CHARGES OF REMOVABILITY

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BURDENS OF PROOF

This section applies to removal proceedings under INA § 240 only. It is inapplicable to deportation proceedings under former INA § 242(b) and exclusion proceedings under former INA § 236.

A. Burden of Proof

The burden of proof necessary to sustain a charge of removability varies based upon whether the respondent in removal proceedings has been admitted to the United States. INA §§ 240(c)(2)-(3); 8 C.F.R. § 1240.8(a)-(c).[1]

1. "Admitted Aliens"[2]

The Department of Homeland Security ("DHS") bears the burden of establishing by clear and convincing evidence that a noncitizen who has been admitted to the United States is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

a. Who is an "Admitted Alien?"

An "admitted alien" is a noncitizen who lawfully enters the United States after inspection and authorization by an immigration officer. INA § 101(a)(13)(A). Compliance with substantive legal requirements for admission is not determinative of whether a noncitizen "lawfully entered" the United States. Matter of Quilantan, 25 I&N Dec. 285, 292-93 (BIA 2010). Rather, a "lawful entry" requires only "procedural regularity" in the manner of entering. Quilantan, 25 I&N Dec. at 292-93. Refugees and K visa holders who lawfully enter the United States are considered "admitted aliens" even though their admission is "conditional." Matter of D-K-, 25 I&N Dec. 761, 768-69 (BIA 2012) (citing Matter of Sesay, 25 I&N Dec. 431, 432 (BIA 2011)). A grant of asylum does not constitute an "admission" to the United States unless it is pursuant to a "final agency order." Matter of V-X-, 26 I&N Dec. 147, 151-54 (BIA 2013); Tanov v. INS, 443 F.3d 195, 201 (2d Cir. 2006) ("Without the BIA's affirmance . . . an IJ's determination granting asylum is not a final agency order."); but see Matter of S-A-, 22 I&N Dec. 1328, 1337 (BIA 2000) (ordering that the respondent be "admitted to the United States as an asylee").[3]

Adjustment of status constitutes an admission. See, e.g., Matter of Chavez-Alvarez, 26 I&N Dec. 274, 276-78 (BIA 2014), rev'd on other grounds, 783 F.3d 478 (3d Cir. 2015); Matter of Rodriguez, 25 I&N Dec. 784, 789 (BIA 2012) ("While we have acknowledged that adjustment of status does not fit within the statutory definition of the term "admission" set forth at section

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[1] "[I]f a criminal conviction as charged as a ground of removability or was known to the Immigration Judge at the time cancellation of removal was granted under section 240A(a) of the [INA], . . . that conviction cannot serve as the sole factual predicate for a charge of removability in subsequent removal proceedings." Matter of Voss, 28 I&N Dec. 107, 111 (BIA 2020).

[2] The term "alien" is no longer used in EOIR decisions unless quoting a statute, regulation, legal opinion, court order, or settlement agreement.

[3] INA § 101(a)(47)(B) defines a final order as: "(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."

101(a)(13)(A) of the Act, we have nevertheless been constrained to treat adjustment as an admission in order to preserve the coherence of the statutory scheme and avoid absurdities."); Matter of Alyazji, 25 I&N Dec. 397-404 (BIA 2011). Thus, a noncitizen who attains lawful permanent resident status through adjustment of status is an admitted alien even if he entered the United States without inspection. Matter of Rosas-Ramirez, 22 I&N Dec. 616, 623 (BIA 1999). However, in some limited circumstances, noncitizens lawfully admitted for permanent residence who depart the United States and seek to reenter may be regarded as applicants for admission rather than as "admitted aliens." See INA § 101(a)(13)(C); see also infra at § A.2.a.

A noncitizen who is paroled into the United States pursuant to INA § 212(d)(5) or permitted to land temporarily as a noncitizen crewman is *not* considered to have been admitted. INA §§ 101(a)(13)(B), 212(d)(5); 8 C.F.R. § 1001.1(q). In addition, a noncitizen who enters the United States under a false claim of United States citizenship has not been "inspected," Quilantan, 25 I&N Dec. at 293 (citing Reid v. INS, 492 F.2d 251, 255 (2d Cir. 1974)), and thus is not an "admitted alien" as defined in INA § 101(a)(13)(A). Matter of Pinzon, 26 I&N Dec. 189 (BIA 2013).

2. "Arriving Aliens"

An "arriving alien" bears the burden of proving that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b).

b. Who is an "Arriving Alien?"

An "arriving alien" is:

> [A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. § 1001.1(q).

A noncitizen lawfully admitted for permanent residence is *not* regarded as an applicant for admission into the United States, and thus cannot be considered an "arriving alien," unless the noncitizen: (i) has abandoned or relinquished LPR status; (ii) has been absent from the United States for a continuous period of more than 180 days; (iii) has engaged in illegal activity after departing the United States; (iv) has departed the United States while under removal or extradition proceedings; (v) has committed an offense identified in INA § 212(a)(2), unless he has since been granted relief under INA §§ 212(h) or 240A(a); or (vi) is attempting to enter the United States without inspection or has not been admitted. INA § 101(a)(13)(C). DHS bears the burden to prove by clear and convincing evidence that one or more of these statutory exceptions apply. Matter of Rivens, 25 I&N Dec. 623, 625-27 (BIA 2011); see also Matadin v. Mukasey, 546 F.3d 85, 90-91 (2d Cir. 2008).

A permanent resident suspected of unlawfully acquiring her status cannot be regarded as seeking admission and may not be charged under an INA § 212(a) inadmissibility ground (even though INA § 101(a)(13)(C) uses the term "lawfully admitted"), unless he can be regarded as seeking an admission under one of the six exceptions in INA § 101(a)(13)(C). Matter of Pena, 26 I&N Dec. 613, 616 (BIA 2015). Rather, such a permanent resident could only be removed under an INA § 237(a) deportability ground. Pena, 26 I&N Dec. at 619.

The phrase "illegal activity" in INA § 101(a)(13)(C)(iii) refers to "*criminal* activity as opposed to other forms of 'illegal' activity, such as torts, breaches of contracts, or noncriminal regulatory violations." Matter of Guzman Martinez, 25 I&N Dec. 845, 847 (BIA 2012) (emphasis in original). The phrase "after departing from the United States" includes illegal activity, such as "alien smuggling," that occurs during inspection at a port of entry. Guzman Martinez, 25 I&N Dec.at 848.

A returning LPR can be treated as an applicant for admission under INA § 101(a)(13)(C)(v), if the LPR commits a crime involving moral turpitude ("CIMT") before leaving the United States, is paroled into the United States for prosecution for that CIMT and is subsequently convicted of that CIMT. See Matter of Valenzuela-Felix, 26 I&N Dec. 53 (BIA 2012). At the time of parole, DHS "need not have all the evidence to sustain its burden of proving that the alien is an applicant for admission but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings." Valenzuela-Felix, 26 I&N Dec. at 53. It is unclear, however, whether DHS can treat a returning LPR as an applicant for admission if the LPR commits a CIMT after the LPR has been paroled into the United States for prosecution for a different crime. Cf. Valenzuela-Felix, 26 I&N Dec. at 60-63.

A lawful permanent resident cannot be charged as an "arriving alien" based upon his conviction of an offense identified in INA § 212(a)(2) if the conviction occurred prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Vartelas v. Holder, 132 S. Ct. 1479 (2012). Moreover, a lawful permanent resident may not be charged as an "arriving alien" based upon his conviction of an offense identified in INA § 212(a)(2) if the culpable conduct occurred prior to the enactment of IIRIRA, even if the conviction occurred after the enactment of IIRIRA. Centurion v. Sessions, 860 F.3d 69 (2d Cir. 2017). Such a noncitizen will be regarded as an "arriving alien" only if his travel abroad was "meaningfully interruptive" of his LPR status and was not "innocent, casual, and brief." See Vartelas, 132 S. Ct. at 1484, 1492; Rosenberg v. Fleuti, 374 U.S. 449, 461-62 (1963); Matter of Collado-Munos, 21 I&N Dec. 1061 (BIA 1998).

3. "Aliens Present without Admission or Parole"

In the case of a respondent charged as being in the United States without admission or parole, DHS bears the burden to prove alienage. 8 C.F.R. § 1240.8(c). Evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to overcome that presumption with a preponderance of credible evidence. Matter of Rodriguez-Tejedor, 23 I&N Dec. 153, 164 (BIA 2001); Matter of Tijerina-Villareal, 13 I&N Dec. 327, 330 (BIA 1969).

Once DHS establishes alienage, the burden shifts to the noncitizen to (1) demonstrate by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission; or (2) prove that he is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2)(A)-(B); 8 C.F.R. § 1240.8(c). A noncitizen who seeks to demonstrate that he is lawfully present in the United States pursuant to a prior admission "shall have access" to his visa or other entry document and any records and documents pertaining to his admission or presence in the United States, except records and documents considered by the Attorney General to be confidential. INA § 240(c)(2).

4. Concessions of Removability

If a respondent admits the factual allegations contained in his Notice to Appear and concedes removability as charged, an Immigration Judge ("IJ") may determine that removability has been established by the admissions of the respondent, provided that the IJ "is satisfied that no issues of law or fact remain." 8 C.F.R. § 1240.10(c). However, an IJ may not accept a concession of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by a near relative, legal guardian, or friend. 8 C.F.R. § 1240.10(c); see also Matter of M-A-M-, 25 I&N Dec. 474, 482 (BIA 2011) (incompetent respondents); but see Matter of Amaya-Castro, 21 I&N Dec. 583, 586-87 (BIA 1996) (under certain conditions, an IJ may accept an unrepresented minor respondent's admissions to factual allegations, which may be sufficient to establish removability).

When a noncitizen's attorney makes an admission as part of a tactical decision in removal proceedings, the admission is binding on the noncitizen client and may be relied upon as evidence of removability. See Roman v. Mukasey, 553 F.3d 184, 187 (2d Cir. 2009) (citing Matter of Velasquez, 19 I&N Dec. 377, 382 (BIA 1986)). An Immigration Judge "is authorized to accept a concession of removability [from a noncitizen's attorney] when that concession is not plainly contradicted by record evidence." Hoodho v. Holder, 558 F.3d 184, 193 (2d Cir. 2009); but see Salazar-Menjivar v. Holder, 401 F.App'x 574, 575 (2d Cir. 2010) (finding that IJ properly refused to allow the noncitizen to withdraw the admission of the government's factual allegations and the concession to removability made by his original lawyer, no evidence of that arrest or any subsequent statements made by the noncitizen were introduced at the proceeding before the IJ were sufficient to support the IJ's determination that removability was established).

B. Common Charges of Removability

"Admitted aliens" are charged with removability under INA § 237. All other noncitizens are charged with inadmissibility under INA § 212.

1. INA § 212—Charges of Inadmissibility

a. INA § 212(a)(2)(A)(i)(I)—Crime Involving Moral Turpitude

A noncitizen convicted of, or who admits having committed acts which constitute the essential elements of a crime involving moral turpitude, or an attempt or conspiracy to commit such a crime, is inadmissible. INA § 212(a)(2)(A)(i)(I). A noncitizen who has been convicted of soliciting a CIMT is inadmissible under INA § 212(a)(2)(A)(i)(I), even though "the inadmissibility ground expressly references attempt and conspiracy offenses," because "a statute's inclusion of some generic offenses, such as attempt or conspiracy, does not indicate Congress' intent to exclude other generic crimes like solicitation from the statute's reach." Matter of Roma, 26 I&N Dec. 743, 747 (BIA 2016).

When determining whether a prior conviction is categorically a CIMT, the court must apply the categorical approach, focusing solely on whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic version of the enumerated crime, while ignoring the particular facts of the case. See Mathis v. United States, 136 S. Ct. 2243, 2257 (2016); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013); Matter of Nemis, 28 I&N Dec. 250 (BIA 2021). For a guide on how to properly conduct a categorical, modified categorical, circumstance specific, and realistic probability analysis, please reference the "Analysis of Criminal Convictions" document.

i. Exceptions

I. Petty Offense Exception

A crime involving moral turpitude does not render a respondent inadmissible if: (1) he or she committed only one crime involving moral turpitude, (2) the maximum penalty possible for the crime did not exceed imprisonment for one year,[4] and (3), the noncitizen was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). INA § 212(a)(2)(A)(ii)(II). The "petty offense exception" is available to a person with more than one petty offense if only one crime constitutes a CIMT. See Matter of Garcia-Hernandez, 23 I&N Dec. 590, 594-95 (BIA 2003). The maximum sentence possible for an offense, rather than the standard range of sentencing, determines a noncitizen's eligibility for the "petty offense exception." Matter of Ruiz-Lopez, 25 I&N Dec. 551 (BIA 2011).

[4] See Matter of Nemis, 28 I&N Dec. 250, 251 n. 2 (BIA 2021) (a respondent convicted of conspiracy to commit visa fraud under 18 U.S.C. §§ 371 and 1546(a) (2012) is not eligible for the petty offense exception because a "conviction under U.S.C § 1546(a), is not punishable as a misdemeanor. Therefore, the maximum penalty under 18 U.S.C. § 371 exceeds one year, such that the petty offense exception does not apply").

II. Youth

A crime involving moral turpitude does not render a respondent inadmissible if: (1) the offense was committed when the noncitizen was under eighteen years of age, and (2) was committed (and the noncitizen was released from any confinement to a prison or correctional institution imposed for the crime) more than five years before the date of application for a visa, other documentation, or application for admission to the United States. INA § 212(a)(2)(A)(ii)(I).

An adjudication of "youthful trainee" status pursuant to section 762.11 of the Michigan Compiled Laws is a "conviction" under section 101(a)(48)(A) of the Act because such an adjudication does not correspond to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (2006). Matter of V-X-, 26 I&N Dec. 147 (BIA 2013); Matter of Fajardo Espinoza, 26 I&N Dec. 603 (BIA); see also Matter of Devison, 22 I&N Dec. 1362 (BIA 2000).

III. Purely Political Offense

A crime that involves moral turpitude will not render a noncitizen inadmissible if it is a "purely political offense." INA § 212(a)(2)(A(i)(I). The term "purely political offense" may include fabricated charges and convictions predicated on repression of racial, political and religious minorities. Matter of O'Cealleagh, 23 I&N Dec. 976, 980 (BIA 2006). However, where there is evidence that a noncitizen, in fact, committed a crime, he or she must establish, among other requirements, that his or her actions were "completely or totally" motivated by political reasons. O'Cealleagh, 23 I&N Dec. at 981.

ii. CIMT Definition[5]

The term "moral turpitude" generally refers to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons, or the duties owed to society in general. Matter of Torres-Varela, 23 I&N Dec. 78, 83 (BIA 2001); Matter of Tran, 21 I&N Dec. 291, 292-93 (BIA 1996); Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006); Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989). Moral turpitude requires "reprehensible conduct and a culpable mental state." Matter of Hernandez, 26 I&N Dec. 397, 398 (BIA 2014); see also Matter of Silva-Trevino, 26 I&N Dec. 826, 828 (BIA 2016). Although reprehensible conduct and scienter are the two hallmarks of moral turpitude, the requisite conduct and mental state will differ slightly for each of the following categories. Even though scienter is a hallmark of moral turpitude, the BIA held that a sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young—that is, under 14 years of age—or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child. See Matter of Jimenez-Cedillo, 27 I&N Dec. 1, 7 (BIA 2017).

[5] See Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006), for a discussion on the meaning of "moral turpitude."

iii. Categories of CIMT

I. Fraud and False Statements

Crimes containing an intent to defraud as an essential element have "always been regarded as involving moral turpitude." Jordan v. DeGeorge, 71 S. Ct. 703 (1951); Matter of M-, 8 I&N Dec. 535 (BIA 1960). However, a crime that does not include intent to defraud as an essential element can constitute a crime of moral turpitude if it is "inherently fraudulent." See Matter of Kochlani, 24 I&N Dec. 128, 131 (BIA 2007); Matter of Flores, 17 I&N Dec. 225, 229 (BIA 1980). For example, the Board has found that fraud is inherent in the crime of trafficking counterfeit goods because the offense (1) involved a fraudulent item, and (2) required proof of an intent to traffic and knowledge that the items were counterfeit. Kochlani, 24 I&N Dec. at 131; see also Matter of Zaragoza-Vaquero, 26 I&N Dec. 814, 817 (2016) (finding that criminal copyright infringement is closely analogous to the theft and fraud crimes that the BIA has consistently held are crimes involving moral turpitude); Matter of K-, 7 I&N Dec. 178 (BIA 1956) (offense that requires possession of molds of U.S. currency implicitly contained "intent to defraud" element) rev'd in part on other grounds by Flores, 17 I&N Dec. at 230; Popoff v. Beimer, 79 F.2d 513 (2d Cir. 1935) (aiding a noncitizen in committing fraud is inherently fraudulent).

The BIA has held conspiracy to commit visa fraud in violation of 18 U.S.C. §§ 371 and 1546(a)[6] is a crime involving moral turpitude under the modified categorical approach. Matter of Nemis, 28 I&N Dec. 250, 258 (BIA 2021) (holding that a conviction in violation of "phase four" of 18 U.S.C. § 1546(a), involving the use of fraudulent documents, constitutes a CIMT). Further, the BIA clarified its prior decision in Matter of Serna, stating that—unlike the specific subsection of the respondent's conviction in Matter of Nemis—"possessing with no illegal use or intent to illegally use an altered or counterfeit immigration document is not morally turpitudinous." Id. at 258–59;[7] see Matter of Serna, 20 I&N Dec. 579 (BIA 1992).

In cases involving fraud of the government, the crime involves moral turpitude even if the government is not deprived of money or property; it is enough that the offense "impair or obstruct an important function of a department of the government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means." Matter of Flores, 17 I&N Dec. 225, 229 (BIA 1980); see also Matter of Tejwani, 24 I&N Dec. 97, 99 (BIA 2007); Matter of Jurado, 24 I&N Dec. 29, 34-35 (BIA 2006).

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[6] 18 U.S.C § 371 "criminalizes 'two or more persons[who] conspire either to commit any offense against the United States, or to defraud the United States . . . .'" Matter of Nemis, 28 I&N Dec. 250, 252 (BIA 2021). The BIA held that this statute was both "facially overbroad, since it punishes both crimes involving moral turpitude and crimes which may not include moral turpitude," and divisible between the offense clause, which may or may not involve a crime of moral turpitude, and the defraud clause, which is categorically a CIMT. Id. at 252, 254.

[7] In clarifying the divisibility of 18 U.S.C. § 1546(a), the BIA explained that its decision in Matter of Serna analyzed an outdated version of 18 U.S.C. § 1546(a)—i.e. from 1982—and at the time of the BIA's analysis of the statute, the modified categorical approach had not yet been created.

A conviction for making a false statement under 18 U.S.C § 1001(a)[8] is a crime involving moral turpitude as it requires deceit and an intent to impair the efficiency and lawful functioning of the government. Cupete v. Garland, __ F.4th __ 2022 WL 791021 (2d Cir. March 16, 2022). Likewise, a conviction for the offense of knowingly and willfully making any materially false, fictitious, or fraudulent statement to obtain a United States passport, in violation of 18 U.S.C. § 1001(a)(2), is a crime involving moral turpitude. Matter of Pinzon, 26 I&N Dec. 189 (BIA 2013).

A conviction for making a false statement in a passport application, in violation of 18 U.S.C. § 1542, is a crime involving moral turpitude. Rodriguez v. Gonzales, 451 F.3d 60 (2d Cir. 2006). The Second Circuit has found that submitting a fraudulent passport application, even when unsigned and without swearing the required oath, satisfies the elements of the 18 U.S.C. § 1542; the court observed that the statute and regulations define a passport application as a submitted form and supporting documents and statements and determined that submission occurs when a person provides those materials to a federal official for review. United States v. Gu, 8 F.4th 82, 88–90 (2d Cir. 2021). Further, the court noted that the statute does not indicate that withdrawing the application removes criminal liability. Id.

However, a conviction for misprision of a felony in violation of 18 U.S.C. § 4 is not a CIMT because misprision lacks the necessary evil intent embedded in the generic federal definition of a CIMT. See Mendez v. Barr, 960 F.3d 80, 84–85 (2d Cir. 2020)[9] ("The absence of an intent requirement from § 4 contrasts sharply with perjury and obstruction of justice—which contain intent requirements and which are CIMTs."). The Second Circuit also held that like federal misprision, second-degree money laundering under NYPL § 470.15(1)(b)(ii)(A) is not a CIMT. See Jang v. Garland, __F.4th __, No. 19-4289, 2022 WL ___ (2d Cir. 2022) (holding that the intent requirement is satisfied merely by knowledge that the financial transaction is designed to "conceal or disguise the . . . proceeds of past criminal conduct" and did not require the individual conducting the illicit transaction to act with the "evil intent" or "specific mental purpose that is inherently base, vile or depraved" needed for a CIMT.).

II. Crimes against Persons: Manslaughter, Assault, Battery and Menacing

To determine whether an assault-type crime involves moral turpitude, the court must analyze "both the state of mind and the level of harm required to complete the offense." Matter of Solon, 24 I&N Dec. 239, 242 (BIA 2007). "[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious harm is required in order to find that the crime involves moral turpitude." Id. A lesser degree of culpable mental state and resulting harm is required for offense that "necessarily involve[] aggravating factors[,]" such as "a deadly weapon[,]" or "bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer." Matter of Sanudo, 23 I&N Dec. 968, 971–72 (BIA 2006).

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[8] 18 U.S.C. § 1001(a) requires that the offender act "knowingly and willfully" in making a materially false statement, to or concealing a material fact from, the government. Cupete v. Garland, 29 F.4th 53 (2d Cir. March 16, 2022).

[9] The Second Circuit explicitly overruled the Board's holding in Matter of Mendez, 27 I&N Dec. 219 (BIA 2018), and overruled in part the Board's holding in Matter of Robles-Urrea, 24 I&N Dec. 22 (BIA 2006).

Assaults requiring "*intentional* infliction of *serious* bodily injury on another" involve moral turpitude. Sanudo, 23 I&N Dec. at 971 (emphasis in original). In Matter of Aguilar-Mendez, 28 I&N Dec. 262 (BIA 2021), the BIA followed Matter of Wu, 27 I&N Dec. 8 (BIA 2017) and held that assault by means of force likely to produce great bodily injury in violation of Cal. Penal Code § 245(a)(4) constituted a CIMT because the statute requires a culpable mental state greater than recklessness or criminal negligence, and it involves an aggravating factor that renders an assault offense under that provision reprehensible. Matter of Aguilar-Mendez, 28 I&N Dec. at 265.

In general, simple assaults do not involve moral turpitude because "they require general intent only" and many require only "de minimis…harm, such as offensive…contact." Solon, 24 I&N Dec. at 241; see also Matter of E-, 1 I&N Dec. 505, 507 (BIA 1943) (New York's former assault statute, which did not require specific intent or proof of actual physical injury, did not involve moral turpitude). However, a simple assault combined with an aggravating factor can involve moral turpitude. For example, a crime that requires the use of "a deadly weapon" will usually involve moral turpitude. Matter of Medina, 15 I&N Dec. 611, 614 (BIA 1976) aff'd sub nom. Medina-Luna v. INS, 547 F.2d 1171 (7th Cir. 1977); see also Matter of Logan, 17 I&N Dec. 367 (BIA 1980) (offense requiring physical force with a knife involved moral turpitude); Matter of Ptasi, 12 I&N Dec. 790 (BIA 1968). A crime "involving [an] aggravated assault against a peace officer, which results in bodily harm to the victim and which involves knowledge by the offender that his force is directed to an officer who is performing an official duty, constitutes a crime involving moral turpitude." Matter of Danesh, 19 I&N Dec. 669, 673 (BIA 1988); see also Matter of O-, 4 I&N Dec. 301 (BIA 1951) (crime involving assault on a police officer was not a crime involving moral turpitude because knowledge that the victim was a police officer was not necessarily an element of the offense); cf. Matter of B-, 5 I&N Dec. 538 (BIA 1953) (simple assault on a prison guard did not involve moral turpitude, even where the victim was known to be discharging official duties) modified on other grounds by Danesh, 19 I&N Dec. at 673; Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996). Similarly, a crime requiring the willful "infliction of bodily harm upon a person with whom one has . . . a familial relationship," involves moral turpitude. Matter of Tran, 21 I&N Dec. 291, 294 (BIA 1996) (involving "willful infliction of corporal injury on a spouse, cohabitant or parent of the perpetrator's child"). The crime of menacing involves moral turpitude if it requires "evil or malicious intent, and the level of threatened harm, or magnitude of menace implicit in the threat, is serious and immediate," even if the statute does not require "actual inflicted fear" or harm. Matter of J-G-P-, 27 I&N Dec. 642, 647-48 (BIA 2019) (distinguishing an Oregon statute requiring "intent to cause apprehension of *serious* physical injury" from New York's menacing statute, which requires intent to cause apprehension of mere physical injury). However, a crime requiring only "minimal nonviolent 'touching'" and no injury against a victim with whom the perpetrator had a domestic relationship did not involve moral turpitude. Matter of Sanudo, 23 I&N Dec. 968, 972-73 (BIA 2006).

Recklessness, defined as a conscious disregard of a substantial and unjustified risk that constitutes a gross deviation from the accepted standard of care, is a culpable mental state for purposes of a crime involving moral turpitude. See, e.g., Matter of Leal, 26 I&N Dec. 20, 22-23 (BIA 2012). Recklessness arising from voluntary intoxication is a culpable mental state that satisfies the corrupt scienter requirement for a crime involving moral turpitude. Leal, 26 I&N Dec. at 22-23. Notably, NYPL § 15.05 (3) permits a finding of recklessness, even where such recklessness occurs by virtue of involuntary intoxication. Leal, 26 I&N Dec. at 22-23.

Accordingly, crimes that require a reckless state of mind combined with actual death constitute crimes involving moral turpitude. See, e.g., Matter of Franklin, 20 I&N Dec. 867, 869 (BIA 1994) (interpreting a Missouri statute); Matter of Wojtkow, 18 I&N Dec. 111, 113 (BIA 1981). A reckless assault causing mere "bodily injury," however, does not involve moral turpitude. Matter of Fualaau, 21 I&N Dec. 475, 478 (BIA 1996); cf. Medina, 15 I&N Dec. at 614 (reckless assault with a weapon involves moral turpitude). Reckless conduct that places another person in "substantial risk of imminent death" involves moral turpitude, even though no actual harm is required. Leal, 26 I&N Dec. at 25.

A crime requiring only bodily harm caused by "criminal negligence," which is defined as failing "to be aware of a substantial risk" that "constitutes a gross deviation from the standard of care," does not involve moral turpitude. Matter of Perez-Contreras, 20 I&N Dec. 615, 618-19 (BIA 1992) (internal quotation marks omitted).

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Reckless manslaughter in the second degree, in violation of NYPL § 125.15 (1), involves moral turpitude. Matter of Wojtkow, 18 I&N Dec. 111, 113 (BIA 1981).

Attempted reckless assault in the second degree, in violation of NYPL §§ 110-120.05 (4), does not involve moral turpitude because "*no* mental state can be clearly discerned from" a conviction that requires an attempt to commit a crime of recklessness. Gill v. INS, 420 F.3d 82, 91-92 (2d Cir. 2005).

Assault in the third degree, in violation of NYPL § 120.00 (1), involves moral turpitude because it requires specific intent to cause physical injury and actual physical injury, which is defined as "'impairment of physical condition or substantial pain.'" Matter of Solon, 24 I&N Dec. 239, 244 (BIA 2007) (quoting NYPL § 10.00 (9)); see also Mustafaj v. Holder, 369 F.App'x 163, 167 (2d Cir. 2010). Thus, an assault in New York, by definition, goes beyond common law assault, but New York continues to criminalize conduct akin to common law assault through other sections of the penal law. Solon, 24 I&N Dec. at 243 n.5.

III. Sex Crimes

"[I]ndecent exposure is not inherently turpitudinous in the absence of lewd or lascivious intent." Matter of Cortes Medina, 26 I&N Dec. 79, 82 (BIA 2013); see also Matter of P- 2 I&N Dec. 117, 121 (BIA 1944) (indecent exposure did not involve moral turpitude where the exposure was "to arouse the sexual desires of the parties concerned or with a lewd or lascivious intent, *or whether it was because of a negligent disregard of the children's presence occasioned by physical necessity*"); Matter of Mueller, 11 I&N Dec. 268, 270 (BIA 1965) (indecent exposure conviction that did not require "any intent whatsoever" did not involve moral turpitude); cf. Matter of Lambert, 11 I&N Dec. 340 (BIA 1965) (renting a room with knowledge that it would be used for prostitution or lewdness in violation of state law involved moral turpitude). For an "offense of indecent exposure to be considered a crime involving moral turpitude under the immigration laws, the statute prohibiting the conduct must require not only the willful exposure of private parts but also a lewd intent." Cortes Medina, 26 I&N Dec. at 83. However, "the intent to receive sexual gratification, standing alone, is not evil." Efstathiadis v. Holder, 752 F.3d 591, 597 (2d Cir. 2014).

A sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young—that is, under 14 years of age—or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child. See Matter of Jimenez-Cedillo, 27 I&N Dec. 1, 7 (BIA 2017).

IV. Crimes Against Property

The Board's analysis of assault crimes, where it considers "both the state of mind and the level of harm required to complete the offense," may be instructive for analyzing crimes involving property. Matter of Solon, 24 I&N Dec. 239, 242 (BIA 2007); see also Louisaire v. Muller, 758 F. Supp. 2d 229, 237 n.4 (S.D.N.Y. 2013) (holding that NYPL § 145.00 (criminal mischief) does not involve moral turpitude because a conviction can be sustained by very slight damage to property and the statute does not require evil intent); Matter of Armando Ruiz-Lopez, 25 I&N Dec. 551, 556 (BIA 2011) (holding that under certain circumstances, moral turpitude necessarily inheres a crime requiring wanton or willful disregard for property).

The Board's decision in Matter of J-G-D-F-, 27 I&N Dec. 82, 91 (BIA 2017), provides strong support for the proposition that burglary in the second degree under INA § 140.25(2) is a crime involving moral turpitude because it proscribes unlawfully entering or remaining in a dwelling with the intent to commit a crime therein. The NYPL defines "dwelling" as "a building which is usually occupied by a person lodging therein at night." NYPL § 140.00(3); *see also Matter of V-A-K-*, 28 I&N Dec. 630 (BIA 2022). It thus contains a requirement of regular/intermittent occupancy and is sufficiently analogous to the Oregon burglary statute at issue in *J-G-D-F-* to be considered a crime involving moral turpitude as well. *See* J-G-D-F-, 27 I&N Dec. at 88.

V. Theft and Larceny

Theft or larceny offenses have been found to involve moral turpitude. See, e.g., Matter of Jurado-Delgado, 24 I&N Dec 29, 33 (BIA 2006) overruled in part by Matter of Thakker, 28 I&N Dec. 843 (BIA 2024). The Board has found an offense to qualify as a categorical crime involving moral turpitude ("CIMT") if it "embodies a mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." Matter of Diaz-Lizarraga, 26 I&N Dec. 847, 853-54 (BIA 2016) (finding that the traditional dichotomy between permanent and temporary takings is anachronistic in light of modern penal codes, most of which no longer require an intent to permanently deprive an owner of property as an explicit statutory requirement). However, the Second Circuit has held the BIA's holding in Diaz-Lizarraga cannot be applied retroactively to larceny crimes committed prior to that decision. Obeya v. Sessions, 884 F.3d 442, 449 (2d Cir. 2018); see Ottey v. Barr, 965 F.3d 84, 95 (2d Cir. 2020) (stating that Obeya and Diaz-Lizarraga did not apply to offenses dealing "with possession of stolen property").

The statute at issue in Diaz-Lizarraga required the intent "to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment

of any reward or other compensation[,] or to transfer or dispose of it so that it is unlikely to be recovered." Diaz-Lizarraga, 26 I&N Dec. at 848. The Board found that such an offense qualifies as a categorical crime involving moral turpitude. Id. at 854-55; see also Matter of Obeya, 26 I&N Dec. 856, 859 (BIA 2016) ("[A]n offense qualifies as a categorical crime involving moral turpitude if it 'embodies a mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.'" (quoting Diaz-Lizarraga)). Theft that does not require an intent to permanently deprive the victim of property is categorically not a CIMT. Matter of Thakker, 28 I&N Dec. 843 (BIA 2024) (holding that a retail theft offense that criminalizes less than permanent takings does not involve an intent to permanently deprive a victim of their property and is inconsistent with the categorical approach) (overruling Matter of Jurado, 24 I&N Dec. 29 (BIA 2006)).

Petit larceny in violation of NYPL § 155.25, "which requires proof of the intent to permanently or virtually permanently deprive an owner of property," is categorically a crime involving moral turpitude. Matter of Obeya, 26 I&N Dec. at 861. A conviction pursuant to NYPL § 155.25 that occurred before the Board's decision in Diaz-Lizarraga on November 16, 2016, is not a crime involving moral turpitude. Obeya v. Sessions, 884 F.3d 442, 450 (2d Cir. 2018). The Second Circuit further clarified that N.Y. Penal Law § 155.25 is categorically a CIMT because under NYPL § 155.00(4)(b), an intent to "appropriate" property requires an intent to deprive the owner of his or her property either permanently or under circumstances where the owner's property rights are substantially eroded. Ferreiras v. Garland, ---F.4th ---, No. 19-4111, 2022 WL 480209 at *1 (2d Cir. 2022).

Notably, a conviction for larceny in the form of "defrauding a public community" constitutes a crime involving moral turpitude regardless of whether a permanent taking was intended because the intent to *defraud* involves moral turpitude. Mendez v. Mukasey, 547 F.3d 345, 350-51 (2d Cir. 2008).

VI. Receipt of Stolen Property

The BIA has interpreted "receipt of stolen property" broadly to include "the category of offenses involving knowing receipt, possession or retention of property from its rightful owner." Matter of Bahta, 22 I&N Dec. 1381, 1391 (BIA 2000) (finding Nevada's crime of "receipt of stolen property" is a crime of moral turpitude). Receipt of stolen property is a "distinct and separate offense" from theft. Matter of Cardiel-Guerrero, 25 I&N Dec. 12, 14 (BIA 2009); see Ottey v. Barr, 965 F.3d 84, 95 (2d Cir. 2020) (stating that Obeya and Diaz-Lizarraga affected larceny offenses and did not apply to offenses dealing "with offenses of possession of stolen property"). Nonetheless, the Board has long held that criminal possession of stolen property is a crime involving moral turpitude. See, e.g., Matter of Salvail, 17 I&N Dec. 19 (BIA 1979). The Second Circuit has affirmed the Board's principle. For example, the Second Circuit has held that criminal possession of stolen property in the third and fifth degrees is categorically a crime involving moral turpitude because both definitions involve a corrupt scienter. See Michel v. INS, 206 F.3d 253 (2d Cir. 2000) (holding that criminal possession of stolen property in the fifth degree is a CIMT); Ottey, 965 F.3d at 95 (comparing to Michel and holding that criminal possession of stolen property in the third degree requires the same *mens rea* as the statute in Michel, and is thus a CIMT).

VII. Controlled Substance Crimes

The Second Circuit and the BIA have consistently held that "evil intent is inherent in the illegal distribution of drugs and that 'participation in illicit drug trafficking is a crime involving moral turpitude.'" Matter of Gonzales-Romo, 26 I&N Dec. 743, 746 (BIA 2016); see Matter of Khourn, 21 I&N Dec. 1041, 1046–47 (BIA 1997); see also Carmona v. Ward, 576 F.2d 405, 411–12 (2d Cir. 1978) ("Social harm in drug distribution is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse."); Mota v. Barr, 971 F.3d 96 (2d Cir. 2020) (applying the categorical approach to a charge of felony possession of narcotics with intent to sell, in violation of Conn. Gen. Stat. § 21a-277(a)(1)).

Solicitation to possess marijuana for sale, in violation of Arizona Revised Statutes §§ 13-1002, 13-3405(A)(2), is a CIMT. Matter of Gonzales-Romo, 26 I&N Dec. 743, 743, 746 (BIA 2016).

VIII. Inchoate Crimes

If an offense involves moral turpitude, then an attempt or conspiracy to commit that offense also involves moral turpitude. Meyer v. Day, 54 F.2d 336, 337 (2d Cir. 1931); Matter of Romo, 26 I&N Dec. 743, 746 (BIA 2016) ("[W]ith respect to moral turpitude, there is no meaningful distinction between an inchoate offense and the completed crime."); Matter of Vo, 25 I&N Dec. 426, 426 (BIA 2011) (holding that where the substantive offense underlying a noncitizen's conviction for an attempt is a crime involving moral turpitude, the noncitizen is considered to have been convicted of a crime involving moral turpitude for purposes of INA § 237(a)(2)(A), even though that section makes no reference to attempt offenses).

However, attempted reckless assault in the second degree, in violation of NYPL §§ 110-120.05(4), does not involve moral turpitude because "*no* mental state can be clearly discerned from" a conviction that requires an attempt to commit a crime of recklessness. Gill v. INS, 420 F.3d 82, 91-92 (2d Cir. 2005).

The offense of accessory after the fact is a crime involving moral turpitude, but only if the underlying offense is such a crime. Matter of Rivens, 25 I&N Dec. 623, 629 (BIA 2011).

IX. Miscellaneous Crimes

"Sponsoring or exhibiting an animal in an animal fighting venture" in violation of 7 U.S.C. § 2156(a)(1) is categorically a crime involving moral turpitude because it "is contrary to the most basic moral standards that exist in our civilized society." Matter of Ortega-Lopez, 27 I&N Dec. 382, 391 (BIA 2018); *see also* Matter of Ortega-Lopez, 26 I&N Dec. 99, 101-103 (BIA 2013).

Abuse of a corpse, in violation of Arkansas Code Annotated ("ACA") § 5-60-101, does not categorically constitute a CIMT. (b)(6) v. Garland, No. (b)(6) 2023 WL 4067358 (2d Cir. (b)(6) (b)(2023) (explaining that the statute contains broad language containing language that criminalizes conduct that is not inherently base, vile, or depraved).

b. INA § 212(a)(2)(A)(i)(II)—Controlled Substance

A noncitizen "convicted of, or who admits having committed acts which constitute the essential elements of…a violation (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 102 of the Controlled Substance Act (21 U.S.C. 802) is inadmissible." INA § 212(a)(2)(A)(i)(II); Chery v. Garland, _ F. 4th_, 2021 WL 4805217 at *3 (2d Cir. Oct. 15, 2021).

The Court must apply the categorical approach to determine whether a state drug conviction renders a respondent removable. Chery v. Garland, _F.4th_, 2021 WL 4805217 at *2 (2d Cir. Oct. 15, 2021). Where a noncitizen has been convicted of violating a State drug statute that includes a controlled substance that is not on the Federal controlled substances schedules, he or she must establish a realistic probability that the State would actually apply the language of the statute to prosecute conduct involving that substance in order to avoid the immigration consequences of such a conviction. Matter of Navarro Guadarrama, 27 I&N Dec. 560, 560 (BIA 2019) (reaffirming Matter of Ferreira, 26 I&N Dec. 415 (BIA 2014)).

The Federal definition of "marijuana" at 21 U.S.C. § 802(16) was amended on December 20, 2018. Matter of Navarro Guadarrama, 27 I&N Dec. at 561 n.2. While the definition remained the same, the statute was divided into two parts as follows:

> [S]ubsection (a), which defines marijuana, and subsection (B), which specifies what the term marijuana does not include. In addition to the mature stalks and other parts of the plant that were previously excluded, § 802(16)(B) now also provides that marijuana does not include a certain type of "hemp."

Id.

c. INA § 212(a)(2)(B)—Multiple Convictions Not Arising Out of Single Scheme

An "alien convicted of 2 or more offenses . . . for which the aggregate sentences to confinement were 5 years or more" is inadmissible. INA § 212(a)(2)(B). It is irrelevant "whether the conviction was in a single trial or whether the offenses arose from a single scheme of conduct and regardless of whether the offense involved moral turpitude." INA § 212(a)(2)(B). However, "purely political offenses" are excepted. INA § 212(a)(2)(B).

d. INA § 212(a)(2)(C)—Controlled Substance Trafficker

"Any alien who . . . the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance" is inadmissible. INA § 212(a)(2)(C). The determination of whether an applicant is inadmissible under INA § 212(a)(2)(C), must be based upon "reasonable, substantial, and probative evidence." Matter of Rico, 16 I&N Dec. 181, 185 (BIA 1977); see also Garces v. U.S. Attorney General, 611 F.3d 1337, 1347 (11th Cir. 2010). A conviction is not necessary to find "reason to believe" the person is a trafficker; "reason to believe" is similar to a "probable cause" standard. Matter of Rico, 16 I&N Dec. 181, 184 (BIA 1977); Matter of U-H-, 23 I&N Dec. 355, 356 (BIA 2002) (equating "reasonable ground to believe" a person is engaged in terrorist activity with probable cause).

The INA does not define the term "illicit trafficker." See INA § 212(a)(2)(C). However, the former INA § 212(a)(23) provided that noncitizens were excludable if, among other things, they were "illicit traffickers." Matter of R-H-, 7 I&N Dec. 675, 677 (BIA 1958) (quoting former INA § 212(a)(23).[10] In this excludability context, the phrase "illicit trafficker" does not require "a continuous and organized trade." Matter of P-, 5 I&N Dec. 190, 192 (BIA 1953). Indeed, a noncitizen is an "illicit trafficker," if he or she attempts one time to smuggle drugs into the United States. See Matter of Favela, 16 I&N Dec. 753, 755 (BIA 1979); Rico, 16 I&N Dec. at 186; Matter of P-, 5 I&N Dec. at 192. A noncitizen is also an "illicit trafficker," if the noncitizen, "was a knowing and conscious participant in the illicit traffic in narcotic drugs." R-H-, 7 I&N Dec. at 676, 678 (involving the noncitizen receiving 15-20 marijuana cigarettes on three occasions and acting as a middleman for a dealer and his customers).

These interpretations comport with the Board's interpretation of the phrase "illicit trafficking" in the context of removability under INA § 237(a)(1)(A), which refers to noncitizens who "at the time of entry or adjustment of status [were] . . . inadmissible." In this context, the Board, relying upon the ordinary definition of the words "illicit" and "traffic," concluded that anyone with a "conviction involving the unlawful trading or dealing of any controlled substance" is a drug trafficker. Matter of Davis, 20 I&N Dec. 536, 541 (BIA 1992) modified on other grounds by Matter of Yanez-Garcia, 23 I&N Dec 390 (BIA 2002). Further, because the definition of "illicit traffic" is "[c]ommerce; trade; sale of merchandise . . .," the Court noted that "[t]he offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of "illicit trafficking." Davis, 20 I&N Dec. at 541 (quoting Black's Law Dictionary, 1340 (5th ed. 1979)).

The Board found that the offense of traveling in interstate commerce with the intent to distribute the proceeds of an unlawful drug enterprise, in violation of 18 U.S.C. § 1952(a)(1)(A), is not an "aggravated felony" under INA § 101(a)(43)(B), because the offense is neither a "drug trafficking crime" under 18 U.S.C. § 924(c) nor "illicit trafficking in a controlled substance." Matter of Flores, 26 I&N Dec. 155, 156-57 (BIA 2013). "Although distribution of proceeds is an integral part of a drug organization's business, such conduct is too distinct from the actual physical distribution of drugs to be considered an "illicit trafficking" aggravated felony under the interpretation adopted in Matter of Davis." Flores, 26 I&N Dec. at 157.

"Illicit trafficking" offenses contain no "*mens rea* element with respect to knowledge of the illicit nature of the controlled substance, at least when accompanied . . . by an affirmative defense permitting a defendant to show that he or she had no such awareness, as well as by a requirement that the defendant be aware of the presence of the substance (apart from its illegality)." Matter of L-G-H-, 26 I&N Dec. 365, 371, 373 (BIA 2014) (finding that section 893.13(1)(a)(1) of the Florida Statutes is an aggravated felony under the illicit trafficking clause of section 101(a)(43)(B) of the INA).

[10] Notably, in construing the phrase "illicit trafficker," Matter of P- and Matter of R-H- both rely on other portions of the statutory text of former INA § 212(a)(23). This language does not exist in INA § 212(a)(2)(C). However, not every case relies on that language, and given that the phrase is not defined elsewhere, these cases can reasonably inform the Court's interpretation of INA § 212(a)(2)(C).

The Board distinguishes between simple possession and importing drugs into the U.S. for one's own recreational use, which renders a person a "drug trafficker." See Matter of McDonald & Brewster, 15 I&N Dec. 203, 205 (BIA 1975) (finding that applicants who entered the U.S. with six marijuana cigarettes for personal use were not excludable under the INA).

Criminal Possession of a Controlled Substance in the Third Degree - NYPL § 220.16(1)

i. Categorical match to the CSA

New York law defines a "narcotic drug" as "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." NYPL § 220.00(7). Moreover, a "controlled substance" consists of "any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marihuana, but including concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of such law." NYPL § 220.00(5). Thus, "narcotic drugs" as defined in NYPL § 220.16(1) are, in fact, "controlled substances," albeit a more limited list found only within four designated sub-schedules of New York's five schedules of controlled substances. *See* NYPL §§ 220.16(1), 220.00(17); New York Public Health Law (NYPHL) § 3306.

As a whole, the New York and federal schedules of controlled substances do not match because "chorionic gonadotropic" is a controlled substance listed on the New York schedule, but it is not listed on the federal schedule in the CSA. NYPL § 220.00; NYPHL § 3306, Schedule III(g); 21 U.S.C. § 802 (6); see also Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017). Despite this mismatch, however, NYPL § 220.16(1) does not define "narcotic drug" more broadly than 21 U.S.C. § 802. First, "chorionic gonadotropin" is not classified as a "narcotic drug" under New York law because it is listed under Schedule III(g) and not in one of the four designated sub-schedules for "narcotic drugs." *See* NYPL §§ 220.00 (6), (17); NYPHL § 3306. Second, the four designated sub-schedules that define "narcotic drugs" under New York law only contain substances that categorically match the federally controlled substances that are listed in the CSA.

ii. Felony under the CSA

A person commits a felony under the CSA when he, *inter alia*, "knowingly or intentionally . . . possess[es] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). A person violates NYPL § 220.16(1), a class B felony, "when he knowingly and unlawfully possesses . . . a narcotic drug with intent to sell it." The federal definition of "distribute" has been held to be analogous to the New York definition of "sell." Pascual v. Holder, 723 F.3d 156, 159 (2d Cir. 2013).

Under federal law, "distribute" means to "deliver," which is "the actual, constructive, or attempted transfer of a controlled substance . . . ." 21 U.S.C. § 802(8), (11). For purposes of NYPL § 220.16(1), to "sell" means to "sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL § 220.00(1). In Pascual, the Second Circuit held that an "offer to sell" is equivalent to an attempted transfer and therefore that the New York definition of "sell" is a categorical match with the CSA definition of "distribute." 723 F.3d at 159. The CSA similarly

criminalizes possession with intent to distribute, and "distribute" under the CSA was held to be analogous to "sell" under New York law by the Pascual Court. *Id.*

The four designated sub-schedules that define "narcotic drugs" under NYPL §220.00(7) only contain substances that categorically match the federally controlled substances that are listed in the CSA. See also NYPL § 220.16(1). Therefore, a conviction under NYPL §220.16(1) is a felony under the CSA because the New York and federal laws are a categorical match. Additionally, the maximum term of imprisonment authorized by the statute of conviction is more than one year. See NYPL § 70.00(2)(b) (the maximum term of incarceration authorized under New York law for a class B felony is twenty-five years).

e. INA § 212(a)(3)(A)—Security and Related Grounds

Any noncitizen whom a consular officer or the Attorney General knows, or has reasonable ground to believe, "seeks to enter the United States to engage solely, principally, or incidentally in (i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information, (ii) any other unlawful activity, 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 inadmissible." INA § 212(a)(3)(A). Since this statutory language refers to the intent to engage in future conduct, an individual's prior convictions do not render him or her *per se* inadmissible under this section. See In Re (b)(6), 2008 WL 2401104 (BIA (b)(6), 2008).

The heading for this inadmissibility ground is the same as that of section 237(a)(4). However, the legislative history suggests that the provision for inadmissibility covers a broader range of unlawful activity than the deportation ground, which Congress intended to limit to conduct threatening either public safety or national security. See Matter of Tavarez Peralta, 26 I&N Dec. 171, 176 (BIA 2013).

f. INA § 212(a)(3)(B)—Terrorist Activities

The following noncitizens are inadmissible under INA § 212(a)(3)(B)(i): Noncitizens who (1) have "engaged in terrorist activities," (2) "a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, [are] engaged in or [are] likely to engage after entry in any terrorist activity . . ." (3) have "under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity," (4) are "representative[s] . . . of a terrorist organization" or "a political, social, or other group that endorses or espouses terrorist activity," (5) "is a member of a terrorist organization described in" INA § 212(a)(3)(B)(vi)(I) or (II), (6) is a member of a terrorist organization described in" INA § 212(a)(3)(B)(vi)(III), "unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization," (7) "endorses or espouses terrorist activity or persuades other to endorse or espouse terrorist activity or support a terrorist organization," (8) "has received military-type training (as defined by [18 U.S.C. 2339D(c)(1)] from or on behalf of any organization that, at the time the training was received, was a terrorist organization as defined by [INA § 212(a)(3)(B)(vi)]," or (9)

"is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years." INA § 212(a)(3)(B).

A noncitizen who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity. *Id.*

i. Definitions

The term "terrorist organization" has three definitions. INA § 212(a)(3)(B)(vi). First, a terrorist organization can be formally designated by the Secretary of State, pursuant to INA § 219. INA § 212(a)(3)(B)(vi)(I) ("Tier I Organization"). Second, a terrorist organization can be designated upon publication in the Federal Register. INA § 212(a)(3)(B)(vi)(II) ("Tier II Organization"). Third, a terrorist organization can also refer to "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, ['terrorist activity']." INA § 212(a)(3)(B)(vi)(III) ("Tier III Organization").

The Department of State can also remove organizations from the list of Tier I and II Organizations. For example, on April 29, 2004, the Secretary of State designated the Maoists as a Tier II Organization. See Press Statement, U.S. Department of State, Additions to the Terrorism Exclusion List, Adam Ereli, Apr. 29, 2004, http://2001-2009.state.gov/r/pa/prs/ps/2004/31943.htm (last accessed Nov. 6, 2019). However, on September 6, 2012, the State Department officially announced that it had delisted the Maoists from the TEL. See Media Note, U.S. Department of State, Delisting of the Communist Party of Nepal (Maoists), Sep. 6, 2012, https://2009-2017.state.gov/r/pa/prs/ps/2012/09/197411.htm (last accessed Nov. 6, 2019). Although the statutory language is somewhat ambiguous, the most natural reading of INA § 212(a)(3)(B) is that the organization's designation at the time of the noncitizen's alleged involvement is controlling. Accordingly, a respondent who provided material support to the Maoists anytime outside the time period of April 29, 2004, through September 6, 2012, cannot be found to have provided material support to a designated Tier II organization. However, it may be possible for an Immigration Judge to find that the Maoists were a Tier III organization outside that time period.

"Terrorist activity" is defined as any activity that (1) is unlawful in the country where it was committed or would be unlawful if committed in the United States and (2) involves any of the following: "highjacking or sabotage of any conveyance"; "[t]he seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person . . . to do or abstain from doing any act. . . "; "[a] violent attack upon an internationally protected person" (as defined in 18 U.S.C. 1116(b)(4)) "or upon the liberty of such a person"; "an assassination"; the use of a biological, chemical, nuclear device, explosive, firearm or "other weapon or dangerous device . . . with intent to endanger . . . the safety of one or more individuals or to cause substantial damage to property"; or "a threat, attempt, or conspiracy to do any of the foregoing." INA § 212(a)(3)(B)(iii)(I)-(VI).[11]

[11] Consideration of whether the noncitizen's actions would have been unlawful under either the country where the action was committed or the U.S. is a necessary element of the weapons bar; failure to make such a consideration may serve as the basis for a finding of arbitrary and capriciousness under the Administrative Procedures Act ("APA"). See Kakar v. United States Citizenship and Immigration Services, __ F.4th __ 2022 WL 893399 (2d Cir. March 28, 2022).

A person can "engage" in a terrorist activity in six different ways. See INA § 212(a)(3)(B)(iv)(I)-(VI).[12]

ii. INA § 212(a)(3)(B)(iv)(IV)—Solicitation of Funds

A noncitizen "engages in terrorist activity" if he or she "solicits funds or other things of value" for a "terrorist activity" or for a "terrorist organization." INA § 212(a)(3)(B)(iv)(IV)(aa)-(bb). However, a noncitizen does not "engage in terrorist activity" if the noncitizen solicits for a Tier III Organization and "can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was terrorist organization." INA § 212(a)(3)(B)(iv)(IV)(cc).

iii. INA § 212(a)(3)(B)(iv)(V)—Solicitation of an Individual

A noncitizen "engages in terrorist activity" if he or she solicits "any individual" (1) to engage in conduct that amounts to terrorist activity or (2) for membership in a "terrorist organization." INA § 212(a)(3)(B)(iv)(V)(aa)-(cc). However, a noncitizen does not "engage in terrorist activity" if the noncitizen solicits an individual for membership in a Tier III Organization and "can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(iv)(V)(cc).[13]

iv. INA § 212(a)(3)(B)(iv)(VI)—Material Support

A noncitizen "engages in a terrorist activity" by committing "an act that the actor knows, or reasonably should know, affords material support" (1) "for the commission of a terrorist activity," (2) "to any individual who the actor knows, or reasonably should know, has committed

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There, the Second Circuit found that USCIS's decision was arbitrary and capricious under the APA for, in part, failing to consider the noncitizen's affirmative defense of duress to the crime, which would have negated the unlawfulness element of the weapons bar. Id.; INA § 212(A)(3)(B)(iii). Without making a finding on the merits, the Second Circuit suggested that the noncitizen had a "colorable duress defense," which may or may not negate the unlawfulness element required. Id. at *14.

[12] A noncitizen can "engage" in a terrorist activity by (1) committing or inciting another to commit a terrorist activity under circumstances indicating an intention to cause death or serious bodily injury; (2) preparing or planning a terrorist activity; (3) gathering information on potential targets for a terrorist activity; (4) soliciting things of value for (a) a terrorist activity or (b) a terrorist organization; (5) soliciting any individual to engage in (a) activities described in this section or (b) for membership in a terrorist organization; or (6) committing an act that the actor knows, or reasonably should know, affords material support. INA § 212(a)(3)(B)(iv)(I)-(VI).

[13] In determining whether a noncitizen knew or reasonably should have known that he was soliciting individuals for membership in a terrorist organization, the Sixth Circuit has considered the noncitizen's age when he became involved with the organization, his lack of awareness of or participation in the organization's violent activities, and his voluntary dissociation from the organization after he learned of such activities.. See Daneshvar v. Ashcroft, 355 F.3d 615, 628 (6th Cir. 2004).

or plans to commit a terrorist activity," or (3) to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI).[14]

I. Materiality

The INA does not define the term "material support." In Matter of S-K-, the BIA recognized that the term "material support" was not clear, stating that "while the list of examples following the term [material support] provides some clarification regarding its scope, its meaning remains somewhat ambiguous." 23 I&N Dec. 936, 943 (BIA 2006). In Matter of A-C-M-, the BIA found that a noncitizen provides "material support" to a terrorist organization if "the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree." 27 I&N Dec. 303, 308 (BIA 2018). The BIA found that "material support is a term of art that relates to the type of aid provided, that is, aid of a material and normally tangible nature, and it is not quantitative."[15] Matter of A-C-M-, 27 I&N Dec. 303, 307 (BIA 2018) (internal citations omitted).[16]

II. Knowledge of Material Support Requirement

The material support bar operates to bar asylum only where the actor "knows, or reasonably should know" that his act "affords material support." INA § 212(a)(3)(B)(iv)(VI). When read in context, INA § 212(a)(3)(B)(iv)(VI) requires only that "the alien knew he was rendering material support to the recipient of his support." American Acad. of Religion v. Napolitano, 573 F.3d 115, 131 (2d Cir. 2009) (citing Flores-Figueroa v. United States, 556 U.S. 646 (2009)). Thus, a

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[14] INA § 212(a)(3)(B)(iv)(VI) provides a list of examples of material support: "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons…, explosives, or training."

[15] The Third Circuit views the use of "material" as an adjective that modifies "support" and has applied legal definitions of both terms to determine whether a noncitizen's support was material. See Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004). "Material" is defined as "having some logical connection with the consequential facts…[or] [o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary, 9th ed; see also Singh-Kaur, 385 F.2d at 298. "Support," in relevant part, is defined as "sustenance or maintenance." Black's Law Dictionary, 9th ed; see also Singh-Kaur, 385 F.2d at 298.

[16] In Matter of S-K-, the BIA stated that even if "material" were read to modify support, the petitioner would have rendered material support. 23 I&N Dec. at 945. In determining that the support would have been "material," the BIA considered: (1) the size of petitioner's donation relative to her income and (2) the fact that the donation had "some effect on the ability of the [organization] to accomplish its goals." Id. at 945-46. Other circuit courts have touched on the issue of "material support." In Singh-Kaur v. Ashcroft, the Third Circuit held that material support had been provided where the applicant claimed membership in a (subsequently designated) terrorist group, provided a statement showing that he had "taken an oath to participate" in the group, and voluntarily provided meals and tents to group members that transported weapons. 385 F.3d 293, 295-96, 299 (3d Cir. 2004). The Eighth Circuit found that a petitioner rendered material support when his lack of credible testimony indicated that he voluntarily joined the LTTE and participated in military activities against the Sinhalese army. Perinpanathan v. INS, 310 F.3d 594, 598-99 (8th Cir. 2002). In Pathak v. Gonzales, the Ninth Circuit held that the petitioner had provided material support by voluntarily permitting known terrorists to use his family's workshop to repair their weapons, and by later joining them on a lengthy cross-country trip to help them recover the weapons they claimed to have hidden in his family's workshop. 203 F.App'x 829, 830 (9th Cir. 2006) (unpublished).

noncitizen need not know "that the recipient is a terrorist organization." American Acad., 573 F.3d at 130. In the context of monetary support, a noncitizen will usually know that he or she "was rendering material support to the recipient." American Acad., 573 F.3d at 130-31 (holding that an applicant who voluntarily donated money to an organization that supported Hamas met the knowledge requirement simply because he knew that he was donating money to the organization). In the context of non-monetary support, however, the knowledge requirement has "considerable meaning" because a noncitizen may not know that he or she "was rendering material support to the recipient." American Acad., 573 F.3d at 130-31.

III. Exceptions

A noncitizen does not "engage in a terrorist activity" by providing material support to a Tier III Organization if the noncitizen establishes "by clear and convincing evidence that [the noncitizen] did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(iv)(VI)(dd). This provision requires that the applicant "be confronted with the allegation that he knew he had supported a terrorist organization," American Acad., 573 F.3d at 132, and be "afford[ed]…a reasonable opportunity to present evidence endeavoring to meet the 'clear and convincing' negation of knowledge." American Acad., 573 F.3d at 133.

The INA does not contain a duress exception for material support. See INA § 212(a)(3)(B)(iv)(VI). Nor is there an implied duress exception to the material support bar. Hernandez v. Sessions, 884 F.3d 107, 110 (2d Cir. 2018); Matter of M-H-Z-, 26 I&N Dec. 757, 761 (BIA 2016). There is, however, a waiver the Secretary of Homeland Security may grant in his or her discretion for applicants who have not "voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of" a terrorist organization. INA § 212(d)(3)(B)(i).

g. INA § 212(a)(3)(D)(i)—Membership in/Affiliation with Communist or Totalitarian Party

Under INA § 212(a)(3)(D)(i), any immigrant "who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible." INA § 212(a)(3)(D)(i). The INA defines "affiliation" as including, but not limited to, the "giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization." INA § 101(e)(2). Moreover, "[t]he term affiliate, as used in INA [§] 212(a)(3)(D), means an organization which is related to, or identified with, a proscribed association or party, including any section, subsidiary, branch, or subdivision thereof, in such close association as to evidence an adherence to or a furtherance of the purposes and objectives of such association or party, or as to indicate a working alliance to bring to fruition the purposes and objectives of the proscribed association or party." 22 C.F.R. § 40.34(a). For an applicant to be inadmissible under INA § 212(a)(3)(D)(i), their affiliation must involve a "meaningful association" with the party (or its subdivision or affiliate). See Matter of Rusin, 20 I&N Dec. 128, 131 (BIA 1989) (citing Rowoldt v. Perfetto, 355 U.S. 115 (1957); Galvan v. Press, 347 U.S. 522, 528 (1954); and Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963)).

The statute provides several exceptions to inadmissibility under INA § 212(a)(3)(D)(i), including: where the membership or affiliation was involuntary; was solely when the applicant was under the age of 16; was by operation of law; or was necessary for purposes of obtaining employment, food rations, or other essentials of living. INA § 212(a)(3)(D)(ii). Other exceptions include where the applicant's membership or affiliation was terminated prior to her application for admission or for purposes of family unity, where the applicant is a close relative of a U.S. citizen or LPR. INA §§ 212(a)(3)(D)(iii)-(iv).

h. INA § 212(a)(6)(A)(i)—"Aliens Present without Admission or Parole"

"An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." INA § 212(a)(6)(A)(i). A noncitizen who entered the United States without being admitted or paroled is removable under this section even if he was subsequently arrested by DHS and released on "conditional parole" under INA § 236(a)(2)(B). Cruz-Miguel v. Holder, 650 F.3d 189 (2d Cir. 2011) (distinguishing "conditional parole" from parole for "urgent humanitarian reasons or significant public benefit" pursuant to INA § 212(d)(5)); see Matter of Cabrera-Fernandez, 28 I&N Dec. 747, 750 (BIA 2023) (finding that applicants who were detained soon after their unlawful entry, placed in removal proceedings under INA § 240, and charged with inadmissibility under INA § 212(a)(6)(A)(i) were released on their own recognizance pursuant to DHS' conditional parole authority under INA § 236(a)(2)(B) and not humanitarian parole pursuant to INA § 212(d)(5)(A)). However, a noncitizen who was inspected and admitted to the United States is not removable under INA § 212(a)(6)(A)(i) even if he was not lawfully entitled to enter the United States when he was admitted. Matter of Garcia Quilantan, 25 I&N Dec. 285, 293 (BIA 2010)

iii. Exception

A noncitizen seeking to qualify for the exception to inadmissibility in INA § 212(a)(6)(A)(ii), "an alien present in the United States without being admitted or paroled," must satisfy all three subclauses of that section, including the requirement that the noncitizen be "a VAWA self-petitioner." Matter of Pangan-Sis, 27 I&N Dec. 130 (BIA 2017).

i. INA § 212(a)(6)(B)—Failure to Attend Removal Proceedings

Any respondent who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the noncitizen's inadmissibility or deportability, and who seeks admission to the United States within five years of such noncitizen's subsequent departure or removal, is inadmissible. INA § 212(a)(6)(B).[17]

[17] There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act, but an individual is not inadmissible under section 212(a)(6)(B) of the Act if they can establish that there was a "reasonable cause" for failure to attend their removal proceeding. See Memo from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and

j. INA § 212(a)(6)(C)(i)—Fraud or Misrepresentation[18]

A noncitizen who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, admission into the United States or any other benefit provided under the INA is inadmissible. INA § 212(a)(6)(C)(i). "Fraud" and "willfully misrepresenting a material fact" are two different, alternative bases for removability under this section. See Emokah v. Mukasey, 523 F.3d 110, 116 (2d Cir. 2008). Both bases for removability require that the fraudulent statement or willful misrepresentation be made to an authorized official of the United States government. Matter of D-L- & A-M-, 20 I&N Dec. 409, 411 (BIA 1991). A waiver of inadmissibility for fraud or misrepresentation of a material fact is available at INA § 212(i). A similar waiver is available at INA § 237(a)(1)(H) for noncitizens who are charged with removability pursuant to INA § 237(a)(1)(A) on the ground that they were inadmissible at the time of admission as noncitizens described in INA § 212(a)(6)(C)(i).

i. Fraud

Although the Second Circuit has not addressed the difference between "fraud" and "willfully misrepresenting a material fact" in the context of INA § 212(a)(6)(C)(i), other Courts of Appeals have held that "fraud" requires an intent to deceive, whereas "willful misrepresentation" requires only knowledge of the falsity of the representation. See Parlak v. Holder, 578 F.3d 457, 463-64 (6th Cir. 2009); Mwongera v. INS, 187 F.3d 323, 330 (3d Cir. 1999); Witter v. INS, 113 F.3d 549, 554 (5th Cir. 1997). Generally, "[f]raud requires that the respondent know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception." Matter of Tijam, 22 I&N Dec. 408, 424 (BIA 1998) (Rosenberg, J., concurring and dissenting) (citing Matter of G-G-, 7 I&N Dec. 161 (BIA 1956)).[19]

ii. Willfully Misrepresenting a Material Fact

In cases where the charge of removability relates to willful misrepresentation of a material fact, four elements must be shown to substantiate the charge. Monter v. Gonzales, 430 F.3d 546, 554 (2d Cir. 2005) (citing Kungys v. United States, 485 U.S. 759, 767 (1988)); see also Monter, 430 F.3d at 556 (applying the four-part Kungys test, which arose in the context of judicial denaturalization proceedings, to the context of administrative removal proceedings). First, the

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Stra., U.S. Citizenship and Immigration Services, to Field Leadership, "Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators" 13 (March 3, 2009).

[18] While the Court generally does not address issues of denaturalization, it is possible that the Supreme Court's discussion in Maslenjak v. United States, 582 U.S. __ (2017) may inform an inadmissibility analysis under INA § 212(a)(6)(C) with respect to material misrepresentations and false claims to U.S. citizenship.

[19] A lawful permanent resident (LPR) who filed a spousal second preference petition for LPR status for his wife more than five years after he acquired LPR status through a prior marriage is not required to establish by clear and convincing evidence that prior marriage was not fraudulent. Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(a); 8 C.F.R. § 204.2(a)(2)(1). (b)(5) v. Bd. of Immigration Appeals, No. (b)(5) (ALC), 2016 WL 831948 at *6 (S.D.N.Y. (b)((b) 2016). The S.D.N.Y. Court found that "the statutory language of 8 U.S.C. § 1154(a)(2)(A) is plain and unambiguous and at odds with the regulation, 8 C.F.R. § 204.2(a)(2)(1)," and thus it held that decisions made by USCIS and the BIA which were based on this unlawful regulation should be set aside because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706." Id. at *7.

respondent must have misrepresented or concealed some fact. Monter, 430 F.3d at 554. Second, the misrepresentation or concealment must have been willful. Id. Third, the fact must have been material. Id. Finally, if the respondent is charged with procuring a benefit by willful misrepresentation of a material fact, the respondent must have procured the benefit *as a result of* the misrepresentation or concealment. Id. (emphasis added). "In other words,…an alien has procured an immigration benefit through material misrepresentation when that misrepresentation was determinative to the alien's success in obtaining the benefit sought." Emokah v. Mukasey, 523 F.3d 110, 117 (2d Cir. 2008). It is unclear what, if any, applicability this fourth requirement has in cases where a respondent is charged with *seeking* to procure a benefit by willful misrepresentation.

"[A]n act is done willfully if [it is] done intentionally and deliberately and if it is not the result of innocent mistake, negligence or inadvertence." Emokah, 523 F.3d at 116-17 (citing United States v. Dixon, 536 F.2d 1388, 1397 (2d Cir.1976)). The "willfulness" element is generally satisfied by a finding that the respondent knew of the falsity of the representation at the time he made it. See Matter of Healy and Goodchild, 17 I&N Dec. 22, 28 (BIA 1979). "Misrepresentations are willful if they are deliberately made with knowledge of their falsity." Matter of Mensah, 28 I&N Dec. 288, 293 (BIA 2021).

In the context of a signed application, a noncitizen makes a willful misrepresentation under INA 212(a)(6)(C)(i) when he or she knows of or authorizes false statements in an application filed on the noncitizen's behalf. See Matter of Valdez, 27 I&N Dec. 496 (BIA 2018). A noncitizen's signature on an immigration application establishes a strong presumption that he or she knows of and has assented to the contents of the application, but the noncitizen can rebut the presumption by establishing fraud, deceit, or other wrongful acts by another person. Valdez, 27 I&N Dec. at 499-501.

A misrepresentation or concealment is "material" if it "tends to shut off a line of inquiry that is relevant to the alien's admissibility and that would predictably have disclosed other facts relevant to his or her eligibility for a visa, other documentation, or admission to the United States." Matter of D-R-, 27 I&N Dec. 105, 113 (BIA 2017) (affirming Matter of Bosuego, 17 I&N Dec. 125, 130 (BIA 1979) (a misrepresentation is "material" if it "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.")); see also Monter, 430 F.3d at 553. Matter of Mensah states, in relevant part, that "[I]nformation is "material" when it has a "natural tendency to affect[] the official decision" of an adjudicator, Kungys, 485 U.S. at 771, or "tends to shut off a line of inquiry... that would predictably have disclosed other [relevant] facts." Matter of Mensah, 28 I&N Dec. 288, 293–94 (BIA 2021). Misrepresentation of one's identity is material "because it impairs an adjudicator's ability to probe past conduct that might be potentially disqualifying or bear on the exercise of discretion" and "blinds the adjudicator to whose past conduct is at issue." Matter of O-R-E-, 28 I&N Dec. 330, 339-340 (BIA 2021). The government need not produce evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed to meet its burden for purposes of INA § 212(a)(6)(C)(i). D-R-, 27 I&N Dec. 109-113.

Finally, "[p]roof that an alien has made a material misrepresentation in the course of applying for an immigration benefit creates a rebuttable presumption that the alien procured the benefit by means of this representation." Emokah, 523 F.3d at 117 (citing Monter, 430 F.3d at

557-58). "To rebut this presumption, the alien must demonstrate that knowledge of his true circumstances would not have led to the denial of the benefit." Emokah, 523 F.3d at 117.

iii. Timely Retraction

There is no clear legal authority indicating whether or not the doctrine of timely retraction can be applied to waive inadmissibility under INA § 212(a)(6)(C)(i) for willfully misrepresenting a material fact, although at least one unpublished Second Circuit case suggests that it can. See Rahman v. Mukasey, 272 F.App'x 35 (2d Cir. 2008). In other contexts, the timely retraction, or timely recantation, doctrine allows a respondent to retract a misrepresentation and thereby avoid its consequences. See Matter of M-, 9 I&N Dec. 118, 119 (BIA 1960); cf. Zheng v. Mukasey, 514 F.3d 176, 183 (2d Cir.2008) (suggesting BIA consider the applicability of the timely recantation doctrine in the context of a frivolousness finding, where the noncitizen deliberately made material misrepresentations on a withdrawn asylum application). For the timely retraction doctrine to apply, the retraction of a false representation must be made voluntarily and prior to the exposure of the false representation. See M-, 9 I&N Dec. at 119; see also Matter of R-R-, 3 I&N Dec. 823 (BIA 1949). Retraction is neither voluntary nor timely if it occurs solely in response to the actual or imminent exposure of the falsehood. Matter of Namio, 14 I&N Dec. 412, 414 (BIA 1973); see also Matter of Ngan, 10 I&N Dec. 725, 727 (BIA 1964)(finding a retraction that took place three and a half years after the statement, and after an investigation had disclosed that the applicant had made misrepresentations, "was not timely" enough to fall within the doctrine of timely recantation).

k. INA § 212(a)(6)(C)(ii)—Falsely Claiming Citizenship

Any noncitizen who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under the INA (including INA § 274A, which relates to noncitizen employment) or any other Federal or State law is inadmissible. INA § 212(a)(6)(C)(ii). Neither this ground of inadmissibility nor the identically worded ground of deportability at INA § 237(a)(3)(D) applies to any false representation of citizenship made prior to September 30, 1996. See IIRIRA § 344(c).

No knowledge requirement is evident from the text of INA § 212(a)(6)(C)(ii), and the BIA has noted that this ground of inadmissibility is "broadly defined." Matter of Barcenas-Barrera, 25 I&N Dec. 40, 42 (BIA 2009). Nonetheless, decisions holding that a respondent is removable for falsely claiming citizenship have sometimes incorporated analysis of whether the misrepresentation was "willful" or "knowing." See Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006); Barcenas-Barrera, 25 I&N Dec. at 42. These decisions do not explicitly establish a knowledge requirement, and the importance of the "willful" or "knowing" analysis to the holding is not clear. See Richmond v. Holder, 714 F.3d 725, 729 & n.3 (2d Cir. 2013) (noting in dicta that the plain text of INA § 212(a)(6)(C)(ii)(I) suggests that "false citizenship claims need not be knowing," but declining to decide whether the provision "exempts the genuinely deluded").

The definition of "purpose or benefit" is ambiguous, but "cannot be read so broadly that it fails to exclude anything." Richmond, 714 F.3d at 731 (remanding to the BIA to determine whether a noncitizen who falsely represented himself as a United States citizen to DHS in order to avoid removal proceedings had lied "for a purpose or benefit" as defined in INA

§ 212(a)(6)(C)(ii)). It is unresolved whether a "purpose or benefit" is "determined objectively—based on whether citizenship status would actually affect, say, a loan application or a routine brush with local law enforcement—or subjectively, based on the effect that a non-citizen intends his or her citizenship claim to have." Richmond, 714 F.3d at 730 (emphases in the original).

A claim of birth in the United States is sufficient to constitute a representation to be a citizen of the United States. Barcenas-Barrera, 25 I&N Dec. at 42. In addition, checking a box on an I-9 attesting to be a "citizen or national" of the United States is sufficient where the noncitizen does not carry his burden of proof to show that he claimed to be a national rather than a citizen. Crocock v. Holder, 670 F.3d 400, 403 (2d Cir. 2012).

No conviction is required to establish inadmissibility under this section. See, e.g., Crocock, 670 F.3d at 403. However, evidence that a noncitizen pled guilty to making a false claim of United States citizenship, in violation of 18 U.S.C. § 911, may be sufficient, by itself, to find that the noncitizen is inadmissible under INA § 212(a)(6)(C)(ii). See Barcenas-Barrera, 25 I&N Dec. at 43 (citing Pichardo v. INS, 216 F.3d 1198, 1201 (9th Cir. 2000)). Similarly, evidence that a noncitizen pled guilty to making a false statement in a passport application in violation of 18 U.S.C. § 1542 will preclude him from claiming that he did not knowingly submit false information to obtain a passport. Rodriguez, 451 F.3d at 65; see also Barcenas-Barrera, 25 I&N Dec. at 43.

No statutory waiver of inadmissibility exists for falsely claiming citizenship. There is, however, a limited exception for children of United States citizens who reasonably believed that they were citizens when they represented themselves as such. See INA § 212(a)(6)(C)(ii)(I). In addition, the doctrine of timely retraction, see supra at § B.1.j.3, *may* be available to waive inadmissibility under INA § 212(a)(6)(C)(ii) for falsely claiming citizenship, but the only case that addresses this issue at present is an unpublished BIA decision. See Matter of (b)(6) 2006 WL 1558823 (BIA (b)(6) 2006).

l. INA § 212(a)(6)(E)(i)—Smugglers

Any noncitizen who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other noncitizen to enter or try to enter the United States in violation of law is inadmissible. INA § 212(a)(6)(E)(i). Waivers of inadmissibility are available for certain classes of noncitizens who provided assistance only to close family members. See INA § 212(d)(11). In addition, there is an exception to inadmissibility for certain noncitizens who were physically present in the United States on May 5, 1998, and provided assistance only to close family members. See INA § 212(a)(6)(E)(ii).

A respondent may be found to have provided "knowing" assistance to a noncitizen to enter the United States in violation of law based upon the respondent's misstatements to immigration officials regarding the noncitizen's residency and identity documents. Chambers v. Office of Chief Counsel, 494 F.3d 274, 278 (2d Cir. 2007). An IJ could reasonably infer from such misstatements that the respondent sought to deceive immigration officials as to the noncitizen's immigration status because the respondent knew that the noncitizen would not otherwise be permitted to enter the United States. Chambers, 494 F.3d at 278.

Some level of "affirmative assistance" is required in order for a respondent to be inadmissible for "alien smuggling." See Chambers, 494 F.3d at 279. However, the Second Circuit "has yet to set forth anything approaching a bright-line test as to the nature of the actions that will or will not suffice to support a finding that a noncitizen has 'encouraged, induced, assisted, abetted, or aided' another in illegally entering the United States." Chambers, 494 F.3d at 279. Where a respondent arranged transportation for a noncitizen and deceived customs officials at the time of his attempted entry, she provided adequate assistance to render her inadmissible to the United States. Chambers, 494 F.3d at 279-80. In another case, where the respondent harbored illegal entrants close to the United States border in order to help them evade detection, her conduct was adequate to sustain a charge of removability for "alien smuggling" under INA § 237(a)(1)(E)(i). Matter of Martinez-Serrano, 25 I&N Dec. 151, 155 (BIA 2009). The charge of removability at INA § 237(a)(1)(E)(i) is worded nearly identically to the charge of inadmissibility at hand here, such that interpretations of the two provisions should not differ significantly. See infra at § B.2.d.

Also in the context of removability under INA § 237(a)(1)(E)(i), the BIA has emphasized that "the act of an entry may include other related acts that occurred either before, during, or after a border crossing, so long as those acts are in furtherance of, and may be considered part of, the act of securing and accomplishing the entry." Martinez-Serrano, 25 I&N Dec. at 154. Therefore, "direct participation in the physical border crossing is not required," so long as the respondent's conduct is "tied to the aliens' manner of entry." Martinez-Serrano, 25 I&N Dec. at 154-155. A conviction for "Aiding and Abetting an Alien to Elude Examination and Inspection by Immigration Officers" pursuant to 18 U.S.C. §§ 2(a) and 1325(a)(2) may be sufficient, without more, to establish a charge of removability for "alien smuggling." Martinez-Serrano, 25 I&N Dec. at 153.

m. INA § 212(a)(7)(A)(i)—Documentation Requirements for Immigrants

Except as otherwise specifically provided in the INA, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa or other entry document, a valid unexpired passport or other travel document, and any other required document, is inadmissible. INA § 212(a)(7)(A)(i)(I). In addition, any immigrant whose visa was not issued in compliance with the INA is inadmissible. INA § 212(a)(7)(A)(i)(II). A waiver of this ground of inadmissibility is available for certain noncitizens who possess immigrant visas and could not have ascertained prior to their departure for the United States that they would be inadmissible. See INA § 212(k). An additional waiver is available at INA § 237(a)(1)(H) for noncitizens who are charged with removability pursuant to INA § 237(a)(1)(A) on the ground that they were inadmissible at the time of admission as noncitizens described in INA § 212(a)(7)(A)(i)(I), where there was a misrepresentation made at the time of admission, whether innocent or not. In Re Guang Li Fu, 23 I&N Dec. 985, 988 (BIA 2006). In addition, the Attorney General may, in the exercise of his discretion, readmit certain returning resident immigrants who are otherwise admissible to the United States but do not possess all required documentation. INA § 211(b); see Ahmed v. Ashcroft, 286 F.3d 611, 612-13 (2d Cir. 2002).

n. INA § 212(a)(7)(B)(i)—Documentation Requirements for Nonimmigrants

Any nonimmigrant who is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the noncitizen's admission, or any nonimmigrant who is not in possession of a valid nonimmigrant visa or border crossing

identification card, is inadmissible. INA § 212(a)(7)(B)(i). A waiver of this ground of inadmissibility is available for certain noncitizens in transit through the United States, nationals of certain foreign states with reciprocity agreements, or on the basis of unforeseen emergency in individual cases. See INA § 212(d)(4).

o. INA § 212(a)(9)(A)—Previously Removed

Any noncitizen who has been ordered removed under INA § 235(b)(1) (expedited removal proceedings for "arriving aliens"), or at the end of proceedings under INA § 240 initiated upon the noncitizen's arrival in the United States, is inadmissible to the United States for five years after the date of removal. INA § 212(a)(9)(A)(i); 8 C.F.R. § 1212.2. In addition, any noncitizen not described in clause (i) who has been ordered removed under INA § 240 or any other provision of law or departed the United States while an order of removal was outstanding, is inadmissible to the United States for ten years after the date of his departure or removal. INA § 212(a)(9)(A)(ii); 8 C.F.R. § 1212.2. Finally, any noncitizen in either category who seeks admission within twenty years after a second or subsequent removal, or who seeks admission at any time after being convicted of an aggravated felony, is inadmissible. INA § 212(a)(9)(A)(i)-(ii); 8 C.F.R. § 1212.2. Notably, this ground of inadmissibility requires an order of removal, and as such, it is not applicable to noncitizens who were granted voluntary departure and timely departed from the United States. Matter of Zmijewska, 24 I&N Dec. 87, 92 (BIA 2007).

This ground of inadmissibility does not apply to a noncitizen reapplying for admission before the designated time if, prior to his departure for the United States or his attempt to be readmitted, the Attorney General consents to his reapplication for admission. INA § 212(a)(9)(A)(iii). Procedures for reapplying for admission are laid out at 8 C.F.R. §§ 212.2 and 1212.2. See also INA § 212(d)(3). "An approved request for permission to reapply for admission is not a visa or entry document; it is merely evidence of the Government's judgment that [INA § 212(a)(9)(A)(ii)] need no longer be an obstacle to the alien's acquisition of such a document." Matter of Torres-Garcia, 23 I&N Dec. 866, 872 (BIA 2006). Thus, a noncitizen granted permission to reapply for admission must follow lawful procedures governing the acquisition of a visa before he may be readmitted to the United States. Torres-Garcia, 23 I&N Dec. at 872.

In some limited circumstances, an IJ is permitted to grant *nunc pro tunc* permission to reapply for admission to cure a noncitizen's failure to obtain such permission prior to reentry after removal. Matter of Garcia-Linares, 21 I&N Dec. 254, 257 (BIA 1996). The IJ's authority to grant *nunc pro tunc* permission to reapply is limited to cases where the grant "would effect a complete disposition of the case, i.e., where the only ground of deportability or inadmissibility would thereby be eliminated or where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissibility." Garcia-Linares, 21 I&N Dec. at 257 (internal citations and quotation marks omitted).

p. INA § 212(a)(9)(B)—Unlawfully Present

Any noncitizen, other than an LPR, who was unlawfully present in the United States for a period of more than 180 days but less than one year, voluntarily departed the United States prior to the commencement of removal proceedings, and again seeks admission within three years of the noncitizen's departure or removal, is inadmissible. INA § 212(a)(9)(B)(i)(I). In addition, any

noncitizen, other than an LPR, who was unlawfully present in the United States for one year or more, and who again seeks admission within ten years of the noncitizen's departure or removal from the United States, is inadmissible. INA § 212(a)(9)(B)(i)(II). Inadmissibility under INA § 212(a)(9)(B)(i)(II) does not result from unlawful presence that accrues *after* a noncitizen reenters the United States; rather, the noncitizen must have been unlawfully present for at least one year *prior to* departing the United States to be inadmissible under this section. Matter of Rodarte-Roman, 23 I&N Dec. 905, 909 (BIA 2006). A noncitizen who applies for adjustment of status is a noncitizen who "seeks admission" under INA § 212(a)(9)(B)(i). Id. at 908.[20]

"Departure," within the meaning of INA § 212(a)(9)(B)(i)(II), is broadly construed "to encompass any 'departure' from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding." Matter of Lemus, 24 I&N Dec. 373, 376-77 (BIA 2007); see also Cervantes-Ascencio v. INS, 326 F.3d 83, 85-86 (2d Cir. 2003) (declining to read an exception into INA § 212(a)(9)(B)(i)(II) for long-term unlawfully present noncitizens who submitted to removal proceedings and departed pursuant to a grant of voluntary departure). However, a noncitizen who leaves the United States temporarily pursuant to a grant of advance parole under INA § 212(d)(5)(A) does not thereby make a "departure" within the meaning of INA § 212(a)(9)(B)(i)(II). Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771, 775-79 (BIA 2012) (clarifying Lemus, 24 I&N Dec. at 376-77).

A noncitizen is deemed to be unlawfully present if he is present after the expiration of the period of stay authorized by the Attorney General or is present without being admitted or paroled. INA § 212(a)(9)(B)(ii). Unlawful presence may or may not include the period of time during which a noncitizen overstays his visa solely to attend removal proceedings. Compare Matter of Halabi, 15 I&N Dec. 105, 106 (BIA 1974), with Westover v. Reno, 202 F.3d 475, 481 (1st Cir. 2000) (noting that the practice of charging noncitizens with overstaying when they remain in the United States to defend themselves against other charges of removal may violate the Fifth Amendment right to due process of law). Minors, noncitizens who have bona fide asylum applications pending, beneficiaries of family unity protection, certain battered women and children, and certain trafficking victims do not accrue unlawful presence for the purposes of INA § 212(a)(9)(B)(i). INA § 212(a)(9)(B)(iii). In addition, unlawful presence does not include any period of time prior to April 1, 1997. Rodarte-Roman, 23 I&N Dec. at 911 (citing IIRIRA § 301(b)(3), 110 Stat. at 3009-578). A waiver of inadmissibility for certain noncitizens who have accrued unlawful presence is available at INA § 212(a)(9)(B)(v).

q. INA § 212(a)(9)(C)—Unlawfully Present after Previous Immigration Violation

Any noncitizen who (I) has been unlawfully present in the United States for an aggregate period of more than one year, or (II) has been ordered removed under INA §§ 235(b)(1), 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted, is permanently inadmissible. INA § 212(a)(9)(C)(i)(I)-(II). This ground of removability does not apply to a noncitizen seeking admission more than ten years after the date of his last

[20] "[N]oncitizens who are inadmissible for a specified period of time pursuant to [INA § 212(a)(9)(B)(i)], due to their previous unlawful presence and departure, are not required to reside outside of the U.S. during this period in order to subsequently overcome this ground of inadmissibility." See Matter of Duarte-Gonzalez, 28 I&N Dec. 688, 691 (BIA 2023).

departure from the United States if, prior to his departure for the United States or his attempt to be readmitted, the Secretary of Homeland Security consents to his reapplication for admission. INA § 212(a)(9)(C)(ii). A waiver of inadmissibility is available for certain VAWA self-petitioners. INA § 212(a)(9)(C)(iii).

Inadmissibility under INA § 212(a)(9)(C)(i) cannot be cured by a grant of *nunc pro tunc* permission to reapply for admission after unlawfully reentering the United States because such permission cannot be granted until the noncitizen departs and remains outside the United States for at least ten years. See Matter of Torres-Garcia, 23 I&N Dec. 866, 875–76 (BIA 2006); see also Delgado v. Mukasey, 516 F.3d 65, 72 (2d Cir. 2008) ("holding that an alien who is ruled inadmissible pursuant to [INA § 212(a)(9)(C)(i)(II)], as a result of having been removed, is ineligible for adjustment of status . . . ."); Mora v. Mukasey, 550 F.3d 231, 236–37 (2d Cir. 2008); Garcia-Villeda v. Mukasey, 531 F.3d 141, 150–51 (2d Cir. 2008).

2. INA § 237—Charges of Deportability

a. INA § 237(a)(1)(A)—Inadmissible at the Time of Entry or Adjustment

Any noncitizen who at the time of entry or adjustment of status was within one or more of the classes of noncitizens inadmissible by the law existing at such time is deportable. INA § 237(a)(1)(A). Waivers are available at INA § 237(a)(1)(H) for noncitizens who were inadmissible at the time of entry or adjustment of status under INA § 212(a)(6)(C)(i) for fraud or willful misrepresentation of a material fact, or under INA § 212(a)(7)(A)(i)(I) for lack of valid entry documents, where there was a misrepresentation made at the time of admission. INA § 237(a)(1)(H); see Matter of Fu, 23 I&N Dec. 985, 988 (BIA 2006) (extending the waiver, which, by its terms, applies only to misrepresentations under INA § 212(a)(6)(C)(i), to misrepresentations under INA § 212(a)(7)(A)(i)(I)).

In cases where the underlying ground of inadmissibility requires "knowledge" or "reason to believe," the "knowledge" or "reason to believe" must be shown to have existed prior to or contemporaneous with the noncitizen's entry or adjustment of status. Matter of Casillas-Topete, 25 I&N Dec. 317, 320–21 (BIA 2010); Matter of Rocha, 20 I&N Dec. 944, 946 (BIA 1995). This standard is applicable, in particular, to the ground of inadmissibility at INA § 212(a)(2)(C) for "any alien who the consular officer or the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance." In the context of that ground of inadmissibility, it is notable that the examining officer need not have had knowledge or reason to believe that the noncitizen was a drug trafficker at the time of his admission, provided that any "appropriate immigration official" had such knowledge or reason to believe. Casillas-Topete, 25 I&N Dec. at 320–21. "Appropriate immigration officials" include the consular officer and anyone to whom the Attorney General or Secretary of Homeland Security has delegated authority. Id. at 320.

In cases where the underlying ground of inadmissibility requires a conviction (or required a conviction at the time of the noncitizen's entry or adjustment of status), it is important to note that the definition of "conviction" under the INA has changed over time and that a "conviction" for purposes of immigration law today is a much broader concept than it was prior to the enactment of IIRIRA. See Saleh v. Gonzales, 495 F.3d 17, 23 (2d Cir. 2007); Francis v. Gonzales, 442 F.3d 131, 139–41 (2d Cir. 2006). When determining whether a noncitizen was within one or more of the classes of noncitizens inadmissible by the law existing *at the time of entry or adjustment of status*, INA § 237(a)(1)(A), the appropriate definition of "conviction" must be used. Francis, 442 F.3d at 139–41.

b. INA § 237(a)(1)(B)—Present in Violation of Law

Any noncitizen who is present in the United States in violation of the INA 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 INA § 221(i), is deportable. INA § 237(a)(1)(B). Nonimmigrant migrants who are admitted for a temporary period of time and who remain in the United States beyond the authorized time are often charged with removability under this section of the INA. See, e.g., Zerrei v. Gonzales, 471 F.3d 342 (2d Cir. 2006). A passport alone may constitute clear and convincing evidence of a noncitizen's removability for

overstaying his visa, provided that the passport clearly shows the date until which the noncitizen was admitted, and the noncitizen does not dispute that he was not granted an extension of his stay. Id. at 346–47.

If a noncitizen overstays his visa solely to attend removal proceedings and is subsequently charged under this section, the charge may violate the noncitizen's right to due process of law. Compare Matter of Halabi, 15 I&N Dec. 105, 106 (BIA 1974) (holding that charge of deportability under former INA § 241(a)(2) for having remained in the United States longer than permitted was sustained where a noncitizen overstayed his visa during removal proceedings), and Matter of Teberen, 15 I&N Dec. 689, 690 (BIA 1976), with Westover v. Reno, 202 F.3d 475, 481 (1st Cir. 2000) (noting that the practice of charging noncitizens with overstaying when they remain in the United States to defend themselves against other charges of removal may violate the Fifth Amendment right to due process of law). The Second Circuit has not yet addressed this issue.

c. INA § 237(a)(1)(C)(i)—Violated Nonimmigrant Status or Condition of Entry

Any noncitizen who was admitted as a nonimmigrant and has failed to maintain his nonimmigrant status or comply with the conditions of such status is deportable. INA § 237(a)(1)(C)(i). The requirements for maintaining nonimmigrant status and the conditions of each nonimmigrant status are provided at 8 C.F.R. §§ 214.1-.2. Common status violations include: unauthorized employment (including any employment by noncitizens admitted as temporary visitors for pleasure or noncitizens in transit through the United States), 8 C.F.R. § 214.1(e); lack of compliance with registration, photographing, or fingerprinting requirements, or failure to provide full and truthful disclosure of all requested information, 8 C.F.R. § 214.1(f); and conviction in any United States jurisdiction for a crime of violence for which a sentence of more than one year of imprisonment may be imposed, 8 C.F.R. § 214.1(g).

i. Special Requirements for Nonimmigrant F-1 Students to Maintain Status

Nonimmigrant students are admitted for "duration of status," with "duration of status" defined in part as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by [DHS] for attendance by foreign students, or engaging in authorized practical training following completion of studies." 8 C.F.R. § 214.2(f)(5)(i). The status of an F-1 student is anchored at all times to the particular educational institution that issued his Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status. A student who seeks admission to the United States in F-1 status must present a SEVIS Form I-20 issued by the institution that he attends or will attend. 8 C.F.R. §§ 214.2(f)(1), (f)(4). After the student arrives in the United States, he must follow the procedures laid out at 8 C.F.R. § 214.2(f)(8) in order to change educational levels or transfer to a new school. See C.F.R. §§ 214.2(f)(5)(ii), (f)(8). Under those procedures, the student is issued a new Form I-20 by the transfer school prior to his release date from his current school. 8 C.F.R. § 214.2(f)(8)(ii)(C). Thus, an F-1 student who follows the prescribed transfer procedures is in possession of a valid Form I-20 throughout the transfer process.

If an F-1 student fails to maintain status, even if he "act[s] in good faith in all of [his] dealings with the government," he becomes removable pursuant to INA § 237(a)(1)(C)(i). See Matter of Yazdani, 17 I&N Dec. 626, 630 (BIA 1981). The regulations provide that a student may in some cases violate the terms of his status as a result of "circumstances beyond the student's

control…includ[ing] serious injury or illness, closure of the institution, a natural disaster, or inadvertence, oversight, or neglect on the part of the [designated school official ("DSO")]." 8 C.F.R. § 214.2(f)(16)(i)(F)(1). In such cases, USCIS "may consider reinstating a student who makes a request for reinstatement on Form I-539, Application to Extend/Change Nonimmigrant Status, accompanied by a properly completed SEVIS Form I-20 indicating the DSO's recommendation for reinstatement." 8 C.F.R. § 214.2(f)(16)(i). The decision of USCIS on an application to reinstate student status is discretionary, and there is no appeal from the denial of such an application. See 8 C.F.R. § 214.2(f)(16)(ii); see also Yazdani, 17 I&N Dec. at 628–29 (noting that neither an IJ nor the BIA may review the propriety of a determination on an application to reinstate of student status).

d. INA § 237(a)(1)(E)(i)—Smuggling

Any noncitizen who (prior to the date of entry, at the time of any entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other noncitizen to enter or try to enter the United States in violation of law is deportable. INA § 237(a)(1)(E)(i). Waivers of inadmissibility are available for lawful permanent residents who provided assistance only to close family members. See INA § 237(a)(1)(E)(iii). In addition, there is an exception to inadmissibility for certain noncitizens who were physically present in the United States on May 5, 1998. See INA § 237(a)(1)(E)(ii). The phrasing of this ground of removability, aside from the parenthetical, is identical to the language used in the ground of inadmissibility at INA § 212(a)(6)(E)(i). For more information, see supra at § B.1.k.

e. INA § 237(a)(2)(A)(i)—Crimes Involving Moral Turpitude[21]

i. One CIMT within 5 years AND a conviction with a sentence of 1 year or more

A noncitizen convicted of a crime involving moral turpitude committed within five years (or ten years in the case of a noncitizen provided lawful permanent resident status under INA § 245(j)) after the date of admission, and for which a sentence of one year or more *may be* imposed, is removable. INA § 237(a)(2)(A)(i); see Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011). Adjustment of status is an admission. See Matter of Koljenovic, 25 I&N Dec. 219, 221 (BIA 2010), overruled in part on other grounds by Matter of J-H-J-, 26 I&N Dec. 563 (BIA 2015); Matter of Rodarte, 23 I&N Dec. 905, 908 (BIA 2006); Matter of Rosas, 22 I&N Dec. 616, 618–20 (BIA 1999). However, for the purpose of INA § 237(a)(2)(A)(i), the five-year clock is not reset by a new admission *from within* the United States (through adjustment of status), if the noncitizen was present in the United States pursuant to an admission at the time of adjustment. Alyazji, 25 I&N Dec. at 406. The noncitizen's adjustment does not reset the five-year clock because it adds nothing to the deportability inquiry; it may have extended or reauthorized his/her then-existing presence, but it does not change his/her status vis-à-vis the grounds of deportability. Id. at 408. An overstay or violation of a migrant's nonimmigrant status before adjusting has no effect on this analysis under INA § 237(a)(2)(A)(i). Id. at 407 n.8. Conversely, where the noncitizen adjusts his/her status after entering the United States without inspection, the date of adjustment triggers

[21] See Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006), for a discussion on the meaning of "moral turpitude."

the running of the five-year clock because it commences (rather than extends) the noncitizen's period of presence in the United States following an admission. Id. at 408 n.9.

The Second Circuit has held that INA § 237(a)(2)(A)(i) focuses on the "historical fact" of a noncitizen's prior conviction and thereby consults "the state law applicable at the time of the *criminal* proceedings, not at the time of the *removal* proceedings." (b)(6) v. Garland, No. (b)(6) 2023 WL 5943613, at *1 (2d Cir. (b)(6) 2023) (emphasis in original). To determine whether a criminal sentence of one year or more may be imposed for a CIMT conviction, the agency must conduct a "backward-looking inquiry" into the maximum possible sentence the noncitizen "*could have received* for his offense *at the time of his conviction*." (b)(6), No. (b)(6) at *4 (holding that New York law that reduced the maximum possible sentence for Class A misdemeanors from one year to 364 days cannot be retroactively applied to the petitioner in this case) (emphasis in original).

ii. Two CIMT Not Arising Out of a Single Scheme

A noncitizen 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 and regardless of whether the convictions were in a single trial, is removable. INA § 237(a)(2)(A)(ii).

f. INA § 237(a)(2)(A)(iii)—Aggravated Felony

A noncitizen convicted of an aggravated felony any time after admission is removable. INA § 237(a)(2)(A)(iii). The term "aggravated felony" is defined in INA § 101(a)(43). The section encompasses a wide variety of conduct and includes a conspiracy or attempt to commit any crime described in that section. INA § 101(a)(43)(U); 8 C.F.R. § 1001.1(t).

The current definition of "aggravated felony" in INA § 101(a)(43) applies retroactively to pre-IIRIRA convictions. INA § 101(a)(43) ("Notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after September 30, 1996"); IIRIRA § 321(c) (effective date provision for the current definition of "aggravated felony" stating, "The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act [September 30, 1996], regardless of when the conviction occurred . . . ."); see also Brown v. Ashcroft, 360 F.3d 346, 353–55 (2d Cir. 2004) (finding that the expanded definition of aggravated felony applied retroactively to attempted robbery convictions to bar the respondent's eligibility for former INA § 212(c) relief); Chan v. Gantner, 464 F.3d 289, 292–93 (2d Cir. 2006); Moreno-Bravo v. Gonzales, 463 F.3d 253, 264 (2d Cir. 2006); Matter of Truong, 22 I&N Dec. 1090, 1096–97 (BIA 1999).

When determining whether a prior conviction is categorically an aggravated felony, the court must apply the categorical approach, focusing solely on whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic version of the enumerated crime, while ignoring the particular facts of the case. See Mathis v. United States, 136 S. Ct. 2243 (2016); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). For a guide on how to

properly conduct a categorical, modified categorical, circumstance specific, and realistic probability analysis, please reference the "Analysis of Criminal Convictions" document.

i. INA § 101(a)(43)(A)—Murder, Rape or Sexual Abuse of a Minor

The term "aggravated felony" includes murder, rape, or sexual abuse of a minor. INA § 101(a)(43)(A).

I. Murder

A conviction for murder in violation of a statute requiring a showing that the perpetrator acted with extreme recklessness or a malignant heart, notwithstanding that the requisite mental state may have resulted from voluntary intoxication and that no intent to kill was established. See Matter of M-W-, 25 I&N Dec. 748 (BIA 2012).

In Santana-Felix v. Barr, 924 F.3d 51, 56–57 (2d Cir. 2019), the Second Circuit held that murder in the second degree, in violation of NYPL § 125.25, is a categorical match to an aggravated felony murder offense under INA § 101(a)(43)(A) based on the federal murder offense at 18 U.S.C. § 1111(a).

II. Rape

In Matter of Keeley, the BIA held that the term "rape" in INA § 101(a)(43)(A) encompasses an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight. See Matter of Keeley, 27 I&N Dec. 146 (BIA 2017). [22] It further held that the term "rape" also requires that the underlying sexual act be committed without consent, which may be shown by showing it was "committed when the [victim's] resistance is overcome by force or fear, or under other prohibitive conditions." Id. at 155. "Other prohibitive conditions" may include the age of the victim, the victim's physical or mental condition, or other factors that negate consent. Id. The victim's mental condition that makes an underlying act of sexual penetration unlawful may include a statutory requirement that the victim's ability to appraise the nature of the conduct was substantially impaired and the offender had a culpable mental state as to such impairment. See id.

III. Sexual Abuse of a Minor

In its interpretation of the term "sexual abuse of a minor," the BIA referenced the meaning of "sexual abuse" found in 8 U.S.C. § 3509 to "operate as a 'guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor.'" Oouch v. U.S. Dep't of Homeland Sec., 633 F.3d 119, 121 (2d Cir. 2011) (citing Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 994–96 (BIA 1999)). However, the Second Circuit has stressed that 18 U.S.C. § 3509 "offers only a guide, not an inflexible boundary, for construing the INA phrase 'sexual abuse of a minor.'" Rodriguez v. Barr, __ F.3d __, 2020 WL 5580446, at *10 (2d Cir. Sept. 18, 2020) (citing James v.

[22] Prior to Matter of Keeley, the BIA had not issued any published decision on the generic definition of rape, but in several unpublished decisions, the BIA stated that the generic definition of rape involves "some degree of nonconsensual sexual penetration." See, e.g., In re: (b)(6) 2008 WL 2079304 (BIA (b)(6), 2008); In re: (b)(6) 2005 WL 952424 (BIA (b)(6), 2005).

Mukasey, 522 F.3d 250, 254 (2d Cir. 2008)). Accordingly, the phrase "sexual abuse of a minor" under INA § 101(a)(43)(A) "was intended to include not just the crimes that involved physical contact, but also 'to capture the broad spectrum of sexually abusive behavior' and 'encompasses the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used.'" Rodriguez v. Barr, __ F.3d __, 2020 WL 5580446, at *8 (2d Cir. Sept. 18, 2020) (quoting Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 996 (BIA 1999)). The Second Circuit has accorded Chevron[23] deference to the BIA's interpretation of the phrase "sexual abuse of a minor" as provided under INA § 101(a)(43)(A). See, e.g., Rodriguez v. Barr, 975 F.3d 188, 192 (2d Cir. 2020); James, 522 F.3d at 254; Santos v. Gonzales, 436 F.3d 323, 355 (2d Cir. 2006); Mugalli v. Ashcroft, 258 F.3d 52, 60 (2d Cir. 2001).

In Equivel-Quintana v. Sessions, the U.S. Supreme Court clarified the definition of a "minor"[24] for the purposes of INA § 101(a)(43)(A) and held that "the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." 137 S. Ct. 1562, 1568 (2017). Further, the Supreme Court found that "[a]bsent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants." Id. at 1572.[25] In Matter of Aguilar-Barajas, the BIA clarified that the Supreme Court's holding in Esquivel-Quintana does not affect its definition of a "crime of child abuse," which was defined in Matter of Velazquez-Herrera, where the BIA held that for the purposes of a "crime of child abuse of a minor," a "child" is a person under 18. *See* Matter of Aguilar-Barajas, 28 I&N Dec. 354, 360 (BIA 2021).

States categorize sex crimes against children in many different ways, and a specific state or federal definition is not dispositive when determining whether an offense constitutes "sexual abuse of a minor" for immigration purposes. Rodriguez-Rodriguez, 22 I&N Dec. at 996. An offense involving sexual abuse of a minor constitutes an aggravated felony even if it is a misdemeanor under state law. See Matter of Small, 23 I&N Dec. 448, 450 (BIA 2002). In order for a statutory rape offense to qualify as a sexual abuse of a minor under INA § 101(a)(43)(A), a victim must be under 16 years old where the offense criminalizes sexual intercourse based solely on the age of the participants. Esquivel-Quintana, 137 S. Ct. at 1572. Thus, even if a state law criminalizes *consensual* sexual conduct as statutory rape offenses involving a younger partner who is 16 or 17 years old, such offenses should not be considered sexual abuse of a minor aggravated

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[23] The U.S. Supreme Court has since overruled Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), holding that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." Loper Bright Enters. v. Raimondo, 603 U.S. ___ (2024), No. 22-1219, 2024 WL 3208360, at *22 (U.S. June 28, 2024). Nevertheless, decisions issued prior to Loper Bright are not automatically called into question simply because the Supreme Court overruled the Chevron framework. See Loper Bright Enters., 603 U.S. at __, 2024 WL 3208360, at *21.

[24] While not directly addressed in this decision, it would appear that the prior holding in Matter of V-F-D-, 23 I&N Dec. 859, 962 (BIA 2006) (defining a victim of sexual abuse as a minor for the purpose of INA § 101(a)(43)(A) if he/she is under 18 years of age regardless of consent in the convicting jurisdiction) has been called into question.

[25] The Court, however, declined to address: (1) whether the generic offense requires "a particular age differential between the victim and perpetrator" and (2) whether the generic offense encompasses "sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants." Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

felonies under INA § 101(a)(43)(A). Id. at 1568 (finding that the offense of unlawful intercourse with a minor, in violation of Cal. Pen. Code § 261.5(c), which requires that the minor victim be "more than three years younger" than the perpetrator, is not categorically sexual abuse of a minor and thus not an aggravated felony).[26]

NYPL § 130. 20 (1)–Sexual Misconduct

In Ganzhi v. Holder, 624 F.3d 23 (2d Cir. 2010), the Second Circuit upheld the BIA's finding that the petitioner's conviction for sexual misconduct, in violation of NYPL § 130.20(1), qualified as sexual abuse of a minor under INA § 101(a)(43)(A). The Court found NYPL § 130.20(1) to be divisible, and the record of conviction demonstrated that he was convicted under a branch of the statute that constituted an aggravated felony: specifically, the portion of the statute defining a person under seventeen years old as incapable of consent. Ganzhi, 624 F.3d at 30.[27]

NYPL § 130.25(2)–Rape in the 3rd Degree

The Second Circuit has held that the subsection of Rape in the Third Degree describing a person twenty-one years old or more engaging in sexual intercourse with another person less than seventeen years old, in violation of NYPL § 130.25(2), constitutes sexual abuse of a minor. See Mugalli v. Ashcroft, 258 F.3d 52, 60–61 (2d Cir. 2001).[28]

NYPL §130.60(2)–Sexual Abuse in the 2nd Degree

Under NYPL §130.60(2), a person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is less than fourteen years old. The Second Circuit found that this constitutes "sexual abuse of a minor" and is thus an aggravated felony as defined under INA § 101(a)(43), 8 U.S.C. 1101(a)(43), as the generic federal offense defines a minor as an individual under the age of 18. See (b)(6) v. Garland, No. (b)(6) (2nd Cir. (b)(6) (b)(2023)

[26] For the purposes of Cal Pen. Code § 261.5(c), a "minor" was defined as a person under the age of 18. In Esquivel-Quintana, he was 21 years old at the time he had consensual sexual intercourse with a 17-year-old. Id.

[27] The same issues affecting Mugalli v. Ashcroft regarding consensual sexual intercourse involving 16-year-olds also applies to Ganzhi. See supra.

[28] Although Mugalli v. Ashcroft has not been directly abrogated or otherwise altered, it appears as though it may have been called into question, in part, after the decision in Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017), namely with respect to consensual sexual intercourse involving 116-year-olds. Thus, where statutes on their face list the age of the victim as simply "less than seventeen years old," such as with NYPL § 130.25(1) in Mugalli, the statute would likely be considered overbroad as it is not divisible with respect to the age element based on the categorical approach. See Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 n. 1; see also Criminal Jury Instructions 2d (New York) ("CIJ2d"), *available at* http://www.nycourts.gov/judges/cji/2-PenalLaw/130/art130hp.shtml. However, for statutes which simply list that a sexual offense occurred due to "lack of consent," modified categorical approach would need to be applied to determine if it was violated due to the age of the victim and the actual age of the victim would be known based on a review of the record of conviction documents. See Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 n. 1; see also NYPL § 130.05(2)-(3).

NYPL § 130.65(3)–Sexual Abuse in the 1st Degree

A conviction under NYPL § 130.65(3) is the sexual abuse in the first degree, when the perpetrator subjects another person to sexual contact . . . [and] the other person is less than eleven years old. Rodriguez v. Barr, __ F.3d __, 2020 WL 5580446, at *9 (2d Cir. Sept. 18, 2020). The Second Circuit has held that NYPL § 130.65(3) categorically matches the generic federal definition of "sexual abuse of a minor" under INA § 101(a)(43)(A) and is therefore an aggravated felony. Rodriguez v. Barr, __ F.3d __, 2020 WL 5580446, at *12 (2d Cir. Sept. 18, 2020) (reasoning that the NY law "criminalizes conduct . . . that falls within the 'broad range of maltreatment of a sexual nature' covered by the INA") (citing Rodriguez-Rodriguez, 22 I&N Dec. at 996).

NYPL § 263.05–Use of a Child in a Sexual Performance

In Oouch v. U.S. Dep't of Homeland Sec., the Second Circuit held that NYPL § 263.05, use of a child in a sexual performance, is categorically an aggravated felony of "sexual abuse of a minor." 633 F.3d 119,126 (2d Cir. 2011).

Tex. Pen. Code § 21.11(a)(2)–Knowing Exposure of Genitals in Presence of Child

The offense of indecency with a child by exposure, pursuant to section 21.11(a)(2) of the Texas Penal Code Annotated, is included within the definition of sexual abuse of a minor and is therefore an aggravated felony within the meaning of INA § 101(a)(43)(A). Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991, 996 (BIA 1999).

ii. INA § 101(a)(43)(B)—Trafficking in a Controlled Substance

The term "aggravated felony" encompasses illicit trafficking in a controlled substance, including "a drug trafficking crime," as defined in section 924(c) of Title 18 of the United States Code ("U.S.C."). "Illicit trafficking" offenses contain no "*mens rea* element with respect to knowledge of the illicit nature of the controlled substance, at least when accompanied . . . by an affirmative defense permitting a defendant to show that he or she had no such awareness, as well as by a requirement that the defendant be aware of the presence of the substance (apart from its illegality)." Matter of L-G-H-, 26 I&N Dec. 365, 371 (BIA 2014) (finding that section 893.13(1)(a)(1) of the Florida Statutes is an aggravated felony under the illicit trafficking clause of section 101(a)(43)(B) of the INA).

As relevant here, the term "drug trafficking crime" is defined as any felony punishable under the Controlled Substances Act ("CSA") (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46 (maritime drug law enforcement). 18 U.S.C. § 924(c)(2); see Lopez v. Gonzales, 549 U.S. 47, 55, 60 (2006); Chery v. Garland, _F.4th_, 2021 WL 4805217 at *3 (2d Cir. Oct. 15, 2021) ("[A] drug trafficking crime is defined as 'any felony punishable under the [CSA].'") (citations omitted).

An offense constitutes a felony under the CSA if the maximum term of imprisonment authorized by the CSA is more than one year. See 18 U.S.C. § 3559(a)(5). The CSA authorizes a maximum term of imprisonment of more than one year for "manufacturing, distributing, or dispensing a controlled substance." 21 U.S.C. § 841(a). A controlled substance is any substance that appears under 21 U.S.C. § 812.

A person commits a felony under the CSA when he or she "knowingly or intentionally…manufacture[s], distribute[s], or dispense[s], or possess[es] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1). However, where the offense involves a "small amount of marihuana for no remuneration," 21 U.S.C. § 841(b)(4), the penalty is "a term of imprisonment of not more than 1 year." See 21 U.S.C. § 844(a). This renders the offense a misdemeanor under the CSA, not a felony. 18 U.S.C. § 3559(a)(5).

In the removability context, the burden is on the government to prove that the respondent's marijuana distribution conviction categorically constitutes an aggravated felony; the respondent does not have the burden of proving the quantity of narcotics or the nature of the transfer.[29] Moncrieffe v. Holder, 133 S. Ct.1678 (2013); Martinez v. Mukasey, 551 F.3d 113, 121–22 (2d Cir. 2008). Applying the categorical approach, the offense is not an aggravated felony if the *minimum criminal conduct necessary* to sustain the conviction could have been based on a non-remunerative transfer of a small amount of marijuana. Id. Therefore, state offenses that criminalize, *inter alia*, the distribution – or the possession with intent to distribute – of a small amount of marijuana for no remuneration, are not categorically drug trafficking aggravated felonies because such a conviction would not necessarily be a felony under the Controlled Substances Act (CSA). Moncrieffe, 133 S. Ct. at 1688.

The Supreme Court in Moncrieffe clarified that there must be a "realistic probability," not just a theoretical possibility, that that the State would apply its statute to conduct falling outside of the generic definition of a crime in order to sustain a finding that the state offense is not categorically equivalent to the federal offense. Id. at 1685 (citing Duenas-Alvarez, 549 U.S. at 193).[30] If it is only theoretically possible for a person to be convicted under the state statute for distribution of a small amount of marijuana for no remuneration, but the state never prosecutes such conduct under that statute, there is sufficient evidence to find that a respondent's conviction

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[29] The Supreme Court rejected the government's argument that the noncitizen bears the burden of establishing that his conviction falls within the "mitigating exception." Moncrieffe, 133 S. Ct. at 1687; see also Martinez v. Mukasey, 551 F.3d 113, 121-22 (2d Cir. 2008).

[30] [Note to reader: The "reasonable probability" analysis referred to in Duenas-Alvarez arises in the context of a state statute that one party argues creates a crime outside the generic definition, but that does not, on its face, refer to such crime. This is to be distinguished from, *inter alia*, controlled substances statutes in which a specific controlled substance is referred to explicitly and thus criminalized. In the latter situation, the "realistic probability" versus "theoretical possibility" analysis may be unnecessary because even if no cases exist in which a defendant was prosecuted under that particular subsection of the statute, it is clear that the state legislature intended to criminalize such conduct because it was written directly into the statute. Accordingly, no "legal imagination" is required.] In addressing the disparity between Federal courts of appeals on whether to extend the realistic probability test to the context of crimes involving moral turpitude, the BIA held that "we will apply the Supreme Court's realistic probability test in deciding whether an offense categorically qualifies as a crime involving moral turpitude, unless controlling circuit law expressly dictates otherwise." Matter of Silva-Trevino, 26 I&N Dec. 826, 832 (BIA 2016) (applying the Fifth Circuit's "minimum reading" approach to the categorical inquiry instead of the "realistic probability" test).

categorically constitutes an aggravated felony. Id.; see also Matter of Chairez, 26 I&N Dec. 349, 357 (BIA 2014) (finding no realistic probability that a state statute would be applied in a manner constituting a removable offense where the Respondent identified no decision where anyone had been so prosecuted), overruled in part by Matter of Chairez, 26 I&N Dec. 478 (BIA 2015) (rejecting Matter of Lanferman "to the extent that it is inconsistent with [the Board's] understanding of the Supreme Court's approach to divisibility in Descamps."). The Court did not clarify what comprises a "small amount" of marijuana.

The CSA provides for a term of imprisonment of more than one year if a person commits a drug possession offense after a prior conviction under the CSA or "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State." 21 U.S.C. § 844(a). However, a second or subsequent conviction for simple possession is not an aggravated felony under INA § 101(a)(43), unless the prosecutor charged the noncitizen defendant with simple possession recidivism before trial or before a guilty plea, in order to provide the individual with notice and an opportunity to challenge the validity of the prior conviction. See Carachuri-Rosendo v. Holder, 560 U.S. 563, 582 (2010); see also Alsol v. Mukasey, 548 F.3d 207, 217 (2d Cir. 2008); Matter of Cuellar-Gomez, 25 I&N Dec. 850, 863 (BIA 2012).

The CSA provides for a term of imprisonment of more than one year for persons who possess more than five grams of cocaine base, and persons who possess flunitrazepam. Lopez v. Gonzales, 549 U.S. 47, 55, 60, 64 (2006). Similarly, possession of more than what one person would ordinarily possess for his or her own personal use may support a conviction for the federal felony of possession with intent to distribute. See 21 U.S.C. § 841; Lopez, 549 U.S. at 53 (citing United States v. Kates, 174 F.3d 580, 582 (5th Cir. 1999)).

A conviction that does not identify the drug involved cannot be used to establish that it was a federally listed controlled substance. See Matter of Paulus, 11 I&N Dec. 274, 276 (BIA 1965). However, even if the conviction record is silent as to the type of drug involved, the remarks of the defendant during his criminal trial may be considered as part of the "record of conviction." Matter of Mena, 17 I&N Dec. 38, 39–40 (BIA 1979) (finding that the defendant's admission during arraignment to possession of heroin could be considered part of the record of conviction upon which to base a finding of deportability).

I. NYPL § 221.40—Criminal Sale of Marijuana

The Second Circuit has held that a conviction for criminal sale of marijuana in the fourth degree, § 221.40, is not categorically a drug trafficking crime because the conviction could have been based on facts that meet the exception in 21 U.S.C. § 841(b)(4) for distribution of a small amount of marijuana for no remuneration, classifying the crime as a federal misdemeanor. Martinez v. Mukasey, 551 F.3d 113, 121-22 (2d Cir. 2008); see also Moncrieffe v. Holder, 133 S. Ct. 1678 (2013). A noncitizen does not have the burden of proving the quantity of narcotics or the nature of the transfer, even when he has the burden to show eligibility for relief. Martinez, 551 F.3d at 118 n.4.

II. NYPL § 220.31-43—Criminal Sale of a Controlled Substance

The Second Circuit has held that a conviction for fifth degree criminal sale of a controlled substance, in violation of NYPL § 220.31, does not categorically constitute an aggravated felony under INA § 101(a)(43)(B) because the New York definition of a "controlled substance" includes "chorionic gonadotropic", a substance which is not considered a controlled substance under the CSA. Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017).

In the context of New York controlled substance offenses, "sell" means "to sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL § 220.00. The Second Circuit has held that a conviction for third degree criminal sale of a controlled substance, namely cocaine, in violation of NYPL § 220.39(1), categorically constitutes an aggravated felony under INA § 101(a)(43)(B) because New York law requires the offer be "bona fide," which is one that is "made with the intent and ability to follow through on the transaction." Pascual v. Holder, 707 F.3d 403 (2d Cir. 2013). The analogous federal statute, 21 U.S.C. § 841(a)(1), punishes the "'actual, constructive or *attempted* transfer of a controlled substance,'" and thus a mere offer or attempt to sell a controlled substance would be punishable as an aggravated felony. Pascual, 707 F.3d 403; but cf. United States v. Savage, 542 F.3d 959 (2d Cir. 2008) (holding that a conviction under a Connecticut statute did not categorically qualify as a controlled substance offense because it "plainly criminalizes . . . a mere offer to sell a controlled substance[,]" including fraudulent offers). Other circuits have held that broad definitions that include offers to sell do not match the federal definition of a drug trafficking offense, and that the statutes are therefore divisible. See U.S. v. Medina-Almaguer, 559 F.3d 420, 422-44 (6th Cir. 2009) (finding that a conviction under a California statute that included "offer to sell" was not categorically drug trafficking offense); United States v. Gonzales, 484 F.3d 712, 714 (5th Cir. 2007) (same, for Texas statute).

III. 18 U.S.C. § 1952(a)(1)(A)—Travel in interstate commerce with intent to distribute proceeds

The offense of traveling in interstate commerce with the intent to distribute the proceeds of an unlawful drug enterprise in violation of 18 U.S.C. § 1952(a)(1)(A) (2006) is not an "aggravated felony" under INA § 101(a)(43)(B) because it is neither a "drug trafficking crime" under 18 U.S.C. § 924(c) (2006) nor "illicit trafficking in a controlled substance." Matter of Flores-Aguirre, 26 I&N Dec. 155 (BIA 2013) (affirming Matter of Davis, 20 I&N Dec. 536 (BIA 1992)).

IV. NYPL § 220.16(1)—Criminal Possession of a Controlled Substance in the Third Degree

Categorical match to the CSA

New York law defines a "narcotic drug" as "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." NYPL § 220.00(7). Moreover, a "controlled substance" consists of "any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marihuana, but including concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of such law." NYPL § 220.00(5). Thus, "narcotic drugs" as defined in NYPL § 220.16(1) are, in fact, "controlled substances," albeit a more limited list found only within four designated sub-schedules of New

York's five schedules of controlled substances. See NYPL §§ 220.16(1), 220.00(7); New York Public Health Law (NYPHL) § 3306.

As a whole, the New York and federal schedules of controlled substances do not match because "chorionic gonadotropic" is a controlled substance listed on the New York schedule, but it is not listed on the federal schedule in the CSA. NYPL § 220.00; NYPHL § 3306, Schedule III(g); 21 U.S.C. § 802 (6). Despite this mismatch, however, NYPL § 220.16(1) does not define "narcotic drug" more broadly than 21 U.S.C. § 802. First, "chorionic gonadotropin" is not classified as a "narcotic drug" under New York law because it is listed under Schedule III(g) and not in one of the four designated sub-schedules for "narcotic drugs." See NYPL §§ 220.00 (6), (17); NYPHL § 3306. Second, the four designated sub-schedules that define "narcotic drugs" under New York law only contain substances that categorically match the federally controlled substances that are listed in the CSA.

Felony under the CSA

A person commits a felony under the CSA when he, *inter alia*, "knowingly or intentionally . . . possess[es] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). A person violates NYPL § 220.16(1), a class B felony, "when he knowingly and unlawfully possesses . . . a narcotic drug with intent to sell it." The federal definition of "distribute" has been held to be analogous to the New York definition of "sell." Pascual v. Holder, 723 F.3d 156, 159 (2d Cir. 2013).

Under federal law, "distribute" means to "deliver," which is "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8), (11). For purposes of NYPL § 220.16(1), to "sell" means to "sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL § 220.00(1). In Pascual, the Second Circuit held that an "offer to sell" is equivalent to an attempted transfer and therefore that the New York definition of "sell" is a categorical match with the CSA definition of "distribute." 723 F.3d at 159. The CSA similarly criminalizes possession with intent to distribute, and "distribute" under the CSA was held to be analogous to "sell" under New York law by the Pascual Court. Id.

The four designated sub-schedules that define "narcotic drugs" under NYPL §220.00(7) only contain substances that categorically match the federally controlled substances that are listed in the CSA. See also NYPL § 220.16(1). Therefore, a conviction under NYPL §220.16(1) is a felony under the CSA because the New York and federal laws are a categorical match. Additionally, the maximum term of imprisonment authorized by the CSA is more than one year. See Pascual, 723 F.3d 156.

iii. INA § 101(a)(43)(C)—Trafficking in Firearms

The term "aggravated felony" includes "illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title)." INA § 101(a)(43)(C). The term "trafficking" has been construed to include all firearms offenses that exhibit a "business or merchant nature, *i.e.* trading, selling, or dealing in goods." Kuhali v. Reno, 266 F.3d 93, 107 (2d Cir. 2001). In Kuhali, the respondent was convicted of conspiracy to export firearms and ammunition without a license, in violation of

18 U.S.C. § 371 and 22 U.S.C. § 2778. Kuhali, 266 F.3d at 98. The respondent in that case argued that the term "export" does not always mean business or merchant activity; rather, it could mean mere transportation across international borders. However, the Second Circuit held that a conviction for the unlicensed export of firearms in the context of the Arms Export Control Act (within which 22 U.S.C. § 2778 is found) inherently involves a business or merchant activity and is thus a "trafficking" offense under INA § 101(a)(43)(C). Kuhali, 266 F.3d at 108-09.

The Board held that unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) is not a firearms offense under INA § 101(a)(43)(C) because it is categorically overbroad and indivisible. Matter of Ortega-Quezada, 28 I&N Dec. 598 (BIA 2022) (holding that the statute is overbroad because it regulates ammunition and "otherwise disposing of" such materials and that the statute is not divisible because (1) applicable case law does not treat possession of multiple firearms and ammunition as separate offenses, (2) there are not varying penalties under the statute, and (3) the model jury instructions treat firearms and ammunition as alternative means rather than elements).

iv. INA § 101(a)(43)(D)—Money Laundering

Circumstance Specific Approach from Nijhawan v. Holder applies

The definition of "aggravated felony" includes an offense described in 18 U.S.C. § 1956 (relating to money laundering) or 18 U.S.C. § 1957 (relating to engaging in monetary transactions in property derived from specific unlawful activity), if the amount of money involved exceeds $10,000. INA § 101(a)(43)(D). A conviction for conspiracy to commit money laundering is an aggravated felony under either INA § 101(a)(43)(D) or INA § 101(a)(43)(U). Barikyan v. Barr, 917 F.3d 142, 145 (2d Cir. 2019)

To determine whether the statute's monetary threshold has been met in a given case, the Court utilizes the "circumstance-specific approach" identified in Nijhawan v. Holder, 557 U.S. 29 (2009). See also Varughese v. Holder, 629 F.3d 272, 274 (2d Cir. 2010); Barikyan v. Barr, 917 F.3d 142, 146 (2d Cir. 2019). When using the circumstance-specific approach, the Court considers "the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion" in order to determine whether the conviction involved the required amount of loss. Nijhawan, 129 S. Ct. at 40; see also Pierre v. Holder, 588 F.3d 767, 773 (2d Cir. 2009). Under this approach, the Court may examine documents from the respondent's record of conviction as well as the presentence report, which is generally not considered part of the record of conviction. See Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009). In Varughese, the Second Circuit upheld the Immigration Judge's use of the petitioner's statements during his plea colloquy to conclude that the amount of funds involved in the crime exceeded $10,000. 629 F.3d at 274. In Barikyan, the Second Circuit held that the Immigration Judge properly consulted the forfeiture order in finding that clear and convincing evidence supported that petitioner laundered more than $10,000. 917 F.3d 142, 147 (2d Cir. 2019).[31] In looking to a restitution order, forfeiture

[31] In Barikyan, the Petitioner argued that the forfeiture order cannot be relied upon as a measure of the funds that were actually laundered because the criminal forfeiture statute sometimes requires forfeiture of legitimate funds. 917 F.3d at 146 (citing 18 U.S.C. § 982(a)(1) (requiring forfeiture of all property traceable to, or commingled with, laundered funds)). However, the Court found that Barikyan offered no evidence that this hypothetical situation applied to his

order, or presentence report for facts to support whether a loss exceeds $10,000, such facts "must be assessed with an eye to . . . the burden of proof employed." Barikyan v. Barr, 917 F.3d 142, 147 (2d Cir. 2019) (quoting Matter of Babaisakov, 24 I&N Dec. 306, 319 (BIA 2007)).[32]

An actual loss exceeding $10,000 may not be required for conspiracies and attempts to commit an aggravated felony as defined in INA § 101(a)(43)(D). See Matter of S-I-K-, 24 I&N Dec. 324, 327 n.3 (BIA 2007) (citing Perez v. Elwood, 294 F.3d 552, 557 n.1 (3d Cir. 2002)). But cf. Pierre v. Holder, 588 F.3d 767 (2d Cir. 2009) (finding that an actual loss exceeding $10,000 was required to find an aggravated felony where the respondent was not charged under INA § 101(a)(43)(U), but only under INA § 101(a)(43)(M)).

v. INA § 101(a)(43)(E)—Explosive Materials/Firearms Offenses

The definition of "aggravated felony" includes an offense described in 18 U.S.C. § 842(h) or (i), or 18 U.S.C. § 844(d)-(i) (relating to explosive materials offenses); 18 U.S.C. § 922(g)(1)-(5), (j), (n), (o), (p), or (r), or 18 U.S.C. § 924(b) or (h) (relating to firearms offenses); or § 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses). INA § 101(a)(43)(E).

To be convicted under 18 U.S.C. § 922(g)(5)(A), a person must have knowledge not only that he or she is in possession of a firearm or ammunition, but also that his or her unlawful immigration status rendered him or her ineligible to lawfully possess a firearm of ammunition. See Rehaif v. United States, 139 S. Ct. 2191 (2019). The Supreme Court found that a defendant must possess a culpable mental state regarding "each of the statutory elements that criminalizes otherwise innocent conduct." See id. (citing United States v. X-Citement Video, Inc, 513 U.S. 64, 72 (1994)).

I. NYPL §§ 110-150.10—Attempted Arson

Attempted arson in the third degree in violation of NYPL §§ 110.00/150.10 is an aggravated felony under INA § 101(a)(43)(E)(i) and 18 U.S.C. § 844(i), even though NYPL §§ 110.00/150.10 lacks the jurisdictional element included in 18 U.S.C. § 844(i). Torres v. Lynch, 136 S. Ct. 1619 (2016) (affirming the holding in Torres v. Holder, 764 F.3d 152 (2d Cir. 2014)); Matter of Bautista, 25 I&N Dec. 616 (BIA 2011).

II. NYPL § 265.11(2)—Criminal Sale of a Firearm and NYPL § 265.03—Criminal Possession of a Weapon

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case, nor did he challenge the reliability of the forfeiture order. *Id.* Therefore, under the circumstances, "it was not clear error for the agency to find that at least $10,000 of the $120,000 forfeiture amount (less than 10%) reflected funds that were actually laundered." *Id.*

[32] "[A] defendant's failure to contest, during criminal proceedings, a fact found by a preponderance [of the evidence] would bear on whether that fact was reliable for removal purposes as well, especially in the absence of any showing in removal proceedings that there was an error in the criminal proceedings respecting that fact." Matter of Babaisakov, 24 I&N Dec. 306, 320 (BIA 2007); see also Barikyan v. Barr, 917 F.3d 142, 147 (2d Cir. 2019) (finding that a forfeiture order—which need only be supported by preponderance of the evidence—can constitute clear and convincing evidence to carry the burden in removability proceedings where a respondent failed to challenge its reliability).

The Second Circuit held that NYPL §§ 265.03, criminal possession of a weapon, and 265.11(2), criminal sale of a firearm, are categorically not firearm offenses under INA § 237(a)(2)(C). See Jack v. Barr, 966 F.3d 95, 97-98 (2d Cir. 2020). The Second Circuit reasoned that since New York's firearm definition covers loaded "muzzle loading pistol or revolver" but the federal definition exempts from its firearms definition *all* antique firearms, loaded and unloaded, the New York statutes are categorically overbroad. *Id.* Thus, the Second Circuit's reasoning may apply.

III. 18 U.S.C. § 922(g)—Criminal Possession of Ammunition

The offense of unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g) (2006), is an aggravated felony under INA § 101(a)(43)(E)(ii). Matter of Oppedisano, 26 I&N Dec. 202 (BIA 2013) (holding that "Congress intended [the parenthetical in INA § 101(a)(43)(E)(ii)] only to be descriptive of the types of offenses that are referenced in § 922(g), rather than a limitation that excludes ammunition offenses from the aggravated felony definition"), aff'd, Oppedisano v. Holder, 769 F.3d 147 (2d Cir. 2014). 18 U.S.C. § 922(g)(5)(A), which prohibits an "alien . . . illegally or unlawfully in the United States" from possessing a firearm or ammunition, does not require an "entry," but rather, "requires only that a noncitizen be physically present within the United States." United States v. Balde, 927 F.3d 71, 77 (2d Cir. 2019).

vi. INA § 101(a)(43)(F)—Crime of Violence

The definition of the term "aggravated felony" includes a "crime of violence" (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment is at least one year. INA § 101(a)(43)(F). A term of confinement in a substance abuse treatment facility imposed as a condition of probation constitutes a "term of imprisonment" under INA § 101(a)(48)(B) and 8 U.S.C. § 1101(a)(48)(B), for the purposes of determining if an offense is a crime of violence under INA § 101(a)(43)(F). Matter of Calvillo Garcia, 26 I&N Dec. 697 (BIA 2015). A "crime of violence" is defined as: "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16; Dos Santos v. Gonzales, 440 F.3d 81 (2d Cir. 2006); Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994). Sections 16(a) and (b) both involve the "use" of "physical force against" another's person or property, which requires "a higher degree of intent than negligent or merely accidental conduct." See Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

To determine whether a state statute is a categorical match to 18 U.S.C. § 16(a), the Court must consider whether the "use, attempted use, or threatened use of physical force against the person or property of another" is an element of the State offense. Matter of Francisco-Alonzo, 26 I&N Dec. 594, 596-97 (BIA 2015); see also Matter of Guzman-Polanco, 26 I&N Dec. 713, 717 (BIA 2016) (for a State offense to qualify as a crime of violence under 18 U.S.C. § 16(a), the State statute must require as an element the use, attempted use, or threatened use of violent physical

force); Matter of Chairez, 26 I&N Dec. 819 (BIA 2016).[33] In determining whether the elements of conviction for the State statute are narrower than those of the generic offense, the Court should apply the "realistic probability" test. Francisco-Alonzo, 26 I&N Dec. at 597 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The Supreme Court decisions in Johnson v. United States, 559 U.S. 133 (2010)[34], and Stokeling v. United States, 139 S. Ct. 544 (2019)[35], control the interpretation of 18 U.S.C. § 16(a). See Matter of Dang, 28 I&N Dec. 541, 548 (BIA 2022); see also Matter of E.Velasquez, 25 I&N Dec. 278, 282 (BIA 2010) (holding that the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i) is, "in pertinent part, identical" to the definition of "crime of violence" in 18 U.S.C. § 16(a); therefore, the Board applied Johnson's definition of "physical force" under 18 U.S.C. § 924(e)(2)(B)(i) to its interpretation of section 237(a)(2)(E)(i), which incorporates § 16(a) by reference.).

The language of 18 U.S.C. § 16(b) sweeps more broadly than § 16(a) and includes offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. Leocal v. Ashcroft, 543 U.S. 1, 10 (2004). The Second Circuit has concluded that a crime of violence under section 16(b) must present a substantial risk of the *intentional* use of force. Vargas-Sarmiento v. U.S. Dep't of Justice, 448 F.3d 159, 172 (2d Cir. 2006) (citing Jobson v. Ashcroft, 326 F.3d 367, 374 (2d Cir. 2003); see also Morris v. Holder, 676 F.3d 309, 314 (2d Cir 2012) (citing Vargas-Sarmiento, 448 F.3d at 169-170).[36] In determining

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[33] In Matter of Guzman-Polanco, 26 I&N Dec. 806 (BIA 2016), the Board clarified its prior holding in Matter of Guzman-Polanco, 26 I&N Dec. 713 (BIA 2016) and stated that controlling circuit law should be followed regarding the question of whether conduct such as the use or threatened use of poison to injure another person involved sufficient "force" to constitute a crime of violence. See United States v. Hill, 832 F.3d 135 (2d Cir. 2016), amended and superseded by United States v. Hill, 890 F.3d 51 (2d Cir. 2018), for a Second Circuit discussion on whether an indirect application of force, such as poisoning, would categorically constitute a crime of violence for the purpose of 18 U.S.C. § 924(c)(3)(A).

[34] In Johnson, the Supreme Court held that, "in the context of [18 U.S.C. §§ 924(e)(1), (2)(B)(i) (2006), Armed Career Criminal Act ("ACCA")] definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." Applying this construction of 18 U.S.C. § 924(e)(2)(B)(i), the Court concluded that the defendant's Florida battery conviction, which, under State law, required proof of only the merest offensive touching, did not categorically require proof of violent force, and therefore did not qualify as a violent felony. Id. at 138–43.

[35] In Stokeling, the Supreme Court distinguished the statute at issue from the statute in Johnson, explaining that the Florida battery statute at issue in Johnson tracked the common-law battery definition, criminalizing "any intentional physical contact." Id. at 553 (quoting Johnson, 559 U.S. at 140). That definition necessarily encompassed force not capable of causing physical pain or injury, including mere offensive touching. In Stokeling, the Court reasoned the offensive touching "Johnson addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim." Id. To the contrary, the Court held that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by Johnson, and 'suggest[s] a degree of power that would not be satisfied by the merest touching.'" Id. (alteration in original) (quoting Johnson, 559 U.S. at 139). The Court in Stokeling concluded that this "understanding of 'physical force' comports with Johnson." Id. at 552; see also id. at 555 (concluding that "physical force" or "'force capable of causing physical pain or injury' includes the amount of force necessary to overcome a victim's resistance" (quoting Johnson, 559 U.S. at 140)). Because the Florida robbery statute at issue in Stokeling required proof of force sufficient to overcome a victim's resistance, while the Florida battery statute at issue in Johnson did not, Stokeling concluded that the robbery statute qualified as a "violent felony" under the ACCA. 139 S. Ct. at 554–55.

[36] In Jobson, the Second Circuit stated with regard to §16(b) that "an unintentional accident caused by recklessness cannot properly be said to involve a substantial risk that a defendant will use physical force." 326 F.3d 367, 373-74 (2d Cir. 2003). However, acts of intimidation where a defendant "*know[s]* that his actions would create the impression in an ordinary person that resistance would be met by force" involve the use or threatened use of force. United

whether a statute is a crime of violence under 18 U.S.C. § 16(b), the proper inquiry is whether the conduct encompassed by the elements of the State offense present a substantial risk that physical force may be used in the course of committing the offense in the "ordinary case." Matter of Francisco-Alonzo, 26 I&N Dec. 594, 599-600 (BIA 2015) (rejecting Moncrieffe's "least culpable conduct" analysis in the context of determining crimes of violence under § 16(b)).[37] However, the Supreme Court subsequently overruled James v. United States, upon which the BIA relied in deciding Francisco-Alonzo. See Johnson v. United States, 135 S. Ct. 2251, 2255-58, 2563 (2015) (finding the residual clause "or otherwise involves conduct that presents a serious potential risk of physical injury to another" is unconstitutionally vague); see also Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (holding that the residual clause of 18 U.S.C. § 16(b), as incorporated by INA § 101(a)(43)(f) (defining the "crime of violence" aggravated felony under the Act), is unconstitutionally vague.)[38] The Supreme Court also held that the residual clause of 18 U.S.C. § 1924(c) was unconstitutionally vague. In its analysis, the Court stated that the statute was "nearly identical" to 18 U.S.C. § 16(b) (previously held unconstitutionally vague in Sessions v. Dimaya) and that, like § 16(b), 18 U.S.C. § 1924(c), mandated a categorical analysis, not a case-specific analysis. See United States v. Davis, 139 S. Ct. 2319 (2019).

States v. Hendricks, 921 F.3d 320, 328 (2d Cir. 2019) (holding that federal bank robbery under 18 U.S.C. § 2113(a) committed by intimidation categorically constitutes a crime of violence); Collier v. United States, 989 F.3d 212, 222 (2d Cir. 2021) (holding that attempted federal bank robbery under 18 U.S.C. § 2113(a) is also categorically a crime of violence).

[37] This approach appears to be at tension with the Supreme Court's pronouncement that "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute." Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (quoting Moncrieffe v. Holder, 133 S. Ct. 1678, 1685-86 (2013)). The BIA explained its reasoning as follows. In Francisco-Alonzo, the BIA applied the "ordinary case" approach in Matter of Ramon Martinez, 25 I&N Dec. 571, 574 (BIA 2011), and expressly distinguished this approach from the realistic probability approach used for determining crimes of violence under 18 U.S.C. § 16(a). 26 I&N Dec. at 597. The BIA also relied on James v. United States, 550 U.S. 192, 207, which held it is not necessary to determine whether all prosecutions of the State crime must create a risk of injury to others in order to constitute a categorical match with a "violent felony" under 18 U.S.C. § 924(e)(2)(B). Francisco-Alonzo, 26 I&N Dec. at 597-98. Looking to James for guidance, the BIA reasoned that the definitions of "crime of violence" in § 16(b) and of "violent felony" in the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), both contain similar "probabilistic" terms. Id. at 599. The BIA further reasoned that because of the similarities in terms, crimes of violence under § 16(b) should be analyzed with the "ordinary case" approach that is used to analyze violent felonies under the residual clause of ACCA. Id. The BIA stated that Moncrieffe has not "cast doubt" on the validity of James. Francisco-Alonzo, 26 I&N Dec. at 599. However, the Supreme Court subsequently overruled James, finding that the residual clause of ACCA, "or otherwise involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague for purposes of sentencing enhancements. Johnson v. United States, 135 S. Ct. 2251, 2255-58, 2563 (2015).

[38] In light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (holding 18 U.S.C. 16(b) to be unconstitutionally vague and thus void), the Second Circuit granted the PFR and terminated removal proceedings. See Genego v. Barr, 922 F.3d 499 (2d Cir. 2019). The sole basis for the petitioner's removability was his Connecticut conviction for third-degree burglary (Conn. Gen. Stat. § 53(a)-103), which the BIA held constituted an aggravated felony crime of violence under 18 U.S.C. § 16(b). Stating that remand is unnecessary "if it would be pointless or futile, such as where there is an alternative and sufficient basis for the result, the error is tangential to non-erroneous reasoning, or the overwhelming evidence makes the same decision inevitable," the court terminated proceedings rather than remand to the BIA with instructions to terminate because the case was argued during the government shutdown, which the court characterized as having "exacerbated the backlog of immigration cases."

The term "physical force" in 18 U.S.C. § 16 is defined as "power, violence, or pressure directed against a person or thing." Morris v. Holder, 676 F.3d 309, 314 (2d Cir. 2012) (citing Vargas-Sarmiento v. U.S. Dept. of Justice, 448 F.3d 159, 169 (2d Cir. 2006)).[39] The force referenced in 18 U.S.C. § 16(b) need not be "*violent* force." Morris, 676 F.3d 309, 314-15 (2d Cir. 2012) (citing Vargas-Sarmiento, 448 F.3d at 169 (2d Cir. 2006)). "Physical force" has been broadly interpreted and includes acts such as poisoning food that the defendant intends someone to eat, because the act of poisoning "intentionally avails h[im]self of the physical force exerted by poison on a human body." Vargas-Sarmiento, 448 F.3d at 174. "[W]hen the victim cannot consent . . . because of the disparate ages of the defendant and the victim, or the mental incapacity or physical helplessness of the victim, or the defendant's position of authority over the victim, the crime, *semper et ubique*, includes a substantial risk of physical force." Chery v. Ashcroft, 347 F.3d 404, 408-09 (2d Cir. 2003) (finding that a violation of Connecticut General Statutes § 53a-71 is a "crime of violence"); Dos Santos v. Gonzales, 440 F.3d 81, 84 (2d Cir. 2006); Kondjoua v. Barr, 961 F.3d 83 (2d Cir. 2020) (holding that sexual assault in the third degree, in violation of Connecticut General Statutes § 53a-72a(a)(1) is categorically a crime of violence under the "force clause," 8 U.S.C. § 16(a)). When the underlying crime requires that the defendant intend to inflict serious physical injury, there is inherently a substantial risk that the perpetrator may intentionally use physical force to cause the injury because the infliction of a serious physical injury is "likely to meet vigorous resistance from a victim." Morris, 676 F.3d at 315 (quoting Vargas-Sarmiento, 448 F.3d at 173-74).

"Use of force" can also include committing an offense by omission. United States v. Scott, 990 F.3d 94, 110 (2d Cir. 2021) (holding that first-degree manslaughter in violation of N.Y. Penal Law § 125.20(1) is a crime of violence). Under New York law, an omission is recognized as an action that is sufficient to support criminal culpability. N.Y. Penal Law § 15.00(5). Additionally, "use" in its ordinary meaning applies as much to a use of physical force by omission as by commission. Scott, 990 F.3d at 125. Federal law determines the relevant physical force by what causes physical injury to the victim, as opposed to what is physically performed by the defendant; further, the defendant's use of force is determined by the defendant's knowing or intentional causation of injury by means of force as opposed to the defendant's physical acts. Id.

I. Arson—NYPL § 150.15

Attempted arson in the second degree, in violation of NYPL §§ 110-150.15, categorically constitutes an aggravated felony under INA § 101(a)(43)(F) and (a)(43)(U), as an attempt to commit "a crime of violence…for which the term of imprisonment [is] at least one year." Santana v. Holder, 714 F.3d 140 (2d Cir. 2013).

II. Assault—NYPL § 120.05

The Second Circuit has held that a respondent's New York conviction for second-degree assault (N.Y. Penal Law § 120.05(1)) is an aggravated crime of violence under INA § 101(a)(43)(F) and 18 U.S.C. § 16(a). Thompson v. Garland, 994 F.3d 109, 111–12 (2d Cir. 2021). The court explained that because New York second-degree assault requires a defendant to

[39] As discussed supra, in Matter of Dang, 28 I&N Dec. 541 (BIA 2022), the BIA clarified that the construction of "physical force" under 18 U.S.C. § 924(e)(2)(B)(i) as discussed in Johnson v. United States, 559 U.S. 133 (2010) and Stokeling v. United States, 139 S. Ct. 544 (2019) should be applied when interpreting 18 U.S.C. § 16(a).

(1) cause a serious physical injury to another (2) with the intent to do so, it necessarily meets the physical force requirement of 18 U.S.C. § 16(a) because a person who causes "serious physical injury" with intent to do so necessarily uses physical force. U.S. v. Castleman, 572 U.S. 157, 170 (2014). Further, the court held that force causing "serious physical injury" is violent force because New York defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. Penal Law § 10.00(10). The court also dismissed the petitioner's claim that the statute was overbroad, stating that the argument was without merit. Thompson, 994 F.3d at 112.

The Second Circuit has held that a respondent's New York conviction for second-degree assault with a deadly weapon or dangerous instrument (N.Y. Penal Law § 120.05(2)) is categorically an aggravated felony crime of violence. Singh v. Barr, 939 F.3d 457 (2d Cir. 2019); Dale v. Barr, __ F.3d __, 2020 WL 4211039 (2d Cir. July 23, 2020). The court explained that the statute matches the crime of violence definition in 18 U.S.C. § 16(a) because it requires the use of a deadly or dangerous weapon and the causation of physical injury. Next, the court upheld the BIA's determination that the petitioner's conviction is a particularly serious crime, making him ineligible for withholding of removal or protection under the Convention Against Torture. See Singh v. Barr, 939 F.3d 457 (2d Cir. 2019). The Second Circuit further explained that the substantive New York offense of assault in the second degree is a crime of violence because the use, attempted use, or threatened use of physical force is an element of the offense and rejected the petitioner's arguments that the offense is not a crime of violence because it could be accomplished by indirect force or by omission. Additionally, it held that attempted second-degree assault is also a crime of violence because an attempt to cause physical injury by means of a deadly weapon or dangerous instrument, as required by § 120.05(2), is necessarily an attempt to use physical force, as required by the crime of violence definition. See United States v. Tabb, 949 F.3d 81 (2d Cir. 2020). Given the reasoning in these decisions, a conviction under NYPL § 120.10 (01) (Assault in the First Degree) is probably also an aggravated felony (crime of violence).

Similarly, the Second Circuit held that "assaulting a federal officer," in violation of 18 U.S.C. § 111(b), is categorically a crime of violence, as defined under 18 U.S.C. § 924(c)(1)(A).[40] Gray v. United States, __ F.3d __, 2020 WL 66855302, at *1 (2d Cir. Nov. 13, 2020). First, the Court agreed with other federal courts of appeals that section 111 is divisible. See id. at *2 (citing United States v. Chestaro, 197 F.3d 600, 606 (2d Cir. 1999) (recognizing that section 111 "creates three distinct categories of conduct")). Second, employing the modified categorical approach, the Court held that a conviction under section 111(b) requires the use of a "deadly or dangerous weapon" or the "inflict[ion of] bodily injury," and therefore independently satisfies the physical force requirement of section 924(c)(3)(A). See id.; see also id. at *2–4. Notably, the Court reasoned that "infliction of bodily injury" under 18 U.S.C. § 111(b), "by means of a forcible assault or battery necessarily involves physical force as defined by Johnson and required by § 924(c)(3)(A)." Id. at *3. Based on its reasoning, the Court held that 18 U.S.C. § 111(b) is categorically a crime of violence under 18 U.S.C. § 924(c)(3)(A). See id. at *4.

[40] 18 U.S.C. § 924(c)(1)(A) effectively employs the same definition as 18 U.S.C. § 16(b).

Assault in the third degree, in violation of Connecticut law, which is identical to New York assault in the third degree,[41] does not constitute a "crime of violence" because the statute requires only intent to injure and the causation of injury; it does not require the use of force.[42] Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003). However, assault of a police officer, as defined in Connecticut, is a "crime of violence" because it "inherently presents a substantial risk that force may be used." Canada v. Gonzales, 448 F.3d 560, 571 (2d Cir. 2006); cf. Blake v. Gonzales, 481 F.3d 152 (2d Cir. 2007) (finding that a conviction for assault and battery on a police officer under Massachusetts law constitutes a crime of violence).

The Board of Immigration Appeals held that a conviction for the misdemeanor offense of assault and battery against a family or household member, in violation of section 18.2-57.2(A) of the Virginia Code Annotated, is not categorically a crime of violence as defined in 18 U.S.C. § 16(a). Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010).

III. Assault—NYPL § 120.10(1)

The Second Circuit held that a conviction for attempted first-degree assault (N.Y. Penal Law §§ 110.00, 120.10(1)) is a crime of violence as defined under 18 U.S.C. § 16(a). In doing so, the court examined the elements of the offense of conviction—which requires a showing of (1) an intent to cause serious physical injury and (2) the use of a deadly weapon or dangerous instrument—and determined that the elements satisfy the use of violent force required under 18 U.S.C. § 16(a). Accordingly, the court found that the petitioner's conviction for attempted first-degree assault is an aggravated felony as defined by both INA § 101(a)(43)(F) (crime of violence) and 101(a)(43)(U) (attempt). (b)(6) v. Garland, No. (b)(6) 2022 WL 18359302 (2d Cir. (b)(6) (b)(2023).

IV. Child Abuse

The BIA held that a conviction for "criminally negligent child abuse," in violation of Colorado law, is not necessarily a crime of violence. Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999). In Sweetser, the Colorado statute at issue was found to be divisible, and the portion under which the respondent was convicted—unreasonably placing a child in a situation which poses a threat to life or health—was found not to involve a "substantial risk" of physical force. 22 I&N Dec. at 715. Therefore, the conviction did not constitute a crime of violence. Sweetser, 22 I&N Dec. at 715. The Board explained that "[n]o force or violence is necessary. Instead, only an act of omission is required for a conviction under this portion of the state criminal statute." Sweetser, 22 I&N Dec. at 715.

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[41] Compare Conn. Gen. State. 53a-61 with NYPL § 120.00.

[42] In Matter of Martin, 23 I&N Dec. 491 (BIA 2002), decided before Chrzanoski, the BIA considered the same statute, concluding that it is a "crime of violence" because it involves the intentional infliction of physical injury. 23 I&N Dec. 491 (BIA 2002).

V. Criminal Contempt—NYPL § 215.51(b)(i)

A conviction for criminal contempt in the first degree in violation of NYPL § 215.51(b)(i) constitutes a "crime of violence" as defined in 8 U.S.C. § 16(b). Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999).

VI. Corporal Injury on a Spouse

A misdemeanor conviction for the willful infliction of corporal injury on a spouse, in violation of section 273.5(a) of the California Penal Code, categorically constitutes a "crime of violence" as defined in 18 U.S.C. § 16(a). Matter of Perez Ramirez, 25 I&N Dec. 203 (BIA 2010).

VII. Criminal Possession of a Weapon—NYPL § 265.03(1)(b)

Under the categorical approach, a conviction for criminal possession of a weapon in the second degree under NYPL § 265.03(1)(b) constitutes a "crime of violence" as defined by 18 U.S.C. § 16(b). Brooks v. Holder, 621 F.3d 88, 91 (2d Cir. 2010); see also Henry v. Bureau of ICE, 493 F.3d 303 (3d Cir. 2007), cert. denied, 552 U.S. 1256 (2008). The "possession of a loaded firearm with the intent to use it unlawfully against another person plainly involves a substantial risk that physical force against the person or property of another may be used." Brooks, 621 F.3d at 91 (citing NYPL § 265.03(1)(b) and 18 U.S.C. § 16(b)). This holding only applies to subsection NYPL § 265.03(1), which requires intent to use a firearm against another person. Id.

In United States v. Gamez, 577 F.3d 394 (2d Cir. 2009), the Second Circuit held that a conviction for criminal possession of a weapon in the second degree in violation of NYPL § 265.03 did *not* constitute a "crime of violence" as described in the United States Sentencing Guidelines ("Guidelines") § 2L.2(b)(1)(A)(ii). In reaching this determination, the Second Circuit relied on commentary for § 2L1.2(b)(1) of the Guidelines, which defines "crime of violence" to include language substantially similar to that found at 18 U.S.C. § 16(a). The Court in Brooks distinguished the two cases by noting that the commentary to §2L1.2(b)(1) "tracks only the language of 18 U.S.C. § 16(a)," which deals with "use" of force, and not 18 U.S.C. § 16(b), which deals with "substantial risk" that force will be used. Brooks, 621 F.3d at 90 n.2. Thus, in Gamez, the Second Circuit did not consider whether NYPL § 265.03 would constitute a "crime of violence" as defined by 18 U.S.C. § 16(b).

VIII. DUI—NY VTL § 1192.3

The U.S. Supreme Court held that a state conviction for driving under the influence of alcohol ("DUI") and causing serious bodily injury in an accident is not a "crime of violence" and, thus, is not an "aggravated felony," if the offense "do[es] not have a *mens rea* component or require[s] only a showing of negligence in the operation of a vehicle." Leocal v. Ashcroft, 543 U.S. 1, 6, 13 (2004). The Second Circuit held that driving while intoxicated, in violation of section 1192.3 of New York's Vehicle and Traffic Law, is not a crime of violence because commission of the offense does not require the use of physical force. Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001).

IX. False Imprisonment—NYPL § 135.10

In New York, "[a] person is guilty of unlawful imprisonment in the first degree when he restrains another under circumstances which expose the latter to a risk of serious physical injury." NYPL § 135.10. This statute is not categorically a crime of violence because the definition of "restrain" (found at NYPL § 135.00(1)) encompasses some acts which require the use of force (or a substantial risk that force may be used) and others which do not. Dickson v. Ashcroft 346 F.3d 44, 52 (2d Cir. 2003).

Under the modified categorical approach, a conviction under NYPL § 135.10 is a "crime of violence" when the victim is a competent adult because it necessarily includes the use of force, threatened use of force, or a substantial risk that force will be used. Dickson v. Ashcroft, 346 F.3d 44, 51 (2d Cir. 2003). Unlawful imprisonment of an incompetent person or a child under sixteen years old, however, is not a crime of violence because it does not have as an element the use of force, nor is there a substantial risk that force will be used to commit the offense. Dickson, 346 F.3d at 52.

X. Kidnapping—NYPL § 135.20

In New York, "[a] person is guilty of kidnapping in the second degree when he abducts another person. NYPL § 135.20. This statute is not categorically a crime of violence because the definition of abduct (found at NYPL § 135. 00(2)) encompasses some acts that require the use of force or attempted use of force and others which do not. See U.S. v. Eldridge, 2023 WL 2698566 (2d Cir. Mar. 30, 2023).

XI. Manslaughter—NYPL §§ 125.15(1)-(2), 125.20

Manslaughter in the second degree, in violation of NYPL § 125.15(1) (recklessly causing the death of another person), is not a "crime of violence" because an unintentional accident caused by recklessness cannot involve a substantial risk of intentional use of force. Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003).

However, in Vargas-Sarmiento v. U.S. Dep't of Justice, the Second Circuit held that manslaughter in the first degree, in violation of NYPL § 125.20(1) or (2), is a "crime of violence" under 18 U.S.C. §16(b), because a conviction under either section requires proof of intent to cause serious injury or death, and there is a substantial risk that intentional force will be used. Matter of Vargas-Sarmiento, 23 I&N Dec. 651 (BIA 2004), Vargas-Sarmiento v. U.S. Dep't of Justice, 448 F.3d 159, 162 (2d Cir. 2006), *abrogated in part by* Sessions v. Dimaya, 138 S. Ct. 1204 (2018). In making this determination, the Second Circuit found NYPL § 125.20 to be divisible. Vargas-Sarmiento, 448 F.3d at 167-68; see also United States v. Castillo, 896 F.3d 141, 149–50 (2d Cir. 2018) (determining that NYPL § 125.20 criminalizes multiple crimes in the alternative). But, in Sessions v. Dimaya, the Supreme Court held that the residual clause of crime of violence in §16(b) is unconstitutionally vague, thereby abrogating the Second Circuit's holding. 138 S. Ct. 1204.

In United States v. Scott, the Second Circuit held that NYPL § 125.20(1) does not satisfy the force clause of the Armed Career Criminal Act ("ACCA") and the Career Offender Sentencing

Guideline ("COSG") because the statute includes commission of the crime by inaction, while the force clause requires action. 954 F.3d 74, 87 (2020). The Court further held that NYPL § 125.20(1) does not satisfy the COSG's enumerated offense clause because it is broader than the generic definitions of murder, manslaughter, and aggravated assault. Id. at 90–92. NYPL § 125.20(1) is therefore not a crime of violence. Id. at 92.

A conviction under NYPL § 125.20(3) (causing death of pregnant woman while performing abortion) does not constitute a crime of violence. Matter of Vargas-Sarmiento, 23 I&N Dec. 651. Moreover, in January 2019, the New York legislature repealed § 125.20(3). See 2019 N.Y. Sess. Law Ch. 1 (S. 240) (McKinney).

XII. Murder

The Second Circuit held that NYPL § 125.25(1), murder in the second degree, "categorically involves the use of force" and that it constitutes a categorical crime of violence under the elements clause of 18 U.S.C. § 924(c)[43] which defines a crime of violence as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." United States v. (b)(6) Nos. (b)(6) (b)(6) 2022 WL 2057424 (2d Cir. (b)(6) 2022). The Second Circuit further held that attempt to commit second degree murder is categorically a crime of violence. Id.

XIII. Rape

Note: while there is no precedential law on whether rape in any degree under NYPL is a crime of violence under the INA, the District Court for the Eastern District of New York and the Ninth Circuit have found that rape in the second degree under NYPL § 130.30 is a crime of violence under the Federal Sentencing Guidelines which defines crime of violence with similar, albeit not exactly identical, language. See United States v. Palaguachi, 187 F. Supp. 3d 356, 363–64 (E.D.N.Y. 2016); United States v. (b)(6) 2013 WL 1613222, at *2 (9th Cir. (b)(6), 2013), *withdrawn on denial of reh'g en banc*, 2013 WL 4038591 (9th Cir. (b)(6), 2013). Significantly, the reasoning may not apply because the sentencing enhancement guidelines definition of crime of violence also includes "forcible sex offenses" a definition not contained in 18 U.S.C. § 16. Compare (b)(6) 2013 WL 1613222, at *2 (9th Cir. (b)(6), 2013), *withdrawn on denial of reh'g en banc*, 2013 WL 4038591 (9th Cir. (b)(6), 2013), with 18 U.S.C. § 16.

XIV. Robbery—NYPL § 160.15

Robbery in the first degree, in violation of NYPL § 160.15, constitutes a "crime of violence" because an element of the offense involves the forcible stealing of property, which involves the use of force. United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997). According to the Board of Immigration Appeals, the federal crime of robbery with a deadly weapon is also a crime of violence. Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997). The Second Circuit also held that a conviction under New Jersey state law for robbery in the second degree is an aggravated felony. Moreno-Bravo v. Gonzales, 463 F.3d 253, 264 (2d Cir. 2006).

[43] This provision is analogous to 18 U.S.C. § 16(a).

Additionally, the Second Circuit held that a Connecticut conviction for first-degree robbery (Conn. Gen. Stat. § 53a-134(a)(4)) is an aggravated felony crime of violence. Wood v. Barr, 941 F.3d 628 (2d Cir. Nov. 1, 2019). The Second Circuit reasoned that the mere displaying of a firearm in the commission of a larceny "necessarily implies a threat to commit violence." Id. at 2.

In (b)(6) v. United States, No. (b)(6) 2024 WL 3957071 (2d Cir. (b)(6), 2024), the Second Circuit held that aggravated postal robbery under 18 U.S.C. § 2114(a) qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A) (analogous to 18 U.S.C. § 16(a)). Aggravated postal robbery under 18 U.S.C. § 2114(a) incorporates the elements of the base offense of completed § 2114(a) robbery, the same as common-law robbery. (b)(6) v. United States, No. (b)(6) 2024 WL 3957071 (2d Cir. (b)(6) 2024). "The elements of the common-law crime of robbery" have "long required force or violence" because "robbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle." (b)(6) v. United States, No. (b)(6) 2024 WL 3957071 at *12 (2d Cir. (b)(6) 2024) (*quoting* Stokeling v. United States, 586 U.S. 73 (2019)). Because the elements of the base offense, § 2114(a) robbery, necessarily entails the use, attempted use, or threatened use of physical force, it qualifies as a categorical crime of violence, as does the "aggravated offense that incorporates the elements of that base offense." (b)(6) v. United States, No. (b)(6) 2024 WL 3957071 at *13 (2d Cir. (b)(6), 2024).

XV. Sodomy

The charge of sodomy by force, as set forth under a pre-2016 amended article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925, is a crime of violence under 18 U.S.C. § 16 within the definition of an aggravated felony pursuant to INA § 101(a)(43)(F), because an element of the offense requires force. Matter of Chavez-Alvarez, 26 I&N Dec. 274, 278-79 (BIA 2014). In contrast, the offense of sexual misconduct under NYPL § 130.20(1)-(2) includes the element of a lack of consent that results from either forced compulsion or a lack of capacity to consent. See NYPL §§ 130.20(1)-(2); 130.05(2).

XVI. Solicitation

Solicitation is likely not a crime of violence. Under prior case law whether solicitation to commit a crime of violence itself constitutes a crime of violence turned on "the risk of physical force as a consequence of the criminal conduct at issue," or "whether there is a substantial risk that physical force will be used in the course of committing the offense." Matter of Guerrero, 25 I&N Dec. 631, 635 (BIA 2011) (quoting Prakash v. Holder, 579 F.3d 1033, 1036 (9th Cir. 2009)). This holding, however, was based on the now unconstitutional residual clause of 18 U.S.C. § 16(b). Id.; Sessions v. Dimaya, 138 S. Ct. 1204 (2018). The crime of solicitation is complete when communication is made with the intent that the other person engage in unlawful activity. People v. Cheathem, 658 N.Y.S.2d 84 (Sup. Ct. 1997). Thus, solicitation is likely not a crime of violence under 18 U.S.C. § 16(a) because the crime's elements (communication and intent to induce another to commit a crime) do not contain the use, attempted use, or threatened use of violent physical force. Compare id., with Matter of Guzman-Polanco, 26 I&N Dec. 713, 717 (BIA 2016) (for a state offense to qualify as a crime of violence under 18 U.S.C. § 16(a), the State statute must require as an element the use, attempted use, or threatened use of violent physical force).

XVII. Stalking

Stalking, in violation of section 646.9(b) of the California Penal Code (engaging in stalking after a temporary restraining order, injunction, or court order is in effect to prohibit stalking), is likely not a "crime of violence." Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th Cir 2007). The statue provides that "[a]ny person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years." CAL. PENAL CODE § 646.9(b). The Ninth Circuit found the noncitizen's stalking conviction to not be a crime of violence under the now unconstitutional residual clause of § 16(b). Id. Further, both parties conceded that stalking in violation of section 646.9(b) of California Penal Code was not a crime of violence under 18 U.S.C. § 16(a). See Malta-Espinoza v. Gonzales, 137 F.App'x 985, 986 note 1 (9th Cir. 2005).

The Second Circuit has not addressed whether stalking in violation of NYPL §§ 120.45-60 is a crime of violence.

XVIII. Terrorism

The Board of Immigration Appeals held that terrorism, in violation of Iowa law (shooting or discharging a dangerous weapon at or into an occupied building, vehicle, or assembly of people, or threatening to do so, placing people in fear of serious injury), is a "crime of violence" because it involves a substantial risk that physical force may be used. Matter of S-S-, 21 I&N Dec. 900 (BIA 1997). This, however, has been abrogated by the Supreme Court's holding in Sessions v. Dimaya. 138 S. Ct. 1204 (2018).

XIX. Unauthorized Use of a Motor Vehicle

The Board of Immigration Appeals held that the unauthorized use of a motor vehicle, in violation of section 31.07(a) of the Texas Penal Code ("intentionally or knowingly operat[ing] another's boat, airplane, or motor-propelled vehicle without effective consent of the owner"), constitutes a "crime of violence" and is therefore an aggravated felony under 18 U.S.C. § 16(b). Matter of Brieva-Perez, 23 I&N Dec. 766 (BIA 2005). Significantly, in Sessions v. Dimaya, the Supreme Court held that the residual definition of crime of violence in §16(b) is unconstitutionally vague. 138 S. Ct. 1204 (2018). However, the Ninth Circuit has held that carjacking in violation of CAL. PENAL CODE § 215(a) is not a crime of violence. Solorio-Ruiz v. Sessions, 881 F.3d 733, 736-38 (9th Cir. 2018).

The Second Circuit has no precedential opinions addressing whether unauthorized use of a vehicle in violation of N.Y.P.L. §§ 165.05, 165.06, 165.08 is a crime of violence.

XX. Interference of aircraft

18 U.S.C. § 32(a)(5) prohibits the interference or disabling of "anyone engaged in the authorized operation of such aircraft or any air navigation facility aiding in the navigation of any such aircraft," "with intent to endanger the safety of any person or with a reckless disregard for the safety of human life." The Board has held that it is not a crime of violence under 18 U.S.C. § 16 (2006). Matter of Tavarez Peralta, 26 I&N Dec. 171 (BIA 2013).

XXI. Burglary – NYPL § 140.25(1)(d)

Burglary in the Second Degree, in violation of NYPL § 140.25(1)(d), requires the defendant to display what appears to be a firearm while committing the burglary offense. See Matter of Pougatchev, 28 I&N Dec. 719 (BIA 2023). To "display" what appears to be a firearm necessarily requires another person to be present to witness it. Id. at 728. The Board held that the confrontational nature of second-degree burglary under NYPL § 140.25(1)(d) categorically involves the use, attempted use, or threatened use of physical force and is "essentially a criminal threat of force or violence" for crime of violence purposes. Id. at 728-729.

However, Burglary in the Second Degree is not a categorical crime of violence. See Matter of Pougatchev, 28 I&N Dec. 719, 725 (BIA 2023). For example, a person commits second degree burglary under NYPL § 140.25(2) when he or she knowingly enters or remains unlawfully in a dwelling with intent to commit a crime. Id. The conduct underlying section 140.25(2) does not necessarily include the use, attempted use, or threatened use of physical force against the person or property of another. Id.

vii. INA § 101(a)(43)(G)—Theft or Burglary

The term "aggravated felony" includes "a theft offense (including[44] receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."[45] INA § 101(a)(43)(G). The Board has defined "theft" as the "taking of, or exercise of control over, property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." Matter of Garcia-Madruga, 24 I&N Dec. 436, 440 (BIA 2008) (Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000), clarified). "A generic theft offense requires that the property be stolen 'without consent' of the owner." Santana v. Barr, 975 F.3d 195 , 200 (2d Cir. 2020) (citing Almeida v. Holder, 588 F.3d 778, 785 (2d Cir. 2009)); see e.g. Matter of Koat, 28 I&N Dec. 450, 457-59 (BIA 2022) (finding that the record of conviction determined the respondent was convicted of "theft by taking," under section 714.1(1) of the Iowa Code, which matches the generic definition of aggravated felony theft under section 101(a)(43)(G)). Aggravated felony theft offenses include nonconsensual taking of property but do not include offenses that require taking of property with consent that was fraudulently obtained. Matter of Morgan, 28 I&N Dec. 508, 515 (BIA 2022) (holding that larceny in the third degree under 53a-124(a) of the Connecticut General Statutes is not a theft offense aggravated felony because it incorporates by reference a definition of "larceny" under section 53a-119 of the Connecticut General Statutes that includes both theft and fraud offenses).

This definition includes the unlawful taking and driving of a vehicle in violation of state law. V-Z-S-, 22 I&N Dec. at 1338. This definition further includes extortionate takings, in which consent is coerced by the wrongful use of force, fear, or threats. Matter of Ibarra, 26 I&N Dec. 809, 813 (BIA 2016). The definition under INA § 101(a)(43)(G) also includes the attempted possession of stolen property,[46] Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000), and aiding and abetting a theft offense. Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007).

Separately, the Attorney General concluded that grand larceny in the second degree under NYPL § 155.40(1) qualifies as an aggravated felony for the purposes of the INA because the means

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[44] The central issue in Santana v. Barr was whether the Second Circuit should accord the BIA's interpretation of the term "including" under INA § 101(a)(43)(G) Chevron deference. 975 F.3d at 200. After examining the Ninth Circuit's reasoning in United States v. Flores, 901 F.3d 1150, 1157 (9th Cir. 2018), the Second Circuit agreed that the term "'including' is ambiguous . . . for . . . the same reason . . . that it is not clear whether receipt of stolen property is a subset of a theft offense or a separate offense." Santana v. Barr, 975 F.3d 195, 201 (2d Cir. 2020). In deferring to the BIA's interpretation, the Second Circuit held that the parenthetical phrase is "not limited to receipt offenses in which the property was obtained by means of theft." Id. at 202. Note that the U.S. Supreme Court has since overruled the Chevron framework, however, its decision did not automatically call into question decisions issued under Chevron before June 28, 2024. See Loper Bright Enters. v. Raimondo, 603 U.S. ___ (2024), No. 22-1219, 2024 WL 3208360, at *21–*22 (U.S. June 28, 2024).

[45] The phrase "term of imprisonment" in INA § 101(a)(43)(G) includes any applicable recidivist enhancements. Dawkins v. Holder, 762 F.3d 247 (2d Cir. 2014).

[46] See also Matter of Cardiel-Guerrero, 25 I&N Dec. 12 (BIA 2009) (reviewing case law regarding "receipt of stolen property" and finding it distinct from a "theft" offense but also included under INA § 101(a)(43)(G)). Generally, receipt of stolen property offenses will categorically qualify as aggravated felonies when the statute requires that the offender received the property with the knowledge that it was stolen or obtained by theft or extortion. See Matter of Sierra, 26 I&N Dec. 288, 291 (BIA 2014) (citing Cardiel, 25 I&N Dec. 12). However, attempted possession of a stolen vehicle was found to *not* categorically constitute an aggravated felony when the relevant statute required only a mental state of "reason to believe." Sierra, 26 I&N Dec. at 292 (noting that "[n]o valid inference may be drawn that the offender intended to deprive the true owner of the rights and benefits of ownership where he was not actually aware of the stolen character of the item received but merely should have been aware of that fact from the circumstances").

of conviction under the statute corresponds to either aggravated-felony theft, INA § 101(a)(43)(G), or aggravated-felony fraud, INA § 101(a)(43)(M)(i). Matter of Reyes, 28 I&N Dec. 52, 63 (AG 2020).

I. Receipt of Stolen Property

In Matter of Alday-Dominguez, the BIA differentiated a "theft offense" from an offense involving "receipt of stolen property" and concluded that "the receipt of stolen property . . . is not limited to receipt offenses in which the property was obtained by means of theft." Santana v. Barr, 975 F.3d 195, 200 (2d Cir. 2020) (quoting Matter of Alday-Dominguez, 27 I&N Dec. 48, 50–51 (BIA 2017) (applying the U.S. Supreme Court's interpretation that the term "stolen" includes offenses in which property was obtained with an owner's consent) (citation omitted)). The Second Circuit deferred to the BIA's interpretation, noting that the elements of generic theft "differ from the elements of stolen property . . . ." Santana v. Barr, 975 F.3d 195, 201 (2d Cir. 2020).

An essential element of an aggravated felony receipt of stolen property offense is that an offender must receive property with the "knowledge or belief" that it was stolen, and this element excludes receipt of stolen property only with a "reason to believe" that such property was stolen. Matter of Deang, 27 I&N Dec. 57, 59 (BIA 2017) (finding that as "a necessary element of both generic theft and receipt of stolen property offenses is an intent to deprive the owner of the rights or benefits of the property taken or received, a receipt of stolen property offense committed with a mens rea of "reason to believe" (or a similar mental state) cannot fall within the generic definition of an aggravated felony receipt of stolen property offense under section 101(a)(43)(G) of the Act").

The Second Circuit clarified that where the state criminal statute does not explicitly incorporate an intent to deprive, the statute can nonetheless categorically match the "receipt of stolen property" offense, if such intent "can be inferred from the requirement that the offender knew that the property was stolen." Santana v. Barr, 975 F.3d 195, 201 (2d Cir. 2020) (citing Abimbola v. Ashcroft, 378 F.3d 173, 179–80 (2d Cir. 2004) (holding that receipt of stolen property under Conn. Gen. Stat. § 53a-119(8) includes the necessary mens rea requirement)). Accordingly, the Second Circuit held that a conviction under NYPL § 165.50 for the criminal possession of stolen property in the third degree categorically matches the definition of "receipt of stolen property," an aggravated felony, under INA § 101(a)(43)(G). Santana v. Barr, 975 F.3d 195, 201 (2d Cir. 2020) ("[A]n intent to deprive is inherent in the [statutory] requirement that an offender 'knowingly' possesses stolen property.").

II. Burglary

The Supreme Court in Taylor v. United States determined that the definition of "burglary" contains at least the following elements: "an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598-99 (1990). See also Descamps v. United States, 570 U.S. 254 (2013) (holding that in the context of the ACCA a California burglary statute was categorically not "burglary" because it includes privileged entry). The BIA agrees. Matter of Perez, 22 I&N Dec. 1325, 1327 (BIA 2000) (holding that "the basic elements of burglary are unlawful or unprivileged entry into, or remaining in, a building or other structure with the intent to commit a crime"). As does the Second Circuit. See United States v. Evans, 924 F.3d 21, 26 (2d Cir. 2019). In Quarles v. United States, 139 S.

Ct. 1872 (2019), the Supreme Court clarified the timing of the intent requirement for burglaries as interpreted by Taylor, and stated that for burglary predicated on unlawful *entry*, "the defendant must have the intent to commit a crime at the time of entry," but that for burglary predicated on unlawful *remaining*, "the defendant must have the intent to commit a crime at the time of remaining, which is any time during which the defendant unlawfully remains." In their words, generic "remaining-in" burglary occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. Id. at 1878.

The Board held that Second Degree Burglary in violation of NYPL § 140.25(1)(d) is not categorically an aggravated felony burglary offense under INA § 101(a)(43)(G) because the statute is overbroad and indivisible with respect to the definition of "building" under New York law. See Matter of Pougatchev, 28 I&N Dec. 723 (BIA 2023). The definition of "building" under NYPL § 140.00(2) includes an "enclosed motor truck" which falls outside the "building or other structure" element of generic burglary because New York law treats such trucks as "buildings" even if used only for storage or recreation, as opposed to residential or business purposes. Id. at 722. Further, there is no indication that the specific type of building is an element that must be proven beyond a reasonable doubt such that the statute would be divisible with respect to the definition of "building." Id. at 723. Therefore, a conviction for burglary of a building under NYPL § 140.25(1)(d) is not categorically an aggravated felony burglary offense.

In contrast, the Board has held that a conviction for Second Degree Burglary of a Dwelling under NYPL § 140.25(2) is categorically a conviction for generic burglary under section 101(a)(43)(G), because the statute requires burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. Matter of V-A-K-, 28 I&N Dec. 630 (BIA 2022).

viii. INA § 101(a)(43)(H)—Ransom Demand

ix. INA § 101(a)(43)(I)—Child Pornography

The Second Circuit held that a conviction for possession of child pornography under NYPL § 263.11 qualifies as an offense under 8 U.S.C. 1101(a)(43)(I) because, relying on the Supreme Court's decision in Torres v. Lynch, 136 S. Ct. 1619 (2016), violation of a state criminal law may constitute an aggravated felony for purposes of the INA even if the law lacks a federal jurisdictional element. See Weiland v. Lynch, 835 F.3d 207, 209-10 (2d Cir. 2016).

x. INA § 101(a)(43)(J)—RICO or Gambling

In a persuasive but not precedential decision, the BIA found that a conviction for enterprise corruption under NYPL § 460.20(1)(a) is not a categorical match to racketeer influenced corrupt organizations (RICO) violations as defined in 18 U.S.C. § 1962 because the predicate acts constituting "racketeering activities" under the New York statute is broader than those under the federal definition. See (b)(6), A (b)(6) 2019 WL 2464423, at *5–6 (BIA (b)(6), 2019).

xi. INA § 101(a)(43)(K)—Prostitution/Human Trafficking/Slavery

I. Promoting or Owning a Prostitution Business

The Second Circuit has held that a conviction under NYPL § 230.25(1) for promoting prostitution is not a conviction for an aggravated felony offense relating to a prostitution business under INA § 101(a)(43)(K). See Prus v. Holder, 660 F.3d 144, 146-49 (2d Cir. 2011). The Second Circuit found that the definition of prostitution in the INA only includes acts of "sexual intercourse," whereas the New York definition broadly defines prostitution to include "sexual conduct." Id. at 146-48. (citing 22 C.F.R. § 40.24 for the definition of prostitution in the context of inadmissibility and construing it as the same as the definition of prostitution as an aggravated felony). In so finding, the Court's reasoning rested on two grounds; it must give Chevron[47] deference to the BIA's interpretation of the term prostitution in another section of the INA and that as a rule of statutory construction, the same words used in different parts of the statute are meant to have the same meaning. Id. at 147. However, the BIA has subsequently rejected the Second Circuit's reasoning and held that the term prostitution in § 101(a)(43)(K) "is not limited to offenses involving sexual intercourse but is defined as engaging in, or agreeing or offering to engage in, sexual conduct for anything of value." Matter of Ding, 27 I&N Dec. 295, 299 (BIA 2018).

II. Relating to Transportation for Propose of Prostitution if Committed for Commercial Advantage

Circumstance Specific Approach from Nijhawan v. Holder applies

The term "aggravated felony" includes an offense described in 18 U.S.C. §§ 2421, 2422, or 2423 "(relating to transportation for the purpose of prostitution) if committed for commercial advantage." INA § 101(a)(43)(K)(ii). Notwithstanding the Second Circuit's decision in Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137 (2d Cir. 2008), the portion of this definition that refers to "commercial advantage" is subject to the circumstance specific approach. Nijhawan v. Holder, 557 U.S. 29 (2009). Under this approach, the Court may examine documents from the respondent's record of conviction as well as the presentence report, which is generally not considered part of the record of conviction, to determine whether the crime was committed for commercial advantage. Id.; see also Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009).

xii. INA § 101(a)(43)(L)—Disclosure of Classified Information

[47] The U.S. Supreme Court has since overruled Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), holding that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." Loper Bright Enters. v. Raimondo, 603 U.S. ___ (2024), No. 22-1219, 2024 WL 3208360, at *22 (U.S. June 28, 2024). Decisions issued prior to Loper Bright are not automatically called into question simply because the Supreme Court overruled the Chevron framework. See Loper Bright Enters., 603 U.S. at __, 2024 WL 3208360.

xiii. INA § 101(a)(43)(M)—Fraud or Deceit with Loss over $10,000

Circumstance Specific Approach from Nijhawan v. Holder applies

The term "aggravated felony" includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." INA § 101(a)(43)(M)(i). The categorical and modified categorical approaches are used to determine whether an offense involves fraud or deceit; however, the portion of this definition that refers to a "loss [that] exceeds $10,000" is subject to the "circumstance-specific approach" articulated in Nijhawan v. Holder, 557 U.S. 29 (2009).

Although the term "fraud" is not defined in the INA, the Board of Immigration Appeals has directed that the term should be used in its "commonly accepted legal sense," meaning "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party," that are "believed and acted upon by the party deceived to his disadvantage." Matter of G-G-, 7 I&N Dec. 161 (BIA 1956); see also Ming Lam Sui v. INS, 250 F.3d 105 (2d Cir. 2001). The Second Circuit has found that an aggravated felony under INA § 101(a)(43)(M) requires "actual loss to the victim or victims in excess of $10,000." Pierre v. Holder, 588 F.3d 767, 773 (2d Cir. 2009) (citing Ming Lam Sui, 250 F.3d at 119). However, prior to the Second Circuit's decision in Pierre, the BIA held that a noncitizen convicted of conspiracy in which the substantive crime that was the object of the conspiracy was an offense that involved "fraud or deceit" and where the potential loss to the victim or victims exceeded $10,000 is removable pursuant to INA §§ 101(a)(43)(M)(i) and (U) if charged together. Matter of S-I-K-, 24 I&N Dec. 324 (BIA 2007) ("[R]equiring proof of *actual* loss . . . exceeding $10,000 from attempts and conspiracies would defeat the very purpose behind section 101(a)(43)(U).").

Because the phrase a "loss [that] exceeds $10,000" is not an element of the offense, it is subject to the "circumstance-specific approach" articulated in Nijhawan v. Holder, 557 U.S. 29 (2009). Under this approach, the Court may examine documents from the respondent's record of conviction as well as the presentence report, which is generally not considered part of the record of conviction, to determine whether the conviction resulted in a loss of $10,000 or more. Id.; Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009).[48]

In all cases, the Government bears the burden of clearly and convincingly establishing that "the loss [was] tied to the specific counts covered by the conviction." Nijhawan, 557 U.S. at 42 (internal quotation marks omitted); see Rampersaud v. Barr, __ F.3d __, 2020 WL 4810091, at *1 (2d Cir. Aug. 19, 2020) (evaluating insurance fraud in the third degree in violation of NYPL § 176.20, and grand larceny in the fourth degree in violation of NYPL § 155.30). The "amount cannot be based on acquitted or dismissed counts or general conduct." Nijhawan, 557 U.S. at 42

[48] In looking to a restitution order, forfeiture order, or presentence report for facts to support whether a loss exceeds $10,000, such facts "must be assessed with an eye to . . . the burden of proof employed." Matter of Babaisakov, 24 I&N Dec. 306, 319 (BIA 2007). "[A] defendant's failure to contest, during criminal proceedings, a fact found by a preponderance [of the evidence] would bear on whether that fact was reliable for removal purposes as well, especially in the absence of any showing in removal proceedings that there was an error in the criminal proceedings respecting that fact." Matter of Babaisakov, 24 I&N Dec. 306, 320 (BIA 2007); see Barikyan v. Barr, 917 F.3d 142, 147 (2d Cir. 2019) (finding that a forfeiture order—which need only be supported by preponderance of the evidence—can constitute clear and convincing evidence to carry the burden in removability proceedings where a respondent failed to challenge its reliability).

(citing Alaka v. Att'y Gen. of the United States, 456 F.3d 88, 107 (3d Cir. 2006), overruled on other grounds by Bastaro-Vale v. Att'y Gen., 934 F.3d 255, 267 (3d Cir. 2019)). A restitution order may stipulate to a loss only for the purposes of sentencing and restitution; therefore, the loss may not be tethered to specific counts covered by the conviction. See, e.g., Rampersaud v. Barr, __ F.3d __, 2020 WL 4810091, at *1 (2d Cir. Aug. 19, 2020) ("[W]here the petitioner was convicted of two separate crimes and ordered to pay an overarching restitution amount without indication of what part, if any, was for the insurance fraud, the restitution order, without more, is unsufficient to demonstrate that more than $10,000 in losses were caused by the insurance fraud count as distinct from the larceny count."); Alaka, 456 F.3d at 107; Knutsen v. Gonzalez, 429 F.3d 733, 739-40 (7th Cir. 2005). However, restitution orders are not *ipso facto* evidence of actual loss to a victim because in some contexts, the restitution orders can include amounts not limited to a victim's actual loss. See Singh v. Attorney Gen. of U.S., 677 F.3d 503, 513 (3d Cir. 2012); but see Doe v. Sessions, 709 F.App'x 63, 65-67 (2d Cir. Sep. 17, 2017) (finding a restitution order, absent evidence undermining the restitution order's reliability as an accurate measure of loss, sufficient to meet the government's burden of establishing the victim's actual loss of more than $10,000). The amount of forfeiture, like the amount of restitution, may be considered to determine the amount of loss to the victims under section 101(a)(43)(M)(i) if the proceeds received are sufficiently tethered and traceable to the conduct of conviction. See Matter of F-R-A-, 28 I&N Dec. 460, 462 (BIA 2022) (finding that, while restitution is meant to compensate victims for harm suffered, forfeiture is a punishment meant to take away the proceeds received by the defendant from the criminal actions).

Willfully making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1), and aiding and assisting in the preparation of a false tax return in violation of 26 U.S.C. § 7206(2), are each aggravated felonies under INA § 101(a)(43)(M)(i), as offenses that "involve fraud or deceit," if the loss to the Government exceeds $10,000. Kawashima v. Holder, 132 S. Ct. 1166 (2012). Regardless of whether fraud or deceit was a "formal element" of the statute, the conduct punished by 26 U.S.C. § 7206 "necessarily entail[ed] fraudulent or deceitful conduct." Kawashima, 132 S. Ct.at 1172.

A conviction for embezzlement by a bank employee under 18 U.S.C. § 656 is potentially a conviction for an aggravated felony crime involving deceit. See Akinsade v. Holder, 678 F.3d 138 (2d Cir. 2012). In Akinsade, the Second Circuit held that the BIA and IJ erred when they assumed the Respondent's intent to defraud from the facts present in his record of conviction for 18 U.S.C. § 656. Id. at 145-47. Further, for the purposes of resolving the legal error, the Second Circuit presumed that 18 U.S.C. § 656 is divisible in nature; specifically, it can be satisfied with either an element of intent to injure *or* an intent to defraud. Id. at 142, 145 note 5. However, the Second Circuit did not explicitly overrule the IJ's and BIA's findings that 18 U.S.C. § 656 is divisible in nature. Id. Thus, it is not settled law whether 18 U.S.C. § 656 is in fact divisible in nature or whether a conviction under it is or is not categorically a crime involving fraud or deceit.

xiv. INA § 101(a)(43)(N)—"Alien Smuggling"

The term "aggravated felony" includes an offense relating to "alien smuggling," unless a noncitizen shows that he or she committed the offense only once and for the purposes of aiding his or her spouse, child, or parent (and no other individual). A conviction for conspiracy to smuggle noncitizens in violation of 18 U.S.C. § 371 is an aggravated felony within the meaning

of INA §§ 101(a)(43)(N) and (U), even if it was not an aggravated felony under the INA at the time of the noncitizen's conviction. Chan v. Gantner, 464 F.3d 289, 293 (2d Cir. 2006).

The BIA and other Circuits have construed the phrase "relating to alien smuggling" as descriptive rather than limiting language. See Matter Ruiz-Romero, 22 I&N Dec. 486, 488-89 (BIA 1999); Patel v. Ashcroft, 294 F.3d 465, 469-70 (3d Cir. 2002) *superseded by statute on other grounds as recognized in* Kamara v. Att'y Gen., 420 F.3d 202, 209 (3d Cir. 2005). Thus, offenses relating to "alien smuggling" are broad and include transporting noncitizens solely within the United States and harboring offenses. See Ruiz-Romero, 22 I&N Dec. at 488-89; Patel, 294 F.3d 469-70.

xv. INA § 101(a)(43)(O)—Illegal Reentry

xvi. INA § 101(a)(43)(P)—Document Fraud

xvii. INA § 101(a)(43)(Q)—Failure to Appear

An "offense relating to a failure to appear by a defendant for service of sentence" is an aggravated felony under section 101(a)(43)(Q) of the Immigration and Nationality Act, if the underlying offense was "punishable by" imprisonment for a term of five years or more, regardless of the penalty actually ordered or imposed. Matter of Adeniye, 26 I&N Dec. 726 (BIA 2016); cf. Henriquez v. Sessions, 890 F.3d 70, 73-74 (2d Cir. 2018) (citing Matter of Adeniye, 26 I&N Dec. 726 (BIA 2016) when finding that the phrase "may be imposed" in the INA similarly refers to the maximum penalty authorized not the actual penalty imposed).

xviii. INA § 101(a)(43)(R)—Counterfeiting/Forgery/Trafficking

The term "aggravated felony" includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles" with identification numbers ("VINs") that have been altered, "for which the term of imprisonment is at least one year." INA § 101(a)(43)(R).

Although the INA provides no definition for "commercial bribery," the Board of Immigration Appeals noted that the crime "focuses on influencing action in the private sector involving the breach of the duty of fidelity," whereas bribery of a public official focuses on the intent to influence official conduct. Matter of Gruenangerl, 25 I&N Dec. 351, 354-55 (BIA 2010) (quoting 2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 737 n.4 (3d Cir. 2004)). The crime of bribery of a public official under 18 U.S.C. § 201(b)(1)(A) is categorically not an offense related to "commercial bribery" and is therefore not an aggravated felony under INA § 101(a)(43)(R). Gruenangerl, 25 I&N Dec. at 357.

A state statute "relating to" forgery, *i.e.* knowingly possessing and using a forged document, can support a finding of removability even if the underlying offense is not a categorical match to "forgery" under common law. See Richards v. Ashcroft, 400 F.3d 125 (2d Cir. 2005).

I. NYPL § 170.10—Forgery in the Second Degree

Forgery in the second degree, in violation of NYPL § 170.10, is a CIMT because it involves intent to injure, which is "often indicative of moral turpitude." Matter of Wong, 28 I&N Dec. 518, 527 (BIA 2022). "[A] defendant convicted under section 170.10 must intend to cause injury by falsely making, completing, or altering a written document, which itself involves fraud or deceit." Id. at 528. The BIA, held that the interpretation of "Conviction" in Matter of Wong, 28 I&N Dec. 518, was not arbitrary, or capricious. Wong v. Garland, 95 F.4th 82, 86 (2d Cir. 2024). Forgery in the second degree, under of NYPL § 170.10, "is categorically a CIMT." Id. at 9.

Forgery in the second degree, in violation of NYPL § 170.10(2), which carries a sentence of imprisonment of at least one year, is an aggravated felony within the meaning of INA § 101(a)(43)(R). Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999).

II. Possession of a Forged Document with Intent to Deceive

A conviction under 18 U.S.C. § 513(a) for uttering and possessing counterfeit securities is an aggravated felony within the meaning of INA § 101 (a)(43)(R). See Kamagate v. Ashcroft, 385 F.3d 144, 153-56 (2d Cir. 2004).

xix. INA § 101(a)(43)(S)—Obstruction of Justice/Perjury

The term "aggravated felony" includes "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." INA § 101(a)(43)(S). The generic definition of the term "perjury" "requires that an offender make a material false statement knowingly or willfully while under oath or affirmation where an oath is authorized or required by law." Matter of Alvarado, 26 I&N Dec. 895, 901 (BIA 2016). A conviction for the offense of accessory after the fact, in violation of 18 U.S.C. § 3, constitutes an "aggravated felony" as a crime relating to the "obstruction of justice" under INA § 101(a)(43)(S). Matter of Batista-Hernandez, 21 I&N Dec. 955 (1997). However, a conviction for misprision of a felony, in violation of 18 U.S.C. § 4, is not an "aggravated felony" under INA § 101(a)(43)(S). Matter of Espinoza-Gonzalez, 22 I&N Dec. 889 (BIA 1999).

In Higgins v. Holder, the Second Circuit held that a conviction for witness tampering, in violation of Connecticut General Statutes § 53a-151, is an "offense relating to obstruction of justice" under the aggravated felony definition in INA § 101(a)(43)(S). Higgins v. Holder, 677 F.3d 97 (2d Cir. 2012). The Second Circuit declined to decide whether it should give Chevron[49] deference to the Board of Immigration Appeals' definition of an obstruction of justice offense in Matter of Espinoza-Gonzales, 22 I&N Dec. 889 (BIA 1999) (en banc).

In Pugin v. Garland, the Supreme Court held that an "offense relating to the obstruction of justice" under § 1101(a)(43)(S) does not require pendency of investigation or proceedings to

[49] The U.S. Supreme Court has since overruled Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), holding that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." Loper Bright Enters. v. Raimondo, 603 U.S. ___ (2024), No. 22-1219, 2024 WL 3208360, at *22 (U.S. June 28, 2024). Decisions issued prior to Loper Bright are not automatically called into question, however, simply because the Supreme Court overruled the Chevron framework. See Loper Bright Enters., 603 U.S. at ___, 2024 WL 3208360, at *21.

constitute an aggravated felony supporting removal. See (b)(6) v. Garland, No. (b)(6) 2023 WL 4110232 (U.S. (b)(6), 2023) (noting that the phrase "relating to" ensures that this statute covers offenses that have a "connection with" obstruction of justice, which covers common obstruction offenses that can occur when an investigation or proceeding is not pending).

xx. INA § 101(A)(43)(T)—Failure to Appear to Answer a Felony Charge

Failure to appear before a court "pursuant to a court order to answer or dispose of a charge or felony for which a sentence of 2 years' imprisonment or more may be imposed" is an aggravated felony. INA § 101(a)(43)(T). The categorical approach applies when determining whether an offense relates to the individual's failure to appear before a court, but the circumstance specific approach applies to determine whether the failure to appear was "(1) pursuant to a court order (2) to answer to or dispose of a charge of a felony (3) for which a sentence of two years' imprisonment or more may be imposed." *Matter of Garza-Olivares*, 26 I&N Dec. 637 (BIA 2016); *see also Nijhawan v. Holder*, 557 U.S. 29 (2009).

The Second Circuit has stated that the elements of failure to appear under INA § 101(a)(43)(T) are: 1) failure to appear; 2) before a court; 3) pursuant to a court order; 3) to answer to or dispose of a charge of a felony; 5) for which a sentence of two years of imprisonment may be imposed. *Perez Henriquez v. Sessions*, 890 F.3d 70, 73 (2d Cir. 2018). The sentencing element applies to the sentence imposed for the failure to appear, not the sentence imposed for the underlying felony. *Id.* The maximum sentence for an offense must be at least two years imprisonment in order to qualify as aggravated felony under INA § 101(a)(43)(T). *Id.* at 74.

An offense for Bail Jumping in violation of NYPL § 215.57 categorically constitutes an aggravated felony for failure to appear pursuant to INA § 101(a)(43)(T). *Perez Henriquez v. Sessions*, 890 F.3d 70 (2d Cir. 2018).

xxi. INA § 101(a)(43)(U)—Attempt/Conspiracy

An attempt or conspiracy to commit any offense described in INA § 101(a)(43) constitutes an "aggravated felony." INA § 101(a)(43)(U). To qualify as a "conspiracy" under INA § 101(a)(43)(U), "the commission of an overt act in furtherance of the conspiracy by one of the conspirators" is *not* required. Matter of Richardson, 25 I&N Dec. 226, 230 (BIA 2010). A noncitizen found removable under INA § 101(a)(43)(U) based on his or her conviction of a conspiracy to commit an aggravated felony may *not* also be found removable based on his or her commission of the offense underlying the conspiracy. Richardson, 25 I&N Dec. 226. "[S]ubsection U does not use the word 'attempt' to mean conviction of an offense formally denominated as an attempt, but instead means conduct that satisfies a generally accepted definition of an attempted offense." Pierre v. Holder, 588 F.3d 767, 775 (2d Cir. 2009) (citing Ming Lam Sui, 250 F.3d 113, 115-16 (2d Cir. 2001). Although an attempted aggravated felony under subsection U can be charged alongside its completed aggravated felony counterpart, a charge solely under another subsection of INA § 101(a)(43) does not necessarily include an attempt or conspiracy to commit an offense under subsection U. Pierre, 588 F.3d at 775.

Attempted arson in the second degree, in violation of NYPL §§ 110-150.15, categorically constitutes an aggravated felony under INA §§ 101(a)(43)(F) and (a)(43)(U), as an attempt to

commit "a crime of violence…for which the term of imprisonment [is] at least one year." Santana v. Holder, 714 F.3d 140 (2d Cir. 2013).

Conspiracy in the second degree, in violation of NYPL § 105.15, is not a categorical match to the aggravated felony offense under INA § 101(a)(43)(U) because not all New York felonies are aggravated felonies under the INA. Santana-Felix v. Barr, 924 F.3d 51, 54-55 (2d Cir. 2019). However, a conviction for conspiracy in the second degree, in violation of NYPL § 105.15, is an aggravated felony when the object of the conspiracy is murder in the second degree in violation of NYPL § 125.25. Santana-Felix, 924 F.3d at 56.

The Second Circuit held that a conviction for attempted first-degree assault (N.Y. Penal Law §§ 110.00, 120.10(1)) is an aggravated felony as defined by both INA § 101(a)(43)(F) (crime of violence) and 101(a)(43)(U) (attempt). (b)(6) v. Garland, No. (b)(6) 2022 WL 18359302 (2d Cir. (b)(6) 2023).

g. INA § 237(a)(2)(B)(i)—Controlled Substance Offense[50]

Circumstance Specific Approach from Nijhawan v. Holder may apply

"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 102 of the Controlled Substances Act (21 U.S.C. 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable." INA § 237(a)(2)(B)(i). To establish removability, the Court employs the categorical approach; *i.e.*, "the Government must connect an element of the alien's conviction to a drug defined in [21 U.S.C.] § 802." Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (finding that a paraphernalia conviction for possession of a sock in which the noncitizen had placed four unidentified orange tablets does not trigger removability because it does not connect to an element of the noncitizen's conviction to a drug defined in § 802); see Matter of P-B-B-, 28 I&N Dec. 43, 45–46 (BIA 2020) (holding that section 13-3407 of the Arizona Revised Statutes is divisible with regard to the specific "dangerous drug" involved in a violation of that statute); Matter of Dikhtyar, 28 I&N Dec. 214, 215 (BIA 2021) (holding that section 58-37-8(2)(a)(i) of the Utah Code is divisible with respect to the identity of the specific "controlled substance" involved in a violation of that statute).[51] In applying the categorical approach, the

[50] In one case, the BIA noted that INA § 212(a)(2)(A)(i)(II) and INA § 237(a)(2)(B)(i) "are materially identical." Matter of Dikhtyar, 28 I&N Dec. 214, 217 n.4 (BIA 2021) (citing Matter of Voss, 28 I&N Dec. 107, 108 n.3 (BIA 2020)).

[51] In the Immigration Judge's view, the "alternative *schedules* are alternative elements that render the statute divisible, but the identity of the specific substance listed under these schedules is merely an alternative 'means' of satisfying these elements." Matter of Dikhtyar, 28 I&N Dec. at 217. As the CSA did not list "etizolam" as a controlled substance, contrary to the Utah Code, the state conviction did not render the noncitizen removable—because the "specific substance underlying the offense" was overbroad as compared to the controlled substances listed in the CSA. Id. The BIA, after reviewing the statutory language, jury instructions, and state case law, concluded that the specific substance is an "element" rather than a "means" of the Utah statute—and the statute is therefore divisible based on the identity of the controlled substance. Id. at 218–22 (analyzing, e.g., the differing punishments for specific controlled substances). The divisibility of the Utah statute based on the specific substance rendered the respondent's conviction for "methamphetamine" a categorical match to the CSA and qualified him for removability under INA § 237(a)(2)(B)(i). Id. at 222.

Court compares the respondent's statute of conviction to the version of the Controlled Substance Act in effect at the time of the respondent's conviction. Doe v. Sessions, 886 F.3d 203 (2d Cir. 2018).

In cases where the State statute of conviction is categorically overbroad, the Court considers whether it is divisible. Descamps v. United States, 570 U.S. 254, 257 (2013). If the statute is divisible, the Court may employ the modified categorical approach, "which permits [the Court] to examine the respondent's record of conviction to determine 'what crime, with what elements, [he] was convicted of.'" Matter of Dikhtyar, 28 I&N Dec. at 215 (citing Mathis v. United States, 136 S. Ct. 2243, 2249 (2016)); see e.g. Matter of German Santos, 28 I&N Dec. 552, 558 (BIA 2022), affirming Matter of Laguerre, 28 I&N Dec. 437 (BIA 2022) (holding that the identity of the controlled dangerous substance involved in a violation of New Jersey Statute Annotated section 2C:35-10(a)(1) is an "element," rendering the state statute divisible such that the modified categorical approach applies); but see Harbin v. Sessions, 860 F.3d 58, 65 (2d Cir. 2017) (holding that a New York statute, which defined a controlled substance as "any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law . . ." is an indivisible statute because the text of the New York statute prohibited a single offense that had several factual means by which the crime could be committed and that "[a]lthough it incorporates state schedules to clarify which substances are "controlled," it provides no indication that the sale of each substance is a distinct offense").

The phrase "any law or regulation of a State" encompasses laws promulgated by a state through its political subdivisions and thus includes municipal ordinances. Matter of Cuellar-Gomez, 25 I&N Dec. 859, 856 (BIA 2012). A conviction for criminal solicitation to commit an offense relating to a controlled substance renders a noncitizen removable for violating a law relating to a controlled substance, even though "solicitation" is not among the inchoate offenses explicitly listed in INA § 237(a)(2)(B)(i). Mizrahi v. Gonzales, 492 F.3d 156, 163-65 (2d Cir. 2007); Matter of Zorilla-Vidal, 24 I&N Dec. 768, 768-69 (BIA 2009).

The phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana" calls for a circumstance-specific approach, not a categorical inquiry into the elements of a single statutory crime. Matter of Dominguez-Rodriguez, 26 I&N Dec. 408 (BIA 2014) (citing Matter of Davey, 26 I&N Dec. 37, 39 (BIA 2012)).[52] The Department of Homeland Security bears the burden of establishing that the offense did not involve "possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i); Dominguez-Rodriguez, 26 I&N Dec. at 413; see Davey, 26 I&N Dec. at 41; Matter of Moncada-Servellon, 24 I&N Dec. 62 (BIA 2007).

The phrase "single offense" refers to "the totality of an alien's specific acts on a single occasion," as opposed to "a single generic crime." Davey, 26 I&N Dec. at 38-39 (holding that a noncitizen who was convicted of simultaneously possessing marijuana and possessing drug paraphernalia in the form of the plastic baggie in which she carried the marijuana qualified for the "single offense" exception even though she was convicted of multiple statutory offenses). "A

[52] The BIA has concluded that Moncrieffe does not cast doubt on the validity of Davey. Dominguez-Rodriguez, 26 I&N Dec. at 410. However, if the record of conviction conclusively establishes that the "possession for personal use exception" applies, "the removal charge must be dismissed without resort to a circumstance-specific inquiry." Id. at 413.

crime 'involves' possession of thirty grams or less of marijuana for personal use if the particular acts that led to the alien's conviction were closely related to such conduct." Davey, 26 I&N Dec. at 40-41. Thus, the possession of drug paraphernalia is an offense "involving possession for one's own use of thirty grams or less of marijuana" if the paraphernalia in question is "merely an adjunct to the offender's simple possession or ingestion of thirty grams or less of marijuana," but not if the paraphernalia "was associated with the manufacture, smuggling, or distribution of marijuana or with the possession of a drug other than marijuana." Davey, 26 I&N Dec. at 40-41.

"A single offense involving possession for one's own use of thirty grams or less of marijuana" does not include an offense with an aggravating element exceeding simple possession, such as an element requiring that the possession take place in a prison or correctional facility. Matter of Moncada-Servellon, 24 I&N Dec. 62, 67 (BIA 2007).

h. INA § 237(a)(2)(C)—Firearm Offense

"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 18 U.S.C. § 921(a)] in violation of any law is deportable." INA § 237(a)(2)(C). This ground of removability is "'exceedingly broad' and 'evinces an expansive purpose—to render deportable those aliens that commit firearms offenses of any type.'" Kuhali v. Reno, 266 F.3d 93, 103 (2d Cir. 2001) (quoting Hall v. INS, 167 F.3d 852, 855–56 (4th Cir.1999)); see also Matter of Flores-Abarca, 26 I&N Dec. 922 (BIA 2017) (holding that section 237(a)(2)(C) is broadly construed to encompass all types of firearms offenses). As such, it encompasses "'possessing' and 'carrying' firearms not simply as crimes in their own right, but also as elements of other crimes." Kuhali v. Reno, 266 F.3d 93, 103 (2d Cir. 2001).

The Second Circuit reasoned that criminal possession of a firearm in the second degree, in violation of NYPL § 265.03, and criminal sale of a firearm in the third degree, in violation of NYPL § 265.11, rely on the definition of "firearm" and its "antique firearm" exception under NYPL §§ 265.00(3), (14). Jack v. Barr, 966 F.3d 95, 97-98 (2d Cir. 2020). Furthermore, the New York statute's definition of "antique firearm" penalizes conduct that is broader than the federal generic definition of an "antique firearm" under 18 U.S.C. § 921(a)(3). Id. at *8. Because "[t]his 'textual difference' relating to antique firearms creates a categorical mismatch between the New York statutes and the INA's definition of a firearm," the noncitizens were not removable under INA §§ 237(a)(2)(A)(iii) and 237(a)(2)(C). Id.; see Williams v. Barr, 960 F.3d 68 (2d Cir. 2020) (holding that Connecticut General Statutes § 29-35(a) is not a categorical match to INA § 237(a)(2)(C)).

i. INA § 237(a)(2)(E)—Domestic Violence, Stalking, Protection Order Violation 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." INA § 237(a)(2)(E)(i).

I. Domestic violence

A noncitizen who at any time after admission is convicted of a crime of domestic violence is removable. INA § 237(a)(2)(E). For purposes of this ground of removability, a crime of domestic violence is

> any crime of violence (as defined in section 16 of title 18, United States Code) 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 who 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.

INA § 237(a)(2)(E)(i).

"In order to demonstrate that a noncitizen is removable under this provision, DHS must show both that the statute of conviction is categorically[53] a "crime of violence" and that the crime was committed by a person with the requisite domestic relationship to the victim." Matter of Dang, 28 I&N Dec. 541, 543 (BIA 2022). Whether a conviction is domestic in nature is determined through a circumstance-specific, rather than categorical, analysis. Matter of H. Estrada, 26 I&N Dec. 749, 753 (BIA 2016).[54] In order to determine whether a domestic relationship exists, "all reliable evidence may be considered, including documents that comprise the formal 'record of conviction.'" Id.

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[53] See Part B, 2, f, vi – Crime of Violence at 47. For example, in Matter of Dang, 28 I&N Dec. 541, 543 (BIA 2022), the Board explained that in order to determine "whether a criminal conviction is a "crime of violence" under 18 U.S.C. § 16(a), and thus a removable "crime of domestic violence" under section 237(a)(2)(E)(i) of the INA, the Court must apply the categorical approach. In this case, the Board held that because misdemeanor domestic abuse battery with child endangerment under section 14:35.3(I) of the Louisiana statute of conviction extends to mere offensive touching, it is overbroad with respect to 18 U.S.C. § 16(a) and therefore is not categorically a crime of domestic violence. Id. at 551.

[54] It should be noted that Estrada was decided under Eleventh Circuit law, which considers *simple battery* sufficient to establish a crime of domestic violence where there is a domestic relationship. This is not necessarily the case in the Second Circuit. The BIA has held that battery by offensive touching does not involve violent force and, as such, is neither a crime of violence nor a crime of domestic violence. See Matter of Velasquez, 25 I&N Dec. 278, 283 (BIA 2010).

Removability pursuant to INA § 237(a)(2)(E)(ii), resulting from a violation of a protection order, is not governed by the categorical or modified categorical approach. Instead, removability is determined by a circumstance-specific assessment of the noncitizen's protection order and of a court's particular finding that the noncitizen violated that order. (b)(6) v. Garland, No. (b)(6) 2022 WL 1416581 at *9-10 (2d Cir. (b)(6) 2022), affirming the BIA's interpretation of INA § 237(a)(2)(E)(ii) in Matter of Obshatko, 27 I&N Dec. 173 (BIA 2017). The adjudicator should consider all probative and reliable evidence regarding the state court's determination about the respondent's violation and decide (1) whether the state court "determine[d]" that the respondent "engaged in conduct that violates the portion of a protection order that involve[d] protection against credible threats of violence, repeated harassment, or bodily injury" and (2) whether the order was "issued for the purpose of preventing violent or threatening acts of domestic violence." Matter of Obshatko, 27 I&N Dec. 173, 175-76 (BIA 2017).[55]

II. Stalking

The generic definition of stalking has at least three elements: "(1) conduct that was engaged in on more than a single occasion, (2) which was directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death." Matter of Sanchez-Lopez, 26 I&N Dec. 71, 74 (BIA 2012). The Board of Immigration Appeals has not determined whether "stalking" also requires

> "a showing that the individual was, in fact, placed in fear of bodily injury or death; whether it is sufficient to show *only* that a reasonable person in the circumstances would have been placed in such fear; or whether it is necessary to prove that *both* the targeted individual *and* a reasonable person in the circumstances did or would experience such fear."

Sanchez-Lopez, 26 I&N Dec. at 74.

III. Child Abuse

"[T]he term 'crime of child abuse' is interpreted broadly." Specifically, the BIA has defined it, in part, as:

> any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the

[55] The BIA rejected DHS's argument to apply the "circumstance-specific" approach, but acknowledged that in practical terms, the approach may lead to the same result as a the "circumstance-specific" approach, since both the specific circumstances surrounding the violation and what the state court "determined" regarding the violation may be established through any reliable evidence. See Estrada, 26 I&N Dec. 749, 753 (BIA 2016).

> infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct…

Matter of Velazquez-Herrera, 24 I&N Dec. 503, 512 (BIA 2008); see also Matter of Soram, 25 I&N Dec. 378, 381 (BIA 2010). The BIA further held that the phrase, "an act or omission that constitutes maltreatment of a child," as used in Velazquez-Herrera, is sufficiently broad to encompass endangerment-type crimes where no actual injury occurs. Soram, 25 I&N Dec. 383–84. In Matter of Aguilar-Barajas, the BIA reaffirmed its holding in Velazquez-Herrera that for purposes of a "crime of child abuse," a "child" is a person under 18. Matter of Aguilar-Barajas, 28 I&N Dec. 354, 360 (BIA 2021). In Matter of Soram and Matter of Mendoza Osorio, the BIA emphasized that "a key consideration in determining whether a child endangerment-type offense constitutes a 'crime of child abuse' is the risk of harm to the child." Matter of Rivera-Mendoza, 28 I&N Dec. 184, 186 (BIA 2020). Instead, "a State-by-State analysis is appropriate to determine whether the risk of harm by the endangerment-type language in any given State statute is sufficient to bring an offense within the definition of 'child abuse' under the [INA]." Id. (quoting Soram, 25 I&N Dec. at 382–83). In Marquez v. Garland, the Second Circuit held that the rule introduced in Soram, that a "crime of child abuse" does not require actual harm, applies retroactively. 13 F.4th 108, 111 (2d Cir. 2021).

Neither the Second Circuit nor the BIA has specified exactly what constitutes a sufficiently high risk of harm to a child for purposes of INA § 237(a)(2)(E)(i).[56] However, the BIA has held that the concept of child abuse under INA § 237(a)(2)(E)(i) should be interpreted broadly, and the Second Circuit has given deference to the BIA's "sweeping" interpretation. See Florez v. Holder, 779 F.3d 207 (2d Cir. 2015) (citing Velazquez-Herrera, 24 I&N Dec. at 509); see also Matthews v. Barr, 927 F.3d 606 (2d Cir. 2019). The definition of child abuse is not limited to offenses that require proof of harm or injury to the child. Florez v. Holder, 779 F.3d 207, 212 (2d Cir. 2015) (citing Soram, 25 I&N Dec. at 381); Matter of Mendoza Osorio, 26 I&N Dec. 703, 710 (BIA 2016).

The BIA has also acknowledged that "there are child endangerment statutes that do not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment under the Act." Mendoza Orsario, 26 I&N Dec. at 711 (pointing to a California statute criminalizing conduct that *may* endanger a child's health or person). "Thus, in order for a child endangerment-type offense to constitute a 'crime of child abuse,' the statute must require proof of a 'likelihood' or 'reasonable probability' that a child will be harmed, not a mere possibility or potential for harm." Matter of Rivera-Mendoza, 28 I&N Dec. at 187 (reviewing decisions of the Oregon courts and finding that the "risk of harm that must be shown for a conviction under section 163.545(1) . . . is sufficiently high to bring [the requisite risk] within [the BIA's] definition

[56] In Matter of Dang, 28 I&N Dec. 541 (BIA 2022), the BIA held that because misdemeanor domestic abuse battery with child endangerment under section 14:35.3(I) of the Louisiana Statutes extends to mere offensive touching, it is overbroad with respect to 18 U.S.C. § 16(a) and therefore is not categorically a crime of domestic violence under section 237(a)(2)(E)(i) of the INA, 8 U.S.C. § 1227(a)(2)(E)(i). The BIA further held that the interpretation of "physical force" in United States v. Castleman, 572 U.S. 157 (2014) is not applicable as part of the definition of a "misdemeanor crime of domestic violence."

[of] 'child abuse, child neglect, or child abandonment'"); cf. Matter of Rodriguez, 28 I&N Dec. 815, 823 (BIA 2024) (noting that the "additional likelihood-of-harm analysis" is only applicable when analyzing child endangerment crimes and inapplicable when analyzing "injury-type" offenses).

In Matter of D. Rodriguez, 28 I&N Dec. 815 (BIA 2024), the BIA clarified that a conviction for an attempt to commit a crime may constitute a crime of child abuse, child neglect, or child abandonment under INA § 237(a)(2)(E)(i). The BIA found that it would be "improper to infer from silence that Congress deliberately intended to exclude attempts" from INA § 237(a)(2)(E)(i). Matter of D. Rodriguez, 28 I&N Dec. at 819. Additionally, the BIA noted that "[w]hether an attempt to injure ultimately results in injury is immaterial to the danger posed to the child at the moment the attempt is made. Matter of D. Rodriguez, 28 I&N Dec. at 821. Attempted injury to a child constitutes a crime of child abuse under section 237(a)(2)(E)(i) of the INA, 8 U.S.C. § 1227(a)(2)(E)(i), where a substantial step has been taken toward the completion of a categorically abusive act. Matter of D. Rodriguez, 28 I&N Dec. at 822.

I. NYPL § 260.10—Endangering the Welfare of a Child

NYPL § 260.10(1), which addresses endangering the welfare of a child, is categorically a crime of child abuse under INA § 237(a)(2)(E)(i).[57] Matter of Mendoza Osorio, 26 I&N Dec. 703 (BIA 2016); see also Matthews v. Barr, 927 F.3d 606 (2d Cir. 2019) (holding that NYPL § 260.10(1) is a categorical match to the federal definition of "child abuse"). The clauses set forth two separate forms of conduct, each of which could sustain a conviction for endangering the welfare of a child: by knowingly "act[ing] in a manner likely to be injurious to the physical, mental or moral welfare of a child . . ." or by knowingly "direct[ing] or authoriz[ing] such child to engage in an occupation involving a substantial risk of danger to his life or health." NYPL § 260.10(1). The BIA held that both clauses categorically constitute child abuse. Mendoza Osorio, 26 I&N Dec. 703.

j. INA § 237(a)(3)(D)—Falsely Claiming Citizenship

Any noncitizen who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under the INA (including INA § 274A, which relates to noncitizen employment) or any Federal or State law is deportable. INA § 237(a)(3)(D)(i); see Crocock v. Holder, 670 F.3d 400 (2d Cir. 2012) (holding that the Respondent failed to demonstrate that he was not inadmissible for falsely represented himself to be a United States citizen and thus he was ineligible for adjustment of status). There is a limited exception for children of United States citizens who reasonably believed that they were citizens when they represented themselves as such. See INA § 237(a)(3)(D)(ii). The phrasing of this ground of deportability is identical to the language used in the ground of inadmissibility at INA § 212(a)(6)(C)(ii). For more information, see supra at § B.1.k. Under the plain language of section 237(a)(3)(D)(i) of the

[57] The BIA has not analyzed whether NYPL § 260.10(2) is categorically a crime of child abuse under INA § 237(a)(2)(E)(i). Therefore, where a respondent's record of conviction indicates a conviction pursuant to § 260.10, but does not refer to a subsection, the IJ must analyze whether NYPL § 260.10 as a whole is categorically a crime of child abuse.

Immigration and Nationality Act, 8 U.S.C. § 1227(a)(3)(D)(i) (2012), it is not necessary to show intent to establish
that a noncitizen is deportable for making a false representation of United States citizenship. See Matter of Zhang, 27 I&N Dec. 569 (BIA 2019). Although a Certificate of Naturalization (Form N-550) is evidence of United States citizenship, the certificate itself does not confer citizenship status if it is acquired unlawfully. Id.

k. INA § 237(a)(4)—Security Grounds

A noncitizen convicted of violating 18 U.S.C. § 32(a)(5) by interfering with a police helicopter pilot by shining a laser light into the pilot's eyes while he operated the helicopter, is removable under INA § 237(a)(4)(A)(ii) as a noncitizen who has engaged in criminal activity that endangers public safety. Matter of Tavarez- Peralta, 26 I&N Dec. 171, 174-76 (BIA 2013). However, a violation of 18 U.S.C. § 32(a)(5) is not a crime of violence under 18 U.S.C. § 16 and therefore not an aggravated felony. Tavarez-Peralta, 26 I&N Dec. at 177.

l. INA § 237(a)(4)(B)—Terrorist Activities

Any noncitizen who is described in subparagraph (B) (terrorist activities) or (F) (association with terrorist organizations) of INA § 212(a)(3) is deportable. INA § 237(a)(4)(B). For more information about INA § 212(a)(3), see supra at § B.1.e. *See also* Court's boilerplate on Legal Standards for Mandatory Terrorism Bar and Legal Standards for Tier III Determinations in the Tier III Terrorist Organization subfolder of the boilerplate folder.