

# New York State Defenders Association Immigrant Defense Project

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## PRACTICE ADVISORY: CRIMINAL DEFENSE OF IMMIGRANTS IN STATE DRUG CASES — THE IMPACT OF *LOPEZ V. GONZALES*\*

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This advisory is IDP's third in a series of practice advisories on the impact of the Supreme Court's decision in *Lopez v. Gonzales* (No. 05-547) (Dec. 5, 2006). The Court's decision answers an important question for criminal lawyers representing immigrants: What state drug offenses are "aggravated felonies" and thereby trigger mandatory deportation without the possibility of a waiver?

### What the Supreme Court decided in *Lopez*

The Supreme Court held that the federal government may not apply the aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that **state first-time drug simple possession offenses**—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are **NOT aggravated felonies**, even if classified as a felony by the state. Thus, while noncitizen clients convicted of such offenses will generally still face regular drug offense deportability or inadmissibility, some may be eligible to seek discretionary relief from removal in later immigration proceedings, e.g., cancellation of removal, asylum or naturalization.

### What *Lopez* means for state criminal defense practice

1. Conviction of, or mere guilty plea to, **virtually any drug offense still generally triggers deportability and/or inadmissibility**. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver.
2. *Lopez*, however, makes clear that **most first-time drug possession offenses will not trigger the more certain mandatory deportation consequences** attached to the "aggravated felony" label.
3. **Whether a second possession offense may be deemed an aggravated felony remains uncertain** and may depend on the law of the federal circuit in which your client's removal case later arises.
4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal felony "*trafficking*" offense continues to trigger aggravated felony mandatory deportation consequences.

For background on *Lopez*, see pages 2 - 3.

For details on the impact of *Lopez* on state defense practice, see pages 4 - 6.

For post-*Lopez* practice tips for state defense practice, see pages 7 - 9. *Cont'd* ►

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## **Background; More on Lopez**

**Pre-Lopez case law conflict.** Before *Lopez*, the Board of Immigration Appeals (BIA) had reversed position and federal courts had been split on what state drug offenses constitute a “drug trafficking” aggravated felony for immigration purposes.

The immigration statute defines “aggravated felony” to include “illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).” See INA 101(a)(43)(B). The BIA had initially interpreted INA 101(a)(43)(B) and 18 U.S.C. 924(c) to hold that a state drug offense qualifies as an aggravated felony only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered “illicit trafficking” as commonly defined or (2) regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act (the so-called **federal felony approach**). *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), *reaffirmed by Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999).

In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including possession with intent to distribute), but simple possession drug offenses are generally misdemeanors. See 21 U.S.C. 801 et seq. and 21 U.S.C. 844 (penalizing possession offenses as misdemeanors unless the prosecution has charged and proven a prior final drug conviction, or possession of more than five grams of cocaine base or any amount of flunitrazepam).

Before and after *Matter of L-G-*, however, several federal circuit courts concluded, in the context of the prior aggravated felony sentence enhancement for the federal crime of illegal reentry after removal, that a state simple possession drug offense is an aggravated felony if it is classified as a felony under state law, even if it is not punishable as a felony under federal law (the so-called **state felony approach**). See *U.S. v. Restrepo-Aguilar*, 74 F.3d 361 (1<sup>st</sup> Cir. 1996); *U.S. v. Polanco*, 29 F.3d 35 (2d Cir. 1994); *U.S. v. Wilson*, 316 F.3d 506 (4<sup>th</sup> Cir. 2003); *U.S. v. Hinojosa-Lopez*, 130 F.3d 691 (5<sup>th</sup> Cir. 2001); *U.S. v. Briones-Mata*, 116 F.3d 308 (8<sup>th</sup> Cir. 1997); *U.S. v. Ibarra-Galindo*, 206 F.3d 1337 (9<sup>th</sup> Cir. 2000); *U.S. v. Cabrera-Sosa*, 81 F.3d 998 (10<sup>th</sup> Cir. 1996); *U.S. v. Simon*, 168 F.3d 1271 (11<sup>th</sup> Cir. 1999).

In 2002, in response to the trend in sentencing cases, the BIA, in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), reversed course and adopted the reasoning of the federal courts in the sentencing context and found that a state simple possession drug offense is an aggravated felony for immigration purposes if it is classified as a felony under state law, unless the case arises in a federal circuit with a contrary rule.

After *Matter of Yanez-Garcia*, conflict in the case law only increased. Some federal circuit courts applied the state felony approach in both the immigration and sentencing contexts, see, e.g., the lower court decision in the case before the Supreme Court—*Lopez v. Gonzales*, 413 F.3d 934 (8<sup>th</sup> Cir. 2005). At the same time, several other courts lined up in support of the federal felony approach, at least in the immigration context. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002)(immigration context), *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9<sup>th</sup> Cir. 2004)(immigration context), *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir. 2005)(sentencing context, but applicable also in the immigration context), and

*Gonzales-Gomez v. Achim*, 441 F.3d 532 (7<sup>th</sup> Cir. 2006)(immigration context). Two Circuits – the Second and Ninth -- adopted different rules for sentencing and immigration cases. Compare *U.S. v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999) and *U.S. v. Ibarra-Galindo*, *supra* (sentencing cases following state felony approach), with *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996) and *Cazarez-Gutierrez v. Ashcroft*, *supra* (immigration cases following federal felony approach). Yet other courts went so far as to find or suggest that a state drug offense is an aggravated felony if it is a felony under either state or federal law (the so-called “**either or**” approach). See, e.g., *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992)(immigration context); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(sentencing context); *U.S. v. Sanchez-Villalobos*, 413 F.3d 575 (5<sup>th</sup> Cir. 2005)(sentencing context, but Fifth Circuit followed same rule in immigration and sentencing contexts).

**Lopez resolves case law conflict.** With *Lopez*, the Supreme Court resolved this conflict, ruling in favor of the federal felony approach to interpreting the meaning of the 18 U.S.C. 924(c) “drug trafficking crime” term referenced in the aggravated felony definition. Thus, the government may no longer deem a state felony possession offense to be an aggravated felony unless it would be a felony under federal law.

The Court relied in part on the ordinary meaning of “trafficking,” noting that “[t]he everyday understanding of ‘trafficking’ should count for a lot here, for the statutes in play do not define the term . . . .” *Lopez*, slip op. at 5. Noting that “ordinarily ‘trafficking’ means some sort of commercial dealing,” it stated that reading 924(c) the government’s way would nevertheless turn simple possession into trafficking, “just what the English language tells us not to expect.” *Lopez* at 3. Although there are exceptions, the Court found that typically federal law treats non-trafficking offenses as misdemeanors, and therefore such offenses generally should not be deemed “drug trafficking crimes” in the absence of express Congressional command. The “inclusion of a few possession offenses in the definition of ‘illicit trafficking’ does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning.” *Lopez* at n.6. Moreover, the Court made clear that it did not matter what quantity of the controlled substance was possessed, since federal law punishes virtually all simple possession offenses as misdemeanors without, in general, designating such offenses as felonies based on the quantity involved. See *Lopez* at 11-12.

The only exceptions to the general rule that simple possession offenses are misdemeanors under federal law, the Court noted, are offenses involving possession of two specific controlled substances—crack cocaine and flunitrazepam—as well as “recidivist possession,” citing 21 U.S.C. 844(a) (providing sentence enhancements for possession of more than five grams of cocaine base, known as “crack cocaine,” possession of any amount of flunitrazepam, and possession of a controlled substance after a prior drug conviction has become final). See *Lopez* at n.4 & n.6. The Court indicated that state counterparts may be deemed aggravated felonies if the state offense “corresponds” to the analogous federal offense. See *Lopez* at n. 6.

## What *Lopez* means for state criminal defense practice

We distill the import of *Lopez* for state criminal defenders into the following four general principles:

- 1. Conviction of, or mere guilty plea to, virtually *any* drug offense still generally triggers deportability and/or inadmissibility, even if later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver.** If your noncitizen client is convicted of virtually any drug offense relating to a controlled substance, he or she will become removable despite the Supreme Court decision in *Lopez*. Your client's conviction will trigger regular controlled substance offense deportability for lawfully admitted immigrants,<sup>1</sup> or inadmissibility for others who now or in the future may be seeking lawful admission.<sup>2</sup> The only exception is for deportability purposes and applies only to lawfully admitted immigrants convicted of a single offense involving possession for one's own use of thirty grams or less of marijuana.<sup>3</sup>

Even a drug conviction later expunged via a rehabilitative statute--or even a mere guilty plea to a drug offense later vacated, e.g., due to successful completion of a drug treatment program--may be sufficient for your client to be deemed convicted for immigration purposes and rendered removable (unless the disposition involves a first-time possession offense and the removal case later arises in the Ninth Circuit).<sup>4</sup>

Moreover, if your client is a lawful permanent resident immigrant ("green card" holder) who was admitted to the United States less than seven years before the alleged commission of the drug offense, conviction or plea to a drug offense may trigger *mandatory deportation*.<sup>5</sup> And, if your client is a noncitizen who does not have lawful permanent resident status, conviction or plea to virtually any drug offense will trigger *inadmissibility without a waiver* if the client is now applying, or in the future plans to apply, for permanent resident status.<sup>6</sup>

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<sup>1</sup> See INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i).

<sup>2</sup> See INA 212(a)(2)(A)(i)(II), 8 U.S.C. 1182(a)(2)(A)(i)(II).

<sup>3</sup> See INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i).

<sup>4</sup> See INA 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A)(guilty plea combined with some penalty or restraint ordered by a court sufficient to be deemed conviction for immigration purposes); see also *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute); but see *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act).

<sup>5</sup> The relief of cancellation of removal for lawful permanent resident immigrants is barred not only if the individual is convicted of an aggravated felony, but also if the individual commits any drug offense before the person has continuously resided in the United States for seven years. See INA 240A(a) & (d), 8 U.S.C. 1229b(a) & (d).

<sup>6</sup> The waiver of inadmissibility available for persons seeking lawful permanent resident status who have been convicted of, or who have admitted, crimes is not available for any drug offense other than a single offense of simple possession of 30 grams or less of marijuana. See INA 212(h), 8 U.S.C. 1182(h).

- 2. Lopez, however, dictates that most first-time drug possession convictions will no longer trigger the more certain mandatory deportation consequences attached to the “aggravated felony” label.** Your client convicted of a first-time possession offense – even if deemed a felony under state law – will no longer be deemed convicted of an aggravated felony. The only exceptions would be if your client was convicted of possession of more than five grams of crack cocaine or any amount of flunitrazepam since such offenses would be felonies under federal law.<sup>7</sup>

This is important: If your client is convicted of a first-time drug possession offense, he or she may avoid the statutory aggravated felony bars for eligibility for removal relief such as cancellation of removal for certain lawful permanent residents,<sup>8</sup> asylum,<sup>9</sup> withholding of removal,<sup>10</sup> and termination of removal proceedings in order to pursue naturalization.<sup>11</sup> Whether your client may be able to obtain such relief will depend on whether he or she is otherwise eligible and the strength of the claim.

For example, if your client is a lawful permanent resident and is convicted of a drug offense that triggers removability but is not an aggravated felony, your client may later be eligible for the relief of cancellation of removal as long as s/he has resided continuously in the United States for at least seven years prior to commission of the offense.<sup>12</sup> To be granted such relief, your client will have to show favorable factors such as family ties within the United States, residency of long duration in the country, evidence of hardship to the individual and family if deportation were to occur, service in the armed forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation, and evidence attesting to good moral character.<sup>13</sup> It is estimated that about one-half of applicants whose applications for the similar “212(c) waiver” cancellation predecessor form of relief were decided between 1989 and 1995 were granted such relief.<sup>14</sup>

Finally, it should be noted that avoiding the aggravated felony label also avoids other negative immigration consequences under the immigration laws, such as the stiff sentence enhancements that exist for the federal crime of illegal reentry after deportation subsequent to an aggravated felony conviction.<sup>15</sup>

- 3. Whether a conviction of a second possession offense may be deemed an aggravated felony remains uncertain, and may depend on the law of the federal court circuit in which your client’s removal case later arises.** The only drug offense plea that is currently safe from aggravated felony consequences is a first-time possession offense. If preceded by a prior drug conviction, even a

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<sup>7</sup> See 21 U.S.C. 844(a).

<sup>8</sup> Barred by aggravated felony—see INA 240A(a)(3)).

<sup>9</sup> Barred by aggravated felony—see INA 208(b)(2)(B)(i)).

<sup>10</sup> Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—see INA 241(b)(3)(B)).

<sup>11</sup> Barred by post-November 29, 1990 aggravated felony—see INA 101(f).

<sup>12</sup> See INA 240A(a) & (d), 8 U.S.C. 1229b(a) & (d).

<sup>13</sup> See *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).

<sup>14</sup> See *INS v. St. Cyr*, 533 U.S. 289 at 296, n.5 (2001).

<sup>15</sup> See INA 276(b)(2), 8 U.S.C. 1326(b)(2).

misdemeanor possession offense might be deemed an aggravated felony. This is because the government may continue to argue, as it has in the past, that under the federal felony approach adopted by the Supreme Court in *Lopez*, a misdemeanor possession offense preceded by a prior drug conviction must be deemed an aggravated felony because of the authority under federal law to penalize a second or subsequent possession conviction as a felony.<sup>16</sup> Some federal circuits have adopted this position.<sup>17</sup> However, other circuits have applied the federal felony approach to find that the later conviction does not correspond to a federal “recidivism possession” 21 U.S.C. 844(a) felony offense if the state conviction did not involve notice and proof of the prior conviction as required for a federal possession recidivism conviction under 21 U.S.C. 851.<sup>18</sup> In addition, even if a circuit has stated that a second or subsequent possession offense may be deemed an aggravated felony, it may not so find if the prior conviction was not yet final at the time of commission of the later offense. This is because a second or subsequent state drug possession conviction is subject to an 844(a) recidivism sentence enhancement only if the prior conviction was final at the time of commission of the later offense.<sup>19</sup> It should be noted that the Ninth Circuit Court of Appeals has ruled that a second or subsequent state drug possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a “felony” punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement,<sup>20</sup> however, be aware that the *Lopez* decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year as “felonies” falling within the 18 U.S.C. 924(c)(2) “drug trafficking crime” definition. See *Lopez* at n.6.

4. **Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal “trafficking” offense continues to trigger aggravated felony mandatory deportation consequences.** Any state drug offense that corresponds to a federal felony drug offense listed at 18 U.S.C. 841 *et seq.* -- generally true trafficking-type offenses such as drug distribution or intent to distribute offenses -- is an aggravated felony. However, conviction of a state offense that covers conduct that may not be a federal felony (e.g., possession, transfer of marijuana without remuneration, or maybe offer to sell – see practice tips below), as well as conduct that would be a federal felony, may not necessarily be deemed an aggravated felony unless the federal government is able to establish, through the state record of conviction, that your client was convicted of that portion of the statute relating to the covered conduct that would be a federal felony.

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<sup>16</sup> See 21 U.S.C. 844(a) (subjecting individuals convicted of possession of a controlled substance after a prior drug conviction has become final to a maximum sentence in excess of one year).

<sup>17</sup> See *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5<sup>th</sup> Cir. 2005)(finding second misdemeanor possession offense constituted an aggravated felony); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(finding second misdemeanor possession offense to be an aggravated felony in illegal reentry sentencing context but declining to comment on whether such offense would be an aggravated felony in the immigration context).

<sup>18</sup> See *Berhe v. Gonzales*, 464 F.3d 74 (1<sup>st</sup> Cir. 2006) (“Because Berhe’s 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of a hypothetical federal felony”); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001).

<sup>19</sup> See 21 U.S.C. 844(a)(providing for sentence enhancement based on a prior conviction only if the offense at issue is committed after such prior conviction “has become final”); see also *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir. 2005)(later offense committed while prior drug case still pending in criminal court); *Smith v. Gonzales*, 468 F.3d 272 (5<sup>th</sup> Cir. 2006)(later offense committed while individual still within time to seek leave to appeal prior conviction).

<sup>20</sup> See *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9<sup>th</sup> Cir. 2004);

## Practice Tips

In light of *Lopez*, state criminal defense practitioners representing noncitizen clients facing state drug charges may wish to consider the following tips:

► **Avoid drug conviction or plea, if possible.** As explained above, virtually any drug offense – other than a single offense involving possession for one’s own use of thirty grams or less of marijuana -- triggers controlled substance deportability for a lawfully admitted noncitizen client. Moreover, any drug offense triggers inadmissibility for a noncitizen client who is not yet lawfully admitted. Therefore, if possible, you should avoid conviction of a drug offense for a noncitizen client. This includes a guilty plea to a drug offense combined with some penalty or restraint ordered by a court (e.g., court-ordered commitment to a drug treatment program) since such a disposition may be deemed a conviction for immigration purposes even if the plea is later vacated. See, *supra*, note 4. If possible, when there is a possibility of placement in a drug treatment or other alternative-to-incarceration program, try to negotiate a disposition that does not involve an up-front guilty plea to a drug offense.

► **If this is your client’s first drug offense charge, plead to possession rather than sale.** As discussed above, *Lopez* makes clear that any first-time drug possession offense – although it will still trigger removability -- may not be deemed an aggravated felony triggering mandatory removal of a lawful permanent resident immigrant. Thus, if your permanent resident client will plead guilty, you should negotiate a plea to a simple possession offense rather than a sale or possession with intent-to-sell or other trafficking-type offense in order to preserve the possibility of relief from removal. Moreover, since the Court made clear that it did not matter what quantity of the controlled substance was possessed as long as the possession offense does not contain a distribution, intent to distribute, or other federal “trafficking” element, your client may in some states be able to offer a plea to a simple possession offense that is of a comparable or even higher level than the “trafficking” offense charged. Even if your client is not a permanent resident, avoiding the aggravated felony label may enable your client to apply for asylum if otherwise eligible or, if your client is deported, may avoid the stiff federal prior aggravated felony sentence enhancement if your client is charged and convicted in the future of the crime of illegal reentry after deportation.

► **If your client has a prior drug conviction(s), file an appeal of the prior conviction(s), or seek leave to appeal the prior conviction(s), if possible.** *Lopez* leaves open the question of whether a second state drug possession conviction may be deemed an aggravated felony. However, a second state possession offense should not be deemed to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the prior conviction was not final at the time of commission of the later offense. Thus, if your client is still within the time to file an appeal of the prior conviction as of right, you might advise your client that he or she may avoid aggravated felony consequences for the current case if he or she appeals the prior conviction. If the time for an appeal of right has passed but there is still time to seek discretionary leave to appeal the prior conviction, you might advise your client to seek such leave. See *Smith v. Gonzales*, 468 F.3d 272 (5<sup>th</sup> Cir. 2006)(later offense committed while individual still within the time to seek leave to appeal the prior conviction).

► **If your client has a prior drug conviction(s), avoid plea to offense that involves charge and proof of the prior conviction(s).** As discussed above, a second state drug possession conviction might be deemed not to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the conviction does not include charging and proof of the prior drug conviction. Thus, if your state has separate offenses for those convicted of possession depending on whether the prosecution chooses to charge and prove a prior conviction of a drug offense, you should seek to avoid the offense involving proof of the prior conviction. This strategy should work in particular if your client's later removal case is likely to fall within the jurisdiction of the U.S. Courts of Appeals for the First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island) or the Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands). See *Berhe v. Gonzales*, 464 F.3d 74 (1<sup>st</sup> Cir. 2006); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001). Be aware, however, that this strategy may not work if your client's later removal case falls within the jurisdiction of the Second Circuit (Connecticut, New York, Vermont) or the Fifth Circuit (Canal Zone, Louisiana, Mississippi, Texas). See *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5<sup>th</sup> Cir. 2005).

► **If possible, plead to a preparatory or accessory-after-the-fact offense.** For removal cases arising in the Ninth Circuit, a state conviction of a free-standing preparatory or accessory offense such as solicitation, even if the underlying offense is a drug offense, should not be deemed an aggravated felony. See *Levya-Licea v. INS*, 187 F.3d 1147 (9<sup>th</sup> Cir. 1999). Therefore, if your noncitizen client is charged with a drug offense, you might offer an alternate plea to such a preparatory or accessory offense. At present, this strategy may work only if your client's later removal case falls within the jurisdiction of the Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington); however, even for clients whose cases will probably not fall within Ninth Circuit jurisdiction, such a disposition may offer your client an argument to avoid removal or mandatory removal.

► **If your client will plead guilty to a state drug offense that covers conduct that would be an aggravated felony but also conduct that would not, keep out of the record of conviction any information that would help establish that the conduct is an aggravated felony.** Under immigration case law, an offense that covers some conduct that is an aggravated felony and some that is not may not categorically be determined to be an aggravated felony. For example, the Third Circuit has found that a state marijuana "sale" offense that might cover transfer of a small amount of marijuana for no compensation should not categorically be considered a "drug trafficking crime" or an "illicit trafficking" aggravated felony since such a transfer would be treated as a misdemeanor under federal law. See 21 U.S.C. 841(b)(4) ("distributing a small amount of marijuana for no remuneration" treated as simple possession misdemeanor under 21 U.S.C. 844); *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001). Similarly, the Ninth Circuit has found that a state drug offense that includes "offers" to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct and, therefore, could not categorically be determined to be an aggravated felony. See *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001). However, be aware that the immigration authorities may look to the record of conviction to determine whether your client was

convicted of that portion of the statute relating to conduct that would be an aggravated felony. Therefore you may help your noncitizen client avoid removal if you either make sure the record of conviction establishes conduct that would not be considered an aggravated felony, or keep out of the record of conviction any information that would help the federal government establish conduct that would be an aggravated felony.

► **If your client will plead guilty to a state drug offense whose elements do not establish the controlled substance involved, keep out of the record of conviction any information that would help establish that the substance involved is one listed in the federal controlled substance schedules.** The aggravated felony definition at INA 101(a)(43)(B) covers only drug offenses that relate to a substance included in the federal definition of “controlled substance” in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 U.S.C. 812). However, many states define “controlled substance” to include some substances that do not appear in the federal controlled substance schedules. Therefore, if you are able to avoid the record of conviction in your client’s state criminal case establishing the particular controlled substance involved, this may offer your client an argument in later immigration proceedings that his or her particular offense is not necessarily an aggravated felony.

► **If your client will plead guilty based on an understanding that the plea will not trigger removal, or at least mandatory removal, advise your client to allocute to his or her understanding.** You might advise your client to include such a statement of his or her understanding in the plea allocution in order to provide some basis for a later withdrawal of the plea should this understanding be upset by later legal developments.

### **Contact Us**

For the latest legal developments or litigation support on any of the issues discussed in this advisory, contact IDP’s Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208, or for support on issues involving drug possible alternative-to-incarceration (ATI) disposition cases, contact IDP’s Alina Das at (718) 858-9658 ext. 203. They may also be contacted by email at [bjain@nysda.org](mailto:bjain@nysda.org), [mvargas@nysda.org](mailto:mvargas@nysda.org) and [adas@nysda.org](mailto:adas@nysda.org).