CHARGES OF REMOVABILITY

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BURDENS OF PROOF

This section applies to removal proceedings under INA § 240 only. It is inapplicable to deportation proceedings under former INA § 242(b) and exclusion proceedings under former INA § 236.
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A. Burden of Proof

The burden of proof necessary to sustain a charge of removability varies based upon whether the respondent in removal proceedings has been admitted to the United States. INA § 240(c)(2)-(3); 8 C.F.R. § 1240.8(a)-(c).

1. Admitted Aliens

The Department of Homeland Security ("DHS") bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the United States is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

a. Who is an Admitted Alien?

An admitted alien is an alien who lawfully enters the United States after inspection and authorization by an immigration officer. INA § 101(a)(13)(A). Compliance with substantive legal requirements for admission is not determinative of whether an alien "lawfully entered" the United States. Matter of Quilantan, 25 I&N Dec. 285, 292-93 (BIA 2010). Rather, a "lawful entry" requires only "procedural regularity" in the manner of entering. Quilantan, 25 I&N Dec. at 292-93. Refugees and K visa holders who lawfully enter the United States are considered admitted aliens even though their admission is "conditional." Matter of D-K-, 25 I&N Dec. 761, 768-69 (BIA 2012) (citing Matter of Sesay, 25 I&N Dec. 431, 432 (BIA 2011)). A grant of asylum does not constitute an "admission" to the United States unless it is pursuant to a "final agency order." See Matter of V-X-, 26 I&N Dec. 147 (BIA 2013); Tanov v. INS, 443 F.3d 195, 201 (2d Cir. 2006) ("Without the BIA's affirmance . . . an IJ's determination is not a final agency order."); but see

Matter of S-A-, 22 I&N Dec. 1328, 1337 (BIA 2000) (ordering that the respondent be "admitted to the United States as an asylee").[1]

Adjustment of status constitutes an admission. See, e.g., Matter of Chavez-Alvarez, 26 I&N Dec. 274, 276-78 (BIA 2014), rev'd on other grounds, 783 F.3d 478 (3d Cir. 2015); Matter of Rodriguez, 25 I&N Dec. 784, 789 (BIA 2012) ("While we have acknowledged that adjustment of status does not fit within the statutory definition of the term "admission" set forth at section 101(a)(13)(A) of the Act, we have nevertheless been constrained to treat adjustment as an admission in order to preserve the coherence of the statutory scheme and avoid absurdities."); Matter of Alyazji, 25 I&N Dec. 397, 404 (BIA 2011). Thus, an alien who attains lawful permanent resident status through adjustment of status is an admitted alien even if he entered the United States without inspection. Matter of Rosas-Ramirez, 22 I&N Dec. 616, 623 (BIA 1999). However, in some limited circumstances, aliens lawfully admitted for permanent residence who depart the United States and seek to reenter may be regarded as applicants for admission rather than as admitted aliens. See INA § 101(a)(13)(C); see also infra at § A.2.a.

An alien who is paroled into the United States pursuant to INA § 212(d)(5) or permitted to land temporarily as an alien crewman is *not* considered to have been admitted. INA §§ 101(a)(13)(B), 212(d)(5); 8 C.F.R. § 1001.1(q). In addition, an alien who enters the United States under a false claim of United States citizenship has not been "inspected," Quilantan, 25 I&N Dec. at 293 (citing Reid v. INS, 492 F.2d 251, 255 (2d Cir. 1974)), and thus is not an admitted alien as defined in INA § 101(a)(13)(A). Matter of Pinzon, 26 I&N Dec. 189 (BIA 2013).

2. Arriving Aliens

An arriving alien bears the burden of proving that he is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b).

a. Who is an Arriving Alien?

An arriving alien is:

> [A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. § 1001.1(q).

An alien lawfully admitted for permanent residence is *not* regarded as an applicant for admission into the United States, and thus cannot be considered an arriving alien, unless the alien: (i) has abandoned or relinquished LPR status; (ii) has been absent from the United States for a

[1] INA § 101(a)(47)(B) defines a final order as: "(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals."

continuous period of more than 180 days; (iii) has engaged in illegal activity after departing the United States; (iv) has departed the United States while under removal or extradition proceedings; (v) has committed an offense identified in INA § 212(a)(2), unless he has since been granted relief under INA §§ 212(h) or 240A(a); or (vi) is attempting to enter the United States without inspection or has not been admitted. INA § 101(a)(13)(C). DHS bears the burden to prove by clear and convincing evidence that one or more of these statutory exceptions apply. Matter of Rivens, 25 I&N Dec. 623, 625 (BIA 2011); see also Matadin v. Mukasey, 546 F.3d 85, 90-91 (2d Cir. 2008).

A permanent resident suspected of unlawfully acquiring her status cannot be regarded as seeking admission and may not be charged under an INA § 212(a) inadmissibility ground (even though INA § 101(a)(13)(C) uses the term "lawfully admitted"), unless he can be regarded as seeking an admission under one of the six exeptions in INA § 101(a)(13)(C). Matter of Pena, 26 I&N Dec. 613, 616 (BIA 2015). Rather, such a permanent resident could only be removed under an INA § 237(a) deportability ground. Pena, 26 I&N Dec. at 619.

The phrase "illegal activity" in INA § 101(a)(13)(C)(iii) refers to "*criminal* activity as opposed to other forms of 'illegal' activity, such as torts, breaches of contracts, or noncriminal regulatory violations." Matter of Guzman Martinez, 25 I&N Dec. 845, 847 (BIA 2012) (emphasis in original). The phrase "after departing from the United States" includes illegal activity, such as alien smuggling, that occurs during inspection at a port of entry. Guzman Martinez, 25 I&N Dec.at 848.

A returning LPR can be treated as an applicant for admission under INA § 101(a)(13)(C)(v), if the LPR commits a crime involving moral turpitude ("CIMT") before leaving the United States, is paroled into the United States for prosecution for that CIMT and is subsequently convicted of that CIMT. See Matter of Valenzuela-Felix, 26 I&N Dec. 53 (BIA 2012). At the time of parole, DHS "need not have all the evidence to sustain its burden of proving that the alien is an applicant for admission but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings." Valenzuela-Felix, 26 I&N Dec. at 53. It is unclear, however, whether DHS can treat a returning LPR as an applicant for admission if the LPR commits a CIMT after the LPR has been paroled into the United States for prosecution for a different crime. Cf. Valenzuela-Felix, 26 I&N Dec. at 60-63.

A lawful permanent resident cannot be charged as an arriving alien based upon his conviction of an offense identified in INA § 212(a)(2) if the conviction occurred prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Vartelas v. Holder, 132 S.Ct. 1479 (2012). Moreover, a lawful permenant resident may not be charged as an arriving alien based upon his conviction of an offense identified in INA § 212(a)(2) if the culpable conduct occurred prior to the enactment of IIRIRA, even if the conviction occurred after the enactment of IIRIRA. Centurion v. Sessions, No. 15-516, --- F.3d ---, 2017 WL 2661593 (2d Cir. June 21, 2017). Such an alien will be regarded as an arriving alien only if his travel abroad was "meaningfully interruptive" of his LPR status and was not "innocent, casual, and brief." See Vartelas, 132 S.Ct. at 1484, 1492; Rosenberg v. Fleuti, 374 U.S. 449, 461-62 (1963).

3. Aliens Present without Admission or Parole

In the case of a respondent charged as being in the United States without admission or parole, DHS bears the burden to prove alienage. 8 C.F.R. § 1240.8(c). Evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to overcome that presumption with a preponderance of credible evidence. Matter of Rodriguez-Tejedor, 23 I&N Dec. 153, 164 (BIA 2001); Matter of Tijerina-Villareal, 13 I&N Dec. 327, 330 (BIA 1969).

Once DHS establishes alienage, the burden shifts to the alien to (1) demonstrate by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission; or (2) prove that he is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2)(A)-(B); 8 C.F.R. § 1240.8(c). An alien who seeks to demonstrate that he is lawfully present in the United States pursuant to a prior admission "shall have access" to his visa or other entry document and any records and documents pertaining to his admission or presence in the United States, except records and documents considered by the Attorney General to be confidential. INA § 240(c)(2).

4. Concessions of Removability

If a respondent admits the factual allegations contained in his Notice to Appear and concedes removability as charged, an Immigration Judge ("IJ") may determine that removability has been established by the admissions of the respondent, provided that the IJ "is satisfied that no issues of law or fact remain." 8 C.F.R. § 1240.10(c). However, an IJ may not accept a concession of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by a near relative, legal guardian, or friend. 8 C.F.R. § 1240.10(c); see also Matter of M-A-M-, 25 I&N Dec. 474, 482 (BIA 2011) (incompetent respondents); but see Matter of Amaya-Castro, 21 I&N Dec. 583, 586-87 (BIA 1996) (under certain conditions, an IJ may accept an unrepresented minor respondent's admissions to factual allegations, which may be sufficient to establish removability).

When an alien's attorney makes an admission as part of a tactical decision in removal proceedings, the admission is binding on the alien client and may be relied upon as evidence of removability. See Roman v. Mukasey, 553 F.3d 184, 187 (2d Cir. 2009) (citing Matter of Velasquez, 19 I&N Dec. 377, 382 (BIA 1986)). An Immigration Judge "is authorized to accept a concession of removability [from an alien's attorney] when that concession is not plainly contradicted by record evidence." Hoodho v. Holder, 558 F.3d 184, 193 (2d Cir. 2009).

B. Common Charges of Removability

Admitted aliens are charged with removability under INA § 237. All other aliens are charged with inadmissibility under INA § 212.

1. Charges of Inadmissibility – INA § 212

a. INA § 212(a)(2)(A)(i)(I) – Crime Involving Moral Turpitude

An alien convicted of, or who admits having committed acts which constitute the essential elements of a crime involving moral turpitude, or an attempt or conspiracy to commit such a crime, is inadmissible. INA § 212(a)(2)(A)(i)(I).

An alien who has been convicted of soliciting a CIMT is inadmissible under INA § 212(a)(2)(A)(i)(I), even though "the inadmissibility ground expressly references attempt and conspiracy offenses," because "a statute's inclusion of some generic offenses, such as attempt or conspiracy, does not indicate Congress' intent to exclude other generic crimes like solicitation from the statute's reach." Mattter of Roma, 26 I&N Dec. 743, 747 (BIA 2016).

i. Exceptions

(1) Petty Offense Exception

A crime involving moral turpitude does not render a respondent inadmissible if: (1) he or she committed only one crime involving moral turpitude, (2) the maximum penalty possible for the crime did not exceed imprisonment for one year, and (3), the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). INA § 212(a)(2)(A)(ii)(II); see Matter of Garcia-Hernandez, 23 I&N Dec. 590, 594-95 (BIA 2003) ("An alien who has committed more than one petty offense is not ineligible for the 'petty offense' exception if 'only one crime' is a crime involving moral turpitude.").

The maximum sentence possible for an offense, rather than the standard range of sentencing, determines an alien's eligibility for the "petty offense exception." Matter of Ruiz-Lopez, 25 I&N Dec. 551 (BIA 2011).

(2) Youth

A crime involving moral turpitude does not render a respondent inadmissible if: (1) the offense was committed when the alien was under eighteen years of age, and (2) was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than five years before the date of application for a visa, other documentation, or application for admission to the United States. INA § 212(a)(2)(A)(ii)(I).

An adjudication of "youthful trainee" status pursuant to section 762.11 of the Michigan Compiled Laws is a "conviction" under section 101(a)(48)(A) of the Act because such an adjudication does not correspond to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (2006). Matter of V-X-, 26 I&N Dec. 147 (BIA 2013); see also Matter of Devison, 22 I&N Dec. 1362 (BIA 2000).

(3) Purely Political Offense

A crime that involves moral turpitude will not render an alien inadmissible if it is a "purely political offense." INA § 212(a)(2)(A(i)(I). The term "purely political offense" may include fabricated charges and convictions predicated on repression of racial, political and religious minorities. Matter of O'Cealleagh, 23 I&N Dec. 976, 980 (BIA 2006). However, where there is

evidence that an alien, in fact, committed a crime, he or she must establish, among other requirements, that his or her actions were "completely or totally" motivated by political reasons. O'Cealleagh, 23 I&N Dec. at 981.

ii. CIMT Definition

The term "moral turpitude" generally refers to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons, or the duties owed to society in general. Matter of Torres-Varela, 23 I&N Dec. 78, 83 (BIA 2001); Matter of Tran, 21 I&N Dec. 291, 292-93 (BIA 1996); Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989). Moral turpitude requires "reprehensible conduct and a culpable mental state." Matter of Hernandez, 26 I&N Dec. 397, 398 (BIA 2014); see also Matter of Silva-Trevino, 26 I&N Dec. 826, 828 n.2 (BIA 2016). Although reprehensible conduct and scienter are the two hallmarks of moral turpitude, the requisite conduct and mental state will differ slightly for each of the following categories. Even though scienter is a hallmark of moral turpitude, the BIA held that a sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young—that is, under 14 years of age—or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child. See Matter of Jimenez-Cedillo, 27 I&N Dec. 1 (BIA 2017).

iii. Categories of CIMT

(1) Fraud and False Statements

Crimes containing an intent to defraud as an essential element have "always been regarded as involving moral turpitude." Jordan v. DeGeorge, 341 U.S. 223, 232 (1951). However, a conviction that does not include intent to defraud as an essential element can constitute a crime of moral turpitude if it is "inherently fraudulent." See Matter of Kochlani, 24 I&N Dec. 128, 131 (BIA 2007); Matter of Flores, 17 I&N Dec. 225, 229 (BIA 1980). For example, the Board has found that fraud is inherent in the crime of trafficking counterfeit goods because the offense (1) involved a fraudulent item, and (2) required proof of an intent to traffic and knowledge that the items were counterfeit. Kochlani, 24 I&N Dec. at 131; see also Matter of Zaragoza-Vaquero, 26 I&N Dec. 814, 817 (2016) (finding that criminal copyright infrignment is closely analogous to the theft and fraud crimes that the BIA has consistently held are crimes involving moral turpitude); Matter of K-, 7 I&N Dec. 178 (BIA 1956) (offense that requires possession of molds of U.S. currency implicitly contained "intent to defraud" element) rev'd in part on other grounds by Flores, 17 I&N Dec. at 230; Popoff v. Beimer, 79 F.2d 513 (2d Cir. 1935) (aiding an alien in committing fraud is inherently fraudulent). However, "[a] conviction under 18 U.S.C. § 1546 (1982) for possession of an altered immigration document with knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a conviction for a crime involving moral turpitude." Matter of Serna, 20 I&N Dec. 579, 579 (BIA 1992).

In cases involving fraud of the government, the crime involves moral turpitude even if the government is not deprived of money or property; it is enough that the offense "impair or obstruct an important function of a department of the government by defeating its efficiency or destroying

the value of its lawful operations by deceit, graft, trickery, or dishonest means." Matter of Flores, 17 I&N Dec. 225, 229 (BIA 1980); see also Matter of Tejwani, 24 I&N Dec. 97, 99 (BIA 2007); Matter of Jurado, 24 I&N Dec. 29, 34-35 (BIA 2006). Similarly, a conviction for misprision of a felony in violation of 18 U.S.C. § 4 is a crime involving moral turpitude because "gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship." Matter of Robles, 24 I&N Dec. 22, 26 (BIA 2006) (quoting Roberts v. United States, 445 U.S. 552, 558 (1980)). A conviction for making a false statement in a passport application, in violation of 18 U.S.C. § 1542, is a crime involving moral turpitude. Rodriguez v. Gonzales, 451 F.3d 60 (2d Cir. 2006). Likewise, a conviction for the offense of knowingly and willfully making any materially false, fictitious, or fraudulent statement to obtain a United States passport, in violation of 18 U.S.C. § 1001(a)(2), is a crime involving moral turpitude. Matter of Pinzon, 26 I&N Dec. 189 (BIA 2013).

(2) Crimes against Persons: Manslaughter, Assault, Battery and Menacing

To determine whether an assault-type crime involves moral turpitude, the court must analyze "both the state of mind and the level of harm required to complete the offense." Matter of Solon, 24 I&N Dec. 239, 242 (BIA 2007). "[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious harm is required in order to find that the crime involves moral turpitude." Id. A lesser degree of culpable mental state and resulting harm is required for offense that "necessarily involve[] aggravating factors[,]" such as "a deadly weapon[,]" or "bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer." Matter of Sanudo, 23 I&N Dec. 968, 971-72 (BIA 2006).

Thus, assaults requiring "*intentional* infliction of *serious* bodily injury on another" involve moral turpitude. Sanudo, 23 I&N Dec. at 971 (emphasis in original). By contrast, simple assaults, in general, do not involve moral turpitude because "they require general intent only" and many require only "de minimis…harm, such as offensive…contact." Solon, 24 I&N Dec. at 241; see also Matter of E-, 1 I&N Dec. 505, 507 (BIA 1943) (New York's former assault statute, which did not require specific intent or proof of actual physical injury, did not involve moral turpitude).

A simple assault combined with an aggravating factor, however, can involve moral turpitude. For example, a crime that requires the use of "a deadly weapon" will usually involve moral turpitude. Matter of Medina, 15 I&N Dec. 611, 614 (BIA 1976) aff'd sub nom. Medina-Luna v. INS, 547 F.2d 1171 (7th Cir. 1977); see also Matter of Logan, 17 I&N Dec. 357 (BIA 1980) (offense requiring physical force with a knife involved moral turpitude); Matter of Ptasi, 12 I&N Dec. 790 (BIA 1968). A crime "involving [an] aggravated assault against a peace officer, which results in bodily harm to the victim and which involves knowledge by the offender that his force is directed to an officer who is performing an official duty, constitutes a crime involving moral turpitude." Matter of Danesh, 19 I&N Dec. 669, 673 (BIA 1988); see also Matter of O-, 4 I&N Dec. 301 (BIA 1951) (crime involving assault on a police officer was not a crime involving moral turpitude because knowledge that the victim was a police officer was not necessarily an element of the offense); cf. Matter of B-, 5 I&N Dec. 538 (BIA 1953) (simple assault on a prison guard did not involve moral turpitude, even where the victim was known to be discharging official duties) modified on other grounds by Danesh, 19 I&N Dec. at 673. Similarly, a crime requiring the willful "infliction of bodily harm upon a person with whom one has . . . a familial relationship,"

involves moral turpitude. Matter of Tran, 21 I&N Dec. 291, 294 (BIA 1996) (involving "willful infliction of corporal injury on a spouse, cohabitant or parent of the perpetrator's child"). However, a crime requiring only "minimal nonviolent 'touching'" and no injury against a victim with whom the perpetrator had a domestic relationship did not involve moral turpitude. Matter of Sanudo, 23 I&N Dec. 968, 972-73 (BIA 2006).

Recklessness, defined as a conscious disregard of a substantial and unjustified risk that constitutes a gross deviation from the accepted standard of care, is a culpable mental state for purposes of a crime involving moral turpitude. See, e.g., Matter of Leal, 26 I&N Dec. 20, 22-3 (BIA 2012). Recklessness arising from voluntary intoxication is a culpable mental state that satisfies the corrupt scienter requirement for a crime involving moral turpitude. Leal, 26 I&N Dec. at 22-23. Notably, NYPL § 15.05 (3) permits a finding of recklessness, even where such recklessness occurs by virtue of involuntary intoxication. Leal, 26 I&N Dec. at 22-23.

Accordingly, crimes that require a reckless state of mind combined with actual death constitute crimes involving moral turpitude. See, e.g., Matter of Franklin, 20 I&N Dec. 867, 869 (Missouri statute) (BIA 1994); Matter of Wojtkow, 18 I&N Dec. 111, 113 (BIA 1981). A reckless assault causing mere "bodily injury," however, does not involve moral turpitude. Matter of Fualaau, 21 I&N Dec. 475, 478 (BIA 1996); cf. Medina, 15 I&N Dec. at 614 (reckless assault with a weapon involves moral turpitude). Reckless conduct that places another person in "substantial risk of imminent death" involves moral turpitude, even though no actual harm is required. Leal, 26 I&N Dec. at 25. Similarly, reckless conduct that places another in "imminent danger of serious bodily injury" involves moral turpitude. Matter of Hernandez, 26 I&N Dec. 464 (BIA 2015).

A crime requiring only bodily harm caused by "criminal negligence," which is defined as failing "to be aware of a substantial risk" that "constitutes a gross deviation from the standard of care," does not involve moral turpitude. Matter of Perez-Contreras, 20 I&N Dec. 615, 618-19 (BIA 1992) (internal quotation marks omitted).

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Reckless manslaughter in the second degree, in violation of NYPL § 125.15 (1), involves moral turpitude. Matter of Wojtkow, 18 I&N Dec. 111, 113 (BIA 1981).

Attempted reckless assault in the second degree, in violation of NYPL §§ 110-120.05 (4), does not involves moral turpitude because "*no* mental state can be clearly discerned from" a conviction that requires an attempt to commit a crime of recklessness. Gill v. INS, 420 F.3d 82, 91-92 (2d Cir. 2005).

Assault in the third degree, in violation of NYPL § 120.00 (1), involves moral turpitude because it requires specific intent to cause physical injury and actual physical injury, which is defined as "'impairment of physical condition or substantial pain.'" Matter of Solon, 24 I&N Dec. 239, 244 (BIA 2007) (quoting NYPL § 10.00 (9)); see also Mustafaj v. Holder, 369 Fed. Appx. 163, 167 (2d Cir. March 9, 2010). Thus, an assault in New York, by definition, goes beyond

common law assault, but New York continues to criminalize conduct akin to common law assault through other sections of the penal law. Solon, 24 I&N Dec. at 243 n.5.

(3) Sex Crimes

"[I]ndecent exposure is not inherently turpitudinous in the absence of lewd or lascivious intent." Matter of Cortes Medina, 26 I&N Dec. 79, 82 (BIA 2013); see also Matter of P- 2 I&N Dec. 117, 121 (BIA 1944) (indecent exposure did not involve moral turpitude where the exposure was "to arouse the sexual desires of the parties concerned or with a lewd or lascivious intent, *or whether it was because of a negligent disregard of the children's presence occasioned by physical necessity*"); Matter of Mueller, 11 I&N Dec. 268, 270 (BIA 1965) (indecent exposure conviction that did not require "any intent whatsoever" did not involve moral turpitude); cf. Matter of Lambert, 11 I&N Dec. 340 (BIA 1965) (renting a room with knowledge that it would be used for prostitution or lewdness in violation of state law involved moral turpitude). For an "offense of indecent exposure to be considered a crime involving moral turpitude under the immigration laws, the statute prohibiting the conduct must require not only the willful exposure of private parts but also a lewd intent." Cortes Medina, 26 I&N Dec. at 83. However, "the intent to receive sexual gratification, standing alone, is not evil." Efstathiadis v. Holder, 752 F.3d 591, 597 (2d Cir. 2014).

A sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young—that is, under 14 years of age—or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child. See Matter of Jimenez-Cedillo, 27 I&N Dec. 1 (BIA 2017).

(4) Crimes against Property

The Board's analysis of assault crimes, where it considers "both the state of mind and the level of harm required to complete the offense," may be instructive for analyzing crimes involving property. Matter of Solon, 24 I&N Dec. 239, 242 (BIA 2007); see also Louisaire v. Muller, 758 F. Supp. 2d 229, 237 n.4 (S.D.N.Y. 2013) (holding that NYPL § 145.00 (criminal mischief) does not involve moral turpitude because a conviction can be sustained by very slight damage to property and the statute does not require evil intent); Matter of Armando Ruiz-Lopez, 25 I&N Dec. 551, 551 (BIA 2011) (holding that under certain circumstances, moral turpitude necessarily inheres a crime requiring wanton or willful disregard for property).

The Board's decision in Matter of J-G-D-F-, 27 I&N Dec. 82 (BIA 2017), provides strong support for the proposition that burglary in the second degree under INA § 140.25(2) is a crime involving moral turpitude because it proscribes unlawfully entering or remaining in a dwelling with the intent to commit a crime therein. The NYPL defines "dwelling" as "a building which is usually occupied by a person lodging therein at night." NYPL s. 140.00(3). It thus contains a requirement of regular/intermittent occupancy and is sufficiently analogous to the Oregon burglary statute at issue in *J-G-D-F-* to be considered a crime involving moral turpitude as well. *See* J-G-D-F-, 27 I&N Dec. at 88.

(5) Theft and Larceny

Theft or larceny offenses have been found to involve moral turpitude. See, e.g., Matter of Jurado-Delgado, 24 I&N Dec 29, 33 (BIA 2006). Until recently, the Board recognized that it was an open question whether theft or larceny offenses categorically constitute crimes involving moral turpitude where the statute of conviction does not require a permanent taking of property. See Jurado-Delgado, 24 I&N Dec. at 33. However, in Matter of Diaz-Lizarraga, the Board held that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." Matter of Diaz-Lizarraga, 26 I&N Dec. 847, 853 (BIA 2016) (finding that the traditional dichotomy between permanent and temporary takings is anachronistic in light of modern penal codes, most of which no longer require an intent to permanently deprive an owner of property as an explicit statutory requirement).

The statute at issue in Diaz-Lizarraga required the intent "to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation[,] or to transfer or dispose of it so that it is unlikely to be recovered." Diaz-Lizarraga, 26 I&N Dec. at 848. The Board found that such an offense qualifies as a categorical crime involving moral turpitude. Id. at 854-55. See also Matter of Obeya, 26 I&N Dec. 856, 859 (BIA 2016) ("an offense qualifies as a categorical crime involving moral turpitude if it 'embodies a mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded'" (quoting Diaz-Lizarraga)). Following the reasoning set forth in Diaz-Lizarraga, the Board has also found that petit larceny in violation of NYPL § 155.25, "which requires proof of the intent to permanently or virtually permanently deprive an owner of property," is categorically a crime involving moral turpitude. Matter of Obeya, 26 I&N Dec. at 861.

The Board in Diaz-Lizarraga did not explicitly overrule its previous holdings that a permanent taking can be inferred under certain circumstances. See Jurado-Delgado, 24 I&N Dec. at 33 (holding that it is reasonable to infer an intent to permanently take property where a Pennsylvania law required "proof that the person took merchandise offered for sale by a store without paying for it and with the intention of depriving the store owner of the goods"); Grazley, 14 I&N Dec at 333 (holding that it is reasonable to infer intent to permanently take property where "cash was taken"). Moreover, in dicta, the Board had previously suggested that it may be permissible to infer an intent to permanently deprive "whenever one unlawfully takes, or attempts to take, the property of another." Jurado-Delgado, 24 I&N Dec. at 33 (citing Matter of V-Z-S-, 22 I&N Dec. 1338, 1350 (BIA 2000)).

Notably, a conviction for larceny in the form of defrauding a public community constitutes a crime involving moral turpitude regardless of whether a permanent taking was intended because the intent to *defraud* involves moral turpitude. Mendez v. Mukasey, 547 F.3d 345, 350 (2d Cir. 2008).

(6) Controlled Substance Crimes

Solicitation to possess marijuana for sale, in violation of Arizona Revised Statutes §§ 13-1002, 13-3405(A)(2), is a CIMT. Matter of Romo, 26 I&N Dec. 743, 743, 746 (BIA 2016).

(7) Inchoate Crimes

If an offense involves moral turpitude, then an attempt or conspiracy to commit that offense also involves moral turpitude. Meyer v. Day, 54 F.2d 336, 337 (2d Cir. 1931); Matter of Romo, 26 I&N Dec. 743, 746 (BIA 2016) ("[W]ith respct to moral turpitude, there is no meaningful distinction between an inchoate offense and the completed crime."); Matter of Vo, 25 I&N Dec. 426 (BIA 2011) (holding that where the substantive offense underlying an alien's conviction for an attempt is a crime involving moral turpitude, the alien is considered to have been convicted of a crime involving moral turpitude for purposes of INA § 237(a)(2)(A), even though that section makes no reference to attempt offenses).

However, attempted reckless assault in the second degree, in violation of NYPL §§ 110-120.05 (4), does not involves moral turpitude because "*no* mental state can be clearly discerned from" a conviction that requires an attempt to commit a crime of recklessness. Gill v. INS, 420 F.3d 82, 91-92 (2d Cir. 2005).

The offense of accessory after the fact is a crime involving moral turpitude, but only if the underlying offense is such a crime. Matter of Rivens, 25 I&N Dec. 623 (BIA 2011).

(8) Miscellaneous Crimes

"[K]nowingly sponsoring or exhibiting animals in an animal fight for sport, wager, or entertainment in violation of 7 U.S.C. § 2156(a)(1) necessarily involves" moral turpitude because it requires a knowing mental state and a morally reprehensible conduct. Matter of Ortega-Lopez, 26 I&N Dec. 99, 101-103 (BIA 2013).

(9) Blank for Future Updates

b. INA § 212(a)(2)(A)(i)(II) – Law Relating to a Controlled Substance

An alien "convicted of, or who admits having committed acts which constitute the essential elements of…a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802) is inadmissible." INA § 212(a)(2)(A)(i)(II).

c. INA § 212(a)(2)(B) – Multiple Convictions not arising out of Single Scheme

An "alien convicted of 2 or more offenses....for which the aggregate sentences to confinement were 5 years or more" is inadmissible. INA § 212(a)(2)(B). It is irrelevant "whether the conviction was in a single trial or whether the offenses arose from a single scheme of conduct and regardless of whether the offense involved moral turpitude." INA § 212(a)(2)(B). However, "purely political offenses" are excepted. INA § 212(a)(2)(B).

d. INA § 212(a)(2)(C) – Controlled Substance Trafficker

"Any alien who...the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance" is inadmissible. INA § 212(a)(2)(C). The determination of whether an applicant is inadmissible under INA § 212(a)(2)(C), must be based upon "reasonable, substantial, and probative evidence." Matter of Rico, 16 I&N Dec. 181, 185 (BIA 1977); see also Garces v. U.S. Attorney General, 611 F.3d 1337, 1347 (11th Cir. 2010). A conviction is not necessary to find "reason to believe" the person is a trafficker; "reason to believe" is similar to a "probable cause" standard. Matter of Rico, 16 I&N Dec. 181 (BIA 1977); Matter of U-H-, 23 I&N Dec. 355, 356 (BIA 2002) (equating "reasonable ground to believe" a person is engaged in terrorist activity with probable cause).

The INA does not define the term "illicit trafficker." See INA § 212(a)(2)(C). However, the former INA § 212(a)(23) provided that aliens were excludable if, among other things, they were "illicit traffickers." Matter of R-H-, 7 I&N Dec. 675, 677 (BIA 1958) (quoting former INA § 212(a)(23).[2] In this excludability context, the phrase "illicit trafficker" does not require "a continuous and organized trade." Matter of P-, 5 I&N Dec. 190, 192 (BIA 1953). Indeed, an alien is an "illicit trafficker," if he or she attempts one time to smuggle drugs into the United States. See Matter of Favela, 16 I&N Dec. 753, 755 (BIA 1979); Rico, 16 I&N Dec. at 186; Matter of P-, 5 I&N Dec. at 192. An alien is also an "illicit trafficker," if the alien, "was a knowing and conscious participant in the illicit traffic in narcotic drugs." R-H-, 7 I&N Dec. at 676, 678 (involving the alien receiving 15-20 marijuana cigarettes on three occasions and acting as a middle man for a dealer and his customers).

These interpretations comport with the Board's interpretation of the phrase "illicit trafficking" in the context of removability under INA § 237(a)(1)(A), which refers to aliens who "at the time of entry or adjustment of status [were]…inadmissible." In this context, the Board, relying upon the ordinary definition of the words "illicit" and "traffic," concluded that anyone with a "conviction involving the unlawful trading or dealing of any controlled substance" is a drug trafficker. Matter of Davis, 20 I&N Dec. 536, 541 (BIA 1992) modified on other grounds by Matter of Yanez-Garcia, 23 I&N Dec 390 (BIA 2002). Further, because the definition of "illicit traffic" is "[c]ommerce; trade; sale of merchandise…," the Court noted that "[t]he offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of "illicit trafficking." Davis, 20 I&N Dec. at 541 (quoting Black's Law Dictionary, 1340 (5th ed. 1979).

The Board found that the offense of traveling in interstate commerce with the intent to distribute the proceeds of an unlawful drug enterprise, in violation of 18 U.S.C. § 1952(a)(1)(A), is not an "aggravated felony" under INA § 101(a)(43)(B), because the offense is neither a "drug trafficking crime" under 18 U.S.C. § 924(c) nor "illicit trafficking in a controlled substance." Matter of Flores, 26 I&N Dec. 155, 156-57 (BIA 2013). "Although distribution of proceeds is an integral part of a drug organization's business, such conduct is too distinct from the actual physical distribution of drugs to be considered an "illicit trafficking" aggravated felony under the interpretation adopted in Matter of Davis." Flores, 26 I&N Dec. at 157.

[2] Notably, in construing the phrase "illicit trafficker, " Matter of P- and Matter of R-H- both rely on other portions of the statutory text of former INA § 212(a)(23). This language does not exist in INA § 212(a)(2)(C). However, not every case relies on that language, and given that the phrase is not defined elsewhere, these cases can reasonably inform the Court's interpretation of INA § 212(a)(2)(C).

"Illicit trafficking" offenses contain no "*mens rea* element with respect to knowledge of the illicit nature of the controlled substance, at least when accompanied . . . by an affirmative defense permitting a defendant to show that he or she had no such awareness, as well as by a requirement that the defendant be aware of the presence of the substance (apart from its illegality)." Matter of L-G-H-, 26 I&N Dec. 365 (BIA 2014) (finding that section 893.13(1)(a)(1) of the Florida Statutes is an aggravated felony under the illicit trafficking clause of section 101(a)(43)(B) of the INA).

The Board distinguishes between simple possession and importing drugs into the U.S. for one's own recreational use, which renders a person a "drug trafficker." See Matter of McDonald & Brewster, 15 I&N Dec 203, 205 (1975) (finding that applicants who entered the U.S. with six marijuana cigarettes for personal use were not excludable under the INA).

i. Criminal Possession of a Controlled Substance in the Third Degree - NYPL § 220.16(1)

a) Categorical match to the CSA

New York law defines a "narcotic drug" as "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." NYPL § 220.00(7). Moreover, a "controlled substance" consists of "any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marihuana, but including concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of such law." NYPL § 220.00(5). Thus, "narcotic drugs" as defined in NYPL § 220.16(1) are, in fact, "controlled substances," albeit a more limited list found only within four designated sub-schedules of New York's five schedules of controlled substances. *See* NYPL §§ 220.16(1), 220.00(17); New York Public Health Law (NYPHL) § 3306.

As a whole, the New York and federal schedules of controlled substances do not match because "chorionic gonadotropic" is a controlled substance listed on the New York schedule, but it is not listed on the federal schedule in the CSA. NYPL § 220.00; NYPHL § 3306, Schedule III(g); 21 U.S.C. § 802 (6); *see also* Harbin v. Sessions, No. 14-1433-ag, --- F.3d ---, 2017 WL 2661590 (2d Cir. June 21, 2017). Despite this mismatch, however, NYPL § 220.16(1) does not define "narcotic drug" more broadly than 21 U.S.C. § 802. First, "chorionic gonadotropin" is not classified as a "narcotic drug" under New York law because it is listed under Schedule III(g) and not in one of the four designated sub-schedules for "narcotic drugs." *See* NYPL §§ 220.00 (6), (17); NYPHL § 3306. Second, the four designated sub-schedules that define "narcotic drugs" under New York law only contain substances that categorically match the federally controlled substances that are listed in the CSA.

b) Felony under the CSA

A person commits a felony under the CSA when he, *inter alia*, "knowingly or intentionally . . . possess[es] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). A person violates NYPL § 220.16(1), a class B felony, "when he knowingly and unlawfully possesses . . . a narcotic drug with intent to sell it." The federal definition of "distribute" has been held to be analogous to the New York definition of "sell." Pascual v. Holder,

723 F.3d 156, 159 (2d Cir. 2013).

Under federal law, "distribute" means to "deliver," which is "the actual, constructive, or attempted transfer of a controlled substance . . ." 21 U.S.C. § 802(8), (11). For purposes of NYPL § 220.16(1), to "sell" means to "sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL § 220.00(1). In Pascual, the Second Circuit held that an "offer to sell" is equivalent to an attempted transfer and therefore that the New York definition of "sell" is a categorical match with the CSA definition of "distribute." 723 F.3d at 159. The CSA similarly criminalizes possession with intent to distribute, and "distribute" under the CSA was held to be analogous to "sell" under New York law by the Pascual Court. *Id.*

The four designated sub-schedules that define "narcotic drugs" under NYPL §220.00(7) only contain substances that categorically match the federally controlled substances that are listed in the CSA. See also NYPL § 220.16(1). Therefore, a conviction under NYPL §220.16(1) is a felony under the CSA because the New York and federal laws are a categorical match. Additionally, the maximum term of imprisonment authorized by the statute of conviction is more than one year. See NYPL §70.00(2)(b) (the maximum term of incarceration authorized under New York law for a class B felony is twenty-five years).

e. INA § 212(a)(3)(A) – Security and Related Grounds

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in "(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information, (ii) any other unlawful activity, or (iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is inadmissible." INA § 212(a)(3)(A). Since this statutory language refers to the intent to engage in future conduct, an individual's prior convictions do not render him or her *per se* inadmissible under this section. See In Re Michel Vincent Diago, 2008 WL 2401104 (BIA May 1, 2008).

The heading for this inadmissibility ground is the same as that of section 237(a)(4). However, the legislative history suggests that the provision for inadmissibility covers a broader range of unlawful activity than the deportation ground, which Congress intended to limit to conduct threatening either public safety or national security. See Matter of Tavarez Peralta, 26 I&N Dec. 171 (BIA 2013).

f. INA § 212(a)(3)(B) – Terrorist Activities

The following aliens are inadmissible under INA § 212(a)(3)(B)(i): Aliens who (1) have "engaged in terrorist activities," (2) "a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, [are] engaged in or [are] likely to engage after entry in any terrorist activity . . ." (3) have "under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity," (4) are "representative[s] . . . of a terrorist organization" or "a political, social, or other group that endorses or espouses terrorist activity," (5) "is a member of a terrorist organization described in" INA §

212(a)(3)(B)(vi)(I) or (II), (6) is a member of a terrorist organization described in" INA § 212(a)(3)(B)(vi)(III), "unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization," (7) "endorses or espouses terrorist activity or persuades other to endorse or espouse terrorist activity or support a terrorist organization," (8) "has received military-type training (as defined by [18 U.S.C. 2339D(c)(1)] from or on behalf of any organization that, at the time the training was received, was a terrorist organization as defined by [INA § 212(a)(3)(B)(vi)]," or (9) "is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years." INA § 212(a)(3)(B).

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity. *Id.*

i. Definitions

The term "terrorist organization" has three definitions. INA § 212(a)(3)(B)(vi). First, a terrorist organization can be formally designated by the Secretary of State, pursuant to INA § 219. INA § 212(a)(3)(B)(vi)(I) ("Tier I Organization"). Second, a terrorist organization can be designated upon publication in the Federal Register. INA § 212(a)(3)(B)(vi)(II) ("Tier II Organization"). Third, a terrorist organization can also refer to "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, ['terrorist activity']." INA § 212(a)(3)(B)(vi)(III) ("Tier III Organization").

The Department of State can also remove organizations from the list of Tier I and II Organizations. For example, on April 29, 2004, the Secretary of State designated the Maoists as a Tier II Organization. See Press Statement, U.S. Department of State, Additions to the Terrorism Exclusion List, Adam Ereli, Apr. 29, 2004, http://2001-2009.state.gov/r/pa/prs/ps/2004/31943.htm (last accessed Oct. 12, 2012). However, on September 6, 2012, the State Department officially announced that it had delisted the Maoists from the TEL. See Media Note, U.S. Department of State, Delisting of the Communist Party of Nepal (Maoists), Sep. 6, 2012, http://www.state.gov/r/pa/prs/ps/2012/09/197411.htm (last accessed Oct. 12, 2012). Although the statutory language is somewhat ambiguous, the most natural reading of INA § 212(a)(3)(B) is that the organization's designation at the time of the alien's alleged involvement is controlling. Accordingly, a respondent who provided material support to the Maoists anytime outside the time period of April 29, 2004, through September 6, 2012, cannot be found to have provided material support to a designated Tier II organization. However, it may be possible for an Immigration Judge to find that the Maoists were a Tier III organization outside that time period.

"Terrorist activity" is defined as any activity that (1) is unlawful in the country where it was committed or would be unlawful if committed in the United States and (2) involves any of the following: "highjacking or sabotage of any conveyance"; "[t]he seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person . . . to do or abstain from doing any act. . . "; "[a] violent attack upon an internationally protected person" (as defined in 18 U.S.C. 1116(b)(4)) "or upon the liberty of such a person"; "an assassination"; the use of a biological, chemical, nuclear device, explosive, firearm or "other weapon or dangerous device . . . with intent to endanger . . . the safety of one or more individuals

or to cause substantial damage to property"; or "a threat, attempt, or conspiracy to do any of the foregoing." INA § 212(a)(3)(B)(iii)(I)-(VI).

A person can "engage" in a terrorist activity in six different ways. See INA § 212(a)(3)(B)(iv)(I)-(VI).[3]

ii. *Material Support – INA § 212(a)(3)(B)(iv)(VI)*

An alien "engages in a terrorist activity" by committing "an act that the actor knows, or reasonably should know, affords material support" (1) for the commission of a terrorist activity, (2) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity, or (3) to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI).[4]

(1) Materiality

The INA does not define the term "material support." In Matter of S-K-, 23 I&N Dec. 936 (BIA 2006), the BIA recognized that the term "material support" was not clear, stating that "while the list of examples following the term [material support] provides some clarification regarding its scope, its meaning remains somewhat ambiguous." S-K-, 23 I&N Dec. at 943. Moreover, neither the Second Circuit nor the BIA has decided whether the word "material" modifies "support" or whether "material support" is a legal term of art.[5] See S-K-, 23 I&N Dec. at 945 (expressly declining to decide whether "material" should be given independent significance). However, in Matter of S-K-, the BIA stated that even if "material" were read to modify support, the petitioner would have rendered material support. S-K-, 23 I&N Dec. at 945. In determining that the support would have been "material," the BIA considered: (1) the size of petitioner's donation relative to her income and (2) the fact that the donation had "some effect on the ability of the [organization] to accomplish its goals." Id. at 945-46.[6]

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[3] An alien can "engage" in a terrorist activity by (1) committing or inciting another to commit a terrorist activity under circumstances indicating an intention to cause death or serious bodily injury; (2) preparing or planning a terrorist activity; (3) gathering information on potential targets for a terrorist activity; (4) soliciting things of value for (a) a terrorist activity or (b) a terrorist organization; (5) soliciting any individual to engage in (a) activities described in this section or (b) for membership in a terrorist organization; or (6) committing an act that the actor knows, or reasonably should know, affords material support. INA § 212(a)(3)(B)(iv)(I)-(VI).

[4] INA § 212(a)(3)(B)(iv)(VI) provides a list of examples of material support: "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons…, explosives, or training."

[5] The Third Circuit views the use of "material" as an adjective that modifies "support" and has applied legal definitions of both terms to determine whether an alien's support was material. See Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004). "Material" is defined as "having some logical connection with the consequential facts…[or] [o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary, 9th ed; see also Singh-Kaur, 385 F.2d at 298. "Support," in relevant part, is defined as "sustenance or maintenance." Black's Law Dictionary, 9th ed; see also Singh-Kaur, 385 F.2d at 298.

[6] Other circuit courts have touched on the issue of "material support." In Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004), the Third Circuit held that material support had been provided where the applicant claimed membership in a (subsequently designated) terrorist group, provided a statement showing that he had "taken an oath to participate" in the group, and voluntarily provided meals and tents to group members that transported weapons. The Eighth Circuit found that a petitioner rendered material support when his lack of credible testimony indicated that he voluntarily

(2) Knowledge of Material Support Requirement

The material support bar operates to bar asylum only where the actor "knows, or reasonably should know" that his act "affords material support." INA § 212(a)(3)(B)(iv)(VI). When read in context, INA § 212(a)(3)(B)(iv)(VI) requires only that "the alien knew he was rendering material support to the recipient of his support." American Academy of Religion v. Napolitano, 573 F.3d 115, 131 (2d Cir. 2009) (citing Flores-Figueroa v. United States, 556 U.S. 646 (2009)). Thus, an alien need not know "that the recipient is a terrorist organization." American Academy, 573 F.3d at 130. In the context of monetary support, an alien will usually know that he or she "was rendering material support to the recipient." American Academy, 573 F.3d at 130 (holding that an applicant who voluntarily donated money to an organization that supported Hamas met the knowledge requirement simply because he knew that he was donating money to the organization). In the context of non-monetary support, however, the knowledge requirement has "considerable meaning" because an alien may not know that he or she "was rendering material support to the recipient." American Academy, 573 F.3d at 130.

(3) Exceptions

An alien does not "engage in a terrorist activity" by providing material support to a Tier III Organization if the alien establishes "by clear and convincing evidence that the [alien] did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(iv)(VI)(dd). This provision requires that the applicant "be confronted with the allegation that he knew he had supported a terrorist organization," American Academy, 573 F.3d at 132, and be "afford[ed]…a reasonable opportunity to present evidence endeavoring to meet the 'clear and convincing' negation of knowledge." American Academy, 573 F.3d at 133.

The INA does not contain a duress exception for material support. See INA § 212(a)(3)(B)(iv)(VI). Nor is there an implied duress exception to the material support bar. Matter of M-H-Z-, 26 I&N Dec. 757, 761 (BIA 2016). There is, however, a waiver the Secretary of Homeland Security may grant in his or her discretion for applicants who have not "voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of" a terrorist organization. INA § 212(d)(3)(B)(i)

iii. *Solicitation of Funds – INA § 212(a)(3)(B)(iv)(IV)*

An alien "engages in terrorist activity" if he or she "solicits funds or other things of value" for a "terrorist activity" or for a "terrorist organization." INA § 212(a)(3)(B)(iv)(IV)(aa)-(bb). However, an alien does not "engage in terrorist activity" if the alien solicits for a Tier III Organization and "can demonstrate by clear and convincing evidence that he did not know, and

joined the LTTE and participated in military activities against the Sinhalese army. Perinpanathan v. INS, 310 F.3d 594 (8th Cir. 2002). In Pathak v. Gonzales, 203 Fed. Appx. 829 (9th Cir. 2006) (unpublished), the Ninth Circuit held that the petitioner had provided material support by voluntarily permitting known terrorists to use his family's workshop to repair their weapons, and by later joining them on a lengthy cross-country trip to help them recover the weapons they claimed to have hidden in his family's workshop.

should not reasonably have known, that the organization was terrorist organization." INA § 212(a)(3)(B)(iv)(IV)(cc).

iv. Solicitation of an Individual – INA § 212(a)(3)(B)(iv)(V)

An alien "engages in terrorist activity" if he or she solicits "any individual" (1) to engage in conduct that amounts to terrorist activity or (2) for membership in a "terrorist organization." INA § 212(a)(3)(B)(iv)(V)(aa)-(cc). However, an alien does not "engage in terrorist activity" if the alien solicits an individual for membership in a Tier III Organization and "can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(iv)(V)(cc).[7]

g. INA § 212(a)(6)(A)(i) – Aliens Present without Admission or Parole

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible. INA § 212(a)(6)(A)(i). An alien who entered the United States without being admitted or paroled is removable under this section even if he was subsequently arrested by DHS and released on "conditional parole" under INA § 236(a)(2)(B). Cruz-Miguel v. Holder, 650 F.3d 189 (2d Cir. 2011) (distinguishing "conditional parole" from parole for "urgent humanitarian reasons or significant public benefit" pursuant to INA § 212(d)(5)). However, an alien who was inspected and admitted to the United States is not removable under INA § 212(a)(6)(A)(i) even if he was not lawfully entitled to enter the United States when he was admitted. Matter of Garcia Quilantan, 25 I&N Dec. 285, 293 (BIA 2010)

h. INA § 212(a)(6)(A)(ii) – Exception: Aliens Present without Admission or Parole

An alien seeking to qualify for the exception to inadmissibility in INA § 212(a)(6)(A)(ii), an alien present in the United States without being admitted or paroled, must satisfy all three subclauses of that section, including the requirement that the alien be "a VAWA self-petitioner." Matter of Pangan-Sis, 27 I&N Dec. 130 (BIA 2017).

i. INA § 212(a)(6)(B) – Failure to Attend Removal Proceedings

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability, and who seeks admission to the United States within five years of such alien's subsequent departure or removal, is inadmissible. INA § 212(a)(6)(B).[8]

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[7] In determining whether an alien knew or reasonably should have known that he was soliciting individuals for membership in a terrorist organization, the Sixth Circuit has considered the alien's age when he became involved with the organization, his lack of awareness of or participation in the organization's violent activities, and his voluntary dissociation from the organization after he learned of such activities.. See Daneshvar v. Ashcroft, 355 F.3d 615, 628 (6th Cir. 2004).

[8] There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act, but an individual is not inadmissible under section 212(a)(6)(B) of the Act if they can establish that there was a "reasonable cause" for failure to attend their removal proceeding. See Memo from Donald Neufeld, Act. Assoc. Dir.,

j. INA § 212(a)(6)(C)(i) –Fraud or Misrepresentation[9]

An alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, admission into the United States or any other benefit provided under the INA is inadmissible. INA § 212(a)(6)(C)(i). "Fraud" and "willfully misrepresenting a material fact" are two different, alternative bases for removability under this section. See Emokah v. Mukasey, 523 F.3d 110, 116 (2d Cir. 2008). Both bases for removability require that the fraudulent statement or willful misrepresentation be made to an authorized official of the United States government. Matter of D-L- & A-M-, 20 I&N Dec. 409, 411 (BIA 1991). A waiver of inadmissibility for fraud or misrepresentation of a material fact is available at INA § 212(i). A similar waiver is available at INA § 237(a)(1)(H) for aliens who are charged with removability pursuant to INA § 237(a)(1)(A) on the ground that they were inadmissible at the time of admission as aliens described in INA § 212(a)(6)(C)(i).

i. Fraud

Although the Second Circuit has not addressed the difference between "fraud" and "willfully misrepresenting a material fact" in the context of INA § 212(a)(6)(C)(i), other Courts of Appeals have held that "fraud" requires an intent to deceive, whereas "willful misrepresentation" requires only knowledge of the falsity of the representation. See Parlak v. Holder, 578 F.3d 457, 463-64 (6th Cir. 2009); Mwongera v. INS, 187 F.3d 323, 330 (3d Cir. 1999); Witter v. INS, 113 F.3d 549, 554 (5th Cir. 1997). Generally, "[f]raud requires that the respondent know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception." Matter of Tijam, 22 I&N Dec. 408, 424 (BIA 1998) (Rosenberg, J., concurring and dissenting) (citing Matter of G-G-, 7 I&N Dec. 161 (BIA 1956)). [10]

ii. Willfully Misrepresenting a Material Fact

In cases where the charge of removability relates to willful misrepresentation of a material fact, four elements must be shown to substantiate the charge. Monter v. Gonzales, 430 F.3d 546, 554 (2d Cir. 2005) (citing Kungys v. United States, 485 U.S. 759, 767 (1988)); see also Monter, 430 F.3d at 556 (applying the four-part Kungys test, which arose in the context of judicial

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Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Services, to Field Leadership, "Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators" 13 (March 3, 2009).

[9] While the Court generally does not address issues of denaturalization, it is possible that the Supreme Court's discussion in Maslenjak v. United States, 582 U.S. __ (2017) may inform an inadmissibility analysis under INA § 212(a)(6)(C) with respect to material misrepresentations and false claims to U.S. citizenship.

[10] A lawful permanent resident (LPR) who filed a spousal second preference petition for LPR status for his wife more than five years after he acquired LPR status through a prior marriage is not required to establish by clear and convincing evidence that prior marriage was not fraudulent. Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(a); 8 C.F.R. § 204.2(a)(2)(1). Chen v. Bd. of Immigration Appeals, No. 1:15-CV-01269 (ALC), 2016 WL 831948 at *6 (S.D.N.Y. Feb. 29, 2016). The S.D.N.Y. Court found that "the statutory language of 8 U.S.C. § 1154(a)(2)(A) is plain and unambiguous and at odds with the regulation, 8 C.F.R. § 204.2(a)(2)(1)," and thus it held that decisions made by USCIS and the BIA which were based on this unlawful regulation should be set aside because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706." Id. at *7.

denaturalization proceedings, to the context of administrative removal proceedings). First, the respondent must have misrepresented or concealed some fact. Monter, 430 F.3d at 554. Second, the misrepresentation or concealment must have been willful. Id. Third, the fact must have been material. Id. Finally, if the respondent is charged with procuring a benefit by willful misrepresentation of a material fact, the respondent must have procured the benefit *as a result of* the misrepresentation or concealment. Id. (emphasis added). "In other words…an alien has procured an immigration benefit through material misrepresentation when that misrepresentation was determinative to the alien's success in obtaining the benefit sought." Emokah v. Mukasey, 523 F.3d 110, 117 (2d Cir. 2008). It is unclear what, if any, applicability this fourth requirement has in cases where a respondent is charged with *seeking* to procure a benefit by willful misrepresentation.

"[A]n act is done willfully if [it is] done intentionally and deliberately and if it is not the result of innocent mistake, negligence or inadvertence." Emokah, 523 F.3d at 116-17 (citing United States v. Dixon, 536 F.2d 1388, 1397 (2d Cir.1976)). The "willfulness" element is generally satisfied by a finding that the respondent knew of the falsity of the representation at the time he made it. See Matter of Healy and Goodchild, 17 I&N Dec. 22, 28 (BIA 1979).

A misrepresentation or concealment is "material" if it "tends to shut off a line of inquiry that is relevant to the alien's admissibility and that would predictably have disclosed other facts relevant to his or her eligibility for a visa, other documentation, or admission to the United States." Matter of D-R-, 27 I&N Dec. 105, 113 (BIA 2017) (affirming Matter of Bosuego, 17 I&N Dec. 125, 130 (BIA 1979) (a misrepresentation is "material" if it "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.")); see also Monter, 430 F.3d at 553. The government need not produce evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed to meet its burden for purposes of INA § 212(a)(6)(C)(i). D-R-, 27 I&N Dec. 109-113.

Finally, "[p]roof that an alien has made a material misrepresentation in the course of applying for an immigration benefit creates a rebuttable presumption that the alien procured the benefit by means of this representation." Emokah, 523 F.3d at 117 (citing Monter, 430 F.3d at 557-58). "To rebut this presumption, the alien must demonstrate that knowledge of his true circumstances would not have led to the denial of the benefit." Emokah, 523 F.3d at 117.

iii. Timely Retraction

There is no clear legal authority indicating whether or not the doctrine of timely retraction can be applied to waive inadmissibility under INA § 212(a)(6)(C)(i) for willfully misrepresenting a material fact, although at least one unpublished Second Circuit case suggests that it can. See Rahman v. Mukasey, 272 F. App'x. 35 (2d Cir. 2008). In other contexts, the timely retraction, or timely recantation, doctrine allows a respondent to retract a misrepresentation and thereby avoid its consequences. See Matter of M-, 9 I&N Dec. 118, 119 (BIA 1960); cf. Zheng v. Mukasey, 514 F.3d 176, 183 (2d Cir.2008) (suggesting BIA consider the applicability of the timely recantation doctrine in the context of a frivolousness finding, where the alien deliberately made material misrepresentations on a withdrawn asylum application). For the timely retraction doctrine to apply, the retraction of a false representation must be made voluntarily and prior to the exposure of the false representation. See M-, 9 I&N Dec. at 119; see also Matter of R-R-, 3 I&N Dec. 823

(BIA 1949). Retraction is neither voluntary nor timely if it occurs solely in response to the actual or imminent exposure of the falsehood. Matter of Namio, 14 I&N Dec. 412, 414 (BIA 1973); see also Matter of Ngan, 10 I&N Dec. 725, 727 (BIA 1964)(finding a retraction that took place three and a half years after the statement, and after an investigation had disclosed that the applicant had made misrepresentations, "was not timely" enough to fall within the doctrine of timely recantation).

k. INA § 212(a)(6)(C)(ii) – Falsely Claiming Citizenship

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under the INA (including INA § 274A, which relates to alien employment) or any other Federal or State law is inadmissible. INA § 212(a)(6)(C)(ii). Neither this ground of inadmissibility nor the identically-worded ground of deportability at INA § 237(a)(3)(D) applies to any false representation of citizenship made prior to September 30, 1996. See IIRIRA § 344(c).

No knowledge requirement is evident from the text of INA § 212(a)(6)(C)(ii), and the BIA has noted that this ground of inadmissibility is "broadly defined." Matter of Barcenas-Barrera, 25 I&N Dec. 40, 42 (BIA 2009). Nonetheless, decisions holding that a respondent is removable for falsely claiming citizenship have sometimes incorporated analysis of whether the misrepresentation was "willful" or "knowing." See Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006); Barcenas-Barrera, 25 I&N Dec. at 42. These decisions do not explicitly establish a knowledge requirement, and the importance of the "willful" or "knowing" analysis to the holding is not clear. See Richmond v. Holder, 714 F.3d 725, 729 & n.3 (2d Cir. 2013) (noting in dicta that the plain text of INA § 212(a)(6)(C)(ii)(I) suggests that "false citizenship claims need not be knowing," but declining to decide whether the provision "exempts the genuinely deluded").

The definition of "purpose or benefit" is ambiguous, but "cannot be read so broadly that it fails to exclude anything." Richmond, 714 F.3d at 731 (remanding to the BIA to determine whether an alien who falsely represented himself as a United States citizen to DHS in order to avoid removal proceedings had lied "for a purpose or benefit" as defined in INA § 212(a)(6)(C)(ii)). It is unresolved whether a "purpose or benefit" is "determined objectively—based on whether citizenship status would actually affect, say, a loan application or a routine brush with local law enforcement—or subjectively, based on the effect that a non-citizen intends his or her citizenship claim to have." Richmond, 714 F.3d at 730 (emphases in the original).

A claim of birth in the United States is sufficient to constitute a representation to be a citizen of the United States. Barcenas-Barrera, 25 I&N Dec. at 42. In addition, checking a box on an I-9 attesting to be a "citizen or national" of the United States is sufficient where the alien does not carry his burden of proof to show that he claimed to be a national rather than a citizen. Crocock v. Holder, 670 F.3d 400, 403 (2d Cir. 2012).

No conviction is required to establish inadmissibility under this section. See, e.g., Crocock, 670 F.3d at 403. However, evidence that an alien pled guilty to making a false claim of United States citizenship, in violation of 18 U.S.C. § 911, may be sufficient, by itself, to find that the alien is inadmissible under INA § 212(a)(6)(C)(ii). See Barcenas-Barrera, 25 I&N Dec. at 43 (citing Pichardo v. INS, 216 F.3d 1198, 1201 (9th Cir. 2000)). Similarly, evidence that an alien pled

guilty to making a false statement in a passport application in violation of 18 U.S.C. § 1542 will preclude him from claiming that he did not knowingly submit false information to obtain a passport. Rodriguez, 451 F.3d at 65; see also Barcenas-Barrera, 25 I&N Dec. at 43.

No statutory waiver of inadmissibility exists for falsely claiming citizenship. There is, however, a limited exception for children of United States citizens who reasonably believed that they were citizens when they represented themselves as such. See INA § 212(a)(6)(C)(ii)(I). In addition, the doctrine of timely retraction, see supra at § B.1.j.3, *may* be available to waive inadmissibility under INA § 212(a)(6)(C)(ii) for falsely claiming citizenship, but the only case that addresses this issue at present is an unpublished BIA decision. See Matter of Jose Valadez-Munoz, 2006 WL 1558823 (BIA April 12, 2006).

l. INA § 212(a)(6)(E)(i) – Smugglers

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is inadmissible. INA § 212(a)(6)(E)(i). Waivers of inadmissibility are available for certain classes of aliens who provided assistance only to close family members. See INA § 212(d)(11). In addition, there is an exception to inadmissibility for certain aliens who were physically present in the United States on May 5, 1998, and provided assistance only to close family members. See INA § 212(a)(6)(E)(ii).

A respondent may be found to have provided "knowing" assistance to an alien to enter the United States in violation of law based upon the respondent's misstatements to immigration officials regarding the alien's residency and identity documents. Chambers v. Office of Chief Counsel, 494 F.3d 274, 278 (2d Cir. 2007). An IJ could reasonably infer from such misstatements that the respondent sought to deceive immigration officials as to the alien's immigration status because the respondent knew that the alien would not otherwise be permitted to enter the United States. Chambers, 494 F.3d at 278.

Some level of "affirmative assistance" is required in order for a respondent to be inadmissible for alien smuggling. See Chambers, 494 F.3d at 279. However, the Second Circuit "has yet to set forth anything approaching a bright-line test as to the nature of the actions that will or will not suffice to support a finding that an alien has 'encouraged, induced, assisted, abetted, or aided' another in illegally entering the United States." Chambers, 494 F.3d at 279. Where a respondent arranged transportation for an alien and deceived customs officials at the time of his attempted entry, she provided adequate assistance to render her inadmissible to the United States. Chambers, 494 F.3d at 279-80. In another case, where the respondent harbored illegal entrants close to the United States border in order to help them evade detection, her conduct was adequate to sustain a charge of removability for alien smuggling under INA § 237(a)(1)(E)(i). Matter of Martinez-Serrano, 25 I&N Dec. 151, 155 (BIA 2009). The charge of removability at INA § 237(a)(1)(E)(i) is worded nearly identically to the charge of inadmissibility at hand here, such that interpretations of the two provisions should not differ significantly. See infra at § B.2.d.

Also in the context of removability under INA § 237(a)(1)(E)(i), the BIA has emphasized that "the act of an entry may include other related acts that occurred either before, during, or after a border crossing, so long as those acts are in furtherance of, and may be considered part of, the act of securing and accomplishing the entry." Martinez-Serrano, 25 I&N Dec. at 154. Therefore,

"direct participation in the physical border crossing is not required," so long as the respondent's conduct is "tied to the aliens' manner of entry." Martinez-Serrano, 25 I&N Dec. at 154-155. A conviction for "Aiding and Abetting an Alien to Elude Examination and Inspection by Immigration Officers" pursuant to 18 U.S.C. §§ 2(a) and 1325(a)(2) may be sufficient, without more, to establish a charge of removability for alien smuggling. Martinez-Serrano, 25 I&N Dec. at 153.

m. INA § 212(a)(7)(A)(i) – Documentation Requirements for Immigrants

Except as otherwise specifically provided in the INA, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa or other entry document, a valid unexpired passport or other travel document, and any other required document, is inadmissible. INA § 212(a)(7)(A)(i)(I). In addition, any immigrant whose visa was not issued in compliance with the INA is inadmissible. INA § 212(a)(7)(A)(i)(II). A waiver of this ground of inadmissibility is available for certain aliens who possess immigrant visas and could not have ascertained prior to their departure for the United States that they would be inadmissible. See INA § 212(k). An additional waiver is available at INA § 237(a)(1)(H) for aliens who are charged with removability pursuant to INA § 237(a)(1)(A) on the ground that they were inadmissible at the time of admission as aliens described in INA § 212(a)(7)(A)(i)(I), where there was a misrepresentation made at the time of admission, whether innocent or not. In Re Guang Li Fu, 23 I&N Dec. 985, 988 (BIA 2006). In addition, the Attorney General may, in the exercise of his discretion, readmit certain returning resident immigrants who are otherwise admissible to the United States but do not possess all required documentation. INA § 211(b); see Ahmed v. Ashcroft, 286 F.3d 611, 612-13 (2d Cir. 2002).

n. INA § 212(a)(7)(B)(i)—Documentation Requirements for Nonimmigrants

Any nonimmigrant who is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission, or any nonimmigrant who is not in possession of a valid nonimmigrant visa or border crossing identification card, is inadmissible. INA § 212(a)(7)(B)(i). A waiver of this ground of inadmissibility is available for certain aliens in transit through the United States, nationals of certain foreign states with reciprocity agreements, or on the basis of unforeseen emergency in individual cases. See INA § 212(d)(4).

o. INA § 212(a)(9)(A) – Previously Removed

Any alien who has been ordered removed under INA § 235(b)(1) (expedited removal proceedings for arriving aliens), or at the end of proceedings under INA § 240 initiated upon the alien's arrival in the United States, is inadmissible to the United States for five years after the date of removal. INA § 212(a)(9)(A)(i); 8 C.F.R. § 1212.2. In addition, any alien not described in clause (i) who has been ordered removed under INA § 240 or any other provision of law, or departed the United States while an order of removal was outstanding, is inadmissible to the United States for ten years after the date of his departure or removal. INA § 212(a)(9)(A)(ii); 8 C.F.R. § 1212.2. Finally, any alien in either category who seeks admission within twenty years after a second or subsequent removal, or who seeks admission at any time after being convicted of an aggravated felony, is inadmissible. INA § 212(a)(9)(A)(i)-(ii); 8 C.F.R. § 1212.2. Notably, this ground of inadmissibility requires an order of removal, and as such, it is not applicable to aliens

who were granted voluntary departure and timely departed from the United States. Matter of Zmijewska, 24 I&N Dec. 87, 92 (BIA 2007).

This ground of inadmissibility does not apply to an alien reapplying for admission before the designated time if, prior to his departure for the United States or his attempt to be readmitted, the Attorney General consents to his reapplication for admission. INA § 212(a)(9)(A)(iii). Procedures for reapplying for admission are laid out at 8 C.F.R. §§ 212.2 and 1212.2. See also INA § 212(d)(3). "An approved request for permission to reapply for admission is not a visa or entry document; it is merely evidence of the Government's judgment that [INA § 212(a)(9)(A)(ii)] need no longer be an obstacle to the alien's acquisition of such a document." Matter of Torres-Garcia, 23 I&N Dec. 866, 872 (BIA 2006). Thus, an alien granted permission to reapply for admission must follow lawful procedures governing the acquisition of a visa before he may be readmitted to the United States. Torres-Garcia, 23 I&N Dec. at 872.

In some limited circumstances, an IJ is permitted to grant *nunc pro tunc* permission to reapply for admission to cure an alien's failure to obtain such permission prior to reentry after removal. Matter of Garcia-Linares, 21 I&N Dec. 254, 257 (BIA 1996). The IJ's authority to grant *nunc pro tunc* permission to reapply is limited to cases where the grant "would effect a complete disposition of the case, i.e., where the only ground of deportability or inadmissibility would thereby be eliminated or where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissibility." Garcia-Linares, 21 I&N Dec. at 257 (internal citations and quotation marks omitted).

p. INA § 212(a)(9)(B) – Unlawfully Present

Any alien, other than an LPR, who was unlawfully present in the United States for a period of more than 180 days but less than one year, voluntarily departed the United States prior to the commencement of removal proceedings, and again seeks admission within three years of the alien's departure or removal, is inadmissible. INA § 212(a)(9)(B)(i)(I). In addition, any alien, other than an LPR, who was unlawfully present in the United States for one year or more, and who again seeks admission within ten years of the alien's departure or removal from the United States, is inadmissible. INA § 212(a)(9)(B)(i)(II). Inadmissibility under INA § 212(a)(9)(B)(i)(II) does not result from unlawful presence that accrues *after* an alien reenters the United States; rather, the alien must have been unlawfully present for at least one year *prior to* departing the United States to be inadmissible under this section. Matter of Rodarte-Roman, 23 I&N Dec. 905, 909 (BIA 2006). An alien who applies for adjustment of status is an alien who "seeks admission" under INA § 212(a)(9)(B)(i). Id. at 908.

"Departure," within the meaning of INA § 212(a)(9)(B)(i)(II), is broadly construed "to encompass any 'departure' from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding." Matter of Lemus, 24 I&N Dec. 373, 376-77 (BIA 2007); see also Cervantes-Ascencio v. INS, 326 F.3d 83, 85-86 (2d Cir. 2003) (declining to read an exception into INA § 212(a)(9)(B)(i)(II) for long-term unlawfully present aliens who submitted to removal proceedings and departed pursuant to a grant of voluntary departure). However, an alien who leaves the United States temporarily pursuant to a grant of advance parole under INA § 212(d)(5)(A) does not thereby make a "departure" within the meaning of INA §

212(a)(9)(B)(i)(II). Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771, 775-79 (BIA 2012) (clarifying Lemus, 24 I&N Dec. at 376-77).

An alien is deemed to be unlawfully present if he is present after the expiration of the period of stay authorized by the Attorney General or is present without being admitted or paroled. INA § 212(a)(9)(B)(ii). Unlawful presence may or may not include the period of time during which an alien overstays his visa solely to attend removal proceedings. Compare Matter of Halabi, 15 I&N Dec. 105, 106 (BIA 1974), with Westover v. Reno, 202 F.3d 475, 481 (1st Cir. 2000) (noting that the practice of charging aliens with overstaying when they remain in the United States to defend themselves against other charges of removal may violate the Fifth Amendment right to due process of law). Minors, aliens who have bona fide asylum applications pending, beneficiaries of family unity protection, certain battered women and children, and certain trafficking victims do not accrue unlawful presence for the purposes of INA § 212(a)(9)(B)(i). INA § 212(a)(9)(B)(iii). In addition, unlawful presence does not include any period of time prior to April 1, 1997. Rodarte-Roman, 23 I&N Dec. at 911 (citing IIRIRA § 301(b)(3), 110 Stat. at 3009-578). A waiver of inadmissibility for certain aliens who have accrued unlawful presence is available at INA § 212(a)(9)(B)(v).

q. INA § 212(a)(9)(C) – Unlawfully Present after Previous Immigration Violation

Any alien who (I) has been unlawfully present in the United States for an aggregate period of more than one year, or (II) has been ordered removed under INA §§ 235(b)(1), 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted, is permanently inadmissible. INA § 212(a)(9)(C)(i)(I)-(II). This ground of removability does not apply to an alien seeking admission more than ten years after the date of his last departure from the United States if, prior to his departure for the United States or his attempt to be readmitted, the Secretary of Homeland Security consents to his reapplication for admission. INA § 212(a)(9)(C)(ii). A waiver of inadmissibility is available for certain VAWA self-petitioners. INA § 212(a)(9)(C)(iii).

Inadmissibility under INA § 212(a)(9)(C)(i) cannot be cured by a grant of *nunc pro tunc* permission to reapply for admission after unlawfully reentering the United States because such permission cannot be granted until the alien departs and remains outside the United States for at least ten years. Matter of Torres-Garcia, 23 I&N Dec. 866, 875-76 (BIA 2006).

2. Charges of Deportability – INA § 237

a. INA § 237(a)(1)(A) – Inadmissible at the Time of Entry or Adjustment

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable. INA § 237(a)(1)(A). Waivers are available at INA § 237(a)(1)(H) for aliens who were inadmissible at the time of entry or adjustment of status under INA § 212(a)(6)(C)(i) for fraud or willful misrepresentation of a material fact, or under INA § 212(a)(7)(A)(i)(I) for lack of valid entry documents, where there was a misrepresentation made at the time of admission. INA § 237(a)(1)(H); Matter of Guang Li Fu, 23 I&N Dec. 985, 988 (BIA 2006) (extending the waiver, which, by its terms, applies only to

misrepresentations under INA § 212(a)(6)(C)(i), to misrepresentations under INA § 212(a)(7)(A)(i)(I)).

In cases where the underlying ground of inadmissibility requires "knowledge" or "reason to believe," the "knowledge" or "reason to believe" must be shown to have existed prior to or contemporaneous with the alien's entry or adjustment of status. Matter of Casillas-Topete, 25 I&N Dec. 317, 320-21 (BIA 2010); Matter of Rocha, 20 I&N Dec. 944, 946 (BIA 1995). This standard is applicable, in particular, to the ground of inadmissibility at INA § 212(a)(2)(C) for "any alien who the consular officer or the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance." In the context of that ground of inadmissibility, it is notable that the examining officer need not have had knowledge or reason to believe that the alien was a drug trafficker at the time of his admission, provided that any "appropriate immigration official" had such knowledge or reason to believe. Casillas-Topete, 25 I&N Dec. at 320-21. "Appropriate immigration officials" include the consular officer and anyone to whom the Attorney General or Secretary of Homeland Security has delegated authority. Id. at 320.

In cases where the underlying ground of inadmissibility requires a conviction (or required a conviction at the time of the alien's entry or adjustment of status), it is important to note that the definition of "conviction" under the INA has changed over time and that a "conviction" for purposes of immigration law today is a much broader concept than it was prior to the enactment of IIRIRA. See Francis v. Gonzales, 442 F.3d 131, 139-41 (2d Cir. 2006). When determining whether an alien was within one or more of the classes of aliens inadmissible by the law existing *at the time of entry or adjustment of status*, INA § 237(a)(1)(A), the appropriate definition of "conviction" must be used. Id.

b. INA § 237(a)(1)(B) – Present in Violation of Law

Any alien who is present in the United States in violation of the INA or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under INA § 221(i), is deportable. INA § 237(a)(1)(B). Nonimmigrant aliens who are admitted for a temporary period of time and who remain in the United States beyond the authorized time are often charged with removability under this section of the INA. See, e.g., Zerrei v. Gonzales, 471 F.3d 342 (2d Cir. 2006). A passport alone may constitute clear and convincing evidence of an alien's removability for overstaying his visa, provided that the passport clearly shows the date until which the alien was admitted, and the alien does not dispute that he was not granted an extension of his stay. Zerrei, 471 F.3d at 346-47.

If an alien overstays his visa solely to attend removal proceedings and is subsequently charged under this section, the charge may violate the alien's right to due process of law. Compare Matter of Halabi, 15 I&N Dec. 105, 106 (BIA 1974) (holding that charge of deportability under former INA § 241(a)(2) for having remained in the United States longer than permitted was sustained where an alien overstayed his visa during removal proceedings), with Westover v. Reno, 202 F.3d 475, 481 (1st Cir. 2000) (noting that the practice of charging aliens with overstaying when they remain in the United States to defend themselves against other charges of removal may violate the Fifth Amendment right to due process of law). The Second Circuit has not yet addressed this issue.

c. INA § 237(a)(1)(C)(i) – Violated Nonimmigrant Status or Condition of Entry

Any alien who was admitted as a nonimmigrant and has failed to maintain his nonimmigrant status or comply with the conditions of such status is deportable. INA § 237(a)(1)(C)(i). The requirements for maintaining nonimmigrant status and the conditions of each nonimmigrant status are provided at 8 C.F.R. §§ 214.1 and 214.2. Common status violations include: unauthorized employment (including any employment by aliens admitted as temporary visitors for pleasure or aliens in transit through the United States), 8 C.F.R. § 214.1(e); lack of compliance with registration, photographing, or fingerprinting requirements, or failure to provide full and truthful disclosure of all requested information, 8 C.F.R. § 214.1(f); and conviction in any United States jurisdiction for a crime of violence for which a sentence of more than one year of imprisonment may be imposed, 8 C.F.R. § 214.1(g).

i. Special Requirements for Nonimmigrant F-1 Students to Maintain Status

Nonimmigrant students are admitted for "duration of status," with "duration of status" defined in part as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by [DHS] for attendance by foreign students, or engaging in authorized practical training following completion of studies." 8 C.F.R. § 214.2(f)(5)(i). The status of an F-1 student is anchored at all times to the particular educational institution that issued his Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status. A student who seeks admission to the United States in F-1 status must present a SEVIS Form I-20 issued by the institution that he attends or will attend. 8 C.F.R. §§ 214.2(f)(1), (f)(4). After the student arrives in the United States, he must follow the procedures laid out at 8 C.F.R. § 214.2(f)(8) in order to change educational levels or transfer to a new school. See C.F.R. §§ 214.2(f)(5)(ii), (f)(8). Under those procedures, the student is issued a new Form I-20 by the transfer school prior to his release date from his current school. 8 C.F.R. § 214.2(f)(8)(ii)(C). Thus, an F-1 student who follows the prescribed transfer procedures is in possession of a valid Form I-20 throughout the transfer process.

If an F-1 student fails to maintain status, even if he "act[s] in good faith in all of [his] dealings with the government," he becomes removable pursuant to INA § 237(a)(1)(C)(i). See Matter of Yazdani, 17 I&N Dec. 626, 630 (BIA 1981). The regulations provide that a student may in some cases violate the terms of his status as a result of "circumstances beyond the student's control…includ[ing] serious injury or illness, closure of the institution, a natural disaster, or inadvertence, oversight, or neglect on the part of the [designated school official ("DSO")]." 8 C.F.R. § 214.2(f)(16)(i)(F)(1). In such cases, USCIS "may consider reinstating a student who makes a request for reinstatement on Form I-539, Application to Extend/Change Nonimmigrant Status, accompanied by a properly completed SEVIS Form I-20 indicating the DSO's recommendation for reinstatement." 8 C.F.R. § 214.2(f)(16)(i). The decision of USCIS on an application to reinstate student status is discretionary, and there is no appeal from the denial of such an application. See 8 C.F.R. § 214.2(f)(16)(ii); see also Yazdani, 17 I&N Dec. at 628-629 (noting that neither an IJ nor the BIA may review the propriety of a determination on an application to reinstate of student status).

d. INA § 237(a)(1)(E)(i) – Smuggling

Any alien who (prior to the date of entry, at the time of any entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is deportable. INA § 237(a)(1)(E)(i). Waivers of inadmissibility are available for lawful permanent residents who provided assistance only to close family members. See INA § 237(a)(1)(E)(iii). In addition, there is an exception to inadmissibility for certain aliens who were physically present in the United States on May 5, 1998. See INA § 237(a)(1)(E)(ii). The phrasing of this ground of removability, aside from the parenthetical, is identical to the language used in the ground of inadmissibility at INA § 212(a)(6)(E)(i). For more information, see supra at § B.1.k.

e. INA § 237(a)(2)(A)(i) – Crimes Involving Moral Turpitude

i. One CIMT within 5 years AND a conviction with a sentence of 1 year or more

An alien convicted of a crime involving moral turpitude committed within five years (or ten years in the case of an alien provided lawful permanent resident status under INA § 245(j)) after the date of admission, and for which a sentence of one year or more *may be* imposed, is removable. INA § 237(a)(2)(A)(i). Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011). Adjustment of status is an admission. See Matter of Koljenovic, 25 I&N Dec. 219, 221 (BIA 2010), overruled in part on other grounds by Matter of J-H-J-, 26 I&N Dec. 563 (BIA 2015); Matter of Rodarte, 23 I&N Dec. 905, 908 (BIA 2006); Matter of Rosas, 22 I&N Dec. 616, 618-20 (BIA 1999). However, for the purpose of INA § 237(a)(2)(A)(i), the five-year clock is not reset by a new admission *from within* the United States (through adjustment of status), if the alien was present in the United States pursuant to an admission at the time of adjustment. Alyazji, 25 I&N Dec. at 406. The alien's adjustment does not reset the five-year clock because it adds nothing to the deportability inquiry; it may have extended or reauthorized his/her then-existing presence, but it does not change his/her status vis-à-vis the grounds of deportability. Id. at 408. An overstay or violation of an alien's nonimmigrant status before adjusting has no effect on this analysis under INA § 237(a)(2)(A)(i). Id. at 407 n. 8. Conversely, where the alien adjusts his/her status after entering the United States without inspection, the date of adjustment triggers the running of the five-year clock because it commences (rather than extends) the alien's period of presence in the United States following an admission. Id. at 408 n. 9.

ii. Two CIMT Not Arising Out of a Single Scheme

An alien who at any time after admission is convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, regardless of whether confined and regardless of whether the convictions were in a single trial, is removable. INA § 237(a)(2)(A)(ii).

f. INA § 237(a)(2)(A)(iii) – Aggravated Felony

An alien convicted of an aggravated felony any time after admission is removable. INA § 237(a)(2)(A)(iii). The term "aggravated felony" is defined in INA § 101(a)(43) and includes a conspiracy or attempt to commit any crime described in that section. INA § 101(a)(43)(U); 8 C.F.R. § 1001.1(t).

The current definition of "aggravated felony" in INA § 101(a)(43) applies retroactively to pre-IIRIRA convictions. INA § 101(a)(43) ("Notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered befre, on, or after September 30, 1996"); IIRIRA § 321(c) (effective date provision for the current definition of "aggravated felony" stating, "The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act [September 30, 1996], regardless of when the conviction occurred . . . ."); see also Brown v. Ashcroft, 360 F.3d 346, 353-55 (2d Cir. 2004) (finding that the expanded definition of aggravated felony applied retroactively to attempted robbery convictions to bar the respondent's eligibility for former INA § 212(c) relief); Matter of Truong, 22 I&N Dec. 1090, 1096-97 (BIA 1999).

i. Murder, Rape or Sexual Abuse of a Minor – INA § 101(a)(43)(A)

The term "aggravated felony" includes murder, rape, or sexual abuse of a minor. INA § 101(a)(43)(A).

(1) Murder

A conviction for murder in violation of a statute requiring a showing that the perpetrator acted with extreme recklessness or a malignant heart, notwithstanding that the requisite mental state may have resulted from voluntary intoxication and that n intent to kill was established. Matter of M-W-, 25 I&N Dec. 748 (BIA 2012).

(2) Rape

Prior to Matter of Keeley, 27 I&N Dec. 146 (BIA 2017), the Board of Immigration Appeals ("BIA") had not issued any published decision on the generic definition of rape, but in several unpublished decisions, the BIA stated that the generic definition of rape involves "some degree of nonnconsensual sexual penetration." See, e.g., In re: Juan Carlos Mendoza, 2008 WL 2079304 (BIA April 28, 2008); In re: Michael Cruz Paulmino, 2005 WL 952424 (BIA April 11, 2005).

In Keeley, the BIA held that the the term "rape" in section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (2012), encompasses an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight. Perez-Gonzalez v. Holder, 667 F.3d 622 (5th Cir. 2012), not followed. Keeley, 27 I&N Dec. 146. It further held that the term "rape" also requires that the underlying sexual act be committed without consent, which may be shown by a statutory requirement that the victim's ability to appraise the nature of the conduct was substantially impaired and the offender had a culpable mental state as to such impairment.

(3) Sexual Abuse of a Minor

The BIA has adopted the meaning of "sexual abuse" found in 8 U.S.C. § 3509(a)(8) to "operate as a 'guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor.'" Oouch v. U.S. Dep't of Homeland Sec., 633 F.3d 119 (2d Cir. 2011) (citing Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 994-96 (BIA 1999)). Sexual abuse includes the

employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. 8 U.S.C. § 3509(a)(8). In Equivel-Quintana v. Sessions, the Supreme Court clarified the definition of a "minor"[11] for the purposes of INA § 101(a)(43)(A) and held that "the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." Id., No. 16-54, 2017 WL 2322840, at *5 (2017). Further, the Court found that "[a]bsent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants." Esquivel-Quintana v. Sessions, No. 16-54, 2017 WL 2322840, at *9 (2017).[12]

States categorize sex crimes against children in many different ways, and a specific state or federal definition is not dispositive when determining whether an offense constitutes "sexual abuse of a minor" for immigration purposes. Rodriguez-Rodriguez, 22 I&N Dec. at 996. An offense involving sexual abuse of a minor constitutes an aggravated felony even if it is a misdemeanor under state law. Matter of Small, 23 I&N Dec. 448, 450 (BIA 2002). In order for a statutory rape offense to qualify as a sexual abuse of a minor under INA § 101(a)(43)(A), a victim must be under 16 years old where the offense criminalizes sexual intercourse based solely on the age of the participants. Esquivel-Quintana, No. 16-54, 2017 WL 2322840 at *5. Thus, even if a state law criminalizes *consensual* sexual conduct as statutory rape offenses involving a younger partner who is 16 or 17 years old, such offenses should not be considered sexual abuse of a minor aggravated felonies under INA § 101(a)(43)(A). Esquivel-Quintana, No. 16-54, 2017 WL 2322840 at *9 (finding that the offense of unlawful intercourse with a minor, in violation of Cal. Pen. Code § 261.5(c), which requires that the minor victim be "more than three years younger" than the perpetrator, is not categorically sexual abuse of a minor and thus not an aggravated felony).[13]

- Rape in the 3rd Degree – NYPL § 130.25 (2)

The Second Circuit has held that the subsection of Rape in the Third Degree describing a person twenty-one years old or more engaging in sexual intercourse with another person less than seventeen years old, in violation of section 130.25(2) of the New York Penal Law ("NYPL")—constitutes sexual abuse of a minor. Mugalli v. Ashcroft, 258 F.3d 52, 60-61 (2d Cir. 2001).[14]

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[11] While not directly addressed in this decision, it would appear that the prior holding in Matter of V-F-D-, 23 I&N Dec. 859, 962 (BIA 2006) (defining a victim of sexual abuse as a minor for the purpose of INA § 101(a)(43)(A) if he/she is under 18 years of age regardless of consent in the convicting jurisdiction) has been called into question.

[12] The Court, however, declined to address: (1) whether the generic offense requires "a particular age differential between the victim and perpetrator" and (2) whether the generic offense encompasses "sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants." Esquivel-Quintana v. Sessions, No. 16-54, 2017 WL 2322840, at *9 (2017).

[13] For the purposes of Cal Pen. Code § 261.5(c), a "minor" was defined as a person under the age of 18. In Equivel-Quintana, he was 21 years old at the time he had consensual sexual intercourse with a 17 year old. Id., No. 16-54, 2017 WL 2322840, at *3.

[14] Although Mugalli v. Ashcroft has not been directly abrograted or otherwise altered, it appears as though it may have been called into question, in part, after the decision in Esquivel-Quintana v. Sessions, No. 16-54, 2017 WL 2322840, namely with respect to consensual sexual intercourse involving 16 year olds. See supra. Thus, where statutes on their

- Use of a Child in a Sexual Performance – NYPL § 263.05

In Oouch v. U.S. Dep't of Homeland Sec., the Second Circuit held that NYPL § 263.05, use of a child in a sexual performance, is categorically an aggravated felony of "sexual abuse of a minor." 633 F.3d 119,126 (2d Cir. 2011).

- Sexual Misconduct – NYPL § 130. 20 (1)

In Ganzhi v. Holder, 624 F.3d 23 (2d Cir. 2010), the Second Circuit upheld the BIA's finding that the petitioner's conviction for sexual misconduct, in violation of NYPL § 130.20(1), qualified as sexual abuse of a minor under INA § 101(a)(43)(A). The Court found NYPL § 130.20(1) to be divisible, and the record of conviction demonstrated that he was convicted under a branch of the statute that constituted an aggravated felony: specifically, the portion of the statute defining a person under seventeen years old as incapable of consent. Ganzhi, 624 F.3d at 30.[15]

- Other Offenses

The offense of indecency with a child by exposure, pursuant to section 21.11(a)(2) of the Texas Penal Code Annotated, is included within the definition of sexual abuse of a minor and is therefore an aggravated felony within the meaning of INA § 101(a)(43)(A). Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 996 (BIA 1999).

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ii. Trafficking in a Controlled Substance – INA § 101(a)(43)(B)

The term "aggravated felony" encompasses illicit trafficking in a controlled substance, including "a drug trafficking crime," as defined in section 924(c) of Title 18 of the United States Code ("U.S.C."). "Illicit trafficking" offenses contain no "*mens rea* element with respect to knowledge of the illicit nature of the controlled substance, at least when accompanied . . . by an affirmative defense permitting a defendant to show that he or she had no such awareness, as well as by a requirement that the defendant be aware of the presence of the substance (apart from its illegality)." Matter of L-G-H-, 26 I&N Dec. 365, 371 (BIA 2014) (finding that section 893.13(1)(a)(1) of the Florida Statutes is an aggravated felony under the illicit trafficking clause of section 101(a)(43)(B) of the INA).

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face list the age of the victim victim as simply "less than seventeen years old," such as with NYPL § 130.25(1) in *Mugalli*, the statute would likely be considered overbroad as it is not divisible with respect to the age element based on the categorical approach. See Esquivel-Quintana v. Sessions, No. 16-54, 2017 WL 2322840 *4, fn. 1; see also Criminal Jury Instructions 2d (New York) ("CIJ2d"), *available at* http://www.nycourts.gov/judges/cji/2-PenalLaw/130/art130hp.shtml. However, for statutes which simply list that a sexual offense occurred due to "lack of consent," modified categorical approach would need to be applied to determine if it was violated due to the age of the victim and the actual age of the victim would be known based on a review of the record of conviction documents. See Esquivel-Quintana v. Sessions, No. 16-54, 2017 WL 2322840 *4, fn. 1; see also NYPL § 130.05(2)-(3).

[15] The same issues affecting Mugalli v. Ashcroft regarding consensual sexual intercourse involving 16 year olds also applies to Ganzhi. See supra.

As relevant here, the term "drug trafficking crime" is defined as any felony punishable under the Controlled Substances Act ("CSA") (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46 (maritime drug law enforcement). 18 U.S.C. § 924(c)(2); see Lopez v. Gonzales, 549 U.S. 47, 55, 60 (2006). "[A]ny felony" includes a state drug trafficking offense, as long as it would be a felony under the CSA.

An offense constitutes a felony under the CSA if the maximum term of imprisonment authorized by the CSA is more than one year. See 18 U.S.C. § 3559(a)(5). The CSA authorizes a maximum term of imprisonment of more than one year for "manufacturing, distributing, or dispensing a controlled substance." 21 U.S.C. § 841(a). A controlled substance is any substance that appears under 21 U.S.C. § 812.

A person commits a felony under the CSA when he or she "knowingly or intentionally…manufacture[s], distribute[s], or dispense[s], or possess[es] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1). However, where the offense involves a "small amount of marihuana for no remuneration," 21 U.S.C. § 841(b)(4), the penalty is "a term of imprisonment of not more than 1 year." See 21 U.S.C. § 844(a). This renders the offense a misdemeanor under the CSA, not a felony. 18 U.S.C. § 3559(a)(5). In the removability context, the burden is on the government to prove that the respondent's marijuana distribution conviction categorically constitutes an aggravated felony; an alien does not have the burden of proving the quantity of narcotics or the nature of the transfer.[16] Moncrieffe v. Holder, 133 S. Ct.1678 (2013); Martinez v. Mukasey, 551 F.3d 113, 121-22 (2d Cir. 2008). Applying the categorical approach, the offense is not an aggravated felony if the *minimum criminal conduct necessary* to sustain the conviction could have been based on a non-remunerative transfer of a small amount of marijuana. Id. Therefore, state offenses that criminalize, *inter alia*, the distribution – or the possession with intent to distribute – of a small amount of marijuana for no remuneration, are not categorically drug trafficking aggravated felonies because such a conviction would not necessarily be a felony under the Controlled Substances Act (CSA). Moncrieffe, 133 S. Ct. at 1688.

The Supreme Court in Moncrieffe clarified that there must be a "realistic probability," not just a theoretical possibility, that that the State would apply its statute to conduct falling outside of the generic definition of a crime in order to sustain a finding that the state offense is not categorically equivalent to the federal offense. Id. at 1685 (citing Duenas-Alvarez, 549 U.S. at 193).[17] If it is only theoretically possible for a person to be convicted under the state statute for

[16] The Supreme Court rejected the government's argument that the alien bears the burden of establishing that his conviction falls within the "mitigating exception." Moncrieffe, 133 S. Ct. at 1687; see also Martinez v. Mukasey, 551 F.3d 113, 121-22 (2d Cir. 2008).

[17] [Note to reader: The "reasonable probability" analysis referred to in Duenas-Alvarez arises in the context of a state statute that one party argues creates a crime outside the generic definition, but that does not, on its face, refer to such crime. This is to be distinguished from, *inter alia*, controlled substances statutes in which a specific controlled substance is referred to explicitly and thus criminalized. In the latter situation, the "realistic probability" versus "theoretical possibility" analysis may be unnecessary because even if no cases exist in which a defendant was prosecuted under that particular subsection of the statute, it is clear that the state legislature intended to criminalize such conduct because it was written directly into the statute. Accordingly, no "legal imagination" is required.] In addressing the disparity between Federal courts of appeals on whether to extend the realistic probability test to the context of crimes involving moral turpitude, the BIA held that "we will apply the Supreme Court's realistic probability

distribution of a small amount of marijuana for no remuneration, but the state never prosecutes such conduct under that statute, there is sufficient evidence to find that a respondent's conviction categorically constitutes an aggravated felony. Id.; see also Matter of Chairez, 26 I&N Dec. 349, 357 (BIA 2014) (finding no realistic probability that a state statute would be applied in a manner constituting a removable offense where the Respondent identified no decision where anyone had been so prosecuted), overruled in part by Matter of Chairez, 26 I&N Dec. 478 (BIA 2015) (rejecting Matter of Lanferman "to the extent that it is inconsistntn with [the Board's] understanding of the Supreme Court's approach to divisibility in Descamps."). The Court did not clarify what comprises a "small amount" of marijuana and what does not.

The CSA provides for a term of imprisonment of more than one year if a person commits a drug possession offense after a prior conviction under the CSA or "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State." 21 U.S.C. § 844(a). However, a second or subsequent conviction for simple possession is not an aggravated felony under INA §101(a)(43), unless the prosecutor charged the noncitizen defendant with simple possession recidivism before trial or before a guilty plea, in order to provide the individual with notice and an opportunity to challenge the validity of the prior conviction. Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010); see also Alsol v. Mukasey, 548 F.3d 207, 217 (2d Cir. 2008); Matter of Cuellar-Gomez, 25 I&N Dec. 850, 863 (BIA 2012).

The CSA provides for a term of imprisonment of more than one year for persons who possess more than five grams of cocaine base, and persons who possess flunitrazepam. Lopez v. Gonzales, 549 U.S. 47, 55, 60, 64 (2006). Similarly, possession of more than what one person would ordinarily possess for his or her own personal use may support a conviction for the federal felony of possession with intent to distribute. See 21 U.S.C. § 841; Lopez, 549 U.S. at 53 (citing United States v. Kates, 174 F.3d 580, 582 (5th Cir. 1999)).

A conviction that does not identify the drug involved cannot be used to establish that it was a federally listed controlled substance. See Matter of Paulus, 11 I&N Dec. 274, 276 (BIA 1965). However, even if the conviction record is silent as to the type of drug involved, the remarks of the defendant during his criminal trial may be considered as part of the "record of conviction." Matter of Mena, 17 I&N Dec. 38, 39-40 (BIA 1979) (finding that the defendant's admission during arraignment to possession of heroin could be considered part of the record of conviction upon which to base a finding of deportability).

(1) Criminal Sale of Marijuana – NYPL § 221.40

The Second Circuit has held that a conviction for criminal sale of marijuana in the fourth degree, § 221.40, is not categorically a drug trafficking crime because the conviction could have been based on facts that meet the exception in 21 U.S.C. § 841(b)(4) for distribution of a small amount of marijuana for no remuneration, classifying the crime as a federal misdemeanor. Martinez v. Mukasey, 551 F.3d 113, 121-22 (2d Cir. 2008); see also Moncrieffe v. Holder, 133 S. Ct. 1678 (2013). An alien does not have the burden of proving the quantity of narcotics or the

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).

nature of the transfer, even when he has the burden to show eligibility for relief. Martinez, 551 F.3d at 118 n.4.

(2) Criminal Sale of a Controlled Substance – NYPL § 220.31-43

The Second Circuit has held that a conviction for fifth degree criminal sale of a controlled substance, in violation of NYPL § 220.31, does not categorically constitiute an aggravated felony under INA § 101(a)(43)(B) because the New York definition of a "controlled substance" includes "chorionic gonadotropic", a substance which is not considered a controlled substance under the CSA. Harbin v. Sessions, No. 14-1433-ag, --- F.3d ---, 2017 WL 2661590 (2d Cir. June 21, 2017).

In the context of New York controlled substance offenses, "sell" means "to sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL § 220.00. The Second Circuit has held that a conviction for third degree criminal sale of a controlled substance, namely cocaine, in violation of NYPL § 220.39(1), categorically constitutes an aggravated felony under INA § 101(a)(43)(B) because New York law requires the offer be "bona fide," which is one that is "made with the intent and ability to follow through on the transaction." Pascual v. Holder, 707 F.3d 403 (2d Cir. 2013). The analogous federal statute, 21 U.S.C. § 841(a)(1), punishes the "'actual, constructive or *attempted* transfer of a controlled substance,'" and thus a mere offer or attempt to sell a controlled substance would be punishable as an aggravated felony. Pascual, 707 F.3d 403; but cf. United States v. Savage, 542 F.3d 959 (2d Cir. 2008) (holding that a conviction under a Connecticut statute did not categorically qualify as a controlled substance offense because it "plainly criminalizes . . . a mere offer to sell a controlled substance[,]" including fraudulent offers). Other circuits have held that broad definitions that include offers to sell do not match the federal definition of a drug trafficking offense, and that the statutes are therefore divisible. See U.S. v. Medina-Almaguer, 559 F.3d 420, 422-44 (6th Cir. 2009) (finding that a conviction under a California statute that included "offer to sell" was not categorically drug trafficking offense); United States v. Gonzales, 484 F.3d 712, 714 (5th Cir. 2007) (same, for Texas statute).

(3) Travel in interstate commerce with intent to distribute proceeds - 18 U.S.C. § 1952(a)(1)(A)

The offense of traveling in interstate commerce with the intent to distribute the proceeds of an unlawful drug enterprise in violation of 18 U.S.C. § 1952(a)(1)(A) (2006) is not an "aggravated felony" under INA § 101(a)(43)(B) because it is neither a "drug trafficking crime" under 18 U.S.C. § 924(c) (2006) nor "illicit trafficking in a controlled substance." Matter of Flores-Aguirre, 26 I&N Dec. 155 (BIA 2013) (affirming Matter of Davis, 20 I&N Dec. 536 (BIA 1992)).

(4) Criminal Possession of a Controlled Substance in the Third Degree – NYPL § 220.16(1)

a) Categorical match to the CSA

New York law defines a "narcotic drug" as "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." NYPL § 220.00(7). Moreover, a "controlled substance" consists of "any substance listed in schedule I, II, III, IV or V of section thirty-three

hundred six of the public health law other than marihuana, but including concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of such law." NYPL § 220.00(5). Thus, "narcotic drugs" as defined in NYPL § 220.16(1) are, in fact, "controlled substances," albeit a more limited list found only within four designated sub-schedules of New York's five schedules of controlled substances. See NYPL §§ 220.16(1), 220.00(7); New York Public Health Law (NYPHL) § 3306.

As a whole, the New York and federal schedules of controlled substances do not match because "chorionic gonadotropic" is a controlled substance listed on the New York schedule, but it is not listed on the federal schedule in the CSA. NYPL § 220.00; NYPHL § 3306, Schedule III(g); 21 U.S.C. § 802 (6). Despite this mismatch, however, NYPL § 220.16(1) does not define "narcotic drug" more broadly than 21 U.S.C. § 802. First, "chorionic gonadotropin" is not classified as a "narcotic drug" under New York law because it is listed under Schedule III(g) and not in one of the four designated sub-schedules for "narcotic drugs." See NYPL §§ 220.00 (6), (17); NYPHL § 3306. Second, the four designated sub-schedules that define "narcotic drugs" under New York law only contain substances that categorically match the federally controlled substances that are listed in the CSA.

b) Felony under the CSA

A person commits a felony under the CSA when he, *inter alia*, "knowingly or intentionally . . . possess[es] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). A person violates NYPL § 220.16(1), a class B felony, "when he knowingly and unlawfully possesses . . . a narcotic drug with intent to sell it." The federal definition of "distribute" has been held to be analogous to the New York definition of "sell." Pascual v. Holder, 723 F.3d 156, 159 (2d Cir. 2013).

Under federal law, "distribute" means to "deliver," which is "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8), (11). For purposes of NYPL § 220.16(1), to "sell" means to "sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL § 220.00(1). In Pascual, the Second Circuit held that an "offer to sell" is equivalent to an attempted transfer and therefore that the New York definition of "sell" is a categorical match with the CSA definition of "distribute." 723 F.3d at 159. The CSA similarly criminalizes possession with intent to distribute, and "distribute" under the CSA was held to be analogous to "sell" under New York law by the Pascual Court. Id.

The four designated sub-schedules that define "narcotic drugs" under NYPL §220.00(7) only contain substances that categorically match the federally controlled substances that are listed in the CSA. See also NYPL § 220.16(1). Therefore, a conviction under NYPL §220.16(1) is a felony under the CSA because the New York and federal laws are a categorical match. Additionally, the maximum term of imprisonment authorized by the CSA is more than one year. See Pascual, 723 F.3d 156.

(5) Controlled Dangerous Substance ("CDS") Offenses under New Jersey Law (N.J.S.A § 2C:35-3 through § 2C:35-11)

Although New Jersey does not categorize crimes as "felonies," but rather as crimes of the first, second, third and fourth degrees and as disorderly conduct offenses, New Jersey has for other purposes defined a "felony" as an offense punishable by more than a year in prison. See New Jersey v. Doyle, 42 N.J. 334 (N.J. 1964) (defining "felony" for purposes of determining whether peace officer may make an arrest without a warrant as an offense punishable by more than a year in state prison); N.J. STAT. ANN. § 39:3-10.11 (defining "felony" for purposes of motor vehicle registration and licensing laws as "any offense . . . that is punishable by death or imprisonment for a term exceeding one year). A third degree offense, such as a conviction under N.J.S.A. § 2C:35-5a(1) and (b)(3), is punishable by a "specific term of years which . . . shall be between three and five years." N.J. Stat. Ann. § 2C:43-6(a)(3). Thus, it qualifies as a felony under New Jersey law.

iii. Trafficking in Firearms – INA § 101(a)(43)(C)

The term "aggravated felony" includes "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)." INA § 101(a)(43)(C). The term "trafficking" has been construed to include all firearms offenses that exhibit a "business or merchant nature, *i.e.* trading, selling, or dealing in goods." Kuhali v. Reno, 266 F.3d 93, 107 (2d Cir. 2001). In Kuhali, the respondent was convicted of conspiracy to export firearms and ammunition without a license, in violation of 18 U.S.C. § 371 and 22 U.S.C. § 2778. Kuhali, 266 F.3d at 98. The respondent in that case argued that the term "export" does not always mean business or merchant activity; rather, it could mean mere transportation across international borders. However, the Second Circuit held that a conviction for the unlicensed export of firearms in the context of the Arms Export Control Act (within which 22 U.S.C. § 2778 is found) inherently involves a business or merchant activity and is thus a "trafficking" offense under INA § 101(a)(43)(C). Kuhali, 266 F.3d at 108-09.

iv. Money Laundering – INA § 101(a)(43)(D)

Circumstance Specific Approach from Nijhawan v. Holder applies

The definition of "aggravated felony" includes an offense described in 18 U.S.C. § 1956 (relating to money laundering) or 18 U.S.C. § 1957 (relating to engaging in monetary transactions in property derived from specific unlawful activity), if the amount of money involved exceeds $10,000. INA § 101(a)(43)(D). To determine whether the statute's monetary threshold has been met in a given case, the Court utilizes the "circumstance-specific approach" identified in Nijhawan v. Holder, 557 U.S. 29 (2009). See also Varughese v. Holder, 629 F.3d 272, 274 (2d Cir. 2010). When using the circumstance-specific approach, the Court considers "the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion" in order to determine whether the conviction involved the required amount of loss. Nijhawan, 129 S. Ct. at 40; see also Pierre v. Holder, 588 F.3d 767, 773 (2d Cir. 2009). Under this approach, the Court may examine documents from the respondent's record of conviction as well as the presentence report, which is generally not considered part of the record of conviction. See Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009). In Varughese, the Second Circuit upheld the Immigration Judge's use of the petitioner's statements during his plea colloquy to conclude that the amount of funds involved in the crime exceeded $10,000. 629 F.3d at 274.

An actual loss exceeding $10,000 may not be required for conspiracies and attempts to commit an aggravated felony as defined in INA § 101(a)(43)(D). See Matter of S-I-K-, 24 I&N Dec. 324, 327 n.3 (BIA 2007) (citing Perez v. Elwood, 294 F.3d 552, 557 n.1 (3d Cir. 2002)). But cf. Pierre v. Holder, 588 F.3d 767 (2d Cir. 2009) (finding that an actual loss exceeding $10,000 was required to find an aggravated felony where the respondent was not charged under INA § 101(a)(43)(U), but only under INA § 101(a)(43)(M)).

v. Explosive Materials/Firearms Offenses – INA § 101(a)(43)(E)

The definition of "aggravated felony" includes an offense described in 18 U.S.C. § 842(h) or (i), or 18 U.S.C. § 844(d)-(i) (relating to explosive materials offenses); 18 U.S.C. § 922(g)(1)-(5), (j), (n), (o), (p), or (r), or 18 U.S.C. § 924(b) or (h) (relating to firearms offenses); or § 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses). INA § 101(a)(43)(E).

(1) Attempted Arson – NYPL §§ 110-150.10

Attempted arson in the third degree in violation of NYPL §§ 110.00/150.10 is an aggravated felony under INA § 101(a)(43)(E)(i) and 18 U.S.C. § 844(i), even though NYPL §§ 110.00/150.10 lacks the jurisdictional element included in 18 U.S.C. § 844(i). Torres v. Lynch, – U.S. –, – S. Ct. –, 2016 WL 2903424 (2016) (affirming the holding in Torres v. Holder, 764 F.3d 152 (2d Cir. 2014)); Matter of Bautista, 25 I&N Dec. 616 (BIA 2011).

(2) Criminal Possession of Ammunition – 18 U.S.C. § 922(g)

The offense of unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g) (2006), is an aggravated felony under INA § 101(a)(43)(E)(ii). Matter of Oppedisano, 26 I&N Dec. 202 (BIA 2013) (holding that "Congress intended [the parenthetical in INA § 101(a)(43)(E)(ii)] only to be descriptive of the types of offenses that are referenced in § 922(g), rather than a limitation that excludes ammunition offenses from the aggravated felony definition"), aff'd, Oppedisano v. Holder, 769 F.3d 147 (2d Cir. 2014).

vi. Crime of Violence – INA § 101(a)(43)(F)

The definition of the term "aggravated felony" includes a "crime of violence" (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment is at least one year. INA § 101(a)(43)(F). A term of confinement in a substance abuse treatment facility imposed as a condition of probation constitutes a "term of imprisonment" under INA § 101(a)(48)(B) and 8 U.S.C. § 1101(a)(48)(B), for the purposes of determining if an offense is a crime of violence under INA § 101(a)(43)(F). Matter of Calvillo Garcia, 26 I&N Dec. 697 (BIA 2015). A "crime of violence" is defined as: "(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; Dos Santos v. Gonzales, 440 F.3d 81 (2d Cir. 2006); Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994). Sections 16(a) and (b) both involve the "use" of "physical force against" another's person or property, which requires "a higher degree of intent than negligent or merely accidental conduct." See Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

To determine whether a State statute is a categorical match to 18 U.S.C. § 16(a), the Court must consider whether the "use, attempted use, or threatened use of physical force against the person or property of another" is an element of the State offense. Matter of Francisco-Alonzo, 26 I&N Dec. 594, 596-97 (BIA 2015); see also Matter of Guzman-Polanco, 26 I&N Dec. 713, 717 (BIA 2016) (for a State offense to qualify as a crime of violence under 18 U.S.C. § 16(a), the State statute must require as an element the use, attempted use, or threatened use of violent physical force); Matter of Chairez, 26 I&N Dec. 819 (BIA 2016).[18] In determining whether the elements of conviction for the State statute are narrower than those of the generic offense, the Court should apply the "realistic probability" test. Francisco-Alonzo, 26 I&N Dec. at 597 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

The language of 18 U.S.C. § 16(b) sweeps more broadly than § 16(a) and includes offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. Leocal v. Ashcroft, 543 U.S. 1, 10 (2004). The Second Circuit has concluded that a crime of violence under section 16(b) must present a substantial risk of the *intentional* use of force. Vargas-Sarmiento v. U.S. Dep't of Justice, 448 F.3d 159, 172 (2d Cir. 2006) (citing Jobson v. Ashcroft, 326 F.3d 367, 374 (2d Cir. 2003); see also Morris v. Holder, 676 F.3d 309, 314 (2d Cir 2012) (citing Vargas-Sarmiento, 448 F.3d at 169-170).[19] In determining whether a statute is a crime of violence under 18 U.S.C. § 16(b), the proper inquiry is whether the conduct encompassed by the elements of the State offense present a substantial risk that physical force may be used in the course of committing the offense in the "ordinary case." Matter of Francisco-Alonzo, 26 I&N Dec. 594, 599-600 (BIA 2015) (rejecting Moncrieffe's "least culpable conduct" analysis in the context of determining crimes of violence under § 16(b)).[20] However, the

[18] In Matter of Guzman-Polanco, 26 I&N Dec. 806 (BIA 2016), the Board clarified its prior holding in Matter of Guzman-Polanco, 26 I&N Dec. 713 (BIA 2016) and stated that controlling circuit law should be followed regarding the question of whether conduct such as the use or threatened use of poison to injure another person involved sufficient "force" to constitute a crime of violence. [See United States v. Hill, No. 14-3872-cr, 2016 WL 4120667, at *6-7 (2d Cir. Aug. 3, 2016) for a Second Circuit discussion on whether an indirect application of force, such as poisioning, would categorically constitute a crime of violence for the purpose of 18 U.S.C. § 924(c)(3)(A).]

[19] In Jobson, the Second Circuit stated with regard to §16(b) that "an unintentional accident caused by recklessness cannot properly be said to involve a substantial risk that a defendant will use physical force." 326 F.3d 367, 373-74 (2d Cir. 2003).

[20] This approach appears to be at tension with the Supreme Court's pronouncement that "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute." Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (quoting Moncrieffe v. Holder, 133 S. Ct. 1678, 1685-86 (2013)). The BIA explained its reasoning as follows. In Francisco-Alonzo, the BIA applied the "ordinary case" approach in Matter of Ramon Martinez, 25 I&N Dec. 571, 574 (BIA 2011), and expressly distinguished this approach from the realistic probability approach used for determining crimes of violence under 18 U.S.C. § 16(a). 26 I&N Dec. at 597. The BIA also relied on James v. United States, 550 U.S. 192, 207, which held it is not necessary to determine whether all prosecutions of the State crime must create a risk of injury to others in order to constitute a categorical match with a "violent felony" under 18 U.S.C. § 924(e)(2)(B). Francisco-Alonzo, 26 I&N Dec. at 597-98. Looking to James for guidance, the BIA reasoned that the definitions of "crime of violence" in § 16(b) and of "violent felony" in the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), both contain similar "probalistic" terms. Id. at 599. The BIA further reasoned that because of the similarities in terms, crimes of violence under § 16(b) should be analyzed with the "ordinary case" approach that is used to analyze violent felonies under the residual clause of ACCA. Id. The BIA stated that Moncrieffe has not "cast doubt" on the validity of James. Francisco-Alonzo, 26 I&N Dec. at 599. However, the Supreme Court subsequently overruled James, finding that the residual clause of ACCA,

Supreme Court subsequently overruled James v. United States, upon which the BIA relied in deciding Francisco-Alonzo. See Johnson v. United States, 135 S. Ct. 2251, 2255-58, 2563 (2015) (finding the residual clause "or otherwise involves conduct that presents a serious potential risk of physical injury to another" is unconstitutionally vague).

The term "physical force" in 18 U.S.C. § 16 is defined as "power, violence, or pressure directed against a person or thing." Morris v. Holder, 676 F.3d 309, 314 (2d Cir. 2012) (citing Vargas-Sarmiento v. U.S. Dept. of Justice, 448 F.3d 159, 169 (2d Cir. 2006)). The force referenced in 18 U.S.C. § 16(b) need not be "*violent* force." Morris, 676 F.3d 309, 314-15 (2d Cir. 2012) (citing Vargas-Sarmiento, 448 F.3d at 169 (2d Cir. 2006)). "Physical force" has been broadly interpreted and includes acts such as poisoning food that the defendant intends someone to eat, because the act of poisoning "intentionally avails h[im]self of the physical force exerted by poison on a human body." Vargas-Sarmiento, 448 F.3d at 174. "[W]hen the victim cannot consent . . . because of the disparate ages of the defendant and the victim, or the mental incapacity or physical helplessness of the victim, or the defendant's position of authority over the victim, the crime, *semper et ubique*, includes a substantial risk of physical force." Chery v. Ashcroft, 347 F.3d 404, 408-09 (2d Cir. 2003) (finding that a violation of section 53a-71 of the Connecticut General Statutes is a "crime of violence"); Dos Santos v. Gonzales, 440 F.3d 81, 84 (2d Cir. 2006). When the underlying crime requires that the defendant intend to inflict serious physical injury, there is inherently a substantial risk that the perpetrator may intentionally use physical force to cause the injury because the infliction of a serious physical injury is "likely to meet vigorous resistance from a victim." Morris, 676 F.3d at 315 (quoting Vargas-Sarmiento, 448 F.3d at 173-74).

(1) Arson – NYPL § 150.15

Attempted arson in the second degree, in violation of NYPL §§ 110-150.15, categorically constitutes an aggravated felony under INA § 101(a)(43)(F) and (a)(43)(U), as an attempt to commit "a crime of violence…for which the term of imprisonment [is] at least one year." Santana v. Holder, 714 F.3d 140 (2d Cir. 2013).

(2) Assault – NYPL § 120.05 (2)

A conviction for assault in the second degree, in violation of NYPL § 120.05(2), is a "crime of violence," as defined in 8 U.S.C. § 16(b). Morris v. Holder, 676 F.3d 309 (2d Cir. 2012).

Assault in the third degree, in violation of Connecticut law, which is identical to New York assault in the third degree,[21] does not constitute a "crime of violence" because the statute requires only intent to injure and the causation of injury; it does not require the use of force.[22] Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003). However, assault of a police officer, as defined in

"or otherwise involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague for purposes of sentencing enhancements. Johnson v. United States, 135 S. Ct. 2251, 2255-58, 2563 (2015).

[21] Compare Conn. Gen. State. 53a-61 with NYPL § 120.00.

[22] In Matter of Martin, 23 I&N Dec. 491 (BIA 2002), decided before Chrzanoski, the BIA considered the same statute, concluding that it is a "crime of violence" because it involves the intentional infliction of physical injury. 23 I&N Dec. 491 (BIA 2002).

Connecticut, is a "crime of violence" because it "inherently presents a substantial risk that force may be used." Canada v. Gonzales, 448 F.3d 560, 571 (2d Cir. 2006); cf. Blake v. Gonzales, 481 F.3d 152 (2d Cir. 2007) (finding that a conviction for assault and battery on a police officer under Massachusetts law constitutes a crime of violence).

The Board of Immigration Appeals held that a conviction for the misdemeanor offense of assault and battery against a family or household member, in violation of section 18.2-57.2(A) of the Virginia Code Annotated, is not categorically a crime of violence as defined in 18 U.S.C. § 16(a). Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010).

(3) Child Abuse

The Board of Immigration Appeals held that a conviction for "criminally negligent child abuse," in violation of Colorado law, is not necessarily a crime of violence. Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999). In Sweetser, the Colorado statute at issue was found to be divisible, and the portion under which the respondent was convicted—unreasonably placing a child in a situation which poses a threat to life or health—was found not to involve a "substantial risk" of physical force. 22 I&N Dec. at 715. Therefore, the conviction did not constitute a crime of violence. Sweetser, 22 I&N Dec. at 715. The Board explained that "[n]o force or violence is necessary. Instead, only an act of omission is required for a conviction under this portion of the state criminal statute." Sweetser, 22 I&N Dec. at 715.

(4) Criminal Contempt – NYPL § 215.51(b)(i)

A conviction for criminal contempt in the first degree in violation of NYPL § 215.51(b)(i) constitutes a "crime of violence" as defined in 8 U.S.C. § 16(b). Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999).

(5) Corporal Injury on a Spouse

A misdemeanor conviction for the willful infliction of corporal injury on a spouse, in violation of section 273.5(a) of the California Penal Code, categorically constitutes a "crime of violence" as defined in 18 U.S.C. § 16(a). Matter of Perez Ramirez, 25 I&N Dec. 203 (BIA 2010).

(6) Criminal Possession of a Weapon – NYPL § 265.03(1)(b)

Under the categorical approach, a conviction for criminal possession of a weapon in the second degree under NYPL § 265.03(1)(b) constitutes a "crime of violence" as defined by 18 U.S.C. § 16(b). Brooks v. Holder, 621 F.3d 88, 91 (2d Cir. 2010); see also Henry v. Bureau of ICE, 493 F.3d 303 (3d Cir. 2007), cert. denied, 552 U.S. 1256 (2008). The "possession of a loaded firearm with the intent to use it unlawfully against another person plainly involves a substantial risk that physical force against the person or property of another may be used." Brooks, 621 F.3d at 91 (citing NYPL § 265.03(1)(b) and 18 U.S.C. § 16(b)). This holding only applies to subsection NYPL § 265.03(1), which requires intent to use a firearm against another person. Id.

In United States v. Gamez, 577 F.3d 394 (2d Cir. 2009), the Second Circuit held that a conviction for criminal possession of a weapon in the second degree in violation of NYPL § 265.03

did *not* constitute a "crime of violence" as described in the United States Sentencing Guidelines ("Guidelines") § 2L.2(b)(1)(A)(ii). In reaching this determination, the Second Circuit relied on commentary for § 2L1.2(b)(1) of the Guidelines, which defines "crime of violence" to include language substantially similar to that found at 18 U.S.C. § 16(a). The Court in Brooks distinguished the two cases by noting that the commentary to §2L1.2(b)(1) "tracks only the language of 18 U.S.C. § 16(a)," which deals with "use" of force, and not 18 U.S.C. § 16(b), which deals with "substantial risk" that force will be used. Brooks, 621 F.3d at 90 n.2. Thus, in Gamez, the Second Circuit did not consider whether NYPL § 265.03 would constitute a "crime of violence" as defined by 18 U.S.C. § 16(b).

(7) DUI – NYVTL § 1192.3

The U.S. Supreme Court held that a state conviction for driving under the influence of alcohol ("DUI") and causing serious bodily injury in an accident is not a "crime of violence" and, thus, is not an "aggravated felony," if the offense "do[es] not have a *mens rea* component or require[s] only a showing of negligence in the operation of a vehicle." Leocal v. Ashcroft, 543 U.S. 1, 6, 13 (2004). The Second Circuit held that driving while intoxicated, in violation of section 1192.3 of New York's Vehicle and Traffic Law, is not a crime of violence because commission of the offense does not require the use of physical force. Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001).

(8) False Imprisonment – NYPL § 1350.10

In New York, "[a] person is guilty of unlawful imprisonment in the first degree when he restrains another under circumstances which expose the latter to a risk of serious physical injury." NYPL § 135.10. This statute is not categorically a crime of violence because the definition of "restrain" (found at NYPL § 135.00(1)) encompasses some acts which require the use of force (or a substantial risk that force may be used) and others which do not. Dickson v. Ashcroft 346 F.3d 44, 52 (2d Cir. 2003).

Under the modified categorical approach, a conviction under NYPL § 135.10 is a "crime of violence" when the victim is a competent adult because it necessarily includes the use of force, threatened use of force, or a substantial risk that force will be used. Dickson v. Ashcroft, 346 F.3d 44, 51 (2d Cir. 2003). Unlawful imprisonment of an incompetent person or a child under sixteen years old, however, is not a crime of violence because it does not have as an element the use of force, nor is there a substantial risk that force will be used to commit the offense. Dickson, 346 F.3d at 52.

(9) Manslaughter – NYPL § 125.15 (1) & (2)

Manslaughter in the second degree, in violation of NYPL § 125.15(1) (recklessly causing the death of another person), is not a "crime of violence" because an unintentional accident caused by recklessness cannot involve a substantial risk of intentional use of force. Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003). But see Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994) (stating that specific intent is not required and that even reckless behavior can be a "crime of violence"). Manslaughter in the first degree, in violation of NYPL § 125.20(1) or (2), is a "crime of violence," however, because a conviction under either section requires proof of intent to cause serious injury

or death, and there is a substantial risk that intentional force will be used. Matter of Vargas-Sarmiento, 23 I&N Dec. 651 (BIA 2004), petition for review denied by Vargas-Sarmiento v. U.S. Dep't of Justice, 448 F.3d 159, 162 (2d Cir. 2006). A conviction under NYPL § 125.20(3) (causing death of pregnant woman while performing abortion) does not constitute a crime of violence. Matter of Vargas-Sarmiento, 23 I&N Dec. 651.

(10) Rape

Sexual assault in the second degree, in violation of Connecticut law, is a "crime of violence" because the offense involves a substantial risk that force will be used during its commission. Costa v. Holder, 611 F.3d 110 (2d Cir. 2010); Chery v. Ashcroft, 347 F.3d 404 (2d Cir. 2003). The Board of Immigration Appeals has held that rape in the second degree, in violation of Maryland law (essentially the offense of "statutory rape"), is also a "crime of violence." Matter of B-, 21 I&N Dec. 287, 288-90 (BIA 1996).

(11) Robbery – NYPL § 160.15

Robbery in the first degree, in violation of NYPL § 160.15, constitutes a "crime of violence" because an element of the offense involves the forcible stealing of property, which involves the use of force. United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997). According to the Board of Immigration Appeals, the federal crime of robbery with a deadly weapon is also a crime of violence. Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997). The Second Circuit also held that a conviction under New Jersey state law for robbery in the second degree is an aggravated felony. Moreno-Bravo v. Gonzales, 463 F.3d 253, 264 (2d Cir. 2006).

(12) Sodomy

The charge of sodomy by force, as set forth under article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925, is a crime of violence under 18 U.S.C. § 16 within the definition of an aggravated felony pursuant to INA § 101(a)(43)(F), because an element of the offense requires force. Matter of Chavez-Alvarez, 26 I&N Dec. 274, 278-79 (BIA 2014).

(13) Solicitation

Whether solicitation to commit a crime of violence itself constitutes a crime of violence turns on "the risk of physical force as a consequence of the criminal conduct at issue," or "whether there is a substantial risk that physical force will be used in the course of committing the offense." Matter of Guerrero, 25 I&N Dec. 631, 635 (BIA 2011) (quoting Prakash v. Holder, 579 F.3d 1033, 1036 (9th Cir. 2009)). "Solicitation seeks to induce the commission of a crime, and thus is the original, direct cause of the crime if it is subsequently committed." Guerrero, 25 I&N Dec. at 635 (quoting United States v. Cornelio-Pena, 435 F.3d 1279, 1287-88 (10th Cir. 2006)). Thus, solicitation to commit assault with a dangerous weapon, which itself is a crime of violence, is a crime of violence, where a sentence of one year or longer has been imposed. Id.

(14) Stalking

Stalking, in violation of section 646.9(b) of the California Penal Code (engaging in stalking after a temporary restraining order, injunction, or court order is in effect to prohibit stalking), is a "crime of violence." Matter of Malta-Espinoza, 23 I&N Dec. 656 (BIA 2004), rev'd sub nom. Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th Cir 2007). The Board of Immigration Appeals reasoned that conduct that is serious, continuing, and poses a credible threat to another's safety poses a substantial risk that force will be used. Malta-Espinoza, 23 I&N Dec at 658.

(15) Terrorism

The Board of Immigration Appeals held that terrorism, in violation of Iowa law (shooting or discharging a dangerous weapon at or into an occupied building, vehicle, or assembly of people, or threatening to do so, placing people in fear of serious injury), is a "crime of violence" because it involves a substantial risk that physical force may be used. Matter of S-S-, 21 I&N Dec. 900 (BIA 1997).

(16) Unauthorized Use of a Motor Vehicle

The Board of Immigration Appeals held that the unauthorized use of a motor vehicle, in violation of section 31.07(a) of the Texas Penal Code ("intentionally or knowingly operat[ing] another's boat, airplane, or motor-propelled vehicle without effective consent of the owner"), constitutes a "crime of violence" and is therefore an aggravated felony. Matter of Brieva-Perez, 23 I&N Dec. 766 (BIA 2005).

(17) Interference of aircraft

18 U.S.C. § 32(a)(5) prohibits the interference or disabling of "anyone engaged in the authorized operation of such aircraft or any air navigation facility aiding in the navigation of any such aircraft," "with intent to endanger the safety of any person or with a reckless disregard for the safety of human life." The Board has held that it is not a crime of violence under 18 U.S.C. § 16 (2006). Matter of Tavarez Peralta, 26 I&N Dec. 171 (BIA 2013).

(18) BLANK for future updates

vii. Theft or Burglary – INA § 101(a)(43)(G)

The term "aggravated felony" includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."[23] INA § 101(a)(43)(G). The Board has defined "theft" as the "taking of, or exercise of control over, property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." Matter of Garcia-Madruga, 24 I&N Dec. 436, 440 (BIA 2008) (Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000), clarified). This definition includes the unlawful taking and driving of a vehicle in violation of state law. V-Z-S-, 22 I&N Dec. 1338. This definition also includes the attempted possession of stolen

[23] The phrase "term of imprisonment" in INA § 101(a)(43)(G) includes any applicable recidivist enhancements. Dawkins v. Holder, 762 F.3d 247 (2d Cir. 2014).

property,[24] Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000), and aiding and abetting a theft offense. Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007). An essential element of an aggravated felony receipt of stolen property offense under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G) (2012), is that an offender must receive property with the "knowledge or belief" that it has been stolen, and this element excludes a mens rea equivalent to a "reason to believe." Matter of Deang, 27 I&N Dec. 57, 59 (BIA 2017) (finding that as "a necessary element of both generic theft and receipt of stolen property offenses is an intent to deprive the owner of the rights or benefits of the property taken or received, a receipt of stolen property offense committed with a mens rea of "reason to believe" (or a similar mental state) cannot fall within the generic definition of an aggravated felony receipt of stolen property offense under section 101(a)(43)(G) of the Act"). A "theft offense" under INA § 101(a)(43)(G), which requires the taking of property "without consent," includes extortionate takings, in which consent is coerced by the wrongful use of force, fear, or threats. *Matter of Ibarra*, 26 I&N Dec. 809, 813 (BIA 2016).

viii. Ransom Demand – INA § 101(a)(43)(H)

ix. Child Pornography – INA § 101(a)(43)(I)

The Second Circuit held that a conviction for possession of child pornography under NYPL § 263.11 qualifies as an offense under 8 U.S.C. 1101(a)(43)(I) because, relying on the Supreme Court's decision in Torres v. Lynch, 136 S. Ct. 1619 (2016), violation of a state criminal law may constitute an aggravated felony for purposes of the INA even if the law lacks a federal jurisdictional element. See Weiland v. Lynch, No. 14-3631-AG, 2016 WL 3548350, at *1 (2d Cir. June 29, 2016)

x. RICO or Gambling – INA § 101(a)(43)(J)

xi. Human Trafficking/Slavery – INA § 101(a)(43)(K)

Circumstance Specific Approach from Nijhawan v. Holder applies

The term "aggravated felony" includes an offense described in 18 U.S.C. §§ 2421, 2422, or 2423 "(relating to transportation for the purpose of prostitution) if committed for commercial advantage." INA § 101(a)(43)(K)(ii). Notwithstanding the Second Circuit's decision in Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137 (2d Cir. 2008), the portion of this definition that refers to "commercial advantage" is subject to the circumstance specific approach. Nijhawan v. Holder, 557 U.S. 29 (2009). Under this approach, the Court may examine documents from the

[24] *See also Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009) (reviewing case law regarding "receipt of stolen property" and finding it distinct from a "theft" offense but also included under INA § 101(a)(43)(G)). Generally, receipt of stolen property offenses will categorically qualify as aggravated felonies when the statute requires that the offender received the property with the knowledge that it was stolen or obtained by theft or extortion. *See Matter of Sierra*, 26 I&N Dec. 288, 291 (BIA 2014) (citing *Cardiel*, 25 I&N Dec. 12). However, attempted possession of a stolen vehicle was found to *not* categorically constitute an aggravated felony when the relevant statute required only a mental state of "reason to believe." *Sierra*, 26 I&N Dec. at 292 (noting that "[n]o valid inference may be drawn that the offender intended to deprive the true owner of the rights and benefits of ownership where he was not actually aware of the stolen character of the item received but merely should have been aware of that fact from the circumstances").

respondent's record of conviction as well as the presentence report, which is generally not considered part of the record of conviction, to determine whether the crime was committed for commercial advantage. Id.; see also Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009).

xii. Disclosure of Classified Information – INA § 101(a)(43)(L)

xiii. Fraud or Deceit with Loss over $10,000 – INA § 101(a)(43)(M)

Circumstance Specific Approach from Nijhawan v. Holder applies

The term "aggravated felony" includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." INA § 101(a)(43)(M)(i). The categorical and modified categorical approaches are used to determine whether an offense involves fraud or deceit; however, the portion of this definition that refers to a "loss [that] exceeds $10,000" is subject to the "circumstance-specific approach" articulated in Nijhawan v. Holder, 557 U.S. 29 (2009).

Although the term "fraud" is not defined in the INA, the Board of Immigration Appeals has directed that the term should be used in its "commonly accepted legal sense," meaning "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party," that are "believed and acted upon by the party deceived to his disadvantage." Matter of G-G-, 7 I&N Dec. 161 (BIA 1956); see also Ming Lam Sui v. INS, 250 F.3d 105 (2d Cir. 2001). The Second Circuit has found that an aggravated felony under INA § 101(a)(43)(M) requires "actual loss to the victim or victims in excess of $10,000." Pierre v. Holder, 588 F.3d 767, 773 (2d Cir. 2009) (citing Ming Lam Sui, 250 F.3d at 119). However, an alien convicted of conspiracy in which the substantive crime that was the object of the conspiracy was an offense that involved "fraud or deceit" and where the potential loss to the victim or victims exceeded $10,000 is removable pursuant to INA §§ 101(a)(43)(M)(i) and (U). Matter of S-I-K-, 24 I&N Dec. 324 (BIA 2007) ("[R]equiring proof of *actual* loss . . . exceeding $10,000 from attempts and conspiracies would defeat the very purpose behind section 101(a)(43)(U).").

Because the phrase a "loss [that] exceeds $10,000" is not an element of the offense, it is subject to the "circumstance-specific approach" articulated in Nijhawan v. Holder, 557 U.S. 29 (2009). Under this approach, the Court may examine documents from the respondent's record of conviction as well as the presentence report, which is generally not considered part of the record of conviction, to determine whether the conviction resulted in a loss of $10,000 or more. Id.; Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009).

In all cases, "the loss must be tied to the specific counts covered by the conviction." Nijhawan, 557 U.S. at 42 (internal quotation marks omitted). The "amount cannot be based on acquitted or dismissed counts or general conduct." Nijhawan, 557 U.S. at 42 (citing Alaka v. Attorney General of the United States, 456 F.3d 88, 107 (3d Cir. 2006)). A restitution order may stipulate to a loss only for the purposes of sentencing and restitution; therefore, the loss may not be tethered to specific counts covered by the conviction. See, e.g., Alaka, 456 F.3d at 107; Knutsen v. Gonzalez, 429 F.3d 733, 739-40 (7th Cir. 2005).

Willfully making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1), and aiding and assisting in the preparation of a false tax return in violation of 26 U.S.C. § 7206(2),

are each aggravated felonies under INA § 101(a)(43)(M)(i), as offenses that "involve fraud or deceit," if the loss to the Government exceeds $10,000. Kawashima v. Holder, 132 S.Ct. 1166 (2012). Regardless of whether fraud or deceit was a "formal element" of the statute, the conduct punished by 26 U.S.C. § 7206 "necessarily entail[ed] fraudulent or deceitful conduct." Kawashima, 132 S.Ct.at 1172.

A conviction for embezzlement by a bank employee under 18 U.S.C. § 656 does not categorically involve fraud or deceit. Akinsade v. Holder, 678 F.3d 138 (2d Cir. 2012).

xiv. Alien Smuggling – INA § 101(a)(43)(N)

The term "aggravated felony" includes an offense relating to alien smuggling, unless an alien shows that he or she committed the offense only once and for the purposes of aiding his or her spouse, child, or parent (and no other individual). A conviction for conspiracy to smuggle aliens in violation of 18 U.S.C. § 371 is an aggravated felony within the meaning of INA §§ 101(a)(43)(N) and (U), even if it was not an aggravated felony under the INA at the time of the alien's conviction. Chan v. Gantner, 464 F.3d 289, 293 (2d Cir. 2006).

xv. Illegal Reentry – INA § 101(a)(43)(O)

xvi. Document Fraud – INA §101(a)(43)(P)

xvii. Failure to Appear – INA §101(a)(43)(Q)

An "offense relating to a failure to appear by a defendant for service of sentence" is an aggravated felony under section 101(a)(43)(Q) of the Immigration and Nationality Act, if the underlying offense was "punishable by" imprisonment for a term of five years or more, regardless of the penalty actually ordered or imposed. Matter of Adeniye, 26 I&N Dec. 726 (BIA 2016).

xviii. Counterfeiting /Forgery/Trafficking – INA § 101(a)(43)(R)

The term "aggravated felony" includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles" with identification numbers ("VINs") that have been altered, "for which the term of imprisonment is at least one year." INA § 101(a)(43)(R).

Although the INA provides no definition for "commercial bribery," the Board of Immigration Appeals noted that the crime "focuses on influencing action in the private sector involving the breach of the duty of fidelity," whereas bribery of a public official focuses on the intent to influence official conduct. Matter of Gruenangerl, 25 I&N Dec. 351, 357 (BIA 2010). at 354-55 (quoting 2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 737 n.4 (3d Cir. 2004)). The crime of bribery of a public official under 18 U.S.C. § 201(b)(1)(A) is categorically not an offense related to "commercial bribery" and is therefore not an aggravated felony under INA § 101(a)(43)(R). Gruenangerl, 25 I&N Dec. at 357.

A state statute "relating to" forgery can support a finding of removability even if the underlying offense would not have been considered "forgery" under common law. See Richards v. Ashcroft, 400 F.3d 125 (2d Cir. 2005).

(1) Forgery in the Second Degree – NYPL § 170.10(2)

Forgery in the second degree, in violation of NYPL § 170.10(2), which carries a sentence of imprisonment of at least one year, is an aggravated felony within the meaning of INA § 101(a)(43)(R). Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999).

xix. Obstruction of Justice/Perjury – INA § 101(a)(43)(S)

The term "aggravated felony" includes "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." INA § 101(a)(43)(S). The generic definition of the term "perjury" "requires that an offender make a material false statement knowingly or willfully while under oath or affirmation where an oath is authorized or required by law." Matter of Alvarado, 26 I&N Dec. 895, 901 (BIA 2016). A conviction for the offense of accessory after the fact, in violation of 18 U.S.C. § 3, constitutes an "aggravated felony" as a crime relating to the "obstruction of justice" under INA § 101(a)(43)(S). Matter of Batista-Hernandez, 21 I&N Dec. 955 (1997). However, a conviction for misprision of a felony, in violation of 18 U.S.C. § 4, is not an "aggravated felony" under INA § 101(a)(43)(S). Matter of Espinoza-Gonzalez, 22 I&N Dec. 889 (BIA 1999).

In Higgins v. Holder, the Second Circuit held that a conviction for witness tampering, in violation of Connecticut General Statutes § 53a-151, is an "offense relating to obstruction of justice" under the aggravated felony definition in INA § 101(a)(43)(S). Higgins v. Holder, 677 F.3d 97 (2d Cir. 2012). The Second Circuit declined to decide whether it should give Chevron deference to the Board of Immigration Appeals' definition of an obstruction of justice offense in Matter of Espinoza-Gonzales, 22 I&N Dec. 889 (BIA 1999) (en banc).

xx. Failure to Appear to Answer a Felony Charge – INA § 101(A)(43)(T)

Failure to appear before a court "pursuant to a court order to answer or dispose of a charge or felony for which a sentence of 2 years' imprisonment or more may be imposed" is an aggravated felony. INA § 101(a)(43)(T). The categorical approach applies when determining whether an offense relates to the individual's failure to appear before a court, but the circumstance specific approach applies to determine whether the failure to appear was "(1) pursuant to a court order (2) to answer to or dispose of a charge of a felony (3) for which a sentence of two years' imprisonment or more may be imposed." *Matter of Garza-Olivares*, 26 I&N Dec. 637 (BIA 2016); *see also Nijhawan v. Holder*, 557 U.S. 29 (2009).

xxi. Attempt/Conspiracy – INA § 101(a)(43)(U)

An attempt or conspiracy to commit any offense described in INA § 101(a)(43) constitutes an "aggravated felony." INA § 101(a)(43)(U). To qualify as a "conspiracy" under INA § 101(a)(43)(U), "the commission of an overt act in furtherance of the conspiracy by one of the conspirators" is *not* required. Matter of Richardson, 25 I&N Dec. 226, 230 (BIA 2010). An alien found removable under INA § 101(a)(43)(U) based on his or her conviction of a conspiracy to commit an aggravated felony may *not* also be found removable based on his or her commission of the offense underlying the conspiracy. Richardson, 25 I&N Dec. 226. "[S]ubsection U does not

use the word 'attempt' to mean conviction of an offense formally denominated as an attempt, but instead means conduct that satisfies a generally accepted definition of an attempted offense." Pierre v. Holder, 588 F.3d 767, 775 (2d Cir. 2009) (citing Ming Lam Sui, 250 F.3d 113, 115-16 (2d Cir. 2001). Although an attempted aggravated felony under subsection U can be charged alongside its completed aggravated felony counterpart, a charge solely under another subsection of INA § 101(a)(43) does not necessarily include an attempt or conspiracy to commit an offense under subsection U. Pierre, 588 F.3d at 775.

Attempted arson in the second degree, in violation of NYPL §§ 110-150.15, categorically constitutes an aggravated felony under INA §§ 101(a)(43)(F) and (a)(43)(U), as an attempt to commit "a crime of violence…for which the term of imprisonment [is] at least one year." Santana v. Holder, 714 F.3d 140 (2d Cir. 2013).

g. INA § 237(a)(2)(B)(i) – Controlled Substance Offense

Circumstance Specific Approach from Nijhawan v. Holder may apply

"Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable." INA § 237(a)(2)(B)(i). To establish removability, "the Government must connect an element of the alien's conviction to a drug defined in [21 U.S.C.] § 802." Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (finding that a paraphernalia conviction for possession of a sock in which the alien had placed four unidentified orange tablets does not trigger removability because it does not connect to an element of the alien's conviction to a drug defined in § 802).

The phrase "any law or regulation of a State" encompasses laws promulgated by a state through its political subdivisions and thus includes municipal ordinances. Matter of Cuellar-Gomez, 25 I&N Dec. 859, 856 (BIA 2012). A conviction for criminal solicitation to commit an offense relating to a controlled substance renders an alien removable for violating a law relating to a controlled substance, even though "solicitation" is not among the inchoate offenses explicitly listed in INA § 237(a)(2)(B)(i). Mizrahi v. Gonzales, 492 F.3d 156, 163-65 (2d Cir. 2007); Matter of Zorilla-Vidal, 24 I&N Dec. 768, 768-69 (BIA 2009).

The phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana" calls for a circumstance-specific approach, not a categorical inquiry into the elements of a single statutory crime. Matter of Dominguez-Rodriguez, 26 I&N Dec. 408 (BIA 2014) (citing Matter of Davey, 26 I&N Dec. 37, 39 (BIA 2012)).[25] The Department of Homeland Security bears the burden of establishing that the offense did not involve "possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i); Dominguez-Rodriguez, 26

[25] The BIA has concluded that Moncrieffe does not cast doubt on the validity of Davey. Dominguez-Rodriguez, 26 I&N Dec. at 410. However, if the record of conviction conclusively establishes that the "possession for personal use exception" applies, "the removal charge must be dismissed without resort to a circumstance-specific inquiry." Id. at 413.

I&N Dec. at 413; see Davey, 26 I&N Dec. at 41; Matter of Moncada-Servellon, 24 I&N Dec. 62 (BIA 2007).

The phrase "single offense" refers to "the totality of an alien's specific acts on a single occasion," as opposed to "a single generic crime." Davey, 26 I&N Dec. at 38-39 (holding that an alien who was convicted of simultaneously possessing marijuana and possessing drug paraphernalia in the form of the plastic baggie in which she carried the marijuana qualified for the "single offense" exception even though she was convicted of multiple statutory offenses). "A crime 'involves' possession of thirty grams or less of marijuana for personal use if the particular acts that led to the alien's conviction were closely related to such conduct." Davey, 26 I&N Dec. at 40-41. Thus, the possession of drug paraphernalia is an offense "involving possession for one's own use of thirty grams or less of marijuana" if the paraphernalia in question is "merely an adjunct to the offender's simple possession or ingestion of thirty grams or less of marijuana," but not if the paraphernalia "was associated with the manufacture, smuggling, or distribution of marijuana or with the possession of a drug other than marijuana." Davey, 26 I&N Dec. at 40-41.

"A single offense involving possession for one's own use of thirty grams or less of marijuana" does not include an offense with an aggravating element exceeding simple possession, such as an element requiring that the possession take place in a prison or correctional facility. Matter of Moncada-Servellon, 24 I&N Dec. 62, 67 (BIA 2007).

h. INA § 237(a)(2)(C) – Firearm Offense

"Any alien who at any time after admission is convicted under any law of purchasing selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part or accessory which is a firearm or destructive device [as defined in 18 U.S.C. 921(a)] in violation of any law is deportable." INA § 237(a)(2)(C). This ground of removability is "'exceedingly broad' and 'evinces an expansive purpose—to render deportable those aliens that commit firearms offenses of any type.'" Kuhali v. Reno, 266 F.3d 93, 103 (2d Cir. 2001) (quoting Hall v. INS, 167 F.3d 852, 855–56 (4th Cir.1999)); see also Matter of Flores-Abarca, 26 I&N Dec. 922 (BIA 2017) (holding that section 237(a)(2)(C) is broadly construed to encompass all types of firearms offenses). As such, it encompasses "'possessing' and 'carrying' firearms not simply as crimes in their own right, but also as elements of other crimes." Kuhali v. Reno, 266 F.3d 93, 103 (2d Cir. 2001).

i. INA § 237(a)(2)(E) – Domestic Violence, Stalking, Protection Order Violation and Child Abuse

"Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable." INA § 237(a)(3)(E).

(1) Domestic violence

An alien who at any time after admission is convicted of a crime of domestic violence is removable. INA § 237(a)(3)(E). For purposes of this ground of removability, a crime of domestic violence is

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

INA § 237(a)(3)(E).

Whether a conviction is domestic in nature is determined through a circumstance-specific, rather than categorical, analysis. Matter of H. Estrada, 26 I&N Dec. 749, 753 (BIA 2016).[26] In order to determine whether a domestic relationship exists, "all reliable evidence may be considered, including documents that comprise the formal 'record of conviction.'" Id.

(2) Stalking

The generic definition of stalking has at least three elements: "(1) conduct that was engaged in on more than a single occasion, (2) which was directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death." Matter of Sanchez-Lopez, 26 I&N Dec. 71, 74 (BIA 2012). The Board of Immigration Appeals has not determined whether "stalking" also requires

> "a showing that the individual was, in fact, placed in fear of bodily injury or death; whether it is sufficient to show *only* that a reasonable person in the circumstances would have been placed in such fear; or whether it is necessary to prove that *both* the targeted individual *and* a reasonable person in the circumstances did or would experience such fear."

Sanchez-Lopez, 26 I&N Dec. at 74.

(3) Child Abuse

"[T]he term 'crime of child abuse' is interpreted broadly." Specifically, the BIA has defined it, in part, as:

[26] It should be noted that Estrada was decided under Eleventh Circuit law, which considers *simple battery* sufficient to establish a crime of domestic violence where there is a domestic relationship. This is not necessarily the case in the Second Circuit. The BIA has held that battery by offensive touching does not involve violent force and, as such, is neither a crime of violence nor a crime of domestic violence. See Matter of Velasquez, 25 I&N Dec. 278, 283 (BIA 2010).

> any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct…

Matter of Velazquez-Herrera, 24 I&N Dec. 503, 512 (BIA 2008); see also Matter of Soram, 25 I&N Dec. 378, 381 (BIA 2010). The BIA further held that the phrase, "an act or omission that constitutes maltreatment of a child," as used in Velazquez-Herrera, is sufficiently broad to encompass endangerment-type crimes where no actual injury occurs. Soram, 25 I&N Dec. 383-84.

Neither the Second Circuit nor the BIA has specified exactly what constitutes a sufficiently high risk of harm to a child for purposes of INA § 237(a)(2)(E)(i). However, the BIA has held that the concept of child abuse under INA § 237(a)(2)(E)(i) should be interpreted broadly, and the Second Circuit has given deference to the BIA's "sweeping" interpretation. See Florez v. Holder, 779 F.3d 207 (2d Cir. 2015) (citing Velazquez-Herrera, 24 I&N Dec. at 509). Furthermore, the definition of child abuse is not limited to offenses that require proof of harm or injury to the child. Florez v. Holder, 779 F.3d 207, 212 (2d Cir. 2015) (citing Soram, 25 I&N Dec. at 381); Matter of Mendoza Orsorio, 26 I&N Dec. 703, 710 (BIA 2016). The BIA has also acknowledged that "there are child endangerment statutes that do not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment under the Act." Mendoza Orsario, 26 I&N Dec. at 711 (pointing to a California statute criminalizing conduct that *may* endanger a child's health or person). However, the BIA has found that NYPL § 260.10(1)'s requirement of knowing that one's actions are *likely* to result in physical mental, or moral harm to a child rises to the level of child abuse pursuant to INA § 237(a)(2)(E)(i). Id. at 706, 711.

(4) Endangering the Welfare of a Child – NYPL § 260.10

NYPL § 260.10(1), which addresses endangering the welfare of a child, is categorically a crime of child abuse under INA § 237(a)(2)(E)(i).[27] Matter of Mendoza Osorio, 26 I&N Dec. 703 (BIA 2016). The clauses set forth two separate forms of conduct, each of which could sustain a conviction for endangering the welfare of a child: by knowingly "act[ing] in a manner likely to be injurious to the physical, mental or moral welfare of a child . . ." or by knowingly "direct[ing] or authoriz[ing] such child to engage in an occupation involving a substantial risk of danger to his life or health." NYPL § 260.10(1). The BIA held that both clauses categorically constitute child abuse. Mendoza Osorio, 26 I&N Dec. 703.

[27] The BIA has not analyzed whether NYPL § 260.10(2) is categorically a crime of child abuse under INA § 237(a)(2)(E)(i). Therefore, where a respondent's record of conviction indicates a conviction pursuant to § 260.10, but does not refer to a subsection, the IJ must analyze whether NYPL § 260.10 as a whole is categorically a crime of child abuse.

j. INA § 237(a)(3)(D) – Falsely Claiming Citizenship

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under the INA (including INA § 274A, which relates to alien employment) or any Federal or State law is deportable. INA § 237(a)(3)(D)(i); see Crocock v. Holder, 670 F.3d 400 (2d Cir. 2012)(holding that the Respondent failed to demonrtate that he was not inadmissible for falsely represented himself to be a United Sattes citizen and thus he was ineiglible for adjustment of status). There is a limited exception for children of United States citizens who reasonably believed that they were citizens when they represented themselves as such. See INA § 237(a)(3)(D)(ii). The phrasing of this ground of deportability is identical to the language used in the ground of inadmissibility at INA § 212(a)(6)(C)(ii). For more information, see supra at § B.1.k.

k. INA § 237(a)(4) – Security Grounds

An alien convicted of violating 18 U.S.C. § 32(a)(5) by interfering with a police helicopter pilot by shining a laser light into the pilot's eyes while he operated the helicopter, is removable under INA § 237(a)(4)(A)(ii) as an alien who has engaged in criminal activity that endangers public safety. Matter of Tavarez- Peralta, 26 I&N Dec. 171, 174-76 (BIA 2013). However, a violation of 18 U.S.C. § 32(a)(5) is not a crime of violence under 18 U.S.C. § 16 and therefore not an aggravated felony. Tavarez-Peralta, 26 I&N Dec. at 177.

l. INA § 237(a)(4)(B) – Terrorist Activities

Any alien who is described in subparagraph (B) (terrorist activities) or (F) (association with terrorist organizations) of INA § 212(a)(3) is deportable. INA § 237(a)(4)(B). For more information about INA § 212(a)(3), see supra at § B.1.e. *See also* Court's boilerplate on Legal Standards for Mandatory Terrorism Bar and Legal Standards for Tier III Determinations in the Tier III Terrosits Organization subfolder of the boilerplate folder.