CRIMINAL ISSUES IN IMMIGRATION LAW

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CRIMINAL ISSUES IN IMMIGRATION LAW

I. JUDICIAL REVIEW

A. Judicial Review Scheme Before Enactment of the REAL ID Act of 2005

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which limited petition-for-review jurisdiction for individuals removable based on enumerated crimes. *See* 8 U.S.C. § 1252(a)(2)(C) (permanent rules); IIRIRA section 309(c)(4)(G) (transitional rules). For § 1252(a)(2)(C)'s jurisdiction-stripping provision to apply, its language requires that the agency determine that a petitioner is actually removable and order the petitioner removed on a basis specified in that section. *See Alvarez-Santos v. INS*, 332 F.3d 1245, 1250-53 (9th Cir. 2003); *see also Eneh v. Holder*, 601 F.3d 943, 946 (9th Cir. 2010) (explaining that for the jurisdiction stripping provision in § 1252(a)(2)(C) to apply, removal must be expressly premised upon a criminal conviction); *Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) ("Because Blanco was not ordered removed as a criminal alien under § 1182(a)(2), the jurisdictional bar of § 1252(a)(2)(C) does not apply."); *Kelava v. Gonzales*, 434 F.3d 1120, 1122-23 (9th Cir. 2006) (8 U.S.C. § 1252(a)(2)(C) did not preclude judicial review where BIA failed to address IJ's findings on aggravated felony charge and instead based decision solely on terrorist activity charge); *Unuakhaulu v. Ashcroft*, 416 F.3d 931, 936-37 (9th Cir. 2005) (exercising jurisdiction because while agency found applicant *removable* based on aggravated felony conviction, removal was not ordered on that basis and alternate grounds of removal were charged).

Under the IIRIRA provisions, if the court determined that the petitioner was ordered removed or ineligible for relief from removal based on a conviction for an enumerated crime, it lacked direct judicial review over the petition for review. *Cf. Unuakhaulu*, 416 F.3d at 937; *Alvarez-Santos*, 332 F.3d at 1253. However, the court retained jurisdiction to determine its own jurisdiction, *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000), and to decide "three threshold issues: whether the petitioner was [1] an alien, [2] removable, and [3] removable because of a conviction for a qualifying crime," *see Zavaleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotation marks, alteration, and emphasis omitted).

Where direct judicial review was unavailable over a final order of deportation or removal, a petitioner could file a petition for writ of habeas corpus in district court under 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (AEDPA and IIRIRA did not repeal habeas corpus jurisdiction to challenge the legal validity of a final order of deportation or removal); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964 (9th Cir. 2004) (same), *abrogated on other grounds by Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007).

Cross-reference: Jurisdiction over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

B. The Current Judicial Review Scheme under the REAL ID Act of 2005

1. Expanded Jurisdiction on Direct Review

In May 2005, Congress amended the INA to expand the scope of direct judicial review over petitions for review brought by individuals removable based on enumerated crimes, and to limit the availability of habeas corpus relief over challenges to final orders of removal, deportation, or exclusion. Congress explicitly made the REAL ID Act's judicial review amendments retroactive and directed that they shall apply to all cases in which the final administrative order was issued before, on, or after May 11, 2005, the date of enactment of the Act. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005).

The REAL ID Act added the following new judicial review provision to 8 U.S.C. § 1252:

> Judicial review of certain legal claims
>
> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D); REAL ID Act, Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310 (2005). Pursuant to this new provision, the court now has jurisdiction to review constitutional claims and questions of law presented in all petitions for review, including those brought by individuals found removable based on certain enumerated crimes. *See Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *see also, e.g.*, *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1126 (9th Cir. 2007); *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082, 1085 (9th Cir. 2007); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1194 (9th Cir. 2006); *Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1009-10 (9th Cir. 2006) (en banc); *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005); *Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005).

Although the court does not have jurisdiction to evaluate discretionary decisions by the Attorney General, the court retains jurisdiction to review questions of law raised in a petition for review. *See Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (explaining court had jurisdiction to determine if the BIA applied the correct legal standard in making its particularly serious crime determination); *see also Rivera-Peraza v. Holder*, 684 F.3d 906, 909 (9th Cir. 2012) (court had jurisdiction to review whether BIA used erroneous legal standard in its analysis of petitioner's application for waiver of inadmissibility); *Arbid v. Holder*, 674 F.3d 1138, 1140 (9th Cir. 2012) (per curiam) (jurisdiction to review BIA's determination that alien was convicted of a particularly serious crime); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) (court retains jurisdiction to determine its jurisdiction, and thus has jurisdiction to determine whether an offense is an aggravated felony); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010) (court has jurisdiction to determine whether a particular offense constitutes an offense governed by the jurisdiction-stripping provisions); *Prakash v. Holder*, 579 F.3d 1033, 1035 (9th Cir. 2009) (court has jurisdiction to determine as a matter of law whether a conviction constitutes an aggravated felony); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (stating the court has "jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors, ... , or relied on improper evidence, . . . , in making the 'particularly serious crime' determination." (citations omitted)). "[J]urisdiction over 'questions of law' as defined in the Real ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." *Ramadan v. Gonzales*, 479 F.3d 646, 648

(9th Cir. 2007) (per curiam); *see also Chen v. Mukasey*, 524 F.3d 1028, 1031 (9th Cir. 2008); *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (applying *Ramadan* to conclude that in assessing equitable tolling, "the due diligence question necessarily falls within *Ramadan*'s ambit as a mixed question of law and fact, requiring merely that we apply the legal standard for equitable tolling to established facts").

With respect to asylum, withholding of removal, and CAT claims of a petitioner who was convicted of an offense covered by § 1252(a)(2)(C), the court has jurisdiction to review the denial of an asylum application and to review the denial of withholding of removal and CAT relief to the extent that a petitioner raises questions of law, including mixed questions of law and fact, or constitutional claims. *See Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007); *see also Planes v. Holder*, 652 F.3d 991, 997-98 (9th Cir. 2011) (where BIA made no legal error regarding criminal grounds for removability, court lacked jurisdiction to review final order of removal under 8 U.S.C. § 1252(a)(2)(C)), *petition for rehearing en banc denied*, 686 F.3d 1033 (9th Cir. 2012) (order). Moreover, as to "factual issues, when an IJ does not rely on an alien's conviction in denying CAT relief and instead denies relief on the merits, none of the jurisdiction-stripping provisions ... apply to divest this court of jurisdiction." *Id.* at 980; *see also Haile v. Holder*, 658 F.3d 1122, 1130-31 (9th Cir. 2011); *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008) ("The jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(C) does not deprive [the court] of jurisdiction over denials of *deferral* of removal under the CAT, which are always decisions on the merits." (emphasis added)); *Villegas v. Mukasey*, 523 F.3d 984, 987-88 (9th Cir. 2008); *Arteaga v. Mukasey*, 511 F.3d 940, 942 n.1 (9th Cir. 2007).

Thus, whereas the court previously had jurisdiction to evaluate only whether a criminal conviction was a qualifying offense for the purpose of IIRIRA's jurisdictional bars, the court now has jurisdiction to review the petition for review on the merits, assuming no other provision in the INA limits judicial review. *See Fernandez-Ruiz*, 410 F.3d at 586-87, *as adopted by* 466 F.3d at 1124; *see also, e.g.*, *Garcia-Jimenez*, 488 F.3d at 1085 (stating that court has jurisdiction over questions of law despite petitioner's crime involving moral turpitude and controlled substance offense); *Lisbey*, 420 F.3d at 932-34 (concluding that petitioner was convicted of an aggravated felony and denying the petition on the merits); *Parrilla*, 414 F.3d at 1040 (same).

2. Applicability to Former Transitional Rules Cases

In addition to restoring direct judicial review and eliminating habeas jurisdiction over final orders of removal in cases involving enumerated criminal offenses, § 106(d) of the REAL ID Act directs that a petition for review filed in a transitional rules case "shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252) [IIRIRA's permanent rules]." REAL ID Act, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005); *see also Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than 8 U.S.C. § 1105(a)). Accordingly, the restoration of direct judicial review over cases involving enumerated offenses applies to both transitional rules and permanent rules cases.

3. Contraction of Habeas Jurisdiction

In addition to expanding the scope of judicial review for aliens convicted of certain enumerated crimes, the REAL ID Act also "makes the circuit courts the 'sole' judicial body able to review challenges to final orders of deportation, exclusion, or removal." *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005); *see also* 8 U.S.C. § 1252(a)(5); *Momeni v. Chertoff*, 521 F.3d 1094, 1095-96 (9th Cir. 2008) (district court lacked habeas jurisdiction over petition filed after effective date of REAL ID Act). "To accomplish this streamlined judicial review, the Act eliminated habeas jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over final orders of deportation, exclusion, or removal." *Alvarez-Barajas*, 418 F.3d at 1052.

The REAL ID Act required the district courts to transfer to the appropriate court of appeals all habeas petitions challenging final orders of removal, deportation or exclusion that were pending before the district court on the effective date of the REAL ID Act (May 11, 2005). *See* REAL ID Act, Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310-11 (2005); *see also Alvarez-Barajas*, 418 F.3d at 1052. Although the REAL ID Act did not address appeals of the denial of habeas relief already pending in the court of appeals on the effective date of the Act, this court has held that such petitions shall be treated as timely filed petitions for review. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928-29 (9th Cir. 2005); *Alvarez-Barajas*, 418 F.3d at 1053; *see also Singh v. Gonzales*, 491 F.3d 1090,

1095 (9th Cir. 2007) (holding that "a habeas petition is 'pending' in the district court within the meaning of [REAL ID Act]'s transfer provision when the notice of appeal was not filed at the time [REAL ID Act]'s was enacted, but was filed within the sixty day limitations period for filing a timely appeal of a habeas petition under Federal Rules of Appellate Procedure 4(a)(1)(B)"); *cf. Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (holding that aliens who lacked opportunity to file petitions for review prior to the enactment of the REAL ID Act had a grace period of 30 days from the Act's effective date in which to seek review).

Exceptions for continuing habeas jurisdiction survive, however, for claims like challenges to indefinite detention: "[I]n cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006).

Cross-reference: Jurisdiction over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

II. CRIMINAL CONVICTIONS AS GROUNDS FOR INADMISSIBILITY AND REMOVABILITY

A. Distinguishing between Inadmissibility and Removability

Criminal activity may result in a variety of immigration consequences for aliens. Crimes may be grounds of inadmissibility which prohibit an alien's admission to the United States as a non-immigrant or immigrant. *See* 8 U.S.C. § 1182 (listing grounds of inadmissibility). Crimes may also serve as grounds of deportation which result in an alien's removal from the United States. *See* 8 U.S.C. § 1227 (listing grounds of deportation). Finally, crimes may render an alien ineligible for certain forms of relief from removal.

B. Differing Burdens of Proof

When analyzing an immigration case with criminal issues, it is crucial to determine whether the crime is being used to charge the alien as inadmissible, removable, or ineligible for relief from removal. The posture of the case generally determines who bears the burden of proving the existence and nature of the conviction. When an alien is charged as removable for a criminal conviction, it is

the government's burden of proving by clear and convincing evidence that the alien is removable. *See* 8 U.S.C. § 1229a(c)(3); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) ("The government bears the burden of proving by 'clear, unequivocal, and convincing evidence that the facts alleged as grounds for [removability] are true.'" (quoting *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989)); *Retuta v. Holder*, 591 F.3d 1181, 1184 (9th Cir. 2010) ("The government bears the burden of proving by clear, unequivocal, and convincing evidence that the alien is removable."); *Altamirano v. Gonzales*, 427 F.3d 586, 590-91 (9th Cir. 2005). On the other hand, an alien who is an "applicant for admission" bears the burden of proving that he is clearly and beyond a doubt admissible and not inadmissible under 8 U.S.C. § 1182. *See* 8 U.S.C. § 1229a(c)(2); *Altamirano*, 427 F.3d at 590-91; *see also Kepilino v. Gonzales*, 454 F.3d 1057, 1059-60 (9th Cir. 2006) (discussing shifting burden of production in the admission context).

It is less clear who bears the burden of proving the existence and nature of a crime in the context of establishing eligibility for relief from removal. In *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129-30 (9th Cir. 2007), the court held that an alien seeking to prove eligibility for cancellation of removal bears the burden of establishing that he has not been convicted of an aggravated felony, but may meet this burden by pointing to inconclusive conviction records. Judge Thomas concurred, writing that he supports a rule where the government bears the burden of proving the conviction, even where the conviction is at issue only as it relates to the relief application. *See Sandoval-Lua*, 499 F.3d at 1133. *See also Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011) ("Where a record of conviction proves inconclusive, an alien carries his burden of proving by a preponderance of the evidence that she has not been convicted of an aggravated felony."); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391 (9th Cir. 2006) (suggesting government bears burden of proving nature of crime under the modified categorical approach in the context of a relief application). Where the alien points to an inconclusive record of conviction, the "government has the burden of going forward to prove" the disqualifying offense. *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 (9th Cir. 2010).

C. Admissions

When a crime is charged as a ground of inadmissibility rather than deportability, an alien may not always have to be convicted of the crime, but may only need to admit the essential elements of the crime. *Compare* 8 U.S.C. § 1182(a)(2)(A)(i) (ground of inadmissibility for any alien who is convicted of or admits committing the essential acts of a crime involving moral turpitude) *with* 8 U.S.C. § 1227(a)(2)(A)(i) (ground of deportability for an alien convicted of a crime involving moral turpitude). Admissions of controlled substances offenses may also be used to bar an alien's entry. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1218 (9th Cir. 2002) (applicant was inadmissible because he admitted prior use of marijuana in the Philippines, which constituted the essential elements of a violation of a foreign state's law relating to a controlled substance).

"[A]dmissions by an alien to facts alleged in the [notice to appear], and concessions concerning matters of law, made in the 8 C.F.R. § 1240.10(c) 'pleading stage' of removal proceedings may be relied upon by an IJ." *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011).

D. What Constitutes a Conviction?

IIRIRA provided the first statutory definition of "conviction" in the INA. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1289 (9th Cir. 2004). A conviction is defined as:

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A); *see also Retuta v. Holder*, 591 F.3d 1181, 1185-86 (9th Cir. 2010); *Murillo-Espinoza v. INS*, 261 F.3d 771, 773-74 (9th Cir. 2001). An offense committed while an alien is a juvenile qualifies as a conviction if the alien is tried as an adult. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 927 (9th Cir. 2007). *See also Rangel-Zuazo v. Holder*, 678 F.3d 967, 968-69 (9th Cir. 2012) (per curiam) (discussing the term "conviction" and reiterating that "where a juvenile offender is charged and convicted as an adult under state law, the offender has a 'conviction' for purposes of the INA").

Note that 8 U.S.C. "§ 1101 (a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived." *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011), *petition for rehearing en banc denied*, 686 F.3d 1033 (9th Cir. 2012) (order).

1. Final, Reversed and Vacated Convictions

"A criminal conviction may not be considered by an IJ until it is final." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (pre-IIRIRA), *superseded by statute as stated in Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011). A conviction is final for immigration purposes "[o]nce an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled." *Id.* (internal quotation marks omitted). "A conviction subject to collateral attack or other modification is still final." *Id.* (rejecting petitioner's claim that his conviction was not final because he had a pending petition for writ of error coram nobis). *See also Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) (holding that "§ 1101 (a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived."), *petition for rehearing en banc denied*, 686 F.3d 1033 (9th Cir. 2012) (order).

A conviction overturned for substantive, non-immigration reasons may not be used as the basis for removability. *See Nath v. Gonzales*, 467 F.3d 1185, 1187-89 (9th Cir. 2006) ("[A] conviction vacated because of a procedural or substantive defect is not considered a conviction for immigration purposes and cannot serve as the basis for removability." (internal quotation marks and citation omitted)); *see also Poblete Mendoza*, 606 F.3d 1137, 1141 (9th Cir. 2010) ("A conviction vacated for reasons 'unrelated to the merits of the underlying criminal proceedings'

may be used as a conviction in removal proceedings whereas a conviction vacated because of a procedural or substantive defect in the criminal proceedings may not." (citation omitted)); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107-08 (9th Cir. 2006) (remanding for consideration of whether conviction was vacated on the merits or because of immigration consequences); *Wiedersperg v. INS*, 896 F.2d 1179, 1182-83 (9th Cir. 1990) (alien was entitled to reopen proceedings where state conviction was vacated).

The government bears the burden of proving whether a state court reversed or vacated a prior conviction for reasons other than the merits. *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) ("[T]he inquiry must focus on the state court's rationale for vacating the conviction, and the burden is on the government to prove that it was vacated *solely* for rehabilitative reasons or reasons related to his immigration status." (internal quotation marks and citation omitted); *Nath*, 467 F.3d at 1189; *Cardoso-Tlaseca*, 460 F.3d at 1107 n.3 ("[F]or the government to carry its burden in establishing that a conviction remains valid for immigration purposes, the government must prove with clear, unequivocal and convincing evidence that the Petitioner's conviction was quashed *solely* for rehabilitative reasons or reasons related to his immigration status, *i.e.* to avoid adverse immigration consequences." (internal quotation marks and citation omitted)).

2. Expunged Convictions

a. Expungement Generally Does Not Eliminate Immigration Consequences of Conviction

Following codification of the statutory definition of conviction in 8 U.S.C. § 1101(a)(48)(A), this court has deferred to the BIA's interpretation of the statute as "preclud[ing] the recognition of subsequent state rehabilitative expungements of convictions." *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony). "For immigration purposes, [therefore,] a person continues to stand convicted of an offense notwithstanding a later expungement under a state's rehabilitative law." *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expungement of a misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *see also Ramirez-*

Altamirano v. Holder, 563 F.3d 800, 805-06 (9th Cir. 2009), *overruled by Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

b. Exception for Simple Drug Possession Offenses

In general, for convictions occurring prior to July 14, 2011, *see Nunez-Reyes v. Holder*, 646 F.3d 684, 694 (9th Cir. 2011) (en banc), the government may not remove an alien on the basis of a simple drug possession conviction that has been expunged under a state rehabilitative statute and would satisfy the requirements of the Federal First Offender Act ("FFOA"), 18 U.S.C. § 3607. *See Lujan-Armendariz v. INS*, 222 F.3d 728, 749-50 (9th Cir. 2000), *overruled by Nunez-Reyes*, 646 F.3d at 690; *see also Rice v. Holder*, 597 F.3d 952, 956-57 (9th Cir. 2010) (alien's conviction in state court for using or being under the influence of a controlled substance was eligible for the same immigration treatment as those convicted of drug possession under FFOA), *overruled by Nunez-Reyes*, 646 F.3d at 695; *Romero v. Holder*, 568 F.3d 1054, 1059-60 (9th Cir. 2009), *overruled by Nunez-Reyes*, 646 F.3d at 690; *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 806-08 (9th Cir. 2009), *overruled by Nunez-Reyes*, 646 F.3d at 690 (alien's conviction for possession of drug paraphernalia under California law qualified for similar treatment under *Lujan-Armendariz* rationale); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024-25 (9th Cir. 2007); *Dillingham v. INS*, 267 F.3d 996, 1006-07 (9th Cir. 2001), *overruled by Nunez-Reyes*, 646 F.3d at 690 (reversing BIA's refusal to recognize foreign expungement of simple possession that would have qualified for federal first offender treatment). But, the alien's offense had to fall within the scope of the FFOA, and not just a state rehabilitative statute, for the alien to avoid immigration consequences. *See Dillingham*, 267 F.3d at 1006-07; *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 815 (9th Cir. 1994); *see also Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 983-84 (9th Cir. 2006). Further, the federal first offender exception does not apply to convicted aliens who are eligible for, but have not yet received, expungement of the conviction. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1291 (9th Cir. 2004) (removal order based on conviction that had not yet been expunged did not violate equal protection). "FFOA relief is unavailable when an offender has violated a condition of probation." *Estrada v. Holder*, 560 F.3d 1039, 1041 (9th Cir. 2009).

The court has held that persons convicted for possession of drug paraphernalia may be eligible for the same immigration treatment as those convicted under the FFOA. *See Ramirez-Altamirano*, 563 F.3d at 808-09 (petitioner convicted of California Health and Safety Code § 11364).

Furthermore, the court held in *Romero*, 568 F.3d at 1062, that the "facts underlying a conviction that would have been eligible for relief under the FFOA, but was expunged under a state rehabilitative statute, cannot serve as an 'admission' of a drug offense, statutorily barring a finding of good moral character under 8 U.S.C. § 1101(f)(3)."

Recently, in *Nunez-Reyes*, the court overruled *Lujan-Armendariz*, holding that the constitutional guarantee of equal protection does not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under FFOA. *Nunez-Reyes*, 646 F.3d at 690. Accordingly, all cases that followed the rule in *Lujan-Armendariz*, were overruled, including *Romero*, 568 F.3d at 1059-60, *Ramirez-Altamirano*, 563 F.3d at 806, *Dillingham v. INS*, 267 F.3d 996, 1006-07 (9th Cir. 2001), and *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 n.4 (9th Cir. 2000). The new rule announced by *Nunez-Reyes* only applies prospectively. *Nunez-Reyes*, 646 F.3d at 690-694 (holding that *Lujan-Armendariz* continues to apply to those aliens convicted before the publication date of *Nunez-Reyes*, July 14, 2011).

E. Definition of Sentence

Under the INA, "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B).

In the criminal context, the court has held that the sentence imposed may be the term later imposed after revocation of probation. *See United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (defendant in unlawful reentry case was convicted of aggravated felony because even though he was initially granted probation, probation was revoked and he was sentenced to two years' imprisonment).

1. One-Year Sentences

A sentence "for which the term of imprisonment [is] at least one year" means the actual sentence imposed by the court. *Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that the relevant term of imprisonment is the potential sentence that the judge could have imposed); *see also United States v. Pimentel-Flores*, 339 F.3d 959, 962 (9th Cir. 2003).

The phrase "at least one year" refers to a sentence of 365 days or more. *Matsuk v. INS*, 247 F.3d 999, 1001-02 (9th Cir. 2001) (rejecting petitioner's contention that the phrase "should be read to mean a 'natural or lunar' year, which is composed of 365 days and some hours"), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc); *Bayudan v. Ashcroft*, 298 F.3d 799, 800 (9th Cir. 2002) (order) (setting aside previous order dismissing petition for lack of jurisdiction because 364-day sentence for manslaughter was not a crime of violence constituting an aggravated felony); *see also United States v. Gonzalez-Tamariz*, 310 F.3d 1168, 1171 (9th Cir. 2002).

2. Recidivist Enhancements

Recidivist enhancements are not considered when determining the nature of an offense, but may be considered when calculating the amount of time served on account of an offense. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4, the defendant received a two-year sentence for his conviction for petty theft with a prior. This court held that the conviction was not an aggravated felony under federal sentencing law because the maximum possible sentence for petty theft in California, without the recidivist enhancement, was six months. *See also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) (alien was not convicted of an aggravated felony which would deprive the court of jurisdiction because his California conviction of petty theft with a prior was not a crime for which a sentence of one year or longer could be imposed). However, this court held in *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1129 (9th Cir. 2007) that, for purposes of determining eligibility for relief under former § 212(c), it could consider recidivist enhancements when calculating the amount of time served. *Saravia-Paguada* explained that *Corona-Sanchez* and *Rusz* stand for the

proposition that recidivism should not inform the nature of an offense, but may be considered when determining the actual time served. *See id.* at 1127-29.

Note that in *United States v. Rodriguez*, 553 U.S. 377 (2008), the Supreme Court reversed this court's decision in *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), which applied the rule in *Corona-Sanchez* holding that the maximum term of imprisonment under the Armed Career Criminal Act must be determined without taking recidivist enhancements into account. In reversing this court's decision, the Supreme Court held that when determining the "maximum term of imprisonment" it is necessary to refer to the applicable recidivist enhancements for prior offenses. *See Rodriguez*, 553 U.S. at 382-84*; see also United States v. Rivera*, 658 F.3d 1073, 1076 (9th Cir. 2011) ("because the recidivist sentence *does* relate to the commission of the repeat offense and is clearly part of the sentence "prescribed by law," a recidivist sentence may be considered in determining whether a prior conviction qualifies as a predicate offense").

3. Misdemeanors

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that a state drug offense may only be an aggravated felony if it proscribes conduct punishable as a felony under federal law. However, an offense designated by the state as a misdemeanor, but by federal law as a felony, may qualify as an aggravated felony. *See, e.g.*, *United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005); *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); *see also Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011); *United States v. Rivera*, 658 F.3d 1073, 1075-76 (9th Cir. 2011) (holding that defendant's state felony petty theft conviction qualified as an aggravated felony, although under California law conviction for petty theft was misdemeanor).

4. Wobblers

An "offense [that] can result in a range of punishments ... is referred to as a 'wobbler' statute, providing for either a misdemeanor or a felony conviction." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). For wobbler offenses, "it is clear that a state court's designation of a criminal offense [as a misdemeanor or a felony] is binding on the BIA for purposes of determining

whether there has been a conviction under the INA." *Id.* at 846. *See also Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir. 2004); *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999).

F. Overlap with Other Immigration and Criminal Sentencing Areas of Law

Some grounds of inadmissibility do not require that an alien be convicted of or admit a crime, but rather require proof of undesirable behavior. Although not considered here, these grounds should be kept in mind as they may overlap with the grounds discussed in this section. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(D)(i) (prostitution and commercialized vice); 8 U.S.C. § 1182(a)(6)(E)(i) (alien smuggling); 8 U.S.C. § 1182(a)(2)(E) (aliens asserting immunity from prosecution); 8 U.S.C. § 1182(a)(2)(H) (trafficking in persons); 8 U.S.C. § 1182(a)(2)(I) (money laundering).

The criminal sentencing guidelines also are similar to certain immigration provisions, and thus cases interpreting them may be relevant. U.S.S.G. § 2L1.2 defines "aggravated felony" with specific reference to 8 U.S.C. § 1101(a)(43) (pursuant to § 2L1.2 certain drug trafficking offenses, crimes of violence, aggravated felonies, etc. may be used to enhance an alien's sentence for violating 8 U.S.C. § 1326), and should be relevant to immigration cases considering the same statute. In some cases, the court has found criminal sentencing cases controlling in the immigration context. For example, this court has held that for purposes of determining whether a crime constituted aggravated felony sexual abuse of a minor, prior precedent in a criminal case was controlling. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066-67 (9th Cir. 2003) (citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999)); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam) (applying construction of "crime of violence" from sentencing case); *Castro-Baez v. Reno*, 217 F.3d 1057, 1058-59 (9th Cir. 2000) (applying definition of rape adopted in a criminal case); *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) (applying the uniform definition of "burglary" in the Career Criminals Amendment Act).

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that the same definition of aggravated felony drug offense should be used in both the criminal sentencing and immigration contexts, rejecting the Ninth Circuit's prior cases which defined the term differently in the two contexts. The Court held that in both contexts, a state offense could only be an aggravated felony if it proscribes conduct punishable as a felony under federal law.

U.S.S.G. § 2L1.2 also has provisions regarding crimes of violence, firearms offenses, and drug trafficking offenses. Cases interpreting these statutes may also be useful in analyzing criminal immigration cases, but these terms are defined differently in the immigration statute, and thus cases interpreting them are not controlling. *Compare Valencia v. Gonzales*, 439 F.3d 1046, 1053 (9th Cir. 2006) (statutory rape is not a crime of violence under the immigration statute), *with United States v. Asberry*, 394 F.3d 712, 717-18 (9th Cir. 2005) (holding that statutory rape is a crime of violence under U.S.S.G. § 4B1.2). *See also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) (holding that the modified categorical approach applies to prior crimes of domestic violence and distinguishing *United States v. Belless*, 338 F.3d 1063, 1065-67 (9th Cir. 2003), which held otherwise). *But see Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (discussing rule of lenity and stating that the statutory definition of crime of violence must be interpreted "consistently, whether we encounter its application in a criminal or noncriminal context").

Cross-reference: Aggravated Felonies, Offenses Defined as Aggravated Felonies, Illicit Trafficking in Controlled Substances, or State Drug Offenses.

III. METHOD OF ANALYSIS

A. Standard of Review

This court reviews de novo whether a state or federal conviction is an offense with immigration consequences. *See, e.g.*, *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011) (reviewing "de novo whether a criminal conviction is a crime of violence and therefore an aggravated felony rendering an alien removable"); *Carlos-Blaza v. Holder*, 611 F.3d 583, 587 (9th Cir. 2010) (reviewing de novo whether a particular conviction qualified as an aggravated felony); *Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1072 (9th Cir. 2010)

("Whether a particular conviction is a [removable] offense is a question of law we review de novo." (alteration in original) (internal citation and quotation marks omitted)); *Szalai v. Holder*, 572 F.3d 975, 978 (9th Cir. 2009) (per curiam) ("The Ninth Circuit reviews *de novo* whether a conviction constitutes a removable offense under the Immigration and Nationality Act."); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1126-27 (9th Cir. 2007); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1081 (9th Cir. 2007); *Parrilla v. Gonzales*, 414 F.3d 1038, 1041 (9th Cir. 2005) (post-REAL ID Act); *see also Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (reviewing de novo whether federal conviction was a removable offense).

The court reviews for abuse of discretion whether an alien's crime was particularly serious, rendering him ineligible for withholding of removal. *Arbid v. Holder*, 674 F.3d 1138, 1141 (9th Cir. 2012) (per curiam) ("[D]etermining whether a crime is particularly serious is an inherently discretionary decision, and we will review such decisions for abuse of discretion.").

B. Categorical Approach

In order to determine whether a conviction constitutes a predicate offense for immigration purposes, the court applies the two-step approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990) and *Shepard v. United States*, 544 U.S. 13, 15 (2005). *See Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *see also Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012); *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005) (post-REAL ID Act case applying the same approach). The court has stated that "[a]lthough *Shepard* dealt with categorizing a prior conviction for purposes of sentencing in a criminal case, the [Supreme] Court has noted that where a statute 'has both criminal and noncriminal applications,' the statute should be consistently interpreted in both criminal and noncriminal, *i.e.*, immigration, applications." *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 n.3 (9th Cir. 2005) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)); *see also Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1131 n.9 (9th Cir. 2007) (stating that *Taylor*'s "analysis applies in the immigration context since the INA uses similar language" to the statute considered in *Taylor*).

The court will "first make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *see also Robles-Urrea*, 678 F.3d at 707; *Rohit v. Holder*, 670 F.3d 1085, 1088 (9th Cir. 2012); *Hoang v. Holder*, 641 F.3d 1157, 1159-60 (9th Cir. 2011); *Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010)). "Under the *Taylor* categorical approach, this court must look to 'the ordinary case' that is prosecuted by the state, not some extreme hypothetical. *James v. United States*, 550 U.S. 192, 208 (2007)." *Rebilas v. Keisler*, 527 F.3d 783, 785 (9th Cir. 2008). The court will examine "what types of conduct are ordinarily prosecuted ... . *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (explaining that an offender 'must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.')." *Rebilas*, 527 F.3d at 785; *see also Martinez-Perez*, 417 F.3d at 1026; *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (stating that the categorical approach is based only on the elements of the statute, and the court will not "look to the particular facts underlying the conviction").

The court has held, however, that "[w]here ... a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, 549 U.S. at 193, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (concluding also that for the statute at issue "state courts have not narrowed this expansive definition – to the contrary, they have applied the statute just as broadly as its text allows"); *see also United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (citing *Grisel* and holding that where a statute's text is overbroad, the statutory language alone may be relied on "to establish the statute as overinclusive"); *Robles-Urrea*, 678 F.3d at 707 ("to hold that the statute of conviction is overbroad, we must determine that there is a 'realistic probability' of its application to conduct that falls beyond the scope of the generic federal offense" (internal citation omitted)); *Jordison v. Keisler*, 501 F.3d 1134, 1135 (9th Cir. 2007).

"[I]n conducting the categorical analysis, [the court does] not consider the availability of affirmative defenses; the fact that there may be an affirmative defense under the federal statute, but not under the state statute of conviction, does not mean that the state conviction does not fall categorically within the federal statute." *Gil v. Holder*, 651 F.3d 1000 (9th Cir. 2011).

See also Rohit, 670 F.3d at 1088-91 (holding that conviction under Cal. Penal Code § 647(b) constituted a conviction of a crime involving moral turpitude); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1170-71 (9th Cir. 2011) (holding that conviction for child molestation in the third degree under Wash. Rev. Code § 9A.44.089 categorically constitutes a crime of child abuse within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i)); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052-56 (9th Cir. 2011) (determining that California conviction for shooting at an inhabited dwelling or vehicle was not categorically a crime of violence); *Mendoza v. Holder*, 623 F.3d 1299, 1302-04 (9th Cir. 2010) (applying categorical approach and determining that conviction for robbery under Cal. Penal Code § 211 was categorically a crime of moral turpitude); *Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1073 (9th Cir. 2010) (applying two-step test in *Taylor* analyzing whether Cal. Health & Safety Code § 11379(a) categorically qualified as a crime relating to a controlled substance); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012-16 (9th Cir. 2009) (sexual abuse of a minor not categorically an aggravated felony); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 750-54 (9th Cir. 2009) (owning and operating a chop shop in violation of California law did not constitute an aggravated felony of theft).

C. Modified Categorical Approach

If the statute at issue is divisible into several crimes or sub-sections, or if it is broader than the generic definition of the crime, the conviction will not necessarily qualify as an aggravated felony or other predicate immigration offense, and the modified categorical approach will be applied. *See Carty v. Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005); *see also Robles-Urrea v. Holder*, 678 F.3d 702, 711 (9th Cir. 2012) (remanding to BIA to apply modified categorical approach where offense of misprision of felony was categorically broader than the generic definition of a crime involving moral turpitude). "Under the modified categorical approach, [the court] determine[s], in light of the facts in the judicially noticeable documents, (1) what facts the conviction necessarily rested on (that is, what facts

the trier of fact was actually required to find); and (2) whether these facts satisfy the elements of the generic offense." *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir 2011) (en banc). Prior to *Aguila-Montes de Oca*, the modified categorical approach could not be used "[w]hen the crime of conviction [was] missing an element of the generic crime altogether." *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 & n.10 (9th Cir. 2007) (en banc); *see also Li v. Ashcroft*, 389 F.3d 892, 899-901 (9th Cir. 2004) (Kozinski, J., concurring) (cited with approval by *Navarro-Lopez*). However, *Aguila-Montes de Oca* overruled *Navarro-Lopez*'s "missing element" rule, as well as subsequent cases that followed that rule. *See Aguila-Montes de Oca*, 655 F.3d at 940; *see also Flores-Lopez v. Holder*, 685 F.3d 857, 866 (9th Cir. 2012) (recognizing that *Aguila-Montes de Oca* overruled the missing-element rule); *Robles-Urrea*, 678 F.3d at 712 (same).

Under the modified categorical approach, the court will "consider whether documentation or other judicially noticeable facts in the record indicate that [the petitioner] was convicted of the elements of the generically defined crime." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *see also Hoang v. Holder*, 641 F.3d 1157, 1164-65 (9th Cir. 2011); *Carlos-Blaza v. Holder*, 611 F.3d 583, 589 (9th Cir. 2010). "The idea of the modified categorical approach is to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4; *see also Flores-Lopez*, 685 F.3d at 862-65 ("Under the modified categorical approach, a court may review enumerated documents within the record to determine whether a petitioner's plea 'necessarily' rested on the fact identifying the [offense] as generic." (internal citation and quotation marks omitted)). "As we have noted repeatedly, the government has the burden to establish clearly and unequivocally the conviction was based on all of the elements of a qualifying predicate offense." *Quintero-Salazar v. Keisler*, 506 F.3d 688, 694 (9th Cir. 2007) (internal quotation marks and citations omitted); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076 (9th Cir. 2007) (burden is on the government to establish removability).

The court will "look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction," but will not "look beyond the record of conviction itself to the particular facts underlying the conviction." *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *see also*

Randhawa v. Ashcroft, 298 F.3d 1148, 1152 (9th Cir. 2002) (stating that the court will "conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over-inclusive"). If an alien's admissions or concession leave material issues in dispute, the IJ may rely on facts admitted at the pleading stage, but may not consider further statements made by the alien unless they are contained in the specific set of documents that are part of the record of conviction. *Pagayon v. Holder*, 675 F.3d 1182, 1189 (9th Cir. 2011) (per curiam). Note that the modified categorical approach "is concerned only with "the crime of which the defendant was convicted, and not with his *conduct*." *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) (emphasis in original).

See also Rosas-Castaneda v. Holder, 655 F.3d 875, 885-86 (9th Cir. 2011) (concluding record of conviction was inconclusive as to whether Arizona drug conviction was an aggravated felony); *Carlos-Blaza*, 611 F.3d at 590 (concluding that under the modified categorical approach a conviction for misapplication of funds under 18 U.S.C. § 656 necessarily involves fraud or deceit and therefore is an aggravated felony); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 754 (9th Cir. 2009) (record was not sufficient to establish Cal. Veh. Code § 10801 conviction was an aggravated felony under modified categorical approach).

1. Charging Documents, Abstracts of Judgment, and Minute Orders

"[T]he types of documents [the court] may consider in applying the modified categorical approach [include]: 'the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc) (quoting *Shepard v. United States*, 544 U.S. 13, 16 (2005). Note that this list is illustrative, and that documents of equal reliability may also be considered. *Snellenberger*, 548 F.3d at 701 (holding that district courts may rely on state court clerk's minute orders that conform to certain procedures in applying the modified categorical approach). *See also United States v. Gomez-Hernandez*, 680 F.3d 1171, 1174-75 (9th Cir. 2012); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010) (deferring "to the BIA's reasonable conclusion that all reliable information may be considered in making a

particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction" (internal quotation marks and citation omitted)); *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 877-78 (9th Cir. 2008); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir. 2003) (order); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (Under the modified categorical approach, the court may look to the "charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment ... to document the elements of conviction."); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4.

In *Snellenberger*, the court held that the district court could rely on the state court clerk's minute order in determining whether a prior state burglary conviction qualified as a crime of violence. *Snellenberger*, 548 F.3d at 702.

Prior to *Snellenberger*, abstracts of judgment were found not sufficient to establish the nature of a defendant's conviction. *See, e.g., United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004) (holding that a California abstract of judgment was not sufficient to establish unequivocally that defendant was convicted of the sale and transportation of methamphetamine); *cf. United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007) (per curiam) (contrasting impermissible reliance on an abstract of judgment to determine the nature of a conviction with permissibly using it to determine "a discrete fact regarding Defendant's prior conviction, namely, the length of sentence imposed"). This court has stated that although *Snellenberger* did not explicitly overrule *Navidad-Marcos*, it is clear that its reasoning is inconsistent with that decision. *Kwong v. Holder*, 671 F.3d 872, 879 (9th Cir. 2011) (mandate pending) (discussing the sufficiency of abstract of judgment to establish conviction), *petition for cert. filed* (U.S. Jul. 30, 2012) (No. 12-150).

"Charging papers alone are never sufficient" but "may be considered in combination with a signed plea agreement." *Corona-Sanchez*, 291 F.3d at 1211 (internal citation omitted); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007) ("Ruiz-Vidal did not plead guilty to an offense that was charged in the information. Here also, the administrative record contains no plea agreement, plea colloquy, or any other document that would reveal the factual basis for Ruiz-

Vidal's ... conviction."); *Martinez-Perez v. Ashcroft*, 417 F.3d 1022, 1028-29 (9th Cir. 2005) (information charging second-degree robbery, minute order memorializing a probation violation hearing, and abstract of judgment showing guilty plea to grand theft, where the record did not contain any plea agreement or transcript of the plea proceeding, were insufficient to determine whether petitioner pled guilty to generic theft offense); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003). *Compare United States v. Savage*, 488 F.3d 1232, 1236 (9th Cir. 2007) (applying the modified categorical approach "[b]ased on the charging document and the transcript of Savage's plea allocution" to establish that he committed a crime of violence).

> When the record of conviction contains a charging document that lists conduct that does constitute an aggravated felony and conduct that does not constitute an aggravated felony, the conclusion is that the jury was not *necessarily* required to find the elements of the generic aggravated felony in order to convict on that document. Without more, it cannot be said as a matter of law that such conviction was for the generic crime.

Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1132 (9th Cir. 2007).

> [W]hen the record of conviction comprises only the indictment and the judgment, the judgment must contain the critical phrase 'as charged in the Information.'
>
> . . .
>
> [A]n indictment that merely recites the language of the statute ... is insufficient to establish the offense as generic for purposes of a modified categorical analysis.

United States v. Vidal, 504 F.3d 1072, 1087-88 (9th Cir. 2007) (en banc) (internal quotation marks and citation omitted).

"The set of noticeable documents includes the indictment (but only in conjunction with a signed plea agreement), the judgment of conviction, the minute order fully documenting the judgment, jury instructions, a signed guilty plea or the transcript from the plea proceedings." *Cheuk Fung S-Yong v. Holder*, 600 F.3d

1028, 1035 (9th Cir. 2010) (where IJ relied solely on alien's judicial admissions and an unidentified "conviction document" to determine that conviction was a controlled substance offense under the INA, the court held the government failed to meet its burden because the judicially noticeable documents in the record were inconclusive); *see also Malilia v. Holder*, 632 F.3d 598, 603 (9th Cir. 2011); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011) ("The list of judicially noticeable documents that this court may consider in applying the modified categorical approach is limited to the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (internal quotation marks and citation omitted)); *Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (explaining that neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction, to determine whether alien was convicted of a "crime of child abuse" within the meaning of the INA).

"[T]he INA makes clear that '[o]fficial minutes of a court proceeding' are sufficient 'proof of a criminal conviction.'" *Retuta v. Holder*, 591 F.3d 1181, 1184-85 (9th Cir. 2010) (quoting 8 U.S.C. § 1229A(c)(3)(B)(iv)).

"When the modified categorical approach must be employed, an alien's factual admissions may not be used as evidence to establish that he is removable, unless those admissions are included in the 'narrow, specified set of documents that are part of the record of conviction,' such as a plea agreement." *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011) (citations omitted).

See also Kwong v. Holder, 671 F.3d 872, 879-80 (9th Cir. 2011) (mandate pending) (discussing the sufficiency of abstract of judgment to establish conviction), *petition for cert. filed* (U.S. Jul. 30, 2012) (No. 12-150); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011) ("The list of judicially noticeable documents that this court may consider in applying the modified categorical approach is limited to the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (internal quotation marks and citation omitted)).

2. Police Reports and Stipulations

The court may not "look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for," a relevant offense. *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding "that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"); *see also United States v. Almazan-Becerra*, 482 F.3d 1085, 1090-91 (9th Cir. 2007) (remanding to determine whether, in light of *Shepard*, a police report stipulated to form the basis of a guilty plea could be used to support a sentencing enhancement).

However, "[a]lthough police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, the contents of these documents may be considered if specifically incorporated into the guilty plea or admitted by a defendant." *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor) (internal citation omitted); *see also Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (explaining that neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction, to determine whether alien was convicted of a "crime of child abuse" within the meaning of the INA); *United States v. Espinoza-Cano*, 456 F.3d 1126 (9th Cir. 2006) (police report could be considered in determining whether prior conviction qualified as an aggravated felony because report was incorporated by reference into the charging document and stipulated to form the factual basis of a guilty plea); *United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005) (defendant's assent to the statement of facts in a motion to set aside the indictment or information under Cal. Penal Code § 995 was a proper basis for a sentencing court to engage in a modified categorical analysis).

3. Probation or Presentence Reports

In *Corona-Sanchez*, this court held that the defendant's presentence report ("PSR"), which recited the facts of the crime as alleged in the charging papers, was not sufficient to establish that the defendant pled guilty to the elements of the

generic definition of a crime. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4; *see also United States v. Castillo-Marin*, 684 F.3d 914, 919-20 (9th Cir. 2012) (plain error to rely on PSR to determine defendant had prior conviction for crime of violence); *Rebilas v. Mukasey*, 527 F.3d 783, 787 (9th Cir. 2008); *Abreu-Reyes v. INS*, 350 F.3d 966, 967 (9th Cir. 2003) (order) (IJ may not use PSR to determine whether petitioner was an aggravated felon); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153-54 (9th Cir. 2003) (BIA erred in relying solely on the PSR to demonstrate the elements of a drug trafficking conviction); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076-77 (9th Cir. 2003) (order); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003). *Cf. United States v. Rodriguez-Guzman*, 506 F.3d 738, 746-47 & n.9 (9th Cir. 2007) (stating that under *Shepard*'s modified categorical approach a sentencing hearing transcript is not judicially noticeable).

4. Extra-Record Evidence

Under the modified categorical approach, evidence outside the record of conviction may not be considered to determine whether a conviction is a predicate immigration offense. *See Tokatly v. Ashcroft*, 371 F.3d 613, 623-24 (9th Cir. 2004) (stating that "[w]e decline to modify this court's – and the Board's – strict rules against extra-record of conviction evidence in order to authorize use of an alien's admissions in determining removability" and holding that IJ erred by relying on testimonial evidence at the removal hearing to determine that petitioner was convicted of a crime of domestic violence); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (IJ's reliance on alien's admissions, coupled with the government attorney's assessment that was based on a "rap sheet" that the IJ never looked at, was insufficient to conclude that the alien "had been convicted of possession for sale of a controlled substance that would constitute an aggravated felony under the INA."); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393 (9th Cir. 2006) (inferences and admissions during testimony before the IJ could not be used to determine whether petitioner was convicted of a crime of domestic violence); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129 n.7 (9th Cir. 2007) ("The BIA improperly considered Lua's testimony before the IJ in concluding that Lua had not demonstrated his eligibility for cancellation of removal. ... [U]nder the modified categorical approach we may not consider this testimony."); *see also Taylor v. United States*, 495 U.S. 575, 601 (1990) (noting the "practical difficulties

and potential unfairness of a factual approach," rather than a categorical approach, to a defendant's prior offenses).

5. Remand

If the court determines that the record in a case does not support attaching immigration consequences to a particular crime of conviction under the modified categorical approach, the case will ordinarily not be remanded under *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), for the government to submit further documentation. *See Flores-Lopez v. Holder*, 685 F.3d 857, 865 (9th Cir. 2012); *Fregozo v. Holder*, 576 F.3d 1030, 1036 (9th Cir. 2009); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132-35 (9th Cir. 2006) (en banc); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079-80 (9th Cir. 2007) ("[H]ere the record on remand would consist only of those documents already in the record. ... And the evidence in the record either supports the finding of removability or it does not. No further agency expertise is required to make that determination."). However, remand may be appropriate where it is unclear whether DHS had the opportunity to introduce all relevant evidence regarding the conviction in the proceedings below. *See Flores-Lopez*, 685 F.3d at 865-67 (remanding for BIA to apply modified categorical approach in the first instance where the record of conviction may have been incomplete).

See also Cheuk Fung S-Yong v. Holder, 600 F.3d 1028, 1036 (9th Cir. 2010) (granting petition for review and reversing the order of removal); *Retuta v. Holder*, 591 F.3d 1181, 1190 (9th Cir. 2010) ("Because the Government presented no evidence sufficient to establish that Retuta was subject to removal, we grant the petition for review, reverse the order of removal, and remand to the Board for disposition consistent with this opinion").

IV. CATEGORIES OF CRIMINAL OFFENSES THAT CAN BE GROUNDS OF REMOVABILITY AND/OR INADMISSIBILITY

A. Crimes Involving Moral Turpitude ("CMT")

1. Removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i)

a. Single Crime Committed within Five Years of Admission

An alien "convicted of a crime involving moral turpitude committed within five years ... after the date of admission, and ... for which a sentence of one year or longer may be imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i). The "date of admission" for purposes of calculating the five years is the date of the alien's lawful entry to the United States upon inspection and authorization by an immigration officer. *See Shivaraman v. Ashcroft*, 360 F.3d 1142, 1148-49 (9th Cir. 2004). The alien's subsequent adjustment to lawful permanent resident status will not trigger the five-year provision if he or she continued to maintain lawful presence in the United States after an initial lawful entry. *See id.* at 1149 (applicant was not removable because his CMT was not committed within five years of his initial lawful admission); *cf. Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001) (applicant's adjustment of status could constitute an "admission" for purposes of removability based on a conviction of an aggravated felony where he initially entered the United States without inspection).

b. Multiple Offenses at Any Time

Multiple convictions for moral turpitude offenses may subject an individual to removability. *See* 8 U.S.C. § 1227(a)(2)(A)(ii). "Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable." *Id.*; *see also Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) ("[A]n immigrant is removable if, after being admitted, he is convicted of two or more CIMTs that did not arise out of a single scheme of criminal misconduct." (internal quotation marks, alteration, and citation omitted)). For purposes of removability under 8 U.S.C. § 1227(a)(2)(A)(ii), the government must prove that the crimes were not part of a single scheme of criminal misconduct. *See*

Ye v. INS, 214 F.3d 1128, 1134 n.5 (9th Cir. 2000) (rejecting argument that the court lacked jurisdiction, because INS did not show that the two counts of vehicle burglary arose out of different criminal schemes); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (conviction for two counts of oral copulation, one month apart, not part of a single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (two robberies at same bank arose out of a single scheme).

2. Inadmissibility Pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I)

An alien convicted or who admits the essential elements of a CMT is inadmissible. But, an alien with one CMT is not inadmissible if he or she meets the petty offense exception. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). A CMT will meet the petty offense exception if "'the maximum penalty possible for the crime of which the alien was convicted ... did not exceed imprisonment for one year and ... the alien was not sentenced to a term of imprisonment in excess of 6 months.'" *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161-62 (9th Cir. 2009) ("[S]ingle conviction for a crime of moral turpitude - petty theft - may fall within the petty offenses exception set forth at 8 U.S.C. § 1182(a)(2)(A)(ii)(II)"); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9th Cir. 2003). For the purpose of the petty offense exception, "'the maximum penalty possible' ... refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years).

The youthful offender exception will apply if:

> the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States.

8 U.S.C. § 1182(a)(2)(A)(ii)(I).

3. Definition of Crime Involving Moral Turpitude

"[T]he BIA must consider on a case-by-case basis whether a particular crime involves moral turpitude." *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011). Although the immigration statute contains no definition of CMT, this court has explained that a CMT involves "base, vile, and depraved conduct that shocks the conscience and is contrary to the societal duties we owe each other." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1069 (9th Cir. 2007) (en banc) (holding that accessory after the fact offense was not a CMT), *overruled on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir 2011) (en banc) (per curiam); *see also Robles-Urrea v. Holder*, 678 F.3d 702, 707-11 (9th Cir. 2012) (concluding BIA erred in determining that misprision of felony was categorically a CMT); *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012); *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (explaining the court has upheld the BIA's emphasis on "evil intent"); *Morales-Garcia v. Holder*, 567 F.3d 1058, 1062 (9th Cir. 2009); *United States v. Santacruz*, 563 F.3d 894, 896 (9th Cir. 2009) (per curiam) (to determine whether a crime involves moral turpitude we ask whether a crime is "'vile, base or depraved and ... violates societal moral standards.'" (quoting *Navarro-Lopez*, 503 F.3d at 1074)); *Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) (holding that crime of false identification to a peace officer is not categorically a CMT). The court has noted that it is often helpful to determine whether a state crime involves moral turpitude by comparing it with crimes that have previously been found to involve moral turpitude. *Rohit*, 670 F.3d at 1089.

"[T]he federal generic definition of a CIMT is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards." *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010). "Non-fraudulent CIMTs 'almost always involve an intent to harm someone.'" *Id.* (quoting *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010)).

The majority of the *Navarro-Lopez* court concurred in Judge Pregerson's opinion, but not in his rationale that fraud offenses must be base, vile, and depraved in order to be CMT's. Judge Reinhardt, concurring, joined by seven other judges, wrote that while accessory after the fact was not a CMT, Judge Pregerson's rejection of the general rule that fraud offenses are CMT's regardless of whether they are base, vile, and depraved, conflicted with the circuit's and the

Supreme Court's precedent. *See Navarro-Lopez*, 503 F.3d at 1078. In sum, the majority reaffirmed the rule that crimes may either be fraudulent or base, vile, and depraved to be CMT's. *See id*.

"Crimes involving fraud are considered to be crimes involving moral turpitude." *Tijani v. Holder*, 628 F.3d 1071, 1075-79 (9th Cir. 2010) (internal quotation marks and citation omitted) (conviction for using false statements to obtain credit cards in violation of California law were inherently fraudulent). *See also Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) ("crimes that have fraud as an element, …, are categorically crimes involving moral turpitude), *petition for rehearing en banc denied*, 686 F.3d 1033 (9th Cir. 2012) (order). *See, e.g., Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994) (California conviction for grand theft is a CMT); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) (conspiracy to affect the market price of stock by deceit with intent to defraud is a CMT); *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) (dealing in counterfeit obligations is a CMT); *see also United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a CMT); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-20 (9th Cir. 2005) (burglary convictions under Wash. Rev. Code §§ 9A.52.025(1) and 9A.08.020(3) do not categorically meet the definition of CMT, but do meet the definition under the modified categorical approach because petitioner intended to steal property, a fraud crime), *abrogated on other grounds by Holder v. Martinez Guetierrez*, 132 S. Ct. 2011 (2012).

Crimes against property that do not involve fraud are generally not considered CMT's. *See Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n.5 (9th Cir. 1995) (crime of malicious mischief was not CMT).

Strict liability offenses and crimes against the state are generally not CMT's. *See Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007) (statutory rape under California Penal Code § 261.5(d) is not a categorical CMT because statute proscribes some conduct that is *malum prohibitum* rather than *malum in se*); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184 (9th Cir. 2000) (noting difference between *malum prohibitum*, an act only statutorily prohibited, and *malum in se*, an act inherently wrong); *see also Notash v. Gonzales*, 427 F.3d 693, 697 (9th Cir. 2005) (concluding that a conviction for attempted entry of goods by means of a false statement was not a CMT); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117,

1118-19 (9th Cir. 2003) (Arizona aggravated driving under the influence is not a categorical CMT where person may be convicted without actually driving); *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003) (simple DUI convictions are not CMT's); *Beltran-Tirado*, 213 F.3d at 1183-84 (convictions for making a false attestation on an employment verification form and using a false Social Security number do not constitute CMT's); *United States v. Chu Kong Yin*, 935 F.2d 990, 1003-04 (9th Cir. 1991) (gambling crimes did not necessarily involve moral turpitude). *But see Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009) (en banc) (concluding that DUI offenses committed with the knowledge that one's driver's license has been suspended or otherwise restricted are crimes involving moral turpitude).

Simple battery is generally not a crime involving moral turpitude, although it may be rendered such by aggravating circumstances. *See Morales-Garcia v. Holder*, 567 F.3d 1058, 1067 (9th Cir. 2009) (concluding that conviction under Cal. Penal Code § 273.5(a) for abuse of a cohabitant was not categorically a CMT); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1167 (9th Cir. 2006) (Arizona domestic assault statute is not categorical CMT because it penalizes reckless conduct); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006) (California conviction for domestic battery under Cal. Penal Code § 243(e) is not a categorical CMT because it lacks an injury requirement and includes no inherent element evidencing grave acts of baseness or depravity); *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (California conviction for assault with firearm not a CMT); *but see Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (willful infliction of injury to a spouse is CMT), *superseded by statute on other grounds as stated in Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (willful infliction of injury to a child is a CMT); *Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953) (California conviction for assault with deadly weapon is CMT).

"When the only benefit the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *See Latu v. Mukasey*, 547 F.3d 1070, 1074 (9th Cir. 2008) (quotation marks omitted) (concluding that violation of Hawaii Revised Statute § 291C-12.5(a), which requires the a driver to give an address or vehicle registration number following an accident resulting in substantial bodily injury, was not a CMT).

Sex-related offenses (other than statutory rape) are generally considered to be CMT's. *See Rohit v. Holder*, 670 F.3d 1085, 1089-90 (9th Cir. 2012) (conviction for solicitation of prostitution); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) ("Incest ... involves an act of baseness or depravity contrary to accepted moral standards, and we hold that it too is a 'crime involving moral turpitude.'"); *see also Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007) (Washington conviction for communication with a minor for immoral purposes is a CMT); *Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001) (alien did not challenge that conviction for stalking was a CMT). *But see Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997-1008 (9th Cir. 2008) (conviction under Cal. Penal Code § 647.6(a) for annoying or molesting a child under the age of 18 was not categorically a CMT), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

Knowing possession of child pornography is also a crime involving moral turpitude. *See also United States v. Santacruz*, 563 F.3d 894, 897 (9th Cir. 2009). However, a conviction for indecent exposure under California law is not a crime involving moral turpitude. *See Nunez v. Holder*, 594 F.3d 1124, 1138 (9th Cir. 2010) (concluding that "indecent exposure as defined by Cal. Penal Code § 314, and as construed by California courts, is not categorically a crime of moral turpitude").

Solicitation to possess a large quantity of marijuana is a crime involving moral turpitude. *See Barragan-Lopez v. Mukasey*, 508 F.3d 899, 904 (9th Cir. 2007).

"Petty theft is a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I)[,]" *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (per curiam), as is a conviction for credit card fraud in violation of Cal. Penal Code § 532a(1), *see Tijani*, 628 F.3d at 1075-77 (conviction for using false statements to obtain credit cards in violation of California law were inherently fraudulent). However, a conviction for receipt of stolen property under Cal. Penal Code § 496 is not categorically a crime of moral turpitude. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). *See also Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (prior conviction in Canada for aggravated assault did not categorically qualify as CMT); *Blanco*, 518 F.3d at 718-20 (9th Cir. 2008) (holding that crime of false identification to a peace officer under Cal. Penal Code

§ 148.9(a) was not categorically a CMT); *Cerezo v. Mukasey*, 512 F.3d 1163, 1166-69 (9th Cir. 2008) (concluding that California conviction for leaving the scene of an accident resulting in bodily injury or death in violation of Cal. Vehicle Code § 20001(a) was not categorically a CMT).

Misdemeanor false imprisonment under Cal. Penal Code § 236 is not categorically a crime involving moral turpitude because it "does not require the defendant to have had the intent to harm necessary for the crime to be 'base, vile, or depraved.'" *Saavedra-Figueroa*, 625 F.3d at 626.

A robbery conviction under Cal. Penal Code § 211 is a crime involving moral turpitude for the purposes of 8 U.S.C. § 1182(a)(2)(A)(i)(I). *Mendoza v. Holder*, 623 F.3d 1299, 1303-04 (9th Cir. 2010).

Crime of making threats with intent to terrorize under Cal Penal Code § 422 is categorically a crime of moral turpitude. *Latter-Singh v. Holder*, 668 F.3d 1156, 1161-63 (9th Cir. 2012).

B. Controlled Substances Offenses

1. Deportation Ground – 8 U.S.C. § 1227(a)(2)(B)(i)

Aliens may be removable for drug offenses. *See* 8 U.S.C. § 1227(a)(2)(B)(i). This section is broader than the aggravated felony deportation ground since it relates to all controlled substance offenses rather than just illicit trafficking offenses. *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) *with* 8 U.S.C. § 1101(a)(43)(B). 8 U.S.C. § 1227(a)(2)(B)(i) provides:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

See also Medina v. Ashcroft, 393 F.3d 1063, 1065 (9th Cir. 2005) (Nevada conviction of attempting to be under the influence of THC-carboxylic acid, a

controlled substance, was not a removable offense because it came within the statutory exception for possession of 30 grams or less of marijuana).

> The operative statutory phrase, 'relating to a controlled substance,' modifies 'law or regulation.' The ordinary meaning of the term 'relate' is 'to show or establish a logical or causal connection between.' Thus, [the court] look[s] to the language of the statute of conviction to determine whether it establishes a logical or causal connection to a controlled substance as defined in 21 U.S.C. § 802, section 102 of the Controlled Substances Act [].

Mielewczyk v. Holder, 575 F.3d 992, 994-95 (9th Cir. 2009) (internal citations omitted).

"[S]ection 1227(a)(2)(B)(i) exempts from removability solely those aliens who have (1) committed only one controlled substance offense, where (2) that offense is possession for personal use of less than 30 grams of marijuana." *Rodriguez v. Holder*, 619 F.3d 1077, 1079 (9th Cir. 2010) (per curiam) (discussing "personal use exception" of § 1227(a)(2)(B)(i) and holding that it does not apply to aliens who have more than one drug conviction).

See also Pagayon v. Holder, 675 F.3d 1182, 1189-90 (9th Cir. 2011) (per curiam) (state conviction for possessing methamphetamine constituted a controlled substance offense rendering alien removable, where petitioner made a pleading-stage admission to the conviction); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) (explaining that a conviction under Cal. Health & Safety Code § 11379 does not necessarily entail a "controlled substance offense" under 8 U.S.C. § 1227 (a)(2)(B)(i)); *Retuta v. Holder*, 591 F.3d 1181, 1185-89 (9th Cir. 2010) (minute order sufficient to show alien pled guilty to charge of possession of a controlled substance, methamphetamine, in violation of Cal. Health & Safety Code § 11377(a), but government failed to prove alien was "convicted" because "the definition of 'conviction' does not include criminal judgments whose only consequence is a suspended non-incarceratory sanction"); *Bermudez v. Holder*, 586 F.3d 1167, 1168-69 (9th Cir. 2009) (per curiam) (alien's conviction for offense of prohibited acts related to drug paraphernalia qualified as violation of law "relating to a controlled substance," within meaning of statute).

In the removal context, the government bears the burden of proving that the substance underlying an alien's state law conviction is one covered by § 802 of the Controlled Substances Act ("CSA"). *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076-77 (9th Cir. 2007) (conviction under California possession statute was not a categorical controlled substance offense because California regulates the possession and sale of many substances not covered by the CSA). The government also must demonstrate that the conviction is one "relating to a controlled substance," although this requirement has been construed broadly. *See, e.g.*, *Luu-Le v. INS*, 224 F.3d 911, 915-16 (9th Cir. 2000) (holding that Arizona conviction for possession of drug paraphernalia was a conviction relating to a controlled substance); *Johnson v. INS*, 971 F.2d 340, 342-43 (9th Cir. 1992) (conviction for violation of the Travel Act, 18 U.S.C. § 1952, was a violation of a law relating to a controlled substance); *but see Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153 (9th Cir. 2003) *as amended* (Arizona money laundering offense is not a crime relating to a controlled substance); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona solicitation conviction is not a violation of a law relating to a controlled substance, and is therefore not a deportable offense).

2. Inadmissibility Grounds – 8 U.S.C. § 1182(a)(2)(A)(i)(II) & 8 U.S.C. § 1182(a)(2)(C)

Additional grounds of inadmissibility bar the admission of aliens who are convicted of or admit the essential elements of a crime related to a controlled substance or who are controlled substance traffickers. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance crime), § 1182(a)(2)(C) (controlled substance traffickers); *see also Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1073 (9th Cir. 2010) (holding "that a conviction under § 11379(a), irrespective of whether the underlying offense was solicitation, qualifies for removal under § 1182(a)(2)(A)(i)(II), so long as the substance involved in the conviction is determined to have been a controlled substance under the modified categorical approach."). An alien inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II) may be granted a waiver of inadmissibility if his conviction was for simple possession of 30 grams or less of marijuana and he can establish that denial of his admission would result in extreme hardship to his United States citizen or lawful permanent resident spouse, parent, son or daughter. *See* 8 U.S.C. § 1182(h).

V. CATEGORIES OF CRIMINAL OFFENSES THAT ARE GROUNDS OF REMOVABILITY ONLY

A. Aggravated Felony

Several dozen offenses are categorized as aggravated felonies under 8 U.S.C. § 1101(a)(43). An applicant is removable if convicted of an aggravated felony at any time after admission. *See Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134 (9th Cir. 2001); *see also Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) ("Under 8 U.S.C. § 1229b(a)(3), an LPR convicted of an 'aggravated felony' is ineligible for cancellation of removal. 'Aggravated felony' is defined by 8 U.S.C. § 1101(a)(43)(F) as including a 'crime of violence ... for which the term of imprisonment [is] at least one year.'"); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) ("'Any alien who is convicted of an aggravated felony at any time after admission is deportable.'" (quoting 8 U.S.C. § 1227(a)(2)(A)); *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) ("An immigrant convicted of an aggravated felony after being admitted to this country is removable."); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 750 (9th Cir. 2009) ("'Any alien who is convicted of an aggravated felony at any time after admission is deportable.'" (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)). Aggravated felons are also disqualified from many forms of relief including asylum, voluntary departure, and cancellation of removal (although some aliens may remain eligible for § 212(c) relief). Although an alien previously removed for having been convicted of an aggravated felony is permanently inadmissible under 8 U.S.C. § 1182(a)(9)(A)(i), absent consent of the Attorney General, there is no independent ground of inadmissibility for having been convicted of an aggravated felony.

The aggravated felony provisions in the INA were first introduced by the Anti-Drug Abuse Act of 1988 and included murder, drug trafficking, arms trafficking, and any attempt or conspiracy to commit such acts. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915-16 (9th Cir. 2004). Subsequent legislation expanded the definition incrementally, until § 321 of IIRIRA added new offenses to the definition and dramatically broadened the definition's reach by expanding the terms of many offenses. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1044-45 & n.3 (9th Cir. 2004); *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002). 8 U.S.C. § 1227(a)(2)(A)(iii) does not apply to convictions that occurred prior to

enactment of the Anti-Drug Abuse Act of 1988. *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1080 (9th Cir. 2010).

The expanded definition of aggravated felony applies to all "actions taken" by the Attorney General on or after September 30, 1996, regardless of the date of conviction. *See* IIRIRA § 321(b) and (c); *Aragon-Ayon v. INS*, 206 F.3d 847, 852 (9th Cir. 2000) (citing *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)). This court has upheld the retroactive application of IIRIRA's expanded definition of aggravated felony. *See Aragon-Ayon*, 206 F.3d at 853; *see also Becker v. Gonzales*, 473 F.3d 1000, 1002 (9th Cir. 2007); *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 852 (9th Cir. 2006); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Former 212(c) Relief, Section 212(c) Relief, Application of Retroactivity Analysis.

1. Murder, Rape or Sexual Abuse of a Minor – 8 U.S.C. § 1101(a)(43)(A)

a. Rape

The contemporary definition of rape does not include a forcible compulsion element. *See United States v. Yanez-Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002) (third-degree rape under Washington law meets the definition of rape even though it does not necessarily include an element of physical force). "In ordinary usage, rape is understood to include the act of engaging in non-consensual sexual intercourse with a person whose ability to resist has been substantially impaired by drugs or other intoxicants." *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000).

b. Sexual Abuse of a Minor

See Rivera-Cuartas v. Holder, 605 F.3d 699, 702 (9th Cir. 2010) (Arizona Revised Statute § 13-1405, which criminalizes sexual conduct with a minor under the age of 18, did not constitute an aggravated felony); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012-16 (9th Cir. 2009) (holding that California offense of unlawful sexual intercourse with a minor did not meet the definition of sexual

abuse of a minor under removal statute and therefore was not categorically an aggravated felony under § 1101(a)(43)(A)); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc) (concluding that California convictions under §§ 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) do not categorically constitute "sexual abuse of a minor"), *abrogated on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011); *Rebilas v. Keisler*, 527 F.3d 783, 786-87 (9th Cir. 2008) (Arizona conviction for attempted public sexual indecency to a minor is not a categorical aggravated felony because the statute does not require actual touching, the minor does not need to be aware of the perpetrator's conduct, and Arizona's definition of attempt is broader than the federal definition); *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 996-97 (9th Cir. 2008) (conduct under Cal Penal Code § 647.6(a), which prohibits annoying or molesting a child under age 18, does not constitute sexual abuse of a minor), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *Parrilla v. Gonzales*, 414 F.3d 1038, 1043-44 (9th Cir. 2005) (conviction for communicating with a minor for immoral purposes under Wash. Rev. Code § 9.68A.090 did not categorically qualify as sexual abuse of a minor, but under the modified categorical approach, the information and the Certification for Determination of Probable Cause incorporated by reference into the guilty plea demonstrated that applicant was convicted of sexual abuse of a minor); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 (9th Cir. 2003) (Nevada conviction for lewdness with a child under 14 constitutes sexual abuse of a minor).

See also United States v. Baza-Martinez, 464 F.3d 1010, 1012 (9th Cir. 2006) (North Carolina conviction for taking indecent liberties with a child is not categorically sexual abuse of a minor because statute prohibits conduct that is not necessarily physically or psychologically harmful); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1244 (9th Cir. 2005) (Nevada conviction for statutory sexual seduction constituted sexual abuse of a minor for sentencing purposes); *United States v. Pallares-Galan*, 359 F.3d 1088, 1100-03 (9th Cir. 2004) (misdemeanor California conviction for annoying or molesting child under age 18 does not categorically constitute sexual abuse of minor for immigration purposes); *United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (9th Cir. 2001) (Washington conviction for third-degree attempted child molestation was an aggravated felony for sentencing purposes); *United States v. Mendoza-Iribe*, 198 F.3d 742, 744-45 (9th Cir. 1999) (per curiam) (California conviction for

penetrating genital or anal openings of child under 14 with foreign object constituted sexual abuse of a minor for sentencing purposes); *United States v. Baron-Medina*, 187 F.3d 1144, 1146-47 (9th Cir. 1999) (California conviction for lewd conduct with a child under 14 constituted sexual abuse of a minor for sentencing enhancement purposes).

2. Illicit Trafficking in a Controlled Substance – 8 U.S.C. § 1101(a)(43)(B)

The aggravated felony provision is narrower than the controlled substances offense provision of 8 U.S.C. § 1227(a)(2)(B)(i) because the aggravated felony provision only covers drug trafficking offenses. A controlled substances offense is an aggravated felony if it (1) includes an element of illicit trafficking or (2) would be a felony drug trafficking crime under federal law. *See* 8 U.S.C. § 1101(a)(43)(B); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004).

Most cases considering whether a drug crime is an aggravated felony have done so under the second definition – felony drug trafficking crimes under federal law. If the alien was actually convicted of a drug trafficking crime under federal law, then the analysis is straightforward. If, however, the alien is convicted of a state crime, then the court must determine whether the crime would be punishable as a felony drug trafficking crime under federal law. First, the offense must be punishable as a felony under federal law; the state's designation of the crime as a felony is not sufficient to render it an aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (state felony possession offense was not an aggravated felony because the federal Controlled Substances Act punishes simple possession as a misdemeanor). Alternatively, the substantive crime can be analogous to a federal drug trafficking felony. *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1128 (9th Cir. 2007) (California transportation of controlled substances offense was not a categorical aggravated felony because statute punishes solicitation which is not mentioned in the federal Controlled Substances Act); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1067-68 (9th Cir. 2006) (California conviction under Health & Safety Code § 11366 for opening or maintaining a place for the purpose of selling, giving away, or using a controlled substance was an aggravated felony because it was analogous to a federal offense); *Olivera-Garcia v. INS*, 328 F.3d 1083, 1086-87 (9th Cir. 2003) (conviction for being an accessory after the fact to

the manufacture of methamphetamine was an aggravated felony because alien was convicted under substantive federal drug statute); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (conviction under generic solicitation statute rather than substantive drug statute was not aggravated felony because not analogous to federal drug offense).

See also Daas v. Holder, 620 F.3d 1050, 1053-54 (9th Cir. 2010) (conviction for distributing ephedrine and pseudoephedrine with reasonable cause to believe they would be used to manufacture methamphetamine qualified as a "drug trafficking crime" and thus was an aggravated felony); *Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008) (holding that possession of a controlled substance with the intent to sell contains a trafficking element and is an aggravated felony).

Although "recidivist simple possession" can be a felony under the Controlled Substances Act, the Supreme Court held in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580-81 (2010), that "second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43), when, … , the state conviction is not based on the fact of a prior conviction."

3. Illicit Trafficking in Firearms – 8 U.S.C. § 1101(a)(43)(C)

An aggravated felony includes "illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title)." 8 U.S.C. § 1101(a)(43)(C).

4. Money Laundering – 8 U.S.C. § 1101(a)(43)(D)

An aggravated felony includes "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000." 8 U.S.C. § 1101(a)(43)(D). In order for a conviction for money laundering to constitute an aggravated felony under this section, the amount of funds laundered must be over $10,000. *See Chowdhury v. INS*, 249 F.3d 970, 973-75 (9th Cir. 2001) (conviction for money laundering was not an aggravated felony because amount of funds laundered was less than $10,000).

5. Explosives, Firearms and Arson – 8 U.S.C. § 1101(a)(43)(E)

An aggravated felony includes:

an offense described in –

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses).

8 U.S.C. § 1101(a)(43)(E); *see also United States v. Mendoza-Reyes*, 331 F.3d 1119, 1122 (9th Cir. 2003) (Washington conviction for first-degree unlawful possession of a firearm is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) for sentencing purposes); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1024 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E) for sentencing purposes); *United States v. Sandoval-Barajas*, 206 F.3d 853, 856-57 (9th Cir. 2000) (Washington conviction for possession of firearm by non-citizen was not an aggravated felony for sentencing purposes).

6. Crimes of Violence ("COV") – 8 U.S.C. § 1101(a)(43)(F)

The definition of aggravated felony includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F); *see also Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000).

Section 16 of Title 18, in turn, provides that 'crime of violence' means:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Ye, 214 F.3d at 1133 (quoting 18 U.S.C. § 16); *see also Flores-Lopez v. Holder*, 685 F.3d 857, 862-65 (9th Cir. 2012) (Cal. Penal Code § 69 is not categorically a COV); *Kwong v. Holder*, 671 F.3d 872, 877-79 (9th Cir. 2011) (mandate pending) (prior California conviction for first-degree burglary constituted COV, and thus petitioner was not eligible for withholding of removal), *petition for cert. filed* (U.S. Jul. 30, 2012) (No. 12-150); *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (2004). "We have squarely held that the force necessary to constitute a crime of violence must actually be violent in nature." *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (internal quotation marks and alteration omitted) (Oregon conviction for harassment was not COV). In determining whether a crime is a COV under section 16, it may be relevant to look at whether the state defines the crime as a "violent felony." *See Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1222 (9th Cir. 2004); *cf. Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005) (the fact that California does not list sexual battery as a "violent" crime is not dispositive); *see also Camacho-Cruz v. Holder*, 621 F.3d 941, 942 (9th Cir. 2010) ("To determine whether a state law conviction is categorically a 'crime of violence,' we compare the elements of the state law crime to the elements of a 'crime of violence,' as defined in 18 U.S.C. § 16.").

The "language [of the statute] requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7.

a. Negligent and Reckless Conduct Insufficient

"The critical aspect of § 16(a) is that a crime of violence is one involving the use ... of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis and internal quotation marks omitted). "[U]se requires active employment," and "most naturally suggests a higher degree

of intent than negligent or merely accidental conduct." *Id.* (internal quotation marks omitted).

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes.

Id. at 11; *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (explaining that gross negligence "does not constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence").

Likewise, "the reckless use of force is 'accidental' and crimes of recklessness cannot be crimes of violence" under 18 U.S.C. § 16(a) or 16(b). *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc). The court has explained: "Neither gross negligence in failing to perceive, nor conscious disregard of a substantial and unjustifiable risk of injury implies that physical force is instrumental to carrying out the crime, such as the plain meaning of the word 'use' denotes." *Id.* (internal quotation marks and citations omitted); *see also Penuliar v. Mukasey*, 528 F.3d 603, 609-10 (9th Cir. 2008) (evading an officer in violation of California Vehicle Code § 2800.2 does not categorically qualify as a COV); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007) (California Penal Code § 646.9 is not a COV because it penalizes reckless conduct).

State driving under the influence offenses that either do not have a *mens rea* component, or require only a showing of negligence in the operation of a vehicle, do not qualify as crimes of violence. *See Leocal*, 543 U.S. at 8-10 (2004) (Florida conviction for felony DUI causing injury); *see also Lara-Cazares*, 408 F.3d at 1221-22 (California conviction for gross vehicular manslaughter while intoxicated) (overruling *Park v. INS*, 252 F.3d 1018, 1023-25 (9th Cir. 2001), and its progeny to the extent inconsistent with *Leocal*); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (California felony conviction of DUI with multiple prior convictions).

b. Force Against Another

18 U.S.C. § 16 defines a COV as one involving the use of force against another person or another's property, and thus a crime that could involve the use of force against oneself or one's own property does not meet the definition. *See Jordison v. Gonzales*, 501 F.3d 1134 (9th Cir. 2007) (California Penal Code § 452(c) prohibiting setting fire to a structure or forest land was not an aggravated felony COV because petitioner could have set fire to his own property.). "Section 16(a) does not require an actual application of force or an injury to the victim. Rather, the threatened use of force is sufficient for a crime to constitute a crime of violence." *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (explaining that whether the defendant actually intends to harm the victim or whether any harm results is irrelevant).

c. Specific Crimes Considered

Examples of cases finding an offense to be a COV include: *Kwong v. Holder*, 671 F.3d 872, 878-79 (9th Cir. 2011) (mandate pending) (prior California conviction for first-degree burglary constituted COV, and thus petitioner was not eligible for withholding of removal), *petition for cert. filed* (U.S. Jul. 30, 2012) (No. 12-150); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111-12 (9th Cir. 2011) (holding that conviction for residential burglary under Cal. Penal Code § 459 constitutes a COV because it is a felony that involves a substantial risk that physical force against the person or property of another may be used in committing the offense, and is thus a "particularly serious crime"; further noting that "certain crimes can be categorically crimes of violence under one of the relevant sections but not the other because the term 'crime of violence' is defined differently in different statutes."); *Camacho-Cruz v. Holder*, 621 F.3d 941, 942-43 (9th Cir. 2010) (holding that conviction for assault with use of a deadly weapon under Nev. Rev. Stat. § 200.471 was a crime of violence); *Nieves-Medrano v. Holder*, 590 F.3d 1057, 1058 (9th Cir. 2010) (order) (conviction for carjacking under Cal. Penal Code § 215 is categorically a COV); *Prakash v. Holder*, 579 F.3d 1033, 1034 (9th Cir. 2009) (holding that "convictions for solicitation to commit rape by force, in violation of Cal. Penal Code § 653f(c), and solicitation to commit assault by means of force likely to produce great bodily injury, in violation of Cal. Penal Code § 653f(a), constitute crimes of violence under 8 U.S.C. § 1101(a)(43)(F) for immigration law purposes."); *Ortiz-Magana v. Mukasey*, 542 F.3d 653, 661 (9th

Cir. 2008) (holding that an alien "convicted of aiding and abetting an assault with a deadly weapon under California Penal Code § 245(a)(1) has committed a crime of violence"); *Estrada-Rodriguez v. Mukasey*, 512 F.3d 517, 520-21 (9th Cir. 2007) (conviction for resisting arrest under Arizona Revised Statutes § 13-2508 is a COV); *Lisbey v. Gonzales*, 420 F.3d 930, 932-34 (9th Cir. 2005) (conviction for sexual battery under Cal. Penal Code § 243.4(a) is a COV); *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1222 (9th Cir. 2004) (conviction for mayhem under California Penal Code § 203 is a COV); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 941 (9th Cir. 2004) (conviction for exhibiting deadly weapon with intent to evade arrest under California Penal Code § 417.8 is a COV); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (conviction for making terrorist threats under California Penal Code § 422 is a COV); *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (petitioner's convictions for assaulting his wife and children were COV's under 18 U.S.C. § 16(a)), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc); *Aragon-Ayon v. INS*, 206 F.3d 847, 851 (9th Cir. 2000) ("It is undisputed that assault with a deadly weapon is included in the amended definition of 'aggravated felony' in INA § 101(a)(43)(F).").

Cases finding that an offense is not a COV include: *Flores-Lopez v. Holder*, 685 F.3d 857, 862-65 (9th Cir. 2012) (Cal. Penal Code § 69 not a categorical COV); *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 946-47 (9th Cir. 2011) (en banc) (per curiam) (holding "conviction for first-degree residential burglary under Cal. Penal Code § 459 does not qualify as a 'crime of violence' under either the categorical or modified categorical approach); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1055 (9th Cir. 2011) (California conviction for shooting at an inhabited dwelling or vehicle was not categorically a COV); *Cortez-Guillen v. Holder*, 623 F.3d 933, 935-36 (9th Cir. 2010) (Alaska conviction for coercion not categorically a COV); *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1227 (9th Cir. 2008) ("Washington fourth degree assault statute is categorically overbroad, and the modified categorical approach does not establish Suazo was convicted of a 'crime of violence'"); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (Oregon harassment offense, which can be accomplished by mere "ephemeral touching," is not a COV); *Valencia v. Gonzales*, 439 F.3d 1046, 1054-55 (9th Cir. 2006) (statutory rape conviction under California Penal Code § 261.5(c) is not a COV); *Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000)

(conviction for entry into a locked vehicle under California Penal Code § 459 is not a COV).

Cross-reference: Domestic Violence Crimes.

7. Theft or Burglary – 8 U.S.C. § 1101(a)(43)(G)

The definition of aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); *see also Alvarez-Reynaga v. Holder*, 596 F.3d 534, 536 (9th Cir. 2010) (conviction under Cal. Penal Code § 496d(a) constitutes a conviction for an aggravated felony); *Verdugo-Gonzales v. Holder*, 581 F.3d 1059, 1060 (9th Cir. 2009) (conviction for receipt of stolen property under Cal. Penal Code § 496(a) categorically qualified as an aggravated felony conviction); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 750-54 (9th Cir. 2009) (conviction for owning and operating a chop shop under Cal. Veh. Code § 10801 did not constitute an aggravated felony of theft); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002); *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000). The Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) recognized that several circuits and the BIA have adopted a generic definition of a theft offense as: "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id*. at 184 (internal quotation marks and citation omitted); *see also Arteaga v. Mukasey*, 511 F.3d 940, 947 (9th Cir. 2007) ("Arteaga cites to no authority to support his assertion that a theft offense requires an intent to permanently deprive another of property."). However, the Supreme Court rejected the Ninth Circuit's ruling in *Penuliar v. Ashcroft*, 435 F.3d 961 (9th Cir. 2006), that Cal. Vehicle Code § 10851 is broader than the generic theft definition because it includes aiding and abetting liability. *See Duenas-Alvarez*, 549 U.S. at 184. While not directly overruling them, the Supreme Court's decision calls into question the rule of *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4, and *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005), in which the Ninth Circuit had found other California theft offenses to be broader than the generic definition of theft due to the inclusion of aiding and abetting liability. In *United States v. Vidal*, 504 F.3d 1072, 1090 (9th Cir. 2007) (en banc), this court held that a conviction under California Vehicle

Code § 10851(a) is not categorically an aggravated felony because it includes accessory after the fact liability. *See also Penuliar v. Mukasey*, 528 F.3d 603, 611-12 (9th Cir. 2008) (unlawful driving or taking of a vehicle under Cal. Vehicle Code § 10851(a) does not categorically qualify as a theft offense because it extends liability to accessories after the fact).

In order to qualify as an aggravated felony theft offense, the term of imprisonment actually imposed by the trial judge must be at least one year. *See Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that "term of imprisonment" refers to the potential sentence that the judge could have imposed).

See also Ramirez-Villalpando v. Holder, 645 F.3d 1035, 1041 n.1 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1739 (2012) (mem.) (California conviction for grand theft under Cal. Penal Code § 487(a) did not categorically qualify as an aggravated felony; however, under the modified categorical approach, the conviction was one of personal property that qualified it as an aggravated felony); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589-91 (9th Cir. 2008) (Oregon identity theft conviction was not categorically an aggravated felony theft offense); *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9th Cir. 2003) (Arizona conviction for theft of a means of transportation is not categorically an aggravated felony); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (Arizona conviction for possession of a stolen vehicle is not categorically an aggravated felony); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (federal conviction for possession of stolen mail qualifies as an aggravated felony); *United States v. Perez-Corona*, 295 F.3d 996, 1001 (9th Cir. 2002) (Arizona conviction for unlawful use of means of transportation is not a theft offense for sentencing purposes).

8. Ransom Offenses – 8 U.S.C. § 1101(a)(43)(H)

The definition of aggravated felony includes "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)." 8 U.S.C. § 1101(a)(43)(H).

9. Child Pornography Offenses – 8 U.S.C. § 1101(a)(43)(I)

The definition of aggravated felony includes "an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)." 8 U.S.C. § 1101(a)(43)(I).

10. RICO Offenses – 8 U.S.C. § 1101(a)(43)(J)

The definition of aggravated felony includes:

> an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed.

8 U.S.C. § 1101(a)(43)(J).

11. Prostitution and Slavery Offenses – 8 U.S.C. § 1101(a)(43)(K)

The definition of aggravated felony includes:

> an offense that –
>
> (i) relates to the owning, controlling, managing, or supervising of a prostitution business;
>
> (ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
>
> (iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons).

8 U.S.C. § 1101(a)(43)(K).

12. National Defense Offenses – 8 U.S.C. § 1101(a)(43)(L)

The definition of aggravated felony includes:

an offense described in–

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents).

8 U.S.C. § 1101(a)(43)(L).

13. Fraud or Deceit Offenses – 8 U.S.C. § 1101(a)(43)(M)

The definition of aggravated felony includes:

an offense that–

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M).

In order to establish that an alien has been convicted of a fraud offense, the offense must involve fraud and the loss must be more than $10,000. In the past, the court has applied the categorical and modified categorical approach to find these elements. *See Carlos-Blaza v. Holder*, 611 F.3d 583, 590 (9th Cir. 2010) (applying the modified categorical approach and concluding that conviction for misapplication of funds was one that involved "fraud or deceit" and was therefore

an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i)); *Kharana v. Gonzales*, 487 F.3d 1280, 1283-85 (9th Cir. 2007) (amount of loss determined under the modified categorical approach); *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098-1100 (9th Cir. 2004) (same).

The Supreme Court, however, held in *Nijhawan v. Holder*, 557 U.S. 29 (2009), that the monetary threshold in 8 U.S.C. § 1101(a)(43)(M)(i) "applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion," rather than to an element of the fraud or deceit crime. *Nijhawan*, 557 U.S. at 40 (concluding that where defendant's own stipulation, produced for sentencing purposes, involved losses considerably greater than $10,000, and the court's restitution order showed the same, clear and convincing evidence supported conclusion that conviction fell within the scope of 8 U.S.C. § 1101(a)(43)(M)(i)). In determining the amount of loss, the court is not limited to the record of conviction used for the modified categorical approach. *See id*. at 40-42.

"The scope of [8 U.S.C. § 1101(a)(43)(M)(i)] is not limited to offenses that include fraud or deceit as formal elements. "Rather, Clause (i) refers more broadly to offenses that 'involv[e]' fraud or deceit – meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (holding that alien's tax crimes qualified as an aggravated felony involving fraud or deceit).

14. Alien Smuggling – 8 U.S.C. § 1101(a)(43)(N)

The definition of aggravated felony includes:

> an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.

8 U.S.C. § 1101(a)(43)(N).

The crime of harboring illegal aliens constitutes an aggravated felony under this section. *See Castro-Espinoza v. Ashcroft*, 257 F.3d 1130, 1132 (9th Cir. 2001); *see also United States v. Galindo-Gallegos*, 244 F.3d 728, 734 (9th Cir.), *amended by* 255 F.3d 1154 (9th Cir. 2001) (conviction for transporting illegal aliens already in United States was aggravated felony for sentencing enhancement purposes).

Note that the aggravated felony provision requires that an alien be convicted of a criminal offense relating to alien smuggling, where as the alien smuggling inadmissibility ground under 8 U.S.C. § 1182(a)(6)(E) and deportability ground under 8 U.S.C. § 1227(a)(1)(E) require no such conviction.

15. Illegal Reentry after Deportation for Aggravated Felony – 8 U.S.C. § 1101(a)(43)(O)

The definition of aggravated felony includes "an offense described in section 1325(a) [Improper entry by alien] or 1326 [Reentry of removed aliens] of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph." 8 U.S.C. § 1101(a)(43)(O).

Note that an independent section provides that an alien previously removed for having been convicted of an aggravated felony is permanently inadmissible. *See* 8 U.S.C. § 1182(a)(9)(A)(i). This bar to admission applies unless "the Attorney General has consented to the alien's reapplying for admission." *Id.* § 1182(a)(9)(A)(iii).

16. Passport Forgery – 8 U.S.C. § 1101(a)(43)(P)

The definition of aggravated felony includes:

> an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding

only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.

8 U.S.C. § 1101(a)(43)(P).

17. Failure to Appear for Service of Sentence – 8 U.S.C. § 1101(a)(43)(Q)

The definition of aggravated felony includes "an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more." 8 U.S.C. § 1101(a)(43)(Q).

18. Commercial Bribery and Counterfeiting – 8 U.S.C. § 1101(a)(43)(R)

The definition of aggravated felony includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered, for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(R). A federal conviction for possession of counterfeit obligations is an aggravated felony under this section. *See Albeola-Figueroa v. INS*, 221 F.3d 1070, 1073-74 (9th Cir. 2000).

The court has adopted a generic core definition of forgery that requires intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument. *See Morales-Algeria v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006) (California conviction for forgery of a check, in violation of Cal. Penal Code § 476(a), categorically qualifies as an aggravated felony because it requires knowledge of the fictitious nature of the instrument).

See also Vizcarra-Ayala v. Mukasey, 514 F.3d 870, 877 (9th Cir. 2008) (California conviction for offense of forgery in violation of Cal. Penal Code § 475(c) is not categorically an offense "relating to ... forgery" within the meaning of 8 U.S.C. § 1101(a)(43)(R)).

19. Obstruction of Justice – 8 U.S.C. § 1101(a)(43)(S)

The definition of aggravated felony includes "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(S).

See Renteria-Morales v. Mukasey, 551 F.3d 1076, 1079 (9th Cir. 2008) (conviction under 18 U.S.C. § 3146 qualifies as generic crime of "obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S)).

20. Failure to Appear before a Court – 8 U.S.C. § 1101(a)(43)(T)

The definition of aggravated felony includes "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed." 8 U.S.C. § 1101(a)(43)(T).

See Renteria-Morales v. Mukasey, 551 F.3d 1076, 1079 (9th Cir. 2008) (conviction under 18 U.S.C. § 3146 for failing to appear in court, or "bail jumping," was not categorically an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(T)).

21. Attempt or Conspiracy to Commit an Aggravated Felony – 8 U.S.C. § 1101(a)(43)(U)

The definition of aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph." 8 U.S.C. § 1101(a)(43)(U); *see also Hernandez-Cruz v. Holder, 651 F.3d 1094, 1100 (9th Cir. 2011); Ngaeth v. Mukasey*, 545 F.3d 796, 800-01 (9th Cir. 2008) (per curiam) (discussing definition of "attempt").

B. Domestic Violence and Child Abuse Offenses

1. General Definition

In 1996, IIRIRA added a ground of removability for state or federal convictions of crimes of domestic violence. *See* 8 U.S.C. § 1227(a)(2)(E). There is no such ground of inadmissibility. *See Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d

649, 650 (9th Cir. 2004). The ground of removability applies to convictions or violations of protective orders occurring after September 30, 1996. *See* IIRIRA § 350(b).

The statute covers "[a]ny alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i); *see also Tokatly v. Ashcroft*, 371 F.3d 613, 619 (9th Cir. 2004). The act also covers violators of protective orders. *See* 8 U.S.C. § 1227(a)(2)(E)(ii).

A "crime of domestic violence" means:

> any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. § 1227(a)(2)(E)(i).

A crime of violence ("COV") is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16; *see also Singh v. Ashcroft*, 386 F.3d 1228, 1231 n.2 (9th Cir. 2004). This is the same definition of crime of violence used in the aggravated felony context. *See* 8 U.S.C. § 1101(a)(43)(F).

"In order to determine that [a petitioner] was convicted of a 'crime of domestic violence' under section 237(a)(2)(E)(i), we would have to conclude that his crime was not only one of 'violence,' but also that the violence was 'domestic' within the meaning of that section." *Tokatly*, 371 F.3d at 619; *see also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393-94 (9th Cir. 2006). To ascertain whether a conviction constitutes a crime of domestic violence, the adjudicating authority may not go beyond the record of conviction. *See Cisneros-Perez*, 465 F.3d at 393 (inferences and admissions in the administrative record could not be used to determine whether a conviction was for domestic violence).

2. Cases Considering Domestic Violence Convictions

Habibi v. Holder, 673 F.3d 1082, 1085 (9th Cir. 2011) (conviction under Cal. Penal Code § 243(e)(i)); *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083-86 (9th Cir. 2010) (holding that a conviction under Cal. Penal Code § 273.5(a) is categorically a crime of domestic violence); *Szalai v. Holder*, 572 F.3d 975, 979-82 (9th Cir. 2009) (per curiam) (judgment holding alien in contempt for disobeying the stay away portion of a restraining order qualified as a violation of a protection order); *Alanis-Alvarado v. Holder*, 558 F.3d 833, 839-40 (9th Cir. 2009) (California conviction under Cal. Fam. Code § 6320 categorically qualified as conviction of violating a "protection order" under 8 U.S.C. § 1227(a)(2)(E)(ii)); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (Arizona domestic violence/assault statute penalizing reckless conduct was not a COV and thus not a crime of domestic violence); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1014-15 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a COV and thus not a crime of domestic violence); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393-94 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a crime of domestic violence because it encompasses violence against strangers); *Tokalty v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004) (Oregon convictions for burglary and attempted kidnaping are not crimes of domestic violence under categorical and modified categorical approaches); *Singh v. Ashcroft*, 386 F.3d 1228, 1230 (9th Cir. 2004) (Oregon's harassment law, "which outlaws intentionally harassing or annoying another person by subjecting that person to offensive physical contact," was not COV and thus not a crime of domestic violence).

3. Cases Considering Child Abuse Convictions

Jimenez-Juarez v. Holder, 635 F.3d 1169, 1170-71 (9th Cir. 2011) (distinguishing *Fregozo*, and holding that conviction for child molestation in the third degree under Wash. Rev. Code § 9A.44.089 constitutes a categorical crime of child abuse within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i)); *Fregozo v. Holder*, 576 F.3d 1030, 1038 (9th Cir. 2009) (concluding that "a conviction under Cal. Penal Code [§] 273a(b) is not categorically a 'crime of child abuse' within the meaning of [§] 237(a)(2)(E)(i) of the INA"); *Velazquez-Herrera v. Gonzales*, 466 F.3d 781, 783 (9th Cir. 2006) (per curiam) (remanding for the BIA to consider in the first instance statutory interpretation of the term "child abuse" in 8 U.S.C. § 1227(a)(2)(E)(i)).

C. Firearms Offenses

8 U.S.C. § 1227(a)(2)(C) provides:

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18, United States Code) in violation of any law is deportable.

This provision has been read broadly, to include the "entire panoply of firearms offenses." *See Valeria-Ochoa v. INS*, 241 F.3d 1092, 1095 (9th Cir. 2001) (holding that California conviction for willfully discharging firearm in grossly negligent manner under California Penal Code § 246.3 was removable firearms offense); *see also Gil v. Holder*, 651 F.3d 1000 (9th Cir. 2011) (concluding that under the categorical approach, a conviction under Cal. Penal Code § 12025(a) constitutes a firearms offense under 8 U.S.C. § 1227(a)(2)(C)); *Malilia v. Holder*, 632 F.3d 598, 602-04 (9th Cir. 2011) (discussing how § 1227 was intended to apply broadly, and concluding that conviction for knowingly delivering a firearm without first providing written notice to the carrier rendered alien removable).

D. Miscellaneous Removable Offenses

The statute lists several other miscellaneous removable offenses. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iv) (conviction for high speed flight); 8 U.S.C. § 1227(a)(2)(A)(v) (conviction for failure to register as sex offender); 8 U.S.C. § 1227(a)(2)(D) (convictions for espionage, treason, violations of the Military Selective Service Act or the Trading with the Enemy Act).

VI. ELIGIBILITY FOR RELIEF DESPITE CRIMINAL CONVICTIONS

Some types of relief remain available to individuals in removal proceedings despite their criminal convictions, although criminal convictions or conduct can create bars to relief eligibility even if they are not charged as grounds of removability or inadmissibility. In addition to references to relief contained in this section, the effects of criminal convictions on relief eligibility are discussed in some other sections of this outline addressing particular forms of relief that may be available. Examples of potential relief include: Cancellation of Removal, including VAWA Relief under 8 U.S.C. § 1229b(5); Suspension of Deportation; NACARA Suspension or Cancellation Relief; Cuban Adjustment Act Relief; Former 212(c) Relief; Section 212(h) Relief; Adjustment of Status; Registry; Asylum; Withholding of Removal; CAT Relief; Naturalization.