APPENDIX F

DOMESTIC VIOLENCE: THE OVERLAP BETWEEN STATE LAW AND IMMIGRATION LAW

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I. THE OVERLAP OF CULTURAL AND IMMIGRATION CONCERNS WITH DOMESTIC VIOLENCE LAW

As public policy and legislation have focused efforts on deterring domestic violence and ameliorating its effects, and the legal system is increasingly faced with litigants of varying ethnic and racial backgrounds and life experiences, courts will likely encounter increased numbers of immigrant survivors of domestic violence. While state court judges do not have jurisdiction to make decisions about immigration status, state court decisions can have a significant if not conclusive impact on immigration issues. Issues of culture and immigration status frequently arise within the context of family law and domestic violence cases, and judges need to understand certain aspects of immigration law because in the process of conducting routine proceedings, they may unknowingly make decisions with far-reaching immigration consequences. An appreciation of how these issues affect litigants will help courts in their efforts to assure access to justice for all individuals.

II. BARRIERS FACING IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE

Domestic violence is a pattern of behaviors that one intimate partner or spouse exerts over another as a means of control.[1] This includes psychological, social, and familial factors as well as physical acts.[2] Battered immigrants, like all survivors of domestic violence, experience physical violence, emotional abuse, coercion, threats and intimidation, isolation, economic abuse, and sexual abuse. In addition, perpetrators of domestic violence against immigrants use culture and cultural taboos, children and child custody, and economics to enhance their control.[3] In addition, abusers often use *immigration status* as a tool of control.[4]

A. Fear of Deportation

He came in and kicked me repeatedly. I was bleeding and I was starting to develop bruises. Finally, he calmed down and he left me alone. The beatings were getting worse. I began to feel that my life was *in danger. When he would beat me, I never called the police because I was afraid of being deported. I thought the police were connected to Immigration. I have heard that they ask people if they* have *papers, and if they don't, they are turned over to Immigration. Even though my husband has a green card, he has refused to apply for papers for our children and me. After he beats me, he always promises that he will fix my papers, but he never follows through. I have lived in constant fear of his abuse and his reporting me to immigration.*

Threats and fears of deportation are the often the primary concern for many non-citizen or non-English speaking survivors who are seeking help fleeing domestic

violence. Abusers of battered immigrants frequently threaten them with deportation if they complain about the abuse, threaten to leave, or attempt to call the police or ask others for help. For undocumented women, fear of deportation is one of the primary reasons that few seek any help unless the violence against them has reached *catastrophic* proportions. Even women who do have lawful status may fear deportation if they report domestic violence due to incorrect information provided to battered women by their batterers. Victims may fear that if they report the abuse, their abusers may be deported, and they will lose valuable child support or other economic assistance they need. Unfortunately, in places where it is common for those affiliated with the legal system to inquire about individuals' immigration status, victims of crime will not seek protection or redress from the justice system.

B. Cultural Issues

Immigrant abuse survivors often face pressure from their "cultural communities"[5] to remain in abusive relationships for complex reasons, ranging from cultural norms about the role of women in the community, or the sacredness of the family unit, to the batterer's higher status in the particular community. Immigrant survivors of domestic violence may fear ostracism by members of their community if they seek assistance from outside their community, which may include all of their friends or family members in the United States.[6]

Survivors from closely-knit religious communities may feel that the remedies provided by the legal system conflict with their religious beliefs. For examples, survivors may have beliefs that emphasize the sanctity of the family and prohibit or strongly discourage divorce. Religious leaders may instruct battered immigrants that they have a duty to make their marriages work. Battered immigrants who may not want to separate permanently from their batterers may need different types of family court orders to accommodate these needs. For example, a survivor can request a protection order that requires the batterer to abstain from abusive behavior, but does not require the batterer to stay away from the survivor or leave the family home.

Along with barriers created by their cultural norms, survivors may be afraid to reveal violence to individuals outside their community. Many cultural traditions are quite different than "mainstream" American customs and it may be difficult to find services that satisfy the needs of survivors from immigrant communities. Battered immigrants who choose to seek assistance from a domestic violence shelter may feel alienated and alone without access to culturally familiar surroundings. Their apprehension may cause them to leave or avoid seeking assistance in the future. Attorneys can work with domestic violence service providers and shelters to help battered immigrants receive the services they need. Some examples may include allowing battered immigrants to prepare their own food, providing translators to accompany battered immigrants to individual or

group counseling sessions offered by the shelter, or advocating for language specific support groups.

To help remove these barriers, courts can learn more about the dynamics of domestic violence experienced by immigrants. In addition, courts can work to develop strategies for instituting culturally-appropriate policies and procedures. For example, courts can work on adopting culturally competent assumptions including:[7]

- All cultures are contradictory in that there are both widespread acceptance of domestic violence as part of society and traditions of resistance.
- Each victim is not only a member of her/his community, but also a unique individual with her/his own responses. The complexity of a person's response to domestic violence is shaped by multiple factors.
- Each individual comes into any encounter with cultural experiences and perspectives that might differ from those present in the system.
- All institutions should develop specific policies and procedures to systematically build cultural competence by: learning to recognize and reject preexisting beliefs, biases, and prejudices about a particular culture, by focusing on understanding information being provided by individual litigants within the context at hand, and by foregoing labeling persons by using fixed or generalized information.

C. Unfamiliarity with the American Legal System

The last time I tried to call the police, when I was still in Mexico, they didn't do anything, because they consider it a family problem. My experience with the police is that they only protect the rich. When I tried to get help from them in the past, they would not help me.

Many immigrants come from countries whose legal systems work very differently than ours. Immigrant litigants in the United States often have great difficulty understanding our legal system, for example, the role of the court in resolving what is considered a "private" matter such as domestic violence.[8]

In addition, many immigrants come from countries where the courts serve as an arm of a repressive government and do not function independently. They expect that persons who will win in court are those with the most money or the strongest connections to the government.[9] Many refugees who have fled their native countries have associated any contact with the legal system with persecution and terror.

Many battered immigrants distrust the U.S. legal system because of misinformation from abusers. In domestic violence cases, batterers will often manipulate these beliefs to get battered immigrant women to drop charges, or dismiss protection order petitions by convincing them that since the batterer is a citizen or has more money, or is a man and therefore his word is more inherently credible, he will win in court and the victim's life will become even more difficult. [10] Abusers may tell victims that they will never be believed in court or that they will be deported if they call the police or go to court. These allegations are often exacerbated by court personnel believing that non-citizens are not entitled to protections under state law against abuse. To the extent possible, court personnel should explain the U.S. legal system with immigrant litigants and answer any questions they may have regarding the value of their testimony and the legal relief that is available.[11]

D. Language Barriers

One time, after my husband had beaten me severely and I fled the house with my children. I didn't know where to go, but I was terrified of being near him. I went to our church, who in turn called the local domestic violence program. When I got there, there was no one there who could talk to me. I had to wait for hours until they could find someone on the telephone who could talk with me. I stayed at the domestic violence shelter for a few days, but decided to go back to my husband. I didn't have anybody I could talk to, and I felt very lonely. They said that I had to participate in their support groups, but I couldn't speak English, and I didn't have anything in common with the other women there, I didn't understand them and they didn't understand me.

Another time, my husband accused me of cheating on him. He began yelling at and beating me. Someone called the police, who came to the house and knocked on the front door. The officers came to talk to me*, but I did not understand what they were saying. My husband told them something in English, and they left. He had proven to me that he could do whatever he wanted to do, and that the police would not believe me.*

When battered immigrant women do approach the legal system for help, the courts and law enforcement agencies, and even shelters often have not implemented policies which ensure that domestic violence victims who do not speak English can communicate their complaints effectively, and can learn about their rights as domestic violence victims. An inability to communicate may prevent a battered immigrant from seeking necessary legal, shelter, or emergency services. For example, the immigrant may be unable to communicate with law-enforcement officers responding to an emergency call. The batterer may attempt to communicate on behalf of the victim, and distort and twist the facts or completely minimize or deny the abuse. Furthermore, the abuser may lie and tell the police that the victim initiated the fight and she may be arrested as a result.

Many courts, domestic violence shelters, crisis hotlines, and social service agencies have limited access to interpreters, further isolating the battered immigrant from the services she needs. Immigrants may also be unaware of the availability of interpreters and translated forms, and thus fail to access available services.

Though domestic violence protection order forms and instructions are translated in various states, including Washington State,[12] this is only a small part of the legal process faced by domestic violence survivors.[13] The lack of ability to read or understand English impacts every part of the immigrant woman's encounter with the legal system: forms must be translated; hearings are meaningless unless an interpreter is present; and the woman may not understand court orders or when a violation has occurred unless adequate, translated explanation is provided.

As our society becomes more aware about the problem of domestic violence, more and more non-citizen battered women and children are turning to the legal system for assistance. Although domestic violence traverses all racial, ethnic, religious, and economic lines, battered immigrant women face greater obstacles to escaping violence and getting help from the legal system. Awareness of how immigration law affects battered women can help courts intervene more effectively in all domestic violence cases.

III. DOMESTIC RELATIONS LAW AND BATTERED IMMIGRANTS

A. Child Custody

Abusers frequently threaten to obtain legal custody of the children, telling immigrant victims that they will lose their children due to their lack of immigration status. In parenting plan cases involving battered immigrants, an abuser may attempt to introduce evidence about the victim's immigration status.[14] This maneuver is intended to control the battered immigrant victim by frightening her and reinforcing the abuser's threats that he will have her deported if she does not comply with his demands. Immigration status is irrelevant in and of itself to the custody determination. If the abuser claims that this information is necessary because of the threat of flight with the children, the abuser should be required to prove that the threat of flight is real, as any litigant would have to do in any other parenting plan matter. The immigration status of the battered immigrant is not relevant to this determination. However, in determining the children's best interest, the court should focus on the abuser's violence, rather than the victim's immigration status.[15]

Upon separation, abusers may engage in protracted custody or visitation litigation, as a means to control their former partners.[16] Abusers may harass victims during court proceedings by repeatedly filing motions to modify temporary parenting

arrangements; by repeatedly requesting continuances to force victims to return to court, jeopardizing their employment; stalking victims from court home or to work; and by filing false complaints with Child Protective Services. Explicit court orders can prevent abusers from using the legal system as a battleground for control.

Abusers may also claim that because the immigrant is from a foreign culture, it is not in the best interests of children to be raised in an environment that differs from the "norm." For example, an immigrant litigant's living arrangements may appear unusual to a judge from a different ethnic or cultural background. A client may live with extended family members, or share a bedroom with another family. This may be a typical arrangement within the immigrant community, but may raise concerns for the court. The court should seek information regarding cultural differences and about whether the unfamiliar cultural practices harm the children or affect them negatively.

Abusers may use visitation with the children as an opportunity to harass, assault, or monitor victims. Other abusers threaten to remove the children to another country if victims leave the relationship. Abusers tend to escalate the violence when victims attempt to leave the relationship, increasing the likelihood that victims will be assaulted or killed at that time.[17] Safety provisions should be provided within parenting plans and protection order provisions of family court orders to protect the safety of battered immigrants and their children.

1. Parenting Plans/Custody Orders

Findings of domestic abuse in judicial proceedings are relevant to the best of interests of children. [18] In addition, the findings may be highly relevant in future immigration cases in that they are helpful to be able to prove battery or extreme cruelty in the immigration case.

Findings of abuse, restrictions in residential placement or visitation due to abuse, and restraint provisions in custody orders may also affect a litigant's ability to prove the requirement of "extreme hardship" in certain types of deportation cases. For example, judicial findings that the abuser has threatened to harm the children might help establish that removing the battered parent or children from the legal protections provided by U.S. courts would cause "extreme hardship." In addition, family court findings with respect to a child's best interest being primary residential placement with the non-abusive parent might be used to demonstrate extreme hardship to either the parent or the child due to their long term separation.

Family Court findings may also affect a battered immigrant's ability to meet the "good moral character" requirement for an immigration case. If

there has been a finding that a non-citizen "failed to protect" the child from abuse, the individual may face difficulty in establishing that s/he has good moral character for the purposes of the immigration matter.

2. Shared Parenting or Mediation

Joint residential placement is inappropriate for families with a history of domestic violence.[19] Joint residential placement allows an abuser to exert ongoing control over the victim by maintaining ongoing contact with the victim and children, exposing the battered immigrant spouse to continued physical violence and psychological abuse.

For similar reasons, *mediation* is generally inappropriate in parenting or dissolution cases involving domestic violence, either in the resolution of the final parenting plan, or as a means of dispute resolution ordered in the final parenting plan itself.[20] Mediation may expose victims to increased physical and psychological violence by providing abusers with an opportunity to further intimidate victims. Furthermore, the imbalance of negotiating strength between the parties may be exacerbated due to an immigrant victim's inability to speak English well or lack of understanding about the U.S. legal system. When there is a history of domestic violence, mediated agreements may be based on the abuser's coercion, rather than common agreement. The court should not subject domestic violence victims to continued abuse and control by the abuser by ordering mediation.

3. International Parental Kidnapping[21]

When abusers have ties to other countries, concerns about international abduction become very valid. When children are abducted and taken to another country it becomes extremely difficult to get them back to the U.S. and battered immigrants often decide to remain with their abusers in order to prevent international abduction. Courts should consider allegations concerning kidnapping seriously and issue orders to deter an abuser's kidnapping attempts.[22]

Parenting plans can be filed with State Department to block passport issuance to citizen children.[23] As a means to prevent removal of U.S. citizen children out of the country in violation of custody orders, federal law provides for passports to be blocked by the filing of the court orders with the State Department. There must be an order from a court of competent jurisdiction, i.e. a U.S. state court or foreign court having jurisdiction over child custody issues consistent with the principles of the Hague convention on the Civil Aspects of International Child Abduction and the Uniform Child Custody Jurisdiction and Enforcement Act. The

court must be the court in the state where the child resides or place of habitual residence.

The order must:

1. Grant sole custody to the objecting parent, or
2. Establish joint legal custody, or
3. Prohibit the child's travel without the permission of both parents or the court, or
4. Require the permission of both parents or the court for important decisions unless permission is granted in writing.

B. Dissolution of Marriage

Various issues may arise for battered immigrants in matters involving dissolution of marriage. An immigrant's legal immigration status may be completely dependent on the fact that s/he is married to a spouse with a certain legal status. Other concerns may be related to beliefs about the propriety of dissolving a marriage. Divorce may be contrary to their religious or social beliefs, or they may be concerned that they will shunned by their community if they initiate dissolution proceedings. Some may seek to obtain a legal separation instead of a dissolution of marriage.

1. Financial Issues

Many battered immigrants may face economic barriers due to a lack of employment authorization from the Bureau of Citizenship and Immigration Services (CIS), low-paying jobs, or an inability to obtain certain public benefits due to their immigration status.24 Battered immigrants may lack job experience or employment skills due to isolation by the abuser. For examples, abusers often prohibit battered immigrants from learning English or from working outside the home in order to maintain control.

Economic issues can be addressed by family court orders distributing marital assets, as well as orders to pay maintenance and child support. In dividing property and awarding maintenance, it is appropriate for courts to consider domestic violence by considering the length of time the abused immigrant may require financial support for herself and/or her children; the length of time it will take for the abused immigrant to be able to work, the abused party's lost employment opportunities due to the abuser's controlling behavior, and/or other factors such as the need for counseling or other interventions resulting from the abuse.[25]

C. Civil Protection Orders

Protection orders can offer broad relief and can offer crucial protection against continued violence.[26] In addition, orders including findings of abuse provide critical evidence for battered immigrants who self-petition or file for cancellation of removal.

Washington's protection order statute includes a "catch-all" provision that can be used creatively to obtain specific relief for battered immigrants.[27] These provisions can be used to ensure that protection orders address potential areas of continuing conflict, and remove barriers that prevent victims from leaving their abusers.

In addition to the forms of relief restraining the abuser from engaging in acts of physical violence, threats, contacting the victim and her children, and from coming within a specified distance of certain locations, courts can use "catch-all" provisions to prevent the abuser from engaging in other acts of control over the victim. The following forms of relief may be particularly helpful for battered immigrants who have needs beyond those faced by non-immigrant victims, such as the need for specific documentation of elements required in immigration cases:[28]

- The respondent shall give petitioner access to, or copies of, any documents supporting petitioner's immigration application.
- The respondent shall not withdraw the application for permanent residency or any other visa application which has been filed with the CIS on the petitioner's behalf.
- The respondent shall not contact the Bureau of Immigration and Customs Enforcement (ICE), the (insert particular) Consulate, or the (insert particular) Embassy about the petitioner's immigration petition.
- The respondent shall take any and all action necessary to ensure that the petitioner's application for permanent residency is approved.
- The respondent shall turn over the following items or copies of the following items to the petitioner: petitioner's pocketbook, wallet, working permit, ID card, bank card, social security card, passport, certificate of naturalization or citizenship (if applicable), alien registration receipt card or passport stamp to prove permanent residency (if applicable).
- The respondent shall relinquish possession and/or use of the following items: respondent's passport, certificate of naturalization or citizenship, alien registration receipt card or passport stamp to prove permanent residency, working permit, ID card, bank card, baptismal certificate, Social Security card.

- The respondent shall relinquish possession and/or use of the following items: the parties' marriage certificate, family photos, papers, documentation, or other objects relating to the marriage, copies of the respondent's divorce certificates for any previous marriages and/or information about where such divorce decrees may be obtained.
- The respondent shall relinquish possession and/or use of the following items: children's early school records, rent receipts, and income tax returns.
- The respondent shall not remove the children from the court's jurisdiction and/or the United States absent a court order and shall relinquish the children's passports to the petitioner or the court.
- The respondent shall sign a statement informing the (particular) embassy or consulate that it should not issue a visitor, or any other type of visa, to the child absent an order of the court.
- The respondent shall pay all fees associated with the petitioner's and/or children's immigration cases.
- The respondent shall sign a prepared CIS FOIA (Freedom of Information Act) form. This signed form shall be turned over to the petitioner or the petitioner's attorney.

By ordering these types of remedies, courts can prevent an abuser from continuing to use the immigration process as a means to control and manipulate the victim.

IV. IMMIGRATION LAW AND ITS OVERLAP WITH FAMILY LAW

A. Background

A general understanding of the overlap of immigration and domestic violence and family law is important for various reasons. These may include: injury to litigants by lack of knowledge, providing litigants the opportunity to know what the consequences are for certain decisions, and giving them a chance to make an informed choice.

With respect to domestic violence survivors, recent changes in immigration law have attempted to address problems faced by survivors of domestic violence. Early American immigration law, rooted in feudal notions that treated wives and children as property of their husbands and fathers, gave male citizens and permanent residents control over the immigration status of their immigrant wives. However, citizen and permanent women could not file applications for their male immigrant spouses.[29]

The Immigration and Nationality Act of 1952 (INA) created gender neutrality, making it possible for either husband or wife to petition for an immigrant

spouse.[30] In 1986, as a result of Congressional concerns about marriage fraud, the spousal petitioning process was changed, and the status of Conditional Permanent Residence was created.[31] If a couple is married for less than two years at the time the immigrant spouse obtains her permanent residence, she is granted conditional status. Conditional residents and their spouses must file a *joint* petition to remove the conditional status two years after the immigrant spouse obtains permanent resident status. Failing to file the joint petition could result in the denial of permanent residency and the initiation of removal proceedings against the immigrant spouse.[32] However, the joint petitioning requirement had the unfortunate effect of placing battered immigrants at the mercy of their abusers and at risk of continuing abuse.

In 1990, based in large part on advocacy efforts by both domestic violence and immigrant advocates, the Immigration Act of 1990 created important amendments to the immigration law, allowing "good faith" and "battered spouse/ extreme cruelty" waivers.[33] It soon became evident that this remedied only part of the problem because many abusive spouses and parents never filed petitions for their immigrant spouses at all. In the Violence Against Women Act (VAWA) of 1994,[34] Congress added two new forms of immigration relief to help this group of individuals. They were "VAWA self-petitioning" and "VAWA suspension of deportation." As part of VAWA, Congress dictated that both BCIS[35] and the EOIR[36] apply a liberal "any credible evidence" standard to all VAWA applications, and to battered spouse waivers of the joint petition to remove conditions on residence, [37] recognizing that immigrant survivors may not have access to traditional primary and secondary evidence, because of the dynamics of domestic violence and isolation from services and resources.[38] The Illegal Immigration Reform and Immigrant Responsibility Act[39] reframed VAWA suspension of deportation as VAWA cancellation of removal and included several exemptions to new grounds of inadmissibility for immigrant survivors of domestic violence. The Battered Immigrant Protection Act of 2000[40] and VAWA of 2005[41] remedied numerous procedural and practical problems found in the implementation of VAWA, as well as created a new non-immigrant visa for victim witnesses who may be ineligible to take advantage of the remedies found in VAWA. Recently, the oversight of enforcement of immigration law has been transferred to the Bureau of Citizenship and Immigration within the Department of Homeland Security.[42]

B. Potential Impacts on Immigration Status

An understanding of the immigration consequences of state court decisions may assist the court in understanding many factors influencing litigants' choices and decision-making. One primary impact of a court ordering a dissolution of marriage is that spouses and/ or children may lose their immigration status as a result of the order.

1. Permanent resident spouses

The most common issue is the effect of a dissolution of marriage where one spouse is a permanent resident. Typically, a U.S. citizen spouse filed a petition for the immigrant spouse after the marriage. So long as permanent residence was not obtained more than two years after the date of marriage, the permanent resident status is ***conditional*** for two years from the date of status and the spouse is referred to as a conditional permanent resident (CPR).[43] Within the 90 days prior to the expiration of the two years, so long as the marriage has not legally terminated, the parties must file a joint petition to remove the condition, Form I-751. Timely filing extends the applicant's status for six months, unless it is denied prior to that time. If the petition is not filed, the permanent resident status terminates.[44] In order to preserve immigration status, litigants may seek evidence to show the bona fides of the marriage.[45] The citizen spouse need only testify truthfully that the marriage was bona fide *at the time it was commenced*, but that it subsequently deteriorated.[46]

Alternatively, the immigrant spouse can file to waive the requirement of a joint petition.[47] Grounds for waiver are as follows:

1. Extreme hardship if alien deported, where the hardship arose during the conditional residence period.
2. Marriage was entered into in good faith, but has terminated.
3. Abuse of spouse or child: "battered by or was the subject of extreme cruelty perpetrated by his or her spouse and the beneficiary was not at fault in failing to meet the petitioning requirements."

Immigration regulations define this to include psychological or sexual abuse or exploitation.[48] The testimony of the U.S. citizen spouse can be crucial in bringing a prompt resolution to the waiver applications based on extreme hardship or based on good faith, as the CIS is likely to contact them to learn their perspective about the nature of the marriage. If the application for the waiver is denied, the denial can be reviewed by an immigration judge.[49]

2. Beneficiary of spousal petition (Second Preference, I-130)

Where a legal permanent resident has filed a petition to obtain status for his/her spouse, there is a quota of visas permitted to be issued annually, and as a result, there is a waiting list for the availability of a visa, which may last as long as seven or eight years[50]. If the marriage terminates before a visa is available and the immigrant spouse can get her/his permanent resident status, s/he is no longer eligible for the immigration

status s/he applied for, unless s/he is eligible to self-petition under the Violence Against Women Act or is eligible for other immigration relief.

3. Nonimmigrant and other categories

Nonimmigrant visa categories typically provide derivative status for the spouses and children of the principals, for example the spouse of an F-1 student gets an F-2 visa, or the spouse of an H-1B temporary worker gets an H-4 visa. If the marriage terminates, the derivative spouse or dependent is no longer entitled to the visa status. ICE may not discover this, but no extension would be granted were one to apply for one. The individual should check the expiration date of the visa. Other categories, such as asylee spouses or Family Unity spouses, may also lose their status (or not be entitled to extensions or adjustment) after the final order of dissolution.

4. Naturalization

The legal termination of a marriage can also impact the naturalization process. Naturalization applications can be filed by permanent residents (LPR) in three years, rather than five, where the applicant has been married to a U.S. Citizen (USC) and an LPR for three years. After a permanent resident has resided in the United States for three years they can apply for citizenship if they have been in "marital union" with the citizen spouse for that time period. Otherwise, generally they must wait five years.[51] Citizenship includes the right to seek employment with the federal government, and to apply for many forms of government benefits that may otherwise be unavailable to permanent residents. Citizens can also petition to bring in their parents without being consigned to a waiting list. There is no gift/estate tax marital deduction for non-citizen spouses. There are many long-term permanent resident spouses of citizens who are not aware of this significant tax consequence. If naturalization is not an option, there is a trust device that may avoid these consequences.

5. Criminal Convictions[52]

Criminal convictions for spousal or child abuse may render an immigrant removable from the United States (deportable). All non-citizens may risk removal, or be rendered ineligible to adjust status to permanent resident, or to obtain citizenship if they are convicted of a criminal offense.

Domestic violence crimes, stalking, child abuse, and violations of protection orders, no matter what sentence imposed are grounds for deportation.[53]

Immigration applications generally ask if the beneficiary has ever been arrested. Even where the charges are dropped, the beneficiary will usually have to disclose the details of the arrest and disposition. This may affect his or her eligibility for discretionary immigration relief.

C. Self-Petitioning for Resident Status Under VAWA

VAWA allows abused spouses, and children of lawful permanent residents[54] or abused spouses, parents, and children of United States citizens[55] to file petitions for lawful permanent residence without having to rely on their abusive spouse or parent to apply for them. Spouses also may file petitions based on abuse suffered by their children. In order to successfully self-petition under VAWA, an applicant must demonstrate[56]:

1. Battering or extreme cruelty inflicted by a U.S. citizen or lawful permanent resident on a spouse or child (or parent by a U.S. Citizen child);
2. Good faith marriage and residence with the United States citizen or lawful permanent resident spouse (or residence if a child or parent); and
3. Good moral character.

The state court system can help facilitate a battered immigrant's self-petitioning process by providing evidence to meet the statutory requirements under VAWA, as well as help protect her from further abuse. For example, protection or restraining orders that order abusers to vacate a joint residence may provide the opportunity for a battered immigrant to gather the documents necessary to support a self-petition. In such a case, it may be crucial for such an order to go into immediate effect, preventing an abuser from being given the opportunity to hide, destroy, or remove importance evidence needed for her self-petition.

1. Battering or Extreme Cruelty[57]

A self-petitioner must be "battered" or "the subject of extreme cruelty."[58] These terms include but are not limited to "being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury."[59] Acts of violence include "[p]sychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution," as well as "other abusive actions . . . that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence."[60] The Preamble to the interim Immigration regulations states that actions against another individual or thing may also qualify if these acts "were deliberately used to perpetrate extreme cruelty against the self-petitioner or the self-petitioning spouse's child."[61]

Evidence of battering or extreme cruelty may include "any credible evidence."[62] Specifically, "[e]vidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel."[63] Other relevant evidence may include: an order of protection against the abuser or other legal steps to end the abuse, evidence of seeking refuge in a battered women's shelter or similar place, a photograph showing visible injuries, or documentation of "nonqualifying abuses" to show a pattern of abuse and violence.[64]

Thus, relevant evidence may include the following:

a. temporary and final no-contact and civil restraining and protection orders;
b. police records and reports;
c. criminal court records, complaints, arrest records;
d. medical records;
e. school records;
f. evidence of torn clothing, broken furniture;
g. photographs of injuries;
h. declaration by the client detailing her relationship with the abuser and children, dates they began living together, when and how domestic abuse began, description of each incident, physical injuries and verbal threats, attempts to leave or seek help, difficulty in leaving, feelings about the abuse;
i. declarations from friends, witnesses, or relatives corroborating the client's statements;
j. declarations from shelter workers, counselors, social workers, clergy, experts on domestic violence, or other service providers.

The state court can facilitate a self-petitioner's gathering of evidence to support an application by providing documentation of a record of domestic violence. Restraining and protection orders without a finding of abuse are not as useful to self-petitioners as orders with such findings, except to corroborate other evidence. Courts should permit battered immigrants to provide testimony and evidence on the record about the history of violence, injuries to the petitioner, the impact of violence on the petitioner and/or her children, use of control over the petitioner's immigration status as a means to exert power and control, threats made by the abuser, and the respondent's criminal record. In addition, it may be preferable to obtain a judicial finding that domestic violence has occurred in protection order

matters or family law cases rather encouraging the parties to settle such matters without hearing.

2. Qualifying Abusers

The abuse must have been "perpetrated by the alien's spouse,"[65]parent, or adult child , and the abuser have been a U.S. citizen or lawful permanent resident within two years of CIS approving the self-petition. If the spouse or parent has lost their citizenship or permanent resident status, this loss of status must have been related to the abuse.[66] Thus, a spouse married to, or child or parent of an undocumented abuser may not self-petition.[67]

A self-petitioner must submit proof of the abuser's status as a U.S. citizen or lawful permanent resident.[68] Though CIS may assist with searching its records for information regarding the abuser's status, if the CIS does not locate any record, the CIS will rule on the petition based on the information sent by the self-petitioner.[69] Thus, the burden of proving the abuser's status remains on the self-petitioner.[70]

A state court may make findings about the abuser's legal status or order the batterer to provide evidence to the other party about his immigration status. Such documents may also be obtained in discovery through requests for production.[71] However, courts should recognize that advocates may strongly resist inquiries on the record about the abuser's or the victim's immigration status, as they might result in the erosion of the immigrant community's confidence in the legal system, and discourage future cooperation with law enforcement.

3. When and Where the Abuse Took Place

For a spouse to self-petition, the battering or extreme cruelty against herself or her child must have occurred "during the marriage."[72] For a child to self-petition, he must show that the battering or extreme cruelty took place "during the period of residence with the abuser."[73] For a parent to self-petition, he must show the battering or extreme cruelty was committed by his adult son or daughter.[74]

4. Good Faith Marriage to the Abuser

The marriage[75] between the self-petitioner and the abuser must have been in "good faith."[76] It is the self-petitioner's good faith that is important. CIS will deny a self-petition if "the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws."[77]

Good faith marriage must also be proved by individuals applying for a waiver of the joint filing requirements to remove conditions on residence based on either termination of the marriage or battery and/or extreme cruelty.[78]

Evidence of "good faith" may include proof that both spouses are listed on bills, insurance policies, property leases, income tax forms or bank accounts and "testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences."[79] Other relevant evidence could include birth certificates of children; police, medical or court documents with information about the relationship; and declarations from individuals with personal knowledge of the relationship.[80]

A self-petitioning spouse must submit evidence of the marriage (such as a marriage certificate) and proof that all prior marriages of both the self--petitioner and the abuser have legally terminated.[81] If the self-petition is based on abuse to a child, the self-petitioner must include a copy of the child's birth certificate or other evidence of the relationship to the abuser.[82]

5. The Effect of Dissolution or Declarations of Invalidity of Marriage

After the self-petition is properly filed, future legal termination of the marriage (through death, divorce or annulment) has no effect on a pending self-petition,[83] and no effect on an approved self-petition.[84] Nor does it have an effect on an application for the waiver of the joint filing requirements to remove conditions on residence, providing that the immigrant can prove "good faith marriage."

Where a battered immigrant has obtained an order dissolving her marriage, in order to qualify for a self-petition, she must properly file a self-petition before two years pass after she obtains the dissolution order. If a dissolution has already been ordered, she will need to explore ways to file a self-petition within two years. She should also document how the divorce is related to domestic violence.

Petitions for declarations of invalidity have the same effect as dissolutions of marriage, however, a finding of invalidity due to fraud might be problematic for a self-petitioner who must prove "good faith marriage." State courts should be mindful that it is not unusual in abusive relationships for abusers to petition for declarations of invalidity based on fraud, alleging that their victims fraudulently induced them into marriage for immigration purposes and also claim that the victims have fabricated

the abuse in order to obtain immigration benefits. Courts should be wary of the possible manipulative tactics of abusers, and engage in further inquiry of these allegations rather than accepting them at face value.

6. Proving the Abuser's Prior Marriages Have Terminated

A spouse must submit proof that all of the abuser's prior marriages have legally ended. This may be extremely difficult. She may not know whether her spouse was married before or may not have access to proof that his prior marriages have terminated. Legitimate children and stepchildren of abusers also must show the termination of all prior marriages of their abusive parents.[85]

The state court can force the abuser to provide that information or to make rulings on this issue. Advocates can explain to the court that the abuser's refusal to provide the information is part of the pattern of abuse and coercion the court may sanction. In addition, the relevant state statute on marriage licenses and requirements might require an attestation that the parties are free to marry.

7. Residence with the Abuser and Residence in the United States

A self-petitioner must be residing in the United States at the time she files the self-petition[86] unless she is the spouse or child of a U.S. military or government employee and can show that she has resided with the abuser. She does not have to be residing with him when she files the self-petition; however, she must have lived with the abuser.[87]

A self-petitioner may submit documents demonstrating residence with the abuser and residence in the United States[88] such as bills, police reports, protection orders, employment records, utility receipts, school records, medical records, birth certificates of children born in the United States, rental records, mortgages, affidavits and other credible evidence to show residence.[89]

8. Good Moral Character

The self-petitioner must prove good moral character.[90] The inquiry focuses on the past three years, although CIS may examine prior history.[91] Generally speaking, criminal convictions may prevent a person from showing good moral character,[92] though there may be exceptions for battered immigrants. In addition, findings of child neglect or intervention by Child Protective Services may undermine a finding of good moral character.

9. Employment Authorization for VAWA Self Petitioners

All approved VAWA petitioners are eligible for work authorization, either because they are immediately eligible to adjust to permanent resident status[93] (immediate relatives and those with current priority dates), because they have approved self-petitions,[94] or because they are suspension or cancellation applicants.[95] Those granted conditional residence or permanent residence do not need a separate employment authorization document; their resident status grants them the ability to work. In addition, battered spouses of certain non-immigrants, including spouses of H visa holders (business visas), A visa holders (diplomatic), E(iii) visa holders (treaty based travel), and G visas holders (employees of foreign government or international organizations) may obtain employment authorization if they can demonstrate battering or extreme cruelty by the primary visa holder during the marriage.[96]

For battered immigrants, it may be particularly important in crafting protection and restraining orders that restrict an abuser from contacting the petitioner at her place of employment. Battered immigrants may have employment authorization, but in some cases, it may be only at an authorized workplace. In addition, language and other barriers may make it difficult to find other employment if she loses her job due to her abuser's harassment.

D. Abused Children

An abused child must have had a parent-child relationship with the qualifying abuser and must be unmarried, have been abused before the age of twenty-one and otherwise qualified as a "child" under immigration law in order to self-petition.[97] Once CIS has approved the self-petition, the child may sever the relationship with the abuser. Step-children may maintain their relationship with their abusive parents even when their parents have separated.[98] If a child is included in their self-petitioning parent's application before turning 21 and marrying s/he will not be required to file a separate self-petition and will be able to adjust to permanent resident status based on the parent's approved self-petition. However the applications for children of abusive lawful permanent residents will automatically be revoked if they marry.[99]

In addition to provisions under VAWA for abused children of parents who possess legal status, children who do not have parents in the United States, who have been abandoned by their parents, or who are abused by both parents, may wish to consider applying for "special immigrant juvenile" status.[100] This requires a finding by the Juvenile Court the child is dependent on the State, and that it would be in the best interest of the child to obtain long-term foster care.

E. Prohibition Against CIS or ICE Use of Information Provided by an Abuser

One of the largest fears of battered immigrants is that their abusers will turn them into ICE. IIRIRA §384 prohibits immigration officers from making adverse determinations on admissibility or deportability "using information furnished solely by" the applicant's abuser, an abusive member of the applicant's household, or someone who has abused the applicant's child.[101] It also prohibits the "use by or disclosure to anyone" except to other Department of Homeland Security officers "for legitimate . . . agency purposes," of information relating to self – petitioners, conditional residents requesting battered spouse waivers, and applicants for cancellation of removal.[102] Anyone who "willfully uses, publishes, or permits information to be disclosed in violation of this section shall be subject to appropriate disciplinary action *and subject to a civil money penalty of not more than $5,000 for each such violation*."[103] These prohibitions and penalties apply to any act by a DHS officer or trial attorney that took place on or after September 30, 1996.[104] In addition, in any Immigration Court proceeding where an enforcement action leading to removal proceedings was initiated at a domestic violence shelter, rape crisis center, supervised visitation center, family justice center, victim services provider, or courthouse where an immigrant appears in connection with a protection order case, child custody matter, or other civil or criminal matter relating to domestic violence sexual assault, trafficking, or stalking, in which the immigrant has been subjected to certain violent crimes, the Immigration service must include a statement certifying that the agency has complied with IIRAIRA §384. This means that the immigration agency must keep information relating to any self-petition case confidential and that the agency employees make no adverse determination regarding the immigrant using information furnished solely by an abuser or perpetrator.[105]

F. VAWA Cancellation of Removal (Formerly Suspension of Deportation)

VAWA cancellation of removal provides a defense for individuals placed in removal (deportation) proceedings. VAWA cancellation and self-petitioning are very similar, but there are some differences which may affect an individual's decision about which route to choose, and may also depend on whether or not s/he is not already in removal proceedings.

On the one hand, abused spouses and children of lawful permanent residents may be eligible to obtain permanent residence status immediately if an immigration judge grants her/his application for VAWA cancellation of removal. On the other hand, some individuals may not have the requisite marital relationship to their abuser, and may not be able to include dependent children in their applications.

In order to be eligible for VAWA Cancellation of Removal, an individual must prove:

1. the individual has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent);
2. s/he has been physically present in the United States for three years;
3. s/he good moral character;
4. s/he has not been convicted of certain crimes; and
5. his or her removal would result in extreme hardship to the individual, his or her child, or parent.[106]

1. Qualifying Relationships to Abusers

The suspension/cancellation statute is broader than the self-petition provisions in that the applicant may be a "parent of a child of a United States citizen or lawful permanent resident" if the "child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent."[107] This provision has been interpreted to include a domestic violence survivor who was never married to her abuser but whose child in common with the abuser suffered extreme cruelty from witnessing the abuse.

2. Extreme Hardship

Unlike the self-petition process, an individual applying for VAWA Cancellation must prove "extreme hardship" to herself, her child, or parent if she is removed from the United States.[108] Extreme hardship may also serve as a basis for an individual filing an application for a waiver of the joint petition to remove conditions on residence.[109]

Evidence relating to abuse that applicants may submit to show extreme hardship includes:[110]

a. the nature and extent of physical abuse and the psychological consequences of battering or extreme cruelty;
b. the need for access to U.S. courts, to the U.S. criminal justice system (including but not limited to the ability to obtain and enforce protection orders, criminal investigations and prosecutions), and to family law proceedings for child support, maintenance and custody;
c. the need for social, medical, and mental health or other services for both self-petitioners and their children that are available

here but are not "reasonably accessible" in self-petitioners' homelands;

d. laws, social mores and customs in the home country that would ostracize or penalize the self-petitioner or her child for being the victim of abuse, for leaving the abusive situation, or for taking actions to stop the abuse, including divorce;

e. the abuser's ability and inclination to follow his victims to the homeland and that country's inability or unwillingness to protect victims of abuse; and

f. the likelihood that the abuser's family, friends or others would physically or psychologically harm the self-petitioner or her child.

Protective orders and child custody are key issues requiring ongoing access to the courts in the United States. A child custody order may be meaningless if the mother is deported, perhaps allowing the abuser the ability to reopen the custody decision without challenge. The lack of enforcement of restraining or protection orders in the homeland is also a powerful extreme hardship consideration. A protection order acquired in the United States cannot be enforced abroad.

The effect on children of domestic violence in the household is also relevant in determining whether or not an individual will suffer extreme hardship. Since extreme hardship to an applicant's children may qualify her for status, can be documented through the domestic relations or criminal case, whether the children are included in the application or not. Any testimony with respect to the children having witnessing domestic violence, and how this harms children may enhance the likelihood of the mother's application being approved.

Applicants may include evidence of traditional extreme hardship factors, such as: age of the subject, health, family ties, length of residence in the U.S., financial status, other means of adjustment of status, immigration history, position in the community, and other factors, if they exist, but they should not rely on them exclusively.[111]

3. Three Years' Continuous Physical Presence

Applicants for VAWA suspension/cancellation need not show they have lived with the abuser. They must, however, show three years of continuous physical presence in the United States.[112] Departures of ninety days or more, or for aggregate periods exceeding one-hundred eighty days are deemed to break continuous physical presence.[113]

G. Asylum for Victims of Domestic Violence and Sexual Assault

An individual is eligible for asylum in United States if she can meet the definition of a "refugee" as defined under immigration law. A refugee is one outside of his or her country of nationality, who is unwilling or unable to avail herself of the protection of that country due to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group (having a shared immutable characteristic), or political opinion (either actual or imputed).[114] Persecution can consist of imprisonment, torture, physical abuse, mental abuse, denial of employment, rations, education, or other basic rights; serious discrimination, other human rights violations, though not all mistreatment will rise to the level of persecution.

A developing area in immigration law is the recognition of persecution or severe discrimination of women on the basis of gender, where asylum is granted for membership in a particular social group, or religion. A number of important victories in support of the human rights of women refugees have occurred in the last few years, including the publication of the draft regulations on particular social group,[115] a Board of Immigration Appeals decision finding that female genital mutilation constituted a form of persecution,[116] and a Ninth Circuit panel's decision in ***Aguirre-Cervantes v. INS***,[117] in favor of a young woman fleeing domestic violence.[118]

CIS and judges around the country have asylum in cases involving domestic violence[119] and rape[120], where adjudications have found persecution based on a particular social group, for example, the group of "women who espouse Western values and who are unwilling to live their lives at the mercy of their husbands, their society, [and] their government."[121] However, there still remain numerous decisions in which adjudicators have rejected the proposition that violations of a woman's human rights to be a sufficient basis for an asylum claim.

State courts may provide valuable evidence in establishing harm that may constitute persecution under asylum law and ordering protection for victims. These might include, but not be limited to: findings of domestic violence and/ or sexual abuse that had existed since prior to the parties' entry in the United States, as well as providing protective orders against ongoing abuse, providing a means for enforcement of these orders, as well as criminal punishment of traffickers for violations of the law which may not be available in victims' home countries.

H. Visas for Certain Victims of Crime and Trafficking

The Victims of Trafficking and Violence Protection Act (VTVPA) created two new categories of visas for immigrant crime victims. Both types of visas are designed to provide immigration status for individuals who are assisting or

willing to assist authorities investigating specifically delineated crimes. The provisions in the VTVPA also provide a route to apply for lawful permanent residences for individuals who obtain "T" and "U" visas.

1. "U" Visas for Victims of Crime

The U visa is designed for immigrant crime victims who have suffered substantial physical or mental abuse as a result of criminal activity and who have cooperated with government officials investigating or prosecuting such criminal activity.

To qualify for a U visa, the individual must show:

- that she has suffered "substantial physical or mental abuse"[122] as the result of one of the following forms of criminal activity (or "similar" activity):

  > …rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.[123]

- that she possesses information concerning the criminal activity[124]

- ***AND***

- provide a certification from a federal, state, or local law enforcement official, prosecutor, judge, or authority investigating criminal activity designated in the statute that states that the U visa applicant is being, has been or is likely to be helpful to the investigation or prosecution of designated criminal activity.[125]

The statutory language of the VTVPA does not require that an investigation in which the immigrant victim cooperated result in a conviction, nor does it require that a prosecution result in a prosecution. State court judges can provide certifications for individuals who have provided statements that serve as the basis for a criminal investigation (e.g, the basis for a warrant) or for individuals who have served as witnesses in a criminal prosecution.

As of the date of the printing of this article, CIS has not issued regulations or forms for individuals to be able to apply for a U visa, but will provide interim relief to individuals who appear to have established prima-facie eligibility for a U visa. This interim relief may provide the individual eligibility to obtain employment authorization from the CIS and protection from deportation.

2. "T" Trafficking Visas

The T visa is similar to the U visa, but designed specifically for those who have been subjected to sex trafficking or other "severe forms of trafficking."[126] The VTVPA defines sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[127] It defines "severe" trafficking as:

> …sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
>
> the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[128]

Applicants for T visas must provide the CIS "any credible evidence" that they:

- are or have been victims of severe trafficking
- are physically present in the United States or at a U.S. port of entry on account of such trafficking
- have "complied with any reasonable request for assistance in the investigation or prosecution" of an act of trafficking act or be under age fifteen and
- show he or she would "suffer extreme hardship involving unusual and severe harm" if removed.[129]

Some factors that might demonstrate "extreme hardship" include, but are not limited to:

- The age and personal circumstances of the applicant;
- Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country;

- The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons;
- The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the severe forms of trafficking in persons or other crimes perpetrated against for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;
- The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;
- The likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the applicant;
- The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would severely harm the applicant; and
- The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict as demonstrated by the designation of Temporary Protected Status, under section 244 of the Act, or the granting of other relevant protections.130

Trafficking victims can qualify for T visas by working with state, local, or federal authorities, and by cooperating in the investigation of crimes ancillary to trafficking.[131] State courts may provide trafficking victims with valuable evidence in establishing that they would suffer extreme hardship in various forms. These might include, but not be limited to: protection from their traffickers in the form of protective or restraining orders, by awarding damages for harm suffered at the hands of traffickers, by providing a means for enforcement of these orders, as well as criminal punishment of traffickers for violations of the law which may not be available in victims' home countries.

V. FEDERAL POWERS TO BLOCK TRAVEL

In addition to affecting immigrants' legal status in the United States, federal law also intersects with domestic relations law with respect to restrictions on individuals' ability to travel. For example, alien spouses who violate U.S. custody decrees as to U.S. citizen children are thereby excludable from entry to the U.S. and not eligible for visa issuance, or adjustment of status to permanent residence, unless the child is located in a foreign country that is a signatory to the Hague Convention.[132]

Additionally, the CIS has the power to enter "departure control" orders to block the departure from the U.S. of non-citizens.[133] Besides providing a means to block departure in national security or criminal matters, such an order may issue to block the departure of any alien needed as a party or witness in the U.S. in connection with a federal, state or local judicial proceeding, or where doubt exists that the alien is departing or seeking to depart voluntarily.[134]

With respect to child support matters, the State Department can also revoke the U.S. passport for delinquent child support owed over $5,000.00.[135] In order to reinstate the passport, the obligor must demonstrate to the State Child Support Enforcement Agency the obligation has been fulfilled, and the State will forward the relevant information to the Federal Child Support Enforcement Division, to be then forwarded to the U.S. Passport Agency.

VI. OVERVIEW OF IMMIGRATION LAW AND CRIMINAL PROCEEDINGS[136]

Often the most important issue facing non-citizen defendants charged with crimes is whether a conviction and sentence for any given offense will trigger certain provisions under the Immigration and Nationality Act (INA)[137] that will result in his/her removal (deportation) from the United States. Often non-citizen defendants do not realize just how important this issue is until it is too late.

Under current provisions of immigration law, the consequences for obtaining criminal convictions can be severe. Non-citizens who plead guilty to a seemingly low-level misdemeanor offense (i.e. theft in the third degree, simple assault) can face severe consequences.

Once convicted, non-citizens may face such consequences as automatic deportation, permanent bars to returning to the United States and possible indefinite detention by the Bureau of Immigration and Customs Enforcement (ICE) – regardless of how long they have lived in the United States and what family ties they may have, or whether they are here legally. Moreover, the vast majority of non-citizen defendants (more than 85%) will be unrepresented (pro se) in their immigration proceedings before the Immigration Courts. Most will be detained in ICE detention facilities during these proceedings.

VII. RELEVANT CONCEPTS IN IMMIGRATION LAW – SOME BASICS

Immigration procedures – including removal proceedings, are **civil**, not criminal, in nature.[138] Although the consequences of removal may be harsh, removal is not "punishment."[139] In addition, while certain violations of law are criminal offenses, being in the United States in violation of immigration law as an undocumented person is not a criminal offense.[140] It is a civil violation of immigration law and will subject a non-citizen to a civil proceeding. Consequently, the Supreme Court has held repeatedly that the prohibition against *ex post facto* laws does not apply to deportation proceedings.[141] There is a statutory right to counsel, but not at government expense.[142]

A non-citizen's immigration status will determine which specific set of immigration laws relating to crimes will apply to him/her. Immigration status often will determine the amount of due process accorded to a non-citizen in immigration and/or deportation proceedings. Note that while there are similarities between the provisions – namely the grounds of inadmissibility and the grounds of deportability – there are very important distinctions.

The following three sections attempt to briefly outline the specific provisions of immigration law relating to crimes. Set forth in the beginning of each section is a brief summary of when each of these provisions applies to which category of non-citizen.

A. Grounds of Inadmissibility Relating to Crimes

The criminal grounds of inadmissibility are contained in the immigration statute at INA §212(A)(2), 8 U.S.C. §1182(a)(2). The grounds of inadmissibility apply, generally, to non-citizens in the following circumstances:

- Undocumented non-citizens who entered the country illegally and have no legal status in the United States when ICE initiates deportation/removal proceedings against them. In these proceedings, these non-citizens will be subject to, inter alia, these grounds of inadmissibility for their criminal conduct.
- Any person who is not a U.S. citizen – including lawful permanent residents (greencard holders) – who is seeking entry into the U.S. If the non-citizen falls within any of these grounds of inadmissibility, s/he will be deemed inadmissible to the U.S. and denied entry.
- Any non-citizen who is applying for lawful permanent resident status (a greencard) will be subject to these grounds of inadmissibility. If the applicant falls within any of these grounds, s/he will be deemed ineligible for her/his greencard.
- Lawful permanent residents applying for U.S. citizenship (naturalization) must show that they are a person "of good moral

character". If the naturalization applicant falls within any of these grounds of inadmissibility, s/he will be barred from meeting this requirement.

B. Grounds of Deportability Relating to Crimes

The criminal grounds of deportability are listed in the immigration statute at I.N.A. §237, 8 U.S.C. §1227. The grounds of deportability apply to any non-citizen who was lawfully admitted to the United States, including refugees, or to any non-citizen who is a lawful permanent resident (greencard holder) and apply to this group of non-citizens when the ICE initiates deportation/removal proceedings against them due to criminal conduct. ICE will file what is called a Notice to Appear with the Immigration Court charging the non-citizen with deportability pursuant to one of the following grounds.

C. Crimes Involving Moral Turpitude

In determining whether an offense involves moral turpitude, a fact finder examines the crime as defined by the elements in the criminal statute, not the defendant's actual conduct.[143] A conviction under a statute in which theft, fraud, or intent to commit bodily harm is an essential element involves moral turpitude. It is the elements of the offense that determine whether a conviction is a crime involving moral turpitude, not the name or designation of the offense.[144]

1. One Crime Involving Moral Turpitude

A non-citizen is deportable for a crime of moral turpitude if he or she:

- Is convicted;
- Of a crime involving moral turpitude;
- Committed within five years of admission;[145] and
- For which he or she could receive a sentence of one year or more.[146]

2. Two or More Crimes Involving Moral Turpitude

A non-citizen is also deportable if he or she:

> Is convicted of two or more crimes involving moral turpitude; that did not arise out of "a single scheme of criminal misconduct."[147]

3. Divisible Statutes

The Board of Immigration Appeals created a special rule to interpret whether a conviction under a multi-sectioned or broad statute is a conviction for a crime involving moral turpitude. It refers to these as "divisible" statutes.

a. Multi-Sectioned Statutes

If a multi-sectioned statute includes certain subsections that necessarily involve moral turpitude and other subsections that do not, then the fact finder will examine the record of conviction to identify the defendant's conviction. If the record of conviction does not establish the defendant has a conviction under a subsection that necessarily involves moral turpitude, then the non-citizen is not deportable for that offense. The record of conviction includes the charge, plea, verdict (including defender's admissions made while entering plea), and judgment.[148]

b. Broad Statutes

The second type of divisible statute involves broadly worded offenses. If a broadly worded statute defines certain offenses that involve moral turpitude and others that do not, then the fact finder will examine the "record of conviction" (see below) to determine whether the offense involves moral turpitude. The BIA will not examine evidence of the defendant's actual conduct that is outside the record of conviction. Where the defendant had a conviction for intent to commit a felony upon a minor, the BIA held that the offense did not involve moral turpitude even though the INS offered other evidence that the felony involved a sexual assault.[149]

4. Specific Offenses

Whether a crime involves moral turpitude depends on the elements of the offense, not the name of the offense.[150] Domestic violence related offenses may involve moral turpitude. For example, a conviction for simple assault does not involve moral turpitude.[151] An assault offense that requires a mental state of criminal recklessness does not involve moral turpitude unless the statute also requires that the assault result in serious bodily injury.[152] Nevertheless, a conviction for an assault offense where injury to a spouse or child is an element of the offense involves moral turpitude.[153] A conviction for assault with a deadly weapon is also a conviction for a crime involving moral turpitude.[154] In contrast, a

conviction for an offense in which fraud is an essential element of the crime always involves moral turpitude.[155] In addition, a conviction for an offense that includes as an element the intent to deprive the rightful owner permanently of his or her property, such as theft, involves moral turpitude.[156] A conviction for possessing stolen property involves moral turpitude without regard to the triviality of the offense.[157]

5. Inadmissibility for Moral Turpitude Offenses

A non-citizen is inadmissible for a single conviction for a crime involving moral turpitude unless the person qualifies for the petty offense exception or youthful offender exception.[158] The petty offense exception applies when:

- A non-citizen has committed a single offense that involves moral turpitude;
- The maximum possible punishment is a year or less; and
- The non-citizen received a sentence of six months or less.

The youthful offender exception applies when a non-citizen has committed a crime involving moral turpitude while under the age of 18; and any imprisonment for the offense ended more than five years before the current visa application.

6. Admission of Crime Involving Moral Turpitude

The moral turpitude ground of inadmissibility may apply even if a non-citizen does not have a conviction. A non-citizen is inadmissible if he or she voluntarily admits the essential elements of a crime involving moral turpitude to an ICE or Department of State official. To constitute a valid admission, a non-citizen must admit voluntarily to the elements of the offense after the ICE or Department of State official explains the offense in plain terms.[159]

D. The Aggravated Felony Definition

Conviction of an aggravated felony may bring the most serious immigration consequences. Often, the individual will be removed (deported) as there are virtually no waivers available, absent a very strong claim to fear of persecution or torture in the home country. If a person who was convicted of an aggravated felony and removed then reenters the United States without authorization, the person is subject to an up to 20-year federal prison sentence for the illegal re-entry.[160]

If ICE determines that a non-citizen's conviction renders her/him an aggravated felon under this definition, the non-citizen's immigration status will then determine the type of proceedings (and amount of due process) s/he will be subject to. Lawful permanent residents (greencard holders) and non-citizens who were admitted to the U.S. as refugees will still be entitled to a hearing before an immigration judge in deportation/removal proceedings (under INA §240, 8 U.S.C. §1229a). All other non-citizens deemed to be aggravated felons by ICE will be subject to "expedited removal" (under INA Sec. 238(b); 8 U.S.C. 1228b) wherein ICE will issue him/her a virtually unreviewable administrative order of deportation.

Certain provisions of the aggravated felony definition, as currently applied by ICE, Immigration Courts and the Federal Circuit Courts, have been found to include certain offenses classified as misdemeanors under state law – such as assault in the fourth degree and theft in the third degree where the non-citizen received a 365 day sentence (regardless of time suspended). This has created a situation where a non-citizen who is convicted of gross misdemeanor theft and sentenced to 365 days with all or most of the days suspended will be an aggravated felon under immigration law. However, the defendant who is convicted of theft in the second degree, a class B felony, and sentenced to three months imprisonment is not an aggravated felon.

This issue of "aggravated misdemeanors" is currently unresolved and the subject of much litigation in the federal courts.[161] Thus, non-citizen gross misdemeanor defendants must seriously consider challenging sentences imposed of 365 days.

The aggravated felony definition is contained in the immigration statute at INA §101(a)(43); 8 U.S.C. §1101(a)(43):

> The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Not withstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph [September 30, 1996].

The dozens of serious and minor offenses that constitute aggravated felonies are listed at 8 USC § 1101(a)(48)(B). Aggravated felonies that commonly arise in domestic violence situations include the following:

1. Crime of Violence with a One-Year Sentence Imposed

Conviction of any "crime of violence" with one-year sentence imposed (including suspended sentence) is an aggravated felony.[162] As defined in federal statute, "crime of violence" includes any felony or misdemeanor that involves the intent to use or threaten force against a person or property, as well as any felony that carries an inherent risk that force will be used.[163] The crime of violence analysis can become complicated. If the elements of the offense include a failure to act, the offense may not be a crime of violence. The BIA held that this definition includes involuntary manslaughter.[164] It does not, however, apply to offenses where there is no connection between the use of force and the commission of the crime.[165]For example, in one case, criminally negligent child abuse under a Colorado statute, where the person negligently permitted a baby to drown in a bathtub, was found not to be a "crime of violence." [166] In some jurisdictions a simple battery is likely not to be held a crime of violence if the crime can be committed by "mere offensive touching" and the record of conviction does not indicate that a higher level of force was used.

2. Sentence of One Year

A sentence of a year or more must be imposed for the crime of violence to constitute an aggravated felony. An aggravated felony can be avoided in many situations by obtaining a sentence of 364 days or less instead of one year. A "sentence imposed" includes either a straight sentence or as a sentence imposed, but suspended. Where the imposition of the sentence was suspended and jail is imposed as a condition of probation, the amount of jail time imposed counts as the "sentence."[167]

3. Murder, Rape, and Sexual Abuse

The BIA has held that murder includes murder in the third degree.[168] A conviction for manslaughter may be a crime of violence, but it is not murder.[169] Rape is an aggravated felony regardless of sentence imposed. [170] The Immigration and Nationality Act does not define the phrase "sexual abuse of a minor, " but the BIA selected 18 U.S.C. § 3509(a)(8) as a guidepost to define "sexual abuse of a minor." The BIA has also held that a non-citizen with a conviction for indecency with a child has a conviction for "sexual abuse of a minor" even though it was possible to commit the offense without touching the minor victim.[171] The BIA has also held that statutory rape is a crime of violence.[172]

4. Theft, Burglary, and Commercial Bribery

A conviction for theft, receipt of stolen property, or burglary is an aggravated felony if the defendant receives a sentence of a year or more.[173] The BIA also has held that a conviction for attempted possession of stolen property constitutes an aggravated felony.[174] In so doing, the BIA equated "possession of stolen property" and "receipt of stolen property."[175] According to the BIA, a taking of property constitutes a theft offense for purposes of the aggravated felony definition regardless of whether a permanent taking of the property is an element of the offense.[176] The Seventh Circuit shares this interpretation.[177]

A conviction for a "burglary" offense is not necessarily a conviction for an aggravated felony within the meaning of 8 U.S.C. §1101(a)(43)(G), INA §101(a)(43)(G) unless it comports with the federal definition of burglary established in ***Taylor v. United States***, 495 U.S. 575 (1990).[178] Under this definition, a conviction for burglary of an automobile is not a "burglary offense."[179] A conviction for commercial bribery, forgery, or trafficking in vehicles with altered numbers is an aggravated felony if the defendant receives a sentence of a year or more. [180]

5. Obstruction of Justice

A conviction for obstruction of justice, bribery of a witness, or perjury is an aggravated felony if the defendant receives a sentence of a year or more.[181] A federal conviction for accessory after the fact comes within the aggravated felony definition for obstruction of justice.[182] A federal conviction for misprision of a felony is not obstruction of justice as defined in 8 U.S.C. §1101(a)(43)(S), INA §101(a)(43)(S). [183]

6. False Documents

A conviction for using or creating false documents is an aggravated felony if the term of imprisonment is at least a year. There is an exception for a first offense committed to aid the defendant's spouse, child, or parent.[184]

7. Smuggling

A conviction for smuggling is an aggravated felony. There is an exception for a first offense in which only the smuggler's parent, spouse, or child is involved. [185] The BIA considers harboring or transporting offenses also to be aggravated felonies.[186]

8. Failure to Appear

A conviction for failure to appear to serve a sentence if the underlying offense is punishable by a term of five years, or to face charges of an offense for which a court may impose a sentence of two years is an aggravated felony.[187]

9. Other Crimes

The Immigration and Nationality Act defines the words "aggravated felony" to include "illicit trafficking in a controlled substance (as defined in § 802 of title 21), including a drug trafficking crime (as defined in §924(c) of title 18)."[188] In addition, a conviction for trafficking in firearms or federal crimes relating to firearms or destructive devices (bombs, grenades) is an aggravated felony. [189] The Immigration and Nationality Act does not define "trafficking." A federal conviction for being a felon in possession of a firearm satisfies the definition of aggravated felony because it is an offense described in 18 U.S.C. §922(g)(1).[190] In 2002, the BIA held that a state conviction for possession of a firearm is an aggravated felony because it is also described in 18 U.S.C. §922(g)(1) even though the state offense lacks the "interstate commerce" element described in 18 U.S.C. 922(g)(1).[191] A conviction for money laundering and monetary transactions from illegally derived funds is an aggravated felony.[192] A conviction for fraud, deceit, or tax evasion if the loss to the victim or government exceeds $10,000 is an aggravated felony.[193]

Various other offenses such as demand for ransom, child pornography, RICO offenses punishable by a one-year sentence, running a prostitution business, slavery, offenses relating to national defense, sabotage, treason, or revealing the identity of a foreign or domestic undercover agent are aggravated felonies.[194] A conviction for illegal re-entry after conviction of an aggravated felony followed by deportation is an aggravated felony.[195]

10. Conspiracies or Attempts

A conviction for conspiracy or attempt to commit any offense listed in the aggravated felony definition is an aggravated felony.[196]

E. Controlled Substance Offenses

While substance abuse offenses are not generally classified as domestic violence offenses, they often are present in those situations. The immigration penalties for controlled substance offenses may be particularly severe. A permanent resident

with a past conviction relating to controlled substances may already be removable without any immigration relief, and should obtain specialized counseling before considering pleas to additional charges.

1. Specific Controlled Substance Offenses and Deportability

A non-citizen convicted of an offense relating to a controlled substance is deportable and subject to removal from the United States.[197] In the Ninth Circuit, a conviction for solicitation to possess a controlled substance is not a deportable offense under the controlled substance ground of deportability.[198] However, any record of conviction that does not identify the drug cannot support an order of deportability.[199] In addition, a conviction for a single offense for simple possession of 30 grams or less of marijuana is not a deportable offense.[200]

2. Effect of Rehabilitative Disposition

A dismissal or expungement under the Federal First Offender Act is not a conviction for "any purpose whatsoever."[201] The BIA treats as a conviction for immigration purposes a disposition under a state counterpart to the Federal First Offender Act.[202] The Ninth Circuit held that the BIA's treating state counterparts to the Federal First Offender Act as a conviction for immigration purposes violates equal protection of the laws.[203]

3. Inadmissibility for Controlled Substance Offenses

A single conviction for any controlled substance triggers inadmissibility under 8 U.S.C. §1182(a)(2)(A)(i)(II), INA §212(a)(2)(A)(i)(II). A non-citizen is inadmissible if he or she makes a formal, knowing admission of a drug offense to a Department of State or an ICE official.[204] No conviction is necessary to trigger inadmissibility under this section. A non-citizen must admit voluntarily to the elements of the offense after the official explains the offense in plain terms for it to constitute a valid admission.[205] The BIA has held that it will not treat a plea from a disposition that results in less than a conviction as an admission to the essential elements of a crime.[206]

A non-citizen is inadmissible if a Department of State or an ICE official has a "reason to believe" that the non-citizen is or was a drug trafficker.[207] No conviction is necessary to trigger inadmissibility under this section. A non-citizen who is a "drug addict" or "drug abuser" is inadmissible.[208]

F. Firearms and Explosive Devices

1. Deportability

A non-citizen faces removal from the United States if he or she has a single conviction for purchasing, selling, using, owning, or possessing a firearm in violation of law.[209]

2. Scope of Record

If the statutory definition of the offense does not involve a weapon, then a conviction is not a firearm offense even if the record of conviction shows that the defendant actually used a firearm.[210] If a statute punishes use of a weapon, including a firearm, then it is a "divisible offense." A non-citizen convicted under a "divisible statute" is not deportable for a firearm offense unless the record of conviction establishes that the offense committed involved firearms.[211] A police report is not part of the record of conviction.[212] In addition, a sentencing enhancement for using a firearm is not a conviction for a firearm offense.[213]

G. Domestic Violence

1. Deportability

In 1996, Congress added a ground of deportability for domestic violence convictions and for violations of civil protection orders:

> A person is deportable for a conviction for a domestic violence offense if on or after September 30, 1996, he or she is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.[214]

The statute defines domestic violence as a "a crime of violence (as defined in section 16 of title 18)" directed against a current or former spouse, co-parent of a child, co-habitator, or other person similarly situated under domestic violence laws. A crime of violence under 18 U.S.C. §16 includes 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 a felony that by its nature involves significant risk of use of such force. Thus, simple assault may come within this ground of deportability under this section if the victim was, for example, a former cohabiting girlfriend.

2. Violation of a Protective Order

The ground of deportability also applies when a non-citizen is enjoined by a protective order and is found by a criminal or civil court to have violated the portion of the order that protects "against credible threats of violence, repeated harassment, or bodily injury."

H. The Record of Conviction (ROC) for Immigration Purposes

The "record of conviction" for immigration purposes constitutes:

- the charging document (e.g. the indictment or information);
- the defendant's guilty plea;
- the verdict, and the judgment & sentence;
- factual admissions made by defendant during plea and/or sentencing.[215]

The record of conviction is often of critical importance in determining whether or not a non-citizen's criminal offense falls within one or more of the criminal grounds of inadmissibility and/or deportability or is an aggravated felony and, thus, subjects the non-citizen to deportation/removal. For purposes of determining removability, the actual conduct of the accused is outside the scope of consideration by ICE and the immigration courts.[216]

In making such determinations, ICE and the Immigration Courts are in the first instance limited to the language of the statute under which the non-citizen was convicted. If a statute is divisible (containing multiple possible offenses) and it is unclear as to which offense or which elements the non-citizen defendant was convicted under, ONLY THEN the immigration courts can refer to the record of conviction relating to the offense to determine whether it makes the non-citizen deportable/inadmissible. In so doing, the immigration courts are limited to the information contained in the record of conviction.

Only the charging document in relation to the offense that the non-citizen defendant pled guilty to will count as part of the record of conviction. So, if the prosecutor files an amended charging document to a new offense in connection with a negotiated plea agreement, it is the amended charging document, not the original charging document that counts. Probation reports, prosecutors' recommendations or any other facts not contained in the documents listed above are NOT part of the record of conviction and, thus, cannot be relied upon by ICE in its efforts to deport/remove a non-citizen.[217]

The record of conviction does not include any other documents. The police report is not considered part of the record of conviction, UNLESS it is attached to the

defendant's plea statement and relied upon by the court for establishing the factual basis for the plea (such as in Alford pleas).

I. Convictions Under Immigration Law

Congress defines "conviction" at 8 U.S.C. § 1101(a)(48)(A), INA §101(a)(48) as follows:

> 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 a jury has found the alien guilty or the alien has entered a plea of guilty or *nolo* 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.

Congress added this definition to the INA in 1996. The statutory definition is retroactive and applies to all convictions entered before, on or after this definition became part of immigration law on September 30, 1996.

The following sections attempt to analyze whether offenses adjudicated under state court procedures and statutes constitute convictions under this definition. However, regardless of whether or not an offense constitutes a conviction for purposes of deportation/removal of a non-citizen defendant, it is important to remember that the offense will constitute a negative discretionary factor whenever the non-citizen is seeking a benefit from the BICE or Immigration Courts, such as lawful permanent residence, asylum, citizenship or (re)entry into the United States.

1. Deferred Prosecution Schemes

Some state laws allow for "deferred prosecution" in certain criminal cases if a defendant is charged with a misdemeanor or gross misdemeanor. Deferred prosecution under this provision is available to defendants whose wrongful conduct was caused by alcoholism, drug addiction, or mental problems.

Under deferred prosecution schemes, the law establishes the procedure whereby the defendant does not plead guilty to the charges against her/him. Instead, the defendant is generally required to submit a statement that contains, inter alia, a stipulation to the admissibility and sufficiency of the facts contained in the written police report; and an acknowledgement

that the statement will be entered and used to support a finding of guilty if the court finds cause to revoke the order granting deferred prosecution." Additionally, the defendant is informed that the Court will not allow deferred prosecution if the defendant believes that she is innocent of the charges.

The defendant must generally also agree to undergo treatment in accordance with the court's orders. If the defendant fails to comply with the court's orders, the court can revoke the deferred prosecution and enter a finding and judgment of guilt against the defendant based upon the record.

However, generally ICE and the Immigration Courts will treat these deferred prosecutions as convictions [218], though recently both the Board of Immigration Appeals and the Ninth Circuit have recently held that Driving Under The Influence offenses (the vast majority of deferred prosecution cases) do not trigger deportation.[219]

2. Judge or Jury Has Found the Noncitizen Guilty

Where the judge or jury has made an actual finding of guilt – pursuant to either trial, plea of guilty or plea of no contest - and "the judge has ordered some form of punishment, penalty or restraint on the [non-citizen's] liberty," the offense at issue WILL constitute a conviction for immigration purposes.[220]

3. The Noncitizen Has Entered a Plea of Guilty or Nolo Contendere

In any proceeding wherein the non-citizen enters a plea of guilty or formal admission of guilt (or nolo contendere), such plea/admission will be considered by ICE and the Immigration Courts to constitute a conviction for immigration purposes under INA 101(a)(48)(i). Where the court has given the defendant a "deferred sentence" following a plea of guilty it will still be a conviction for immigration purposes since there will be a finding of guilt and the conditions imposed under the deferred sentencing scheme will be considered a sufficient "restraint on the [non-citizen's] liberty" under INA Sec. 101(a)(48)(A)(ii).

A panel of the Ninth Circuit has recently held that such an admission of guilt will render the conviction permanent for immigration purposes, regardless of whether the admission is subsequently withdrawn in a state rehabilitative procedure.[221]

4. The Noncitizen Has Admitted Sufficient Facts to Warrant a Finding of Guilt

Traditionally, a disposition under a pre-plea deferral agreement or diversion statute has not been a conviction for immigration purposes.[222] However, the third prong under INA Sec. 101(a)(48)(A)(i) has expanded the definition of conviction. In the legislative history adding this definition to the INA, it is clear that Congress was attempting to attach immigration consequences (specifically deportation/removal) where the non-citizen defendant had formally admitted guilt. However, many deferred adjudication schemes do not require the defendant to plead guilty or formally admit guilt.

For immigration purposes, the portion of these agreements that matters in relation to the third prong of INA Sec. 101(a)(48)(A)(i) is the paragraph wherein the defendant agrees to the admissibility of the police report into evidence with the understanding that if s/he violates the agreement the judge will rely (often times solely) on the police report in determining the defendant's guilt or innocence. Some agreements go further and require the defendant to actually stipulate to the accuracy of the facts contained in the police report.

These admissions, particularly where they include a stipulation by the non-citizen defendant as to the sufficiency of the facts, put a non-citizen defendant at risk that ICE and the Immigration Courts will consider this an admission "…to fact sufficient to warrant a finding of guilt" and, thus, it will constitute a conviction under immigration law. So, an uninformed non-citizen defendant (and her/his defense attorney) think s/he is agreeing to comply with certain conditions (such as some form of specified treatment, no further criminal law violations, etc.) and if s/he complies, the case will be dismissed. In actuality, s/he may very well be agreeing to her/his deportation.[223]

5. Drug Addiction and Drug Abuse[224]

Even if the deferred adjudication schemes discussed herein do not constitute convictions under INA Sec. 101(a)(48)(A), deferred prosecutions and any other deferral scheme wherein a non-citizen defendant admits to drug abuse or drug addiction, or agrees to undergo treatment for drug abuse/addiction, will be problematic for another reason. Drug abuse and drug addiction are both a ground of inadmissibility under INA §212 and a ground of deportability under INA §237. These provisions do not require a conviction to be applied against a non-citizen.

This means that admissions of drug abuse and/or addiction in conjunction with these deferral schemes may be a sufficient basis to subject a non-citizen defendant to deportation/removal and make him/her ineligible to (re)enter the U.S., obtain lawful permanent residency (a greencard) or certain other benefits under immigration law. ICE and Immigration Courts use a very broad test in determining drug addiction and drug abuse.

6. Restraint on a Noncitizen Liberty

The second prong of the definition of what constitutes a conviction for immigration purposes under INA Sec. 101(a)(48)(ii) requires that "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." Imposed jail time, probation and payment of fines will suffice to meet this requirement. Moreover, the conditions imposed with virtually all deferred adjudication schemes (even "immigration-safe" ones) will, at a minimum, suffice to constitute a restraint on the non-citizen's liberty.

J. Juvenile Dispositions

It is a long-standing rule of immigration law that juvenile dispositions do not constitute convictions for immigration purposes.[225] In a recent decision where it revisited this issue in light of the new statutory definition of a conviction at INA §101(a)(48(A), the Board of Immigration Appeals reaffirmed this rule.[226]

It is important to note that not all of the criminal provisions under immigration law require convictions. And juvenile disposition will be sufficient to trigger deportation/removal under the criminal provisions that do not require convictions. For example, a juvenile disposition for the offense of delivery of a controlled substance will likely fall under INA §212(a)(2)(c)'s "reason to believe" the non-citizen is a drug trafficker provision. Additionally, a finding by a juvenile court that the youth has violated a restraining/protective/no-contact order can trigger deportation under INA Sec. 237(a)(2)(E)(ii)'s "violation of a family protective order" ground.

Additionally, while not a basis for removal, juvenile dispositions can and will be considered by ICE and the Immigration Courts in making discretionary determinations such as applications for permanent residency, requests for relief from deportation/removal, and applications for U.S. citizenship.

Finally, time in a juvenile detention facility or other institution imposed in conjunction with a juvenile disposition is not considered to be a sentence under immigration law as it does not constitute a "period of incarceration or confinement" under INA §101(a)(48)(b).

K. Convictions On Direct Appeal – Finality Requirements

Since the Supreme Court decided ***Pino v. Landon***, 349 U.S. 901 (1955), it has been the general rule that a conviction must attain some degree of finality under state or federal court procedure in order for it to be used as a basis for deportation/removal. Thus, a conviction on direct appeal will not be considered sufficiently final for purposes of deportation/removal of the non-citizen defendant.

This requirement of finality appears to be in conflict with the definition of what constitutes a conviction under INA § 101(a)(48)(A) and the broad interpretations of that definition by ICE and the courts to date. For example, even if a non-citizen defendant "...admitted sufficient facts to warrant a finding of guilt" in connection with a deferred adjudication agreement, clearly the proceedings are not final during the period of the deferral. Thus, it is unclear how treating such an agreement, even assuming it was a conviction, could satisfy the Supreme Court's requirement of finality. The conflict remains unresolved.

L. Expungements, Vacations and Successfully Completed Deferrals

Prior to Congressional amendments to the immigration laws in 1996, it was a well-settled principle of immigration law that expungements – and successfully completed rehabilitative schemes (such as the deferred sentencing and adjudication schemes discussed *supra*) – would, essentially, eliminate many non-drug-related convictions as a basis for deportation/removal.[227] While the applicability and scope of this principle was the subject of ongoing litigation, non-citizens often successfully got their deportation/removal proceedings terminated by proving to the immigration judge that the conviction had been expunged or dismissed pursuant to a completed deferred adjudication scheme.

Following the 1996 amendments, the Board of Immigration Appeals held that state court expungements are no longer considered to ameliorate the immigration consequences of a conviction.[228] The Board held in ***Roldan*** that a non-citizen's admission of guilt (in a formal plea) will render the offense a conviction in perpetuity, regardless of subsequent state rehabilitative action.[229] The Ninth Circuit has upheld the Board's decision in ***Roldan***, finding that an Arizona State expungement of a non-citizen defendant's theft conviction had no effect for immigration purposes, and thus rendered him deportable.[230]

Notably, this reasoning does not apply to offenses relating to first-time simple possession of a controlled substance. Noncitizen defendants with these types of offenses who have been accorded rehabilitative treatment in the courts will NOT be deemed to have a conviction for immigration purposes.[231]

In addition, a conviction that a trial or appeals court vacates because it was legally defective is not a conviction for immigration purposes.[232] A conviction that a trial court vacates for equitable reasons remains a conviction for immigration purposes.[233]

M. Inchoate Offenses – Attempt, Conspiracy and Solicitation

A non-citizen defendant who pleads guilty to attempt or conspiracy to commit an underlying offense that will trigger deportation/removal will still be deportable as if s/he had committed the underlying predicate offense. The crime-related deportation/removal provisions either contain specific language including attempt and conspiracy, or the caselaw interpreting those provisions has held that an attempt or conspiracy to commit, say, a crime of moral turpitude such as theft, will be treated the same as the underlying theft offense.

The aggravated felony definition at INA Sec. 101(a)(43)(U), explicitly states that any attempt or conspiracy to commit any offense listed in that definition will be considered an aggravated felony. See Aggravated Felony definition, *supra.*

The offense of criminal solicitation is NOT treated the same as attempt and conspiracy under immigration law. In two recent decisions, the Ninth Circuit has held that criminal solicitation under Washington State law is not a controlled substance violation and is not a drug trafficking offense under the aggravated felony definition.[234] The court's reasoning in these cases can arguably be extended beyond drug offenses (i.e. criminal solicitation to commit theft is not a crime of moral turpitude).

N. Sentences Under Immigration Law

In 1996, Congress established a statutory definition for what is a sentence for immigration purposes.[235] The provision treats as a sentence "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution" of all or part of the sentence.

1. Misdemeanor/Felony Distinction

A very-common belief among judges, attorneys, non-citizens is that simple misdemeanor and gross misdemeanor offenses do not trigger deportation/removal. Not only can misdemeanor and gross misdemeanor offenses render non-citizen defendants deportable/removable, sometimes these convictions can trigger more severe consequences than a felony conviction. For example, a conviction under Washington law for malicious mischief in the second degree under RCW 9A.48.080, a Class C felony, is not a crime of moral turpitude under current interpretations of immigration law.[236] However, a conviction for attempted theft in the third

degree under RCW 9A.56.050, a simple misdemeanor carrying a maximum penalty of 90 days, IS a crime of moral turpitude that may render a non-citizen deportable/removable.[237]

Additionally, many gross misdemeanor convictions are now considered to be aggravated felonies, and, as such, trigger the most severe consequences for a non-citizen defendant and should be avoided at all costs. Under immigration law, it may be to a non-citizen's advantage to plead guilty to a felony theft in the second degree with a 30 day sentence rather than risk ending up with a conviction for theft in the third degree with a 365 day sentence (364 suspended). The former being at most a crime of moral turpitude; the latter being both a crime of moral turpitude and an aggravated felony.

2. Implications for Aggravated Felony Definition

This definition has important consequences for the aggravated felony ground of deportability because the INA defines certain offenses as aggravated felonies only if the defendant receives a sentence to imprisonment or confinement of a year or more.[238] The BIA respects a state court's sentence modification.[239] Sentences are often the critical factor in determining the immigration consequences that a non-citizen defendant may face in relation to a criminal offense. Sentences are particularly problematic in relation to gross misdemeanor offenses.

Section 101(a)(48)(B) of the Immigration and Nationality Act defines a sentence for immigration purposes. It states:

> 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. (Emphasis added.)

Thus, it is the actual time (sentence) imposed by the court – *REGARDLESS OF TIME SUSPENDED* – that counts for immigration purposes. Probation time does constitute a "period of incarceration or confinement" and, thus, is not a sentence under immigration law.[240] However, any jail time imposed as a condition of probation IS considered a sentence for immigration purposes.

Many (though not all) of the crime-related provisions of immigration law are triggered not simply by virtue of a conviction, but also require a

specific sentence. For almost all of these provisions, it is the amount of time imposed by the court that counts (several provisions look to the amount of time possible (i.e., 365 days for gross misdemeanors) that could be imposed).[241]

Obtaining post-conviction modification of a sentence for a non-citizen defendant – even by just one day (364 days to 365 days) can change a non-citizen's conviction from one that triggers certain deportation as an aggravated felon, to an offense that does not trigger deportation. The Board of Immigration Appeals[242] has recently held a state court modification of the defendant's sentence is controlling under immigration law and it is the subsequently imposed sentence, not the original sentence, that counts for immigration purposes.[243]

VIII. Issues Related to the Disclosure of Defendant's Immigration or Citizenship Status

Advisals by the Court relating to immigration issues or issues of international law should be provided to every defendant without particularized determinations seeking to ferret out who is a non-citizen.

State and local judges who engage in the practice of questioning defendants as to their immigration status may run afoul of non-citizen defendants' constitutional and statutory rights. In addition to being a constitutional violation, it is impossible to determine a defendant's citizenship and immigration status based upon race, ethnicity or language. Many people who require the use of interpreters to navigate complex legal proceedings are, in fact, U.S. citizens for whom English may be their second (or third) language.

A. The Fifth Amendment Protects Noncitizen Defendants From Being Compelled To Disclose Their Immigration Status

The courts have long recognized that non-citizens have Fifth Amendment right to remain silent as to any questions relating to their immigration status and entry into the United States. Although the scope may vary, this right attaches in relation to both deportation proceedings and criminal proceedings. [244] Noncitizens may invoke this privilege "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory".[245]

A non-citizen's right to remain silent is grounded in the fact that courts have clearly recognized a non-citizen's exposure to criminal prosecution based upon questions concerning "alienage" (her/his immigration status and manner of entry into the United States). The following are some of the federal criminal offenses where a person's "alienage" or immigration status and manner of entry are elements of the offense:

8 U.S.C. 1282(c) – Alien crewman overstays;
8 U.S.C. 1306(a) – If overstay after 30 days and no fingerprints/registration;
8 U.S.C. 1304(e) – 18 or over not carrying BICE documentation;
8 U.S.C. 1306(b) – Failing to comply with change of address w/in 10 days;
8 U.S.C. 1324c(e) – Failure to disclose role as document preparer;
8 U.S.C. 1324(a) – Alien smuggling;
8 U.S.C. 1325 – Entry Into United States without inspection or admission;
8 U.S.C. 1326 – Illegal Reentry after deportation;
18 U.S.C. 1546 – False statement/fraudulent documents;
18 U.S.C. 1028(b) – False documents;
18 U.S.C. 1001 – False statement;
18 U.S.C. 911, 1015 – False claim to U.S. citizenship.

B. The Fourth Amendment Protects Noncitizens From Unwarranted Racial And Ethnic Profiling

In order to comport with the Fourth Amendment, ICE must have reasonable suspicion based upon articulable facts that the individual questioned is an "illegal alien."[246] The federal courts will look to a "totality of the circumstances" to determine whether the "reasonable suspicion" test has been met and they have consistently held that race or "alienage" or accent or "foreign-sounding" surname or ethnicity alone are insufficient factors to meet this test. These same standards apply to state and local law enforcement officers in their efforts to cooperate with ICE enforcement of immigration laws.[247]

This reasoning applies to judges and prosecutors in state and local criminal courts. Singling out defendants for questioning regarding their immigration status based upon their race, ethnicity or use of interpreters is a violation of the Fourth Amendment as well as an unwarranted intrusion into the preemptive powers of the federal government.

C. The Defendant Has The Right To Decide Whether or Not To Disclose Her/His Immigration Status In The Course Of Criminal Proceedings And Should Only Do So Upon Advice of Competent Counsel

While immigration consequences may still be considered "collateral" to the criminal proceeding by the courts, such severe consequences as deportation are often times the most direct consequence of criminal proceedings in the lived-out reality of non-citizen defendants. The Supreme Court and federal circuit courts have long acknowledged that deportation is akin to banishment, permanent exile and possibly the loss of "all that makes life worth living."[248]

Because deportation is now a certain consequence for so many criminal offenses,[249] the only time to avoid or mitigate the immigration consequences of criminal convictions is DURING the criminal proceedings. Thus, it may often be the case that a non-citizen defendant will choose to disclose his/her immigration status to the court and/or prosecutor in an effort to avoid or mitigate the immigration consequences.

Where a non-citizen has raised the issue of immigration consequences, it is within the court's authority to consider this factor in resolving the case. Simply because the immigration consequences may be deemed collateral, the court is not precluded from factoring them into the criminal proceedings. Courts regularly address a myriad of other collateral issues and consequences in the context of criminal proceedings.

The most important step that judges can take regarding this issue is to ensure that defendants have competent counsel who will address this issue with their clients. Judges should alert defendants that, if they are not U.S. citizens, it is not a good idea to waive their right to court-appointed counsel.

IX. Issues Relating To Article 36(1)(b) of the Vienna Convention on Consular Relations

Article 36 of the Vienna Convention on Consular Relations has been in effect since the convention was ratified by Congress in 1969. 21 U.S.T. 77, 100-101. Art. 36 states in relevant part:

> (1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (b) If he so requests, the competent authorities of the receiving State shall without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is

> detained in any other manner…The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Two recent Ninth Circuit decisions, discussed below, brought the issue of compliance with these provisions more into the foreground of state and local criminal courts. However, the decisions also generated a corresponding level of confusion and misguided policies. Namely, many courts and prosecutors violated non-citizen defendants' constitutional and statutory right of nondisclosure of their immigration status in an effort to comply with obligations under Art. 36(b). In ***U.S. v. Lombera-Camorlinga***, 170 F.3d 1241 (9th Cir. Feb. 25, 1999) (Withdrawn) *(Lombera I)*, the defendant was a Mexican national facing drug trafficking charges in Federal District Court. In a pre-trial motion, he moved to suppress his confession on the basis that it was obtained in violation of his right under Art. 36 since he had not been notified of his right to have his consulate notified of his arrest prior to his confession. The District Court denied the motion and the defendant appealed this denial. A three-judge panel of the 9th circuit held the following:

1. The right created under Art. 36 was an individual right not the sending State's right, which in this case meant that the right belonged to

   Mr. Lombera-Camorlinga, not Mexico, and, thus, Mr. Lombera-Camorlinga had standing to bring an action for a violation of this right;

2. The court held that a pretrial suppression motion was the proper vehicle for exercising his right under Art. 36 and that granting such a motion would be an appropriate remedy in criminal proceedings if the defendant could show prejudice from this violation.

The court then remanded the case for a factual hearing on the issue of whether the defendant could show prejudice from this violation.

The government filed a petition for rehearing en banc, which was granted. On March 6, 2000, an en banc panel issued ***U.S. v. Lombera-Camorlinga***, 206 F.3d 882 (9th Cir. 2000) (*Lombera II*). In *Lombera II*, the majority of the en banc Court took a decidedly different view of Art. 36 and held the following:

1. The Court refused to decide the issue of standing, i.e. whether Mr. Lombera-Camorlinga had an individual right to bring a claim asserting a violation of Art. 36 (or whether the right belonged to the Sending State (Mexico));
2. The Court went on to find that even assuming *arguendo* that the defendant did have standing to bring such a claim, exclusion of a voluntary confession via a motion to suppress was not the appropriate remedy. In short, the Court's rationale for this was that such a remedy

> was reserved almost exclusively for constitutional violations and the court refused to extend this remedy to treaty violations under Art. 36.

The Court dismissed the appeal.[250]

Where courts are dealing with Art. 36 issues in criminal proceedings, it is advisable to adopt a uniform procedure for ALL defendants - without asking any particular defendant to identify their place of birth/nationality or immigration status – whereby everyone is simply told that if they are not a U.S. citizen they have a right to have their consulate notified of their arrest/detention/criminal prosecution and, if the defendant wishes to exercise this right they should inform their defense attorney who can then alert the appropriate authorities.

X. Duty of Courts To Advise Noncitizen Defendants of Immigration Consequences

In light of the severe consequences facing non-citizen defendants with criminal convictions[251] and their families, it is important that courts take the time to ensure that defendants truly are aware that, if they are not U.S. citizens, their pleas of guilty will almost certainly result in deportation.

Despite the reality that removal is a likely automatic consequence that flows from a conviction, many courts continue to maintain that deportation is a collateral, not a direct, consequence.[252] It is important that a non-citizen defendant have the opportunity to meaningfully address the immigration consequences BEFORE deciding on which course of action to pursue in her/his criminal proceedings.

Long ago the U.S. Supreme Court recognized that "[i]n this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities."[253]

The Ninth Circuit recently stated:

> [I]mmigration consequences continue to be a collateral consequence of a plea and the resulting conviction. This means that district courts are not constitutionally required to warn defendants about potential removal in order to assure voluntariness of a plea; but it does not mean that they should not do so. Many district judges comment in their Rule 11 colloquy that a plea of guilty and resulting conviction may affect an alien's status in this country, and inquire whether the defendant understands the possible immigration consequences of his plea. Although not required by Rule 11 or due process, we commend this sort of dialogue for there is no question

that immigration consequences of a conviction are important to aliens contemplating a plea.[254]

Clearly, the court should be mindful of reminding defense counsel of his/her greater duties in relation to the defendant about advice concerning the consequences of his/ her plea. The most expeditious and effective way for the court to ensure that non-citizen defendants have been notified of, and are making knowing and intelligent decisions in relation to, possible immigration consequences is to ensure that all defendants have competent defense counsel who can address this issue. In it's recent decision affirming the overturning a non-citizen's deportation order based on a criminal conviction, the United States Supreme Court stated that "competent defense counsel" would have advised the non-citizen defendant as to the immigration consequences inherent in his guilty plea.[255]

With respect to responsibilities of judges, ABA Standard 14-1.4(c) (Defendant to be advised) provides: "Before accepting a plea of guilty or nolo , the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including . . . if the defendant is not a United States citizen, a change in the defendant's immigration status."

XI. CONCLUSION

The effectiveness of court interventions can be improved with an understanding of the cultural and immigration legal barriers that face non-citizen litigants in both the civil and criminal court.

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[1] Anne Ganley, "Domestic Violence: The What, Why and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases," in *Domestic Violence Manual for Judges* Chapter 2, 2-6, (Washington State Gender and Justice Commission (2006)).

[2] Id, Ch. 2, p.4-6.

[3] Leti Volpp and Leni Marin, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible*, 6 (Family Violence Prevention Fund 1995).

[4] A study of service needs of more than 400 undocumented women in the San Francisco area found that a primary reason victims of domestic violence failed to seek help included their abusers' refusal to help them regularize their immigration status. Chris Hogeland and Karen Rosen, *Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity* (1991).

[5] In this context, "cultural community" refers to the way in which individuals identify as belonging to a certain community that is comprised of individuals having a common set of experiences.

[6] *Overcoming Cultural Barriers*, Ayuda, Inc. (October 1998). *See*, Janet Bauer, 'Speaking of Culture," in *Immigrants in Courts*, 19 (Joanne Moore ed., 1999)

[7] Sujata Warrier, "*Cultural Considerations in Domestic Violence Cases*," (2001).

[8] Janet Bauer, "Speaking of Culture," in *Immigrants in Courts, supra*, at 24-25; Juan-Vincent Palerm et. al, "Mexican Immigrants In Courts, " in *Immigrants in Courts, supra*, at 94-95

[9] United States Commission on Civil Rights, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination-Los Angeles Hearing*, 75 (1993).

[10] Leslye Orloff, Deeana Jang, and Catherine F. Klein, *With No Place To Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 Fam L. Q. 313, 316 (1995).

[11]*Id.*

[12] RCW 26.50.035 provides, "The administrator for the courts shall determine the significant non-English-speaking or limited English-speaking populations in the state. The administrator shall then arrange for translation of the instructions and informational brochures required by this section, which shall contain a sample of the standard petition and order for protection forms, into the languages spoken by those significant non-English-speaking populations and shall distribute a master copy . . ."

[13] Margaret Hobart, *Honoring their Lives, Learning from their Deaths: Findings and Recommendations from the Washington State Domestic Violence Fatality Review*, 45-51 (Washington State Coalition Against Domestic Violence 2000)

[14] *See, e.g*, Kim v. Kim, 208 Cal. App. 3d 364 (1989)

[15] Howard A. Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* 20 (1994).

[16] Anne Ganley, *supra*, note 147.

[17]Ronet Bachman and Linda E. Saltzman,, "National Crime Victimization Survey, *Violence Against Women: Estimates from the Redesigned Survey*, 1, 3 (Bureau of Justice Statistics 1995)

[18] R.C.W. Sec. 26.09.002; R.C.W. Sec. 26.09.187; R.C.W. 26.09.191.

[19]*See, e.g.*, R.C.W. Sec. 26.09.191(1)(c)

[20] National Council of Juvenile and Family Court Judges, *Model Code on Domestic and Family Violence*, Sec. 407 (1994).

[21] *See, infra*, International Kidnapping and Hague Convention Chapter.

[22] Catherine F. Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 1027 (1993).

[23] 22 C.F.R. §51.27, 61 Fed. Reg. 6505 (Feb. 21, 1996).

[24] *See, e.g.*, Washington Administrative Code Sec. 388-424-001, et. al, 8 U.S.C, §§1601 et. al.

[25] *See*, In re Marriage of Foran, 67 Wn. App 242, 258(1992)

[26] Victoria Holt, et.al, "Civil Protection Orders and Risk of Subsequent Police-Reported Violence, *Journal of the American Medical Association*, Vol. 288, No. 5, 589 (August 7, 2002).

[27] R.C.W. §26.50.060(f).

[28] Leslye Orloff, et. al, "Creative Use of Protection Orders in Battered Immigrant Cases," *Somewhere to Turn: Making Services Accessible to Battered Immigrant Women.* (May 1999).

[29] Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act* (1998) 92 NW.U.L.Rev. 665, 667-68.

[30] Immigration and Nationality Act of 192, Pub. L. No. 414, 66 Stat. 166 (1952).

[31] Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

[32] INA §216(c)(2); 8 U.S.C. §1186a(c)(2)

[33] The battered spouse waiver was included in Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 codified at 8 U.S.C. §1186a(c)(4)

[34] Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-1955, 8 USC §§ 1151, 1154, 1186a, 1186a note, 1254, 1245 (1994) (hereinafter VAWA).

[35] INA § 204(a)(1)(H).

[36] INA § 240A(b)(2).

[37] INA § 216(c)(4).

[38] *See, e.g.*, §204.2(c)(3)(ii).

[39] Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter IIRAIRA).

[40] Pub.L. No. 106-386, Division B of the Victims of Trafficking and Violence Protection Act of 2000 (H.R. 3244).

[41] Pub.L. No 109-162, Violence Against Women and Department of Justice Reauthorization Act of 2005, (H.R. 3402).

[42] (Pub. L. No. 107–296; Title IV of the Homeland Security Act of 2002, (H.R. 5005).

[43] 8 U.S.C.§ 1186.

[44] 8 C.F.R.§ 216.4.

[45] Matter of Laureano, 19 I&N Dec. 1 (BIA 1983) (types of evidence).

[46] *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979); *Lutwak v. U.S.*, 344 U.S. 604 (1954); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975.)

[47] 8 U.S.C.§1186(c)(4); 8 C.F.R.§216.5

[48] 8 C.F.R.§ 216.5(e)(3)(i).

[49] 8 C.F.R.§ 216.4.

[50] Although the BCIS may have determined that the requisite family relationship exists, and has approved the initial application for eligibility, the immigrant spouse must wait until there is a visa number available for her/him to be able to apply to adjust status to that of a legal permanent resident.

[51] Unless they obtained legal permanent residence as the spouse of an abusive U.S. Citizen. 8 U.S.C. §1430.

[52] See Section VI of this Chapter, "Overview of Immigration Law and Criminal Proceedings."

[53] INA §237(a)(2)(E)

[54]INA§§ 204(a)(1)(B)(ii) and (iii).

[55]INA §§ 204(a)(1)(A)(iii), (iv), and (vii).

[56] INA §§204(a)(1)(A)(iii), (iv), (vii), and (B)(ii) and(iii)

[57] This evidence is also relevant in supporting a waiver of the joint petition to remove conditions on residence. INA§216(c)(4)(C), 8 U.S.C. §1186a(c)(4)(C).

[58]INA §§ 204(a)(1)(A)(iii) and (iv), and (B)(ii) and (iii).

[59]8 CFR §§ 204.2(c)(1)(vi) and (e)(1)(vi).

[60] *See, Hernandez v. Aschroft*, 345 F. 3d 824 (9th Cir. 2003) (interpreting "extreme cruelty")

[61]Preamble to Interim Regulations, 61 Fed. Reg. 13,065 (Mar. 26, 1996).

[62] INA § 204(a)(1)(H).

[63]8 CFR §§ 204.2(c)(2)(iv) and (e)(2)(iv).

[64] *Id*. Non-qualifying abuse includes abuse that took place at a time outside the requirements for VAWA self-petitioning, e.g., when the parties were not married or, in the case of a self-petitioning child, when the child was not living with the abusive parent. They might also include incidents that, by themselves, might not amount to "battery or extreme cruelty" but, when taken in conjunction with other incidents, form a qualifying pattern of abuse.

[65] INA §§ 204(a)(1)(A)(iii)(1) and (B)(ii)).

[66] Pub.L. No. 106-386, Division B, Section 1503 of the Victims of Trafficking and Violence Protection Act of 2000 (H.R. 3244).

[67] One possible option for individuals in this situation is an application for asylum based on domestic violence as gender-based persecution. See, 65 F.R. 76588-76598 (December 7, 2000). Another possible option is a "U" visas for certain victims of crime. INA §101(a)(15)(U)(i).

[68] 8 CFR §§ 204.2(c)(2)(ii) and (e)(2)(ii).

[69] 8 CFR § 103.2(b)(17).

[70] It could be argued that CIS should have the burden of presenting information about a lawful permanent resident or naturalized citizen abuser once a self-petitioner has made credible assertions of his legal status since this information is within CIS' particular knowledge. *See Matter of Vivas,* 16 I&N Dec. 68 (BIA 1977).

[71]Ramos & Runner, Cultural Considerations in Domestic Violence Cases: A National Judges Benchbook (Family Violence Prevention Fund, 1999).

[72] INA §§ 204(a)(1)(A)(iii)(I) and (B)(ii).

[73] INA §§ 204(a)(1)(A)(iv) and (B)(iii); *see also* 8 CFR §§ 204.2(e)(1)(i)(E) and (vi).

[74] INA §204(a)(1)(A)(vii).

[75] The fact that an individual's abusive spouse is bigamous does not preclude the victim from self-petitioning if she underwent a marriage ceremony and believed that, in fact, she was entering into a legal marriage. If your client is not married to her abuser, check to see if there are any children who also are abused. She may file for cancellation of removal if she can prove the abuser is the parent of the battered child.

[76]INA §§ 204(a)(1)(A)(iii)(1) and (B)(ii). Children who are self-petitioning do not need to prove that their parents married in good faith. INA §§ 204(a)(1)(A)(iv) and (B)(iii).

[77]8 CFR § 204.2(c)(1)(ix).

[78] INA §216(c)(4)(B) and (C), 8 U.S.C. §1186a(c)(4)(B) and (C)

[79] 8 CFR § 204(c)(2)(vii).

[80] *Id.*

[81]8 CFR § 204.2(c)(2)(ii).

[82] *Id*.

[83] *Id. See also*, Preamble to Interim Regulations, 61 Fed. Reg. 13,065 (Mar. 26, 1996)..

[84] INA § 204(h).

[85]S*ee* 8 CFR § 204.2(e)(2)(ii).

[86] INA § 204(a)(1)(A)(iii)(I) and (iv)(I) and (B)(ii) and (iii)(I). Preamble to Interim Regulations, 61 Fed. Reg. at 13065 (Mar. 26, 1996).

[87] *See* INA §§ 204(a)(1)(A)(iii) and (iv) and (B)(ii) and (iii).

[88] 8 CFR §§ 204.2(c)(2)(iii) and (e)(2)(iii).

[89] *Id.*

[90] INA §§ 204(a)(1)(A)(iii) and (B)(ii) and (iii). A child of less than 14 years of age is presumed to be of good moral character and need not submit affidavits, police clearances or other evidence.

[91] Preamble to Interim Regulations, 61 Fed. Reg. at 13,066.

[92] INA § 101(f).

[93]8 CFR § 274a.12(c)(9).

[94] INA §204(a)(1)(K).

[95]8 CFR§ 274a.12(c)(10).

[96] Pub.L. No 109-162, Section 814(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, (H.R. 3402).

[97] INA § 101(b)(1) contains various definitions of children, including legitimate children, children born out of wedlock, adopted children and stepchildren.

[98] *See, e.g., Matter of Mowrer*, 17 I&N 613 (BIA 1981); *Matter of Mourillon*, 18 I&N 122 (BIA 1981).

[99]8 CFR § 205.1(a)(3)(i)(I).

[100]INA § 101(a)(27)(J).

[101]IIRAIRA § 384(a)(1).

[102]IIRAIRA § 384(a)(2).

[103]IIRAIRA § 384(c) (emphasis supplied).

[104]IIRAIRA § 384(d)(2).

[105] Pub.L. No 109-162, Section 825(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, (H.R. 3402).

[106] INA §240A(b)(2); 8 U.S.C. 1229b(b)(2)

[107] *Id.*

[108] INA § 240A(b)(2)(E)

[109] INA §216(c)(4)(A); 8 U.S.C. §1186a(c)(4)(A).

[110] 8 C.F.R 240.58(c)

[111] In *Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978), the Board of Immigration Appeals discussed a number of factors that should be considered with respect to determining hardship:

[112]INA § 240A(b)(2)(B).

[113]INA §240A(d)(2), 8 U.S.C. §1229b(d)(2).

[114] INA §101(a)(42).

[115] 65 Fed. Reg 76588 (Dec. 7, 2000).

[116] *Matter of Kasinga*, Int. Dec 3278 (BIA 1996).

[117]*Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001), vacated, 273 F.3d 1220 (9th Cir. 2001).

[118] However, the decision in this case was vacated when the abuser in the home country died.

[119] *Matter of A- and Z-*, A72-190-893, A 72-793-219 (EOIR Arlington VA, Dec. 1994).

[120] *Matter of D-V*, Int. Dec 3252 (BIA 1993)

[121] *Matter of A- and Z-*, supra, n. 102.

[122] INA §101(a)(15)(U)(i)(I), added by VTVPA §1513(b).

[123] INA §101(a)(15)(U)(iii), added by VTVPA §1513(b).

[124] INA §101(a)(15)(U)(i)(II), added by VTVPA §1513(b).

[125] INA §101(a)(15)(U)(i)(III) & INA §214(o)(1), added by VTVPA §1513(b) & (c).

[126] INA §101(a)(15)(T), added by VTVPA §107(e).

[127] VTVPA §§ 103 (9).

[128] VTVPA §§ 103(8).

[129] INA §101(a)(15)(T), added by VTVPA §107(e).

[130] 8 C.F.R. §214.11(i)(2) (2002)

[131] Pub.L. No 109-162, Section 801(a) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, (H.R. 3402).

[132] INA §212(a)(9).

[133] 8 C.F.R. §215

[134] 8 C.F.R.§ 215.3(h), .3(i)

[135] 22 C.F.R. §51.70(a)(8); 22 C.F.R §51.72

[136] This section has been adapted in part from, A. Benson, *Immigration Consequences of Criminal Conduc*t, Washington Defender Association, 2001. This area of the law is constantly changing and highly technical. This section provides an orientation and common issues that arise in criminal matters but gives insufficient information for analysis in individual cases.

[137] Codified at 8 U.S. Code.

[138] *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

[139] *Galvan v. Press*, 347 U.S. 522, 530 (1954).

[140] Unless in violation of a prior order of removal.

[141] *See, e.g., Lehmann v. Carson*, 353 U.S. 685, 690 (1957); *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913)

[142] 8 U.S.C. §1362, INA § 292.

[143] Goldesthtein v. INS, 8 F.3d 645 (9th Cir. 1993); *Matter of Short*, 20 I&N Dec.136 (BIA 1989).

[144] *See, e.g., Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (conviction for Louisiana kidnapping offense does not involve moral turpitude)

[145] The period is ten years for those non-citizens who obtained an immigrant visa because they provided significant assistance in a state or federal prosecution. 8 U.S.C. §1227(a)(2)(A)(i), INA §237(a)(2)(A)(i).

[146] Before the Anti-Terrorism and Effective Death Penalty Act of 1996, the statute required that the defendant receive a sentence of a year or more. The change applies to proceedings initiated after April 24, 1996. 8 U.S.C. §1227(a)(2)(A)(i), INA §237(a)(2)(A)(i).

[147] 8 U.S.C. §1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i).

[148] *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964); *Matter of Mena*, 7 I&N Dec. 30 (BIA 1979).

[149] *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

[150] *Compare, Matter of Balao*, 20 I&N Dec. 440 (BIA 1992) (holding that offense of passing bad checks involves moral turpitude because fraud was an element of offense) with *Matter of Bart*, 20 I&N Dec. 436 (BIA 1992) (holding that offense of passing bad checks does not involve moral turpitude because fraud was not an element of

the offense).

[151] *Matter of Short*, 20 I&N Dec.136 (BIA 1989); Matter *of S*, 9 I&N 688 (BIA 1962)

[152] *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

[153] *INS v. Grageda*, 12 F.3d 919 (9th Cir. 1993); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996).

[154] *Matter of Logan*, 17 I&N Dec.367 (BIA 1980).

[155] *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

[156] *Compare Matter of De La Nues*, 18 I&N Dec.140 (BIA 1981) (holding that theft constitutes a conviction for a crime involving moral turpitude) *with Matter of M*, 2 I&N Dec. 686 (BIA 1946) (holding that joyriding does not involve moral turpitude because statute included temporary taking of a motor vehicle).

[157] *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000).

[158] 8 U.S.C. §1182(a)(2)(A)(ii), INA §212(a)(2)(A)(ii).

[159] *See, e.g., Matter of G.M.*, 7 I&N Dec. 40 (A.G. 1956).

[160] 8 USC § 1326(b)(2).

[161] *See Matter of Crammond*, Int. Dec. 3443 (BIA 2001); *U.S. v. Christopher*, 239 F.2d 1191 (11th Cir. 2001); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2001); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *U.S. v. Graham*, 169 F.3d 787 (3rd Cir.), *cert. denied*, 528 U.S. 845 (1999).

[162] See definition of aggravated felony at 8 USC § 1101(a)(43)(F), and definition of sentence at 8 USC §1101(a)(48)(B).

[163] 18 USC § 16.

[164] *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994). *See also Matter of Martin*, 23 I&N 491 (BIA 2002) (treating Connecticut assault statute as aggravated felony conviction).

[165] *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999)

[166] *Matter of Sweetser*, Int. Dec. 3390 (BIA 1999).

[167] *See* 8 USC § 1101(a)(48)(B), See also *Alberto-Gonzalez v. INS*, 215 F.3d 906 (9th Cir. 2000)

[168] *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998).

[169] *See, e.g., Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

[170] *See, e.g., Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000).

[171] *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 911 (BIA 2000).

[172] *Matter of B*, 21 I&N Dec. 287 (BIA 1996) (applying crime of violence analysis to statutory rape conviction).

[173] 8 U.S.C. §1101(a)(43)(G), INA §101(a)(43)(G)

[174] *Matter of Bahta*, 22 I&N Dec. 1381(BIA 2000).

[175] *Id*.

[176] *Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000).

[177] *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1009 (7th Cir. 2001).

[178] For purposes of the Career Criminal Offender Act, the Supreme Court defined burglary as an unlawful or unprivileged entry in a building or other structure with the intent to commit a crime. *See Taylor v. United States*, 495 U.S. 575, 598 (1990).

[179] *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000).

[180] 8 U.S.C. §1101(a)(43)(R), INA §101(a)(43)(R).

[181] 8 U.S.C. §1101(a)(43)(S), INA §101(a)(43)(S).

[182] *Matter of Batista-Hernandez*, 21 I&N Dec. (BIA 1997)

[183] *Matter of Espinosa*, 22 I&N Dec. 889 (BIA 1999).

[184] 8 U.S.C. §1101(a)(43)(P), INA §101(a)(43)(P).

[185] 8 U.S.C. §1101(a)(43)(N), INA §101(a)(43)(N).

[186] *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999), *aff'd Ruiz-Romero v. Reno*, 205 F.3d 837 (5th Cir. 2000).

[187] 8 U.S.C. 1101(a)(43)(Q), (T), INA §101(a)(43) (Q), (T).

[188] 8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B).

[189] 8 U.S.C. §1101(a)(43) (C), (E), INA §101(a)(43) (C), (E).

[190] 8 U.S.C. §1101(a)(43)(E)(ii), INA §101(a)(43)(E)(ii).

[191] *Matter of Vasquez-Muniz*, 23 I&N 207 (BIA 2002), overruling *Matter of Vasquez-Muniz*, 22 I&N 1415 (BIA 2000).

[192] 8 U.S.C. §1101(a)(43)(D), INA §101(a)(43)(D).

[193] 8 U.S.C. §1101(a)(43)(M), INA §101(a)(43) (M). The victim does not need to suffer an actual loss. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) (holding that a failed insurance fraud in which the claim exceeded $10,000 was an aggravated felony even though there was no actual loss).

[194] 8 U.S.C. §1101(a)(43)(H), (I), (J), (K), (L), INA §101(a)(43) (H), (I), (J), (K), (L)

[195] 8 U.S.C. §1101(a)(43)(O), INA §101(a)(43) (O).

[196] 8 U.S.C. §1101(a)(43)(U), INA § 101(a)(43)(U).

[197] 8 U.S.C. §1227(a)(2)(B), INA § 237(a)(2)(B).

[198] *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (drawing negative implication from the statutory language that includes attempts or conspiracies).

[199] *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

[200] 8 U.S.C. §1227(a)(2)(B)(i), INA §237(a)(2)(B)(i).

[201] 18 U.S.C. §3607

[202] *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)

[203] *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

[204] 8 U.S.C. §1182(a)(2)(A)(i)(II), INA §212(a)(2)(A)(i)(II).

[205] *See, e.g., Matter of G.M.*, 7 I&N Dec. 40 (A.G. 1956).

[206] *Matter of Winter*, 12 I&N Dec. 638 (BIA 1968).

[207] 8 U.S.C. §1182(a)(2)(C), INA § 212(a)(2)(C)

[208] 8 U.S.C. §1182(a)(1)(A)(iv), INA §212(a)(1)(A)(iv).

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

[210] *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992).

[211] *See, e.g., Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996).

[212] *Matter of Teixerira*, 21 I&N Dec. 316 (BIA 1996).

[213] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (treating as a separate element of an offense any fact that

increases punishment beyond the statutory maximum other than the fact of the existence of a prior offense). *Matter of Rodriguez-Cortez*, 20 I&N Dec. 587 (BIA 1992).

[214] 8 U.S.C. §1227(a)(2)(E), INA §237(a)(2)(E).

[215] *Matter of Madrigal-Calvo*, Int. Dec. 3274 (BIA 1996); *Matter of Pichardo*, Int. Dec. 3275 (BIA 1996).

[216] *Matter of Alcantar*, Int. Dec. 3220 (BIA 1994).

[217] The rationale for this limitation is to prevent relitigating criminal issues in immigration proceedings.

[218] *See also*, *U.S. v. Sylve*, 135 F.3d 680 (9th Cir. 1998)

[219] *See Matter of Torres Varela, 23 I&N Dec. 78 (BIA 2001*) [simple DUI not a crime of moral turpitude]; *United States v. Trinidad-Aquino*, No. 00-10013 (9th Cir., Aug. 8, 2001) [DUI not a crime of violence and thus not an aggravated felony under INA 101(a)(43)(F)].

[220] *Matter of Punu*, Int. Dec. 3364 (BIA 1998).

[221] *Murillo-Espinoza v. INS*, No. 00-70096 (9th Cir. Aug. 2000).

[222] *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989).

[223] There are viable legal arguments to assert that a non-citizen defendant who has made these admissions in the context of one of these agreements has not "…admitted facts sufficient to warrant a finding of guilt". However, as a practical matter, ICE and the Immigration Courts are likely to treat deferred adjudication agreements that contain such admissions as convictions for immigration purposes under this prong.

[224] Alcohol abuse/addiction does not constitute "drug" abuse or addiction for immigration purposes.

[225] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

[226] Matter of Devison, Int. Dec. 3435 (BIA 2000).

[227] *See Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); *Matter of G*, 9 I&N Dec. 159 (1961).

[228] *Matter of Roldan*, Int. Dec. 3377 (BIA 1999).

[229] Note that a conviction that is vacated on a legal or factual basis (versus a rehabilitative basis) will also vacate the conviction for immigration purposes as well. *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000).

[230] *Murillo-Espinoza v. INS*, No. 00-70096 (9th Cir. August 2000). A petition for rehearing en banc on this issue was denied in October 2001.

[231] *Lujan-Amendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

[232] *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970)

[233] *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998)

[234] *See Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *U.S. v. Vargas-Gomez*, 2000 U.S. App. LEXIS 539 (9th Cir. 2000).

[235] 8 U.S.C. §1101(a)(48)(B), INA §101(a)(48)(B).

[236] *See Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995).

[237] *See U.S. v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999).

[238] *See United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) (requiring that a court impose a sentence of a year rather than that the statute merely authorize a possible sentence of a year).

[239] *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

[240] *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *U.S. v. Banda-Zamora*, 178 F.3d 728 (5th Cir. 1999)

[241] One additional exception looks to the amount of jail time actually served by the defendant. Under 8 U.S.C. §1101(f), a person who has served six months or more in jail will not be able to show "good moral character" that is

required, amount other things, in order to become a U.S. citizen.

[242] The Board of Immigration Appeals is the administrative precedent-setting body for ICE and the Immigration Courts. It is part of the Department of Justice under the Executive Office for Immigration Review.

[243] *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *see also Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001).

[244] The Fifth Amendment rights of a non-citizen in a civil deportation proceeding are not as broad as those in a criminal case. Namely, a non-citizen's refusal to testify as to his/her immigration status or manner of entry may form the basis of inferences used against him/her in a deportation proceeding. *See U.S. v. Alderete-Deras*, 743 F.2d 645, *citing Bilokumsky v. Todd*, 263 U.S. 149 (1923) *and Cabral-Avila v. INS*, 589 F.2d 957 (9th Cir. 1978).

[245] *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972); *U.S. v. Alderete-Deras*, 743 F.2d 645 (9th Cir. 1984); *Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984).

[246] *U.S. v. Rodriguez*, 976 F.2d 592 (9th Cir. 1992); *Matter of King and Yang*, 16 I&N Dec. 502 (BIA 1978).

[247] *USA v. Montero-Camargo*, No. 97-50643 (9th Cir. 2000) (en banc); *Gonzalez-Rivera v. INS*, 22 F. 3d 1441 (9th Cir. 1994); *Orhorhaghe v. INS*, 38 F. 3d 488 (9th Cir. 1994); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1986).

[248] *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Padilla-Agustin v. INS*, 21 F.3d 970 (9th Cir. 1994).

[249] It is important to note that although removal is a certainty that accompanies many criminal convictions, the timing of a non-citizens deportation is not always certain. For many non-citizens, ICE will take custody of them and effect their deportation upon their release from incarcertation. For others, it may be months or years before removal proceedings may begin. The important fact to keep in mind is that a non-citizen with a criminal conviction for a "deportable" offense will, at some point, certainly face deportation.

[250] Prior to *Lombera I & II*, failure to notify a non-citizen of her/his right to contact his/her country's consulate would result in a reversal of a deportation order where the non-citizen would meet certain requirements. *U.S. v. Rangel-Gonzalez*, 617 F.2d 529 (9th Cir. 1980). Following *Lombera II*, it is unclear whether this holding remains good law in deportation (removal) proceedings.

[251] For example: under current immigration case law, a 20-year lawful permanent resident (greencard holder) who is convicted for misdemeanor theft with no jail time but a 365 day sentence will face deportation as an aggravated felon, even if s/he has U.S. citizen spouse and children here. However, a lawful permanent resident, here for one year, convicted of Solicitation to Deliver Narcotics and sentenced to 18 months prison time will NOT be subject to deportation.

[252] *See, e.g, State v. Martinez-Lazo*, 100 Wn. App. 869, 999 P.2d 1275 (Ct. App., Div. III 2000); *In Re Yim*, 139 Wn. 2d 581, 989 P.2d 512 (1999). These decisions define "collateral" differently. "The distinction between direct and collateral consequences of a plea 'turns on *whether* the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Cuthrell v. Director*, 475 F.2d 1364, 1366 (4th Cir. 1973), *citing State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Although the AEDPA and IIRRA "changes to the [Immigration and Nationality Act] make... deportation certain... they do not alter its collateral nature as an independent civil proceeding over which the sentencing judge has no control." *Martinez-Lazo*, at 871, 1277.

[253] *Costello v. Immigration Service*, 376 U.S. 120,131. (1964).

[254] *United States v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002).

[255] *INS. V. St. Cyr*, No 00-767 at ft.nt. 53, U.S.S.C. (June 25, 2001).