

APPENDIX C

Aggravated Felony Practice Aids

The Immigration and Nationality Act (INA) includes a definition of “aggravated felony” for immigration purposes in INA 101(a)(43), 8 U.S.C. 1101(a)(43), contained in Appendix J. This Appendix contains three practice aids designed to assist the criminal defense practitioner in determining whether a specific criminal offense (felony or misdemeanor) is or might be deemed to be an aggravated felony:

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For information on the various immigration consequences of an aggravated felony conviction, see Chapter 3 (Possible Immigration Consequences of a Noncitizen Criminal Defendant Client’s Case).

For strategies to avoid conviction of an aggravated felony, see Chapter 5 (Strategies for Avoiding the Potential Negative Immigration Consequences of a New York Criminal Case).

APPENDIX C-1

Aggravated Felony Categories Listed in Statutory Order

- (A) Murder, rape, or sexual abuse of a minor
- (B) Illicit trafficking in a controlled substance
- (C) Illicit trafficking in firearms or destructive devices
- (D) Certain offenses relating to laundering of monetary instruments or engaging in monetary transactions in property derived from specific unlawful activity IF THE AMOUNT OF THE FUNDS EXCEEDED \$10,000
- (E) Certain explosive materials and firearms offenses
- (F) Crime of violence FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR
- (G) Theft or burglary offense FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR
- (H) Certain offenses relating to the demand for or receipt of ransom
- (I) Certain offenses relating to child pornography
- (J) Certain offenses relating to racketeer influenced corrupt organizations, or certain gambling offenses, FOR WHICH A SENTENCE OF ONE YEAR IMPRISONMENT OR MORE MAY BE IMPOSED

- (K) Offense relating to the owning, controlling, managing, or supervising of a prostitution business; or certain offenses relating to transportation for the purpose of prostitution; or certain offenses relating to peonage, slavery, and involuntary servitude
- (L) Certain offenses relating to gathering or transmitting national defense information, disclosure of classified information, sabotage, or treason
- (M) Offense that involves fraud or deceit IN WHICH THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000; or certain offenses relating to tax evasion IN WHICH THE REVENUE LOSS TO THE GOVERNMENT EXCEEDS \$10,000
- (N) Certain offenses relating to alien smuggling, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent
- (O) Certain improper entry or illegal reentry offenses committed by an alien who was previously deported on the basis of an aggravated felony conviction
- (P) Offense which is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument, or certain other offenses relating to document fraud, FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST 12 MONTHS, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent
- (Q) Offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more
- (R) Commercial bribery, counterfeiting, forgery, trafficking in vehicles the identification numbers of which have been altered FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR
- (S) Obstruction of justice, perjury or subornation of perjury, bribery of a witness FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR
- (T) Offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years imprisonment or more may be imposed
- (U) Attempt or conspiracy to commit any of the above offenses

APPENDIX C-2
Alphabetical List of Offenses
That Are or Might Be Deemed
Aggravated Felonies

NOTE: Bracketed capital letter references at the end of the title of each offense listed below are to the relevant subsection of the statutory definition of “aggravated felony” (see Appendix C-1 and Appendix J).

Accessory after the fact [S] if deemed an “obstruction of justice” offense and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Aggravated sexual abuse [A, F], see entry below for “Sexual abuse”

Aggravated unlicensed operation of a vehicle [F] *IF THE OFFENSE INCLUDES AN ELEMENT OF OPERATING THE VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG* (e.g., NY VTL 511(3)(a)(i)) and is deemed a “crime of violence” (see entry below for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Alien smuggling offense [N] described in 8 U.S.C. 1324(a)(1)(A) or (2), 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 the Immigration and Nationality Act

Arson [F] if deemed a “crime of violence” (see entry below for “Crime of violence”) *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Assault [F] if deemed a “crime of violence” (see entry below for “Crime of violence”) *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Attempt [U] to commit any aggravated felony

Bail jumping [T] if the underlying offense is a felony for which a sentence of 2 years’ imprisonment or more may be imposed

Bribery [S, R] if deemed an offense relating to “bribery of a witness” or “commercial bribery,” and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Burglary [G, F] if deemed a “burglary” offense or a “crime of violence” (see entry below for “Crime of violence”), and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

N.Y. NOTE: There may be an argument that NY Burglary in the third degree is not a “burglary” offense based on the U.S. Supreme Court decision in *Taylor v. U.S.*, 495 U.S. 575 (1990), discussed in Chapter 5, section 5.6; however, depending on what the record of conviction shows, it might be deemed a “crime of violence.”

Child pornography offense [I] described in 18 U.S.C. 2251, 2251A, or 2252

Commercial bribery offense [R] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Conspiracy [U] to commit any aggravated felony

Contempt [S] if deemed an “obstruction of justice” offense and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Controlled substance offense [B] if deemed “illicit trafficking in a controlled substance,” including a “drug trafficking crime” as defined in 18 U.S.C. 924(c)

DEFINITION: “Controlled substance” is defined in the federal Controlled Substances Act at 21 U.S.C. 802(6) to include a drug or other substance, or immediate precursor, included in the five federal schedules of controlled substances published at 21 U.S.C. 812.

DEFINITION: “Drug trafficking crime” is defined in 18 U.S.C. 924(c) to include “any felony punishable” under the federal Controlled Substances Act (21 U.S.C. 801 et seq.), or the federal Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), AND simple possession drug offenses when the defendant has a prior drug conviction (which has become final) or is convicted of possession of more than five grams of cocaine base, meaning crack cocaine.

N.Y. NOTE: For immigration law purposes, the Board of Immigration Appeals has held that this aggravated felony category includes a state controlled substance offense if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered “illicit trafficking” as commonly defined, or (2), regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act. *Matter of L-G-*, Int. Dec. #3254 (BIA 1995). Under this interpretation, this aggravated felony category includes the following New York offenses:

- NY Criminal Sale of a Controlled Substance or Criminal Sale of Marihuana offenses, whether felony or misdemeanor, with the possible exception of Criminal Sale of Marihuana in the fifth degree (see “Criminal sale of marijuana”);
- NY Criminal Possession of a Controlled Substance or Criminal Possession of Marijuana offenses, whether felony or misdemeanor, where the defendant (1) is convicted under a subsection that includes an intent to distribute element, or (2) has a prior controlled substances conviction which has become final, or (3) is convicted of possession of more than five grams of cocaine base (meaning crack cocaine); and
- probably other NY controlled substance offenses that are felonies and might be considered “illicit trafficking,” such as Criminally Using Drug Paraphernalia in the first degree or Criminal Possession of Precursors of Controlled Substances.

Under the BIA’s interpretation in *Matter of L-G-*, this aggravated felony category does *not* include a first-time conviction for simple possession of a controlled substance (with the exception of possession of more than five grams of crack cocaine) or marijuana, because such an offense is not a felony under federal law. See *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996)(deferring to the BIA interpretation in *Matter of L-G-*). Note, however, that, for illegal reentry criminal sentencing purposes, the U.S. Court of Appeals for the Second Circuit, as well as the Courts of Appeals in some other Circuits, have held that this aggravated felony category includes *any* state felony conviction for an offense punishable under the federal Controlled Substances Act, whether or not the offense would be classified as a felony under the federal Act. See *United States v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999).

Counterfeiting offense [R, M] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*, or if the offense is deemed a “fraud or deceit” offense (see

entry below for “Fraud or deceit” offense) and *IF THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000*

Crime of violence [F] as defined in 18 U.S.C. 16 *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

DEFINITION: “Crime of violence” is defined in 18 U.S.C. 16 to include “(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.”

Criminal contempt [S], see entry above for “Contempt”

Criminal facilitation, see entry for “Criminal Facilitation” in Appendix E

Criminal mischief [F], see entry below for “Mischief, criminal”

Criminal possession of a controlled substance [B], see entry above for “Controlled substance offense”

Criminal possession of a weapon [E, F], see entry below for “Weapon, possession”

Criminal possession of marijuana [B], see entry above for “Controlled substance offense”

Criminal possession of precursors of controlled substances [B], see entry above for “Controlled substance offense”

Criminal possession of stolen property [G], see entry below for “Theft offense”

Criminal sale of a controlled substance [B], see entry above for “Controlled substance offense”

Criminal sale of a firearm [C], see entry below for “Firearm or explosive materials offense”

Criminal sale of marijuana [B], see entry above for “Controlled substance offense”

N.Y. NOTE: There may be an argument that NY Criminal Sale of Marijuana in the fifth degree is not “illicit trafficking in a controlled substance” by analogy to the federal law treatment of distribution of marijuana for no remuneration as a misdemeanor rather than as a “drug trafficking crime” (see 21 U.S.C. 841(b)(4)).

Criminal solicitation, see entry for “Criminal Solicitation” in Appendix E

Criminal trespass [F], see entry below for “Trespass”

Criminally using drug paraphernalia [B], see entry above for “Controlled substance offense”

Document fraud offense [P] described in 18 U.S.C. 1546(a), 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 the Immigration and Nationality Act *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST 12 MONTHS*

Driving while ability impaired by drugs [F], if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Driving while intoxicated [F], if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Drug paraphernalia, criminally using [B], see entry above for “Controlled substance offense”

Explosive materials offense [C, E, F], see entry below for “Firearm or explosive materials offense”

Facilitation, see entry for “Criminal Facilitation” in Appendix E

Firearm or explosive materials offense [C, F, E] under category [C] if deemed “illicit trafficking in firearms or destructive devices or in explosive materials;” or under category [F] if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*; or under category [E] if described in 18 U.S.C. 842(h) or (i) or 844(d),(e),(f),(g),(h), or (i) (relating to explosive materials offenses), 18 U.S.C. 922(g)(1),(2),(3),(4) or (5),(j),(n),(o),(p), or (r) or 924(b) or (h) (relating to firearms offenses), or in section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses)

DEFINITION: “Firearm” is defined in 18 U.S.C. 921(a)(3) to include “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.”

DEFINITION: “Destructive device” is defined in 18 U.S.C. 921(a)(4) to include “(A) any explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projection by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled. The term ‘destructive device’ shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational, or cultural purposes.”

DEFINITION: “Explosive material” is defined in 18 U.S.C. 841(c) to include “explosives, blasting agents, and detonators.” For specific detailed definitions of “explosives,” “blasting agents,” and “detonators,” see 18 U.S.C. 841(d),(e), & (f).

N.Y. NOTE: New York firearm offenses that may constitute aggravated felonies include those covered under category [C] as an “illicit trafficking” offense (e.g., Criminal sale of a firearm) or under category [F] as a “crime of violence” (any firearm offense that meets the federal definition of a crime of violence in 18 U.S.C. 16 — see entry above for “Crime of violence”) with a prison sentence of one year or more. It is uncertain to what extent category [E] includes additional state firearm offenses. If the Board of Immigration Appeals and the courts determine that category [E] covers state analogues to those federal offenses cited in category [E], this category might be deemed to cover, for example, a NY Criminal Possession of Weapon conviction involving a machine gun.

Forgery offense [R, M] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*, or if the offense is deemed a “fraud or deceit” offense (see entry below for “Fraud or deceit” offense) and *IF THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000*

Fraud or deceit offense [M] *IF THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000*

Gambling offense [J] described in 18 U.S.C. 1084 (if it is a second or subsequent offense) or in 18 U.S.C. 1955, and *FOR WHICH A SENTENCE OF ONE YEAR IMPRISONMENT OR MORE MAY BE IMPOSED*

Grand larceny [G] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Hindering prosecution [S] if deemed an “obstruction of justice” offense and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Illegal entry offense [O] described in 8 U.S.C. 1325(a) committed by an alien who was previously deported on the basis of an aggravated felony conviction

Illegal reentry offense [O] described in 8 U.S.C. 1326 committed by an alien who was previously deported on the basis of an aggravated felony conviction

Kidnapping [F, H] if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR* or if described in 18 U.S.C. 875, 876, 877, or 1202

Larceny, grand [G] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Larceny, petit [G] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF ONE YEAR*

N.Y. NOTE: There may be an argument that NY Petit Larceny cannot be deemed an aggravated felony because it is a misdemeanor under state law; however, this argument has been specifically rejected by one federal court. See *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999).

Mail fraud [M] if the offense is deemed a “fraud or deceit” offense (see entry above for “Fraud or deceit” offense) and *IF THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000*

Manslaughter [F], if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Marijuana offense [B], see entry above for “Controlled substance offense”

Mischief, criminal [F] if deemed a “crime of violence” (see entry above for “Crime of violence”), and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Money laundering offense [D] described in 18 U.S.C. 1956 or 1957 *IF THE AMOUNT OF THE FUNDS EXCEEDED \$10,000*

Murder [A]

National security offense [L] described in 18 U.S.C. 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage), 2381 or 2382 (relating to treason), or in 50 U.S.C. 421

Obstruction of justice offense [S] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Passport fraud offense [P] described in 18 U.S.C. 1543, 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 the Immigration and Nationality Act *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST 12 MONTHS*

Peonage or slavery offense [K] described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, or 1588

Perjury or subornation of perjury [S] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Petit larceny [G] *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF ONE YEAR*

N.Y. NOTE: There may be an argument that NY Petit Larceny cannot be deemed an aggravated felony because it is a misdemeanor under state law; however, this argument has been specifically rejected by two federal courts. See *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999); *Jaafar v. INS*, 199 WL 1133682 (W.D.N.Y. 1999).

Prostitution-promoting offense [K] if deemed an offense that relates to the owning, controlling, managing, or supervising of a prostitution business, an offense described in 18 U.S.C. 2421, 2422, or 2433 (relating to transportation for the purpose of prostitution), or an offense described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, or 1588 (relating to peonage, slavery, and involuntary servitude)

Racketeer influenced corrupt organization (RICO) offense [J] described in 18 U.S.C. 1962 *FOR WHICH A SENTENCE OF ONE YEAR IMPRISONMENT OR MORE MAY BE IMPOSED*

Ransom offense [H] described in 18 U.S.C. 875, 876, 877, or 1202

Rape [A, F] under category **A** if deemed “rape” or “sexual abuse of a minor;” or under category **F** if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Robbery, [G, F] if deemed a “theft” offense or a “crime of violence” (see entry below for “Crime of violence”), and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Sexual abuse of a minor [A, F] under category **A** if deemed “rape, or sexual abuse of a minor;” or under category **F** if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

N.Y. NOTE: There may be arguments that a NY Sexual Abuse offense should not be deemed an aggravated felony if, for example, the record of conviction does not establish that the victim was under the age of 16 and/or the offense is not a felony (see discussion in Chapter 5, section 5.5).

Smuggling, alien [N] described in 8 U.S.C. 1324(a)(1)(A) or (2), 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 the Immigration and Nationality Act

Sodomy [A, F] under category [A] if deemed “rape” or “sexual abuse of a minor;” or under category [F] if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Solicitation, see entry for “Criminal Solicitation” in Appendix E

Stalking [F] if deemed a “crime of violence” (see entry above for “Crime of violence”), and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Stolen property, possession [G] if deemed “receipt of stolen property” and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Tax evasion offense [M] described in section 7201 of the Internal Revenue Code of 1986 *IF THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000*

Theft offense [G] if deemed a “theft” offense and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Trespass [F], if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Vehicle trafficking [R] if offense relating to trafficking in vehicles the identification numbers of which have been altered and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Vehicular manslaughter [F], if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*

Weapon, Possession [F, E] under category [F] if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*; or under category [E] if described in 18 U.S.C. 922(g)(1),(2),(3),(4) or (5),(j),(n),(o),(p), or (r) or 924(b) or (h), or in section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses) (see entry above for “Firearm or explosive materials offense”)

N. Y. NOTE: New York weapon possession offenses that may constitute aggravated felonies include those covered under category [F] as a “crime of violence” (any weapon offense that meets the federal definition of a crime of violence in 18 U.S.C. 16 — see entry above for “Crime of violence”) with a prison sentence of one year or more. It is uncertain to what extent category [E] includes additional state weapon offenses involving firearms. If the Board of Immigration Appeals and the courts determine that category [E] covers state analogues to those federal offenses cited in category [E], this category might be deemed to cover, for example, a NY Criminal Possession of Weapon conviction involving a machine gun.

APPENDIX C-3

Sample Aggravated Felony Case Law Determinations

NOTE: A determination as to whether an offense falls within the statutory definition of aggravated felony is based on the elements of the offense as described in the relevant state or federal criminal statute and in the particular individual’s record of conviction. Therefore, an aggravated felony determination relating to an offense in one jurisdiction and to one particular individual’s record of conviction may not offer a conclusive answer for an offense of the same name in another jurisdiction. In addition, some of the cases collected below interpret the definition of aggravated felony for illegal reentry criminal sentencing purposes, rather than for immigration law purposes. In some cases, the definition may be interpreted differently for these different purposes. See, e.g., *United States v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999) (interpreting a “drug trafficking” aggravated felony more broadly for illegal reentry criminal sentencing purposes than for immigration law purposes). Therefore, the cases collected below should be used as the starting point rather than as a substitute for legal research on the particular offense. Capital letter category references under *HOLDING* are to the relevant subsection of the statutory definition of “aggravated felony” (see Appendix C-1 and Appendix J).

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Accessory after the fact	<i>In Re Batista-Hernandez</i> , Int. Dec. 3321 (BIA 1997); <i>In Re Espinoza-Gonzalez</i> , Int. Dec. 3402 (BIA 1999)	18 U.S.C. § 3	AF — category S Note: offense falls under category S only if prison sentence of at least one year imposed
Alien smuggling (transporting alien within the United States)	<i>In Re Ruiz-Romero</i> , Int. Dec. 3376 (BIA 1999)	8 U.S.C. § 1324(a)(1)(A)(ii)	AF — category N
Arson	<i>In Re Palacios</i> , Int. Dec. 3373 (BIA 1998)	Alaska law (1st degree)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Assault and battery with dangerous weapon	<i>Brahimi v. INS</i> , 1999 WL 172795 (D. Mass. 1999)	Mass. Gen. Laws ch. 265, §15A	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Bank larceny	<i>U.S. v. Nwene</i> , 20 F. Supp.2d 716 (D. N.J. 1998)	Unspecified	AF — category G Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary	<i>U.S. v. Solis-Estrada</i> , 62 F.3d 1426 (9th Cir. 1995)	Cal. Penal Code § 460(1) (1st degree)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Child abuse, criminally negligent	<i>In Re Sweetser</i> , Int. Dec. 3390 (BIA 1999)	Col. Rev. Stat. § 18-6-401(1) & (7)	<u>NOT</u> AF under category F
Contempt, criminal	<i>In Re Aldabesheh</i> , Int. Dec. 3410 (BIA 1999)	N.Y. Penal Law § 215.51(b)(i) (1st degree)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Controlled substance, simple possession (first conviction)	<i>Matter of L-G-</i> , Int. Dec. 3254 (BIA 1995)	Louisiana Rev. Stat. § 40:967F(2)	<u>NOT</u> AF under category B (unless possession of more than 5 grams of crack cocaine)
Controlled substance, simple possession (first conviction)	<i>Aguirre v. INS</i> , 79 F.3d 315 (2d Cir. 1996)	N.Y. Penal Law § 220.18 (CPCS, 2nd degree)	<u>NOT</u> AF under category B (deferring to BIA decision in <i>Matter of L-G-</i> , Int. Dec. 3254 (BIA 1995))
Controlled substance, simple possession (first conviction)	<i>U.S. v. Pornes-Garcia</i> , 171 F.3d 142 (2d Cir. 1999)	N.Y. Penal Law § 220.18 (attempted CPCS, 1st degree)	AF — category B (for illegal reentry sentencing purposes)
Controlled substance, simple possession (second conviction)	<i>U.S. v. Garcia-Olmedo</i> , 112 F.3d 399 (9th Cir. 1997)	Arizona law	AF — category B
Counterfeiting	<i>Bazuaye v. INS</i> , 1997 WL 122768 (S.D.N.Y. 1997)	U.S. law	AF — category M Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000
Driving under the influence	<i>Le v. U.S. Attorney General</i> , 1999 WL 1092112 (11th Cir. 1999)	Fla. Stat. Ann. §§ 316.193(3) 322.34(3)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Driving under the influence, aggravated	<i>In Re Magallanes</i> , Int. Dec. 3341 (BIA 1998)	Ariz. Rev. Stat. Ann. §§ 28-692(a)(1); 28-697(A)(1), (D), (E), (G)(1), (H), and (I)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Driving while intoxicated	<i>In Re Puente</i> , Int. Dec. 3412 (BIA 1999); <i>Camacho-Marroquin v. INS</i> , 188 F.3d 649 (5th Cir. 1999)	Texas Penal Code §§ 49.04 & 49.09	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Forgery	<i>In Re Aldabesheh</i> , Int. Dec. 3410 (BIA 1999)	N.Y. Penal Law § 170.10(2) (2nd degree)	AF — category R Note: offense falls under category R only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Fraud, attempt to commit	<i>In Re Onyido</i> , Int. Dec. 3379 (BIA 1999)	Ind. Code § 35-43-5-4-(10)	AF — U/M Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000
Fraud (unauthorized possession of access devices with intent to defraud)	<i>Agdachian v. INS</i> , 194 F.3d 1316 (9th Cir. 1999)	Unspecified	AF — category M (based on value of loss specified in plea agreement) Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000
Indecency with a child by exposure	<i>In Re Rodriguez-Rodriguez</i> , Int. Dec. 3411 (BIA 1999)	Texas Penal Code § 21.11(a)(2)	AF — category A
Kidnapping	<i>Choeum v. INS</i> , 129 F.3d 29 (1st Cir. 1997)	New York law	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Mail fraud	<i>Akorede v. Perryman</i> , 1999 WL 262129 (N.D. Ill. 1999)	Unspecified	AF — category M Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000
Manslaughter, attempted	<i>In Re Yeung</i> , Int. Dec. 3297 (BIA 1996)	Florida law	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter, involuntary	<i>Matter of Alcantar</i> , 20 I. & N. Dec. 801 (BIA 1994)	Illinois law	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter, involuntary	<i>Park v. Schlitten</i> , 1999 WL 138887 (N.D. Cal. 1999)	Cal. Penal Code § 192(b)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Marijuana, criminal sale (state misdemeanor)	<i>U.S. v. Graham</i> , 927 F. Supp. 619 (W.D.N.Y. 1996)	New York law	AF — category B
Misprision of felony	<i>In Re Espinoza-Gonzalez</i> , Int. Dec. 3402 (BIA 1999)	18 U.S.C. § 4	<u>NOT</u> AF under category B (even if underlying offense is a drug-trafficking felony)

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Negligence, criminal (criminally negligent child abuse)	<i>In Re Sweetser</i> , Int. Dec. 3390 (BIA 1999)	Col. Rev. Stat. § 18-6-401(1) & (7)	<u>NOT</u> AF under category S
Obstructing and hindering	<i>In Re Joseph</i> , Int. Dec. 3398 (BIA 1999)	Maryland common law	<u>NOT</u> AF under category S
Petit larceny (misdemeanor)	<i>U.S. v. Graham</i> , 169 F.3d 787 (3d Cir. 1999); <i>Jaafar v. INS</i> , 1999 WL 1133682 (W.D.N.Y. 1999)	N.Y. Penal Law § 155.25	AF — category G Note: offense falls under category G only if prison sentence of at least one year imposed
Rape	<i>Castro-Baez v. Reno</i> , 1999 WL 281093 (N.D. Cal. 1999)	Cal. Penal Code 261(a)(3)	AF — category A
Rape (statutory rape)	<i>In Re B-</i> , 1996 WL 170049 (BIA 1996)	Mar. Ann. Code Art. 27, § 463(a)(3) (2nd degree)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a minor (indecent with a child by exposure)	<i>In Re Rodriguez-Rodriguez</i> , Int. Dec. 3411 (BIA 1999)	Texas Penal Code § 21.11(a)(2)	AF — category A
Sexual assault (lewd assault), attempted	<i>Ramsey v. INS</i> , 55 F.3d 580 (11th Cir. 1995)	Florida Statutes §§ 777.04(1) & 800.04(1)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault of a child (statutory rape)	<i>Xiong v. INS</i> , 173 F.3d 601 (7th Cir. 1999)	Wis. Stat. § 948.02(2)	<u>NOT</u> AF under category F* (because consensual sex precluded finding of a “crime of violence,” absent substantial age difference) * but court did not reach issue of whether offense was “sexual abuse of a minor” under category A
Sexual assault of a child	<i>U.S. v. Alas-Castro</i> , 184 F.3d 812 (8th Cir. 1999)	Nebraska law	AF — category F (because “substantial risk that force may be used;” even if no force actually used) Note: offense falls under category F only if prison sentence of at least one year imposed
Solicitation to possess marijuana for sale	<i>Leyva-Licea v. INS</i> , 187 F.3d 1147 (9th Cir. 1999)	Ariz. Rev. Stat. §§ 13-1002(A) 13-305(A) (2)(B)(5)	<u>NOT</u> AF under category B (even if underlying offense is a drug-trafficking offense)

APPENDIX C

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Stolen property, possession	<i>U.S. v. Martinez-Vasquez</i> , 1995 WL 918357 (D. Nev. 1995)	N.R.S. 205.275 (Nevada)	AF — category G (because offense included in definition of theft under state law) Note: offense falls under category G only if prison sentence of at least one year imposed
Terrorism	<i>In Re S-S-</i> , Int. Dec. 3317 (BIA 1997)	Iowa Code Annotated § 708.6	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Theft, misdemeanor (petit larceny)	<i>U.S. v. Graham</i> , 169 F.3d 787 (3d Cir. 1999); <i>Jaafar v. INS</i> , 1999 WL 1133682 (W.D.N.Y. 1999)	N.Y. Penal Law § 155.25	AF — category G Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, petty (including misappropriation of labor)	<i>U.S. v. Esparza-Ponce</i> , 7 F. Supp.2d 1084 (S.D. Cal. 1998)	Cal. Penal Code § 484	AF — category G Note: offense falls under category G only if prison sentence of at least one year imposed
Trespass, criminal	<i>U.S. v. Delgado-Enriquez</i> , 188 F.3d 592 (5th Cir. 1999)	Col. Rev. Stat. Ann. § 18-4-502	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed