

# Guide to Representing Non-Citizen Criminal Defendants in Pennsylvania

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Last Revised March 2019

## INTRODUCTION: REPRESENTING NONCITIZEN DEFENDANTS IN PENNSYLVANIA

**Purpose of the Chart:** Under the decision of the Supreme Court in *Padilla v. Kentucky*, 599 U.S.356 (2010), the Sixth Amendment requires defense counsel to provide immigration advice to defendants regarding the deportation consequences of pending criminal charges. The purpose of this guide is to provide an introductory tool for criminal defense attorneys to assist in navigating the complex field of immigration law, and to aide attorneys in complying with their constitutional and ethical obligations by offering a starting point for analysis. What this guide does NOT intend to do is to replace the need for individual research in each case that takes into account the particularities of each client’s situation. Competent advice about the best criminal disposition in an individual noncitizen defendant’s case will depend on that individual’s prior criminal record, his or her immigration status, the status of immediate relatives and a number of other factors. This guide does not purport to provide legal advice or to give an opinion as to the immigration consequences that might result from a criminal disposition in a particular case.

For practice advisories and developments in the law following *Padilla*, please visit [www.defendingimmigrants.org](http://www.defendingimmigrants.org).

**Note to Immigration Attorneys on Using the Chart.** This chart was primarily written for criminal defense attorneys. The conclusions in each category represent a conservative view of the law, meant to guide criminal defense counsel away from potentially dangerous options and toward safer ones. Thus, immigration counsel should not rely on the conclusions in the chart in deciding whether to pursue defense against removal. An offense may be listed as a “probably” as an aggravated felony or other adverse category here even if there are strong arguments to the contrary that might prevail in immigration proceedings. We have included a column of suggestions for immigration counsel consisting of ideas for arguments against a finding of deportability or inadmissibility for certain statutes. Many of our ideas are untested and this column does not constitute legal advice.

**Sending comments about the Chart:** Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed or to propose other alternate “safer” pleas, or want to say how the chart works for you or how it could be improved. Send email to [Immigration@philadefender.org](mailto:Immigration@philadefender.org). This address will not answer legal questions.

**Please note:** This chart is based on case law in the Third Circuit. Due to the constantly changing case law in this area, the chart is continuously being updated, and may not provide the most up-to-date information. The date the chart was last updated does not mean that every entry on the chart was updated on that date.

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**DISPELLING SOME DANGEROUS MYTHS REGARDING IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS**

Defense attorneys should understand that the intersection of federal immigration law and Pennsylvania criminal law often leads to results that are counterintuitive. The following are some of the misconceptions about this area of the law most often heard from defense practitioners. The primary lesson to be conveyed is that the immigration consequences of a criminal conviction must be considered in every case involving a defendant who is not a U.S. citizen.

***MYTH: Immigration consequences are only an issue if the person is here “illegally.”***

WRONG. Criminal charges or convictions may lead to deportation for any individual who is not a citizen of the United States. A noncitizen defendant could face immigration consequences even if he or she has been in this country since an early age, has been a lawful permanent resident (i.e. “green-card” holder), is married to a United States citizen or has citizen children, has assimilated completely into our society and has never had a prior criminal conviction. The defendant’s status may impact what kind of consequences he or she faces, but all noncitizens could face deportation as long as they have not naturalized.

***MYTH: Immigration consequences are only an issue if the conviction is a felony.***

WRONG. Even the most drastic of immigration consequences can result from convictions that are only misdemeanors under Pennsylvania law. Indeed, many misdemeanor convictions under Pennsylvania law could be classified as “aggravated felonies” under immigration law (this is the case even though the offenses were neither “aggravated” nor “felonies”). Of course, the fact that an offense is a felony is often relevant to the potential immigration consequences, and certain felony convictions are more likely to have drastic consequences, but misdemeanors are in no way outside the scope of immigration law.

***MYTH: There will be no immigration consequences if the defendant does not serve time.***

***MYTH: There will be no immigration consequences if the defendant serves only a year or less.***

***MYTH: There will be no immigration consequences if the sentence is suspended.***

WRONG, WRONG, and WRONG. The term of imprisonment imposed for a particular conviction may be important in determining the immigration consequences of the conviction, but it also may not be relevant at all. In some circumstances, the length of a term of imprisonment will be critically important: for instance, some convictions will qualify as an “aggravated felony” only if a sentence of 1 year OR more is imposed. **(Under Pennsylvania sentencing, it is the maximum term of imprisonment imposed that is used to determine whether a sentence is 1 year or more; see below for more information on sentencing).** Remember, however, that the length of the

sentence is relevant only in some cases. In many situations, it will not matter that the defendant was not sentenced to any jail time: the mere fact of conviction will trigger immigration consequences regardless of sentence.

***MYTH: If the person is here “illegally,” it doesn’t matter what they’re convicted of since they’ll get deported anyway.***

WRONG. A noncitizen without legal status at a particular point could be eligible to obtain lawful immigration status in a number of different ways. Many, if not most, of those avenues could be foreclosed by certain types of criminal convictions. There are also many discretionary waivers of deportation for which a noncitizen could qualify, but again many of these waivers are not available to those convicted of certain offenses. But even if a person will not be able to avoid deportation in the end, criminal convictions can have harsh additional consequences. For instance, most noncitizens being deported because of a criminal conviction will face mandatory detention pending their removal. Many may be ineligible for a type of relief called “voluntary departure,” which allows them to depart the country on their own and therefore avoid additional sanctions. Finally, if an undocumented individual reenters the country after being deported, she or he may face federal criminal charges if they are caught by immigration authorities, and the potential sentences they would face are much longer if they were deported subsequent to certain types of criminal convictions. For all of these reasons, immigration consequences comprise an issue that is important to every noncitizen defendant.

***MYTH: The record in this particular case will be sealed or expunged, so there won’t be any immigration consequences.***

WRONG. Immigration practitioners have found that nothing is “sealed” for purposes of immigration law. Applicants for immigration benefits are often required to provide information for all prior arrests and convictions. Defense attorneys are therefore advised to assume that all criminal records will be available to immigration authorities and could trigger immigration consequences—regardless of the fact that those records are considered “sealed” as a matter of state law. A conviction will still exist for purposes of immigration law even if the conviction was expunged or sealed. Often times, expungement of a conviction poses additional hardships for the noncitizen because they are unable to demonstrate to the immigration officer the nature of the offense.

***MYTH: This issue is just too complicated and there’s nothing I can really do about it.***

***MYTH: My clients just want to avoid serving time and they won’t care about the immigration consequences.***

WRONG and WRONG. This area of the law is undoubtedly complex and the lines that are drawn by immigration law do not always make intuitive sense. However, there are very simple things that a defense attorney can do to improve a client’s chances in immigration court if he or she is alert to particularly dangerous dispositions. In addition, it is certainly the case that many criminal defendants will be more concerned about the more imminent prospect of serving time (or getting out of jail) than they will be about the future immigration consequences. Defense attorneys should recognize, however, that many noncitizens may be operating under the erroneous assumption that a particular conviction will not affect their immigration status: for instance, a defendant may think that because he is a “permanent” resident he cannot be deported. The ultimate decision about how to proceed is of course up to the client, but defense attorneys have a constitutional and professional obligation to ensure that the client is properly informed. Defense attorneys should keep in mind that the decisions made during the criminal proceedings will be crucial in framing any subsequent immigration proceedings. Clients should be made aware that

there may be little an immigration attorney can do down the line if immigration consequences are not addressed during the criminal proceeding.

## WHAT ARE THE CATEGORIES OF CRIMES THAT CAN TRIGGER IMMIGRATION CONSEQUENCES?

It is important to note that any criminal conviction—and in some cases, criminal *conduct*, even if it does not lead to a conviction—could have consequences for the immigration status of a noncitizen. The reason is that many decisions as to whether to grant a particular immigration benefit—including naturalization—are left to the discretion of federal immigration authorities. Criminal conduct or a criminal conviction of any kind can be taken into account by those authorities in making discretionary determinations.

Certain classes of convictions trigger automatic provisions of immigration law which render a noncitizen deportable (or “removable”) and/or subject them to mandatory detention.<sup>1</sup> Many of those same classes of convictions will make a noncitizen ineligible for discretionary waivers or other forms of relief that may allow them to stay in the country even if they are considered deportable. The following is a brief overview of these categories:

**Aggravated Felony (AF):** This will be the worst category of criminal offenses for immigration purposes for lawful permanent residents (LPRs) and individuals seeking asylum. Its name is misleading because the offense need be neither “aggravated” (as that term may be commonly understood) nor a “felony” under state law for it to be an “aggravated felony.” The list of what this category includes is long<sup>2</sup>, but the most common offenses charged as aggravated felonies are: murder, rape, sexual abuse of a minor, drug-trafficking crimes, and certain subcategories of crimes which meet a certain threshold: for example “crimes of violence,” “burglary” or “theft offenses” for which a sentence of 1 year OR more is imposed, or “fraud” offenses in which the loss to the victim exceeds \$10,000. When a noncitizen’s conviction falls into this category, the consequences are severe: the individual will face mandatory detention, almost certain deportation, will be ineligible for virtually all forms of relief, and he or she will face criminal penalties of up to 20 years in federal prison for Illegal reentry after a conviction for an Aggravated Felony.

**Controlled Substances Offenses (CS):** This is another category that will result in drastic immigration consequences for most noncitizens. This category encompasses offenses “relating to” a controlled substance as defined by federal law, and it therefore encompasses simple possession and distribution offenses involving substances covered by *federal* drug schedules (if the substance is regulated only by the state, it is not covered). A conviction in this category often renders undocumented immigrants ineligible to apply for legal status (and therefore subjects them to mandatory deportation).

**Crimes Involving Moral Turpitude (CIMT):** A broad category of criminal offenses, this category is as vague as its title suggests. One often feels that the courts’ take on “moral turpitude” is the same as their take on “obscenity”: they know it when they see it. However, there is considerable case law guiding this analysis. Generally, the following types of crimes are found to be CIMTs: offenses involving theft or an intent to defraud; offenses involving intent to cause bodily harm, or offenses involving recklessness that result in serious bodily harm; and most offenses involving sexual conduct. CIMTs do not render a noncitizen removable in every case—the impact of a CIMT will depend on the immigration status, timing of the offense, prior criminal record, and actual and potential sentence for the offense.

**Crime Against Children (CAC):** Another broad category of crimes that encompasses any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that qualifies as maltreatment, and harms a minor’s mental or physical well-being, regardless of proof of actual injury or harm to the child.

**Other Categories:** Other categories of offenses are more specific: crimes of domestic violence (CODV), firearm offenses, etc... Many of these categories of offenses will have their greatest negative impact on noncitizens who have been lawfully admitted to the country, especially lawful permanent residents (LPRs). Unlike Aggravated Felonies,

these categories of offenses will often (but not always) preserve a lawful permanent resident’s eligibility for discretionary waivers of deportation.

### COMMON GROUNDS OF DEPORTABILITY AND INADMISSIBILITY

The categories of offenses discussed supra can trigger different sections of the Immigration and Nationality Act. When assessing your client’s immigration consequences you have to assess whether the client’s concern is avoiding a ground of deportability or a ground of inadmissibility. Clients who have been lawfully admitted; including LPRS and nonimmigrants will be concerned with avoiding grounds of deportability. Undocumented individuals are already deportable due to their unlawful entry and therefore must avoid convictions that would impact their ability to apply for immigration relief. Noncitizens seeking lawful (re)admission to the US and LPRs returning from travel abroad must also be deemed admissible to be allowed entry to the US.

The client’s entire criminal and immigration history must be assessed in order to determine the immigration consequences of past convictions and current charges.

Classification of Crime	Inadmissible	Deportable
One CIMT	Yes, unless offense falls under petty-offense exception	Yes, if committed within 5 years of date of admission and sentence of one year or longer MAY be imposed.
Multiple CIMTs	Yes	Yes
Controlled Substance	Yes	Yes, except for one offense simple possession of 30 grams or less of Marijuana
Aggravated Felony	No; unless the offense falls into some other ground of inadmissibility	Yes
Firearms Offense	No, but discretionary factor	Yes
Money Laundering	Yes, but can argue that only if in violation of federal law.	Maybe. Potential Aggravated Felony.
Domestic Violence	No, but underlying crime may be a CIMT.	Yes.
Alien Smuggling	Yes	Yes
Immigration Violations, Visa & Passport Fraud	Maybe.	Yes

## REPRESENTATION DO'S AND DON'TS

### What are the things to AVOID when representing a noncitizen defendant?

As noted earlier, a comprehensive assessment of what offenses should be avoided in a particular case requires knowledge of the individual's past criminal history, his or her immigration status, and many other factors regarding his family circumstances and the specifics of the offense. However, recognizing that each case will present its own circumstances, criminal defense attorneys should keep in mind the following *general* guidance:

- ✓ **Avoid a “conviction” whenever possible:** Although even just some forms of criminal-related conduct can have immigration consequences, most immigration issues arise after a conviction. Obviously, obtaining an outright dismissal or a *nolle prosequi* would be ideal. However, Pennsylvania also provides a number of pre-trial diversion programs, some of which do not require an admission of guilt or a “no contest” plea and which lead to dispositions that would not be considered “convictions” for immigration purposes. The best option in Pennsylvania is the Accelerated Rehabilitative Disposition (ARD) program, which does not require an admission or finding of guilt and which is not considered a conviction for immigration purposes. Defense attorneys should note, however, that some of Pennsylvania's pretrial diversion programs do require an admission of guilt. Therefore these programs will NOT prevent immigration consequences, such as the Section 17 drug treatment program which is considered a conviction for immigration purposes. For cases involving juveniles, delinquency adjudications in Pennsylvania are not considered convictions; however remember there are certain types of conduct, particularly if it is related to controlled substances, which may have independent immigration consequences.
- ✓ **Avoid an “Aggravated Felony”:** In most situations, and especially when a defendant is a lawful permanent resident (LPR) (also known as a “green-card holder”), a conviction for an aggravated felony will have the worst immigration consequences. Practitioners should be particularly careful with the subcategories of “aggravated felony” that hinge on sentence or amount of loss: here, simple changes to a plea agreement can make huge differences.
- ✓ **Avoid a “Controlled Substance Offense”:** Virtually all drug offenses will result in harsh immigration consequences for most noncitizens. The only exception is a first offense for simple possession of 30 grams or less of marijuana (30g = 1.05 ounces), which will not trigger deportability for a lawful permanent resident (but which may affect ability to return from travel abroad). Other controlled substance offenses will make a lawful permanent resident deportable, and some will bar relief from deportation. Most undocumented immigrants with a drug offense will be barred from getting legal status, unless it is a first conviction for simple possession of 30 grams or less of marijuana.
- ✓ **Avoid “Crimes of Domestic Violence,” “Firearm Offenses,” and others:** these categories have particularly serious consequences for lawful permanent residents (LPRs). Other kinds of convictions to be avoided in this area are: crimes of stalking, crimes against children, and violations of protective orders.
- ✓ **Avoid a “Crime Involving Moral Turpitude” (CIMT):** Depending on the individual's status and prior criminal history, this category may make the person removable; however, it *may* leave open more avenues for relief than would a conviction for an aggravated felony. If a CIMT cannot be avoided completely, but the defendant does not have any prior convictions for an offense that would be considered a CIMT, a defense attorney should consider the following options:
  - *If the defendant is a Lawful Permanent Resident (LPR), but has been admitted lawfully for less than five years:* avoid conviction for a CIMT for which a sentence of more than one year may be imposed (i.e. first and second degree misdemeanors and all felonies).
  - *If the defendant is a Lawful Permanent Resident (LPR) or other Alien lawfully admitted:* avoid a conviction for 2 or more CIMTS not arising out of a single scheme of criminal misconduct to prevent deportability

- *If the defendant is undocumented:* avoid a conviction for a CIMT with a maximum possible sentence of more than one year (i.e., avoid all second and third degree misdemeanors and felonies) and obtain a maximum sentence imposed of six months or less. This should preserve the client’s eligibility for the “petty offense exception” if they are otherwise eligible to apply for lawful status.

### **WHAT ARE THE THINGS TO DO WHEN REPRESENTING A NONCITIZEN DEFENDANT?**

Ultimately, it is your job to investigate, research, and communicate the consequences of a conviction to your client. This will involve assessing complex immigration laws and packaging the information in a way that is digestible to your client.

- ✓ **Ask detailed questions about client’s current immigration status:** This information is essential to an attorney’s ability to provide specific and accurate immigration advice. We have provided a sample intake form in this guide; however, additional information may be needed depending on the details of a particular client’s situation.
- ✓ **Conduct independent research into the immigration consequences of pending charges:** This guide offers a starting point for analysis, but updated research into recent case law that takes into account the individual details of a client’s situation and defense priorities is *always* necessary.
- ✓ **Communicate your specific, detailed conclusions regarding the immigration consequences of pending charges to your client:** Under *Padilla v. Kentucky*, it is an attorney’s constitutional obligation to inquire as to the immigration status of their clients and to advise a noncitizen client of the deportation consequences of their criminal charges. These consequences go beyond whether a client will be deportable. Many convictions can impact availability of future immigration relief, as well as a client’s ability to travel outside of the United States.
- ✓ **Ascertain your client’s wishes regarding the disclosure of their immigration status to the DA and the Court:** Client’s may have serious and sometimes warranted concerns regarding the disclosure of their status to anyone for fear of being detained by ICE. Be sure to discuss the possible negative and positive effects of disclosing their status, as well as the risks and benefits. Ultimately, it is your client’s decision.
- ✓ **Urge client to consider pre-trial diversion programs, if applicable:** In many situations, if an outright dismissal is not possible, a pre-trial diversion program like ARD that avoids a “conviction” for immigration purposes, because no plea is entered, will be the best possible outcome for a defendant. Although these programs impose significant requirements, a client should be advised of the benefits in the immigration context.
- ✓ **Pay careful attention to crafting a plea agreement:** In many situations, small changes to how the plea agreement is crafted can have a huge impact on the consequences stemming from the conviction. For instance:
  - If the conviction is one which could constitute an aggravated felony if a sentence of 1 year or more is imposed, a plea agreement with a sentence (whether suspended or to be served) of 364 days instead of 1 year may well make the difference between an essentially permanent deportation and possibly no immigration consequences at all.
  - Consider crafting pleas to charges that do not trigger immigration consequences, or that trigger less serious categories (for instance, it is often better to plea to a CIMT than to plea to an aggravated felony).

## DEFINITION OF A CONVICTION & “SENTENCE IMPOSED” IN PENNSYLVANIA

**Definition of “conviction” for immigration purposes.** A conviction occurs where there is a formal judgment of guilt. A conviction can also exist where the adjudication of guilt is withheld and two conditions are met:

- a judge or jury has found the alien guilty, the alien has entered a plea of guilty or nolo contendere, or the alien has admitted sufficient facts to warrant a finding of guilt; AND
- Some form of punishment, penalty, or confinement on the alien’s liberty has been ordered.<sup>3</sup>

**Definition of “sentence imposed” for immigration purposes.** The immigration statute defines sentence imposed as the “period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part.”<sup>4</sup> Thus, a plea plus confinement, regardless of suspension or execution of the sentence will be a conviction. Under Pennsylvania’s minimum/maximum sentencing structure the “sentence imposed” for immigration purposes is the maximum sentenced imposed.<sup>5</sup> Example: 11 ½ to 23 months is a sentence of one year or more. A sentence of 5 1/2 to 11 months is not.

- This language refers to the sentence actually imposed, not to the potential sentence.
- It does not include the period of probation, although the additional sentence imposed by a court after a probation or parole violation is included within the “sentence imposed.”
- A condition of probation that requires a period of incarceration or confinement, such as an in-patient treatment facility, will count towards a sentence of confinement.
- It includes the entire sentence imposed even if the client has been immediately paroled and never actually served any period of incarceration.
- It includes the aggregation of consecutive sentences on a single charge.
- House arrest with electronic monitoring satisfies the definition of imprisonment.<sup>6</sup>

**How to get a sentence of less than one year.** Often counsel can avoid having an offense classed as an aggravated felony by creative plea bargaining. *Some (but not all) aggravated felony grounds are only triggered by a sentence of a year or more. For such offenses, the key is to avoid any one count from being punished by a sentence of one year or more.* If needed, counsel can still negotiate significant jail time for the defendant. If immigration concerns are important, counsel might:

- bargain for the maximum sentence being less than one year on a single count;
- plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
- plead to an additional or substitute offense that does not have immigration consequences, and take the jail time on that;
- waive credit for time already served or prospective “good time” credits and persuade the judge to take this into consideration in imposing a shorter official sentence, that will result in the same amount of time actually incarcerated as under the originally proposed sentence;
- rather than take a probation violation that adds time to the sentence for the original conviction, ask for a new conviction (one without immigration consequences) and take the time on the new count.

**Vacated sentences:** Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent some convictions from being considered aggravated felonies.<sup>7</sup> Vacating a sentence can be for any reason, including avoiding immigration consequences. This will not eliminate a conviction but will help avoid certain aggravated felonies. This will only help avoid an aggravated felony that is triggered by a one year sentence. Remember that many aggravated felony categories do not have any sentencing requirement.

**The petty offense exception.** The above definition of “sentence imposed” also applies to persons attempting to qualify for the “petty offense” exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum possible sentence of one year or less and a sentence imposed of six months or less.<sup>8</sup>

**IMMIGRATION REFERRAL**

Client \_\_\_\_\_ A# / USCIS# (8 or 9 digits) \_\_\_\_\_ PP# \_\_\_\_\_

Client/Family Contact \_\_\_\_\_ Immigration Attorney \_\_\_\_\_

Country of Origin \_\_\_\_\_ Date of 1<sup>st</sup> Entry to U.S. \_\_\_\_\_

IMMIGRATION STATUS UPON ENTRY TO U.S.
<input type="checkbox"/> Undocumented <input type="checkbox"/> Visa <input type="checkbox"/> Refugee <input type="checkbox"/> Lawful Permanent Resident / Green Card Holder <input type="checkbox"/> Other _____

Prior Immigration Court Hearing?	Y	N
Ordered Deported?	<input type="checkbox"/> Y	<input type="checkbox"/> N
Relief Granted?	<input type="checkbox"/> Y	<input type="checkbox"/> N
Other Outcome?	_____	

CURRENT IMMIGRATION STATUS
(check all that apply)
<input type="checkbox"/> Undocumented -- Date of last entry _____
<input type="checkbox"/> LPR/Green Card Holder -- Since when? _____
<input type="checkbox"/> US Citizen -- Since when? _____
<input type="checkbox"/> Application Pending -- For what? _____
<input type="checkbox"/> Asylee/Refugee <input type="checkbox"/> Other _____

FAMILY TIES IN U.S.
Spouse: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented
Partner: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented
Children: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented Ages _____
Mother: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented
Father: <input type="checkbox"/> USC <input type="checkbox"/> LPR <input type="checkbox"/> Undocumented
USC Grandparent? <input type="checkbox"/> YES <input type="checkbox"/> NO

**IMMIGRATION DETAINER IN LOCK & TRACK?    Y    N**

Please attach copies of available immigration documents (e.g., green card, visa, work authorization card, US passport or other proof of US citizenship, correspondence from USCIS/DHS/ICE).

Comments \_\_\_\_\_

Referred by \_\_\_\_\_ Referral Date \_\_\_\_\_

# IMMIGRATION CONSEQUENCES OF SELECTED PENNSYLVANIA OFFENSES: A QUICK REFERENCE CHART

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<b>Inchoate Crimes</b>				
<i>18 Pa. C.S. § 901</i> <i>(Generally)</i> <b>Attempt</b>	Attempt to commit an aggravated felony is an aggravated felony. <sup>9</sup>	Attempt to commit a CIMT is a CIMT, unless the underlying offense has a mental state of recklessness. <sup>10</sup>	Attempt to commit any controlled substance or firearm offense is a controlled substance or firearm offense.  Attempt to commit a CODV or crimes against child offense may be a CODV or crimes against child offense. <sup>11</sup>	Tip for criminal defense attorneys: Look to plead an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability.
<i>18 Pa. C.S. § 902</i> <b>Solicitation</b>	Generally, no. Possible AF if the underlying crime falls within one of the “relating to” aggravated felony grounds. <sup>12</sup>	Solicitation to commit a CIMT is a CIMT. <sup>13</sup>	Solicitation to commit a controlled substance offense where the record reflects a federally controlled substance is probably a CSO. This could be charged for other types of offenses as well. <sup>14</sup>	Tip for criminal defense attorneys: Look to plead an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability.
<i>18 Pa. C.S. § 903</i> <b>Conspiracy</b>	Conspiracy to commit an aggravated felony is an aggravated felony. <sup>15</sup>	Conspiracy to commit a CIMT is generally a CIMT. <sup>16</sup>	Conspiracy to commit any controlled substance, CODV, firearm or other offense is generally a controlled substance, CODV, firearm or other offense. <sup>17</sup>	Tip for criminal defense attorneys: Look to plead an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<b>Homicide</b>				
<i>18 Pa. C.S. § 2502</i> <b>Murder</b>	Yes. <sup>18</sup>	Yes. <sup>19</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>20</sup>	
<i>18 Pa. C.S. § 2503</i> <b>Voluntary manslaughter</b>	Yes, crime of violence AF if term of imprisonment is imposed of one year or more. <sup>21</sup>	Yes. <sup>22</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>23</sup>	
<i>18 Pa. C.S. § 2504</i> <b>Involuntary manslaughter</b>	No. <sup>24</sup>	Possibly. <sup>25</sup>	Crimes Against Child: Possibly, if graded as a second degree felony for victim under 12 years of age. <sup>26</sup>	Tip for immigration attorneys: To avoid CIMT, argue that <i>all</i> negligence, including gross negligence, includes unawareness of the risk, and therefore <u>Matter of Tavidishvili</u> controls. <sup>27</sup>
<b>Assault</b>				

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<p><i>18 Pa. C.S. § 2701(a)(1)</i>  <b>Simple Assault</b></p>	<p>Probably not, but keep a term of imprisonment to less than one year imposed or make it clear that it involves reckless conduct.<sup>28</sup></p>	<p>Probably not, but plead to the full language of the statute or reckless conduct.<sup>29</sup></p>	<p>CODV: Probably not.<sup>30</sup></p> <p>CAC: Definitely not without M1 sentencing enhancement, still probably not.<sup>31</sup></p>	<p>Tips for criminal attorneys: Simple assault 2701(a)(2) is preferable. Otherwise, attempt to specify reckless mental state on the record or plead generally to the language of the statute with no mention of the level of intent.</p> <p>Tip for immigration attorneys: Argue that the statute is not divisible between the different mens reas, and recklessness is insufficient for COV or CIMT.<sup>32</sup></p>
<p><i>18 Pa. C.S. § 2701(a)(2)</i>  <b>Simple Assault (negligently)</b></p>	<p>No.<sup>33</sup></p>	<p>No.<sup>34</sup></p>	<p>CODV: No.</p> <p>Firearm: Probably not, but avoid putting firearm on the record.</p> <p>Crimes Against Child: Definitely not without M1 sentencing enhancement, still probably not.<sup>35</sup></p>	<p>Tip for criminal attorneys: Make sure the record is clear that client is pleading to or convicted of (a)(2).</p>
<p><i>18 Pa. C.S. § 2701(a)(3)</i>  <b>Simple Assault (physical menace)</b></p>	<p>Yes, crime of violence AF if term of imprisonment of one year or more is imposed.<sup>36</sup></p>	<p>Yes.<sup>37</sup></p>	<p>CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative.<sup>38</sup></p> <p>Crimes Against Child: Definitely not without M1 sentencing enhancement, still probably not.<sup>39</sup></p>	<p>Tip for criminal attorneys: Try to plead to a different subsection if possible. If not, keep the maximum sentence under 365 days to avoid an AF.</p>
<p><i>18 Pa. C.S. § 2702(a)(1)</i>  <b>Aggravated Assault</b></p>	<p>No.<sup>40</sup></p>	<p>Yes.<sup>41</sup></p>	<p>CODV: No, because not COV.</p>	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 2702(a)(2)</i> <b>Aggravated Assault</b>	No. <sup>42</sup>	Yes. <sup>43</sup>	CODV: No, because not COV.  CAC: No, because age of victim not an element of the offense. <sup>44</sup>	
<i>18 Pa. C.S. § 2702(a)(3)-(a)(6)</i> <b>Aggravated Assault</b>	Yes, crime of violence AF if term of imprisonment of one year or more is imposed if convicted under (a)(4) or (a)(6). <sup>45</sup>  Probably crime of violence AF if convicted under (a)(3) or (a)(5) and term of imprisonment is one year or more. <sup>46</sup>	Yes. <sup>47</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>48</sup>  CAC: No, because age of victim is not an element.  Firearms: Probably not, but avoid putting firearm on the record for (a)(4).	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: For (a)(3) and (a)(5), could argue not a COV regardless of mens rea based on no use of force element, footnote 35.
<i>18 Pa. C.S. § 2702(a)(7)</i> <b>Aggravated Assault</b>	Probably AF as crime of violence if term of imprisonment of one year or more is imposed. <sup>49</sup>	Probably. <sup>50</sup>	CODV: Probably yes if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>51</sup>	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: Argument against AF could be that crime could be strict liability offense, so would not rise to the level of intent necessary for an AF or a CIMT.
<i>18 Pa. C.S. § 2702(a)(8), (9)</i> <b>Aggravated Assault</b>	No. <sup>52</sup>	Probably. <sup>53</sup>	Crimes Against Child: Yes. <sup>54</sup>	
<i>18 Pa. C.S. § 2705</i> <b>Recklessly Endangering Another Person</b>	No. <sup>55</sup>	No. <sup>56</sup>	CODV: No, because not a crime of violence.	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 2706 (a)(1)</i> <b>Making Terroristic Threats</b>	Yes, probably crime of violence AF if term of imprisonment of one year or more is imposed. <sup>57</sup>	Yes. <sup>58</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>59</sup>	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Harassment may be a safer alternative.  Tip for immigration attorneys: To avoid AF, argue that “crime of violence” under PA law is broader than under federal law. <sup>60</sup>
<i>18 Pa. C.S. § 2706 (a)(2), (a)(3)</i> <b>Making Terroristic Threats</b>	No. <sup>61</sup>	Probably not. <sup>62</sup>	CODV: No.	
<i>18 Pa. C.S. § 2707(a)</i> <b>Propulsion of Missiles into occupied vehicle</b>	Probably yes if maximum a sentence of confinement of a year or more imposed. <sup>63</sup>	Probably yes. <sup>64</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>65</sup>	Tip for criminal attorneys: Better alternatives are REAP, SA (a)(1),(2). Keep max sentence of confinement to less than 365 days,
<i>18 Pa. C.S. § 2709(a)</i> <b>Harassment</b>	No. <sup>66</sup>	Probably not. <sup>67</sup>	CODV: No, because force required is insufficient for COV. <sup>68</sup>  Also not crime of stalking. <sup>69</sup>	Tip for criminal attorneys: While all subsections are likely safe, (a)(3) is better than (a)(1).
<i>18 Pa. C.S. § 2709.1</i> <b>Stalking</b>	No.	Probably. <sup>70</sup>	Crime of Stalking: Probably not. <sup>71</sup>	Tip for criminal attorneys: Plead to the full language of the statute to avoid divisibility argument. Harassment is a safer alternative.  Tip for immigration attorneys: Argue that the two types of intent (place in fear of bodily injury and cause emotional distress) are not divisible and therefore not a crime of stalking.
<i>18 Pa. C.S. § 2718</i> <b>Strangulation</b>	Possible crime of violence AF if sentence of a year or more is imposed. <sup>72</sup>	Yes. <sup>73</sup>	CODV: Possibly, see note 68 on whether this is a COV, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>74</sup>	Tip for immigration attorneys: Argue that this is not an AF regardless of sentence because the statute explicitly does not require physical injury and thus includes de minimis touching, while “physical force” as used in 18 U.S.C. § 16(a) must be force capable of causing pain or injury under <u>Matter of Velasquez</u> .

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 2901(a)</i> <b>Kidnapping</b>	Probably not, except possibly 2901(a)(3), with a sentence of a year or more. <sup>75</sup>	Yes. <sup>76</sup>	CODV: No, except possibly 2901(a)(3) if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>77</sup>  Crimes Against Child: Conviction under (a.1) would qualify. <sup>78</sup>	Tip for criminal attorneys: Avoid conviction under 2901(a)(3) and/or keep sentence to under 365 days to avoid possible crime of violence AF.  Tip for immigration attorneys: Could argue that despite the numbered subsections, the statute is not divisible. The intent under 2901(a)(4) is arguably not morally turpitudinous. <sup>79</sup>
<i>18 Pa. C.S. § 2902</i> <b>Unlawful Restraint</b>	No.	Yes. <sup>80</sup>	CODV: No.  Crimes Against Child: Sections (b) and (c) would probably qualify.	Tip for criminal attorneys: Avoid sections involving minors to avoid crimes against child.
<i>18 Pa. C.S. § 2903</i> <b>False Imprisonment</b>	No.	Possibly. <sup>81</sup>	CODV: No.  Crimes Against Child: Sections (b) and (c) might qualify.	
<i>18 Pa. C.S. § 2904</i> <b>Interference with custody of children</b>	No.	Probably not. <sup>82</sup>	CODV: No.  Crimes Against Child: Probably not. <sup>83</sup>	
<i>18 Pa. C.S. § 2910</i> <b>Luring child into motor vehicle or structure</b>	No.	Probably not. <sup>84</sup>	Crimes Against Child: Probably not. <sup>85</sup>	
<b>Sexual Offenses</b>				
<i>18 Pa. C.S. § 3121(a)</i> <b>Rape</b>	Yes, rape AF regardless of sentence imposed. <sup>86</sup>	Yes. <sup>87</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>88</sup>	
<i>18 Pa. C.S. § 3121(c), (d)</i> <b>Rape of a child</b>	Yes, sexual abuse of a minor AF regardless of sentence imposed. <sup>89</sup>	Yes.	Crimes Against Child: yes.	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 3122.1</i> <b>Statutory Sexual Assault</b>	Yes, sexual abuse of a minor AF regardless of sentence imposed. <sup>90</sup>	Probably. <sup>91</sup>	CODV: No.  Crimes Against Child: Yes.	
<i>18 Pa. C.S. § 3123(a)(1) – (2)</i> <b>Involuntary Deviate Sexual Intercourse</b>	Yes, rape AF regardless of sentence imposed. <sup>92</sup>  Probably not a COV AF. <sup>93</sup>	Yes. <sup>94</sup>	CODV: Probably not.	Tip for immigration attorneys: Argument against rape AF would be that conduct criminalized is broader than common law definition of rape. <sup>95</sup>
<i>18 Pa. C.S. § 3123(a)(3) – (5)</i> <b>Involuntary Deviate Sexual Intercourse where victim cannot consent</b>	Yes, rape AF regardless of sentence imposed. <sup>96</sup>  Not COV AF. <sup>97</sup>	Yes. <sup>98</sup>	CODV: No.	Tip for immigration attorneys: Same as above.
<i>18 Pa. C.S. § 3123(a)(7)</i> <b>Involuntary Deviate Sexual Intercourse where victim is less than 16</b>	Yes. AF as sexual abuse of a minor regardless of sentence imposed. <sup>99</sup>	Yes. <sup>100</sup>	Crimes Against Child: Yes.	
<i>18 Pa. C.S. § 3123(b), (c)</i> <b>Involuntary Deviate Sexual Intercourse With a Child less than 13</b>	Yes. AF as sexual abuse of a minor regardless of sentence imposed. <sup>101</sup>	Yes. <sup>102</sup>	Crimes Against Child: Yes.	
<i>18 Pa. C.S. § 3124.1</i> <b>Sexual Assault</b>	Possible rape AF. <sup>103</sup>  Probably not a COV AF because no use of force required.	Yes. <sup>104</sup>	CODV: Probably not.	
<i>18 Pa. C.S. § 3124.2</i> <b>Institutional Sexual Assault</b>	No, under (a). <sup>105</sup>  (a.1) is likely a sexual abuse of a minor AF regardless of the sentence.	Yes. <sup>106</sup>	Crimes Against Child: Yes, under (a.1).	
<i>18 Pa. C.S. § 3125(a)(1)-(6)</i> <b>Aggravated Indecent Assault</b>	Yes. AF as rape regardless of the sentence imposed. <sup>107</sup>	Yes. <sup>108</sup>	CODV: Probably not.	Tip for immigration attorneys: Argument against rape AF would be that conduct criminalized is broader than common law definition of rape. <sup>109</sup> Argument for (a)(1) could be that lack of consent is broader than common law definition.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 3125(a)(7) and (8)</i> <b>Aggravated Indecent Assault</b> <i>(a)(7) victim is less than 16</i> <i>(a)(8) victim is less than 13</i>	Yes. AF as sexual abuse of a minor regardless of sentence imposed. <sup>110</sup>	Yes. <sup>111</sup>	Crimes Against Child: yes.	
<i>18 Pa. C.S. § 3125(b)</i> <b>Aggravated Indecent Assault of a Child</b>	Yes. AF as sexual abuse of a minor regardless of sentence imposed.	Yes. <sup>112</sup>	Crimes Against Child: yes.	
<i>18 Pa. C.S. § 3126(a)(1)</i> <b>Indecent Assault without consent</b>	No. <sup>113</sup>	Yes. <sup>114</sup>	CODV: No.	
<i>18 Pa. C.S. § 3126(a)(2) – (a)(3)</i> <b>Indecent Assault</b> <i>(a)(2) with force</i> <i>(a)(3) with threat of force</i>	Probably not. <sup>115</sup>	Yes. <sup>116</sup>	CODV: Probably not.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Alternatively, plead generally to § 3126(a) without specifying the subsection.  Tip for immigration attorneys: Argue that the forcible compulsion needed under PA law is broader than the physical force required for a COV AF. <sup>117</sup>
<i>18 Pa. C.S. § 3126(a)(4) – (a)(6)</i> <b>Indecent Assault</b> <i>(a)(4) victim is unconscious</i> <i>(a)(5) victim is impaired</i> <i>(a)(6) victim is disabled</i>	No. <sup>118</sup>	Yes. <sup>119</sup>	CODV: No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF.
<i>18 Pa. C.S. § 3126(a)(7) and (a)(8)</i> <b>Indecent Assault</b> <i>(a)(7) victim is less than 16</i> <i>(a)(8) victim is less than 13</i>	Yes. AF as sexual abuse of a minor regardless of sentence imposed. <sup>120</sup>	Yes. <sup>121</sup>	Crimes Against Child: Yes.	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 3127</i> <b>Indecent exposure</b>	No.	No. <sup>122</sup>	CODV: No, because not a crime of violence.  CAC: Possibly under sentence enhancement for victim less than 16 years old. <sup>123</sup>	Note for immigration attorneys: To avoid CAC where sentence is enhanced for minor complainant, argue that enhancement is not an element of the offense under <i>Jean-Louis v. Attorney General</i> . <sup>124</sup>
<i>18 Pa. C.S. §§ 4915, 4915.1</i> <b>Failure to comply with registration requirements</b>	No.	No. <sup>125</sup>	Probably not. <sup>126</sup>	
<i>18 Pa. C.S. § 5901</i> <b>Open lewdness</b>	No.	Probably not. <sup>127</sup>	No.	
<b>Property Destruction</b>				
<i>18 Pa. C.S. §3301(a)(1)(i)</i> <b>Arson endangering person</b>	No. <sup>128</sup>	Possibly. <sup>129</sup>	CODV: No because not a crime of violence	Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding. <sup>130</sup>
<i>18 Pa. C.S. §3301(a)(1)(ii)</i> <b>Arson endangering person</b>	Yes, AF under 8 U.S.C. § 1101(a)(43)(E) regardless of sentence imposed. <sup>131</sup>	Yes. <sup>132</sup>	CODV: Yes because a crime of violence, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>133</sup>	
<i>18 Pa. C.S. §3301(a)(2)</i> <b>Arson endangering person</b>	Yes, murder AF regardless of sentence. <sup>134</sup>	Yes.	CODV: Yes, if murder in the first, because a crime of violence, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>135</sup>	
<i>18 Pa. C.S. §3301(a.1)(1)(i)</i> <b>Arson endangering person</b>	Probably not. <sup>136</sup>	Possibly. <sup>137</sup>	CODV: Probably not because not COV.	Tip for criminal attorneys: To avoid AF, specify recklessness, plead to full language of the statute, or avoid a maximum sentence of 365 days or more.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. §3301(a.1)(2)</i> <b>Arson endangering person</b>	Yes, murder AF regardless of sentence. <sup>138</sup>	Yes.	CODV: Probably not because not necessarily COV.	
<i>18 Pa. C.S. §3301(c)(1)</i> <b>Arson endangering property</b>	Yes, AF under 8 U.S.C. § 1101(a)(43)(E) regardless of sentence imposed. <sup>139</sup>	Yes. <sup>140</sup>	CODV: Yes, if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>141</sup>	
<i>18 Pa. C.S. §3301(c)(2)</i> <b>Arson endangering property</b>	No. <sup>142</sup>	Possibly.	CODV: No because not a crime of violence	Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding. <sup>143</sup>
<i>18 Pa. C.S. §3301(c)(3)</i> <b>Arson endangering property</b>	Yes AF under 8 U.S.C. § 1101(a)(43)(E) regardless of sentence imposed. <sup>144</sup>	Yes. <sup>145</sup>	No.	
<i>18 Pa. C.S. § 3301(d)</i> <b>Reckless Burning or Exploding</b>	No. <sup>146</sup>	Possibly. <sup>147</sup>	CODV: No because not a crime of violence.	Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding. <sup>148</sup>
<i>18 Pa. C.S. § 3301(f)</i> <b>Possession of explosion or incendiary materials and devices</b>	Not COV AF because no element of use of force. Probably not AF under 8 U.S.C. § 1101(a)(43)(E). <sup>149</sup>	Probably. <sup>150</sup>	No.	
<i>18 Pa. C.S. § 3302(a)</i> <b>Causing catastrophe</b>	Not an explosive materials AF. <sup>151</sup>  F1 is possible COV AF, F2 is not. <sup>152</sup>	Yes. <sup>153</sup>	No.	Tip for criminal attorneys: Plead to F2 (reckless conduct) OR keep the max sentence to under 365 to avoid AF.
<i>18 Pa. C.S. § 3302(b)</i> <b>Risking catastrophe</b>	No.	Probably. <sup>154</sup>	No.	Tip for immigration attorneys: Argument against CIMT in the Third Circuit would analogize to <i>Mahn v. Att’y Gen.</i> , 767 F.3d 170 (3d Cir. 2014).

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 3304(a)(1)</i> <b>Criminal Mischief</b>	No, not COV or explosive device AF. <sup>155</sup>	No. <sup>156</sup>	Probably not a “destructive device offense” – keep evidence of the explosive/fire/etc. used off the record.	Tip for criminal attorneys: Plead specifically to negligent or reckless conduct or to the full language of the statute without any facts to avoid AF and CIMT.  Tip for immigration attorneys: Argue that the statute is not divisible with regard to the <i>mens rea</i> or the dangerous means employed.
<i>18 Pa. C.S. § 3304(a)(2)</i> <b>Criminal Mischief</b>	No. <sup>157</sup>	Probably not. <sup>158</sup>	No.	Tip for criminal attorneys: For safest outcome, plea specifically to reckless conduct or to the full language of the statute without any facts to avoid AF and CIMT
<i>18 Pa. C.S. § 3304(a)(3)</i> <b>Criminal Mischief</b>	Probably not, but to be safe avoid loss of more than \$10,000 on the record or a sentence of a year or more. <sup>159</sup>	Possibly. <sup>160</sup>	No.	Tip for criminal attorneys: To avoid AF, keep record clear of any language regarding specific intent or amount of loss if more than \$10,000. If possible, plea specifically to reckless conduct. Plea should specifically be to amount less than \$10,000 to avoid AF. <sup>161</sup>  Tip for immigration attorneys: Argue that statute is not divisible as to the <i>mens rea</i> and reckless conduct is not fraud/CIMT.
<i>18 Pa. C.S. § 3304(4)(5)(6)</i> <b>Criminal Mischief</b>	Probably not, but avoid sentence of a year or more to be safe. <sup>162</sup>	Probably not. <sup>163</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: Argue that least culpable conduct is not violent force for purposes of COV.
<b>Burglary and Criminal Intrusion</b>				

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<p><i>18 Pa. C.S. § 3502(a)(1)(i)</i>  <b>Burglary adapted for overnight accommodations and person present and commits, attempts to commit or threatens to commit a bodily injury crime</b></p>	<p>Possible burglary AF if a sentence of confinement of a year or more is imposed.<sup>164</sup></p> <p>Possible crime of violence AF if sentence of confinement of a year or more imposed.<sup>165</sup></p>	<p>Very probably.<sup>166</sup></p>	<p>CODV: Possibly. If it's a crime of violence, would be CODV offense if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative.<sup>167</sup></p>	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF</p> <p>Tip for immigration attorneys: Possible argument against CIMT is that conviction under this statute is distinguishable from <u>Louissant</u> and <u>JGDF</u> because adapted for overnight accommodation under PA statute is broader than dwelling, and could include intent to commit/commission of non-CIMT.</p> <p>Argument against burglary AF is that unlawful entry is not an element, see note 164.</p>
<p><i>18 Pa. C.S. § 3502(a)(1)(ii)</i>  <b>Burglary adapted for overnight accommodations and person present</b></p>	<p>Possible burglary AF if a sentence of confinement of a year or more is imposed.<sup>168</sup></p> <p>No as crime of violence AF.<sup>169</sup></p>	<p>Very probably.<sup>170</sup></p>	<p>CODV: No, because not COV.</p>	<p>Tip for immigration attorneys: Same as above, argument for not CIMT would focus on distinction between adaption for overnight accommodation and dwelling. Argument against burglary AF is no unlawful entry element.</p>
<p><i>18 Pa. C.S. § 3502(a)(2)</i>  <b>Burglary adapted for overnight accommodations and no person present</b></p>	<p>Possible burglary AF if a sentence of confinement of a year or more is imposed.<sup>171</sup></p> <p>No as crime of violence AF.<sup>172</sup></p>	<p>Probably.<sup>173</sup></p>	<p>CODV: No, because not COV.</p>	<p>Tip for immigration attorneys: Same as above, argument for not CIMT would focus on distinction between adaption for overnight accommodation and dwelling. Argument against burglary AF is no unlawful entry element.</p>
<p><i>18 Pa. C.S. § 3502(a)(3)</i>  <b>Burglary not adapted for overnight accommodations and person present</b></p>	<p>No as Burglary AF.<sup>174</sup></p> <p>No as crime of violence AF.<sup>175</sup></p>	<p>Probably not.<sup>176</sup></p>	<p>CODV: No, because no COV.</p>	<p>Tip for immigration attorneys: Argue not CIMT under <u>Matter of M</u> because no intent to commit CIMT and not a dwelling.</p>
<p><i>18 Pa. C.S. § 3502(a)(4)</i>  <b>Burglary not adapted for overnight accommodations and no person present</b></p>	<p>No as Burglary AF.<sup>177</sup></p> <p>No as crime of violence AF.<sup>178</sup></p>	<p>No.<sup>179</sup></p>	<p>CODV: No, because no COV.</p>	<p>Tip for immigration attorneys: Argue not CIMT under <u>Matter of M</u> because no intent to commit CIMT and not a dwelling.</p>

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 3503(a)</i> <b>Criminal Trespass-- Buildings and Occupied Structures</b>  <b>(1)(i) F3 (unprivileged entry)</b>	No. <sup>180</sup>	No. <sup>181</sup>	No.	
<i>18 Pa. C.S. § 3503(a)</i> <b>Criminal Trespass Buildings and Occupied Structures</b>  <b>(1)(ii) F2 (breaking and entering)</b>	No. <sup>182</sup>	Probably not. <sup>183</sup>	No.	Tip for immigration attorneys: even though it requires breaking, least culpable conduct does not require actual use of force or even property damage.
<i>18 Pa. C.S. § 3503(b)</i> <b>Defiant Trespass</b>	No. <sup>184</sup>	No. <sup>185</sup>	No.	Tip for immigration attorneys: Statute punishes mere presence, which should not qualify as an AF or CIMT.
<i>18 Pa. C.S. § 3503(b.1)</i> <b>Simple Trespass</b>	No. <sup>186</sup>	Probably, at least for subsections (i), and (iv). <sup>187</sup>	CODV: No.	Tips for criminal attorneys: Sections (b.1)(1)(ii) and (iii) (purpose of defacing property) is the safest option.  Tip for immigration attorneys: For (iii), argument against CIMT is similar to criminal mischief analysis under § 3304. For (ii), starting a fire is, itself, not a crime or a CIMT.
<b>Robbery</b>				
<i>18 Pa.C.S. § 3701</i> <b>Robbery</b>	Yes, theft or attempted theft AF if term of imprisonment of one year or more is imposed.  Subsection (i), (ii) and (iv) are also crime of violence AFs if a term of imprisonment of one year or more is imposed. <sup>188</sup>	Yes. <sup>189</sup>	CODV: Yes, for subsections (i), (ii), or (iv), if victim is a current or former spouse, co-parent, co-habitating partner, parent, child, or other blood relative. <sup>190</sup>  Firearms: No.	Tips for criminal attorneys: Keep maximum term of imprisonment to 364 days or less to avoid AF. Plead to subsections (iii) (F1) or (iv) (F2) to avoid crime of violence AF and CODV. <sup>191</sup>  Tip for immigration attorneys: Possible argument against theft AF is that robbery can be committed in the course of any kind of theft under PA law, not all of which constitute generic theft. <sup>192</sup>

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 3702</i> <b>Robbery of a Motor Vehicle</b>	No. <sup>193</sup>	Maybe. <sup>194</sup>	Firearms: Probably not because crime by statute does not require firearm.	Tips for criminal attorneys: UUA is a safer alternative to avoid CIMT.  Tip for immigration attorneys: Possible argument against CIMT is that statute requires neither intent to permanently deprive nor intent to harm. <sup>195</sup>
<b>Theft Offenses</b>				
<i>18 Pa. C.S. § 3921(a)</i> <b>Theft by unlawful taking Movable Property</b>	Yes, theft AF if a term of imprisonment of one year or more is imposed. <sup>196</sup>	Yes. <sup>197</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. If case involves an auto, unauthorized use of an automobile is a safer option to avoid AF and CIMT.  Tip for immigration attorneys: Could try to argue that pre-2016 convictions are not CIMTs because change in definition shouldn't apply retroactively. <sup>198</sup>
<i>18 Pa. C.S. § 3921(b)</i> <b>Theft by unlawful taking Immovable Property</b>	Probably not. <sup>199</sup>	Probably not. <sup>200</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: This conviction should not be a theft AF or CIMT because there is no element of intent to deprive.
<i>18 Pa. C.S. § 3922(a)</i> <b>Theft by Deception</b>	AF as fraud offense if the loss to the victim reflected in the record is \$10,000. <sup>201</sup>  Not AF as a theft offense. <sup>202</sup>	Yes. <sup>203</sup>	No.	Tip for criminal attorneys: Plea should specifically be to amount less than \$10,000 to avoid AF. <sup>204</sup> Bad checks is a safer alternative.
<i>18 Pa. C.S. § 3924</i> <b>Theft of Lost Property</b>	Probably not. <sup>205</sup>	Maybe. <sup>206</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to less than 364 days to avoid potential theft AF.  Tip for immigration attorneys: To argue that this is not CIMT, argue that even if mental state is sufficiently culpable, the conduct includes omissions and therefore is not necessarily reprehensible. <sup>207</sup>

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C. S. § 3925</i> <b>Receiving stolen property</b>	Yes, theft AF if a term of imprisonment of one year or more is imposed. <sup>208</sup>	Yes. <sup>209</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
<i>18 Pa. C. S. § 3926</i> <b>Theft of Services</b>	Probably theft AF if term of imprisonment of one year or more is imposed. <sup>210</sup>  Not a fraud AF. <sup>211</sup>	Maybe. <sup>212</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: Argument against theft AF could be that offense includes fraudulent takings as well as takings without consent. <sup>213</sup> Argument against CIMT is that it doesn't require intent to permanently deprive. <sup>214</sup>
<i>18 Pa. C.S. § 3928</i> <b>Unauthorized Use of an Automobile</b>	No. <sup>215</sup>	No. <sup>216</sup>	No.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF if immigration law changes.
<i>18 Pa. C. S. § 3929</i> <b>Retail Theft</b>	Yes, theft AF if a term of imprisonment of one year or more is imposed. <sup>217</sup>	Yes. <sup>218</sup>	No.	Tips for criminal attorneys: Keep maximum term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: For sections (4) and (5), possible argument that these are not theft offenses because there is no requirement of exercising control over property. <sup>219</sup>
<i>18 Pa. C.S. § 3934</i> <b>Theft from a Motor Vehicle</b>	Yes, theft AF if a term of imprisonment of one year or more is imposed. <sup>220</sup>	Yes. <sup>221</sup>	No.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
<b>Forgery and Fraudulent Practices</b>				

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 4101</i> <b>Forgery</b>	Yes, forgery AF if a term of imprisonment of one year or more is imposed.  Probably fraud AF if convicted of intent to defraud and documents related to conviction show loss is greater than \$10,000. <sup>222</sup>	Yes. <sup>223</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid forgery AF. Plea specifically to amount less than \$10,000 to avoid fraud AF. <sup>224</sup>
<i>18 Pa.C.S. § 4104</i> <b>Tampering with Records or identification</b>	Probably forgery AF if sentence of a year or more is imposed. <sup>225</sup>	Yes. <sup>226</sup>	No.	Tip for criminal attorneys: Keep the maximum sentence to 364 days or less to avoid AF.  Tip for immigration attorneys: Possible argument against AF is that document doesn't have to have legal efficacy as required for forgery AF under <u>Williams</u> .
<i>18 Pa.C.S. § 4105</i> <b>Bad checks</b>	No. <sup>227</sup>	No. <sup>228</sup>	No.	Tip for criminal attorneys: This is a good statute to use when negotiating a plea.
<i>18 Pa.C.S. § 4106(a)</i> <b>Access Device Fraud</b>	Probable fraud AF if loss is greater than \$10,000. <sup>229</sup>	Yes. <sup>230</sup>	No.	Tip for criminal attorneys: Plead to (c)(1)(ii) or (iii) or specifically to an amount less than \$10,000 to avoid AF. <sup>231</sup> In general, (a)(3) is the safest subsection.  Tip for immigration attorneys: Argument against AF (or CIMT) could be that no specific intent is required. <sup>232</sup>
<i>18 Pa.C.S. § 4106.1</i> <b>Unlawful Device-Making Equipment</b>	Probably not. <sup>233</sup>	Yes. <sup>234</sup>	No.	Tip for criminal attorneys: To be safe, try to plead specifically to an amount less than \$10,000 to avoid AF.
<i>18 Pa.C.S. 4107</i> <b>Deceptive or fraudulent business practices</b>	Probable fraud AF if documents related to conviction show loss is greater than \$10,000. <sup>235</sup>	Probably. <sup>236</sup>	No.	Tip for criminal attorneys: Section 4107 is least likely to be an AF or CIMT because it does not require actual fraud or intent to defraud.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 4116</i> <b>Copying; recording devices</b>	Possible counterfeiting AF if a term of imprisonment of one year or more is imposed. <sup>237</sup>	Maybe. <sup>238</sup>	No.	Tip for criminal attorneys: Keep maximum term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: Argument against AF is that no deceptive or counterfeit mark or labeling is required. <sup>239</sup>
<i>18 Pa.C.S. § 4119</i> <b>Trademark Counterfeiting</b>	Yes, counterfeiting AF if a term of imprisonment of one year or more is imposed. <sup>240</sup>	Yes. <sup>241</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
<i>18 Pa.C.S. § 4120</i> <b>Identity Theft</b>	Possible fraud AF if loss to the victim is more than \$10,000. <sup>242</sup>	Probably. <sup>243</sup>	Yes, possible ground of inadmissibility if non-citizen claims to be USC for any purpose or benefit under the INA or federal or state law.	Tip for criminal attorneys: Plead to M1 or specify a loss to the victim that is less than \$10,000 to avoid AF. DHS can rely on extra-record evidence to establish loss to the victim. <sup>244</sup>  Tip for immigration attorneys: Argument against CIMT could be that there is no intent to defraud or injure victim required. <sup>245</sup>
<i>62 P.S. § 481</i> <b>Welfare Fraud</b>	AF as fraud offense if loss to the victim exceeds \$10,000. <sup>246</sup>	Yes. <sup>247</sup>	No.	Tip for criminal attorneys: Plead to misdemeanor or specify a loss that is less than \$10,000 to avoid AF. DHS can rely on extra-record evidence to establish loss to the victim. <sup>248</sup>
<b>Offenses Against the Family</b>				
<i>18 Pa.C.S. § 4304 (a)(1)</i> <b>Endangering welfare of children</b>	No.	No. <sup>249</sup>	No. <sup>250</sup>	
<b>Falsification</b>				
<i>18 Pa.C.S. § 4902</i> <b>Perjury</b>	Yes, perjury AF if a term of imprisonment of one year or more is imposed. <sup>251</sup>	Yes. <sup>252</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 4903</i> <b>False Swearing</b>	Probably not a perjury AF.  Could be a fraud AF if there is a loss to the victim of \$10,000 or more. <sup>253</sup>	Yes under (a)(2), probably not under (a)(1) or (b). <sup>254</sup>	No.	Tip for criminal attorneys: To be safe from an AF, keep sentence of imprisonment to 365 days or less and, in a case that involves loss, plead specifically to less than \$10,000. DHS can rely on extra-record evidence to establish loss to the victim. <sup>255</sup> The best option to avoid CIMT is the M3 under subsection (b).  Tip for immigration attorneys: See <u>Rivera v. Lynch</u> , 816 F.3d 1064 (9th Cir. 2016) for additional arguments that this is not a CIMT.
<i>18 Pa.C.S. § 4904</i> <b>Unsworn Falsification</b>	Not a perjury AF.  Could be a fraud AF if there is a loss to the victim of \$10,000 or more. <sup>256</sup>	Yes. <sup>257</sup>	No.	Tips for criminal attorneys: In a case that involves loss, plead specifically to less than \$10,000. DHS can rely on extra-record evidence to establish loss to the victim. <sup>258</sup>
<i>18 Pa. C.S. § 4905</i> <b>False Alarms to Agencies of Public Safety</b>	Could be fraud AF if there is a loss to law enforcement of \$10,000 or more. <sup>259</sup>	Probably. <sup>260</sup>	No.	Tips for criminal attorneys: In a case that involves loss, plead specifically to less than \$10,000. DHS can rely on extra-record evidence to establish loss to the victim. <sup>261</sup>  Tip for immigration attorneys: Argument against CIMT could be that offense does not require intent to deceive/mislead. <sup>262</sup>
<i>18 Pa.C.S. § 4906</i> <b>False reports to law enforcement</b>	Could be fraud AF if there is a loss to law enforcement of \$10,000 or more. <sup>263</sup>	Yes. <sup>264</sup>	No.	Tips for criminal attorneys: In a case that involves loss, plead specifically to less than \$10,000. DHS can rely on extra-record evidence to establish loss to the victim. <sup>265</sup>
<i>18 Pa. C.S. § 4914</i> <b>False ID to Law Enforcement Officer</b>	No.	Probably not. <sup>266</sup>	No.	Tip for immigration attorneys: To argue against CIMT, note that least culpable conduct is giving a name the defendant should have known was wrong and then correcting himself. <sup>267</sup>
<b>Obstruction</b>				

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 4910</i> <b>Tampering with or Fabricating Physical Evidence</b>	Probable obstruction of justice AF if a term of imprisonment of a year or more is imposed. <sup>268</sup>	Yes. <sup>269</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Section 5101 is a good alternative to avoid a CIMT.  Tip for immigration attorneys: To argue against AF, distinguish <u>Denis</u> on the basis that the PA law covers evidence relevant to an investigation, not only an official proceeding. <sup>270</sup>
<i>18 Pa.C.S. § 4952</i> <b>Intimidation of Witnesses or Victims</b>	Yes, obstruction of justice AF if a term of imprisonment of a year or more is imposed. <sup>271</sup>	Probably. <sup>272</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
<i>18 Pa.C.S. § 4953</i> <b>Retaliation Against Witness, Victim or Party</b>	Yes, obstruction of justice AF if a term of imprisonment of a year or more is imposed. <sup>273</sup>	Yes. <sup>274</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
<i>18 Pa.C.S. § 5101</i> <b>Obstructing administration of law or other governmental function</b>	Possible obstruction of justice AF if a term of imprisonment of one year or more is imposed. <sup>275</sup>	No. <sup>276</sup>	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: Argument against AF is that the statute covers conduct not related to any judicial proceeding. <sup>277</sup>
<i>18 Pa.C.S. § 5104</i> <b>Resisting Arrest</b>	No. <sup>278</sup>	Probably not. <sup>279</sup>	No.	
<i>18 Pa. C.S. § 5104.1</i> <b>Disarming a Law Enforcement Officer</b>	No. <sup>280</sup>	Probably not. <sup>281</sup>	Firearms: Probably not, but avoid putting firearm on the record. <sup>282</sup>	
<i>18 Pa.C.S. § 5105</i> <b>Hindering apprehension or prosecution</b>	Subsection (a)(3) is probably an obstruction of justice AF if a sentence of a year or more is imposed, the other subsections probably are not AFs. <sup>283</sup>	Probably, if the underlying offense the person is wanted for is a CIMT. <sup>284</sup>	Firearms: No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.  Tip for immigration attorneys: Argument against CIMT could be that intent does not necessarily require fraud or deceit, and conduct is not necessarily vile or depraved regardless of the underlying crime. <sup>285</sup>

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 5124</i> <b>Default in required appearance (failure to appear)</b>	Possible AF under § 1101(a)(43)(T), if the underlying charge is a felony. <sup>286</sup>  Possible AF under § 1101(a)(43)(Q) if related to failure to appear for service of sentence where underlying offense is punishable by 5 years or more. <sup>287</sup>  Probably not an obstruction of justice AF. <sup>288</sup>	Probably not. <sup>289</sup>	No.	Tip for criminal attorneys: Criminal contempt for failure to appear in court is a safer alternative.  Tip for immigration attorneys: Argument against AF is that the offense includes both failure to appear in court and failure to serve a sentence and therefore does not categorically involve either. <sup>290</sup>
<i>18 Pa.C.S. § 5126</i> <b>Flight to avoid apprehension, trial or punishment</b>	Probably not Obstruction of Justice AF under current third circuit case law, better to avoid a sentence of a year or more to be safe. <sup>291</sup>	Possibly. <sup>292</sup>	No.	
<i>42 Pa.C.S. § 4132</i> <b>Contempt(failure to appear)</b>	No. <sup>293</sup>	Possibly, at least under (2) and (3). <sup>294</sup>	No.	
<b>Disorderly Conduct</b>				
<i>18 Pa. C.S. § 5503</i> <b>Disorderly Conduct</b>	No.	No. <sup>295</sup>	No.	
<i>18 Pa. C.S. § 5506</i> <b>Loitering and Prowling at Night Time</b>	No.	Probably not. <sup>296</sup>	Stalking: No. <sup>297</sup>	
<b>Prostitution</b>				

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 5902(a)</i> <b>Prostitution</b>	No. <sup>298</sup>	Yes. <sup>299</sup>	Prostitution: Maybe. <sup>300</sup>	Tip for criminal attorneys: Alternate safe havens: -Obstruction of Highway -Disorderly Conduct -Loitering -Defiant Trespass  Tip for immigration attorneys: To avoid prostitution ground of inadmissibility, argue that PA definition of prostitution is broader than the BIA's definition. <sup>301</sup>
<i>18 Pa.C.S. § 5902(b)(1)</i> <b>Promoting Prostitution</b>	Yes, regardless of sentence imposed. <sup>302</sup>	Yes. <sup>303</sup>	Prostitution: Possibly. <sup>304</sup>	Tip for criminal attorneys: While not entirely safe, subsections (2)-(5) have stronger arguments against AF.  Tip for immigration attorneys: The BIA recently foreclosed the argument that the state definition of prostitution is overbroad for purposes of this AF ground, but it is worth preserving the argument for federal court review. <sup>305</sup>
<i>18 Pa.C.S. § 5902(b)(2)-(5)</i> <b>Promoting Prostitution</b>	Maybe. <sup>306</sup>	Yes. <sup>307</sup>	Prostitution: Possibly. <sup>308</sup>	Tip for criminal attorneys: Subsections (3)-(5) are least likely to be AFs.  Tip for immigration attorneys: To avoid AF, argue that both the activities criminalized are broader than 8 U.S.C. § 1101(a)(43)(K)(i). <sup>309</sup>
<i>18 Pa.C.S. § 5902(b)(6)</i> <b>Promoting Prostitution</b>	Probably, if record shows the offense was committed for commercial advantage. <sup>310</sup>	Probably. <sup>311</sup>	Prostitution: Possibly. <sup>312</sup>	Tip for immigration attorneys: To avoid AF, argue that the categorical approach applies to the commercial advantage requirement, and the PA statute does not require that the act be done for commercial advantage. <sup>313</sup>
<i>18 Pa.C.S. § 5902(b)(7)</i> <b>Promoting Prostitution</b>	Probably not. <sup>314</sup>	Probably. <sup>315</sup>	Prostitution: Probably not. <sup>316</sup>	Tip for immigration attorneys: Argument against CIMT could be that the statute includes omissions which are insufficiently culpable. <sup>317</sup>
<i>18 Pa.C.S. § 5902(b)(8)</i> <b>Promoting Prostitution</b>	Probably not. <sup>318</sup>	Probably. <sup>319</sup>	Prostitution: Possibly. <sup>320</sup>	
<i>18 Pa. C.S. § 5902(e)</i> <b>Patronizing Prostitutes</b>	No.	Probably. <sup>321</sup>	Prostitution: Not for a single act of soliciting on one's own behalf. <sup>322</sup>	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<b>Firearms Offenses</b>				
<b>18 Pa.C.S. § 6105</b> <b>Persons not to possess, use, manufacture, control, sell or transfer firearms</b>	Yes, where person has been convicted of an enumerated offense in (b). <sup>323</sup>  Yes, where the person is defined under (c)(1)-(5), (9). No, where the person is defined under (6)-(8). <sup>324</sup>	No. <sup>325</sup>	Firearms: Yes. <sup>326</sup>	Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW). If conviction is unavoidable, try to plead specifically to being a person defined under subsection (c), without specifying which particular definition.  Tip for immigration attorneys: Could argue that the subsections of (c) are means rather than elements, so a conviction under (c) would not be a categorical aggravated felony. <sup>327</sup>
<b>18 Pa.C.S. § 6106</b> <b>Firearms not to be carried without a license</b>	No.	No. <sup>328</sup>	Firearms: Yes. <sup>329</sup>	Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW).
<b>18 Pa.C.S. § 6108</b> <b>Firearms not to be carried on public streets in Philadelphia</b>	No.	No. <sup>330</sup>	Firearms: Yes. <sup>331</sup>	Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW).
<b>Minors</b>				
<b>18 Pa.C.S. § 6301</b> <b>Corruption of minors (a)(1)(i)</b>	No. <sup>332</sup>	Probably not. <sup>333</sup>	Crimes Against Child: Probably. <sup>334</sup>	Tip for criminal attorneys: Plead generally to the statute and keep facts off the record.  Tip for immigration attorneys: To avoid CAC, argue that level of harm required is not sufficient. <sup>335</sup>
<b>18 Pa.C.S. § 6301</b> <b>Corruption of minors (a)(1)(ii)</b>	Probably AF as sexual abuse of a minor regardless of sentence imposed. <sup>336</sup>	Probably.	Crimes Against Child: Yes.  CODV: No. <sup>337</sup>	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa.C.S. § 6301</i> <b>Corruption of minors (2) assisting minor in truancy</b>	No.	No. <sup>338</sup>	Probably not, but possible CAC.	
<i>18 Pa.C.S. § 6310.1</i> <b>Sale or furnishing of alcohol to minors</b>	No.	No. <sup>339</sup>	Crimes Against Child: No. <sup>340</sup>	
<i>18 Pa.C.S. § 6310.2</i> <b>Manufacture or sale of false identification card</b>	No. <sup>341</sup>	Possibly. <sup>342</sup>	No.	Tip for criminal attorneys: To lessen risk of CIMT, plead specifically to reckless violation of statute or to the full statutory language.  Tip for immigration attorneys: Argue that reckless conduct is not a CIMT absent an aggravating factor not present here.
<i>18 Pa.C.S. § 6310.3</i> <b>Carrying a false identification card</b>	No.	Probably not. <sup>343</sup>	No.	Tip for criminal attorneys: To lessen risk of CIMT, plead to mere possession or to the full language of the statute.  Tip for immigration attorneys: Regardless of the contents of the record, argue that the statute is not divisible and mere possession is the least culpable conduct. <sup>344</sup>
<i>18 Pa.C.S. § 6312(b)</i> <b>Sexual abuse of children: Photographing, videotaping, depicting on computer or filming sex acts</b>	Probable AF as sexual abuse of a minor regardless of sentence imposed. <sup>345</sup>  Not a child pornography AF. <sup>346</sup>	Yes. <sup>347</sup>	Crimes Against Child: Yes. <sup>348</sup>	Tip for criminal attorneys: Try to plead to (c) or (d) to avoid AF.  Tip for immigration attorneys: Argument against sexual abuse of a minor AF is that the PA statute includes “knowingly permits” without actually taking any action. <sup>349</sup>
<i>18 Pa.C.S. § 6312(c)</i> <b>Dissemination of photographs, videotapes, computer depictions and films.</b>	No. <sup>350</sup>	Yes. <sup>351</sup>	Crimes Against Child: Yes. <sup>352</sup>	
<i>18 Pa.C.S. § 6312(d)</i> <b>Child Pornography</b>	No. <sup>353</sup>	Yes. <sup>354</sup>	Crimes Against Child: Yes. <sup>355</sup>	

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<b>18 Pa.C.S. § 6318 Unlawful Contact with Minor</b>	Possible sexual abuse of a minor AF. <sup>356</sup>	Probably. <sup>357</sup>	Crime against Child: Yes.	<p>Tip for criminal attorneys: Plead generally to (a) and (a)(1) and try avoid specifying the underlying offense.</p> <p>Tip for immigration attorneys: Emphasize least culpable offenses under Chapter 31, like indecent exposure.</p>

### Domestic Violence, Protection Orders and Child Support

<b>23 Pa.C.S. § 6114 Contempt for violation of protection order</b>	No.	Yes. <sup>358</sup>	Violation of Protective Order: Yes. <sup>359</sup>	<p>Tip for criminal attorneys: Safer alternative pleas include harassment, simple assault (a)(1) or (2). 18 Pa. C.S. § 4955 could be a safer alternative because no showing of abuse required for order to issue, but since categorical approach does not apply police reports etc. could still be problematic.</p> <p>Tip for immigration attorneys: If facts are good, could try to use factual approach to show that the court did not determine that the court found that the defendant violated a portion of the order involving threats, harassment, or bodily injury.</p>
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### Controlled Substances

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<p><i>35 P.S. § 780-113(16)</i>  <b>Knowing or intentional possession of a controlled or counterfeit substance</b></p> <p><i>35 P.S. § 780-113(19)</i>  <b>Purchase or receipt of a controlled substance</b></p>	<p>No (see exception below).</p> <p>However, yes if substance is any amount of flunitrazepam.<sup>360</sup></p>	<p>No.<sup>361</sup></p>	<p>Controlled substance: Yes, if substance specified is included on list of federal schedule of controlled substances.<sup>362</sup></p> <p>Exception: For deportability ground only, a first offense for possession of less than 30 grams of marijuana for personal; second and subsequent offenses would be CSOs.<sup>363</sup></p>	<p>Tip for criminal attorneys: Best language to use is “substance under PA Law but not under Federal Law” or avoid specifying the substance involved in the record of conviction where client is a lawful permanent resident. In plea colloquy state guilty of drug or C/S as specified in PA. Do not reference affidavit of probable cause in plea.<sup>364</sup></p> <p>If client is undocumented you may want to specify a C/S found in the PA statute but not on list of federally controlled substances such as: dextrorphan and salvia dinorum.<sup>365</sup></p> <p>Tip for immigration attorneys: If the record of conviction is unclear, argue that this is not a CSO regardless of whether your client is applying for relief, because under <u>Mellouli</u> this is a categorical inquiry which is a pure question of law.<sup>366</sup></p>
<p><i>35 P.S. § 780-113(30)</i>  <b>Manufacture, Delivery, or possession w/ intent to deliver a controlled substance ALL DRUGS EXCEPT MARIJUANA (SEE BELOW FOR MARIJUANA)</b></p>	<p>Yes, as drug trafficking AF if substance specified is included on list of federal schedule of controlled substances.<sup>367</sup></p>	<p>Yes.<sup>368</sup></p>	<p>Controlled substance: Yes, if substance specified is included on list of federal schedule of controlled substances.<sup>369</sup></p>	<p>Tips for criminal and immigration attorneys: Same as above.</p>

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<p><i>35 Pa.C.S. § 780-113(30)</i> <b>Manufacture, Delivery, or possession w/ intent to deliver a controlled substance MARIJUANA</b></p>	<p>Probably not. Safest if record does not establish the amount of the substance or specifies a small amount, and does not reflect actual or intended transfer, delivery, sale or any remuneration, this may not be an AF.</p> <p><u>Very complicated area!</u> <u>See advice!</u><sup>370</sup></p>	<p>Yes.<sup>371</sup></p>	<p>Controlled substance: Yes.<sup>372</sup></p>	<p>Tip for criminal attorneys: Keep record clear of amount of marijuana other than a small amount; any remuneration involved; and manufacturing for other than self, i.e. have the complaint amended to take out these facts, and do not mention in the colloquy. If client transferred drugs without remuneration make sure the record indicates so. Sample vague language for amended complaint: “Client did manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, to wit: marijuana with no remuneration.”</p> <p>Tip for immigration attorneys: Argue that amount of marijuana and remuneration or not are not elements of the offense, so ANY PWID marijuana conviction is categorically not an aggravated felony.<sup>373</sup></p>
<p><i>35 P.S. § 780-113(31)</i> <b>Marijuana Offenses - Possession or distribution, but not sale, of a small amount of marijuana (30 grams or less of marijuana or 8 grams of hashish).</b></p>	<p>No.<sup>374</sup></p>	<p>Simple possession: No</p> <p>Delivery but not for sale: Probably.<sup>375</sup></p>	<p>Controlled substance: Yes.</p> <p>Exception: A first offense for possession of less than 30 grams of marijuana would not qualify under the deportability grounds, but the second and subsequent offense would.<sup>376</sup></p>	<p>Tip for criminal attorneys: Note that while a first offense will be “safe” for permanent residents, this offense is <u>not safe</u> for undocumented people, and a second offense can make a permanent resident deportable.</p>

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>35 P.S. § 780-113(32)</i> <b>The use of, or possession with intent to use drug paraphernalia for purposes relating to controlled substance</b>	No. <sup>377</sup>	Simple possession: No	Controlled substance: Maybe, if the record of conviction reflects that it relates to a substance listed in the federal schedule. <sup>378</sup>	Tip for criminal attorneys: Avoid specifying the substance involved in the record of conviction where client is a lawful permanent resident, just plead to the objects without referencing a particular drug. Do not reference affidavit of probable cause in plea.  Tip for immigration attorneys: Argue that the identity of the controlled substance is not an element, and therefore this offense is never a CSO under <u>Meloulli</u> . <sup>379</sup>
<i>35 P.S. § 780-113 (33)</i> <b>Delivery of, or possession with intent to deliver, drug paraphernalia for purpose of use with a controlled substance</b>	Probably, if the record establishes that the offense relates to a federally-controlled substance. <sup>380</sup>	Delivery but not for sale: Probably. <sup>381</sup>	Controlled substance: Maybe, if the record of conviction reflects that it relates to a substance listed in the federal schedule. <sup>382</sup>	Same tips as above.
<i>35 P.S. § 780-113(35)</i> <b>Possession with intent to distribute a noncontrolled substance</b>	No. <sup>383</sup>	Probably. <sup>384</sup>	Controlled substance: No. <sup>385</sup>	Tip for immigration attorneys: It is clear from the language of the statute that this is not “relating to” a controlled substance because <i>all</i> convictions under this statute do not, by definition, involve controlled substances.
<b>Traffic Offenses</b>				
<i>75 Pa. C.S § 1543</i> <b>Driving While Suspended</b>	No.	No. <sup>386</sup>	No.	
<i>75 Pa. C.S. § 3732</i> <b>Homicide by Vehicle</b>	No. <sup>387</sup>	Possibly. <sup>388</sup>	No.	Tip for criminal attorneys: Section 3742 is a better alternative to avoid a CIMT.  Tip for immigration attorneys: To avoid CIMT, argue that <i>all</i> negligence, including gross negligence, includes unawareness of the risk, and therefore <u>Matter of Tavdidiishvili</u> controls. <sup>389</sup>
<i>75 Pa. C.S. § 3732.1</i> <b>Aggravated Assault by Vehicle</b>	No. <sup>390</sup>	Possibly. <sup>391</sup>	No.	Tips: Same as above.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>75 Pa. C.S. § 3733</i> <b>Fleeing and Eluding Police</b>	No.	Probably not. <sup>392</sup>	No.	
<i>75 Pa. C.S. § 3735.1</i> <b>Aggravated Assault while DUI</b>	No. <sup>393</sup>	No. <sup>394</sup>	Controlled substance: No, but the required DUI violation that comes with this offense could be if the record specifies a federally controlled substance.	
<i>75 Pa. C.S. § 3742</i> <b>Accidents Involving Death or Personal Injury</b>	No.	No. <sup>395</sup>	No.	
<i>75 Pa. C.S. § 3743</i> <b>Accidents in Attended Vehicle</b>	No.	No. <sup>396</sup>	No.	
<i>75 Pa. C.S. § 3802</i> <b>Driving While Under the Influence of Alcohol or controlled Substance</b>	No.	No. <sup>397</sup>	Controlled substance: Yes, if under § 3802(d) and the record specifies a federally controlled substance.	Tip for criminal attorneys: Avoid § 3802(d), or plead to (d)(2) or (d)(3) and keep mention of the specific drug off the record.
<b>Misc.</b>				
<i>18 Pa. C.S. § 907 (a)</i> <b>Possession of an Instrument of Crime</b>	No.	No. <sup>398</sup>	No.	
<i>18 Pa. C.S. § 907(b)</i> <b>Possession of an Instrument of Crime</b>	No. <sup>399</sup>	No. <sup>400</sup>	Firearms Offense: Maybe, if the record indicates that the weapon possessed was a firearm. <sup>401</sup>	Tip for Criminal Attorneys: Plead noncitizen clients to § 907(a), which is the same grade and can encompass the same conduct, instead. <sup>402</sup>
<i>18 Pa.C.S. 908</i> <b>Possession of Offensive Weapon</b>	No.	No. <sup>403</sup>	No.	See advice above.
<i>18 Pa.C.S. 912</i> <b>Possession of weapon on School Property</b>	No.	No. <sup>404</sup>	Firearms Offense: No. <sup>405</sup>	See advice above.

Offense	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc.	Alternate Pleas and Practice Tips
<i>18 Pa. C.S. § 5513</i> <b>Gambling devices, gambling</b>	No. <sup>406</sup>	No. <sup>407</sup>	Commercialized Vice (Inadmissibility Ground): Possibly. <sup>408</sup>  Gambling Offense (GMC bar): Yes. <sup>409</sup>	Tip for Criminal Attorneys: While this offense will likely not make an LPR deportable, it will jeopardize an undocumented person's eligibility for most relief, so avoid for those clients.
<i>18 Pa. C.S. § 7512</i> <b>Communication Facility</b>	Probable drug trafficking aggravated felony if in furtherance of a drug trafficking offense. <sup>410</sup>  Possible other AF ground if the record reflects that the underlying offense is an aggravated felony. <sup>411</sup>	Probably, if in furtherance of a CIMT. <sup>412</sup>	Controlled Substance: Yes, if the record reflects that the underlying felony related a particular federal controlled substance. Could also be inadmissible based on reason to believe individual is a drug trafficker.	Tip for Criminal Attorneys: Try to plead generally to the statute without specifying the underlying felony. If it is a drug offense, avoid specifying the particular substance involved.  Tip for Immigration Attorneys: To avoid AF and possibly CIMT, argue that facilitation for the purpose of this statute is broader than facilitation under the federal analogue. <sup>413</sup> Could also argue that the statute is not divisible, so the least culpable conduct is facilitation of a non-CSO, non-CIMT. <sup>414</sup>
<i>47 P.S. § 4-491, 492</i> <b>Unlawful sale or manufacture of liquor</b>	No.	No. <sup>415</sup>	No.	

<sup>1</sup> See 8 U.S.C. § 1226(c); see also 8 U.S.C. § 1231(a)(2) for complete list of grounds resulting in mandatory detention. Some examples of convictions that would result in mandatory detention: Aggravated felonies; inadmissible + CIMT conviction; Deportable + CIMT + 1 year sentence; Deportable + 2 CIMTs; Controlled Substance Violation; Firearms offense; money laundering...

<sup>2</sup> See 8 U.S.C. § 1101(a)(43) for list of Aggravated Felonies.

<sup>3</sup> 8 U.S.C. § 1101(a)(48)(A).

<sup>4</sup> 8 U.S.C. § 1101(a)(48)(B).

<sup>5</sup> *Bovkun v. Att'y Gen.*, 283, F.3d 166, 171 (3d Cir. 2002).

<sup>6</sup> *Ilchuk v. Att'y Gen.*, 434 F.3d 618 (3d Cir. 2006) (Where alien's conviction under Pennsylvania theft of services statute constituted an aggravated felony because a sentence of six to twenty-three months of house arrest with electronic monitoring was a term of imprisonment)

<sup>7</sup> *Matter of Cota*, 23 I&N Dec. 849 (BIA 2005) (holding that a trial court's decision to modify or reduce an alien's criminal sentence nunc pro tunc is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction).

<sup>8</sup> See 8 USC § 1182(a)(2)(A)(ii)(II)(i.e. Petty offense exception that enables a single conviction to not be considered for immigration purposes. A subsequent CIMT will void the petty offense exception and the client will have two CIMTs).

<sup>9</sup> 8 U.S.C. § 1101(a)(43)(U).

<sup>10</sup> *Matter of Gonzalez Romo*, 26 I. & N. Dec. 743 (BIA 2016); see *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004) (holding that acting recklessly is inconsistent with the mens rea requirement for attempt and thus an attempt crime is not a CIMT wherein the underlying offense is reckless).

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- <sup>11</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance inadmissibility ground); 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance ground deportability ground); 21 § USC 846, 8 U.S.C. § 1227(a)(2)(C) (firearms ground of deportability); see also Matter of Bronsztejn, 15 I. & N. Dec. 281 (BIA 1974) (where a person would be found deportable if convicted of a substantive offense, he would also be deportable if convicted of an attempt to commit that offense).
- <sup>12</sup> Matter of Luis Manuel Guerrero, 25 I. & N. Dec. 631 (BIA 2011) (holding that solicitation is distinct from attempt and conspiracy and therefore not covered under 8 U.S.C. § 1101(a)(43)(U); see also Ng v. Att’y Gen., 436 F.3d 392, 396 (3d Cir. 2006) (considering whether solicitation of murder was a crime of violence as defined in 18 U.S.C. § 16(b), now unconstitutional, rather than analyzing as equivalent to murder). However, the “relating to” aggravated felony grounds, like 8 U.S.C. § 1101(a)(43)(R)-(T), can embrace offenses with a logical or causal relation to the type of crime in question. Williams v. Att’y Gen., 880 F.3d 100 (3d Cir. 2018); Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017).
- <sup>13</sup> Matter of Gonzalez Romo, 26 I. & N. Dec. 743 (BIA 2016).
- <sup>14</sup> Matter of Beltran, 20 I. & N. Dec. 521, 526–27 (BIA 1992) (defining solicitation as an inchoate crime that presupposes a purpose to commit another crime); see also Mizrahi v. Gonzales, 492 F.3d 156 (2d Cir. 2007).
- <sup>15</sup> 8 USC § 1101(a)(43)(U).
- <sup>16</sup> 8 USC § 1182(a)(2)(A)(i)(I); Matter of Gonzalez Romo, 26 I. & N. Dec. 743 (BIA 2016).
- <sup>17</sup> See note 11 regarding attempt crimes.
- <sup>18</sup> 8 USC § 1101(a)(43)(A); Matter of M-W-, 25 I. & N. Dec. 748 (BIA 2012) (holding that murder with malice aforethought, regardless of intent to kill, is an aggravated felony); Commonwealth v. Tolbert, 670 A.2d 1172, 1179 (Pa. Sup. Ct. 1995) (noting that all three types of murder require malice).
- <sup>19</sup> Matter of Lopez-Amaro, 20 I&N Dec. 668 (BIA 1993); Matter of Sanchez-Linn, 20 I. & N. Dec. 362 (BIA 1991).
- <sup>20</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
- <sup>21</sup> Voluntary manslaughter is a COV because it requires intent to kill. Commonwealth v. Mason, 378 A.2d 807 (Pa. 1977); see Stokeling v. United States, 2019 WL 189343, at \*8 (Jan. 15, 2019) (holding that physical force is capable of causing physical pain or injury); Matter of Luis Manuel Cervantes Nunez, 27 I. & N. Dec. 238, 241 (BIA 2018) (holding that a voluntary manslaughter statute requiring intent to kill is a COV);
- <sup>22</sup> Matter of Rosario, 15 I. & N. Dec. 416 (BIA 1975).
- <sup>23</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
- <sup>24</sup> Reckless or negligent conduct is insufficient for a COV under 18 U.S.C. § 16(a). Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005).
- <sup>25</sup> Reckless manslaughter is a CIMT, while negligent manslaughter is not. Matter of Tavdidishvili, 27 I. & N. Dec. 142 (BIA 2017); Matter of Wojtkow, 18 I. & N. Dec. 111 (BIA 1981). PA courts interpret “gross negligence” for purposes of this statute to be more culpable than ordinary criminal negligence, but are not entirely clear about what it requires. Commonwealth v. Huggins, 836 A.2d 862, 405 (Pa. 2003).
- <sup>26</sup> Child abuse encompasses criminally negligent acts that impair physical well-being. This includes infliction of even slight physical harm. Matter of Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008). However, see note 31 for argument that age of complainant is not an element of the offense.
- <sup>27</sup> If “gross negligence” were exactly the same as recklessness, it would be superfluous in this statute.
- <sup>28</sup> COV cannot be committed recklessly. Popal v. Gonzales, 416 F.3d 249, 254 (3d Cir. 2005). Under Mathis v. U.S., 136 S. Ct. 2243 (2016), the statute should not be divisible. However, DHS may still argue otherwise so safest to plead to the full language of the statute or recklessness.
- <sup>29</sup> Reckless simple assault is not a CIMT. Jean-Louis v. Attorney General, 582 F.3d 462 (3d Cir. 2009). Under Mathis v. U.S., 136 S. Ct. 2243 (2016), the statute should not be divisible. However, DHS may still argue otherwise so safest to plead to the full language of the statute or recklessness.
- <sup>30</sup> See note 28.
- <sup>31</sup> Jean-Louis v. Attorney Gen. of U.S., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense; see also Commonwealth v. Kisner, 736 A.2d 672, 674 (Pa. Super. Ct. 1999) (the grading of the offense is not an element). Child victim must be an element to be a CAC. Matter of Valazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008).
- <sup>32</sup> See, e.g., Matter of Chairez-Castrejon, 27 I. & N. Dec. 21 (BIA 2017) (finding that a statute with a similar mens rea element is not divisible).
- <sup>33</sup> Leocal v. Ashcroft, 125 S.Ct. 377 (2004); Popal v. Gonzales, 416 F.3d 249 (3d Cir. 2005)
- <sup>34</sup> Partyka v. Attorney General, 417 F.3d 408 (3d Cir. 2005) (NJ simple assault is not a CIMT where subsection is not specified and statute includes negligent conduct).
- <sup>35</sup> Jean-Louis v. Attorney Gen. of U.S., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense; see also Commonwealth v. Kisner, 736 A.2d 672, 674 (Pa. Super. Ct. 1999) (the grading of the offense is not an element). Child victim must be an element to be a CAC. Matter of Valazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008).
- <sup>36</sup> Singh v. Gonzales, 432 F.3d 533, 540 (3d Cir. 2006) (holding that simple assault as defined by 18 Pa. C.S. § 2701(a)(3) requires specific intent to use, threaten to use, or attempt to use force against an individual, and is therefore a crime of violence within 18 U.S.C. § 16(a)).

- <sup>37</sup> See Javier v. Att’y Gen., 826 F.3d 127 (3d Cir. 2016) (holding terroristic threats with intent to terrorize is a CIMT); Singh v. Gonzales, 432 F.3d 533, 540 (3d Cir. 2006) (least culpable conduct under 2701(a)(3) requires specific intent).
- <sup>38</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
- <sup>39</sup> Jean-Louis v. Attorney Gen. of U.S., 582 F.3d 462, 468 (3d Cir. 2009) held that the age of the victim is a grading factor, not an element of the offense; see also Commonwealth v. Kisner, 736 A.2d 672, 674 (Pa. Super. Ct. 1999) (the grading of the offense is not an element). Child victim must be an element to be a CAC. Matter of Valazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008).
- <sup>40</sup> The crime of violence aggravated felony definition in 18 U.S.C. § 16(b) is unconstitutional, Sessions v. Dimaya, 138 S. Ct. 1204 (2018), so statute must have element of use of force to be a COV. This subsection does not. Commonwealth v. Thomas, 867 A.2d 594, 597 (Sup. Ct. Pa. 2005); United States v. Mayo, 901 F.3d 218, 224 (3d Cir. 2018). Additionally, reckless conduct is insufficient for a § 16(a) COV. Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005); United States v. Haines, 296 F. Supp. 3d 726, 736 (E.D. Pa. 2017).
- <sup>41</sup> Mental state of at least recklessness with element of serious bodily injury/extreme indifference is a CIMT. Baptiste v. Attorney General, 841 F.3d 601, 623 (3d Cir. 2016).
- <sup>42</sup> See footnote 40.
- <sup>43</sup> Mental state of at least recklessness with element of serious bodily injury is a CIMT. Matter of Danesh, 19 I. & N. Dec. 669 (BIA 1988); In re Fualaau, 21 I. & N. Dec. 475 (BIA 1996); Baptiste v. Attorney General, 841 F.3d 601, 623 (3d Cir. 2016).
- <sup>44</sup> The categorical approach applies, so the victim being under 18 years old needs to be an element of the offense. Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 515 (BIA 2008).
- <sup>45</sup> United States v. Ramos, 892 F.3d 599, 610 (3d Cir. 2018) (subsection (a)(4) is COV); Singh v. Gonzales, 432 F.3d 533 (2006) (attempt by physical menace is COV).
- <sup>46</sup> See United States v. Pitts, 655 F. App’x 78, 81 (3d Cir. July 31, 2016); Wilks v. Att’y Gen., 273 F. App’x 196 (3d Cir. 2008).
- <sup>47</sup> Intentional assault on peace officer is CIMT. Matter of Danesh, 19 I. & N. Dec. 669 (BIA 1988). Assault w/a deadly weapon, even if reckless, is a CIMT. Matter of Medina, 15 I&N Dec. 611 (BIA 1976). Offenses requiring knowing or intentional assault/threats are CIMTs. Jean-Louis v. Att’y Gen., 582 F.3d 462, 468-69 (3d Cir. 2008).
- <sup>48</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
- <sup>49</sup> No case law on point, but probably a COV under § 16(a). Use of noxious gas or device would likely be found to require use of force.
- <sup>50</sup> No case law on point, but probably CIMT based on cases equating “use” with intentionality. See Leocal v. Ashcroft, 543 U.S. 1 (2004).
- <sup>51</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
- <sup>52</sup> See footnote 40.
- <sup>53</sup> While Jean-Louis v. Attorney General, 582 F.3d 462 (3d Cir. 2009) held that the similar SA statute, 2701(b)(2), is not a CIMT, it focused on the fact that the PA gap-filling statute for mens rea would not apply to the age of the child. Here, since the age of the child is an element, they probably would apply and Jean-Louis could be distinguishable.
- <sup>54</sup> Matter of Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008).
- <sup>55</sup> Not a crime of violence under Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2006).
- <sup>56</sup> Mahn v. Att’y Gen. of U.S., 767 F.3d 170, 174 (3d Cir. 2014).
- <sup>57</sup> Bovkun v. Ashcroft, 283 F.3d 166 (3d Cir. 2002).
- <sup>58</sup> Javier v. Att’y Gen., 826 F.3d 127, 131 (3d Cir. 2016)
- <sup>59</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.
- <sup>60</sup> See United States v. Brown, 765 F.3d 185, 193 (3d Cir. 2014), but note that unlike the sentencing guidelines § 16(a) includes force against property. Under Brown, the definition of “crime of violence” is not divisible. 765 F.3d at 193.
- <sup>61</sup> United States v. Martinez-Paramo, 380 F.3d 799, 802 (5th Cir. 2004); United States v. Brown, 765 F.3d 185, 192 (3d Cir. 2011). No use of force element.
- <sup>62</sup> In contrast to Javier above, no requirement of specific intent to terrorize.
- <sup>63</sup> This is likely a crime of violence, pursuant to 16(a) because the court considers the manner of use and force of the object to determine whether it is a dangerous or deadly weapon capable of serious harm against a person or property. Com. v. Roman, 714 A.2d 440, 443 (Pa. Super. Ct. 1998) citing Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992) (where the inquiry is not in the nature of object but instead on the manner of use of the object and its capacity to “endanger life or inflict great bodily harm.)
- <sup>64</sup> The offense requires specific intent as well as a use of force that would turn the object into a deadly or dangerous weapon. Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992). Additionally, a deadly or dangerous weapon is defined as any firearm, weapon, device, or instrumentality, that based on how it is used is “calculated or likely to produce death or serious bodily injury.” 18 Pa.C.S. 2301.
- <sup>65</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

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<sup>66</sup> Even with sentence of a year or more, this should not be a COV because the level of violent force isn't sufficient to qualify under 18 U.S.C. § 16(a). Matter of Guzman-Polanco, 26 I. & N. Dec. 806 (BIA 2016).

<sup>67</sup> Least culpable conduct includes mere physical contact, following, or repeated acts with intent to annoy, which does not rise to the level of CIMT. See Commonwealth v. Lutes, 793 A.2d 949, 961 (Pa. Super. Ct. 2002) and Commonwealth v. Miller, 689 A.2d 238, 240 (Pa. Super. Ct. 1997). See also Barrera-Lima v. Sessions, 901 F.3d 1108, 1118 (9th Cir. 2018) (noting that intent to annoy is generally not sufficient for a CIMT) Matter of Sejas, 24 I. & N. Dec. 236, 237-38 (BIA 2007); Matter of Sanudo, 23 I. & N. Dec. 968, 972 (BIA 2006).

<sup>68</sup> See note 66.

<sup>69</sup> Matter of Sanchez-Lopez, 27 I. & N. Dec. 256 (BIA 2018) (defining a crime of stalking to include the following elements: "(1) conduct that was engaged in on more than a single occasion, (2) which was directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death."). Summary harassment does not require intent to create fear of bodily injury or death.

<sup>70</sup> Matter of Ajami, 22 I&N Dec. 949 (BIA 1999). Note that this case addresses aggravated stalking in Michigan, which includes credible threats. The PA statute is distinguishable. However, intent required for stalking conviction is similar to intent required for terroristic threats, found to be morally turpitudinous in Javier v. Att'y Gen., 826 F.3d 127 (3d Cir. 2016).

<sup>71</sup> The statute is overbroad relative to the definition of a crime of stalking because it can involve intent to cause emotional distress, not just place a person in reasonable fear of bodily injury. Matter of Sanchez-Lopez, 27 I. & N. Dec. 256 (BIA 2018). However, DHS might argue it is divisible.

<sup>72</sup> This statute requires a mens rea of knowingly/intentional, but my not require the level of violent force necessary for a COV. See Matter of Velasquez, 25 I. & N. Dec. 278, 283 (BIA 2010) (holding that "the 'physical force' necessary to establish that an offense is a 'crime of violence' for purposes of the Act must be "violent" force, that is, force capable of causing physical pain or injury to another person.

<sup>73</sup> Intentional assault is a CIMT regardless of the level of injury. Matter of Solon, 24 I. & N. Dec. 239, 246 (BIA 2007).

<sup>74</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>75</sup> Use of force is not an element of the offense, and 18 U.S.C. § 16(b) has been found unconstitutional. See Delgado-Hernandez v. Holder, 697 F.3d 1125, 1127 (9th Cir. 2012). Even under 2901(a)(3), the statute only requires intent to inflict bodily injury or terrorize, not the actual use, attempted use, or threatened use of physical force.

<sup>76</sup> Matter of Nakoi, 14 I&N Dec. 208 (BIA 1972); Matter of C-M-, 9 I. & N. Dec. 487 (BIA 1961).

<sup>77</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>78</sup> See Matter of Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008) (defining "child" as under 18).

<sup>79</sup> See Commonwealth v. Markman, 916 A.2d 586, 272 (Pa. 2007) (finding evidence sufficient where it showed either intent to inflict bodily injury or intent to facilitate commission of a felony); Ildelfonso-Candelario v. Att'y Gen., 866 F.3d 102 (3d Cir. 2017) (holding that obstruction of justice is not a CIMT); Castrijon-Garcia v. Holder, 704 F.3d 1205, 1213 (9th Cir. 2013) (finding that CA kidnapping is not a CIMT).

<sup>80</sup> Sharpe v. Riley, 271 F. Supp. 2d 631 (E.D. Pa. 2003); see also In re Mioten, 2003 WL 23269873 (BIA 2003). IN RE: CLINTON VALENTINE SHARP, 2002 WL 32149034 (BIA 2002).

<sup>81</sup> Restraint must be knowing, but no intent to harm required. See Turijan v. Holder, 744 F.3d 617, 621 (9th Cir. 2014).

<sup>82</sup> Least culpable conduct is recklessly taking custody without permission, so there is arguably no aggravating factor paired with the reckless mens rea and the conduct is not necessarily morally reprehensible. See, e.g., Commonwealth v. Thrush, 23 Pa. D. & C. 3d 302 (Pa. Ct. Comm. Pleas 1980).

<sup>83</sup> See Liao v. Att'y Gen. of the U.S., 910 F.3d 714, 722 (3d Cir. 2018) (holding that crimes of child abuse require a likelihood of harm to the child).

<sup>84</sup> The statute does not require an intent to harm, so arguably lacks a culpable mens rea. Commonwealth v. Hart, 28 A.3d 898, 911 (Pa. 2011). Also, the statute only requires recklessness with regard to the victim's age. Commonwealth v. Gallagher, 924 A.2d 636, 266 (Pa. 2007).

<sup>85</sup> See Liao v. Att'y Gen. of the U.S., 910 F.3d 714, 722 (3d Cir. 2018) (holding that crimes of child abuse require a likelihood of harm to the child).

<sup>86</sup> See Matter of Keeley, 27 I. & N. Dec. 146 (BIA 2017).

<sup>87</sup> Matter of H, 2 I&N Dec. 406 (BIA 1945).

<sup>88</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>89</sup> Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

<sup>90</sup> Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) (holding that statutory rape offenses qualifying as generic sexual abuse of a minor if they require that the victim be under the age of 16).

<sup>91</sup> Matter of Jimenez-Cedillo, 27 I. & N. Dec. 1, 6 (BIA 2017); but see Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018) (reversing because the BIA failed to explain why it changed its prior position that knowledge of age was necessary for statutory rape to be a CIMT). Note that neither knowledge of victim's age nor intent is an element of the offense – mistake of age defense shifts burden to the defendant. 18 Pa. C.S. § 3102; Commonwealth v. A.M.C., 951 A.2d 1174, 1177-78 (Pa. Sup. Ct. 2008).

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<sup>92</sup> Matter of Keeley, 27 I. & N. Dec. 146 (BIA 2017).

<sup>93</sup> Forcible compulsion need not be physical force as required by 18 U.S.C. § 16(a). 18 Pa. C.S. § 3101; see United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005) (noting that sexual assault that does not require physical force is not a 16(a) COV).

<sup>94</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008).

<sup>95</sup> See Keeley v. Whitaker, 901 F.3d 878 (6th Cir. 2018); Perez-Gonzalez v. Holder, 667 F.3d 622, 626 (5th Cir. 2012). In PA this would probably have to be litigated up to the circuit because the BIA said otherwise in Matter of Keeley.

<sup>96</sup> Matter of Keeley, 27 I. & N. Dec. 146 (BIA 2017).

<sup>97</sup> United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005).

<sup>98</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008).

<sup>99</sup> Esquivel-Quintana v. Sessions, 137 S. Ct. 1561, 1572 (2017).

<sup>100</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008).

<sup>101</sup> Esquivel-Quintana v. Sessions, 137 S. Ct. 1561, 1572 (2017).

<sup>102</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008).

<sup>103</sup> Matter of Keeley, 27 I. & N. Dec. 146 (BIA 2017) defines rape as intercourse without consent, but discussion of lack of consent primarily covers the types of situations criminalized in PA by rape and IDSI, i.e. force or inability to consent due to impairment or mental defect.

<sup>104</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008).

<sup>105</sup> Includes indecent contact so not rape, no use of force required.

<sup>106</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>107</sup> Matter of Keeley, 27 I. & N. Dec. 146 (BIA 2017).

<sup>108</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>109</sup> See Keeley v. Whitaker, 901 F.3d 878 (6th Cir. 2018); Perez-Gonzalez v. Holder, 667 F.3d 622, 626 (5th Cir. 2012). In PA this would probably have to be litigated up to the circuit because the BIA said otherwise in Matter of Keeley.

<sup>110</sup> Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

<sup>111</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>112</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>113</sup> Not a rape AF because no penetration required. Matter of Keeley, 27 I. & N. Dec. 146 (BIA 2017). Not a crime of violence under § 16(a) because no use of violent force required. See Matter of Guzman-Polanco, 26 I. & N. Dec. 806 (BIA 2016). Crime of violence aggravated felony as defined in § 16(b) has been ruled unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

<sup>114</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008).

<sup>115</sup> Probably not crime of violence aggravated felony because “forcible compulsion” can include intellectual, moral, emotional or psychological force, 18 Pa. C.S. § 3101, while 18 U.S.C. § 16(a) requires physical force.

<sup>116</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>117</sup> See United States v. Davis, 875 F.3d 592 (11th Cir. 2017).

<sup>118</sup> See note 113; United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005).

<sup>119</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>120</sup> Cadapan v. Att’y Gen., 749 F.3d 157 (3d Cir. 2014).

<sup>121</sup> Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

<sup>122</sup> Matter of Cortes Medina, 26 I. & N. Dec. 79 (BIA 2013) (“We therefore hold that for the offense of indecent exposure to be considered a crime involving moral turpitude under the immigration laws, the statute prohibiting the conduct must require not only the willful exposure of private parts but also a lewd intent.”)

<sup>123</sup> See note 31 about whether the sentencing enhancement for a minor complainant is an element of the offense.

<sup>124</sup> See note 31.

<sup>125</sup> Totimeh v. Att’y Gen. of the U.S., 666 F.3d 109 (3d Cir. 2012).

<sup>126</sup> Although there is a ground of deportability for failure to register as a sex offender, 8 U.S.C. § 1227(a)(2)(A)(v) this only applies to federal convictions under 18 § U.S.C 2250.

<sup>127</sup> Matter of Cortes Medina, 26 I. & N. Dec. 79 (BIA 2013) (indecent exposure is only a CIMT where the statute requires lewd intent); Commonwealth v. Botzum, 302 A.2d 381 (Sup. Ct. Pa. 1973) (holding, for a prior version of the statute, that deliberate or malicious intent is not an element of the offense).

<sup>128</sup> Not a crime of violence. Tran v. Attorney General, 414 F. 3d 464 (3d Cir. 2005). Also not an ag fel under 8 U.S.C. § 1101(a)(43)(E), because arson offense at 18 U.S.C. § 844(i) requires malicious, not just reckless, property destruction.

<sup>129</sup> Recklessness with regard to risk of harm should not be a CIMT. See Mahn v. Att’y Gen., 767 F.3d 170, but see Pretelt v. Att’y Gen., 370 F. App’x 338 (3d Cir. 2010) (unpublished) (holding that a comparable NJ statute is a CIMT); see also United States v. Mitchell, 218 F. Supp. 3d 360 (M.D. Pa. 2016) (discussing least culpable conduct). Rebecca is currently litigating this issue before the BIA/Third Circuit.

<sup>130</sup> See Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless mens rea is not a CIMT).

<sup>131</sup> Luna Torres v. Lynch, 136 S. Ct. 1619 (2016). Probably also a COV AF if a sentence of a year or more is imposed.

<sup>132</sup> Matter of S-, 3 I. & N. Dec. 617 (BIA 1949).

<sup>133</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>134</sup> See Matter M-W-, 25 I. & N. Dec. 748, 750 n.3 (BIA 2012) (noting that felony murder is uncontroversially part of the common law definition of murder).

<sup>135</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>136</sup> Least culpable conduct is recklessness, which is not a COV or (E) ag fel, see note 128. There is a strong argument that statute is not divisible under Mathis v. United States, 136 S. Ct. 2243 (2016), but plead to full language or recklessness to be safe.

<sup>137</sup> See notes 129 and 136.

<sup>138</sup> See note 134.

<sup>139</sup> Luna Torres v. Lynch, 136 S. Ct. 1619 (2016). Probably also a COV AF if a sentence of a year or more is imposed.

<sup>140</sup> Matter of S-, 3 I. & N. Dec. 617 (BIA 1949).

<sup>141</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>142</sup> See note 128.

<sup>143</sup> See Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless mens rea is not a CIMT).

<sup>144</sup> Luna Torres v. Lynch, 136 S. Ct. 1619 (2016).

<sup>145</sup> Matter of S-, 3 I. & N. Dec. 617 (BIA 1949).

<sup>146</sup> See note 128.

<sup>147</sup> See note 129.

<sup>148</sup> See Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless mens rea is not a CIMT). As mentioned above, Knapik remains good law.

<sup>149</sup> This statute is broader than 18 U.S.C. § 844(d).

<sup>150</sup> Includes intent to commit an offense.

<sup>151</sup> The list of means of causing the catastrophe is not divisible because it is an illustrative, not exhaustive, list. Commonwealth v. Karetny, 880 A.2d 505, 534 (Pa. 2005).

<sup>152</sup> Recklessness cannot meet the definition for use of force under 18 U.S.C. § 16(a). Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005).

<sup>153</sup> F1 (intentional or knowing) would definitely be a CIMT, F2 (reckless) would also likely be a CIMT because the magnitude of harm would be an aggravating factor. See Matter of Hernandez, 26 I. & N. Dec. 464, 466 (BIA 2015).

<sup>154</sup> Catastrophe means “widespread injury or damage,” and “[t]he risk proscribed by this legislation is the use of dangerous means by one who consciously disregards a substantial and unjustifiable risk and thereby unnecessarily exposes society to an extraordinary disaster.” Commonwealth v. Hughes, 364 A.2d 306, 311-12 (Pa. 1976). The dangerous means and the degree of harm risked would likely be considered sufficient “aggravating factors” to make this recklessness offense a CIMT. See Knapik v. Ashcroft, 384 F.3d 84, 90 (3d Cir. 2004); Matter of Hernandez, 26 I. & N. Dec. 464 (BIA 2015).

<sup>155</sup> Recklessness/negligence cannot constitute use of force for purposes of 18 USC 16(a). Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005). Not a match to the elements of any of the offenses in 8 USC 1101(a)(43)(E).

<sup>156</sup> Negligence is not sufficiently culpable to involve moral turpitude. Matter of Tavdidishvili, 27 I. & N. Dec. 142 (BIA 2017).

<sup>157</sup> Recklessness is insufficient for COV; even intentional conduct might not involve sufficiently violent physical force. Tran v. Gonzales, 414 F.3d 464, 469 (3d Cir. 2005); see US v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001)

<sup>158</sup> See Matter of B, 2 I&N Dec. 867 (BIA 1947); Matter of M, 2 I & N. Dec. 686 (BIA 1946); see also Commonwealth v. Zambelli, 695 A.2d 848, 850 (Pa. Sup. Ct. 1997) (holding that criminal mischief does not require lack of consent of the property owner).

<sup>159</sup> This is an odd statute because it’s hard to imagine what reckless deception or threat would entail, but avoid loss of \$10,000 to avoid fraud AF and sentence of a year or more to avoid COV AF.

<sup>160</sup> Offenses in which there is inherently deceptive conduct and significant societal harm are CIMTs. Matter of Kochlani, 24 I&N Dec. 128, 130-131 (BIA 2007); Matter of Jurado, 24 I&N Dec. 29, 35 (BIA 2006). Unlawful taking of property by threats is a CIMT. C---, 5 I. & N. Dec. 370 (BIA 1953). Intentional transmission of threats is CIMT. Matter of Ajami, 22 I&N Dec. 949, 952 (BIA 1999). Offenses in which fraud is an element are CIMTs. See Jordan v. DeGeorge, 341 U.S. 223,229 (1951); Matter of Flores, 17 I&N Dec. 225, 228 (BIA 1980).

<sup>161</sup> Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount. Nijhawan remains good law.

<sup>162</sup> 8 USC 16 includes force against property, but these provisions probably don’t require the level of “violent force” required for a COV. See Johnson v. U.S., 559 U.S. 133, 140 (2010); US v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001).

<sup>163</sup> In re Majok, A 094-582-812 (BIA Dec. 20, 2016) (unpublished); see also old cases at note 158.

<sup>164</sup> United States v. Stitt, 2018 WL 6439818 (S. Ct. Dec. 10, 2018) held that generic burglary includes burglaries of vehicles that are adapted for overnight accommodation. However, generic burglary requires an unlawful/unprivileged entry. Taylor v. United States, 495 U.S. 575, 599 (1990). The statute does not have this as an element, instead privilege or permission is an affirmative defense. 18 Pa. C.S. § 3502(b); see Descamps v. United States, 570 U.S. 254 (2013) (emphasizing that only elements that must be proven beyond a reasonable doubt are relevant to the categorical approach).

<sup>165</sup> The statute goes beyond intent to commit a felony and instead includes an element requiring commission, intent to commit, or threat to commit a bodily injury crime. The term “bodily injury crime” includes:

(1) An act, attempt or threat to commit an act which would constitute a misdemeanor or felony under the following:

Chapter 25 (relating to criminal homicide).

Chapter 27 (relating to assault).Chapter 29 (relating to kidnapping).

Chapter 31 (relating to sexual offenses).Section 3301 (relating to arson and related offenses).

Chapter 37 (relating to robbery).Chapter 49 Subch. B (relating to victim and witness intimidation).

(2) The term includes violations of any protective order issued as a result of an act related to domestic violence.

18 Pa.C.S.A. § 3502. Not all of these crimes are COVs – e.g. REAP. But, not clear if the statute is divisible. This is the least safe subsection and should be avoided where possible.

<sup>166</sup> See Matter of Louissant, 24 I&N Dec. 754 (BIA 2009); Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

<sup>167</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>168</sup> See footnote 164

<sup>169</sup> Definition of COV AF in 18 U.S.C. § 16(b) is unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This statute does not require use, attempted use, or threatened use of force.

<sup>170</sup> See Matter of Louissant, 24 I&N Dec. 754 (BIA 2009); Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

<sup>171</sup> See footnote 164

<sup>172</sup> See footnote 169.

<sup>173</sup> See Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

<sup>174</sup> The statute criminalizes entry into structures that are not adapted for overnight accommodation. This falls outside the generic definition of burglary. United States v. Stitt, 2018 WL 6439818 (S. Ct. Dec. 10, 2018).

<sup>175</sup> See footnote 169.

<sup>176</sup> Matter of M-, 2 I&N Dec. 721 (BIA 1946), holding that burglary is not a CIMT absent intent to commit a CIMT, is still good law for burglaries of non-dwellings. See Matter of JGDF, 27 I&N Dec. 82 (BIA 2017).

<sup>177</sup> See footnote 174

<sup>178</sup> See footnote 169.

<sup>179</sup> Matter of M-, 2 I&N Dec. 721 (BIA 1946).

<sup>180</sup> Definition of COV AF in 18 U.S.C. § 16(b) is unconstitutional. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This statute does not require use, attempted use, or threatened use of force.

<sup>181</sup> No, because no intent to commit a CIMT required. Matter of M-, 2 I&N Dec. 721 (BIA 1946); Matter of Esfandiary, 16 I. & N. Dec. 659 (BIA 1979).

<sup>182</sup> “Break into” can involve use of force, but not required.

<sup>183</sup> Similar analysis as note 181 above.

<sup>184</sup> No use of force required here.

<sup>185</sup> See note 181.

<sup>186</sup> Sections i-iii are summary offenses. Section iv is an M1. While these subsections may qualify as crimes of violence, they are summary offenses and only punishable by up to 90 days, so they cannot be an aggravated felony.

<sup>187</sup> Sections (i) and (iv) likely involve intent to commit a CIMT and therefore are CIMTs. Matter of Esfandiary, 16 I. & N. Dec. 659 (BIA 1979); see Javier v. Att’y Gen., 826 F.3d 127 (3d Cir. 2016); Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016).

<sup>188</sup> Matter of Ibarra, 26 I. & N. Dec. 809 (BIA 2016); see United States v. Heng Khim, 748 F. App’x 440, 444 (3d Cir. 2018) (unpublished); United States v. Harris, 205 F. Supp.3d 651, 673 (M.D. Pa. 2016); Zavala Cerrato, 2009 WL 1488348 (BIA 2009); Vannara Phou, 2006 WL 901553 (BIA 2006).

<sup>189</sup> Matter of Martin, 18 I. & N. Dec. 226, 227 (BIA 1982).

<sup>190</sup> See 23 Pa. C.S. § 6102 for who is protected under Pennsylvania family violence law. Note that immigration judges can look at evidence beyond the record of conviction to determine whether the victim was in a protected relationship with the defendant.

<sup>191</sup> United States v. Peppers, 899 F.3d 211, 233 (3d Cir. 2018); United States v. Harris, 205 F. Supp.3d 651, 673 (M.D. Pa. 2016).

<sup>192</sup> See 18 Pa. C.S. § 3902 (noting that all offenses in Chapter 39 of the PA criminal code are “theft”); Com. v. Weigle, 949 A.2d 899 (Pa. Sup. Ct. 2008) (stating that “it appears that proof of any theft offense defined in Chapter 39 of the Crimes Code would be sufficient”); Com v. Stevens, 352 A.2d 509, 513 (Pa. Sup. Ct. 1975) (applying § 3902 to the definition of robbery). See, e.g., Commonwealth v. Espenlaub, 2016 WL 5870893 (Pa. Sup. Ct. Oct. 7, 2016) (arguably relating to a robbery in the course of theft by deception). See the theft offense section below for offenses that might not meet the generic definition under Matter of Ibarra, 26 I. & N. Dec. 809 (BIA 2016). See also Lopez-Valenciana v. Lynch, 798 F.3d 863 (9th Cir. 2015).

<sup>193</sup> Mateo v. Att’y Gen., 870 F.3d 228 (3d Cir. 2008). This is not a theft AF because it does not require intent to permanently deprive. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007); Com. v. Jones, 771 A.2d 796, 798 (Pa. Super. Ct. 2001). Not a COV after Dimaya because use of violent force is not an element. Compare Jones, 771 A.2d at 799 (affirming conviction where defendant got in running car and drove it away with victim in the back) with Matter of Kim, 26 I. & N. Dec. 912 (BIA 2017) (defining use of force as force capable of causing pain or injury).

<sup>194</sup> Case law establishes that the defendant must have used force, intimidation, or inducement of fear to accomplish the taking, which could be seen as a sufficiently culpable mens rea and actus reus to be a CIMT. Com. V. George, 705 A.2d 916, 920 (Pa. Sup. Ct. 1998).

<sup>195</sup> Commonwealth v. Jones, 771 A.2d 796, 798-99 (Pa. Super. Ct. 2001). Therefore, the statute does not fit neatly within theft or assault categories of CIMTs. See Matter of Wu, 27 I. & N. Dec. 8 (BIA 2017); Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016).

<sup>196</sup> Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007).

<sup>197</sup> Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016).

<sup>198</sup> See Garcia-Martinez v. Sessions, 886 F.3d 1291, 1296 (9th Cir. 2018); Obeya v. Sessions, 884 F.3d 442, 449 (2d Cir. 2018); Lucio-Rayos v. Sessions, 875 F.3d 573, 578 (10th Cir. 2017).

<sup>199</sup> Statute should be distinguishable from generic theft because no intent to deprive. See Lewin v. Att’y Gen., 885 F.3d 165, 168 (3d Cir. 2018).

<sup>200</sup> No case law on point here. However, since this lacks the intent to deprive, it is not categorically a CIMT. See Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016); Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973).

<sup>201</sup> In Al-Sharif v. USCIS, 734 F.3d 207 (3d Cir. 2013), the court overruled Nugent v. Ashcroft and held that an offense involving fraud or deceit is a fraud AF regardless of whether it is also a theft offense.

<sup>202</sup> Theft AFs and fraud AFs are distinct, with theft requiring a taking without consent rather than a taking with consent unlawfully obtained. Matter of Garcia-Madruga, 24 I. & N. Dec. 436 (BIA 2008).

<sup>203</sup> Jordan v. DeGeorge, 341 U.S. 223, 227 (1951) (all offenses involving fraudulent intent are CIMTs).

<sup>204</sup> Under Nijhawan v. Holder, 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount.

<sup>205</sup> Theft offenses must involve taking or exercising control of another’s property without consent. Matter of Garcia-Madruga, 24 I. & N. Dec. 436, 440 (BIA 2008). On its face this statute can include theft of property obtained with mistaken consent. See, e.g., Greenberg v. Chester Downs and Marina LLC, 694 F. App’x 877 (3d Cir. 2017) (finding probable cause to believe casino patron who had been overpaid and refused to return money violated section 3924). Therefore, the statute is arguably overbroad. See Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014).

<sup>206</sup> The intent required is sufficiently turpitudinous under Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016), but arguably the act is less reprehensible since it does not require a taking without consent.

<sup>207</sup> See Hernandez-Cruz v. Att’y Gen., 764 F.3d 281, 285 (3d Cir. 2014) (citing a statute’s prohibition of omissions as an example of non-turpitudinous conduct); Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847, 852-53 (basing decision on the fact that taking property without consent is inherently reprehensible).

<sup>208</sup> See Lewin v. Att’y Gen., 885 F.3d 165 (3d Cir. 2018).

<sup>209</sup> De Leon-Reynoso v. Ashcroft, 293 F. 3d 633 (3d Cir. 2002).

<sup>210</sup> Ilchuk v. Attorney Gen. of U.S., 434 F.3d 618, 623 (3d Cir. 2006) held that this is a theft AF. However, under newer case law there could be an argument against, because it does not necessarily involve taking of property without consent rather than with consent but by deception. See Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014); Matter of Garcia-Madruga, 24 I. & N. Dec. 436, 440 (BIA 2008); but see De Lima v. Sessions, 867 F.3d 260, 267 (1st Cir. 2017) (holding theft of services is generic theft).

<sup>211</sup> The statute does not necessarily involve fraud or deceit. Valansi v. Ashcroft, 278 F.3d 203, 209-10 (3d Cir. 2002).

<sup>212</sup> Statute requires knowing or intentional mens rea, but does not necessarily require intent to permanently deprive. See Garcia v. Sessions, 721 F. App’x 35, 38 (2d Cir. 2018) (remanding for determination of whether theft of services is a CIMT); Johnson v. Holder, 413 F. App’x 435 (3d Cir. 2010) (same); Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016).

<sup>213</sup> See note 210.

<sup>214</sup> For example, a conviction was upheld for legislator using staff time for political rather than governmental purposes.

Commonwealth v. Stetler, 95 A.3d 864 (Sup. Ct. Pa. June 3, 2014).

<sup>215</sup> In Com. v. Carson, 592 A.2d 1318, 1321 (1991), the court held that the elements required for a conviction only require the operation of a vehicle without consent and that the defendant knew or should have known that he lacked consent. Therefore, does not require the intent to deprive necessary for a theft offense. See Lewin v. Att’y Gen., 885 F.3d 165 (3d Cir. 2018).

<sup>216</sup> Matter of M-, 2 I&N Dec. 686, 687 (BIA 1946) (finding that joyriding is not a crime involving moral turpitude because the statute did not require malicious or vicious intent to deprive the owner); Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847, 847 (BIA 2016) (holding that theft CIMTs require an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.)

<sup>217</sup> Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007); Dempster v. Att’y Gen., 565 F. App’x 123, 125 (3d Cir. 2014) (unpublished decision acknowledging that the BIA determined that the statute was divisible and that subparts (a)(1) through (a)(3) constituted theft offenses under § 1101(a)(43)(G).)

<sup>218</sup> Matter of Jurado-Delgado, 24 I. & N. Dec. 29, 29 (BIA 2006). See also Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016). The intent required for all subsections of this statute matches the intent found to be morally turpitudinous in Diaz-Lizarraga. Note that a single summary RT conviction is subject to the petty offense exception for both inadmissibility and deportability grounds.

<sup>219</sup> See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007).

<sup>220</sup> Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007)

<sup>221</sup> Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016).

<sup>222</sup> Onyejiaka v. Att’y Gen., 183 Fed.Appx 193 (3d Cir. 2006); see Williams v. Att’y Gen., 880 F.3d 110 (2018) (discussing forgery AFs). An offense can be a forgery offense and a fraud offense. Bobb v. Att’y Gen., 458 F.3d 213 (3d Cir. 2006). However, in Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002), the Third Circuit found that intent to defraud is an AF, but intent to

injure is not, in the context of a different statute. But see Commonwealth v. Leber, 802 A.2d 648 (Pa. Sup. Ct. 2002) (holding that fraudulent intent is an essential element of PA forgery).

<sup>223</sup> Jordan v. DeGeorge, 341 U.S. 223, 227 (1951) (all offenses involving fraudulent intent are CIMTs).

<sup>224</sup> DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>225</sup> See Williams v. Att’y Gen., 880 F.3d 110 (2018) (forgery); Yong Wong Park v. Att’y Gen., 472 F.3d 66 (3d Cir. 2006) (counterfeiting). Probably not fraud AF because it includes intent to deceive *or* injure, i.e. could cover destruction of a someone’s important record without any element of fraud. See Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002).

<sup>226</sup> Matter of Flores, 17 I. & N. Dec. 225 (BIA 1980) (indicating that crimes involving fraud are crimes involving moral turpitude).

<sup>227</sup> Not fraud AF because no intent to defraud. Mirat v. Att’y Gen., 184 F. App’x 153 (3d Cir. 2006) (unpublished decision).

<sup>228</sup> Matter of Balao, 20 I. & N. Dec. 440 (BIA 1992) held that this statute is not a CIMT because it does not require intent to defraud;. See also Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988) and Matter of Colbourne, 13 I&N Dec. 319 (BIA 1969).

<sup>229</sup> See Kawashima v. Holder, 565 U.S. 478 (2012); Mowlana v. Lynch, 803 F.3d 923, 928 (8th Cir. 2015) (holding that unauthorized SNAP use is a fraud AF). This is not a theft AF because it does not require taking of property without consent with intent to deprive. Matter of Garcia-Madruga, 24 I. & N. Dec. 436 (BIA 2008).

<sup>230</sup> Matter of Chouinard, 11 I. & N. Dec. 839 (BIA 1966).

<sup>231</sup> DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>232</sup> While fraudulent intent need not be an element of the offense if it is implied, this statute does not require *any* specific intent. Cf. Kawashima v. Holder, 565 U.S. 478, 483 (noting that the statute required specific intent to violate the law). This is particularly true for (a)(3), which requires mere possession.

<sup>233</sup> Probably not a fraud AF because it includes intent to defraud *or* injure. Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002). This is not a theft AF because it does not require taking of property without consent with intent to deprive. Matter of Garcia-Madruga, 24 I. & N. Dec. 436 (BIA 2008).

<sup>234</sup> Matter of Flores, 17 I. & N. Dec. 225 (BIA 1980) (indicating that crimes involving fraud are crimes involving moral turpitude).

<sup>235</sup> See Kawashima v. Holder, 565 U.S. 478 (2012).

<sup>236</sup> Matter of Flores, 17 I. & N. Dec. 225 (BIA 1980) (indicating that crimes involving fraud are crimes involving moral turpitude).

<sup>237</sup> See Perez-Paredes v. Holder, 561 F. App’x 774 (10th Cir. 2014) (upholding BIA decision finding an unauthorized recording practices statute to be an AF); Yong Wong Park v. Att’y Gen., 472 F.3d 66 (3d Cir. 2006) (describing the Third Circuit’s broad approach to counterfeiting AFs).

<sup>238</sup> Matter of Zaragoza-Vaquero, 26 I. & N. Dec. 814 (BIA 2016).

<sup>239</sup> Therefore, arguably, there is no logical or causal connection to any counterfeiting offense in Title 18, Chapter 25. See Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017); see also Fofana v. Ridge, 114 F. App’x 490, 491 n.2 (3d Cir. 2004) (noting that the Government did not argue that this offense was an AF in that case).

<sup>240</sup> Yong Wong Park v. Att’y Gen., 472 F.3d 66 (3d Cir. 2006); Fofana v. Ridge, 114 Fed.Appx. 490 (3d Cir. 2004) (unpublished opinion finding PA statute to be counterfeiting AF; rejected argument that counterfeiting only applied to counterfeit currency).

<sup>241</sup> Matter of Kochlani, 24 I. & N. Dec. 128 (BIA 2017); see Dolgosheev v. Att’y Gen., 436 F. App’x 91 (3d Cir. 2011) (unpublished).

<sup>242</sup> See Kawashima v. Holder, 565 U.S. 478, 484 (2012) (holding that offenses that necessarily involve fraudulent or deceitful conduct are fraud AFs). Not a theft aggravated felony. See Mandujano-Real v. Mukasey, 526 F.3d 585 (9th Cir. 2008) (holding that OR identity theft is not a theft AF); Matter of Garcia-Madruga, 24 I. & N. Dec. 436 (BIA 2008).

<sup>243</sup> Compare Linares-Gonzalez v. Lynch, 823 F.3d 508 (9th Cir. 2016) (holding that a similar CA statute is not a CIMT) with Veloz-Luvevano v. Lynch, 799 F.3d 1308 (10th Cir. 2015) (holding that criminal impersonation is inherently fraudulent and therefore a CIMT).

<sup>244</sup> Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>245</sup> See Linares-Gonzalez v. Lynch, 823 F.3d 508 (9th Cir. 2016).

<sup>246</sup> Welfare fraud is a fraud, not theft, offense. Matter of Garcia-Madruga, 24 I. & N. Dec. 436 (BIA 2008).

<sup>247</sup> Miller v. U.S.I.N.S., 762 F.2d 21 (3d Cir. 1985); Matter of Cortez Canales, 25 I. & N. Dec. 301 (BIA 2010).

<sup>248</sup> Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>249</sup> Hernandez-Cruz v. Att’y Gen., 764 F.3d 281 (3d Cir. 2014).

<sup>250</sup> Zhi Fei Lao v. Att’y Gen., 910 F.3d 714 (3d Cir. 2018).

<sup>251</sup> Matter of Alvarado, 26 I. & N. Dec. 895 (BIA 2016) (setting forth the BIA’s approach to perjury); see also Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017) (describing the Third Circuit’s approach). This statute is likely a perjury offense under either definition. See Com. v. Yanni, 222 A.2d 617, 619 (Pa. Super. Ct. 1966) (noting that PA perjury must occur in a judicial proceeding).

<sup>252</sup> Matter of B-, 5 I. & N. Dec. 405 (BIA 1953); Matter of H-, 1 I. & N. Dec. 669 (BIA 1943) (holding that perjury where materiality is required is a CIMT).

<sup>253</sup> Does not fit the BIA’s generic definition of perjury because the statement need not be material. See Matter of Alvarado, 26 I. & N. Dec. 895 (BIA 2016). However, it is possible that it could be deemed to have a “logical or causal connection” to perjury under the Third Circuit’s approach. Williams v. Att’y Gen., 880 F.3d 100 (3d Cir. 2018); Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017). Could be a fraud offense if there is sufficient loss. Singh v. Att’y Gen., 677 F.3d 503 (3d Cir. 2012).

<sup>254</sup> Offenses involving intent to mislead are CIMTs. Matter of Jurado-Delgado, 24 I. & N. Dec. 29 (BIA 2006). The other subsections are probably not CIMTs because they do not require materiality. Matter of G-, 8 I. & N. Dec. 315 (BIA 1959); Matter of L-, 1 I. & N. Dec. 324 (1942).

<sup>255</sup> Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>256</sup> In addition to not requiring materiality, this does not require that the statement be under oath, and therefore is very different than perjury. See Matter of Alvarado, 26 I. & N. Dec. 895 (BIA 2016); Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017). Could be a fraud offense if there is sufficient loss. Singh v. Att’y Gen., 677 F.3d 503 (3d Cir. 2012).

<sup>257</sup> Matter of Jurado-Delgado, 24 I. & N. Dec. 29 (BIA 2006).

<sup>258</sup> Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>259</sup> See Singh v. Att’y Gen., 677 F.3d 503 (3d Cir. 2012); Pilla v. Holder, 668 F.3d 368 (6th Cir. 2012) (holding that false statements to FBI resulting in more than \$10,000 in government losses is an aggravated felony).

<sup>260</sup> See Matter of Jurado-Delgado, 24 I. & N. Dec. 29 (BIA 2006).

<sup>261</sup> Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>262</sup> See Idefonso-Candelario, 866 F.3d 102 (3d Cir. 2017) (distinguishing Matter of Jurado-Delgado).

<sup>263</sup> See Singh v. Att’y Gen., 677 F.3d 503 (3d Cir. 2012); Pilla v. Holder, 668 F.3d 368 (6th Cir. 2012) (holding that false statements to FBI resulting in more than \$10,000 in government losses is an aggravated felony).

<sup>264</sup> The intent required for this statute is analogous to the intent to mislead discussed in Matter of Jurado-Delgado, 24 I. & N. Dec. 29 (BIA 2006).

<sup>265</sup> Nijhawan v. Holder, 557 U.S. 29 (2009).

<sup>266</sup> The statute does not require intent to disrupt the performance of official duties. Cf. Matter of Jurado-Delgado, 24 I. & N. Dec. 29, 35 (BIA 2006); see also Blanco v. Mukasey, 518 F.3d 714, 720 (9th Cir. 2008). An unpublished BIA case held it is not a CIMT. Roosevelt Raphael, A XXX-XX0-497 (BIA Feb. 26, 2010).

<sup>267</sup> Com. v. Flamer, 848 A.2d 951 (Pa. Sup. Ct. 2004); see Bobadilla v. Holder, 679 F.3d 1052, 1058 (8th Cir. 2012) (stating that this type of conduct is not morally turpitudinous).

<sup>268</sup> Denis v. Att’y Gen., 633 F.3d 201 (3d Cir. 2011) (holding that a similar New York offense is an aggravated felony).

<sup>269</sup> The statute requires intent to impair evidence or mislead. See Matter of Mendez, 27 I. & N. Dec. 219 (BIA 2018).

<sup>270</sup> See Flores v. Att’y Gen., 856 F.3d 280, 292-93 (3d Cir. 2017) (making this distinction).

<sup>271</sup> This is sufficiently analogous to 18 U.S.C. § 1512(b). See Flores v. Att’y Gen., 856 F.3d 280, 291 (3d Cir. 2017).

<sup>272</sup> BIA case law says that taking steps to conceal a felony is morally turpitudinous. Matter of Mendez, 27 I. & N. Dec. 219 (BIA 2018). Also, the statute requires intimidation. Commonwealth v. Doughty, 126 A.3d 951, 957 (Pa. 2015); cf. Javier v. Att’y Gen., 826 F.3d 127 (3d Cir. 2016) (holding that terroristic threats is a CIMT). But see Escobar v. Lynch, 846 F.3d 1019 (9th Cir. 2017).

<sup>273</sup> This is analogous to 18 U.S.C. § 1513. See Flores v. Att’y Gen., 856 F.3d 280, 291 (3d Cir. 2017).

<sup>274</sup> The logic in note 272 *supra* applies. This statute also requires actual harm. Commonwealth v. Ostrosky, 589 Pa. 437 (Pa. 2006).

<sup>275</sup> PA statute could be deemed similar enough to the “catchall” provision of 18 U.S.C. § 1503(a) to have a “logical or causal connection” to that statute. See Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017).

<sup>276</sup> Idefonso-Candelario v. Att’y Gen., 866 F.3d 102 (3d Cir. 2017).

<sup>277</sup> Idefonso-Candelario v. Att’y Gen., 866 F.3d 102, 106 (3d Cir. 2017) (noting that the statute covers conduct like shouting profanities at a meter maid and blocking a street during a protest); Flores v. Att’y Gen., 856 F.3d 280, 292 (3d Cir. 2017) (noting that “due administration of justice” in section 1503 means a judicial proceeding).

<sup>278</sup> Not a COV because does not require the use of force. Com. v. Miller, 475 A.2d 145 (Pa. Sup. Ct. 1984). Not obstruction ag fel because not related to any offense in Title 18 Chapter 73. See Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017); see also Matter of Joseph, 22 I&N Dec. 799 (BIA 1999). Also, BIA found not COV or obstruction of justice agg fel. Juan Pedro Stoll, 2007 WL 1168514 (BIA 2007).

<sup>279</sup> Unpublished BIA opinion held that this crime is not a CIMT. Dariusz Garncarz, 2005 WL 1104185 (BIA 2005). Under Matter of Danesh, 19 I. & N. Dec. 669 (BIA 1988), statutes like this that punish “passive resistance” are not CIMTs. See Com. v. Thompson, 922 A.2d 926 (Pa. Sup. Ct. 2007) (holding that passive resistance is sufficient for a conviction under this statute); but see United States v. Stinson, 592 F.3d 469 (3d Cir. 2010) (holding that the statute does not criminalize passive resistance). No mens rea for risk of bodily injury so default should be recklessness, which is insufficient for CIMT. See Mahn v. Att’y Gen., 767 F.3d 170 (3d Cir. 2014).

<sup>280</sup> This is not a crime of violence, because it does not require the use of force.

<sup>281</sup> The statute only requires “reasonable cause to know” the person is a police officer, which is essentially equivalent to negligence with regard to the only element that makes this a crime. See Matter of Tavdidishvili, 27 I. & N. Dec. 142 (BIA 2017) (holding that criminal negligence is not sufficiently culpable for a CIMT).

<sup>282</sup> Arguably this offense is not divisible as to the type of weapon involved. See Mathis v. United States, 136 S. Ct. 2243 (2016). It also does not require the defendant to actually possess or carry the weapon and therefore is overbroad compared to 8 U.S.C. § 1227(a)(2)(C).

<sup>283</sup> Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017) (holding that accessory after the fact is not an aggravated felony); Denis v. Att’y Gen., 633 F.3d 201 (3d Cir. 2011). However, note that accessory after the fact is an aggravated felony under BIA case law, so it is best to avoid a sentence of a year or more in case there is a change in the law. Matter of Valenzuela Gallardo, 27 I. & N. Dec. 449 (BIA 2018).

<sup>284</sup> Matter of Rivens, 25 I. & N. Dec. 623, 627 (BIA 2011); see also Com. v. Johnson, 100 A.3d 207, 214 (Pa. Super. Ct. 2014) (holding that evidence that the person concealed was being sought for a crime is an element of the offense).

<sup>285</sup> See Ildefonso-Candelario v. Att’y Gen., 866 F.3d 102, 105 (3d Cir. 2017); Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1071 (9th Cir. 2007), *rev’d* on other grounds by United States v. Aguila-Montes de Oca, 503 F.3d 1063 (9th Cir. 2007).

<sup>286</sup> Matter of Garza-Olivares, 26 I. & N. Dec. 736 (BIA) (holding that the categorical approach applies to whether the offense relates to failure to appear before a court, but the circumstance-specific approach applies to whether it is pursuant to a court order to answer to a felony punishable by two years or more). This offense does not categorically require failure to appear *before a court*.

<sup>287</sup> See Matter of Adeniyeye, 26 I. & N. Dec. 726 (BIA 2016). It is not clear which elements are categorical vs. circumstance-specific, although Matter of Garza-Olivares is likely a good guide.

<sup>288</sup> Failure to appear is not punished within Chapter 73 of Title 18 of U.S. Code, like the offense at issue in Flores it is codified elsewhere. See Flores v. Att’y Gen., 856 F.3d 280 (3d Cir. 2017).

<sup>289</sup> The minimum mens rea is recklessness. See Com. v. Miller, 560 A.2d 229, 234 (Pa. Sup. Ct. 1989). This is arguably a regulatory offense, meaning not a CIMT. See, e.g. Mayorga v. Att’y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014).

<sup>290</sup> Under Matter of Garza-Olivares, 26 I. & N. Dec. 736 (BIA), the categorical approach applies to whether an offense relates to failure to appear in court for purposes of 8 U.S.C. § 1101(a)(43)(T). This statute criminalizes failure to appear at any time and place and therefore is overbroad. See also Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014) (adopting a similar analysis).

<sup>291</sup> For an offense to be an obstruction of justice AF (8 USC 1101(a)(43)(S)), it has to have a logical or causal connection to an offense in chapter 73 of Title 18 of the USC, which this offense does not. Flores v. Att’y Gen., 856 F.3d 280, 291 (3d Cir. 2017). However, under BIA case law this offense probably is an AF, so there is risk for change in the law here. See Matter of Valenzuela Gallardo, 27 I. & N. Dec. 449 (BIA 2018).

<sup>292</sup> The statute requires intent to hinder an investigation, but this intent may not entail moral turpitude. Compare Ildefonso-Candelario v. Att’y Gen., 866 F.3d 102 (3d Cir. 2017) with Tejwani v. Att’y Gen., 349 F. App’x 719, 724 (3d Cir. 2009).

<sup>293</sup> This cannot be an obstruction of justice AF because it is not punishable by a year imprisonment. It is also not a failure to appear AF. Matter of Garza-Olivares, 26 I. & N. Dec. 736, 736 (BIA 2016) held that the categorical approach applies to the generic elements of failure to appear before a court, while the circumstance-specific approach applies to the court order to answer to a felony for which a sentence of two years imprisonment may be imposed. PA contempt does not have a specific subsection for failure to appear so it is overbroad and not divisible.

<sup>294</sup> Contempt is not necessarily a CIMT, Matter of P-, 6 I. & N. Dec. 400 (BIA 1954), but this statute does require wrongful intent. The elements of § 4132(2) are “the order or decree must be definite, clear, specific, and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited; the contemnor must have had notice of the specific order or decree; the act constituting the violation must have been volitional; and the contemnor must have acted with wrongful intent.” The elements of § 4132(3) are “(1) misconduct, (2) in the presence of the court, (3) committed with the intent to obstruct the proceedings, (4) that obstructs the administration of justice”). Behr v. Behr, 695 A.2d 776, 779 (1997).

<sup>295</sup> The least culpable conduct, reckless creation of a public inconvenience or annoyance, is not sufficiently culpable to be a CIMT. See, e.g., Matter of Wu, 27 I. & N. Dec. 8 (BIA 2017).

<sup>296</sup> The statute requires a mens rea of “maliciousness,” meaning an intent to do a wrongful act or having as its purpose injury to the privacy, person, or property of another. Commonwealth v. Belz, 441 A.2d 410, 411 (Pa. Sup. Ct. 1982). This is a broader than the intent to commit a CIMT required for trespass-related CIMTs. Matter of Esfandiary, 16 I. & N. Dec. 659 (BIA 1979); Matter of M-, 2 I. & N. Dec. 721 (BIA 1946).

<sup>297</sup> This statute does not require repeated conduct directed at a specific individual, as required for a crime of stalking. Matter of Sanchez-Lopez, 27 I. & N. Dec. 256 (BIA 2018).

<sup>298</sup> This section does not include business-related activity necessary for 8 U.S.C. § 1101(a)(43)(K) AF.

<sup>299</sup> Matter of W, 4 I. & N. Dec. 401 (BIA 1951).

<sup>300</sup> 8 U.S.C. § 1182(a)(2)(D). “Engaging in” prostitution or “procuring” prostitutes within ten years before application for admission, even absent conviction, is separate basis for inadmissibility. However, under Matter of Gonzalez-Zoquiapan, 24 I. & N. Dec. 549 (BIA 2008), prostitution requires sexual intercourse, while it is defined more broadly under PA law. Commonwealth v. Cohen, 538 A.2d 582, 584 (Sup. Ct. Pa. 1988) (holding that “sexual activity” includes masturbation); see Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I. & N. Dec. 549 (BIA 2008)). Matter of Ding did not revisit this inadmissibility ground, but the BIA might do that in the future. 27 I. & N. Dec. at 299 n.9.

<sup>301</sup> See note 300.

<sup>302</sup> Matter of Ding, 27 I. & N. Dec. 295 (BIA 2018).

<sup>303</sup> Matter of P, 3 I. & N. Dec. 20 (BIA 1947); Matter of Lambert, 11 I. & N. Dec. 340 (BIA 1965), Matter of W, 3 I. & N. Dec. 231 (BIA 1948).

<sup>304</sup> See note 300. This inadmissibility ground is likely broad enough in terms of the acts committed to embrace this offense. See Matter of R-M-, 7 I. & N. Dec. 392, 395 (BIA 1957).

<sup>305</sup> Compare Matter of Ding, 27 I. & N. Dec. 295 (BIA 2018) with Prus v. Holder, 660 F.3d 144 (2d Cir. 2011) (citing Matter of Gonzalez-Zoquiapan, 24 I. & N. Dec. 549 (BIA 2008)); see also note 300.

<sup>306</sup> Arguably these sections do not entail the owning, managing, or supervising required by 8 USC § 1101(43)(K)(i); see, e.g., Familia Rosario v. Holder, 655 F.3d 739 (7th Cir. 2011); but see Williams v. Att’y Gen. of the U.S., 880 F.3d 100 (3d Cir. 2018) (discussing the Third Circuit’s interpretation of “relating” under the INA).

<sup>307</sup> Matter of Lambert, 11 I. & N. Dec. 340 (BIA 1965).

<sup>308</sup> See note 300. This inadmissibility ground is likely broad enough in terms of the acts committed to embrace these offenses. See Matter of R-M-, 7 I. & N. Dec. 392, 395 (BIA 1957).

<sup>309</sup> Specifically, these offenses do not necessarily relate to a prostitution business. See Matter of Ding, 27 I. & N. Dec. 295, 300 (BIA 2018).

<sup>310</sup> This is similar to the offenses in 8 USC 1101(43)(K)(ii), other than the jurisdictional element. See Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (holding that a state statute that lacks an interstate commerce element but otherwise matches the generic federal offense is an aggravated felony). The circumstance-specific approach likely applies to whether the offense was committed for commercial advantage. Nijhawan v. Holder, 557 U.S. 29, 38 (2009) (dicta).

<sup>311</sup> See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).

<sup>312</sup> See note 300.

<sup>313</sup> Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 147 (2d Cir. 2008). Could also argue that the PA statute is overbroad because it includes paying for transportation, while federal statute requires that the defendant actually transport the individuals. See United States v. Holland, 381 F.3d 80, 87 (2d Cir. 2004).

<sup>314</sup> The statute does not require supervision, ownership, etc. of the actual business, as required under 8 U.S.C. § 1101(43)(K)(i). See Matter of Ding, 27 I. & N. Dec. 295, 300 (BIA 2018).

<sup>315</sup> See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).

<sup>316</sup> This statute includes failure to stop prostitution from occurring, which is neither prostitution nor receiving proceeds from prostitution.

<sup>317</sup> See Hernandez-Cruz v. Att'y Gen., 764 F.3d 281, 285 (3d Cir. 2014).

<sup>318</sup> See note 314.

<sup>319</sup> See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).

<sup>320</sup> See notes on this inadmissibility ground above.

<sup>321</sup> Reyes v. Lynch, 835 F.3d 556 (6th Cir. 2016); Rohit v. Holder, 670 F.3d 1085 (3d Cir. 2012); Ranjit Singh Sehmi, A XXX-XXX-847, 2014 WL 4407689 (BIA 2014)

<sup>322</sup> Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008).

<sup>323</sup> This is an AF under 8 U.S.C. § 1101(a)(43)(E)(ii), which cross-references 18 U.S.C. § 922(g)(1) (making it unlawful for anyone with a prior conviction in any court punishable by a year more to “ship or transport in interstate or foreign commerce, or possess in or affecting any commerce, any firearm or ammunition”). This is equivalent to 18 Pa.C.S 6015(a)(1) because the enumerated offenses listed in subsection (b) are all punishable by a year. See Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (holding that a state statute that lacks an interstate commerce element but otherwise matches the generic federal offense is an aggravated felony); see also Juan Ramon Belliard Tejada, 2012 WL 6968960 (BIA 2012) (unpublished decision where 6105(a)(1) was deemed to be an aggravated felony because the underlying offense was punishable by one year.) The statute is probably divisible between people defined under (b) and people defined under (c). See Commonwealth v. Jemison, 189 A.3d 1004, 1261 (Pa. 2014) (holding that the specific underlying offense is an element of the crime).

<sup>324</sup> 18 USC § 922(g)(1)-(5) match 18 Pa. C.S 6105(c)(1)-(5); see 18 Pa. C.S. § 3803 (providing that third DUIs are either M1s or M2s, punishable by more than a year imprisonment). However, 18 Pa. C.S. § 6105 (c)(6)-(9) do not match the 922(g) grounds that are listed in 8 U.S.C. § 1101(a)(43)(E).

<sup>325</sup> See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014); Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979).

<sup>326</sup> 8 U.S.C. § 1227 (a)(2)(C).

<sup>327</sup> Commonwealth v. Keiper, 887 A.2d 317 (2005) (holding that defendant’s prior conviction of burglary was not an element of charge of under 6105); but see Commonwealth v. Jemison, 189 A.3d 1004, 1261 (Pa. 2014) (holding that the specific underlying offense is an element of the crime). There is less case law on (c), but also seems to require proof of the specific subsection. See, e.g., Commonwealth v. Smith, 2018 WL 4089657 (Sup. Ct. Pa. Aug. 28, 2018).

<sup>328</sup> See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014); Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979).

<sup>328</sup> 8 U.S.C. § 1227(a)(2)(C).

<sup>329</sup> 8 U.S.C. § 1227(a)(2)(C).

<sup>330</sup> See Mayorga v. Att'y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014); Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979).

<sup>331</sup> 8 U.S.C. § 1227(a)(2)(C).

<sup>332</sup> Even corruption of morals does not have to be sexual, and the statute is not further divisible. See Commonwealth v. Decker, 698 A.2d 99, 101 (Pa. Sup. Ct. 1997) (discussing the breadth of the statute).

<sup>333</sup> Subah v. Attorney General, F. App’x 556 (3d. Cir. 2007) (unpublished decision holding this conviction is not a CIMT because the least culpable conduct does not meet the requirements for a CIMT)

<sup>334</sup> See Matter of Mendoza-Osorio, 26 I. & N. Dec. 703 (BIA 2016). Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 512 (BIA 2008).

<sup>335</sup> See, e.g., Commonwealth v. Penrith, 11 Pa. D. & C. 3d 619 (Pa. Ct. Comm. Pls. 1979) (holding that buying alcohol for a minor is sufficient to convict for CMOM); Sharon Khakai Luvisia, A 099-785-387 (unpublished) (finding that buying alcohol for a minor does not rise to the level of harm required for a CAC under Velasquez Herrera).

<sup>336</sup> See Blaziu Palfi, A 028-118-725, 2004 WL 1167145 (BIA 2004) (unpublished decision). This portion of the statute deals with sexual offenses.

<sup>337</sup> Chapter 31 includes offenses that do not involve use of force, like indecent exposure.

<sup>338</sup> See Matter of C-, 2 I. & N. Dec. 220, 222 (BIA 1944) (aiding a student in skipping school is not enough for a CIMT).

<sup>339</sup> Matter of P-, 2 I. & N. Dec. 117 (BIA 1944).

<sup>340</sup> This does not necessarily involve a likelihood of harm to a child under eighteen years old. See Matter of Velasquez Herrera, 24 I. & N. Dec. 503 (BIA 2008).

<sup>341</sup> This is overbroad compared to 8 U.S.C. § 1101(a)(43)(P) because it does not necessarily involved immigration documents. See Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (holding that a crime triggers an aggravated felony ground with “described in” language if it is a categorical match to the non-jurisdictional elements of the federal offense).

<sup>342</sup> See Matter of Flores, 17 I. & N. Dec. 225, 227 (BIA 1980) (holding that conspiracy to utter and sell false immigration registry papers is a CIMT because it is inherently fraudulent). However, this offense can be committed recklessly so arguably does not require intent to defraud.

<sup>343</sup> The least culpable conduct is mere possession of a fake ID. Matter of Serna, 20 I. & N. Dec. 579 (BIA 1992) (holding that possession of a false document without intent to use it or otherwise defraud is not a CIMT).

<sup>344</sup> See, e.g., Com. v. Yellin, 2014 WL 10897008, at \*2 (Pa. Sup. Ct. 2014) (noting that the offense “require[s] mere possession”).

<sup>345</sup> See Restrepo v. Att’y Gen., 617 F.3d 787 (3d Cir. 2010); Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (BIA 1999).

<sup>346</sup> Although the conduct criminalized is similar to the conduct in 18 U.S.C. § 2251, Pennsylvania describes prohibited sexual acts more broadly than federal law by including all nudity. 18 Pa. C.S. § 6312(g); Com. v. Savich, 716 A.2d 1251, 1257 (Pa. Sup. Ct. 1998); see Salmoran v. Att’y Gen., 909 F.3d 73 (3d Cir. 2018).

<sup>347</sup> Moreno v. Att’y Gen., 887 F.3d 160 (3d Cir. 2018).

<sup>348</sup> Salmoran v. Att’y Gen., 909 F.3d 73 (3d Cir. 2018).

<sup>349</sup> See Restrepo v. Att’y Gen., 617 F.3d 787, 796 (3d Cir. 2010) (adopting the BIA’s definition that includes “employment, use, persuasion, inducement, enticement, or coercion”). “Knowingly permits” is none of those things.

<sup>350</sup> The definition of a prohibited sexual act is broader than the definition of sexually explicit conduct for the purposes of 18 U.S.C. § 2252. See note 346.

<sup>351</sup> Moreno v. Att’y Gen., 887 F.3d 160 (3d Cir. 2018).

<sup>352</sup> Salmoran v. Att’y Gen., 909 F.3d 73 (3d Cir. 2018).

<sup>353</sup> The definition of a prohibited sexual act is broader than the definition of sexually explicit conduct for the purposes of 18 U.S.C. § 2252. See note 346.

<sup>354</sup> Moreno v. Att’y Gen., 887 F.3d 160 (3d Cir. 2018).

<sup>355</sup> Salmoran v. Att’y Gen., 909 F.3d 73 (3d Cir. 2018).

<sup>356</sup> Under Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (1999) the definition of sexual abuse of a minor is broad, but could argue that contact for the purpose of a sexual offense does not rise to the level of “employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.” 18 U.S.C. § 3509(a)(8); see Commonwealth v. Morgan, 913 A.2d 906 (Pa. Sup. Ct. 2006).

<sup>357</sup> See Matter of Jimenez-Cedillo, 27 I. & N. Dec. 1, 7 (BIA 2017).

<sup>358</sup> Clinton Sharp, 2002 WL 32149034 (BIA Oct. 7, 2002) is an unpublished decision where the court held that violation of 23 Pa. C.S. 6114 is a CIMT, citing Com. v. Baker, 722 A.2d 718, 721 (Pa. Super. Ct. 1998), aff’d, 564 Pa. 192, 766 A.2d 328 (2001) (wrongful intent is an element of civil contempt). Note that the maximum penalty is six months, so the petty offense exception would apply to a first offense in both the inadmissibility and deportability contexts. 23 Pa. C.S. § 6114(b)(1).

<sup>359</sup> Matter of Obshatko, 27 I. & N. Dec. 173 (BIA 2017) (holding that the categorical approach does not apply to the violator of protection order ground of deportability in 8 U.S.C. § 1227(a)(2)(E)(ii); Matter of Strydom, 25 I&N Dec. 507 (BIA 2011) (holding that “violation of a “no-contact” provision of an injunction designed to protect a person against abuse is sufficient to find deportability without an additional showing that the respondent made credible threats of violence, repeated harassment or bodily injury”); see also 23 Pa. C.S.A. §§ 6107(b), 6102 (Where a Pennsylvania court must determine that there is an immediate and present danger of abuse, defined as threats of violence, serious bodily injury, false imprisonment, sexual abuse, and harassment that creates a reasonable fear of bodily injury before a protection from abuse order can be issued.)

<sup>360</sup> Drug offenses are only aggravated felonies if punishable as felonies under the federal CSA. Moncrieffe v. Holder, 569 U.S. 184, 192 (2013). Simple drug possession is not. 21 U.S.C. § 844(a); see Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (holding that recidivist possession is not an AF unless conviction is based on fact of prior conviction).

<sup>361</sup> Matter of Abreu-Semino, 12 I. & N. Dec. 775 (BIA 1968).

<sup>362</sup> See Mellouli v. Lynch, 135 S. Ct. 1980 (2015); Rojas v. Attorney General, 728 F.3d 203 (3d Cir. 2013); Gonzalez-Espinoza v. Att’y Gen., 2018 WL 3599293 (3d Cir. July 26, 2018) (unpublished) (holding that the statute is divisible).

<sup>363</sup> This only applies to avoiding deportability for LPRs under 8 U.S.C. § 1227(a)(2)(B)(i). A conviction for possession of marijuana will still make an undocumented person inadmissible and ineligible for some relief. See 8 U.S.C. § 1182(a)(2)(A)(i)(II).

<sup>364</sup> Singh v. Att’y Gen., 839 F.3d 273 (3d Cir. 2016).

<sup>365</sup> See Syblis v. Att’y Gen., 763 F.3d 348, 352 (3d Cir. 2014) (holding person applying for affirmative relief must show that either the law is not relating to a controlled substance or that the controlled substance does not appear on the federal schedule); but see Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (abrogating the discussion in Syblis about when an offense relates to a controlled substance and making it clear that the categorical approach applies).

<sup>366</sup> See Sauceda v. Lynch, 819 F.3d 526 (1st Cir. 2016)

<sup>367</sup> Singh v. Att’y Gen., 839 F.3d 273 (3d Cir. 2016); Avila v. Att’y Gen., 826 F.3d 662, 666 (3d Cir. 2016).

<sup>368</sup> Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

<sup>369</sup> See Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

<sup>370</sup> For argument against AF, see Walker v. Att’y Gen., 625 F. App’x 87 (3d Cir. 2015) (unpublished); Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Evanson v. AG, 550 F.3d 284 (3d Cir. 2008); Garcia v. AG, 462 F.3d 287 (3d Cir. 2006); Jeune v. AG, 476 F.3d 199 (3d Cir. 2007); Matter of Rosa, 27 I. & N. Dec. 228, 232 n.7 (BIA 2018). This was successful in

<sup>371</sup> Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

<sup>372</sup> Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

<sup>373</sup> Walker v. Att’y Gen., 625 F. App’x 87 (3d Cir. 2015) (unpublished).

<sup>374</sup> Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Evanson v. AG, 550 F.3d 284 (3d Cir. 2008).

<sup>375</sup> Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

<sup>376</sup> 8 U.S.C. § 1227(a)(2)(B)(i). Note that the controlled substance inadmissibility ground does not include this exception.

<sup>377</sup> Possession of paraphernalia is not a federal felony under 21 U.S.C. § 863.

<sup>378</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1991 (2015). To trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug “defined in [§ 802].” Arguably the statute is not divisible with regard to the drug identity because it is not an element of the offense, so this conviction should never be a CSO. See Com. v. Bennett, 124 A.2d 237, 331 (Pa. Sup. Ct. 2015) (upholding conviction where no drug was found); Com. v. Pitner, 928 A.2d 1104, 1111 (Pa. Super. Ct. 2007) (holding that possession of a controlled substance is not an element of possession of paraphernalia). However, DHS may still charge this as a CSO.

<sup>379</sup> See note 378

<sup>380</sup> This is a federal felony. 21 U.S.C. § 863.

<sup>381</sup> Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

<sup>382</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1991 (2015). Similar to possession of paraphernalia, this statute arguably only requires knowledge that the paraphernalia will be used with some illegal drug, not a particular illegal drug, and therefore is not divisible. See, e.g., Com. v. Potter, 504 A.2d 243, 245 (Pa. Sup. Ct. 1986); Com. v. Lacey, 496 A.2d 1256, 1261 (Pa. Sup. Ct. 1985).

<sup>383</sup> An offense relating to a non-controlled substance does not violate federal controlled substance law. Singh v. Att’y Gen., 839 F.3d 273, 285 (3d Cir. 2016); United States v. Cooper, 121 F.3d 130, 134 (3d Cir. 1997) (holding that sale of fake cocaine was not an offense under federal law).

<sup>384</sup> The intent would likely be viewed as comparable to that at issue in Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997), regardless of the absence of an actual controlled substance.

<sup>385</sup> If substance is not on federal schedule, then the conviction does not constitute controlled substance offense. Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

<sup>386</sup> This is a regulatory offense. See Mayorga v. Att’y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014).

<sup>387</sup> Francis v. Reno, 269 F.3d 162, 166 (3d Cir. 2001) (holding that homicide by vehicle is not a crime of violence).

<sup>388</sup> Causing death with criminal negligence is not a CIMT, but recklessly causing death can be. Matter of Tavdidishvili, 27 I. & N. Dec. 142 (BIA 2017); Matter of Hernandez, 26 I. & N. Dec. 464 (BIA 2015); Matter of Franklin, 20 I. & N. Dec. 867 (BIA 1994). It’s not entirely clear where PA “gross negligence” falls on that spectrum in the context of this provision. Compare Com. v. Huggins, 836 A.2d 862 (Pa. 2003) (holding that gross negligence is similar to recklessness for the purposes of the involuntary manslaughter statute) with Com. v. Heck, 535 A.2d 575, 579-80 (Pa. 1987) (applying the definition of ordinary criminal negligence to the vehicular homicide statute).

<sup>389</sup> If “gross negligence” were exactly the same as recklessness, it would be superfluous in this statute.

<sup>390</sup> Francis v. Reno, 269 F.3d 162, 166 (3d Cir. 2001).

<sup>391</sup> Note 388 applies with equal force to this statute involving causing serious bodily injury rather than death.

<sup>392</sup> Matter of Ruiz-Lopez, 25 I. & N. Dec. 551 (BIA 2011) held that somewhat similar statute was a CIMT, but emphasized that that statute required reckless driving. This PA statute does not require flight or a chase. Commonwealth v. Wise, 171 A.3d 784 (Sup. Ct. Pa. 2017). See also Com. v. Scattone, 672 A.2d 345 (Pa. Sup. Ct. 1996) (characterizing this offense as a regulatory/malum prohibitum offense).

<sup>393</sup> Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

<sup>394</sup> Matter of Tavdidishvili, 27 I. & N. Dec. 142 (BIA 2017). The negligence required for conviction under this statute is criminal negligence comparable to the mens rea at issue in Tavdidishvili. Com. v. Ketterer, 725 A.2d 801, 806 (Pa. Sup. Ct. 1999).

<sup>395</sup> The minimum mens rea for this statute is criminal negligence, which is insufficiently culpable for a CIMT. Com. v. Woosnam, 819 A.2d 1198, 1206 (Pa. Sup. Ct. 2003); Matter of Tavdidishvili, 27 I. & N. Dec. 142 (BIA 2017); see also Cerezo v. Mukasey, 512 F.3d 1163 (9th Cir. 2008).

<sup>396</sup> See note 395.

<sup>397</sup> Matter of Torres-Varela, 23 I. & N. Dec. 78 (BIA 2001); Matter of Lopez-Meza, 22 I&N Dec. 1188, 1194 (BIA 1999).

<sup>398</sup> Matter of S--, 6 I. & N. Dec. 769 (1955) and Matter of Serna, 20 I. & N. Dec. 579 (BIA 1992) hold that possession of an instrument of a crime is only a CIMT if there is intent to use it for CIMT. “Intent to use criminally” can include intent to commit any crime, not only CIMTs. See Commonwealth v. Vida, 715 A.2d 1180 (Pa. Sup. Ct. 1998) (upholding conviction for possession of paint stick used to commit criminal mischief i.e. graffiti).

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<sup>399</sup> Would not be a crime of violence aggravated felony as there is no element requiring the use of force, the statute punishes repairs, sales, uses, or possession. There is no requirement to intend to use the offensive weapon. Com. v. Karlson, 674 A.2d 249, 251 (1996) (citing Commonwealth v. Gatto, 344 A.2d 566 (1975)).

<sup>400</sup> See note 398. Like § 907(a), intent to use criminally is broader than intent to commit a CIMT. However, § 907(a) is better because it more clearly covers non-violent conduct.

<sup>401</sup> Arguably, this statute is not divisible because “firearm” is just an illustrative example of the umbrella term “weapons.” See Mathis v. United States, 136 S. Ct. 2243 (2016). The statute enumerates various weapons but it is not an exhaustive list and therefore alternative ways to commit the offense. However, to be safe, avoid specifying firearm on the record or better, plead to § 907(a).

<sup>402</sup> See Com. v. Smith, 384 A.2d 1343, 1345 (1978) (holding that the two provisions are not mutually exclusive). Section 907(a) is less likely to be a CIMT and a firearms offense.

<sup>403</sup> Matter of Serna, 20 I. & N. Dec. 579 (BIA 1992); see Com. v. Gatto, 344 A.2d 566 (Pa. Sup. Ct. 1975) (noting that this offense does not require an intent to use the weapon criminally).

<sup>404</sup> See Matter of Serna, 20 I. & N. Dec. 579 (BIA 1992); Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979) (holding that possession of a sawed-off shotgun is not a CIMT). The minimum culpable conduct is reckless possession of a weapon on school grounds, without any intent to use the weapon criminally. Commonwealth v. Giordano, 121 A.3d 998 (Pa. Sup. Ct. 2015).

<sup>405</sup> The definition of a weapon in the statute includes non-firearms and is a non-exhaustive/illustrative list – therefore, it should not be divisible under Mathis.

<sup>406</sup> Unlike the PA statute, the aggravated felony ground for gambling offenses requires that the defendant manage an illegal gambling business involving at least five people and continuous operation or a minimum revenue. 8 U.S.C. § 1101(a)(43)(J); 18 U.S.C. § 1955; see Luna Torres v. Lynch, 136 S. Ct. 1619 (2016) (requiring a categorical match to the substantive elements of the generic federal offense for aggravated felonies defined as “described in” federal criminal provisions).

<sup>407</sup> This is a regulatory offense that is not a CIMT. Matter of Gaglioti, 10 I. & N. Dec. 719 (BIA 1964).

<sup>408</sup> The “commercialized vice” inadmissibility ground at 8 U.S.C. § 1182(a)(2)(D)(iii) has been interpreted to include gambling. Matter of B-, 6 I. & N. Dec. 98 (BIA 1954). Note that this ground does not require a conviction, but conviction would likely trigger an inquiry into this issue.

<sup>409</sup> Conviction of two or more gambling offenses is a bar to good moral character, as is having most of one’s income derive from gambling. 8 U.S.C. § 1101(f)(4), (5). This would likely be considered a gambling offense. See Matter of A-, 6 I. & N. Dec. 242 (BIA 1954).

<sup>410</sup> Courts may view the underlying felony that the person facilitated as an element of the offense. See Com. v. Moss, 852 A.2d 374, 381 (Pa. Super. Ct. 2004). Then, if the record of conviction establishes that the underlying felony was equivalent to a felony under the CSA, this offense is parallel to 21 U.S.C. § 843(b). See Foreman v. Att’y Gen., 205 F. App’x 87, 89 (3d Cir. 2006) (unpublished) (holding that § 843(b) is an aggravated felony). At least one IJ has viewed the state statute as parallel to the federal statute in a drug case regardless of the underlying felony; United States v. Zuniga-Guerrero, 460 F.3d 733 (6th Cir. 2006).

<sup>411</sup> See Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007) (holding that aiding and abetting an aggravated felony falls within the scope of that generic offense). But see United States v. Daniels, 915 F.3d 148, 165-66 (3d Cir. 2019) (discussing the argument that the PA use of a communication facility statute sweeps more broadly than typical aiding and abetting liability).

<sup>412</sup> Inchoate offenses including facilitation take on the nature of the object offense for purposes of the CIMT inquiry. Matter of Gonzalez Romo, 26 I. & N. Dec. 743, 746 (BIA 2016).

<sup>413</sup> United States v. Daniels, 915 F.3d 148, 165-66 (3d Cir. 2019) lays out this argument.

<sup>414</sup> See Commonwealth v. Rose, 960 A.2d 149, 158 (2008) (holding that conviction of the underlying felony is not a necessary predicate of criminal use of a communication facility); Commonwealth v. Mallory, 2017 WL 6568220, at \*14 (Sup. Ct. of Pa. Dec. 26, 2017) (noting that it was unclear which felony was the predicate offense for a communication facility conviction). Or, even if the statute is divisible, if the underlying felony is not charged in that count of the indictment or otherwise reflected in the record of conviction for that offense, a court should not look elsewhere in the record to ascertain the underlying offense. See United States v. Tucker, 703 F.3d 205, 212 & n.5 (3d Cir. 2012); Juggernaut v. Att’y Gen., 432 F.3d 1346, 1355 (10th Cir. 2005).

<sup>415</sup> Regulatory offenses are not CIMTs. Mayorga v. Att’y Gen., 757 F.3d 126, 133-34 (3d Cir. 2014).