

PRACTICE ADVISORY: RECENT DEVELOPMENTS IN THE CATEGORICAL APPROACH Tips For Criminal Defense Lawyers Representing Immigrant Clients

APPENDIX

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*Isaac Wheeler, Immigrant Defense Project & Heidi Altman, Neighborhood Defender Service of Harlem (Oct. 2009).
January 2011 update prepared with assistance of
Lindsey Austin and Lindsay Silverblatt, Immigration & Human Rights Clinic, UDC David A. Clarke School of Law*

OVERVIEW

This practice advisory provides:

- **Introduction (see p. 2)** discussing the basics of the “categorical approach” that immigration courts employ to determine whether a state or federal criminal offense falls within the criminal grounds of removal (deportation) and why it is important to criminal defense attorneys;
- **Background on recent developments in the “categorical approach” (see pp. 2–5);** and
- **Practice tips (see pp. 6–12)** to help criminal defenders representing immigrant clients to take advantage of the categorical approach where it applies and to avoid or mitigate negative immigration consequences under these new legal developments.

What is the categorical approach and how have recent developments changed it?

- The categorical approach limits the documents that an immigration court can consult to find an individual removable on the basis of a conviction. Under the “strict” categorical approach, the court cannot look behind the bare elements of the statute of conviction when determining whether a given conviction triggers removability. Under the “modified” categorical approach, the court may also consult a limited set of court documents in the “record of conviction,” including at a minimum the charging document, plea agreement, plea colloquy transcript, and verdict or judgment of conviction.
- Recent caselaw has significantly eroded the categorical approach in some areas while reaffirming that it continues to apply to many other criminal grounds of deportation.
- The categorical approach continues to apply to many common “aggravated felony” deportation categories, including “drug trafficking crimes,” “crimes of violence,” firearms offenses, theft and burglary crimes, obstruction of justice and bail jumping offenses, and sexual abuse of a minor; and most non-aggravated felony grounds of removal including controlled substance offenses, crimes of child abuse, and firearms offenses.
- The categorical approach has been significantly modified for a few aggravated felony offenses including “fraud and deceit,” tax evasion offenses, alien smuggling, and passport fraud; and possibly for the broad, non-aggravated felony deportation grounds for “crimes involving moral turpitude.”

What does this mean for me as a criminal defense lawyer?

- You may be able to protect your immigrant clients by paying attention to the statutory elements necessary for conviction, comparing those elements to relevant grounds of removability, and keeping the record clear of facts other than those necessary elements.

INTRODUCTION

The “categorical approach” describes the method that immigration judges and reviewing federal courts usually employ to decide whether a given local, state or federal criminal offense triggers deportation or other immigration consequences under federal law.¹ Since at least 1914, most courts have engaged in an abstract, “categorical” analysis that compares the minimum statutory elements of the offense of conviction to the relevant deportation ground, without reference to the particular conduct that underlies the defendant’s conviction. See, e.g., *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862–63 (2d Cir. 1914). The Board of Immigration Appeals (“BIA”), the administrative appeals body that interprets the immigration laws on behalf of the Attorney General, has also usually used this approach, both on its own and in deference to applicable circuit law. See, e.g., *Matter of Pichardo*, 21 I. & N. Dec. 330, 335–36 (BIA 1996).

The modern version of this “categorical approach” is modeled on the analysis elaborated by the Supreme Court in a pair of federal criminal sentencing cases, *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990), and expressly applied in the immigration context in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) and *Carachuri-Rosendo v. Holder*, 570 U.S. ___, 130 S. Ct. 2577 (2010). Under the “strict” version of the “*Taylor/Shepard*” categorical approach, courts simply compare the general or “generic” federal ground of removal with the minimum conduct necessary to offend the criminal statute. If every violation of the criminal statute necessarily falls within the federal removal ground, then a conviction under that criminal statute categorically triggers deportation. But if the criminal statute can be offended without engaging in conduct that falls within the generic deportation ground, the conviction will not be found to trigger removal regardless of the actual conduct that resulted in conviction.

Most courts employ some version of a “modified” *Taylor/Shepard* categorical approach. Under this modified analysis, if the statute of conviction punishes some conduct that falls within the generic deportation ground and some conduct that falls outside it, the court may move on to a second step in which it examines the “record of conviction,” a set of official court documents, to determine whether the defendant was necessarily convicted of an offense falling within the deportation ground. Statutes that contain more than one offense, one or more of which does not trigger deportation, are sometimes called “divisible” statutes.² The “record of conviction” that a court will consult to determine what offense a defendant committed under a divisible statute consists, at a minimum, of the complaint/indictment or other charging document, any plea agreement, any plea colloquy transcript, and a verdict or judgment of conviction. See *Matter of Short*, 20 I. & N. Dec. 136, 137–38 (BIA 1989).

Both the strict and the modified categorical approaches provide criminal defense counsel with important tools to help noncitizen clients avoid or mitigate immigration consequences of conviction. In addition, understanding the categorical analysis is essential to properly advising clients about the immigration consequences that may attach to a decision to plead guilty to a given offense or to proceed to trial.

A number of recent BIA and federal court decisions have limited or eroded the categorical approach; at the same time, the Supreme Court and the BIA have reaffirmed and clarified its use in several contexts. This practice advisory discusses these recent developments and provides concrete tips for criminal defenders to protect their noncitizen clients in light of these cases. The first part of this advisory summarizes the recent developments. The second part contains practice tips for criminal defense counsel on how to handle charges in particular criminal offense categories.

HOW HAS THE CATEGORICAL APPROACH BEEN CHANGED?

A. The BIA Has Abandoned the Categorical Approach in Making Certain “Aggravated Felony” Determinations, Distinguishing Between “Element” and “Nonelement” Requirements for Removability

In a pair of 2007 decisions, the BIA departed from precedent to limit the application of the *Taylor/Shepard* categorical approach. In *Matter of Babaisakov*, the BIA, addressing the same issue later treated by the Supreme Court in *Nijhawan v. Holder* (discussed below), found that the amount of monetary loss required for a fraud offense to be an “aggravated felony” under immigration law does not need to be an element of the statute of conviction, but may be proved by evidence outside the record of conviction. 24 I. & N. Dec. 306 (BIA 2007). In *Matter of Gertsenshteyn*, the BIA found that “any available probative evidence” could be used to determine whether a given prostitution offense was “committed for commercial advantage,” making it an aggravated felony. 24 I. & N. Dec. 111 (BIA 2007), *rev’d*, 544 F.3d 137 (2d Cir. 2008).

In *Babaisakov* and *Gertsenshteyn*, the Board drew a distinction between criminal removability grounds that demand exclusive focus on the elements of the prior conviction, therefore requiring a categorical inquiry, and those grounds that include requirements “not tied to the elements of any State or Federal criminal statute” — so-called “nonelement” requirements for removability. 24 I. & N. Dec. at 309. The BIA described these “nonelement” require-

ments as those that do not describe a category of state or federal offenses, but rather serve as “limiting or aggravating factor[s]” meant to distinguish between more and less serious violations of statutes of the same general type. 24 I. & N. Dec. at 313–16. Such “nonelement” factors, the BIA held, can be established by evidence outside of the record of conviction. *Id.* at 318–19.

In *Matter of Velasquez-Herrera*, however, the BIA declined an invitation from the government’s attorneys to extend the *Gertsenshteyn/Babaisakov* approach to the non-aggravated felony removal ground of “crime[s] of child abuse,” 8 U.S.C. § 1227(a)(2)(E)(i). 24 I. & N. Dec. 503 (BIA 2008). The BIA held that evidence outside the formal record of conviction cannot be used to establish that a given conviction was committed against a minor. *Velasquez* reaffirms that the categorical approach will continue to apply where the immigration statute does not “invite” inquiry into nonelement factors, although the opinion gives little guidance about what may constitute such an “invitation.” One relevant factor is apparent from *Gertsenshteyn* and *Velasquez*: in both cases, the BIA considered whether a categorical analysis would render the relevant deportation ground significantly “underinclusive” of state offenses that involved deportable conduct. *Velasquez*, 24 I. & N. Dec. at 515; *Gertsenshteyn*, 24 I. & N. Dec. at 114. In other words, the BIA seems more likely to deem a particular factor triggering removal to be a “nonelement” factor that can be established by evidence outside the record of conviction if that factor is generally *not* included as an element in relevant state or federal criminal statutes, because a categorical approach would result in most defendants convicted under such statutes escaping removal.

B. In *Silva-Trevino*, the Attorney General Significantly Modified the Categorical Approach With Respect to Crimes Involving Moral Turpitude

The most radical potential slippage in the categorical approach involves the broad deportation ground of “crimes involving moral turpitude” (“CIMTs”).³ In the waning weeks of the Bush administration, Attorney General Mukasey drastically altered the approach used to determine whether a given offense constitutes a CIMT. The decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), gives immigration judges the authority in certain cases to look beyond the formal record of conviction and use whatever evidence is deemed necessary to determine whether the conduct underlying the offense of conviction involves moral turpitude. While *Silva-Trevino* is expressly limited to the CIMT context, it contravenes the law of almost every federal circuit court, which had accepted the BIA’s longstanding categorical CIMT analysis,⁴ and is arguably inconsistent with the Supreme Court’s subsequent decision in *Nijhawan* (discussed below).

A.G. Mukasey’s decision in *Silva-Trevino* instructs immigration judges to apply the traditional categorical analysis as a first step to determine whether a given conviction constitutes a CIMT. The defendant’s *actual* conduct is completely irrelevant at this first step; the sole question is whether the conduct described by the elements of the statute of conviction either *necessarily* fall within the definition of a CIMT or *never* do so.⁵ If the immigration judge is unable to determine that the prohibited conduct under the statute either *always* or *never* involves turpitude, then the judge proceeds to consult the traditional “record of conviction,” as a court would under the typical “modified” categorical approach. *Id.* at 704. The “record of conviction” is consulted at this step only to assess whether the immigrant was convicted under the CIMT or non-CIMT portion of the statute. *Silva-Trevino*, 24 I. & N. Dec. at 704. Again, the turpitude inquiry will end if the court is able to determine, at this second step, whether or not the defendant was convicted of a CIMT. However, if this modified categorical inquiry does not resolve the question one way or the other, the *Silva-Trevino* decision provides for an unprecedented third step: the immigration judge is instructed to consider “any additional evidence the adjudicator determines is necessary or appropriate to resolve adequately the moral turpitude question,” whether or not contained in the formal conviction record. 24 I. & N. Dec. at 704.

Since the 2008 decision, two federal circuit courts have explicitly rejected the new methodology set forth in *Silva-Trevino* in its entirety, while another has accepted it. Other circuits have so far reserved judgment or have not reached the issue. In October 2009, the Third Circuit flatly rejected *Silva-Trevino*, finding that it was an unreasonable interpretation of the statute and renewing the circuit’s commitment to its existing precedent. *Jean-Louis v. Att’y Gen.*, 582 F.3d 462 (3rd Cir. 2009). Similarly, the Eighth Circuit declared “[w]e are bound by our circuit’s precedent [requiring a categorical approach], and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law.” *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010). Most recently the Seventh Circuit held, in *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010), that that it would defer to the *Silva-Trevino* decision, though this was unsurprising because that court (alone among the circuits) had already abandoned the categorical approach to CIMT analysis in *Ali v. Mukasey*. The Ninth Circuit has not yet explicitly ruled on the propriety of the *Silva-Trevino* “step 3” methodology,⁶ though it has continued to apply the traditional modified categorical approach in decisions issued after *Silva-Trevino*. See, e.g., *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).

Because noncitizens convicted of crimes may be detained and transferred by ICE to a location outside the federal circuit in which they were convicted, for now, defense lawyers from every jurisdiction should conservatively assume that *Silva-Trevino* could govern how their immigrant clients' convictions will be analyzed.

WHAT DOES *SILVA-TREVINO* MEAN FOR CRIMINAL DEFENSE COUNSEL?

Practice tips for particular offense categories are set out in the second part of this advisory. In general, criminal defenders should keep in mind the following about offenses that might be deemed crimes involving moral turpitude ("CIMTs"):

- **Defense counsel can no longer safely rely on the divisible or broad nature of a statute to protect immigrant clients charged with a crime that sometimes might be deemed a CIMT.**

For example, since temporary taking of property is not a CIMT, prior to *Silva-Trevino* a noncitizen who pled to a theft statute that punished both permanent and temporary takings could later argue, under the categorical approach, that the conviction was not a CIMT. If the record of conviction was completely silent as to whether the defendant intended a permanent or temporary taking, the government would be unable to establish that the offense was a CIMT. Now, where the record does not indicate whether the taking was temporary or permanent, the government might be allowed to resort to other evidence to show that the defendant intended a permanent taking. (A plea to a temporary taking, however, should still be safe even under *Silva-Trevino*.)

- **It is no longer safe to assume that a silent or indeterminate record will protect a client from a CIMT finding.** The Attorney General's *Silva-Trevino* opinion may result in the burden being placed on your client to prove to the immigration judge that she did not commit a CIMT.

- **Defense counsel should continue to seek pleas under non-CIMT statutes or divisible statutes, but in addition should do everything possible to create an affirmative record that the client has not been convicted of a CIMT.**

Defense counsel should ask the prosecution to re-draft charging documents to eliminate extraneous CIMT charges or, when this is not possible, affirmatively deny guilt of CIMT charges to which the defendant is not pleading. If a defendant is charged with a CIMT offense but pleads guilty to a related divisible or non-CIMT offense in satisfaction of that charge, it is possible that an immigration judge would take note of the original charge or particular factual allegations in the police report or complaint as evidence that the defendant in fact committed a CIMT. Mere silence as to the original charges may be regarded as tacit admission of facts alleged. For instance, in the example discussed above, rather than simply trying to keep the record opaque as to whether a defendant intended a permanent or temporary taking, defense counsel should ask the prosecutor to re-draft the charging instrument to allege only a temporary taking, or allocute their clients specifically to a temporary taking.

- **When it is not possible to eliminate or directly contradict allegations in the charging document that constitute "turpitudinous" behavior, defense counsel at a minimum should state or have their client state on the record that the defendant admits to the offense of conviction but "no other allegations in the complaint."**

C. The Supreme Court Provided Clarity on the Categorical Approach in *Nijhawan v. Holder*

In *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the Supreme Court considered the "fraud and deceit" aggravated felony ground of removability at 8 U.S.C. § 1101(a)(43)(M)(i), which requires a loss to the victim exceeding \$10,000. Mr. Nijhawan was found guilty of fraud, had stipulated for sentencing purposes that the loss to the victim exceeded \$100 million, and was ordered to pay restitution of \$683 million. The Court held that it was appropriate for the immigration court to abandon the categorical approach in determining the loss amount for the purpose of the aggravated felony determination, and to look beyond the record of conviction to evidence such as stipulations at sentencing and restitution orders.

Although *Nijhawan*'s narrow holding specifically concerns the amount of loss requirement at 8 U.S.C. § 1101(a)(43)(M)(i), the decision created a framework for the more general application of the categorical approach in removal proceedings. The Court affirmed that the categorical approach as outlined in *Taylor* and *Shepard* remains appropriate when the removal statute refers to a "generic crime." It contrasted this approach with a "circumstance-specific approach" that is appropriate when the removal statute refers to "the specific way in which an offender committed the crime on a specific occasion," allowing the immigration court to investigate underlying facts, using evidence beyond the record of conviction.

In dicta, *Nijhawan* defines the following offenses as “generic” and therefore limited to the categorical approach: “murder, rape, or sexual abuse of a minor,” 8 U.S.C. § 1101(a)(43)(A); “illicit trafficking in a controlled substance,” 8 U.S.C. § 1101(a)(43)(B); “illicit trafficking in firearms or destructive devices,” 8 U.S.C. § 1101(a)(43)(C); and aggravated felony grounds referring to an “offense described” in sections of the federal criminal code including explosive materials and firearms, ransom, child pornography, racketeering and gambling, and sabotage and treason, 8 U.S.C. §§ 1101(a)(43)(E), (H), (I), (J), and (L). *Nijhawan*, 129 S. Ct. at 2300. Although crimes of violence, 8 U.S.C. § 1101(a)(43)(F), and theft offenses, 8 U.S.C. § 1101(a)(43)(G), are not explicitly referenced as “generic” offenses in *Nijhawan*, the reasoning used by the court in categorizing other offenses as generic strongly supports their inclusion as such. *Id.* See the discussion of “crimes of violence” in the “assault offenses” practice tip below.

Nijhawan further states that the following grounds require “circumstance-specific” analysis: the loss requirement for the tax evasion aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(ii); the “if committed for commercial advantage” qualifier in the aggravated felony ground relating to transportation for the purpose of prostitution, 8 U.S.C. § 1101(a)(43)(K)(ii); and the exception to the passport fraud and smuggling aggravated felony grounds for offenses committed to assist family members, 8 U.S.C. §§ 1101(a)(43)(P) and (N).⁷ *Nijhawan*, 129 S. Ct. at 2301.

WHAT DOES NIJHAWAN MEAN FOR CRIMINAL DEFENSE COUNSEL?

Practice tips for particular offense categories are set out in the second part of this advisory. In general, the *Nijhawan* decision may be helpful to defenders representing non-citizen clients. It clarified the applicability of the categorical approach and reminded lower courts that the categorical approach still applies in immigration proceedings in all but a few circumstances. Criminal defense counsel, therefore, can represent immigrant clients with a clearer sense of what documents in the criminal record might later be used against the client in removal proceedings, depending on whether the categorical or circumstance-specific approach will be applied.

- ***Nijhawan* draws a distinction between “generic” and “circumstance-specific” grounds of removability and explicitly states that the categorical approach as outlined in Taylor and Shepard still applies to “generic” grounds.**

Although *Nijhawan* dealt with only one specific aggravated felony ground, the Court addressed many others in dicta and its reasoning is clearly applicable to more. Furthermore, the decision limits the extra-statutory inquiry to the traditionally defined “record of conviction” for generic offenses. Generally, the *Nijhawan* Court’s affirmation of the categorical analysis in “generic” crimes of removability allows defenders representing immigrant clients to focus exclusively on the statute of conviction in certain cases and the statute and record of conviction in others. See *Nijhawan*, 129 S. Ct. at 2300 (listing offenses deemed “generic”).

- ***Nijhawan* provides guidance on the types of offenses that require a “circumstance-specific” approach, highlighting for defenders those types of cases that demand extra attention be paid to evidence outside of the record of conviction.**

Generally, the Court provides that the circumstance-specific approach only be applied where the relevant aspect of the removable offense refers to the specific way in which a defendant committed a crime on a particular occasion. See *Nijhawan*, 129 S. Ct. at 2301. The tips section below provides an accounting of the most common circumstances in which documents and admissions outside of the record of conviction may be scrutinized in immigration proceedings.

- ***Nijhawan* sets some limits on the sources of evidence an immigration judge may consult for a “circumstance-specific” inquiry.**

Although it is clear from *Nijhawan* that the “circumstance-specific” approach allows the immigration court to look beyond the statute and record of conviction, the decision does not specify the full reach of the approach. The Court set some limits based on notions of fairness that may help immigration practitioners argue that certain documents in the criminal record are too unreliable to be considered in immigration court. See *Nijhawan*, 129 S. Ct. at 2303. Perhaps most importantly, evidence in the criminal record may only be considered in immigration court if it is “tied to the specific counts covered by the conviction.” *Id.* Nevertheless, at a minimum, defenders must assume that sentencing documents and admissions, including restitution orders and stipulations, may be used against immigrant defendants in immigration proceedings in certain circumstances. *Id.* Various circuit court precedents indicate that pre-sentence reports are also very likely to be considered under the circumstance-specific approach. See, e.g., *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008) (allowing consideration of pre-sentencing report as “reasonable, substantial, and probative evidence”); *Ali*, 521 F.3d at 743.

PRACTICE TIPS

Keeping recent developments regarding the categorical approach in mind, defense counsel should consider the following practice tips when representing immigrant defendants.⁸ These practice tips are divided into the following crime categories:

- A. **Drug Offenses**.....pp. 6-7
- B. **Offenses Against the Person**, including sex crimes and assault offenses..... pp. 7-11
- C. **Offenses Against Property**.....pp. 11-12
- D. **Weapons Offenses**.....pp. 12

Introductory Note on what it means to “keep the record clean”:

Many of the tips in this advisory urge you to protect your client by “keeping the record clean.” Doing so many provide your client with a defense to removability in immigration court. Keeping the record clean means:

1. Keeping all information except for the statutory elements of the offense out of the record of conviction and other documents such as pre-sentence reports and sentencing documents.
2. Asking the prosecutor to issue a new charging document that excludes damaging allegations, if necessary.
3. Controlling the plea colloquy so that your client allocutes only to the bare statutory elements of the offense. If underlying facts pose a risk of removability, you may want to controvert those facts or, if this is not possible, state on the record that your client “admits to the elements of the statute required for conviction and nothing more.”

A. Drug Offenses:

Drug offenses may trigger removal for noncitizen clients under either the “drug trafficking” aggravated felony ground or the non-aggravated felony “controlled substance” grounds of removal.⁹ *Nijhawan* and another recent case, *Carachuri-Rosendo v. Holder*, 570 U.S. ___, 130 S. Ct. 2577 (2010), clarified that the drug trafficking aggravated felony ground of removability is a “generic crime” demanding the categorical approach pursuant to the *Taylor/Shepard* framework. The general controlled substance grounds are also analyzed under the categorical approach. Defenders representing immigrant defendants on drug charges, therefore, should focus their attention on the statute of conviction and the traditionally defined record of conviction, as immigration judges will be limited in their inquiry to these documents.

- **Negotiate a plea to an offense without a controlled substance element in the statute of conviction.** Pursuant to the categorical approach as clarified in *Nijhawan*, allegations or evidence of drug possession or sale included in the charging document or elsewhere in the criminal record cannot be consulted in immigration proceedings unless the statute of conviction has a drug offense as a necessary element of conviction.
- **Keep the record clean of reference to the type of drug involved.** If it is impossible to negotiate a plea to a non-drug offense, keep the record of conviction free of any reference to the type of drug involved in the case. To establish deportability on controlled substance grounds, the government often has the burden of proving by clear and convincing evidence that the substance involved is included in the controlled substance schedule at 21 U.S.C. § 802.¹⁰ *Nijhawan* supports the view that the immigration factfinder cannot look beyond the record of conviction to establish the type of drug involved. Therefore, if no record of the type of drug is included in the record and if the state law at issue punishes offenses relating to even a single substance that is not included in the federal schedules, the government cannot meet its burden in deportation proceedings and your client will have a defense to deportability.¹¹ (Note, however, that in some contexts your client may be required to prove that she did not commit a controlled substance offense. In such cases, an indeterminate record may not be sufficient to prevail).
- **Negotiate a plea to an offense without a drug trafficking element so as to avoid an aggravated felony.** If it is impossible to negotiate a plea to a non-drug offense or to keep the type of drug out of the record of conviction, a guilty plea to a drug offense will almost certainly render your client removable pursuant to the general controlled substance grounds of removability.¹² You may, however, be able to preserve your client’s eligibility for immigration relief by avoiding an aggravated felony conviction.¹³ A state drug felony or misdemeanor may be categorized as an aggravated felony if it involves an element of commercial dealing. Avoid a drug trafficking aggravated felony by

negotiating a plea to a possession-only offense with no element of sale, distribution or intent to sell or distribute (note, however, that second or subsequent possession offenses may be aggravated felonies — see tip below — and that possession offenses involving more than five grams of crack cocaine or any amount of flunitrazepam are aggravated felonies). If this is impossible, in marijuana cases you can at the very least preserve an argument that the conviction is not a drug trafficking aggravated felony by negotiating a plea to an offense that is broad enough in its wording to include non-remunerative transfers or gifts in addition to sale. You must then keep the record of conviction clean of any reference to a sale or exchange of money.¹⁴

- **Beware of second or subsequent simple possession offenses, and keep the record clean of any reference to prior offenses or recidivist enhancement.** As noted above, almost every simple possession offense will render your client removable. However — as with the tip above — you may preserve your client’s eligibility for immigration relief by avoiding an aggravated felony conviction. The definition of a “drug trafficking crime” aggravated felony includes any state conviction that would qualify as a felony under certain federal drug laws, and one of those laws provides for recidivist felony prosecution for a second or subsequent offense of simple possession if a prior drug conviction was final at the time of the second or subsequent offense and if certain procedural requirements (including notice and an opportunity to contest the fact, finality, and validity of the prior conviction) are met. 21 U.S.C. § 844(a), 851. In June of 2010, the Supreme Court clarified that a state offense of simple possession will only qualify as an aggravated felony under this prong if the state conviction was based on the fact of a prior conviction. *Carachuri-Rosendo v. Holder*, 570 U.S. ___, 130 S. Ct. 2577 (2010). By overruling contrary federal circuit court precedent, the Supreme Court’s decision gives nationwide effect to the earlier analysis of the Board of Immigration Appeals in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), in which the BIA stated that, but for the contrary federal circuit law governing in that case, it would have found that a second or subsequent possession offense does not correspond to the federal recidivist felony unless the prior drug conviction had actually been established in the criminal case in a process that, at a minimum, provided the defendant with notice and an opportunity to be heard on whether recidivist punishment was proper. Therefore, if a noncitizen defendant is convicted of a state possessory offense but the fact of the defendant’s prior drug conviction was not included in the record as a basis for enhanced criminal liability, the new offense will not be deemed to correspond to a federal felony and therefore will not be considered an “aggravated felony.”
- There still remains some question as to how this decision applies to convictions from jurisdictions where recidivist enhancement procedures exist but only partly mirror the federal procedures. Moreover, recidivist convictions under state procedures that do correspond closely to federal requirements regarding finality and notice may still be deemed “aggravated felonies” even where the state procedures result in a misdemeanor conviction. Defenders should therefore keep the record of conviction clean of any mention of a prior drug conviction and steer clear of any analog to federal recidivist prosecution under 21 U.S.C. §§ 844(a) and 851.¹⁵

B. Offenses Against the Person:

Offenses against the person may trigger deportation for noncitizen clients under a variety of grounds. Certain offenses for which a sentence of one year or more is imposed will trigger the aggravated felony ground for “crimes of violence.”¹⁶ Many intentional assault offenses and some reckless assault crimes will constitute “crimes involving moral turpitude” (“CIMTs”).¹⁷ Sex crimes may additionally place clients at risk of removal under the “rape” or “sexual abuse of a minor” aggravated felony grounds.¹⁸ Offenses against spouses or household members may trigger removal under the separate “crimes of domestic violence” grounds of removability, and offenses against minors can trigger removal under another prong of this ground of removability.¹⁹

1. Sex Crimes:

Sexual abuse of a minor

Sexual abuse of a minor (“SAM”) is an aggravated felony.²⁰ While some federal courts had previously been hesitant to apply the categorical approach to this ground,²¹ *Nijhawan* strongly supports the argument that this removal ground is a “generic” one requiring application of the categorical approach. 129 S. Ct. at 2300. Immigration advocates can argue after *Nijhawan* that the categorical approach should apply such that both the “sexual abuse” requirement and the minority of the complainant must be elements of the offense or at a minimum must be established in the record of conviction.²² Defense counsel should therefore seek pleas that do not include either sexual conduct or the minority of the victim (or both) as elements.

- **Seek a plea to a statute that lacks any element of sexual abuse.** A plea to a broad child-endangerment or false imprisonment statute that lacks the element of lewd or sexual conduct and/or intent is far less likely, after *Nijhawan*, to constitute an aggravated felony.²³
- **Seek a plea to a statute that lacks the age of the victim as an element and keep the record clear of the complainant's minority.** As an additional defense, controvert or keep the record clear of any mention of the minority of the complainant.²⁴
- **Be aware of additional grounds of removability that may apply even if the offense does not fall within the sexual abuse of a minor aggravated felony ground discussed above.** Many pleas that avoid the SAM aggravated felony ground may nonetheless trigger grounds of removal, including a CIMT or a crime of “child abuse, child neglect or child abandonment” under 8 U.S.C. § 1227(a)(2)(E)(i), a ground applicable to noncitizens who have been lawfully admitted or paroled. In some cases a CIMT plea or a plea to a “child abuse” offense will be materially better for your client than a SAM aggravated felony, but you should not advise a noncitizen that such a plea is “safe” without consulting immigration counsel. Furthermore, pleas to some possible alternative offenses, such as false imprisonment, may constitute “crime of violence” or “obstruction of justice” aggravated felonies when a sentence of one year or more is imposed. To avoid this risk, seek a sentence of 364 days or less.
- **Be aware that ICE has prioritized removal of sex offenders and devotes significant resources to identifying and arresting noncitizen sex offenders in the community.** When it is not possible to avoid conviction of a sex offense, particularly a sex offense involving a minor, avoid sentences that increase the likelihood of ICE detection and detention, including incarceration, probation, and sex offender registration.

Rape

“Rape” is an aggravated felony ground.²⁵ *Nijhawan* strongly supports the argument that the rape ground is a generic one calling for the categorical approach. 129 S. Ct. at 2300. While the immigration statute does not define the term “rape,” immigration advocates can argue that the aggravated felony ground is only triggered by convictions that satisfy the federal criminal prohibition on “aggravated sexual abuse” at 18 U.S.C. § 2241 (which generally requires forcible compulsion), or at a minimum, convictions that contain the elements of sexual intercourse and lack of consent.²⁶ Defense counsel can preserve these arguments by avoiding conviction under statutes that punish forcible or compelled sexual conduct, as well as statutes that punish sexual penetration without consent.

- **Seek an alternate plea to a statute that does not include conduct satisfying the common-law definition of rape or the federal definition of “aggravated sexual abuse.”** Offenses such as false imprisonment, a non-sexual assault statute, or a sexual abuse statute that penalizes sexual misconduct other than non-consensual intercourse may not be considered to fall within the rape aggravated felony ground. To avoid the risk that such a plea will nonetheless constitute a “crime of violence” aggravated felony, seek a sentence of 364 days or less.
- **Be aware that such pleas, while avoiding the rape aggravated felony ground, may nonetheless constitute CIMTs that may subject your client to removal.** In some cases a CIMT plea will be materially better for your client than an aggravated felony, but you should not advise a noncitizen client that a plea to assault or a false imprisonment statute is “safe” without consulting immigration counsel.

2. Assault Offenses:

A “crime of violence” for which a sentence of a year or more is imposed is an aggravated felony.²⁷ A “crime of violence” is defined for these purposes as a felony that, “by its nature, involves a substantial risk that physical force against the person or property of another may be used,” or a misdemeanor or felony offense that has as an element the use, threatened use, or attempted use of force against the person or property of another.²⁸ The BIA has clarified that the force necessary to constitute a “crime of violence” as defined in 18 U.S.C. § 16 must be violent force, that is, force that has the ability to cause physical pain or injury to another person. *Matter of Velasquez*, 25 I. & N. Dec. 278, 283 (BIA 2010) (citing *Johnson v. United States*, 130 S. Ct. 1265 (2010)). Therefore, an aggravated felony crime of violence against a person²⁹ must have as an element an intentional use of violent force. *Matter of Velasquez* reaffirms the general consensus that the “crime of violence” aggravated felony inquiry is a categorical one.³⁰ Defense counsel should remain aware, however, that the Supreme Court’s *Duenas-Alvarez* decision arguably requires a showing of a “realistic probability, not a theoretical possibility” of

prosecution on facts that do not involve violent force, before deportation may be avoided under this ground. See *Duenas-Alvarez*, 549 U.S. at 193. Such a showing may be based on the defendant's own case or on other state case law.

Assault offenses may also trigger the CIMT grounds of removability. In this regard, *Silva-Trevino* probably does not upset prior BIA case law drawing complex distinctions between assault statutes that are CIMTs and those that are not. Prior BIA cases provided that "simple" assault crimes, i.e., those that punish offensive touching with no specific intent to injure, are not CIMTs. See *Matter of Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989). The BIA has also stated that assault statutes punishing intentional but *de minimis* offensive contact are not CIMTs. See *Matter of Solon*, 24 I. & N. Dec. 239, 241 (BIA 2007). In contrast, "intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous." *Id.* at 242. In addition, *Silva-Trevino* arguably does not disturb existing case law requiring that reckless crimes involve some aggravating dimension to be turpitudinous. See *Solon*, 24 I. & N. Dec. at 242 ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.").

- **To avoid an aggravated felony conviction, seek a plea to a felony that does not "by its nature" involve risk that force will be used, if state case law supports that argument; or seek a plea to misdemeanor that does not include as an element the use, attempted use, or threatened use of force.** "Use" of force in this context means "active employment," so negligent offenses will not be deemed "crimes of violence." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). By the same token, recklessness as to the risk of injury or property damage does not make an offense a crime of violence, because the "risk" required is risk that force will be actively employed. *Id.* at 10. As noted above, the BIA has held that where the offense involves force against a person, "force" means violent force capable of causing pain or injury, so a plea to a battery statute that requires mere offensive touching or contact will not constitute a crime of violence.
- If conviction of a crime of violence is unavoidable, seek a sentence of 364 days or less.
- **To avoid a CIMT, seek a plea to a statute requiring only negligent conduct.** It remains the case after *Silva-Trevino* that negligent conduct cannot constitute a CIMT. *Silva-Trevino*, 24 I. & N. Dec. at 689 n.1; *Solon*, 24 I. & N. Dec. at 242.
- **Seek to protect against a CIMT finding by creating an affirmative record that a reckless assault offense did not include aggravating dimensions such as serious physical injury.** Reckless assault crimes with no aggravating factor such as serious injury may not be CIMTs. At the very least, however, in many jurisdictions they will not constitute "crime of violence" aggravated felonies, as noted above. Thus, where a plea to a negligent offense is not possible, a plea to a reckless offense may guard against the aggravated felony risk if not the CIMT risk. For some clients, conviction of a CIMT has less drastic consequences.
- **Protect against a CIMT finding by seeking a plea to attempted reckless assault.** Several federal courts have found that because the offense of attempted reckless assault lacks any logically coherent *mens rea*, it is categorically not a CIMT. See *Gill v. INS*, 420 F.3d 82 (2d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004). As these cases illustrate, it is sometimes possible to plead guilty to a logically incoherent offense.
- **To avoid a CIMT, seek a plea to a "simple" assault statute and construct an affirmative record that your client's assault conviction did not involve moral turpitude.** *Silva-Trevino* may make it more likely that an immigration court will examine the particular facts of a defendant's case, even where the defendant is prosecuted under a statute that punishes "simple" or general-intent assault, or where a statute punishes both *de minimis* offensive contact and conduct resulting in injury.³¹ If your client is charged under such a statute and an alternate plea to negligent conduct is not possible, make a record at allocution that your client lacked a specific intent to injure and/or deny that injury resulted.
- **In jurisdictions with "simple" or non-specific intent assault statutes, controvert or keep the record clear of allegations of other aggravating factors.** Factors such as a special relation of trust between the defendant and the complainant, the use of a weapon or dangerous instrument, or a complainant's status as a police officer or other official may make even a "simple" assault a CIMT and should be excluded from the record.

Crimes Against Children

As discussed above, under the BIA's decision in *Velasquez-Herrera*, a conviction cannot trigger removability under the rubric of a "crime of child abuse, child neglect, or child abandonment" if the minority of the complainant was not an element of the statute of conviction or disclosed in the formal record of conviction.³² In a recent decision, the Board reaffirmed the application of the categorical approach to this ground of removal. *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010). *Soram* also held, however, that this removal ground reaches offenses that punish child endangerment, even where the statute does not require that any actual harm was suffered by the child subjected to endangerment. *Id.* at 380-81. While noting that states vary significantly in the extent to which their child endangerment statutes require imminent or substantial risk of harm, the BIA in *Soram* declined to "analyze whether the myriad State formulations of endangerment-type child abuse offenses come within the ambit of 'child abuse' under section 237(a)(2)(E)(i) of the Act," *id.* at 383, leaving the bounds of this removal ground uncertain. *Soram* appears to indicate, however, that endangerment statutes requiring a knowing, reckless or criminally negligent *mens rea* will qualify, at least where there is a "reaonsable probability" that harm might result. *Id.* at 384-86.

- **If a defendant is charged with an offense specific to minors, seek an alternate plea to an offense that does not include as an element the minority of the complainant and keep the record clean of any mention of the minority of the complainant.**
- Be aware that such offenses may nonetheless constitute CIMTs or may trigger other removal grounds, depending on the nature of the offense.

Domestic Violence Offenses

Apart from general assault crimes, discussed above, there is a distinct ground of deportability for "crimes of domestic violence," which requires for removability both that: 1) the offense must be a "crime of violence" as defined at 18 U.S.C. § 16 (discussed *supra* under "assault offenses" generally); and 2) the offense must have been committed against a complaining witness with a domestic relationship to the defendant as defined in the immigration statute or who would be protected by federal or state domestic violence laws.³³

- **Negotiate a plea to an offense that is not a "crime of violence."** (See discussion at pages 12–13, above). *Nijhawan* supports the proposition, and the circuits are nearly unanimous,³⁴ that the strict categorical approach applies to the categorization of an offense as a "crime of violence." By negotiating a plea to an offense that is not necessarily a "crime of violence," you can protect your client from the "crime of domestic violence" ground of deportability regardless of the relationship between your client and the complaining witness.
- **Keep the record clean — within and outside of the record of conviction — of any reference to the relationship between the defendant and the complaining witness.** *Nijhawan* and *U.S. v. Hayes*, 129 S. Ct. 1079 (2009), may support the government's argument that the "circumstance-specific" approach may be used to determine the relationship between the defendant and the complaining witness for the purpose of the domestic violence ground of deportability. This argument, if successful, allows the immigration court to reach beyond the record of conviction to establish a domestic relationship between the defendant and complaining witness. Citing *Hayes*, the BIA has recently noted in dicta that the domestic relationship between the defendant and the complainant need not be an element of the statute of conviction for an offense to trigger "domestic violence" deportability. *Velasquez*, 25 I. & N. Dec. at 280 n.1. Most circuit courts of appeals were headed in this direction prior to *Nijhawan*,³⁵ with the exception of the Ninth Circuit, which continued to adhere strictly to the categorical approach for all aspects of the domestic violence ground of removability.³⁶ Although immigration practitioners may continue to advance the argument that the entirety of this ground of removability should be subject to the categorical approach, defenders who cannot avoid a plea to a "crime of violence" offense can best protect their clients by keeping the relationship between the defendant and the complaining witness entirely out of the criminal record, not only the record of conviction.
- **Be aware of additional grounds of removability that may apply even if the offense does not fall within the "domestic violence" ground of removability discussed above.** Defenders should be aware that an offense at risk of categorization as a crime of domestic violence may also fall under: the CIMT ground of removability, 8 U.S.C. § 1227(a)(2)(A)(i); the "crime of violence" aggravated felony ground of removal if the sentence imposed is a term of imprisonment of one year or longer, 8 U.S.C. § 1101(a)(43)(F); and

potentially the “sexual abuse of a minor” aggravated felony ground of removal, 8 U.S.C. § 1101(a)(43)(A). For tips on how to address these potential dangers, see the practice tips for “assault offenses” and “sex crimes” above.

C. Offenses Against Property:

Offenses against property may trigger removal against noncitizen clients under a variety of grounds. Many theft, fraud and property damage offenses will trigger the CIMT grounds of removability.³⁷ In addition, there are specific aggravated felony grounds of removal for: fraud and deceit offenses with a loss to the victim exceeding \$10,000; theft or burglary offenses for which a sentence of one year or more is imposed; offenses relating to commercial bribery, forgery and counterfeiting; and money laundering offenses “described in” specified provisions of federal criminal law and involving more than \$10,000 in funds.³⁸

“Fraud and Deceit” Offenses

As discussed above, *Nijhawan* narrowly addressed the question of whether a stipulation of monetary loss at sentencing could trigger the aggravated felony ground for crimes “involv[ing] fraud or deceit in which the loss to the victim ... exceeds \$10,000.” 8 U.S.C. § 1101(a)(43)(M)(i). While the Court held that the statute of conviction need not include the relevant loss amount as an element, the *Nijhawan* opinion does place limits on the evidence the immigration court may examine to determine loss amount. In addition, *Nijhawan* affirms that the question of whether an offense “involves fraud or deceit” remains a categorical one.³⁹ 129 S. Ct. at 2297.

- **In cases involving charges of fraud or deceit and an actual or intended loss of more than \$10,000, seek an alternate plea to a theft offense that does not involve an element of fraud or deceit.** Under *Nijhawan* and *Babaisakov*, this inquiry remains strictly categorical. The BIA regards theft and taking by fraud as distinct offenses. See *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008). A theft offense that does not include fraud or deceit as a necessary element for conviction is therefore probably not an aggravated felony under section § 1101(a)(43)(M)(i) even where actual or intended loss exceeds \$10,000. Note, however, that such an offense may nonetheless constitute a “theft” aggravated felony if the sentence imposed is one year or more.
- **Where an alternate plea to a theft offense is not possible, create an affirmative record of “convicted” loss of \$10,000 or less.** *Babaisakov* and *Nijhawan* both affirm that only losses specifically tied to convicted conduct are relevant to the \$10,000 inquiry. In cases involving fraud or deceit where it is likely that restitution of over \$10,000 will be ordered or charging instruments allege losses or intended losses over \$10,000, allocute your client to a loss amount of \$10,000 or less tied to convicted conduct, or enter a written stipulation or plea agreements to that effect. Such a record may prevent the immigration authorities from later proving by the requisite “clear and convincing evidence” that additional amounts for which restitution was ordered are tied to convicted conduct.
- **Be aware that fraud and deceit offenses may also trigger removability under the CIMT deportation ground as well as the aggravated felony grounds for various forgery and counterfeiting and other offenses “described in” provisions of federal criminal law, 8 U.S.C. §§ 1101(a)(43)(D), (R).**

Theft or Burglary Offenses

A “theft” or “burglary” offense, including receipt of stolen property, with a sentence of one year or more is an aggravated felony.⁴⁰ This inquiry remains categorical. See *Nijhawan*, 129 S. Ct. at 2299; *Duenas-Alvarez*, 549 U.S. at 189.

- **For theft, receipt of stolen property, and burglary offenses, seek a sentence of 364 days or less to avoid the aggravated felony ground.**
- **To avoid a CIMT, seek an alternate plea to an offense that punishes mere temporary conversion (e.g., unauthorized use of vehicle or “joyriding” in preference to grand larceny or grand theft auto), and if possible create an affirmative record that the intention was to effect a temporary taking.** *Silva-Trevino* leaves undisturbed BIA case law holding that larceny statutes that punish an intent to convert property temporarily, as opposed to an intent permanently to deprive the owner of his/her property, do not involve moral turpitude. See, e.g., *Matter of Grazley*, 14 I. & N. Dec. 330 (BIA 1973); *Matter of P*, 2 I. & N. Dec. 887 (BIA 1947). However, for statutes that punish both temporary and permanent takings, *Silva-Trevino* greatly expands the universe of evidence that may be consulted to determine whether the defendant in

fact intended a permanent taking. Where it is not possible to seek an alternate plea, try to controvert or keep the record clear of evidence suggesting an intent to effect a permanent taking.

D. Weapons Offenses:

Weapons offenses may trigger removability for noncitizen clients under the aggravated felony grounds related to firearms and explosive devices and illicit firearms trafficking, as well as the non-aggravated ground of removal for certain convictions relating to the purchase, sale, possession, use, ownership, and carrying of a “firearm or destructive device,” including any attempt or conspiracy offenses.⁴¹ *Nijhawan* affirms that the categorical analysis is used for convictions falling under the firearms aggravated felony grounds, both of which define the relevant categories of offenses as those “described in” listed federal statutes. Additionally, nothing in *Nijhawan* or the BIA’s recent categorical approach cases purports to alter the analysis of the non-aggravated firearms ground, which remains categorical. The term “firearm or destructive device” is defined at 18 U.S.C. § 921(a).

- **To avoid aggravated felony removal grounds linked to federal firearm offenses, seek alternate pleas to state statutes that lack one or more of the elements required under the listed federal statutes.** Note, however, that the BIA and the Seventh and Ninth Circuits have held, under the categorical approach, that a state offense need not contain any counterpart to the federal “jurisdictional” element requiring an effect on interstate commerce in order to qualify as an aggravated felony. See *Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002); accord *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1272 (9th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 502 (7th Cir. 2008).
- **To avoid general firearm deportation ground, where your client is charged with possession of a firearm, seek an alternate plea to an offense that does not involve possession of a “firearm or destructive device” as defined at 18 U.S.C. § 921(a).** Keep the record clear of the nature of the weapon if the statute includes but is not exclusive to “firearms” or “destructive devices” as defined in federal law.
- **To avoid CIMT removal grounds, where your client is charged with possession of a weapon with intent to use it, seek an alternate plea to a weapons offense that punishes mere possession of a weapon with no intent to use. Create an affirmative record that the defendant did not intend to use the weapon unlawfully.** The recent developments discussed in this advisory leave undisturbed the longstanding distinction in BIA and circuit case law between weapons offenses that punish mere knowing possession of contraband weapons, which do not involve moral turpitude, and offenses that punish possession of a weapon with intent to use it unlawfully against the person or property of another, which generally do involve moral turpitude. Where a statute punishes both possession with intent to use and possession with no such intent, *Silva-Trevino* expands the universe of evidence an immigration judge may consult to determine whether the defendant possessed the weapon with intent to use it, so you should create an affirmative record regarding the lack of intent.

**For further information on immigration consequences of convictions,
please contact the Immigrant Defense Project at 212.725.6422 or visit
www.immigrantdefenseproject.org**

**Public defenders can also find resources on representing immigrants
on the website of the Defending Immigrants Partnership,
www.defendingimmigrants.org**

NOTES

- 1 While immigration law technically distinguishes between grounds of “deportability” and “inadmissibility” in many contexts, *compare* 8 U.S.C. § 1182 *with* 8 U.S.C. § 1227, the terms “deportability” and “removability” are used interchangeably in this advisory to refer to any grounds to expel a noncitizen from the United States.
- 2 In *Duenas-Alvarez*, 549 U.S. at 193, the Court stated that there must be a “realistic possibility” that the statute reaches conduct that falls outside of the generic deportation ground, as evidenced by reported cases (or the immigrant’s own case). In light of this dictum, a farfetched hypothetical possibility that a statute could trigger prosecution for an offense falling outside the deportation ground definition may not be sufficient to show that a statute is divisible.
- 3 Noncitizens may be deportable or inadmissible upon conviction of one or more “crimes involving moral turpitude,” depending on their individual circumstances. See 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), (ii). This undefined term has been used in federal immigration statutes since 1891, see Act of March 3, 1891, 26 Stat. 1084, and its meaning has been the subject of decades of administrative and judicial case law. See generally *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (rejecting a void-for-vagueness challenge to the term and defining it to include any offenses involving a specific intent to defraud).
- 4 The Seventh Circuit was the only federal court to have rejected the categorical approach in the CIMT context. See *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).
- 5 In making this determination, immigration judges are instructed to consider whether there is a “realistic probability” that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I. & N. Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193).
- 6 See *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (“As th[e] question is not squarely before us, we reserve judgment as to the validity of that portion of our prior case law which suggests review should be more confined.”). The Ninth Circuit has, however, endorsed the portion of *Silva-Trevino* that requires that there be a “realistic probability” that a given statute would be applied to non-CIMT conduct before finding that the offense is not categorically a CIMT. See *Saavedra-Figueroa*, 625 F.3d at 627.
- 7 For a comprehensive discussion of the likely impact of *Nijhawan* on each aggravated felony ground in the Immigration and Nationality Act, see Dan Kesselbrenner & Manuel D. Vargas, “Practice Advisory: The Impact of *Nijhawan v. Holder* on the Categorical Analysis of Aggravated Felonies” app. (June 24, 2009), available at [http://www.immigrantdefenseproject.org/docs/09_Nijhawan-practiceadvisory--\(6-24-09\).pdf](http://www.immigrantdefenseproject.org/docs/09_Nijhawan-practiceadvisory--(6-24-09).pdf).
- 8 Criminal defense attorneys should be aware that the constitutional prohibition against *ex post facto* laws does not apply in the immigration context. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (noting that Congress may attach new immigration consequences to past convictions within certain constitutional limits). In some circumstances where disclosure of your client’s immigration status is not prejudicial, it may be advisable to make a record during allocution that your client is pleading guilty in reliance on immigration advice that you have provided. While this will not automatically shield your client from future changes in immigration law, such a record may strengthen available arguments against retroactive application.
- 9 8 U.S.C. § 1101(a)(43)(B) (aggravated felony ground); 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(2)(C), 1227(a)(2)(B) (non-aggravated felony inadmissibility and deportability grounds).
- 10 See *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965).
- 11 You may want to take some time to compare the controlled substances covered in your state’s penal code with the drugs scheduled at 21 U.S.C. § 802 and its accompanying regulations to determine if the former includes any substances not included in the latter (or find out if there is an immigration practitioner in the state who has already done so).
- 12 There is a minor exception under the controlled substance ground of deportability for the possession of thirty grams or less of marijuana for one’s own personal use. See 8 U.S.C. § 1227(a)(2)(B). This exception does not exist for the corresponding ground of inadmissibility.
- 13 Conviction of an “aggravated felony” presents a bar to almost every type of immigration relief. See, e.g., 8 U.S.C. §§ 1101(f), 1158(b)(2)(B)(i), 1229b. An individual deported on the basis of an “aggravated felony” also faces a lifetime bar to lawful return to the U.S. 8 U.S.C. § 1182(9)(A)(ii).
- 14 See generally Immigrant Defense Project Practice Advisory: Using *Lopez v. Gonzales* to Challenge Aggravated Felony Drug Trafficking Charges or Bars on Relief (May 19, 2008), available at http://www.immigrantdefenseproject.org/docs/08_Post-LopezPracticeAdvisory51908.pdf.
- 15 See generally Immigrant Defense Project Practice Advisory: Multiple Drug Possession Cases After *Carachuri-Rosendo v. Holder* (June 21, 2010), available at http://www.immigrantdefenseproject.org/docs/2010/10_Carachuri%20Practice%20Advisory%2020100622-FINAL.pdf.
- 16 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).
- 17 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).
- 18 8 U.S.C. §§ 1101(a)(43)(A).
- 19 8 U.S.C. § 1227(a)(2)(E)(i), (ii).

- 20 8 U.S.C. § 1101(a)(43)(A).
- 21 See, e.g., *Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005).
- 22 See *Garcia-Lara v. Holder*, No. 08-4023, 2009 WL 2589115, at *3 (7th Cir. Aug. 25, 2009) (unpublished) (noting the “categorical approach that governs the determination whether a conviction constitutes the aggravated felony of sexual abuse of a minor,” citing *Nijhawan*, and questioning whether resort to a police report to determine minority of complainant was proper).
- 23 But see *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008) (pre-*Nijhawan* case remanding to BIA question of whether child endangerment statute lacking sexual conduct element was “divisible” as to SAM aggravated felony).
- 24 See *Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); but see *Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005) (pre-*Nijhawan* case allowing resort to extrinsic evidence of complaining witness’s age).
- 25 8 U.S.C. § 1101(a)(43)(A).
- 26 See, e.g., *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000) (relying on Black’s Law Dictionary definition of “rape” to hold that “rape” aggravated felony requires nonconsensual intercourse; rejecting the argument that “rape” requires forcible compulsion); but see *Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006) (statutory rape may fall within the “rape” aggravated felony ground).
- 27 8 U.S.C. § 1101(a)(43)(F).
- 28 *Id.* (incorporating by reference 18 U.S.C. § 16).
- 29 The BIA has reserved the question of whether the level of force required for an offense to be a “crime of violence” may be lesser when directed against property. *Velasquez*, 25 I. & N. Dec. at 282 n.2.
- 30 *Matter of Velasquez*, 25 I.&N. Dec. at 283. Although *Nijhawan* does not explicitly list crimes of violence as a “generic” crime, “crime of violence” is defined in the Immigration and Nationality Act with reference to 18 U.S.C. § 16, making it analogous to the “violent felony” analysis in the Armed Career Criminal Act at issue in *Taylor, Chambers v. United States*, 129 S. Ct. 687 (2009); *James v. United States*, 550 U.S. 192 (2007) and *Johnson*, in which the Supreme Court used the categorical approach.
- 31 Compare, e.g., *Solon*, 24 I. & N. Dec. at 241 (“[T]he conviction will be found to be for a crime involving moral turpitude only if the full range of the conduct prohibited in the statute supports such a finding.”) with *Silva-Trevino*, 24 I. & N. Dec. at 696–98 (rejecting the “minimum conduct” approach to determining whether a statute is a CIMT).
- 32 8 U.S.C. § 1227(a)(2)(E)(i). The government may argue that the *Velasquez-Herrera* decision should be revisited in light of the Supreme Court’s decision in *United States v. Hayes*, 129 S. Ct. 1079 (2009), which held that a criminal statute that includes wording similar to 8 U.S.C. § 1227(a)(2)(E)(i) invited circumstance-specific inquiry into the status of the complainant, but no court has yet indicated that *Velasquez-Herrera*’s holding is in doubt.
- 33 8 U.S.C. § 1227(a)(2)(E)(i).
- 34 See, e.g., *Sutherland v. Reno*, 228 F.3d 171, 177 n.5 (2d Cir. 2000); *Gonzales-Garcia v. Gonzales*, 166 F. App’x 740 (5th Cir. 2006) (unpublished); *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003); *Tokatly v. Gonzales*, 71 F.3d 613, 621–24 (9th Cir. 2004); *Cesar v. Attorney General*, 240 F. App’x 856, 857 (11th Cir. 2007) (unpublished).
- 35 See, e.g., *Flores*, 350 F.3d at 671 (finding the second prong of the domestic violence ground of removability to be a “real-offense characteristic” which “may be proved without regard to the elements of the crime” and setting no real limit on the evidence that might be used to prove it). Several of the circuit courts had not reached the issue but deliberately failed to conclusively limit the analysis of the second prong to the record of conviction. See, e.g., *Sutherland*, 228 F.3d at 177; *Gonzales-Garcia*, 166 F. App’x at 743 n.6; *Cesar*, 240 F. App’x at 857.
- 36 See *Tokatly*, 71 F.3d at 621–24 (applying the strict categorical approach to both the “crime of violence” categorization and the determination of the relationship between defendant and complaining witness, finding the government’s argument that the second prong should reach beyond the categorical approach while the first prong remains within it to be a “convoluted and bipolar methodology”); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391–92 (9th Cir. 2006).
- 37 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).
- 38 8 U.S.C. §§ 1101(a)(43)(M)(i) (fraud and deceit); 1101(a)(43)(G) (theft and burglary); 1101(a)(43)(R) (bribery, forgery and counterfeiting); 1101(a)(43)(D) (money laundering).
- 39 See also *Carachuri*, 130 S.Ct. at 2586 n.11 (noting that there was “no debate in *Nijhawan* over whether the petitioner actually had been ‘convicted’ of fraud; we only considered how to calculate the amount of loss once a conviction for a particular category of aggravated felony has occurred.”).
- 40 8 U.S.C. § 1101(a)(43)(G).
- 41 8 U.S.C. §§ 1101(a)(43)(C), (E) (firearm and explosive device aggravated felonies); 1227(a)(2)(C) (non-aggravated felony firearms ground).