

## GLOSSARY OF IMMIGRATION TERMS

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### A

- "A" Number:** An eight digit number (or nine digit, if the first number is a zero) beginning with the letter "A" that the DHS gives to some non-citizens.
- Adjustment of Status:** A process by which a non-citizen in the United States becomes a lawful permanent resident without having to leave the U.S.
- Administrative Order of Removal:** A removal order pursuant to 8 U.S.C. § 1228. Non-lawful permanent residents with aggravated felony convictions can be removed pursuant to these orders, without any right to see an immigration judge.
- Admission:** The decision of the DHS to allow a non-citizen at the United States border or international airport or seaport to enter the United States.
- Admissible:** A non-citizen who may enter the U.S. because he/she is not excludable for any reason or has a waiver of excludability.
- Aggravated Felony:** Defined at INA § 101(a)(43). An aggravated felony includes many crimes that can be categorized into charged-based and sentence-based aggravated felonies.
- Alien:** A person who is not a citizen or national of the United States.
- Alien Registration Receipt Card:** The technical name for a "green card," which identifies an immigrant as having permanent resident status.
- Aliens Previously Removed:** Ground of inadmissibility, for persons previously removed for anywhere from five years to twenty years depending on prior circumstances.

**Aliens Unlawfully Present:** Ground of inadmissibility for three years for one unlawfully present in the U.S. for more than 180 days but less than one year commencing April 1, 1997 or for ten years if unlawfully present for one year or more.

**Asylee:** A person who is granted asylum in the United States.

**Asylum:** A legal status granted to a person who has suffered harm or who fears harm because of his/her race, religion, nationality, political opinion or membership in a particular social group.

## B

**Board of Immigration Appeals (BIA):**

The highest administrative body for immigration appeals and for interpretation of the immigration law. Immigration Court decisions are appealed to the BIA. Published BIA decisions are often subject to *Chevron* deference by the circuit courts and Supreme Court.

**Bond:** A person in immigration custody may be eligible for immigration bond. However, most non-citizens with certain crimes are subject to mandatory detention under 8 USC § 1226(c).

## C

**Cancellation of Removal:** Discretionary remedy for an LPR who has been a permanent resident for at least five years and has resided continuously in the United States for at least seven years after having been admitted in any status and has not been convicted of an aggravated felony, or anyone physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application, who has been a person of good moral character during such period, has not been convicted of certain offenses and who establishes that removal would result in extreme hardship to the U.S. citizen or LPR spouse, parent, or child.

**Citizen (USC):** Any person born in the fifty United States, Guam, Puerto Rico, or the U.S. Virgin Islands; or a person who has naturalized to become a U.S. citizen. Some people born abroad are also citizens if their parents were citizens (either acquired or derived citizenship).

**Convention Against Torture (CAT):**

International treaty that prevents the United States from returning a person to a country where he/she will be tortured by the government or with the government's acquiescence.

**Conviction:**

Formal judgment of guilt entered by a court or, if adjudication of guilt was withheld, if a judge or jury has found the person guilty or the person has entered a plea of guilty or *nolo contendere* and has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty or restraint.

**Crime of Violence:**

Under 8 USC § 1182(a)(2), crime of violence for immigration purposes is an offense that meet the definition of a crime of violence under 8 USC § 16. However, the definition of a crime of violence for immigration purposes is constantly evolving due to new litigation.

**Criminal Ground of Inadmissibility:**

Found at 8 USC § 1182(a)(2), reasons that a person with criminal convictions may be inadmissible to the United States.

**Criminal Ground of Deportability:**

Found at 8 USC § 1227(a)(2), reasons that a person with criminal convictions may be removed from the United States.

**Criminal History:**

Any contact that a person has had with any law enforcement agency, even if contact did not result in a conviction.

**Crime Involving Moral Turpitude (CIMT):**

There is no statutory definition for what constitutes a CIMT. Generally, any crime that involves deceit, and/or theft, intended violence or serious bodily harm.

**D**

**Department of Homeland Security (DHS):**

The federal department charged, in part, with implementing and enforcing immigration law and policy.

**Deportable:**

Being subject to removal from the U.S. for violating an immigration law, such as entering without inspection,

overstaying a temporary visa, or being convicted of certain crimes.

**Deportation:**

The removal of a non-citizen from the United States. A deported person cannot ordinarily reenter the United States for five years, ten years, twenty years, or permanently, if deported for certain crimes. A non-citizen cannot be deported without a hearing, unless he/she has been convicted of an aggravated felony and is not an LPR, or has a prior removal order.

**E**

**Entry:**

Being physically present in the U.S. after inspection by the DHS or after entering without inspection.

**Entry Without Inspection (EWI):**

Entering the United States without being inspected by the DHS, such as a person who crosses across the border between the U.S. and Mexico or Canada without permission. This is a violation of the immigration laws.

**Executive Office for Immigration Review (EOIR):**

The Immigration Court and the Board of Immigration Appeals, within the Department of Justice which decides immigration cases.

**Expedited Order of Removal:**

Removal order pursuant to 8 U.S.C. § 1225(b)(1), for a non-citizen who is apprehended near or at the border and is not eligible to be admitted to the United States.

**I**

**Immigration and Customs Enforcement (ICE):**

The agency within the Department of Homeland Security responsible for overseeing detention and release of immigrants and the investigation of immigration-related administrative and criminal violations.

**Immigration and Nationality Act (INA):**

The immigration law that Congress originally enacted in 1952 and has modified repeatedly.

**Immigration and Naturalization Service (INS):**

Former branch of the United States Department of Justice charged with enforcing the immigration laws. On March 1, 2003, the INS ceased to exist. Responsibility for immigration policy and immigration functions is now shared between the Department of Justice and the Department of Homeland Security.

**Immigration History:**

Any contact that a person has had with immigration authorities.

**Immigration Hold:**

A detainer that is placed on a person in criminal custody which will result in the person being transferred to federal immigration custody either when the person attempts to post criminal bond or when criminal proceedings are completed.

**Immigration Judge:**

Administrative judge who presides over removal proceedings.

**Inspection:**

The DHS process of inspecting a person's travel documents at the U.S. border or international airport or seaport.

**L**

**Lawful Permanent Resident (LPR):**

A person who has received a "green card" and whom the DHS has decided may live permanently in the U.S. LPRs eventually may become citizens, but if they do not, they could be deported from the U.S. for certain activities, such as crimes described under INA § 237(a)(2).

**N**

**Naturalization:**

The process by which an LPR becomes a United States citizen. A person must ordinarily have been an LPR for five years before applying for naturalization. A person who became an LPR through marriage to a U.S. citizen and is still married to that person in most cases may apply for naturalization after three years as an LPR.

**Non-citizen:**

Any person who is not a citizen of the U.S., whether legal or undocumented. Referred to in the INA as an "alien."

## O

**Order of Supervision:** Individuals in immigration detention may be released on an order of supervision if they cannot be removed from the United States within a certain time period.

## P

**Parole:** To permit a person to come into the U.S. who may not actually be eligible to enter--often granted for humanitarian reasons, such as to allow a person to seek asylum within the U.S.

**Petty Offense Exception:** If a non-citizen is convicted of a single misdemeanor crime involving moral turpitude, with less than 6 months jail time, the non-citizen may avoid removal (deportation) or at least qualify for immigration relief.

## R

**Reasonable Fear Interview:** An interview with the Asylum Office that determines whether a non-citizen expresses a reasonable fear of returning to his home country. Non-citizens who are not otherwise eligible to see an immigration judge because they are subject to administrative removal orders or reinstatement of removal and who are afraid to return to their home country can request this interview upon transfer to immigration custody.

**Refugee:** A person who is granted permission while outside the U.S. to enter the U.S. legally because of harm or feared harm due to his/her race, religion, nationality, political opinion or membership in a particular social group.

**Reinstatement of Removal:** The process under 8 U.S.C. § 1231(a)(5) by which a previously carried out removal order (i.e., the person was physically deported and then returned) is reused against a non-citizen. Non-citizens subject to reinstatement do not have the right to see an immigration judge except in limited circumstances.

**Relief:** Term used for a variety of grounds to avoid deportation or exclusion.

**Removal Order:** An order, either by the Immigration Court/Board of Immigration Appeals, or by the DHS, that a non-citizen depart from the United States. All removal orders carry a bar to re-entry.

**Removal Proceedings:** Proceedings to enforce departure of persons seeking admission to the US who are inadmissible or persons who have been admitted who are removable.

**Respondent:** The term used for the non-citizen in removal proceedings.

## S

**Stipulated Order of Removal:** A removal entered pursuant to a signed "stipulation" by a non-citizen that he does not have permission to reside in the United States, waives his right to see an immigration judge, and agrees to deportation.

## U

**Undocumented:** A non-citizen whose presence in the U.S. is not known to the DHS and who is residing here without legal immigration status. Undocumented persons include those who originally entered the U.S. legally for a temporary stay and overstayed, and those who entered without inspection.

**United States Citizenship and Immigration Services (USCIS):** The agency within the Department of Homeland Security responsible for adjudicating affirmative applications for immigration benefits.

## V

**Voluntary Departure:** Permission granted to a non-citizen to leave the U.S. voluntarily. The person must have good moral character and must leave the U.S. at his/her own expense, within a specified time. A non-

citizen granted voluntary departure can reenter the U.S. legally in the future.

## **W**

### **Withholding of Removal:**

Relief granted to a person who demonstrates that he/she has or will suffer harm because of his/her race, religion, nationality, political opinion or membership in a particular social group by an individual or group that the government is unable or unwilling to control.

## **REPRESENTING NON-CITIZEN CLIENTS IN CRIMINAL PROCEEDINGS**

*Office of the Federal Public Defender, Wilmington, DE  
September 12, 2014*

PLEASE NOTE: This outline serves as a starting point for criminal defense attorneys representing non-citizen clients in criminal cases. Please contact NIJC's Defender's Initiative for further advice regarding your client's individual case.

### **QUESTION #1, ALWAYS: what is your client's immigration status?**

*Non-citizens fall into different categories:*

- **Lawful permanent residents (LPRs):** individuals who have indefinite legal status in the United States ("green card holders")
- **Persons lawfully present who are not LPRs:** asylees, refugees, visitors, foreign students, individuals with work visas, temporary protected status, or deferred action for childhood arrivals (DACA)
- **Undocumented individuals:** people who entered with a valid temporary status and overstayed or people who entered without inspection

#### **WHEN DETERMINING SOMEONE'S IMMIGRATION HISTORY AND CURRENT STATUS, ASK:**

1. When and how did they arrive in the United States?
  - Without inspection (by crossing the border without detection)?
  - On a valid nonimmigrant visa, such as a tourist or student visa?
  - As a lawful permanent resident?
  - Through the use of false documents, such as a foreign passport with a U.S. visa, an LPR card, or a U.S. passport?
2. If in lawful status, how did they obtain this status (via family, work, 1980's amnesty program, refugee/asylee status)?

3. Have they ever had an encounter with immigration officials or seen an immigration judge in the past? Within the interior of the U.S. or at the border/within 100 miles of the border? What happened?

## What is your client's criminal history?

Find out your client's **COMPLETE** criminal history:

- Some non-citizens may face removal based on prior criminal convictions, even convictions that are decades old
- Multiple convictions may trigger certain negative immigration consequences
- All criminal history is relevant, regardless of whether the individual received jail time and regardless of whether the crime was a misdemeanor or felony.

### IS YOUR CLIENT'S OFFENSE A CONVICTION FOR IMMIGRATION PURPOSES?

*Under 8 USC § 1101(a)(48)(A), an offense is a conviction under immigration law where:*

- Judge/jury finds the non-citizen guilty; or non-citizen enters a guilty or "nolo contendere" plea; or non-citizen admits sufficient facts to warrant finding of guilt  
AND
- A judge orders some form of punishment, penalty, or restraint on liberty.

## Is your client already inadmissible or deportable, or will their pending charge make them inadmissible or deportable?

**REMEMBER**, any individual who is present in the United States without lawful status is subject to removal. Individuals without lawful status may be subject to additional criminal grounds of inadmissibility or deportability. Individuals **WITH** lawful status who are not otherwise removable may become inadmissible or deportable under criminal grounds.

### Criminal grounds of inadmissibility:

- Located at 8 U.S.C. § 1182(a)(2)
- Includes:
  - Admissions to or Conviction of a Crime Involving Moral Turpitude (CIMT), 8 U.S.C. § 1182(a)(2)(A)(i)(I)
    - Petty offense exception: ONE misdemeanor CIMT with a sentence under 180 days

- Admissions to or Conviction of **Controlled Substance Violations**, 8 U.S.C. § 1182(a)(2)(A)(i)(II)
- Conviction of 2 or more Crimes with **Aggregate Sentence of 5 Years or more**, 8 U.S.C. § 1182(a)(2)(B)
- Reason to believe that individual is or has been an **illicit trafficker** in any controlled substance, 8 U.S.C. § 1182(a)(2)(C)
- **Prostitution** (within 10 years of admission or adjustment of status) and **commercialized vice**, 8 U.S.C. § 1182(a)(2)(D)
- Reason to believe that individual is involved with **money laundering**, 8 U.S.C. § 1182(a)(2)(I)

**Criminal grounds of deportability:**

- Located at 8 U.S.C. § 1227(a)(2)
- Includes:
  - **Single Crime Involving Moral Turpitude (CIMT)**, 8 U.S.C. § 1227(a)(2)(A)(i):
    - *Committed* within 5 years after the day of admission;
    - Punishable by a sentence of a year or longer.
  - **Multiple CIMTs**, 8 U.S.C. § 1227(a)(2)(A)(ii)
    - Conviction of two or more CIMTs;
    - Not arising out a single scheme;
    - Occuring any time after admission.
  - **Aggravated Felonies**. 8 U.S.C. § 1227(a)(2)(A)(iii), defined by 8 U.S.C. § 1101(a)(43)
  - **Controlled Substance Offenses**, 8 U.S.C. § 1227(a)(2)(B)(i)
    - EXCEPTION: single possession of marijuana less than 30 grams.
  - **Firearms Offenses**, 8 U.S.C. § 1227(a)(2)(C)
  - **Crimes Involving Domestic Violence, Stalking, Child Abuse, Violation of Orders of Protection**, 8 U.S.C. § 1227(a)(2)(E)

## SO WHAT EXACTLY IS A CRIME INVOLVING MORAL TURPITUDE?

- According to the BIA, it is a vile, depraved or immoral act, a violation of the basic duties owed to fellow man, a “reprehensible act.”
- Generally includes offenses that involve intent to cause bodily harm, or to deceive or defraud, or to permanently deprive an owner of property (i.e., theft).
- Reckless acts can sometimes be CIMTs, particularly where great bodily harm results.
- **The following offenses are almost always CIMTs:**
  - Robbery
  - Theft
  - Fraud
  - Bribery
  - Aggravated assault
  - Child abuse
  - Rape
  - Arson
- **Crimes that are usually not CIMTs include:**
  - Domestic violence (if no bodily injury)
  - Simple Battery
  - Possession of a Controlled Substance
  - Possession of a Firearm
  - Driving Under the Influence
- The categorical approach may or may not apply in determining whether your client’s offense is a CIMT, depending on what circuit law controls.

## CONTROLLED SUBSTANCE OFFENSES:

*All drug crimes have severe consequences for non-citizens!*

- Any state or federal conviction relating to a controlled substance as defined at 21 U.S.C. § 802 will render a non-citizen DEPORTABLE, with the exception of a single marijuana possession of 30 grams or less. 8 U.S.C. § 1227(a)(2)(B).
- Any state or federal conviction for a controlled substance violation will render a person INADMISSIBLE, including possession of less than 30 grams of marijuana. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

### *Consequences for LPRs v. non-LPRs:*

- LPRs can seek a waiver of removal if they are convicted of possessory drug offense as long as it is not a drug trafficking offense.
- **NOTE:** Multiple possessory drug offenses will not disqualify an LPR from a waiver so long as the LPR is not charged as a recidivist. In addition, an LPR convicted of manufacture and/or delivery of cannabis may still qualify for a waiver (see aggravated felony section below).
- Non-LPRs with drug offenses will be disqualified from most forms of relief, even if the offense is simple possession and involves a small amount only!

### **AGGRAVATED FELONIES:**

- The term “aggravated felony” is defined by 8 U.S.C. § 1101(a)(43). This section of law contains a laundry list of offenses that can constitute aggravated felonies.
- Attempt and Conspiracy to commit any of the enumerated aggravated felonies are treated the same as if the person was convicted of the aggravated felony. 8 U.S.C. § 1101(a)(43)(U); *See Matter of Richardson*, 25 I. & N. Dec. 226 (BIA 2010)
- There are two primary ways to categorize aggravated felonies:
  - **Charge-Based Aggravated Felonies:** These are convictions that make a non-citizen deportable if the crime meets the definition **regardless of sentence**.
    - **Note:** Misdemeanor offenses, such as sexual abuse of a minor, can constitute an aggravated felony without being a felony under state law.
    - **Sentence-Based Aggravated Felonies:** Offenses that make a non-citizen deportable if the crime meets a certain definition, and a court orders at least one year imprisonment
- Examples of **charge-based or categorical aggravated felonies** are:
  - **Murder**, 8 U.S.C. § 1101(a)(43)(A)
  - **Rape**, 8 U.S.C. § 1101(a)(43)(A)
  - **Sexual Abuse of a Minor**, 8 U.S.C. § 1101(a)(43)(A)
  - **Drug Trafficking**, 8 U.S.C. § 1101(a)(43)(B)
    - Defined in reference to the federal Controlled Substances Act.
    - Simple possession drug offenses are not generally drug trafficking aggravated felonies. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010)
    - Any drug offense that includes elements of buying, selling, manufacturing or delivery will be a drug trafficking aggravated felony **UNLESS** that offense could be committed by transferring a small amount of marijuana to another for no

remuneration (and thus could qualify for federal misdemeanor treatment). See *Moncrieffe v. Holder*, 560 U.S. \_\_\_ (2013).

- PLEA TIP: Plead to misprision of a felony under 18 U.S.C. § 4. Under the categorical approach, courts can only look to the elements of the statute and not the actual underlying conduct. See *Descamps v. United States*, 570 U.S. \_\_; 133 S.Ct. 2276 (2013); *U.S. v. Montes-Flores*, 736 F.3d 357 (4th Cir. 2013).
  - **Many Firearms and Explosive Materials Offenses, including Arson**, 8 U.S.C. § 1101(a)(43)(C), (E)
  - **Offense Relating to Owning, Managing a Prostitution Business, or to Peonage, Slavery, Involuntary Servitude and the Trafficking in Persons**, 8 U.S.C. § 1101(a)(43)(K)
  - **Fraud or Deceit where the Loss to Victim Exceeds \$10,000**, 8 U.S.C. § 1101(a)(43)(M). See *Nijhawan v. Holder*, 557 U.S. 29 (2009)
    - **PLEA AGREEMENT TIP:**
      - Convince the prosecutor to agree to a loss amount of less than \$10,000  
OR
    - Plead to an offense that does not contain elements of fraud or deceit.
  - **Non-Citizen Smuggling**, 8 U.S.C. § 1101(a)(43)(N)
  - **Illegal Re-entry [after deportation on the basis of an aggravated felony]**, 8 U.S.C. § 1101(a)(43)(O)
- Examples of sentence-based aggravated felonies are:
- **Crimes of violence**, 8 U.S.C. § 1101(a)(43)(F)
    - For an offense to constitute a “crime of violence” under immigration law, it must be a crime of violence as defined by 18 U.S.C. § 16.
    - The definition of a crime of violence is constantly evolving as it is a highly litigated area of immigration law.
    - Cannot involve a negligent act. In many circuits, must involve an intentional act.
  - **PLEA AGREEMENT TIP:**
    - Plead to a sentence of less than one year.

- Plead to an offense that involves *a negligent act* rather than intentional act. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004). If that is not possible, a *reckless act* may be okay as well, depending on which circuit law controls.
- NOTE: Even if you are able to obtain a sentence of less than a year, thus avoiding an aggravated felony, your client's conviction may still be considered a CIMT. But more defenses exist for people convicted of CIMTs than of aggravated felonies.
- Theft, 8 U.S.C. § 1101(a)(43)(G)
- Burglary, 8 U.S.C. § 1101(a)(43)(G)
- Receipt of stolen property, 8 U.S.C. § 1101(a)(43)(G)
- Commercial Bribery, 8 U.S.C. § 1101(a)(43)(R)
- Counterfeiting, 8 U.S.C. § 1101(a)(43)(R)
- Forgery, 8 U.S.C. § 1101(a)(43)(R)
- Obstruction of Justice, 8 U.S.C. § 1101(a)(43)(S)
- Perjury, 8 U.S.C. § 1101(a)(43)(S)

#### CAN YOU AVOID A CONVICTION FOR IMMIGRATION PURPOSES?

- Avoid any unnecessary admission of guilt.
- Diversion programs such as "drug school" will likely avoid convictions for immigration purposes, as long as no admission or finding of guilt is required.

See U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 712(F) ("The offender must acknowledge responsibility for his or her behavior, but is not asked to admit guilt.")

#### SENTENCING TIPS:

- Often, avoiding a term of imprisonment of one year or more will determine whether your client remains eligible for immigration relief. However, this is not ALWAYS the case. For example, many offenses are aggravated felonies regardless of their sentence, and some offenses (those involving fraud or deceit, and tax evasion) become aggravated felonies where the amount of

loss is over \$10,000. In other contexts, simply having a certain offense, even if not an aggravated felony and regardless of the sentence imposed, will render your client ineligible for relief.

- The sentence ORDERED matters: To determine whether an offense is an aggravated felony based on its sentence, or to determine whether a misdemeanor CIMT will fall into the petty offense exception, the immigration court will look to the sentence imposed and will not consider whether any portion of the sentence was suspended or probated.

## Is your client eligible for immigration relief that will be affected by a conviction of their pending charge?

### Questions to ask:

1. How long has your client resided in the United States?
2. What family members do they have here? In particular, does your client have an LPR or USC spouse, child, or parent?
3. Does your client fear returning to his home country?
4. Has your client been the victim of a violent crime regarding which they cooperated with law enforcement?
5. Is there any possibility that your client derived or acquired U.S. citizenship through a family member?

### PRIMARY FORMS OF RELIEF:

- **U.S. citizenship:**
  - U.S. citizens cannot be removed or detained by immigration.
  - There are cases where a non-citizen may have acquired or derived U.S. citizenship without being aware of it.
  - U.S. citizens are not subject to any removal grounds and cannot be held in immigration custody.
- **Cancellation of removal for lawful permanent residents:**
  - Discretionary waiver for LPRs who are removable due to crimes. See 8 U.S.C. § 1229b(a).
  - To be eligible, must demonstrate:
    - Five years of LPR status

- At least 7 years presence in the U.S. following admission in any status, prior to commission of offense that makes them inadmissible
  - No aggravated felony convictions!
- **Cancellation of removal for non-permanent residents:**
  - Discretionary waiver based on a showing of exceptional hardship to qualifying relatives (USC or LPR spouse, parent, or child) in the U.S. See 8 U.S.C. § 1229b(b).
  - Must have resided in the United States for at least 10 years prior to placement in removal proceedings. Prior contact with DHS may break the 10 years.
  - EVERY offense that makes an individual inadmissible or deportable on criminal grounds will render them ineligible for non-LPR cancellation of removal!
  - Applicant must also demonstrate that he has not served more than 180 days jail time for ANY offense. Time served for past offenses is added together to calculate this figure.
- **Adjustment of status through family or employment:**
  - A non-citizen may be able to obtain lawful permanent resident status through a family or employment petition for which a visa number is currently available (e.g., petition by USC spouse). See 8 U.S.C. § 1255.
  - In order to seek adjustment of status, except in rare circumstances, the applicant must have entered the United States lawfully, such as on a tourist or student visa.
    - Individuals who do not meet this requirement may be eligible to apply for LPR status from outside the United States, as long as they meet the other requirements/are not subject to any bars.
  - Individuals who are inadmissible may be able to seek a waiver of their grounds of inadmissibility if they can demonstrate extreme hardship a USC or LPR spouse, parent, or child.
  - Drug offenses, except for simple possession of marijuana under 30 grams, can never be waived!
  - False claims to U.S. citizenship cannot be waived!
- **Adjustment of status for refugees and asylees:**
  - For refugees and asylees who have not become LPRs.

- Includes a generous waiver that can waive almost all offenses, EXCEPT drug trafficking. See 8 U.S.C. § 209(c).
  - Still discretionary; must establish that deserves the waiver and that granting the waiver will serve humanitarian or family unity considerations or be in the public interest.
- **Relief for individuals who fear returning to their home country:**
    - Asylum, Withholding of Removal, and relief under the Convention Against Torture (CAT)
    - If your client fears returning to country of origin, he/she may be eligible to seek protection in the United States.
    - Individuals with administrative removal orders and those subject to reinstatement of removal may still request a “reasonable fear” interview with an asylum officer to determine whether they should receive a hearing before an immigration judge for asylum-type protection in the U.S. See 8 C.F.R. § 208.31.
    - Please refer to NIJC’s practice advisory on protection-based relief, available at <http://www.fd.org/docs/select-topics/immigration/practice-advisory-protection-based-relief-from-removal.pdf?sfvrsn=6>
- **U visa:**
    - An individual who has been the victim of a crime and who cooperates with law enforcement in the investigation or prosecution of the crime may be eligible for a U visa.
    - Law enforcement, authority or prosecuting agency must certify that client has been helpful.
    - Criminal defense attorneys often in best position to work with agencies such as the USAO, FBI, DEA, DOL or federal judge to obtain signed certification.
    - Client must demonstrate that he suffered ongoing mental or physical harm as a result of the crime.
- **Other special visas/statuses:**
    - Violence Against Women Act (VAWA)
    - S visa (informants)
    - T visa (victims of human trafficking)
    - DACA (deferred action for childhood arrivals)

## Beyond relief: If your client is transferred to ICE custody, will he be eligible for bond?

- Non-citizens with prior removal orders are not eligible for bond!
- In addition, non-citizens with certain types of convictions are not eligible for bond. These include drug offenses, felony CIMTs, multiple CIMTs, and aggravated felonies. See 8 U.S.C. § 1226(c).
- Non-citizens with *pending* charges and no prior disqualifying offenses will be eligible for bond. It will be a matter of your client's risk of flight and/or dangerousness

## Additional issues in the federal context: defending against illegal reentry charges:

- Please refer to NIJC's practice advisory, *Illegal Reentry Practice Advisory for Federal Defenders* (November 2013), available at <http://www.fd.org/docs/select-topics/immigration/illegal-reentry-practice-advisory-for-federal-defenders.pdf?sfvrsn=6>
- To challenge the validity of a prior removal order, a non-citizen must demonstrate:
  - Exhaustion of any administrative remedies;
  - Deprivation of the opportunity for judicial review; and
  - Removal order was fundamentally unfair. See 8 U.S.C. § 1326(d).
- **ALWAYS DETERMINE:** What kind of removal order does your client have?
  - **Final administrative order of removal pursuant to 8 U.S.C. § 1228;**
    - Lodged against individual if no lawful status and convicted of an aggravated felony
    - Notice of Intent to Issue Administrative Removal Order must allow for representation and inspection of evidence. C.F.R. § 238.1(b)(4).
    - Any challenge to the administrative order must be filed with DHS within 10 days if served in person, 13 if by mail. 8 C.F.R. § 238.1(c)(1).
    - A petition for review must be filed with the court of appeals within 30 days of the issuance of the final administrative removal order.

- TIPS for § 1326 cases:
  - If the regulations in 8 C.F.R. § 238.1 were not complied with, argue that prior order was not lawful and so cannot be used to sustain a charge under 8 U.S.C. § 1326(a) for illegal reentry.
  - Argue that the underlying offense supporting the administrative order is not an aggravated felony and that the order was erroneous.
- Expedited order of removal pursuant to 8 U.S.C. § 1225(b)(1); or
- Order of removal issued by an Immigration Judge pursuant to proceedings under 8 U.S.C. § 1229a, including a stipulated order of removal.
  - Your client may have previously agreed to a “stipulated order of removal,” signed by an Immigration Judge (IJ) pursuant to 8 U.S.C. § 1229a. Stipulated orders of removal entail a waiver of an in-person hearing before an IJ, as well as the waiver of other due process rights.
  - TIP: You may be able to successfully challenge a stipulated removal orders by showing that your client’s waiver of rights was not knowing or intelligent. *U.S. v. Ramos*, 623 F.3d 672 (9th Cir. 2010). Ask:
    - Was your client eligible to fight his removal case?
    - Did your client know that the stipulated order was equivalent to any other removal order?

### **SPECIAL NOTE FOR FEDERAL DEFENDERS – Reinstatement of removal:**

- Typically, non-citizens facing illegal re-entry charges in the federal context are also subject to “reinstatement” of their prior removal order in the immigration context. 8 U.S.C. § 1231(a)(5).
- Note that if you are challenging a prior order of removal, you (or immigration counsel) might also challenge the reinstatement itself as a “final order of removal,” 8 U.S.C. § 1252(a) with a court of appeals.
- A petition for review must be filed with the court of appeals within 30 days of the issuance of the reinstatement notice. 8 U.S.C. § 1252(a)(5)(b)(1). Because individuals facing reinstatement may be transferred to federal criminal custody to face illegal reentry charges, this deadline may occur while they are in criminal custody.

- Individuals subject to reinstatement of removal who fear harm in their country of origin should request a “reasonable fear interview” once they are transferred to ICE custody.

### **Contacting NIJC’s Defender’s Initiative:**

- **Email:** [defenders@heartlandalliance.org](mailto:defenders@heartlandalliance.org)
- **Call:** 312-660-1610
- **Webpage:** <http://www.immigrantjustice.org/programs/defenders-initiative-0>