

Common Criminal Grounds of Removal:

These grounds are enumerated in Immigration & Nationality Act (INA) § 212(a)(2), 8 USC § 1182(a)(2) (inadmissibility) and INA § 237(a)(2), 8 USC § 1227(a)(2) (deportability):

Crimes Involving Moral Turpitude (“CIMTs”): “Moral turpitude” is a somewhat nebulous concept. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), discusses the scope of the CIMT concept in detail. In general, a crime involves moral turpitude if it has as an element fraud or other dishonest intent, such as the intent to permanently deprive a rightful owner of her property. Other offenses are CIMTs because they violate clearly established social norms, for example, child molestation or assault with a deadly weapon. An important thing to remember is that even a minor offense with no jail time imposed can be a CIMT. See *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992). Thus, theft of a fifty-cent candy bar is still a CIMT because it involves intent to permanently deprive the owner of her property.

Under INA § 212(a)(2)(A)(i)(I), any person who has been convicted of a CIMT, or who admits committing acts which constitute the essential elements of a CIMT, is inadmissible to the United States. However, if a respondent has only one criminal offense, an exception commonly called the “petty offense exception” may be available. See INA § 212(a)(2)(A)(ii)(II). This applies if the maximum sentence imposed for the offense was one year, and the respondent received a sentence of six months or less. This provision generally does not cover felonies, since the maximum sentence for most felonies is more than one year. However, respondents with misdemeanor convictions for “wobbler” offenses (those chargeable as either a misdemeanor or a felony) may be able to use the petty offense exemption if they can get their offense classified as a misdemeanor. See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003) (applying the petty offense exception of INA § 212(a)(2)(A)(ii)(II) based on the criminal court’s declaration of the offense to be a misdemeanor under § 17(b)(3)). There is also an exception for a single offense committed while a juvenile if any jail term was completed more than five years ago. See INA § 212(a)(2)(A)(ii)(I).

Under INA § 237(a)(2)(A)(i), any person who, within five years of the date of admission to the United States, commits a CIMT for which a sentence of one year or more may be imposed is deportable. Note that this may include misdemeanors that can be punished by a one year sentence.

Under INA § 237(a)(2)(A)(ii), any person who at any time after admission to the United States is convicted of two or more CIMTs not arising from the same scheme of criminal misconduct is deportable, regardless of the sentence imposed.

Drug Offenses: There are numerous provisions of the INA which render people inadmissible or deportable for a violation of any law relating to a controlled substance. See INA § 212(a)(2)(A)(i)(II); § 212(a)(2)(C); § 237(a)(2)(B)(i); and § 237(a)(2)(A)(iii)/101(a)(43)(B). It is important to note that the offense must involve one of the federally-regulated controlled substances listed in 21 U.S.C. § 802.

Domestic Violence Offenses: INA § 237(a)(2)(E) renders deportable an alien convicted of domestic violence, stalking, or child abuse, neglect, or abandonment, and includes both actual convictions and court findings that certain portions of a restraining order were violated. It is effective for convictions or violations of court orders occurring after September 30, 1996. See IIRIRA § 350. Note that domestic violence offenses are not a ground of inadmissibility unless the particular offense constitutes a CIMT.

Firearms Offenses: INA § 237(a)(2)(C) renders deportable any alien convicted of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying a firearm or destructive device, or attempting or conspiring to do so). Note that firearms offenses are not a ground of inadmissibility under INA § 212(a)(2), except to the extent that they may involve moral turpitude. For example, simple possession of a firearm without a license or carrying a firearm in a vehicle would not involve moral turpitude, while an offense that has as an element the use of a firearm to cause fear or induce submission would likely involve moral turpitude. Note that certain sentence enhancements for use of a firearm in the commission of an offense have been held not to qualify as conviction of a firearms offense where the underlying offense does not have firearms use or possession as an element. *See Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992) (holding that firearms ground of deportability did not apply because California firearms enhancements apply only where use of a firearm is not an element of the underlying offense).

Aggravated Felony Offenses: INA § 237(a)(2)(A)(iii); § 101(a)(43). This category was created in 1988, and has steadily expanded since that time. An aggravated felony conviction renders a respondent ineligible for most forms of relief from deportation, and there are thus often fierce debates over whether a given conviction constitutes an aggravated felony. Although most subsections of the aggravated felony definition define offenses by reference to specific sections of the federal criminal code, some do not. Instead, these subsections use terms like “theft offense” without defining them. In many such cases, the Board of Immigration Appeals and the Circuit Courts have examined the term and provided some guidance. See, e.g., *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (finding that “auto burglary” under California statute was not a “burglary offense” within the meaning of INA § 101(a)(43)(G)).

You will need to consult the federal criminal code in order to make sense of several of the aggravated felony provisions, such as subsection (B) (see 18 U.S.C. § 924(c) for the definition of a “drug trafficking crime”) and (F) (see 18 U.S.C. § 16 for the definition of a “crime of violence”).

Common Aggravated Felony Offenses:

The complete list is set forth in INA § 101(a)(43) (8 USC § 1101(a)(43)), but these are most common:

- Murder; rape; sexual abuse of a minor (including statutory rape in California and other jurisdictions)
- Drug trafficking offenses, and in some jurisdictions, any felony drug offense
- Trafficking in firearms, destructive devices, or explosive materials
- Money laundering of over \$10,000
- Certain firearms offenses, including being a convicted felon in possession of a firearm
- Crime of violence with a sentence of one year
- Theft or burglary offense or possession of stolen property with a sentence of one year
- Offense involving fraud or deceit in which the loss or attempted loss to victim exceeds \$10,000
- Certain alien smuggling or illegal re-entry convictions
- Commercial bribery, counterfeiting, forgery, or trafficking in stolen vehicles with a sentence of one year
- Obstruction of justice (including perjury) with a sentence of one year
- Attempt or conspiracy to commit an aggravated felony offense

(Keep in mind that under the immigration laws a suspended sentence is treated just like time ordered to be served. Thus, for example, a misdemeanor grand theft with a suspended sentence of one year will be considered an aggravated felony.)

Definition of Conviction under Federal Immigration Law

INA § 101(a)(48)(A) (8 USC 1101(a)(48)(A)):

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(Note that except for certain first-offense drug convictions, an expungement or deferred entry of judgment will not be effective for immigration purposes. Successful completion of a pre-plea diversion program will not be considered to result in a conviction, however, because there is no admission or finding of guilt.)

Beware of Suspended Sentences

INA § 101(a)(48)(B) (8 USC 1101(a)(48)(B)):

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Note on Divisible Offenses

Many offenses are “divisible,” that is, they prohibit some behavior that has immigration consequences and some that does not. In such a case, the court must look only to the record of conviction to ascertain which portion of the statute the respondent was convicted under. The record of conviction includes the indictment, plea, judgment, verdict, sentence, or transcript of the plea proceeding, but does not include a police report. See *Matter of Teixeira*, 21 I&N Dec. 316, 319 (BIA 1996). Where the record of conviction does not indicate which portion of a divisible statute the respondent was convicted under, the charge of removability cannot be sustained. For example, in *Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996), the Board examined a conviction for weapons possession. Mr. Pichardo had in fact possessed a gun, as he testified at his deportation hearing, but the record of conviction did not specify what “weapon” he had illegally possessed. Because the statute covered both firearms and other weapons, the Board concluded that the respondent had not been convicted of a firearms offense specifically and that the firearms charge under INA § 241(a)(2)(C) was therefore not sustainable.

Expungement of Certain Drug Convictions

For a first-offense simple possession drug conviction, an expungement under Cal. Penal Code § 1203.4 (after completion of probation) or upon completion of a Proposition 36 program will remove it from consideration for removal purposes. See *Lujan-Armendariz v. INS*, 222 F.3d 728, 738 (9th Cir. 2000) (holding an expungement effective for immigration purposes where an individual has been found guilty of simple possession of a controlled substance; has not, prior to the commission of such offense, been convicted of violating a federal or state law relating to controlled substances; has not previously been accorded first offender treatment under any law; and has had an order entered pursuant to a state rehabilitative statute under which the proceedings have been dismissed after probation); see also *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reiterating that an effective expungement statute need not exactly parallel the Federal First Offenders Act).

Convictions for misdemeanor possession of drug paraphernalia and misdemeanor drug use are also encompassed by the *Lujan-Armendariz* rule. See *Cardenas-Urriarte v. INS*, 227 F.3d 1132, 1137 (9th Cir. 2001) (holding, based on legislative history of first-offender statute, that expungement of misdemeanor drug offenses less serious than simple possession of a controlled substance must also be recognized in immigration proceedings); *Flores-Arellano v. INS*, 5 F.3d 360, 363 (9th Cir. 1993) (noting that “[d]rug use has generally been considered a less serious crime than possession,” and holding that where an exemption refers to possession for personal use, it implicitly encompasses actual use as well). Note that multiple counts or convictions can be cleared by expungement, so long as all convictions independently qualify and the convictions were entered at the same time, with no prior drug convictions. See 18 USC § 3607 (The Federal First Offender Act).

Keep in mind that in order for a prior court proceeding to qualify as a conviction, there must have been a guilty/no contest plea or a finding of guilt by the court. Pre-plea diversion programs are not convictions. See INA § 101(a)(48)(A) (requiring a finding of guilt, a plea of guilty or no contest, or an admission of sufficient facts to warrant a finding of guilt in order for an offense to qualify as a “conviction”). It is not until a guilty or no contest plea is entered that a person acquires a first-offense conviction and can make use of the first offender expungement program. See 18 § USC 3607(a) (providing for a special probationary program for “a person found guilty of an offense”). Prior proceedings that were resolved via successful pre-plea diversion programs do not disqualify a person from using the first offender expungement rule for a later case in which they plead or are found guilty.

More on Simple Possession Drug Convictions

In the Ninth Circuit, a state felony simple possession drug offense is not an aggravated felony unless the offense would also qualify as a felony under the federal drug laws. See *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004). Moreover, *Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004), holds that a second simple possession does not qualify as an aggravated felony, contrary to the BIA’s traditional rule. See, e.g., *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995) (holding that second simple possession offense is an aggravated felony because possession with a prior offense is punishable as a felony under the federal Controlled Substances Act).

Cal. Penal Code § 17(b)(3): Turning a Case into a Petty Offense

Where an individual is convicted of a California felony, the criminal court's subsequent action under Cal. Penal Code § 17(b)(3) designating the offense as a misdemeanor must be given effect in immigration proceedings. See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003) (applying the petty offense exception of INA § 212(a)(2)(A)(ii)(II) based on the criminal court's declaration of the offense to be a misdemeanor under § 17(b)(3)). This provision is only available for so-called "wobblers," where the penal code states that the offense may be punished either by imprisonment in the state prison or by confinement in the county jail for up to one year. To use § 17(b)(3), the defendant must demonstrate that he or she merits a reduction based on rehabilitation; the criminal court will consider such a request after probation has been completed or in conjunction with a request for successful early termination of probation.

Where a person has a felony conviction for a crime involving moral turpitude, but the sentence was six months or less, § 17(b)(3) has three main uses:

- 1) In proceedings where a person is charged with inadmissibility under INA § 212(a)(2)(A)(i)(I) based on a single felony conviction for a crime involving moral turpitude (CIMT), reducing the offense to a misdemeanor will render the case a petty offense and invalidate the charge of removability.
- 2) Where a person has a stop-time problem for cancellation of removal eligibility because they have a single felony CIMT within their first 7 years, reducing that offense to a misdemeanor will allow application of *Matter of Deanda-Romo*, as noted in the discussion of the stop-time rule on the cancellation of removal handout, as long as any jail sentence was six months or less.
- 3) In certain aggravated felony cases, reducing a felony to a misdemeanor can allow a permanent resident to apply for adjustment of status without the need for a § 212(h) waiver. This comes up especially in statutory rape cases, where the government maintains that consensual intercourse with anyone under age 18 is an aggravated felony; and in fraud cases where the loss to the victim is more than \$10,000. A person with a single misdemeanor CIMT and a sentence of six months or less can adjust his or her status without a waiver, based on the petty offense exception, as long as they have a visa petition with a current priority date or from an immediate relative.

Resentencing to Avoid an Aggravated Felony

In cases where a person is still on probation it is often possible to ask for a case to be placed back on the criminal court's calendar for modification of the terms of probation. Where a person has gotten a sentence of 365 days in the county jail, and has thereby triggered the aggravated felony definition (as a crime of violence, theft offense, etc), a modification of the terms of probation changing the sentence to 364 days will take the conviction out of the aggravated felony definition. See *Matter of Cota*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001). The most effective way to do this is to have the court enter an order vacating the original sentence and imposing the new sentence nunc pro tunc.

If the person is no longer on probation, or was sentenced to state prison, the situation is considerably more complicated, and will require a specialist in criminal law. Norton Tooby has published several helpful books on post-conviction relief that discuss some of the possible scenarios. See his website, criminalandimmigrationlaw.com, for more information.