Categorical Analysis Checklist

By Norton Tooby & Joseph Justin Rollin*

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* This Checklist contains a list of all conviction-based grounds of deportability and inadmissibility, and a description of the type of categorical analysis that applies to each, together with the reasoning concerning why the recent decisions require this result. It was taken from N. TOOBY & J. ROLLIN, CATEGORICAL ANALYSIS TOOL KIT (2d ed. 2009), Appendix A.

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Introduction

Grounds of Removal. This checklist contains all conviction-based grounds of removal, both grounds of inadmissibility under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), and grounds of deportability under INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A). This checklist specifies the form of categorical analysis most likely to be applied, in light of *Nijhawan*, in determining whether a given conviction will trigger removal under the ground.

Bars to Relief. The vast majority of conviction-based bars to relief are based on these grounds of removal. See, e.g., INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C). There is no reason why the form of categorical analysis of the nature of conviction would differ between, e.g., a moral turpitude ground of deportation or inadmissibility, and a moral turpitude bar to relief.

Burden of Proof. The applicable burden of proof will depend upon the context. The Government bears the burden of establishing deportability under INA § 237, 8 U.S.C. § 1227.[1] The noncitizen often bears the burden of disproving inadmissibility under INA § 212, 8 U.S.C. § 1182.[2] Noncitizens seeking relief from removal also bear the burden of proof.[3] See N. Tooby & J. Rollin, *Criminal Defense of Immigrants* §§ 15.26, 17.9, 18.6-18.7 (4th ed. 2007).

Thanks to Joseph Justin Rollin for preparing this Appendix. Many thanks, also, to Dan Kesselbrenner and Manuel D. Vargas, and the other authors of CATEGORICAL ANALYSIS TOOL KIT, Appendix B(2) (N. Tooby, ed., 2009), and to Katherine Brady, author of *ibid.*, Appendix B(3), for their excellent analysis.

§ A.1 I. Conviction-Based Grounds of Deportation

[1] INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3).
[2] INA § 240a(c)(2), 8 U.S.C. § 1229a(c)(2).
[3] INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4). See, e.g., *Matter of Martinez-Espinoza*, 25 I. & N. Dec. 118, 123 (BIA 2009) (INA § 212(h) availability for noncitizens with a single conviction for an offense "related to" first-time simple possession of marijuana is "circumstance-specific," rather than tied to the elements of the crime of conviction; possession of paraphernalia conviction may fit within the 30-gram exception; noncitizen must show, by a preponderance of the evidence, that his offense fits within the 30-gram exception in INA § 212(h) waiver), citing *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298-2299 (2009). But see *Esquivel-Garcia v. Holder*, 593 F.3d 1025 (9th Cir. Jan. 28, 2010); *S-Yong v. Holder*, 578 F.3d 1169, 1174, 1176 (9th Cir.2009) (record of conviction that is inconclusive as to the exact nature of the controlled substance involved is sufficient to establish eligibility for cancellation of removal, placing on the government the burden of going forward with evidence to prove that the controlled substance the petitioner possessed was heroin or some other controlled substance listed under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II)); *Sandoval-Lua v. Gonzales,* 499 F.3d 1121, 1129-30 (9th Cir.2007) (person seeking "to prove eligibility for cancellation of removal can meet his or her initial burden by pointing to an inconclusive record of conviction.").

The conviction-based grounds of deportation are listed below, with a discussion of the form of analysis most likely to be applied to each. For more information on these grounds, see N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS, Chap. 19 (4th ed. 2007).

§ A.2 A. Aggravated Felony Conviction

The Act makes a noncitizen deportable who is convicted of an aggravated felony, as defined by INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), at any time after admission. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The aggravated felony definition includes a number of distinct offenses. The following subsections discuss how the categorical analysis is applied to each. For more information on these grounds see N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS, Chap. 19 (4th ed. 2007).

§ A.3 1. Alien Harboring

A number of courts[4] have held that a conviction for harboring illegal aliens[5] is an aggravated felony, since harboring is "relating to" alien smuggling.[6] See § A.4, *infra*.

§ A.4 2. Alien Smuggling

The aggravated felony definition includes "[a]n offense described in paragraph (1)(a) or (2) of section 274(a) (relating to alien smuggling)."[7] This aggravated felony category has a statutory exception, which constitutes a safe haven, for "a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child or parent (and no other individual) to violate a provision of this Act."[8]

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[4] See, e.g., *United States v. Martinez-Candejas*, 347 F.3d 853 (10th Cir. Oct. 21, 2003) (alien smuggling aggravated felony includes transportation and harboring for sentencing purposes); *Patel v. Ashcroft,* 294 F.3d 465 (3d Cir. June 20, 2002) (federal conviction of harboring an undocumented noncitizen, in violation of INA § 101(a)(1)(A), 8 U.S.C. § 1324(a)(1)(A), met the definition of an "aggravated felony" under INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N), for immigration purposes, despite the fact that defendant had no part in the harbored person's illegal admission or entry into the United States); *Gavilan-Cuate v. Yetter*, 276 F.3d 418 (8th Cir. Jan. 9, 2002) (federal conviction of conspiracy to transport and harbor illegal aliens, in violation of INA §§ 274(a)(1)(A)(ii) and (iii), 8 U.S.C. §§ 1324(a)(1)(A)(ii) and (iii), constituted aggravated felony under INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N), despite parenthetical mentioning smuggling); *Castro-Espinoza v. Ashcroft*, 257 F.3d 1130 (9th Cir. 2001); *Ruiz-Romero v. Reno*, 205 F.3d 837 (5th Cir. 2000); *United States v. Monjaras-Castaneda*, 190 F.3d 326, 331 (5th Cir. 1999) (same issue in sentencing context).

[5] INA § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii).

[6] INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).

[7] INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N). See Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), § 5401, Pub. L. No. 108-458; S. 2845, 108th Congress (signed Dec. 17, 2004), amending INA § 274, 8 U.S.C. § 1324.

[8] *Ibid.*

This aggravated felony ground refers to a specific federal statute defining an immigration offense.[9] The noncitizen must have been *convicted* of violating 8 U.S.C. § 1324(a) to trigger this aggravated felony ground.[10]

While the violation of INA § 274(a)(1)(A) or (2), 8 U.S.C. § 1324(a)(1)(A) or (2) is a question requiring the traditional categorical analysis, this ground includes a circumstance-specific exception – i.e., that this ground does not apply where the circumstances involved (1) a first offense, where (2) the noncitizen has affirmatively shown that the noncitizen committed the offense for the purpose of assisting, abetting, or aiding only the noncitizen's spouse, child or parent (and no other individual) to violate a provision of the INA.[11] This exception was explicitly recognized in *Nijhawan* as a circumstance specific extra-element fact that may be proven by evidence outside the record of conviction.[12]

This aggravated felony ground arguably requires *three* types of analysis. First, the traditional categorical analysis applies to the violation of INA § 274(a)(1)(A) or (2), 8 U.S.C. § 1324(a)(1)(A) or (2). Second, the circumstance specific analysis applies (with the burden still on the Government) to the question of whether this is the noncitizen's first alien-smuggling offense. Third, the burden then shifts to the noncitizen to make a circumstance-specific showing – under the specific statutory requirement that the noncitizen must "affirmatively" show -- that the offense involved only the noncitizen's spouse, child or parent.[13]

§ A.5 3. Alien Transporting

A number of circuit courts have held that a conviction for transporting illegal aliens is an aggravated felony,[14] as a conviction "relating to" alien smuggling.[15] See § A.4, *supra*.

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[9] INA § 274, 8 U.S.C. § 1324.

[10] See, e.g., *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. Oct. 31, 2005) (mere presence in vehicle at port of entry does not constitute alien smuggling under INA § 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i), even if the individual has knowledge that an alien was hiding in the trunk of the vehicle; simple knowledge without encouraging, inducing, assisting, abetting, or aiding is insufficient); *United States v. Resendiz-Ponce*, 425 F.3d 729 (9th Cir. Oct. 11, 2005) (indictment's failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326, requiring dismissal); *Tapucu v. Gonzales*, 399 F.3d 736, 740-42 (6th Cir. 2005) (driving an undocumented noncitizen to the United States border, and presenting him to the immigration authorities upon inspection, not knowing that the noncitizen is not entitled to enter the United States, at least on a temporary basis, does not constitute "alien smuggling").

[11] INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).

[12] *Nijhawan v. Holder*, 557 U.S. __, 129 S.Ct. 2294, 2301 (2009).

[13] *United States v. Guzman-Mata*, 579 F.3d 1065 (9th Cir. Aug. 27, 2009) (federal conviction for violation of 8 U.S.C. § 1324(a)(1)(A) is categorically an "alien smuggling" offense for illegal re-entry sentencing purposes; noncitizen bears burden of showing that "family" exception applies; shift of burden is not impermissible).

[14] INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).

[15] *United States v. Martinez-Candejas*, 347 F.3d 853 (10th Cir. Oct. 21, 2003) (alien smuggling includes transportation and harboring for purposes of 16-level enhancement of illegal re-entry sentence under U.S.S.G. §

§ A.6 4. Attempt

The INA explicitly includes attempt to commit an aggravated felony offense as an aggravated felony.[16] The "attempt" portion of an attempt aggravated felony is a generic definition subject to the strict categorical analysis. There is no language in the definition suggesting otherwise. The aggravated felony target offense portion of the definition is analyzed according to the nature of the specific aggravated felony that is attempted. That is, the generic portion of the target aggravated felony is analyzed under the categorical analysis, and any specific circumstance portion of the target aggravated felony is analyzed under the circumstance specific analysis.

At least one court has held that the DHS must specifically charge the respondent in removal proceedings under INA § 101(a)(43)(U), rather than merely charging the principal aggravated felony category.[17]

§ A.7 5. Bribery - Commercial

The aggravated felony statute includes "an offense relating to commercial bribery . . . for which the term of imprisonment is at least one year."[18] This aggravated felony is not defined by reference to a federal statute, and the BIA has yet to adopt a "generic" definition of the offense.

The traditional categorical analysis should be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.8 6. Bribery of a Witness

The aggravated felony statute includes "an offense relating to . . . bribery of a witness . . . for which the term of imprisonment is at least one year."[19] This aggravated felony is not defined by reference to a federal statute, and the BIA has yet to adopt a "generic" definition of this offense.

2L1.2(b)(1)(A)(vii) (2002) based on prior aggravated felony conviction); *United States v. Solis-Campozano*, 312 F.3d 164 (5th Cir. Nov. 12, 2002) (federal conviction for transporting aliens within the United States, in violation of INA § 274(a)(1)(A)(ii), 8 U.S.C. § 1324(a)(1)(A)(ii), was an "alien smuggling offense" within meaning of the Sentencing Guidelines for purpose of constituting an aggravated felony to enhance a sentence under U.S.S.G. § 2L1.2(b)(1)(A)(vii) for illegal re-entry); *Gavilan-Cuate v. Yetter*, 276 F.3d 418 (8th Cir. Jan. 9, 2002); *United States v. Galindo-Gallegos*, 244 F.3d 728 (9th Cir. 2001); *Ruiz-Romero v. Reno*, 205 F.3d 837 (5th Cir. Mar. 3, 2000).

[16] INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

[17] *Pierre v. Holder*, 588 F.3d 767 (2d Cir. Dec. 8, 2009) (a charge under INA § 101(a)(43)(U) for attempt to commit fraud is not a "lesser included offense" under INA § 101(a)(43)(M)(i); therefore, where the victim suffered no actual loss, the DHS could not prove that the noncitizen was deportable under INA § 101(a)(43)(M)(i)).

[18] INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R).

[19] INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S).

The traditional categorical analysis should be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.9 7. Burglary

The INA explicitly includes as an aggravated felony a "burglary offense for which the term of imprisonment [is] at least one year."[20] "[T]he term 'burglary,' as used in [8 U.S.C.] section 1101(a)(43)(G), has a uniform definition independent of the labels used by state codes . . . -- *the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime*."[21] At least one court has additionally indicated that aggravated felony burglary includes structures other than buildings.[22]

Nijhawan reaffirmed that burglary is a "generic" offense to which the traditional categorical analysis must be applied.[23]

§ A.10 8. Child Pornography

The statute includes within the aggravated felony definition "an offense described in section 2251, 2251A, or 2252 of Title 18, United States Code (relating to child pornography)."[24] These offenses are aggravated felonies, regardless of the sentence imposed.

This portion of the aggravated felony definition specifically lists offenses described in the following statutes:

18 U.S.C. § 2251, entitled "Sexual exploitation of children," punishing the use of a minor to engage in any sexually explicit conduct[25] for the purpose of producing any

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[20] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

[21] *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) (adopting definition of burglary from *Taylor*) (emphasis supplied); *United States v. Velasco-Medina*, 305 F.3d 839, 850 (9th Cir. Aug. 12, 2001); *Taylor v. United States*, 495 U.S. 575 (1990)

[22] *United States v. Rivera-Oros*, 590 F.3d 1123 (10th Cir. Dec. 29, 2009) (federal generic definition of burglary includes structures other than buildings, such as boats and tents); citing *Taylor v. United States*, 495 U.S. 575, 598 (May 29, 1990) (burglary includes "building or other structure"); *United States v. Cummings*, 531 F.3d 1232, 1235 (10th Cir.2008) (generic burglary can include structures other than buildings; court declined the invitation to find the phrase 'or other structure' superfluous). See also *United States v. Grisel*, 488 F.3d 844, 848 (9th Cir. June 5, 2007) ("the substitution of the term 'building or structure' for the term 'building' .... was one of form, not substance.").

[23] *Nijhawan* at 2299.

[24] INA § 101(a)(43)(I), 8 U.S.C. § 1101(a)(43)(I).

[25] Texas Penal Code, § 43.26(a)(1) (prohibiting possession or promotion of child pornography), penalizes possession of material containing an image of a child engaging in "sexual conduct," as opposed to "explicit sexual conduct." Counsel could therefore argue that the Texas statute includes more material than the federal statute.

visual depiction of that conduct,[26] as well as punishing any parent or guardian who permits or assists the minor to do so.[27]

18 U.S.C. § 2251(c)(1), punishing anyone who knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering:

(a) to receive, exchange, buy, produce, display, distribute, or reproduce any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(b) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct. The federal jurisdictional base requires that the person "knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or . . . such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed."[28]

18 U.S.C. § 2251A, punishing the selling or buying of children.

18 U.S.C. § 2252, entitled "Certain activities relating to material involving the sexual exploitation of children," punishing a number of offenses:

Subparagraph (a)(1) penalizes anyone who knowingly transports in interstate commerce by computer or mail any visual depiction of a minor engaging in sexually explicit conduct.

Subparagraph (a)(2) penalizes anyone who knowingly receives or distributes any visual depiction of a minor engaging in sexually explicit conduct that has been mailed or transported in interstate commerce by computer or knowingly reproduces any visual depiction for distribution in interstate commerce by computer or mail.

Subparagraph (a)(3)(A) penalizes knowing sale or possession for sale of any visual depiction of a minor engaging in sexually explicit conduct in U.S. territorial jurisdiction or land.

Subparagraph (a)(3)(B) penalizes knowing sale or possession for sale any visual depiction of a minor engaging in sexually explicit conduct that has been mailed or

[26] 18 U.S.C. § 2251(a).
[27] 18 U.S.C. § 2251(b).
[28] *Ibid*., subparagraph (2).

transported in interstate commerce or which was produced using materials that were mailed or transported in interstate or foreign commerce by any means including computer.

Subparagraph (a)(4)(A) penalizes knowing possession of "one or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" of a minor engaging in sexually explicit conduct in U.S. territorial jurisdiction or land.

Subparagraph (a)(4)(B) penalizes knowing possession of "one or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" of a minor engaging in sexually explicit conduct that has been mailed or transported in interstate commerce or which was produced using materials that were mailed or transported in interstate or foreign commerce by any means including computer.[29]

Subparagraph (b)(1) provides a 10-year maximum for a violation, attempt, or conspiracy to violate subparagraphs (a)(1)-(3). With a prior conviction under this chapter or chapter 109A, the term is from five to 15 years. Note that this list of the two no-substantive offenses of attempt and conspiracy gives rise to the argument that other unlisted non-substantive offenses are not included.

Subparagraph (b)(2) provides a five-year maximum for a violation, attempt, or conspiracy to violate (a)(4).

This aggravated felony definition specifically refers to a federal statute defining a criminal offense. To qualify as an aggravated felony, all the elements of the statute of conviction must fall within one of these sections.[30] The traditional categorical analysis should be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.11 9. Conspiracy

The statute explicitly states that conspiracy to commit an aggravated felony constitutes an aggravated felony.[31] The "conspiracy" portion of a conspiracy aggravated

[29] This section has been found unconstitutional.

[30] See, e.g., *Gonzalez v. Ashcroft*, 369 F.Supp.2d 442 (S.D.N.Y. Apr. 29, 2005) (New York conviction for "use of a child in a sexual performance" under New York Penal Law § 263.05, did not constitute an offense relating to child pornography, and was therefore not an aggravated felony under INA § 101(a)(43)(I), 8 U.S.C. § 1101(a)(43)(I), because the statute of conviction permits convictions for a lesser degree of scienter when parents or guardians are charged with violating the statute than the federal statutes encompassed by the aggravated felony provisions require, i.e., to act intentionally or knowingly: "Unless the scienter element is read so as not to attach to the parent's knowledge of the nature of the performance, the clause regarding parents is rendered superfluous.").

[31] INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U). See, e.g., *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. Aug. 22,

felony is a generic definition subject to the strict categorical analysis. The aggravated felony target offense portion of the definition, i.e., the offense the defendant conspired to commit, is analyzed according to the nature of the specific aggravated felony that is the object of the conspiracy. That is, the generic portion of the target aggravated felony is analyzed under the categorical analysis, and any specific circumstance portion of the target aggravated felony is analyzed under the circumstance specific analysis.

At least one court has held that the DHS must specifically charge the respondent in removal proceedings under INA § 101(a)(43)(U), rather than merely charging the principal aggravated felony category.[32]

§ A.12 10. Counterfeiting

The INA defines as an aggravated felony "an offense relating to . . . counterfeiting . . . for which the term of imprisonment is at least one year."[33] This aggravated felony is not defined by reference to a federal statute, and the BIA has yet to adopt a "generic" definition of the offense.

Whether the conviction involved counterfeiting should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

Nijhawan did not specifically address the question of whether the one-year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[34] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[35] Therefore, decisions allowing resort to the record of conviction to

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2006) (federal conviction for conspiracy under 18 U.S.C. § 371, where the underlying offense was a violation of 18 U.S.C. § 1344 [bank fraud] with a loss in excess of $10,000, is an aggravated felony fraud offense for immigration purposes); *Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. Sept. 21, 2004) (federal conviction of conspiracy constitutes an aggravated felony, under INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U), triggering deportability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), so long as the substantive offense that is the object of the conspiracy constitutes an aggravated felony, without regard to whether the elements of the conspiracy crime themselves establish the underlying aggravated felony offense).

[32] *Pierre v. Holder*, 588 F.3d 767 (2d Cir. Dec. 8, 2009) (a charge under INA § 101(a)(43)(U) for attempt to commit fraud is not a "lesser included offense" under INA § 101(a)(43)(M)(i); therefore, where the victim suffered no actual loss, the DHS could not prove that the noncitizen was deportable under INA § 101(a)(43)(M)(i)).

[33] INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R).

[34] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).

[35] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).

determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

Clearly, the sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.13 11. Crimes of Violence

The INA defines as an aggravated felony "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[36]

The definition of the crime of violence aggravated felony for immigration purposes is set out at 18 U.S.C. § 16:

(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.[37]

Whether an offense is a crime of violence under § 16(a) is usually clear: the offense as defined in the criminal statute of conviction must contain as an essential statutory *element* the use or threat of physical force against person or property.[38] This question is clearly subject to the traditional categorical analysis.

The controversy concerning which offenses should be considered crimes of violence has usually centered on the definition of the term under § 16(b), a felony involving the "substantial risk" that physical force may be "used" for the commission of

[36] INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).
[37] 18 U.S.C. § 16 (emphasis supplied).
[38] *United States v. Reve*, 241 F.Supp.2d 470 (D.N.J. Jan. 31, 2003) (New Jersey conviction of sexual assault, defined as committing an act of sexual penetration with a victim who is at least thirteen but less than sixteen years old and the actor is at least four years older than the victim, in violation of former N.J.S.A. § 2C:14-2(c)(5) (1995), recodified, N.J.S.A. § 2C:14-2(c)(4) (Supp. 2002), did not constitute an aggravated felony crime of violence, because the offense did not have as an element using, attempting to use, or threatening to use force against the victim, as required by 18 U.S.C. § 16(a); government did not argue substantial risk under 18 U.S.C. § 16(b)).

the offense. Since this is a criminal, rather than an immigration, statute, the federal courts do not defer to the Board of Immigration Appeals in its interpretation. *Nijhawan* did not address this provision specifically. However, it noted that it had already applied the traditional categorical analysis to very similar language in the Armed Career Criminal Act.

> That statute defines the "violent" felonies it covers to include "burglary, arson, or extortion" and "crime[s]" that have "as an element" the use or threatened use of force. 18 U.S.C. §§ 924(e)(2)(B)(i)-(ii). This language refers directly to generic crimes. The statute, however, contains other, more ambiguous language, covering "crime[s]" that "involv[e] conduct that presents a serious potential risk of physical injury to another." *Ibid.* (emphasis added). While this language poses greater interpretive difficulty, the Court held that it too refers to crimes as generically defined.[39]

Therefore, the "crime of violence" issue is subject to the normal categorical analysis.

A conviction for a crime of violence under 18 U.S.C. § 16(a) or (b) only becomes an aggravated felony if a sentence of one year or more is imposed. *Nijhawan* did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[40] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[41] Therefore, decisions allowing resort to the record of conviction to determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

Clearly, the sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

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[39] *Nijhawan* at 2300, citing *James v. United States*, 550 U.S. 192, 212, 127 S.Ct. 1586 (2007).
[40] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).
[41] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).

Finally, this aggravated felony ground carves out an exception for "purely political offenses."[42] There are no judicial decisions defining this term in the crime of violence context, but the same term appears in the crime of moral turpitude ground of inadmissibility.[43] In that context, the BIA has held that an offense must be determined to have been completely or totally political in view of the totality of the circumstances.[44] This is clearly a circumstance-specific inquiry.

§ A.14 12. Deceit

The aggravated felony definition includes an offense that "involves . . . *deceit* in which the loss to the victim or victims exceeds $10,000."[45] This aggravated felony is not defined by reference to a federal statute, and the BIA has yet to adopt a "generic" definition of the offense. There are very few cases on this aggravated felony offense. Most cases instead deal with the *fraud* portion of INA § 101(a)(43)(M)(i). See § A.26, *infra*.

In *Valansi v. Ashcroft*,[46] the Third Circuit found that the "fraud or deceit" aggravated felony category was *not* limited only to fraud offenses:

> we determine whether the phrase "offense that--involves fraud or deceit" has a plain meaning. The word "involves" means "to have within or as part of itself" or "to require as a necessary accompaniment." Webster's Third New International Dictionary at 1191. Thus, an offense that "involves fraud or deceit" is most naturally interpreted as an offense that includes fraud or deceit as a necessary component or element. It does not require, however, that the elements of the offense be coextensive with the crime of fraud.[47]

In seeking to define "deceit" the court stated:

> The term "deceit" also is not defined in the INA. However, it is commonly perceived as "[t]he act of intentionally giving a false impression," Black's Law Dictionary 413 (7th ed.1999), or "the act or process of deceiving," which is in turn defined as "to cause to believe the false." Webster's Third

[42] INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).
[43] "[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of -- (I) a crime involving moral turpitude (*other than a purely political offense*) or an attempt or conspiracy to commit such a crime . . . is inadmissible." INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (emphasis supplied); *Matter of B*, 1 I. & N. Dec. 47 (AG 1941).
[44] *Matter of O'Cealleagh*, 23 I. & N. Dec. 976 (BIA 2006).
[45] INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (emphasis added).
[46] *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. Jan. 23, 2002).
[47] *Id.* at 209-210.

New International Dictionary of the English Language Unabridged 584 (3d ed.1993).[48]

Nijhawan specifically stated that the "deceit" portion of INA § 101(a)(43)(M)(i) is to be examined using the traditional categorical analysis.[49]

On the other hand, the Court held that the determination of the loss to the victim is a circumstance-specific determination in the fraud offense aggravated felony context.[50] There is no reason for the analysis to differ between the fraud and the deceit definitions. The immigration authorities may therefore look beyond the elements of the statute and beyond the record of conviction to show, by clear and convincing evidence, that the loss to the victim(s) from a deceit offense exceeded $10,000.

§ A.15 13. Destructive Device Trafficking

The INA includes as an aggravated felony a conviction for "illicit trafficking in firearms or destructive devices (as defined in § 921 of title 18, United States Code) or in explosive materials (as defined in § 841(c) of that title) . . . ."[51]

This definition expressly lists the exact contraband in which illicit trafficking is forbidden, by reference to specific federal statutory definitions. Therefore, if a person is convicted of trafficking in an item that is not on the list, the conviction does not trigger deportation under this category. This is clearly an element-specific analysis, and the traditional categorical analysis must be applied.

While the contraband is explicitly defined by reference to federal statutes, the term "illicit trafficking" is not. Therefore a generic definition of "illicit trafficking" must be found. Counsel may wish to draw an analogy to drug trafficking cases finding that trafficking relates to *commercial* transactions.[52]
Even though "illicit trafficking" is not defined here, there is no language in this definition to suggest that the court may apply a circumstance-specific analysis to make this determination. The traditional categorical analysis should therefore be applied.

§ A.16 14. Document Fraud

The statute includes within the aggravated felony definition:

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[48] *Id.* at 209.
[49] *Nijhawan* at 2302.
[50] *Id.*
[51] INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).
[52] See *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001) (trafficking requires a commercial element, and does not include gratuitous distribution).

> an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, *or* is described in section 1546(a) of such title (relating to document fraud) *and* (ii) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 12 months, *except* in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act . . . . [53]

This provision can be separated into two offense prongs and an exception:

> (1) A conviction under 18 U.S.C. § 1543, for falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument, for which a sentence of at least 12 months is imposed; *or*
>
> (2) A conviction under 18 U.S.C. § 1546(a), for which a sentence of at least 12 months is imposed;
>
> (3) Except for a first offense in which the noncitizen aided only his or her spouse, child, or parent.

Each of the two prongs contains a reference to a specific federal statute and a sentence limitation. While prong (2) clearly calls for the traditional categorical analysis in determining the elements of conviction, prong (1) is somewhat more complicated, since 18 U.S.C. § 1543 punishes *more* crimes than those listed in the aggravated felony definition.

> Section 1543 punishes:
>
> > Whoever falsely makes, forges, counterfeits, mutilates, or alters any passport or instrument purporting to be a passport, with intent that the same may be used; or
> >
> > Whoever willfully and knowingly uses, or attempts to use, or furnishes to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same.[54]

[53] INA § 101(a)(43)(P), 8 U.S.C. § 1101(a)(43)(P) (emphasis added).
[54] 18 U.S.C. § 1543.

The aggravated felony definition exactly tracks the first paragraph of this criminal statute, but does *not* include any of the language of the second paragraph. Since Congress did not use any expansive language, such as "described in" or "relating to," in the aggravated felony definition, a conviction under 18 U.S.C. § 1543 *must* be on the basis of the first paragraph, not the second, to qualify as an aggravated felony. If the record of conviction is unclear as to which paragraph formed the basis of conviction, the government cannot establish the conviction is an aggravated felony. Nevertheless, there is nothing in the language of the statute that requires a circumstance-specific analysis. Because prong (2) simply restates the first paragraph of 18 U.S.C. § 1543, the task of the Government is to determine whether the noncitizen was convicted under the first paragraph. Therefore, this issue must be analyzed under the traditional categorical analysis.

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[55] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[56] Therefore, decisions allowing resort to the record of conviction to determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

Clearly, the sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th Ed. 2007).

Like alien smuggling,[57] this ground includes a circumstance-specific exception – i.e., that this ground does not apply where the circumstances involved (1) a first offense, where (2) the noncitizen has affirmatively shown that the noncitizen committed the offense for the purpose of assisting, abetting, or aiding only the noncitizen's spouse, child

[55] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).
[56] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).
[57] INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).

or parent (and no other individual) to violate a provision of the INA.[58] This exception was explicitly recognized in *Nijhawan* as a circumstance specific factor that may be proven by evidence beyond the record of conviction.[59]

This aggravated felony ground arguably requires *four* types of analysis. First, the traditional categorical analysis applies to the violation of 18 U.S.C. § 1546(a) and the first paragraph of 8 U.S.C. § 1543. Second, the court can look to the record, but arguably not beyond, to determine the sentence imposed. Third, the circumstance specific analysis applies (arguably with the burden still on the Government) to the question of whether the noncitizen has committed alien smuggling in the past, i.e., whether this is a first offense. Fourth, the statute then shifts the affirmative burden to the noncitizen to make a circumstance-specific showing that the offense involved only the noncitizen's spouse, child or parent.[60]

§ A.17 15. Drug Trafficking

(A) *In General.* The INA defines as an aggravated felony a conviction of:

> (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code) . . .[61]

A drug trafficking conviction can be categorized as an aggravated felony if it meets either of two tests provided in the statute:

(1) The conviction must be for an offense involving "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act)."[62]

The elements of this branch of the drug trafficking aggravated felony category are:

(a) a conviction of an offense;
(b) which is a felony;
(c) of illicit trafficking (i.e., a commercial transaction);

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[58] INA § 101(a)(43)(P), 8 U.S.C. § 1101(a)(43)(P).
[59] *Nijhawan v. Holder*, 557 U.S. __, 129 S.Ct. 2294, 2301 (2009).
[60] INA § 101(a)(43)(P), 8 U.S.C. § 1101(a)(43)(P).
[61] INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C). While the section was created as part of INA § 101(a)(43) by the 1988 ADAA, it was newly designated as subsection "C" under the 1994 INTCA.
[62] Controlled Substances Act § 102 is the large federal schedule listing illegal drugs, including marijuana and hashish.

(d) in a controlled substance "(as defined in section 102 of the Controlled Substances Act)."

The generic definition of "trafficking" is "the unlawful trading or dealing of any controlled substance."[63]

Although *Nijhawan* does not expressly address this aggravated felony category, the U.S. Supreme Court previously examined this category in *Lopez v. Gonzales*,[64] and applied the traditional categorical analysis to this definition:

> an offense that necessarily counts as "illicit trafficking" under the INA is a "drug trafficking crime" under § 924(c), that is, a "felony punishable under the [CSA]," § 924(c)(2). And if we want to know what felonies might qualify, the place to go is to the definitions of crimes punishable as felonies under the Act[.][65]

Therefore, the traditional categorical analysis applies to this portion of the drug trafficking aggravated felony definition.

(2) In the alternative, the conviction is an aggravated felony if it is for a "drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." Section 924(c) of Title 18 in turn lists convictions under: (1) the Controlled Substances Act (21 U.S.C. §§ 801, *et seq*.), (2) the Controlled Substances Import and Export Act (21 U.S.C. §§ 951, *et seq*.), and (3) the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901, *et seq*.).

To qualify under the second prong, a conviction must:

(a) be a felony;
(b) include all elements of a federal drug offense listed in the Controlled Substances Act (21 U.S.C. §§ 801, *et seq*.), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951, *et seq*.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901, *et seq*.); and
(c) involve a controlled substance on the federal list (21 U.S.C. § 802).

Since this definition specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute, must fall within the federal statute, for a state conviction to be considered an aggravated felony under this theory.

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[63] *Matter of Davis*, 20 I. & N. Dec. 536, 541 (BIA 1992).
[64] *Lopez v. Gonzales*, 549 U.S. 47, 127 S.Ct. 625, 630-631 (2006).
[65] *Ibid*.

The traditional categorical analysis should therefore be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

(B) *Second Possession Conviction as Drug Trafficking Aggravated Felony*. The Supreme Court also identified illicit trafficking in a controlled substance under 8 U.S.C. § 1101(a)(43)(B) as a generic offense, which requires a conviction to be analyzed under the traditional categorical approach.[66] Counsel can use this to argue that a second conviction for simple possession of a controlled substance can constitute a drug trafficking aggravated felony only where the state actually pleaded and proved the prior possession conviction during the prosecution for the second possession offense. *Nijhawan* supports the position of the BIA, which has held that, unless circuit law had determined otherwise, an immigration factfinder should stay within the record of conviction of the second or subsequent conviction in determining whether a second or subsequent possession offense constituted recidivist possession of a controlled substance, which would make the offense an aggravated felony under 8 USC § 1101(a)(43)(B).[67]

Under this view, only if a state pleaded and proved the prior in the second prosecution would a state conviction qualify as illicit trafficking. In reviewing whether a second conviction for possession of a controlled substance constituted "illicit trafficking", the Fifth Circuit has said to the contrary that "[u]nder this court's approach for successive state possession convictions, a court or an immigration official characterizes the conduct proscribed in the latest conviction, by referring back to the conduct proscribed by a prior conviction as well."[68] In considering the petitioner's prior conviction, the Fifth Circuit examined evidence that was not part of the record of conviction at issue. Similarly, the Seventh Circuit also considered evidence beyond the statute and record of conviction to determine that a second or subsequent conviction for possession of a controlled substance was an aggravated felony under the illicit trafficking section of aggravated felony definition.[69] While the Supreme Court cited *Fernandez*, it specifically referred to pages 871-72 of that decision, where the Seventh Circuit stated that it was following the *Taylor* categorical approach. In fact, the Supreme Court also cited *Steele v. Blackman*,[70] which reached the opposite conclusion from the Seventh Circuit on the merits of the two-possession issue, indicating that the Court was citing these cases for their general adoption of a categorical approach, and not for how the circuits applied that approach to the issue of when a second or subsequent conviction for possession of a controlled substance is an aggravated felony.[71]

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[66] *Nijhawan* at 2300.
[67] *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (BIA 2007).
[68] *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. May 29, 2009).
[69] *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008); *United States v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008).
[70] *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001).
[71] *Nijhawan* at 2300.

The Supreme Court in *Nijhawan* permitted a factfinder to examine evidence outside of the record of conviction only in "circumstance specific" sections of the aggravated felony definition. The Court classified illicit trafficking aggravated felony definition under INA § 101(a)(43)(B), 8 USC § 1101(a)(43)(B) as a generic offense, and not a "circumstance specific" offense.[72] Therefore, the Fifth and Seventh Circuits' decisions permitting a factfinder to look at a separate conviction document that is not part of the record of conviction at issue is inconsistent with *Nijhawan*.

§ A.18 16. Extortion

The INA includes as an aggravated felony "an offense described in §§ 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom)."[73] The offenses punished under the listed statutes include demands for money or property through kidnapping, extortion,[74] threats of violence to persons or property, threats to a person's reputation, and threats to falsely accuse another of a crime.

Since this definition specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute must fall within the federal statute, for a state conviction to be considered an aggravated felony under this theory. The traditional categorical analysis should therefore be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.19 17. Failure to Appear in Court

The aggravated felony definition includes two offenses relating to failure to appear in court:

(a) failure to appear in court to face charges, see § A.20, *infra*, and

(b) failure to appear for sentence. See § A.21, *infra*.

§ A.20 a. To Face Charges

The statute includes as an aggravated felony "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a

[72] *Nijhawan* at 2300.
[73] INA § 101(a)(43)(H), 8 U.S.C. § 1101(a)(43)(H).
[74] 18 U.S.C. § 1951 defines "extortion" as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under the color of official right."

felony for which a sentence of 2 years' imprisonment or more may be imposed . . . ."[75] This category therefore appears to have the following elements:

(1) a conviction of an offense
(2) relating to a failure to appear
(3) before a court
(4) pursuant to a court order
(5) to answer to or dispose of a charge
(6) of a felony
(7) for which two years imprisonment or more may be imposed.

The language used in this section, however, arguably has two different possible meanings:

(a) it might require a conviction of a failure to appear offense for which a sentence of two years' imprisonment or more may be imposed; or

(b) it might require a conviction of an offense relating to a failure to appear to dispose of an underlying felony charge, *for which underlying felony* a sentence of two years' imprisonment or more may be imposed.

Although the language of the statute appears to mention two layers of offenses, the clause referring to the punishment is similar in structure to INA §§ 101(a)(43)(F), (G), (R) and (S). It is possible to argue that in (Q), Congress expressly referred to the "underlying" offense to address the punishment for that offense and by not using that term in (T), meant for the "2 years' imprisonment" language to refer to the maximum possible punishment for the failure to appear itself, not the underlying offense.

Whether the issue is the maximum possible punishment for the underlying offense or the failure to appear itself, this is clearly a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue (in either case) that the question of the maximum possible punishment should not extend beyond the record of conviction and the criminal statute.[76] See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.21 b. To Serve Sentence

[75] INA § 101(a)(43)(T), 8 U.S.C. § 1101(a)(43)(T).
[76] See *Renteria-Morales v. Mukasey*, 532 F.3d 949 (9th Cir. Jul. 10, 2008) (federal conviction for failure to appear in court, in violation of 18 U.S.C. § 3146 is not categorically an aggravated felony as defined by INA §§ 101(a)(43)(Q) or (T); under the modified categorical approach, court was allowed to look to the record of conviction to determine the maximum punishment allowed for the underlying convictions and to determine whether the failure to appear was pursuant to "service of a sentence" or to "answer to or dispose of a charge of a felony.").

The statute includes as an aggravated felony "an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more . . . ."[77] This category has the following elements:

(1) a conviction of an offense
(2) relating to a failure to appear by a defendant
(3) for service of a sentence
(4) if the underlying offense is punishable by imprisonment of five years or more.

The maximum possible sentence of the underlying conviction is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of the maximum possible sentence should not extend beyond the record of conviction and the criminal statute itself.[78] See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.22 18. Firearms Offenses

Two categories of firearms offenses are listed as aggravated felonies:

(1) illicit trafficking in firearms or destructive devices,[79] and

(2) miscellaneous federal firearms offenses.[80]

These categories are discussed in the next two sections. See also § A.54, *infra*, for a discussion of the separate firearms ground of deportability.[81]

§ A.23 a. Firearms Trafficking

The aggravated felony statute 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) . . . ."[82] This ground therefore has the following elements:

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[77] INA § 101(a)(43)(Q), 8 U.S.C. § 1101(a)(43)(Q).
[78] See *Renteria-Morales v. Mukasey*, 532 F.3d 949 (9th Cir. Jul. 10, 2008) (federal conviction for failure to appear in court, in violation of 18 U.S.C. § 3146 is not categorically an aggravated felony as defined by INA §§ 101(a)(43)(Q) or (T); under the modified categorical approach, court was allowed to look to the record of conviction to determine the maximum punishment allowed for the underlying convictions and to determine whether the failure to appear was pursuant to "service of a sentence" or to "answer to or dispose of a charge of a felony.").
[79] INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).
[80] INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E).
[81] INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).
[82] INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).

(1) a conviction of an offense that is
(2) illicit trafficking
(3) in firearms or destructive devices (as defined in section 921 of title 18, United States Code), or
(4) in explosive materials (as defined in section 841(c) of that title).

Unlike the drug trafficking definition, the firearms trafficking definition is limited to the common-sense definition of "trafficking," and resort is had to federal statutes only to define the "firearms," "destructive devices," or "explosives" that must be the subject of the illicit trafficking. For purposes of determining whether an offense involves illicit trafficking in firearms,[83] "firearms" and "destructive devices" are defined in 18 U.S.C. § 921(a)(3).

Illicit trafficking in explosive materials (as defined in 18 U.S.C. § 841(c)) also constitutes an aggravated felony.[84] "'Explosive materials' means explosives, blasting agents, and detonators."[85] "Explosives" "means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion . . . ."[86] "The Secretary shall publish and revise at least annually in the Federal Register a list of these and any additional explosives which he determines to be within the coverage of this chapter."[87]

Since this definition specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute must fall within the federal statute, for a state conviction to be considered an aggravated felony under this theory. The traditional categorical analysis should therefore be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.24 b. Other Firearms Offenses

In addition to the firearms trafficking aggravated felony discussed above, the aggravated felony definition[88] includes an offense described in the following sections of 18 U.S. Code:

- 844(h) (receiving stolen explosives),

[83] INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).
[84] INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).
[85] 18 U.S.C. § 841(c).
[86] 18 U.S.C. § 841(d).
[87] *Ibid*.
[88] INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E).

- 841(i) (shipping or receiving explosives in interstate or foreign commerce by indictee, felon, fugitive, addict, or mental defective or committee),

- 844(d) (transportation or receipt of explosives in interstate or foreign commerce with intent to injure, intimidate or damage property),

- 844(e) (communication of threat or false information concerning attempt to injure, intimidate, or damage property by fire or explosive),

- 844(f) (malicious damage by fire or explosive to property of United States or organization receiving federal funds),

- 844(g) (illegal possession of explosive in airport),

- 844(h) (use or carrying of explosive in commission of federal felony),

- 844(i) (malicious destruction by fire or explosive of property used in or affecting commerce),

- 922(g)(1)-(5) (shipping or receiving firearms or ammunition by felon, fugitive, addict, mental defective or committee, alien unlawfully in U.S., dishonorable discharge, or person who renounced U.S. citizenship),[89]

- 922(j) (receiving stolen arms or ammunition),

- 922(n) (shipping or receiving arms or ammunition by felony indictee),

- 922(o) (possession of machine gun),

- 922(p) (possession of undetectable firearm),

- 922(r) (assembly of illegal rifle or shotgun from imported parts),

- 924(b) (ship or receive firearm or ammunition with intent therewith to commit a felony), and

[89] *Alvarado v. Gonzales*, 484 F.3d 535, 536 (8th Cir. Apr. 17, 2007) (*per curiam*) (federal conviction of possession of firearms and ammunition by an unlawful user of a controlled substance, under 18 U.S.C. §§ 922(g)(3), 924(a)(2), constituted aggravated felony for purposes of removal and disqualification from cancellation of removal, despite the fact that the parties agreed in the plea agreement that the base offense level under the Sentencing Guidelines is reduced because the defendant possessed the firearm "solely for lawful sporting purposes," distinguishing *Lemus-Rodriguez v. Ashcroft*, 350 F.3d 652, 655 (7th Cir. 2003), as not addressing an aggravated felony firearms offense).

- 924(h) (transfer of firearm with knowledge it will be used to commit a crime of violence or drug trafficking offense).

The definition also includes "an offense described in" Internal Revenue Code § 5861 (26 U.S.C. § 5861) (failure to pay firearms tax, possession of unregistered firearm or one with serial number altered, etc.). That section prohibits the following acts:

a. engage in business as firearms dealer without having paid special tax or registered as required in 26 U.S.C. §§ 5801, 5802,

b. possess a firearm transferred in violation of this chapter (26 U.S.C. §§ 5801-5872),

c. possess a firearm made in violation of this chapter,

d. possess a firearm not registered to the possessor in the National Firearms Registration and Transfer Record,

e. transfer a firearm in violation of this chapter,

f. make a firearm in violation of this chapter,

g. alter identification of a firearm required by this chapter,

h. possess a firearm with altered identification,

i. possess a firearm not identified as required by this chapter,

j. transport or receive any firearm in interstate commerce which has not been registered as required by this chapter,

k. possess a firearm imported into the U.S. in violation of 26 U.S.C. § 5844, or

l. knowingly make a false entry on any record required by this chapter.

A conviction of a listed offense, or of a state offense of which the minimum conduct falls entirely within one of the listed federal offenses, will constitute an aggravated felony under this definition.

Since this aggravated felony category specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute must fall within the federal statute, for a state conviction to be considered an aggravated felony

under this theory. The traditional categorical analysis should therefore be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.25 19. Forgery

The aggravated felony statute includes "an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year."[90] The forgery ground therefore requires the following elements:

(1) a conviction of an offense
(2) relating to
(3) forgery
(4) for which the term of imprisonment is at least one year.

This aggravated felony is not defined by reference to a federal statute, and the BIA has yet to adopt a "generic" definition of the offense. However, the Ninth Circuit, in *Morales-Alegria v. Gonzales*,[91] examined common-law, state definitions and the Model Penal Code to find that the generic definition of forgery, for aggravated felony purposes, must include "both an intent to defraud and knowledge of the fictitious nature of the [forged] instrument."[92]

Whether the conviction involved forgery should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[93] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[94] Therefore, decisions allowing resort to the record of conviction to

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[90] INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R).
[91] *Morales-Alegria v. Gonzales*, 449 F.3d 1051 (9th Cir. Jun. 6, 2006) (California conviction of forgery under California Penal Code § 476 constitutes an "offense relating to ... forgery" under INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R), for purposes of qualifying as an "aggravated felony" to trigger removal, since it requires knowledge of the fictitious nature of the instrument required to meet the *mens rea* requirement for the generic aggravated felony definition of an "offense relating to ... forgery").
[92] *Id.* at 1056. See also *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. Jan. 23, 2008) ("an essential element of the generic offense of forgery is the false making or alteration of a document, such that the document is not what it purports to be."; thus the offense of using a genuine instrument with intent to defraud is not "forgery").
[93] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).
[94] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum

determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

Clearly, the sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.26 20. Fraud

(A) *In General.* The statute includes as an aggravated felony "an offense that — (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 . . ."[95]

This ground therefore requires the following elements:

(1) a conviction for an offense
(2) that involves fraud or deceit
(3) for which the loss to the victim(s) exceeds $10,000.[96]

This aggravated felony is not defined by reference to a federal statute, but the BIA has adopted a "generic" definition of the offense, stating that "fraud" should be defined "in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party. The representation must be believed and acted upon by the party deceived to his disadvantage."[97] BLACK'S LAW DICTIONARY defines "fraud" as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment," and "deceit" as "the act of intentionally giving a false impression."[98]

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constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).

[95] INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

[96] One circuit has held that this loss amount may include costs incurred to investigate the offense. *Tian v. Holder*, 576 F.3d 890 (8th Cir. Aug. 19, 2009) (federal conviction of unauthorized access to a computer, in violation of 18 U.S.C. § 1030(a)(4), qualifies as a fraud or deceit aggravated felony, because the victim's investigative costs to determine whether defendant caused any damage constitute a legitimate loss factor).

[97] *Matter of GG*, 7 I. & N. Dec. 161, 164 (BIA 1956).

[98] BLACK'S LAW DICTIONARY 413, 670 (7th ed. 1999).

Nijhawan specifically held that while the "fraud" portion of this aggravated felony category must be established using the traditional categorical analysis, the "loss to the victim" exceeding $10,000 is a circumstance-specific issue that may be determined by looking beyond the elements of the statute and beyond the record of conviction.[99]

(B) *Immigration Arguments*. In *Matter of Babaisakov,*[100] the BIA authorized immigration judges to employ evidence outside the record of conviction to find the requisite loss necessary to conclude the conviction is a fraud aggravated felony.[101] *Nijhawan* approves of the BIA decision in allowing consideration of facts outside the elements of the conviction. The Supreme Court focused exclusively on sentence-related evidence. It cited *Babaisakov* solely for sentence-related evidence, but did not defer to *Babaisakov.* It discussed the need for fairness, required evidence be tied to the count of conviction, and did not allow the facts underlying the conviction to be relitigated. In these senses, *Nijhawan* supports the argument that only sentence-related evidence is reliable. Counsel can argue that the Court's narrowly-tailored discussion of evidence in *Nijhawan* supersedes the BIA's expansive description of what evidence a factfinder can use to determine the amount of the loss or any other possible circumstance-specific factor.

Nijhawan overrules all Ninth Circuit cases on the $10,000 loss to the victim issue, because they held either that no evidence could be consulted or that only evidence from the record of conviction could be consulted.[102]

(B) *Criminal Defense of Fraud Cases to Avoid Aggravated Felonies*. After *Nijhawan*, criminal defenders can use the following strategies to avoid fraud aggravated felonies:

(1) Plead to a theft offense, instead of a fraud offense, where the sentence imposed can be kept below one year. In *Matter of Garcia*,[103] the BIA held that a Rhode Island conviction for welfare fraud was not a theft offense because the defendant took the victim's property with the owner's consent and theft is a taking without consent. A plea to larceny, therefore, would not be considered a fraud offense.

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[99] *Nijhawan v. Holder*, 557 U.S. __, 129 S.Ct. 2294, 2301 (2009). See also *Kawashima v. Holder*, 593 F.3d 979 (9th Cir. Jan. 27, 2010) (if the requirement is "circumstance specific," the reviewing court must determine whether the BIA used "fundamentally fair procedures" in examining those factors to establish removability; examination of a plea agreement that contains a stipulated loss amount is "fundamentally fair."); *Hamilton v. Holder*, 584 F.3d 1284 (10th Cir. Oct. 27, 2009) (Immigration Judge properly examined sentencing-related material to determine the amount of loss to the victim for aggravated felony fraud purposes).

[100] *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007).

[101] INA § 101(a)(43)(M)(i), 8 USC § 1101(a)(43)(M)(i).

[102] E.g., *Li v. Ashcroft,* 389 F.3d 892 (9th Cir. 2004); *Kawashima v. Mukasey,* 530 F.3d 1111 (9th Cir. 2008).

[103] *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008).

(2) Plead to a count that specifically involves a loss of $10,000 or less. In *Nijhawan*, the Court required that the loss amount be tied to the count of conviction itself, rather than to any dismissed counts. The Court required that there must be a connection between the evidence of loss and the specific conviction, and that dismissed counts must not be the source of the evidence.[104] This implies approval of the Ninth Circuit's approach in *Chang v. INS*, [105] holding that a conviction of a count involving a bad check in the amount of $600 could not be considered as involving a loss over $10,000 even though the loss from the entire scheme was in excess of that amount.

(3) Raise objections to the amount of the loss in criminal court, and present evidence of a lower loss. It may sometimes be possible to enter a plea to a part of the loss, to keep the total at or under $10,000. The court in *Nijhawan,* in concluding that the restitution order and stipulation constituted clear and convincing evidence, noted the absence of any conflicting evidence as to the amount of the loss.[106] One possibility would be for a defendant to enter a plea for a sum certain that is $10,000 or less. Another possibility would be for the criminal court to approve a plea agreement for a sum certain that is $10,000 or less. In both such cases, the existence of such conflicting evidence may mean that the government is unable to establish by clear and convincing evidence that the loss exceeds $10,000 even where there is evidence introduced later under the lower burden of proof at sentencing that the loss exceeded $10,000.

(4) At sentencing, counsel should decline to enter a stipulation as to the amount of the loss, and refer to any conflicting evidence. At a minimum, any stipulation should expressly be limited to criminal sentencing purposes only.

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[104] *Nijhawan* at 2303.
[105] *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002). See also *Tian v. Holder*, 576 F.3d 890 (8th Cir. Aug. 19, 2009) (loss to the victim determination must be tied to the count of conviction, and cannot include loss arising from dismissed counts).
[106] *Nijhawan* at 2303.

§ A.27 21. Illegal Re-Entry After Deportation

The INA includes as an aggravated felony "an offense described in [INA] §§ 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph . . . ."[107] The statutes referred to are codified in 8 U.S.C. §§ 1325(a) and 1326.

This ground therefore has the following elements:

(1) a conviction of an offense
(2) described in 8 U.S.C. §§ 1325(a) (illegal entry) or 1326 (illegal re-entry after deportation)
(3) committed by an alien who was previously deported
(4) on the basis of a conviction for an offense that is an aggravated felony other than one that is described in 8 U.S.C. §§ 1325(a) or 1326.

This ground presents several levels of analysis.

(A) *8 U.S.C. § 1325(a):* The categorical analysis should apply to the determination of whether the noncitizen was convicted under this statute. Whether the noncitizen was previously deported will require a circumstance-specific analysis, because a prior deportation is not an element under that statute. Likewise, whether the original order of removal was "based upon" an aggravated felony conviction would appear to be a circumstance specific question requiring examination of the record of the deportation proceeding, which is not an element of the offense of conviction, and is not included in the record of conviction. This is a question of the basis for the removal, rather than the nature of the underlying conviction. Finally, because the prior removal may or may not have been based upon a finding by the immigration judge that the offense of conviction was an aggravated felony, it would be necessary to complete that analysis. The answer to this question, and the analysis to be applied, will depend upon the aggravated felony category that the underlying conviction allegedly falls within.

(B) *8 U.S.C. § 1326:* The categorical analysis should apply to the determination of whether the noncitizen was convicted under INA § 276, 8 U.S.C. § 1326. This is also true of the question of prior deportation, since that is an element of INA § 276, 8 U.S.C. §1326.

Whether the prior conviction was an aggravated felony is not a question required by the elements of INA § 276, 8 U.S.C. § 276. Instead, it is a question relevant to the sentence imposed.[108] However, as this sentence enhancement increases the statutory

[107] INA § 101(a)(43)(O), 8 U.S.C. § 1101(a)(43)(O).
[108] INA § 276(b)(2), 8 U.S.C. § 1326.

maximum possible punishment, it is required to be proven in *criminal* court beyond a reasonable doubt.[109] Arguably, this means that this question should also be subject to the categorical analysis.[110] Whether the deportation was "based on" that conviction is a separate question, and not an element of the offense or a sentence enhancement, that may be determined by looking at the specific circumstances. Arguably, in this context the fact-based analysis should be limited to documents showing the basis of the removal order.

§ A.28 22. Kidnapping

The statute includes as an aggravated felony "an offense described in §§ 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom)."[111]

The offenses punished under the listed statutes include demands for money or property through kidnapping, extortion,[112] threats of violence to persons or property, threats to a person's reputation, and threats to falsely accuse another of a crime.

Since this aggravated felony category specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute must fall within the federal statute, for a state conviction to be considered an aggravated felony under this theory.[113] The traditional categorical analysis should therefore be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

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[109] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (Jan. 12, 2005) ("[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

[110] In this context, it may also be necessary to prove otherwise "circumstance specific" questions, such as the "loss to the victim" though a categorical analysis. See *Nijhawan* at 2302 (suggesting that the government must prove the fraud aggravated felony loss amount in an illegal reentry trial before the jury beyond a reasonable doubt to eliminate constitutional concerns).

[111] INA § 101(a)(43)(H), 8 U.S.C. § 1101(a)(43)(H).

[112] 18 U.S.C. § 1951 defines "extortion" as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under the color of official right."

[113] Even in the illegal re-entry sentencing context, where kidnapping is only generally mentioned, the courts have defined kidnapping narrowly. *United States v. Ventura*, 565 F.3d 870 (D.C. Cir. May 15, 2009) (generic definition of "kidnapping," under the Guidelines, requires "(1) an act of restraining, removing, or confining another; and (2) an unlawful means of accomplishing that act [i.e., by force] . . . . The most common approach defines kidnapping to include [in addition] a particular nefarious purpose. And the majority approach requires some kind of heightened intent beyond the mere intent to restrain the victim's liberty. Most critically, a substantial majority of jurisdictions -- forty-four out of fifty-two -- require some additional element of intent or severity.").

§ A.29 23. Money Laundering

The aggravated felony definition includes "an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or § 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000 . . . ."[114] The elements of this category are:

> (1) a conviction of an offense;
>
> (2) described in 18 U.S.C. § 1956 (relating to laundering of monetary instruments) or § 1957 (relating to engaging in monetary transactions in property derived from specific unlawful activity);
>
> (3) if the amount of the funds [laundered] exceeded $10,000.

A conviction of an unlisted federal statute should not constitute an aggravated felony under this category, and conviction of a violation of state law should not constitute an aggravated felony under this category, unless the state conviction as assessed by the record of conviction must fall within the essential substantive elements of one of the two listed federal offenses. However, a court could read the "related to" language broadly to include offenses outside the scope of the listed federal statutes, even though this language is included within a parenthetical similar to those other courts have described as descriptive, not limiting. See N. Tooby & J. Rollin, AGGRAVATED FELONIES § 5.4 (2005).

The conviction itself defines a generic offense, that must be established using the categorical analysis. The "loss to the victim" language, however, parallels the loss requirement of the fraud aggravated felony definition, and it appears likely the courts will follow *Nijhawan* in holding that the amount of funds requirement here is likewise an extra-element fact that can be proven by evidence outside the record of conviction.

> On the other hand, at least one of the referenced federal criminal statutes did in 1996 require findings that the amount of the funds exceeded $10,000. See 18 U.S.C. § 1957; see also 18 U.S.C. § 1956(b)(1) (providing for civil penalty greater than $10,000 if value involved in the transaction exceeded $10,000). State money laundering statutes in 1996 varied on whether they identified $10,000 as an element. Compare N.Y. Penal Law § 470.05 (West 1995) ($10,000 threshold); Ill. Stat. Ch. 38 ¶ 29B/1 (West 1996) ($10,000 threshold), with Cal. §§ 186.10(a) (West 1996) (amount other than $10,000 specified); Tex. Penal Code § 34.02 (West 1996) (same).

[114] INA § 101(a)(43)(D), 8 U.S.C. § 1101(a)(43)(D).

Kesselbrenner & Vargas, Aggravated Felony Analytical Approach Post-*Nijhawan*, p. 9 (June 24, 2009), reprinted with permission as Appendix B(2) in this volume.

§ A.30 24. Murder

The aggravated felony definition includes "murder . . . ."[115] This aggravated felony is not defined by reference to a federal statute, and the BIA has yet to adopt a "generic" definition of the offense. This category clearly includes first- and second-degree murder,[116] but should not include manslaughter or other lesser forms of homicide, since they do not meet the common-sense definition of the term "murder."

Whether the conviction was for murder should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

§ A.31 25. National Security Offenses

The INA includes as an aggravated felony a conviction under the following sections of Title 18: "793 (relating to the disclosure of classified information), 2153 (relating to sabotage), or 2381 or 2382 (relating to treason)."[117]

Since this aggravated felony category specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute must fall within the federal statute, for a state conviction to be considered an aggravated felony under this theory. Of course, in this context, there are not likely to be state equivalents to these statutes.

The traditional categorical analysis should be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.32 26. Obstruction of Justice

The INA includes as an aggravated felony a conviction for an offense "relating to . . . obstruction of justice . . . for which the term of imprisonment is at least one year."[118]

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[115] INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

[116] *United States v. Morgan*, 380 F.3d 698 (2d Cir. Aug. 19, 2004) (New York conviction for second degree attempted murder, with sentence to indeterminate term of two-and-a-half to seven-and-a-half years' imprisonment, properly treated as an "aggravated felony" for illegal re-entry sentencing purposes, even though it was not an aggravated felony under the relevant immigration statute at the time of the conviction).

[117] INA § 101(a)(43)(L)(i), 8 U.S.C. § 1101(a)(43)(L)(i).

This aggravated felony is not defined by reference to a federal statute, but the BIA has adopted a "generic" definition of the offense. In *Matter of Espinoza-Gonzalez*,[119] the BIA found that "obstruction of justice" should be defined as that set of offenses punishable under Chapter 73 of title 18, United States Code ("Obstruction of Justice").[120] These offenses include assault on a process server, influencing or injuring an officer or juror, obstruction of proceedings before agencies, theft or alteration of record or process, false bail, picketing or parading, recording jury deliberations, obstruction of court orders, audits, criminal investigations, and law enforcement, and tampering with or retaliating against a witness, victim, or informant.[121]

The BIA has stated, however, that at a minimum the offense must involve "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice."[122] Therefore, an offense should not be considered obstruction of justice unless there is an intent to interfere with a judicial *process*.[123]

Whether the conviction was for obstruction of justice should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[124] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[125] Therefore, decisions allowing resort to the record of conviction to

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[118] INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S).
[119] *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999) (*en banc*).
[120] 18 U.S.C. §§ 1501-1518 (1994 & Supp. II 1996).
[121] See *Renteria-Morales v. Mukasey*, 551 F.3d 1076 (9th Cir. Dec. 12, 2008), withdrawing previous opinion, 532 F.3d 949 (9th Cir. July 10, 2008) (aggravated felony obstruction of justice involves: (a) active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice; and (b) the specific intent to interfere with the process of justice; no meaning distinction exists between failing to appear for court proceedings and hindering a third party from appearing; "Although misprision of felony or fleeing arrest may obstruct justice in a general sense, neither act interferes with judicial process and thus both offenses are different in kind than generic obstruction-of-justice offenses."), following *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 893 (BIA 1999); *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. Oct. 18, 2004) (federal conviction of contempt of court, under 18 U.S.C. § 401(3), was one "relating to obstruction of justice," and thus an "aggravated felony" for immigration purposes).
[122] *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. at 894 (BIA 1999).
[123] See, e.g., *Matter of Joseph*, 22 I. & N. Dec. 799, 808 (BIA May 28, 1999) ("[I]t is substantially unlikely that the offense of simply obstructing or hindering one's own arrest will be viewed as an obstruction of justice aggravated felony under INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S) of the Act for removal purposes.").
[124] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).
[125] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466

determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

The sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.33 27. Perjury

The aggravated felony definition includes "an offense relating to . . . perjury . . . for which the term of imprisonment is at least one year . . . ." [126]

This aggravated felony is not defined by reference to a federal statute, but the BIA has adopted a "generic" definition of the offense. In *Matter of Martinez-Recinos*,[127] the BIA adopted the federal definition of perjury at 18 U.S.C. § 1621 for purposes of the perjury aggravated felony category. That section punishes whoever:

> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true . . . .

Whether the conviction was for perjury should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

(2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).

[126] INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S).

[127] *Matter of Martinez-Recinos*, 23 I. & N. Dec. 175 (BIA Oct. 15, 2001).

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[128] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[129] Therefore, decisions allowing resort to the record of conviction to determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

The sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.34 28. Prostitution

The INA defines as an aggravated felony, "an offense that relates to the owning, controlling, managing or supervising of a prostitution business."[130] The INA *also* defines as an aggravated felony offenses described in 18 U.S.C. §§ 2421, 2422, 2433 (relating to transportation for the purpose of prostitution), *if committed for commercial advantage*[131] and 18 U.S.C. §§ 1581-1585, 1588 (relating to peonage, slavery, and involuntary servitude).[132]

(A) *Prostitution Business*. The "prostitution business" ground does not refer to a specific federal statute. Because the ground lists four specific offenses relating to a prostitution business, a different, unlisted offense relating to a prostitution business would arguably not be included in this ground. A receptionist for a prostitution business, for example, should not be an aggravated felon under this ground. However, the courts may choose to apply the "relating to" language broadly.[133] An offense relating to a

[128] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).
[129] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).
[130] INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i).
[131] INA § 101(a)(43)(K)(ii), 8 U.S.C. § 1101(a)(43)(K)(ii) (emphasis added).
[132] INA § 101(a)(43)(K)(iii), 8 U.S.C. § 1101(a)(43)(K)(iii).
[133] See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 6.36 (4th ed. 2007).

different type of business, such as a massage or escort business, is also arguably not included.

Whether the conviction falls under this "prostitution business" ground should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

(B) *Transportation*. The parenthetical language used in this section "(relating to transportation for the purposes of prostitution)" is arguably restrictive of the types of offenses within the listed sections that will trigger deportation as an aggravated felony.[134] The listed offenses mostly concern acts related to sexual abuse, not prostitution. It is an open question whether this type of parenthetical language, if restrictive, would entail a circumstance-specific examination beyond the record of conviction, much like the exceptions under the alien smuggling and document fraud aggravated felony categories.[135]

(C) *Commercial Advantage*. The court in *Nijhawan* identified the aggravated felony ground of certain prostitution convictions committed "for commercial advantage" as a specific circumstance that may be proven in the removal hearing by evidence outside the record of conviction.

> The [aggravated felony] statute has other provisions that contain qualifying language that certainly seems to call for circumstance specific application. Subparagraph (K)(ii), for example, lists "offense[s] . . . described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) *if committed for commercial advantage*" (emphasis added). Of the three specifically listed criminal statutory sections only one subsection (namely, §2423(d)) says anything about *commercial advantage.* Thus, unless the "commercial advantage" language calls for circumstance-specific application, the statute's explicit references to §§2421 and 2422 would be pointless. But see *Gertsenshteyn* v. *United States Dept. of Justice*, 544 F. 3d 137, 144–145 (CA2 2008).[136]

The phrase "if committed for commercial advantage" had previously been found by the BIA to be an "extra element" that need not have been included as an element of the criminal offense in order for a conviction to trigger deportability as an aggravated felony.[137] The subsequent decision from the Second Circuit,[138] overturning this BIA decision, should not survive *Nijhawan*.

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[134] See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 6.37 (4th ed. 2007).
[135] INA §§ 101(a)(43)(N), (P), 8 U.S.C. §§ 1101(a)(43)(N), (P).
[136] *Nijhawan* at 2301.
[137] *Matter of Gertsenshteyn*, 24 I. & N. Dec. 111 (BIA 2007).
[138] *Gertsenshteyn v. United States Dept. of Justice*, 544 F.3d 137 (2d Cir. 2008).

(D) *Involuntary Servitude*. Despite the "relating to" language, Congress was specific in listing certain sections of Chapter 77 or Title 18 (peonage, slavery, and trafficking in persons), but not others. Arguably, a conviction under one of the unlisted sections of that chapter should therefore not be found "related to" the listed ones.[139] It is an open question whether this type of parenthetical language, if restrictive, would entail a circumstance-specific examination beyond the record of conviction, much like the exceptions under the alien smuggling and document fraud aggravated felony categories.[140]

§ A.35 29. Rape

The aggravated felony definition includes "rape."[141] This aggravated felony is not defined by reference to a federal statute, and the BIA has not yet adopted a "generic" definition of the offense. However, a conviction of committing nonconsensual sexual intercourse by force or serious threat will likely be held to be an aggravated felony.

Rape involves sexual intercourse and is not simply a sexual assault on an adult. Both the common law[142] and Model Penal Code[143] definitions of rape require sexual intercourse between a man and a woman effected through use of force (or, in the Model Penal Code, through force, serious threat, intoxicant, or with a young child).

Whether a conviction will fall under this ground should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

§ A.36 30. Receipt of Stolen Property

The aggravated felony definition includes a "theft offense (including receipt of stolen property) . . . for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least one year . . . ."[144] To trigger removal under this category, the requirements of the generic definition of "theft" must be met.

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[139] See, e.g., 18 U.S.C. § 1589, punishing forced labor by force, threat of force, or abuse of law.
[140] INA §§ 101(a)(43)(N), (P), 8 U.S.C. §§ 1101(a)(43)(N), (P).
[141] INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).
[142] CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, at I, *Sexual Intercourse*, § 276 (2004), in general. "At common law, rape was the unlawful carnal knowledge of a woman by force and against her will." *Id.*, § 277, *Carnal Knowledge*. Rape requires the element of "carnal knowledge." Although some states still use the common-law expression, a growing number are coming to use the term "sexual intercourse."
[143] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, *Crimes Against the Person*, § 213.1, Rape and Related Offenses: "(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct (through drugs or intoxicants); or (c) the female is unconscious; or (d) the female is less than 10 years old."
[144] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

Whether a conviction will falls under this ground should be answered by application of the traditional categorical analysis. There is nothing in the text of the definition to suggest otherwise.

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[145] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of conviction.[146] Therefore, decisions allowing resort to the record of conviction to determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

The sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.37 31. Revealing Undercover Agent's Identity

An aggravated felony includes a conviction under 50 U.S.C. § 421 (relating to protecting the identity of undercover agents or undercover intelligence agents).[147] The disclosure of sensitive information aggravated felony category includes in the definition:

> (L) an offense described in--
> . . .
> (ii) section 421 of Title 50 (relating to protecting the identity of *undercover intelligence agents*); or
> (iii) section 421 of Title 50 (relating to protecting the identity of *undercover agents*);[148]

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[145] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).
[146] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).
[147] INA §§ 101(a)(43)(L)(ii), (iii), 8 U.S.C. §§ 1101(a)(43)(L)(ii), (iii).
[148] INA §§ 101(a)(43)(L)(ii), (iii), 8 U.S.C. §§ 1101(a)(43)(L)(ii), (iii) (emphasis supplied).

Congress obviously meant every word in these parentheticals to have significance, since it twice referred to the same statute, with two parentheticals listing different types of agents. It is impossible for Congress to have meant the parenthetical just to be a label for the statute, or it would not have needed to include two separate subdivisions each referring to a different portion of the same statute.

It is an open question whether this type of parenthetical language, which clearly appears to be restrictive, would entail a circumstance-specific examination beyond the record of conviction, much like the exceptions under the alien smuggling and document fraud aggravated felony categories.[149]

Since this aggravated felony category specifically refers to several federal statutes, a state conviction must have identical elements to one of these federal statutes, or all the conduct encompassed by the minimum conduct required to violate the state statute must fall within the federal statute, for a state conviction to be considered an aggravated felony under this theory. Of course, in this context, there are not likely to be state equivalents to these statutes.

The traditional categorical analysis should be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

§ A.38 32. RICO Offenses

A conviction of "an offense described in § 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed" is an aggravated felony. The elements of this category are as follows:

(1) a conviction of an offense
(2) described in
    (a) 18 U.S.C. § 1962 (relating to racketeer influenced corrupt organizations), or
    (b) 18 U.S.C. § 1084 (if it is a second or subsequent offense) or
    (c) 18 U.S.C. § 1955 (relating to gambling offenses),
(3) for which a sentence of one year imprisonment or more may be imposed.

A first conviction of violating 18 U.S.C. § 1084 cannot trigger this ground of deportation. Like the "drug trafficking" aggravated felony category, as applied to simple possession, counsel can argue that any prior conviction under 18 U.S.C. § 1084 must be established at the criminal hearing for the second offense. See § A.17, *supra*. However,

[149] INA §§ 101(a)(43)(N), (P), 8 U.S.C. §§ 1101(a)(43)(N), (P).

it does not appear that the maximum possible punishment for a violation of 18 U.S.C. § 1084 increases upon a second conviction. Therefore, it may be that this will be determined to be a circumstance-specific question.

It is an open question whether this parenthetical language, if restrictive, would entail a circumstance-specific examination beyond the record of conviction, much like the exceptions under the alien smuggling and document fraud aggravated felony categories.[150]

This category requires a *potential* sentence of one year before the offense is considered an aggravated felony. The maximum possible sentence is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of maximum possible sentence should not extend beyond the record of conviction and the criminal statute itself.

§ A.39 33. Sexual Abuse of a Minor

The aggravated felony definition includes "sexual abuse of a minor."[151] There is no requirement that a one-year sentence be imposed in order for sexual abuse of a minor to be an aggravated felony. This aggravated felony category therefore has the following elements:

(1) a conviction of an offense that is
(2) sexual
(3) abuse
(4) of a minor.

The Ninth Circuit, applying the categorical analysis, now has two separate definitions for "sexual abuse of a minor."[152] Where the offense involves what is known as "statutory rape," the relevant test is whether the statute of conviction falls within 18 U.S.C. § 2243 ("Whoever ... knowingly engages in a sexual act with another person who-(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both."). The mens rea of "knowingly" in

[150] INA §§ 101(a)(43)(N), (P), 8 U.S.C. §§ 1101(a)(43)(N), (P). See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS §§ 19.24, 19.54 (2007).
[151] INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).
[152] *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. Dec. 14, 2009) (California conviction of "unlawful sexual intercourse with a minor" under Penal Code § 261.5(d) is not categorically sexual abuse of a minor as defined in INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), for immigration purposes: "Because section 261.5(d) does not include the relevant scienter requirement of § 2243, and criminalizes sexual conduct that is not necessarily abusive, we conclude that section 261.5(d) does not qualify as the generic federal crime of "sexual abuse of a minor," and therefore is not categorically an aggravated felony under § 1101(a)(43)(A).").

§ 2243(a) requires only that the act was "knowingly" committed, not that the defendant knew the age of the victim or the age difference.

> In non-statutory rape case, the definition of "sexual abuse of a minor" means:
>
> (1) the conduct prohibited by the criminal statute is sexual, (2) the statute protects a minor, and (3) the statute requires abuse." *Id*. at 513 (internal quotation omitted). A criminal statute includes the element of "abuse" if it expressly prohibits conduct that causes "physical or psychological harm in light of the age of the victim in question." *Id*. at 513. Sexual conduct involving younger children is per se abusive. *Id*.[153]

The court looked to both definitions, and found that California Penal Code § 261.5(d) did not meet either of them. The California offense did not meet the first definition since it could be committed without "knowledge" (i.e., through intoxication of the defendant), and did not meet the second definition since the state statute does not require "abuse," as an element, and sex with a minor one day short of 16 is not *per se* abusive.

The Supreme Court identified sexual abuse of a minor defined under 8 U.S.C. § 1101(a)(43)(A) as a generic offense, for which the conviction to contain the elements of the ground of deportability.[154] Counsel can argue against government introduction of evidence to establish the age of a victim when this fact was not required to be established by the elements of the statute of conviction.[155] The Seventh Circuit had previously reached a contrary holding that the age of the victim need not be an element of the offense for the conviction to constitute a sexual abuse of a minor aggravated felony.[156]

§ A.40 34. Statutory Rape

This is not technically an aggravated felony category. However, this offense can be considered an aggravated felony as a crime of violence,[157] as rape,[158] or as sexual abuse of a minor.[159] Refer to those aggravated felony categories to determine the appropriate analysis.

§ A.41 35. Tax Evasion

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[153] *Pelayo-Garcia v. Holder*, 589 F.3d at 1014, citing *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009).
[154] *Nijhawan* at 2300.
[155] *See, e.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*) (cited with approval by the Supreme Court in *Nijhawan*).
[156] *Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7th Cir. 2001); *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005).) These latter decisions are no longer good law in light of *Nijhawan*.
[157] See § A.13, *supra*.
[158] See § A.29, *supra*.
[159] See § A.33, *supra*.

The aggravated felony definition includes "an offense that . . . is described in § 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000 . . . ."[160] This category therefore has the following elements:

(1) a conviction of an offense
(2) described in Internal Revenue Code § 7201 (relating to tax evasion)
(3) in which the revenue loss to the Government exceeds $10,000.

If the conviction is not under the specified statute, it cannot trigger deportation under this category.[161] If the record of an analogous state conviction does not establish the defendant was convicted of elements that unquestionably fit within the substantive elements of the listed federal statute, the conviction does not trigger deportation under this category. Note, however, that other tax evasion convictions may qualify as aggravated felony fraud offenses under INA § 101(a)(43)(M)(i).[162]

The court in *Nijhawan* expressed no doubt that the loss requirement of the tax evasion aggravated felony definition constituted a specific circumstance that can be proven outside the record of conviction.

> Subparagraph (M)(ii) provides yet another example. It refers to an offense "described in section 7201 of title 26 (relating to tax evasion) *in which the revenue loss to the Government exceeds $10,000*" (emphasis added). There is no offense "described in section 7201 of title 26" that has a specific loss amount as an element. Again, unless the "revenue loss" language calls for

[160] INA § 101(a)(43)(M)(ii), 8 U.S.C. § 1101(a)(43)(M)(ii).

[161] *Lee v. United States*, 368 F.3d 218 (3d Cir. May 19, 2004) (federal conviction of filing false income tax returns, in violation of 26 U.S.C. § 7206(1), is not an aggravated felony, as defined by INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M), for immigration purposes, as INA § 101(a)(43)(M)(ii), 8 U.S.C. § 1101(a)(43)(M)(ii) specifically covers tax evasion, and INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) does not, since to hold otherwise would render INA § 101(a)(43)(M)(ii), 8 U.S.C. § 1101(a)(43)(M)(ii) mere surplusage); *Abreu-Reyes v. INS*, 292 F.3d 1029 (9th Cir. 2002), *earlier mandate withdrawn, petition for rehearing granted, prior opinion withdrawn, petition for review granted*, 350 F.3d 966 (9th Cir. Nov. 21, 2003) (the entire opinion was vacated, including the finding that a conviction under 26 U.S.C. § 7206(1) is an aggravated felony under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)).

[162] *Kawashima v. Holder*, 593 F.3d 979 (9th Cir. Jan. 27, 2010) (federal conviction for aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2), constituted an aggravated felony fraud offense under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), rejecting argument that tax offenses other than those described in 26 U.S.C. § 7201 cannot qualify as aggravated felonies under subsection (M)(i) because subsection (M)(ii)'s specific reference to § 7201 indicates Congress's intent to exclude all federal tax offenses from the definition of aggravated felonies under the more general subsection (M)(i)), withdrawing and superceding 530 F.3d 1111 (9th Cir. July 1, 2008); accord, *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. April 22, 2008); but see *Ki Se Lee v. Ashcroft,* 368 F.3d 218 (3d Cir.2004) (the presence of subsection (M)(ii) reflected Congress's intent to specify tax evasion as the only removable tax offense, and thereby exclude tax offenses from the scope of subsection (M)(i)).

circumstance-specific application, the tax-evasion provision would be pointless.[163]

This certainty was one reason the court concluded that the loss requirement for the fraud aggravated felony definition also admitted of proof as an extra-element fact at a removal hearing.[164]

§ A.42 36. Theft

An aggravated felony includes "a theft offense . . . for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least one year."[165] The elements of this category are therefore as follows:

(1) a conviction of an offense that is
(2) a theft offense[166]
(3) with a sentence imposed of at least one year imprisonment.

The BIA and various circuits have adopted more or less consistent definitions of the term "theft offense," although there are some differences.[167] The courts have noted that "Congress used the words 'theft offense' rather than just 'theft,' thus indicating that the phrase ought to be read to incorporate different but closely related constructions in modern state statutes."[168]

The traditional categorical analysis should be applied to this aggravated felony definition. There is nothing in the language of the statute to suggest otherwise.

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[169] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of

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[163] *Nijhawan* at 2301, discussing INA § 101(a)(43)(M)(ii), 8 U.S.C. § 1101(a)(43)(M)(ii).
[164] *Ibid.*
[165] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).
[166] See *Almeida v. Holder*, 588 F.3d 778 (2d Cir. Dec. 8, 2009) (Connecticut conviction for larceny, in violation of Conn. Gen. Stat. §§ 53a-48 and 53a-123, was a "theft offense" for aggravated felony purposes; although the statute of conviction may be committed with intent to "deprive" or "appropriate," the court found that both terms meet the generic definition of theft: "criminal intent to deprive the owner [of property] of the rights and benefits of ownership, even if such deprivation is less than total or permanent."), citing *Matter of VZS,* 22 I. & N. Dec. 1338, 1346 (BIA 2000).
[167] See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 19.94 (4th ed. 2007).
[168] *United States v. Vidal*, 426 F.3d 1011, 1014 (9th Cir. Oct. 24, 2005), *quoting Hernandez-Mancilla v. INS*, 246 F.3d 1002 (7th Cir. 2001). See also *Matter of VZS*, 22 I. & N. Dec. 1338, 1345-1346 (BIA 2000).
[169] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).

conviction.[170] Therefore, decisions allowing resort to the record of conviction to determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

The sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.43 37. Vehicles with ID Numbers Removed -- Trafficking

The aggravated felony statute includes "an offense relating to commercial bribery, counterfeiting, forgery, or *trafficking in vehicles the identification numbers of which have been altered* for which the term of imprisonment is at least one year."[171] The elements of the trafficking in vehicles ground are:

(1) a conviction of an offense
(2) relating to
(3) trafficking in
(4) vehicles the identification numbers of which have been altered
(5) for which the term of imprisonment is at least one year.

There are three federal statutes under which similar conduct is punished.[172] Counsel can argue that any state convictions should fall within one of these three statutes.

Nijhawan did not specifically address the question of whether the one year sentence imposed requirement is a "circumstance-specific" question. In *Singh v. Ashcroft*,[173] the Third Circuit suggested that the sentencing language "obviously invites an inquiry into the sentence actually imposed on the alien, rather than a categorical inquiry into the statutory punishment for the offense." The question of sentence, however, is arguably distinct from the question of the nature or elements of the offense of

[170] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).
[171] INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R) (emphasis supplied).
[172] 18 U.S.C. §§ 511, 553(a)(2), 2321.
[173] *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. Sept. 17, 2004).

conviction.[174] Therefore, decisions allowing resort to the record of conviction to determine the sentence imposed do not undermine the rule that the categorical analysis must be used to determine the nature of the offense.

The sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

§ A.44 B. Border Crossing

A noncitizen is deportable if convicted of a violation of INA § 215, 8 U.S.C. § 1185, making it illegal for any noncitizen or citizen to commit various acts related to entry to or departure from the United States in violation of law. INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1237(a)(2)(D)(iv).

The subsection of INA § 215 that prescribed sanctions for violations of this statute was repealed in 1978. Act of Oct. 7, 1978, § 707, Pub. L. No. 95-426, 92 Stat. 992. It is unclear how anyone could be convicted of violating this section in the absence of any provision for criminal penalties, unless there is some catch-all statute that prescribes penalties for violation of this statute.

§ A.45 C. Crime of Moral Turpitude – One Conviction

This deportation ground requires the following five elements:

(a) a conviction of
(b) a criminal offense,
(c) involving moral turpitude,
(d) committed within five years of the noncitizen's last admission into the United States, or 10 years if the noncitizen was admitted with an "S" visa,[175]
(e) for which the maximum possible sentence was one year or more in custody.[176]

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[174] But see *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) (clarifying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) rule that any factual sentence enhancement that increases potential punishment over statutory maximum constitutes an element of the offense and must be found true by the jury; relevant "statutory maximum" is not maximum sentence judge may impose after finding additional facts, but maximum judge may impose without any additional findings).

[175] If the noncitizen was admitted into the United States by virtue of an "S" visa, granted for cooperation with law enforcement or prosecuting authorities in the investigation or prosecution of crime, under INA § 245(j), 8 U.S.C. § 1255(j), then the person is deportable if the offense was committed within 10 years of admission, instead of within five years. INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

This final requirement applies in all removal proceedings initiated on or after April 24, 1996.

(A) *Moral Turpitude*. Whether the offense involves moral turpitude may or may not implicate the application of the strict categorical analysis. Tradition-ally, this question was subject to the categorical analysis, but a decision by outgoing Attorney General Mukasey has turned the traditional analysis on its head.[177] It is unclear whether this decision will stand or be followed by the circuit courts.

In *Matter of Silva-Trevino*,[178] the Attorney General held, among other things, that evidence outside the record of conviction can be used to establish that an offense is a crime involving moral turpitude. This decision violates the missing elements rule by allowing evidence to be presented concerning facts that not required under the criminal statute to establish guilt of the offense of conviction. *Silva-Trevino* also applies the "realistic probability" test from *Duenas*, rather than the minimum conduct analysis, to the initial categorical-analysis step.[179] The Supreme Court did not mention *Silva-Trevino*, or the crime of moral turpitude grounds of removal, in *Nijhawan*.

Silva-Trevino is inconsistent with *Nijhawan* in several respects.[180]

(1) *Consideration of Evidence of Facts Beyond Record of Conviction*. *Silva-Trevino* holds that an immigration judge, in considering whether a conviction constitutes a crime of moral turpitude, may consider evidence at the removal hearing that is beyond the record of conviction and that is not permitted under the categorical analysis.[181] *Nijhawan*, on the other hand, approved the strict categorical analysis except where the language of the statute indicates Congress intended to allow consideration of a specific circumstance as well as a generic definition.

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[176] This is the current definition of this ground. For deportation proceedings initiated prior to April 1, 1997, the person is not deportable unless s/he was actually sentenced to serve one year or more in custody as a result of the conviction.

[177] *Matter of Silva-Trevino*, 24 I. & N. Dec. 647 (A.G. Nov. 9, 2008).

[178] In *Matter of Silva-Trevino***,** 24 I. & N. Dec. 687 (AG 2008).

[179] *Matter of Louissai*nt, 24 I. & N. Dec. 754 (BIA Mar. 18, 2009) (categorical approach for determining if a particular crime involves moral turpitude set forth in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), requires the traditional categorical analysis, which was used by the United States Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), and also includes an inquiry into whether there is a "realistic probability" that the statute under which the noncitizen was convicted would be applied to reach conduct that does not involve moral turpitude).

[180] This discussion is based in large part on Kathy Brady's excellent analysis of this issue. K. Brady, Preliminary Advisory on *Nijhawan v. Holder* (Immigrant Legal Resource Center, 2009), pp. 16-20, reprinted as Appendix B(3), *infra*. http://www.ilrc.org/immigration_law/pdf/Practice%20Advisory%20Nijhawan%20ILRC.pdf

[181] *Silva-Trevino*, 24 I. & N. Dec. at 708-709.

Using *Nijhawan* terminology, *Silva-Trevino* essentially held that "crime involving moral turpitude" is not a generic definition of a category of deportable offenses. Rather, Congress intended to treat it as a specific factual circumstance that may be proven by evidence at the removal hearing, and need not be found within the elements of the offense of conviction. This conclusion is impossible under the *Nijhawan* analysis.

Moral turpitude cannot be a specific fact as part of a removal ground that is described under (2) above, because if it is, then there is no generic definition of an offense of conviction at all. This would render the conviction requirement of the moral turpitude grounds of removal meaningless; it would convert them entirely into conduct-based grounds of removal. The Supreme Court in *Nijhawan* made clear that it would follow the normal rule of statutory interpretation and refuse to interpret the immigration statutes in such a way as to render part of their language meaningless.[182]

As Brady pointed out, "the familiar immigration law principles governing the 'reviewable record of conviction' and 'divisible statutes,' which now are considered part of the categorical approach, evolved in the context of adjudicating moral turpitude cases."[183]

The phrase "crime involving moral turpitude" is exactly the type of phrase Congress universally used to define a generic offense for removal purposes. This phrase does not employ any additional language that Congress may have used to indicate a specific fact necessary to bring a generic offense within a removal ground, such as a fraud offense "in which" the loss to the victim was over $10,000, or the similar definitions of tax evasion aggravated felonies or money laundering aggravated felonies with specific dollar amounts.

Silva-Trevino is inconsistent with *Nijhawan* with respect to the implications of the word "involving" in the moral turpitude removal grounds. In *Silva-Trevino,* the former Attorney General stated, without explanation, that the term "involving" "seems to call for, or at least allow, inquiry into the particularized facts of the crime."[184]

Nijhawan, however, disagreed. Use of the word "involving" does not indicate any intent of Congress to allow proof of specific facts:

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[182] E.g., *Nijhawan*, at 2296 ("Because no § 7201 offense has a specific loss amount as an element, the tax-evasion provision would be pointless, unless the "revenue loss" language calls for circumstance-specific application.").
[183] Brady, at 17, citing application of these rules to older moral turpitude cases in *Matter of R*, 4 I & N Dec. 176, 179 (BIA 1950); *Matter of T*, 3 I & N Dec. 641, 642-643 (BIA 1949); *Matter of DS*, 3 I & N Dec. 502, 504 (BIA 1949); *Matter of P*, 3 I & N Dec. 290, 296-297 (BIA 1948); *Matter of P*, 1 I & N Dec. 48 (BIA 1947); *Matter of R*, 2 I & N Dec. 819 (BIA 1947); *Matter of M*, 2 I & N Dec. 721, 724 (BIA 1946); *Matter of M*, 2 I & N Dec. 525, 526 (BIA 1946); *Matter of E*, 2 I & N Dec 328, 335 (BIA 1945); *Matter of P*, 2 I & N Dec. 117 (BIA 1944); *Matter of T,* 2 I & N Dec. 22 (BIA 1944).
[184] *Silva-Trevino* at 693.

> Consider, first, ACCA in general. That statute defines the "violent" felonies it covers to include "burglary, arson, or extortion" and "crime[s]" that have "as an element" the use or threatened use of force. 18 U. S. C. §§924(e)(2) (B)(i)–(ii). This language refers directly to generic crimes. The statute, however, contains other, more ambiguous language, covering "crime[s]" that "*involv[e] conduct* that presents a serious potential risk of physical injury to another." *Ibid.* (emphasis added). While this language poses greater interpretive difficulty, the Court held that it too refers to crimes as generically defined. *James, supra,* at 202.[185]

As Brady pointed out:

> The terms "involve" or "involving" describe generic offenses that require the categorical approach. Two examples appear in *Nijhawan,* where the court held that an offense that "involves fraud or deceit" under INA § 101(a)(43)(M)(i), and crimes "involving conduct" that presents a serious risk of injury, under 18 U. S. C. §§924(e)(2) (B)(ii),both are generic offenses. But see *Matter of Silva-Trevino, supra* at 693, where the AG states without explanation that the term "involving" "seems to call for, or at least allow, inquiry into the particularized facts of the crime."[186]

There is no reason flowing from the language of the "crime of moral turpitude" removal grounds to consider that Congress meant to depart from the normal categorical analysis here.

The Ninth Circuit continues to apply the traditional categorical analysis thus far, and has yet to address *Silva-Trevino* directly.[187] The Third Circuit has resoundingly rejected the *Silva-Trevino* analysis,[188] and has additionally rejected the "realistic probability" test in the moral turpitude context.[189]

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[185] *Nijhawan* at 2300, citing *James* v. *United States*, 550 U. S. 192, 202 (2007) (emphasis in opinion).
[186] Brady at 19 n.25.
[187] See, e.g., *United States v. Santacruz*, 563 F.3d 894 (9th Cir. Apr. 20, 2009) (*per curiam*) ("this circuit applies the "categorical" and "modified categorical" approaches of *Taylor v. United States*, 495 U.S. 575, 599-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), when determining whether a crime involves moral turpitude), following *Navarro-Lopez v. Gonzales*, 503 F.3d 1062, 1067 (9th Cir. 2007) (*en banc*).
[188] *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. Oct. 6, 2009) (the term "crime involving moral turpitude" is a term of art; the use of the term "involving" does not "invite" an examination into the underlying circumstances of the offense). See also *Nijhawan v. Holder*, 129 S.Ct. 2294, 2299 ("Thus in *James*, referring to *Taylor*, we made clear that courts must use the "categorical method" to determine whether a conviction for "attempted burglary" was a conviction for a crime that, in ACCA's language, "involved conduct that presents a serious potential risk of physical injury to another."§ 924(e)(2)(B)(ii).")
[189] *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. Oct. 6, 2009) ("We have applied this . . . approach in order to determine the least culpable conduct sufficient for a conviction, and, where a CIMT is asserted, measure that conduct for depravity;" court rejected application of *Duenas-Alvarez*' "realistic probability" test in the CMT context, as applying this test would disrupt predictability, and result in an impermissible switch of the burden of proof).

(2) *The Missing Element Rule*. In *Silva-Trevino*, the former Attorney General permitted the Immigration Judge to consider extra-record evidence to establish a portion of a generic definition of a crime of moral turpitude ground of removal even though that evidence does not constitute an essential element of the offense of conviction. *Silva-Trevino* remanded the case to allow the Immigration Judge to take evidence as to whether the respondent knew, or a reasonable person should have known, that the victim was under age, even though this guilty knowledge was not an element of the offense of conviction.[190] In contrast, as we have seen, the Supreme Court in *Nijhawan* reaffirmed the strict categorical analysis of generic definitions of conviction-based removal grounds enunciated in *Taylor*. In effect, it reaffirmed the missing element rule of the categorical analysis, by reaffirming the normal analysis for the vast majority of cases. It also held that statutory definitions similar to "crimes of moral turpitude," such as the classic one-word definitions, and even the far more complex "crime of violence" definition, were generic definitions not allowing the courts to go outside the normal categorical analysis.

Therefore, we can infer that the Supreme Court's analysis conflicts with *Silva-Trevino* in a number of important respects. *Silva-Trevino* should therefore be reversed. If *Silva-Trevino* survives, the implications for litigating crime of moral turpitude issues are discussed at length in Chapter 3, *supra*.

(B) *Within Five/Ten Years of Admission.* Whether the noncitizen committed the offense within five (or ten) years of admission is clearly not subject to the traditional categorical analysis. However, the date of the commission of the offense is still a factor which must be established by the Government by clear and convincing evidence. Whether the 10 year period applies (i.e., whether admission was on the basis of an S-visa) must also be proven by the Government by clear and convincing evidence.

(C) *One-Year Maximum Possible Sentence*. Whether the offense of conviction is punishable by one year or more is also a question that goes beyond the elements of the statute. However, the evidence used to determine this issue should be limited to the criminal statute and the record of conviction documents (in case the conviction was reduced from a felony to a misdemeanor, etc.

§ A.46 D. Crime of Moral Turpitude–Multiple Convictions

A noncitizen is deportable "who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial . . . ." [191] The elements of this ground of deportation are as follows:

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[190] *Silva-Trevino*, 24 I. & N. Dec. at 708-709.

[191] INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). The multiple-CMT ground of deportation was amended by

(a) two or more convictions
(b) after admission to the United States
(c) of a crime
(d) of moral turpitude
(e) not arising as part of a single scheme of criminal misconduct.

Conviction of two crimes involving moral turpitude — committed at any time after admission and regardless of sentence — is a basis for deportation unless the offenses arose as part of a "single scheme of criminal misconduct."[192] There is no time requirement, and all CMTs trigger this result, regardless of the potential or imposed sentence.[193]

(A) *Moral Turpitude*. For a discussion of the analysis of whether an offense is a crime of moral turpitude, see § A.44, *supra*.

(B) *Two or More Convictions not Arising from a Single Scheme of Criminal Misconduct.* Because the issue of single scheme is separate from the moral turpitude *nature* of the convictions, its should be presumed not to require application of the categorical analysis. This would mean this issue would be considered a circumstance specific question, subject to proof by evidence outside the record of conviction. However, this does not mean that criminal law considerations do not come into play. Various jurisdictions have laws regarding when a defendant may be charged with multiple convictions arising from a single act. Criminal court findings may be considered relevant, in immigration proceedings, to a determination whether two offenses were committed as part of a single scheme of criminal misconduct.

The government bears the burden of establishing that the convictions did not arise out of a single scheme of misconduct, unless the nature, time, or circumstances of the crimes makes such proof unnecessary.[194] The Supreme Court, however, established a

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AEDPA to read as follows: "(ii) Multiple criminal convictions. -- Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." The prior version read the same, except it provided the conviction must occur after "entry." Former INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i), prior to amendment by AEDPA.

[192] INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

[193] In 1952, the INA revised the multiple-CMT deportation ground to eliminate the prior requirement that each conviction result in a sentence of one year or more. S. Rep. No. 82-1137, at 21 (1952); H.R. Rep. No. 82-1365, at 60 (1952), reprinted in 1952 U.S.C.C.A.N. 1653. The statute now provides that a noncitizen will be deported for two convictions at any time after admission, of crimes involving moral turpitude, regardless what sentence is imposed, and even if the execution or imposition of the sentence was wholly suspended. *Matter of P*, 8 I. & N. Dec. 424 (BIA 1959); *Matter of O*, 7 I. & N. Dec. 539 (BIA 1957).

[194] *Nason v. INS*, 370 F.2d 865 (2d Cir. 1967) (no administrative finding that burden was met; on appeal after remand, the court held that evidence was sufficient to support the finding that noncitizen's two convictions for devising scheme to defraud were not a "single scheme of criminal misconduct" and that deportation was properly authorized); *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963) (burden not sustained where two similar crimes involving

presumption that agency action is valid, but in some circuits this can be overcome by testimony.[195]

§ A.47 E. Controlled Substances

A noncitizen is deportable for one conviction after admission of a violation of, or conspiracy or attempt to violate, any state, federal, or foreign law relating to a controlled substance, as defined in 21 U.S.C. § 802, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.[196]

This ground has the following elements:

(1) a conviction for violation
(2) or conspiracy or attempt to violate
(3) any law or regulation
(4) of any state, federal, or foreign law
(5) relating to
(6) a controlled substance, as defined in 21 U.S.C. § 802. [197]

If the government cannot prove by clear and convincing evidence that each of these elements exists, the noncitizen is not deportable under this ground.[198]

This ground of removal specifically refers to federal criminal statute. To qualify as a controlled substances offense, the controlled substance involved must be one

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thefts of automobiles were committed within one day of each other); *Wood v. Hoy*, 266 F.2d 825 (9th Cir. 1959); *Zito v. Moutal*, 174 F.Supp. 531 (N.D. Ill. 1959); *Matter of Pataki*, 15 I. & N. Dec. 324 (BIA 1975) (government did not sustain burden, since record supported inconsistent inferences); *Matter of T*, 9 I. & N. Dec. 646 (BIA 1962) (when respondent stood mute, government's burden met by introducing his preliminary statement and court records of his convictions); *Matter of C*, 9 I. & N. Dec. 524 (BIA 1961); cf. *Glaros v. INS*, 434 F.2d 685 (5th Cir. 1970); *Costello v. INS*, 311 F.2d 343 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 120 (1964) (no affirmative showing required when respondent remained silent and tax evasion charges were for separate years); *Fitzgerald v. Landon*, 238 F.2d 864 (1st Cir. 1956) (disregarding convicting court's statement that the offenses were part of a single criminal enterprise).

[195] *Matter of Adetiba*, 20 I. & N. Dec. 506 (BIA 1992)(rejecting common plan test for single scheme), followed in *Balogun v. INS*, 31 F.3d 8 (1st Cir. 1994); *Akindemowo v. U.S. INS*, 61 F.3d 282 (4th Cir. 1995); *Iredia v. INS*, 981 F.2d 847 (5th Cir. 1993); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Nguyen v. INS*, 991 F.2d 621 (10th Cir. 1993), *contra*, *Nason v. INS*, 394 F.2d 223 (2d Cir. 1968)(a specific coherent plan of action to constitute a single scheme of criminal misconduct."); see *Michel v. INS*, 206 F.3d 2000 (2d Cir. 2000)(expressly leaving open question whether *Chevron* required it to follow *Adetiba*); *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963)(expansive view of single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614, 616 (9th Cir. 1990)(government will lose if "credible, uncontradicted evidence, which is consistent with the circumstances of the crimes, shows that the two predicate crimes were planned at the same time and executed in accordance with that plan ...."). If the offenses occurred on the same date and do not reflect the exact time, the government should lose even under *Adetiba* because there will be no evidence that the crimes were not committed simultaneously. *Matter of Pataki,* 15 I. & N. Dec. 324 (BIA 1975)(crimes were committed minutes apart). See also *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963).

[196] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[197] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[198] INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3).

included in the federal controlled substances schedules.[199] The traditional categorical analysis should be applied to this ground of removal. There is nothing in the language of the statute to suggest otherwise.

However, the exception for use of 30 grams or less of marijuana is arguably a circumstance-specific question. While many states have a special provision for conviction of possession of a small amount of marijuana, others do not, or may not draw the line at 30 grams. Therefore to prevent this exception from being applied in a limited and haphazard manner,[200] it is likely that the courts will allow an examination beyond the elements and the record of conviction to establish whether the exception applies. The BIA has already applied the circumstance-specific approach in the context of the 30-gram exception in INA § 212(h).[201]

§ A.48 F. Domestic Violence, Stalking, and Child Abuse[202]

(A) *Domestic Violence.* In order to constitute a deportable conviction of a crime of domestic violence, the victim must be on the list as a protected victim. The statute defines "crime of domestic violence" as follows:

> For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person *committed by* a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.[203]

This offense therefore has the following elements:

(1) a listed crime of

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[199] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. Jan. 18, 2007); *Matter of Paulus*, 16 I. & N. Dec. 274 (BIA 1965).
[200] See *Nijhawan* at 2302.
[201] *Matter of Martinez-Espinoza*, 25 I. & N. Dec. 118 (BIA Nov. 4, 2009) (respondent may look to the specific facts of the underlying conviction to determine the amount of marijuana involved to prove, by a preponderance of the evidence, that the offense fits within the "less than 30 grams of marijuana" exception for purposes of a seeking a waiver under INA § 212(h)), citing *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009).
[202] The conviction must also occur *after* September 30, 1996 (the effective date of IIRAIRA) to trigger deportability under this ground. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 350(a), Pub. L. No. 104-208, 110 Stat. 3009.
[203] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (emphasis added).

(2) domestic
(3) violence
(4) against a listed person.

If the government is unable to prove any of these elements by clear and convincing evidence, it cannot establish this ground of deportation.[204]

(1) *Crime of Violence*. This determination should be subject to the same traditional categorical analysis as the aggravated felony crime of violence category.[205] The definition here is slightly different than the aggravated felony crime of violence definition, since here the definition requires that the crime of violence must have been committed against a *person*, rather than a person or property. Nonetheless, the categorical analysis should be applied.

(2) *Committed By*. The question of whether the crime of violence was committed by someone in an enumerated domestic relationship with the victim appears to be a circumstance-specific question. While the court did not directly discuss the domestic violence deportation ground in *Nijhawan*, its analysis may indicate the government can use any evidence – even outside the elements and record of conviction – to prove the required domestic relationship existed at the time of the offense.[206] Cases such as *Tokatly,*[207] *Cisneros-Perez*,[208] and other DV cases that require the domestic relationship to be shown under the modified categorical analysis, may be overturned in the near future.

Counsel can still focus on the text of the immigration statute, which lists as deportable "Any alien who at any time after admission is *convicted* of a crime of domestic violence . . . . "[209] Even though this statute goes on to define "crime of domestic violence," the initial clause requires that the defendant must be "convicted of a crime of domestic violence . . . ."[210] This requirement of a *conviction* of this crime strongly implies that the domestic element of the generic definition must be contained in the essential elements of the crime of conviction.[211] The decision and reasoning of *Nijhawan* support this reading of the domestic violence definition as a generic definition, rather than one calling for proof of an extra-element fact. The decision in *Nijhawan* is therefore in tension with the decision in *Hayes*.

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[204] *Woodby v. INS*, 385 U.S. 276 (1966).
[205] See § A.13, *supra*.
[206] See *Nijhawan* at 2302, citing *United States v. Hayes*, 129 S.Ct. 1079 (2009).
[207] *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)
[208] *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006).
[209] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i)(emphasis supplied).
[210] *Ibid.*
[211] But cf. *United States v. Hayes* 129 S.Ct. 1079 (2009) (holding to the contrary in a federal criminal context, with reference to a different statute with similar wording).

(3) *United States v. Hayes.* In *United States v. Hayes*,[212] the Supreme Court held "that the domestic relationship, although it must be established beyond a reasonable doubt in a[n 18 U.S.C.] § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." Justice Ginsberg authored the opinion. Justice Thomas joined in all but Part III, in which the court found practical considerations supported its reading to avoid frustrating Congress' manifest purpose. Chief Justice Roberts authored a persuasive dissent, and was joined by Justice Scalia, in his argument that the domestic relationship as well must be found within the elements of the predicate offense, and his defense of the virtues of the categorical analysis.

While this decision arose in the criminal context, it has a number of important implications for the domestic violence deportation ground.[213] First, the language of the illegal firearm offense at issue in *Hayes* is largely indistinguishable from the language of the domestic violence deportation ground.[214] The fact that each statute defines the required domestic relationship slightly differently has no impact on the question whether or not the offense of conviction must have the domestic relationship as an element.

There is a real risk that the immigration laws will be interpreted to reach the same conclusion. In that event, as in *Hayes*, a conviction of a generic crime of violence that has no domestic element, but is committed against a person meeting the deportation ground's definition of a protected relationship, will trigger deportation where it can be proven by other evidence. For example, a conviction of simple assault or battery may trigger the DV deportation ground if the government can prove a listed domestic relationship at the removal hearing, so long as the elements of the offense of conviction meet the immigration definition of "crime of violence."[215] This would mean overruling decisions, such as *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. June 10, 2004), that hold the government may not resort to evidence extrinsic to the elements of the offense of conviction to establish the domestic relationship required to trigger this ground of deportation.

The Supreme Court in *Hayes* also declined to use the "rule of lenity" to push the decision in the defendant's favor. The court stated:

> "[T]he touchstone of the rule of lenity is statutory ambiguity." *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (internal quotation marks omitted). We apply the rule "only when, after consulting traditional canons of statutory construction, we are left with an

[212] *United States v. Hayes,* 129 S.Ct. 1079 (Feb. 24, 2009),
[213] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).
[214] Compare 18 U.S.C. § 922(g)(9) (firearm prohibition applies to persons convicted of "a misdemeanor crime of domestic violence."), with INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (deportation ground covers a noncitizen "convicted of a crime of domestic violence . . . .").
[215] See INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), citing 18 U.S.C. § 16.

> ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994). Section 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence," we acknowledge, is not a model of the careful drafter's art. See *Barnes*, 295 F.3d, at 1356. But neither is it "grievous[ly] ambigu[ous]." *Huddleston v. United States*, 415 U.S. 814, 831, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974). The text, context, purpose, and what little there is of drafting history all point in the same direction: Congress defined "misdemeanor crime of domestic violence" to include an offense "committed by" a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.[216]

Aside from these immigration issues, the *Hayes* decision should not have any other direct negative impact on criminal immigration law. It should have no application to the categorical analysis in general, other than Chief Justice Roberts' spirited dissent in favor of the administrative benefits of the categorical analytical approach:

> The majority's approach will entail significant problems in application. Under the interpretation adopted by the court below, it is easy to determine whether an individual is covered by the gun ban: Simply look to the record of the prior conviction. Under the majority's approach, on the other hand, it will often be necessary to go beyond the fact of conviction and "engage in an elaborate fact-finding process regarding the defendant's prior offens[e]," *Taylor v. United States*, 495 U.S. 575, 601, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), to determine whether it happened to involve domestic violence.
>
> That is one reason we adopted a categorical approach to predicate offenses under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor*, *supra*, at 600, 110 S.Ct. 2143; see *Shepard v. United States*, 544 U.S. 13, 19, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Court considered "predicate offens[e] in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes")… As we warned in *Taylor* and reaffirmed in *Shepard*, "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor*, *supra*, at 601, 110 S.Ct. 2143; see *Shepard*, *supra*, at 20, 125 S.Ct. 1254. Those same concerns are implicated here, given that the majority would require juries and courts to look at the particular facts of a prior conviction to determine

[216] *United States v. Hayes*, 129 S.Ct. 1079, 1088-1089 (Feb. 24, 2009).

> whether it happened to involve domestic violence, rather than simply looking to the elements of the predicate offense. See ante, at ---- - ----.[217]

The reasoning of this decision is thus limited to taking the "extra element" approach to the DV deportation ground alone.

If *Hayes* is followed in the DV deportation context, it will transform the domestic relationship element of the deportation ground in effect into a conduct-based ground of deportation.

For further information on this topic, see N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS, Chap. 4, § 22.26 (2007); N. Tooby & J. Rollin, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS, Chap. 7, § 154 (2005).

(B) *Stalking*. The traditional categorical analysis should be applied to this ground of removal. There is nothing in the language of the statute to suggest otherwise. The federal stalking statute is codified at 18 U.S.C. § 2261. There is an argument that the federal definition of "stalking" should control, but there is as yet little authority for this specific proposition.

(C) *Child Abuse Convictions*. In *Matter of Velazquez-Herrera*,[218] the BIA defined the term "child abuse" broadly to mean

> 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 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; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking. Moreover, as in the "sexual abuse of a minor" context, we deem the term "crime of child abuse" to refer to an offense committed against an individual who had not yet reached the age of 18 years. *Cf. Matter of V-F-D-*, 23 I. & N. Dec. 859 (BIA 2006).[219]

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[217] *United States v. Hayes*, 129 S.Ct. 1079, 1092 (Feb. 24, 2009).
[218] *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008).
[219] *Id.* at 512.

Despite this broad definition, the BIA found that the term "child abuse" does not call for a circumstance-specific approach. "[T]here is nothing in the language of the 'crime of child abuse' clause of section 237(a)(2)(E)(i) that invites inquiry into facts unrelated to an alien's "convicted conduct." Furthermore, there is no reason to believe that application of the categorical approach will render INA§ 237(a)(2)(E)(i) so underinclusive as to defeat the purpose of the statute. Most States have criminal statutes that are designed to punish child abuse in its various forms, and many of these statutes protect children exclusively."[220] Therefore, the traditional categorical analysis applies to this definition. The Ninth Circuit has applied the categorical analysis in this context, finding that the statute of conviction must require actual injury to a child to trigger deportation under this ground.[221]

§ A.49 G. Domestic Violence Protection Order Violation

The deportation ground provides:

> Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has *engaged in conduct* that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding. [222]

This ground of deportation therefore has the following elements:

(1) a determination
(2) by a court
(3) that issued a protection order enjoining

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[220] *Id.* at 515.

[221] *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. Aug. 12, 2009) (California conviction of misdemeanor child endangerment, in violation of Penal Code § 273a(b), was not categorically a domestic violence "crime of child abuse" under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), and therefore does not disqualify the noncitizen from statutory eligibility for cancellation of removal for non-Lawful Permanent Residents under INA § 240A(b)(1)(c), 1229b(b)(1)(C), because in penalizing allowing "[a] child to be placed in a situation where his or her person or health may be endangered," Penal Code § 273a(b) (emphasis added) clearly reaches conduct that creates only potential harm to a child; no actual injury to a child is required for conviction, which is broader than the BIA's definition of "child abuse," which requires that the perpetrator's actions, either intentional or criminally negligent, must actually inflict some form of injury on a child).

[222] INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii) (emphasis added).

(4) a noncitizen
(5) who after admission
(6) engaged in conduct
(7) that violates the position of the protection order
(8) that protects a person
(9) against credible threats of violence, repeated harassment, or bodily injury.

This deportation ground, strictly speaking, does not require a criminal conviction. A court finding of a violation of the portion of a domestic-violence protection order is sufficient. A criminal conviction that encompasses the elements of this deportation ground, however, is also sufficient to require deportation. This ground requires both that the court order issued and the conduct occurred "after admission" to the United States.

In this case, it appears that the circumstance-specific approach is *less* onerous than the categorical approach. The Ninth Circuit had recently applied the categorical analysis in this context to find that *any* violation of a protection order issued for purposes of protecting a person against domestic violence automatically triggers this ground of removal.[223] Even after *Nijhawan*, the Ninth Circuit continued to apply the traditional categorical analysis in this context in *Szalai*.[224] Although the majority opinion simply states that it is bound by *Alanis-Alvarado*, a dissenting opinion discussed *Nijhawan*, and suggested that the traditional categorical approach should not apply to the determinations of (1) whether an Oregon restraining order qualified as a "protection order, and (2) whether the noncitizen violated an applicable "portion" of the order was *not* subject to the traditional categorical analysis.[225]

§ A.50 H. Espionage

Final conviction at any time of a violation of, or conspiracy or attempt to violate, any offense under chapter 37 of title 18 of the United States Code (relating to espionage),[226] for which a term of five or more years may be imposed.[227]

This includes convictions of violating 18 U.S.C. §§

[223] *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. Sept. 3, 2008) (where a protection order can be issue only upon a showing of reasonable proof of a past act of abuse, any violation of such protection order will trigger removal under INA § 237(a)(2)(E)(ii), even if the act that violates the protection order is not itself a domestic violence offense).
[224] *Szalai v. Holder*, 572 F.3d 975 (9th Cir. July 16, 2009).
[225] *Id.* (Wu, dissenting).
[226] Chapter 37 is entitled "Espionage and Censorship," suggesting it contains offenses related to those two topics. The deportation provision, however, specifies only those offenses contained in Chapter 37 "(relating to espionage)." This would seem to exclude offenses within the chapter relating to censorship but not espionage. But see N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 16.37 (2001).
[227] INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i).

792 (harboring or concealing person who has committed or is about to commit a violation of 18 U.S.C. §§ 793 (gathering, transmitting, or losing defense information), or 794 (same to aid a foreign government) is punishable by up to 10 years);

793 (gathering, transmitting, or losing defense information is punishable by up to 10 years);

794 (same to aid a foreign government punishable by death or life); and

798 (disclosure of classified information is punishable by up to 10 years).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.51 I. Foreign Agent Registration Act

A violation of, or attempt or conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 [22 U.S.C. §§ 611-621].[228]

The Foreign Agents Registration Act prohibits willful violation of "any provision of this subchapter [§§611-621] or any regulation thereunder . . . ." 22 U.S.C. § 618(a)(1). It also proscribes willfully making a false statement of a material fact, or omitting any material fact. 22 U.S.C. § 618(a)(2). The maximum penalty is five years and a fine of $10,000, except that violations of §§ 614(b), (e), or (f), and 618(g), or (h) are punishable by a maximum of six months and a fine of $5,000. *Id.* This statute also provides that: "Any alien who shall be convicted of a violation of, or a conspiracy to violate, any provision of this subchapter [§§611-621] or any regulation thereunder shall be subject to removal pursuant to chapter 4 of title II of the Immigration and Nationality Act [8 U.S.C. § 1221 et seq.]." 22 U.S.C. § 618(c).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.52 J. Foreign Espionage Trainee Registration

Any noncitizen convicted of a violation of the Act of August 1, 1956, Ch 849, 70 Stat. 899 (50 U.S.C. §§ 851, *et seq*.), governing registration of certain persons trained in foreign espionage systems, or of a violation of any regulation under the Act, is subject to

[228] INA § 237(a)(3)(B)(ii), 8 U.S.C. § 1227(a)(3)(B)(ii).

deportation.[229] NOTE: This ground of deportation is not listed in INA § 237, 8 U.S.C. § 1227.

This ground of deportation specifically references federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.53 K. Failure to Register as a Sex Offender

Effective July 27, 2006, Congress added a new deportation ground making deportable "[a]ny alien who is convicted under [18 U.S.C. § 2250 – failure to register as a sex offender] . . . ." [230]

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.54 L. Firearms or Destructive Devices

The firearms ground of deportation[231] has the following elements:

(1) conviction
(2) after admission
(3) of attempting to commit, conspiring to commit, or of committing
(4) a qualifying offense,
(5) involving a weapon which "is" a firearm or destructive device, as defined in 18 U.S.C. § 921(a).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.55 M. Fraud – Registration

A conviction at any time for:

False statement in alien registration process. INA § 266(c), 8 U.S.C. § 1306(c) (knowingly make a false statement in application for registration or attempt to procure registration through fraud; "any [noncitizen] so convicted shall,

[229] 50 U.S.C. § 855(b).
[230] INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v), added by Adam Walsh Child Protection and Safety Act of 2006, HR 4472, PL 109-248, § 401 (July 27, 2006).
[231] INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

upon the warrant of the Attorney General, be taken into custody and be removed in the manner provided in part IV of this subchapter.").[232]

False statement in former alien registration process. Alien Registration Act, 1940, § 36(c).[233]

This provision was formerly codified at 8 U.S.C. § 457. (Acts June 28, 1940, c. 439, Title III, § 36, 54 Stat. 675.) This provision was repealed, effective, December 24, 1952. (Acts June 27, 1952, c. 477, Title IV, § 403(a)(39), 66 Stat. 280.) The substance is now covered by 8 U.S.C. § 1306. (See 8 U.S.C.A. § 451 ff., Historical and Statutory Notes, p. 32.) The new provision cannot be described as "Alien Registration Act, 1940, § 36(c)." Therefore, this provision should render deportable only convictions that occurred before its repeal in 1952.

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.56 N. Fraud – Visa Fraud

A conviction of a violation of, or attempt or conspiracy to violate, 18 U.S.C. § 1546, "(relating to fraud and misuse of visas, permits, and other admission documents)."[234]

Section 1546(a) of the United States Code penalizes knowingly forging, altering, or possessing any visa or other entry document or evidence of authorized stay or employment, or impersonating another when applying for a permit or entry, or knowingly making under oath any false statement with respect to a material fact in any document required by the immigration laws by a maximum of 25 years if committed to facilitate terrorism,[235] 20 years if committed to facilitate a drug trafficking crime,[236] 10 years for a first or second offense, or 15 years for any other offense. The statute also prohibits knowingly and improperly using an identification document or a false document for the purpose of satisfying a requirement of INA § 274A(b), 8 U.S.C. § 1324a (unlawful employment of noncitizens), and punishes the offense by up to five years.[237]

[232] INA § 237(a)(3)(B)(i), 8 U.S.C. § 1227(a)(3)(B)(i).
[233] INA § 237(a)(3)(B)(i), 8 U.S.C. § 1227(a)(3)(B)(i).
[234] INA § 237(a)(3)(B)(iii), 8 U.S.C. § 1227(a)(3)(B)(iii).
[235] 18 U.S.C. § 2331.
[236] 18 U.S.C. § 929(a).
[237] 18 U.S.C. § 1546(b).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.57 O. High-Speed Flight from Immigration Checkpoint

Conviction of a violation of 18 U.S.C. § 758 (relating to high speed flight from an immigration checkpoint).[238]

This ground of deportation specifically refers tofederal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.58 P. Neutrality Law

A noncitizen is deportable if convicted of a violation of the neutrality law, which forbids aiding or participating in a military expedition from the United States against any foreign people with whom the United States is at peace. 18 U.S.C. § 960.[239] A defendant convicted under this section shall be fined or imprisoned not more than three years.

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.59 Q. Sabotage

Final conviction at any time of a violation of, or conspiracy or attempt to violate, any offense under 18 U.S.C., chapter 105 (relating to sabotage), [240] for which a term of five or more years may be imposed.[241]

This includes convictions of violating 18 U.S.C. §§

> 2152 (willful trespass on, injure, or interfere with operation of any harbor-defense system or knowingly, willfully, or wantonly violate any Presidential

[238] INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv).
[239] INA § 237(a)(2)(D)(ii); 8 U.S.C. § 1227(a)(2)(D)(ii).
[240] Chapter 105 is entitled "Sabotage." The deportation provision specifies only those offenses contained in Chapter 105 "(relating to sabotage)." This would seem to exclude offenses within the chapter that do not relate to sabotage. In particular, violation of certain provisions of 18 U.S.C. § 2152 can be committed merely by trespassing upon forbidden areas, or violating any Presidential regulation governing defensive sea areas, without actually committing or attempting sabotage and without any intent to interfere with U.S. defense efforts. Logically, these violations cannot be said to be "relating to sabotage," and so should be excluded from this ground of deportation. But see N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 16.37 (2001).
[241] INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i).

regulation governing persons or vessels within defensive sea areas is punishable by up to five years);

2153 (destruction of war material, during war or national emergency, with intent to obstruct U.S. war efforts is punishable by up to 30 years);

2154 (production of defective war material with intent to obstruct U.S. defense activities is punishable by up to 30 years);

2155 (destruction of national defense material with intent to obstruct U.S. national defense is punishable by up to 10 years);

2156 (production of defective national defense material with intent to obstruct U.S. national defense activities is punishable by up to 10 years).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.60 R. Selective Service

Conviction of violation of any provision of the Military Selective Service Act (50 U.S.C. App. §§ 451-471a).[242]

Selective Service offenses are particularly defined in § 462. This statute prohibits knowingly (1) failing to carry out any duty provided by this Act or regulations, (2) making any false or improper decision or statement under the law or regulations, or (3) otherwise evading registration or service, or (4) interfering with the administration of the law, or attempting or conspiring to do so, and establishes a maximum penalty of five years and $10,000 fine. (50 U.S.C. App. § 462(a).) It also penalizes knowingly (1) transferring false identification or Selective Service document for the purpose of aiding the making of any false identification or representation, (2) possesses any Selective Service certificate not issued to him for the purpose of false identification or representation, (3) changes any such certificate, (4) counterfeits any such certificate with intent that it be used for any purpose of false identification or representation, (5) knowingly possessing any counterfeit or false certificate, or (6) knowingly violates or evades any provision of this Act or regulations, and provides a maximum penalty of five years imprisonment and a $10,000 fine. (50 U.S.C. App. § 462(b).) It may be important to verify that the noncitizen has not received a pardon under the various Executive Orders relating to amnesty for draft offenders following the Vietnam War. See 50 U.S.C.A. App. § 462, pp. 394-398 (1990).

[242] INA § 237(a)(2)(D)(iii), 8 U.S.C. § 1227(a)(2)(D)(iii).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.61 S. Smuggling – Importation for Immoral Purposes

Conviction for violation of INA § 278, 8 U.S.C. § 1328 (importing, holding, or harboring noncitizen for prostitution or any other immoral purpose punishable by up to 10 years).[243]

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.62 T. Threats Against the President and Successors

This includes conviction of any offense under 18 U.S.C. §§ 871 (mailing threats against the President and successors punishable by up to five years).[244]

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.63 U. Trading with the Enemy

Conviction of violation of any provision of the Trading With the Enemy Act (50 U.S.C. App. §§ 1-6, 7-39, 41-44).[245]

These offenses are limited to a war which has been declared by Act of Congress. There has been no declared war in effect since 1952. See 50 U.S.C.A. App., § 1, p. 5 (1990). This act prohibits (a) trading with an enemy or its ally without a license, (b) transportation of enemy or ally's citizens into or out of the United States, and U.S. vessels' captains transporting them anywhere, (c) sending a writing into or out of the United States to an enemy or its ally except in the regular course of mail, and (d) willfully evading censorship or use of code to conceal a message's intended meaning. 50 U.S.C. App. § 3. The maximum penalty is 10 years in custody and a fine of $100,000. 50 U.S.C. App. § 16(a).

[243] INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv).
[244] INA § 237(a)(2)(D)(ii), 8 U.S.C. § 1227(a)(2)(D)(ii).
[245] INA § 237(a)(2)(D)(iii), 8 U.S.C. § 1227(a)(2)(D)(iii).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.64 V. Treason or Sedition

Final conviction at any time of a violation of, or conspiracy or attempt to violate, any offense under 18 U.S.C., chapter 115 (relating to treason and sedition), [246] for which a term of five or more years may be imposed.[247]

This includes convictions of violating 18 U.S.C. §§

2381 (treason, which consists in levying war against the United States, or adhering to its enemies, giving them aid and comfort is punishable by death);

2382 (misprision of treason, i.e., knowing of treason and failing to disclose it is punishable by up to seven years);

2383 (inciting any rebellion or insurrection against the authority of laws of the U.S., or giving aid or comfort thereto is punishable by up to 10 years);

2384 (seditious conspiracy to overthrow by force the U.S. government or to conspire by force to prevent, hinder or delay the execution of any law of the United States is punishable by up to 20 years);

2385 (advocacy of the violent overthrow of the U.S. government or assassination of any U.S. government officer, or publication of any writing advocating forcible overthrow of the government, or organizing any group that advocates the violent overthrow of the government is punishable by up to 20 years);

2386 (failing to register, or making a false statement in registration materials, of any organization (a) that proposes to overthrow the U.S. government and receives aid from a foreign government, or (b) that proposes to overthrow the U.S. government and engages in civilian military activity; or (c) that receives foreign support and engages in civilian military activity; or (d) one purpose of which is the forcible overthrow of the government, is punishable by up to five years);

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[246] Chapter 115 is entitled "Treason, Sedition, and Subversive Activities." The deportation provision specifies only those offenses contained in Chapter 115 "(relating to treason and sedition)." This would seem to exclude offenses within the chapter that do not relate to treason or sedition. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 16.37 (2007).

[247] INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i).

2387 (advising or causing insubordination in military with intent to reduce morale, or distributing such writings is punishable by up to 10 years);

2388 (during wartime, making a false statement with intent to interfere with U.S. military success or cause insubordination is punishable by up to 20 years);

2389 (recruiting soldiers to engage in armed hostilities against the United States is punishable by up to five years).

This ground of deportation specifically refers to federal law. The traditional categorical analysis should be applied to this ground. There is nothing in the language of the statute to suggest otherwise.

§ A.65 II. Conviction-Based Grounds of Inadmissibility

There are three *conviction-based* grounds of inadmissibility. It is important to remember that most noncitizens in inadmissibility proceedings bear the burden of showing they are, clearly and beyond doubt, not subject to any grounds of inadmissibility. See Appendix A, Introduction, Burden of Proof, *supra*; N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS §§ 18.6-18.7 (4th Ed. 2007). It is not yet clear whether this difference in burden (compared with the clear and convincing evidence burden on the DHS in the deportation context) will be treated in light of *Nijhawan*.

Two of these grounds – the moral turpitude and controlled substances grounds -- may also be triggered if a noncitizen admits committing the essential elements of acts that trigger these grounds of removal. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS §§ 20.28, 21.5 (4th ed. 2007). The following discussion is limited to only analysis of convictions under these conviction-based grounds of inadmissibility.

§ A.66 A. Crime of Moral Turpitude

(A) *In General.* "[A]ny alien convicted of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible."[248]

See § A.45(A), *supra*, for a discussion of the analysis applicable to crimes of moral turpitude.

(B) *Exceptions.* The INA provides three exceptions to this ground of inadmissibility:

(1) *Youthful Offender Exception.* This ground of inadmissibility "shall not apply to an alien who committed only one crime if – (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States . . . ."[249]

This exception applies to convictions in *adult* court where the acts occurred while the defendant was under 18 years old. The question of the timing of the application for admission is clearly a non-elemental question to which the circumstance-specific analysis must be applied. The age of the defendant at the time the acts were committed may or may not be at issue at the criminal court level. If the criminal records show the age of the minor, however, it should not be necessary to go beyond the record of conviction. Counsel can argue, however, that since the age of the defendant is rarely if ever an element of the offense itself, this is a circumstance specific issue that may be proven by evidence outside the record of conviction.

(2) *Petty Offense Exception.* This ground of inadmissibility "shall not apply to an alien who committed only one crime if . . . (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed)."[250]

Whether the noncitizen has *committed* more than one CMT is a circumstance-specific question. The question of statutory maximum can be answered simply by

[248] INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).
[249] INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 1182(a)(2)(A)(ii)(I).
[250] INA § 212(a)(2)(ii)(II), 8 U.S.C. § 1182(a)(2)(ii)(II).

looking at the statute of conviction as written at the time the offense was committed, and at any sentencing records, if necessary. The term imposed is likewise a non-elemental question, but may be answered by looking to the record of conviction.

(3) *Political Offense Exception*. The BIA has held that an offense must be determined to have been completely or totally political in view of the totality of the circumstances.[251] This is clearly a circumstance-specific inquiry.

§ A.67 B. Controlled Substances

(A) *In General.* "[A]ny alien convicted of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), . . . is inadmissible."[252]

This ground has the following elements:

(5) a conviction for violation
(6) or conspiracy or attempt to violate
(7) any law or regulation[253]
(8) of any state, federal, or foreign law
(5) relating to
(6) a controlled substance, as defined in 21 U.S.C. § 802.

This ground of removal specifically refers to federal law. To qualify as a controlled substances offense, the controlled substance involved must be one included in the federal controlled substances schedules.[254] The traditional categorical analysis should be applied to this ground of removal. There is nothing in the language of the statute to suggest otherwise.

(B) *Waiver.* The most common ground of inadmissibility applicable to criminal convictions, INA § 212(h), 8 U.S.C. § 1182(h), does not waive controlled substances convictions *except* for a conviction for first-time possession of 30 grams or less of marijuana. Determining whether this exception applies is a circumstance-specific question. While many states have a special provision for conviction of possession of a small amount of marijuana, others do not, or may not draw the line at 30 grams.

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[251] *Matter of O'Cealleagh*, 23 I. & N. Dec. 976 (BIA 2006).
[252] INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).
[253] See *Matter of Martinez-Espinoza*, 25 I. & N. Dec. 118, 123 (BIA 2009) (a federal analog offense is not required to before a state controlled substances offense will trigger inadmissibility; possession of drug paraphernalia therefore triggers inadmissibility even if the same offense is not culpable under federal law).
[254] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. Jan. 18, 2007); *Matter of Paulus*, 16 I. & N. Dec. 274 (BIA 1965).

Therefore to prevent this exception from being applied in a limited and haphazard manner,[255] the courts should allow proof beyond the elements and the record of conviction to establish whether the exception applies. The BIA has already applied the circumstance-specific approach in the context of the 30-gram exception in INA § 212(h).[256]

§ A.68 C. Multiple Convictions with Aggregate Sentences Imposed of Five Years

(A) *In General.* "Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible."[257]

The sentence imposed is a question that goes beyond the categorical question of the *elements* of which the noncitizen was convicted. However, counsel can argue that the question of sentence imposed should not extend beyond the record of conviction – i.e., the documents showing the actual sentence imposed by the court. Counsel could argue, for example, that a FBI rap-sheet is insufficient to establish the sentence imposed by clear and convincing evidence, since these records are often incorrect. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 10.52 (4th ed. 2007).

(B) *Political Offense Exception*. The BIA has held that an offense must be determined to have been completely or totally political in view of the totality of the circumstances.[258] This is clearly a circumstance-specific inquiry.

[255] See *Nijhawan* at 2302.
[256] *Matter of Martinez-Espinoza*, 25 I. & N. Dec. 118 (BIA Nov. 4, 2009) (respondent may look to the specific facts of the underlying conviction to determine the amount of marijuana involved to prove, by a preponderance of the evidence, that the offense fits within the "less than 30 grams of marijuana" exception for purposes of a seeking a waiver under INA § 212(h)), citing *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009).
[257] INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).
[258] *Matter of O'Cealleagh*, 23 I. & N. Dec. 976 (BIA 2006).