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## **YOUR RESPONSIBILITY WHEN USING THIS MANUAL**

When we wrote this material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to different interpretations. We do not always have the resources to make changes to this material every time the law changes. Moreover, immigration law is extremely complex and this manual provides only a very general overview of the law. If you use this information, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institutional law library.

# **INFORMATION FOR CALIFORNIA STATE PRISONERS WITH IMMIGRATION HOLDS**

Revised March 2012

This manual is designed for noncitizen prisoners in the custody of the California Department of Corrections and Rehabilitation (CDCR). Thus, the manual is addressed to people who are currently serving criminal sentences of longer than one year and who have at least one felony conviction; people in other situations may have more options for relief from removal.

The purpose of the manual is to give noncitizen CDCR prisoners an understanding of what will happen to them as the result of an immigration detainer (hold), help them decide whether to challenge removal (deportation), and help them prepare for the proceedings if they choose to challenge removal. For most noncitizen prisoners, the main questions will be whether they can be deported and whether they have any defenses to deportation (known as “relief from removal”). The answers will depend on each person’s immigration status, other immigration history, the type of criminal convictions they have on their record, and family or social factors. Unfortunately, most CDCR prisoners will be deportable and will have few or no defenses to deportation.

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## **OTHER RESOURCES**

The laws that govern deportation are contained in various sources. These are the Immigration and Nationality Act (INA), which is set forth in the United States Code (USC), the Code of Federal Regulations (CFR), decisions of the Board of Immigration Appeals (BIA), and federal court decisions.

An excellent source of information about the immigration consequences of criminal convictions is the Immigrant Legal Resource Center (ILRC). The ILRC publishes a comprehensive manual called *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws*. The ILRC website at [www.ilrc.org](http://www.ilrc.org) has helpful resources including a chart of the immigration consequences of various California criminal offenses and a list of organizations that provide low cost or free legal services for immigrants.

Another helpful organization is The Florence Immigrant and Refugee Rights Project, which provides “know your rights” presentations and limited legal services for people in the immigration detention centers in Arizona near several of California’s out-of-state prisons. The Project website at [www.firrp.org](http://www.firrp.org) contains self-help materials with more details on many of the topics discussed in this Manual. The Project’s address is Florence Project Main Office, P.O. Box 654, Florence, AZ 85132.

The Northwest Immigrant Rights Project, also provides know your rights presentations and legal services for persons in immigration detention centers in Washington where California prisoners may be transferred. They have a self-help guide at [www.nwirp.org](http://www.nwirp.org). NWIRP’s address is 615 2nd Avenue, Suite 400, Seattle, WA 98104.

Families for Freedom and the Immigrant Defense Project, two New York-based organizations, provide self-help materials for people facing deportation and information for families assisting their loved ones in the deportation process. They are among the several authors of *Deportation 101: A Community Resource on Anti-deportation Education and Organizing*. The *Deportation 101* manual can be downloaded (in English or Spanish) at [www.familiesforfreedom.org](http://www.familiesforfreedom.org) or at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

Another source of information and legal forms is the Department of Justice Executive Office for Immigration Review website, [www.justice.gov/eoir](http://www.justice.gov/eoir). Also helpful are the U.S. Immigration and Customs Enforcement website at [www.ice.gov](http://www.ice.gov) and the U.S. Citizenship and Immigration Services website at [www.uscis.gov](http://www.uscis.gov). Both have information and some forms. The ICE webpage includes an online detainee locator to track the whereabouts of any person in federal immigration custody.

The Prison Law Office can provide more information on challenging criminal convictions through direct appeals or state and federal habeas corpus petitions. The Office can also provide information on challenging state prison classifications. Write to the Prison Law Office, General Delivery, San Quentin, CA 94964 or go to the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

## **ACKNOWLEDGMENTS**

We are deeply indebted to the Political Asylum/Immigration Representation Project (PAIR) ([www.pairproject.org](http://www.pairproject.org)), which generously shared its *Self-Help Manual for People Detained by the Immigration Service* (Nov. 2009) with us. PAIR's manual provided the framework for this manual, although Prison Law Office staff reorganized and revised the content significantly to make the material appropriate for California state prisoners.

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Further thanks are due to the Detention Watch Network, Families for Freedom, Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild, who kindly allowed us to append excerpts of their excellent resource, *Deportation 101: A Community Resource on Anti-Deportation Education and Organizing*, to this manual.

Any errors in this manual are the sole responsibility of the Prison Law Office.

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## **THE IMMIGRATION DETAINER (HOLD)**

### **What is an immigration detainer or hold? How will I know if I have a hold?**

The California Department of Corrections and Rehabilitation (CDCR) reports all prisoners who are believed to be noncitizens (often based upon birth in a foreign place) to U.S. Immigration and Customs Enforcement (ICE), a division of the Department of Homeland Security. This is the start of the process by which ICE identifies noncitizen prisoners for “removal,” (often called deportation) from the U.S. An overview of the deportation process and the agencies that are involved in the various stages of the process (“Deportation Map” from *Deportation 101*) is included in the Appendices at the end of this manual.

If the CDCR notifies ICE that you may be noncitizen, ICE will interview you to decide whether or not to issue an immigration detainer (also called an ICE “hold”). Any information that you give to ICE in the interview can be used to place a hold and eventually to deport you. For tips on what an immigration hold means and what to do during an immigration interview, see the Appendix (“Immigration in Jail” from *Deportation 101*) at the end of this manual.

An ICE hold is a request for CDCR to notify ICE when your prison term is finished and to hold you in custody so that ICE can pick you up and place you into deportation proceedings. It is important to understand that ICE may issue a hold even if you are a U.S. citizen or are lawfully in the U.S. An ICE hold does not necessarily mean that you can or will be removed from the U.S.

If ICE decides to issue a hold, CDCR will give you a written notice (Form I-247) telling you that a hold has been placed. The form will show whether ICE is just investigating you or whether ICE is actually asking CDCR to hold you for transfer to ICE custody when you finish serving your state prison term. Typically, CDCR officials will notify ICE at the end of your term so that you will be transferred to ICE custody and not be released to the streets. CDCR can hold you for ICE for no more than 48 hours (not counting weekends and federal holidays) after the date that your state prison term ends. Sample requests to be released from custody if you have been held in state prison more than 48 hours after the end of your state prison term can be obtained by contacting Immigrant Legal Resource Center ([www.ilrc.org](http://www.ilrc.org)).

### **Will the immigration hold affect my prison housing or programming?**

Although the ICE form says that an ICE hold should not affect prison classification or eligibility for work programs, the CDCR regulations provide otherwise. Under CDCR rules, an immigration hold does not increase your classification score, but it is a case factor that will be noted in your classification documents and might affect where you will be housed. For example, if you have an immigration hold you cannot be housed at a Level One minimum security facility that does not have gun towers. You are also more likely to be transferred to one of the CDCR’s out-of-state facilities if you have an immigration hold. An

immigration hold may prevent you from participating in some programs, such as Prison Industries Authority (PIA) jobs, the Family Foundations Program, the Alternative Custody Program, substance abuse programs, or work furlough. If you want to challenge a classification or program restriction based on your ICE hold, you should file a CDCR Form 602 administrative appeal and pursue it to the highest level. If you do not get a satisfactory response to your 602, you may want to file a petition for writ of habeas corpus in state court. On request, the Prison Law Office can send you free information on how to file administrative appeals and state habeas petitions.

### **Can I be deported before the end of my prison term?**

California will not let ICE deport you until you have finished serving your state prison term.

In the past, the California law-makers have tried to change the laws to allow early release and deportation of some noncitizen prisoners. However, as of this date, efforts to change the law in this way have not succeeded.

### **Can I be moved to a prison in my home country to finish my prison term?**

There are treaties under which noncitizen prisoners may serve their sentences in their home countries. However, there is no right to a transfer and the U.S. government, the state of California, and the foreign country all must agree to a transfer. The process takes 6 months to 3 years and very very few California prisoners have ever been transferred. Your correctional counselor should be able to provide you with transfer application forms and information on the process. Information is also available from the Immigrant Legal Resource Center (ILRC).

If you want to apply for a transfer, you should understand what rights you will or won't have in your home country and what your home county's prison conditions are like. For more information, Human Rights Watch and Amnesty International write reports that comment on prison conditions in other countries.

## **GROUNDS FOR DEPORTATION**

### **Can I be deported even if I am a citizen? How do I know if I might be a citizen?**

ICE cannot deport a person who was born a U.S. citizen, has gone through the process of becoming a "naturalized" U.S. citizen, or has derived citizenship from a parent.

Under certain circumstances, you might be a citizen by birth or through your parents if:

- You were born in the U.S. or a U.S. territory such as Puerto Rico, the U.S. Virgin Islands or Guam;

- You were born in another country, but one or both of your parents was a U.S. citizen and lived in the U.S. for a certain period of time before your birth;
- You were found in the U.S. when you were under the age of 5 and your parents' place of birth are unknown;
- Before your 18<sup>th</sup> birthday and while you were a Lawful Permanent Resident, both (or sometimes just one) of your parents became a naturalized citizens and while you were still an unmarried minor, a citizen parent had legal and physical custody of you.

The law is complicated and has changed over the years; there may be other grounds on which you might or might not be a U.S. citizen or national. Five factors will affect whether you are a U.S. citizen even though you were born outside of the U.S. Those factors are:

- (1) Whether your parents were married when you were born;
- (2) Your date of birth;
- (3) Whether one or both of your parents was a U.S. citizen when you were born or became a citizen while you were a minor;
- (4) How long your citizen parent lived in the U.S. prior to your birth; and
- (5) How long and at what ages you have lived in the U.S.

Charts to help determine whether you are a U.S. citizen are available at [www.ilrc.org](http://www.ilrc.org) under the Citizenship and Naturalization tab.

**If you think there is a possibility that you are a U.S. citizen, you should immediately gather information and documents to prove your citizenship. If possible, you should send this information to ICE while you are still in state prison to try to get ICE to drop your hold. If ICE still brings deportation proceedings against you, you should not waive your rights to have a hearing in front of an Immigration Judge. When you have a hearing, you should tell the Immigration Judge why you think you are a citizen. It is never too late to bring a citizenship claim. You can do this even after you have been removed from the U.S.**

### **Who can be deported?<sup>1</sup>**

Any person who is not a U.S. citizen can be deported from the U.S. However, whether you are in the U.S. legally, and what type of immigration status you have, can make a big difference in whether you have any chance of being able to stay in the U.S. at the end of your prison term. It may also make a difference in whether you are ever able to come back to the U.S. lawfully.

People who have legal status in the U.S. include lawful permanent residents (green card holders), asylees/refugees, people granted withholding of removal or temporary protected status (TPS), and people with visas (as tourists, students, businesspeople, etc.). But

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<sup>1</sup> Portions of this section were adopted from *Deportation 101*.

even if you are in the U.S. legally, you may be deportable because of your criminal conviction. Unless you are granted some type of relief, you could lose your lawful status and/or be barred from getting a more secure form of legal status and end up being deported.

People who are “undocumented,” meaning they are not in the U.S. lawfully, will have a much lower chance of being allowed to stay in the U.S. If you are not legally in the U.S., you are subject to deportation regardless of whether you were convicted of a crime. On top of that, your conviction may make it even less likely that you will be able to avoid deportation and may affect whether you can ever visit or live in the U.S. legally in the future. You are not lawfully in the U.S if:

- you “entered without inspection” – for example, you walked across the border without going through Immigration inspection.
- you have a prior deportation order; you might have a deportation order, even if you don’t know it – for example, if your green card application was denied and you did not get the notice that the government had started a deportation case against you then.
- you had a visa but stayed in the U.S. longer than your visa allowed.

**If you are not in the U.S. legally, your main goal at the end of your prison term might be to preserve your ability to get legal status in the U.S. either now or in the future. Whether or not you can succeed in that goal will be affected by what type of criminal conviction(s) you have.**

**Can I be removed even if I was in the U.S. legally or had a green card before I was convicted? Can I be removed even if I am married to a U.S. citizen or am the parent of a U.S. citizen?**

Deportation is **always** a possibility for **anyone** who is not a U.S. citizen. For example, even a person who is married to a U.S. citizen, has children who are U.S. citizens, and has had a green card for 20 years could be deported. However, in some situations, your green card status or close family relationship to U.S. citizens might help you avoid deportation. (See “Relief from Deportation,” below.)

**What are the reasons why I could be deported?**

There are several reasons why a noncitizen may be deported. In some cases, more than one reason may apply. The most common reasons are:

- You have violated immigration law, such as by entering the U.S. without documentation or with false documents, staying after your visa expired, committing marriage fraud, or returning to the U.S. after being deported. You can be deported for these immigration violations even if you do not have a criminal conviction.
- You have certain type(s) of criminal conviction(s), including even minor convictions relating to drugs, crimes involving moral turpitude (such as theft, fraud or violence),

firearms, domestic violence, child abuse, sexual crimes, and prostitution. While many felony convictions resulting in state prison sentences carry severe immigration consequences, the fact of a felony conviction alone does not necessarily mean an individual will be removed.

### **Does my criminal conviction make me deportable?**

Many types of felony convictions will make you deportable from the U.S. even if you are in the U.S. lawfully. More serious types of crimes will also limit your ability to get relief from deportation regardless of whether you have lawful status or are undocumented. The following is an overview of the most common types of crimes that will make you removable. Included in the Appendices to this manual are charts summarizing the different types of criminal conviction with immigration consequences (“Immigration Consequences of Crime Summary Checklist” and “Suggested Approaches for Representing a Noncitizen in a Criminal Case”, both from *Deportation 101*). Please be aware that the law is complicated and there can be disputes over whether particular offenses fall into certain categories.

#### **1. Aggravated Felonies**

An aggravated felony conviction is the most serious type of crime under immigration law. It triggers deportation even for people with lawful status and bars almost all forms of relief from removal for any noncitizen. Therefore, an aggravated felony conviction results in virtually **mandatory deportation** in the great majority of cases.

If you are undocumented and have an aggravated felony conviction, you most likely will be deported from the U.S. “administratively” without a hearing. This means that you will not even get a hearing in front of a judge to make sure that your conviction really qualifies as an aggravated felony.

If you are deported from the U.S. because of an aggravated felony, you will be permanently barred from returning to the U.S. If you are deported for an aggravated felony and then return to the U.S. illegally, it is a crime and you could be sentenced to up to 20 years in federal prison just for the illegal re-entry.

Immigration law has its own definition of what counts as an “aggravated felony,” and the category actually includes many misdemeanors and other offenses that are not particularly “aggravated.” The list of aggravated felonies includes the following crimes:

- murder
- rape
- sexual abuse of a minor
- any offense generally considered to be “drug trafficking”

- trafficking in firearms
- money laundering and illegal money transactions involving more than \$10,000
- fraud and tax evasion, including welfare fraud involving more than \$10,000
- a “crime of violence” with a sentence imposed of one year or more. A crime of violence means (a) a crime for which one of the elements is the use, attempt to use, or threatened use of physical force against a person or property, or (b) any other crime that is a felony and involves a substantial risk that physical force may be used against a person or property in the course of committing crime.
- theft, burglary, or receipt of stolen property with a sentence imposed of one year or more
- any crime of smuggling, harboring or illegally transporting noncitizens, except for a first offense involving your parent, spouse or child
- using or creating false documents with a sentence imposed of one year or more, except for a first offense which you committed to aid your spouse, child or parent.
- commercial bribery, forgery, trafficking in vehicles with altered numbers with a sentence imposed of one year or more
- bribery of a witness or perjury, with a sentence imposed of one year or more
- various other offenses such as demand for ransom, child pornography, a RICO offense punishable with a 5 year sentence, running a prostitution business, slavery, offenses relating to national defense, sabotage or treason, revealing the identity of an undercover agent, and failure to appear to serve a sentence if the underlying offense is punishable by a term of five years, or to face charges if the underlying sentence is punishable by two years, and
- obstruction of justice, with a sentence imposed of one year or more
- attempt or conspiracy to commit any aggravated felony.

## **2. Crimes Relating to Controlled Substances**

Drug convictions have very serious immigration consequences. Nearly all offenses for crimes “relating to” controlled substances (illegal drugs) will make a non-citizen removable. Even minor offenses such as being under the influence of drugs, possessing drug paraphernalia, or possessing a small amount of drugs, will trigger these immigration consequences. However, some crimes that are not directly related to drugs, like a conviction for being an “accessory after the fact” to another person’s drug crime, may not qualify as being “related to” controlled substances.

There is only one situation in which a drug crime might not have severe immigration consequences -- if your only drug crime is one conviction of simple possession of 30 grams or less of marijuana. If you have lawful status, you are not deportable if that is your only crime. If you are undocumented, you may be eligible to avoid being deported for the offense.

Some controlled substance offenses that qualify as “drug trafficking” offenses will also be classified as aggravated felonies. For immigration purposes, drug trafficking can include even sale of small amounts of a controlled substances and possession with intent to sell. There are arguments, however, that convictions for transporting, offering to transport, or offering to sell a controlled substance are not “drug trafficking” aggravated felonies. If you are convicted of any of these particular offenses you might be able to argue that your conviction is not an aggravated felony.

### **3. Crimes Involving Moral Turpitude (CMTs)**

“Crimes involving moral turpitude” (or “CMT’s”) is a broad category of crimes that may make you removable and ineligible for relief from deportation. Hundreds of types of offenses qualify as CMTs. Since federal immigration law provides no specific definition of what crimes are CMTs, there are numerous legal disputes about whether a particular crime is or is not a CMT. In general, the following types of crimes are considered to be CMTs:

- offenses (either felonies or misdemeanors) which require either an intent to defraud or an intent to steal (for example grand or petty theft);
- offenses which require an intent to cause or threaten great bodily harm or, in some cases, in which great bodily harm is caused by a willful or reckless act;
- some offenses against special groups such as spouses, domestic partners, minors, and other dependents;
- felonies and some misdemeanors which require “malice”; and
- sex offenses which require “lewd” intent.

Whether you will be removable or will be barred from staying in the U.S. for a CMT depends on the number of your CMT convictions, the length of the potential or actual sentence you received for the CMT, and the date you committed the CMT. A CMT conviction can limit the types of relief from removal that are available to you, but you may have more options than if you have an aggravated felony conviction.

### **4. Other Deportable Offenses**

Some crimes that do not qualify as either aggravated felonies, controlled substance offenses, or CMTs can make you removable and/or bar you from obtaining immigration relief. However, with such convictions, you may have more ways to get relief from removal.

The most common offenses for which you can be deported (that are not in one of the other categories) are the following:

- a firearms conviction, such as unlawful possession of a gun, or
- a conviction for domestic violence, stalking, violating a protective order or abusing, neglecting or abandoning a child.

## **5. Gang Membership and Affiliation**

There is no immigration law that makes a person deportable just for gang membership or affiliation (although a conviction for actually participating in criminal gang activities would likely be deemed to be a CMT). However, if you have a record of being involved with a street or prison gang, it will be especially difficult for you to get any relief from deportation. If there is any chance that ICE will think that you have a gang affiliation, and you want to avoid being deported, you should gather as much evidence as possible to show that you were not involved in a gang or that you are rehabilitated and have dropped out of the gang lifestyle.

### **Can I argue that my conviction is not an aggravated felony, drug-related crime, crime involving moral turpitude (CMT) or other removable offense?**

The federal government often has the burden to prove that your criminal conviction is an aggravated felony, drug-related crime, CMT or other deportable offense. In some cases, your criminal history records will clearly show that your crime falls in one or more of those categories. Other times, it may be open to dispute. Usually disputes happen where the state law that you were convicted under covers several different types of actions that don't all neatly fit into one of the immigration law categories. For example, a California conviction for possessing a weapon might involve either firearms or non-firearm weapons; that conviction will qualify as a deportable crime under the immigration law firearms rule only if the weapon actually was a firearm.

If there is a question about whether your crime fits a certain immigration law criteria, you can try to defend against deportation by arguing that your conviction does not make you deportable or is not a drug crime, aggravated felony or CMT. An immigration judge will usually use a "categorical analysis" to decide whether your conviction triggers a particular immigration law penalty. For example, for a weapons possession offense, the judge might have to decide if there is evidence that you possessed a gun rather than a knife or other weapon. In most cases, the immigration judge is only allowed to look at certain official documents from your criminal case file to see what the facts were. Those documents include the charging papers (indictment, complaint, information), jury instructions, verdicts or findings made by a jury or court, your written agreement to plead guilty or no contest and the reporter's transcript from the hearing when you entered your plea, and the sentencing order and the reporter's transcript from your sentence hearing. The immigration judge cannot rely on a police report or probation report **unless you pled guilty or no contest and you or your attorney agreed that the report contained a factual basis for the plea.** The immigration

judge cannot consider comments you make or the prosecutor's or co-defendant's statements, or other any information that is not an official finding of the criminal case jury or judge.

You should be aware that the categorical approach currently does **not** apply in two important situations. This means that in some cases the immigration judge can look outside of the official documents described above to decide whether you are deportable. First, the categorical approach does not fully apply to immigration provisions with "circumstance-specific" factors, like the aggravated felony for "fraud or deceit offense with a loss exceeding \$10,000" and possibly the deportable "crime of domestic violence." Second, the categorical approach does not fully apply to decisions about whether crimes involve moral turpitude (are CMTs).

**Is there anything else I can do about my criminal conviction that would improve my chances of not being deported?**

Getting your criminal conviction reversed or reduced to less serious offenses, or getting your sentence lowered, might help you avoid deportation. For example, getting an aggravated felony reduced to a less serious offense under immigration law could increase your chances of getting relief from removal. The key is that the conviction must be reversed, vacated or reduced because of legal error. For example, the immigration consequences of a conviction will not be eliminated or changed by so-called "rehabilitative relief." Rehabilitative relief includes situations where the court modified or erased (sometimes called "expunging") a conviction because you completed probation or fulfilled other conditions or for humanitarian purposes. In deciding whether to challenge your criminal conviction(s) to avoid deportation, you should think about what remedy the courts could grant you if you win the legal arguments you are making, and whether you might end up with no criminal conviction or with a different type of conviction or shorter sentence with less severe immigration consequences.

Any challenge to your criminal conviction should be presented to the state courts that hear criminal cases (not to the immigration judge). You should bring any criminal case challenges as soon as possible in hopes of getting the issues resolved before the end of your CDCR prison sentence.

There are many types of legal errors that can lead to reversal or modification of a conviction or sentence. Sometimes there are legal errors related to a defendant's noncitizen status. For example, the court that convicted you might have made a legal error requiring reversal of your conviction if it did not warn you that your guilty or no contest plea could make you deportable. As another example, you might be able to get your conviction reversed if your criminal case attorney provided ineffective assistance by not accurately advising you about the immigration consequences of a conviction before you decided whether to plead guilty or no contest.

The most common ways to challenge a criminal conviction are summarized here:

- You can file a **direct appeal**. You must file a notice of appeal within 60 days of your sentencing; in rare cases, you may be able to get permission to file a late notice of appeal. Also, if you pled guilty or no contest, and you want to raise some types of issues, will have to apply to the court for permission to raise those issues; this is called a certificate of probable cause. If you are indigent (have little or no money) and you ask for an attorney, the court must appoint an attorney to represent you in your direct appeal at the state's expense.
- You can request a **recall of commitment**. The court that sentenced you has power to grant a recall of commitment within 120 days after your sentencing for any rational reason related to lawful sentencing. If the court was not aware of the immigration consequences of your sentence, it might be willing to recall your commitment and re-sentence you to a term that could make it easier for you to avoid removal under the immigration laws.
- You can file a **motion to vacate your criminal conviction under Penal Code § 1016.5** if (1) you pled guilty or no contest and the judge did not warn you that the plea could lead to your removal from the U.S. and (2) you can show there is a reasonable probability that you would not have pled guilty or no contest if you had been properly warned. There is no set time limit for filing a § 1016.5 motion, but you should do so as soon as possible.
- You can file a **state petition for writ of habeas corpus**. You must file a habeas while you are still in state prison or on state parole. You can request an attorney; if the court issues an "order to show cause" (an order that the state respond to your legal arguments), then it must appoint an attorney to represent you at the court's expense. State habeas corpus is used when the issue requires consideration of facts that were not presented in the trial court. A common habeas corpus claim is that trial or appellate counsel provided ineffective assistance that might have affected the outcome of the case. For example, you may have received ineffective assistance if (1) your criminal attorney did not accurately tell you the specific immigration consequences if you entered a guilty or no contest plea and (2) you would not have entered the plea if you had been properly advised.
- If you challenge your conviction in the state courts, and you are not successful, you might be able to bring a **petition for writ of habeas corpus in federal court**. There are strict deadlines for filing federal habeas corpus actions and you usually will have to file your petition within one year after your direct appeal is concluded; however, some types of state court actions can toll the timelines (stop the clock) while they are pending. If you are indigent, the court might appoint an attorney to represent you free of charge, but it does not have to do so.

The rules of criminal law and procedure are complicated. Your trial or appellate attorney from your criminal case may be able to answer your questions or help you challenge your

conviction or sentence. You can get more information about direct appeals, challenges to guilty pleas, and state or federal habeas corpus by writing to the Prison Law Office, General Delivery, San Quentin, CA 94964.

### **Can I be deported if I am still challenging my criminal conviction?**

The rules used to be that you could not be removed based on your criminal conviction until your conviction became officially “final,” meaning that the time to file a direct appeal had passed or your direct appeal was decided. However, a recent court decision said that an immigration judge may find that you are removable for a criminal offense if a criminal court has entered a judgment of conviction, even if you are appealing the conviction. Also, the fact that you have an on-going direct appeal may be irrelevant if you can be deported based on non-criminal grounds like being undocumented or overstaying a work visa.

Removal proceedings will not be stopped just because you are bringing a “collateral attack” on your conviction, such as a motion to vacate or a petition for a writ of habeas corpus. Because of this, it is very important to get those types of cases going as soon as possible.

## **RELIEF FROM DEPORTATION**

### **What forms of relief from deportation might be available to me if I am a longtime lawful permanent resident just finishing a state prison sentence?**

There are a couple of types of relief from deportation that are available only to people who are longtime lawful permanent residents of the U.S. (green card holders). Those types of relief are discussed in the following subsections. If you read the following subsections and think you can apply for these types of relief, you should tell the immigration judge at your first hearing and ask for the proper application and fee waiver forms.

#### **1. Relief from Removal Under Former INA § 212(c)**

If you have an old conviction with immigration consequences and you are a lawful permanent resident, you might be able to get relief from deportation under former laws that were more lenient than current laws. Former INA § 212(c) relief is still available to lawful permanent residents who were eligible for § 212(c) at the time that they entered their plea.

The rules governing who is eligible for § 212(c) are complex and the rules that apply may be different depending on the date of your old conviction and the date and type of any new convictions. The bottom line is that if you are a permanent resident who is faced with deportation proceedings based entirely or in part on a conviction that occurred before April 1, 1997, you should consider applying for former § 212(c) relief. At the very least, you should try to get more information or advice about whether you might be eligible.

Section 212(c) is a discretionary remedy. This means that the immigration judge can decide not to grant you relief from deportation even if you meet the basic eligibility criteria.

In making the decision, the judge is supposed to consider both facts in your favor and facts against you. Favorable facts might include family ties in the U.S., living in the U.S. a long time and/or as a child, hardship to you and your family if you are deported, service in the U.S. military, a history of employment, property or business ties, and other evidence showing you are rehabilitated and have a good character. Facts that the judge might consider against you include any violations of the immigration laws, the seriousness and recency of your criminal record, and any other evidence of a bad character. Because of these standards, while you are in prison you should participate in as much rehabilitative programming as possible, such as job, education, vocation, substance abuse and therapy programs. Before your release date, you should gather documents or support letters from friends, family, counselors, or correctional officers to try to convince the judge to grant you relief from deportation.

## **2. Cancellation of Removal for Lawful Permanent Residents**

If you are a lawful permanent resident, a type of relief called “cancellation of removal” might allow you to keep your lawful permanent resident status and avoid deportation.

To be eligible for cancellation of removal, you must meet all of the following requirements:

- have been a lawful permanent resident in the U.S. for at least five years;
- have lived continuously in the U.S. for seven years after being admitted to the U.S. in any lawful status; however, time after you committed certain offenses or after the start of deportation proceedings does not count;
- not have a conviction for an aggravated felony;
- not be inadmissible or deportable as a Nazi or terrorist;
- not have persecuted others;
- not have had certain types of immigration status; and
- not have previously been granted cancellation or suspension of deportation or § 212(c) relief.

Cancellation of removal is discretionary. In addition to meeting the basic criteria, you must convince an immigration judge that you deserve to stay in the U.S. The immigration judge will weigh your positive qualities against your bad acts to decide whether relief should be granted or denied. The types of factors that the judge will consider are the same as those discussed above in the subsection on former § 212(c) relief.

### **Can I avoid being deported regardless of my immigration status if my removal will cause hardship to me or my family?**

Hardship alone is not a defense against deportation. However, hardship to a close family member might help your immigration case if (1) you are undocumented and have a way to apply to be admitted to the U.S. lawfully or (2) you are a lawful permanent resident who is eligible to re-apply for lawful permanent residence based on family relationships. In such cases, the hardship might convince immigration officials to “waive” or disregard your

criminal conviction so you can pursue other types of immigration actions that will allow you to “adjust your status” and stay in the U.S. This is called an “INA § 212(h) waiver.” However, a § 212(h) waiver is very difficult to win, and it is unlikely that you will get a § 212(h) waiver if you have just served a state prison term.

You may be eligible for a § 212(h) waiver if you meet all of the following criteria:

- The criminal offense(s) that you want to have waived is a CMT (except murder or torture), a single conviction for simple possession of 30 grams or less of marijuana, a conviction for prostitution; or multiple criminal convictions for deportable non-drug for which you received a total term of 5 years or more. If you immigrated to the U.S. as a lawful permanent resident, you must not have been convicted of any aggravated felony. (If you came to the U.S. unlawfully or through some other legal status and later became a lawful permanent resident, the aggravated felony bar should not apply to you.)
- If you are a lawful permanent resident, you also must have lawfully resided in the U.S. for at least 7 years before the removal proceedings are initiated. If you are not a lawful permanent resident, you don’t have to meet a residency requirement.
- You are the spouse, parent or child of a U.S. citizen or lawful permanent resident; and
- Your removal would cause “extreme hardship” to your U.S. citizen or permanent resident family member. If you have been convicted of a violent or dangerous crime, you have to show the hardship would be “exceptional and extremely unusual.” Hardship to yourself does not count.<sup>2</sup> Depending upon the gravity of the underlying criminal offense, “a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion....”

Section 212(h) relief is discretionary, which means that the immigration judge may deny your application for a waiver even if you meet the basic eligibility requirements. In addition to proving extreme hardship to family members, you must show that you deserve to get a waiver. The immigration judge may consider your family ties, the amount of time you have lived in the U.S., your health and the health of your citizen or lawful permanent resident children, the political and economic conditions in your home country, the economic problems for your family if you leave the U.S., and your involvement in the community. You and your relatives should write statements “under penalty of perjury” about these facts. You can also ask teachers, employers, church officials, probation officers, neighbors, and others to write statements about your good qualities.

If you think you can apply for a § 212(h) waiver, tell the immigration judge and ask for the application form and a fee waiver form.

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<sup>2</sup> Another form of relief, cancellation of removal, can also be granted in “hardship” cases, but if you have just finished serving a CDCR term, you will not be able to get cancellation of removal for a hardship because a conviction that resulted in actual imprisonment of 180 days or more will prohibit you from meeting the good moral character requirement.

## **Can I avoid being deported if returning to my home country will put me in danger?**

If you fear harm or persecution if sent back to your home country, there are several forms of relief that may be available. Unfortunately, you may not be able to get some of these types of relief if you have an aggravated felony conviction or a crime that is considered particularly serious or violent under immigration law.

You apply for most of these types of relief by filling out Form I-589, which the immigration judge will give you at your hearing. For any of these types of relief, you need to explain why you would be in danger and who will harm you. You should write a declaration (a sworn statement made “under the penalty of perjury”) about why you left your country and the harm you face if you are deported there. You can also help your case by getting declarations from family and others who know the situation. If you have reports, letters or newspaper articles or other papers that show how you would be in danger, attach those to your application and bring them to your immigration court hearing.

### **1. Asylum**

Fear of harm alone, even serious harm, is not enough to win asylum. You may apply for asylum if you can show a “reasonable possibility” that (1) you have suffered past persecution or have a well-founded fear of persecution in your country and (2) the persecution is due to your race, religion, nationality, political opinion, or membership in a particular social group. Persecution means suffering or harm or a threat to your life or freedom; persecution might include economic deprivation like your land or money being taken away from you. However, persecution usually does not include mere discrimination. For asylum, the threat of persecution does not need to come from the government and can come from other organizations or groups. Be aware that you cannot get asylum if you were well-settled in another country (not the one you were persecuted in) before you came to the U.S.

Some types of criminal convictions will bar you from getting asylum. You cannot be granted asylum if you have been convicted of a “particularly serious crime.” Aggravated felonies are automatically considered particularly serious crimes, but other crimes can also qualify as particularly serious. Drug-trafficking offenses are particularly serious crimes, and so are most violent or dangerous crimes. There are also some other bars on asylum; for example, you will not be able to get asylum if you committed serious crimes outside the U.S. or persecuted people in another country or are considered to be a terrorist.

Normally, you must apply for asylum within 1 year after you arrive in the U.S. and have no safe third country to go to. There is an exception to this rule if you have been in some other lawful status, such as holding a green card, prior to filing the asylum application. Otherwise, if you miss the 1-year filing deadline, your asylum application will be denied unless you can show changed or extraordinary circumstances that provide a good reason why you did not apply earlier. There might be “changed circumstances” if you now fear persecution upon return to your country for a reason that did not exist when you first entered the U.S. Changed circumstances could also include reductions in your criminal conviction or sentence that remove one of the automatic bars to asylum. “Extraordinary circumstances”

means that you have an especially good reason why you missed the filing deadline, including serious illness, depression resulting from past harm, or changes in your immigration status.

Asylum is a discretionary remedy, meaning that the immigration judge is not required to grant asylum. To get asylum, you will need to convince the judge that even though you have a criminal record, there are strong reasons to allow you to stay in the U.S.

## **2. Restriction on Removal (Withholding of Removal)**

Restriction on removal, also called withholding of removal, is similar to asylum, but there are several important differences. Some of these differences could make it possible for you to get withholding of removal even if you can't get asylum (which is discussed in the previous subsection).

Like asylum, you cannot get withholding of removal if you have a conviction for a "particularly serious crime," but the law does not *not* automatically bar withholding of removal for all aggravated felony convictions. The law bars withholding of removal only if you have been convicted of an aggravated felony (or felonies) for which you have been sentenced to a total prison term of 5 years or more. However, federal officials have the power to decide on a case-by-case basis that any crime is particularly serious even if the crime is not an aggravated felony and/or the sentence imposed was less than 5 years.

Another difference is that you can get withholding of removal even if you were settled in another country (which was not the country you were persecuted in) before you came to the U.S.

On the other hand, the burden of proof for getting withholding of removal is higher than for asylum. To get withholding of removal, you must show a "clear probability" that your life or freedom would be threatened because of your race, religion, nationality, political opinion, or membership in a social group.

There are two other differences from asylum. Withholding of removal is a mandatory remedy, which means the judge must grant relief if you are eligible. This form of relief does not necessarily entitle you to stay in the U.S if you could be deported to a country other than the country where you suffered or fear persecution. However, in most instances, individuals granted withholding are released in the U.S.

## **3. Deferral of Removal Under the Convention Against Torture (CAT)**

Even if you have been convicted of a serious crime, such as an aggravated felony under immigration law, you can ask for relief from deportation under the international Convention Against Torture (CAT) if you fear that you would be tortured by government agents or with the government's approval if you are forced to return to your home country (or whatever the country U.S. officials want to send you to). CAT is a mandatory remedy, so the immigration judge has to grant relief if you qualify.

To qualify for deferral of removal, you must show that it is “more likely than not” that you would be tortured in your home country. The definition of “torture” is complex and sometimes open to dispute, but involves three basic requirements:

- the infliction of severe pain or suffering, either mental or physical;
- which is done with the specific intent to inflict severe pain or suffering;
- and which is done by a public official, at the official’s request, or with the official’s consent or acquiescence.

Under CAT, there is no requirement that the torture be based on any particular ground such as religion, race, nationality, membership in a particular social group, or political opinion. However, lawful punishment or sanctions by a government are not considered torture under CAT.

If you are granted deferral of removal, the immigration judge can order that you be deported to some country other than your home country.

#### **4. Refugee Waiver**

If you are a refugee with a criminal conviction and never became a lawful permanent resident (green card holder), you may be able to apply to become a lawful permanent resident and be allowed to stay in the U.S. despite your criminal conviction(s). You can apply to have your conviction waived so that you can get lawful permanent resident status using a INA § 209(c) waiver.

When you apply for a § 209(c) waiver, you are claiming that you are eligible to adjust your immigration status and that you should be allowed to stay in the U.S. even though you have a criminal conviction. You must show humanitarian reasons why you should not be deported.

Conviction of a particularly serious crime or an aggravated felony is not always a bar to a § 209(c) waiver application. However, if you have been convicted of a crime that immigration officials think is a dangerous or violent offense, they will deny your application unless there are extraordinary circumstances. Also, you cannot get a refugee waiver if the government believes you have been a drug trafficker or are a security or terrorist threat, even if you don’t have a criminal conviction for a drug or terrorist crime.

#### **Can I avoid being deported if I have been the victim or witness of a crime in the U.S?**

Even though you have a criminal record, if you have been a victim or witness of a crime, you may be eligible for certain visas that will allow you to stay in the U.S. There are several types of these visas that apply in different situations.

## **1. The U Visa for Crime Victims**

The U visa allows non-citizen crime victims to stay in the U.S. for a few years and possibly become lawful permanent residents. The purpose of this visa program is to help law enforcement investigate and prosecute crimes and to protect victims of serious crimes.

You may be able to get a U visa if you have suffered serious physical or mental abuse as a victim of certain crimes such as sexual or physical assaults or exploitation, kidnapping, or extortion. You must also have assisted or be willing to assist law enforcement or another public agency in the investigation or prosecution of the crime. Along with your application for a U visa, you must submit a form filled out by the investigating/prosecuting agency stating that you have been and/or are being helpful.

The U visa currently is not available to people who are lawful permanent residents, although this policy might change in the future. If you are a lawful permanent resident, you might be able to give up your permanent resident status to be granted a U visa.

Immigration officials can grant you a U visa even if criminal convictions or other factors might normally bar you from staying in the U.S. However, immigration officials do not have to grant a visa to everyone who has been a crime victim, and your criminal record will be something that immigration officials will consider in deciding whether to give you a U visa.

## **2. The S Visa For Crime or Terrorism Informants**

There are two kinds of S visas (S-5 and S-6); one is for criminal witnesses and informants and one is for terrorism informants. To be eligible for these types of visas, you must have important information concerning criminal or terrorist activities and must be willing to give or have given this information to law enforcement authorities or to a court. For the criminal informant (S-5) visa, immigration officials must find that your continued presence in the U.S. is necessary for a law enforcement investigation or prosecution. For the terrorist informant (S-6) visa, immigration officials must believe that you have been or will be placed in danger as a result of providing the information. If you are eligible for one of these types of visas, immigration officials have the discretion to allow you to stay in the U.S. even though you have criminal convictions and/or are undocumented.

A request for either of these types of visas must be filed by a state or federal law enforcement agency, which would have to take responsibility for you until you either leave the U.S. or get a different immigration status. There are a limited number of these types of visas available each year.

The length of stay for an S-5 or S-6 nonimmigrant is limited to 3 years, and there is a possibility of applying to become a legal permanent resident.

### **3. The T Visa for Victims Brought to the U.S. For Forced Labor or Sex**

The T visa program might allow you to stay in the U.S. and possibly become a permanent resident if you have been a victim of “a severe form of trafficking in persons.” This means that someone else brought you or convinced you to come to the U.S. and then forced you to work or perform other services. The force could be physical or it might have been through threats or lies. You must also show that you would suffer “extreme hardship involving unusual and severe harm” if you were to be deported from the U.S. You must show that you have complied with any reasonable law enforcement agency request for assistance in the investigation or prosecution of the acts of trafficking. Only a limited number of T visas can be granted each year.

Immigration officials have power to grant a T visa even if a person would otherwise not be allowed to enter or stay in the U.S. due to criminal convictions or other reasons. Of course, immigration officials can still consider your criminal record in deciding whether to grant you a T visa. If your own crimes were caused by or related to your being a victim of trafficking, you should make sure that the immigration official know that information.

## **DEPORTATION PROCEEDINGS**

### **What will happen at the end of my prison term?**

When you finish serving your state prison sentence, you will probably be picked up by ICE and moved to one of ICE’s detention centers for your immigration case. Noncitizens from California usually are detained in facilities in California, Arizona, Washington, and sometimes Texas.

ICE can also conduct removal proceedings at state prisons or county jails. The CDCR currently operates the Institutional Removal Program (IRP) for male prisoners at RJ Donovan State Prison and Centinela State Prison; there currently is no IRP for female CDCR prisoners. If you are selected for the IRP, immigration agents will hold your deportation proceedings while you are serving your state prison sentence so that you can be deported more quickly at the end of your prison term. The immigration judge and officials may come to the prison for the hearing or the hearing may be through a video screen on which you and the judge can see and hear each other.

Going through the IRP may lessen the amount of time you will spend in immigration detention at the end of your criminal sentence. On the other hand, even though you have the same rights at an IRP hearing as in Immigration Court, an IRP hearing may make it more difficult for you to assert your rights and defenses because you will have less access to legal information and assistance. For more information on IRP proceedings and how to object to them, see the Appendix “Immigration in Prison” from *Deportation 101*, which is attached to this manual.

ICE begins removal proceedings by filing a Notice to Appear (NTA) with the Immigration Court and serving a copy of the Notice on you. The Notice tells you about the

nature of the proceedings, the charges against you, your right to get counsel if you can hire or find a legal advisor, the time and place for the proceedings, and information about any free legal services that may be available.

How long the removal process takes depends on whether you fight removal. If you don't have any defense to removal, the process will likely take a few weeks or a couple of months. If you choose to fight removal, a removal case takes a bit longer, on the order of a few months. If you are ordered removed and you appeal to the BIA, the appeal will take another 4 to 6 months or so. If you then appeal your case to the U.S. Court of Appeals for the Ninth Circuit, that appeal could take 1 or 2 years or more.

### **Does ICE have to give me a hearing or could I be removed without a hearing?**

If you re-entered the U.S. illegally after a prior removal order, you can be removed based on the prior order without any right to a hearing. The only exception is that if you fear harm or persecution in your home country, you can ask immigration officials to deport you to somewhere other than your home country.

There is another way in which ICE may try to remove you from the U.S. without holding a hearing. This is called "expedited" or "administrative" removal. This can happen if you are not a lawful permanent resident (don't have a green card) and you have an aggravated felony conviction. If ICE does go through with an expedited removal proceeding, you will not be allowed to apply for any of the discretionary forms of relief from removal. Before removing you without a hearing, ICE must give you a special notice showing that your conviction is an aggravated felony and that you are not a lawful permanent resident. If you receive such a notice, you should answer it in writing to let ICE authorities know if:

- You have a green card (if possible send proof, such as a copy);
- You think your conviction is not for an aggravated felony;
- Your conviction is currently on direct appeal; and/or
- You fear harm if forced to go back to your country.

### **Can or should I ask to voluntarily leave the United States?**

Voluntary return or departure is a form of relief in deportation proceedings. It is not a form of relief that allows you to stay in the U.S., but it has less serious consequences than an order of removal. If you are allowed to leave the U.S. voluntarily, you will not have an official order of removal on your record. This can be a good thing because if you have an official order of removal, it will be harder or maybe impossible for you to return to the U.S. through legal means.

A grant of voluntary return departure might be the best possible outcome for someone who has just served a CDCR term and is likely to have no good defenses to removal. ICE can grant you voluntary return after they have arrested you. Note, however, ICE often tricks

people into signing a deportation order instead of an agreement for voluntary return. An immigration judge can also grant you voluntary departure at the beginning of removal proceedings or at the conclusion of your proceedings. You will not be allowed to get voluntary departure if you are deportable for an aggravated felony conviction or for terrorist activities. Also, voluntary departure is a discretionary form of relief and it is not likely to be granted to anyone who has served time in state prison. However, there is no harm in asking for this type of relief.

### **Can I be released, or will I have to stay in detention while I am awaiting a deportation hearing?**

If you have just served a CDCR prison term, you will likely be subject to mandatory detention, which means that you will have to stay in custody and will not be eligible for release on bond during your removal proceedings. The detention will continue as long as your removal proceedings are pending before an Immigration Court or the Board of Immigration Appeals (BIA).

Nonetheless, you can ask for a bond hearing by marking the bond hearing box on your Notice to Appear. At your hearing, the immigration judge will consider whether you are eligible to be considered for release on bond. If you are eligible, the judge will consider the same kind of evidence used for bail in a criminal case to decide whether you are a danger to the community or a flight risk.

### **How long will it take before I go to my first immigration court hearing?**

You will not go to Immigration Court for at least 10 days after you receive a Notice to Appear. It is important to review the Notice carefully before your hearing because it may contain mistakes. At your hearing you will have the opportunity to tell the judge about any mistakes on the Notice.

### **Do I have a right to a lawyer for my hearings?**

You have the right to a lawyer, but the government will not pay for one. This means that you cannot get a public defender for Immigration Court. You must either hire a private attorney, find a non-profit organization or law school clinic willing to take your case, or find a volunteer attorney. If you cannot afford an attorney, and if no volunteer attorney takes your case for free, you will have to represent yourself.

There are non-profit organizations and volunteer lawyers that provide free legal information and assistance for non-citizens at many of the ICE detention centers. These lawyers may hold “Know Your Rights” sessions or give you written information about the deportation process. When you get to the ICE detention center, you should be able find out what information and assistance is available.

If you need more time to find a lawyer, you can ask the immigration judge to postpone the proceedings to give you more time to find a lawyer before your hearing. Usually the judge will give you at least one or two weeks to look for a lawyer.

## **What will happen at my immigration court hearing(s)?**

The first hearing is called the Master Calendar Hearing. An immigration judge will be there. There will also be a government lawyer who will be trying to convince the judge to remove you. If you have a lawyer, he or she should be there also.

At the Master Calendar Hearing, the judge should tell you about your rights and then ask you if the Notice to Appear contains correct information. One of the rights that you have is to remain silent and not answer any questions about your immigration status or criminal record. However, if you tell the judge that the information on the Notice is correct, the judge will order you removed unless you say that you want to raise a defense to removal. If any information on the Notice is incorrect, or if you may have a defense to removal, tell the judge that you want a full hearing. The immigration judge should give you the application forms for any defenses or requests for relief that you want to make, and set a date for you to file the forms and other papers with the court.

If you ask for a full hearing, the judge will set your case for an “Individual Calendar Hearing.” At the Individual Calendar Hearing, you can tell the judge your side of the case and present evidence to show why you should not be deported. The immigration judge and the government attorney also may ask you questions. You should prepare for the hearing by thinking about and writing down the details about your immigration, family and criminal histories. You should also ask witnesses to attend the hearing and gather as many documents as possible to support your side of the case. Helpful witnesses and documents might explain your family ties in the U.S. and/or how your family would face hardships if you left. You could also present evidence showing you entered or stayed in the U.S. legally, and describing your education, employment, rehabilitation, community involvement and other positive activities. Other helpful information would be evidence showing that you would be in danger if you return to your home country. The documents you present to the court can be official government documents, news reports or reports from human rights organizations, or written statements made “under penalty of perjury” by people who know you or your situation. You should try to get an English translation of any document that is written in another language.

For any hearing, you should tell the Immigration Judge if you do not understand English. The judge must provide an interpreter for you. If there is no interpreter for your language, ask that the hearing be postponed until the court can provide an interpreter. If you have an interpreter, but still do not understand what happened at the hearing, you should tell the judge that the interpreter was not doing a good job and ask for a new hearing with a good interpreter. After the hearing you can write a letter to the judge to explain that you did not understand the hearing, but it is better to tell the judge at the hearing if you do not understand.

## **AFTER THE REMOVAL ORDER**

### **How long will it be after the removal order before I am removed?**

If the judge orders that you be deported, and you tell the judge you do not want to appeal, the government can deport you immediately, although it generally has up to 90 and sometimes 180 days to do so.

If you tell the Immigration Judge that you want to appeal, ICE must wait at least 30 days to give you time to file a Notice of Appeal. If you do file a Notice of Appeal, ICE cannot remove you from the U.S. until the appeal process is finished. Filing a motion to reopen or a motion to reconsider your case also will delay your removal until the motion has been decided.

Before removing you, the government has to get travel documents for you, which can take a month or more. You can help speed up your removal by asking your consulate to immediately issue your travel documents. Friends and relatives who have legal status can also help speed things up by bringing your identity papers to the appropriate Office of Enforcement and Removal. They should make copies of all documents before giving them to ICE. Someone without legal status should not go to ICE for you because he or she could be arrested.

### **Can I appeal my removal order or get the immigration judge to reopen or reconsider my case?**

There are three different ways to challenge a removal order: an administrative appeal, a motion to reopen, or a motion to reconsider. If you file an appeal, ICE cannot remove you from the U.S. until the appeal. However, a motion to reopen or reconsider does not stop ICE from removing you until either ICE or a court granted a stay of removal. It is also important to file an appeal or motion to reopen or reconsider if you might want to challenge the removal order in court. **Note that there are strict deadlines for filing these appeals and motions and that late filings are almost always refused.**

The most common challenge to a removal order is **an administrative appeal to the Board of Immigration Appeals (BIA)**. If the immigration judge orders you removed, he or she will ask if you want to appeal. If you say yes, the immigration judge will give you the forms to fill out to file an appeal. Appeals are complicated, and having a lawyer helps. After filing your appeal, you will receive a written record of your removal hearing and you will have time to write out in more detail the reasons why the immigration judge's decision was incorrect and why you should not be removed from the U.S.

In addition to filing an appeal, you can ask to file a **motion to reopen** your case if the immigration judge did not tell you about available defenses or if the law has changed in a way that helps you or if your situation has changed and you have new evidence about your case. You can file another type of motion, a **motion to reconsider**, if the judge's decision was based on an error of fact or law. Filing these types of motions is a complicated process which is best handled by a lawyer. If the immigration judge denies your motion, you can file

an appeal of that denial to the BIA, using the same process as for an appeal from a removal order.

### **If the BIA denies my appeal(s), can I challenge the removal order in court?**

If the BIA denies your appeal or appeals, you might be able to take your case to the U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over ICE and immigration judges in California. To do this, you have to file a Petition for Review with the Ninth Circuit in San Francisco (P.O. Box 193939, San Francisco, CA, 94119-3939) within 30 days of the BIA's decision. Your petition can be a simple document giving your name and alien registration number and stating that you are detained in ICE custody, that you are appealing from a decision of the BIA, and giving the date of the BIA decision. You must attach a copy of the BIA order being challenged. To stop ICE from removing you before the court can take any action on your petition, you must also ask for a temporary stay of the removal order. The stay will be in effect at least until the court can consider ICE's opposition. You must either pay a filing fee or request for proceed without paying the fee (called "in forma pauperis" status). The court will send you an information packet for immigration cases, which is also available at [www.ca9.uscourts.gov/www.ca9.uscourts.gov/](http://www.ca9.uscourts.gov/www.ca9.uscourts.gov/). The court's website also includes a detailed outline of immigration law.

The rules for an immigration case in the Ninth Circuit are complicated, and it is a good idea to get a lawyer if you can. Courts cannot review discretionary immigration decisions such as those regarding detention, voluntary departure, and most forms of relief from removal. However, the court still has the power to review any cases that raise questions of constitutional law. Courts can also review factual determinations (such as whether a person actually is a noncitizen or was actually convicted of the criminal offense) and legal determinations such as whether the offense was an aggravated felony, crime of moral turpitude or removable offense. Review is also permitted where a person has been denied a form of relief from removal that is mandatory and not subject to the immigration judge's discretion (such as deferral of removal under CAT).

### **Can I request to be sent to a country other than my home country?**

If you have the right to live in more than one country (for example, you have dual citizenship), name the country where you want to live. If you want to go to a country where you are not a citizen, you will need to have that country's permission. Usually, you need to apply to the Embassy or Consulate of that country for permission; it can be difficult to get accepted by another country, especially if you have a criminal record.

### **What if no country will take me? Will I have to stay in detention if my removal is delayed?**

The government generally should remove you from the U.S within 90 days after a removal order becomes final. After 90 days, the government must review your case and may release you from detention while you are awaiting removal. If you are kept in detention at that point, then six months following your removal order, ICE must consider whether to keep

you in detention or release you on parole. Note that these timelines do not start running if you appeal your immigration case in court and the court grants a stay of removal.

ICE must consider releasing you from detention if your removal is not “reasonably foreseeable” – for example, because no country is likely to agree to take you. However, ICE can keep you in detention if you refuse or fail to assist with the government’s efforts to remove you. For example, you must cooperate with immigration officials in getting travel documents for return to your country, such as giving them any identification information in your or your family’s possession. ICE staff may also be able to detain you longer if they think you are a flight risk or a danger to the community because you are likely to commit more crimes.

If you think you are entitled to be released from detention, you can write to the local field Office of Enforcement and Removal (ERO) and request your release. If you are not released by six months after your final removal order, you can also write to ICE headquarters in Washington, D.C., asking for release. You should explain where you would be living if you were released, whether you have a job offer or your family and friends would support you, why you are not a danger to the community, and why you will not miss any immigration appointments.

The US Supreme Court has held indefinite detention to be unconstitutional. If you are detained beyond 6 months, you might consider challenging the legality of your detention by filing a petition for a writ of habeas corpus in federal court.

### **Can I ever come back to the United States after I am removed?**

If you are removed based on an aggravated felony, you can probably never return legally to the U.S. After being removed for other reasons, you must wait either 5 or 10 years (depending on your case factors) before you may try to return to the U.S. legally. After a second removal order, the wait is 20 years. You can ask immigration officials for permission to re-enter sooner, but your request may be denied.

### **What will happen if I come back to the United States without permission after being removed?**

After you have been removed from the U.S., federal law makes it a felony offense for you to re-enter the country without getting the U.S. government’s approval.

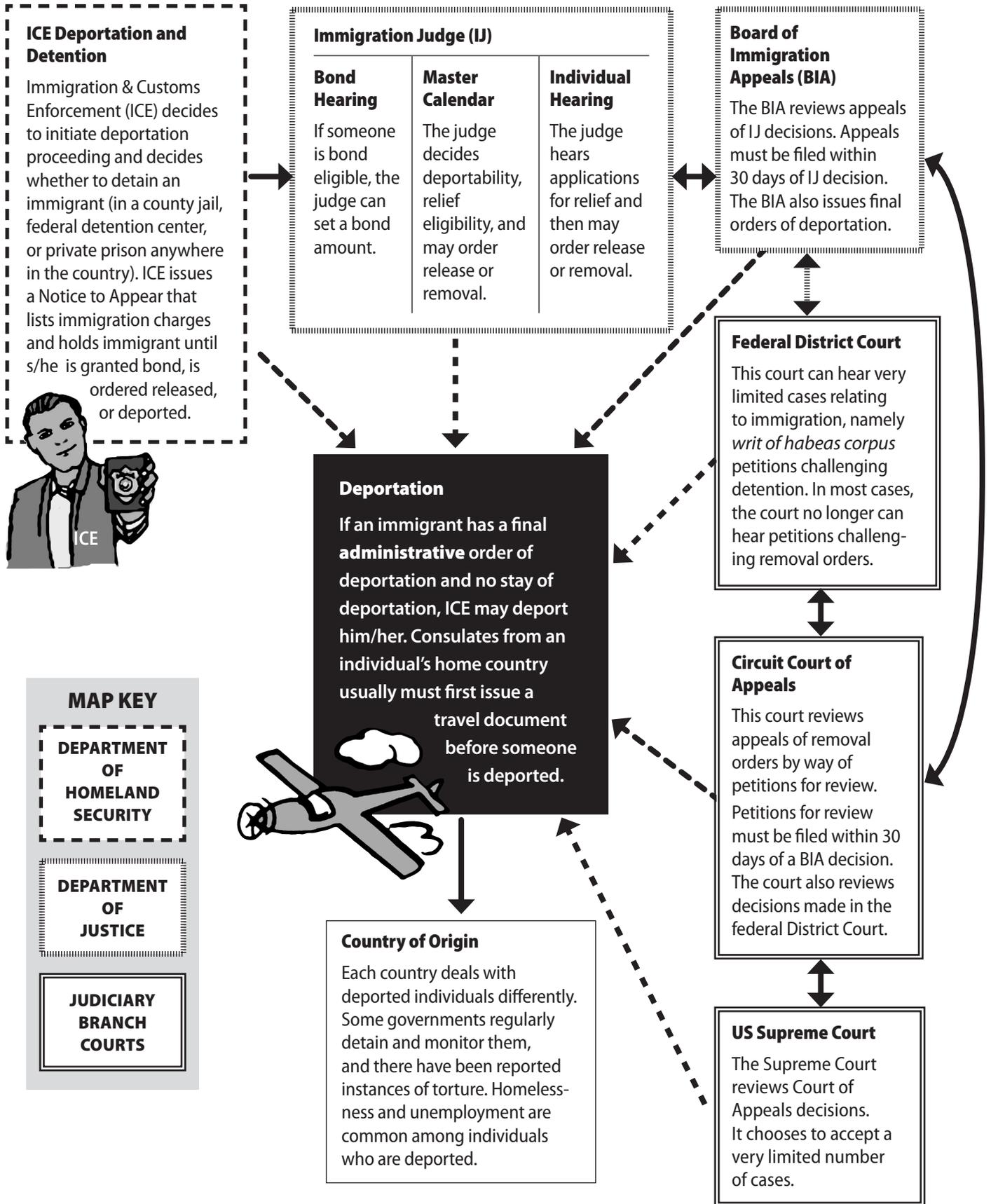
If you commit an illegal re-entry, after removal for a felony conviction, the punishment can be severe. For a non-aggravated felony, or after three or more misdemeanor convictions for drug-related crimes or crimes against people, you can be subject to imprisonment for up to 10 years. If you re-enter the country after an aggravated felony conviction, you can be imprisoned for up to 20 years. You might get an even longer sentence if you have been removed after certain kinds of incarceration or if you are deemed to be associated with terrorist groups or activities.

## **APPENDICES:**

The Appendices attached to this Manual are excerpts from *Deportation 101: A Community Resource on Anti-deportation Education and Organizing*, which was prepared by Detention Watch Network, Families for Freedom, Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild. The full *Deportation 101* manual can be downloaded (in English or Spanish) at [www.familiesforfreedom.org](http://www.familiesforfreedom.org) or at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

1. **Deportation Map**
2. **Immigration in Jail:** tips for immigration interviews/ immigration detainees
3. **Immigration in Prison:** information on “IRP” in-prison deportation proceedings
4. **Immigration Consequences of Crime Summary Checklist and Suggested Approaches for Representing a Noncitizen in a Criminal Case**

# DEPORTATION MAP



# IMMIGRATION IN JAIL

Immigration and Customs Enforcement (ICE) increasingly has a presence at local jails. Many times they will try to interview you before they lodge a detainer (or immigration “hold”) against you.



## Tips during Immigration Interviews

While you are at a local jail, you may be visited by a federal immigration agent, typically from ICE. The agent may ask you questions in order to determine whether you might be deportable. These questions may include your name, country of birth, citizenship, immigration status, age, parents' citizenship, and prior convictions. **This information will be used to help deport you!** If you think you are being questioned by immigration agents or asked immigration information, follow 4 simple rules:

### 1. Don't say anything

Do not answer ANY question – not even your name, country of origin, or immigration status. Immigration agents may threaten you with jail or deportation if you do not answer questions. They may tell you that if you answer, everything will be fine. Do not be fooled. Ask for the agent's identification, like a business card or badge. Be persistent. Record the name and agency of the person talking to you.

### 2. Don't sign anything

If the agent ask for your signature, ask for a copy of the papers but do **NOT** sign. Show the papers to an immigration expert or your attorney.

### 3. Don't lie

Say nothing or say, “I need to speak with a lawyer first.” You can be criminally prosecuted for lying (for example, about your birthplace).

### 4. Ask to speak with your attorney

Ask your attorney for a letter stating that s/he does not permit immigration agents to interview you. Give a copy of this letter to the Immigration agent. If you do not have an attorney, say that you want to find one first. If the agent keeps pushing you to answer questions, just repeat, “I want to talk to an attorney first. I want to stop this interview now.” Then ask to be sent back to your cell.

## Immigration Detainer

### What is an Immigration Detainer?

At any point during your time in jail, ICE may place a detainer or “immigration hold” on you. The detainer is the primary **tool** used by ICE to facilitate transfers of immigrants from criminal to ICE custody and deportation. A detainer is an ICE request – NOT an order – to the criminal justice agency (such as a jail or prison) to notify ICE before releasing someone.

The detainer, which is issued on a Form I-247, means that when the criminal system no longer has a right to jail you – for example, because you are granted bail, are acquitted, or finish your sentence – the local jail or prison may decide to keep you in custody to give ICE an opportunity to pick you up. This hold can prevent you from participating in some programs and getting some privileges (like work release). It can also result in high bail or no bail getting set.

### Who is at Risk of an Immigration Detainer?

The government may place a detainer on a **noncitizen** in government custody who is inadmissible or deportable. This includes:

- **Absconders** – people with old orders of deportation/removal.
- **Out-of-status immigrants** – this includes people who came across the border without any papers, people who overstayed their visas, people who lost their asylum or adjustment hearings, and even previously undocumented people who are now applying to adjust their status.
- **Lawful permanent residents (green card holders) with convictions** – even LPRs who have never been charged with being deportable can get immigration holds if they have been convicted of a deportable offense!

NOTE: if you are an absconder, a green card holder with a past deportable offense, or are out-of-status, your immigration hold will not be lifted even if your current criminal case is dismissed. However, in most cases, if you are in status and have no final convictions, you should not have an immigration detainer.

### What are the limits of the detainer?

- A detainer is alive for **only 48 hours** after it is triggered (excluding weekends and holidays). So if you are in criminal custody after a lawful arrest, the detainer is triggered when the state has no other reason to hold you. This means the detainer can be triggered when you post bail or are ordered released on recognizance; when the charges are dismissed; when you win your case and get ordered released; or when you complete your sentence.
- ICE detainers should not be placed on noncitizens or legal permanent residents who are not deportable.
- A detainer does NOT mean that local police or local jails can hold someone for an undetermined period of time.

### What kind of proof does ICE rely on to lodge a detainer?

- Not much. ICE usually uses place of birth information given by jails or in booking sheets as the basis for lodging a detainer. As a result, ICE does make mistakes. They mistakenly place detainers on US citizens or legal permanent residents who are not deportable. Usually, ICE gets information about alienage from interviewing the noncitizen.

### What can I do if there's a detainer against me?

- If the government's only basis to hold you is the conviction, then you may want to appeal your conviction.
- After 48 hours, the detainer expires. At that point:
  - You have the right to be released. If you have tried but not been allowed to pay criminal bail, you can try again to pay bail. But be aware that if you pay bail and are later deported, you might forfeit the bail money.
  - You can contact your criminal defense lawyer to let him/her know that you should be released. Have your criminal lawyer check to see if you are deportable. If you are not, your criminal defense lawyer can help you make sure that ICE lifts the detainer. You can request the Field Office Director of the nearest ICE Field Office

to lift a detainer. Special attention will be paid to cases where people allege that they are an LPR or a US citizen.

- You can file a letter with the jail advising them that they must comply with the 48 hour rule. (A sample of such a letter is in the appendix). You can also file a grievance with the jail.
- Because you are being held illegally after the 48 hours expire (8 C.F.R. 287.7), you can file for monetary damages for your illegal imprisonment against the jail.
- You can file a state or federal writ of habeas corpus against the facility holding you to get released.
  - Be aware that sometimes, this may just result in ICE finally coming to take you into custody.

**\* ALERT!** *In some cases it is preferable to remain in criminal custody with an immigration detainer than to be transferred to immigrant detention right away. If you qualify for relief, being in criminal custody sometimes provides valuable time to secure representation, collect key documents, and develop favorable factors before being transferred to an immigration facility that may be far away. You should weigh these factors when deciding to file a state habeas challenging a hold longer than 48 hours.*

If you believe your jail routinely violates the 48 hour rule, contact the National Immigration Project of the National Lawyers Guild or the local American Civil Liberties Union in your area.

# IMMIGRATION IN PRISON



Immigration and Customs Enforcement (ICE) focuses their effort on trying to deport people who end up in prison. Generally, people serving more than one year for a crime are in prison. Currently, ICE screens people in every state and federal prison through the Criminal Alien Program to identify immigrants who might be deportable. ICE agents frequently conduct interviews with immigrants in prison, often through video teleconferencing. They then initiate deportation proceedings against these noncitizens while they are still serving their criminal sentence.

## What is the Institutional Removal Program?

The **Institutional Removal Program** (IRP) is a nationwide Department of Homeland Security initiative forcing incarcerated noncitizens into deportation proceedings from within the very prisons to which they are confined. People are forced to defend themselves with little access to legal information or legal assistance.

IRP proceedings in many prisons take the form of “video hearings.” Instead of being in a courtroom, you see a video camera and television monitor from a room within prison. As a result, you are isolated from all other parties, including the judge, ICE prosecutor, the interpreter, witnesses, and sometimes even your own lawyer.

## Objecting to Video Hearings

You can object to a video hearing. You should object the first time a video hearing is scheduled and again at the beginning of the actual video hearing. Immigration judges will probably move forward with the video hearings despite any objections, but an objection “on the record” ensures that you might later be able to challenge the fairness of the hearing. Some issues to cite when objecting to the video hearings include (but are not limited to):

- Video conferences serve to further isolate detainees already held in distant prisons, detached from family, community, legal, and other support.
- There are many inherent problems with testimony given on camera, including: difficulties presenting and examining evidence, communication difficulties, the general unfamiliarity of all parties to interacting via videoconference, and even basic technical problems.
- Accurate interpretation is difficult enough in person; interpreting via video-conference creates even more communication problems.

*For more information on IRP and video-hearings, see the American Immigration Council (formerly AILF) Practice Advisory, “Objecting to Video Merits Hearings” at: [www.americanimmigrationcouncil.org](http://www.americanimmigrationcouncil.org).*



# Immigration Consequences of Crimes Summary Checklist \*

## Immigrant Defense Project

<b>CRIMINAL INADMISSIBILITY GROUNDS</b> – Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.	<b>CRIMINAL DEPORTATION GROUNDS</b> – Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder.	<b>CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP</b> – Will prevent an LPR from being able to obtain U.S. citizenship.
Conviction or admitted commission of a <b>Controlled Substance Offense</b> , or DHS reason to believe that the individual is a drug trafficker	Conviction of a <b>Controlled Substance Offense</b> EXCEPT a single offense of simple possession of 30g or less of marijuana	Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years: ➤ <b>Controlled Substance Offense</b> (unless single offense of simple possession of 30g or less of marijuana) ➤ <b>Crime Involving Moral Turpitude</b> (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) ➤ 2 or more offenses of any type + aggregate prison sentence of 5 years ➤ 2 gambling offenses ➤ <b>Confinement</b> to a jail for an aggregate period of 180 days
Conviction or admitted commission of a <b>Crime Involving Moral Turpitude</b> (CIMT), which category includes a broad range of crimes, including: ♦ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ♦ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ♦ Most sex offenses <i>Petty Offense Exception</i> – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.	Conviction of a <b>Crime Involving Moral Turpitude</b> (CIMT) [see Criminal Inadmissibility Gds] ➤ One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed ➤ Two CIMTs committed at any time “not arising out of a single scheme”	➤ <b>Crime Involving Moral Turpitude</b> (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) ➤ 2 or more offenses of any type + aggregate prison sentence of 5 years ➤ 2 gambling offenses ➤ <b>Confinement</b> to a jail for an aggregate period of 180 days
<b>Prostitution and Commercialized Vice</b>	Conviction of a <b>Firearm or Destructive Device Offense</b>	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
Conviction of <b>two or more offenses</b> of any type + <b>aggregate prison sentence of 5 yrs.</b>	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	<b>“CONVICTION” as defined for immigration purposes</b>
<b>CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY</b> based on extreme hardship to USC or LPR spouse, parent, son or daughter	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10, 000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
➤ Conviction or admitted commission of a <b>Controlled Substance Offense</b> other than a single offense of simple possession of 30 g or less of marijuana ➤ Conviction or admitted commission of a <b>violent or dangerous crime</b> will presumptively bar 212(h) relief ➤ In the case of an LPR, conviction of an <b>Aggravated Felony</b> [see Criminal Deportation Gds], or any <b>Criminal Inadmissibility</b> if removal proceedings initiated before 7 yrs of lawful residence in U.S.	➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10, 000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	A formal judgment of guilt of the noncitizen entered by a court, <b>OR</b> , if adjudication of guilt has been withheld, where: (i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or <i>nolo contendere</i> 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 noncitizen’s liberty to be imposed
<b>CRIMINAL BARS ON ASYLUM</b> based on well-founded fear of persecution in country of removal <b>OR WITHHOLDING OF REMOVAL</b> based on threat to life or freedom in country of removal	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10, 000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	<b>“CONVICTION” as defined for immigration purposes</b>
Conviction of a “ <b>Particularly Serious Crime</b> ” (PSC), including the following: ➤ <b>Aggravated Felony</b> [see Criminal Deportation Gds] ♦ All aggravated felonies will bar asylum ♦ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding ♦ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding of removal ➤ <b>Violent or dangerous crime</b> will presumptively bar asylum ➤ <b>Other PSCs</b> – no statutory definition; see case law	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10, 000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	A formal judgment of guilt of the noncitizen entered by a court, <b>OR</b> , if adjudication of guilt has been withheld, where: (i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or <i>nolo contendere</i> 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 noncitizen’s liberty to be imposed
<b>CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY</b> based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10, 000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	<b>THUS:</b> ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition <u>IS</u> a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated) ➤ A deferred adjudication without a guilty plea <u>IS NOT</u> a conviction ➤ NOTE: A youthful offender adjudication <u>IS NOT</u> a conviction if analogous to a federal juvenile delinquency adjudication
➤ DHS reason to believe that the individual is a <b>drug trafficker</b> ➤ Conviction or commission of a <b>violent or dangerous crime</b> will presumptively bar 209(c) relief	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10, 000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition <u>IS</u> a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated) ➤ A deferred adjudication without a guilty plea <u>IS NOT</u> a conviction ➤ NOTE: A youthful offender adjudication <u>IS NOT</u> a conviction if analogous to a federal juvenile delinquency adjudication
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\*For more comprehensive legal resources, visit IDP at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org) or call 212-725-6422 for individual case support.

\*\* The “at least 1 year” prison sentence requirement includes a suspended prison sentence of 1 year or more.

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## Immigrant Defense Project

### Suggested Approaches for Representing a Noncitizen in a Criminal Case\*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Immigrant Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

#### 1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

#### 2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for the so-called 209(c) waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

#### 3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for LPR status, asylum, or other relief:

**IF your client has some prospect of becoming a lawful permanent resident** based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

**IF your client has a fear of persecution** in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

\*References above are to sections of our manual, *Representing Immigrant Defendants in New York* (4th ed., 2006).