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***Garden State CLE Presents:***

# **The Effect of Criminal Convictions on Immigration Status**



**Lesson Plan**

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By Melinda Smith**

# **Part I. Introduction**

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- j. Can apply to almost any drug offense – even NJ d/p possession of marijuana + 30 grams**
- k. Generally, punishment is far greater on non citizens than citizens accused of the same crimes.**
- l. See also 8 USCA 1182(a)(2)(A)(i) Related to inadmissible aliens based upon criminal conduct (Provides many additional independent grounds for removal – See Section IV & Appendix a)**

## **Part II. Recent Cases Affecting NJ Law**

**Removal Issues Arise for Attorneys  
in two distinct contexts, each of which  
requires a different strategic &  
tactical approach:**

### **1. Pre-conviction:**

**Plea bargaining based upon specific offense,  
factual basis or incarceration term to avoid  
automatic or discretionary removal.**

## 2. Post-conviction relief

### **State v. Nunez-Valdez, 200 N.J. 129 (2009)**

This case essentially presents a claim of ineffective assistance of counsel based on defendant's assertions that counsel provided misleading information on the consequences of a guilty plea. Defendant contends that his attorneys told him to accept the plea offer in exchange for a probationary sentence and that the plea would not affect his immigration status.

Preliminarily, we note our agreement with amici that the traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here. In [State v. Bellamy, 178 N.J. 127, 138-39, 835 A.2d 1231 \(2003\)](#), we approved of Chief Justice Wilentz's observation that whether a defendant should be advised of 'certain consequences of a guilty plea should not depend on ill-defined and irrelevant characterizations of those consequences.' That observation applies here.

However, unlike [Bellamy](#), where the plea form did not include a reference to the Sexually Violent Predator Act, the plea form that defendant signed included question seventeen, which is intended to alert a defendant that there may be deportation consequences as a result of a plea of guilty. Thus, we presently treat deportation similar to a penal consequence that requires notice to defendant.

# **Padilla v. Kentucky, 130 S. Ct. 1473 (2010)**

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under [\*Strickland\*](#).

We have long recognized that deportation is a particularly severe “penalty,” but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a [\*Strickland\*](#) claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. [\*Strickland\*](#) applies to Padilla's claim.

# **Part III. Defendants at Risk for Removal**

## **1. Those Unlawfully in United States**

## **2. Those Who Are Lawfully in The United States**

**a. Green Card**

**b. Asylum (Refugee)**

**c. Student**

**d. Worker**

**e. Tourist**

**f. Other**

**g. Note – Non-citizens are subject to removal regardless of immigration status; length of time in US; existence of family members who are US citizens; or strength of ties to the community**

## **3. Generally, Removal Does not apply to U.S. Citizens**

**a. Exceptions – False Statements or Fraud in Naturalization Process**

## 4. Key Question – Could Your Client possibly be a U.S. Citizen?

### a. Birthright Citizenship

#### 1. In General

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court ruled that a person becomes a citizen of the United States at the time of birth, by virtue of the first clause of the 14th amendment of the Constitution, if that person is:

- Born in the United States
- Born in U.S. Territory or Commonwealth (by statute – e.g. Puerto Rico)
- Has parents that are subjects of a foreign power, but not in any diplomatic or official capacity of that foreign power
- Has parents that have permanent domicile and residence in the United States
- Has parents that are in the United States for business
- Probable exception for war-time births by parents who are nationals of enemy nation.

#### 2. Parents *Not* lawfully in United States

The Supreme Court has never explicitly ruled on whether children born in the United States to illegal immigrant parents are entitled to birthright citizenship via the 14th Amendment, although it has generally been assumed that they are. A birth certificate issued by a U.S. state or territorial government is evidence of citizenship, and is usually accepted as *proof* of citizenship.

### **3. Born Abroad – In General**

**\* Through birth abroad to two United States citizens**

**A child is automatically granted citizenship in the following cases:**

- 1. Both parents were U.S. citizens at the time of the child's birth**
- 2. At least one parent lived in the United States prior to the child's birth. (No time limit required)**

**\* A person's record of birth abroad, if registered with a U.S. consulate or embassy, is proof of citizenship. They may also apply for a passport or a Certificate of Citizenship to have their citizenship recognized.**

**\* Through birth abroad to one United States citizen**

**A person born on or after November 14, 1986, is a U.S. citizen if all of the following are true:**

- 1. One of the person's parents was a U.S. citizen when the person in question was born**
- 2. The citizen parent lived at least five years in the United States before the child's birth (or served in military or US government abroad)**
- 3. A minimum of two of these five years in the United States were after the citizen parent's 14th birthday.**

**A person's record of birth abroad, if registered with a U.S. consulate or embassy, is proof of citizenship. Such a person may also apply for a passport or a Certificate of Citizenship to have a record of citizenship. Such documentation is often useful to prove citizenship in lieu of the availability of an American birth certificate.**

**Different rules apply for persons born abroad to one U.S. citizen before November 14, 1986. United States law on this subject changed multiple times throughout the twentieth century and the law is applicable as it existed at the time of the individual's birth.**

For persons born between December 24, 1952 and November 14, 1986, a person is a U.S. citizen if all of the following are true:

1. One of the person's parents was a U.S. citizen when the person in question was born
2. The citizen parent lived at least ten years in the United States before the child's birth;
3. A minimum of 5 of these 10 years in the United States were after the citizen parent's 14th birthday.

## **b. Naturalized – In General**

### **Eligibility for naturalization**

To become a naturalized United States citizen, one must be at least eighteen years of age at the time of filing, a legal [permanent resident](#) of the United States, and have had a status of a legal permanent resident in the United States for five years less 90 days before he applies (this requirement is reduced to three years less 90 days if he (a) acquired legal permanent resident status, (b) has been married to and living with a citizen for the past three years and (c) the spouse has been a U.S. citizen for at least three years prior to the applicant applying for naturalization.) He must have been physically present for at least 30 months of 60 months prior to the date of filing the application. Also during those 60 months if the legal permanent resident was outside of the U.S. for a continuous period of 6 months or more he is disqualified from naturalizing (certain exceptions apply for those continuous periods of six months to 1 year). He must be a "person of good moral character", and must pass a test on United States history and government. Most applicants must also have a working knowledge of the English language.

# **Part IV. Criminal Grounds for Removal – 8 USCA 1227(a)(2)**

## **1. Crimes of Moral Turpitude 8 USCA 1227(a)(2)(i)**

**Any alien who--**

**(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under [section 1255\(j\)](#) of this title) after the date of admission, and**

**(II) is convicted of a crime for which a sentence of one year or longer may be imposed,**

**is deportable.**

**(III) Multiple criminal convictions**

**Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.**

## **2. Crimes of Moral Turpitude Defined – (Note - May Involve many NJ crimes and petty offenses)**

**a. The term "moral turpitude" means an act of baseness, vileness, or depravity in the private and social duties owing to one's fellow person, or society in general, contrary to accepted and customary rules, and is dependent upon depraved or vicious motives on the part of the alien. [Matter of Mueller, 11 I. & N. Dec. 268, 1965 WL 12277 \(B.I.A. 1965\)](#).**

**b. Since neither the Immigration and Nationality Act (INA) nor its legislative history provides a definition of a crime of moral turpitude, a court of appeals will defer to the long-established Board of Immigration Appeals (BIA) definition that it includes a crime committed recklessly and with a conscious disregard of a substantial and unjustifiable risk to the life and safety of others. [Franklin v. I.N.S., 72 F.3d 571 \(8th Cir. 1995\)](#) (Involuntary manslaughter)**

**A crime of "moral turpitude," an alien's conviction of which will provide the basis for his or her removal, is one that is deliberately committed and serious, either in terms of the magnitude of loss that it causes or the indignation which it arouses in the law-abiding public. Although crimes in which fraud is an ingredient involve moral turpitude, moral turpitude may also inhere in crimes that do not contain fraud as element, and the mere fact that an alien's offense is not one involving fraud does not mean that it is not a crime of "moral turpitude," such as will provide a basis for an alien's removal.**

**In general, an alien's conviction under a criminal statute that encompasses both acts that do and those that do not involve moral turpitude cannot be the basis of removability determination. However, if the statute is divisible, that is, divided into discrete subsections of acts that are, and those that are not, crimes involving moral turpitude, then an alien convicted under a subsection which includes only crimes involving moral turpitude may be removable. [Padilla v. Gonzales, 397 F.3d 1016 \(7th Cir. 2005\)](#). (Lying to the cops – Just like our d/p offense under NJSA 2C:29-3(b)(4))**

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### **3. Aggravated Felony - 8 USCA 1227(a)(2)(i) (Includes Attempts & Conspriacies – No Waivers Permitted)**

**Any alien who is convicted of an aggravated felony at any time after admission is deportable.**

### **4. Aggravated Felony Defined - 8 USCA 1101(a)(43) (Note – Probably does not include drunk driving - Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377 (2004.)**

**The term “aggravated felony” means--**

**(A) murder, rape, or sexual abuse of a minor;**

**(B) illicit trafficking in a controlled substance (as defined in [section 802 of Title 21](#)), including a drug trafficking crime (as defined in [section 924\(c\) of Title 18](#));**

**(C) illicit trafficking in firearms or destructive devices (as defined in [section 921 of Title 18](#)) or in explosive materials (as defined in section 841(c) of that title);**

**(D) an offense described in [section 1956 of Title 18](#) (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;**

**(E) an offense described in--**

**(i) [section 842\(h\)](#) or [\(i\) of Title 18](#), or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);**

**(ii) [section 922\(g\)\(1\), \(2\), \(3\), \(4\), or \(5\), \(j\), \(n\), \(o\), \(p\), or \(r\)](#) or [924\(b\)](#) or [\(h\) of Title 18](#) (relating to firearms offenses); or**

**(iii) [section 5861 of Title 26](#) (relating to firearms offenses);**

**(F) a crime of violence (as defined in [section 16 of Title 18](#), but not including a purely political offense) for which the term of imprisonment at [\[FN3\]](#) least one year;**

**(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [\[FN3\]](#) least one year;**

**(H) an offense described in [section 875, 876, 877, or 1202 of Title 18](#) (relating to the demand for or receipt of ransom);**

**(I) an offense described in [section 2251](#), [2251A](#), or [2252 of Title 18](#) (relating to child pornography);**

**(J) an offense described in [section 1962 of Title 18](#) (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;**

**(K) an offense that--**

**(i) relates to the owning, controlling, managing, or supervising of a prostitution business;**

**(ii) is described in [section 2421](#), [2422](#), or [2423 of Title 18](#) (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or**

**(iii) is described in any of [sections 1581-1585](#) or [1588-1591 of Title 18](#) (relating to peonage, slavery, involuntary servitude, and trafficking in persons);**

**(L) an offense described in--**

**(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;**

**(ii) [section 421 of Title 50](#) (relating to protecting the identity of undercover intelligence agents); or**

**(iii) [section 421 of Title 50](#) (relating to protecting the identity of undercover agents);**

**(M) an offense that--**

**(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or**

**(ii) is described in [section 7201 of Title 26](#) (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;**

**(N) an offense described in [paragraph \(1\)\(A\)](#) or [\(2\) of section 1324\(a\)](#) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [\[FN4\]](#)**

**(O) an offense described in [section 1325\(a\)](#) or [1326](#) of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;**

**(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of [section 1543 of Title 18](#) or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;**

**(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;**

**(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;**

**(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;**

**(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and**

**(U) an attempt or conspiracy to commit an offense described in this paragraph.**

**The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.**

### **3. Other Criminal Offenses - 8 USCA 1227(a)(2)(iv) *et seq.***

#### **(iv) High speed flight**

**Any alien who is convicted of a violation of [section 758 of Title 18](#) (relating to high speed flight from an immigration checkpoint) is deportable.**

#### **(v) Failure to register as a sex offender**

**Any alien who is convicted under [section 2250 of Title 18](#) is deportable.**

#### **(vi) Waiver authorized**

**Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.**

#### **(B) Controlled substances**

##### **(i) Conviction**

**Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [section 802 of Title 21](#)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.**

**(ii) Drug abusers and addicts**

**Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.**

**(C) Certain firearm offenses**

**Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in [section 921\(a\) of Title 18](#)) in violation of any law is deportable.**

**(D) Miscellaneous crimes**

**Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--**

**(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;**

**(ii) any offense under [section 871](#) or [960 of Title 18](#);**

**(iii) a violation of any provision of the Military Selective Service Act ([50 U.S.C. App. 451 et seq.](#)) or the Trading With the Enemy Act ([50 U.S.C. App. 1 et seq.](#)); or**

**(iv) a violation of [section 1185](#) or [1328](#) of this title,**

**is deportable.**

**(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and [\[FN1\]](#)**

**(i) Domestic violence, stalking, and child abuse**

**Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in [section 16 of Title 18](#)) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.**

**(ii) Violators of protection orders**

**Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of**

**domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.**

**(F) Trafficking**

**Any alien described in [section 1182\(a\)\(2\)\(H\)](#) of this title is deportable.**

**(3) Failure to register and falsification of documents**

**(A) Change of address**

**An alien who has failed to comply with the provisions of [section 1305](#) of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.**

**(B) Failure to register or falsification of documents**

**Any alien who at any time has been convicted--**

**(i) under [section 1306\(c\)](#) of this title or under section 36(c) of the Alien Registration Act, 1940,**

**(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 ([22 U.S.C. 611 et seq.](#)), or**

**(iii) of a violation of, or an attempt or a conspiracy to violate, [section 1546 of Title 18](#) (relating to fraud and misuse of visas, permits, and other entry documents), is deportable.**

## **(C) Document fraud**

### **(i) In general**

**An alien who is the subject of a final order for violation of [section 1324c](#) of this title is deportable.**

### **(ii) Waiver authorized**

**The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under [section 1324c](#) of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.**

## **(D) Falsely claiming citizenship**

### **(i) In general**

**Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including [section 1324a](#) of this title) or any Federal or State law is deportable.**

### **(ii) Exception**

**In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably**

**believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.**

**(4) Security and related grounds**

**(A) In general**

**Any alien who has engaged, is engaged, or at any time after admission engages in--**

**(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,**

**(ii) any other criminal activity which endangers public safety or national security, or**

**(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,**

**is deportable.**

**(B) Terrorist activities**

**Any alien who is described in [subparagraph \(B\)](#) or [\(F\) of section 1182\(a\)\(3\)](#) of this title is deportable.**

**(C) Foreign policy**

**(i) In general**

**An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.**

**(ii) Exceptions**

**The exceptions described in clauses (ii) and (iii) of [section 1182\(a\)\(3\)\(C\)](#) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under [section 1182\(a\)\(3\)\(C\)\(i\)](#) of this title.**

**(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing**

**Any alien described in [clause \(i\)](#), [\(ii\)](#), or [\(iii\)](#) of [section 1182\(a\)\(3\)\(E\)](#) of this title is deportable.**

**(E) Participated in the commission of severe violations of religious freedom**

# **Part V. PCR and Plea Vacating Procedures**

## **A. Motion to Withdraw – R. 3:21-1 or Rule 7:6-2(b)**

**A motion to withdraw a plea of guilty or *non vult* shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice.**

### **State v. Slater, 198 NJ 145 (2009)**

- (1) Has the defendant asserted a colorable claim of innocence?
- (2) What are the nature and strength of defendant's reasons for withdrawal?
- (3) Was the plea entered as part of a plea bargain?
- 4) Would withdrawal of the plea result in unfair prejudice to the State or unfair advantage to the accused?

NOTE - Trial courts should consider and balance all of the factors discussed above in assessing a motion for withdrawal of a plea. No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief.

## **B. Ineffective Assistance of Counsel**

### **State v. Fritz, 105 NJ 42 (1987)**

Even if we are not constitutionally compelled to adopt the *Strickland-Cronic* test, the development of the law in this area impels us to conclude that we should recognize the soundness and efficacy of both the substance and formulation of this federal Constitutional standard in defining our own State Constitutional guarantee of effective assistance of counsel. We therefore hold that under [Article I, paragraph 10 of the State Constitution](#) a criminal defendant is entitled to the assistance of reasonably competent counsel, and that if counsel's performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction, the constitutional right will have been violated.

**C. Time Issues - Relaxation of Five year Time Limitations thru Rule 1:1-2 or via a showing of Excusable Neglect Rule 3:22-12 and Rule 7:10-2.**

### **State v. Mitchell, 126 NJ 565 (1992)**

# Part VI. Appendices

## a. Deportable Aliens – 8 USCA 1227

### § 1227. Deportable aliens

#### (a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

#### (1) Inadmissible at time of entry or of adjustment of status or violates status

##### (A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

##### (B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under [section 1201\(i\)](#) of this title, is deportable.

##### (C) Violated nonimmigrant status or condition of entry

##### (i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under [section 1258](#) of this title, or to comply with the conditions of any such status, is deportable.

##### (ii) Violators of conditions of entry

**Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under [section 1182\(g\)](#) of this title is deportable.**

**(D) Termination of conditional permanent residence**

**(i) In general**

**Any alien with permanent resident status on a conditional basis under [section 1186a](#) of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under [section 1186b](#) of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.**

**(ii) Exception**

**Clause (i) shall not apply in the cases described in [section 1186a\(c\)\(4\)](#) of this title (relating to certain hardship waivers).**

**(E) Smuggling**

**(i) In general**

**Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.**

**(ii) Special rule in the case of family reunification**

**Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under [section 1153\(a\)\(2\)](#) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or**

**daughter (and no other individual) to enter the United States in violation of law.**

**(iii) Waiver authorized**

**The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.**

**(F) Repealed. Pub.L. 104-208, Div. C, Title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723**

**(G) Marriage fraud**

**An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of [section 1182\(a\)\(6\)\(C\)\(i\)](#) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if--**

**(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or**

**(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.**

**(H) Waiver authorized for certain misrepresentations**

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in [section 1182\(a\)\(6\)\(C\)\(i\)](#) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who--

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under [paragraphs \(5\)\(A\)](#) and [\(7\)\(A\) of section 1182\(a\)](#) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under [section 1255\(j\)](#) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

**(ii) Multiple criminal convictions**

**Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.**

**(iii) Aggravated felony**

**Any alien who is convicted of an aggravated felony at any time after admission is deportable.**

**(iv) High speed flight**

**Any alien who is convicted of a violation of [section 758 of Title 18](#) (relating to high speed flight from an immigration checkpoint) is deportable.**

**(v) Failure to register as a sex offender**

**Any alien who is convicted under [section 2250 of Title 18](#) is deportable.**

**(vi) Waiver authorized**

**Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.**

**(B) Controlled substances**

**(i) Conviction**

**Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [section 802 of Title 21](#)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.**

**(ii) Drug abusers and addicts**

**Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.**

**(C) Certain firearm offenses**

**Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in [section 921\(a\) of Title 18](#)) in violation of any law is deportable.**

**(D) Miscellaneous crimes**

**Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--**

**(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;**

**(ii) any offense under [section 871](#) or [960 of Title 18](#);**

**(iii) a violation of any provision of the Military Selective Service Act ([50 U.S.C. App. 451 et seq.](#)) or the Trading With the Enemy Act ([50 U.S.C. App. 1 et seq.](#)); or**

**(iv) a violation of [section 1185](#) or [1328](#) of this title,**

**is deportable.**

**(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and [\[FN1\]](#)**

**(i) Domestic violence, stalking, and child abuse**

**Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic**

**violence” means any crime of violence (as defined in [section 16 of Title 18](#)) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.**

**(ii) Violators of protection orders**

**Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.**

**(F) Trafficking**

**Any alien described in [section 1182\(a\)\(2\)\(H\)](#) of this title is deportable.**

**(3) Failure to register and falsification of documents**

**(A) Change of address**

**An alien who has failed to comply with the provisions of [section 1305](#) of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.**

**(B) Failure to register or falsification of documents**

**Any alien who at any time has been convicted--**

**(i) under [section 1306\(c\)](#) of this title or under section 36(c) of the Alien Registration Act, 1940,**

**(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 ([22 U.S.C. 611 et seq.](#)), or**

**(iii) of a violation of, or an attempt or a conspiracy to violate, [section 1546 of Title 18](#) (relating to fraud and misuse of visas, permits, and other entry documents),**

**is deportable.**

**(C) Document fraud**

**(i) In general**

**An alien who is the subject of a final order for violation of [section 1324c](#) of this title is deportable.**

**(ii) Waiver authorized**

**The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under [section 1324c](#) of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.**

**(D) Falsely claiming citizenship**

**(i) In general**

**Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including [section 1324a](#) of this title) or any Federal or State law is deportable.**

**(ii) Exception**

**In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.**

#### **(4) Security and related grounds**

##### **(A) In general**

**Any alien who has engaged, is engaged, or at any time after admission engages in--**

**(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,**

**(ii) any other criminal activity which endangers public safety or national security, or**

**(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,**

**is deportable.**

##### **(B) Terrorist activities**

**Any alien who is described in [subparagraph \(B\)](#) or [\(F\) of section 1182\(a\)\(3\)](#) of this title is deportable.**

##### **(C) Foreign policy**

###### **(i) In general**

**An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.**

**(ii) Exceptions**

The exceptions described in clauses (ii) and (iii) of [section 1182\(a\)\(3\)\(C\)](#) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under [section 1182\(a\)\(3\)\(C\)\(i\)](#) of this title.

**(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing**

Any alien described in [clause \(i\), \(ii\), or \(iii\) of section 1182\(a\)\(3\)\(E\)](#) of this title is deportable.

**(E) Participated in the commission of severe violations of religious freedom**

Any alien described in [section 1182\(a\)\(2\)\(G\)](#) of this title is deportable.

**(F) Recruitment or use of child soldiers**

Any alien who has engaged in the recruitment or use of child soldiers in violation of [section 2442 of Title 18](#), is deportable.

**(5) Public charge**

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

**(6) Unlawful voters**

**(A) In general**

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

**(B) Exception**

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each

**natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.**

**(7) Waiver for victims of domestic violence**

**(A) In general**

**The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship--**

**(i) upon a determination that--**

**(I) the alien was acting in [\[FN2\]](#) self-defense;**

**(II) the alien was found to have violated a protection order intended to protect the alien; or**

**(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime--**

**(aa) that did not result in serious bodily injury; and**

**(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.**

**(B) Credible evidence considered**

**In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.**

**(b) Deportation of certain nonimmigrants**

An alien, admitted as a nonimmigrant under the provisions of either [section 1101\(a\)\(15\)\(A\)\(i\)](#) or [1101\(a\)\(15\)\(G\)\(i\)](#) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a) of this section.

**(c) Waiver of grounds for deportation**

Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) of this section (other than so much of paragraph (1) as relates to a ground of inadmissibility described in [paragraph \(2\)](#) or [\(3\) of section 1182\(a\)](#) of this title) shall not apply to a special immigrant described in [section 1101\(a\)\(27\)\(J\)](#) of this title based upon circumstances that existed before the date the alien was provided such special immigrant status.

**(d)(1)** If the Secretary of Homeland Security determines that an application for nonimmigrant status under [subparagraph \(T\)](#) or [\(U\) of section 1101\(a\)\(15\)](#) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under [section 1231\(c\)\(2\)](#) of this title until

**(A)** the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

**(B)** there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

**(2)** The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.

**(3)** During any period in which the administrative stay of removal is in effect, the alien shall not be removed.

**(4) Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.**

# **Removal Statute – 8 USCA 1101**

## **b. Removal Statute – 8 USCA 1101 (Definitions)**

### **Definitions**

**(a) As used in this chapter--**

**(1) The term “administrator” means the official designated by the Secretary of State pursuant to section 1104(b) of this title.**

**(2) The term “advocates” includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.**

**(3) The term “alien” means any person not a citizen or national of the United States.**

**(4) The term “application for admission” has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.**

**(5) The term “Attorney General” means the Attorney General of the United States.**

**(6) The term “border crossing identification card” means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in**

**accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.**

**(7) The term "clerk of court" means a clerk of a naturalization court.**

**(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.**

**(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.**

**(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.**

**(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.**

**(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.**

**(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.**

**(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.**

**(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--**

**(i) has abandoned or relinquished that status,**

**(ii) has been absent from the United States for a continuous period in excess of 180 days,**

**(iii) has engaged in illegal activity after having departed the United States,**

**(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,**

**(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or**

**(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.**

**(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.**

**(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--**

**(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;**

**(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and**

**(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;**

**(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;**

**(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);**

**(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;**

**(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam or the Commonwealth of the Northern Mariana Islands and solely in pursuit of his calling as a crewman and to depart from Guam or the Commonwealth of the Northern Mariana Islands with the vessel on which he arrived;**

**(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii)**

**solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;**

**(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(I) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who**

**commutes to the United States institution or place of study from Canada or Mexico;**

**(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669)[22 U.S.C.A. 288 et seq.], accredited resident members of the staff of such representatives, [FN1] and members of his or their immediate family;**

**(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;**

**(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;**

**(iv) officers, or employees of such international organizations, and the members of their immediate families;**

**(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;**

**(H) an alien (i) (a) [Repealed. Pub.L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to**

**the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title**

**26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;**

**(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;**

**(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research,**

**consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;**

**(K) subject to subsections (d) and (p) of section 1184 of this title, an alien who--**

**(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;**

**(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or**

**(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;**

**(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or**

**subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;**

**(M) (i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;**

**(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or**

**(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));**

**(O) an alien who--**

**(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or**

**(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,**

**(II) is an integral part of such actual performance,**

**(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing**

**participation of the alien is essential to the successful completion of the production, and**

**(IV) has a foreign residence which the alien has no intention of abandoning; or**

**(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;**

**(P) an alien having a foreign residence which the alien has no intention of abandoning who--**

**(i) (a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);**

**(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and**

**(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;**

**(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and**

**(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or**

**entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or**

**(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;**

**(Q) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers;**

**(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who--**

**(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and**

**(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);**

**(S) subject to section 1184(k) of this title, an alien--**

**(i) who the Attorney General determines--**

**(I) is in possession of critical reliable information concerning a criminal organization or enterprise;**

**(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and**

**(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or**

**(ii) who the Secretary of State and the Attorney General jointly determine--**

**(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;**

**(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;**

**(III) will be or has been placed in danger as a result of providing such information; and**

**(IV) is eligible to receive a reward under section 2708(a) of Title 22,**

**and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;**

**(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland**

**Security, in consultation with the Attorney General, determines--**

**(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22;**

**(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;**

**(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;**

**(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or**

**(cc) has not attained 18 years of age; and**

**(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and**

**(ii) if accompanying, or following to join, the alien described in clause (i)--**

**(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children,**

**unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;**

**(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or**

**(III) any parent or unmarried sibling under 18 years of age of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.**

**(iii) Repealed. Pub.L. 110-457, Title II, § 201(a)(3), Dec. 23, 2008, 122 Stat. 5053**

**(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--**

**(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);**

**(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);**

**(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law**

**enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and**

**(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;**

**(ii) if accompanying, or following to join, the alien described in clause (i)--**

**(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or**

**(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and**

**(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy,**

**or solicitation to commit any of the above mentioned crimes; or**

**(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if--**

**(i) such petition has been pending for 3 years or more; or**

**(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and--**

**(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or**

**(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.**

**(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.**

**(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.**

**(18) The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.**

**(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76)[50 App. U.S.C.A. 454(a)], or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.**

**(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.**

**(21) The term "national" means a person owing permanent allegiance to a state.**

**(22) The term "national of the United States" means (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.**

**(23) The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.**

**(24) Repealed. Pub.L. 102-232, Title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.**

**(25) The term "noncombatant service" shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.**

**(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.**

**(27) The term "special immigrant" means--**

**(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;**

**(B) an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;**

**(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who--**

**(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;**

**(ii) seeks to enter the United States--**

**(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,**

**(II) before September 30, 2012, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or**

**(III) before September 30, 2012, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of Title 26) at the request of the organization in a religious vocation or occupation; and**

**(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);**

**(D) an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: Provided, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;**

**(E) an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of Title 22) enters into force [October 1, 1979], who was resident in the Canal Zone on the effective date of the**

**exchange of instruments of ratification of such Treaty [April 1, 1979], and who has performed faithful service as such an employee for one year or more;**

**(F) an immigrant, and his accompanying spouse and children, who is a Panamanian national and (i) who, before the date on which such Panama Canal Treaty of 1977 enters into force [October 1, 1979], has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or (ii) who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;**

**(G) an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 [April 1, 1979], who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;**

**(H) an immigrant, and his accompanying spouse and children, who--**

**(i) has graduated from a medical school or has qualified to practice medicine in a foreign state,**

**(ii) was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,**

**(iii) entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) of this section before January 10, 1978, and**

**(iv) has been continuously present in the United States in the practice or study of medicine since the date of such entry;**

**(I)(i) an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and (II) applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;**

**(ii) an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or**

**periods aggregating at least 15 years before the date of the death of such officer or employee, and (II) files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;**

**(iii) an immigrant who is a retired officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and (II) files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or**

**(iv) an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;**

**(J) an immigrant who is present in the United States--**

**(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents**

**is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;**

**(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and**

**(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--**

**(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and**

**(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;**

**(K) an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating--**

**(i) 12 years and who, if separated from such service, was never separated except under honorable conditions, or**

**(ii) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant**

**status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,**

**and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;**

**(L) an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause--**

**(i) to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);**

**(ii) to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty, or as a dependent); and**

**(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [FN2]**

**(M) subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in**

**the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.**

**(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.**

**(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.**

**(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.**

**(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.**

**(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.**

**(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.**

**(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.**

**(35) The term "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.**

**(36) The term "State" includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.**

**(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.**

**(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.**

**(39) The term "unmarried", when used in reference to any individual as of any time, means an individual**

**who at such time is not married, whether or not previously married.**

**(40) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.**

**(41) The term "graduates of a medical school" means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.**

**(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on**

**account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.**

**(43) The term "aggravated felony" means--**

**(A) murder, rape, or sexual abuse of a minor;**

**(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);**

**(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);**

**(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;**

**(E) an offense described in--**

**(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);**

**(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or**

**(iii) section 5861 of Title 26 (relating to firearms offenses);**

**(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at [FN3] least one year;**

**(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [FN3] least one year;**

**(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);**

**(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);**

**(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;**

**(K) an offense that--**

**(i) relates to the owning, controlling, managing, or supervising of a prostitution business;**

**(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or**

**(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);**

**(L) an offense described in--**

**(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;**

**(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or**

**(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);**

**(M) an offense that--**

**(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or**

**(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;**

**(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for**

**which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [FN4]**

**(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;**

**(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;**

**(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;**

**(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;**

**(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;**

**(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and**

**(U) an attempt or conspiracy to commit an offense described in this paragraph.**

**The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.**

**(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily--**

**(i) manages the organization, or a department, subdivision, function, or component of the organization;**

**(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;**

**(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational**

**hierarchy or with respect to the function managed;  
and**

**(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.**

**A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.**

**(B) The term "executive capacity" means an assignment within an organization in which the employee primarily--**

**(i) directs the management of the organization or a major component or function of the organization;**

**(ii) establishes the goals and policies of the organization, component, or function;**

**(iii) exercises wide latitude in discretionary decision-making; and**

**(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.**

**(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on**

**the basis of the number of employees that the individual supervises or has supervised or directs or has directed.**

**(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.**

**(46) The term "extraordinary ability" means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction.**

**(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.**

**(B) The order described under subparagraph (A) shall become final upon the earlier of--**

**(i) a determination by the Board of Immigration Appeals affirming such order; or**

**(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.**

**(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--**

**(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere**

**or has admitted sufficient facts to warrant a finding of guilt, and**

**(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.**

**(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.**

**(49) The term "stowaway" means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.**

**(50) The term "intended spouse" means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.**

**(51) The term "VAWA self-petitioner" means an alien, or a child of the alien, who qualifies for relief under--**

**(A) clause (iii), (iv), or (vii) of section 1154(a)(1)(A) of this title;**

**(B) clause (ii) or (iii) of section 1154(a)(1)(B) of this title;**

**(C) section 1186a(c)(4)(C) of this title;**

**(D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;**

**(E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);**

**(F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or**

**(G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).**

**(b) As used in subchapters I and II of this chapter--**

**(1) The term "child" means an unmarried person under twenty-one years of age who is--**

**(A) a child born in wedlock;**

**(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;**

**(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;**

**(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is**

**sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;**

**(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or**

**(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years; or**

**(F)(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for**

**adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or**

**(ii) subject to the same provisos as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title.**

**(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term "parent" does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.**

**(3) The term "person" means an individual or an organization.**

**(4) The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.**

**(5) The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.**

**(c) As used in subchapter III of this chapter--**

**(1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.**

**(2) The terms "parent", "father", and "mother" include in the case of a posthumous child a deceased parent, father, and mother.**

**(d) Repealed. Pub.L. 100-525, § 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.**

**(e) For the purposes of this chapter--**

**(1) The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.**

**(2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.**

**(3) Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.**

**(f) For the purposes of this chapter--**

**No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--**

**(1) a habitual drunkard;**

**(2) Repealed. Pub.L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.**

**(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [FN5] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;**

**(4) one whose income is derived principally from illegal gambling activities;**

**(5) one who has been convicted of two or more gambling offenses committed during such period;**

**(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;**

**(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;**

**(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section); or**

**(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title**

**(relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).**

**The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.**

**(g) For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.**

**(h) For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--**

**(1) any felony;**

**(2) any crime of violence, as defined in section 16 of Title 18; or**

**(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.**

**(i) With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i) of this section--**

**(1) the Secretary of Homeland Security, the Attorney General, and other Government officials, where appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and**

**(2) the Secretary of Homeland Security shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.**

**c. *Criminal Defense Attorneys  
& Noncitizen Clients*, 33 Akron L. Rev. 163 (1999)  
By Melinda Smith**

**IV. 1996 RESTRICTIONS ON THE RIGHTS OF THE CRIMINAL  
ALIEN**

**A. *The AEDPA and IIRIRA: Targeting Criminal Aliens***

The 1996 changes in immigration law have affected an “unprecedented restriction of the constitutional rights and judicial resources traditionally afforded to legal resident aliens.” [\[FN173\]](#) The first of the two Acts which constituted the major overhaul of immigration policy in 1996 is the Anti-terrorism and Effective Death Penalty Act (AEDPA), [\[FN174\]](#) which President Clinton signed into law on April 24, 1996. [\[FN175\]](#) The AEDPA contains two particularly harsh provisions. [\[FN176\]](#) First, the AEDPA greatly expands the realm of criminal offenses for which an alien can be \*194 removed from this country. [\[FN177\]](#) Second, the AEDPA eliminates the traditional judicial review of final removal orders. [\[FN178\]](#) It has been said that this legislative decision “threaten(s) the most basic safeguards of due process and seek(s) to eliminate the meaningful role for the judiciary to perform its historic function of reviewing the implementation of immigration law.” [\[FN179\]](#) By redefining what constitutes an aggravated felony and eliminating judicial review, the AEDPA has put legal resident aliens in jeopardy of removal for even minor offenses which may have been committed years ago. [\[FN180\]](#)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was passed shortly after the AEDPA, and modifies some of the AEDPA's more “problematic immigration provisions.” [\[FN181\]](#) However, some of the IIRIRA's provisions have been described as “so harsh as to amount to ‘national scapegoating’ of immigrants.” [\[FN182\]](#) For example, the IIRIRA severely restricts the role of the federal courts in making immigration decisions. [\[FN183\]](#) Criminal aliens are specifically targeted by provisions prohibiting review by any court of “any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in the enumerated sections.” [\[FN184\]](#)

**“The legitimacy of our legal system is put into question whenever basic due-process rights are denied, even when denied to ‘undesirable’ aliens.” [FN185] \*195** Although the traditional due process rights owing to criminal defendants are not available in deportation proceedings, aliens have historically been protected by certain limited due process rights. [FN186] However, today those rights are being limited by “an overactive Congress bent on ill conceived escapades and, as a member of the BIA recently commented, in a dissent, sometimes giving the impression of trying to kill a fly with an elephant gun.” [FN187] Aliens convicted of criminal offenses are hardest hit by these restrictions placed on aliens' rights and the increasing control by the executive branch. [FN188]

**\*196** Today, the INS is being given increased power over the lives of noncitizens. [FN189] For example, INS officers have an extremely broad power to arrest based upon the very low standard of “reason to believe the person is an alien.” [FN190] Furthermore, § 440 of the AEDPA has broadened the categories of those aliens who are to be subjected to more restrictive removal procedures. [FN191] The new procedures allow for mandatory detention pending removal, expedited removal, and no judicial review of final removal orders. [FN192] The categories of individuals subject to these restrictive procedures include: “(1) aggravated felons, (2) those convicted of controlled substance violations, (3) drug addicts or drug abusers, (4) those convicted of certain firearm offenses, (5) those convicted of miscellaneous crimes, including espionage, sabotage, treason or sedition, (6) and those convicted of two separate crimes of moral turpitude.” [FN193] The goal of the 1996 changes seems to have been “maximiz[ing] the number of criminal aliens who remain in detention and \*197 minimiz[ing] the number who avoid removal through the granting of discretionary relief or through legal technicalit [[ies].” [FN194]

## ***B. Expansion of the Grounds for Deportation***

### **1. Crimes of Moral Turpitude**

Toward that end, Congress enacted two amendments to the INA which expand the category of deportable criminal aliens. [\[FN195\]](#) First, § 435 of the AEDPA amended § 241(a)(2) of the INA to make a single conviction of a crime of moral turpitude a deportable offense, if it carries a possible sentence of one year or more. [\[FN196\]](#) However, crimes of moral turpitude are nowhere specifically listed or defined in the INA. [\[FN197\]](#) The only guidance is provided by the Board of Immigration Appeals which has described moral turpitude as that which:

shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.

[\[FN198\]](#)

It is important to remember that because definitions of crimes vary widely by jurisdiction, the “inherent nature of the crime as defined by the statute and as limited and described by the record of conviction (indictment, plea, verdict, and sentence)’ must be assessed in order to determine whether a crime is one of moral \*198 turpitude.” [\[FN199\]](#) Therefore, criminal defense attorneys must be aware of this assessment since such cases will always be a case of first impression unless there has been a prior immigration case regarding the same statute. [\[FN200\]](#)

The consequences of such a determination can be surprising to the noncitizen criminal defendant as well as to his or her attorney. [\[FN201\]](#) The most pressing question is whether the crime can also be defined as an aggravated felony. [\[FN202\]](#) This is the most important issue because it is the classification of “aggravated felon” which carries the harshest immigration consequences for the noncitizen defendant. [\[FN203\]](#) The factors which will most likely determine whether a crime of moral turpitude is also an aggravated felony include the

amount of harm caused by the crime, the length of the maximum possible sentence as well as the length of the actual sentence imposed. [\[FN204\]](#) In order for plea discussions to be sensitive to the \*199 relevant immigration issues, the criminal defense attorney must be aware of the consequences of each of these determinations. [\[FN205\]](#)

## 2. Expansion of the Definition of "Aggravated Felony"

The second major change Congress made which expands the category of deportable criminal aliens is the expansion of the definition of "aggravated felony." [\[FN206\]](#) The aggravated felony statute was first enacted in 1988 to make deportable any alien convicted of such a crime. [\[FN207\]](#) Ever since that time, Congress has consistently increased the range of crimes which fall under its ballooning definition. [\[FN208\]](#) In fact, there are many cases where crimes classified as \*200 misdemeanors, by the state law under which the alien defendant is convicted, will be considered "aggravated felonies" by today's immigration law standard. [\[FN209\]](#)

The consequences of being classified as an "aggravated felon" have worsened with the 1996 changes in the INA. [\[FN210\]](#) Contrary to the former changes which had been made in the definition of "aggravated felony," the IIRIRA applied its definition "fully retroactive[ly] to actions taken after... [[[its] enactment." [\[FN211\]](#) The IIRIRA also made the classification of a legal permanent resident as an "aggravated felon" a complete bar to relief from deportation. [\[FN212\]](#) Additionally, such convictions \*201 result in expedited deportation proceedings, bail ineligibility, and mandatory detention during the course of the process. [\[FN213\]](#) In addition to increasing the number of deportable aliens by expanding the definition of "aggravated felony," the IIRIRA also denies all aggravated felons the right to seek relief from deportation. [\[FN214\]](#)

### **\*202 3. Retroactivity**

The retroactivity of the IIRIRA is especially troubling for criminal defense attorneys because it is likely to disrupt past expectations of the consequences of certain actions by criminal defense attorneys and their alien clients. [\[FN215\]](#) The retroactive application of the new, more expansive definition of "aggravated felony" will cause the summary deportation of aliens who made decisions in handling their criminal cases with the expectation that they would be permitted to live their lives in the United States. [\[FN216\]](#) These new provisions ensure that even a long time legal \*203 permanent resident who immigrated with his parents as a young child will necessarily be deported upon conviction of nearly any drug offense. [\[FN217\]](#) Deportation under these circumstances affects an extremely harsh penalty upon such a person who is forced out of what he considers his home country and sent to some "foreign" country where he may not be acquainted with the language, customs, and people. [\[FN218\]](#) Thus, the INA as amended by the AEDPA, and the IIRIRA, imposes much harsher criminal penalties on aliens than are imposed upon citizen defendants accused of the very same crimes. [\[FN219\]](#) Therefore, it is imperative that criminal defense attorneys establish their clients' immigration status before entering into plea discussions in a criminal case. [\[FN220\]](#)

### **4. Specific Offenses as Grounds for Deportation**

In addition to aggravated felonies, several specific categories of offenses trigger deportation proceedings under the amended INA. [\[FN221\]](#) Deportable offense categories now include controlled substance violations, [\[FN222\]](#) domestic violence, \*204 stalking, restraining order violations and child abuse, [\[FN223\]](#) as well as firearms offenses. [\[FN224\]](#) One important issue which criminal defense attorneys must be aware of is the addition of domestic violence convictions to the list of crimes presenting grounds for deportation. [\[FN225\]](#) The immigration consequences for both the batterer and the victim are extremely harsh and may be surprising to the criminal defense attorney who is not aware of these new provisions. [\[FN226\]](#)

The 1996 changes have wrought extensive damage in the area of immigrants' rights. The AEDPA has been criticized for unfairly discriminating against certain groups. [\[FN227\]](#) "The

President himself acknowledged when signing the **\*205** bill that it caused several 'major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.'" [\[FN228\]](#) In fact, the AEDPA actually goes as far as to provide terrorist aliens with more procedural due process protection than it offers most other aliens. [\[FN229\]](#)

### *C. Restrictions on Judicial Review*

Section 440(a) of the AEDPA amended § 106(a)(10) of the INA [\[FN230\]](#) to "extinguish[] a court of appeals' jurisdiction over petitions for review filed by aliens convicted of certain criminal offenses." [\[FN231\]](#) Additionally, the IIRIRA included similar provisions amending INA § 242 which eliminate judicial review of final orders of removal against certain groups of disfavored aliens. [\[FN232\]](#) Before the AEDPA **\*206** took effect, aliens had the right, under the INA, to petition federal courts with a writ of habeas corpus. [\[FN233\]](#) Judicial review of discretionary decisions was especially important because discretionary proceedings were intended "to reconcile the rigid categories of the immigration laws with the claims of compassion in individual cases." [\[FN234\]](#) The elimination of judicial review by an Article III court leaves legal long-term aliens' constitutionally protected liberty interest "unprotected from arbitrary and unjust deportation determinations." [\[FN235\]](#)

### **\*207** V. CONCLUSION

The 1996 amendments to the INA, which resulted from the anti-immigration sentiment in America today, [\[FN236\]](#) are designed specifically to target criminal aliens. [\[FN237\]](#) In light of the harsh immigration consequences wrought by these changes, it is imperative that criminal defense attorneys become aware of the immigration status of their clients, and the immigration issues involved in each criminal case. [\[FN238\]](#) Armed with an understanding of the experience of immigration, and an understanding of the basic elements of immigration law, criminal defense attorneys will be more competent advocates capable of providing truly zealous representation.