Washington Defender Association's Immigration Project

110 Prefontaine Place South, Suite 600 Seattle, WA 98104

Ann Benson: Tel: 360-385-2538 Email: abenson@defensenet.org
Jonathan Moore: Tel: 206-623-4321 Email: jonathan@defensenet.org

Table of Contents

I. Immigration Consequences of Having a Conviction Classified as an Aggravated Felony

A conviction for an "aggravated felony" will have severe consequences for anyone who is not a US citizen, but there are important differences based on immigration status. *Immigration consequences of an aggravated felony depend upon immigration status:*

A. Lawful Permanent Residents ("LPRs," or "green-card" holders):

- An LPR becomes directly deportable for an aggravated felony conviction, regardless of how long he or she has been in the USA or what family connections she may have.

- A LPR who is a **conditional permanent resident (CPR)** with an aggravated felony conviction can also be removed "administratively" without a hearing, if ICE so chooses to proceed.[1]

- An LPR becomes ineligible for the main discretionary waiver of removability, called LPR-cancellation of removal (CoR) under 8 USC § 1229b(a).[2]

- An LPR becomes statutorily ineligible for the main discretionary waiver of inadmissibility for a crime involving moral turpitude (CIMT).[3]

- An LPR becomes permanently ineligible for US citizenship (naturalization); and any other form of relief that requires a showing of good moral character (GMC). [4]

- If a conviction is determined to be an aggravated felony, judicial review is barred: "[n]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony.[5]

B. Refugees, Asylees and Asylum-Seekers

1. Refugees (persons with refugee visas)[6]

---

[1] 8 USC §1228(b), INA § 238(b); 8 CFR § 238.1(b)(2)

[2] 8 USC §1229b (a); INA § 240A (a) Cancellation of Removal for Certain Permanent Residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (**3) has not been convicted of any aggravated felony.**

[3] Commonly called "§ 212(h)," under 8 USC § 1182(h). This waiver can sometimes also be used to waive inadmissibility for a crime that "involves moral turpitude" by a returning LPR, or even to "re-adjust" to permanent resident all over again; but:

> "… No waiver shall be granted under this [212(h)] subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence **if** either since the date of such admission **the alien has been convicted of an aggravated felony** or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. …" 8 USC § 1182(h) (emphasis added)

[4] 8 USC § 1101(f)(8); INA § 101(f)(8), and 8 C.F.R. § 316.10(b)(1)(ii)

[5] 8 USC § 1252(a)(2)(C), INA § 242(a)(2)(C), but see 8 USC § 1252(a)(2)(D), INA § 242(a)(2)(D), added in 2005, permitting judicial review "of constitutional claims or questions of law." Because whether a crime *is* an aggravated felony is a jurisdictional question, it can be reviewed for that purpose.

[6] This refers to people admitted with Refugee visas under 8 USC § 1157; INA § 207

- A refugee becomes directly deportable for an aggravated felony conviction.

- A refugee can apply for LPR status as a defense against deportation even with some aggravated felony convictions. However, if the conviction fits an inadmissibility ground (like a crime involving moral turpitude, or a drug crime) she will need a waiver. The special waiver that refugees and asylees can use when applying to get a green card is barred to suspected drug traffickers[7] and is not normally going to be granted to persons with "violent or dangerous" crimes.[8]

2. Asylees (person who have applied for *and been granted* political asylum)

- An asylee becomes directly deportable for an aggravated felony conviction.

- Asylee status can be terminated for an aggravated felony conviction, since an aggravated felony conviction flatly bars asylum.

- An asylee can still try to apply for LPR status in removal proceedings, as a defense, but in some cases, termination of asylum status can cut off the ability to apply for permanent resident status with a waiver.

- An asylee may be able to apply for LPR status as a defense against deportation even with some aggravated felony convictions. However, if the conviction fits an inadmissibility ground (such as a crime involving moral turpitude, or a drug crime) she will need a waiver. The special waiver that refugees and asylees can use when applying to get a green card is barred to suspected drug traffickers,[9] and will normally going to be granted to persons with "violent or dangerous" crimes.[10]

3. Asylum Applicants (seeking but not yet granted asylum)

- Persons who are applying for asylum— asylum applicants-- become statutorily ineligible for political asylum with an aggravated felony conviction.[11]

    - People who fear persecution on return may also become ineligible for a back-up type of protection called "restriction on removal," or

---

[7] 8 USC § 1159(c); INA § 209(c)

[8] *Matter of Jean* 23 I. & N. Dec. 373 (A.G. 2002) ("Aliens who have committed violent or dangerous crimes will not be granted a discretionary waiver to permit adjustment of status from refugee to lawful permanent resident pursuant to section 209(c) of the Act except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.")

[9] 8 USC § 1159(c); INA § 209(c)

[10] *Matter of Jean* 23 I. & N. Dec. 373 (A.G. 2002)

[11] 8 USC §§ 1158(b)(2)(A)(ii), (b)(2)(B)(I); INA §§ 208(b)(2)(A)(ii), (b)(2)(B)(I); 8 CFR § 1208.13(c)(1); *see Rendon v. Mukasey* 520 F.3d 967, 973 (9th Cir. 2008)

"withholding").12 Withholding of removal requires a higher level of proof of persecution, and does not allow the person to gain or retain LPR status.

4. The Convention against Torture

An aggravated felony conviction does not bar an application for relief under the Convention Against Torture (CAT). This is a sort of last-resort application that prohibits removal, but does not grant permanent residency. It requires "substantial grounds for believing" that the person would be in danger of being tortured. This has been interpreted to mean that a person must demonstrate that it is "more likely than not" that he or she will face torture. The standard under the CAT is narrower than that for asylum or restriction on removal, in that the person must fear *future* torture. The applicant must show that the torture he or she fears meets a "more likely than not" standard.[13] This relief is hard to get, and does not lead to resident status.

C. Non-citizens with tourist visas, work visas, or student visas, or other non-citizens who were lawfully admitted to the US

- Non-citizens who have entered the US legally, whether or not they have overstayed or violated the terms of their visas, become directly deportable for an aggravated felony conviction in regular immigration judge (IJ) proceedings.

- However, any person in such a status— any status less than that of a permanent resident—who has an aggravated felony conviction, can also be removed "administratively" without a hearing if ICE so chooses to proceed.[14]

D. Non-citizens who are "present without admission" (sometimes called "EWI," for "entry without inspection")

- Undocumented non-citizens who are present without ever having been legally admitted are conclusively presumed deportable for an aggravated felony conviction.

- They can be removed "administratively" without a hearing;[15] according to a study of some 2006 data:

> "in FY 2006 slightly **over half (55%) of all removal orders under aggravated felony provisions were administrative orders** issued by employees of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security (formerly the Immigration and Naturalization Service (INS)). Under this

---

[12] "Withholding of removal" is at 8 U.S.C. § 1251(b)(3) INA § 241(b)(3). It halts deportation only so long as persecution is threatened. While asylum is flatly barred, "withholding of removal," which is a non-discretionary back-up form of relief for people who fear persecution but are not eligible for asylum, is also barred for a person with an aggravated felony conviction, unless the sentence was less than 5 years and the applicant can show, based on the circumstances, that the crime was not "a particularly serious crime."

[13] See 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(2); and *Matter of M-B-A-*, 23 I. & N. Dec. 474 (BIA 2002); *Matter of G-A-*, 23 I. & N. Dec. 366 (BIA 2002).

[14] 8 USC §1228(b), INA § 238(b); 8 CFR § 238.1(b)

[15] 8 USC § 1228(b); INA § 238(b) Removal of Aliens Who Are Not Permanent Residents. 8 CFR 238.1(b)(iv)

streamlined procedure, ICE is responsible for all steps in the process, from apprehension and detention to issuing the order and deporting the individual." [16]

- That means that *most* non-LPRs charged with being "aggravated felons" *will not even get a hearing* before an administrative immigration law judge to see if their convictions really qualify as an aggravated felony.

- People deported through this streamlined administrative process are ineligible for any type of discretionary application or waiver.[17]

- Even if placed in a regular removal hearing before an immigration judge (IJ) an aggravated felony conviction **bars** the principle discretionary waiver for undocumented persons. That waiver lets certain long term undocumented residents of the US get a green card (based on having close relatives who are LPRs or US citizens, and who would suffer great hardship).[18]

- An aggravated felony conviction can bar battered spouses and children of U.S. citizens or lawful permanent resident abusers from showing the good moral character needed to apply for a green card.[19]

E. An aggravated felony is a bar to any discretionary immigration application that requires a showing of "good moral character (GMC)."[20]

- This means that an aggravated felony conviction will probably be a lifetime bar to naturalization (an application for US citizenship).

F. Federal Criminal Sentencing Consequences

- Returning to the US after a deportation is one of the most prosecuted federal offenses.

- An aggravated felony conviction can result in an 8-level upward sentencing enhancement to a federal criminal conviction for illegal re-entry after a deportation.[21] This enhancement applies to a conviction for a re-entry *subsequent* to a removal or deportation for a criminal conviction.

---

[16] http://trac.syr.edu/immigration/reports/175/

[17] There is supposed be a "reasonable fear" interview, if the person indicates fear of persecution or torture in her country, to allow the person to request "withholding of removal" to that country (but not asylum). See 8 C.F.R. §§ 238.1(b)(2)(i), 238.1(f)(3), and §§ 208.16, 208.31

[18] "10-year" cancellation of removal at 8 USC §§ 1229b(b)(1)(B) and (C) INA §§ 240A(b)(1)(B) and (C)

[19] See VAWA, or Special Rule Cancellation of Removal at 8 USC 1229b(b)(2)(A)(iv); INA § 240A(b)(2)(A)(iv); and VAWA self petitioning at 8 USC §§ 1154(a)(1)(A)(iii), (a)(1)(A)(iv),(a)(1)(B)(ii), or (a)(1)(B)(iii);INA §§ 204(a)(1)(A)(iii), (a)(1)(A)(iv),(a)(1)(B)(ii), or (a)(1)(B)(iii); See 8 CFR §§ 204.1(a)(3), 204.2(c) (describing procedures for self-petitioning)

[20] See 8 USC § 1101(f)(8); INA § 101(f)(8). There is a limited exception to the bar to GMC for some battered spouse or child of a USC or LPR applicants, if the commission of the offense can be shown to have been related to the abuse. See 8 USC § 1154(a)(1)(C), INS § 204(a)(1)(c); and 8 USC § 1229b(b)(2)(C), INS § 240A(b)(2)(C);

[21] 8 USC § 1326(b), INA § 276(b); USSG § 2L1.2

II. Aggravated Felonies as Defined Under Immigration Law[22]

A. Removal Statutes Deploying the Term "Aggravated Felony"

1. General Aggravated Felony Deportation Provision

- The aggravated felony deportation provision refers to a definition of all the types of offenses considered aggravated felonies, at **8 USC 1101(a)(43); INA § 101(a)(43)[**link]

- That definition specifically includes an attempt or a conspiracy to commit a defined offense.

2. The "administrative removal of criminal alien" provisions[23] widen the application of the above aggravated felony ground:

- A deportation ground under 8 USC § 1227(a) normally applies only to non-citizens who are in the US after a lawful admission.[24]

- However, the administrative removal provisions of 8 USC §1228(b) *infra*, mean that the aggravated felony deportation ground applies across the board, both to non-citizens legally admitted, and to those who entered without inspection.

B. Importance of Avoiding a 365-Day Sentence in order to Avoid an Aggravated Felony

1. A 365-day sentence makes certain specific types of offenses into an "aggravated felony."

---

[22] 8 USC § 1227 (a)(2)(A) (iii); INA § 237(a)(2)(A) (iii) Aggravated felony. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." The definition of what an aggravated felony is, is found at 8 USC § 1101(a)(43); INA § 101(a)(43)

[23] 8 USC § 1228(b); INA § 238(b) Removal of Aliens Who Are Not Permanent Residents

(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 237(a)(2)(A)(iii) (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 240.

(2) An alien is described in this paragraph if the alien— (A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or (B) had permanent resident status on a conditional basis (as described in section 216) at the time that proceedings under this section commenced.

. . .

8 USC § 1228(b)(5); INA § 238(b)(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

8 USC § 1228(c); INA § 238 (c) Presumption of Deportability. An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.

[24] The aggravated felony deportation ground is at 8 USC § 1227(a)(2)(A)(iii); INA § 237(a)(2)(A)(iii).

The principal aggravated felonies that require a one year sentence are:

- Any "crime of violence (as defined in 18 USC 16)."
- A theft offense, including receipt or possession of stolen property.
- Burglary of a building.
- A crime "relating to forgery.
- A crime "relating to obstruction of justice or perjury."

There are several others that also have a sentence component, but those are the main ones.

2. A sentence for immigration purposes includes a suspended sentence. The immigration law definition of a criminal sentence is:

"Any 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*."[25]

3. Most other offenses described as aggravated felonies *do not* have a sentence-component as part of the definition.

For example, these aggravated felonies do not have a sentence component:

- illicit drug or firearms trafficking;
- rape;
- murder;
- "sexual abuse of a minor";
- child pornography;
- managing prostitution;
- an offense that involves fraud or deceit; and
- a failure to appear for a felony

-- are all aggravated felonies *regardless of the sentence* imposed or suspended.

C. "Aggravated Felony" Is a Term of Art that Includes Misdemeanors

[25] 8 USC § 1101(a)(48)(A); INA § 101(a)(48)(A)

- Courts and the Board of Immigration Appeals (BIA) have held that, if a state crime is described in the aggravated felony definition, it does not have to be a felony to be an "aggravated felony."[26]

- The title of the statute does not limit "aggravated felonies" to state or federal felonies.

- In Washington, gross misdemeanors such as Assault in the Fourth Degree and Theft in the Third Degree can be aggravated felonies.[27]

III. Strategies to Avoid Having Your Client's Conviction Treated as an Aggravated Felony

A. Negotiate to an alternate offense that does not include elements of an aggravated felony. (Remember that a non-aggravated felony can still be a deportable offense as a crime involving moral turpitude (CIMT) or other ground, and that must be analyzed separately.)

For example:

- In the Ninth Circuit a generic *solicitation* conviction, as under RCW 9A.28.030, will not be an **aggravated felony drug trafficking** conviction, (but attempt or conspiracy to commit a trafficking crime *will* be such an offense).[28]

- An assault with criminal negligence, as in two subsections of Assault 3, RCW §§ 9A.36.031 (d), (f) cannot be a **crime of violence** "as defined in 18 USC § 16," because that has been held to require an intentional use of force.[29] Therefore Assault in the Third degree can be a safer alternative to any intentional assault where the sentence would be one year or more.[30]

---

[26] *U.S. v. Gonzalez-Tamariz* 310 F.3d 1168, 1170 (9th Cir. 2002); *U.S. v. Robles-Rodriguez* 281 F.3d 900, 902 -903 (9th Cir 2002) ("'Aggravated felonies' are not necessarily a subset of felonies; for instance, an offense classified by state law as a misdemeanor can be an 'aggravated felony' . . .In determining whether state convictions are aggravated felonies, courts have consistently favored substance over form, looking beyond the labels attached to the offenses by state law and considering whether the offenses substantively meet the statutory definition of 'aggravated felony.'"); See also *Matter of Small* 23 I. & N. Dec. 448, 449 - 450 (BIA 2002

[27] *Suazo Perez v. Mukasey* 512 F.3d 1222, 1226 (9th Cir 2008) ("[T]he modified categorical approach may be invoked to determine whether the defendant's fourth degree assault conviction was for a 'crime of violence.'); and n 23, *supra.*

[28] *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); and *Coronado-Durazo v. INS*, 123 F.3d 1322, 1323 (9th Cir. 1997); see also US *v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001). These precedents will not prevent removal if a hearing is held outside the 9th Circuit. In *Matter of Zorrila-Vidal* 24 I. & N. Dec. 768 (BIA 2009), the BIA reaffirmed that outside the jurisdiction of the 9th Circuit, it will rule that a solictation conviction is a conviction for a violation of a law "relating to a controlled substance."

[29] *Fernandez-Ruiz v. Gonzales* 466 F.3d 1121, 1132 (9th Cir., 2006) ("[W]e expressly overrule our cases holding that crimes of violence under 18 U.S.C. § 16 may include offenses committed through the reckless, or grossly negligent, use of force."); *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377 (2004),

[30] RCW § 9A.36.031(f) has the additional advantage of having been specifically found by the BIA to not be a crime that involves "moral turpitude," in *Matter of Perez-Contreras* 20 I&N Dec. 615 (BIA 1992)

- An **aggravated felony burglary** is defined as a burglary of a building or structure. Vehicle prowling, because it is a vehicle burglary, is outside of that generic definition.[31] If the *intended* offense of a vehicle prowl is not named as theft, or as one that itself involves a taking, it won't be an aggravated felony as a burglary or a theft offense despite a one-year sentence.[32]

- Malicious Mischief is a crime against property that does not have as an element either a "taking" or the use of force, and so should avoid being deemed an **aggravated felony theft offense or crime of violence**, even if the sentence were one year or more.

- If an offense that **involves fraud** shows a factual loss to victims of $10,000 or more, a plea to a straight theft offense will not be an aggravated felony as long as the sentence is less than one year.

- Theft will not be an aggravated felony as **fraud**, if the theft conviction were for "wrongfully obtain[ing] or exert[ing] unauthorized control over property or services" of another, but was not "by color or aid of deception." Compare RCW §§9A.56.020 (1) (a) or (c), with (b). This can avoid the aggravated felony of "fraud or deceit" where the loss is $10,000 or more.

- A straight theft offense-- a taking not by deception-- will not be an aggravated felony under the separate "**theft offense**" ground, if the sentence is kept under one year, (or, if the taking were only a theft of services or of labor, but not of property).

There may be other ways to plead to an offense that avoids an aggravated felony. Contact the WDA Immigration Project if you need to discuss this.

B. Careful Crafting of the "Record of Conviction" Can Prevent Some Offenses from Being Categorized as an Aggravated Felony

1 The approach to analyzing a prior conviction— to decide how to categorize it-- based on the statutory language, the elements of the offense and the range of conduct that those elements cover, is called the *categorical approach.*[33]

2 The approach to analyzing a prior conviction that allows the court to look beyond the statutory elements and "the mere fact of conviction" and consult the individual record "in a narrow range of cases where a jury was *actually required*

[31] *Sareang Ye* v. INS 214 F.3d 1128, 1133 (9th Cir. 2000) (vehicle burglary is not "burglary" for aggravated felony purposes); and also, *Ye* at 1134 (since vehicle burglary "is not essentially 'violent in nature,' the risk of violence against a person or property is low, and the legislative history does not indicate that Congress intended to include vehicle burglaries, we hold that vehicle burglary is not a [aggravated felony] crime of violence.") Other circuits and the BIA have disagreed with the 9th Circuit, and found that vehicle burglary can be an aggravated felony as a crime of violence.

[32] Cf. *Bunty Ngaeth v. Mukasey* 545 F.3d 796, 802 (9th Cir. 2008) (entering a locked vehicle with the intent to commit theft constitutes an attempted theft offense for purposes of the aggravated felony definition.)

[33] *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990).

to find all the elements of"[34] the generic crime, has been called the *modified-categorical approach,* in the Ninth Circuit. In the administrative immigration case law a similar approach has been called *divisibility* analysis.

3. The documents that can be used in that limited, second-step review are what we call the "record of conviction." By "record of conviction" we mean the documents that a later court can review, when it attempts to decide the legal nature of a prior conviction.[35]

- The Supreme Court has said that these documents are, in addition to the statutory definition, the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[36]

- In a case decided by jury, the key documents would be the jury instructions, and in a bench trial any findings of fact or law that are part of the judgment.[37] The limitation to this narrow set of documents is not just practical; it is also a legal limit "intended to hold our inquiry to the legal conviction rather than the factual conduct."[38] This approach is referred to as the categorical and "modified categorical" approach.

4. Not all documents relating to a case are part of the "record of conviction."

- Documents that are *not* normally part of reviewable record of conviction include dropped or dismissed charges, police reports, certificates of probable cause, probation reports, a co-defendant's record, statements about the crime by a client or others to an immigration judge or to DHS officials.[39]

---

[34] *Taylor*, 495 U.S. at 602. The modified categorical approach could therfore also be referred to as the second step of the analytical approach laid out in *Taylor*.

[35] This is not the standard for what an immigration judge (IJ) can look at when making a *discretionary* decision; in that case the standard is anything that is not fundamentally unfair, often including hearsay documents. It is also not the same list of documents that can be used to prove the mere *existence* of a conviction. See 8 USC § 1229a(c)(3)(B), INA § 240(c)(3)(B); 8 CFR § 8 CFR § 1003.41

[36] *Shepard v. US*, 125 S.Ct. 1254, 1257 (2005).

[37] *Taylor v. U.S.* 495 U.S. 575, 602 (1990)

[38] *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1131-32 (9th Cir. 2007).

[39] See, e.g., *Matter of Mena*, 7 I. & N. Dec. 38 (BIA 1979)(moral tupitude); *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989)(co-defendant's conviction is not included in reviewable record of conviction); *Matter of Y*, 1 I. & N. Dec. 137 (BIA 1941) (report of a probation officer is not included); *Matter of Cassissi*, 120 I. & N. Dec. 136 (BIA 1963) (statement of state' attorney at sentencing is not included); *Matter of Madrigal*, 21 I. & N. Dec. 323 (BIA 1996)(firearms; transcript of plea and sentence hearing *is* included); *Matter of Teixeira*, 21 I. & N. Dec. 316 (BIA 1996)(police report is not included); *Matter of Pichardo*, 21 I. & N. Dec. 330 (BIA 1996)(admission by respondent in immigration court is not included)). See also *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003)(immigration judge was not authorized to use a pre-sentence report in determining whether petitioner was an aggravated felon); see also U.S. *v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

- However if a police report, probable cause certificate, or probation report is stipulated to as "factual basis for the plea," very likely it will be allowed to define the conviction.[40]

- That is one reason why an *Alford/Newton* plea is usually dangerous and undesirable for immigration purposes. **Police reports and police narratives should be kept out of the "record of conviction.**" Such documents should not be stipulated to as providing, without objection, the factual basis for a guilty plea in a case where the nature of the conviction could be contested.

5. Examples of how crafting the judicially reviewable "record of conviction" can prevent a conviction from being an aggravated felony:

- A theft offense where a sentence of one year or more is unavoidable may avoid being an aggravated felony if the theft is specified as a theft of services, including theft of labor.[41] That's because an aggravated felony theft offense is defined as a taking of property.[42]

- A misdemeanor assault will not be a crime of violence "as defined in 18 USC § 16," if the record shows that it was committed only by an offensive touching, since that way of committing assault has been held to not involve the use of force.[43]

- If a sentence of one year or more is unavoidable for a burglary in Washington, then a plea statement that specifies "burglary of a fenced area" or leaving the record of conviction opaque—will preserve a defense against the burglary conviction being an aggravated felony. Under Washington law, a dwelling is defined as a building or a structure, and a building can include "a fenced area, a

[40]See e.g., *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005)("Although 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.")

[41] RCW 9§ A.56.010 (12) "Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water; § (19) "Wrongfully obtains" or "exerts unauthorized control" means: (a) To take the property or services of another; RCW § 9A.56.020.(1) "Theft" means:(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

[42] An aggravated felony "theft offense" is defined as an unconsented taking of property, with some degree of intent to deprive. *Matter of V-Z-S-*, 22 I. & N. Dec. 1338 (BIA 2000); *Penuliar v. Gonzales*, 435 F.3d 961, 969 (2006); *Gonzales v. Duenas-Alvarez* 549 U.S. 183, 189, 127 S.Ct. 815, 820 (U.S.,2007)

[43] *Suazo Perez v. Mukasey* 512 F.3d 1222, 1225 -1226 (9th Cir. 2008) ("Under Washington law, fourth degree assault can be committed by nonconsensual offensive touching. . . . We have held that 'conduct involving mere offensive touching does not rise to the level of a "crime of violence" within the meaning of 18 U.S.C. § 16(a).' ")

railway car, or cargo container." [44] These are outside the generic federal definition of a building, required for a burglary. [45]

- The 9th Circuit has held that Communicating with a Minor for Immoral Purposes[46] covers some behavior that does not fit the aggravated felony definition of "sexual abuse of a minor."(SAM) [47]

6. The Supreme Court Ruled in June of 2009 on the Nature of the "Fraud and Deceit" Aggravated Felony [48]

In *Nijhawan v. Holder* the Supreme Court examined the aggravated felony statute and determined that its provisions can be divided into two groups: some provisions that describe "generic" crimes, such as "the crime of fraud or theft in general," will require interpretation under the categorical approach.

However, other provisions describe "the specific acts in which an offender engaged on a specific occasion, say, the fraud that the defendant planned and executed last month," which do not require the categorical approach. So the second group of aggravated felonies is those that have a component that is "circumstance-specific."

In *Nijhawan* the court concluded that the $10,000 loss in the "fraud or deceit" aggravated felony[49] is not an element of the "generic" fraud offense but rather is a description of circumstances in the particular crime.

---

[44] RCW 9A.04.110 (5).

[45] United States v. Wenner, *351 F3d 969, 972 (9th Cir. 2003).*

[46] RCW § 9.68A.090 (2001); 8 USC § 1101(a)(43)(A), INA § 101(a)(43)(A)("sexual abuse of a minor")

[47] *Parrilla v. Gonzales* 414 F.3d 1038, 1043 (9th Cir 2005):

> Washington law makes clear that the reach of section 9.68A.090 was not limited to only abusive offenses. Among the "immoral purposes" contained in Chapter 9.68 and elsewhere in the Washington Revised Code were offenses that did not fall within the definition of "sexual abuse of a minor" as the BIA interpreted that term in its opinion. See, e.g., Wash. Rev.Code § 9.68.030 (providing information on how to get an unlawful abortion); id. § 9.68.130 (displaying pornography visible from a public thoroughfare); id. § 9.68A.150 (allowing a minor onto the premises of a live erotic performance). Although conduct such as talking to a minor for the purpose of allowing him or her into a live erotic performance is not commendable, neither is it "abusive" as our precedent has explained that term. See Pallares-Galan, 359 F.3d at 1101-02. We hold that the 2002 version of section 9.68A.090 did not define "sexual abuse of a minor" under the categorical approach.

id. at 1043. Immigration counsel should consider whether the 9th Circuit's decision in *Estrada-Espinoza v. Mukasey* 546 F.3d 1147 (9th Cir 2008).provides any argument that CMIP is now categorically outside the SAM definition. But cf .*U.S. v. Medina-Villa*, --- F.3d ----, 2009 WL 1758742 (9th Cir 2009)(*Estrada-Espinoza* defined statutory rape only)

[48] *Nijhawan v. Holder*, 129 S.Ct. 2294, (2009); treating 8 USC § 1101(a)(43)(M); INA § 101(a)(43) (M) "an offense that— (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"; and abrogating *Kawashima v. Mukasey*, 530 F.3d 1111, (9th Cir. 2008). Fo additional analyses see:
http://www.nationalimmigrationproject.org/Nijhawanpracticeadvisory%20(NIP_NLG_IDP).pdf and
http://www.ilrc.org/immigration_law/pdf/Practice%20Advisory%20Nijhawan%20ILRC.pdf

Therefore the statute of conviction does not have to have an element of at least a $10,000 loss for the conviction to come within the "fraud or deceit" aggravated felony conviction. "[T]he monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."[50] Further, in proving the amount of loss to the victim, the government is *not* restricted to using evidence acceptable under the categorical (and "modified-categorical") approach.[51]

The court found there must still be "fundamentally fair procedures" even when going beyond the record of conviction and noted that the process was not an invitation to "relitigate the conviction itself." Significantly, the Court took note of the government's concession that the $10,000 loss must be based on the counts of conviction only-- and said that the "loss" must met the "clear and convincing standard for deportability and "be tied to the specific counts covered by the conviction."[52]

Based on early analysis, the particular aggravated felonies that are "circumstance specific" are, first of all:

- The $10,000 loss to the victims requirement *portion* of an "offense involving fraud or deceit." The crime must first have "fraud or deceit" as an element, but the loss amount is circumstance-specific and the immigration judge (IJ) can look at evidence outside the record of conviction.

Other aggravated felony grounds that may possibly be deemed to have a "circumstance-specific" component (other than the length of sentence imposed or potential sentence) are:[53]

- The **loss amount** of over $10,000 in the federal **money-laundering statutes** "described in" 18 USC § 1956 and §1957, in *8 USC § 1101(a)(43)(D); INA § 101(a)(43)(D).*

- The "**committed for commercial advantage**" component of the offenses relating to **transportation for the purpose of prostitution** in 8 USC § 1101(a)(43)(K); INA *§ 101(a)(43)(K,) "an offense that—is described in [18 USC] section 2421, 2422, or 2423."*

- The **exception** to an alien-smuggling conviction being an aggravated felony if it was *"a first offense for which the alien has affirmatively shown that the*

---

[49] 8 USC § 1101(a)(43)(M)(i); INA § 101(a)(43) (M)(i)

[50] *Nijhawan* at 2302

[51] Meaning: the written plea agreement, transcript of the plea colloquy, or other similar evidence permitted under *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 125 S. Ct. 1254 (2005).

[52] *Nijhawan* at 2303.

[53] Thanks to the National Immigration Project for this analysis: :http://www.nationalimmigrationproject.org/Nijhawanpracticeadvisory%20(NIP_NLG_IDP).pdf

*alien committed the offense **for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent** (and no other individual)"* which is part of *8 USC § 1101(a)(43(N); (INA § 101(a)(43)(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (**relating to alien smuggling**.,*

- The requirement that the "**underlying offense [be] punishable by imprisonment for a term of 5 years** *or more"* of the "failure to appear for service of a sentence ground, at 8 *USC § 1101(a)(43)(Q);INA § 101(a)(43)(Q)* ***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.***

- The requirement that the "**underlying offense [be] punishable by imprisonment for a term of 5 years** *or more"* of the **failure to appear for service of a sentence** ground, at 8 *USC § 1101(a)(43)(Q);INA § 101(a)(43)(Q)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.*

- The requirement that the felony have been one **for which a sentence of 2 years imprisonment or more may be imposed** of the failure to appear ground at *8 USC § 1101(a)(43)(T); INA § 101(a)(43)(T) "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."*

Nijhawan may strengthen application of a strict categorical (elements-based) approach to the other aggravated felony grounds-- such as sexual abuse of a minor, illicit drug trafficking, a crime of violence or a theft offense. It could bolster the requirement that the state statute of conviction have all the non-"circumstance-specific" requirements of the immigration removal ground as elements in order to be judged an aggravated felony.

IV. The Aggravated Felony Definition

8 USC § 1101(a)(43); INA § 101(a)(43) The term ``aggravated felony" means—

8 USC § 1101(a)(43)(A); INA § 101(a)(43)(A) **murder, rape, or sexual abuse of a minor**;

8 USC § 1101(a)(43)(B); INA § 101(a)(43)(B) illicit **trafficking in a controlled substance** (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

8 USC § 1101(a)(43)(C); INA § 101(a)(43)(C) illicit **trafficking in firearms or destructive devices** (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

8 USC § 1101(a)(43)(D); INA § 101(a)(43)(D) an offense described in section 1956 of title 18, United States Code (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 USC § 1101(a)(43)(E); INA § 101(a)(43)(E) an offense described in—

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

(ii) sections 922 (g) (1), (2), (3), (4) or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (**relating to firearms offenses**); or

(iii) section 5861 of the Internal Revenue Code of 1986 (**relating to firearms offenses**);

8 USC § 1101(a)(43)(F); INA § 101(a)(43)(F) **a crime of violence (as defined in section 16 of title 18**, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year;

8 USC § 1101(a)(43)(G); INA § 101(a)(43)(G) **a theft offense (including receipt of stolen property) or burglary** offense for which the term of imprisonment at least one year;

8 USC § 1101(a)(43)(H); INA § 101(a)(43)(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the **demand for or receipt of ransom**);

8 USC § 1101(a)(43)(I); INA § 101(a)(43)(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to **child pornography);**

8 USC § 1101(a)(43)(J); INA § 101(a)(43)(J) an offense described in section 1962 of title 18, United States Code (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 USC § 1101(a)(43)(K); INA § 101(a)(43)(K) 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, United States Code (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, United States Code (relating to **peonage, slavery, involuntary servitude, and trafficking in persons**);

8 USC § 1101(a)(43)(L); INA § 101(a)(43)(L) 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, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

8 USC § 1101(a)(43)(M); INA § 101(a)(43) (M) 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 the Internal Revenue Code of 1986 (relating to **tax evasion) in which the revenue loss to the Government exceeds $10,000;**

8 USC § 1101(a)(43(N); (INA § 101(a)(43)(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (**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 Act;

8 USC § 1101(a)(43)(O); INA § 101(a)(43)(O) an offense described in section 275(a) or 276 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 USC § 1101(a)(43)(P); INA § 101(a)(43)(P) 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, United States Code, 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 Act;

8 USC § 1101(a) (43) (Q); INA § 101(a) (43) (Q) 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 USC § 1101(a)(43)(R); INA § 101(a)(43)(R) 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 USC § 1101(a) (43) (S); (INA § 101(a) (43) (S) 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 USC § 1101(a)(43)(T); INA § 101(a)(43)(T) 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; and

8 USC § 1101(a) (43) (U); INA § 101(a) (43) (U) an **attempt or conspiracy** to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other

provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

****