A VIEW THROUGH THE LOOKING GLASS: HOW CRIMES APPEAR FROM THE IMMIGRATION COURT PERSPECTIVE

Hon. Dana Leigh Marks and Hon. Denise Noonan Slavin[*]

[*] The National Association of Immigration Judges ("NAIJ") is the certified representative and recognized collective bargaining unit which represents the Immigration Judges of the United States. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, an affiliate of the AFL-CIO. This Article was prepared by the current President and Vice President of the NAIJ, Judge Dana Leigh Marks and Judge Denise Noonan Slavin, respectively. The opinions expressed here do not purport to represent the views of the U.S. Department of Justice ("DOJ"), the Executive Office for Immigration Review ("EOIR"), or the Office of the Chief Immigration Judge ("OCIJ").

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INTRODUCTION

Have you ever thought you were speaking the same language, only to discover the meaning of the words was completely different? Surely any American who has been a tourist in England or Australia has had that experience. Those of us who have teenagers face such challenges on almost a daily basis. When viewing crimes from the world of the immigration courts, the certainty that we are talking about oranges instead of apples is a frequent and sometimes perplexing conundrum.

Terms that seem straightforward in the criminal law context have different meanings under our immigration laws. Some dispositions that states treat as rehabilitative and non-criminal are treated as a criminal conviction under the immigration laws. Some non-violent, fairly trivial misdemeanors are considered aggravated felonies under our immigration laws. Seen from the view of the immigration courts, such disconnects and starkly different realities are not infrequent and occur in ever-increasing numbers.

The points of intersection between our criminal laws and immigration laws seem to have multiplied exponentially over the years. With the recent Supreme Court decision of *Padilla v. Kentucky*, the impact of criminal convictions and the ramifications they have under our immigration laws have been acknowledged as crucial concepts that every criminal lawyer has a duty to understand.[1]

The purpose of this Article is to provide a basic overview of a body of law that has been compared as second only to tax law in its complexity.[2] Our goal is to highlight the major areas where criminal laws intersect with and impact noncitizens through the Immigration and Nationality Act.[3] No mere article could be comprehensive in this

1. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1494 (2010). The Third Circuit became the first circuit court of appeals to rule that *Padilla* has retroactive applicability. *See* United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011). Subsequent decisions from other circuits, however, have held that *Padilla* should not be retroactively applied. *See* United States v. Chang Hong, No. 10-6294, 2011 WL 3805763, at *1 (10th Cir. Aug. 30, 2011); Chaidez v. United States, No. 10-3623, 2011 WL 3705173, at *3, *8 (7th Cir. Aug. 23, 2011).

2. *See* Castro-O'Ryan v. U.S. Dep't of Immigration and Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (citation omitted).

3. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.) will hereinafter be referred to as the "Act" or the "INA." Immigration law is exclusively of the federal domain. The U.S. Supreme Court has held that the authority to admit or exclude noncitizens

complicated area of the law that is the subject of voluminous treatises and is subject to constant and rapid revision.[4] However it is our hope to orient non-immigration lawyers and judges to how the outcomes of their work in the criminal courts impact noncitizens when they enter our world, the immigration courts.

This Article is framed as an introduction to "Immigration Law 101," providing information needed to understand the structure of the Act and basic tools to speak the language of that Act.[5] It is intended to help attorneys and judges preserve the intent of criminal court orders, so that they are implemented consistently with the understanding held by the parties at the time of issuance, averting unintended consequences when the conviction is viewed later at the immigration court level. It is our hope that this article will provide a lens through which non-immigration lawyers can peek through to our world and make sense of what they see.

We will start by briefly addressing some common misconceptions held by lawyers and non-lawyers alike. Then we will discuss the basic structure of immigration law and some of its unique terminology. Next, we explain to whom the law applies and where the immigration courts fit into the immigration law scheme. We will then delve more deeply into the central concepts of removability and inadmissibility, using criminal grounds as our point of reference and examples. Then we move on to a discussion of *Matter of Silva-Trevino*, a 2008 Attorney General decision regarding crimes of moral turpitude that has dramatically changed the landscape of the issue of removability for various crimes in immigration courts.[6] We next turn our focus to point out the special ways in which the term "conviction" is defined in the immigration context and how criminal acts can have immigration consequences even when no conviction exists. Next, we provide a very simplified overview of the most common forms of relief sought in the course of removal proceedings. Finally, we will explain the possible impacts of *Padilla v. Kentucky* on pending removal proceedings and prior deportation orders.

from the United States is fundamentally a sovereign act. *See* United States *ex. rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

4. *See, e.g.*, DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES (2002); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK (12th ed. 2010).

5. Please be advised that the citations provided in these footnotes are not intended to be exhaustive, but rather to serve as starting points of authority to research these propositions.

6. *See* Silva-Trevino, 24 I. & N. Dec. 687 (B.I.A. 2008).

I. COMMON MISCONCEPTIONS

In addition to being an extremely complex legal field, immigration law suffers from being a field of law plagued by rampant misconceptions. For example, it is not true that marrying a United States citizen confers automatic immigration status.[7] Many people believe that lawful permanent resident status is guaranteed for life, yet long-time lawful permanent residents, including those who are married to United States citizens and are the parents of United States citizen minor children, can become deportable based on a single misdemeanor conviction.[8] United States citizens cannot help their undocumented parents to legalize their status in the United States until they reach the age of twenty-one.[9] At that juncture there are significant obstacles to lawful status (sometimes ones which cannot be overcome) if, as is generally the case, the parents entered the United States without proper inspection by an immigration official or overstayed a period of nonimmigrant status which was once held by them.[10] Even more surprising to many people, some individuals who were born abroad have automatically inherited United States citizenship and do not even know it.[11]

There are also widely held misconceptions regarding the authority of immigration judges to grant relief. In many cases, an immigration

7. A noncitizen married to a U.S. citizen must first be granted an immigrant visa and then be admitted to the United States at a port of entry or through adjustment of status, at which time the grounds of inadmissibility are applied. *See* 8 U.S.C. § 1181(a) (2006) (requiring that a noncitizen possess a valid unexpired immigrant visa at the time of application for admission); *id.* § 1182(a) (listing the grounds of inadmissibility under which a noncitizen will be rendered ineligible for admission to the United States); *id.* § 1255(a)(2) (requiring that a noncitizen be eligible for an immigrant visa and be admissible to qualify for adjustment of status).

8. *See* Habibi v. Holder, No. 06-72111, 2011 WL 4060417, at *4 (9th Cir. Sept. 14, 2011) (affirming the Board of Immigration Appeals' determination that the lawful permanent resident petitioner was removable and ineligible for relief from removal, even though his sole conviction was classified as a misdemeanor under California law).

9. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (defining "immediate relatives" as including only parents of U.S. citizens who are "at least 21 years of age").

10. *See id.* § 1255(a) (requiring that the noncitizen have been "inspected and admitted or paroled into the United States" to be eligible for adjustment of status); *id.* § 1182(a)(9) (rendering inadmissible individuals with specified periods of unauthorized presence).

11. *See* Compagnie Generale Transatlantique v. United States, 78 F. Supp. 797, 798—99 (Ct. Cl. 1948) ("Any child hereafter born out of the limits and jurisdiction of the United States, who [sic] father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States . . . .").

judge has no discretion to stop removal in a sympathetic case.[12] Because immigration court proceedings are civil in nature, respondents are not entitled to free legal representation and 60% of respondents are unrepresented, a figure which rises to 84% when non-detained cases are taken out of the calculation.[13] Immigration judges have a typical caseload of more than 1200 pending cases, a number that has recently been on the rise.[14] Most immigration judges are scheduled to be in court on the bench thirty-six hours each week.[15] They do their jobs without bailiffs or court reporters and have access to only one-fourth of a judicial law clerk on average, as four judges usually share one clerk.[16] Perhaps most challenging of all, the majority of immigration judges' decisions are rendered orally from the bench immediately at the conclusion of proceedings, without the benefit of a transcript or time for research or reflection.[17]

12. *See* 8 U.S.C. § 1229a(c)(4)(A) (requiring the noncitizen seeking relief from removal to establish not only that a favorable exercise of discretion is warranted if the relief sought is discretionary, but also that he satisfies statutory eligibility for relief).

13. ARNOLD & PORTER LLP, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5–8 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

14. *See Oversight Hearing on the Executive Office for Immigration Review Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of J. Dana Leigh Marks, President, National Association of Immigration Judges), *available at* http://judiciary.house.gov/hearings/pdf/Marks100617.pdf [hereinafter *Marks Testimony*]; ARNOLD & PORTER LLP FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (EXECUTIVE SUMMARY) ES-28 (2010) [hereinafter ABA EXECUTIVE SUMMARY], *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/ReformingtheImmigrationSystemExecutiveSummary.authcheckdam.pdf; *see also Backlog in Immigration Courts Continues to Climb,* TRAC IMMIGRATION (March 11, 2011), http://trac.syr.edu/immigration/reports/225/.

15. *See Marks Testimony*, *supra* note 14, at 2.

16. By comparison, most federal district court judges have a caseload of around 400 pending cases. In addition to having a bailiff and court reporter to assist them, most of them have three full time law clerks. *See id.* Also by comparison, Veterans Law Judges decided 729 veterans benefits cases (less than 200 of which involved hearings) per judge in 2008, and Social Security Judges decided approximately 544 cases per judge in 2007. *See* ABA EXECUTIVE SUMMARY, *supra* note 14, at ES-28.

17. *See* TRAC Immigration, *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, TRAC IMMIGRATION (Jun. 18, 2009), http://trac.syr.edu/immigration/reports/208/; *see also Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 111th

II. SOME IMMIGRATION LAW BASICS

Terminology in this field is problematic even within the immigration law itself. The current law was amended in 1996, replacing deportation and exclusion proceedings with removal proceedings.[18] The proper technical term for an order expelling someone from the United States is now "removal," however colloquially many people still refer to having been ordered "deported." Thousands of outstanding deportation orders still exist[19] and can be either enforced or reinstated in a variety of factual contexts.[20] The term "deportation," however, is still frequently used in colloquial speech to describe both deportation and removal proceedings, despite significant legal differences between the two.[21]

Removal proceedings commence when a charging document called a Notice to Appear issued by the Department of Homeland Security ("DHS") is filed with the immigration court.[22] The individual against whom the charges are lodged is referred to as the respondent. In removal proceedings, the immigration judge must decide whether the

Cong. (2011) (statement of the National Association of Immigration Judges), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da16c9946 (click webcast).

18. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 587-97.

19. *See Fact Sheet: ICE Fugitive Operations,* U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Aug. 19, 2009), http://www.ice.gov/news/library/factsheets/fugops.htm (estimating that by the end of the 2009 fiscal year, there were approximately 535,000 "fugitive alien cases" in which a noncitizen had been ordered removed, deported, or excluded by an immigration judge, but had not left the United States or reported to DHS for removal).

20. *See* 8 U.S.C. § 1231(a)(5) (2006) (providing for the reinstatement of a removal order where a noncitizen reentered the United States illegally after having been removed or having departed voluntarily under an order of removal).

21. Removal proceedings are a unified process for what were previously referred to under the INA as exclusion proceedings and deportation proceedings. *See, e.g.*, IIRIRA, §§ 304(a)(3), 306(a), 309(d), 110 Stat. at 589–96, 607–12, 627 (codified as amended at 8 U.S.C. §§ 1101, 1229a–c, 1231, 1252); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 966 (1998) ("IIRIRA realigned the vocabulary of immigration law, creating a new category of 'removal' proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings . . . ."). In many ways the procedures remain substantially unchanged as there are still significant legal distinctions between those individuals who are seeking admission as opposed to those who have already entered the country, either legally or illegally. *Compare* 8 U.S.C. § 1229a(c)(2)(A) (stating that the applicant bears the burden of demonstrating he is clearly and beyond doubt entitled to admission), *with id.* § 1229a(c)(3) (stating that the burden is on DHS to demonstrate that an individual who has been admitted is removable).

22. *See* 8 U.S.C. § 1229(a).

individual is removable as charged.[23] After that decision is made, the judge must also decide if the individual can apply to remain in the United States. These applications to remain in the United States are generally referred to as "applications for relief from removal."[24]

III. THE GOVERNMENT PLAYERS

The nation's Immigration Court, which has fifty-nine locations in the United States, Puerto Rico and Saipan, employs approximately 260 immigration judges. These courts comprise the trial level tribunal which determines whether or not a respondent in proceedings is removable as charged.[25] Often of equally great consequence to the individual, immigration judges are additionally charged with identifying and adjudicating a variety of applications for benefits which may be available. When these benefits are sought at the immigration court level, they are frequently referred to generically as "relief from removal." Decisions made by the immigration judges can be appealed to the Board of Immigration Appeals by either party.[26]

IV. THOSE SUBJECT TO THE IMMIGRATION LAWS

Most basic to our immigration laws is the fact that people fall into two categories, United States citizens and noncitizens, whom the Act defines as "aliens."[27] No United States citizen can be removed (deported), denied admission or prosecuted for a crime in which alienage is an element.[28] Proof that one is a United States citizen is the most comprehensive defense to a charge of removability or inadmissibility as it mandates termination of the proceedings.[29]

23. *See id.* § 1229a(c)(1)(A).

24. *See id.* § 1229a(c)(4).

25. *See Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/ocijinfo.htm (last updated Apr. 2011). The Immigration Court is housed within the Executive Office for Immigration Review (EOIR), Office of the Chief Immigration Judge (OCIJ), which is located in the U.S. Department of Justice. *See id.*

26. *See id.* EOIR also houses the Board of Immigration Appeals ("Board" or "B.I.A."), which is responsible for administrative appellate review of removal decisions. *See* 8 C.F.R. § 1003.1(b)(2011).

27. *See* 8 U.S.C. § 1101(a)(3) (defining any person not a citizen or national of the United States as an "alien.").

28. *See* United States v. Higuera-Llamos, 574 F.3d 1206, 1209 (9th Cir. 2009) ("Alienage is a specific element of this offense [illegal reentry under 8 U.S.C. § 1326(a)], and the government must prove alienage beyond a reasonable doubt.").

29. *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); *id.* § 1229a(a)(1) (providing that "[a]n immigration

There are four basic ways to become a United States citizen: birth in the United States or a U.S. territory; derivation of U.S. citizenship at birth abroad through U.S. citizen parent(s); acquisition of U.S. citizenship upon the naturalization of a minor child's parent(s); or naturalization.[30]

All persons who are not United States citizens are termed aliens and are subject to our immigration laws. Because the term "alien" is often misunderstood and viewed as a pejorative term outside the immigration law field, this article will refer to "individuals" or "people," with the understanding that for purposes of our discussion, those referred to in that way are not United States citizens or nationals.

Noncitizens fall into various categories under the Act: lawful permanent residents (immigrants);[31] non-immigrant visa holders;[32] undocumented;[33] and many others who are present with the knowledge of the government but hold a variety of different statuses, including, but not limited to parolees,[34] deferred action status,[35] extended voluntary departure,[36] and deferred enforced departure.[37]

Lawful permanent residents can live and work in the United States permanently so long as they do not become inadmissible or deportable, terms which will be described later in this Article. They can trav-

judge shall conduct proceedings for deciding the inadmissibility or deportability of an *alien*") (emphasis added).

30. *See* 8 U.S.C. §§ 1401, 1427, 1431, 1433; *see also* U.S. CONST. art. I, § 8, cl.4.

31. *See* 8 U.S.C. § 1101(a)(20).

32. *Id.* § 1101(a)(26).

33. *Id.* § 1182(a)(7)(A).

34. When used in the Act, "parole" is a status which can be provided to an individual who is stopped at a port of entry and alleged to be inadmissible. Rather than detain all such persons pending a hearing before an immigration judge, at the discretion of DHS some are "paroled" into the United States, thereby allowing them to be free from detention during the pendency of their application process or proceedings before the immigration court. *See id.* § 1182(d)(5)(A) ("The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . .").

35. On rare occasions, DHS exercises its prosecutorial discretion to allow otherwise removable individuals to remain in the United States. Some of these individuals have never been in removal proceedings while others are subject to final orders of removal. This is a temporary status which can be terminated at any time DHS chooses, thereby restoring the individual to the legal position he held prior to the grant of deferred action. *See* Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel, U.S. Immigr. & Customs Enforcement, (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

36. *See* KURZBAN, *supra* note 4.

37. *Id.*

el outside the United States and return, subject to certain restrictions.[38] They can petition for their spouses and unmarried sons and daughters to become lawful permanent residents, subject to numerical limitations, which are often referred to as a "quota" or "visa number requirement."[39] Lawful permanent residents may choose to naturalize to become United States citizens after a specified period of residence.[40]

The Act contains more than twenty categories of nonimmigrant visas.[41] Examples include tourists for pleasure or business, students, temporary professional workers, performers and athletes, and victims of violent crimes or human trafficking.[42] These categories have strict initial qualification criteria, as well as explicit conditions which must be fulfilled in order to maintain valid status.[43] Individuals holding such status must comply with all terms of their visa or they become subject to removal.[44]

Undocumented individuals, sometimes referred to as "illegal aliens" or "undocumented workers," include people who have entered the United States without proper inspection by an official of the DHS and those who entered with a visa or permission that has expired or become invalid.[45]

V. REMOVABILITY AND INADMISSIBILITY

Under the Act, there are separate provisions which render an individual inadmissible to enter the United States (sometimes despite an otherwise valid visa) and provisions which cause an individual who is in the United States to become removable.[46] With few exceptions,

38. *See* 8 U.S.C. §§ 1101(a)(20), (27)(A); Huang, 19 I. & N. Dec. 749, 752 (B.I.A. 1988).

39. *See* 8 U.S.C. § 1153(a)(2).

40. *See id.* § 1427(a)(1); 8 C.F.R. § 319.1(a)(3) (2011).

41. *See* 8 U.S.C. § 1101(a)(15).

42. *See id.*

43. *See id.*

44. *See id.* § 1227(a)(1)(C).

45. *See id.* § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); *id.* § 1227(a)(1)(B) ("Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.").

46. *Compare id.* § 1182(a) (describing classes of inadmissible aliens), *with id.* § 1229(a)(1) (describing reasons for removal proceedings).

every time a noncitizen seeks to enter the United States from a trip abroad, he or she is subject to the grounds of inadmissibility. The grounds of inadmissibility also apply to individuals in the United States who are seeking to obtain lawful permanent resident status; a statutory prerequisite for "adjustment" to that new status includes a mandate that the applicant is not inadmissible.[47] Even people who are already in the United States and who hold legal status can become removable by violating a condition of their immigrant or nonimmigrant status or by committing an act or crime that is a ground for removal.[48]

The interplay between these complicated and contradictory provisions relating to inadmissibility and removability creates fertile ground for confusion, even for experienced immigration practitioners. Additionally problematic is the fact that individuals who are inadmissible or removable due to criminal convictions (as well as some violations of civil protective orders) are often barred from satisfying statutory eligibility requirements for various forms of relief from removal.[49] State, local or foreign convictions, as well as federal convictions, may render someone inadmissible, removable, or bar them from relief.[50] One reason this may occur is because the Act provides that many types of convictions, and some types of conduct, bar people from demonstrating the good moral character required for most forms of relief.[51] Placed in this context, it is easy to see how unintended consequences can flow from criminal convictions due to the

47. *See id.* § 1255(i)(1)(C).

48. *See id.* § 1227(a)(1)(C).

49. *See id.* § 1229b(a)(3) (stating the Attorney General may cancel removal of alien who is inadmissible or deportable from the U.S. if the alien has not been convicted of an aggravated felony); *id.* 1229b(b)(1)(B)–(C) (stating that failure to show good moral character during the statutory period and convictions for certain offenses bar eligibility for non-lawful permanent resident cancellation of removal); *id.* § 1229b(d)(1)(B) (stating that commission of offenses described in the criminal grounds of inadmissibility under § 1182(a)(2) that render the noncitizen either inadmissible under § 1182(a)(2) or deportable under § 1227(a)(2) stops the accrual of continuous residence for lawful permanent resident cancellation of removal and of continuous physical presence for non-lawful permanent resident cancellation of removal); *id.* § 1229c(a)(1) (stating that aggravated felony convictions bar eligibility for pre-conclusion voluntary departure); *id.* § 1229c(b)(1)(B)–(C) (stating that failure to show good moral character during the statutory period and aggravated felony convictions bar eligibility for post-conclusion voluntary departure). If an individual violates a protective order by conduct which involves a credible threat of violence, repeated harassment or bodily injury to the person or persons for whom the protective order was issued, he or she is removable pursuant to § 1227(a)(2)(E)(ii).

50. *See id.* § 1227(a)(2)(B)(i).

51. *See id.* § 1101(f); *infra* Part VIII.

complex interplay of various provisions of the Act. When one factors in diverse state and federal statutory language along with the variety of prerequisites and obligations imposed by state sentencing dispositions, it begins to become quite clear why application of the Act sometimes results in distorted and disparate outcomes at the immigration court level.[52] Particularly where the impact of a criminal disposition is not thoroughly considered in advance, the risk of unintended consequences is extremely high in this rapidly changing area.

Very generally, the following is a non-exhaustive list of the criminal convictions which often render individuals, including lawful permanent residents, removable from the United States. They include convictions for: an aggravated felony,[53] a crime of moral turpitude,[54] a crime relating to a controlled substance (other than simple possession of less than thirty grams of marijuana for personal use),[55] a crime of domestic violence,[56] a firearm offense,[57] or document fraud.[58]

The most common criminal convictions which render individuals with otherwise valid visas inadmissible to the United States include: a crime involving moral turpitude,[59] any crime relating to a controlled substance (with no small-quantity personal-use exception),[60] and two convictions for any crime where the aggregate sentence imposed is five years or more.[61]

Several grounds of inadmissibility and a few grounds of removal are explicitly based on conduct and, thus, do not require a conviction.

52. *See* United States v. Aguila Montes De Oca, 655 F.3d 915, 940 (9th Cir. 2011) ("The process of mapping a generic federal definition onto state crimes—defined variously by a combination of common law definitions, model penal codes, statutes, and judicial exposition—has exposed the diversity of legal thought among state legislatures and courts.").

53. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).

54. A person convicted of a crime of moral turpitude is removable if the potential term of imprisonment for the crime is one year or longer and the offense was committed within five years of admission to the United States. *See id.* § 1227(a)(2)(A)(i).

55. *See id.* § 1227(a)(2)(B)(i).

56. *See id.* § 1227(a)(2)(E)(i).

57. *See id.* § 1227(a)(2)(C).

58. *See id.* § 1227(a)(3)(B).

59. *See id.* § 1182(a)(2)(A)(i). This ground of inadmissibility does not apply to an individual who committed this crime when he or she was under eighteen years of age, where the crime was committed more than five years before the application for a visa or admission, or if the maximum possible term of imprisonment was one year or less and the individual was not sentenced to more than six months in prison. *See id.* § 1182(a)(2)(A)(ii)(I)–(II).

60. *See id.* § 1182(a)(2)(A)(i)(II).

61. *See id.* § 1182(a)(2)(B).

Some examples include admission of the essential elements of a crime of moral turpitude[62] or controlled substance offenses,[63] prostitution,[64] alien smuggling,[65] or fraud or misrepresentation of a material fact to procure or seek to procure an immigration benefit.[66] In such cases, the DHS may seek to use portions of a criminal trial record where no conviction occurred to prove an individual is deportable.

As used in the Act, the term aggravated felony can be particularly misleading to those not familiar with the idiosyncrasies of the Act's provisions.[67] The definition of aggravated felony contains twenty-one subdivisions.[68] It includes such offenses as murder, rape, sexual abuse of a minor, crimes of violence, some theft offenses with a sentence of at least one year, and illicit trafficking in controlled substances, firearms, or destructive devices.[69] It is not too surprising to see these offenses characterized as aggravated felonies. Some misdemeanor convictions carrying a sentence of one year, however, are also aggravated felonies—an outcome which is not so intuitive.[70] For example, misdemeanor convictions for simple battery (unless it is mere offensive touching), reckless endangerment, assault, unlawful imprisonment, menacing or threatening coercion and theft have come within the ambit of the aggravated felony definition.[71]

Although the Act has no specific definition of crimes involving moral turpitude, case precedent describes these crimes as those which shock the public conscience; those which are inherently base, vile, or depraved; or those which are contrary to the rules of morality and duties owed between persons.[72] Crimes involving moral turpitude have been found to include those which involve evil or malicious intent[73] or

62. *See id.* § 1182(a)(2)(A)(i)(I) (subject to exceptions for juvenile and petty offenses, contained in § 1182(a)(2)(A)(ii)(I)–(II)).

63. *See id.* §§ 1182(a)(1)(A)(iv), (a)(2)(A)(i)(II), (a)(2)(C), 1227(a)(2)(B)(ii).

64. *See id.* § 1182(a)(2)(D).

65. *See id.* §§ 1182(a)(6)(E)(i), 1227(a)(1)(E)(i).

66. *See id.* §§ 1182(a)(6)(C)(i), 1227(a)(1)(E)(i).

67. *See id.* § 1101(a)(43).

68. *See id.*

69. *See id.*

70. *See* 2 KATHERINE A. BRADY ET AL., DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT: IMPACT OF CRIMES UNDER CALIFORNIA AND OTHER STATE LAWS 9–36 (10th ed. 2008).

71. *See generally* 2 BRADY ET AL., *supra* note 70, ch. 9.

72. *See* S. REP. NO. 81-1515, at 351 (1950) (describing an act of moral turpitude as "[a]n act of baseness, vileness, or depravity, in the private and social duties which a man owes to his fellow man or to society") (internal citation omitted).

73. *See Flores*, 17 I. & N. Dec. 225, 227 (B.I.A. 1980) ("An evil or malicious intent is said to be the essence of moral turpitude.").

inherent depravity;[74] intentional or reckless behavior which risks or causes great bodily harm;[75] theft with intent to permanently deprive the owner;[76] and crimes involving intent to defraud.[77]

Crimes of moral turpitude provide an excellent example of multiple and differing ramifications under the Act depending on the procedural context. An individual is rendered removable if convicted of a crime of moral turpitude which carries a possible sentence of one year or more within their first five years of admission to the United States.[78] He or she is also removable if convicted of two crimes of moral turpitude not arising out of a single scheme regardless of the sentence imposed.[79] Yet any conviction for a crime of moral turpitude renders an individual inadmissible to the United States, unless he or she can qualify for the narrowly drawn juvenile or petty offense exceptions.[80] Thus a lawful permanent resident may not be removable from the United States for a crime committed five years after coming here, but if he or she leaves the United States—even for a short period like a four-day cruise—that lawful permanent resident will not be able to re-enter. Moreover, conviction for or admission of a crime of moral turpitude can preclude an individual from demonstrating good moral character, which is often a statutory prerequisite to relief.[81]

VI. *SILVA-TREVINO* AND CRIMES OF MORAL TURPITUDE

Perhaps most unusual of all the law relating to crimes of moral turpitude in the immigration context is the treatment they receive in

74. *See* Olquin-Rufino, 23 I. & N. Dec. 896 (B.I.A. 2006); Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988) ("Moral turpitude . . . refers generally to conduct [which is] inherently base, vile, or depraved, [and] contrary to [accepted] rules of morality and the duties owed between [persons] or [to] society in general.").

75. *See* Solon, 24 I. & N. Dec. 239, 240 (B.I.A. 2007) ("Moral turpitude may also inhere in criminally reckless conduct, i.e., conduct that reflects a conscious disregard for a substantial and unjustifiable risk."); *see, e.g.*, Franklin, 20 I. & N. Dec. 867, 867 (B.I.A. 1994) (finding that involuntary manslaughter constitutes a crime involving moral turpitude); Wojtkow, 18 I. & N. Dec. 111, 113 (B.I.A. 1981) (finding that second degree murder is a crime involving moral turpitude); Medina, 15 I. & N. Dec. 611, 614 (B.I.A. 1976) (finding that aggravated assault is a crime involving moral turpitude).

76. *See* Castillo-Cruz v. Holder, 581 F.3d 1154, 1159–61 (9th Cir. 2009).

77. *See* Torres-Varela, 23 I. & N. Dec. 78, 84 (B.I.A. 2001) (describing why fraud is readily categorized as a crime involving moral turpitude).

78. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

79. *See id.* § 1227(a)(2)(A)(ii).

80. *See id.* § 1182(a)(2)(A)(ii).

81. *See id.* § 1101(f).

immigration court following the Attorney General's decision in *Matter of Silva-Trevino*.[82] *Silva-Trevino* has been described by the Board of Immigration Appeals as "a comprehensive decision clarifying the concept of moral turpitude and articulating a methodology for determining whether a particular offense is a crime of moral turpitude."[83] Surprisingly, the greatest impact of this decision does not seem to be on the definition of a crime of moral turpitude, though the decision does reaffirm that a crime of moral turpitude must be committed with specific intent, deliberateness, willfulness or recklessness.[84] What is groundbreaking in this decision is the analytical framework it sets forth to determine whether a particular offense falls within that definition.

Under *Silva-Trevino*, a three step analysis is used. The first step is familiar to many: the traditional categorical analysis of the elements of the statute, an approach set forth by the Supreme Court decision of *Taylor v. United States*.[85] Going a bit further, the Attorney General, citing *Gonzales v. Duenas-Alvarez*, held that the assessment of whether a given conviction for a particular offense is a categorical match should be based on the existence of a reasonable possibility, as opposed to a theoretical possibility, that the statute under which the individual was convicted applies to conduct that does not involve moral turpitude.[86] If this step yields an unambiguous result, the inquiry stops there. If not, the analysis proceeds to the second step, the well-understood modified categorical approach.

This second step is also a familiar approach, requiring examination of the traditional record of conviction documents to see whether they contain evidence that a crucial fact, one which renders the crime to be one involving moral turpitude, was an essential element which was proven in the criminal court.[87] When this step yields an unambiguous result, the analysis stops there.

If the second step does not resolve the issue, the analysis proceeds to a third step. It is the third step that many find surprising. If the question of whether the crime was one of moral turpitude is still unre-

82. *See* Silva-Trevino, 24 I. & N. Dec. 687 (B.I.A. 2008). *But see* Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462, 470 (3d Cir. 2009) (specifically declining to follow *Silva-Trevino*).

83. Louissaint, 24 I. & N. Dec. 754, 756 (B.I.A. 2009).

84. *See Silva-Trevino*, 24 I. & N. Dec. at 689 n.1, 706 n.5.

85. *See* Taylor v. United States, 495 U.S. 575, 588 (1990).

86. *See Silva-Trevino*, 24 I. & N. Dec. at 690 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (1987)).

87. *See id.* at 704; Sweetser, 22 I. & N. Dec. 709, 715 (B.I.A. 1999).

solved after the modified categorical analysis, *Silva-Trevino* holds that the immigration judge may consider any reliable evidence which is deemed necessary and appropriate to ascertain whether the offense involved moral turpitude.[88]

Silva-Trevino expressly limits this departure from the traditional *Taylor* framework to crimes of moral turpitude; thus, this new analytical approach cannot be applied to convictions for aggravated felonies, crimes of domestic violence, firearms cases, controlled substances or any of the other grounds of removal triggered by a conviction.[89]

Even with the limitation of *Silva-Trevino* to crimes of moral turpitude, the addition of a third step to the traditional and well-understood categorical and modified categorical analyses signals a major sea-change for those with criminal convictions. Immigration law has now taken another giant leap away from well-established standards shared with other fields of law and created a unique perspective which may not be readily understood from the vantage point of non-immigration lawyers and criminal court judges.

Step three of the *Silva-Trevino* analysis is extremely broad and places a tremendous amount of discretion in the hands of immigration judges to determine when it is necessary and appropriate to consider evidence beyond the record of conviction, and if so, what evidence would be proper. Indeed, many immigration judges now hold *Silva-Trevino* hearings to determine inadmissibility or removability. While it is clear that immigration judges may not go behind the conviction to reassess guilt or innocence, the question of what evidence is necessary and appropriate to consider remains a wide open question at this juncture. For this reason, seasoned immigration practitioners have become virtually obsessive in developing records in a way that assures no casual or unconsidered fact might creep into the moral turpitude assessment down the road. In light of the Act's broad inadmissibility provisions, which can be triggered by travel decades after a conviction has been entered, such caution is clearly warranted.

VII. WHAT IS A CONVICTION?

Another example of where the Act has its own unique approach and definition of terminology involves the definition of conviction.[90] Some common state court judgments are regarded as convictions un-

88. *See Silva-Trevino*, 24 I. & N. Dec. at 704.

89. *See id.*

90. *See* 8 U.S.C. § 1101(a)(48)(A) (2006); *see also* Ozkok, 19 I. & N. Dec. 546, 551–52 (B.I.A. 1988).

der the Act, even though they are not treated as convictions under state law. When applying the Act to inadmissibility and removability, the following state court determinations constitute convictions when some form of punishment, penalty or restriction is imposed: admissions of fact supporting a conviction, diversion programs if there is a finding of guilt, and deferred or withheld adjudication with a plea of guilty.[91]

Several state remedies that involve amelioration of a conviction will not be recognized under the Act as vitiating a conviction. Some examples of such ineffective remedies include certain plea withdrawals or expungements.[92] Even the vacation of a conviction is ineffective under the Act where the conviction is vacated solely to alleviate immigration consequences.[93] Nor does a presidential or gubernatorial pardon eliminate all grounds of deportability.[94]

There are some outcomes that clearly do not constitute a conviction under the Act. These include pretrial diversion before a plea is entered, deferred prosecution, convictions vacated for legal insufficiency, or convictions vacated for failure of the trial court to advise the defendant of possible immigration consequences of a guilty plea.[95]

VIII. GOOD MORAL CHARACTER

Other examples under the Act where criminal conduct and criminal convictions implicate an individual's status are the provisions relating to good moral character. The Act defines good moral character in the negative, by describing several specific categories of individuals who cannot demonstrate good moral character.[96] Then it provides a

91. *Ozkok*, 19 I. & N. Dec. at 551–52.

92. For example, withdrawal of plea following successful completion of probation in Arizona pursuant to A.R.S. § 13-907(a), or, in California, a plea pursuant to deferred entry of judgment (DEJ), Proposition 36, or Penal Code § 1204.3 does not eliminate a conviction for immigration purposes. *See* Murillo-Espinoza v. INS, 261 F.3d 771, 774 (9th Cir. 2001). Another example is New Jersey's pre-trial intervention program. *See* N.J. CT. R. 3:28, *available at* http://www.judiciary.state.nj.us/rules/r3-28.htm; *see also* Salazar-Regina, 23 I. & N. Dec. 223, 227 (B.I.A. 2002); Roldan, 22 I. & N. Dec. 512, 527 (B.I.A. 1999).

93. *See* Chavez-Martinez, 24 I. & N. Dec. 272, 273 (B.I.A. 2007); Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006); *see also* 8 U.S.C. § 1101(a)(48) (defining "conviction" under the Act).

94. *See* 8 U.S.C. § 1227(a)(2)(A)(vi).

95. See, for example, the pre-*Padilla* New Jersey Supreme Court ruling in State v. Nunez-Valdez, 975 A.2d 418, 424 (N.J. 2009), holding that ineffective assistance of counsel vitiates a guilty plea. S*ee also* N.J. STAT. ANN. § 2C:43-12 to -22 (West 2005 & Supp. 2011); N.J. CT. R. 3:28.

96. *See* 8 U.S.C. § 1101(f).

catch-all provision, which makes clear that the fact that an individual is not included in one of the specified categories does not preclude a finding that good moral character is lacking.[97] Among those who cannot demonstrate good moral character based on conduct are habitual drunkards,[98] those whose income is derived principally from gambling,[99] and anyone who has given false testimony for the purpose of obtaining a benefit under the Act.[100]

The criminal grounds which preclude good moral character are based on a reference back to the grounds of inadmissibility relating to crimes of moral turpitude, multiple convictions with an aggregate sentence of confinement for five years or more, and controlled substance law violations.[101] These provisions also specifically include anyone who has been convicted of an aggravated felony,[102] two or more gambling offenses,[103] or who has been confined to a penal institution for an aggregate period of one hundred and eighty days as a result of a conviction or multiple convictions.[104] Even without convictions, individuals may be precluded from demonstrating good moral character when their conduct falls into the inadmissibility grounds applicable to prostitution, alien smuggling and illegal gambling.[105]

Falling into a category where one is precluded from demonstrating good moral character has far-reaching consequences under the Act, as many immigration benefits, including naturalization, require a showing of good moral character for a specified period of time.

97. *See id.*

98. *See id.* § 1101(f)(1).

99. *See id.* § 1101(f)(4).

100. *See id.* § 1101(f)(6).

101. *See id.* § 1101(f)(3) (providing an exception for a single offense of simple possession of thirty grams or less of marijuana).

102. *See id.* § 1101(f)(8).

103. *See id.* § 1101(f)(5).

104. *See id.* § 1101(f)(7).

105. *See id.* § 1101(f)(3) (precluding a showing of good moral character if the noncitizen "admits the commission" of an offense described in sections 1182(a)(2)(D) (prostitution) and 1182(a)(2)(6)(E) (alien smuggling)); *id.* § 1101(f)(4) (precluding a showing of good moral character for a person whose income is derived principally from illegal gambling); Urzua Covarrubias v. Gonzales, 487 F.3d 742, 744–46 (9th Cir. 2007) (affirming agency's determination that the petitioner was precluded from establishing good moral character based on his admission of alien smuggling in his testimony before the immigration judge).

IX. COMMON FORMS OF IMMIGRATION RELIEF AVAILABLE IN REMOVAL PROCEEDINGS

Immigration judges conduct trials in order to rule on whether the DHS has met its burden of proving alienage and removability by clear, convincing, and unequivocal evidence.[106] These civil administrative determinations are governed by the specific provisions of the Act, which provide for due process, fundamental fairness and several protections very similar to rights afforded criminal defendants, although the formal rules of evidence do not apply.[107]

In the majority of cases, the issue of alienage and/or removability is not contested. The bulk of an immigration judge's role in most cases is to rule on whether a respondent in proceedings is statutorily eligible for any relief from removal and, if so, to determine if he or she merits relief in the exercise of discretion.[108] The forms of relief most often sought in removal proceedings include waivers,[109] cancellation of removal for permanent residents,[110] adjustment to lawful permanent residence status based on family or employer sponsorship,[111] cancellation of removal for non-lawful permanent residents,[112] asylum,[113] and voluntary departure.[114]

Each of these forms of relief has specified statutory requirements, but in addition most have a discretionary component—even if an individual fulfills all the statutory requirements, the application may be denied in the discretion of the judge.[115] It is beyond the scope of this Article to discuss in detail the statutory requirements and discretionary facts which go into ruling on requests for these immigration benefits. A brief overview, however, will help provide context and serve to clarify the ramifications of convictions and criminal behavior,

106. *See* Woodby v. INS, 385 U.S. 276, 286 (1966). *But see* 8 U.S.C. § 1229a(c)(2)(B).

107. *See* Wadud, 19 I. & N. Dec. 182, 188 (B.I.A. 1984); 8 C.F.R. § 1240.7 (2011).

108. Virtually all forms of immigration relief are discretionary, with the exception of a couple of remedies provided to fulfill the international treaty obligations of the United States not to remove an individual to a country where he or she would face persecution or government torture. *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16.

109. *See* 8 U.S.C. § 1182(h).

110. *See id.* § 1229b(a).

111. *See id.* §§ 1151–1159.

112. *See id.* § 1229b(b).

113. *See id.* § 1158.

114. *See id.* § 1229c.

115. *See id.* § 1229a(c)(4)(A) (requiring the noncitizen to establish both statutory eligibility and, if the relief sought is discretionary, that a favorable exercise of discretion is warranted).

demonstrating how they actually play out in immigration court. Accordingly, a very basic explanation of the statutory requirements of several benefits commonly sought as relief from removal is provided below.

Most important in this discussion is to note the themes regarding statutory eligibility and the exercise of discretion that run through the Act, applying both to these selected benefits as well as most others. For example, criminal convictions, as well as some criminal behavior for which no conviction results, bar non-lawful permanent residents from almost all statutory eligibility for immigration benefits.[116] There are waivers which exist in a variety of circumstances, but they generally require qualifying relatives and a showing that the respondent's removal would cause them extreme hardship, a narrowly defined term under the Act.[117] Few benefits under the Act are available to non-lawful permanent residents found to be lacking good moral character. Moreover, behavior which does not automatically preclude good moral character under the Act may nevertheless be considered in arriving at the determination of whether a favorable exercise of discretion is warranted.[118]

Lawful permanent residents who are removable for crimes other than an aggravated felony may apply for cancellation of removal if they have been lawful permanent residents for five years, have resided continuously in the United States for seven years after having been admitted in any status, and can demonstrate that they are deserving of the favorable exercise of discretion.[119] There are bars to this waiv-

116. *See, e.g.*, *id.* § 1101(a)(f)(3) (precluding noncitizens who are convicted of or "admit committing" offenses described in the criminal grounds of inadmissibility listed in sections 1182(a)(2)(A)–(D) and 1182 (a)(6)(E)); id. §§ 1158(b)(2)(A)(ii), (B)(i) (stating that convictions for a "particularly serious crime," which includes aggravated felonies, bar eligibility for asylum); *id.* 1229b(a)(3) (stating that aggravated felony convictions bar eligibility for lawful permanent resident cancellation of removal); *id.* § 1229b(b)(1)(B)–(C) (stating that failure to show good moral character during the statutory period and convictions for certain offenses bar eligibility for non-lawful permanent resident cancellation of removal); *id.* § 1229b(d)(1)(B) (stating that "commission" of certain offenses stops the accrual of continuous residence for lawful permanent resident cancellation of removal and of continuous physical presence for non-lawful permanent resident cancellation of removal); *id.* § 1229c(a)(1) (stating that aggravated felony convictions bar eligibility for pre-conclusion voluntary departure); *id.* § 1229b(b)(1)(B)–(C) (stating that failure to show good moral character during the statutory period and aggravated felony convictions bar eligibility for post-conclusion voluntary departure).

117. *See id.* § 1182(h)—(i).

118. *See, e.g.*, C-V-T-, 22 I. & N. Dec. 7, 10 (B.I.A. 1998); Edwards, 20 I. & N. Dec. 191, 194–95 (B.I.A. 1990); Villegas Aguirre, 13 I. & N. Dec. 139, 140 (B.I.A. 1971).

119. *See* 8 U.S.C. § 1229b(a).

er based on the timing of the commission of the crime and the initiation of removal proceedings.[120] A similar waiver, but more generous since it is applicable to more crimes, is available to lawful permanent residents whose convictions were obtained by plea agreements prior to April 24, 1996.[121] While cancellation of removal can only be granted to a lawful permanent resident one time,[122] a waiver of some convictions may be available to lawful permanent residents who are returning to the United States or those who can apply to readjust their status, if their removal would result in extreme hardship to a qualifying relative.[123]

Very generally, an individual may apply for adjustment of status to that of a lawful permanent resident based on an approved petition filed by a specified qualifying relative or employer if he or she has been inspected and admitted or paroled into the United States and is not inadmissible to the United States.[124] There are several additional potential disqualifiers too complex to discuss here, but one extremely relevant factor is that the applicant must demonstrate that he or she is deserving of the favorable exercise of discretion.[125] It is important to note that, regardless of whether the applicant for this benefit is applying while in removal proceedings or not, the grounds of inadmissibility are central to eligibility since one of the statutory prerequisites for adjustment of status is to show that one is not inadmissible.[126]

Some respondents in removal proceedings are eligible to apply for cancellation of removal for non-lawful permanent residents.[127] To demonstrate statutory eligibility, a respondent must demonstrate ten years of continuous physical presence, good moral character during that period, that he or she has not been convicted of offenses that are described as grounds for removal or inadmissibility under certain listed sections of the Act, and that his or her removal would cause a United States citizen or lawful permanent resident spouse, parent or child exceptional and extremely unusual hardship.[128] This benefit is

120. *See id.* § 1229b(d).

121. *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001), *superseded by statute*, REAL ID Act of 2005, 8 U.S.C. § 1778 (2006).

122. *See* 8 U.S.C. § 1229b(c)(6).

123. *See id.* § 1182(h).

124. *See generally id.* § 1255.

125. *See id.*

126. *See id.* § 1255(a).

127. *See id.* § 1229b(b).

128. *See id.* § 1229b(b)(1).

also available only in the exercise of discretion.[129] Repeating and expanding on the theme seen in adjustment of status eligibility, note that the criminal grounds of inadmissibility and removability, as well as the good moral character criminal preclusions, are grafted onto this benefit as potential bars to demonstrating statutory eligibility.

An individual is eligible to apply for asylum in the United States if he or she can demonstrate past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[130] While there are several specified bases which mandate a denial of an application for asylum, relevant here are the provisions which preclude a grant of relief to an applicant who has been convicted by a final judgment of a particularly serious crime in the United States.[131] A conviction of an aggravated felony is considered a conviction of a particularly serious crime by definition in the Act.[132]

Perhaps the most commonly sought form of relief from removal, albeit the most limited in terms of the status it affords, is voluntary departure. To avoid the adverse consequences of an order of removal, such as monetary sanctions and a bar to many immigration benefits for a period of ten years, an individual in removal proceedings may request voluntary departure.[133] Voluntary departure provides permission to leave the United States at one's own expense, rather than being removed by the government.[134] Prehearing voluntary departure is sought at one's first appearance in immigration court and only aggravated felons and persons engaged in terrorist activities are barred from eligibility.[135] When requesting voluntary departure at the conclusion of a removal hearing, one must show, *inter alia,* physical presence in the United States for at least one year prior to service of the charging document, good moral character for the preceding five

129. *See id.* § 1229b(b).

130. *See id.* §§ 1101(a)(42), 1158(a).

131. *See id.* § 1158(b)(2)(ii).

132. *See id.* § 1158(b)(2)(B)(i); *see also* Y-L-, 23 I. & N. Dec. 270, 274 (B.I.A. 2002) (finding that aggravated felonies which involve unlawful drug trafficking presumptively constitute serious crimes absent extraordinary and compelling circumstances for purposes of withholding of removal, a similar, but more stringent, form of relief).

133. *See* 8 U.S.C. § 1229c(a)(1).

134. *See id.*

135. *See id.* § 1229c(b)(1)(c).

years, and additionally, that the individual is not removable as an aggravated felon or terrorist.[136]

X. *PADILLA V. KENTUCKY*

Now that we have provided a basic overview of the potential effects of criminal convictions on noncitizens, we will examine how these effects play out in immigration court. Noncitizens with criminal convictions, their families, and sometimes even their attorneys, who come before the immigration court often feel like they have entered a carnival "house of mirrors." An all too frequent lament heard in immigration courts across the country goes something like, "But I've already served my time/completed my probation successfully/paid my fine—how can I be charged with the same crime here?" It is understandable that people may confuse the "collateral" immigration consequences of a criminal conviction with the "punishment" of their sentence and feel they are being punished twice for the same crime. The United States Supreme Court has called the effect of being ordered deported or removed to be the equivalent of banishment, a sentence to life in exile, loss of property, life or all that makes life worth living, and, in essence, a "punishment of the most drastic kind."[137] An order of removal (deportation) can effectively amount to a death sentence when an alien will be subject to persecution upon return to his or her country.[138] When an immigration judge explains that although a person may have satisfied the sentence of the criminal court there may still be immigration consequences to the conviction, common responses include, "I never would have accepted the plea agreement if I had known," or, "My attorney told me that it was an 'adjudication withheld' and not even a real conviction." Thus, it was not surprising that the Supreme Court was asked to address the conditions under which plea agreements would be binding when a miscommunication about immigration consequences occurred.

In *Padilla v. Kentucky*,[139] it was as if the Supreme Court had heard the laments of noncitizens in immigration courts. Padilla himself, a lawful permanent resident for over forty years and a Vietnam veteran

136. *See id.* § 1229c(b)(1).

137. Lehman v. United States, 353 U.S. 685, 691 (1957); *accord* Jordan v. De George, 341 U.S. 223, 231 (1951); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

138. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); Padilla-Agustin v. INS, 21 F.3d 970, 978 (9th Cir. 1994).

139. 130 S. Ct. 1473 (2010).

who faced deportation based on an aggravated felony after pleading guilty to transportation of a large amount of marijuana, claimed that he would not have accepted the plea had he not been misinformed by his attorney that he "did not have to worry about immigration status since he had been in the country so long."[140] The Court again recognized the dramatic, harsh consequences of criminal convictions for noncitizens. Indeed, it noted that immigration law had changed dramatically and that immigration reforms had "expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation."[141] Based on these changes, the Court found that "as a matter of federal law, *deportation is an integral part—indeed, sometimes the most important part—of the penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes,"[142] reflecting the chorus oft-heard in immigration courts. For these reasons, the Court majority opinion rejected the finding of the state court that erroneous advice about immigration consequences is merely "collateral" and thus not covered by the Sixth Amendment's guarantee of effective assistance of counsel.[143] Ultimately, the Court held that Padilla's attorney's incorrect advice was constitutionally deficient, and the case was remanded to determine if prejudice resulted.[144] The Court did not limit its holding to alleged affirmative misadvise, and further held that it is the duty of counsel to provide advice about issues like deportation.[145] Finally, the court considered the concerns that its holding might open a "floodgate" of challenges to plea agreements, but held that such a flood was unlikely based on past experience with similar cases, the possibility that such attacks could result in less favorable outcomes for the defendants, and that informed consideration of possible immigration consequences could only benefit the plea bargaining process.[146]

The immediate effect of *Padilla* on immigration proceedings is evident—noncitizens who are able to vacate their pleas may escape the consequence of a removal/deportation order. If a noncitizen's criminal conviction is vacated on the basis of a procedural defect in the

140. *Id.* at 1478.

141. *Id.*

142. *Id.* at 1480 (emphasis added) (citations omitted).

143. *Id.* at 1482. Ultimately, the court found that the "collateral versus direct distinction is . . . ill-suited to evaluating" the claim for ineffective assistance of counsel in the deportation context. *Id.*

144. *See id.* at 1483–84.

145. *See id.* at 1484.

146. *See id.* at 1485–86.

underlying criminal proceedings, it no longer constitutes a conviction for immigration purposes and removal proceedings are terminated without an order of removal.[147] In *Matter of Adamiak*, the Board held that a conviction vacated under an Ohio statute for failure of the trial court to advise the noncitizen defendant of the possible immigration consequences of a guilty plea is no longer valid for immigration purposes.[148] Immigration courts may scrutinize the basis for a *vacatur*, because case law requires that the conviction not be vacated solely for rehabilitative or immigration purposes.[149] A noncitizen trying to avoid the immigration consequences of a criminal conviction should be prepared to present evidence of the underlying reasons for the *vacatur* if it is not clear from the criminal court order itself, such as a copy of the motion to vacate or a transcript of the hearing on the motion.[150]

Surprisingly, one of the first questions that may be created by *Padilla* is whether it imposes any additional duties on an immigration judge. An immigration judge is required to address all issues related to removability and to inform respondents appearing before him or her of any "*apparent* eligibility to apply for any of the benefits enumerated" in the immigration law.[151] This is a formidable task because of the complex and constantly-changing law in this area. Could this duty require immigration judges to advise noncitizens of relief that

147. *See* Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (B.I.A. 2000). But it should be noted that a criminal conviction vacated based on a state rehabilitative statute or to ameliorate the immigration consequences remains a conviction for immigration purposes. *See* Pickering v. Gonzales, 465 F.3d 263, 269 (6th Cir. 2006); *Rodriguez-Ruiz*, 22 I. & N. Dec. at 1379.

148. *See* Adamiak, 23 I. & N. Dec. 878, 881 (B.I.A. 2006).

149. *See* Nath v. Gonzales, 467 F.3d 1185, 1188–89 (9th Cir. 2006) ("A vacated conviction can serve as the basis of removal only if the conviction was vacated for reasons 'unrelated to the merits of the underlying criminal proceedings,' that is, for equitable, rehabilitation, or immigration hardship reasons. But a conviction vacated because of a 'procedural or substantive defect' is not considered a 'conviction' for immigration purposes and cannot serve as the basis for removability." (quoting Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, 454 F.3d 525 (6th Cir. 2006))).

150. *See* Chavez-Martinez, 24 I. & N. Dec. 272, 273–74 (B.I.A. 2007) (noting the conflict between circuits regarding which party bears the burden of proving why the conviction was vacated and holding that in the context of a removal order, the party seeking reopening bears the burden); *see also* Rumierz v. Gonzales, 456 F.3d 31, 40–41 (1st Cir. 2006) (holding that the noncitizen bears the burden of proving that a conviction was not vacated solely for immigration reasons). *But see* Nath v. Gonzales, 467 F.3d 1185, 1188–89 (9th Cir. 2006) (placing burden of proving why the conviction was set aside on the government); Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006) (same for motions to reopen).

151. 8 C.F.R. §§ 1240.8(d), 1240.11(a)(2) (2011) (emphasis added).

may be available to them if they are able to set aside a conviction based on a claim of ineffective assistance of counsel? It is black-letter law that an immigration judge cannot go behind a record of conviction to determine the guilt or innocence of a respondent.[152] But if an unrepresented respondent advises the court of a potential ineffective-assistance-of-counsel claim, does the immigration judge have a duty to advise a respondent of relief which would be available if the conviction were to be set aside by the appropriate criminal court? The regulatory language uses the words "apparent eligibility," suggesting that a broad interpretation should be given. In addition, the recently published *Ethics and Professionalism Guide for Immigration Judges* reveals that immigration judges are held responsible for complying with the standards applicable to all attorneys in the Department of Justice, even those applicable to prosecutors.[153] Thus, the *Padilla* case may impose an additional duty on immigration judges.

Another possibility is that noncitizens who wish to pursue post-conviction relief under *Padilla* may appear in immigration court and request termination of proceedings to pursue such relief. Given that, as discussed above, an immigration court will not go behind a record of conviction, this may not be sufficient grounds for termination. The DHS may "cancel" a notice to appear before it is filed with the immigration court or may move to dismiss on various grounds after it has been filed.[154] Although neither of these remedies explicitly mentions the *vacatur* of a criminal court conviction as an appropriate justification, several of the grounds are broad. For example, a motion to dismiss can be because "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interests of the government."[155] A case can also be administratively closed—which temporarily removes the case from the docket—if not opposed by either party.[156]

152. *See, e.g.*, De La Cruz v. INS, 951 F.2d 226, 228 (9th Cir. 1991) (upholding immigration judge's refusal to grant continuance of deportation hearing to determine whether respondent was informed of deportation consequences of his guilty plea before finding him removable and denying voluntary departure); Sirhan, 13 I. & N. Dec. 592, 594 (B.I.A. 1970).

153. *See* EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES, art. II (2011), *available at* www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf.

154. *See* 8 C.F.R. §§ 239.2(a), (c).

155. *Id.* § 239.2(a)(7).

156. Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (B.I.A. 1996).

Noncitizens in immigration proceedings who may want to pursue post-conviction relief under *Padilla* may also request that the court continue the proceedings until the motion to vacate is decided by the criminal court. Immigration judges have broad discretionary authority over continuances, which are allowed for "good cause" and for a "reasonable time."[157] "Good cause" is not defined in the regulations, but has been interpreted on a case-by-case basis.[158]

It is instructive to look at the case law that has developed on motions for continuance based on a visa petition pending with the DHS since in both cases the immigration court is being asked to delay proceedings to wait for the decision of another entity, which could impact a respondent's eligibility for relief from removal. In *Matter of Garcia*,[159] the Board held that, as a general rule, discretion should be favorably exercised where a prima facie approvable visa petition and adjustment application has been submitted. Thus, in seeking a continuance based on a motion to vacate a criminal conviction, a noncitizen should present prima facie evidence regarding the motion—i.e., the motion itself, affidavit of criminal counsel regarding misadvise or failure to advise regarding immigration consequences of the plea, or a plea colloquy.

A recent case has given some guidance on considerations in motions to continue. In *Matter of Hashmi*, the Board announced various factors to consider when determining if good cause exists to continue immigration proceedings based on a visa petition pending with the DHS. Those factors include: (1) the DHS response to the motion; (2) whether the underlying petition is prima facie approvable; (3) the respondent's statutory eligibility for relief; (4) whether respondent's relief application will merit a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.[160] These factors were described as merely illustrative, and the Board noted

157. Hashmi, 24 I. & N. Dec. 785, 788 (B.I.A. 2009); 8 C.F.R. §§ 1003.29, 1240.6.

158. *See, e.g.*, Singh v. Holder, 638 F.3d 1264, 1274 (9th Cir. 2011) (holding the immigration judge did not abuse her discretion in finding the petitioner had not shown good cause for his second motion for a continuance in order to provide corroborative evidence in support of his asylum application); Jimenez-Guzman v. Holder, 642 F.3d 1294, 1296–98 (10th Cir. 2011) (holding the agency did not abuse its discretion in finding no good cause for the petitioner's motion for a continuance to await the adjudication in state court of his motion for post-conviction relief where he had already been granted several continuances).

159. *Garcia*, 16 I. & N. Dec. 653, 657 (B.I.A. 1978), *superseded by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in* Arthur, 20 I. & N. Dec. 475, 479 (B.I.A. 1992).

160. *Hashmi*, 24 I. & N. Dec. at 790.

that the focus of the inquiry should be on the ultimate likelihood of success of relief from removal before the court.[161] Thus, in addition to pleadings before the criminal court, a noncitizen seeking a continuance may want to submit a copy of the application for relief that he wishes to pursue with supporting documents to show he or she is a worthy candidate for that relief. Most importantly, the Board stressed, "if the DHS affirmatively expresses a lack of opposition, *the proceedings ordinarily should be continued . . .* in the absence of unusual, clearly identified, and supported reasons for not doing so."[162] Therefore, a noncitizen requesting a continuance should seek the concurrence of the DHS. Ultimately, however, the outcomes of decisions on continuances are difficult to predict since they are heavily dependent on the unique facts presented in each case.

Another recent case addressing the denial of a continuance pending the *appeal* of a state court denial of a motion to withdraw a guilty plea based on ineffective assistance of counsel illustrates the analysis that may occur regarding a motion to continue to vacate a plea.[163] The First Circuit found that the denial of the motion to continue was not an abuse of discretion, noting that the immigration judge had already continued the removal hearing several times while the noncitizen's motion for post-conviction relief was pending with the state criminal court. In addition, the Court observed that the conviction record "reflect[ed] that [the noncitizen] acknowledged, in writing, the fact that his guilty plea to the controlled substance charge [would] cause deportation, exclusion from admission to the United States, or denial of naturalization or other immigration consequences."[164]

Having addressed how *Padilla* may affect noncitizens with pending removal proceedings, the next query may be how it will affect noncitizens who have been ordered deported either based on criminal convictions that were the result of a plea they now wish to challenge, or noncitizens who were ordered deported because they were not eligible for relief from removal based on a plea that they are moving to vacate. In such cases, a noncitizen may seek to move to reopen the removal proceedings.

Initially, it should be noted that by regulation, a person who has been physically deported and is outside the United States cannot file

161. *Id.*
162. *Id.* at 791 (emphasis added).
163. *See* Jimenez-Guzman v. Holder, 642 F.3d at 1294.
164. *Id.* at 1296, 1299.

a motion to reopen.[165] However, this regulation has been found to be invalid by at least one circuit court.[166]

Motions to reopen in removal proceedings are disfavored because there is a strong public interest in bringing litigation to a close, especially in immigration cases where "granting such motions too freely will permit endless delay of deportation."[167] There are strict requirements in the regulations for motions to reopen including numerical and time requirements.[168] Specifically, a party may file only one motion to reopen, and that motion must be filed no later than ninety days after the date on which the final administrative decision was rendered.[169] While there are some regulatory exceptions to these numerical and time bars, they are very limited and none of them explicitly address the *vacatur* of a criminal conviction upon which a removal order is based.[170] Thus, unless a noncitizen's motion can be construed to fall within one of these limited exceptions, the motion is barred if the conviction is vacated more than ninety days after his or her removal order is final. A respondent can avoid numerical and time bars by requesting that an immigration judge or the Board reopen proceedings *sua sponte*, but *sua sponte* reopening may only be used in exceptional circumstances and not to cure a filing defect or circumvent the regulations.[171]

Despite all of these restrictions, the Board "has routinely been willing to overlook the untimeliness of an alien's motion to reopen when a conviction supporting a removal order is vacated . . ."[172] In fact, the Third Circuit identified ten unpublished cases where the Board reopened proceedings, finding that convictions supporting removal orders were or may have been invalid under *Pickering*.[173] While none of these decisions are precedential, this seems to indicate that there may be a willingness to address motions to reopen based on vacated

165. *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2011).

166. *See* Coyt v. Holder, 593 F.3d 902, 907 (9th Cir. 2010) ("[T]he physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen."); William v. Gonzales, 499 F.3d 329, 334 (4th Cir. 2007).

167. INS v. Abudu, 485 U.S. 94, 108 (1988).

168. *See* 8 C.F.R. § 1003.2(c)(2).

169. *See id.*

170. *See, e.g.*, 8 C.F.R. § 1003.2(c)(3) (providing for exceptions in reopening certain in absentia orders to apply for asylum or withholding of removal, joint motions, and orders based on fraud).

171. *See, e.g.*, Beckford, 22 I. & N. Dec. 1216, 1218 (B.I.A. 2000); J-J-, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

172. Cruz v. Att'y Gen. of the U.S., 452 F.3d 240, 246 (3d Cir. 2006).

173. *See id.* at 246 n.3.

convictions. Case law in this area is likely to rapidly evolve in light of the Supreme Court's decision in *Padilla*.

CONCLUSION

We hope that our overview of immigration law and how the Supreme Court's decision in *Padilla* may affect it has not left you feeling "Curiouser and Curiouser." As Justice Alito noted in his concurring opinion, immigration law is so complex and specialized that it is not always easy to tell when the law is clear.[174] What does appear clear is that the *Padilla* case will have an impact on state court determinations of whether counsel has been constitutionally deficient regarding past pleas, and if so, whether the deficiency was prejudicial. As these issues are raised and presented in immigration court, it will be incumbent on immigration judges and the Board of Immigration Appeals to decide whether to delay or reopen removal proceedings. While we do not have a crystal ball, this Article has given you a glimpse into some of the factors which will be considered in making these decisions, the language we speak in the immigration courts, and how these decisions appear through our looking glass.

174. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1490 (2010) (Alito, J., concurring).