<sup>100</sup>

Arguing that an offense does not make a person legally inadmissible, however, is no reason to seem less-than-forthcoming or evasive about an applicant’s criminal history.

#### **D. Heightened Discretion Standard for “Violent or Dangerous crimes”**

In the case of U-visa applicants who are inadmissible on criminal grounds, the interim regulations state that discretionary waivers for those convicted of “violent and dangerous crimes” will only be granted “in extraordinary circumstances,”<sup>101</sup> and that waiver denials are both revocable<sup>102</sup> and administratively unappealable.<sup>103</sup> Immigration counsel can argue that limitation on discretion was meant to be applied only to the type of lethally dangerous offenses discussed in *Matter of Jean*,<sup>104</sup> a case involved a homicide of an infant.

The history of this heightened standard for the exercise of discretion is that this language was first promulgated by the Attorney General (AG) in denying a discretionary section 209(c) refugee waiver, in a case called *Matter of Jean*, 23 I. & N. Dec. 373 ( A.G. 2002). In overturning the BIA, the AG in *Jean* evaluated a waiver application by a person who “confessed to beating and shaking a nineteen-month-old child to death” and whose confession “was corroborated by a coroner’s report documenting a wide-ranging collection of extraordinarily severe injuries.”<sup>105</sup>

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<sup>100</sup> *Matter of Mendez-Morales* 21 I&N Dec 296 (BIA 1996).

<sup>101</sup> 8 CFR § 212.17(b)(2); compare to *Matter of Jean* 23 I&N Dec. 373 (A.G. 2002); and 8 CFR § 212.7(d) (“exceptional and extremely unusual hardship” can be an “extraordinary circumstance”).

<sup>102</sup> 8 CFR § 212.17(c).

<sup>103</sup> 8 CFR § 212.17(b)(3).

<sup>104</sup> *Matter of Jean* 23 I&N Dec. 373 (A.G., 2002).

<sup>105</sup> *Id* at 373, 383

Another case the AG used as a baseline in *Jean*, was the offense treated by the BIA in an earlier decision, *Matter of H-N*.<sup>106</sup> The Attorney General noted that he disagreed with the grant of a section 209(c) refugee waiver in that case, based on the equities of US citizen children and a permanent resident spouse. The conviction in that case was for a second degree robbery that the AG described as “participation in a burglary in which one of the one of the applicant’s co-conspirators shot a woman to death in front of her children.”<sup>107</sup> Both offenses discussed were thus extremely violent, and life-endangering.

In *Jean* the Attorney General himself prefaced his ruling in that case by indicating his agreement with Part II of Board member Filippu’s concurrence and dissent in *Matter of H-N*. That part of the decision describes in detail a kind of home invasion where a co-conspirator shot a woman to death in the head. Board member Filippu’s opinion also put significant weight on the fact that H-N- claimed to have been virtually uninvolved, and to have pleaded guilty to robbery due to bad translation and lack of explanation by her public defender. Board member Filippu found the respondent’s “assertion of complete innocence” to be “inconsistent,” and contradicted by other evidence.<sup>108</sup>

Within a year of *Jean*, DHS enacted a new regulation governing the exercise of discretion in section 212(h) waiver cases,: 8 CFR § 212.7(d).<sup>109</sup> That regulation provides that in cases where individuals have committed “violent or dangerous crimes,” the Attorney General will not exercise his discretion to grant waivers under 8 U.S.C. § 1182(h) (known as section 212(h) relief) unless the individual can show “exceptional and extremely unusual hardship.” This regulatory limit on discretion has been upheld in the Second, Fifth, and Ninth Circuits.<sup>110</sup>

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<sup>106</sup> *Matter of H-N*, 22 I. & N. Dec. 1039 (BIA 1999)

<sup>107</sup> “The majority there treated the applicant’s crime - participation in a burglary in which one of the applicant’s co-conspirators shot a woman to death in front of her children - as a virtual afterthought.” *Jean* 23 I. & N. Dec. 373, 382

<sup>108</sup> *Jean* 23 I. & N. Dec. 373, 382; *Matter of H-N*- 22 I. & N. Dec. 1039, 1052 (BIA 1999) Filippu, concurring and dissenting

<sup>109</sup> 8 USC § 1182(h), INA § 212(h) is the principal waiver of inadmissibility for crimes involving moral turpitude. When in removal proceedings, the parallel regulation is 8 CFR § 1212.7(d).

<sup>110</sup> *Mejia v. Gonzales* 499 F.3d 991 (9<sup>th</sup> Cir. 2007); *Perez Pimentel v. Mukasey* 530 F.3d 321 (5<sup>th</sup> Cir. 2008); *Samuels v. Chertoff* 550 F.3d 252, (2<sup>nd</sup> Cir. 2008). *Mejia* and *Perez Pimentel* were cited by DHS in the 12-12-08 preamble to the U-visa adjustment of status (AOS) regulations, in support of new 8 CFR § 245.24(d)(11), about the exercise of discretion *at adjustment*, and which regulation says in part that:

“Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.” 8 CFR § 245.24(d)(11)

A look at these cases shows the kinds of offense that some immigration judges have found to be “violent or dangerous.” The Courts found they did not have jurisdiction to reverse such rulings, and that such guides to discretion were allowable.

- A conviction for child molestation and commission of lewd and lascivious acts upon a child under Cal.Penal Code § 288(a), (c), “based on . . . repeated molestation of his step-daughter, . . .beginning when [she] was twelve years old and continuing for approximately three and a half years. This conduct included slapping her, massaging her breasts, and fondling her genitals. Mejia pleaded guilty and served seven months in jail.”<sup>111</sup>
- A 1983 conviction for burglary: “[h]e said he had agreed to help a man who claimed he was removing items from his own home. . . . [H]e was sentenced to two years of imprisonment and served only nine months. .... The IJ found that . . . the burglary conviction constituted a violent crime. Pursuant to § 212.7(d), the IJ found that Pimentel must establish that the denial of a visa ‘would result in exceptional and extremely unusual hardship.’ The IJ concluded that, although Pimentel’s U.S. citizen children would suffer ‘extreme hardship’ if they moved to Mexico with Pimentel, he had not shown the required ‘exceptional and extremely unusual hardship.’”<sup>112</sup>
- Attempted robbery in the first degree under NY Penal Law §§ 110 and 160.15(2), which require the use of force, or injury, or use of a weapon, with an indeterminate sentence of up to four-and-a-half years of imprisonment.<sup>113</sup>

If you think this could be an issue for your client, it is important to try to establish that “violent or dangerous crimes” refers to the highest tier of lethally violent offenses against persons, using *Jean* and the offense in that case and the example cited from *Matter of H-N-* as a baseline: offenses involving homicide. Barring that, you could try to distinguish the circumstances and nature of your client’s convictions from those cited in *Jean* and *H-N-* and if possible from the offenses and conduct in *Mejia*, *Perez-Pimentel*, and *Samuel*, *supra*.

For example, a simple assault conviction for slapping someone, may fit a literal definition of “violent,” but is clearly outside the type of extreme offense to which the Attorney General intended his new waiver standard to apply. Any offense relating to a controlled substance may be thought to be in some sense “dangerous,” either to the user or to society, just as a DUI can be a dangerous offense. But you can argue that the history of the “violent or dangerous”

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<sup>111</sup> *Mejia*, *supra* at 994 .

<sup>112</sup> *Perez Pimentel*, *supra* at 323 -324 .

<sup>113</sup> *Samuels*, *supra* at 254 -255

standard , given above, clarifies that such offenses were not intended to come under the heightened standard.

If it would help your client, emphasize that the “violent or dangerous crime” determination requires actual examination of “the facts underlying [a] conviction,” and that “[t]he determination in *Jean* was fact-based, not categorical.”<sup>114</sup> Applying a heightened standard without allowing an examination of all the circumstances underlying the conviction, could turn the “violent or dangerous crime “ standard into a kind of a *de facto* threshold which pretermits a full examination of the offense, based only on the statutory label, and this was not the intent of the regulation

In evaluating waivers for criminal convictions you may try to refer to other examples such as the definition of “exceptional circumstances” at INA § 240(e)(1) which includes (being a victim of) “battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien.”

In another immigration law context (employment visas), the phrase “extraordinary circumstances” has been defined as something that would “impose an extreme hardship on the petitioner or that the beneficiary’s services are in the national interest, welfare, or security of the United States.”<sup>115</sup> Duress by itself has been found to amount to an “extraordinary circumstance.”<sup>116</sup>

If a section 212(d)(14) waiver has been denied because an offense was deemed “violent or dangerous,” then because 8 C.F.R. § 212.17(b)(3) permits a new application, you may want to consider whether a second application is worthwhile. If there are additional equities that you did not present that could show exceptional and extremely unusual hardship and other extraordinary factors, or a valid argument that the offense was not “violent or dangerous” that was not made, the regulations allow such a second attempt.

### 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.

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<sup>114</sup> *Rivas-Gomez v. Gonzales* 225 Fed. Appx. 680 (9th Cir. 2007)

<sup>115</sup> *Matter of Safetran* 20 I&N Dec 49 (Comm’r 1989).

<sup>116</sup> *Matter of G*, In Visa Petition proceedings 4 I&N Dec. 57 (BIA 1950).



**For assistance on crime-related issues, please contact Jonathan and/or Annie:**

- **Jonathan: Email: [jonathan@defensenet.org](mailto:jonathan@defensenet.org) Telephone: 206-623-4321**
- **Annie: Email: [defendimmigrants@aol.com](mailto:defendimmigrants@aol.com) Telephone: 360-382-2538**

### **Written Materials**

**Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws**, 10<sup>th</sup> Edition, by Kathy Brady with Norton Tooby, Michael K. Mehr and Angie Junck,<sup>117</sup> 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.

### **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

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<sup>117</sup> Available from the Immigrant Legal Resource Center, at [http://www.ilrc.org/pub\\_output.php?id=1](http://www.ilrc.org/pub_output.php?id=1)

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/> 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](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>