

## CHAPTER 3:

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## 3.1

### Removal Defined

Prior to 1996, immigration law provided for two types of processes to eject noncitizens from the U.S.—“deportation” (if a noncitizen was found to be deportable) and “exclusion” (if a noncitizen was found to be inadmissible). *See infra* § 3.2 (describing differences between deportability and inadmissibility). Laws passed in 1996 ended the distinction and created a single process called removal.

Removal is generally not automatic. Most noncitizens receive a removal hearing before an immigration judge with the Department of Justice, Executive Office for Immigration Review. *See* INA § 240, 8 U.S.C. § 1229a. The immigration judge must make findings of fact and determine whether the noncitizen should be removed under immigration law. If the immigration judge orders a noncitizen removed and that order becomes final, U.S. Immigration and Customs Enforcement (ICE) will physically remove that individual from the U.S.

Removal from the U.S. is the immigration consequence that will probably be of most importance to your client. For a discussion of the impact of different offenses based on the client’s particular immigration status (e.g., lawful permanent resident, refugee, etc.), *see infra* Chapter 5.

## 3.2

### Deportability vs. Inadmissibility

#### A. Consequences Distinguished

A noncitizen can be forced to leave the U.S. (removed) if he or she comes within a ground of deportability. In general, the grounds of deportability apply to noncitizens who have been lawfully “admitted”—that is, noncitizens who have entered the U.S. after inspection and authorization by an immigration officer.

A noncitizen can be denied admission to the U.S. (and thereby removed) or denied adjustment to lawful permanent resident status (a green card) if he or she comes within a ground of inadmissibility. The grounds of inadmissibility generally apply to individuals who have not been “admitted” and are viewed as seeking admission to the U.S. Immigration law generally deems a person as seeking admission when:

- An individual present at the border or port of entry, including airports and seaports, seeks permission to enter the U.S.
- An individual is physically present in the U.S. but entered without inspection (e.g., crossed the border illegally)
- An individual applies to become a lawful permanent resident (LPR) (*see supra* § 2.2B for definition of LPR)
- In some instances, a lawfully admitted individual travels abroad after being convicted of a crime and then returns to the U.S.

There are several criminal grounds of deportability and inadmissibility in the federal immigration statute. *See* INA § 212, 8 U.S.C. § 1182 (grounds of inadmissibility); INA § 237, 8 U.S.C. § 1227 (grounds of deportability). These grounds overlap somewhat, but they are not the same and do not have the same impact. It is critical to determine which consequences your client is concerned about, which will depend on your client's current status and on any future immigration status he or she may seek. For example, a noncitizen client with a non-immigrant specialized worker visa will be subject to the grounds of deportability because he or she has already been lawfully admitted to the U.S., but the client will also be concerned about the grounds of inadmissibility if he or she hopes to adjust status to an LPR in the future.

Admission means the lawful entry into the U.S. after inspection and authorization by an immigration officer. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A).

Deportability applies to non-citizens who have been lawfully admitted to the U.S. (even if their lawful status has expired). LPRs who are in the U.S. and will not be traveling abroad will be most concerned about avoiding deportability.

Inadmissibility applies to people who are seeking admission into the U.S. Noncitizens who plan to adjust status/apply for a green card will be most concerned about avoiding inadmissibility. LPRs who are returning to the U.S. from a trip abroad may be seen as seeking admission and thus subject to the grounds of inadmissibility.

## B. Relief from Removal

If an immigration judge finds that an individual is deportable or inadmissible, the individual will be removed from the U.S. unless he or she is granted some form of relief from removal. There are several forms of relief from removal codified in the immigration statute, each with its own specific eligibility requirements. Most forms of relief are discretionary and will depend on an individual's ties to the U.S. and other factors. In most cases, an immigration judge will determine whether relief from removal will be granted and the individual allowed to remain in the U.S. Certain convictions will make noncitizens ineligible for relief from removal, regardless of ties to the U.S., demonstrated rehabilitation, contributions to the community (including military service), and hardship to family members. *See infra* Chapter 5 (describing the convictions that bar various forms of relief from removal).

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**Practice Note:** Except as noted, a person convicted of one of the offenses discussed below may be eligible for limited forms of relief from removal. However, it is very difficult to get relief and your client should not count on it. When possible, it is best for a noncitizen to avoid convictions that provide grounds for removal.

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## C. Long-term Consequences of Removal Order

Noncitizens who have been ordered removed face a number of obstacles in returning to the U.S. In reality, once deported, most individuals will not be able to return to the U.S.

Generally speaking, clients who are removed from the U.S. will be barred from future admission into the U.S. for a statutory period. An individual ordered removed after a removal hearing will generally be barred from the U.S. for ten years. *See* INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii). In the case of a second or subsequent removal, an individual will be barred from the U.S. for twenty years. *See id.* Although an individual may request permission from the government to return to the U.S. prior to the end of the statutory time period, such permission is difficult to obtain. *See* 8 C.F.R. § 212.2. Even after the statutory period has passed, it will not be easy for your client to return to the U.S.—your client will still have to establish eligibility for an immigrant visa.

The most drastic consequences are for clients who are removed on the basis of an aggravated felony conviction, discussed further below. These clients will generally not be able to return to the U.S. for life unless special permission to return is authorized by the Attorney General. *See* INA § 212(a)(9)(A)(ii)&(iii), 8 U.S.C. § 1182(a)(9)(A)(ii)&(iii).

Noncitizens who return or attempt to return unlawfully are subject to federal prosecution for illegal reentry and face lengthy prison sentences. *See* INA § 276, 8 U.S.C. § 1326. Prison sentences run up to twenty years if the noncitizen was removed after a conviction of an aggravated felony. *See* INA § 276(b)(2), 8 U.S.C. § 1326(b)(2). In recent years, the U.S. Attorneys' offices have significantly increased enforcement of these federal immigration crimes.

### 3.3 Crime-Related Grounds of Deportability

This section reviews the main features of the different categories of criminal offenses that trigger deportability. The criminal grounds of deportability generally require that a “conviction” exist. There is a statutory definition of conviction for immigration purposes. State law does not determine whether a state disposition will be considered a conviction for immigration law purposes. For example, dispositions involving drug treatment court, deferral of prosecution, expungement, and prayers for judgment continued may be treated as convictions for immigration purposes. For the definition of conviction, *see infra* § 4.1.

#### A. Aggravated Felonies Generally

**Definition.** A noncitizen is deportable if convicted of an aggravated felony any time after admission. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). “Aggravated felony” is an immigration law term that includes an expanding list of offenses defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). The label is somewhat misleading, as an offense classified as an “aggravated felony” does not have to be either “aggravated” (as that term may be commonly understood) or a “felony” under state law. As a result of broad interpretations of the statutory language, the term may include some state misdemeanors, such as maintaining a place of prostitution and misdemeanor possession of marijuana if the defendant has a prior drug conviction. *See infra* § 3.3B (discussion of drug trafficking crimes).

The long list of aggravated felony offenses can generally be classified into the following groupings:

- Specific offenses, regardless of sentence, such as murder, rape, sexual abuse of a minor, drug trafficking (discussed further below), and firearm trafficking
- Specific offenses for which an active or suspended sentence of imprisonment of one year or more is imposed (for definition of sentence length, *see infra* § 4.3), such as theft, burglary, forgery, crimes of violence (defined at 18 U.S.C. § 16 and discussed further below), perjury, and obstruction of justice
- Fraud or deceit offenses in which the loss to the victim exceeds \$10,000 (discussed *infra* § 6.2B)
- Any attempt or conspiracy to commit any of the enumerated aggravated felony offenses (solicitation to commit any of the enumerated aggravated felony offenses is possibly an aggravated felony)

The following table lists the broad categories of offenses classified as aggravated felonies. Offenses that do not meet these criteria may still constitute deportable or inadmissible offenses, discussed further below, but they do not trigger the severe consequences associated with aggravated felony convictions.

#### **Aggravated Felonies Regardless of Sentence**

- Murder
- Rape (it is unclear whether a conviction of sexual offense under N.C. law constitutes rape for immigration law purposes, but such a conviction is a crime of violence aggravated felony if accompanied by a sentence of imprisonment of one year or more)
- Sexual abuse of a minor (including indecent liberties with a minor under N.C. law)
- Drug trafficking
- Firearm trafficking and certain other firearm offenses
- Offenses involving demands for ransom
- Offenses involving child pornography
- Offenses involving prostitution business
- Offenses involving slavery or involuntary servitude
- National security offenses
- Alien smuggling offenses, with an exception for spouse, parents, and children
- Illegal reentry after being previously deported for an aggravated felony
- Miscellaneous federal offenses, including racketeering and certain gambling offenses
- Offenses relating to failure to appear for service of sentence if the underlying offense is punishable by five years or more imprisonment
- Offenses related to bail jumping if underlying offense is a felony punishable by two or more years imprisonment

**Aggravated Felonies Triggered by a One-Year Term of Imprisonment (Active or Suspended) or More**

- Crimes of violence
- Theft or burglary offenses (including possession or receiving of stolen property)
- Passport or document fraud offenses
- Offenses related to counterfeiting
- Offenses related to forgery
- Offenses related to commercial bribery
- Offenses related to trafficking in vehicles with altered identification numbers
- Offenses related to obstruction of justice
- Offenses related to perjury or subornation of perjury
- Offenses related to bribery of a witness

**Aggravated Felonies Triggered by More than a \$10,000 Loss**

- Offenses involving fraud or deceit with a loss to the victim of more than \$10,000
- Money laundering offenses involving more than \$10,000
- Tax evasion with a loss to the government of more than \$10,000

**Consequences.** Convictions for aggravated felonies carry the most severe immigration consequences. A conviction for an aggravated felony not only triggers deportability, but it also bars eligibility for almost all forms of relief from removal, effectively subjecting the individual to mandatory removal without any consideration of his or her equities. When removed on the basis of an aggravated felony conviction, an individual is permanently inadmissible and thus permanently barred from returning to the U.S. (unless special permission from the government is obtained, which is quite difficult). *See* INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii). In addition, an individual removed on the basis of an aggravated felony conviction who returns to the U.S. unlawfully may be imprisoned for up to twenty years if federally prosecuted for illegal reentry. *See* INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).

**B. Specific Types of Aggravated Felonies**

**Crime of Violence Aggravated Felonies.** Offenses that constitute “crimes of violence” within the meaning of immigration law are aggravated felonies if a sentence of imprisonment (active or suspended) of one year or more is imposed (for definition of sentence length, *see infra* § 4.3).

The definition of crime of violence is broad in scope. It includes “(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. The definition has been the subject

of much federal litigation. Offenses that have been found to constitute crimes of violence generally include sexual assaults, intentional assaults, kidnappings, robberies, and burglaries. A misdemeanor assault does not constitute a crime of violence aggravated felony because under North Carolina law the sentence cannot exceed 150 days for even the most serious misdemeanor assault.

The Supreme Court has held that an offense requiring only proof of accidental or negligent conduct, even when involving serious physical injury or death, is not an aggravated felony “crime of violence,” as defined in 18 U.S.C. § 16. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that a state offense of driving under the influence of alcohol and causing serious bodily injury, which does not have a mens rea component or requires only a showing of negligence in the operation of a vehicle, is not crime of violence under 18 U.S.C. § 16). For example, a conviction of felony serious injury by vehicle, G.S. 20-141.4(a3), which penalizes unintentionally causing serious injury when driving while impaired (G.S. 20-138.5), should not qualify as a crime of violence aggravated felony even if the person receives a sentence of imprisonment of one year or more.

It is unclear whether a state offense that requires proof of reckless use of force qualifies as a crime of violence. Such an offense will probably not be considered a crime of violence in a court under the jurisdiction of the Fourth Circuit, such as the future immigration court in Charlotte. *See Garcia v. Gonzalez*, 455 F.3d 465 (4th Cir. 2006) (holding that conviction for reckless assault in the second degree is not a crime of violence aggravated felony).

***Drug Trafficking Aggravated Felonies.*** Drug trafficking offenses within the meaning of immigration law are aggravated felonies regardless of the length of the sentence imposed.

Federal law, not state law, determines whether a state offense constitutes an aggravated felony “drug trafficking” offense. *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (drug trafficking crime is defined at 18 U.S.C. § 924(c)). Previously, in some federal circuits, almost any state drug felony offense qualified as a drug trafficking offense. On December 5, 2006, however, the Supreme Court clarified that a misdemeanor or felony conviction for first-time simple possession of a controlled substance—except for possession of more than five grams of crack cocaine or any amount of flunitrazepam (colloquially known as the “date rape drug”)—is not a “drug trafficking” aggravated felony offense. *Lopez v. Gonzalez*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 625 (2006). A subsequent North Carolina drug possession conviction (including a misdemeanor offense) may, however, be deemed a drug trafficking aggravated felony. A conviction of any drug sale or possession with intent to sell continues to qualify as a drug trafficking aggravated felony.

**“Drug Trafficking” Aggravated Felony Offenses in North Carolina**

- Any manufacture, sale, or delivery of controlled substance offense
- Any possession of controlled substance with intent to manufacture, sell, or deliver offense
- Any N.C. drug trafficking offense (except for the possibility that trafficking by possession might not be a drug trafficking aggravated felony)
- Maybe a second N.C. drug possession offense

**Not “Drug Trafficking” Aggravated Felony Offenses**

- Any first-time possession of controlled substance, whether felony or misdemeanor, with the exception of more than five grams of crack cocaine or any amount of flunitrazepam (date rape drug)
- Possession of drug paraphernalia

**Practice Note:** A first-time conviction for simple drug possession (without an intent to sell or distribute) will still render a lawfully admitted client deportable for a controlled substance conviction, with limited exceptions for small amounts of marijuana. *See infra* § 3.3D. However, because such a conviction will not constitute a drug trafficking aggravated felony, your client may be eligible for relief from removal.

**Firearm Aggravated Felonies.** A firearm offense can be considered an aggravated felony on three different grounds. First, certain offenses involving sale or delivery of firearms may be deemed a firearm trafficking offense. Second, specific firearm offenses, such as possession of a machine gun and possession of firearm by felon, will be considered aggravated felonies because similar federal offenses have been labeled as aggravated felonies in the immigration statute. Third, any firearm offense might be considered a “crime of violence” aggravated felony if accompanied by a sentence of imprisonment (active or suspended) of one year or more. *See also infra* § 6.5 (discussing cases involving firearms).

**C. Conviction of a Crime Involving Moral Turpitude**

A noncitizen may be deportable for a conviction of a crime involving moral turpitude (CMT) depending on the potential length of sentence, the number of CMT convictions, and the date the offense was committed in relation to when the noncitizen was admitted to the U.S. (discussed under Consequences, below).

**Definition.** There is no statutory definition for the immigration term “crime involving moral turpitude” (CMT). There is, however, a considerable amount of case law governing what constitutes a CMT. As a general rule, a crime involves “moral turpitude” if it is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See, e.g., Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006). The CMT label covers a broad category of criminal offenses and generally includes:

- offenses in which either an intent to steal or defraud is an element (such as theft and forgery offenses)
- many aggravated assaults (depending on whether infliction of bodily injury is an element)
- most sex offenses

Examples of crimes not involving moral turpitude include simple assault, misdemeanor breaking and entering, carrying a concealed weapon, trespass, unauthorized use of a vehicle, drunk and disruptive, disorderly conduct, and regulatory offenses.

To determine whether a specific crime constitutes a CMT, consult Appendix A, Selected Immigration Consequences of North Carolina Offenses, at the end of this manual.

**Assault Offenses.** Simple assault or battery is generally not deemed to involve moral turpitude for purposes of immigration law. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989). The Board of Immigration Appeals has held that this general rule does not apply, however, where an assault or battery necessarily involves some aggravating dimension that significantly increases the culpability of the offense, such as the perpetrator's use of a deadly weapon or the infliction of serious injury on a person whom society views as deserving of special protection, such as children, domestic partners, or peace officers. *See Matter of Sanudo*, 23 I&N Dec. 968 (2006). Under this case law, simple assault under North Carolina law is not a CMT offense. It is unclear whether assault on a female, assault on an officer, or assault on a child constitutes a CMT offense, as these statutes do not require an infliction of bodily injury. Assault with a deadly weapon is a CMT offense.

**Impaired Driving Offenses.** A conviction for impaired driving may be a CMT depending on the presence of aggravating or grossly aggravating factors. The Board of Immigration (BIA) has held that a simple driving while impaired offense is not a CMT. *See Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). Further, an offense of driving while impaired with two or more prior convictions for simple driving while impaired under an Arizona statute has been held not to be a CMT. *See id.* In contrast, the BIA has held that a conviction for an aggravated DWI offense containing an element of driving with a revoked license is a CMT. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).

Under this case law, an impaired driving conviction under North Carolina law will not constitute a CMT offense if there are no aggravating sentencing factors. An impaired driving conviction with an aggravating sentencing factor of driving with a revoked license is possibly a CMT offense. It is unclear because the case law requires that the driving with a revoked license component be an element of the offense, as opposed to a sentencing factor. Impaired driving convictions with other aggravating factors are probably not CMTs under current case law. (If the record of conviction establishes the use of a controlled substance, however, it is possible that an impaired driving conviction may be a removable offense under the controlled substance ground of deportability or inadmissibility.)

**Consequences.** A noncitizen is deportable if convicted of one CMT committed within five years of admission to the U.S. and punishable by at least one year in prison. *See INA*

§ 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). The Fourth Circuit Court of Appeals has held that to determine whether a North Carolina offense is punishable by at least one year in prison for purposes of the federal sentencing guidelines, courts consider the maximum aggravated sentence that could be imposed for that offense on a defendant with the worst possible criminal history. *See U.S. v. Harp*, 406 F.3d 242 (4th Cir. 2005); *but see U.S. v. McManus*, 236 Fed. Appx. 855 (4th Cir. 2007) (unpublished) (for purposes of federal Assimilative Crimes Act, maximum sentence that may be imposed by federal court for state offense committed on federal enclave is maximum sentence defendant could receive in state court based on defendant's prior record level under North Carolina's structured sentencing statutes). It is unclear whether the interpretation in *Harp* applies to immigration law, but under such an interpretation, all felonies in North Carolina would be punishable by a maximum sentence of at least one year in prison because the maximum sentence that could be imposed under structured sentencing for an offender in prior record level VI is at least 15 months for all felony classes. For a further discussion of the meaning of potential sentence, *see infra* § 4.3D.

A noncitizen is also deportable if convicted of two or more CMTs, not arising out of a single scheme of criminal misconduct, committed at any time after admission and regardless of the actual or potential sentence. *See* INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). Two CMTs arising out of a separate scheme, that are consolidated for judgment or are run concurrently, will likely still be considered separate convictions for immigration purposes and will trigger deportability. Conversely, if a person is convicted of two or more CMTs arising out of a single scheme, the convictions should not trigger deportability.

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**Practice Note:** In North Carolina, because misdemeanors are generally not punishable by a year in prison, the commission of one misdemeanor CMT will not trigger deportability.

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#### D. Conviction of Any Controlled Substance Offense

**Conviction of Any Controlled Substance Offense.** A noncitizen is deportable for any violation of law relating to a controlled substance, whether felony or misdemeanor, except for a single offense of simple possession of 30 grams or less of marijuana. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). That offense is not a deportable offense if the defendant has no prior drug convictions. A drug paraphernalia conviction is a deportable offense, however. “Controlled substance” is defined by federal law and refers to substances covered by the federal drug schedules in 21 U.S.C. § 802. All of the drugs listed in the North Carolina state drug schedules are covered by the federal drug schedules.

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**Practice Note:** A conviction for a Class 3 misdemeanor possession of marijuana should not make a noncitizen with no prior drug convictions deportable under the 30 grams or less exception discussed above. A conviction for a Class 1 misdemeanor possession of marijuana also should not make a noncitizen deportable, unless the record of conviction establishes possession of more than 30 grams of marijuana (*see infra* § 3.5B, which discusses proof of grounds of removal).

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**Drug Abuse or Addiction.** A noncitizen is also deportable if he or she is or has been a drug abuser or addict at any time after being admitted to the U.S. *See* INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii). This ground of deportability does not require a conviction. Neither the immigration statute nor the regulations define “abuse” or “addiction” in the deportability context. This ground is not often charged in removal proceedings and is a less frequent basis to deport. It is more likely to come up during an application for relief from removal or during naturalization proceedings. Because there is very little case law on point, it is unclear what sorts of admissions or conduct would qualify as drug abuse or drug addiction. It is possible, however, that ICE might rely on an admission of drug use on the record in any sort of criminal case to demonstrate drug addiction or drug abuse. *See infra* § 4.2B for a discussion of drug treatment court.

#### E. Conviction of a Firearm or Destructive Device Offense

A noncitizen is deportable for a single conviction of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, whether felony or misdemeanor, a firearm or destructive device (including part or accessory) as defined in 18 U.S.C. § 921(a). *See* INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). The federal law is broader than North Carolina law and includes all firearms (handguns, rifles, shotguns, etc.), with no restrictions as to barrel length. There is an exception for antique firearms. A BB or pellet gun is not considered a firearm under the federal law.

The ground of deportability for firearms and destructive devices offenses is very broad. Where the use of a firearm is an essential element of a crime, the conviction will be considered a firearm offense. *See, e.g., Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993) (holding that convictions for first degree armed burglary and robbery with a firearm under Florida statute constituted a firearm conviction where the use of firearm was an essential element of the crime). A conviction under a divisible statute (which includes offenses both involving a firearm and not involving a firearm) is not a firearm offense unless the record of conviction establishes that the offense committed involved a firearm. *See Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996); *Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996); *see also infra* § 3.5A (discussing significance of record of conviction).

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**Practice Note:** If your client is convicted of a weapons offense, and the record of conviction does not establish that the weapon involved was a firearm, he or she should not be deportable for a firearm offense.

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Federal law also criminalizes the possession of a firearm by noncitizens unlawfully present in the U.S. and by certain nonimmigrant visa holders. *See* 18 U.S.C. § 922(g)(5). Noncitizens in North Carolina have been federally prosecuted for this offense.

**F. Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order**

A noncitizen is deportable if convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, whether felony or misdemeanor. *See* INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

These grounds of deportability only apply to convictions or violations occurring after September 30, 1996. *See* Section 350(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Division C, 110 Stat. 3009-546.

***Crime of Domestic Violence.*** A crime of domestic violence has two main requirements. First, the offense must be a crime of violence as defined in 18 U.S.C. § 16. The definition of crime of violence for a crime of domestic violence is the same as for aggravated felonies, discussed *supra* § 3.3B. Second, the offense must be against a current or former spouse, co-parent of a child, a person with whom the defendant is or has cohabited as a spouse, any other individual similarly situated to a spouse, or other individual protected under federal, state, tribal, or local domestic or family violence laws. *See* INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

ICE has alleged that a conviction of assault on a female is a crime of domestic violence if against a protected individual. Some noncitizens, however, have successfully argued that assault on a female does not satisfy the crime of violence definition (the first requirement discussed above) and is, therefore, not a crime of domestic violence. There is no reported case law on this issue.

***Violation of a Protective Order.*** A noncitizen is also deportable if enjoined by a protective order and found by a civil or criminal court to have violated the portion of a protective order that protects against credible threats of violence, repeated harassment, or bodily injury. *See* INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii). In North Carolina, for protective order purposes, a domestic relationship is broadly defined to include persons of the opposite sex who have lived together, parents and children, grandparents and grandchildren, current or former household members, and persons involved in non-cohabitating romantic relationships. *See* G.S. 50B-1(b). A violation of such a protective order is a deportable offense, even though the covered relationships are broader than under federal law.

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***Practice Note:*** Under certain circumstances, the grounds of deportability for a crime of domestic violence, stalking, and violation of a protective order may be waived by immigration authorities when the defendant has been battered or subjected to extreme cruelty and is not and was not the primary perpetrator of violence in the relationship. *See* INA § 237(a)(7), 8 U.S.C. § 1227(a)(7). If these circumstances seem to apply to your client, any documentation in court that the particular incident was part of a larger pattern of abuse against your client may be helpful to your client in future immigration proceedings.

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### G. Chart of Principal Deportable Offenses

The following chart lists the principal categories of deportable offenses. It does not include some miscellaneous grounds involving infrequently charged federal crimes, which are generally not of concern to state law practitioners. An interested reader can find the complete list of the criminal grounds of deportability at INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). There is also a growing list of security-related grounds of deportability and inadmissibility linked to criminal activity. This is a complicated and developing area of immigration law and covers alleged acts of terrorism, which a state law practitioner is unlikely to encounter. *See* INA § 237(a)(4), 8 U.S.C. § 1227(a)(4); INA § 212(a)(3), 8 U.S.C. § 1182(a)(3).

Keep in mind that one offense can be classified under multiple categories of deportability. For example, a conviction of assault with a deadly weapon inflicting serious injury against a spouse may be an aggravated felony, crime involving moral turpitude, and crime of domestic violence.

Ground of Deportability	Significant Features	Exceptions
Conviction of aggravated felony	<ul style="list-style-type: none"> <li>Includes felonies and some misdemeanors</li> <li>Carries most severe immigration consequences</li> <li>Includes 21 broad categories of offenses as set forth in immigration statute (<i>see</i> table of offenses in § 3.3A <i>supra</i>)</li> </ul>	
Conviction of crime involving moral turpitude (CMT)	<ul style="list-style-type: none"> <li>Committed within 5 years of admission to U.S.</li> <li><u>Punishable</u> by at least 1 year in jail</li> </ul>	All misdemeanors, other than certain impaired driving offenses
Conviction of 2 or more CMTs	<ul style="list-style-type: none"> <li>Committed at any time after admission</li> <li>Length of sentence immaterial</li> </ul>	CMTs arising out of a single scheme
Conviction relating to a controlled substance	<ul style="list-style-type: none"> <li>Includes felonies and misdemeanors</li> <li>Includes drug paraphernalia offenses</li> </ul>	An offense of simple possession of 30 grams or less of marijuana if no prior drug convictions
Drug abuser or addict	<ul style="list-style-type: none"> <li>No conviction necessary</li> </ul>	
Firearm conviction	<ul style="list-style-type: none"> <li>Includes purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying a "firearm or destructive device"</li> <li>Includes felonies and misdemeanors</li> <li>Includes carrying a concealed gun</li> </ul>	
Conviction of domestic violence, stalking, child abuse, child neglect, or child abandonment	<ul style="list-style-type: none"> <li>Includes felonies and misdemeanors</li> <li>Domestic violence crime must be a crime of violence (discussed <i>supra</i> § 3.3A)</li> <li>Domestic violence crime must be directed against a protected party under state or federal domestic violence laws</li> </ul>	Convictions or violations occurring before September 30, 1996
Violation of a protective order	<ul style="list-style-type: none"> <li>Violation of the portion of order that protects against credible threats of violence, repeated harassment, or bodily injury</li> <li>Violation may be found in civil or criminal court</li> </ul>	Convictions or violations occurring before September 30, 1996

### 3.4 Crime-Related Grounds of Inadmissibility

This section reviews the main crime-related grounds of inadmissibility. The criminal grounds of inadmissibility are generally broader than the grounds of deportability and include offenses that are not covered under the comparable deportability grounds. For example, a conviction of simple possession of 30 grams or less of marijuana triggers inadmissibility, but not deportability. There is some overlap with the deportability grounds, but the grounds are different and require close scrutiny. For example, the crime involving moral turpitude ground of inadmissibility covers the same offenses as the crime involving moral turpitude deportability ground, but different rules apply depending on the length of sentence and number of convictions. *See infra* § 4.1 for a discussion of the definition of conviction.

Certain criminal grounds of inadmissibility do not require a conviction—mere “bad acts” or status can trigger the penalty. Examples include engaging in prostitution or if the government has “reason to believe” the person has been a drug trafficker, as discussed below.

The controlled substance and moral turpitude grounds of inadmissibility also allow for a finding of inadmissibility without a conviction where a noncitizen admits the essential elements of a controlled substance offense or of a crime involving moral turpitude. *See* INA §§ 212(a)(2)(A)(i)(I)&(II), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I)&(II). Generally, this ground has come into play when a noncitizen has made certain admissions to an immigration judge or an ICE officer; it does not apply to an admission in a criminal case that does not result in a conviction. *See Matter of Seda*, 17 I&N Dec. 550 (BIA 1980), *overruled in part on other grounds Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

#### A. Controlled Substance Offense

A noncitizen is inadmissible for any conviction of an offense related to any controlled substance, whether felony or misdemeanor. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). (A noncitizen can also be inadmissible for an admission of committing such an offense—usually to an immigration judge or immigration officer).

Drug offenses carry serious consequences for non-LPR clients. Drug offenses trigger inadmissibility and permanently preclude noncitizens from obtaining LPR status. The only exception is for simple possession of 30 grams or less of marijuana if the defendant has no prior drug convictions. Such an offense will still make the defendant inadmissible, but can be waived by an immigration judge under certain circumstances.

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**Practice Note:** If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana, which includes quantities of more and less than 30 grams of marijuana, it is important to document in the record of conviction that your client possessed 30 grams or less of marijuana, if applicable (*see infra* § 3.5C, discussing proof of grounds for relief).

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A person is also inadmissible if the U.S. government knows or has reason to believe that the person is an illicit trafficker, or knowing aider, abettor, assister, conspirator, or colluder with others in illicit trafficking, in a controlled substance (as defined in 21 U.S.C. § 802).

*See* INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C). No conviction (or admission) is necessary. Cases have held “drug trafficking” to mean that a person must have been a knowing and conscious participant or conduit in the transfer, passage, or delivery of narcotic drugs.

## B. Crime Involving Moral Turpitude

A noncitizen is inadmissible for a conviction of a crime involving moral turpitude (CMT). *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). (A noncitizen can also be inadmissible for an admission of committing such an offense—usually to an immigration judge or immigration officer). The types of offenses constituting CMTs are described *supra* § 3.3C.

For purposes of inadmissibility, there is an exception for a petty offense. A conviction is considered a petty offense if the noncitizen has no prior CMT convictions and the maximum possible sentence for that offense is one year or less and the actual sentence of imprisonment, active or suspended, is six months or less. *See* INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II). For discussion of what constitutes the maximum possible sentence, *see infra* § 4.3D.

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**Practice Note:** Because misdemeanors in North Carolina other than impaired driving are not punishable by one year or more of imprisonment under structured sentencing, the commission of one misdemeanor CMT offense will fall within the petty offense exception and not make your client inadmissible. Two CMTs will not fall within the petty offense inadmissibility exception, however, even if they arise out of the same transaction or are consolidated for judgment or run concurrently.

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## C. Conviction of Two or More Offenses of Any Type with an Aggregate Sentence of Imprisonment of at Least Five Years

A noncitizen who has been convicted of two or more offenses of any type with an aggregate sentence of imprisonment, active or suspended, of five years or more is inadmissible. *See* INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

## D. Prostitution

Prostitutes or persons who have engaged in or sought to engage in prostitution or to procure prostitution during the past 10 years are inadmissible. *See* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D); 22 C.F.R. § 40.24. The Board of Immigration Appeals has held that to “engage in” prostitution, one must have engaged in a regular pattern of behavior and conduct. *See Matter of T*, 6 I&N Dec. 474 (BIA 1955). A conviction of a prostitution offense is also a crime involving moral turpitude and may trigger inadmissibility on that ground (*see supra* § 3.4B).

## E. Significant Traffickers in Persons

Any noncitizen whom the President publicly lists in a submission to Congress as playing a significant role in a severe form of trafficking in persons (e.g., the use of force, fraud, or coercion for sex trafficking and/or involuntary servitude, peonage, debt bondage, or slavery) or as materially assisting in or providing financial or technological support for activities of such a trafficker, is inadmissible. *See* INA § 12(a)(2)(H), 8 U.S.C. § 1182(a)(2)(H). A person

is also inadmissible if the government knows or has reason to believe that the individual has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons. *See id.*

## F. Money Laundering

A noncitizen is inadmissible if the government knows or has reason to believe that the individual has engaged, is engaging, or seeks to enter the U.S. to engage in money laundering, or who is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in money laundering. *See* INA § 212(a)(2)(I), 8 U.S.C. § 1182(a)(2)(I).

## G. Chart of Principal Criminal Grounds of Inadmissibility

The following chart lists the principal criminal grounds of inadmissibility. It does not include two other grounds involving foreign government officials and diplomats, which are not of concern to state law practitioners. An interested reader can find the complete list of the criminal grounds of inadmissibility at INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

Ground of Inadmissibility	Significant Features	Exceptions
Crime involving moral turpitude (CMT)	<ul style="list-style-type: none"> <li>• Conviction (or admission)</li> <li>• Committed at any time</li> </ul>	Petty offense, including almost all misdemeanors, if <ul style="list-style-type: none"> <li>• client has no prior CMTs,</li> <li>• maximum <u>potential</u> prison sentence is one year or less, and</li> <li>• <u>actual</u> sentence is six months or less</li> </ul>
Controlled substance offense	<ul style="list-style-type: none"> <li>• Conviction (or admission)</li> <li>• Includes felonies or misdemeanors</li> <li>• Includes drug paraphernalia offenses</li> <li>• Includes single offense of simple possession of 30 grams or less of marijuana (even though it is not an offense triggering deportation)</li> </ul>	Controlled substance offenses render an individual <u>permanently</u> inadmissible, except for a single possession of 30 grams or less of marijuana if the defendant has no prior drug convictions; such an offense can be waived by an immigration judge under certain circumstances
Trafficking in controlled substance	<ul style="list-style-type: none"> <li>• No conviction (or admission) necessary</li> <li>• May be based on government knowledge or reason to believe</li> </ul>	
Conviction of multiple offenses	<ul style="list-style-type: none"> <li>• Includes offenses of any type</li> <li>• Must be at least 2 convictions</li> <li>• Aggregate sentence of imprisonment (active or suspended) of 5 years or more</li> </ul>	
Prostitution	<ul style="list-style-type: none"> <li>• No conviction (or admission) necessary (however, immigration officers generally rely on a conviction or an admission)</li> </ul>	
Trafficking in persons	<ul style="list-style-type: none"> <li>• No conviction necessary</li> <li>• May be based on government knowledge or reason to believe</li> </ul>	
Money laundering	<ul style="list-style-type: none"> <li>• No conviction necessary</li> <li>• May be based on government knowledge or reason to believe</li> </ul>	

## 3.5

### Determining Whether a State Offense Triggers Removal

#### A. Record of Conviction

To determine whether a state conviction qualifies as an offense that triggers deportability or inadmissibility, the immigration court examines the elements of the statute allegedly violated, not the individual's actual conduct. *See, e.g., Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (interpreting whether state conviction for criminally negligent child abuse constituted a crime of violence under the aggravated felony definition). If the statutory violation does not fall within a category that triggers immigration consequences, the defendant is not subject to those consequences.

If a statute is broad enough to include both offenses that carry immigration penalties and offenses that do not (for example some weapon statutes include both firearm offenses and non-firearm offenses), it is considered a divisible statute. The immigration court is then permitted to look at the underlying court record to determine whether the offense of conviction carries an immigration penalty. *See Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999); *U.S. v. Taylor*, 495 U.S. 575 (1990). The record of conviction consists only of specific documents, listed in the box below. The immigration court may not look beyond these items in determining an element of the offense. If the record of conviction does not establish all of the elements necessary for a removable offense, the immigration court must rule in favor of the noncitizen.

The immigration court may look beyond the record of conviction in cases involving aspects of the crime that are considered as going beyond the elements of the offense, such as an aggravated felony triggered by more than a \$10,000 loss. *See Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (holding that the immigration court may rely on evidence outside of the record of conviction to determine whether amount of loss to the victim exceeded \$10,000 in an offense involving fraud or deceit). The immigration court may be able to look beyond the record of conviction in sexual assault cases to determine the age of the complainant and whether the offense constitutes sexual abuse of a minor (an aggravated felony category). The immigration court may also be able to look beyond the record of conviction in assault cases to determine whether the complainant is a protected party under domestic violence laws. These rulings appear to be limited to particular areas such as sexual offenses, domestic violence offenses, and fraud offenses.

### Record of Conviction

The Board of Immigration Appeals and U.S. Supreme Court have determined that these documents make up the record of conviction:

- charging document (indictment, complaint, information)
- plea and plea agreement
- verdict, judgment, and sentence
- factual admissions made by the defendant during the plea or sentence

The following documents are beyond the record of conviction and ordinarily may not be considered by the immigration court:

- police reports
- probation or pre-sentence reports
- statements by the noncitizen outside the judgment and sentence transcript

### B. Burden of Proof on ICE in Establishing Deportability

In removal proceedings, ICE has the burden of establishing that the noncitizen is deportable. *See* INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a). Thus, ICE must demonstrate that the offense of conviction falls into a ground of removal. If the statute of conviction is divisible, and there is insufficient information in the record of conviction to determine whether the elements of the offense carry an immigration penalty, any ambiguity should be construed in the noncitizen's favor.

### C. Burden of Proof on Noncitizen in Applying for Relief

If ICE establishes that a noncitizen is removable, the noncitizen may be able to apply for some form of relief from removal. In general, the noncitizen has the burden of proving he or she is eligible for a form of relief from removal. *See* 8 C.F.R. § 1240.8(d). Thus, in some instances, the noncitizen has the burden of documenting necessary information in the record of conviction. For example, an individual convicted of Class 1 misdemeanor marijuana possession is inadmissible on controlled substance grounds. In order to qualify for relief from removal for such an offense, the noncitizen must demonstrate that the conviction involved 30 grams or less of marijuana. Because Class 1 misdemeanor possession of marijuana covers quantities of more and less than 30 grams, the noncitizen must ensure that the record of conviction indicates that the amount of possession was 30 grams or less.

## 3.6 Criminal Bars to Naturalization

In addition to removal, there are other potential adverse immigration consequences of a conviction. For many noncitizens, the potential for naturalization is a big concern.

Naturalization requires a showing of good moral character for a qualifying period of time, in many cases five years. *See* INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). If an LPR client is convicted of or admits certain crimes, he or she is statutorily precluded for up to five years (or permanently in the case of an aggravated felony conviction) from demonstrating good moral character for naturalization purposes. The convictions listed below have this effect. Immigration authorities still have discretion to find that your client lacks the requisite moral character for U.S. citizenship based on other dispositions, but they do not automatically preclude your client from demonstrating good moral character.

- Conviction of an aggravated felony, entered on or after November 29, 1990, makes your client permanently ineligible for citizenship. *See* INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). It will almost certainly result in your client's removal from the U.S. as well. *See supra* § 3.3A for a discussion of the impact of an aggravated felony conviction.
- Conviction or admitted commission of any controlled substance offense except one offense of simple possession of 30 grams or less of marijuana if no prior drug convictions. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).
- Conviction or admitted commission of a crime involving moral turpitude, except if the client does not have a prior conviction for a crime involving moral turpitude and the offense is not subject to a potential prison sentence of more than one year and does not carry an actual sentence of imprisonment, active or suspended, of more than six months. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).
- Conviction of two or more offenses of any type, plus an aggregate sentence of imprisonment, active or suspended, of five years or more. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).
- Conviction of two or more gambling offenses. *See* INA § 101(f)(5), 8 U.S.C. § 1101(f)(5).
- Confinement, as a result of conviction, to a penal institution for an aggregate period of 180 days or more. *See* INA § 101(f)(7), 8 U.S.C. § 1101(f)(7).

For additional grounds barring a finding of good moral character, *see* INA § 101(f), 8 U.S.C. § 1101(f).

