

APPENDIX E

Accessory or Preparatory Offenses and Their Immigration Effect

| Offense | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? | Controlled Substance Offense (CSO) or Firearm Offense (FO)? |
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| FEDERAL | | | |
| <p>Aiding and Abetting</p> <p>18 U.S.C. 2</p> | <p>Would probably be deemed an AF if the underlying offense is an AF.</p> <p>BUT CONSIDER: <i>U.S. v. Corona-Sanchez</i>, 291 F.3d 1201 (9th Cir. 2002). Conviction under California theft statute does not automatically qualify as a “theft” offense AF because statute covers conduct, such as aiding and abetting theft, outside the generic definition of theft.</p> | <p>Would be deemed a CIMT if the underlying offense is a CIMT.</p> <p>Case Law/Notes: <i>Matter of Short</i>, 20 I. & N. Dec. 136 (BIA 1989). If the underlying crime involves moral turpitude, then an 18 U.S.C. 2 conviction for aiding in the commission of the crime involves moral turpitude. See also <i>Matter of F</i>, 6 I. & N. Dec. 783 (BIA 1955)(Massachusetts offense of “accessory before the fact” found to be a CIMT when the substantive offense was a CIMT).</p> | <p>Would probably be deemed a CSO or FO if the underlying offense is a CSO or FO.</p> <p>Case Law/Notes: <i>United States v. Gonzalez</i>, 582 F. 2d 1162 (7th Cir. 1978). The Seventh Circuit found that aiding and abetting does not define separate crime but codifies a principle of who may be liable for the substantive offense and therefore that a non-citizen convicted of the unlawful distribution of heroin under 18 U.S.C. 2 had been convicted of a CSO.</p> <p><i>Londono-Gomez v. I.N.S.</i>, 699 F. 2d 475 (9th Cir. 1983). The Ninth Circuit reasoned that aiding and abetting does not define a separate offense. A conviction for aiding and abetting must be accompanied by a conviction for the substantive offense and one is subject to same penalties for both.</p> |

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| <p>Accessory after the fact</p> <p>18 U.S.C. 3</p> | <p>If term of imprisonment of at least one year is imposed, would probably be deemed an “obstruction of justice” AF.</p> <p>Case Law/Notes: <i>Matter of Batista-Hernandez</i>, 21 I&N Dec. 955 (BIA 1997); <i>see also Matter of Espinoza-Gonzalez</i>, 22 I&N Dec. 889 (BIA 1999). The BIA found that an 18 U.S.C. 3 conviction as an accessory after the fact was an “obstruction of justice” AF.</p> <p>BUT CONSIDER: In the above cases, the BIA did not have briefing on whether accessory after the fact constituted “obstruction of justice” for purposes of the AF definition. One might still be able to argue that such an offense should not be so considered unless the evidence demonstrates that the conviction is one that relates to one of the federal “obstruction of justice” offenses described in 18 U.S.C. 1501, et seq.</p> | <p>Would probably be deemed a CIMT if the underlying offense is a CIMT.</p> <p>Case Law/Notes: <i>Matter of Sanchez-Marin</i>, 11 I. & N. Dec. 264 (BIA 1965). Non-citizen convicted under Massachusetts law as an accessory after the fact to manslaughter had been convicted of a CIMT where the principal was found guilty of a CIMT and where respondent’s indictment linked him to the crime committed by the principals.</p> <p><i>Cabral v. I.N.S.</i>, 15 F.3d 193 (1st Cir. 1993). The First Circuit found that the BIA had reasonably determined that a respondent who pled guilty as an accessory after the fact to murder under Massachusetts law had been convicted of a CIMT.</p> | <p>Would probably not be deemed a CSO or FO.</p> <p>Case Law/Notes: <i>In re Juan Batista-Hernandez</i>, Interim Dec. #3321 (BIA 1997). The BIA found that a non-citizen convicted as an 18 U.S.C. 3 accessory after the fact to a drug offense was not convicted of a CSO. The BIA rejected the INS’s attempt to analogize the situation to one in which a noncitizen convicted of aiding a crime involving moral turpitude was found to have been convicted of a CIMT. The BIA found that while inchoate crimes always presuppose a purpose to commit another substantive offense, the offense of being an accessory after the fact is not an inchoate offense.</p> <p>BUT CONSIDER: Conviction of an offense such as accessory after the fact to a drug offense might support an INA 212(a)(2)(C) <i>inadmissibility</i> charge that the DHS (formerly INS) “knows or has reason to believe” that the individual is or has been an “illicit trafficker” in a controlled substance. <i>See Sneddon v. I.N.S.</i>, 107 F. 3d 17 (9th Cir. 1997) (unpublished disposition). The Ninth Circuit found that a California conviction as an accessory after the fact to a charge of drug possession with intent to sell was not a “drug trafficking” offense, but nonetheless found that the INS (now DHS) could exclude a noncitizen with such a conviction as a person whom the INS “knows or has reason to believe” is or has been an “illicit trafficker” in a controlled substance. It further held that the Board could look at the original charge, rather than the conviction, to determine whether a noncitizen was excludable as an “illicit trafficker.”</p> |

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| <p>Misprision of felony (concealing knowledge of commission of felony)</p> <p>18 U.S.C. 4</p> | <p>No.</p> <p><i>Case Law/Notes:</i> <i>Matter of Espinoza-Gonzalez</i>, 22 I&N Dec. 889 (BIA 1999).</p> | <p>Might be deemed a CIMT.</p> <p><i>Case Law/Notes:</i> <i>Matter of Sloan</i>, 12 I. & N. Dec. 840 (BIA 1966, AG 1968). The Attorney General held that an analogous 18 U.S.C. 1071 conviction for harboring and concealing a person knowing that there is an outstanding warrant for the arrest of such person is a CIMT.</p> <p>BUT CONSIDER: <i>In Matter of Sloan</i>, the AG did not reach the issue of whether the 18 U.S.C. 4 misprision of felony conviction in the case was a CIMT. Note that, unlike 18 U.S.C. 1071, 18 U.S.C. 4 does not require knowledge of an outstanding arrest warrant. In addition, the BIA has held that the common law crime of misprision of felony is not a CIMT. <i>See Matter of S-C-</i>, 3 I&N 350 (BIA 1949). Nevertheless, in at least one unpublished non-precedent decision, the BIA has held that federal misprision under 18 U.S.C. 4 is a CIMT. <i>See In re Giraldo- Valencia</i>, A36 520 954 (unpublished BIA Index Dec., October 22, 1992).</p> | <p>Would probably not be deemed a CSO or FO.</p> <p><i>Case Law/Notes:</i> <i>Castaneda De Esper v. I.N.S.</i>, 557 F. 2d 79 (6th Cir 1977). Misprision of felony does not establish an alien's deportability as an alien convicted of a CSO. Historically, the offense was separate and distinct from the felony concealed. The offense is also distinct from accessory after the fact and conspiracy and the language of statute does not indicate that it was contemplated to be a "narcotic law."</p> <p><i>Matter of Velasco</i>, 16 I & N Dec 281 (BIA 1977). The BIA followed the Sixth Circuit's ruling in <i>Castaneda De Esper</i> that misprision of felony does not constitute a CSO. <i>See also In re Juan Batista-Hernandez</i>, Interim Dec. #3321 (BIA 1997) (confirming that the BIA continues to follow the Sixth Circuit's rationale with respect to misprision of felony).</p> |

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| NEW YORK STATE | | | |
| <p>Criminal solicitation</p> <p>NYPL 100.00-100.13</p> | <p>Might be deemed an AF if the underlying offense is an AF.</p> <p>Case Law/Notes: See discussion in following column on whether solicitation may be deemed a CSO.</p> <p>ALSO CONSIDER: <i>Leyva-Licea v. INS</i>, 187 F.3d 1147 (9th Cir. 1999). Arizona conviction for solicitation to possess marijuana for sale is not “drug trafficking” AF as it is not listed among the drug trafficking crimes covered in the federal Controlled Substances Act.</p> | <p>Would probably be deemed a CIMT if the underlying offense is a CIMT.</p> <p>Case Law/Notes: The New York offense of criminal solicitation is analogous to the Massachusetts offense of “accessory before the fact” which was found to be a CIMT when the substantive offense was a CIMT in <i>Matter of F</i>, 6 I & N Dec.783 (BIA 1955).</p> <p>See also discussion above of whether federal offense of “Aiding and abetting” is a CIMT.</p> | <p>Might be deemed a CSO or FO if the underlying offense is a CSO or FO.</p> <p>Case Law/Notes: <i>Matter of Beltran</i>, 20 I. & N. Dec. 521 (BIA 1992). The BIA found that a non-citizen convicted in Arizona of solicitation to possess narcotics was convicted of a CSO. The individual was convicted under a statute which provided that a person is guilty of the offense if he “ ‘commands, encourages, requests or solicits’ another person to engage in criminal activity with the intent to promote or facilitate the commission of the crime.” Under Arizona law solicitation is classified as a preparatory offense (inchoate crime) and the BIA found that the crime is more closely related to attempt, conspiracy and aiding and abetting than it is to misprision of a felony. The BIA noted that under federal law, one who commands, encourages or requests a crime is deemed to be an accomplice and guilty of the substantive offense. The BIA also based its decision of the similarity of the penalties in Arizona for solicitation and for the underlying offense.</p> <p>BUT CONSIDER: <i>Coronado-Durazo v. I.N.S.</i>, 123 F.3d 1322 (9th Cir. 1997). A conviction of solicitation to sell narcotics in Arizona was not a CSO where the solicitation statute specifies a general offense not limited to controlled substance violations.</p> <p>ALSO CONSIDER: <i>United States v. Liranzo</i>, 944 F.2d 73 (2nd Cir. 1991). A New York conviction of criminal solicitation of a narcotics offense was not a “controlled substance offense” for purposes of sentencing as a career offender. The career offender statute defines “controlled substance offense” as “an offense under federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance . . . or the possession of a controlled substance with the intent to manufacture, import, export, or distribute.” U.S.S.G. 4B1.2(2).</p> <p><i>United States v. Dolt</i>, 27 F. 3d 235 (6th Cir. 1994). The Sixth Circuit held that a Florida conviction for solicitation to traffic in cocaine was not a “controlled substance offense” for career offender purposes. The solicitation statute at issue did not require completion or commission of an offense or overt act to complete the crime. The court distinguished solicitation from attempt and also did not accept the government’s contention that solicitation was similar to aiding and abetting (which was specifically mentioned in offender statute).</p> |

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| <p>Conspiracy</p> <p>NYPL 105.00-105.17</p> | <p>A conspiracy to commit an AF would also be deemed an AF.</p> <p>Case Law/Notes: See INA 101(a)(43) (AF definition).</p> | <p>A conspiracy to commit a CIMT would probably be deemed a CIMT.</p> <p>Case Law/Notes: See INA 212(a)(2)(A)(i)(I) (CIMT inadmissibility ground). Note that when Congress added express language including “conspiracy” to the CIMT inadmissibility ground it did not do so with respect to the CIMT deportability ground. However, prior case law found or assumed that conspiracy to commit a CIMT was a CIMT. See <i>Jordan v. DeGeorge</i>, 341 U.S. 223 (1951); <i>Matter of Bader</i>, 17 I&N Dec. 525 (BIA 1990).</p> | <p>Conviction would be deemed a CSO or FO if the underlying offense is a CSO or FO.</p> <p>Case Law/Notes: See INA 237(a)(2)(B) and (C) (deportability grounds for CSO and FO) and 212(a)(2)(A)(i)(II) (inadmissibility ground for CSO). For case law prior to express addition of “conspiracy” to the language of these CSO and FO provisions, see <i>Matter of N-</i>, 6 I&N Dec. 557 (BIA, A.G. 1955).</p> |

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| <p>Attempt NYPL 110.00</p> | <p>An attempt to commit an AF would also be deemed an AF.</p> <p>Case Law/Notes: See INA 101(a)(43) (AF definition).</p> | <p>An attempt to commit a CIMT would probably be deemed a CIMT if the underlying offense is a CIMT.</p> <p>Case Law/Notes: See INA 212(a)(2)(A)(i)(I) (CIMT inadmissibility ground). Note that when Congress added express language including “attempt” to the CIMT inadmissibility ground it did not do so with respect to the CIMT deportability ground. However, prior case law found or assumed that an attempt to commit a CIMT was a CIMT. See <i>U.S. ex. rel. Meyer v. Day</i>, 54 F. 2d 336 (2d Cir. 1931); <i>Matter of Katsanis</i>, 14 I&N Dec. 266 (BIA 1973).</p> | <p>Conviction would be deemed a CSO or FO if the underlying offense is a CSO or FO.</p> <p>Case Law/Notes: See INA 237(a)(2)(B) and (C) (deportability grounds for CSO and FO) and 212(a)(2)(A)(i)(II) (inadmissibility ground for CSO). For case law prior to express addition of “conspiracy” to the language of these CSO and FO provisions, see <i>Matter of Bronsztejn</i>, 15 I. & N. Dec. 281 (BIA 1974) (conviction for attempted possession of marijuana was sufficiently related to the substantive offense of criminal possession of marijuana to make it a conviction for a crime “relating to narcotic drugs or marijuana”); <i>Matter of G.</i>, 6 I & N Dec. 353 (BIA 1954) (conviction for attempt to possess a narcotic drug with intent to sell is a CSO).</p> |

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| <p>Criminal facilitation</p> <p>NYPL 115.00-115.08</p> | <p>Might be deemed an AF if the underlying offense is an AF.</p> <p>Case Law/Notes: See discussion above on whether analogous offense of “solicitation” is an AF where the underlying offense is an AF.</p> | <p>Would probably be deemed a CIMT if the underlying offense is a CIMT.</p> <p>Case Law/Notes: The New York offense of criminal facilitation is analogous to the Massachusetts offense of “accessory before the fact” which was found to be a CIMT when the substantive offense was a CIMT in <i>Matter of F</i>, 6 I & N Dec.783 (BIA 1955).</p> <p>See also discussion above of whether federal offense of “Aiding and abetting” is a CIMT.</p> | <p>Conviction might be deemed a CSO or FO if the underlying offense is a CSO or FO.</p> <p>Case Law/Notes: <i>Matter of Del Risco</i>, 20 I. & N. Dec. 109 (BIA 1989). A conviction for facilitating the sale of cocaine is a conviction of a CSO. The BIA found that a conviction for facilitation under an Arizona statute providing that the person act, “with knowledge that another person is committing or intends to commit an offense, such person knowingly provides such other person with means or opportunity for the commission of the offense which in fact aids such person to commit the offense,” was similar in nature to the federal offense of “aiding and abetting” which the Ninth Circuit found was a CSO in <i>Londono-Gomez v. INS</i>, 699 F. 2d 475 (9th Cir. 1983).</p> <p>BUT CONSIDER: There is some case law support for arguing that the analogous offense of solicitation may not be sufficient to establish CSO (see discussion above of whether state offense of “Solicitation” may be a CSO).</p> |

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| <p>Hindering Prosecution</p> <p>NYPL 205.55-205.65</p> | <p>If term of imprisonment of at least one year is imposed, would probably be deemed an “obstruction of justice” AF if the record of conviction establishes a specific purpose of hindering the process of justice; may not do so if the record of conviction establishes only intent to assist a person in profiting or benefiting from the commission of a crime (see NYPL 205.50(6)).</p> <p><i>Case Law/Notes:</i> See <i>Matter of Espinoza-Gonzalez</i>, 22 I&N Dec. 889 (BIA 1999); see also <i>U.S. v. Vigil-Medina</i>, 2002 U.S. App. LEXIS 4961 (4th Cir. 2002) (unpub’d opinion) (conviction for New York hindering prosecution in the 1st degree is an “obstruction of justice” AF when conviction was based on the transport of individuals defendant knew were pursued by police and when defendant admitted in plea agreement to acting with the intent to prevent, hinder, or delay their discovery).</p> <p>BUT CONSIDER: Even if the record of conviction establishes a specific purpose of hindering the process of justice, one might still be able to argue that an offense such as New York Hindering Prosecution should not be considered “obstruction of justice” unless the evidence demonstrates that the conviction is one that relates to one of the federal “obstruction of justice” offenses described in 18 U.S.C. 1501, et seq.</p> | <p>Might be deemed a CIMT.</p> <p><i>Case Law/Notes:</i> <i>Matter of Sloan</i>, 12 I. & N. Dec. 840 (BIA 1966, AG 1968). The 18 U.S.C. 1071 offense of knowingly harboring and concealing a person for whom there is an outstanding arrest warrant is a CIMT.</p> <p>BUT CONSIDER: Unlike 18 U.S.C. 1071, New York Hindering Prosecution does not necessarily require knowledge of an outstanding arrest warrant.</p> | <p>Would probably not be deemed a CSO or FO.</p> <p><i>Case Law/Notes:</i> See discussion above of whether federal offense of “Accessory after the fact” is a CSO.</p> |