OVERVIEW OF IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE

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The following information is designed to help attorneys and advocates working with immigrant victims of domestic violence, sexual assault and trafficking who, due to dual arrest or other factors, have been arrested or have become defendants in criminal prosecutions or have obatined criminal convictions. Immigration victims who otherwise qualify for immigration relief under the Violence Against Women Act's (VAWA) self-petitioning, VAWA cancellation of removal, U-visa crime victim protections or T visa trafficking victim protections can be cut off from access to the protection offered by these forms of immigration relief if they are arrested, plead guilty or are otherwise convicted of a crime. For this reason it is important that advocates, attorneys and justice system personnel working with immigrant victims have a basic understanding of the immigration consequences of criminal conduct and convictions for immigrant victims of violence against women.

Too often immigrant victims who have not committed crimes, who were acting in self-defense or whose criminal conduct was related to the abuse are wrongly advised to plead guilty in criminal cases without being fully and correctly apprised that the plea they are entering has immigration consequences. Often times that consequence is deportation, even for the most minor criminal offense. Immigrant victims' lack of fluency in English and familiarity with U.S. laws and the U.S. legal system compound this problem when police communicate only with the English speaking abuser and when defense attorneys offer advice without considering the immigration consequences of criminal convictions. It is important to remember that when immigrant victims are cut off from VAWA immigration relief their abusers will be less likely to be held accountable by the criminal justice system for their crimes.

The following overview highlights some of the essential information and analysis necessary to understand how criminal convictions can harm immigrant victims. Hopefully it will provide a first step in familiarizing immigration advocates with this complex area of immigration law that is critical to understand in order to effectively advocate for immigrant survivors who have been through the criminal justice system.

This overview is a first step. Advocates must have a copy of the Immigration & Nationality Act and become familiar with the relevant statutory provisions. Additionally, whenever possible, seek additional assistance from experienced immigration attorneys and consult the materials referenced in the resources at §7, as well as encouraging criminal defense counsel to do the same.

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PART I:
Key Concepts in Analyzing Criminal Convictions Under the Immigration & Nationality Act (INA).

Chapter One: Step One - Obtaining Relevant Information About the Criminal Case[1]

In order to effectively determine what immigration consequences the client is facing due to her criminal convictions, arrests or charges, it is essential to obtain as much accurate information as possible regarding the client's criminal proceedings and criminal history.

§1.1. Interviewing the Client Regarding Her Criminal History

Certain information can be obtained only from the client. Some of this information is necessary in order to begin the process of documenting the client's criminal history situation. First, it is necessary to verify the jurisdiction (i.e., the geographical location of the court) in which each criminal conviction occurred. If the conviction is federal, it is necessary to determine the state and district of the U.S. District Court in which the client suffered the conviction. If the conviction occurred in state court, the attorney must ascertain the state and county (or other local governmental subdivision) in which the conviction occurred. This information is necessary in order to determine which "rap sheets" (federal, state and/or local criminal history records) must be obtained in order to verify the existence of the conviction(s), and in order to determine which court in which city has the court file containing the documents.

The second area in which the client's information is indispensable concerns the content of the attorney-client conversations in which the consequences of a plea or conviction were (or were not) discussed. If an interpreter was used, either in private to translate attorney-client conversations, or in court to translate the court proceedings, the client's understanding of what the interpreter said is the only initial source of that information.

Third, it is necessary to obtain the client's version of the events out of which the criminal charge arose. Because most criminal charges result in pleas of guilty, the client's information is often the only source concerning possible defenses or mitigating factors, as the police and prosecution often emphasize facts making the client appear to be Attila the Hun.

§1.2 Verifying Exact Criminal History: Criminal Records and "Rap Sheets."

Because information concerning the client's exact criminal situation may be complex or highly technical, and because clients' memories may not always be complete and accurate, especially if a span of years or extensive use of alcohol or drugs is involved, it is important to verify the details of the plea, conviction, and sentence by resort to official sources of information.

This involves two primary efforts: (1) obtaining the official criminal history reports of the client's arrests and convictions (the "rap sheets"); (2) obtaining (certified, when possible) copies of the plea and conviction records from the rendering court.

[1] The information in this section is adapted from *Immigrants & Post Conviction Relief in Washington State*, by Ann Benson, and *Post Conviction Relief for Immigrants*, by Norton Tooby.

Because FBI information is often in error or incomplete, especially regarding the final result or disposition of a state arrest, it is wise to obtain in addition a state rap sheet for every state in which the client may have one or more convictions, as a guide to the complete list of convictions that may trigger adverse immigration consequences.[2]

§1.3 Obtaining FBI Criminal Record of Client.

Since the Department of Homeland Security (DHS) is a federal agency and relies, often exclusively, on FBI criminal history records, it is most important to obtain the FBI rap sheet concerning the client. This is most easily done directly by the client, who can receive the FBI record by writing a letter to the FBI asking for a "background search." S/he must submit the following: (1) full name; (2) date and place of birth; (3) a set of fingerprints (which can be obtained from most police departments or "photo/fingerprint" shops);[3] and (4) an $18 fee (certified check or money order payable to the "U.S. Treasury"). This information should be sent to:

Attn: Special Correspondence Unit
Federal Bureau of Investigation
Criminal Justice Identification Services
United States Department of Justice
1000 Custer Hollow Road
Clarksberg, West Virginia 26306.

Check to see if any changes of fee, procedure, or forms have been adopted at the following: http://www.fbi.gov/hq/cjisd/fprequest.html

The telephone number is (304) 625-3878. If the client cannot afford the fee, s/he may apply for a fee waiver by including a claim and proof of indigence. The client's letter can request that the FBI criminal history report be sent directly to his or her attorney, if desired. It generally takes five weeks or so to receive the report.

§1.4 Obtaining State Criminal Records of Client.

Each state has it's own system (or systems) for maintaining criminal history records. In most states, the state highway patrol maintains a criminal history data base and, for a small fee, will provide copies of documents upon request. The web page for the state highway patrol you are seeking information from should have a link to information about accessing its data base.

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[2] An excellent self-help manual with forms, addresses, and instructions concerning how to obtain federal, state, and local criminal records and how to correct any errors they contain is Warren Siegel's *How to Seal Your Juvenile and Criminal Records*, available from Nolo Press, 950 Parker Street, Berkeley, CA 94710. Make sure you have the most current edition.

[3] The police department may charge a small fee, usually no more than $10, for the service of taking the client's fingerprints and providing a completed fingerprint card to the client. The client should be instructed not to inform the police department, DMV, or other official source of fingerprints that the prints are sought for immigration purposes, as it is not contemplated that these fingerprints will be submitted to the DHS and the agency may refuse to provide the prints under those circumstances, since the immigration authorities have especially demanding requirements for obtaining fingerprints for immigration purposes. The client should simply state s/he wants to see his or her own criminal record.

Additionally, most states have an office or agency that administers the court systems through out the state. These agencies are usually involved in the storage and maintenance of official criminal records. Again, searching the state government website should get you to this agency.

Court Link is a service of LexisNexis and is free to subscribers. Nonsubscribers can also access it for a small fee (usually under $10/search). This data base houses a public records section which maintains (usually updated each quarter) criminal history records for all states. To access court link go to: www.courtlink.com

§1.5 Obtaining Conviction Records and Transcripts from the Rendering Court.

The most authoritative records of conviction are those created by the court in which the conviction occurred. For each conviction of interest, it is therefore essential to determine the jurisdiction, state, and city in which the court that rendered the conviction is located.

The client's information, together with the criminal histories, is usually sufficient to identify the court and city in which each conviction occurred. The court's records of the conviction may then be obtained from the clerk's office.

For reasons relating to both the immigration and criminal law aspects of the case, it is important to obtain as many of the actual records relating to the case as possible (versus simply a docket print out of the proceedings). Whenever possible, it is important to obtain certified[4] copies of the following:

(a) the clerk's docket or clerk's minutes (the clerk's notes on what happened in court) from the hearing on the day the plea of guilty or no contest (nolo contendere) was entered;

(b) the waiver of rights form, if any, that was initialed and signed by the defendant when the plea was entered; and

(c) the charging document (a.k.a.complaint or information or indictment) – both the original and any amended charging documents - containing the charges against the defendant;

(d) either the jury verdict or the defendant's statement on plea of guilty;

(e) the judgement and sentence.

It is important to obtain the original court records in order to verify the existence and nature of the conviction. FBI, state highway patrol and court-maintained criminal history records are often inaccurate. For example, an assault conviction may be listed on a rap sheet as a felony, when it is in fact a misdemeanor. Many, many arrest records are carried on criminal history reports when the arrests did not result in any conviction at all. For immigration purposes, these documents are often necessary to analyze the specific immigration consequences.

[4] Some criminal courts will rely on uncertified copies, or take judicial notice of them. Immigration courts and USCIS insist on certified copies.

Official Maintainence & Destruction of Court Records. It is incumbent on the court to keep records of certain matters. However, if your client is applying for a benefit under immigration law, such as a VAWA self-petition, it may be her responsibility to provide immigration authorities with certain documents *if they exist*. Pursuant to rules and regulations, many courts systematically destroy certain criminal records after a given length of time. If you request a record, and are informed it does not exist, this may simply mean that the court (or maintaining entity) has destroyed its record of that conviction after the appropriate number of years. The underlying conviction, however, still exists legally, and it is essential to still consider possible immigration consequences before applying for any benefit.

§1.6 Obtaining Case File From Original Defense Counsel.

Lawyers are ethicaly bound to provide a complete copy of their file to the client upon request. This includes the attorney's notes, investigation reports, and everything contained in the file. Immigration advocates should have the client request and obtain such a copy. Immigration advocates can also request the files directly by submitting a written request, accompanied by an information release executed by the client. Since the entire file is the property of the client, you should have no difficulty.

Chapter Two: Step Two - Determine which crime-related provisions of immigration law apply to your client's situation.

§2.1 Crime-Related Grounds Of Inadmissibility – These grounds are located in the immigration statute at: INA §212(a)(2); 8 USC 1882(a)(2) [NOTE: certain criminal conduct may also trigger grounds of inadmissibility under INA §212(a)(1)(A) and §212(a)(6)(E)]

These grounds apply to:

- Noncitizens as grounds for removal in INA §240 removal proceedings;
- Noncitizens applying for lawful permanent resident status pursuant to INA §245 or INA §209(c) – including refugees, asylees and approved self-petitioners who then apply to adjust their status to lawful permanent residency under this section, and crime victim and trafficking victim visa applicants under INA §101(a)(15)(U) & (T);
- Noncitizens seeking a benefit under the INA who must establish good moral character. See INA §101(f)(3) – including self petitioners under INA §204; cancellation applicants per INA §240A(b)(1)&(2); and lawful permanent residents seeking to naturalize per INA §316(a)(3) and INA 319(a)(1);
- All noncitizens seeking admission or readmission into the United States. See INA 101(a)(13)(C); 8 USC 1101(a)(13)(C);

- Some of these provisions can be triggered by conduct alone and no conviction is required. See INA §212(a)(2)(C).

§2.2 Grounds of Deportation - These grounds are located at INA §237(a)(2); 8 USC 1227(a)(2). These provisions apply to any noncitizen who has been lawfully admitted to the United States. Noncitizens who have been lawfully admitted (in any status, regardless of whether it has expired) and who have been convicted of a crime which DHS believes falls within one of these provisions, will be placed in removal proceedings and charged with deportability under one of these grounds.

§2.3 The Aggravated Felony Definition – The aggravated felony definition is found at INA §101(a)(43); 8 USC 1101(a)(43).

- The aggravated felony (AF) provision has over 21 prongs incorporating hundreds of offenses. A conviction deemed to be an AF will trigger the most severe immigration consequences. The AF applies to all noncitizens all the time.

- Lawful permanent residents who are convicted of aggravated felony: deportable under INA 1227(a)(2)(A)(iii) and subject to subject to removal proceedings pursuant to INA §240:

- Aggravated felonies are not a ground of inadmissibility under INA §212(a)(2).

- People who are not lawful permanent residents who are convicted of an aggravated felony : subject to removal pursuant to INA §238 (although immigration authorities have discretion to pursue removal under INA §240);

- Applicants for benefits/relief who have aggravated felony convictions will be barred from establishing good moral character. INA §101(f)(8); 8 USC 1101(f)(8);

- Certain misdemeanor offenses – such as assault and theft offenses – where a sentence of one year has been imposed (regardless of any time suspended) are treated as aggravated felonies under this provision.

§2.4 Removability for selected criminal convictions/conduct[5]

[5] This is only a partial list of types of crimes that can trigger removal. Advocates must consult additional resources for more detailed analysis of these provisions and the particular consequences of any particular criminal conviction. Much of the information contained in this section was prepared by Kathryn Brady, Senior Staff Attorney for the Immigrant Legal Resource Center.

A. Aggravated Felony a "Crime of Violence." Conviction of any "crime of violence" with one-year sentence imposed (including suspended sentence) is an aggravated felony, the worst possible immigration penalty. See definition of aggravated felony at 8 USC 1101(a)(43)(F), definition of "crime of violence" at 18 USC § 16, and definition of sentence at 8 USC 1101(a)(48)(B).

B. Sexual abuse of a minor is an aggravated felony conviction regardless of sentence, under 8 USC 1101(a)(43)(A). Some minor offenses such as misdemeanor statutory rape may be considered an aggravated felony under this category.

C. Rape is an aggravated felony conviction regardless of sentence, under 8 USC § 1101(a)(43)(A).

D. The Domestic Violence Deportation Ground: Either conviction of child abuse, neglect or abandonment, of stalking, or of a "domestic violence" offense, or a civil or criminal court finding of a violation of a violence protection order, is a basis for deportation under 8 USC § 1227(a)(2)(E).

1. "Domestic violence"conviction. Offense is defined in the statute to include any crime of violence committed against a current or former spouse, co-habitor, co-parent of a child, or person protected under state law domestic violence statutes (e.g., in California a person in a dating relationship).

i. It is not established whether the relationship with the victim must appear on the record of conviction, e.g. whether a simple assault is a "domestic violence" offense where there is no information on the record that the victim was a former spouse.

2. A civil or criminal court finding of a violation of sections of a protective order aimed at preventing violence, stalking, repeated harassment, etc. is a basis for deportation even in the absence of a conviction.

3. The conviction or finding of violation of an order must have occurred on or after September 30, 1996 to be a basis for deportation under this ground.

E. Alternate pleas.

Immigrant victims may not be successful in having criminal cases brought against them dismissed. In such case prosecutors and defense attorneys may wish to structure alternative plea agreements so as not to cut off immigrant victims from domestic violence related immigration protections. . Examples of alternate pleas available under state criminal laws that would avoid deportation would include false imprisonment (misdemeanor);nonviolent attempt to dissuade someone from filing a police report; or other nonviolent offenses such as theft or trespass. Some of these may however be

"crimes involving moral turpitude" which might cause immigration penalties under separate provisions.

§2.5 Two part analysis of crimes.

- Analyze client's criminal conviction/conduct for risk of triggering deportation/removal;

- Analyze client's criminal conviction/conduct to determine impact on application for benefits/relief from removal. In this analysis, there are two ways in which criminal convictions/conduct are/is relevant: 1) triggering statutory ineligibility for the benefit/relief sought; 2) in the exercise of discretion.

§2.6 Analyzing Client's Conviction Under Immigration Statutes

- Obtain the specific statute of the criminal offense at issue;

- Identifying possible immigration provisions triggered by this offense:

  * Are immigration consequences triggered by conduct or conviction?
  * Are there issues regarding effective dates?
  * Does the immigration provision reference any federal statutes (i.e. INA 101(a)(43)(F) – Crime of Violence)?
  * Categorical analysis, divisible statute & record of conviction.

§2.7 Convictions for Immigration Purposes

- Statutory Definition at INA §101(a)(48)(A);

- Judge or jury has made a finding of guilt or defendant has enterd plea of guilty or nolo contender – this will constitute a conviction in perpetuity for purposes of immigration consequences. See *Matter of Punu*, Int. Dec. 3364 (BIA 1998); *Matter of Roldan*, Int. Dec. 3377 (BIA 1999); *Murillo-Espinoza v. INS*, No. 00-70096 (9th Cir. 2001); exception for first-time simple possession offenses in the 9th Circuit – see ***Lugan-Amendariz v. INS,*** 222 F.3d 728 (9th Cir. 2000). This includes deferred prosecution or deferred adjudication agreements where the defendant enters a plea of guilty;

- Noncitizen Has Admitted Sufficient Facts To Warrant A Finding Of Guilt – The scope of this provision remains unclear. In some jurisdictions many pre-plea deferral agreements do not require the admission of "facts sufficient". These agreements are often used in misdemeanor DV-related offenses and for first time offenders charged with other misdemeanor crimes. In other jurisdictions pre-plea deferral or diversion agreements, particularly in domestic violence cases, require admission of facts that could constitute "sufficient facts." To know what actually

occurred in a given case, it is critical to obtain all records in relation to these agreements and analyze carefully;

- Deferred adjudication agreements that involve admission of drug addiction or drug abuse run the risk of triggering deportation under INA §237(a)(2)(B)(ii) and inadmissibility under INA §212(a)(1)(A)(iv);

- Expungments, rehabilitative vacations and successfully completed deferral agreements that constitute convictions will NOT eliminate the conviction for immigration purposes. *Matter of Roldan*, Int. Dec. 3377 (BIA 1999); ***Murillo-Espinoza v. INS***, No. 00-70096 (9th Cir. Aug. 2001); exception for first-time simple possession offenses – see ***Lugan-Amendariz v. INS,*** 222 F.3d 728 (9th Cir. 2000).

§2.8 Sentences Under Immigration Law –

- Section 101(a)(48)(B) of the Immigration and Nationality Act defines a sentence for immigration purposes. It states:

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

- Probation time does not constitute a "period of incarceration or confinement" and, thus, is not a sentence under immigration law. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *U.S. v. Banda-Zamora*, 178 F.3d 728 (5th Cir. 1999).

- Certain misdemeanor offenses will constiute aggravated felonies where sentence of 365 days was imposed. US v. Pacheco, 225 F.3d 148 (2d Cir. 2000); United States v. Graham, 169 F.3d 787 (3d Cir.), cert. denied, 120 S.Ct. 116 (1999) (misdemeanor theft held aggravated felony); Wireko v. Reno, 211 F.3d 833 (4th Cir. 2000)(misdemeanor sexual battery aggravated felony); Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000); Moosa v. INS, 171 F.3d 994, 1006 (5th Cir. 1999). US v. Gonzalez-Tamiriz, 310 F.3d 1168 (9th Cir. 2003) (Nevada misdemeanor battery is aggravated felony); US v. Christopher, 239 F.3d 787 (3rd Cir. 2001) (Georgia misdemeanor theft is aggravated felony); Guerro-Perez v. Ashcroft, 2001 256 F.3d 546 (7th Cir. 2001).

- Do not rely on client's statements as to the sentence – confirm by reference to relevant documents.

PART II:
Criminal Consequences Relating to Applications for for VAWA and Selected Other Immigration Benefits Filed With US Citizenship & Immigration Services and Selected Issues In Removal Proceedings

Chapter Three: Filing Benefits Applications With USCIS

§3.1 Vawa Self Petitions

Criminal conduct and criminal convictions can undermine the ability of an immigrant victim of domestic violence to access immigration relief through the VAWA self-petition. It can make it more difficult to have the VAWA self-petition approved and it can affect whether an approved self-petitioner will be able to attain lawful permanent residency based on an approved self-petition.

A. Filing the Self Petition

1. Good Moral Character (GMC) Determinations

Under INA §101(f) there are several crime-related bars: 101(f)(3) incorporates almost all crime-related grounds of inadmissibility under INA §212(a)(2); 101(f)(7) bars persons who have been confined to a penal institution for an aggregate period of 180 days or more; 101(f)(8) bars persons who have been convicted of aggravated felonies under INA §101(a)(43).

2. Waiver of GMC bars

INA §204(a)(1)(C) provides that self petitioning applicants are not barred from showing GMC where: 1) the act or conviction is *waivable* under INA §212 or INA §237; and 2) the act or conviction is connected to the alien's having been battered or subjected to extreme cruelty.

3. Negative Discretionary Determinations

Criminal conduct and convictions will constitute negative discretionary factors in the adjudication of the self-petition.

B. Adjustment of Status to LPR for Approved Self Petitions.

1. INA §212(a)(2)'s crime-related grounds of inadmissibility apply to self petitioners seeking to adjust their status under INA §245(a).

2. Exceptions to the crime of moral turpitude (CMT) bar: 1) Juvenile exception under INA §212(a)(2)(A)(ii)(I); 2) Petty offense exception under INA §212(a)(2)(A)(ii)(II).

3. Waiver of certain grounds of inadmissibility under INA §212(h)(3).

4. Analyze and develop arguments to contest immigration authority's determination that the offense falls within the ground of inadmissibility under INA §212(a)(2).

5. Client must have positive equities to overcome the negative discretionary impact of criminal convictions and criminal conduct.

6. Check for criminal conduct/convictions that occur between the time of approval of self petition and application for adjustment of status.

§3.2 U Visa Applications

As with VAWA self-petitions, criminal conduct and criminal convictions can have a negative affect on the ability of an immigrant victim of domestic violence, sexual assault or trafficking to access the protections offered immigrant victims through the crime victim visa, U visa provisions of the Immigration and Nationality Act.

Be advised that, as of this writing, final government regulations to implement the U visa application and adjustment procedures have not been issued. However, given that the crime-related provisions are part of the statute, it is certain that U visa applicants will need to contend with any criminal arrests/convictions (as outlined below) at the time of applying for interim relief, as well as in their subsequent (post regulations) dealings with USCIS.

A. Filing the U Visa Application

1. INA §212(a)(2)'s crime-related grounds of inadmissibility apply to U visa applicants.

2. INA §212(d)(13) [for U visas] permits the waiver of ANY of the grounds of inadmissibility under INA §212(a) [except INA §212(a)(2) if it is deemed in the public or national interest to do so.

B. Adjustment of Status to Lawful Permanent Residency

1. Adjustment of Status under INA §245(l) [for U visas] - a U visa holder who has been continuously present in the United States for three years may adjust his or her status to that of lawful permanent resident, when such adjustment is justified on humanitarian grounds, to ensure family unity, or when it is otherwise in the public interest.

2. INA §245(l) regarding adjustment of status for U visa holders does NOT require a re-adjudication of admissibility under INA §212(a)(2). There are no crime-related statutory bars for U visa adjustment applicants. However, the criminal grounds of deportability do apply and would likely prompt a denial of the adjustment application and result in the initation of removal proceedings.

3. Applicant must overcome the negative discretionary impact of criminal convictions and criminal conduct.

§3.3 T Visa Applicants

Criminal conduct and criminal convictions can harm the ability of otherwise eligible trafficking victims to access the protections of the T visa. Be advised that, as of this writing, final government regulations to implement the T visa application and adjustment procedures have not been issued. However, given that the crime-related provisions are part of the statute, it is certain that T visa applicants will need to contend with any criminal arrests/convictions as outlined below at the time of applying for interim relief, as well as in their subsequent (post regulations) dealings with USCIS.

A. Filing the T Visa Application

1. INA §212(a)(2)'s crime-related grounds of inadmissibility apply to T visa applicants.

2. INA §212(d)(13)(B) [for T visas] permits the waiver of ANY of the grounds of inadmissibility under INA §212(a)(2) where the activities resulting in inadmissibility were "caused by, or incident to, the victimization".

B. Adjustment of Status

1. Adjustment of status under INA §245(l) [for T visas] – unlike U visa adjustment, T visa adjustment applicants must: 1) show GMC, and 2) admissibility under INA §212(a)(2). INA §245(l)(2) permits the INA to waive statutory ineligibility for T visa adjustment applicants in relation to these provisions.

2. Applicant must overcoming the negative discretionary impact of criminal convictions and criminal conduct.

§3.4 Asylum Applications

A. Filing the Asylum Application

1. Application barred if person convicted of "a particularly serious crime" (PSC) INA §208(b)(2)(A)(ii). Aggravated felonies are per se PSCs. INA §208(B)(i).

2. Applicant barred where government has reason to believe applicant has committed a serious non-political crime outside of U.S. asylum application. INA §208(b)(2)(A)(iii).

3. Assuming the crime does not trigger either of these bars, it will constitute a negative discretionary factor to be overcome.

B. Adjustment of Status

1. INA §212(a)(2)'s crime-related grounds of inadmissibility apply to asylees seeking to adjust their status under INA §209. See INA §209(a)(2).

2. Exceptions to the crime of moral turpitude (CMT) bar: 1) Juvenile exception under INA §212(a)(2)(A)(ii)(I); 2) Petty offense exception under INA §212(a)(2)(A)(ii)(II).

3. Waiver of most grounds of inadmissibility under INA §209(c).

4. Analyze and develop arguments to contest immigration authority's determination that the offense falls within the ground of inadmissibility under INA §212(a)(2).

5. Client must have positive equities to overcome the negative discretionary impact of criminal convictions and criminal conduct.

6. Check for criminal conduct/convictions that occur between the time of approval of self petition and application for adjustment of status.

§3.5 I-751 Waiver Applications

1. The I-751 waiver requirements at INA §216(c)(4) do not contain any specific crime-related bars to seeking the waiver.

2. Crime-related grounds of deportation at INA §237(a)(2) do apply to conditional permanent residents. Thus, deportable convictions will

likely result in a denial of the I-751 waiver application and initiation of removal proceedings.

3. Criminal convictions that do not trigger grounds of deportation will constitute negative discretionary factors to be overcome.

Chapter Four: Immigrant Survivors In Removal Proceedings Under INA §240

§4.1 Step One: Is the person removable as charged by the government?

A. Burden of Proof (BOP) Issues – INA §240(c)

1. Where noncitizen cannot show lawful admission, BOP will be on noncitizen to show s/he is entitled to be admitted. INA §212(a)(2)'s crime-related grounds will apply here.

2. Where noncitizen has been lawfully admitted, BOP will be on the government to show by "clear and convincing evidence" that noncitizen is deportable under INA §237's grounds of deportation.

B. Contesting Removal for Criminal Convictions

Noncitizens must always investigate arguments to contest that a particular conviction is, in fact, a ground of removal (ie. Conviction is not a crime of violence or a crime of moral turpitude). This requires obtaining all relevant criminal documents and doing a categorical analysis of the criminal statute and offense.

§4.2 Step Two: What relief from removal is noncitizen eligible to apply for in INA §240 removal proceedings?

A. Affirmative Applications that Can Be Renewed Before the Immigration Judge in Removal Proceedings:

If denied by USCIS, the immigration judge has the power to consider again in removal proceedings the applications listed below. The same rules apply to these applications before the immigration judge.

1. Adjustment of Status applications of approved self petitioners;
2. Adjustment of status applications of approved U visas;
3. Adjustment of status applications of approved T visas;
4. Asylum applications;

5. Adjustment of status for aslyees;
6. Denied I-751 wavier applications.

B. Affirmative Applications that Cannot Be Made Before the Immigration Judge in Removal Proceedings:

The immigration judge has no power (jurisdiction) to adjudicate the following petitions:

1. VAWA self petitions;
2. U visa applications;
3. T visa applications;
4. I-130 applications;
5. Initial I-751 wavier applications.

C. Impact of Crimes on Applications for VAWA Cancellation of Removal Under INA §240A(b)(2)

1. Good Moral Character (GMC) - As in the case of VAWA self-petitions battered immigrants applying for relief under VAWA cancellation of removal must prove good moral character.

    a. Under INA §101(f) there are several crime-related bars: 101(f)(3) incorporates almost all crime-related grounds of inadmissibility under INA §212(a)(2); 101(f)(7) bars persons who have been confined to a penal institution for an aggregate period of 180 days or more; 101(f)(8) bars persons who have been convicted of aggravated felonies under INA §101(a)(43).

    b. GMC waiver under INA §240A(2)(C).

2. Crime–related bars to VAWA cancellation of removal under INA §240A(b)(2)(A)(iv). Immigrant victims will be barred from VAWA cancellation if they are:

    a. Inadmissible for crime-related grounds under INA §212(a)(2);

    b. Deportable under INA §237(a)(2) [NOTE: this arguably only applies to persons charged with removal under INA§237];

    c. Persons convicted of aggravated felonies;

    d. Applicant will not be barred for certain convictions that trigger deportability under INA §237(a)(E) where she can show eligibility for the waiver of this ground per INA §237(a)(7).

3. Discretionary determinations – Crimes that do not trigger any of the statutory bars listed above will constitute negative discretionary factors which must be overcome.

D. DV Waiver under INA §237(a)(7) for certain crimes under INA §237(a)(2)(E).

1. Waives deportation for domestic violence or stalking convictions that trigger deportation under INA §237(a)(2)(E)(i);

2. Waives deportation under INA §237(a)(2)(E)(ii) for a violation of a protection order;

3. Eligibility as outlined at INA §237(a)(2)(A)(i):

   a. Noncitizen acted in self defense;

   b. Violated order intended for victim's benefit;

   c. Conviction at issue:

- did not result in serious bodily injury;
- involved a connection between the crime and the abuse.