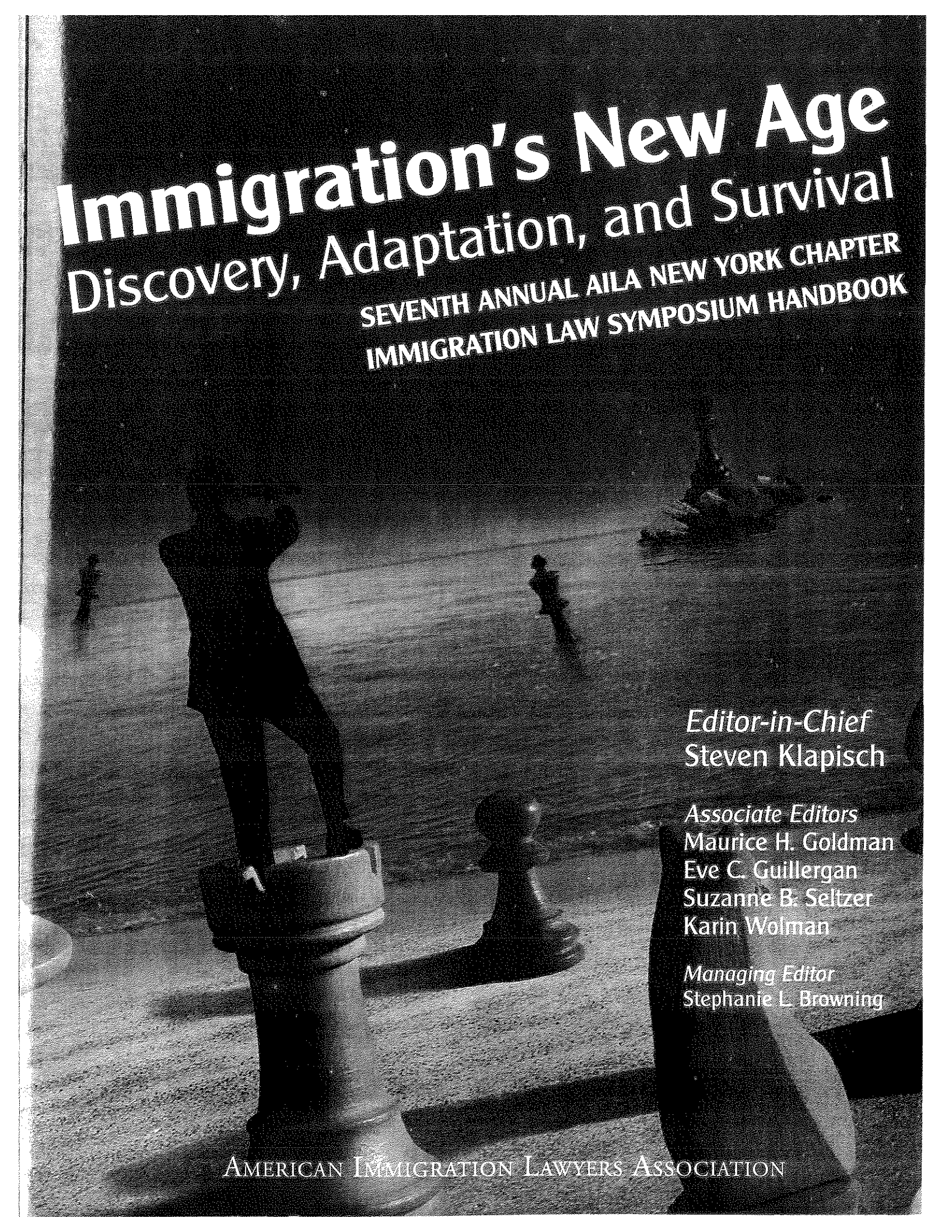

Immigration's New Age

Discovery, Adaptation, and Survival

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CRIME AND IMMIGRATION CONSEQUENCES—A SNAPSHOT

*by Karin Wolman**

INTRODUCTION

This article is intended to give a brief overview of the major categories in which criminal offenses are currently characterized by key portions of the Immigration and Nationality Act.[1] In order to determine the potential consequences for nonimmigrant aliens and lawful permanent residents (LPRs) who have committed crimes, it is critical to understand the major classes of offenses as they are characterized under immigration law.

The passage of the Antiterrorism and Effective Death Penalty Act[2] (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act[3] (IIRAIRA) in 1996 made the immigration consequences of criminal activity far more extensive and draconian than at any time in our nation's history. These acts radically redefined long-standing concepts at the intersection of criminal and immigration law, such as what constitutes a "conviction" for immigration purposes.[4] Furthermore, they radically expanded the number and types of crimes that can serve as grounds for deportation or removal from the United States, or ineligibility for admission.[5] These laws also dramatically restricted judicial discretion and available forms of relief.[6]

Direct immigration consequences of crimes can include inadmissibility under INA §212(a)(2) and deportability under INA §237(a)(2). Indirect consequences of crimes can include ineligibility for U.S. citizenship under INA §316 for failure to demonstrate good moral character; inadmissibility on health grounds under INA §212(a)(1)(A)(iii) for a physical or mental disorder associated with a pattern of harmful behavior due to multiple DUI convictions; and inadmissibility or deportability on security-related grounds under INA §212(a)(3) and §237(a)(3).

INADMISSIBILITY

Inadmissibility can apply in several contexts. It makes an alien who is abroad ineligible to receive a visa from a U.S. embassy, or to be admitted at a port of entry even if he or she already has a visa. It also makes a nonimmigrant alien already in the United States ineligible to adjust to permanent resident status.

Inadmissibility also applies to lawful permanent residents. Under INA§101(a)(13)(C)(v), the commission of any offense listed under INA §212(a)(2) means the alien will be treated as an "arriving alien" under 8 CFR §1.1(q) when he or she seeks readmission to the United States, rather than as a returning resident. As an arriving alien, a resident is eligible for fewer exceptions and bases for relief. The burden of proof also shifts, as U.S. Immigration and Customs Enforcement (ICE) no longer has to prove him or her deportable. Rather, the arriving alien must establish admissibility "clearly and beyond doubt," pursuant to §240(c)(2).

DEPORTABILITY

Deportability means the same thing to nonimmigrants and residents alike, yet very different consequences may ultimately arise from the same criminal

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[1] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*) (INA).

[2] Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (Apr. 24, 1996) (AEDPA).

[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRAIRA).

[4] The new definition of "conviction" at INA §101(a)(48) was added by IIRAIRA §322, and applied retroactively to convictions entered before, on, or after that date. It includes convictions by a jury, sentences by a judge, pleas of guilt or nolo contendere, admissions sufficient to warrant a finding of guilt, and cases where a judge orders some form of punishment, penalty, or restraint of the alien's liberty.

[5] The definition of "aggravated felony" at INA §101(a)(43) was expanded by the amendments of AEDPA §440(e) and IIRAIRA §321, effective October 1, 1996.

[6] *See, e.g.*, IIRAIRA §242(g).

conduct, depending on whether the alien is eligible for a waiver[7] or cancellation of removal.[8]

There are substantial differences between the language of INA §212(a)(2), listing the criminal grounds of inadmissibility, and INA §237(a)(2), listing the criminal grounds of deportability.

Crimes Involving Moral Turpitude (CIMT)

Under §212(a)(2)(A)(i), a conviction for, or admission to committing, or admission of facts that constitute the essential elements of, any CIMT, or attempt or conspiracy to commit a CIMT, renders the alien inadmissible. Exceptions for minors and petty offenders exist where only one CIMT was committed, and either: (1) the alien was under 18 years old at the time, and the conviction was more than five years before the date of admission to the United States; or (2) the maximum penalty for the single offense was one year or less, and the alien was actually sentenced to six months or less.

By contrast, under §237(a)(2)(A)(i), only convictions for a CIMT committed within five years after the date of admission, render the alien deportable (or 10 years after admission, for aliens who adjusted under §245(j) as a material witnesses to a successful criminal investigation).

There is no statutory definition of a CIMT, and this is not an accident. Federal courts have noted that "legislative history leaves no doubt . . . that Congress left the term 'crime involving moral turpitude' to future administrative and judicial interpretation"[9] and have observed that the immigration service's decisions to characterize a given offense as a CIMT are "a quintessential exercise of its broad discretion."[10] Short and pithy definitions have been honed by precedent case law. A crime of moral turpitude "refers generally to conduct that shocks the public conscience,"[11] as being "inherently base, vile or depraved, and contrary to accepted rules of morality."[12] This class of offenses has been deemed to include acts of theft, fraud, or deception against individuals, organizations, or governments (*e.g.*, perjury, check kiting, turnstile jumping), sexual offenses, and acts of personal violence; such inclusions create substantial overlap with other categories such as aggravated felonies and crimes of domestic violence.

Aggravated Felonies

The term "aggravated felony" is defined at §101(a)(43), but it does not appear in §212(a)(2). An aggravated felony per se does not make the alien inadmissible, but many offenses that constitute aggravated felonies may render the alien inadmissible because they also fit into some other category of offenses under §212.

Under §237(a)(2)(A)(iii), any alien convicted of an aggravated felony at any time after admission is deportable. Under §238, an alien convicted of an aggravated felony is subject to expedited removal proceedings.

Since its introduction in the Anti-Drug Abuse Act of 1988,[13] the "aggravated felony" has grown rapidly from a one-paragraph definition including murder, rape, and sexual abuse of a minor,[14] to a 21-paragraph catch-all in which the frequent refrain is that it covers crimes for which the minimum sentence is at least one year. One of the broadest groups is any crime of violence for which the minimum

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[7] Nonimmigrant waivers are authorized under §212(d)(3), which may be used to waive criminal grounds of inadmissibility. Immigrant waivers are authorized under §212(g), (h), (i), and (k), but only §212(h) is applicable to waive criminal grounds of inadmissibility, and then only to grounds under §212(a)(2)(B)—for multiple convictions, (D)—for prostitution and commercialized vice, and (E)—for aliens involved in serious criminal activity who avoided prosecution by exercising immunity and departing the United States.

[8] Per INA §240A(a), LPRs are statutorily eligible for cancellation of removal if they have held LPR status for at least five years, resided continuously in the United States after admission in any status for seven years, and have not been convicted of an aggravated felony. Under §240A(b), nonimmigrants are only statutorily eligible if they have accrued 10 years of continuous physical presence in the United States, have maintained good moral character during that period, have not been convicted of any criminal offense under §212(a)(2) or §237(a)(2) or any security offense under §237(a)(3), and can establish that their removal would result in exceptional and extremely unusual hardship to a spouse, parent, or child, who is a U.S. citizen or LPR.

[9] *Cabral v. U.S.*, 15 F.3d 193, 195 (1st Cir. 1994).

[10] *Medina v. U.S.*, 259 F. 3d 220 (4th Cir. 2001).

[11] *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988).

[12] *Id. See also Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994), *affirmed*, *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995).

[13] Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, §7342, 102 Stat. 4181, 4469 (Nov. 19, 1988). The original ADAA definition of "aggravated felony" was not retroactive, applying only to convictions on or after November 19, 1998.

[14] INA §101(a)(43)(A).

sentence is at least one year.[15] The INA looks to 18 USC §16 to define a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The recurring theme for offenses involving money (money laundering, financial fraud, tax evasion[16]) is that it is an aggravated felony if the amount exceeds $10,000.

Aggravated felonies also include illicit drug trafficking,[17] illicit firearms trafficking,[18] other federal offenses relating to firearms and explosives,[19] theft offenses for which the minimum sentence is one year,[20] demands for, or receipt of, ransom,[21] child pornography,[22] federal racketeering and gambling offenses for which the minimum sentence is one year,[23] pimping but not prostitution,[24] offenses that breach national security,[25] alien smuggling,[26] improper re-entry by an alien previously removed,[27] passport forgery or counterfeiting,[28] failure to appear to serve a sentence of five years or more;[29] any offense for commercial bribery, counterfeiting, forgery, or trafficking in altered vehicle identification numbers for which the minimum sentence is one year,[30] offenses relating to obstruction of justice, perjury, suborning perjury, or bribing a witness for which the minimum sentence is one year,[31] failure to appear in court to answer or dispose of a felony charge for which the minimum sentence is two years or more,[32] or attempt or conspiracy to commit any of the above offenses.[33]

Controlled Substance Violations

Under INA §212(a)(2)(A)(i)(II), a conviction for, or admission to committing, or admission of facts that constitute the essential elements of, any controlled substance violation in the United States or any foreign country, renders the alien inadmissible. Again, there are exceptions for minors and petty offenders where only one offense was committed, and either: (1) the alien was under 18 years old at the time of the offense and it was more than five years before the date of admission to the United States; or (2) the maximum penalty for the offense was one year or less and alien was actually sentenced to six months or less.

Under §237(a)(2)(B)(i), a conviction for any controlled substance violation in the United States or any foreign country, or for any attempt or conspiracy to commit such an offense, is deportable [petty offense exception: other than a single offense of possession of 30g or less of marijuana for personal use]. Based on §237(a)(2)(B)(ii), any alien who is or at any time after admission has been, a drug abuser or addict, is deportable.[34]

An admission of facts is sufficient to render the alien inadmissible for a controlled substance violation and a conviction is necessary for deportation, unless ICE alleges that the alien is an addict or abuser. Furthermore, any controlled substance of-

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[15] INA §101(a)(43)(F).

[16] INA §101(a)(43)(D), (M).

[17] INA §101(a)(43)(B); see more on this topic below, in the section on controlled substance violations.

[18] INA §101(a)(43)(C).

[19] INA §101(a)(43)(E).

[20] INA §101(a)(43)(G).

[21] INA §101(a)(43)(H).

[22] INA §101(a)(43)(I), referring to 18 USC §§2251, 2251A, and 2252.

[23] INA §101(a)(43)(J), referring to 18 USC §§1962, 1084, and 1955.

[24] INA §101(a)(43)(K)(i) includes owning, controlling, managing, or supervising a prostitution business; (ii) includes transportation for purposes of prostitution, if committed for commercial advantage; and (iii) includes peonage, slavery ,and involuntary servitude.

[25] INA §101(a)(43)(L) includes gathering or transmitting national defense information, disclosing classified information, sabotage, treason, and leaking the identity of undercover intelligence agents.

[26] INA §101(a)(43)(N), except a first offense to aid or abet only the alien's spouse, parent, or child.

[27] INA §101(a)(43)(O).

[28] INA §101(a)(43)(P), with the same exception as 101(a)(43)(N).

[29] INA §101(a)(43)(Q).

[30] INA §101(a)(43)(R).

[31] INA §101(a)(43)(S).

[32] INA §101(a)(43)(T).

[33] INA §101(a)(43)(U).

[34] Important Note: while this last section is listed under criminal grounds of deportability, the statute does not require either a conviction or an admission of facts by the alien, so it is unclear what kind of evidence or allegation meets ICE's burden of proof to establish deportability of an addict.

fense that is analogous to a federal felony offense,[35] even if it is a misdemeanor under state law, may also be characterized as a drug trafficking offense. This creates an additional ground of inadmissibility (and deportability too, if there is in fact a felony conviction) out of a single offense, and may also render the alien's dependents inadmissible.

Controlled Substance Traffickers (and the family members who profit from their activity)

Under §212(a)(2)(C), any alien who the consular officer or the Attorney General (in practice, this now means the Secretary of the Department of Homeland Security[36]) knows or has reason to believe: (i) is or has been an illicit trafficker in any controlled substance . . . or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance; or (ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has within the previous five years obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

It is important to note that the "has reason to believe" standard, has all but relieved the government of any significant burden of proof.

Many, but not all drug trafficking offenses are also classified as aggravated felonies, under §101(a)(43)(B). To be an aggravated felony, there must be a conviction, and the offense must meet the definition of drug trafficking at 18 USC §924(c), which states, "the term 'drug trafficking crime' means any *felony* punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." The Board of Immigration Appeals and federal courts have held that multiple misdemeanor controlled substance purchase/sale offenses cannot be combined to establish a felony.[37]

Crimes of Domestic Violence

Domestic violence offenses are not mentioned as such under §212(a)(2), and thus do not render the alien inadmissible unless they also fall into some other category, such as a CIMT. Under §237(a)(2)(E)(i), any alien who at any time after entry is convicted of a crime of domestic violence, stalking, child abuse, child neglect or abandonment is deportable.[38]

Under §237(a)(2)(E)(ii), any alien who is found by a court to have violated a (temporary or final) order of protection, or that portion of an order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person(s) for whom the order was issued, is deportable.

Per INA §237(a)(2)(E), "Crime of domestic violence" means any crime that fits the 18 USC §16 definition of a "crime of violence" (see discussion of aggravated felonies, above), which is committed by a current or former spouse, by an individual who is cohabiting with or has cohabited with the person as a spouse, or by an individual similarly situated to a spouse under the domestic or family violence laws of the jurisdiction where the offense occurs.

Firearms Offenses

Firearms offenses are not mentioned as such under §212(a)(2), and thus do not render the alien inadmissible. Under §237(a)(2)(C), any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry any weapon, part, or accessory that is a firearm or destructive device (as defined in 18 USC §921(a)) in violation of any law is deportable.

The repetition of "any law" in this section, and the inclusion of ownership and possession among the offenses, make it clear that even misdemeanor convictions for gun possession in any jurisdiction make the alien deportable. Many firearms offenses will generate two grounds of deportability, as the ones listed at 18 USC §922(g)(1), (2), (3), (4) and (5); §924(b) and (h); and IRC §5861 are also aggra-

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[35] *Matter of L–G–*, 21 I&N Dec. 89 (BIA 1995).

[36] Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

[37] *See Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002), *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002), and *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001).

[38] Note that this reverts to the pre-IIRAIRA term "entry," meaning it was drafted to apply equally to aliens who entered without inspection. Also, note that it covers child neglect offenses, which can include state misdemeanors for acts such as leaving an unattended child in a parked car.

vated felonies, as are any offenses listed at 18 USC §842(h) and (i); §844(d),(e), (f),(g),(h) and (i) relating to explosive materials.[39]

Multiple Convictions

Under §212(a)(2)(B), any alien convicted of two or more offenses, regardless of whether the conviction was in a single trial or the offenses arose from a single scheme of misconduct, is inadmissibe. Under §237(a)(2)(A)(ii), any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.

Thus, any two convictions, even for two misdemeanors that are not CIMTs, render the alien inadmissible, but both convictions must be CIMTs in order for the alien to be deportable.

Prostitution and Commercialized Vice

Under §212(a)(2)(D), any alien who: (i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status; (ii) directly or indirectly procures or attempts to procure or (within 10 years of the date of application) procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution; or (iii) is coming to the United States to engage in any other commercialized vice, in inadmissible.

There is no reference to prostitution per se under §237(a)(2). However, anyone who profits from, transports, or supervises prostitutes is an aggravated felon under §101(a)(43). Also, given the broad definition of a CIMT and ICE's discretion to determine what falls within it, the commercial sex offenses are also crimes involving moral turpitude, creating an additional ground of inadmissibility and deportability.

CONCLUSION

When an immigration client has committed a criminal offense, the attorney should first review the specific section(s) of criminal law under which the client was charged or convicted and then determine which grounds of inadmissibility and/or deportability apply. As demonstrated in this article, the commission of a single offense may render the alien inadmissible and deportable on multiple grounds. Once these grounds have been identified, counsel should then determine whether any relief is available. More often than not under current law, the answer will be discouraging.

As noted in the title and introduction, this article is intended to provide a quick-reference snapshot of the potential immigration consequences of criminal activity. For the full panoramic view and in-depth discussion of nuanced issues, such as which determinations constitute convictions under INA §101(a)(48), and whether a particular offense is an aggravated felony, see Anna Marie Gallagher, "Immigration Consequences of Criminal Convictions: A Primer on What Crimes Can Get Your Client Into Trouble," 1 *Immigration & Nationality Law Handbook* 166 (2004–05 ed.), and Mary Kramer, *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants* (AILA 2003). For local practitioners, there is an extensive chart of specific New York criminal offenses and their immigration consequences prepared by Manny Vargas of Defending Immigrants Partnership which is available at *www.criminalandimmigrationlaw.com* in the Free Resources section.

[39] INA §101(a)(43)(E).

Author's Note & Apology:

Under the Controlled Substances header, I made the misleading claim that the petty offense exception applies to drug offenses. The petty offense exception in the statute at 212(a)(2)(A)(ii)(II) is by its own language only applicable to CIMTs, but the rule about 30g-or-less-of-marijuana is often referred to as the petty offense exception for drug offenses. However, it is only a true exception in the deportation/removal context, per 237(a)(2)(B)(i). It is not an exception in the inadmissibility context, but is a ground of eligibility for a waiver, subject to other conditions as defined in the waiver provisions, respectively at 212(d)(3) and 212(h)(1).

All Controlled Substance offenses, even a single count of simple possession of 30 grams of marijuana, render the alien inadmissible as of the date of the offense, not as of the conviction. An alien is not deportable for such an offense because the exception applies, but if that alien travels out of the U.S. while a prosecution is ongoing, unless that charge ultimately results in dismissal or acquittal, any intervening foreign travel may be later characterized as entry fraud if the alien re-entered the U.S. after the offense was committed and before a conviction was entered, if the ongoing criminal proceeding was not disclosed in response to the question on Form I-94 relating to arrests and convictions.

-K. Wolman 01/03/2005