Chapter 30

IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

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SYNOPSIS

§ 30.6 CONCLUSION

§ 30.1 INTRODUCTION — HISTORICAL PERSPECTIVE AND ENFORCEMENT PARADIGMS

The fates of non-citizen criminal defendants are often scripted in the legal netherworld between the constitutional rights guaranteed by the criminal justice system and the lesser protections of administrative immigration law. The nexus between immigration status and the criminal justice system has come to dominate the field of immigration law as non-citizens are increasingly drawn into the criminal justice system through a network of Immigration and Customs Enforcement (ICE) enforcement programs[1] and the viral growth over the last decade of state and local legislation targeting non-citizens.[2] Consequently, the fates of many non-citizens are decided in the course of a criminal case long before the client ever reaches an immigration attorney.

Over the past decades, dramatic changes to federal immigration law have greatly increased the categories of criminal offenses that trigger immigration consequences while also narrowing or eliminating several forms of discretionary relief from removal.[3] In 1996, among its

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[1]. For additional information on ICE enforcement programs being integrated into the state and local criminal justice systems, see Melissa Keaney, *Overview of the Key ICE ACCESS Programs: 287(g), the Criminal Alien Program, and Secure Communities* (National Immigration Law Center 2009), *available at* www.nilc.org/ice-access-2009-11-05.html.

[2]. During the 2005 legislative year, immigration was the subject of approximately 300 state bills throughout the country; by 2007, the number grew to more than 1,500. National Conference of State Legislatures, Immigration Policy Project, "2009 Immigration-Related Bills and Resolutions in the States" (April 22, 2009), *available at* www.ncsl.org/documents/immig/2009ImmigFinalApril222009.pdf. State legislatures considered 1,305, 1,500 (approximate), 1,400 (approximate), 1,607, and 983 immigration-related bills in 2008, 2009, 2010, 2011, and 2012, respectively. National Conference of State Legislatures, "2012 Immigration-Related Laws and Resolutions in the States (Jan. 1-Dec. 31, 2012)," www.ncsl.org/research/immigration/2012-immigration-related-laws-jan-december-2012.aspx.

[3]. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, title VII, subtitle J, 102 Stat. 4181 (Nov. 18, 1988) (creating the aggravated felony category); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (eliminating the judicial recommendations against deportation and adding new aggravated felony grounds); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (eliminating certain forms of relief from removal and broadening the definitions of aggravated felony and crimes of moral turpitude); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009 (Sept. 30, 1996) (establishing new grounds of deportability, further abrogating discretionary relief from removal, and providing for

many provisions, the Antiterrorism and Effective Death Penalty Act (AEDPA)[4] enacted bars to judicial review of final orders of removal and petitions for habeas corpus review.[5] Also in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[6] which added new grounds of deportability, further abrogated discretionary relief from removal, and broadened the class of convictions that would subject a non-citizen to mandatory immigration detention.[7] As a result of this legislation, increasing numbers of non-citizens find their lives inexorably altered by the mandatory immigration consequences of even minor criminal offenses. For example, only 1,000 people that were removed from the United States in 1984 possessed a criminal conviction. By 2013, the figure neared 217,000.[8]

In addition to the sweeping changes in federal immigration law, between 2006 and 2012, an anti-immigrant enforcement strategy known as "attrition through enforcement"[9] came to dominate the immigration discourse. This strategy employs the use of state and local law enforcement and criminal justice systems as a "force multiplier" for purposes of federal immigration enforcement. Simultaneously, there has been an increase in state and local legislation targeting non-citizens.[10] Many states have passed laws designed to pull non-citizens into the criminal justice system, often by transforming state and local law enforcement into *de facto* immigration agents, further blurring the distinction between local law and federal immigration enforcement.[11] While the U.S. Supreme Court curtailed some significant aspects of these state-level policies in its 2012 decision in *Arizona v. United States*,[12] federal immigration authorities continue to rely on local law enforcement in significant ways, and non-citizens are all too easily swept up into removal proceedings through contact with local police.

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mandatory immigration detention for broad classes of non-citizens due to criminal convictions or activity).

[4]. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[5]. *Id*.

[6]. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009 (Sept. 30, 1996).

[7]. *Id.*

[8]. *See* U.S. Immigration and Customs Enforcement, *ERO Annual Report: FY 2013 ICE Immigration Removals*, *available at* www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf.

[9]. *See, e.g*., Kobach, "Attrition Through Enforcement: A Rational Approach to Illegal Immigration," 15 *Tulsa J. Comp. & Int'l L.* 155, 156-57, 159-63 (2008). *See also* Stumpf, "States of Confusion: The Rise of State and Local Power Over Immigration," 86 *N.C. L. Rev.* 1557 (2008).

[10]. *See supra* n. 2.

[11]. *See, e.g*., C.R.S. § 29-29-103 (requiring a peace officer who has "probable cause" or a sheriff who "reasonably believes" that the arrestee is not lawfully present in the United States to report the person to ICE).

[12]. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

Currently in Colorado and around the country, there has been a push to limit local law enforcement cooperation with ICE. This has primarily taken form through legal and community efforts to stop local law enforcement from honoring constitutionally suspect immigration detainers — requests from ICE that a local authority continue to hold an individual suspected of immigration violations in custody for up to 48 hours past the time they would otherwise be released.[13]

This chapter provides a general introduction to the immigration consequences of criminal convictions. The chapter explains particular terms and definitions used in the INA, the categories of offenses that implicate removability, the potential consequences of a criminal conviction, and the constitutional duty of effective assistance of counsel that defense counsel owes to non-citizen defendants. Because the law relating to immigration consequences of crimes changes rapidly, attorneys practicing in this area are well served to examine supplemental materials and recent developments in case law when addressing legal issues related to the potential immigration consequences of contact with the criminal justice system.

§ 30.2 IMMIGRATION — TERMS, DEFINITIONS, AND ANALYSIS

The subspecialty of law relating to the immigration consequences of criminal activity depends in large part upon an analytical framework that incorporates federal and state statutes, along with case law from federal and state courts and the Board of Immigration Appeals (BIA). The analytical framework used to determine whether a criminal offense triggers a particular immigration consequence is unique in nature, and often counterintuitive to attorneys unaccustomed to practicing in immigration court.[14] In addition, immigration law has many legal terms of art, which often cause confusion among many state-law practitioners, especially where the same terms have very different meanings for purposes of federal immigration law than they do for state-law purposes.

§ 30.2.1—Definition Of "Conviction" And "Sentence" For Immigration Purposes

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[13]. As of the date of publication, 58 out of 64 Colorado counties have ceased honoring ICE detainers due to concerns about their unconstitutionality. *See* http://aclu-co.org/blog/map-ice-detainers.

[14]. Several articles have been written in Colorado discussing the immigration consequences of criminal dispositions. *See* Jeff Joseph & Nancy B. Elkind, "Immigration Consequences of Criminal Pleas and Convictions," 35 *Colo. Law.* 55 (Oct. 2006) (discussing the immigration consequences of criminal convictions and ethical duties owed by criminal defense counsel, and providing an overview of legal terms and categories of criminal convictions that trigger adverse immigration consequences); *see also* Daniel M. Kowalski & Daniel C. Horne, "Defending the Noncitizen," 24 *Colo. Law.* 2177 (Sept. 1995) (same).

A fundamental starting point in understanding the immigration consequences of crimes depends upon the definitions of certain legal terms for immigration purposes. Perhaps the most important and commonplace definitions are for "conviction" and "sentence" — terms that are defined by federal statute and differ significantly from the definitions of those concepts under Colorado statute. For immigration purposes, a "conviction" is defined by federal statute at INA § 101(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.[15]

When applied to Colorado criminal law, the definition of "conviction" naturally includes traditional guilty pleas as well as convictions at trial. More counterintuitive, the federal statutory definition of "conviction" also encompasses a plea to a deferred judgment and sentence in Colorado, because under such a disposition, the defendant not only admits the essential elements of an offense, but the court also orders some form of restraint on the defendant's liberty.[16] As a result, non-citizen defendants are often unable to avail themselves of the same rehabilitative benefits for immigration purposes that a deferred judgment provides under state law. Unfortunately, although a successful deferred judgment is withdrawn for state law purposes, it will continue to be a "conviction" for federal immigration purposes and, thus, may trigger adverse immigration consequences such as deportation or a bar to lawful immigration status.

Unlike a deferred judgment, a deferred prosecution typically is not a "conviction" for immigration purposes because there is no formal admission of guilt or court-imposed restraint on liberty.[17] As well, convictions under some state laws for infractions or offenses that do not require the same burdens of proof or provide the same constitutional protections afforded to criminal defendants may not rise to the level of a "conviction" for immigration purposes.[18] Finally, a juvenile adjudication in Colorado is generally not considered to be a "conviction" for immigration purposes.[19]

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[15]. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).
[16]. *See Matter of Chairez-Castaneda*, 21 I&N Dec. 44 (BIA 1995); *see also* C.R.S. § 18-1.3-102 (outlining the deferred judgment and sentence plea process under Colorado statute).
[17]. *See Matter of Grulon*, 20 I&N Dec. 12 (BIA 1989).
[18]. *See Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).
[19]. *See Matter of Ramirez-Rivero*, 18 I&N Dec. 185 (BIA 1981); *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

The statutory definition of "sentence" for federal immigration purposes includes any term of *imprisonment* 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."[20] Thus, under Colorado law, a "sentence" includes any partially or fully suspended jail or prison sentence imposed by the court in a criminal case. Therefore, the potential mitigation effect of a suspended sentence in a criminal matter may still carry the same adverse immigration consequences as if the sentence were imposed in full. For example, a long-term lawful permanent resident (LPR) who pleads guilty to a theft offense with a one-year suspended jail sentence may face far more draconian immigration consequences than a plea involving an actual jail sentence of 364 days.[21]

§ 30.2.2—The Criminal Grounds Of Inadmissibility And Deportability

Generally speaking, non-citizens may be removable from the United States based upon criminal convictions that generally fall under one of two categories:[22] (1) the criminal grounds of inadmissibility,[23] or (2) the criminal grounds of deportability.[24] Congress may have created these two different categories with the intent to subject those who are unlawfully present to harsher penalties than those who are lawfully present. In reality, however, due to frequent changes to immigration laws, many provisions are harsher on those lawfully present than those who are not.

Undocumented non-citizens — meaning those persons who entered the United States without inspection and admission, as well as other non-citizens seeking to adjust to some form of lawful status — are generally subject to the grounds of inadmissibility. On the other hand, LPRs and other non-citizens — who were previously inspected by an immigration official and admitted to the United States — are generally subject to the grounds of deportability. Finally, there are many situations in which both the grounds of inadmissibility and deportability may come into play given a particular non-citizen's immigration status and history.

The distinction between inadmissibility and deportability is of significant legal importance because the INA treats different classes of non-citizens to very different legal consequences. Although the grounds of deportability and inadmissibility contain some overlapping provisions, they also substantively differ in critical ways. For example, some criminal grounds of deportability have no statutory counterpart in inadmissibility whatsoever —

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[20]. INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

[21]. *See, e.g.*, INA § 101(a)(43)(G) (outlining as an aggravated felony ground of deportability a theft offense with a sentence to imprisonment of at least one year).

[22]. The immigration law relating to criminal inadmissibility and deportability is far more nuanced and complex. For example, many returning LPRs with criminal convictions may be placed into removal proceedings and charged as an "arriving alien" subject to the grounds of inadmissibility since they are seeking an *admission* back into the United States. *See generally* INA § 235; 8 U.S.C. § 1225a.

[23]. *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

[24]. *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

including the grounds related to aggravated felony offenses,[25] firearms offenses,[26] and domestic violence and child abuse offenses.[27] Thus, certain crimes that might make an LPR deportable from the United States based on a conviction might not trigger a criminal ground of inadmissibility for a person who is undocumented.

Thus, the immigration consequences for a non-citizen will differ depending upon his or her immigration status and whether that status implicates the criminal grounds of inadmissibility or deportability. Like many concepts in immigration law, these legal terms and the analytical framework that applies to them are somewhat counterintuitive, particularly in situations in which a long-term LPR may be deportable for a particular conviction while an undocumented non-citizen with the same conviction might not be inadmissible. Understanding the distinction between the criminal grounds of inadmissibility and deportability is a fundamental first step in working with non-citizens in criminal matters so that criminal defense counsel can ascertain defense priorities in any given case and provide effective assistance of counsel.

§ 30.2.3—Categorical Analysis And Modified Categorical Analysis

In determining whether a conviction may trigger removal or other adverse immigration consequences, a reviewing immigration authority traditionally employs a very specific analytical process known generally as the categorical analysis. This analytical framework is one of the most important concepts in immigration law. While it has been subject to much debate and confusion in recent years, in the 2013 case of *Descamps v. United States*, the U.S. Supreme Court reaffirmed a strict categorical approach in a criminal case,[28] which was adopted by the BIA in *Matter of Chairez-Castrejon*.[29] This BIA and Supreme Court precedent abrogates a former line of cases inconsistent with the traditional categorical analysis.

Under a categorical analysis, the court or adjudicator does *not* look to the actual or alleged conduct in the case to determine whether a particular conviction meets the immigration law definition of a particular crime. Rather, the categorical analysis directs the immigration authority to examine the elements of the criminal offense in order to determine whether all of those elements fit squarely within a particular ground of deportability.[30] If the elements do not fit entirely within an applicable ground, then the person is not removable on that statutory basis. However, the individual must show that there is a "realistic probability, not a theoretical possibility" that the non-removable conduct can be prosecuted under that statute.[31]

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[25]. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).
[26]. *See* INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).
[27]. *See* INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E).
[28]. *See Descamps v. United States*, 133 S. Ct. 2276 (2013).
[29]. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014).
[30]. *See Taylor v. United States*, 495 U.S. 575 (1990).
[31]. *Matter of Chairez-Castrejon*, 26 I&N Dec. at 365 (*citing Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

The adjudicator may only make a more fact-specific inquiry when a criminal offense is "divisible," meaning that the statute includes distinct elements in the alternative, describing some offense that would fall squarely within a ground of deportability and some offense that would not. In that case, the immigration authority may engage in a modified categorical analysis, conducting a limited review of the "record of conviction" in order to determine under what set of elements or subsection of the statute the defendant was convicted.[32]

Importantly, the "record of conviction" consists of a limited set of documents, including the written plea agreement, the charge or indictment, the count of conviction, any written elemental sheet signed by the defendant, the verdict and sentence, or a comparable judicial record of the factual basis for the plea.[33] However, it does not include other documents or allegations, such as witness statements, police reports, or other information normally contained in discovery.

This analytical framework is then applied to the statute of conviction. For example, if a court were trying to determine if a conviction triggered the firearms offense ground of deportability, it would first inquire whether a conviction under the elements of the statute would always constitute a firearms offense. If the statute required as an element the use of a firearm and the term firearm was defined in the state code either equivalently or more narrowly than the federal definition, then a conviction under the statute would categorically be considered a firearm offense. However, if the statute included an element of the use of a "weapon" but did not specify what kind of weapon, then a conviction under the statute would not trigger the firearms offense ground of deportability. Where a statute provided elements in the disjunctive, such as the use of a "firearm or ballistic knife," then a reviewing court would apply the modified categorical approach to look only to the record of conviction to determine whether the defendant actually used a firearm. Where the record of conviction is unclear, then the conviction would not constitute a firearms offense for immigration purposes.

Under Colorado law, there are many offenses that contain numerous subsections or disjunctive elements, and which, therefore, are likely to be divisible. Thus, an immigration authority will often employ a modified categorical analysis to examine the Rule 11 plea agreement, count of conviction, and other permissible documents in the record of conviction in order to determine whether the conviction triggers immigration consequences. As a result, defense counsel should be familiar with both the analytical framework used in analyzing criminal offenses as well as the documents that constitute the record of conviction, because these concepts may significantly impact plea negotiations, resolutions in criminal cases, and whether a particular offense will trigger an immigration consequence.

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[32]. *See Descamps*, 133 S. Ct. 2276.

[33]. *See Shepard v. United States*, 544 U.S. 13, 26 (2005); *see also* INA §§ 240(c)(3)(B) through (C), 8 U.S.C. §§ 1229a(c)(3)(B) through (C) (outlining statutory definition of documents that shall constitute proof of a criminal conviction).

This analytical framework continues to apply to most categories of offenses. However, in the context of crimes involving moral turpitude and some categories of aggravated felony offenses that are considered "circumstance specific," the analysis has changed in important ways. Those changes are discussed in greater detail in §§ 30.3.1 and 30.3.2 later in this chapter.

§ 30.3 CATEGORIES OF OFFENSES

Many Colorado offenses can expose non-citizens to immigration consequences by triggering the grounds of inadmissibility or deportability. The following is a summary of some of the most common grounds implicated by state criminal convictions.[34]

§ 30.3.1—Aggravated Felony Offenses[35]

The term "aggravated felony" is a complex yet important ground of deportability that refers to a large group of offenses that trigger particularly draconian immigration consequences.[36] Unfortunately, due to the breadth of its statutory definition, an "aggravated felony" under federal immigration law need not be "aggravated" nor a "felony" as those terms are defined under Colorado state law. As a result, the aggravated felony category applies not only to an array of felony offenses in Colorado, but also to some misdemeanor and municipal offenses as well.

The most common aggravated felony categories include murder, rape, and sexual abuse of a minor;[37] drug distribution and/or drug trafficking offenses;[38] a "crime of violence" as defined under 18 U.S.C. § 16 for which the term of imprisonment imposed is at least one year;[39] theft or burglary offenses for which the term of imprisonment imposed is at least one year;[40] crimes involving fraud or deceit in which the loss to the victim exceeds $10,000;[41] and any conviction for attempt or conspiracy to commit an aggravated felony offense.[42] In addition to these common

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[34]. This chapter does not contain a discussion regarding all the criminal grounds of inadmissibility or deportability that may impact non-citizen defendants. A full listing of these grounds in contained in the statutory grounds of inadmissibility and deportability found at INA §§ 212(a)(2) and 237(a)(2).

[35]. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

[36]. *See* INA §§ 101(a)(43)(A) through (U), 8 U.S.C. §§ 1101(a)(43)(A) through (U).

[37]. *See* INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

[38]. *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). However, in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), the U.S. Supreme Court found that an offense of possession of marijuana with intent to distribute is not an aggravated felony if the statute includes conduct involving the distribution of a small amount of marijuana for no remuneration.

[39]. *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

[40]. *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

[41]. *See* INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M).

[42]. *See* INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

aggravated felony grounds, there are nearly two dozen other statutory categories of aggravated felony offenses in the INA.[43]

For non-citizens, an aggravated felony conviction is likely as significant for immigration purposes as a mandatory life sentence may be in a criminal case. An aggravated felony conviction will often destroy most defenses to removal for long-term lawful permanent residents,[44] subject non-citizens to mandatory immigration detention without the right to any immigration bond,[45] prevent clients from showing "good moral character" to establish statutory eligibility for certain immigration benefits,[46] and cut off a non-citizen's eligibility for asylum or complicate eligibility for other persecution-based relief from removal.[47] As a result, both lawful and undocumented non-citizens should avoid an aggravated felony conviction at nearly all costs.

While the aggravated felony ground of deportability is generally governed by the categorical analysis, there is a narrow exception for "circumstance-specific" aggravated felonies. In a 2009 U.S. Supreme Court case, *Nijhawan v. Holder*,[48] the Court modified the categorical analysis for certain aggravated felony grounds of deportability. The Court determined that some aggravated felony grounds are considered to be "generic" offenses while other grounds are properly categorized as "circumstance-specific" offenses.[49]

The *Nijhawan* Court explained that "generic" offenses involve elemental conduct and will continue to be governed by the application of the strict categorical analysis used for immigration purposes, discussed in § 30.2.3. However, *Nijhawan* found that certain aggravated felony grounds — such as the fraud ground, which contains language involving an amount of "loss to the victim" — refer to "the specific way in which an offender committed the crime on a specific occasion"[50] rather than the elements required for a conviction. Where a "circumstance-specific" ground is at issue, the immigration authority may examine *extrinsic evidence outside of the record of conviction* to determine whether the offense satisfies the additional "circumstance-specific" language of a particular aggravated felony ground of deportability.

The Supreme Court's recent affirmation of the categorical approach suggests that the *Nijhawan* decision does not mark a major shift in how the categorical approach is to be applied. However, it remains unclear whether the reasoning in *Nijhawan* may be applied to other grounds of inadmissibility and deportability, such as the domestic violence ground of deportability.

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[43]. *See* INA §§ 101(a)(43)(A) through (T), 8 U.S.C. §§ 1101(a)(43)(A) through (T).
[44]. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).
[45]. *See* INA § 236(c), 8 U.S.C. § 1226(c).
[46]. See INA § 101(f), 8 U.S.C. § 1101(f).
[47]. *See* INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).
[48]. *Nijhawan v. Holder*, 557 U.S. 29 (2009).
[49]. *Id*. at 2297.
[50]. Id. at 2298.

Because this is an evolving area of the law, practitioners should make sure to review case law developments on this issue.

§ 30.3.2—Crimes Involving Moral Turpitude[51]

Of all the criminal grounds of removal, the "crime involving moral turpitude" (CIMT) is perhaps the most commonplace, yet nebulous, ground in immigration law. There are both CIMT grounds of inadmissibility and deportability, which impact non-citizens in myriad ways.[52] The term "moral turpitude" is not defined by statute, but is rather a creature born of case law. Historically, moral turpitude has referred to conduct that is "inherently base, vile or depraved, contrary to the rules of morality."[53] In 2008, the definition of moral turpitude was modified to entail offenses involving "reprehensible conduct" together with some form of scienter, whether specific intent, knowledge, or recklessness.[54]

For attorneys seeking to understand whether a particular criminal offense constitutes a CIMT, a starting point for the basic analysis revolves around the interplay between the *mens rea* and the *actus reus* of a particular offense. The more culpable the *mens rea* and the more significant the *actus reus*, the more likely the offense will be considered one involving moral turpitude. However, contrary to a common assumption, the moral turpitude inquiry does not depend upon the grade or classification of an offense, nor on whether a crime is categorized as a misdemeanor or a felony under state law. As a result, a third-degree misdemeanor under Colorado law that contains a specific intent element might constitute a CIMT, while a high-level felony involving criminal negligence might not trigger moral turpitude grounds for immigration purposes.

Generally, offenses that are often considered to be "crimes of moral turpitude" include offenses that involve fraud or deceit; theft; specific intent crimes; offenses involving malice or knowledge; lewd intent crimes; most sex offenses; and offenses with a specific intent to cause bodily injury or reckless mental state coupled with the causation of serious bodily injury. Crimes that are regulatory in nature or that are committed with a *mens rea* of negligence generally — with some potential exceptions — do not trigger moral turpitude grounds.

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[51]. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

[52]. *Compare* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (applying a CIMT inadmissibility ground for conduct punishable by over a year for which a sentence to a term of imprisonment of over six months is imposed) *with* INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (applying a CIMT deportability ground to convictions within five years of admission that are punishable by a year or more).

[53]. *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994).

[54]. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 (A.G. 2008), *vacated and remanded sub nom. Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014).

As well, offenses that involve recklessness and mere bodily injury, or implicate only the substantial risk of causing serious bodily injury, tend not to be classified as CIMT offenses, barring an additional statutory aggravating element. Of course, there are numerous Colorado criminal offenses for which the case law is not yet settled. Moreover, many criminal offenses are likely to proscribe both conduct that does and does not involve moral turpitude, potentially making the statute divisible. In these situations, a good understanding of the categorical analysis and the record of conviction will be effective tools in analyzing whether a particular offense involves moral turpitude.

Currently, there is some uncertainty as to the applicability of the traditional categorical analysis used to determine whether a particular crime constitutes a CIMT offense. In 2008, the attorney general decided *Matter of Silva-Trevino*,[55] which marked a significant departure from established case precedent and provided a more permissive analysis for moral turpitude offenses. Under *Silva-Trevino*, first the court must look to the language of the statute to determine whether the conduct always or never constitutes a CIMT offense. Where the elements of a statute always or never trigger moral turpitude, the CIMT inquiry is complete.

However, for those offenses that are divisible, *Silva-Trevino* allows for a second step to examine the record on conviction under the modified categorical analysis. Where the record *conclusively* resolves the moral turpitude inquiry, the analysis is complete.[56] Finally, if after applying the modified categorical approach the record is inconclusive as to whether the offense involved moral turpitude, the adjudicator is allowed to "consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions."[57] In this situation, the immigration authority can consider general allegations and information related to unproven conduct.

While *Silva-Trevino* remains binding precedent on immigration courts in the Tenth Circuit, it has been rejected by the majority of circuit courts that have considered the issue, and is further called into question by the U.S. Supreme Court's decision in *Descamps*.[58] As a result, the *Silva-Trevino* analysis may be called into question in the foreseeable future, and practitioners may wish to review any updates on the analytical framework that applies to CIMT offenses.

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[55]. *Matter of Silva-Trevino*, 24 I&N Dec. 687.
[56]. *Id*. at 690 (*citing Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).
[57]. *Id*. at 699.
[58]. The Third, Fourth, Fifth, Ninth, and Eleventh Circuits have rejected the attorney general's holding in *Matter of Silva-Trevino*. *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Attorney General of U.S.*, 582 F.3d 462 (3d Cir. 2009). The Seventh and Eighth Circuits, however, have deferred to the agency interpretation. *Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir. 2012); *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008).

§ 30.3.3—Controlled Substance Offenses[59]

There are also grounds of inadmissibility and deportability for offenses "relating to" a controlled substance. The controlled substance ground is generally a very unforgiving ground for nearly all classes of non-citizens.

For non-citizens subject to the criminal grounds of deportability for an offense "relating to" a controlled substance, a conviction for nearly any controlled substance offense other than the simple possession of 30 grams or less of marijuana for personal use is deportable.[60] Furthermore, any drug offense dealing with the manufacture, distribution, or possession of a controlled substance with intent to distribute — no matter how small the amount — will not only trigger the controlled substance ground of deportability, but also will likely be considered an "aggravated felony" for immigration purposes as a drug trafficking offense.[61] However, there is an important difference between controlled substance offenses and drug trafficking aggravated felonies for other non-citizens. Like any aggravated felony, a drug trafficking aggravated felony will render a non-citizen not only deportable, but also ineligible for most forms of relief from removal. While a controlled substance possession offense will render a non-citizen deportable, it will not automatically bar a person from certain forms of relief, such as cancellation of removal, assuming the non-citizen satisfies the other statutory eligibility requirements for such relief.[62]

For non-citizens subject to inadmissibility, the controlled substance ground is far more unforgiving. For those non-citizens, *any* drug offense other than simple possession of 30 grams or less of marijuana for personal use is likely to be a lifetime bar to obtaining lawful immigration status.[63] The one exception to the controlled substance ground of inadmissibility is for a conviction for the simple possession of 30 grams or less of marijuana, which can be waived by an immigration authority in the exercise of discretion. However, in order to qualify for such a "waiver," the client must meet specific statutory eligibility requirements, often including a showing that the denial of the waiver would result in extreme hardship to the non-citizen's citizen or lawful permanent resident child, spouse, or parent.[64]

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[59]. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance ground of inadmissibility); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (controlled substance ground of deportability).

[60]. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[61]. *See Lopez v. Gonzales*, 549 U.S. 47 (2006); *see also* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). However, there is one exception to the drug trafficking aggravated felony grounds of deportability in that possession of marijuana with intent to distribute is not an aggravated felony where the statute includes conduct involving the distribution of a small amount of marijuana for no remuneration. *See Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

[62]. *See* INA § 240A(a) (outlining the statutory requirements for cancellation of removal, including admission as an LPR for more than five years, and continuous residence of more than seven years after a lawful admission and prior to the commission of a disqualifying criminal offense, such as a controlled substance offense).

[63]. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[64]. *See* INA § 212(h), 8 U.S.C. § 1182(h).

In addition, the grounds of inadmissibility also contain a category that applies to a person who the government has "reason to believe" is a drug trafficker in controlled substances.[65] This ground may become an issue in a non-citizen's immigration case based solely on allegations of criminal activity and absent a conviction or any formal finding of guilt.

§ 30.3.4—Firearms Offenses[66]

The firearms ground of deportability covers a wide array of firearms-related offenses that involve the "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying," or the attempt or conspiracy to commit such an offense involving a firearm or destructive device as defined by federal statute.[67] Interestingly, this ground does not have a statutory counterpart in the criminal grounds of inadmissibility and, therefore, generally has a greater impact on those with lawful immigration status.

Given the breadth of the firearms ground, nearly any firearms-related conviction under state law is likely to trigger this ground of deportability. However, many state criminal statutes proscribe the possession or use of a dangerous or illegal weapon, which often includes a statutory definition that encompasses both firearms as well as non-firearms, such as a blackjack, metallic knuckles, or a knife.[68] As a result, many weapons offenses are either categorically overbroad or are subject to a modified categorical analysis. An immigration authority will frequently look to the record of conviction in order to determine whether a conviction under a divisible state statute involved a firearm.

§ 30.3.5—Domestic Violence, Stalking, Violation Of A Protection Order, And Child Abuse[69]

Another ground of deportability that contains no statutory counterpart in inadmissibility is the ground relating to crimes of domestic violence, stalking, crimes against children, and violations of a protection order.[70] This category covers several different types of convictions, many of which — such as "domestic violence" — involve concepts defined in federal statute or case law that differ substantially from definitions under state law.

For example, the "domestic violence" ground of deportability differs significantly from the Colorado statutory definition of "domestic violence" found at C.R.S. § 18-6-800.3. In order for an offense to trigger an immigration consequence under the "domestic violence" ground of deportability, the conviction must meet three requirements: (1) be a "crime of violence" as

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[65]. *See* INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).
[66]. *See* INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).
[67]. *Id.*
[68]. *See, e.g.*, C.R.S. § 18-12-102(1) (defining "dangerous weapon" to include a machine gun and other firearms as well as a ballistic knife); *see also* C.R.S. § 18-12-102(1) (defining "illegal weapon" to include a blackjack, metallic knuckles, and switchblade knife).
[69]. *See* INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E).
[70]. *Id.*

defined under 18 U.S.C. § 16; (2) be committed against a person; and (3) involve a protected person as referred to in the INA.[71]

Under the first requirement, the federal definition of "crime of violence" includes two prongs:

> (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.[72]

Therefore, any state offense that does not involve a statutory element involving force or the substantial risk of the use of force in the commission of the offense is not a "crime of violence" for immigration purposes. Federal courts have found that the "crime of violence" definition under federal law does not apply to offenses involving strict liability, negligence, or recklessness, because acts committed with that level of *mens rea* do not contemplate the type of active force envisioned by the federal statute.[73]

The second requirement explicitly limits the domestic violence ground of deportability to offenses committed against a person. Therefore, offenses committed against property, as well as general public order offenses, should generally fall outside of the scope of the domestic violence deportability ground. Finally, the offense must fall within the classification of protected persons explicitly covered by the federal statute. The statute includes an offense committed against a current or ex-spouse, co-parent of a child, or person who has co-habited as a spouse, or anyone protected under state, local, federal, or tribal domestic or family violence laws.[74]

As a result, those offenses in Colorado that are classified as involving "domestic violence" for state law purposes, but involve reckless or lesser conduct, are not committed against a person, or do not apply to a protected party under the federal statute, should not fall within the "domestic violence" ground of deportability.

In addition to crimes of "domestic violence," this deportation ground also specifies several other classes of offenses that trigger deportability, including a "crime of child abuse, child neglect, or child abandonment."[75] The term "child abuse" has been interpreted broadly by courts and subsumes related crimes of child neglect and abandonment. The INA does not define "child

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[71]. *See* INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).
[72]. *See* 18 U.S.C. § 16.
[73]. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1 (2004); *see also United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008).
[74]. *See* INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).
[75]. *See id*.

abuse," but the BIA has interpreted it broadly to include "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."[76] In 2010, the BIA subsequently expanded this definition in a case involving the Colorado offense of child abuse at C.R.S. § 18-6-401(1)(a), clarifying that no proof of actual harm or injury to the child is required.[77] However, in 2013, the Tenth Circuit held that the "child abuse" ground of deportability does not encompass the class 3 misdemeanor offense of child abuse involving "criminally negligent conduct with no resulting injury to a child."[78]

Finally, the "violation of a protection order" provision of this ground of deportability applies in situations in which a court determines a person "engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury" against the protected person or persons.[79] In fact, this deportability ground can apply in situations where a civil or criminal court has found the person to have violated a domestic violence protective order, even absent a criminal conviction. Furthermore, although the statute contains limiting language about what conduct constitutes a basis for deportability under the statute, the Ninth Circuit has interpreted the ground to encompass broader conduct in violation of the protection order.[80]

§ 30.3.6—Other Miscellaneous Grounds Of Inadmissibility And Deportability

Although most Colorado offenses tend to fall into one of several common grounds of inadmissibility and deportability, the INA contains several additional grounds that trigger adverse immigration consequences for non-citizens. Some of the additional inadmissibility grounds under the INA include those based on multiple criminal convictions of any classification for which the aggregate sentence to confinement is five years or more,[81] as well as non-conviction based findings, such as a "reason to believe" a non-citizen is an illicit trafficker in a controlled substance,[82] or a person who is or has engaged in prostitution.[83] The grounds of deportability contain several additional categories, including miscellaneous grounds based on a conviction for espionage, sedition, or treason;[84] failure to register as a sex offender;[85] or falsification of documents.[86] As well, the "aggravated felony" ground of deportability itself is very broad and

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[76]. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008).
[77]. *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010).
[78]. *Ibarra v. Holder*, 736 F.3d 903, 915-16 (10th Cir. 2013).
[79]. INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).
[80]. *See Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008).
[81]. *See* INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).
[82]. *See* INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).
[83]. *See* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).
[84]. *See* INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D).
[85]. *See* INA § 212(a)(2)(A)(v), 8 U.S.C. § 1182(a)(2)(A)(v).
[86]. *See* INA § 237(a)(3), 8 U.S.C. § 1227(a)(3).

contains over 20 different statutory provisions, many of which prohibit several different types of offenses within the same subsection.[87]

§ 30.4 IMMIGRATION CONSEQUENCES

Criminal convictions — and in certain situations, conduct that does not require a criminal conviction — can trigger a wide array of adverse immigration consequences. These consequences range from presumptively mandatory deportation, to mandatory immigration detention and the elimination of important types of discretionary relief from removal, to adverse impacts on travel outside of the United States and eligibility for citizenship. Depending upon a non-citizen's immigration status and prior criminal history, a particular conviction may have impacts along the full spectrum of potential consequences, certain limited impacts on specific issues, or no adverse impact.

§ 30.4.1—Inadmissibility To The United States

The criminal grounds of inadmissibility generally apply to non-citizens who are undocumented, as well as to those who have fallen out of status or who are applying to adjust status to become an LPR.[88] In these situations, a conviction that falls within one or more criminal grounds of inadmissibility will generally trigger a legal impediment — often referred to as a criminal bar — to the future adjustment of status. However, many of these grounds of inadmissibility provide for a waiver of the offense under certain circumstances.

For example, a non-citizen who triggers the CIMT ground of criminal inadmissibility may apply for a waiver for the offense under 8 U.S.C. § 1182(h) if he or she can show that the denial of such a waiver would result in extreme hardship to the citizen or LPR spouse, parent, or child of the non-citizen.[89] Under other circumstances, there may be no statutory waiver for the offense, and a person in such a circumstance is faced with a bar to admissibility that allows for no statutory waiver.[90] For example, a conviction for any controlled substance offense other than 30 grams or less of marijuana for personal use, or a finding that there is "reason to believe" a non-citizen is a drug trafficker, allows for no statutory waiver. In those situations, a non-citizen will be permanently barred from obtaining lawful status, subject to very limited exceptions.

§ 30.4.2—Deportability From The United States

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[87]. *See, e.g.*, INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (including within the same statutory subsection of the aggravated felony definition the separate offenses of murder, rape, or sexual abuse of a minor).

[88]. *See* § 30.2.2 of this chapter.

[89]. *See* INA § 1182(h), 8 U.S.C. § 1182(h).

[90]. *See id.*

For those non-citizens who have been lawfully admitted to the United States, certain convictions can trigger potential deportability.[91] For example, convictions for certain CIMT, firearms, child abuse, domestic violence, or controlled substance offenses will often make an LPR deportable. Depending on when the conviction occurred and how long the person has been an LPR, such a conviction could also eliminate common forms of relief from removal, such as cancellation of removal, by cutting off a statutory eligibility requirement for the offense known as the period of continuous residence.[92] Finally, a conviction for an aggravated felony offense may not only render a person deportable, it will often also destroy nearly all defenses to removal as well as potentially present a lifetime bar to admissibility in the future, resulting in *de facto* lifetime banishment from the United States.

§ 30.4.3—Mandatory Immigration Detention

An equally onerous immigration consequence of certain criminal offenses involves the application of INA § 236(c) (8 U.S.C. § 1226(c)), commonly known as the mandatory detention provision. This statutory provision allows for the categorical denial of bond in immigration proceedings to broad classes of non-citizens who have been convicted of certain offenses under the criminal grounds of inadmissibility or deportability.[93] Nearly all grounds of criminal inadmissibility and deportability trigger the mandatory detention provision under the INA, and thus a significant percentage of non-citizens with criminal convictions that are placed in immigration proceedings are subject to mandatory immigration detention and categorically denied the right to bond.

This rule is subject to a few notable exceptions: for instance, non-citizens who are deportable solely under the ground related to domestic violence, stalking, child abuse, or violations of a protective order,[94] or if they are deportable solely on the basis of one CIMT offense committed within five years of admission as an LPR, but sentenced to a term of imprisonment of one year or less.[95] In addition, non-citizens who are inadmissible for one CIMT offense that is punishable to a maximum of one year, and who receive a sentence to a term of imprisonment of six month or less, will not be subject to mandatory detention.

Although the mandatory detention provision was upheld by the United States Supreme Court in *Demore v. Kim*,[96] subsequent litigation has carved out an exception to this general rule in limited situations where the length of detention raises significant due process concerns for non-

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[91]. *See* § 30.2.2 of this chapter.
[92]. *See* INA § 240A(d)(1)(ii), 8 U.S.C. § 1229b(d)(1)(ii) (terminating the statutory period of continuous residence requirement when an LPR commits an offense referred to in the criminal grounds of inadmissibility that renders the person inadmissible or deportable under criminal or security-related grounds).
[93]. *See* INA § 236(c), 8 U.S.C. § 1226(c).
[94]. *See* INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B).
[95]. *See* INA § 236(c)(1)(C), 8 U.S.C. § 1226(c)(1)(C).
[96]. *Demore v. Kim*, 538 U.S. 510 (2003).

citizens facing prolonged periods of detention.[97] As well, non-citizens who are released from custody for a current offense that does not trigger mandatory detention, but who may have a prior offense that would fall within the statute, are not subject to mandatory detention.[98] Finally, several federal district courts in Colorado have ruled that the mandatory detention requirement of INA § 236(c) does not apply to individuals who were not taken into immigration custody "when released" from criminal custody on a qualifying offense.[99] As of the date of this publication, this issue is currently pending before the Tenth Circuit.[100]

Therefore, non-citizens negotiating criminal dispositions followed by the likelihood of immigration proceedings may be interested not only in avoiding the grounds of inadmissibility and deportability, but also in resolving their cases in ways that do not trigger mandatory immigration detention.

§ 30.4.4—Impacts On Relief From Removal

Perhaps the most important and immediate immigration consequence of a particular conviction is its concomitant impact on the non-citizen's eligibility for a particular form of relief from removal. This issue is of critical importance to many non-citizens, as there are various statutory avenues for undocumented immigrants to obtain status as well as statutory defenses to removal for LPRs and other non-citizens with valid immigration status.

Depending upon the disposition of a criminal case, undocumented non-citizens and other immigrants subject to the grounds of inadmissibility may be eligible for relief from removal. This may include adjustment of status to become an LPR by virtue of a qualifying family relationship,[101] cancellation of removal,[102] or persecution-based defenses to removal such as asylum.[103] Those non-citizens who are LPRs or who have other forms of lawful immigration status often have a more significant interest in resolving criminal matters in a way that maintains statutory eligibility for certain defenses to removal. These can include cancellation of removal for LPRs,[104] readjustment of status,[105] and other forms of relief from removal. Relief from removal is covered in greater detail in Chapter 31.

§ 30.4.5—Ineligibility For Administrative Relief Or Future Legalization Programs

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[97]. *See Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Reid v. Donelan*, 2014 U.S. Dist. LEXIS 72658 (D. Mass. May 27, 2014).
[98]. *See Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010).
[99]. *See, e.g.*, *Sanchez-Penunuri v. Longshore*, 2013 U.S. Dist. LEXIS 181656 (D. Colo. Dec. 31, 2013); *Baquera v. Longshore*, 948 F. Supp. 2d 1258 (D. Colo. 2013).
[100]. *See Olmos v. Holder*, No. 14-1085 (10th Cir.).
[101]. *See* INA § 245(a), 8 U.S.C. § 1255(a).
[102]. *See* INA § 240A(b), 8 U.S.C. § 1229b(b).
[103]. *See* INA § 208, 8 U.S.C. § 1158.
[104]. *See* INA § 245(a), 8 U.S.C. § 1255(a) and INA § 212(h), 8 U.S.C. § 1182(h).
[105]. *See* INA § 240A(a), 8 U.S.C. § 1229b(a).

With the prospect of legislative and/or executive programs to suspend deportation or provide a path to citizenship, criminal convictions are certain to limit non-citizens' eligibility for new programs. Specifically, the current Deferred Action for Childhood Arrivals (DACA) program provides for relief from deportation and work authorization for undocumented individuals who entered the United States prior to turning 16, were under 31 years old as of June 15, 2012, and meet certain educational requirements.

However, individuals are not eligible for this program if they have been convicted of a felony, a significant misdemeanor, or three or more non-significant misdemeanors.[106] For immigration purposes, federal sentencing guidelines at 18 U.S.C. § 3559(a) determine whether a conviction is classified as a felony. This includes any federal, state, or local offense that is punishable by imprisonment of more than one year, such as any Colorado first degree misdemeanor.

Convictions that are considered "significant misdemeanors" include sexual abuse or exploitation; unlawful possession or use of a firearm; drug sales (distribution or trafficking); burglary; and driving under the influence of alcohol or drugs.[107] State convictions for domestic violence in Colorado may also constitute a "significant misdemeanor," depending upon how immigration authorities view Colorado's "domestic violence" modifier. In addition, any misdemeanor for which the person is sentenced to more than 90 days (not including a suspended sentence) is considered a significant misdemeanor.

Interestingly, the criminal eligibility categories for DACA do not correspond directly to the statutory grounds of inadmissibility and deportability in the INA, and thus require special attention. Any future legalization program may rely on the INA criminal grounds, or may outline a whole new set of eligibility criteria, so it is important for practitioners to be aware of the eligibility requirements for programs as they are announced.

§ 30.4.6—Impacts On Travel And Citizenship

Criminal convictions may also have adverse impacts on eligibility for citizenship and the ability to travel in and out of the United States. In the context of citizenship, criminal convictions can trigger a bar to establishing "good moral character"[108] (GMC), a statutory eligibility requirement for citizenship.[109] Even where an offense does not fall within the grounds of deportability or inadmissibility or otherwise trigger the statutory bar to citizenship eligibility, a prior conviction can be used as a *discretionary* factor in the overall evaluation of the GMC requirement.

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[106]. USCIC, Consideration of Deferred Action for Childhood Arrivals (DACA), www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.
[107]. At present, many DACA applicants are also being denied status based on DWAI convictions.
[108]. *See* INA § 316(a)(3), 8 U.S.C. § 1427(a)(3); *see also* INA § 101(f), 8 U.S.C. § 1101(f) (listing the statutory bars to good moral character).
[109]. *See* INA § 316(a)(3), 8 U.S.C. § 1427(a)(3).

As well, a criminal conviction can have significant impacts on a non-citizen's ability to travel in and out of the United States. For LPRs and other non-citizens with lawful immigration status, a disposition may avoid the criminal grounds of deportability. However, if the same non-citizen travels outside of the country and later returns, he or she may be considered an "arriving alien" seeking a new "admission" to the United States and could be subject to the criminal grounds of inadmissibility. This would require the non-citizen to prove that he or she does not trigger the grounds of inadmissibility and is eligible for admission. Travel under these circumstances may also trigger removal proceedings and the possibility of being taken into custody and subject to mandatory immigration detention during the course of the non-citizen's removal proceedings.

§ 30.5 NON-CITIZENS AND EFFECTIVE ASSISTANCE OF COUNSEL

Given the intersection of immigration and criminal law and the potentially draconian immigration penalties that flow from a conviction, both state and federal courts have outlined the Sixth Amendment duty that defense counsel owes to non-citizen defendants. This constitutional duty was first articulated in Colorado over 20 years ago, and was more recently examined in 2010 by the U.S. Supreme Court.

§ 30.5.1—*People v. Pozo* And The Duty Of Defense Counsel In Colorado

Colorado has long defined the duty that defense counsel owes to non-citizen clients regarding the immigration consequences of criminal convictions. In 1987, the Colorado Supreme Court decided *People v. Pozo*, holding that the failure to advise a non-citizen defendant of the potential immigration consequences of a criminal conviction may constitute ineffective assistance of counsel.[110]

In *Pozo*, the court based its holding around the two-pronged test for evaluating ineffective assistance of counsel articulated in *Strickland v. Washington*[111] and *Hill v. Lockhart*,[112] which required a defendant to show that defense counsel's performance fell below professional norms and that the defendant suffered prejudice as a result.[113] *Pozo* explained that such claims should be evaluated on a case-by-case basis, based on the "objective standards of minimally acceptable levels of professional performance prevailing at the time of the challenged conduct."[114]

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[110]. *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987).
[111]. *Strickland v. Washington*, 466 U.S. 668 (1984).
[112]. *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the two-pronged test of *Strickland* to a Sixth Amendment claim of ineffective assistance of counsel in relation to a guilty plea).
[113]. *See Strickland*, 466 U.S. at 687-88.
[114]. *Pozo*, 746 P.2d at 527.

Since 1987, *Pozo* has governed the evaluation of ineffective assistance of counsel claims related to immigration consequences in Colorado. Over time, and in response to the decision, the academic and legal community has provided analysis, training, and technical assistance to defense attorneys — as well as prosecutors, judges, and others in the criminal justice system — regarding the immigration consequences of convictions.[115] During the last two decades, *Pozo* has provided a narrow but essential post-conviction remedy in situations where representation by defense counsel is ineffective.

§ 30.5.2—*Padilla v. Kentucky* And The Sixth Amendment Duty To Non-Citizens

In 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*, holding that the Sixth Amendment requires defense counsel to provide affirmative and competent legal advice to non-citizen defendants regarding the potential immigration consequences of a guilty plea.[116] The Court held that, because deportation is such a serious consequence and so closely intertwined with a non-citizen's underlying criminal proceedings, defense counsel has a constitutional duty to advise non-citizen defendants regarding the immigration consequences of a guilty plea.[117]

The *Padilla* Court applied the *Strickland* ineffective assistance of counsel test, focusing on *Strickland*'s first prong of whether counsel's representation fell below an objective standard of reasonableness. The Court looked to professional norms that instruct defense counsel to investigate and advise clients regarding immigration consequences as benchmarks to ascertain whether defense counsel's performance was reasonable.[118] The Court then determined that the performance of Padilla's counsel was deficient because the consequence could easily be determined, deportation was presumptively mandatory, and counsel's advice was clearly incorrect.[119]

Padilla recognized the complexity in certain areas of immigration law where the immigration consequences of a particular plea may be unclear or uncertain. In situations in which the law is not settled, the Court found that defense counsel may satisfy their Sixth Amendment duty when they "advise a noncitizen client that pending criminal charges may carry a risk of

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[115]. *See, e.g.*, Van Gilder, "Ineffective Assistance of Counsel Under *People v. Pozo*: Advising Non-Citizen Criminal Defendants of Possible Immigration Consequences in Criminal Plea Agreements," 80 *U. Colo. L. Rev.* 793 (2009) (analyzing the duty to advise in Colorado and arguing that it should be applied to all jurisdictions); Jeff Joseph & Nancy Elkind, "Immigration Consequences of Criminal Pleas and Convictions," 35 *Colo. Law.* 55 (Oct. 2006) (discussing the immigration consequences of criminal convictions and providing an overview of legal terms and categories of criminal convictions that trigger immigration consequences); Kowalski & Horne, "Defending the Noncitizen," 24 *Colo. Law.* 2177 (Sept. 1995) (same).

[116]. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

[117]. *Id.* at 1483.

[118]. *Id.* at 1482-83.

[119]. *Id.* at 1483.

adverse immigration consequences."[120] However, the Court reiterated that "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear."[121]

The *Padilla* decision left unresolved several thorny issues likely to be litigated in the courts over the next several years. However, in 2011, in *People v. Kazadi*,[122] the Colorado Court of Appeals affirmed the central holding of *Padilla* regarding the Sixth Amendment duty of effective assistance of counsel owed to non-citizen defendants. Following *Kazadi*, several unpublished Colorado Court of Appeals decisions have further analyzed ineffective assistance of counsel issues for non-citizen defendants. For example, in *People v. Rivas-Landa*, the Colorado Court of Appeals held in an unpublished decision that the failure to advise an undocumented non-citizen defendant that a plea will destroy the defense of cancellation of removal may constitute ineffective assistance of counsel.[123] In another unpublished decision in *People v. Gerards*,[124] the Colorado Court of Appeals held that defense counsel must guarantee that a non-citizen defendant receives accurate advice regarding immigration consequences, even if that advice comes from outside counsel. Practitioners should be diligent not only in monitoring case developments in this area, but also in utilizing existing models in Colorado and throughout the country to provide correct advice and effective assistance of counsel to non-citizen defendants.[125]

§ 30.6 CONCLUSION

As the criminal justice system and immigration law continue to become increasingly interdependent — and the *Padilla* mandate for constitutionally adequate advice by defense counsel to non-citizen defendants takes root around the country — the immigration consequences of criminal offenses is likely to be a subject matter of increasing importance to practitioners and courts. Understanding the immigration consequences of criminal offenses will not only be an important aspect of working with non-citizens in immigration matters, but it is also likely to

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120. *Id.*

121. *Id.*

122. *See People v. Kazadi*, 284 P.3d 70 (Colo. App. 2011); *see also People v. Campos-Corona*, 2013 COA 23 (unpublished).

123. *See People v. Rivas-Landa*, No. 12CA0378 (Colo. App. July 11, 2013) (unpublished).

124. *See People v. Gerards*, No. 12CA0587 (Colo. App. Oct. 10, 2013) (unpublished).

125. For a more detailed discussion of the constitutional duty of advisement for non-citizen defendants, investigative issues in representing non-citizen defendants, and an analysis regarding the *Padilla* decision and the issue of clear and unclear immigration consequences, see Ann Benson & Jonathan Moore, *How to Advise Noncitizen Defendants: What is "Clear and Unclear" After* Padilla v. Kentucky (Wash. Defender Ass'n Immigr. Project, Apr. 2010), *available at* www.defensenet.org/immigration-project/immigration-resources/padilla-v.-kentucky-resources; *see also* Manuel D. Vargas, *A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After* Padilla v. Kentucky (Immigrant Defense Project, Apr. 2010), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/01/Padilla_Practice_Advisory_011712FINAL.pdf.

become an essential consideration in other areas of the law, the larger legal profession, and for policy makers on the local, state, and federal level.