

**APPENDIX C**  
**Aggravated Felony Practice Aids**

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

<b>Appendix C-1</b>	<b>Aggravated Felony Categories Listed in Statutory Order</b> . . . . .	C-1
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For information on the various immigration consequences of an aggravated felony conviction, see Chapter 3 (Possible Immigration Consequences of a Noncitizen Criminal Defendant Client’s Case).

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

**APPENDIX C-1**  
**Aggravated Felony Categories  
Listed in Statutory Order**

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

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

## APPENDIX C-2

### **Alphabetical List of Some Offenses That Are or Might Be Deemed Aggravated Felonies**

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

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

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

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

**Alien smuggling offense [N]** described in 8 U.S.C. 1324(a)(1)(A) or (2), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act

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

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

**Attempt [U]** to commit any aggravated felony

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

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

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

N.Y. NOTE: There may be an argument that NY Burglary in the third degree is not a “burglary” offense based on the U.S. Supreme Court decision in *Taylor v. U.S.*, 495 U.S.

575 (1990), discussed in Chapter 5, section 5.6; however, depending on what the record of conviction shows, it might be deemed a “crime of violence.”

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

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

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

**Conspiracy [U]** to commit any aggravated felony

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

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

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

DEFINITION: “Drug trafficking crime” is defined in 18 U.S.C. 924(c) to include “any felony punishable” under the federal Controlled Substances Act (21 U.S.C. 801 et seq.), the federal Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the federal Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), AND simple possession drug offenses when the defendant has a prior drug conviction (which has become final) or is convicted of possession of more than five grams of cocaine base, meaning crack cocaine, or of any amount of flunitrazepam.

N.Y. NOTE: For immigration law purposes, the Board of Immigration Appeals has held that, in cases arising in the Second Circuit, this aggravated felony category includes a state controlled substance offense that (1) is punishable under the federal Controlled Substances Act, and (2), regardless of federal classification as a felony or misdemeanor, is classified as a felony by the convicting state. *Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002) (adopting *U.S. v. Pornes-Garcia*, 171 F.3d 142 (2d Cir.), cert. denied, 528 U.S. 880 (1999), an illegal reentry criminal sentencing case, and declining to follow *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996), which deferred to an older BIA interpretation) Under the aggravated felony definition, as interpreted by *Matter of Elgendi*, this aggravated felony category includes the following New York offenses:

- NY Criminal Sale of a Controlled Substance and Criminal Sale of Marihuana offenses classified as felonies;

- NY Criminal Possession of a Controlled Substance and Criminal Possession of Marijuana offenses classified as felonies;
- possibly NY Criminal Sale of Marijuana offenses that are classified as misdemeanors (Note that, for illegal reentry criminal sentencing purposes, the U.S. Court of Appeals for the Second Circuit has held that this aggravated felony category does include misdemeanor sale of marijuana offenses, as well as second-time state misdemeanor possession offenses, see *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002, as amended through Feb. 7, 2003), but also note that there may be an argument that such offenses are not “drug trafficking crimes” by analogy to the federal law treatment of distribution of marijuana for no remuneration as a misdemeanor rather than as a “drug trafficking crime” (see 21 U.S.C. 841(b)(4), see *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001)); and
- possibly other NY controlled substance offenses that might be considered “illicit trafficking,” such as Criminally Using Drug Paraphernalia in the first degree or Criminal Possession of Precursors of Controlled Substances (Note, however, that there may be an argument that a felony NY Criminal Solicitation or NY Criminal Facilitation of a controlled substance offense is not an aggravated felony under category [B] because neither solicitation or facilitation is punishable under the Controlled Substances Act. See entries for “Criminal Solicitation” and “Criminal Facilitation” in Appendix E).

Under the BIA’s interpretation in *Matter of Elgendi*, this aggravated felony category does *NOT* include any misdemeanor conviction for simple possession of a controlled substance or marijuana, with or without prior drug convictions, because such an offense is not a felony under New York law. As noted above, however, the U.S. Court of Appeals for the Second Circuit has held that, for illegal reentry sentencing purposes, second-time convictions for misdemeanor simple possession offenses DO constitute aggravated felonies, see *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002, as amended through Feb. 7, 2003), but also note that there may be an argument that such offenses are not “drug trafficking crimes” by analogy to the federal law treatment of a second simple possession offense as a misdemeanor rather than as a “drug trafficking crime” if the first offense is not litigated as part of the criminal proceeding for the second offense (see 21 U.S.C. 844(a); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001)).

Whether a particular drug offense is included in this aggravated felony category will, for some offenses, depend on the jurisdiction in which the immigration case arises. The BIA has held that the analysis is to be made (1) by reference to the law of the federal circuit in which the immigration case arises, in those circuits that have interpreted the phrase “drug trafficking crime” and (2) in those circuits that do not have an interpretation, by applying the interpretation adopted by the majority of the circuits. See *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002). So, for example, a first-time conviction for felony NY Criminal Possession of a Controlled Substance will be deemed an aggravated felony under this category if the immigration hearing is held in the Second Circuit, but will be deemed *NOT* an aggravated felony under this category if the immigration hearing is held in the Third Circuit. Compare *Matter of Elgendi*, 23 I&N Dec.

515 (BIA 2002) (applying Second Circuit law) with *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002) (Third Circuit law).

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

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

DEFINITION: “Crime of violence” is defined in 18 U.S.C. 16 to include “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

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

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

N.Y. NOTE: There may be an argument that a felony NY Criminal Facilitation of a controlled substance offense is not an aggravated felony under category **[B]** because facilitation is not punishable under the Controlled Substances Act. See entry for “Criminal Facilitation” in Appendix E.

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

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

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

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

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

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

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

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

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

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

N.Y. NOTE: There may be an argument that a felony NY Criminal Solicitation of a controlled substance offense is not an aggravated felony under category **[B]** because solicitation is not punishable under the Controlled Substances Act. See entry for “Criminal Solicitation” in Appendix E.

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

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

**Document fraud offense [P, M]** under category [P] if is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. 1543 or is described in 18 U.S.C. 1546(a), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST 12 MONTHS*; or under category [M] if deemed a “fraud or deceit” offense (see entry below for “Fraud or deceit” offense) and *IF THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS \$10,000*

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

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

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

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

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

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

N.Y. NOTE: There may be an argument that a felony NY Criminal Facilitation of a controlled substance offense is not an aggravated felony under category [B] because facilitation is not punishable under the Controlled Substances Act. See entry for “Criminal Facilitation” in Appendix E.

**False imprisonment [F]**, see entry below for “Unlawful imprisonment”

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

DEFINITION: “Firearm” is defined in 18 U.S.C. 921(a)(3) to include “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel

a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.”

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

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

N.Y. NOTE: New York firearm offenses that may constitute aggravated felonies include those covered under category [C] as an “illicit trafficking” offense (e.g., Criminal sale of a firearm) or under category [F] as a “crime of violence” (any firearm offense that meets the federal definition of a crime of violence in 18 U.S.C. 16—see entry above for “Crime of violence”) with a prison sentence of one year or more. It is uncertain to what extent category [E] includes additional state firearm offenses. In *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), the Board of Immigration Appeals held that category [E] may cover state analogues to those federal offenses cited in category [E], regardless of whether the state offense contains the federal jurisdictional element of “affecting interstate commerce”. Category [E] might, therefore, be deemed to cover, for example, a conviction under N.Y. Penal Law § 265.01(4) for NY Criminal Possession of Weapon By a Felon.

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

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

N.Y. NOTE: An *attempted* fraud or deceit offense may fall under category U/M if the *attempted* loss to the victim or victims exceeds \$10,000 (even if there is no actual loss)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Murder [A]**

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

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

**Passport fraud offense [P]** described in 18 U.S.C. 1543, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST 12 MONTHS*

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

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

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

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

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

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

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

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

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

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

**Smuggling, alien [N]** described in 8 U.S.C. 1324(a)(1)(A) or (2), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of the Immigration and Nationality Act

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

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

N.Y. NOTE: There may be an argument that a felony NY Criminal Solicitation of a controlled substance offense is not an aggravated felony under category [B] because solicitation is not punishable under the Controlled Substances Act. See entry for “Criminal Solicitation” in Appendix E.

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

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

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

**Terrorism [F, L]**, under category [F] if deemed a “crime of violence” (see entry above for “Crime of violence”) and *IF THE DEFENDANT IS SENTENCED TO A TERM OF IMPRISONMENT OF AT LEAST ONE YEAR*, or under category L if described in 18 U.S.C. 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage), 2381 or 2382 (relating to treason), or in 50 U.S.C. 421

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

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

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

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

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

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

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

N.Y. NOTE: New York weapon possession offenses that may constitute aggravated felonies include those covered under category [F] as a “crime of violence” (any weapon offense that meets the federal definition of a crime of violence in 18 U.S.C. 16—see entry above for “Crime of violence”) with a prison sentence of one year or more. It is uncertain to what extent category [E] includes additional state weapon offenses involving firearms. In *Matter of Vazquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), the Board of Immigration Appeals held that category [E] may cover state analogues to those federal offenses cited in category [E], regardless of whether the state offense contains the federal jurisdictional element of “affecting interstate commerce”. Category [E] might, therefore, be deemed to cover, for example, a conviction under N.Y. Penal Law § 265.01(4) for NY Criminal Possession of Weapon By a Felon.

## APPENDIX C-3

### Sample Aggravated Felony Case Law Determinations

**NOTE:** A determination as to whether an offense falls within the statutory definition of aggravated felony is based on the elements of the offense as described in the relevant state or federal criminal statute and in the particular individual’s record of conviction. Therefore, an aggravated felony determination relating to an offense in one jurisdiction and to one particular individual’s record of conviction may not offer a conclusive answer for an offense of the same name in another jurisdiction. In addition, some of the cases collected below interpret the definition of aggravated felony for illegal reentry criminal sentencing purposes, rather than for immigration law purposes. In some cases, the definition may be interpreted differently for these different purposes. See, e.g., *United States v. Pornes-Garcia*, 171 F.3d 142 (2d Cir.), *cert. denied*, 528 U.S. 880 (1999) (interpreting a “drug trafficking” aggravated felony more broadly for illegal reentry criminal sentencing purposes than interpreted by the BIA for immigration law purposes). Therefore, the cases collected below should be used as the starting point rather than as a substitute for legal research on the particular offense. Capital letter category references under *HOLDING* are to the relevant subsection of the statutory definition of “aggravated felony” (see Appendix C-1 and Appendix J).

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Accessory after the fact	<i>Matter of Batista-Hernandez</i> , 21 I&N Dec. 955 (BIA 1997); <i>Matter of Espinoza-Gonzalez</i> , 22 I&N Dec. 889 (BIA 1999)	18 U.S.C. §3	AF—category S  Note: offense falls under category S only if prison sentence of at least one year imposed
Alien smuggling (aiding and abetting illegal entry)	<i>Matter of Alvarado-Alvina</i> , 22 I&N Dec. 718 BIA 1999); ( <i>Rivera-Sanchez v. Reno</i> , 198 F.3d 545 (5th Cir. 1999)	8 U.S.C. §1325(a)	<u>NOT</u> AF under category N  <u>MAYBE</u> AF under category O (but only if the alien had previously been deported on the basis of an AF conviction)
Alien smuggling (transporting aliens)	<i>Matter of Ruiz-Romero</i> , 22 I&N Dec. 486 (BIA 1999); <i>U.S. v. Solis-Campozano</i> , 312 F.3d 164 (5th Cir. 2002);	8 U.S.C. §1324(a)(1)(A)(ii)	AF—category N  Exception: in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent.

*(continued)*

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
	<i>U.S. v. Galindo-Gallego</i> , 244 F.3d 728 (9th Cir. 2001)		
Alien smuggling (conspiracy to transport and harbor aliens)	<i>Gavilan-Cuate v. Yetter</i> , 276 F.3d 418 (8th Cir. 2002)	8 U.S.C. §1324(a)(1)(A)(ii) and (iii)	AF—category N  Exception: in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent
Alien smuggling (harboring aliens)	<i>Castro-Expinosa v. Ashcroft</i> , 257 F.3d 1130 (9th Cir. 2001); <i>Patel v. Ashcroft</i> , 294 F.3d 465 (3d Cir. 2002)	8 U.S.C. §1324(a)(1)(A)(iii)	AF—category N  Exception: in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent
Arson	<i>Matter of Palacios-Pinera</i> , 22 I&N Dec. 434 (BIA 1998)	Alaska law (1st degree)	AF—category F crime of violence within 18 U.S.C. §16(b)  Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, misdemeanor	<i>Matter of Martin</i> , 23 I&N Dec. 491 (BIA 2002)	Conn. Gen. Stat. §53a-61(a)(1) (3d degree)	AF—category F crime of violence within 18 U.S.C. §16(a)*,**  *but not COV within §16(b), which is confined to felony offenses by its terms, because the offense is a misdemeanor under state law and, because punishable by a maximum sentence of one year, is also a misdemeanor for purposes of federal law  **but see <i>Chrzanoski v. Ashcroft</i> , __ F.3d __, 2003 U.S. App. LEXIS 7538 (2d Cir. Apr. 22, 2003), below  Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, misdemeanor	<i>Chrzanoski v. Ashcroft</i> , __ F.3d __, 2003 U.S. App. LEXIS 7538 (2d Cir. Apr. 22, 2003)	Conn. Gen. Stat. §53a-61(a)(1)  [Note: identical to NYPL §120.00(1) misdemeanor assault]	<u>NOT</u> AF under category F as a crime of violence within 18 U.S.C. §16(a)*  *although subsection (1) of state statute requires proof that defendant intentionally caused physical injury to another, it does not have as an element (whether statutorily defined or otherwise) that defendant <i>use physical force</i> to cause that injury  Note: because the offense is categorized as a misdemeanor under state law, it also does not meet the definition of a crime of violence under §16(b)

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Assault	<i>Darius v. INS</i> , 2002 U.S. Dist. LEXIS 18039 (S.D.N.Y. 2002)	N.Y. Penal Law §120.05(2) (2d degree)	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Assault	<i>Persaud v. McElroy</i> , 225 F.Supp. 2d 420 (S.D.N.Y. 2002)	N.Y. Penal Law §120.05(6) (2d degree)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or §16(b)**  *conviction under state statute, while requiring proof of physical injury, does not require as an element of the offense that the defendant use physical force to inflict that injury  **minimal criminal conduct necessary for conviction under state statute need not be conduct that by its nature presents a substantial risk that physical force may be used by the defendant
Assault with bodily injury, misdemeanor	<i>U.S. v. Urias-Escobar</i> , 281 F.3d 165 (5th Cir.), <i>cert. denied</i> , 122 S. Ct. 2377 (2002)	Texas law	AF—category F (even though offense is a misdemeanor under state law)  Note: offense falls under category F only if prison sentence of at least one year imposed
Assault with a deadly weapon/dangerous instrument, aggravated, attempted	<i>U.S. v. Ceron-Sanchez</i> , 222 F.3d 1169 (9th Cir. 2000)	Ariz. Rev. Stat. §13-1204 (A)(2) (along with §§13-100 & 13-1204 (B))	AF—category U/F as attempted crime of violence §16(a) and §16(b)  Note: conviction was based on reckless driving  Note: offense falls under category U/F only if prison sentence of at least one year imposed
Assault with a dangerous weapon	<i>U.S. v. Ortega-Garcia</i> , 2001 U.S. App. LEXIS 14266 (10th Cir.), <i>cert. denied</i> , 534 U.S. 883 (2001)	Okl. Stat. Tit. §645 (1983)	AF—category F crime of violence within both 18 U.S.C. §16(a) and §16(b)  Note: offense falls under category F only if prison sentence of at least one year imposed
Bank fraud, conspiracy	<i>Hussein v. Ashcroft</i> , 2002 U.S. Dist. LEXIS 16976 (E.D.N.Y. 2002)	U.S.C. §371 (conspiracy statute)	AF—category U/M  AF—category U/G  Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” <i>infra</i> )
Bank fraud	<i>Chang v. INS</i> , 307 F.3d 1185 (9th Cir. 2002)	U.S. bank fraud statute	<u>MAYBE</u> AF under category M*  *conviction under statute does not ‘facially qualify’ as AF under category M because covered offenses may include offenses for which loss to victims is not more than \$10,000; court then looked to the record and held that reliance on the pre-sentence report for information on amount of loss was  <i>(continued)</i>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>improper at least where such information was contradicted by explicit language in the plea agreement</p> <p>Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i>, 22 I&amp;N Dec. 552 (BIA 1999) under “Fraud, attempt” infra)</p>
Bank fraud	<i>Khalayleh v. INS</i> , 287 F.3d 978 (10th Cir. 2002)	18 U.S.C. §1344(1)	<p>AF—category M</p> <p>Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i>, 22 I&amp;N Dec. 552 (BIA 1999) under “Fraud, attempt” infra)</p>
Bank larceny	<i>U.S. v. Nwene</i> , 20 F. Supp.2d 716 (D. N.J. 1998), <i>aff’d</i> , 213 F.3d 629 (3rd Cir.), <i>cert. denied</i> , 531 U.S. 864 (2000)	Unspecified	<p>AF—category G theft offense</p> <p>Note: offense falls under category G only if prison sentence of at least one year imposed</p>
Battery causing substantial bodily harm, gross misdemeanor	<i>U.S. v. Gonzalez-Tamariz</i> , 310 F.3d 1168 (9th Cir. 2002)	Nev. Rev. Stat. §200.481	<p>AF—category F (even though offense is not a felony under state law)</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Burglary, attempted	<i>U.S. v. Hidalgo-Macias</i> , 300 F.3d 281 (2d Cir. 2002)	N.Y. law (3d degree)	<p>AF—category U/G</p> <p>Note: but the court did not analyze whether a conviction for vehicle burglary under New York’s 3rd degree burglary statute may <i>not</i> be an AF “burglary” offense (<i>cf. Matter of Perez</i>, 22 I&amp;N Dec. 1325 (BIA 2000) under “Burglary of vehicle” infra)</p> <p>Note: offense falls under category G only if prison sentence of at least one year imposed (in this case, although original sentence imposed was for less than 1 year, the court held that a modified 1+ year sentence following probation violation must be considered the “actual sentence imposed” for category G AF analysis)</p>
Burglary	<i>U.S. v. Borbon-Vasquez</i> , 2000 U.S. App. LEXIS 31861 (2d Cir. 2000) (unpub’d opinion)	New York law (2d degree)	<p>AF—category F</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Burglary	<i>Rivas v. Ashcroft</i> , 2002 U.S. Dist. LEXIS 16254 (S.D.N.Y. 2002)	N.Y. Penal Law §140.30 (1st degree)	AF—category G as burglary offense  Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary of a habitation	<i>U.S. v. Guardado</i> , 40 F.3d 102 (5th Cir. 1994)	Tex. Penal Code Ann. §30.02	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of a non-residential building	<i>U.S. v. Rodriguez-Guzman</i> , 56 F.3d 118 (5th Cir. 1995)	Tex. Penal Code Ann. §30.02	AF—category F as crime of violence under §16(b)  Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary	<i>U.S. v. Velasco-Medina</i> , 305 F.3d 839 (9th Cir. 2002)	Cal. Penal Code §459 (2d degree)	<u>MAYBE</u> AF—category G burglary offense*  *conviction under statute does not ‘facially qualify’ as a burglary offense under category G because statute encompasses conduct that falls outside the generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime; court then held that the charging papers and abstract of judgment in the record established that defendant’s conviction involved the requisite elements of generic burglary for purposes of category G
Burglary	<i>U.S. v. Fernandez-Cervantes</i> , 2001 U.S. App. LEXIS 15910 (9th Cir. 2001) (unpub’d opinion)	Cal. Penal Code §459	<u>MAYBE</u> AF under category G as burglary offense*  <u>NOT</u> AF under category G as theft offense**  *conviction under statute does not ‘facially qualify’ as AF under category G as burglary offense because reaches conduct that may fall outside the generic definition of burglary (e.g. statute criminalizes both lawful and unlawful entry into a building); court then held that documents in the record did not indicate whether defendant’s entry was unlawful as required under the generic burglary definition  **entry with mere <i>intent</i> to commit theft is not a ‘theft offense’ (cf. Ninth Circuit’s subsequent definition of ‘theft offense’ in <i>U.S. v. Corona-Sanchez</i> , 291 F.3d 1201 (9th Cir. 2002), <i>infra</i> , at “Theft, petty (with prior)”)
Burglary	<i>U.S. v. Solis-Estrada</i> , 1995 U.S. App. LEXIS 21024 (9th Cir. 1995) (unpub’d opinion)	Cal. Penal Code §460(1) (1st degree)	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of vehicle	<i>Matter of Perez</i> , 22 I&N Dec. 1325 (BIA 2000)	Tex. Penal Code Ann. §30.04(a)	<u>NOT</u> AF under category G as a burglary offense*  *vehicle burglary does not fall within the generic definition of burglary, which is the unlawful or unprivileged entry  <i>(continued)</i>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>into, or remaining in, a building or structure with intent to commit a crime</p> <p>Note: but court did not reach issue of whether offense may be an AF under category G as a 'theft offense' or under category F as a 'crime of violence'</p>
Burglary of vehicle	<i>Lopez-Elias v. Reno</i> , 209 F.3d 788 (5th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1069 (2001)	Tex. Penal Code Ann. §30.04(a)	<p>AF—category F crime of violence within 18 U.S.C. §16(b)*</p> <p><u>NOT</u> AF under category G as either a theft offense or a burglary offense**</p> <p>*because vehicle burglary involves "substantial risk" that physical force may be used against another's property</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p> <p>**burglary of vehicle with mere intent to commit theft is not a theft offense, and vehicle burglary does not fall under the generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime</p>
Burglary of vehicle	<i>Solorzano-Patlan v. INS</i> , 207 F.3d 869 (7th Cir. 2000)	720 Ill. Comp. Stat. 5/19-1(a)	<p><u>MAYBE</u> AF—category F as crime of violence within 18 U.S.C. §16(b)*</p> <p><u>NOT</u> AF under category G as a burglary offense**</p> <p>*statute is divisible because it criminalizes both conduct that does and conduct that does not involve substantial risk that physical force may be used; case was remanded so that IJ may review the charging papers to determine whether conduct involved substantial risk that physical force may be used so as to fall under category F</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p> <p>**vehicle burglary does not fall within generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime</p> <p>Note: but court did not reach issue of whether offense was an AF under category G as a 'theft offense'</p>
Burglary of vehicle	<i>U.S. v. Alvarez-Martinez</i> , 286 F.3d 470 (7th Cir.), <i>cert. denied</i> , 123 S. Ct. 198 (2002)	720 Ill. Comp. Stat. 5/19-1(a)	<p><u>MAYBE</u> AF under category F as crime of violence within 18 U.S.C. §16(a)*</p> <p>*statute is divisible because it encompasses some conduct that is a crime of violence and some that is not; here the presentence report, which indicated that the vehicle's doors were locked and the passenger side window had been pried open, established the use of physical force against the property of another for the offense to fall within §16(a)</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Burglary of vehicle	<i>U.S. v. Martinez-Garcia</i> , 268 F.3d 460 (7th Cir. 2001), cert. denied, 534 U.S. 1149 (2002)	Illinois law	<p>AF—category U/G as attempted theft offense*</p> <p><u>NOT</u> AF under category U/G as attempted burglary offense (following <i>Solorzano-Patlan</i>, supra)</p> <p>*court defined ‘attempt’, for purposes of category U analysis, as (i) an intent to commit a crime and (ii) a substantial step toward its commission; then found that the information to which defendant had pled guilty established the necessary intent to commit theft and that a substantial step (the unlawful entry into the vehicle without consent) had been taken toward it</p> <p>Note: offense falls under category U/G only if prison sentence of at least one year imposed</p>
Burglary of vehicle	<i>U.S. v. Guzman-Landeros</i> , 207 F.3d 1034 (8th Cir. 2000)	Texas law	<p>AF—category F crime of violence within 18 U.S.C. §16(b)*</p> <p>*court did not reach issue of whether offense was also an AF under category G</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Burglary of vehicle	<i>Ye v. INS</i> , 214 F.3d 1128 (9th Cir. 2000)	Cal. Penal Code §459	<p><u>NOT</u> AF under category F (entry of a vehicle is not necessarily violent in nature)</p> <p><u>NOT</u> AF under category G as a burglary offense* (vehicle burglary does not fall within generic definition of burglary, which is the unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime)</p> <p>*but court did not reach issue of whether offense was an AF under category G as a ‘theft offense’</p>
Child abuse, criminally negligent	<i>Matter of Sweetser</i> , 22 I&N Dec. 709 (BIA 1999)	Colo. Rev. Stat. §18-6-401(1) & (7)(a)(II)	<p><u>MAYBE</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or 16(b)**</p> <p>*Colorado statute is divisible because it encompasses both offenses that do and offenses that do not include as an element ‘the use, attempted use or threatened use of physical force against the person or property of another’; court then looked to record of conviction and found that respondent had been convicted of criminal negligence resulting in death of his child, and ruled that such criminal negligence under Colorado law does not include as an element the use, attempted use or threatened use of physical force against the person or property of another such as to fall within category AF as a crime of violence as defined in §16(a).</p> <p>**Colorado statute is divisible because it encompasses both offenses that may and offenses that may not involve a ‘substantial risk that physical force against the person or property of another may be used in the course of committing the offense’; court then looked to record of conviction to conclude that defendant had been convicted under that portion of the divisible statute that criminalizes ‘permitting a child to be unreasonably placed in a situation which poses a</p> <p style="text-align: right;"><i>(continued)</i></p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			threat', which does not involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, such as to fall within category AF as a crime of violence as defined in §16(b)
Child abuse, misdemeanor (cruelty toward child)	<i>U.S. v. Saenz-Mendoza</i> , 287 F.3d 1011 (10th Cir.), cert. denied, 123 S. Ct. 315 (2002)	Utah law	AF—category F (even though offense is a misdemeanor under state law)
Child molestation, attempted, misdemeanor	<i>U.S. v. Marin-Navarette</i> , 244 F.3d 1284 (11th Cir.), cert. denied, 534 U.S. 941 (2001)	Washington Law (third degree)	AF—category U/A (even though offense is a misdemeanor under state law)
Cocaine [See “Controlled Substance” cases, infra]			
Concealment of merchandise	<i>Ramtulla v. Ashcroft</i> , 301 F.3d 202 (4th Cir. 2002)	Va. Code Ann. §18.2-103	AF—category G Note: offense falls under category G only if prison sentence of at least one year imposed
Contempt, criminal	<i>Matter of Aldabesheh</i> , 22 I&N Dec. 983 (BIA 1999)	N.Y. Penal Law §215.51(b)(i) (1st degree)	AF—category F Note: offense falls under category F only if prison sentence of at least one year imposed
Contempt, criminal	<i>Matter of Almonte</i> (BIA Dec. 5, 2001) (unpub'd opinion)	N.Y. Penal Law §215.51(b)(iii) (1st degree)	<u>NOT</u> AF under category F
Controlled substance, simple possession of cocaine (first or second conviction)	<i>Matter of Yanez-Garcia</i> , 23 I&N Dec. 390 (BIA 2002)	720 Ill. Comp. Stat. §570/402(c) (classified as a felony under Illinois law)	AF—category B* *A state drug offense constitutes a “drug trafficking crime” under 18 U.S.C. §924(c)(2) if it is punishable under the federal Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act and (ii) a “felony” BIA will determine whether a state drug offense constitutes a “drug trafficking crime” AF under category B (i) by reference to the law of the circuit in which the immigration case arose in those circuits that have interpreted “drug trafficking crime” (whether in the civil immigration context or in the criminal illegal reentry sentencing context) and (ii) in those circuits that do not have an interpretation, BIA will apply the interpretation adopted by the majority of the federal circuit courts

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>The majority of the federal circuits have held that a state drug conviction classified as a felony under state law, even if punishable only as a misdemeanor under federal law, is a “felony” for purposes of the “drug trafficking crimes” definition</p> <p>Note: This case arose out of the 7th Circuit, which did not have a published interpretation of “drug trafficking crime,” so BIA applied the interpretation of the majority of federal circuits</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled substance, simple possession of marijuana (first or second conviction)	<i>Matter of Elgendi</i> , 23 I&N Dec. 515 (BIA 2002)	N.Y. Penal Law §221.10 (CPM, 5th degree, misdemeanor)	<p><u>NOT</u> AF under category B*</p> <p>*A state drug offense constitutes a “drug trafficking crime” under 18 U.S.C. §924(c)(2) if it is (i) punishable under the Controlled Substances Act and (ii) the convicting jurisdiction classifies the offense as a felony (citing <i>U.S. v. Pomes-Garcia</i>, 171 F.3d 142 (2d Cir.), cert. denied, 528 U.S. 880 (1999), infra, and <i>U.S. v. Polanco</i>, 29 F.3d 35 (2d Cir. 1994), and declining to follow <i>Aguirre v. INS</i>, 79 F.3d 315 (2d Cir. 1996), infra)</p> <p>Here, the offense is not a “drug trafficking crime” AF because the convicting jurisdiction (NY) classified the offense as a misdemeanor</p> <p>Note: Guided by <i>Matter of Yanez</i>, supra, the BIA referenced Second Circuit law because the case arose in that jurisdiction.</p> <p>Note: Cf. <i>U.S. v. Simpson</i>, 319 F.3d 81(2d Cir. 2002, as amended through Feb. 7, 2003) (for illegal reentry sentencing purposes), infra, under which a second state misdemeanor possession offense may be a “drug trafficking crime” if it is analogous to an offense punishable as a felony under federal law. Also cf. <i>Aguirre v. INS</i>, 79 F.3d 315 (2d Cir. 1996), infra.</p>
Controlled substance, simple possession of marijuana (first or second conviction)	<i>Matter of Santos-Lopez</i> , 23 I&N Dec. 419 (BIA 2002)	Tex. Penal Code §481.121 (misdemeanor)	<p><u>NOT</u> AF under category B*</p> <p>*A state drug offense constitutes 18 U.S.C. §924(c)(2) if it is (i) a “drug trafficking crime” under punishable under the Controlled Substances Act and (ii) the prosecuting jurisdiction classifies the offense as a felony (citing <i>U.S. v. Hernandez-Avalos</i>, 251 F.3d 505 (5th Cir.), cert. denied, 534 U.S. 935 (2001), infra, and <i>U.S. v. Hinojosa-Lopez</i>, 130 F.3d 691 (5th Cir. 1997), infra)</p> <p>Here, the offense is not a “drug trafficking crime” AF because the prosecuting jurisdiction (TX) classified the offense as a misdemeanor</p> <p>Note: Guided by <i>Matter of Yanez</i>, supra, the BIA referenced Fifth Circuit law because the case arose in that jurisdiction</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, simple possession of cocaine (first conviction)	<i>U.S. v. Restrepo-Aguilar</i> ; 74 F.3d 361 (1st Cir. 1996)	R.I. law (felony)	<p>AF—category B* (for illegal reentry sentencing purposes)</p> <p>*A “drug trafficking crime” is an offense that (i) is punishable under the CSA (or one of the other two specified specified federal statutes) and (ii) is a “felony”</p> <p>A state drug offense is a “felony” for purposes of the “drug trafficking crime” definition if the offense is a felony under the relevant state’s law, even if the offense would be punishable only as a misdemeanor under federal law</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled substance, simple possession of cocaine (first or second conviction)	<i>U.S. v. Cuevas</i> , 75 F.3d 778 (1st Cir. 1996)	R.I. law (felony)	<p>AF—category B*</p> <p>*The second state felony possession offense qualifies as a “felony” for purposes of the “drug trafficking crime” definition (citing <i>U.S. v. Forbes</i>, infra, which held a second state felony drug possession offense to be a “drug trafficking crime” AF because it was punishable as a felony under federal law)</p> <p>Regardless of whether the second offense would be punishable as a felony under federal law, both the first and the second offense qualify as “felonies” for purposes of the “drug trafficking crime” definition because they are felonies under state law (citing <i>U.S. v. Restrepo</i>, supra)</p> <p>Note: May, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled substance, simple possession (second conviction)	<i>U.S. v. Forbes</i> , 16 F.3d 1294 (1st Cir. 1994)	N.Y. Penal Law §220.09 (CPCS, 4th degree, felony)	<p>AF—category B*</p> <p>*One prior drug conviction turns the state felony simple possession offense into a “felony” for purposes of the “drug trafficking crime” definition since the maximum penalty under 21 U.S.C. §844(a) increases to over a year (making it a felony under federal law).</p> <p>Moreover, the offense is a felony under the convicting state’s law so, under the definition of felony in 21 U.S.C. §802(13), is also a felony under federal law.</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, possession of marijuana with intent to sell; conspiracy to possess marijuana with intent to sell	<i>U.S. v. Gonzalez</i> , 202 F.3d 20 (1st Cir. 2000)	New Hampshire law (not specified whether state misdemeanor or felony)	AF—category B
Controlled substance, possession with intent to distribute marijuana (first conviction)	<i>U.S. v. Gomez-Ortiz</i> , 62 F. Supp.2d 508 (Dist. R.I. 1999)	Mass. Gen. Law ch. 94C, §32C(a) (misdemeanor)	<u>NOT</u> AF under category B*  *A state misdemeanor drug offense can never be a “felony” for purposes of whether it is a drug trafficking crime AF, even if the same offense is punishable as a felony under federal law; the state’s characterization controls
Controlled substance, simple possession of cocaine (first conviction)	<i>U.S. v. Pornes-Garcia</i> , 171 F.3d 142 (2d Cir.), cert. denied, 528 U.S. 880 (1999)	N.Y. Penal Law §220.18 (attempted CPCS, 1st degree, felony)	AF—category B* (for illegal reentry sentencing purposes)  *An offense is a “drug trafficking crime” AF if it is (i) punishable under the Controlled Substances Act and (ii) is a felony under either state or federal law  A prior offense prosecuted as a state law felony satisfies the “felony” requirement, even though it would have resulted in a misdemeanor conviction under federal law  Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G, section 1.b  Note: The BIA follows <i>Pornes-Garcia</i> in immigration cases arising out of the Second Circuit, see <i>Matter of Elgendi</i> , supra
Controlled substance, possession of marijuana (second conviction); and sale of marijuana (first conviction)	<i>U.S. v. Simpson</i> , 319 F.3d 81 (2d Cir. 2002, as amended through Feb. 7, 2003)	N.Y. Penal Law §221.15 4th degree misdemeanor) and  N.Y. Penal Law §221.40, (CSM, 4th degree, misdemeanor)	AF—category B* (for illegal reentry sentencing purposes)  *A drug trafficking offense is an AF when it is (i) an offense punishable under the Controlled Substances Act and (ii) can be classified as a felony under either state or federal law  Here, the misdemeanor possession offense is (i) punishable under the CSA and (ii) because it followed a prior drug conviction, was punishable as a felony under federal law (pursuant to 21 U.S.C. 844(a)’s sentence enhancement) The misdemeanor sale offense is also (i) punishable under the CSA and (ii) punishable as a felony under federal law (pursuant to 21 U.S.C. 841(b)(1)(D))  Note: The court offered “no comment on whether such convictions constitute ‘aggravated felonies’ for any purpose other than” the federal Sentencing Guidelines.  Note: Cf. <i>Matter of Elgendi</i> , 23 I&N Dec. 515 (BIA 2002), supra (holding that, for immigration cases arising out of the  <i>(continued)</i>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			Second Circuit, a state drug offense satisfies the “felony” requirement of the “drug trafficking crime” definition only if the state classifies the offense as a felony)
Controlled substance, simple possession of cocaine, attempted (first conviction)	<i>Aguirre v. INS</i> , 79 F.3d 315 (2d Cir. 1996)	N.Y. Penal Law §220.18 (CPCS, 2nd degree, felony)	<p><u>NOT</u> AF under category B (unless more than 5 grams of crack cocaine or any amount of flunitrazepam)</p> <p>Note: The court deferred to the BIA interpretation of “drug trafficking crime” in <i>Matter of L-G-</i>, 21 I&amp;N Dec. 89 (BIA 1995), which held that state drug offenses may be considered “drug trafficking crime” AFs if they are analogous to offenses punishable as felonies under the three federal drug laws referenced in 18 U.S.C. §924(c)(2), regardless of whether the state offense is classified as a felony or misdemeanor under state law. <i>Matter of L-G</i> has since been withdrawn by <i>Matter of Yanez-Garcia</i>, supra, to the extent inconsistent with it. Moreover, the BIA in <i>Matter of Elgendi</i>, 23 I&amp;N Dec. 515 (BIA 2002), supra, has stated that, going forward in immigration cases arising in the Second Circuit, it will follow the approach of the Second Circuit on this point in the illegal reentry sentencing context. See <i>U.S. v. Pornes-Garcia</i>, supra</p>
Controlled substance, trafficking in marijuana, cocaine, illegal drugs, meth-amphetamines, LSD (first or second drug conviction)	<i>Gerbier v. Holmes</i> , 280 F.3d 297 (3rd Cir. 2002)	16 Del. Code Ann. §4753A (a)(2)(a) (felony)	<p><u>MAYBE</u> AF under category B*</p> <p>*A state drug conviction will constitute an AF under category B if the offense is either (i) a felony under state law and contains a “trafficking” (unlawful trading or dealing) component (the “illicit trafficking route”), or (ii) is punishable as a felony under the federal Controlled Substances Act (the “hypothetical federal felony route”).</p> <p>Here, the defendant’s conviction was <u>NOT</u> an AF under the “illicit trafficking route” because it lacked the trafficking component. Although the state offense was labeled “trafficking in” enumerated drugs, it also punished simple possession; the court therefore looked to the plea agreement to establish that the defendant had been convicted only of possession, which lacks a “trafficking” element.</p> <p>The conviction was not an AF under the “hypothetical federal felony route” because it was not punishable as a felony under the CSA (maximum term if punished under federal law would have been one year, a misdemeanor under federal law)**</p> <p>**A prior drug conviction did not cause the cocaine possession offense to be punishable as a felony under federal law (pursuant to 21 U.S.C. §844(a)’s sentencing enhancement), because the prior conviction was never litigated as part of the criminal proceeding for the cocaine possession (following <i>Steele v. Blackman</i>, infra)</p> <p>Note: A state felony for simple possession may, however, be deemed an AF if removal proceedings held within jurisdiction of federal circuits that hold state felonies for simple possession to be AF—see App. G., section 1.b</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, sale of marijuana (first or second conviction); & possession of marijuana (first or second conviction)	<i>Steele v. Blackman</i> , 130 236 F.3d (3d Cir. 2001)	N.Y. Penal Law §221.40 (CSM 4th degree, misdemeanor); & N.Y. Penal Law §221.05 (misdemeanor)	<p><u>NOT</u> AF under category B*</p> <p>*The court applied the same legal standard as set forth in <i>Gerbier v. Holmes</i>, see supra, to determine whether these state misdemeanor drug convictions would constitute an AF under category B</p> <p>Each offense was a misdemeanor under state law and, therefore, not an AF under the “illicit trafficking” approach</p> <p>Each offense was <i>not</i> punishable as a felony under federal law and, therefore, not an AF under the hypothetical federal felony approach—the elements of the misdemeanor “sale of marijuana” state offense are met if defendant distributes 30 grams or less of marijuana without remuneration, which under federal law is treated as simple possession punishable by a maximum sentence of one year (i.e. a misdemeanor)</p> <p>The first drug conviction did not cause subsequent misdemeanor drug offense to be punishable as a felony under federal law (pursuant to 21 U.S.C. §844(a)’s sentencing enhancement) because the first conviction was never litigated as part of the criminal proceeding for the subsequent offense</p>
Controlled substance, simple possession of unknown quantity of cocaine (first conviction)	<i>U.S. v. Wilson</i> , 2003 U.S. App. LEXIS 616 (4th Cir. 2003)	Va. law (felony)	<p>AF—category B*</p> <p>*The two elements of a “drug trafficking crime” AF are (i) any “felony”, that is (ii) punishable under the Controlled Substances Act (or one of the other two specified federal statutes)</p> <p>State possession of cocaine offense can constitute a “felony” within the meaning of the “drug trafficking crime” definition if it is classified as a felony under the relevant state’s law, even though the offense would be punishable as a misdemeanor under federal law</p> <p>Note: May, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled substance, simple possession of cocaine (second conviction)	<i>U.S. v. Wilson</i> , 1997 U.S. Dist. LEXIS 3442 (E.D. Va. 1997)	Va. Code Ann. §18.2-250 (felony)	<p>AF—category B*</p> <p>*State felony drug possession offense falls under the “drug trafficking crime” definition because possession of cocaine is (i) punishable under the CSA and (ii) a felony under Virginia law. Moreover, as a second possession charge it would also have constituted a felony under federal law (pursuant to 21 U.S.C. 844(a)’s sentence enhancement)</p> <p>To be a “felony” within the meaning of the “drug trafficking crime” definition, the drug offense must be a felony as defined by either federal or state law</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, simple possession of marijuana (first conviction)	<i>U.S. v. Hinojosa-Lopez</i> , 130 F.3d 691 (5th Cir. 1997)	Tex. Health & Safety Code Ann. §481.121(b)(5) (felony)	<p>AF—category B*</p> <p>*A “drug trafficking crime” AF is an offense that (i) is punishable under the CSA (or one of the other two specified federal statutes) and (ii) is a “felony”</p> <p>A state drug offense is a “felony” for purposes of the “drug trafficking crime” definition if the offense is a felony under the relevant state’s law, even if the offense would be punishable only as a misdemeanor under federal law</p> <p>Note: May, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled cases substance, simple possession of heroin (first conviction)	<i>U.S. v. Hernandez-Avalos</i> , 251 F.3d 505 (5th Cir.), <i>cert. denied</i> , 534 U.S. 935 (2001)	Colo. Rev. Stat. §18-18-203; 18-18-405; 18-1-105 (felony)	<p>AF—category B* (explicitly for both immigration and illegal reentry sentencing cases)</p> <p>*A “drug trafficking crime” AF is an offense that (i) is punishable under the CSA (or one of the other two specified federal statutes) and (ii) is a “felony” under either state or federal law (following <i>U.S. v. Hinojosa-Lopez</i>, supra)</p> <p>The instant offense is a “drug trafficking crime” because it is (i) punishable under the CSA and (ii) a felony under Colorado law</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled substance, simple possession of marijuana (first conviction)	<i>U.S. v. Caicedo-Cuero</i> , 312 F.3d 697 (5th Cir. 2002)	Tex. Health & Safety Code Ann. §481.121(b)(3) (“state jail felony”)	<p>AF—category B* (following <i>U.S. v. Hinojosa-Lopez</i>, supra)</p> <p>*A “state jail felony” offense punishable by a term of up to two years is in substance a felony under Texas law (despite any sentence suspension)</p> <p>Fifth Circuit precedent “suggests” that if an offense is labeled as a felony under state law, it is a “felony” for purposes of whether it is a “drug trafficking crime” AF, even if the offense is not punishable by imprisonment of more than one year (citing <i>U.S. v. Hernandez-Avalos</i>, supra, &amp; <i>U.S. v. Hinojosa-Lopez</i>, supra)**</p> <p>**These cases “suggest” that the proper definition of ‘felony’ to apply in this context is 21 U.S.C. §802(13), which asks only whether the state has labeled the crime a felony. Even assuming that the proper definition to use is 21 U.S.C. §802(44), which defines “felony drug offense” as one requiring punishment by “imprisonment for more than one year”, the instant offense is a ‘felony’ because the maximum term of imprisonment is 2 years</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, possession (cocaine) with intent to deliver (first conviction)	<i>U.S. v. Santillan-Garcia</i> , 2001 U.S. Dist. LEXIS 20779 (N.D. Ill. Nov. 14, 2001)	Ill. Rev. Stat. 1985 ch. 56 ½, para. 1401(b)(2) (felony)	AF—category B*  *A state drug is a “drug trafficking crime” AF if it is (i) punishable under the CSA and (ii) qualifies as a felony under either state or federal law; here the offense is punishable under the CSA and qualifies as a felony under both federal and state law
Controlled substance, simple possession of methamphetamine (second conviction)	<i>U.S. v. Haggerty</i> , 85 F.3d 403 (8th Cir. 1996)	Cal. Health & Safety Code §1137(a) (felony)	AF—category B*  *A drug offense is a “drug trafficking crime” AF if it is (i) punishable under the CSA and (ii) a “felony”  Here, the offense is a felony under both federal and state law**  **Under federal law, an offense is a felony if the maximum term authorized for the offense is more than one year—here, a prior drug offense causes the second drug possession offense to be punishable by more than a year (pursuant to 21 U.S.C. 844(a)’s sentence enhancement). Under state law, California defines felony as an offense punishable with death or by imprisonment in the state prison—here, the offense was punishable by imprisonment in state prison (that the sentence had been suspended in the instant case did not change the result)  Note: May, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF – see App. G., section 1.b
Controlled substance, purchasing marijuana (first conviction)	<i>U.S. v. Briones-Mata</i> , 116 F.3d 308 (8th Cir. 1997)	Florida law (felony)	AF—category B*  *A state drug offense can be an AF if the offense is classified as a felony under the relevant state’s law, even if the offense would be punishable only as a misdemeanor under federal law  Note: A state felony for simple possession may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF see App. G., section 1.b
Controlled substance, simple possession (first conviction)	<i>U.S. v. Arellano-Torres</i> , 303 F.3d 1173 (9th Cir. 2002)	Nev. Rev. Stat. §453.336(2)	AF—category B*  *A drug offense falls under category B if it is (i) an offense of “illicit trafficking in a controlled substance” as defined in 21 U.S.C. §802, or (ii) a “drug trafficking crime” as defined in 18 U.S.C. §924(c).  A drug offense will fall within the “drug trafficking crime” definition if it is (i) punishable under the federal Controlled Substances Act and (ii) a “felony”, i.e. an offense punishable by 0more than one year’s imprisonment under applicable state or federal law  <p align="right"><i>(continued)</i></p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>An offense is punishable under the CSA if the “full range of conduct encompassed by the statute of conviction” is punishable by the CSA (citing <i>U.S. v. Rivera-Sanchez</i>, <i>infra</i>). If the statute of conviction reaches both conduct that would and conduct that would not be punishable under the CSA, the court may look beyond the statute to certain documents or judicially noticeable facts that clearly establish that the conviction was for an offense punishable under the CSA</p> <p>Here, the state possession offense was held to be a “drug trafficking crime” AF because (i) the court assumed** it was punishable under the CSA and (ii) the offense was punishable by more than one year’s imprisonment under Nevada law (a sentence suspension for first-time offenders does not change the result, because under the Nevada statute, the prospect of serving the originally imposed sentence “always hangs over the head of a first-time offender”). <i>Cf. U.S. v. Robles-Rodriguez</i>, <i>infra</i></p> <p>**Note: The court assumed that the state offense was punishable under the CSA (because that issue was not challenged) and observed that it never reached the issued of whether a conviction under the statute ‘facially qualifies’ as an AF under category B (see <i>U.S. v. Rivera-Sanchez</i>, <i>infra</i>)</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G., section 1.b</p>
Controlled substance, simple possession (first or second conviction)	<i>U.S. v. Robles-Rodriguez</i> , 281 F.3d 900 (9th Cir. 2002)	Ariz. Rev. Stat. §§13-3405(B), 13-3408(B), & 13-3411(B), in conjunction with 13-901.01 (which provides for maximum sentence of probation and drug treatment program for non-violent first- and second-time possession offenders; second-time offenders may, as a condition of probation, have up to one year of jail time imposed)	<p><u>NOT</u> AF under category B* (even though the offense might be labeled as a ‘felony’ under state law)</p> <p>*A drug offense is a “drug trafficking crime” AF if it is (i) punishable under the federal Controlled Substances Act and (ii) a “felony”.</p> <p>A “felony” for this purpose means an offense <i>punishable by more than one year’s imprisonment</i> under applicable state or federal law (reading both 21 U.S.C. §802(13), which defines “felony” as any federal or state offense classified by applicable federal or state law as a felony, and 21 U.S.C. §802(44), which defines “felony drug offense” as one requiring punishment by “imprisonment for more than one year”, together)</p> <p>Note: A simple possession (except for more than 5 grams of crack cocaine or for any amount of flunitrazepam), whether for a first or subsequent conviction, is <i>not</i> punishable by more than one year’s imprisonment under <i>federal</i> law, because possession of an unspecified type and quantity of a controlled substance is punishable by up to one year in prison under 21 U.S.C. §844(a). See <i>U.S. v. Arellano-Torres</i>, 303 F.3d 1173 (9th Cir. 2002), which noted that the Ninth Circuit disregards §844’s sentence enhancement penalties for repeat offenders (citing <i>U.S. v. Corona-Sanchez</i>, 291 F.3d 1201 (9th Cir. 2002), see <i>infra</i> under “Theft, petty (with or without prior)”). But see</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p><i>U.S. v. Garcia-Olmedo</i>, infra, and <i>U.S. v. Zarate-Martinez</i>, infra (both holding that a second misdemeanor possession may be AF because punishable as a felony under federal law)</p> <p>Note: may, however, be deemed an AF if removal proceedings held within jurisdiction of federal circuits that hold second state convictions for simple possession to be AF, or in jurisdictions that hold that a state possession offense labeled as a felony by the state is an AF—see App. G, section 1.b</p>
<p>Controlled substance, marijuana, transport, import, sell, furnish, administer, give away, or offer to do any of above, or give away or attempt to import or transport</p>	<p><i>U.S. v. Rivera-Sanchez</i>, 905 F.3d 247 (9th Cir. 2001) (en banc)</p>	<p>Cal. Health &amp; Safety Code §11360(a)</p>	<p><u>MAYBE</u> AF under category B*</p> <p>*To determine whether a state offense is punishable under the federal Controlled Substances Act, court must determine whether the full range of conduct encompassed by the state statute is punishable under the CSA</p> <p>A conviction under this “extremely broad” state statute does not ‘facially qualify’ as AF under category B because it reaches both conduct that would and conduct that would not be punishable under the CSA (e.g. solicitation punishable under the state statute is not an AF under category B, see <i>Leyva-Licea v. INS</i>, infra); case was remanded for a determination of whether other judicially noticeable facts in the record would establish that the conviction involved the requisite elements for purposes of category B</p>
<p>Controlled substance, solicitation to possess for sale marijuana</p>	<p><i>Leyva-Licea v. INS</i>, 187 F.3d 1147 (9th Cir. 1999); see also <i>U.S. v. Rivera-Sanchez</i>, 247 F.3d 905 (9th Cir. 2001), supra</p>	<p>Ariz. Rev. Stat. §§13-1002(A), 13-3405(A)(2)(B)(5)</p>	<p><u>NOT</u> AF under category B* (even if underlying offense is a drug-trafficking offense)</p> <p>*because solicitation is not a listed offense under the federal Controlled Substances Act</p>
<p>Controlled substance, possession of cocaine (first conviction)</p>	<p><i>U.S. v. Ibarra-Galindo</i>, 206 F.3d 1337 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001)</p>	<p>Washington law (felony)</p>	<p>AF—category B* (for illegal entry sentencing purposes)</p> <p>*A state drug offense may be a “felony” for purposes of the “drug trafficking crime” definition if it is a felony under state law, even if the offense would be punishable only as a misdemeanor under federal law.</p> <p>Note: See <i>U.S. v. Arellano-Torres</i>, supra, and <i>U.S. v. Robles-Rodriguez</i>, supra, in which the Ninth Circuit requires that a state drug offense, to be deemed a ‘felony’ under state law, must be punishable under state law with imprisonment for more than one year.</p> <p>Note: may, however, be deemed NOT an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G, section 1.b</p>
<p>Controlled substance, simple possession (second conviction)</p>	<p><i>U.S. v. Garcia-Olmedo</i>, 112 F.3d 399 (9th Cir. 1997); <i>U.S. v. Zarate-Martinez</i>, 133</p>	<p>Arizona law (5 grams of marijuana)</p>	<p>AF—category B*</p> <p>*A “drug trafficking AF is an offense that is (i) punishable under the CSA and (ii) a “felony”</p> <p style="text-align: right;"><i>(continued)</i></p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
	133 F.3d 1994 (9th Cir.), <i>cert. denied</i> , 525 U.S. 849 (1998)	California law (2.15 grams of cocaine)	<p>A second state conviction for simple possession satisfies the “felony” requirement because it is punishable as a felony (imprisonment for more than one year) under federal law (21 U.S.C. §844(a). But see <i>U.S. v. Arellano-Torres</i>, 303 F.3d 1173 (9th Cir. 2002), which noted that second state simple possessions are not punishable as felonies under federal law because the Ninth Circuit disregards §844’s sentence enhancement penalties for repeat offenders for purposes of the “felony” requirement</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G, section 1.b</p>
Controlled substance, possession of cocaine (with or without intent to distribute) (first conviction)	<i>U.S. v. Cabrera-Sosa</i> , 81 F.3d 998 (10th Cir.), <i>cert. denied</i> , 519 U.S. 885 (1996)	New York law (felony)	<p>AF—category B*</p> <p>*To be a “drug trafficking crime” AF, a drug offense must be (i) punishable under the CSA (or one of the other two enumerated statutes) and (ii) a “felony”</p> <p>The state offense was a felony within the meaning of the “drug trafficking crime” definition because it was a felony under NY law</p> <p>Note: State felony for simple possession may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold not AF—see App. G, section 1.b</p>
Controlled substance, distributing marijuana (first conviction)	<i>U.S. v. Zamudio</i> , 314 F.3d 517 (10th Cir. 2002)	Utah law (upon compliance with the terms of a “Plea in Abeyance”, the offense would be reduced to a misdemeanor)	<p>AF—category B as “illicit trafficking in a controlled substance” as defined in 28 U.S.C. §802</p> <p>Note: Defendant’s “Plea in Abeyance” under Utah law was a “conviction” as defined in the INA because defendant entered a guilty plea and was subjected to a penalty in the form of a fine</p>
Controlled substance, possession of cocaine (first conviction)	<i>U.S. v. Simon</i> , 168 F.3d 1271 (11th Cir.), <i>cert. denied</i> , 528 U.S. 844 (1999)	Florida law (felony)	<p>AF—category B*</p> <p>*To be a “drug trafficking crime” AF, a drug offense must be (i) punishable under the CSA (or one of the other two enumerated statutes) and (ii) a “felony”</p> <p>Since the state offense is a felony under state law, it qualifies as a “felony” for purposes of the “drug trafficking crime” definition, even though the offense is punishable only as a misdemeanor under federal law</p> <p>Note: may, however, be deemed <i>NOT</i> an AF if removal proceedings held within jurisdiction of federal circuits (e.g. Third Circuit) that hold state felonies for simple possession not to be AF—see App. G, section 1.b</p>

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Counterfeit securities, possession with intent to deceive	<i>Sui v. INS</i> , 250 F.3d 105 (2d Cir. 2001)	18 U.S.C. §513(a)	<u>NOT</u> AF under category M* (there was no actual loss to victims)  <u>NOT</u> AF under category U/M* (mere possession does not constitute an “attempt”— does not constitute a substantial step toward creating a loss to victims of more than \$10,000). Cf. <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt”, infra, for BIA’s discussion of “attempt” as applied to category U/M analysis.  *but court did not address issue of whether offense may be an AF under category R or U/R
Counterfeiting	<i>Bazuaye v. INS</i> , 1997 U.S. Dist. LEXIS 2996 (S.D.N.Y. 1997)	U.S. law	AF—category M  Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” infra)
Counterfeit obligations, possession	<i>Albillo-Figueroa v. INS</i> , 221 F.3d 1070 (9th Cir. 2000)	18 U.S.C. §472	AF—category R*  Note: offense falls under category R only if prison sentence of at least one year imposed  *court did not reach issue of whether offense may also be an AF under category M
Counterfeit securities (conspiracy to utter and possess forged & counterfeit securities)	<i>Wilson v. INS</i> , 2001 U.S. Dist. LEXIS 19903 (M.D. Pa. 2001)	18 U.S.C. §513(a) and 18 U.S.C. §371	AF—category U/R*  Note: offense falls under category U/R only if prison sentence of at least one year imposed  *court did not reach issue of whether offense may also be an AF under category U/M
Death by motor vehicle, misdemeanor	<i>U.S. v. Alejo-Alejo</i> , 286 F.3d 711 (4th Cir. 2002)	N.C.Gen.Stat. §20 141.4(a)(2)	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Driving while intoxicated (operating a motor vehicle while under the influence)	<i>Matter of Ramos</i> , 23 I&N Dec. 336 (BIA 2002)	Mass. Gen. Laws ch. 90, §24(1)(a)(1)	<u>NOT</u> AF under category F*  *On whether driving under the influence is a crime of violence (i) BIA will follow the law of the circuit in which the immigration case arose in those circuits that have addressed the question and (ii) in those circuits that have not yet ruled on the issue, BIA will require that the elements of the offense reflect that there is substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence under §16(b) <u>and</u> will require that an offense be committed <i>at least recklessly</i> to meet this requirement  The First Circuit, in which the present case arose, had not yet ruled on whether driving under the influence is a crime of violence, so the BIA applied its own requirements and  <i>(continued)</i>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>held that a violation of the Mass. statute is not a crime that, by its nature, involves a substantial risk that the perpetrator may use force to carry out the crime: even if there is a risk that an accident might occur, a conviction for the offense does not require a showing that the perpetrator intentionally or volitionally used force against another in the course of driving under the influence; and no basis exists to conclude that the perpetrator might have to cause such an accident in order to carry out his crime (crime is accomplished when the perpetrator unlawfully drives while under the influence)</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
Driving while intoxicated	<i>Matter of Olivares</i> , 23 I&N Dec. 148 (BIA 2001)	Tex. Penal Code §§49.04 and 49.09	<p><u>NOT</u> AF under category F</p> <p>Note: Guided by <i>Chapa-Garza</i>, supra, the BIA followed Fifth Circuit law because the immigration case arose in that circuit</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
Driving while intoxicated (with two prior DWIs, a felony)	<i>Dalton v. Ashcroft</i> , 257 F.3d 200 (2d Cir. 2001)	N.Y. VTL Law §1192(3)	<p><u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)*</p> <p>*focusing on intrinsic nature of the offense, court held that the risk of use of physical force was not an element of the offense; conviction under statute was possible even where there was no risk of use of force, and the serious potential risk of physical injury from an accident did not constitute likelihood of the intentional employment of physical force</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
Driving while intoxicated, felony	<i>U.S. v. Chapa-Garza</i> , 243 F.3d 921 (5th Cir. 2001)	Tex. Penal Code Ann. §49.09	<p><u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)*, **</p> <p>*a COV as defined by §16(b) must involve the substantial likelihood that the offender will <i>intentionally</i> employ force against the person or property of another in order to effectuate the commission of the offense; intentional use of force is seldom if ever employed to commit the offense of DWI</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p> <p>**but court did not reach issue of whether conviction under statute may be an AF crime of violence within §16(a), the language of which is similar to the “crime of violence” definition found in the 2001 Sentencing Guidelines (cf. <i>U.S. v. Vargas-Duran</i>, 2003 U.S. App. LEXIS 635 (5th Cir. 2003),</p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			an illegal reentry sentencing enhancement case in which the Fifth Circuit holds that Intoxication Assault under Tex. Penal Code Ann. §49.07 is a ‘crime of violence’ as such term is defined in the 2001 Sentencing Guidelines)
Driving while intoxicated (homicide by intoxicated use of vehicle; operating a vehicle while intoxicated; driving under the influence, aggravated)	<i>Bazan-Reyes v. INS</i> , 256 F.3d 600 (7th Cir. 2001)	Wisc. Stat. §940.09; Ind. Code §9-30-5-3; and 625 Ill. Comp. Stat. 5/11-501(d)(1)	<p><u>NOT</u> AF under category F as crime of violence within §16(a)* or 16(b)**</p> <p>*because the word “use” in §16(a) requires volitional conduct</p> <p>**§16(b) is limited to crimes in which the offender is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense; here, intentional force is virtually never employed to commit any of the offenses for which petitioners were convicted.</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
Driving while intoxicated (driving under the influence with injury to another)	<i>U.S. v. Trinidad-Aquino</i> , 259 F.3d 1140 (9th Cir. 2001)	Cal. Vehicle Code §23153	<p><u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or 16(b)*</p> <p>*although §16(b) encompasses both intentional and reckless conduct, California DUI can be committed by mere negligence and therefore is not a crime of violence under §16(b)</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
Driving while intoxicated (driving under the influence (with multiple priors))	<i>Montiel-Barraza v. INS</i> , 275 F.3d 1178 (9th Cir. 2002); <i>U.S. v. Portillo-Mendoza</i> , 273 F.3d 1224 (9th Cir. 2001)	Cal. Vehicle Code §23152 (a) (along with §23175, an enhancement provision for multiple priors)	<p><u>NOT</u> AF under category F (even with prior DUI convictions)</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF—see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
Driving while intoxicated (driving under the influence)	<i>Tapia-Garcia v. INS</i> , 237 F.3d 1216 (10th Cir. 2001)	Idaho Code §18-8004(5)	<p>AF—category F as crime of violence within 18 U.S.C. §16(b)</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p> <p>Note: may, however, be deemed NOT an AF if removal proceedings held within jurisdiction of federal circuits that have held DUI not to be a crime of violence AF—see App. G, section 1.f)</p>
Driving while intoxicated (driving under the influence with serious bodily injury)	<i>Le v. U.S. Att. Gen.</i> , 196 F.3d 1352 (11th Cir. 1999)	Fla. Stat. Ann. §§316.193(3)	<p>AF—category F crime of violence within 18 U.S.C. §16(a)*</p> <p>*because one element of the offense included the actual use of physical force; court did not reach issue of whether also a COV within §16(b)</p> <p style="text-align: right;"><i>(continued)</i></p>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>Note: offense falls under category F only if prison sentence of at least one year imposed</p> <p>Note: may, however, be deemed NOT an AF if removal proceedings held within jurisdiction of federal circuits that have held DUI not to be a crime of violence AF—see App. G, section 1.f)</p>
Endangerment, felony	<i>U.S. v. Hernandez-Castellanos</i> , 287 F.3d 876 (9th Cir. 2002)	Ariz. Rev. Stat. §13-1201	<p><u>MAYBE</u> AF under category F as crime of violence within 18 U.S.C. §16 (b)*</p> <p>*conviction under statute does not ‘facially qualify’ as a COV within §16(b) because not all conduct punishable under statute would constitute a COV within §16 (b)—‘substantial risk of imminent death or physical injury’ (language of state statute) is not the same as ‘substantial risk that physical force . . . may be used’ (required to fall within §16(b)); in this case, record of conviction did not establish whether defendant’s conviction was in fact for a COV within §16(b)</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Failure to appear before a court when legally called	<i>Barnaby v. Reno</i> , 142 F. Supp.2d 277 (D. Conn. 2001)	Conn. Gen. Stat. §53a-172	<p><u>NOT</u> AF under category T*</p> <p>*state statute permits conviction for failing to appear ‘when legally called’, which is not the same as failing to appear ‘pursuant to a court order’ required to fall within category T</p>
Failure to appear before a court	<i>U.S. v. Mejia</i> , 2000 U.S. App. LEXIS 21765 (9th Cir. 2000) (unpub’d opinion), cert. denied, 532 U.S. 936 (2001)	Cal. Penal Code §1320	<p>AF—category T</p> <p>Note: offense falls under category T only if a prison sentence of two or more years may be imposed</p>
False imprisonment	<i>Cortez-Quinonez v. Ashcroft</i> , 2002 U.S. App. LEXIS 6053 (9th Cir. 2002) (unpub’d opinion)	Cal. Penal Code §§236-37	<p><u>MAYBE</u> AF as crime of violence within 18 U.S.C. §16(b)*</p> <p>*conviction under statute, by itself, does not establish COV because statute reaches both conduct that would constitute a COV and conduct that would not (a person may be convicted for false imprisonment by fraud or deceit, as well as by violence or menace); here, however, the judgment of conviction and charging papers established that the defendant was convicted of false imprisonment by violence, and that the crime was perpetrated with a gun</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
False imprisonment	<i>Brooks v. Ashcroft</i> , 283 F.3d 1268 (11th Cir. 2002)	Fla. Stat. §787.02	<p>AF—category F</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
False use of a social security number	<i>St. John v. Ashcroft</i> , 2002 U.S. App. LEXIS 14973 (10th Cir. 2002)(unpub'd opinion); <i>U.S. v. But</i> , 2000 U.S. App. LEXIS 21489 (9th Cir. 2000) (unpub'd opinion)	42 U.S.C. §408(a)(7)(B)	AF—category M (restitution amount ordered to victim may establish amount of loss to victim)  Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” infra)
Firearms, possession by a felon	<i>Matter of Vazquez-Muniz</i> , 23 I&N Dec. 207 (BIA 2002); <i>U.S. v. Castillo-Rivera</i> , 244 F.3d 1020 (9th Cir.), <i>cert. denied</i> , 534 U.S. 931 (2001)	Cal. Penal Code §12021(a)	AF—category E(ii) (state firearm offense may be ‘described in’ a federal statute enumerated under category E, regardless of whether the state statute includes the jurisdictional element of “affecting interstate commerce”)
Firearms, conspiracy to export without a license	<i>Kuhali v. Reno</i> , 266 F.3d 93 (2d Cir. 2001)	22 U.S.C. §2778; 18 U.S.C. §371	AF—category U/C
Firearms, possession by illegal alien	<i>U.S. v. Powell</i> , 2001 U.S. App. LEXIS 21868 (2d Cir. 2001) (unpub'd opinion)	18 U.S.C. §922(g)(5)	AF—category E
Firearms, felony possession (unlawfully carrying a firearm in an establishment licensed to sell alcoholic beverages)	<i>U.S. v. Hernandez-Neave</i> , 291 F.3d 296 (5th Cir. 2001)	Tex. Penal Code §46.02(c)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)*  *state statute does not require a substantial likelihood that the perpetrator will intentionally employ physical force against the person or property of another (statute does require intentional, knowing or reckless carrying of handgun onto premises, but such <i>intent</i> portion of the crime goes to the act of carrying a firearm onto premises, and does not go to any supposed intentional force against another’s person or property), and, further, physical force against the person or property of another need not be used to complete the crime (applying Fifth Circuit’s <i>Chapa-Garza</i> framework (see “Driving while intoxicated” <i>supra</i> )).
Firearms, unlawful possession of short-barreled shotgun	<i>U.S. v. Rivas-Palacios</i> , 244 F.3d 396 (5th Cir. 2001)	Texas law	AF—category F as crime of violence under §16(b)*  *the unlawful possession of any unregistered firearm ‘involves a substantial risk that physical force against the person or property of another’ will occur  <i>(continued)</i>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			Note: This holding has subsequently been called into question by the Fifth Circuit in <i>U.S. v. Hernandez-Neave</i> , 291 F.3d 296 (5th Cir. 2001), <i>supra</i> , as it appears to conflict with the <i>Chapa-Garza</i> framework for analyzing crime of violence AFs (see “Driving while intoxicated” <i>supra</i> ).  Note: offense falls under category F only if prison sentence of at least one year imposed
Firearms, possession by non-citizen without a license	<i>U.S. v. Sandoval-Barajas</i> , 206 F.3d 853 (9th Cir. 2000)	Wash. Rev. Code §9.41.170	<u>NOT</u> AF under category E*  *conviction under state statute that applies to all non-citizens is not an offense ‘described in’ the federal statute enumerated in category E (federal statute applies only to those illegally in the U.S.)
Firearms, possession of short-barreled shotgun	<i>U.S. v. Avila-Mercado</i> , 2001 U.S. App. LEXIS 13335 (9th Cir.) (unpub’d opinion), <i>cert. denied</i> , U.S. LEXIS 10704 (2001)	Nev. Rev. Stat. §202.275	AF—category U/F  Note: offense falls under category F only if prison sentence of at least one year imposed
Firearms, possession of shotgun	<i>U.S. v. Villanueva-Gaxiola</i> , 119 F. Supp.2d 1185 (D. Kan. 2000)	Cal. Penal Code §12020	<u>NOT</u> AF under category E*  <u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)**  *conviction under state statute that applies to any person is not an offense ‘described in’ the federal statute enumerated in category E (federal statute applies only to illegal aliens)  **state statute encompasses misdemeanor offenses and so cannot fall within §16(b)
Forgery	<i>Matter of Aldabesheh</i> , 22 I&N Dec. 983 (BIA 1999)	N.Y. Penal Law §170.10(2) (2nd degree)	AF—category R  Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	<i>U.S. v. Johnstone</i> , 251 F.3d 281 (1st Cir. 2001)	Colorado law (class 5 felony)	AF—category R  Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	<i>Drakes v. Zimski</i> , 240 F.3d 246 (3rd Cir. 2001)	11 Del. Code §861 (second degree)	AF—category R  Note: offense falls under category R only if prison sentence of at least one year imposed
Fraud, attempt (submitting false insurance claim with intent to defraud)	<i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999)	Ind. Code §35-43-5-4-(10)	AF—category U/M*  *even though defendant was not convicted specifically of an offense denominated an “attempt” and even though no actual loss had occurred—‘attempt’ by its very nature is an unsuccessful effort to commit a crime). Under state statute, conviction for attempted fraud requires proof of intent to

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>defraud and that substantial step toward commission of the fraud occurred; here, record of conviction showed substantial step was taken.</p> <p>Note: Cf. <i>Sui v. INS</i>, 250 F.3d 105 (2d Cir. 2001) under “Counterfeit securities, possession”, <i>supra</i>, for Second Circuit’s discussion of “attempt” as applied to category U/M analysis.</p> <p>Note: offense falls under category U/M only if attempted loss to the victim(s) in excess of \$10,000</p>
<p>Fraud (unauthorized possession of access devices with intent to defraud)</p>	<p><i>Agdachian v. INS</i>, 1999 U.S. App. LEXIS 23214 (9th Cir. 1999) (unpub’d opinion)</p>	<p>Unspecified</p>	<p>AF—category M (based on value of loss specified in plea agreement)</p> <p>Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i>, 22 I&amp;N Dec. 552 (BIA 1999) under “Fraud, attempt” <i>infra</i>)</p>
<p>Fraud and misuse of visas, permits and other documents</p>	<p><i>Pena-Rosario v. Reno</i>, 83 F. Supp.2d 349 (E.D.N.Y. 2000); <i>Chukwuezi v. Ashcroft</i>, 2002 U.S. App. LEXIS 23391 (3d Cir. 2002) (unpub’d opinion)</p>	<p>18 U.S.C. §1546(a)</p>	<p>AF—category P</p> <p>Exception: in the case of a first offense for which the alien affirmatively has shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent</p> <p>Note: offense falls under category P only if prison sentence of at least twelve months imposed</p>
<p>Fraudulent tax return</p>	<p><i>Abreu-Reyes v. INS</i>, 292 F.2d 1029 (9th Cir. 2002)</p>	<p>26 U.S.C. §7206(1)</p>	<p>AF—category M (court may look to presentence report to establish amount of loss to victim)</p> <p>Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i>, 22 I&amp;N Dec. 552 (BIA 1999) under “Fraud, attempt” <i>infra</i>)</p>
<p>Heroin [See “Controlled Substance” cases, <i>supra</i>]</p>			
<p>Hindering prosecution</p>	<p><i>U.S. v. Vigil-Medina</i>, 2002 U.S. App. LEXIS 4961 (4th Cir. 2002) (unpub’d opinion)</p>	<p>N.Y. law (1st degree)</p>	<p>AF—category S</p> <p>Note: offense falls under category S only if prison sentence of at least one year imposed</p>

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Indecency with a child by exposure	<i>Matter of Rodriguez-Rodriguez</i> , 22 I&N Dec. 991 (BIA 1999); <i>U.S. v. Zavala-Sustaita</i> , 214 F.3d 601 (5th Cir.), <i>cert. denied</i> , 531 U.S. 982 (2000)	Texas Penal Code §21.11(a)(2)	AF—category A
Indecency with a child by sexual contact	<i>U.S. v. Velazquez-Overa</i> , 100 F.3d 418 (5th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1133 (1997)	Tex. Penal Code §21.11(a)(1)	AF—category F as crime of violence under §16(b)* *when an older person attempted to sexually touch a child, there is always a substantial risk that physical force would be used to ensure the child's compliance  Note: offense falls under category F only if prison sentence of at least one year imposed
Indecent assault and battery on a child under 14	<i>Emile v. INS</i> , 244 F.3d 183 (1st Cir. 2000)	Mass. Gen. Laws ch. 265, §1313	AF—category A as sexual abuse of a minor
Indecent assault and battery on a person over 14	<i>Sutherland v. Reno</i> , 228 F.3d 171 (2d Cir. 2000)	Mass. Gen. Laws ch. 265, §13H	AF—category F crime of violence within 18 U.S.C. §16(b)*  *non-consent is a necessary element of the offense and, therefore, offense involves a substantial risk that physical force may be used
Indecent liberties with a child	<i>Bahar v. Ashcroft</i> , 264 F.3d 1309 (11th Cir. 2001)	N.C. Gen. Stat. 14-202.1	AF—category A (even if offense does not require physical contact)
Inflicting corporal injury on spouse	<i>U.S. v. Jimenez</i> , 258 F.3d 1120 (9th Cir. 2001)	Cal. Penal Code §273.5	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Injury to a child, felony	<i>U.S. v. Gracia-Cantu</i> , 302 F.3d 308 (5th Cir. 2002)	Tex. Penal Code Ann. §22.04(a)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or §16(b)**  *because state statute does not require that the perpetrator actually use, attempt to use, or threaten to use physical force against a child  **because conviction under statute may stem from an omission rather than an intentional use of force, the offense is not, by its nature, a crime of violence within the meaning of §16(b)
Kidnapping	<i>Choeum v. INS</i> , 129 F.3d 29 (1st Cir. 1997)	New York law	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Luring a child under age 16 into vehicle or building for unlawful purpose	<i>U.S. v. Martinez-Jimenez</i> , 294 F.3d 921 (7th Cir. 2002)	720 Ill. Comp. Stat. §5/10-5(10)	AF—category F as crime of violence under §16(b)*  *in illegal reentry context, sentencing court’s ‘aggravated felony’ enhancement was not ‘clear error’ when conduct under statute by its nature involves a substantial risk that in the course of such offense, force may be used against the young victim  Note: offense falls under category F only if prison sentence of at least one year imposed
Mail fraud	<i>Akorede v. Perryman</i> , U.S. Dist. LEXIS 6123 (N.D. Ill. 1999)	Unspecified	AF—category M  Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” supra)
Manslaughter, attempted	<i>Matter of Yeung</i> , I&N Dec. 610 (BIA 1996)	Florida law	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter, involuntary	<i>Matter of Alcantar</i> , 20 I&N Dec. 801 (BIA 1994)	Ill. Rev. Stat. Ch. 38, para. 9-3(a)	AF—category F crime of violence within 18 U.S.C. §16(b)*  *the <i>nature</i> of a crime, as elucidated by its generic elements, determines whether it is a COV under §16(b); therefore the analysis is a categorical approach under which the BIA looks to the statutory definitions, not to the underlying circumstances of the crime  Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter	<i>Jobson v. Ashcroft</i> , ___ F.3d ___, 2003 U.S. App. LEXIS 7539 (2d Cir. Apr. 22, 2003)	N.Y. Penal Law §125.15(1) (2d degree)	<u>NOT</u> AF under category F as a crime of violence within 18 U.S.C. §16(b)*  *§16(b) requires that an offense inherently pose a substantial risk that a defendant will <i>use physical force</i> . It also contemplates risk of an <i>intentional</i> use of force. Neither is an element of the state statute. Applying a categorical approach, court held that the minimum conduct required to violate the state statute is not “by its nature” a crime of violence under §16(b). First, the risk that a defendant will <i>use physical force</i> in the commission of an offense is ‘materially different’ from the risk that an offense will result in physical injury (the state statute requires only the latter). Passive conduct or omissions alone are sufficient for conviction under state statute. Second, an unintentional accident caused by recklessness (which would sustain a conviction under the state statute) cannot properly be said to involve a substantial risk that a defendant will use physical force.  Note: But see <i>Matter of Jean</i> , 23 I&N Dec. 373 (Att. Gen. 2002), in which the attorney general questioned, in dicta, the BIA’s prior determination that offense was not a crime of violence

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Manslaughter, involuntary	<i>Park v. INS</i> , 252 F.3d 1018 (9th Cir. 2001)	Cal. Penal Code §192(b)	AF—category F as crime of violence within 18 U.S.C. §16(b)  Note: offense falls under category F only if prison sentence of at least one year imposed
Marijuana [See “Controlled Substance” cases, supra]			
Menacing	<i>U.S. v. Drummond</i> , 240 F.3d 1333 (11th Cir. 2001)	N.Y. Penal Law §120.14	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Mischief, criminal (intentional marking of another’s property)	<i>U.S. v. Landeros-Gonzalez</i> , 262 F.3d 424 (5th Cir. 2001)	Tex. Penal Code §28.03(a)(3)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)*  *offense does not involve a substantial risk of force—no substantial risk that a vandal will use “destructive or violent force” in the course of unlawfully “making marks” on another person’s property
Misprision of felony	<i>Matter of Espinoza-Gonzalez</i> , 22 I&N Dec. 889 (BIA 1999)	18 U.S.C. §4	<u>NOT</u> AF under category S  Note: also should <u>NOT</u> be an AF under category B (even if underlying offense is a drug-trafficking felony)
Money laundering, conspiracy	<i>Oyenyi v. Estrada</i> , 2002 U.S. Dist. LEXIS 17267 (N.D. Texas 2002)	18 U.S.C. §1956(h)	AF under category U/D  Note: offense falls under category U/D only if amount of funds involved in the transaction exceeds \$10,000
Money laundering (\$1,310 check, but restitution amount ordered to victim had exceeded \$10,000)	<i>Chowdhury v. INS</i> , 249 F.3d 970 (9th Cir. 2001)	18 U.S.C. §1956(a)(1)(B)(i)	<u>MAYBE</u> AF under category D*  *offense falls under category D only if amount of funds involved in the transaction exceeds \$10,000—here the amount was only \$1,310, and restitution amount is not relevant to analysis)
Negligence, criminal (criminally negligent child abuse)	<i>Matter of Sweetser</i> , 22 I&N Dec. 709 (BIA 1999)	Colo. Rev. Stat. §18-6-401(1) & (7)	<u>MAYBE</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or §16(b)*  *For explanatory notes on the holding, see “Child abuse, criminally negligent” supra
Obstructing and hindering	<i>Matter of Joseph</i> , 22 I&N Dec. 799 (BIA 1999)	Maryland common law	<u>MAYBE</u> AF under category S*  *Note: While not squarely addressing the issue, the BIA noted that the common law state offense is divisible, as it may encompass obstructing one’s own arrest in addition to obstructing the arrest of another and, finding that defendant had been convicted for obstructing his own arrest, stated that it is substantially unlikely that obstructing and hindering

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>one's own arrest falls within "obstruction of justice" for purposes of category S</p> <p>Note: offense falls under category S only if prison sentence of at least one year imposed</p>
Perjury	<i>Matter of Martinez-Recinos</i> , 23 I&N Dec. 175 (BIA 2001)	Cal. Penal Code §118(a)	<p>AF—category S (because state law is essentially the same as the federal perjury statute at 18 U.S.C. §1621)</p> <p>Note: offense falls under category S only if prison sentence of at least one year imposed</p>
Petit larceny [See "Theft, misdemeanor" cases, <i>infra</i> ]			
Rape (statutory rape)	<i>Matter of B-</i> , 21 I&N Dec. 287 (BIA 1996)	Mar. Ann. Code Art. 27, §463(a)(3) (2nd degree)	<p>AF—category F as crime of violence under §16(b)*</p> <p>*whenever an older person attempts to sexually touch a child under the age of consent, there is invariably a substantial risk that physical force will be yielded to ensure the child's compliance</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Rape (statutory rape involving minor under age 17 but over age 16)	<i>Mugalli v. Ashcroft</i> , 258 F.3d 52 (2nd Cir. 2001)	N.Y. Penal Law §130.25-2	<p>AF—category A as sexual abuse of a minor*</p> <p>*even though minor was over the age of sixteen</p>
Rape	<i>Castro-Baez v. Reno</i> , 217 F.3d 1057 (9th Cir. 2000)	Cal. Penal Code §261(a)(3)	AF—category A
Rape	<i>U.S. v. Yanez-Saucedo</i> , 295 F.3d 991 (9th Cir. 2002)	Wash. Rev. Code §9A.44.060	AF—category A
Reckless endangering, misdemeanor	<i>Amaye v. Elwood</i> , 2002 U.S. Dist. LEXIS 14276 (Middle Dist. Pa. 2002)	Del. Code Ann. tit. 11, §603 (2001) (2d degree)	<p><u>NOT</u> AF under category F as crime of violence under §16(a)* or 16(b)**</p> <p>*crime does not include as an element the use, attempted use, or threatened use of physical force against the person or property of another—statute requires only reckless engagement in conduct which creates a substantial risk of physical injury to another person, and statute does not mention force at all</p> <p>**Where an offense is categorized as a misdemeanor under state law it does not meet the definition of a crime of violence under §16(b)</p>
Robbery, attempted	<i>U.S. v. Fernandez-Antonia</i> , 278 F.3d 150 (2d Cir. 2002)	N.Y. law (3d degree robbery) & N.Y. Penal Law §110.00	<p>AF—category U/G theft &amp; offense*</p> <p>*rejecting defendant's argument that conviction under the attempt statute, for purposes of category U analysis, falls short of the "substantial step" requirement under federal law</p> <p>Note: offense falls under category U/G only if prison sentence of at least one year imposed</p>

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Robbery	<i>Perez v. Greiner</i> , 296 F.3d 123 (2d Cir. 2002)	N.Y. Penal Law §160.10(1) (2d degree)	AF—category G  Note: offense falls under category G only if prison sentence of at least one year imposed
Robbery	<i>King v. U.S.D.O.J. and INS</i> , 2002 U.S. Dist. LEXIS 19862 (S.D.N.Y. 2002)	N.Y. Penal Law §160.15 (1st degree)	AF—category F as crime of violence under §16(a)  Note: offense falls under category F only if prison sentence of at least one year imposed
Robbery, with a deadly weapon	<i>Chambers v. Reno</i> , 307 F.3d 284 (4th Cir. 2002)	Maryland law	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Robbery	<i>U.S. v. Valladares</i> , 304 F.3d 1300 (8th Cir. 2002)	Cal. Penal Code §211	AF—category F as crime of violence under §16(b)*  <u>MAYBE</u> AF under category F as crime of violence within 18 U.S.C. §16(a)**  *robbery achieved through ‘force or fear’ (state statutory language) by its nature presents a substantial risk that physical force against the person or property of another may be used  **state statute encompasses conduct that may or may not include as an element the use, attempted use, or threatened use of physical force within the meaning of §16(a); underlying record of conviction, however, established that such an element existed in the instant case (provided a handgun to a co-defendant who used the gun to rob a pedestrian)  Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a minor (indecent with a child by exposure)	<i>Matter of Rodriguez-Rodriguez</i> , 22 I&N Dec. 991 (BIA 1999);  <i>U.S. v. Zavala-Sustaita</i> , 214 F.3d 601 (5th Cir.) <i>cert. denied</i> , 531 U.S. 982 (2000)	Texas Penal Code §21.11(a)(2)	AF—category A*  *even though physical touching of the victim is not an element of the state crime
Sexual abuse of a minor, misdemeanor	<i>Matter of Small</i> , 23 I&N Dec. 448 (BIA 2002)	N.Y. Penal Law §130.60(2)	AF—category A (even though offense is a misdemeanor under state law)  <u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or §16(b)**  *offense does not have the element of use of ‘violent or destructive’ physical force necessary under the law of the Fifth Circuit (in whose jurisdiction this case arose) to fall within §16(a) (citing <i>U.S. v. Landeros-Gonzalez</i> , 262 F.3d 424 (5th Cir. 2001), <i>see</i> “Mischief, criminal” <i>supra</i> )

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			<p>**offense is not a felony as required to fall within COV definition at 18 U.S.C. §16(b)</p> <p>Note: BIA follows the law of the Fifth Circuit in this case because the case arose out of the Fifth Circuit</p>
Sexual abuse of a minor (indecent assault and battery on a child under 14)	<i>Emile v. INS</i> , 244 F.3d 183 (1st Cir. 2000)	Mass. Gen. Laws ch. 265, §1313	AF—category A
Sexual abuse of a minor (indecenty with a child sexual contact)	<i>U.S. v. Velazquez-Overa</i> , 100 F.3d 418 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997)	Tex. Penal Code §21.11(a)(1)	<p>AF—category F as crime of violence under §16(b)*</p> <p>*when an older person attempts to sexually touch a child, there is always a substantial risk that physical force would be used to ensure the child’s compliance</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Sexual abuse of a minor, misdemeanor	<i>U.S. v. Gonzales-Vela</i> , 276 F.3d 763 (6th Cir. 2001)	Ky. Rev. Stat. Ann. §510.120(1)	AF—category A (even though offense is a misdemeanor under state law)
Sexual abuse of a minor, misdemeanor	<i>Guerrero-Perez v. INS</i> , 242 F.3d 727 (7th Cir. 2001)	720 Ill. Comp. Stat. 5/12-15 (c)	F—category A (even though offense is a misdemeanor under state law)
Sexual abuse of a minor (lascivious acts with a child)	<i>U.S. v. Rodriguez</i> , 979 F.2d 138 (8th Cir. 1992)	Code of Iowa §709.8	<p>AF—category F as crime of violence under §16(b)*</p> <p>*the crime by its nature involves a substantial risk of physical force</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Sexual abuse of a child, attempted, felony	<i>U.S. v. Reyes-Castro</i> , 13 F.3d 377 (10th Cir. 1993)	Utah Code Ann. §76-5-404.1(1) (1990)	<p>AF—category F as crime of violence under §16(b)*</p> <p>*when an older person attempts to sexually touch a child under the age of fourteen, there is always a substantial risk that physical force will be used to ensure the child’s compliance</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>
Sexual abuse of a minor (indecent liberties with a child)	<i>Bahar v. Ashcroft</i> , 264 F.3d 1309 (11th Cir. 2001)	N.C. Gen. Stat. 14-202.1	AF—category A (even if offense does not require physical contact)

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Sexual assault (lewd assault) on a child	<i>U.S. v. Londono-Quintero</i> , 289 F.3d 147	Fla. Stat. Ann. §800.04 (1994)	AF—category A (if there was physical contact with victim)  Note: court did not answer question of whether a non-physical contact offense under the statute may also fall under category A, but looked to the charging documents to determine that in the instant case the petitioner did have physical contact with the victim
Sexual assault	<i>Lara-Ruiz v. INS</i> , 241 F.3d 934 (7th Cir. 2001)	Ill. Rev. Stat. 1991, ch. 38, §§12-13(a)(1) & 12-13(a)(2)	<u>MAYBE</u> AF under category A  *state statute covered conduct that is sexual abuse of a minor and conduct that is not; record of conviction, however, established that victim was a four year old
Sexual assault of a child (statutory rape)	<i>Xiong v. INS</i> , 173 F.3d 601 (7th Cir. 1999)	Wis. Stat. §948.02(2)	<u>NOT</u> AF under category F* (because consensual sex precluded finding of a “crime of violence,” absent substantial age difference)  *but court did not reach issue of whether offense was “sexual abuse of a minor” under category A
Sexual assault of a child	<i>U.S. v. Alas-Castro</i> , 184 F.3d 812 (8th Cir. 1999)	Neb. Rev. Stat. §28–320.01	AF—category F crime of violence within 18 U.S.C. §16(b)*  *there is ‘substantial risk’ that force may be used, even if no force actually is used  Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault (consensual sexual penetration)	<i>U.S. v. Navarro-Elizondo</i> , 2000 U.S. App. LEXIS 7215 (9th Cir. 2000) (unpub’d opinion)	N.J. Stat. Ann. §2C:14-2a(3)	<u>NOT</u> AF under category A or F (statute permits conviction for consensual sexual penetration which is neither category A ‘rape’ nor category F ‘crime of violence’)
Sexual assault (lewd assault) on a child	<i>U.S. v. Padilla-Reyes</i> , 247 F.3d 1158 (11th Cir.), cert. denied, 534 U.S. 913 (2001)	Fla. Stat. Ann. §800.04 (1987)	AF—category A (regardless of whether there was physical contact with victim)
Sexual assault (lewd assault on a child), attempted	<i>Ramsey v. INS</i> , 55 F.3d 580 (11th Cir. 1995)	Florida Statutes §§777.04(1) & 800.04(1)	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual battery, misdemeanor	<i>Wireko v. Reno</i> , 211 F.3d 833 (4th Cir. 2000)	Va. Code §18.2-67.4	AF—category F (even though offense is a misdemeanor under state law)  Note: offense falls under category F only if prison sentence of at least one year imposed

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Sexual behavior (lewd behavior) with individual 14 or under	<i>U.S. v. Baron-Medina</i> , 187 F.3d 1144 (9th Cir. 1999), <i>cert. denied</i> , 531 U.S. 116 (2001)	Cal. Penal Code §288(a)	AF—category A as sexual abuse of a minor
Simple domestic assault, misdemeanor	<i>U.S. v. Pacheco</i> , 225 F.3d 148 (2d Cir. 2000), <i>cert. denied</i> , 533 U.S. 904 (2001)	R.I. law	AF—category F crime of violence within 18 U.S.C. §16(a) (even though offense is a misdemeanor under state law)  Note: offense falls under category F only if prison sentence of at least one year imposed
Solicitation to possess marijuana for sale	<i>Leyva-Licea v. INS</i> , 187 F.3d 1147 (9th Cir. 1999); see also <i>U.S. v. Rivera-Sanchez</i> , 247 F.3d 905 (9th Cir. 2001), <i>supra</i> , under “Controlled Substances”	Ariz. Rev. Stat. §§13-1002(A) 13-3405(A)(2) (B)(5)	<u>NOT</u> AF under category B* (even if underlying offense is a drug-trafficking offense)  *because solicitation is not a listed offense under the federal Controlled Substances Act
Stolen mail, possession	<i>Randhawa v. Ashcroft</i> , 298 F.3d 1148 (9th Cir. 2002)	18 U.S.C. §1708	AF—category G theft offense  Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen property, possession, attempted	<i>Matter of Bahta</i> , 22 I&N Dec. 1381 (BIA 2000)	Nev. Rev. Stat. §§193.330 and 205.275	AF—category U/G theft offense  Note: BIA reads the ‘receipt of stolen property’ parenthetical in the theft offense provision broadly to include categories of offenses involving knowing receipt, possession or retention of property from the rightful owner  Note: offense falls under category U/G only if prison sentence of at least one year imposed
Stolen property, possession	<i>Williams v. INS</i> , 2002 U.S. App. LEXIS 25126 (3rd Cir. 2002) (unpub’d op.)	N.Y. Penal Law §165.40	AF—category G theft offense  Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen vehicle, possession	<i>Hernandez-Mancilla v. INS</i> , 246 F.3d 1002 (7th Cir. 2001)	625 Ill. Comp. Stat. 5/4-103 (a)(1)	AF—category G theft offense*  *court defines “theft offense” as a taking of property or exercise of control over property without consent with criminal intent to deprive owner of rights and benefits of ownership, even if such deprivation is less than total or permanent  Note: offense falls under category G only if prison sentence of at least one year imposed

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
Stolen vehicle, possession	<i>Huerta-Guevara v. Ashcroft</i> , 312 F.3d 883 (9th Cir. 2003)	Ariz. Rev. Stat. §13-1802	<i>MAYBE</i> AF under category G as theft offense*  *Conviction under Arizona statute does not ‘facially qualify’ as a theft offense (as generically defined in <i>Corona-Sanchez</i> , infra); statute is divisible, subparts of which do not require intent (definition of theft requires intent), and the statute prohibits, among other things, theft of services and aiding and abetting theft (which do not fall within definition of theft); judgment of conviction, the only document submitted to the immigration court, did not otherwise establish defendant’s offense to fall within definition of theft  Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen vehicle, receiving or transferring, attempted	<i>U.S. v. Vasquez-Flores</i> , 265 F.3d 1122 (10th Cir.), cert. denied, 534 U.S. 1165 (2001)	Utah Code Ann. §41-1a-1316	AF—category G theft offense*  *court defines “theft offense” as a taking of property or exercise of control over property without consent with criminal intent to deprive owner of rights and benefits of ownership, even if such deprivation is less than total or permanent  Note: offense falls under category G only if prison sentence of at least one year imposed
Tax evasion, attempted	<i>Evangelista v. Ashcroft</i> , 2002 U.S. Dist. LEXIS 22999 (E.D.N.Y. 2002)	26 U.S.C. §7201	AF—category M(ii)  Note: offense falls under category M(ii) only if revenue loss to the government is in excess of \$10,000 (but <i>attempted</i> offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” infra)
Terrorism	<i>Matter of S-S-</i> , 21 I&N Dec. 900 (BIA 1997)	Iowa Code Annotated §708.6	AF—category F  Note: offense falls under category F only if prison sentence of at least one year imposed
Terrorist Threats	<i>Bovkun v. Ashcroft</i> , 283 F.3d 166 (3rd Cir. 2002)	Pa. [Cons. Stat.] §2706 (1998) (subsequent amendment redesignated language of 1998 text as §2706(a), subsections (1) through (3))	AF—category F as crime of violence under §16(a)  Note: offense falls under category F only if prison sentence of at least one year imposed
Theft, misdemeanor (shoplifting; larceny under \$500)	<i>U.S. v. Pacheco</i> , 225 F.3d 148 (2d Cir. 2000), cert. denied, 533 U.S. 904 (2001)	Rhode Island statutes	AF—category G theft offense (even though offense is a misdemeanor under state law)  Note: offense falls under category G only if prison sentence

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Theft, misdemeanor (petit larceny with maximum 1 year prison sentence)	<i>U.S. v. Graham</i> , 169 F.3d 787 (3d Cir.), cert. denied, 528 U.S. 845 (1999); <i>Jaafar v. INS</i> , 77 F.Supp.2d 360 (W.D.N.Y. 1999)	N.Y. Penal Law §155.25	AF—category G theft offense (even though offense is a misdemeanor under state law)  Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, misdemeanor (shoplifting)	<i>Ewele v. Reno</i> , 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000)	Illinois law	AF—category G theft offense (even though offense is a misdemeanor under state law)  Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, misdemeanor (petty theft with or without prior)	<i>U.S. v. Corona-Sanchez</i> , 291 F.3d 1201 (9th Cir. 2002)	Cal. Penal Code §484(a) (along with §§488 & 666)	<u>MAYBE</u> AF under category G as theft offense* (even though offense may be a misdemeanor under state law)  *court defines “theft offense” as a taking of property or exercise of control over property without consent with criminal intent to deprive owner of rights and benefits of ownership, even if such deprivation is less than total or permanent  *conviction under §484(a) does not ‘facially qualify’ as a theft offense under category G because statute might cover conduct outside the generic definition of theft, such as aiding and abetting theft, conduct that neither takes nor exercises control over property, theft of labor, and solicitation of false credit reporting; court then found insufficient evidence in the record to otherwise establish that the offense constituted generic theft  Note: offense falls under category G only if prison sentence of at least one year imposed (in this case, the court held that defendant’s sentence of at least 1 year did NOT satisfy the sentence requirement of category G because the 1 year sentence had been imposed only as part of a sentence enhancement feature for defendants with priors
Theft, misdemeanor (theft by shoplifting)	<i>U.S. v. Christopher</i> , 239 F.3d 1191 (11th Cir.), cert. denied, 534 U.S. 877 (2001)	Florida law (unspecified)	AF—category G theft offense (even though offense is a misdemeanor under state law)  Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of auto	<i>U.S. v. Rodriguez-Lopez</i> , 2002 U.S. App. LEXIS 23861 (9th Cir. 2002) (unpub’d op.)	Cal. Penal Code §484 (a) (along with §487(b)(3))	<u>MAYBE</u> AF under category G as theft offense*  *conviction under statute does not ‘facially qualify’ as a theft offense under category G because statute permitted conviction for aiding and abetting theft and for conduct that neither took nor exercised control over the property; court then found that nothing in the record unequivocally indicated that the defendant’s actual conduct came within the generic definition of theft.  <i>(continued)</i>

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, embezzlement or misapplication by bank officer or employee (embezzlement of bank funds)	<i>Valansi v. Ashcroft</i> , 278 F.3d 203 (3d Cir. 2002)	18 U.S.C. §656	<u>MAYBE</u> AF under category M*  *statute is divisible because crime does not necessarily involve intent to defraud or deceive—may instead involve intent to injure; court looked to the record and found it inconclusive as to whether defendant acted with intent to defraud; held that defendant’s conviction was not an AF under category M  Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but attempted offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” supra)
Theft, embezzlement or misapplication by bank officer or employee (misapplication of auction drafts)	<i>Moore v. Ashcroft</i> , 251 F.3d 919 (11th Cir. 2001)	18 U.S.C. §656	AF—category M (the crime necessarily involves fraud or deceit)  Note: offense falls under category M only if loss to the victim(s) in excess of \$10,000 (but attempted offense, to fall under category U/M, may not require actual loss, see <i>Matter of Onyido</i> , 22 I&N Dec. 552 (BIA 1999) under “Fraud, attempt” supra)
Theft of retail, felony (indeterminate sentence of 0–5 years)	<i>U.S. v. Garcia-Armenta</i> , 2002 U.S. App. LEXIS 1726 (10th Cir. 2002) (unpub’d opinion)	Utah law	AF—category G  Note: offense falls under category G only if prison sentence of at least one year imposed (in this case, the court held that defendant’s indeterminate sentence of 0–5 years would, for purposes of the requirement of category G, be considered a definite sentence for the possible 5 year maximum period of incarceration)
Trespass, criminal	<i>U.S. v. Delgado-Enriquez</i> , 188 F.3d 592 (5th Cir. 1999)	Colo. Rev. Stat. Ann. §18-4-502 (1st degree)	AF—category F as crime of violence with 18 U.S.C. §16(b)*  *statute requires entering or remaining in dwelling of another, which creates a substantial risk that physical force would be used against the residents in the dwelling  Note: offense falls under category F only if prison sentence of at least one year imposed
Unauthorized use of a motor vehicle	<i>U.S. v. Galvan-Rodriguez</i> , 169 F.3d 217 (5th Cir.), cert. denied, 528 U.S. 837 (1999)	Texas law	AF—category F as crime of violence under §16(b)*  *offense carries a ‘substantial risk’ that the vehicle might be broken into, stripped, or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well**  Note: the Fifth Circuit subsequently limited the holding in this case ‘to its property aspects’, among other things (see <i>U.S. v. Charles</i> , 301 F.3d 309 (5th Cir. 2002))  Note: offense falls under category F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Unlawful driving or taking of vehicle	<i>Matter of V-Z-S</i> , 22 I&N Dec. 1338 1338 (BIA 2000)	Cal. Vehicle Code §10851	AF—category G theft offense*  *A taking of property constitutes a theft offense within category G whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent; not all taking, however, will meet this standard because some takings entail a <i>de minimis</i> deprivation  Note: offense falls under category G only if prison sentence of at least one year imposed
Unlawful driving or taking of vehicle	<i>U.S. v. Cruz-Mandujano</i> , 2002 U.S. App. LEXIS 24417 (9th Cir. 2002) (unpub'd opinion)	Cal. Vehicle Code §10851	<u>NOT</u> AF under category F (following <i>Ye v. INS</i> , see “Burglary of vehicle”, <i>supra</i> )  <u>MAYBE</u> AF under category G as theft offense*  *statute is broader than the generic definition of theft in that it permitted conviction for aiding and abetting; there was insufficient information in the record to determine whether defendant was in fact convicted of generic theft.
Unlawful use of means of transportation	<i>U.S. v. Perez-Corona</i> , 295 F.3d 996 (9th Cir. 2002)	Ariz. Rev. Stat. §13-1803	<u>MAYBE</u> AF under category G*  *not all conduct penalized under statute falls within the generic definition of theft, because intent to deprive the owner of use or possession is not an element of the offense; in this case, no judicially noticeable facts existed in the record regarding circumstances of defendant’s conviction to determine if his conduct constituted a theft offense  Note: offense falls under category G only if prison sentence of at least one year imposed
Vehicular homicide (misdemeanor conviction with one year sentence)	<i>Francis v. Reno</i> , 269 F.3d 162 (3rd Cir. 2001)	75 Pa.C.S.A. §3732**	<u>NOT</u> AF under category F under either §16(a) or §16(b)*  *state vehicular homicide statute <i>at the time of conviction</i> in 1993 was categorized as a misdemeanor under state law. Where an offense is categorized as a misdemeanor under state law, it does not meet the definition of a crime of violence under §16(b). Even if state misdemeanors may be included under §16(b), conviction under state vehicular homicide statute still does not fall under crime of violence definition at §16(b) because statute required proof of criminal negligence only (unintentional conduct), not recklessness  Note: In 2000, the Pennsylvania Legislature amended 75 Pa. C. S. A. S 3732 by substituting ‘recklessly or with gross negligence’ for ‘unintentionally’ and increased the offense from a misdemeanor of the first degree to a felony of the third degree
Vehicular homicide (operating a motor vehicle while intoxicated resulting in the death of another)	<i>U.S. v. Santana-Garcia</i> , 2000 U.S. App. LEXIS 7285 (6th Cir. 2000) (unpub'd opinion)	Ind. Code Ann. §9-30-5-5(a)	AF—category F as crime of violence under both 18 U.S.C. §16(a) and §16(b)

<b>Crime</b>	<b>Case(s)</b>	<b>Basis for Underlying Conviction</b>	<b>Holding plus Notes</b>
<p>Vehicle homicide (homicide by intoxicated use of vehicle)</p>	<p><i>Bazan-Reyes v. INS</i>, 256 F.3d 600 (7th Cir. 2001)</p>	<p>Wisc. Stat. §940.09</p>	<p><u>NOT</u> AF under category F as crime of violence within §16(a)* or 16(b)**</p> <p>*because the word “use” in §16(a) requires volitional conduct</p> <p>**intentional force is virtually never employed to commit any of the offenses for which petitioners were convicted; §16(b) is limited to crimes in which the offender is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense.</p> <p>Note: may, however, be deemed AF if removal proceedings held within jurisdiction of federal circuits that have held DUI to be a crime of violence AF – see App. G, section 1.f), but only if prison sentence of at least one year imposed</p>
<p>Vehicle homicide (criminal vehicle homicide while having an alcohol concentration of 0.10 or more)</p>	<p><i>Omar v. INS</i>, 298 F.3d 710 (8th Cir. 2002)</p>	<p>Minn. Stat. §609.21, subd. 1(4)</p>	<p>AF—category F as crime of violence under §16(b)*</p> <p>*§16(b) does not state that intent is an element or that use of physical force must be intentional or even that force will be involved in the commission of the offense; analysis turns on whether an offense carries a substantial risk that its commission may involve the application of physical force against a person or property, rather than a substantial risk that force will be used</p> <p>Note: offense falls under category F only if prison sentence of at least one year imposed</p>