Removal Defense Checklist in Criminal Charge Cases

(Updated as of 7/17/06)

by Manuel D. Vargas

This checklist lists some legal arguments and strategies that may be pursued by noncitizens and their legal representatives in removal proceedings involving crime-related charges. The checklist also lists some contrary authority in brackets. The checklist is by no means exhaustive and is designed to be used as a starting point for developing other possible arguments and strategies. Please note that some of the legal arguments and strategies listed here may require going into federal court and may raise complicated federal court jurisdictional issues. For guidance on these issues, contact the Immigrant Rights' Project of the American Civil Liberties Union, 125 Broad Street, New York, NY 10004-2427 / Tel: (212) 549-2616 (Contact: Senior Staff Counsel Lee Gelernt). This checklist is updated several times a year. For the most up-to-date checklist, please visit our Internet site at <http://www.immigrantdefenseproject.org>.

SUMMARY OF CONTENTS

 Mr. Vargas is Senior Counsel with NYSDA's Immigrant Defense Project, and the author of *Representing Noncitizen Criminal Defendants in New York State, Third Edition* (2003) (available from NYSDA at 518-465-3524). Mr. Vargas and NYSDA acknowledge the support of the New York Community Trust and Community Funds, Inc., the New York Foundation, the Open Society Institute, the Ford Foundation, and the JEHT Foundation.

- **Apply for 209(c) waiver of inadmissibility**
- **Apply for asylum**
- **Apply for withholding of removal**
- **Apply for relief under Torture Convention**
- **Apply for voluntary departure**

☐ **Raise estoppel or constitutional or international law arguments** **K-38**
☐ **Pursue post-conviction relief or other non-immigration remedies** **K-41**
☐ **Seek release from detention after removal order** **K-43**

CHECKLIST

☐ Seek release from detention during removal proceedings

In general, under the Immigration and Nationality Act (INA), a noncitizen detained by the Department of Homeland Security (DHS) (formerly Immigration and Naturalization Service (INS)) may be released on bond or conditional parole pending completion of removal proceedings. See INA 236 (a)(2). After the initial DHS custody determination of the local district director, which is supposed to be based on whether the noncitizen has shown that he or she would not pose a danger to the community or be a risk of flight, see 8 C.F.R. 236.1(c)(8), a detainee may seek a redetermination by requesting a bond hearing before an Immigration Judge. See 8 C.F.R. 1236.1(d)(1). However, if the district director had determined that noncitizen should not be released or has set of bond of $10,000 or more, and an Immigration Judge orders release on bond or otherwise, the DHS may obtain an automatic stay of the order if the DHS files a notice of intent to appeal the custody redetermination within one business day of issuance of the order. See 8 C.F.R. 1003.19(i)(2). Some detainees have been able successfully to challenge this automatic stay provision in federal court on constitutional grounds. See *Zavala v. Ridge*, 310 F. Supp.2d 1071 (N.D. Ca. 2004); *Ashley v. Ridge*, 288 F.Supp.2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F. Supp.2d 446 (D.Conn 2003); *Almonte-Vargas v. Ellwood*, 2002 U.S.Dist. LEXIS 12387 (E.D.Pa. 2002). A detainee charged with inadmissibility may request a parole determination from the DHS. See INA 212(d)(5)(A); 8 C.F.R. 212.5.

As amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), however, the INA now provides that a noncitizen who is deportable or inadmissible by reason of having committed an offense covered under certain deportability and inadmissibility grounds shall be subject to mandatory detention after release from criminal custody, i.e., detention without any statutory right to seek release on bond or under parole pending completion of removal proceedings. See INA 236(c)(1) (listing grounds of criminal deportability and inadmissibility covered by this new policy of mandatory detention). Under the statute, an individual may be released only if release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." INA 236(c)(2). Denial of the right to seek release on bond or under parole may be challenged before the immigration authorities or in federal court on various statutory and constitutional grounds:

✓ **The government has not charged the detainee with an offense that fits within any of**

the mandatory detention criminal deportability or inadmissibility grounds. Certain criminal deportability or inadmissibility grounds are not subject to mandatory detention under INA 236(c)(1). Examples include INA 237(a)(2)(E) (Crimes of domestic violence, stalking, or violation of protection order, crimes against children), or offenses charged under INA 237(a)(2)(A)(i) (Crimes of moral turpitude) for which the person has not been sentenced to a term of imprisonment of at least one year. In at least one unpublished case, the BIA held that the notice to appear must charge a person with removability based on one of the mandatory detention grounds before the person may be detained pursuant to INA 236(c)(1). See *Matter of Leybinsky*, A73 569 408 (BIA 2000)(unpublished); see also *Alvarez-Santos v. INS*, 332 F.3d 1245, 1253 (9th Cir. 2003); *Yousefi v. INS* , 260 F.3d 318, 325 (4th Cir. 2001); *Xiong v. INS*, 173 F.3d 601, 608 (7th cir. 1999); *Choeum v. INS*, 129 F.3d 29, 40 (1st Cir. 1997) (cases in which the courts of appeals have held that the criminal bar to judicial review is only implicated when a person actually was ordered removed on the basis of the covered deportability or inadmissibility ground); [but see *Fernandez v. AG*, 257 F.3d 1304, 1309-10 (11th Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 793 (5th Cir. 2000)]. In addition, even if the DHS (formerly INS) charges a deportability or inadmissibility ground that is covered by INA 236(c)(1), an individual who has an argument that the deportability/inadmissibility charge is incorrect may raise the argument in the context of an Immigration Judge hearing held pursuant to the BIA decision in *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)(lawful permanent resident immigrant is not "properly included" with a mandatory detention category if the government is "substantially unlikely to establish at the merits hearing, or on appeal, the charges that would otherwise subject the alien to mandatory detention"). See below "Deny deportability or inadmissibility." In addition, if an Immigration Judge finds that an individual is not deportable or inadmissible, and the DHS invokes the automatic stay provision in 8 C.F.R. 1003.19(i)(2), the detainee may challenge such application of the automatic stay provision on constitutional grounds. See *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003).

- ✓ **The detainee may not be charged with inadmissibility after a brief trip abroad.** If the person is a lawful permanent resident charged with inadmissibility after a brief trip abroad, the individual may challenge the DHS' (formerly INS') determination that he or she is subject to inadmissibility review in the context of a federal court *habeas corpus* challenge to detention pending completion of the inadmissibility review. See, e.g., *Made v. Ashcroft*, Civil No. 01-1039 (D. N.J. 2001); [but see *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003)]. In addition, if the returning lawful permanent resident immigrant is charged with inadmissibility based on a criminal conviction prior to April 1, 1997 (IIRIRA general effective date), the person may be able to argue that he or she is not subject to inadmissibility review based on the law in effect prior to IIRIRA. Cf. *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). For a discussion of such statutory arguments, see generally below "Move to terminate proceedings if the respondent is a permanent resident charged with inadmissibility after a brief trip abroad." Finally, detention without an individualized bond or parole hearing of an individual returning from a trip abroad may also be challenged on constitutional equal protection grounds, see *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (violation of equal protection arises if a noncitizen is penalized under the immigration laws based upon the fortuity of departure from the United States), as well as under the Constitution's due process and excessive bail clauses (see subsection below entitled "Mandatory detention is unconstitutional"); see generally below "Raise estoppel or constitutional or international law arguments."
- ✓ **The detainee was released from criminal custody prior to October 9, 1998.** IIRIRA stated that INA 236(c) mandatory detention applies to "individuals released after [the end

of a 1-year or 2-year transitional period]." IIRIRA § 303(b)(2). That transitional period ended on October 9, 1998. Thus, at the very least, as the Board of Immigration Appeals (BIA) and the DHS (formerly INS) have agreed, INA 236(c) should not be applied in cases where the individual placed in removal proceedings was released from criminal custody prior to October 9, 1998. See *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) (INA 236(c) does not apply to noncitizens whose most recent release from custody by an authority other than the INS (now DHS) occurred prior to the expiration of the Transition Period Custody Rules). A sentence to probation or other non-physical restraint after October 9, 1998 does not count as a release from custody triggering mandatory detention. See *Matter of West*, 22 I&N Dec. 1405 (BIA 2000).

- ✓ **The detainee's criminal conviction or offense pre-dated IIRIRA.** Even if the detainee was released after October 9, 1998, the individual may argue that INA 236(c) mandatory detention does not apply when his or her criminal conviction or conduct occurred prior to IIRIRA's general effective date of April 1, 1997. Cf. *Montero v. Cobb*, 937 F.Supp. 88 (D.Mass. 1996)(finding that mandatory detention provisions in predecessor AEDPA statute did not apply retroactively in the absence of clear Congressional intent). IIRIRA did not include any statement that INA 236(c) should be applied retroactively in cases based on pre-IIRIRA convictions or conduct. All the statute provided is that INA 236(c) applies to "individuals released after [October 8, 1998]." IIRIRA § 303(b)(2). In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court held that, absent an explicit statement of legislative intent to apply a new law to past events, a statute should apply prospectively only. Recently, the Supreme Court made clear that this presumption against retroactivity applies to immigration legislation; in fact, the Court applied the presumption to another IIRIRA provision that, like IRRIRA § 303, lacked any explicit statement of retroactive legislative intent in cases based on past events. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001)(holding that IIRIRA § 304(b)—eliminating a pre-IIRIRA right to apply for a discretionary waiver of deportation—could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result).
- ✓ **The detainee was not in criminal custody when arrested by the DHS (formerly INS).** Even if the detainee was released after October 9, 1998, the individual may argue that INA 236(c) mandatory detention does not apply when he or she was not detained immediately after release from criminal custody. Detention is required "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." INA 236(c)(1). The "when released" language indicates that detention is not required of an individual who was not in criminal custody when arrested by the DHS (formerly INS). For example, an individual may argue that this "when released" language means that mandatory detention should not apply to an individual who was not sentenced to imprisonment, or who was sentenced to imprisonment but was not taken into custody by the DHS at the time the person was released from criminal custody but rather was taken into custody by the DHS at some subsequent point. See *Boonkue v. Ridge*, __ F. Supp.2d __, 2004 U.S. Dist. LEXIS 9648 (D.Or. 2004), *Quezada-Bucio v. Ridge*, 317 F. Supp.2d 1221 (W.D.Wash. 2004); see also dissenting opinion of BIA member Rosenberg in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); [but see majority opinion in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001) ("A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to section 236(c) . . . even if the alien is not immediately taken into custody by the Immigration and Naturalization Service when released from incarceration.")].

- ✓ **If the detainee is contesting removability or applying for relief from removal, mandatory detention is unconstitutional.** Prior to April 29, 2003, many noncitizens had successfully argued that detention of noncitizens without the right to an individualized bond hearing pending completion of removal proceedings deprived individuals of their liberty in violation of substantive and procedural due process, or in violation of the Eighth Amendment excessive bail clause. See, e.g., *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); [but see *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999)(where detainee had conceded deportability)]. On April 29, 2003, however, the Supreme Court reversed the Ninth Circuit decision in *Kim v. Ziglar* and held that the government may detain classes of immigrants without conducting individualized bond hearings. *Demore v. Kim*, 123 S. Ct. 1708 (2003). Nevertheless, the Supreme Court's decision was premised on a finding that the petitioner in *Kim* conceded removability. Cases where the person is challenging removability, or is seeking relief from removal, may be distinguished from the Supreme Court's holding in *Kim* on that basis. See, e.g., *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004)(*Kim* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable"); *Uritsky v. Ridge*, 2003 U.S. Dist. LEXIS 17698 (E.D. Mich. 2003); see also below "Deny deportability or inadmissibility" and "Apply for relief from removal;" see also Beth Werlin, "Practice Advisory -- Mandatory Detention after *Kim v. Demore*" (American Immigration Law Foundation, Washington, D.C., August 29, 2003), available at <www.ailf.org>.

- ✓ **If detention is or may be prolonged or indefinite, mandatory detention is unconstitutional.** The Supreme Court upheld mandatory detention in *Demore v. Kim* relying, in part, on a finding that "not only does detention have a definite termination pint, in the majority of cases it lasts for less than [] 90 days." The Court did so to avoid conflict with its earlier decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001)(striking down government indefinite detention of noncitizens following completion of removal proceedings), in which the Court held that individuals with final orders of removal could validly be detained for only six months. 533 U.S. at 701. Cases where the length of detention has exceeded, or is likely to exceed, such time periods may be distinguished from *Kim* on that basis. See *Kim* at 1722 (Kennedy, J., concurring)(explaining Justice Kennedy's understanding that the majority opinion may allow a challenge to detention when, for example, there has been unreasonable delay by the DHS, formerly INS); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005)("Despite the substantial powers that Congress may exercise in regard to aliens, it is constitutionally doubtful that Congress may authorize imprisonment of [two years and four months'] duration for lawfully admitted resident aliens who are subject to removal"); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (construing the statute to include a reasonable time limitation in bringing a removal proceeding to conclusion without an individualized bond hearing); *Parlak v. Baker*, 374 F. Supp. 2d 551 (E.D.Mich. 2005); *Fuller v. Gonzales*, 2005 U.S. Dist. LEXIS 5828 (D. Conn. 2005)("Although *Kim* held that the desire to ensure an alien's presence at future proceedings and the desire to protect the community provide sufficient justification for a short mandatory detention, the sufficiency of that justification decreases as the length of incarceration increases"); *Uritsky v. Ridge*, 286 F. Supp.2d 842 (E.D. Mich. 2003); see also Beth Werlin, "Practice Advisory -- Mandatory Detention after *Kim v. Demore*" (American Immigration Law Foundation, Washington, D.C., August 29, 2003), available at www.ailf.org; see also below "Raise estoppel or constitutional or international law arguments."

☐ Persuade the DHS (formerly INS) to exercise favorable prosecutorial discretion

In a particularly sympathetic case, one should always consider whether it might be possible to persuade the DHS (formerly INS) to exercise favorable prosecutorial discretion, i.e., to decline to file charges or to move to dismiss charges already brought. In the past, persuading the INS (now DHS) to exercise such prosecutorial discretion has been difficult, if not impossible. Since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRIRA, however, the INS had been under some pressure to exercise such discretion in particularly compelling cases. In a January 2000 letter responding to twenty-eight members of Congress who had inquired about INS use of prosecutorial discretion to ameliorate certain harsh consequences, the Justice Department acknowledged that the INS has discretion with respect to both the initiation and the termination of removal proceedings and that it was working on developing additional guidance for its officers "in cases with the potential for extreme hardship." Letter of Assistant Attorney General Robert Raben to twenty-eight U.S. Congresspersons, dated January 19, 2000; see also Memorandum entitled "Prosecutorial Discretion" for All OPLA Chief Counsel, dated October 24, 2005, available via the internet at <http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122>; Memorandum of INS Commissioner Doris Meissner, dated November 17, 2000, available via the internet at <http://uscis.gov/graphics/lawsregs/handbook/discretion.pdf>; *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, n.8 (1999) ("At each stage [of the deportation process] the Executive has discretion to abandon the endeavor"). When a DHS (formerly INS) official needs to be persuaded that the DHS has authority to exercise such favorable discretion, the following regulatory or administrative provisions may be cited:

- ✓ **DHS (formerly INS) authority to cancel a Notice to Appear (NTA) for a removal hearing when the NTA has not yet been filed with the Office of the Immigration Judge**. See 8 C.F.R. 239.2(a). According to regulations, this authority may be exercised where the NTA was "improvidently issued," or where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." 8 C.F.R. 239.2(a)(6)&(7). These two grounds appear to give the agency wide latitude to exercise prosecutorial discretion if it is so inclined. See also *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000)(finding that the INS (now DHS) retains prosecutorial discretion to decide whether or not to commence removal proceedings against a respondent subsequent to the enactment of IIRIRA).

- ✓ **DHS (formerly INS) authority to move to dismiss removal proceedings when the NTA has already been filed with the Office of the Immigration Judge.** See 8 C.F.R. 239.2(c). This authority may also be exercised in the circumstances described in 8 C.F.R. 239.2(a)(6)&(7)(see authority to cancel a Notice to Appear above).

- ✓ **DHS (formerly INS) authority to defer action or otherwise decline to pursue proceedings against a particular individual.** See former INS Operating Instruction 242.1(a)(22)(describing authority to defer action). According to the INS internal administrative directive which provided for deferred action, the INS could consider "sympathetic factors which, while not legally precluding deportation, could lead to unduly protracted deportation proceedings," or "because of a desire on the part of the administrative authorities or the courts to reach a favorable result, could result in a distortion of the law with unfavorable implications for future cases," or "because of the sympathetic factors in the case, a large amount of adverse publicity will be generated which will result in a disproportionate amount of Service time being spent on responding

to such publicity or justifying actions." Id. While this Operating Instruction was rescinded in 1997, the INS apparently continued to exercise such discretion. See Letter of Assistant Attorney General Robert Raben to twenty-eight U.S. Congresspersons, dated January 19, 2000; see also *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, n.8 (1999). The DHS (formerly INS) may also exercise such discretion.

☐ Move to terminate removal proceedings if the respondent was "in proceedings" before April 1, 1997

IIRIRA's transition rules provide that the general rule is that the new IIRIRA removal rules shall not apply in the case of an alien who is "in exclusion or deportation proceedings before the Title III-A effective date [April 1, 1997]." See IIRIRA § 309(c)(1). Thus, if a noncitizen currently in removal proceedings has any argument that he or she was in deportation or exclusion proceedings before April 1, 1997, and the individual would be better off in such pre-IIRIRA proceedings (e.g., eligible to apply for INA 212(c) relief if the person was in proceedings before April 24, 1996—see below "Apply for relief from removal—Apply for 212(c) waiver"; see also 8 C.F.R. 212.3(g)), IIRIRA § 309(c)(1) provides support for a motion to terminate removal proceedings.

Examples of cases where a noncitizen has an argument that he or she was in proceedings "before" April 1, 1997 are the following:

- ✓ **Filing of Charging Document Prior to April 1, 1997.** According to regulations, proceedings "commence" when the INS (now DHS) files a charging document with the Immigration Court. 8 C.F.R. 1003.14(a). Thus, a noncitizen was clearly in proceedings before April 1, 1997 if the INS filed with an Immigration Court a Form I-221 Order to Show Cause (relating to deportation proceedings) or a Form I-122 Notice to Alien Detained for Hearing by an Immigration Judge (relating to exclusion proceedings) prior to that date. Even if the prior proceedings were suspended (e.g., administratively closed) or terminated without entry of an order of deportation or exclusion (e.g., Fleuti termination) before April 1, 1997, the noncitizen should be considered to have been "in proceedings before" that date. If the prior proceedings were administratively closed, they were never formally terminated and are technically still pending. And if the prior proceedings were terminated before April 1, 1997, one can point out that the original language of the IIRIRA general transitional rule applied to aliens in proceedings "as of" April 1, 1997, but that the words "as of" were replaced by Congress with the word "before" in a technical correction passed a few days after enactment of IIRIRA. See P.L. 104-302, 110 Stat. 3656. The plain meaning of the new language covers noncitizens in proceedings anytime "before" April 1, 1997, and not only those in proceedings "as of" that date. Cf. *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000)(concurring opinion of Board Member Filppu).

- ✓ **Service or Issuance of Charging Document Prior to April 1, 1997.** Even if the INS (now DHS) did not file the pre-IIRIRA charging document with the Immigration Court prior to April 1, 1997, and instead filed a Notice to Appear for IIRIRA removal proceedings on or after April 1, 1997, federal courts have found that INS (now DHS) service or issuance of a charging document is sufficient to consider a case to be pending as of the date of service or issuance. See *Lyn Quee de Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003); *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000) (held that proceedings had begun prior to IIRIRA and AEDPA when the INS had previously served an Order to Show Cause and lodged a detainer against the noncitizen);

accord *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (service of order to show cause sufficient to demonstrate pendency of deportation proceeding when AEDPA enacted); *Woo v. Reno*, 200 F.R.D. 516 (D.Ct. Md. 2000) (issuance and service of order to show cause prior to April 1, 1997); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 363 (E.D.N.Y. 2000) ("Since Pena-Rosario was served with an order to show cause before enactment of the 1996 amendments, his case was pending then"); *Dunbar v. INS*, 64 F. Supp.2d 47, 52 (D.Conn. 1999). These courts have chosen not to apply the 8 C.F.R. 1003.14(a) regulatory definition of when proceedings "commence," i.e., when the INS (now DHS) files a charging document with the Immigration Court. As the First Circuit stated in *Wallace*: "In this case we are not concerned with the INS' internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This questions turns on considerations unrelated to the purpose of INS regulations. . . . From *this* standpoint, we think that when an order to show cause is served on the alien, the deportation process has effectively begun." 194 F.3d at 287. [But see *Arenas-Yepez v. Gonzalez*, 421 F.3d 111 (2d Cir. 2005)(in footnote 5, distinguishing *Wallace* and other cases as cases involving criminal aliens, suggesting that the Second Circuit Court might follow *Wallace* in a case involving a criminal alien); *Dipeppe v. Quarantillo*, 337 F.3d 326 (3d Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Deleon-Holguin v. Ashcroft*, 253 F.3d 811 (5th Cir. 2001); *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001); and *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000)(all requiring filing of charging document with the Immigration Court to find proceedings commenced)].

- ✓ **Detention at Port of Entry and Parole Prior to April 1, 1997.** In addition to citing the analogous case law in section 2 above, a noncitizen in this situation can point to the analysis of the U.S. Court of Appeals for the Second Circuit in *Henderson v. INS* in which the court took a broad view of when sufficient INS (now DHS) activity has occurred such that a noncitizen could be considered to be "in proceedings" on the effective date of a Congressional enactment. See *Henderson v. INS*, 157 F.3d 106 (2nd Cir. 1998). In that decision, the Second Circuit determined that one of the petitioners (Guillermo Mojica) in that case was "in exclusion proceedings" on the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) even though the INS had not yet filed a charging document with the Immigration Court. Id. at 130 n.30. The Second Circuit found it sufficient that the INS had detained Mr. Mojica at an airport port of entry and then paroled him into the country pending deferred inspection. Id. at 11[; but see *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000)].

- ✓ **Other Initiation of Process of Deportation Prior to April 1, 1997.** A noncitizen may make an argument that he or she was "in proceedings" before April 1, 1997 whenever the INS (now DHS) has in some way initiated the process of subjecting the individual to exclusion or deportation proceedings prior to that date. [But see *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (deportation proceedings may not be deemed to have begun with the issuance of a detainer notice alone)]. In the alternative, a noncitizen against whom the INS (now DHS) had initiated the process of subjecting the noncitizen to exclusion or deportation proceedings prior to April 1, 1997 can argue that the agency should be estopped from now pursuing removal proceedings, or may argue that DHS/INS initiation of removal proceedings after delaying formally commencing proceedings prior to April 1, 1997 led to a denial of the noncitizen's due process rights. Cf. *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999)(INS foot-dragging in completing deportation proceedings until petitioner no longer statutorily eligible for relief stated the basis of a substantial constitutional due process claim); see also below "Raise estoppel or constitutional or

international law arguments." Yet another way of raising this claim is to argue that there is no rational basis for subjecting the noncitizen to removal proceedings when similarly situated individuals were placed in pre-IIRIRA proceedings, thus violating his or her constitutional right to equal protection of the laws. See below "Raise Estoppel or Constitutional Arguments."

☐ Move to terminate proceedings of a lawful permanent resident charged with inadmissibility after a brief trip abroad

The Immigration and Nationality Act provides that the grounds of inadmissibility apply only to those applying for a visa outside the United States or seeking admission to the United States. See INA § 212(a). As amended by IIRIRA, the Act further provides that a lawful permanent resident "shall not" be regarded as seeking an admission into the United States unless, inter alia, the noncitizen has committed an offense identified in section 212(a)(2)(criminal inadmissibility grounds). The mandatory "shall not" language of this provision precludes application of the grounds of inadmissibility unless one of the exceptions applies. The provision, however, does not contain any such mandatory language requiring that, if one of the exceptions applies, the noncitizen "shall" be subject to admissibility review. This is significant because prior Supreme Court precedent held that a returning lawful permanent resident is not subject to admissibility review upon return from an "innocent, casual, and brief" trip abroad that was not meant to be "meaningfully interruptive" of his or her lawful admission status. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Therefore, although the Board of Immigration Appeals has rejected the argument that the *Fleuti* doctrine still applies after IIRIRA, see *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1997), it may be possible to persuade a federal court to find that a lawful permanent resident immigrant is not subject to the grounds of inadmissibility if the individual's departure was brief, casual, and innocent. See *Made v. Ashcroft*, Civil No. 01-1039 (D. N.J. 2001); *Richardson v. Reno*, 994 F. Supp. 1466, 1471 (S.D. Fla. 1998), reversed and vacated on other grounds, 162 F.2d 1338 (11th Cir. 1998); see also dissenting opinion of Board member Rosenberg in *Matter of Collado;* [but see *Tineo v. Ashcroft*, 350 F.3d 382, 2003 U.S. App. LEXIS 24430 (3d Cir. 2003)]. In addition, if the returning lawful permanent resident immigrant is charged with inadmissibility based on a criminal conviction prior to April 1, 1997 (IIRIRA general effective date), the person may argue that, even if it is true that IIRIRA eliminated the *Fleuti* doctrine, this IIRIRA amendment may not be applied retroactively at least to a conviction involving a pre-4/1/97 agreement to plead guilty because there is no clear statement of such Congressional intent. See *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). Finally, a returning permanent resident may argue that it violates the Fifth Amendment's due process clause to subject a returning resident to admissibility review if his or her departure was not a meaningful interruption of previously conferred lawful admission status in the United States. See below "Raise estoppel or constitutional arguments—Substantive Due Process."

☐ Deny deportability or inadmissibility

In the post-IIRIRA era, when relief from removal is statutorily unavailable in many cases, it becomes more important than ever to contest DHS (formerly INS) charges of deportability or inadmissibility. Keep in mind that, if the respondent has been lawfully admitted to the United States, the burden of proof is on the DHS (formerly INS) to establish deportability by "clear and convincing evidence." See INA 240(c)(3)(A); see also *Woodby v. INS*, 385 U.S. 276 (1966) (enunciating "clear, unequivocal and convincing" evidence standard). Also keep in mind that, while the burden of proof is generally on the applicant to establish admissibility, see INA 240(c)(2)(A), & 291, the burden has been held to shift to the INS (now DHS) to

prove inadmissibility in the case of a lawful permanent resident returning from a trip abroad. See, e.g., *Matter of Huang*, 19 I&N 749 (BIA 1988); see also 8 C.F.R. 240.8(c).

- **Deny "alienage"**
  - ✓ **Where individual is a U.S. citizen by birth in United States**, including Puerto Rico, the U.S. Virgin Islands, and Guam. See INA 301(a)&(b), 302, 304-307 (in addition, note that prior citizenship laws no longer in the statute may apply to certain individuals).
  - ✓ **Where individual acquired citizenship by birth outside United States to citizen parent(s).** See INA 301(c)(d)(e)&(g), 301a, 303 (in addition, note that prior citizenship laws no longer in the statute may apply to certain individuals).
  - ✓ **Where individual derived citizenship by naturalization of parent(s) while individual was a minor.** See INA 320 (effective February 27, 2001) (note that prior citizenship laws—including former INA 320 and 321—no longer in the statute may apply to certain individuals).
  - ✓ **Where individual naturalized as a citizen by applying for and being sworn in as a U.S. citizen**. See INA 310 et al.
  - ✓ **Where individual is a U.S. national, even if not a U.S. citizen.** See INA 101(a)(3)(defining an "alien" as "any person not a citizen or a national of the United States") and 101(a)(22)(defining a "national" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States"). It may be possible to argue that an individual is a national if the individual has previously taken formal steps to declare allegiance to the United States. See *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996)(finding that an individual who was a permanent resident alien of the United States and who had previously applied for U.S. citizenship was a U.S. national); see also *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001) and *Oliver v. INS*, 517 F.2d 426 (2d Cir. 1975) (cases rejecting nationality claims but leaving open the possibility that the result might have been different had the petitioner in each case previously begun the process of applying for U.S. citizenship); [but see *Matter of Navas-Acosta*, 23 I&N Dec. 586 (BIA 2003); *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005)(rejecting claim that one becomes national by pledging allegiance to the U.S. prior to service in the U.S. military); *Sebastian-Soler v. U.S.A.G.*, 409 F.3d 1280 (11th Cir. 2005); *U.S. v. Jimenez-Alcala*, 353 F.3d 858 (10th Cir. 2003)(correcting jury instruction stating that a person becomes a national merely by submitting an application for U.S. citizenship); *Salim v. Ashcroft*, 350 F.3d 307 (3d Cir. 2003)(rejecting claim that one becomes national merely by submitting an application for U.S. citizenship and registering for selective service); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003)(rejecting claim that one becomes a national merely by submitting an application for U.S. citizenship)].
  - ✓ **Where the DHS (formerly INS) is unable to prove alienage.** See 8 C.F.R. 240.8 ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service [now DHS] must first establish the alienage of the respondent").

- **Deny "conviction"**

Most of the criminal grounds of deportability require a "conviction." In addition, while

most of the criminal grounds of inadmissibility do not require a conviction, the DHS (formerly INS) in practice usually also has relied on a criminal court "conviction" when charging inadmissibility. As a result of IIRIRA, the Immigration and Nationality Act now provides that a criminal disposition may be considered a conviction for immigration purposes in the following two circumstances: (1) a *formal judgment of guilt* of the alien has been *entered* by a court, or (2) *adjudication of guilt has been withheld*, but a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See INA § 101(a)(48)(A), added by IIRIRA § 322. The Board of Immigration Appeals has broadly interpreted this new definition to find that no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute). Immigrants and their advocates should be aware that the removal order in *Roldan-Santoyo* was later vacated by the U.S. Court of Appeals for the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act—see discussion below), but *Lujan-Armendariz* is a binding precedent only within the Ninth Circuit. In fact, as a result of the new definition and *Roldan-Santoyo*, the DHS (formerly INS) seems to be taking the position that *any* criminal case disposition where there is some finding or admission of guilt is automatically and irrevocably transformed into a conviction for immigration purposes.

- ✓ **The disposition of the criminal case is not an entry of a formal judgment of guilt, nor a withholding of adjudication of guilt.** Despite its seemingly broad *Roldan-Santoyo* interpretation of the new IIRIRA definition of conviction for immigration purposes, the Board of Immigration Appeals has found that some dispositions involving a finding or admission of "guilt" may not be convictions for immigration purposes. For example, after *Roldan-Santoyo*, the Board held that a New York State youthful offender adjudication, which involves the immediate vacatur of a guilty plea conviction in certain cases involving young defendants and its substitution by a youthful offender finding, is not a conviction for immigration purposes. See *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) ("The adjudication of a person determined to be a . . . youthful offender is not a conviction *ab initio*, nor can it ripen into a conviction at a later date"). Thus, certain "guilty plea" dispositions that cannot be classified as neither a formal judgment of guilty, nor a withholding of adjudication of guilt, may be distinguished from the deferred adjudications at issue in *Roldan-Santoyo* (Idaho withholding of adjudication statute), and *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (Texas deferred adjudication statute).
- ✓ **The disposition of the criminal case is analogous to a federal disposition that is not considered a conviction of a crime under federal law.** Certain federal dispositions are specifically precluded from being deemed criminal convictions. Examples are adjudications under the Federal First Offender Act, 18 U.S.C. 3607 (relating to expungements of first-time simple possession drug offenses), and the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 (relating generally to violations of law committed by a person prior to his 18th birthday). Thus, based on constitutional equal protection requirements, one may argue that a noncitizen whose first-time drug

possession offense is expunged under state or foreign law should similarly not be deemed convicted for immigration purposes. See *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001)(applying same principle to a foreign conviction), see also below "Raise estoppel or constitutional or international law arguments—Equal Protection;" [but see *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002)(declining to follow *Lujan-Armendariz* in cases arising outside of the Ninth Circuit); *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003); *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003); *Vazquez-Velezmoro v. United States INS*, 281 F.3d 693 (8th Cir. 2002); *Fernandez-Bernal v. AG*, 257 F.3d 1304 (11th Cir. 2001)]. Likewise, it may be possible to argue that a noncitizen who committed a state or foreign offense under the age of 18 would have been adjudicated as a juvenile delinquent under federal law and therefore should not be considered to have been convicted of a crime. See *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001) (holding that a New York State youthful offender adjudication is not a conviction as it corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) ("It is well-settled that an act of juvenile delinquency is not a conviction for a crime within the meaning of our immigration laws"); [but see *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005)(Michigan "youthful trainee" disposition counts as conviction for immigration purposes); *Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001)].

- ✓ **The disposition of the criminal case is not final.** If a conviction relied upon by the DHS (formerly INS) is on direct appeal, the individual should present evidence of such to defeat the DHS (formerly INS) charge and, if the person is in DHS custody, he or she should be released because the conviction is not yet final. See *Pino v. Landon*, 349 U.S. 901 (1955); *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971). Although there are indications that some members of the Board of Immigration Appeals believe the IIRIRA definition of "conviction" means that finality is no longer required at least with respect to a criminal deferred adjudication procedure, see *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (concurring opinion of Board member Edward R. Grant), a requirement of finality is still Board precedent. See *Matter of Ozkok*, 19 I&N Dec. 546 at n.7 (BIA 1988)("It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived."); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (concurring and dissenting opinion of Board member Rosenberg) (finality a separate requirement from "conviction" for immigration purposes); [but see *Montenegro v.Ashcroft* , 355 F.3d 1035 (7th Cir. 2003); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999)("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of "conviction" found in IIRIRA § 322(a)")].

- ✓ **The criminal conviction has been vacated.** If a conviction has been vacated on legal or constitutional grounds, that vacatur should be respected by the immigration authorities. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000)("We will . . . accord full faith and credit to this state court judgment [vacating a conviction under New York state law]"); *Matter of Sirhan*, 13 I&N Dec. 592, 600

(BIA 1970) ("[W]hen a court . . . vacates an original judgment of guilt, its action must be respected); *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). In *Rodriguez-Ruiz*, the Board distinguished the New York State statute under which Mr. Rodriguez-Ruiz' conviction was vacated from an expungement statute or other rehabilitative statute. Thus, it may be important for an individual whose conviction has been vacated to show that the vacatur is based on legal error in the underlying criminal proceedings as opposed to an expungement or other rehabilitative statute. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)(held that a conviction vacatur was ineffective to eliminate its immigration consequences since the "quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes."). However, some federal courts, including the Sixth Circuit in reversing *Matter of Pickering*, have put the burden on the government to show that the vacatur was solely to avoid adverse immigration consequences or other rehabilitative reasons, as opposed to legal defect. See *Pickering v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 17923 (6th Cir. 2006); see also *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10th Cir. 2005)(government failed to show that Utah conviction reduced to lesser non-AF offense continued to be conviction of higher level AF offense for immigration purposes as reduction could have been based upon consideration of matters leading up to the conviction, not based upon post-conviction, rehabilitative events); *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001)(Illinois state court re-sentencing constituted a vacatur relating to violation of a fundamental statutory or constitutional right in the underlying criminal proceedings rather than involving a state rehabilitative scheme); but compare with *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001)(Arizona setting aside of conviction upon successful completion of probation constituted an expungement for rehabilitative purposes and therefore the underlying criminal disposition remains a conviction for immigration purposes); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (New York State granting of a certificate of relief from civil disabilities involves a state rehabilitation statute and therefore the underlying criminal disposition remains a conviction for immigration purposes); *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000) (a Puerto Rico dismissal of charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, does not vitiate the original admission of guilt); and *United States v. Campbell*, 167 F.3d 94 (2d Cir. 1999) (dealing with a Texas vacatur of a conviction in the context of illegal reentry sentencing). The Fifth Circuit has, in dicta, indicated that any vacated conviction remains a conviction for immigration purposes. See *Renteria-Gonzalez v. Ashcroft*, 322 F.3d 804 (5th Cir. 2002), as amended on denial of rehearing en banc (2003); but see *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005)(vacating prior decision published at 369 F.3d 472, which had found that a conviction vacated because of procedural and substantive errors remained a conviction for immigration purposes under *Renteria-Gonzalez*, after the government filed a motion seeking vacatur of the prior Fifth Circuit decision and a remand for agency to decide the case under *Matter of Pickering*).

- ✓ **Documentary evidence is insufficient to establish conviction of the charged offense.** When the DHS (formerly INS) offers its documentary proof of a criminal conviction, the practitioner should make sure it satisfies legal requirements. See 8 C.F.R. 1003.41 (listing documents that "shall be admissible as evidence in proving a criminal conviction"); see also INA 240(c)(3)(B) (listing documents that "shall constitute proof of a criminal conviction" in proceedings under IIRIRA). And, even

where the legal requirements are met, one can still argue that the evidence does not meet the DHS' (formerly INS') burden of proof. See, e.g., *Francis v. Gonzales*, 442 F.3d 131 (2d Cir. 2006)(Jamaican police report insufficient to prove conviction for purposes of establishing deportability); United *States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004) (holding that district court improperly relied solely on an abstract of a California judgment as proof that defendant had entered a guilty plea in state court to the specific charge of sale and transportation of methamphetamine); *Dashto v. INS*, 59 F.3d 697, 701 (7th Cir. 1995) (holding that clerk's certified "statement of conviction" that crime was a firearm offense, without more, did not satisfy INS' burden of proof)[; but see *Rosales-Pineda v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 14912 (7th cir. 2006)(holding that rap sheet was sufficient proof to establish ineligibility for relief since government does not have burden of proving ineligibility for relief by clear and convincing evidence as it does when it must establish deportability)].

- **Deny "admission" of offense**

Certain inadmissibility grounds are triggered not only by convictions, but also by admissions of having committed certain offenses, or having committed the essential elements of such offenses. See INA 212(a)(2)(A)(i) (covering admissions of a crime involving moral turpitude or a violation of law relating to a controlled substance). If the DHS (formerly INS) charges an individual with having admitted such an offense, one may, depending on the circumstances, raise the following arguments:

- ✓ **Conduct admitted does not constitute a crime under the laws of the jurisdiction where it occurred.** See *Matter of M*, 1 I&N Dec. 229 (BIA 1942).
- ✓ **Individual did not admit all factual elements of the crime.** See *Matter of E.N.*, 7 I&N Dec. 153 (BIA 1956).
- ✓ **Individual was not provided with a definition of the crime before making the alleged admission.** See *Matter of K*, 9 I&N Dec. 715 (BIA 1962).
- ✓ **Admission was not voluntarily given.** See *Matter of G*, 1 I&N Dec. 225 (BIA 1942).
- ✓ **Guilty plea alone, without conviction, is ordinarily not an admission of a crime for immigration purposes**. See *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (guilty plea, which resulted in something less than a conviction, insufficient to sustain a finding of inadmissibility based on admission of offense); *Matter of Seda*, 17 I&N 550 (BIA 1980); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (limiting use of conviction on appeal to discretionary considerations); but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (where dismissal or acquittal results from purely technical infirmities or from perjured testimony, BIA will not abide by its usual practice of deference to judicial decisions); *Matter of Ozkok*,19 I&N Dec. 546 (BIA 1988) (overruling *Matter of Seda* and other BIA precedent decisions "to the extent they are inconsistent with the standard enunciated by the Board today").
- ✓ **Independent admission of crime after dismissal of criminal case is ordinarily not an admission of crime for immigration purposes**. See *Matter of G*, 1 I&N Dec. 96 (BIA 1942); *Matter of C.Y.C.*, 3 I&N Dec. 623 (BIA 1950); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (immigration authorities may make independent determinations concerning inadmissibility; however, the Board noted that it has been customary to consider the criminal court's adjudication binding as to the cause)].

- **Deny "reason to believe" that the individual is a drug trafficker**

  One often-charged inadmissibility ground is based DHS (formerly INS) "reason to believe" that the individual has been an illicit trafficker in a controlled substance. See INA 212(a)(2)(C). If the DHS (formerly INS) charges an individual with this ground of inadmissibility, one may, depending on the circumstances, raise the following arguments:

  - ✓ **Individual was not a knowing and conscious participant in the drug trafficking.** See *Matter of R.H*, 7 I&N Dec. 675 (BIA 1958).

  - ✓ **DHS (formerly INS) evidence of drug trafficking is not reasonable, substantial, and probative**. See *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977) (enunciating standard).

  - ✓ **Guilty plea alone, without conviction and without independent evidence of drug trafficking, is insufficient evidence to sustain DHS (formerly INS) charge of "reason to believe."** Cf. *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (guilty plea, which resulted in something less than a conviction, insufficient to sustain a finding of inadmissibility based on admission of offense); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (limiting use of conviction on appeal to discretionary considerations); [but see *Matter of I*, 4 I&N Dec. 159 (BIA 1950, AG 1950) (where dismissal or acquittal results from purely technical infirmities or from perjured testimony, BIA will not abide by its usual practice of deference to judicial decisions)].

- **Deny "aggravated felony" (AF)**

  There are many possible challenges to DHS (formerly INS) charges that an individual is deportable, or otherwise disadvantaged under the immigration laws, based on conviction of an aggravated felony. Examples of some of the possible arguments are:

  - ✓ **Offense is not an AF if it is not a felony.** Unless perhaps the definition of a particular AF category specifically provides otherwise, see, e.g., INA 101(a)(43)(F) (AF "crime of violence" category referencing federal law definition of "crime of violence," which might include offense classified by a state as a misdemeanor so long as it comes within the first prong of the 18 U.S.C. § 16 definition), legislative history and common sense dictates that Congress' use of the term "aggravated felony" evidences Congressional intent that only offenses classified as felonies would be covered. See dissenting opinions in *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2003), *cert. denied*, 538 U.S. 1008 (2003) and *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001); *amicus curiae* brief of the New York State Defenders Association in support of petition for rehearing in *U.S. v. Pacheco*, No. 00-1015 (2d Cir. 2000), available at http://www.nysda.org/PachecoBrief.pdf; see also *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992)(stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF);[but see *Matter of Small*, 23 I&N Dec. 448 (BIA 2002)(misdemeanor offense of sexual abuse of a minor may constitute "sexual abuse of a minor" AF); *U.S. v. Cardoza-Estrada*, 385 F.3d 56 (1st Cir. 2004); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001); *U.S. v. Graham*, 169 F.3d 787 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999) (holding that the New York misdemeanor of petty larceny may be deemed a theft offense AF if the offense otherwise meets the sentence of imprisonment threshold for such an AF); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *U.S. v. Urias-Escobar*, 281 F.3d 165

(5th Cir.), *cert. denied*, 122 S. Ct. 2377 (2002); *U.S. v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001); *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2003), *cert. denied*, 538 U.S. 1008 (2003);; *U.S. v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir.), *cert. denied*, 123 S. Ct. 315 (2002); *U.S. v. Christopher*, 239 F.3d 1191 (11th Cir.), *cert. denied*, 534 U.S. 877 (2001)]. Support for considering the ordinary meaning of the "aggravated *felony*" term is provided by the Supreme Court decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)(considering the "ordinary meaning of the term "crime of violence" when analyzing an INA reference to a federal definition of the term).

- ✓ **State offense involving a minor victim is not a *"sexual abuse of a minor"* AF if it covers conduct other than "sexual abuse" or does not necessarily involve a minor victim under state law, and/or the state offense does not contain the same elements as the federal offense of sexual abuse of a minor, and/or the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question.** See INA 101(a)(43)(A). An offense involving a minor victim is not necessarily "sexual abuse of a minor" if the offense covers conduct other than "sexual abuse." See *Stubbs v. Atty. Gen. of the United States*, __ F.3d __, 2006 U.S. App. LEXIS 16311 (3d Cir. 2006)(New Jersey endangering welfare of children is not necessarily "sexual abuse of a minor" since record of conviction failed to establish that the petitioner engaged in sexual conduct *with* the child, or that the abusive conduct actually occurred); *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004)(California annoying or molesting a child under 18 is not necessarily "sexual abuse of a minor"). Likewise, an offense involving a minor victim is not necessarily "sexual abuse of a minor" if a finding of the age of the victim is not required for conviction under state law. See *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); see also *Larroulet v. Ashcroft*, 2004 U.S. App. LEXIS 18518 (9th Cir. 2004)(unpublished opinion). Also, one could argue that an offense involving mere solicitation of a sexual act without knowledge that the person solicited is a minor is not "sexual abuse of a minor". See dissenting opinion of Judge Posner in *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005). In addition, the federal offense of "sexual abuse of a minor" requires the victim to be (a) between the ages of 12 and 16, and (b) at least four years younger than the defendant. See 18 U.S.C. 2243(a). And the federal offense does not cover "touching" through clothing. Thus, if the state offense is broader (that is, it may have involved a victim age 16 or over, or the victim may have been less than four years younger than the defendant was, or the offense may have involved touching through clothing), the offense would not necessarily be covered under the federal offense of sexual abuse of a minor. See dissenting opinion of Board member Guendelsberger in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999); [but see *Matter of V-F-D-*, __ I&N Dec. __ (BIA 2006)(conviction of offense involving 16 or 17 year old victim may still be considered a "sexual abust of a minor" AF); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999)(majority of the Board of Immigration Appeals found that conviction under a broader state offense may still be considered a "sexual abuse of a minor" AF); see also *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) (statutory rape involving minor over age 16), *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001)(offense need not require physical contact)]. Finally, an offense should not be deemed a "sexual abuse of a minor" AF if the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question. See *Gonzalez v. Ashcroft*, 369 F. Supp.2d 442 (SDNY 2005)(state offense of use of a child in a sexual performance is not an AF if the

offense does not require knowledge of the sexual nature of the performance).

- ✓ **State drug offense is not an *"illicit trafficking in a controlled substance"* AF.** See INA 101(a)(43)(B), including a "drug trafficking crime," as defined in 18 U.S.C. 924(c). The BIA has interpreted 101(a)(43)(B) to hold that a state drug offense qualifies as an AF only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined, or (2) regardless of state classification as a felony or misdemeanor, it fits within the "drug trafficking crime" definition as analogous to a felony under the federal Controlled Substances Act. *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), reaffirmed by *Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), but simple possession drug offenses are punishable as felonies only when the defendant has a prior drug conviction (and the prosecution has charged and proven the existence, validity, and finality of the prior conviction) or is convicted of possession of more than five grams of cocaine base, meaning crack cocaine, or possession of flunitrazepam. See 21 U.S.C. 801 et seq., and especially 21 U.S.C. 844 (Penalties for simple possession).

  In 2002, however, the BIA modified its position. In *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the BIA indicated that a state simple possession drug offense would now be deemed a "drug trafficking crime" AF if it is classified as a *felony* under state law, even if it would not be classified as a felony under federal law, unless the case arises in a federal court circuit with a contrary rule. Note, however, that the U.S. Courts of Appeals for the Second Circuit (covering cases arising in New York, Connecticut, and Vermont), Third Circuit (covering cases arising in New Jersey, Pennsylvania, and Delaware), Sixth Circuit (covering cases in Kentucky, Michigan, Ohio, and Tennessee), Seventh Circuit (covering cases arising in Illinois, Indiana, and Wisconsin),and Ninth Circuit (covering cases arising in California, Arizona, Nevada, Oregon, Washington, Idaho, Hawaii, Alaska, and Guam) currently have a contrary rule as they have precedent decisions following or deferring to the former BIA interpretation in *Matter of L-G-*. See *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); see also *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)(finding state simple possession felony not to be AF in federal sentencing context because the offense would not be a felony under federal law and indicating that rule is the same in immigration context).

  At the same time, the BIA held that state *misdemeanor* simple possession drug offenses would not be deemed an AF even if they might have been classified as a felony under federal law. See *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002) (applying new BIA approach in the Fifth Circuit); *Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002)(applying new BIA approach even in the Second Circuit).

  These issues relating to what state drug possession offenses may be deemed "illicit trafficking" aggravated felonies are in litigation and may be resolved, at least in part, by decision in a case currently pending before the U.S. Supreme Court, *Lopez v. Gonzales*, Docket No. 05-547, scheduled to be argued in October 2006). However, under the varying and conflicting current case law standards, the following arguments may be made with respect to certain state drug offenses (note that the

strength or viability of the claim may depend on the law of the circuit in which the case arises):

— Drug offense should not be considered an "illicit trafficking" AF if the offense does not require the prosecution to allege and prove that the controlled substance at issue is one that is included in the definition of "controlled substance" in section 102 of the Controlled Substances Act. See INA 101(a)(43)(B). See *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003)(finding offense to be AF only after conducting analysis to determine that record of conviction proved that offense involved controlled substance listed on federal schedules referenced in section 102 of the Controlled Substances Act).

— State drug offense should not considered an "illicit trafficking" AF unless it is a felony and covers only trafficking conduct. See *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992)(stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF); see also Brief for Amici Curiae NYSDA Immigrant Defense Project et al., in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006), available at http://www.immigrantdefenseproject.org. Support for considering the ordinary meaning of the "aggravated *felony*" and "illicit *trafficking*" terms is provided by the Supreme Court decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)(considering the "ordinary meaning of the term "crime of violence" when analyzing an INA reference to a federal definition of the term).

— The federal "drug trafficking crime" definition, referenced as being included in the definition of an "illicit trafficking" drug AF, should not extend to state convictions. See dissenting opinion of Judge Vacca in Matter of Barrett, 20 I&N Dec. 171 (BIA 1990); see also Point III in Brief for Amici Curiae NYSDA Immigrant Defense Project et al., in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006), available at http://www.immigrantdefenseproject.org.

— Even if the federal "drug trafficking crime" definition may cover state convictions, drug possession offense that is classified by the state as a misdemeanor, or is not punishable by a maximum sentence of more than one year in prison (and therefore would not come within the definition of felony in the federal Controlled Substances Act), should not be considered an "illicit trafficking" AF. See *Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002) (holding that multiple state misdemeanor drug possession offenses may not be deemed aggravated felonies in immigration cases arising in the Second Circuit); *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002)(holding same in immigration cases arising in the Fifth Circuit); *U.S. v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002)(holding that multiple state drug possession offenses for which the maximum possible prison sentence did not exceed one year may not be deemed aggravated felonies even if they might be labeled as felonies under federal law); see also *Liao v. Rabbett*, 398 F.3d 389 (6th Cir. 2005)(holding that, for purposes of determining if it was an AF under immigration law, a state drug possession conviction was not a felony, even if it was labeled as such under state law, if it was not punishable under state law by a term of imprisonment of more than one year); see generally also "Offense is not an AF if it not a felony" above.

— Even if a state drug possession offense is a felony punishable by a maximum sentence of more than one year in prison, it should not be considered an "illicit

trafficking" AF in the Second, Third, Sixth, Seventh, and Ninth Circuits when the offense would not be a felony under federal law, i.e., does not require a showing of intent to sell, does not involve possession of more than five grams of crack, or does not follow a prior final drug conviction. See *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006); *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). One should raise this point even in a case arising in a circuit other than the Second, Third, Sixth, Seventh, or Ninth Circuits if the plea occurred prior to May 13, 2002 based on an argument that the new BIA rule announced in *Matter of Yanez-Garcia* should not apply retroactively to pre-*Yanez-Garcia* plea convictions. See *Von Pradith v. Ashcroft*, CV 03-1304-BR (D. Or. 2003)(finding retroactive application of *Yanez-Garcia* to be contrary to due process); *Gonzalez-Gonzalez v. Weber*, Docket No. 03-RB-0678 (D. Colo. 2003)(finding retroactive application of *Yanez-Garcia* in conflict with Supreme Court decision in *INS v. St. Cyr*, 533 U.S. 289 (2001)); see also concurring and dissenting opinions of Board members Rosenberg and Espinoza in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002)[; but see *Salazar-Regino v. Trominski*, 415 F. 3d 436 (5th Cir. 2005)(finding retroactive application of *Yanez-Garcia* did not violate due process or equal protection)].

— Even if an individual has a prior final drug conviction, a state felony or misdemeanor possession offense should not be considered an "illicit trafficking" AF in the Second, Third, Sixth, Seventh, and Ninth Circuits if the conviction did not require the prosecution to allege and prove the prior conviction, as is required under federal law—see 21 U.S.C. 851(a)(1) ("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon")—for the second possession offense to be treated as a felony. See *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004)(second possession conviction should not be treated as punishable by more than one year's imprisonment and therefore a felony by virtue of a recidivist sentence enhancement); [but see *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005)(finding second misdemeanor possession offense constituted AF for both criminal illegal reentry sentencing and immigration purposes); *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005)(finding that government position that second misdemeanor drug offense constituted AF is not unreasonable to justify award of attorneys' fees to immigrant petitioner, citing *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002), which found second misdemeanor possession offense to be AF in criminal illegal reentry sentencing context but which, in footnote 9, specifically declined to comment on whether such offense would be AF in immigration context); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992)]. Federal courts strictly construe the notice requirement of 21 U.S.C. 851(a)(1). E.g., *U.S. v. Steen*, 55 F.3d 1022 (5th Cir. 1995).

— Even if the federal "drug trafficking crime" definition may cover state offenses, a state drug "sale" offense that covers non-trafficking conduct does not necessarily fall within the referenced federal definition of "drug trafficking crime" as a felony offense punishable under the federal Controlled Substances Act. For example, a marijuana "sale" offense that might cover transfer of a small amount

of marijuana for no compensation should not be considered an "illicit trafficking" AF if the offense might cover transfer of a small amount of marijuana for no compensation, by analogy to 21 U.S.C. 841(b)(4) ("distributing a small amount of marijuana for no remuneration" is treated as simple possession misdemeanor under 21 U.S.C. 844). See *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also Point II in *amicus curiae* brief of the New York State Defenders Association in *Matter of Grant*, A40 093 259 (BIA. 2005), available at http://www.immigrantdefenseproject.org.

— Drug paraphernalia offense should not be considered an "illicit trafficking" AF if the state offense is broader or covers different conduct as compared to felony paraphernalia offenses under the federal Controlled Substances Act (see 21 U.S.C. 863).

— Drug-related solicitation or facilitation offense, or even a drug offense that might cover solicitation or facilitation, should not be considered an "illicit trafficking" AF as solicitation and facilitation offenses are not listed among the drug trafficking crimes covered in the federal Controlled Substances Act. See *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc); *Leyva-Licea v. INS*, 187 F.3d 147 (9th Cir. 1999).

— Accessory-after-the-fact offense, even if connected to a drug offense, should not be considered an "illicit trafficking" AF. See *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999).

✓ **Offense is not a firearm AF under INA 101(a)(43)(E) if it does not include the same elements as one of the listed federal firearms offenses, or if it covers a broader range of conduct than the listed federal firearms offenses.** See, e.g., *U.S. v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000)(state firearm offense is not an AF when it applies to all noncitizens, whereas federal statute applies only to those illegally in the United States); [but see *U.S. v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir.), *cert. denied*, 534 U.S. 931 (2001) and *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002)(both decisions rejecting claims that a state firearm offense was not a firearm AF because the state offense did not include an "affecting commerce" element as did the analogous listed federal offense)].

✓ **Offense is not a *"crime of violence"* AF if it does not necessarily fall within the referenced federal definition of "crime of violence", or if the sentence did not include a term of imprisonment of at least one year.** See INA 101(a)(43)(F), referencing federal definition of "crime of violence" located at 18 U.S.C. 16. The referenced federal definition includes: (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. See 18 U.S.C. 16. Under the case law, the following arguments may be made with respect to certain offenses that the government charges are crimes of violence:

— Under the categorical approach to determining whether an offense falls within the AF definition, an offense is not necessarily a "crime of violence" if the elements of the particular offense do not establish that the offense falls within this "crime of violence" definition. See *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (Colorado child abuse is not a crime of violence where the statute

proscribing such conduct is divisible and the record of conviction does not establish that either of the prongs of the federal definition are met); *Ortega-Mendez v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 14689 (9th Cir. 2006)(California simple battery offense that covers mere touching is not a crime of violence under 16(a) first prong of federal definition); *Valencia v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 5581 (9th Cir. 2006)(statutory rape involving age 17 victim not a crime of violence); *Gonzalez-Garcia v. Gonzales*, 166 Fed. Appx. 740, 2006 U.S. App. LEXIS 3512 (5th Cir. 2005)(unpublished)(Texas simple assault conviction not a crime of violence in that the "offensive or provocative contact" element did not require physical force); *Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7th Cir. 2005)(Illinois harassment by telephone is not "crime of violence" under 16(a) first prong of federal definition because elements of offense do not require use, attempted use, or threatened use of physical force); *U.S. v. Johnson*, 399 F.3d 1297 (11th Cir. 2005)(federal conviction for possession of firearm by felon did not categorically present a substantial risk of violence under federal "crime of violence" definition similar to 18 USC 16 because it did not naturally involve a person acting in disregard of the risk that physical force may have been used against another in committing an offense); *U.S. v. Martinez-Mata*, 393 F.3d 625 (5th Cir. 2004), cert denied, 2005 U.S. LEXIS 3182 (2005)(Texas retaliation conviction is not a "crime of violence" under the criminal illegal reentry Sentencing Guideline that is similar to the 16(a) prong of the 18 U.S.C. 16 definition because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004)(Oregon harassment conviction is not "crime of violence" under 16(a) prong as referenced by the crime of domestic violence deportation category because its elements reached acts that involved offensiveness by invasion of personal integrity, but that did not amount to the use, attempted use, or threatened use of physical force); *U.S. v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), cert denied, 125 S.Ct. 932 (2005)(Texas child endangerment conviction is not a "crime of violence" under the criminal illegal reentry Sentencing Guideline similar to the 16(a) prong because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003)(Indiana battery is not "crime of violence" under 16(a) for the crime of domestic violence deportation category because the elements of the offense do not require use of physical force); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003)(although Connecticut assault provision requires proof that defendant intentionally caused physical injury to another, it is not a crime of violence AF under first prong of federal definition because it does not require proof that defendant used *physical force* to cause the injury); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003)(minimum conduct required to violate New York manslaughter provision is categorically not a crime of violence AF under second prong of federal definition because statute covered passive conduct or omissions that do not involve risk of use of physical force); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001)(violation of the New York DWI statute in question is categorically not a crime of violence AF under second prong of federal definition because risk of use of physical force is not a requisite element); *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002)(Texas offense of injury to a child is not a crime of violence AF under first prong of federal definition because state statute does not require use, attempted use, or threatened use of force); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999) (Wisconsin 2nd degree sexual assault is not a crime of violence because offense

encompasses conduct that does not fall within the federal definition); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000)(Illinois burglary of a motor vehicle is a divisible statute encompassing conduct that does not constitute a crime of violence under second prong of federal definition as well as conduct that does; therefore, court may not categorically classify offense as an aggravated felony by merely reading statutory language without other evidence from the record of conviction); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000)(California auto burglary conviction is not a crime of violence because entry into a locked vehicle is not essentially "violent in nature," the risk of violence against a person or property is low, and the legislative history does not indicate that Congress intended to include vehicle burglaries); *U.S. v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002)(Arizona felony endangerment is not categorically a crime of violence AF under second prong of federal definition where not all conduct punishable under state statute involve substantial risk that physical force may be used); [but see *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)(Texas unauthorized use of a vehicle is a crime of violence); *Canada v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 12258 (2d Cir. 2006)(Connecticut conviction for assaulting peace officer is crime of violence under 16(b) second prong of federal definition); *Vargas-Sarmiento v.United States DOJ*, 448 F.3d 159 (2d Cir. 2006)(New York manslaughter in the first degree is crime of violence under second prong of federal definition); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002)(Minnesota offense of criminal vehicular homicide is a crime of violence under second prong of federal definition); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001)(California involuntary manslaughter is a crime of violence under second prong of federal definition); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000)(Texas burglary of a vehicle is a crime of violence under second prong of federal definition)].

— Furthermore, even if an offense may involve a substantial risk of physical force, it should not be considered a crime of violence if it does not require specific intent to use force, or at least recklessness. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004)(Florida conviction for driving under the influence and causing serious bodily injury was not a crime of violence for purposes of the deportation statute as the phrase "use of physical force against the person or property of another" required a higher *mens rea* than negligent or accidental conduct); *Oyebanji v. Atty. Gen. USA*, 418 F.3d 260 (3rd Cir. 2005)(reckless vehicular manslaughter is not crime of violence AF); *Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006)(Pennsylania recklessly endangering another person is not a crime of violence AF because it requires no more than a *mens rea* of recklessness); *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005)(Pennsylvania simple assault crime not a crime of violence AF under 16(a) prong since it may involve only recklessness)[but note *Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006)(separate Pennsylania simple assault offense involving attempt by physical menace to put another in fear of imminent serious bodily injury is a crime of violence AF because it necessarily involves specific intent);]; *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2006)(Pennsylvania reckless burning offense is not a crime of violence because it does not involve intentional use of force or risk of intentional use of force); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005)(involuntary manslaughter is not crime of violence AF); *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005)(California conviction for gross vehicular manslaughter while intoxicated was not "crime of violence" AF as it required only gross negligence); *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005)(California conviction for

evading officer was not categorically "crime of violence" AF as it included offenses involving mere negligence); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001)(state conviction for vehicular homicide is not a crime of violence in part because offense required only criminal negligence); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001)(although § 16(b) encompasses both intentional and reckless conduct, California DWI can be committed by mere negligence and therefore is not a crime of violence within § 16(b)); see also *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002)(stating, prior to Supreme Court decision in *Leocal*, that, in circuits where the federal court of appeals has not decided whether DWI is a crime of violence, an offense will be considered so only if the offense must involve at least reckless conduct). Some cases indicate that even a reckless *mens rea* may not be sufficient; the government may be required to show that the offense involves specific intent to use physical force. See *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004)(Texas intoxication assault is not a crime of violence under Sentencing Guideline similar to first prong of federal definition because intentional use of force is not a necessary component of the offense); *United States v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003)(Texas driving while intoxicated offense is not a crime of violence under second prong of federal definition because it does not require intentional or close to intentional conduct); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003)(New York involuntary manslaughter provision is not a crime of violence AF under second prong of federal definition because statute covered unintentional accidents caused by recklessness); *U.S. v. Chapa-Garza*, 243 F.3d 921, as revised and amended, 262 F.3d 479 (5th Cir. 2001)(DWI is not a crime of violence under second prong of federal definition because intentional force against the person or property of another is seldom, if ever, employed to commit the offense); *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002)(Texas offense of injury to a child is not a crime of violence AF under second prong of federal definition because conviction under state statute may stem from omission rather than intentional use of force); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001)(DWI is not a crime of violence under either prong of the federal definition because it does not involve the intentional use of force); see also Katherine Brady and Erica Tomlinson, "Intent Requirement of the Aggravated Felony "Crime of Violence," Bender's Immigration Bulletin (Vol. 4, No. 10, May 15, 1999); [but see *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002)(holding that gross negligence or equivalent sufficient for criminal vehicular homicide to be deemed a "crime of violence" under second prong of federal definition); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (holding that reckless *mens rea* sufficient for state involuntary manslaughter offense to be deemed a "crime of violence" under second prong of federal definition)].

— The offense may not be deemed a "crime of violence" under 18 U.S.C. 16(b) unless the offense is classified as a felony by the convicting jurisdiction. See *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001)(finding that a Pennsylvania misdemeanor offense could not be considered a crime of violence under 18 U.S.C. 16(b) even though the offense was punishable by more than one year in prison and therefore would have been deemed a felony under federal law); see also discussion in *Ortega-Mendez v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 14689 (9th Cir. 2006).

— Finally, even if the offense is found to fall within the "crime of violence"

definition, it does not constitute an AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a)(43)(F).

- ✓ **Offense is not a *"theft"* offense AF if the offense does not fall within a generic definition of theft, or if the offense only involved intent to commit theft, or if the sentence did not include a term of imprisonment of at least one year (and, in the case of an offense also involving fraud or deceit, a finding of loss to the victim exceeding $10,000).** See INA 101(a)(43)(G). Several federal circuit courts of appeals have adopted a generic definition of "theft" to include offenses involving a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. See also *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000)(taking of property constitutes a theft offense within the AF definition whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even is such deprivation is less than total or permanent). If the offense does not fall within this definition, then the offense is not a theft AF. See, e.g., *Jaggernauth v. U.S. A.G.*, 432 F.3d 1346 (11th Cir. 2005)(conviction that might have been under Florida offense subpart that requires only an intent to "appropriate use" of the property would not necessarily constitute a "theft" under the BIA's definition, because this subpart lacks the requisite intent to deprive the owner of the rights and benefits of ownership); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005)(found that Virginia credit card fraud offense did not substantially correspond to a theft offense under the INA because the indictment did not establish, among other things, that the individual was charged with taking goods without the consent of the merchant); *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005)(California unlawful driving or taking of vehicle is not a theft AF as it might cover aiding and abetting conduct outside the generic definition of theft); *Martinez-Perez v. Ashcroft*, 393 F.3d 1018 (9th Cir. 2004)(California grand theft offense is not a theft AF as it might cover aiding and abetting conduct outside the generic definition of theft); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003)(holding that certain sections of the Arizona statute for "theft of a means of transportation" did not contain the "criminal intent to deprive the owner" and were therefore not properly considered theft AFs); *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(California petty theft offense is not a theft AF as it might cover conduct outside the generic definition of theft, such as aiding and abetting theft, theft of labor, and solicitation of false credit reporting); [but see *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004)(Connecticut theft offense is a theft AF even though the offense might cover theft of services)]. In addition, if an offense only involved intent to commit theft, one can argue that it is not a theft offense. See *Lopez-Elias v. Reno*, 209 F.3d 758 (5th Cir. 2000)(Texas burglary of a vehicle with intent to commit theft is not a theft offense), *cert. denied*, 531 U.S. 10691 (2001); [but see *U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001)(Illinois burglary of vehicle is an AF as an attempted theft offense where record of conviction established intent to commit theft and substantial step toward its commission), *cert. denied*, 534 U.S. 1149 (2002)]. Finally, even if an offense is a theft offense, it does not constitute a theft AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a)(43)(G). Even where a prison sentence of at least one year is imposed, one court has found that a theft offense that is also an offense involving "fraud or deceit" is not an aggravated felony if it does not also meet the $10,000 threshold for a "fraud or deceit" offense to be deemed an aggravated felony. See *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004)(involving Pennsylvania theft by deception conviction).

- ✓ **Offense is not a "*burglary*" offense AF if the offense does not fall within the generic definition of burglary set forth in *Taylor v. United States*, 495 U.S. 575 (1990), or if the sentence did not include a term of imprisonment of at least one year.** See INA 101(a)(43)(G). In *Taylor*, for purposes of a sentence enhancement statute where Congress similarly did not define what it meant by its use of the burglary term, the Supreme Court applied a generic definition encompassing only offenses involving unlawful entry into a building with the intent to commit a crime. Thus, for example, New York burglary in the third degree does not necessarily constitute burglary under this generic definition because it may include entering or remaining unlawfully in structures beyond the ordinary meaning of the term "building," such as vehicles, watercraft, motor trucks, or motor truck trailers. See New York Penal L. §§ 140.20 and 140.00(2). See *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000)(Texas burglary of a vehicle is not a burglary offense for AF purposes); *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000)(Illinois burglary of a motor vehicle conviction is not a burglary offense for AF purposes); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000)(Texas burglary of a vehicle conviction is not a burglary offense for AF purposes), *cert. denied*, 531 U.S. 10691 (2001); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000)(California auto burglary is not a burglary offense for AF purposes). Even if the offense does fall within the generic definition of burglary, it does not constitute a burglary AF if the sentence imposed did not include a term of imprisonment of at least one year. See INA 101(a)(43)(G).

- ✓ **Offense is not a "*fraud or deceit*" offense AF unless fraud or deceit is a necessary or proven element of the crime and the offense is not a tax offense, or if there was no finding of loss to the victim exceeding $10,000 (and, in the case of an offense also involving theft, a sentence to a term of imprisonment of at least one year)**. See INA 101(a)(43)(M)(i). An offense is not a "fraud or deceit" AF unless fraud or deceit is a necessary or proven element of the crime. See *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005)(scheme laid out in indictment referred to stolen airline tickets, not fraudulently obtained ones); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002); see also case law on fraud or deceit offenses as crimes involving moral turpitude, e.g., *Matter of Balao*, 20 I&N Dec. 440 (BIA 1992) (Pennsylvania passing a bad check not a CIMT because fraud is not an essential element). Even if fraud or deceit is a necessary or proven element of the crime, it should not constitute an AF unless the record of conviction establishes that the loss to the victim or victims exceeded $10,000. See INA 101(a)(43)(M)(i); see also *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002)(reliance for the amount of the loss on information in a pre-sentence report is improper at least where this information contradicted by explicit language in the plea agreement). Where the actual loss did not exceed $10,000, the DHS (formerly INS) may not evade this monetary loss requirement by charging the offense under INA 101(a)(43)(U) as an "attempt" to commit a fraud or deceit AF involving a loss exceeding $10,000, unless the record of conviction establishes the completion of a substantial step toward committing such an offense. See *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). [Note, however, that an offense might fall under INA 101(a)(43)(U) as an "attempt" to commit a fraud or deceit AF even without any actual loss, if the *attempted* loss to the victim or victims exceeded $10,000 and if the record of conviction does establish the completion of a substantial step toward committing such an offense. See *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999).] A tax offense should not be deemed a "fraud or deceit" AF as INA 101(a)(43)(M)(ii) defines the one tax offense (tax evasion under 26 USC 7201) that may be deemed an

AF. See *Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004); [but see *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004)(defeating a tax and evading a tax were interchangeable terms and thus conviction for defeat of a tax was a conviction for an aggravated felony within 8 U.S.C.S. § 1101(a)(43)(M)(ii).)]. Even where there is a finding of loss to the victim exceeding $10,000, one court has indicated that a fraud or deceit offense that is also a theft offense is not an aggravated felony if it does not also meet the one year or more prison sentence threshold for a theft offense to be deemed an aggravated felony. See *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004).

- ✓ **The government may not establish that a conviction falls within an AF category based on information outside the record of conviction.** When the statutory elements of a particular conviction cover conduct broader than that covered by a generic definition in the AF statute, a police report, pre-sentence report or other information outside the record of conviction reciting the alleged facts of the crime (at least without identifying whether the facts came from an acceptable source, such as a signed plea agreement, a transcript of a plea of hearing, or a judgment of conviction) is insufficient evidence to establish that an individual pled guilty to the elements of the generic definition in the AF statute. See *Shepard v. U.S.*, 544 U.S. 13 (2005)(rejecting reliance on a police report to determine whether an offense was a burglary offense for criminal sentencing purposes); and *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003); *Hernandez-Martinez v. Ashcroft*, 343 F.2d 1075 (9th Cir. 2003); and *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(cases rejecting reliance on pre-sentence reports); and *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)(rejecting reliance on testimonial evidence outside the record of conviction to find that offense involved violence and that violence was domestic).

- ✓ **The government may not establish a term of imprisonment threshold for a conviction to fall within an AF category by means of a sentence enhancement.** See *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(determining that petty theft offense for which the maximum prison sentence is less than one year may not be deemed an aggravated felony theft conviction because the individual received a sentence of one year or more based on statutory recidivist sentence enhancements); cf. *Matter of Rodriguez-Cortez*, 20 I&N Dec. 668 (BIA 1993)(holding that noncitizen who received an enhanced sentence for use of a firearm was not deportable under firearm ground of deportability).

- ✓ **The respondent is not deportable under AF ground where the conviction occurred prior to November 18, 1988.** See § 7344(b) of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690; [but see § 602 of the Immigration Act of 1990 (IMMACT), Pub. L. 101-649; *Gelman v. Ashcroft*, 372 F.3d 495 (2d Cir. 2004); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000); *Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000); *Lewis v. INS*, 194 F.3d 539 (4th Cir. 1999); *Matter of Lettman*, 22 I&N Dec. 3365 (BIA 1998)].

- ✓ **The respondent is not deportable under AF ground where the conviction was not an AF at the time of conviction.** See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003)(reversing noncitizen defendant's conviction for illegal reentry after removal after finding that prior removal order was invalid as defendant had "plausible" claim that Congress' retroactive application of IIRIRA § 321[expanding categories of offenses falling within AF ground] violated due process); *United States v. Salvidar-Vargas*, 290 F. Supp. 2d 1210 (S.D.Cal. 2003)(followed *Ubaldo-Figueroa*).

- **Deny "crime involving moral turpitude" (CIMT)**

  - ✓ **Offense is not a CIMT.** See Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law relating to particular offense.

  - ✓ **The CIMT was not committed within five years after the date of admission for purposes of INA 237(a)(2)(A)(i) deportability.** The date of "admission", for purposes of this ground of deportability, is the date of lawful entry to the U.S. upon inspection and authorization by an immigration officer, NOT the subsequent date of one's adjustment of status to lawful permanent residence. See *Shanu v. Department of Homeland Security*, __ F.3d __, 2006 U.S. App. LEXIS 14989 (4th Cir. 2006)(BIA impermissibly interpreted "the date of admission" in § 237 (a)(2)(A)(i) to include the date on which Shanu's status was adjusted; however, in so ruling, the Court expressed no opinion on whether adjustment of status may properly be considered "the date of admission" where the alien sought to be removed has never been "admitted" within the meaning of § 101(a)(13)(A)); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Shivaram v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004); [but see *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005)(holding that (1) the date of adjustment of status qualifies as "the date of admission" under § 1227(a)(2)(A)(i), and that (2) where there is more than one potential date of admission, *any* such date qualifies as "*the* date of admission" under that provision); and, on issue of what constitutes the "date of admission" when the individual has never been "admitted," see Ocampo-Duran v. Ashcroft, 254 F.3d 1133, 1135 (9th Cir. 2001)(concluding that in such circumstance date of adjustment qualifies as "date of admission"); *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999)(same)].

  - ✓ **The CIMT was not one for which a sentence of one year or longer may be imposed for purposes of INA 237(a)(2)(A)(i) deportability.** The maximum possible sentence of an offense should be determined without regard to any recidivist sentence enhancement. See *Rusz v. Ashcroft*, 2004 U.S. App. LEXIS 16091 (9th Cir. 2004)(unpublished opinion).

  - ✓ **Two or more CIMTs arose out of a single scheme of criminal misconduct and thus do not trigger INA 237(a)(2)(A)(ii) deportability.**

  - ✓ **Offense is subject to single juvenile offense exception for inadmissibility pur poses.** See See INA 212(a)(2)(A)(ii)(I).

  - ✓ **Offense is subject to single petty offense exception for inadmissibility purposes.** See INA 212(a)(2)(A)(ii)(II).

- **Deny "controlled substance offense" (CSO)**

  - ✓ **Offense is not a CSO.** See INA 237(a)(2)(B)(i), 212(a)(2)(A)(i)(II), and Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law.

- **Deny "firearm offense" (FO)**

  - ✓ **Offense is not a FO.** See INA 237(a)(2)(C) and Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group) for BIA and federal court case law.

- **Deny "crime of domestic violence," (CODV), "crime of stalking," "crime of child abuse, child neglect, or child abandonment," or a "violation of a protection order"**

  - ✓ **Offense is not a CODV, etc.** See INA 237(a)(2)(E).

  - ✓ **Conviction or violation pre-dated October 1, 1996, the date of enactment of the IIRIRA, which added this ground of deportability.** See IIRIRA § 350(b) (new deportation ground applies only to convictions on or after the date of enactment).

☐ Apply for relief from removal

- **Move to terminate proceedings to permit naturalization hearing**

  Where the respondent is a lawful permanent resident who can establish prima facie eligibility for naturalization, see generally INA §§ 311 et seq., and the matter involves "exceptionally appealing or humanitarian factors," an immigration judge has discretion to terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization. See 8 C.F.R. 1239.2(f). However, it may be necessary to obtain some written or oral communication from the DHS (formerly INS), or a finding by a court declaring the noncitizen prima facie eligible for naturalization but for the pendency of the removal proceedings. See *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975). If the DHS (formerly INS) is unwilling to make such a representation, it may be possible to obtain such a finding from a federal court. See *Gatcliffe v. Reno*, 23 F.Supp.2d 581 (D.V.I. 1998) (finding noncitizen petitioner fully qualified to be naturalized but for the pendency of deportation proceedings); accord *Ngwana v. Attorney General*, 40 F.Supp.2d 319 (D.Md. 1999).

- **Apply for 212(c) waiver**

  Under pre-AEDPA and pre-IIRIRA law, most lawful permanent residents in pre-IIRIRA exclusion or deportation proceedings were eligible to apply for a waiver of exclusion or deportation as long as they had been lawfully domiciled in the United States for at least seven years and had not served a term of imprisonment of five years or more for conviction of one or more aggravated felonies. See former INA § 212(c)(repealed 1996). However, AEDPA restricted the availability of INA § 212(c) relief in deportation proceedings (but not exclusion proceedings), and IRRIRA repealed INA § 212(c). Nevertheless, the Supreme Court has ruled that INA 212(c) relief remains available for permanent residents who agreed to plead guilty prior to AEDPA (effective 4/24/96) and IIRIRA (effective 4/1/97) and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001)(holding that AEDPA and IIRIRA 212(c) waiver bars could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result). Following *St. Cyr*, a lawful permanent resident (LPR) can argue that 212(c) relief should also be available in the following situations:

  - ✓ LPR is in "exclusion" proceedings—see *Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997)(AEDPA bar to 212(c) is inapplicable to persons in exclusion proceedings).

  - ✓ LPR is in "deportation" proceedings but would have been eligible for 212(c) relief had the LPR traveled outside the country and been placed in "exclusion" proceedings – see *Servin-Espinosa v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002)(finding equal

protection violation in disparate treatment of individuals in deportation proceedings compared to those in exclusion proceedings after BIA decision in *Fuentes-Campos* and before 9th Circuit later ruled in *United States v. Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999) that individuals in exclusion proceedings also were not eligible for 212(c) relief); see also *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)(striking down such a distinction in 212(c) relief eligibility between similarly situated individuals as a violation of equal protection) [but see *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001); *Almon v. Reno*, 192 F.3d 28 (1st Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999); *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999)].

- ✓ LPR is in "deportation" proceedings commenced before April 24, 1996 (AEPDA enactment date)—see 8 C.F.R. § 1003.44; see also *Alanis-Bustamante v. Reno* 201 F.3d 1303 (11th Cir. 2000) (held that proceedings had begun prior to AEDPA when the INS had previously served an Order to Show Cause and lodged a detainer against the noncitizen even though the OSC was not filed with the immigration court until after April 24, 1996); accord *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (service of order to show cause sufficient to demonstrate pendency of deportation proceeding when AEDPA enacted); *Lyn Quee de Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003) [but see *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004)(issuance of notice of detainer alone not sufficient to find deportation proceedings commenced) along with *Dipeppe v. Quarantillo*, 337 F.3d 326 (3d Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Deleon-Holguin v. Ashcroft*, 253 F.3d 811 (5th Cir. 2001); *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001)(all requiring filing of charging document with the Immigration Court to find proceedings commenced)]].

- ✓ LPR plead or agreed to plead guilty before 4/24/96 – As mentioned above, the Supreme Court has ruled that 212(c) relief remains available for permanent residents who agreed to plead guilty prior to AEDPA (effective 4/24/96) and IIRIRA (effective 4/1/97) and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); see also *Alvarez-Hernandez v. Acosta*, 401 F.3d 327 (5th Cir. 2005)(rejected government's argument that the date that the judgment of conviction was entered rather than the date of the plea determined application of the IIRIRA bar to § 212(c) relief).

- ✓ LPR did not plead or agree to plead guilty before 4/24/96, but the individual did do so before 10/1/96 and was not deportable at the time of the plea—Possible examples include individuals convicted of offenses now deemed "aggravated felonies" as a result of the changes made to the definition of aggravated felony in IIRIRA effective 10/1/96, but which would not have been deemed aggravated felonies under pre-IIRIRA law, such as a theft, burglary, or crime of violence with a prison sentence of less than one year--See *Maria v. McElroy*, 58 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, *Pottinger v. Reno*, 2000 U.S. App. LEXIS 33521 (2d Cir. 2000)(unpublished opinion); see also *Cordes v. Velazques*, 421 F.3d 889 (9th Cir. 2005)(finding, under Ninth Circuit case law, no violation of the statute under the presumption against retroactivity and no violation of due process, but finding equal protection violation)[; but see *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) and *U.S. v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002)(), cert. denied, 540 U.S. 1210 (2004)(finding no violation of presumption against retroactivity)].

- ✓ LPR did not have seven years of lawful domicile in the United States at the time of his or her pre-AEDPA or pre-IIRIRA agreement to plead guilty, but would otherwise have been eligible for 212(c) relief at the time and accrued seven years before entry of a final order of deportation or removal—See 8 CFR 1.1(p)(LPR status terminates only "upon entry of a final administrative order of exclusion or deportation"); 8 CFR 3.2(c)(1)("motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) . . . may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation"); *Alvarez-Hernandez v. Acosta*, 401 F.3d 327 (5th Cir. 2005)(found that LPR, at the time of his plea, would have been allowed to accrue additional time following his plea toward the total period of continuous domicile; therefore, the district court erred in finding that he had to have accrued seven years' lawful domicile at the time of his plea); see also J. Traci Hong, "Practice Advisory—St. Cyr and Accrual of Lawful Unrelinquished Domicile" (American Immigration Law Foundation, Washington, D.C., October 25, 2001), available at <www.ailf.org>.

- ✓ LPR did not plead guilty, but was convicted at trial after rejecting a plea before AEDPA or IIRIRA, and was not deportable or would have been eligible for 212(c) relief at the time that the LPR chose not to plead guilty—See *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004); [but see *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), petition for rehearing denied, 2003 U.S. App. LEXIS 14474; *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); but see also *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002)(rejecting equal protection challenge to distinction between lawful permanent residents who are convicted after trial and those who plead guilty, but not reaching statutory interpretation issue of applicability of traditional presumption against retroactivity)]. In addition, an individual who was convicted after trial but may have given up the right to apply for 212(c) relief affirmatively before AEDPA/IIRIRA in possible reliance on the later availability of such relief may be able to seek 212(c) relief. *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), see also *Thompson v. Ridge*, __ F. Supp. 2d __, 2005 U.S. Dist. LEXIS 2643 (S.D.N.Y. 2005)(magistrate judge recommended that case be remanded to the BIA, under Restrepo for findings as to whether the individual actually relied on the continued availability of § 212(c) relief.); *Wilson v. Ashcroft*, __ F. Supp.2d __, Docket No. 98-cv-6880 (S.D.N.Y. 2004)(following *Restrepo* and not requiring individualized proof of reliance).

- ✓ LPR was not convicted before AEDPA or IIRIRA either by plea or trial, but the individual's underlying criminal conduct occurred before AEDPA or IIRIRA—See *Garcia-Plascencia v. Ashcroft*, No. CV 04-1067-PA (D. Or. 2004)(holding that the date of offense, rather than the date of plea or conviction is the relevant date for retroactivity analysis); *Mohammed v. Reno*, 205 F. Supp.2d 39 (E.D.N.Y. 2002)(district court decision urging the U.S. Court of Appeals for the Second Circuit to reconsider its decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), in which the Second Circuit held prior to the Supreme Court decision in *INS v. St. Cyr* that the repeal of 212(c) relief could be applied in a case where only the criminal conduct preceded the new laws); *Pena-Rosario et al. v. Reno*, 83 F. Supp.2d 349 (E.D.N.Y. 2000), motion for reconsideration denied, 2000 WL 620207 (E.D.N.Y. 2000); *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, 2000 WL 186477 (2d Cir.

2000)(unpublished opinion); see also *amicus curiae* brief of the New York State Defenders Association in *Zgombic v. Farquharson*, No. 00-6165 (2d Cir. 2000) available at <www.immigrantdefenseproject.org>; see also dissenting opinion of Judge Goodwin in *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); cf. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002), rehearing denied, 2002 U.S. App. LEXIS 6662 (holding in a related context that retroactivity analysis turns on the date of the criminal conduct at issue) [but see *Khan v. Ashcroft*, 352 F.3d 521 (2d Cir. 2003)(finding that the Second Circuit's prior decision in *Domond* remained good law despite *St. Cyr*].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA aggravated felony conviction(s), but the individual had not yet served five years at the time of his or her deportation or removal proceedings—See *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004)(found that, where petitioners accrued more than five years' imprisonment subsequent to the legally erroneous denial of their § 212(c) applications, an award of *nunc pro tunc* relief to allow them to apply for such relief was appropriate); *De Cardenas v. Reno*, 278 F.Supp.2d 284 (D. Ct. 2003) (remanding to the BIA for the entry of an order granting 212(c) relief nunc pro tunc based on the immigration judge's finding that she would have granted such relief in the original proceedings but for the BIA's prior erroneous interpretation of the law); *Mancheno Gomez v. Ashcroft*, 2003 U.S. Dist. LEXIS 10160 (EDNY 2003)(petitioner asserted right to seek 212(c) relief after only 15 months in prison and should not be denied review because an erroneous decision of the immigration judge allowed the five year time period to expire); *Hartman v. Elwood*, 255 F.Supp.2d 510 (E.D. Pa. 2003); *Falconi v. INS*, 240 F.Supp.2d 215 (EDNY 2002)(petitioner had not yet served five years at the time of the Immigration Judge decision erroneously finding petitioner ineligible for 212(c) relief); *Archibald v. INS*, 2002 U.S. Dist. LEXIS 11963 (E.D. Pa. 2002); *Bosquet v. INS*, 2001 U.S. Dist. LEXIS 13573 (SDNY 2001); *Webster v. INS*, 2000 U.S. Dist. LEXIS 21522 (D. Conn. 2000); *Lara v. INS*, No. 3:00CV24 (D. Conn. 2000); see also *Fejzoski v. Ashcroft* 2001 U.S. Dist. LEXIS 16889 (N.D. Ill. 2001)(rejected govt. claim of petitioner's ineligibility for 212(c) based on service of five years after issuance of the notice to appear for removal proceedings noting that the petitioner "may have a viable claim that it violated his due process rights for the INS to lie in the weeds waiting for the five year period to run before seeking removal"); *Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994); see also below "Raise estoppel or constitutional arguments;" [but see *Fernandes-Pereira v. Gonzales*, 417 F.3d 38 (1st Cir. 2005)(declining to follow Second Circuit decision in *Edwards* granting *nunc pro tunc* relief); *Velez-Lotero v. Achim*, 414 F.3d 776 (7th Cir. 2005)(although petitioner had not served five years at the time of his guilty plea or at the time of his first immigration judge hearing when he did not seek 212(c) relief, he had served five years by the time of his later motion to reopen to apply for 212(c) relief); *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004)(petitioner had served five years before BIA issuance of final removal order, but had also served five years even prior to the Immigration Judge's decision)].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA aggravated felony conviction(s), but the individual had not served five years in a single term of imprisonment—See *Paulino-Jimenez v. INS*, 279 F.Supp.2d 313 (SDNY 2003); *Toledo-Hernandez v. Ashcroft*, 280 F.Supp.2d 112 (SDNY 2003) (BIA decisions vacated and remanded to the BIA for a determination on whether separate sentences of imprisonment could be aggregated for purposes of the five

years served bar); see also *United States v. Figueroa-Taveras*, 228 F. Supp. 2d 428 (SDNY 2002), vacated on other grounds, 2003 U.S. App. LEXIS 13983 (2d Cir. 2003) [but see, e.g., *Herrera v. Giambruno*, 2002 U.S. Dist. LEXIS 19387 (SDNY 2002)].

- ✓ LPR has now served more than five years in prison based on his or her pre-AEDPA or pre-IIRIRA conviction of an aggravated felony, but the conviction occurred before 11/29/90, the enactment date of the Immigration Act of 1990 (IMMACT), including § 511, which added the five years served bar to the INA—See 8 C.F.R. 1212.3(f)(4)(ii)(applicable only to pre-1990 plea convictions); *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003)(application of IMMACT § 511 to the pre-1990 plea conviction at issue in case was impermissibly retroactive under *St. Cyr*); see also *amici curiae* brief of the New York State Defenders Association, et al, in Bell *v. Ashcroft*, No. 03-2737 (2d Cir. 2004) available at <www.immigrantdefenseproject.org> [but see *Reid v. Holmes*, 323 F.3d 187 (2d Cir. 2003)(followed Second Circuit's pre-*St. Cyr* decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993) holding that IMMACT § 511(a) could be applied retroactively to a noncitizen with a pre-IMMACT trial conviction)].

- ✓ LPR is charged with deportability for criminal offense under deportation ground for which there is no exact counterpart inadmissibility (formerly, excludability) ground, but which could have triggered inadmissibility had the person traveled abroad – see *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991)(found eligibility for 212(c) in deportation proceedings for AF drug trafficking conviction even though there was no AF excludability ground since there was an excludability ground for drug offenses that would have encompassed the conviction at issue); see also Section 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052 (effective Nov. 29, 1990), which amended then INA section 212(c) to include that a section 212(c) waiver "shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years," implying that some aliens who have been convicted of an aggravated felony are eligible for a section 212(c) waiver, and 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) ("Section 212(c) provides relief from exclusion and by court decision from deportation . . . . This discretionary relief is obtained by numerous excludable and deportable aliens, including aliens convicted of aggravated felonies . . . ."); see generally *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)(striking down a distinction in 212(c) relief eligibility between similarly situated individuals based on whether they traveled abroad as a violation of equal protection); [but see 8 C.F.R. 1212.3(f)(5) (requiring that the person be deportable or removable on a ground that has a statutory counterpart in the inadmissibility grounds) as interpreted by *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brevia-Perez*, 23 I&N Dec. 766 (BIA 2005)(requiring that the inadmissibility ground use "similar language" as the deportation ground sought to be waived]. In addition, if the individual is eligible to re-adjust to permanent residence and thereby avoid deportability, he or she may seek a 212(c) waiver to waive inadmissibility in connection with an application for adjustment of status. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) and *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); see also *Drax v. Reno*, 338 F. 3d 98 (2d Cir. 2003)(noting that, even if an individual is not currently eligible for re-adjustment of status because an immigrant visa number is not immediately available, an immigration judge has discretion to continue proceedings for a reasonable length of time until an immigrant visa number is available).

- For a general discussion of these statutory interpretation arguments, see Nancy Morawetz, "Practice Advisory—Who Should Benefit from *St. Cyr*" (American Immigration Law Foundation, Washington, D.C., August 1, 2001). For a general discussion of possible constitutional arguments against government claims of ineligibility for 212(c) relief that are based on unfair treatment or irrational distinctions, see below "Raise estoppel or constitutional or international law arguments."

- **Apply for 240A(a) cancellation of removal**

  Some lawful permanent residents in removal proceedings may be eligible for the new form of relief called cancellation of removal. See INA 240A(a). A lawful permanent resident respondent would have to show the following:

  1. Respondent has been an LPR for at least five years.

  2. Respondent has resided in the United States continuously for seven years after having been admitted in any status.

  3. Respondent has not been convicted of an aggravated felony (see above "Deny Aggravated Felony").

  The aggravated felony bar precludes eligibility for many long-term lawful permanent residents. However, it may be possible to argue that certain convictions should not be deemed aggravated felonies. See above "Deny "aggravated felony." In addition, in certain situations, it may be possible to argue that it violates due process for a conviction to be retroactively deemed an "aggravated felony" for this purpose if it was not an aggravated felony at the time of conviction. See concurring and dissenting opinions of Board members Rosenberg and Espinoza in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002)(finding retroactive application of a new administrative interpretation of what drug offenses constitute aggravated felonies to be contrary to due process); see below "Raise estoppel or constitutional arguments."

  Another problem that may be encountered is that the IIRIRA provided that the required seven years' period of residence "shall be deemed to end when the alien is served a notice to appear . . . or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) . . . , whichever is earliest." See INA 240A(d)(1). To the extent, however, that the DHS (formerly INS) is relying on the second clause of this clock-stopping rule to argue ineligibility for cancellation of removal—i.e., that the respondent had not resided in the United States for seven years prior to *commission of the offense*—the respondent may be able to make the following arguments:

  - ✓ **The respondent has continuously resided in the U.S. for at least seven years from the date of his first lawful admission to the U.S. to the date of the commission of the offense.** The period of respondent's residence in the U.S. after admission on a nonimmigrant visa may be considered in calculating these 7 years. *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002).

  - ✓ **The respondent's parent has continuously resided in the U.S. for at least seven years after admission in any lawful status prior to the date of the respondent's commission of the offense.** The period of respondent's parent's residence in the

U.S. after admission may be considered in calculating these 7 years. See *Cuevas-Gaspar v. Gonzales*, 430 F. 3d 1013 (9th Cir. 2005)(parent's admission for permanent resident status was imputed to an unemancipated minor child residing with the parent).

- ✓ **The "commission of offense" clock-stopping rule does not apply if the respondent did not commit an offense "referred to in section 212(a)(2)."** If the respondent has committed an offense that makes him or her removable but not inadmissible from the United States, the respondent has not committed an offense "referred to in section 212(a)(2)" and, therefore, should not be subject to this part of the clock-stopping rule. This is because the phrase "removable from the United States under section 237(a)(2)" requires that the offense be one of those listed in section 212(a)(2). Thus, for example, a firearm offense that comes within the firearm ground of deportability but which does not come within any ground of inadmissibility should not trigger this clock-stopping rule. See *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

- ✓ **The "commission of offense" clock-stopping rule does not apply retroactively.** Where the offense at issue pre-dated April 1, 1997, the general effective date of IIRIRA, the respondent may argue that the "commission of offense" part of the clock-stopping rule should not be applied retroactively to such a case. See *Mulholland v. Ashcroft*, 2004 U.S. Dist. LEXIS 21426 (E.D.N.Y. 2004); *Generi v. Ashcroft*, 2004 U.S. Dist. LEXIS 6396 (W.D. Mich. 2004); *Henry v. Ashcroft*, 175 F.Supp.2d 688 (SDNY 2001)(not appealed by the government)[; but see *Worrell v. Ashcroft*, 207 F. Supp. 2d 61 (W.D.N.Y. 2002)]. IIRIRA did not include an explicit statement that INA 240A(d) should be applied retroactively in cases based on pre-Act offenses. Other than a provision that made clear that the other part of the clock-stopping rule that turned on the date of service of the notice to appear applied to notices to appear "issued before, on, or after the date of enactment of this Act," see IIRIRA § 309(c)(5), all the statute provided is the April 1, 1997 general effective date. See IIRIRA § 309(a). The Supreme Court has clearly stated that general language that a statute is effective upon a certain date in no way demonstrates intent that Congress intended it to apply retroactively. See *Landgraf v. USI Film Products*, 511 U.S. 244, 256 (1994) ("[provision stating that] 'this Act . . . shall take effect upon enactment' . . . does not even arguably suggest that it has any application to conduct that occurred at an earlier date"). In *Landgraf*, the Court held that, absent an explicit statement of retroactivity, a statute should apply prospectively only. Thus, the "commission of offense" clock-stopping rule should not be applied retroactively to an individual whose criminal offense predated the general effective date of IIRIRA, which was April 1, 1997. For a review of legislative history supporting the argument that Congress did not intend for this part of the clock-stopping rule to be applied retroactively, see Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 N.Y.U. L. Rev. 97, 151-154 (April 1998); [but see *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999)(holding that Congress intended retroactive application without any discussion of the negative implication and legislative history referenced above)]. Even if the clock-stopping rule could be considered ambiguous as to retroactivity, it attaches new legal consequences to a pre-Act event and therefore should not be applied retroactively under the traditional presumption against retroactivity. See *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001)(holding that AEDPA and IIRIRA 212(c) waiver bars could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication

from Congress that it intended such a result); *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997); *Landgraf v. USI Film Products,* 511 U.S. 244 (1994) [but see *Matter of Perez,* 22 I&N Dec. 689 (BIA 1999)(holding that application of discretionary relief restriction to pre-IIRIRA convictions does not have impermissible retroactive effect in a ruling that preceded and is probably no longer good law following the Supreme Court's decision in *St. Cyr*)].

- ✓ **The "commission of offense" clock-stopping rule does not apply if the respondent has resided in the United States continuously for 7 years after commission of the offense.** The clock-stop rule speaks of events—such as commission of the offense and service of the notice to appear for removal proceedings—that are deemed to end "any" period of continuous residence. See INA 240A(d)(1). This language indicates that an individual may accrue the required seven years of residence between events, e.g., after commission of the offense but before the DHS (formerly INS) served the notice to appear. [But cf. *Matter of Mendoza-Sandino,* 22 I&N Dec. 1236 (BIA 2000) (noncitizen may not accrue the requisite seven years of continuous physical presence required for relief of suspension of deportation *after* service of the charging document)].

- **Apply for suspension of deportation / 240A(b) cancellation of removal**

Under pre-IIRIRA law, some individuals in pre-IIRIRA deportation proceedings were eligible to apply for suspension of deportation as long as they could prove (1) continuous physical presence within the United States for a period of not less than seven years immediately preceding the date of the application; (2) that they were a person of good moral character during that period; and (3) that their deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. See former INA § 244(a)(1)(repealed 1996). However, IIRIRA replaced suspension of deportation with INA § 240A(b) cancellation of removal relief and imposed new restrictions on this relief, including making ineligible those who have been convicted of certain specified offenses (which includes, among other things, aggravated felonies). Nevertheless, an individual may argue that Congress did not clearly state that it intended for these new restrictions to be applied retroactively so that there may be arguments for eligibility for old suspension of deportation relief or new 240A(b) cancellation of removal relief despite a pre-1996 conviction similar to those listed above available to argue for continued eligibility for old 212(c) relief for lawful permanent resident immigrants. See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006)("[t]o deprive Lopez-Castellanos of eligibility for discretionary relief would produce an impermissible retroactive effect for aliens who, like Lopez-Castellanos, were eligible for [suspension of deportation] at the time of the plea"); see also above "Apply for 212(c) waiver".

- **Apply for adjustment of status**

Some individuals in removal proceedings may be eligible to apply for adjustment of their status to lawful permanent residence as a defense to criminal charge removal. See INA 245. This may include an individual who is already a lawful permanent resident but for whom it may be advantageous to re-adjust their status in order to wipe the slate clean and avoid a criminal ground of deportability that does not make the individual inadmissible, e.g., firearm offense that does not constitute a crime involving moral turpitude. See *Matter of Rainford,* 20 I&N 598 (BIA 1992). A lawful permanent resident

immigrant may seek a 212(c) waiver to waive a ground of inadmissibility in connection with an application for re-adjustment of status. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) and *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); see also *Drax v. Reno*, 338 F. 3d 98 (2d Cir. 2003)(noting that, even if an individual is not currently eligible for re-adjustment of status because an immigrant visa number is not immediately available, an immigration judge has discretion to continue proceedings for a reasonable length of time until an immigrant visa number is available).

- **Apply for 212(h) waiver of inadmissibility**

  Some individuals in removal proceedings, who are eligible for adjustment of status (see above) and who are not inadmissible due to a drug offense (other than a single offense of simple possession of 30 grams or less of marijuana), may be able to apply for a 212(h) waiver of other criminal inadmissibility as a defense to criminal charge removal. See INA 212(h). An individual who is a lawful permanent resident seeking readmission after a trip abroad may also seek a 212(h) waiver of criminal inadmissibility without needing to be eligible to apply for readjustment of status. In addition, a lawful permanent resident may seek a 212(h) waiver to waive deportability based on an offense that is also covered by an inadmissibility ground. See *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995). However, in IIRIRA, Congress amended 212(h) to provide that a lawful permanent resident must have resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of removal proceedings and must not have been convicted of an aggravated felony. See INA 212(h) (last paragraph). In addition, these bars on lawful permanent resident eligibility for the 212(h) waiver are subject to equal protection challenge. See *Roman v. Ashcroft*, 181 F. Supp.2d 808 (N.D. Ohio 2002), reversed on other grounds, 2003 U.S. App. LEXIS 16537 (6th Cir. 2003); *Song v. INS*, 82 F.Supp.2d 1121 (C.D.Cal. 2000); see also below "Raise estoppel or constitutional arguments—Equal Protection;" [but see *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002); *DeLeon-Reynoso v. Ashcroft*, 293 F.3d 633 (3d Cir. 2002); *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002); *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001)].

- **Apply for 209(c) waiver of inadmissibility**

  Refugees or asylees who are in removal proceedings, who are eligible for refugee/ asylee adjustment of status and who are not inadmissible based on reason to believe they are a drug trafficker, may be able to apply for a 209(c) waiver of inadmissibility as a defense to criminal charge removal. See INA 209(c) and 209 generally; see also *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004)(asylee adjustment); *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999)(refugee adjustment).

- **Apply for asylum**

  Individuals in removal proceedings who fled or fear persecution in their country of nationality may be able to apply for asylum as a defense to criminal charge removal. See INA 208. Asylum is generally barred to an individual convicted of a "particularly serious crime." See INA 208(b)(2)(A)(iii). For asylum purposes, an individual convicted of an aggravated felony is deemed by statute to have been convicted of a particularly serious crime. See INA 208(b)(2)(B)(i).

- **Apply for withholding of removal**

Individuals in removal proceedings whose life or freedom would be threatened in the country of removal may be able to apply for withholding of removal as a defense to criminal charge removal. See INA 241(b)(3). Withholding of removal is generally barred to an individual convicted of a "particularly serious crime." See INA 241(b)(3)(B)(ii). For withholding of removal purposes, however, an individual convicted of an aggravated felony or felonies is deemed by statute to have been convicted of a particularly serious crime only if he or she has been sentenced to an aggregate term of imprisonment of at least five years. See INA 241(b)(3)(B). A noncitizen sentenced to less than five years' imprisonment may be determined to have been convicted of a particularly serious crime only after an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. See *Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999); see also *Chong v. Dist. Dir., INS*, 264 F.3d 378, 387 (3d Cir. 2001)(BIA must analyze the specific facts of the case "rather than blindly following a categorical rule, i.e., that all drug convictions qualify as 'particularly serious crimes.'"). If the statute is ambiguous as to whether an offense is an aggravated felony, or if there is uncertainty over whether the offense is otherwise a particularly serious crime, one should argue that the decision-maker should look to international law. See Brief for Human Rights First as Amicus Curiae in Support of Petitioners in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). This is because withholding of removal relief exists in order to comply with U.S. obligations under the 1967 U.N. Protocol Relating to the Status of Refugees. Where international obligations are involved, any statutory ambiguity must be resolved in a way that respects the international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64. A key relevant source of international law is the U.N. Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook does not specifically define a "particularly serious crime," but sets a minimum standard when it defines a "serious" offense as a "capital crime or a very grave punishable act." Although the Supreme Court has determined that the Handbook is not legally binding on U.S. officials, the Court stated that it nevertheless provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

- **Apply for relief under Torture Convention**

Individuals in removal proceedings who may be tortured or suffer other cruel treatment in their country of removal may be eligible to apply for relief under the U.N. Torture Convention as a defense to criminal charge removal. See Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in effect for the United States in 1994). The Convention does not include any bar on relief based on criminal record. And, while implementing legislation enacted in 1998 directs the prescribing of regulations excluding from eligibility those excluded from eligibility for withholding of removal (see above), the legislation recognizes that the regulations should do so only "[t]o the maximum extent consistent with the obligations of the United States under the Convention . . ." Foreign Affairs Reform and Restructuring Act of 1998 § 2242(c). Interim regulations, effective March 22, 1999, provide for withholding of removal for those who would not be excluded from eligibility for such relief, see 8 C.F.R. 208.16(c), and for "deferral" of removal for those who would be excluded from withholding based on criminal record. See 8 C.F.R. 208.17.

- **Apply for voluntary departure in lieu of a removal order**

See INA 240B.

☐ Raise estoppel or constitutional or international law arguments

Whenever a removal case has a particularly unfair or unjust feel to it, there may be good estoppel and/or constitutional (or international law) arguments to be raised. Such an argument may eventually require going into federal court. This is because immigration judges and the BIA will generally not rule on an estoppel or constitutional argument. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991) (estoppel claim); *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991) (constitutional claim). For that reason, however, one may be able to argue that one need not have raised such an argument at the administrative level in order to raise it before a federal court. See, e.g., *Garberding v. INS*, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (although a party may be required to exhaust a procedural due process claim that could be remedied by the immigration judge, an equal protection claim that the immigration judge or the BIA cannot decide does not require exhaustion). One should, however, raise such an argument at the administrative level to avoid the risk of a later finding by a federal court that the argument has been waived for failure to raise it before the agency. See, e.g., *Ruiz-Macias v. INS*, 89 F.3d 846 (9th Cir. 1996) (alien's failure to raise estoppel argument before BIA constituted waiver of claim). In addition, even if an immigration judge or the BIA will not rule on the argument, they may consider it in ruling on other arguments. Finally, it may be necessary to raise the argument before an immigration judge in order to make the record necessary for later federal court review. See INA 242(b)(4)(A) ("the court of appeals shall decide the petition only on the administrative record on which the order of removal is based"); *INS v. Miranda*, 459 U.S. 14, 18 n.3 (1982) (noting, in refusing to find estoppel for unreasonable delay in processing, that "because the issue of estoppel was raised initially on appeal [to the BIA], the parties were unable to develop any factual record on the issue").

- **Estoppel**

  "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Services*, 467 U.S. 51 (1984). The law of estoppel has long recognized that a wrongdoer should not be permitted to reap unfair advantage from his or her own wrongful conduct. In the immigration context, estoppel-type arguments might be raised where a respondent has relied on a government misrepresentation to his or her detriment, or to prevent the government from gaining an unfair advantage from a wrongful act that deprives the respondent of a constitutionally protected liberty or property interest. In fact, it was in an immigration case that the United States Court of Appeals for the Second Circuit explained that the government may be precluded from benefiting from its own wrongful conduct even where the Act, "read in vacuo, might suggest a different result." *Corniel-Rodrigues v. INS*, 532 F.2d 301 (2d Cir. 1976).

  The traditional elements of "equitable estoppel" are: (a) a misrepresentation; (b) that the party making the misrepresentation had reason to believe the party asserting estoppel would rely on it; (c) that it was reasonable for the party asserting estoppel to rely on the misrepresentation; and (d) that the party asserting estoppel relied on the misrepresentation to his detriment. *Heckler*, 467 U.S. at 59. Several federal circuit courts have found equitable estoppel to lie where there is an element of "affirmative misconduct" on the part of the government. See *Corniel-Rodrigues*, 532 F. 2d 301 (2d Cir. 1976) (INS failure to warn alien that her visa would automatically become invalid if she married before arriving to the United States sufficient to support estoppel); *Yang v. INS*, 574 F.2d 171, 174-75 (3rd Cir. 1978) (affirmative misconduct by government official gives rise to estoppel); *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987) (allegation

that INS acted "willfully, wantonly, recklessly, and negligently" in delaying processing of alien's visa application encompassed element of affirmative misconduct necessary to state equitable estoppel claim); *Mendoza-Hernandez v. INS*, 664 F.2d 631, 639 (7th Cir. 1981) (affirmative misconduct by government official gives rise to estoppel claim). Equitable estoppel doctrine may be useful in immigration cases where the respondent is seeking to stop a removal that may be said to have resulted from affirmative misconduct by the government, e.g., where the respondent has lost waiver eligibility due to wrongful DHS (formerly INS) delay in commencing deportation or removal proceedings.

There is a another line of Supreme Court cases, which generally do not use the term estoppel, but which similarly preclude the government from gaining an unfair advantage from a wrongful act where the misconduct deprives a person of a constitutionally protected liberty or property interest. See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)(Court refused to permit the government to take advantage of a BIA ruling obtained by a procedure contrary to agency regulations); *Mapp v. Ohio*, 367 U.S. 643 (1961)(Court prevented the government from using the fruits of an illegal search and seizure as evidence in a criminal case); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)(Court ruled that government could not destroy a constitutionally protected property interest due to its negligent failure to hold a required mediation hearing within the statute of limitations period). This line of cases may also be useful in immigration cases where the respondent is seeking to stop a removal that may be said to have resulted in some way from government wrongdoing.

- **Procedural Due Process**

The Fifth Amendment's due process clause protects against federal government deprivation of life, liberty, or property without fair and adequate procedures. See *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court recently reaffirmed that the protection of the due process clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001). While the Court recognized that prior precedent found that full constitutional protections might not apply to an alien who had not "entered" the United States (including individuals stopped at the border and/or "paroled" into the United States), the Court did not rule out that such precedent might no longer be good law. See *Zadvydas*.

Thus, for example, procedural due process challenges may be made to mandatory detention statutes or practices in certain situations. It is generally a violation of procedural due process for the government conclusively to presume unfitness for some benefit on the basis of some event or characteristic, without holding an individualized hearing on the issue of unfitness. Thus, procedural due process challenges may be made to mandatory detention rules that do not permit individualized hearing on the issue of whether an individual is a threat to the community or a risk of flight in certain situations. See above section entitled "Challenge mandatory detention during removal proceedings."

Another example of where a procedural due process challenge might be raised is where removal results from a DHS (formerly INS) failure to commence deportation proceedings when statutorily required to do so. See *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999)(INS foot-dragging in completing deportation proceedings until petitioner no longer statutorily eligible for relief stated the basis of a substantial constitutional due process claim); see also above discussion in subsection on "Estoppel" of the line of Supreme Court cases precluding the government from gaining an unfair advantage from a wrongful act where the misconduct deprives a person of a constitutionally protected liberty or property interest.

- **Substantive Due Process**

  The Fifth Amendment's due process clause also protects against government action infringing fundamental liberty interests, no matter what process is provided, where the infringement is not narrowly tailored to serve a compelling state interest. See *Reno v. Flores*, 507 U.S. 292, at 301-302 (1993). This fundamental or substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987), quoting *Rochin v. California*, 342 U.S. 165, 172 (1952). As the Supreme Court recently stated: "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587 (1996). Legislation imposing disproportionate penalties affecting liberty or property interests may be challenged under substantive due process notions. Id. In addition, legislation that has retroactive aspects affecting such interests may also be challenged as violative of due process where retroactive application is irrationally unfair. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation . . . must meet the test of due process"); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation"); *BMW*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a state may impose"). Thus, retroactive application of a new deportation statute may be found to violate the due process clause. See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003)(reversing noncitizen defendant's conviction for illegal reentry after removal after finding that prior removal order was invalid as defendant had "plausible" claim that Congress' retroactive application of IIRIRA § 321(expanding categories of offenses falling within AF ground) violated due process);. *Mojica v. Reno*, 970 F. Supp. 130, 169-171 (E.D.N.Y. 1997), aff'd sub nom., *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998); see generally Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 N.Y.U. L. Rev. 97 (April 1998).

- **Equal Protection**

  While the equal protection clause of the Fourteenth Amendment applies only to the states, the Fifth Amendment's due process clause has also been interpreted to bar arbitrary discrimination by the federal government. Thus, certain irrational distinctions between similarly situated noncitizens made by the federal deportation laws, or how the federal government applies these laws, may be found unconstitutional. See, e.g., *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001)(distinction between similarly situated individuals as to whether their expunged drug dispositions constitute convictions for immigration purposes struck down as irrational); *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995) (distinction between similarly situated individuals as to 212(h) waiver relief eligibility struck down as irrational); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (distinctions between similarly situated individuals as to 212(c) waiver relief eligibility struck down as irrational).

- **Naturalization Clause**

  When a noncitizen in one state is subject to more adverse immigration consequences than a noncitizen in another state for a similar offense solely because of varying state

criminal law standards and definitions, the noncitizen may argue that such disparate treatment violates the Constitution's Naturalization Clause, which requires a "uniform Rule" of naturalization (and hence of deportation law). See Iris Bennett, "The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions," 74 N.Y.U. L. Rev. 1696 (December 1999); see also Point III in Brief of the American Bar Association as Amicus Curiae in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). Alternatively, the noncitizen may argue that his or her rights to equal protection of the laws has been violated. See above subsection on "Equal Protection."

- **Ex Post Facto**

  Although challenges to retroactive deportation laws under the ex post facto clause have been rejected in the past on the basis that the clause only applies to criminal punishment, the now often mandatory imposition of the "civil" penalty of removal upon conviction suggests that it may be worth preserving such a claim in the hope that the courts will revisit the issue. See *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (concurring opinion of Justice Thomas)(expressing willingness to reconsider whether retroactive civil laws are unconstitutional under the ex post facto clause); *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996)(Sarokin, J., concurring)("If deportation under such circumstances is not punishment, it is difficult to envision what is"); see also Robert Pauw, "A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply," 52 Adm. L.R. 305 (Winter 2000); Javier Bleichmar, "Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law," 14 Geo. Immgr. L.J. 115 (Fall 1999).

- **Double Jeopardy**

- **Cruel and Unusual Punishment**

- **International Law**

  Where international obligations are involved, any statutory ambiguity must be resolved in a way that respects the international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64; see also Brief for Human Rights First as Amicus Curiae in Support of Petitioners in *Lopez v. Gonzales*, No. 05-547 (U.S. Sup. Ct. 2006). For an example of a court decision that applies international law obligations to the interpretation of an immigration statute, see *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), aff'd, 2000 WL 186477 (2d Cir. 2000)(aff'd on other grounds in an unpublished opinion) (district court decision interpreting IIRIRA amendments in a way that avoided retroactive application to pre-IIRIRA conduct in order to avoid conflict with U.S. obligations under international law).

☐ Pursue post-conviction relief or other non-immigration remedies

- **Criminal court vacatur or resentencing**

  If a conviction has been vacated on legal or constitutional grounds, that vacatur should be respected by the immigration authorities. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will . . . accord full faith and credit to this state court judgment [vacating a

conviction under New York state law]"); *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) ("[W]hen a court . . . vacates an original judgment of guilt, its action must be respected); see also *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). See generally Norton Tooby, *Post-Conviction Relief for Immigrants* (Law Offices of Norton Tooby, Oakland, California 2000); Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (West Group, 1999), Chapter 4 ("Amelioration of Criminal Activity: Post-Conviction Remedies); Norton Tooby, *Criminal Defense of Immigrants, National Edition* (Law Offices of Norton Tooby, Oakland, California 2000), Chapter 8 ("Vacating Criminal Convictions"); Katherine A. Brady, *California Criminal Law and Immigration* (Immigrant Legal Resource Center, San Francisco, California 1997), Chapter 8 ("Post-Conviction Relief" by Norton Tooby); Manuel D. Vargas, *Representing Noncitizen Criminal Defendants in New York State, 3rd edition* (New York State Defenders Association, Albany, New York 2003), Section 5.3.M ("Seek post-judgment relief").

In *Rodriguez-Ruiz*, the Board distinguished the New York State statute under which Mr. Rodriguez-Ruiz' conviction was vacated from an expungement statute or other rehabilitative statute. Thus, it may be important for an individual whose conviction has been vacated to show that the vacatur is based on legal error in the underlying criminal proceedings as opposed to an expungement or other rehabilitative statute. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)(held that a conviction vacatur was ineffective to eliminate its immigration consequences since the "quashing of the conviction was not based on a defect in the conviction or in the proceedings underlying the conviction, but instead appears to have been entered solely for immigration purposes."). However, some federal courts, including the Sixth Circuit in reversing *Matter of Pickering*, have put the burden on the government to show that the vacatur was solely to avoid adverse immigration consequences or other rehabilitative reasons, as opposed to legal defect. See *Pickering v. Gonzales*, __ F.3d __, 2006 U.S. App. LEXIS 17923 (6th Cir. 2006); see also discussion above under "Deny deportability or inadmissibility – Deny 'conviction' – The criminal conviction has been vacated."

If an individual's conviction is vacated subsequent to entry of a removal order based on the conviction, the agency should reopen the removal case to consider whether the conviction still counts for immigration purposes. See *Cruz v. AG of the United States*, __ F.3d __ , 2006 U.S. App. LEXIS 15169 (3d Cir. 2006); *see also Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981)(granting motion to reopen where conviction that supported petitioner's deportation had been vacated based on defects in underlying proceedings); *Cruz-Sanchez v. INS*, 438 F.2d 1087, 1088-89 (7th Cir. 1971)(noting the BIA's position that the proper way to attack deportation based upon a subsequently vacated conviction is in a motion to reopen).

Finally, where an individual is re-sentenced to a shorter prison sentence, the new sentence counts for immigration purposes. See *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005)(trial court's decision to modify or reduce an alien's criminal sentence nunc pro tunc is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction); *Matter of Song*, 23 I&N 173 (BIA 2001).

- **Congressional private bill**

See Robert Hopper and Juan P. Osuna, "Remedies of Last Resort: Private Bills and De-

ferred Action," *Immigration Briefings*, No. 97-6 (Federal Publications, Washington, D.C., June 1997).

- **Executive pardon**

  See INA 237(a)(2)(A)(v).

☐ Seek release from detention after removal order

The Supreme Court has struck down the government's practice under the current immigration statute of indefinitely detaining individuals who have been ordered deported or removed after having "entered" the United States, but whom the government is unable to deport or remove. See *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001). Noting the serious constitutional problem that would arise if the immigration statute were read to permit indefinite or permanent deprivation of human liberty (at least with respect to individuals who had formally "entered" the United States, as opposed to being stopped at the border or only "paroled" into the country), the Court interpreted the statute to limit post-order detention to a period reasonably necessary to bring about the detainee's removal from the United States. For the sake of uniform administration in the federal courts, the Court stated that six months would be a presumptively reasonable period of detention to effect a detainee's removal from the country. If removal is not accomplished within this period, the Court indicated that the individual should be released if "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." The Supreme Court has extended the rationale of its *Zadvydas* decision to individuals ordered excluded or removed after being stopped at the border or "paroled" into the country because the Court read the statute's post-order detention provisions to prohibit indefinite detention and these statutory provisions do not distinguish between different groups of detainees. See *Clark v. Martinez*, 125 S. Ct. 716 (2005).

If failure to remove is due to an individual's securing of a stay of removal pending court review of his or her removal order, one court has found that this does not mean that the individual may be denied meaningful consideration for release pending the court's review of the removal order. See *Oyedeji v. Ashcroft*, 332 F. Supp.2d 747 (M.D. Pa. 2004).

In addition, while the government may condition release upon the posting of a bond, one court found that the bond must be reasonable and appropriate under the circumstances and held that a bond that had the effect of preventing an immigrant's release because of inability to pay and resulted in potentially permanent detention was presumptively unreasonable. See *Shokeh v. Thompson*, 369 F.3d 865 (5th Cir. 2004).