A Five-Step Guide to Determining AgFels & CIMTs

Conviction for a **crime involving moral turpitude ("CIMT")** is a ground of *deportability*. Any alien convicted within five years (or ten years in the case of a lawful permanent resident) after the date of admission of a CIMT for which a sentence of one year or longer may be imposed, is removable. INA § 237(a)(2)(A)(i). Alternatively, any alien who is convicted of two or more CIMTs not arising out of a single scheme of criminal misconduct is removable. INA § 237(a)(2)(A)(ii).

Conviction for a CIMT is also a ground of *inadmissibility*. An alien convicted of a CIMT, or an attempt or conspiracy to commit a CIMT, is inadmissible, INA § 212(a)(2)(A)(i)(I), unless either: (i) he was under 18 years of age and committed the CIMT more than five years before the application for a visa or application for admission; or (ii) he has committed only one CIMT; the maximum penalty possible for that CIMT does not exceed imprisonment for one year; and he was not sentenced to a term of imprisonment in excess of six months, INA § 212(a)(2)(A)(ii).

Conviction for an **aggravated felony ("AgFel")** is a ground of *deportability*. INA § 237(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"). Conviction for an AgFel is *not* itself a ground of *inadmissibility*; however, note that a crime constituting an AgFel may also constitute a CIMT or any number of other crimes (e.g., drug trafficking, human trafficking, money laundering, etc.) that render the alien inadmissible. See INA § 212(a). Additionally, if an alien was lawfully admitted for permanent residence, a conviction for an AgFel renders him ineligible for a waiver of inadmissibility under INA § 212(h). INA § 212(h)(2) (This provision does not apply to people who adjusted status at a time other than the time of entry or who entered without inspection).

Whose burden it is to prove that a crime constitutes an AgFel or CIMT?

- **To prove an LPR is an arriving alien**: If the respondent is an LPR and charged as an arriving alien, *DHS* bears the burden to demonstrate *by clear and convincing evidence* that the respondent has committed a crime that renders him an arriving alien. (This is only relevant to LPRs reentering the U.S. after having committed a crime. You still have to determine removability after this analysis.)
- **To prove an admitted alien is removable:** *DHS* bears the burden to show *by clear and convincing evidence* that the respondent has committed a crime that renders him removable.

- **To prove an arriving alien is removable:** The ***Respondent*** bears the burden to show *clearly and beyond a reasonable doubt* that he has not committed a crime that renders him inadmissible.
- **To prove an alien is eligible for relief:** The ***Respondent*** bears the burden to prove by a preponderance of the evidence that a criminal bar does not apply.

To determine whether a crime constitutes either a CIMT or an AgFel, follow these steps:

1) **Identify the elements of the generic offense** by looking to controlling precedent and/or federal statute (e.g., theft is a *taking* with the *intent* to *permanently deprive*).

   a. **(CIMTs)**: The generic elements of moral turpitude are: (i) some degree of scienter; and (ii) reprehensible conduct that shocks the public conscience as: base, vile, or depraved; contrary to the rules of morality; and contrary to duties owed between persons or to society. See Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008) (holding that a CIMT must involve "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness," where the definition of recklessness requires an actual awareness of the risk created by the criminal violator's actions)[1]; Matter of Danesh, 19 I&N Dec. 669 (BIA 1988) ("Moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general").

   b. **(AgFels)**: Subsections (A) – (U) of INA § 101(a)(43) specify several broad categories into which an AgFel may fall, including for example: sexual abuse of a minor, crimes of violence, theft, and burglary. Often federal criminal statutes define generic offenses and provide the specific elements courts use in the categorical and modified categorical approaches. Note that a crime need not be classified as a "felony" under a state's statute of conviction to constitute an aggravated felony under federal immigration law. Matter of Castro-Rodriguez, 25 I&N Dec. 698 (BIA 2012) (finding that a state misdemeanor conviction may be an aggravated felony where its elements correspond to the elements of the federal definition).

2) **Identify the elements of the offense according to the statute of conviction[2] and determine whether the statute is indivisible or divisible**. A criminal statute is divisible if: (i) it either: lists multiple discrete offenses as enumerated alternatives, or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (ii) at least one (but not all) of the listed alternative

[1] The Attorney General recently clarified that the "reprehensible conduct committed with some degree of scienter" standard, earlier articulated in Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008), remains valid despite his recent order that Silva-Trevino has been vacated in its entirety. Atty. Gen. Order No. – (Apr. 10, 2015); see also Matter of Silva-Trevino, 26 I&N Dec. 826, 832 n.2 (BIA 2016).

[2] In order to find this, it may be helpful to look to the jury instructions or plea colloquy to determine what conduct the alien was necessarily convicted of.

offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. Descamps v. United States, 133 S. Ct. 2276, 2281-83 (2013).[3]

a. **If the statute is indivisible** (i.e., it does not list multiple, alternative elements), apply the Categorical Approach.

b. **If the statute is divisible**, apply the Modified Categorical Approach. Id.

- **If, however, the statute appears to be divisible, but state law does not require jury unanimity** on the facts of the crime as contemplated by the Sixth Amendment, the disjunctively presented alternatives are merely alternative "means" by which a defendant can commit the offense, not alternative "elements" of the offense. Matter of Chairez, 26 I&N Dec. 349 (BIA 2014) (finding that the lack of state authority expressly requiring jury unanimity on the question of *mens rea* for a particular state crime rendered the statute indivisible); Descamps, 133 S. Ct. at 2288. Apply the Categorical Approach.

3) **Categorical Approach**

a. **Compare the state statute's elements to the generic federal elements**.

- **(CIMTs)** Note that for CIMTs, the primary generic element to look out for in the statute of conviction is mental state. Because "[i]t is in the intent that moral turpitude inheres," the focus of the analysis is generally "on the mental state reflected" in the statute. Efstathiadis v. Holder, 13-236-AG, 2014 WL 2055333 (2d Cir. May 20, 2014) (citing *Gill v. INS*, 420 F.3d at 89; Mendez, 547 F.3d at 347 ("Whether a crime is one involving moral turpitude depends on the offender's evil intent or corruption of the mind." (internal quotation marks omitted))). In Efstathiadis, the Second Circuit remanded because it was unclear what level of *mens rea* applied to the statute.[4]

[3] In other words consider whether removable and non-removable offenses are listed in different subsections or comprise discrete elements of a disjunctive list of proscribed conduct. Also, note that a statute is *not* divisible simply where it criminalizes an act of fraud where the amount of loss is greater than the amount stipulated in the state statute, and where it may be construed to signify non-removable conduct under INA § 101(a)(43)(M)(i), by causing loss up to $10,000, and removable conduct causing loss of more than $10,000. These offenses must be listed explicitly and separately within the statute. See Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 126 (2d Cir. 2007).

[4] The Second Circuit was unable to determine what level of *mens rea* applies to the lack of consent element of a conviction for sexual assault in the fourth degree pursuant to C.G.S. § 53a-73a(a)(2). Because it could not determine the *mens rea* requirement of one element of the crime, it was left uncertain whether "the minimum conduct criminalized by the statute" necessary to sustain a conviction supported the classification of C.G.S. § 53a-73a(a)(2) as a CIMT. The Second Circuit therefore certified the following questions to the Connecticut Supreme Court: (1) Is C.G.S. § 53a-73a(a)(2) a strict liability offense with respect to the lack of consent element? (2) If C.G.S. § 53a-73a(a)(2) is not a strict liability offense with respect to the lack of consent element, what level of *mens rea* vis-à-vis that element is required to support a conviction?

b. **If the state statute elements are the same as or narrower than the generic elements** (i.e., they criminalize a narrower, more specific swath of conduct that fits within the general definition), the offense categorically is an AgFel/CIMT.[5]

c. **If the state statute elements do not include one or more of the generic elements**,[6] the statute criminalizes a broader swath of conduct than the generic definition. Descamps, 133 S. Ct. at 2281-2 (finding that an indivisible state statute on burglary was missing the unlawful entry element included in the generic federal definition and thereby broadly criminalized activity the federal definition would not, such as a theft by a "shoplifter who enters a store, like any other customer, during normal business hours"). This does not necessarily render the offense categorically not an AgFel/CIMT, however. Rather, there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct falling outside the generic definition." Moncrieffe, 133 S. Ct. at 1685 (citing Gonzales v. Duenas-Alavarez, 549 U.S. 183, 184 (2007)).

- **(CIMTs)** In addressing the disparity between Federal courts of appeals on whether to extend the realistic probability test to the context of CIMTs, the BIA held that "we will apply the Supreme Court's realistic probability test in deciding whether an offense categorically qualifies as a crime involving moral turpitude, **unless controlling circuit law expressly dictates otherwise**." Matter of Silva-Trevino, 26 I&N Dec. 826, 832 (BIA 2016) (applying the Fifth Circuit's "minimum reading" approach to the categorical inquiry instead of the "realistic probability" test) (emphasis added).

Such a "realistic probability" only exists if the applicant can show that the state has successfully prosecuted any individual—including the applicant himself—for the conduct not covered by the generic definition.[7] Duenas-Alavarez, 549 U.S. at 184 (requiring the applicant to "at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues"); Matter of Ferreira, 26 I&N Dec. 415, 420–21 (BIA 2014) (clarifying that the applicant must show that the state has successfully prosecuted nongeneric conduct); Matter of Chairez, 26 I&N Dec. 349, 357 (BIA 2014), overruled in part by Matter of Chairez, 26 I&N Dec. 478 (BIA 2015). The BIA has clarified that a "successful prosecution" refers to a ***conviction***. *See* Matter of Henry Javier Mendoza Osorio, 26 I&N Dec. 703 (BIA 2016). Charging documents, complaints, cases concerning pretrial motions to dismiss that were granted, cases

[5] Even if it appears that the statute criminalizes the same or narrower conduct criminalized by the generic definition, it is helpful to research case law and see if there is any precedent deciding whether a particular crime is an AgFel/CIMT (i.e., whether the statute reaches non-morally turpitudinous/AgFel conduct).

[6] You are trying to determine if *all* of the conduct covered under the statute of conviction *necessarily* fits within the generic criminal removal classification. Remember, it is important to look to the alien's *conviction*, not his or her *conduct* when making this determination. Moncrieffe, 133 S. Ct. at 1684-5 (2013) (in examining the statute elements, an IJ must look at the "minimal conduct criminalized by the state statute" that is necessary to sustain a conviction under that statute, without considering the facts underlying the conviction).

[7] There remains much debate surrounding the viability of the realistic probability test and some advocates argue that the U.S. Supreme Court hinted that it will do away with the realistic probability test in Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015). However, the test has not yet been overturned and has been recently recognized in Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016) in the context of CIMTs.

that did not result in a conviction, and cases vacating convictions are insufficient to demonstrate a successful prosecution. Id.

- **If the state has prosecuted nongeneric conduct (conduct not covered by the federal statute)**, the offense for which the applicant was convicted is overbroad and categorically *not* an AgFel/CIMT.

- **If, however, the state has not prosecuted nongeneric conduct**, the IJ may reasonably conclude that all convictions under the statute—including the applicant's—are for conduct that is morally turpitudinous/constitutive of an AgFel.

4) **Modified Categorical Approach**

a. **Look to the record of conviction ("ROC") to identify the elements of the particular state offense** that the noncitizen was convicted of among all the alternatives in the divisible statute. The Modified Categorical Approach allows a court to look beyond the statute, to the ROC, for the limited purpose of determining what the conviction necessarily involved, meaning *under which set of elements* the Respondent was convicted, not the alien's conduct or the facts of the case.[8] See Descamps, 133 S. Ct. at 2292-93. Only those facts which a jury must find beyond a reasonable doubt to convict constitute elements of the offense. Id. at 2288.

- The ROC includes "the charging document[9] and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea.'" Moncrieffe, 133 S. Ct. at 1684 (quoting Nijhawan v. Holder, 557 U.S. 29, 35 (2009). It also includes any explicit findings by the trial judge to which the defendant assented, Id., as well as the judgment of conviction and indictment.

- The ROC does not include, however: statements in an alien's brief, police reports (unless adopted in plea agreement or transcript as providing the factual basis for the plea), pre-sentence reports, or restitution orders.[10] Additionally, in New York, a criminal complaint might not be part of the record of conviction in some cases because a criminal complaint is not

[8] For example, if the certificate of disposition states only that the respondent was convicted under Statute X and does not specify whether he was convicted under subsection 1, which is a CIMT, or subsection 2, which is not a CIMT, you can look to the ROC to determine to which subsection the respondent pled. For example, maybe the subsection was mentioned in the plea minutes. However, you CANNOT guess that the respondent was convicted under subsection 1 simply because that seems like the best fit for the factual circumstances. Just because someone actually *was* in possession of cocaine does not mean he was *convicted* of possessing cocaine.

[9] Note that charging documents are among the sources of evidence permitted but only to the extent that they are the analog of jury instructions. Only a "charging document that narrows the charge to generic limits" or a "defendant's own admission or accepted findings of fact confirming the factual basis" for the plea can play this role. Shepard v. United States, 125 S. Ct. 1254, 1262 (2005).

[10] Pre-sentence reports and restitution orders do not reflect the offense(s) for which the alien was convicted. Rather, pre-sentence reports may reflect a crime which the alien *committed* but not a crime for which he was *convicted.* Similarly, restitution orders are set by judges and need not be tied to facts admitted by a defendant's plea. See Dulal-Whiteway at 130

always the charging document. See Matter of Ahortalejo-Guzman, 25 I&N Dec. 465, 467 (BIA 2010); see also Thomas v. Att'y Gen. of U.S., 625 F.3d 134, 145 (3d Cir. 2010).[11]

b. **Apply the Categorical Approach (*supra*), comparing the generic elements with the elements of the offense you've nailed down from the ROC**.

5) **Circumstance-Specific Approaches**

a. **(AgFels)**: **For an AgFel statutorily defined with circumstance-specific language, an IJ may review specific facts of the offense outside of the ROC** in determining whether the offense constitutes that AgFel. See Nijhawan, 557 U.S. at 40. However, other portions of the AgFel statute that do not contain such circumstance-specific language do not open the door for a court to consider the facts of the case, but rather remain subject to the categorical/modified categorical approaches. See id. at 38. Nijhawan is the controlling case here, and it is generally applied narrowly.[12]

- An IJ may consider any sentence-related evidence (admissions and findings) that was fundamentally fair, including a restitution order, admissions in a plea colloquy, or other reliable evidence. Id. at 41.

b. **(CIMTs)**: **There is no circumstance-specific approach for CIMTs**.[13]

[11] In New York, a criminal defendant has the right to be prosecuted by an "information," a document with higher evidentiary standards than a complaint. See N.Y. Criminal Procedure Law §§ 100.10(1), (4), 170.65(1). A criminal complaint becomes a "charging document" only if it has been converted into an information. N.Y. Criminal Procedure Law § 170.65(1) (a misdemeanor complaint is converted into an information when it is supplemented by a "supporting deposition" and other documents that "taken together satisfy the requirements for a valid information"). Alternatively, a complaint can constitute a charging document if the defendant has expressly waived the right to be prosecuted by an information. N.Y. Criminal Procedure Law § 170.65(3). Criminal courts may not assume or infer a waiver of this right. People v. Weinberg, 315 N.E.2d 434, 435 (N.Y. 1974); People v. Kalin, 906 N.E. 2d 381, 382 (N.Y. 2009). While not binding on this court, the Third Circuit has concluded that it was unclear whether a police officer's written statement constituted "the relevant charging documents under New York law" because a "misdemeanor complaint 'must…be replaced by an information' unless the defendant 'waive[s] prosecution by information and consent[s] to be prosecuted upon the misdemeanor complaint.'" Thomas, 625 F.3d at 145 (quoting N.Y. Criminal Procedure Law §§ 170.65(1), (3)) (alterations in original). However, some attorneys argue that if the respondent cannot produce an alternate document that served as the information, that is sufficient evidence that the charging document was the information.

[12] For instance, in Nijhawan, the Supreme Court considered whether Respondent's conviction was an aggravated felony under INA § 101(a)(43)(M), which covers crimes that "involve[] fraud or deceit *in which the loss to the victim or victims exceeds $10,000*." INA § 101(a)(43)(M)(i) (emphasis added). The Supreme Court held that the clause "in which the loss to the victim or victims exceeds $10,000" could not be established merely by looking at the language of the statute under which respondent had been convicted. Accordingly, reliable evidence beyond the record of conviction could be examined to determine if Respondent's offense resulted in a loss of more than $10,000.

[13] The Attorney General vacated the portion of Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008), that authorized a circumstance-specific approach in the CIMT context. Atty. Gen. Order No. – (Apr. 10, 2015).