APPENDIX C-3
Sample Aggravated Felony Case Law Determinations

NOTE: This chart is separated by capital letter category which relates to the relevant subsection of the statutory definition of "aggravated felony" (see Apps. C-1 and J). Within each letter category, the cases are grouped by jurisdiction beginning with the Supreme Court and the Board of Immigration Appeals and continuing through the Circuit Courts of Appeals and the Federal District Courts (and by reverse chronological order within each grouping). 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 some cases, 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. The cases collected below should be used as the starting point rather than as a substitute for legal research on the particular offense.

(A) Murder, rape, or sexual abuse of a minor

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Sexual activity with certain minors	*In re V--- F--- D---*, 23 I. & N. Dec 859 (BIA 2006)	Fla. Stat. Ann. §794.05(1)	AF — category A as sexual abuse of a minor* *A minor is a person under the age of 18
Sexual abuse of a minor, misdemeanor	*Matter of Small,* 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 *U.S. v. Landeros-Gonzalez*, 262 F.3d 424 (5th Cir. 2001), *see* "Mischief, criminal" supra) **offense is not a felony as required to fall within COV definition at 18 U.S.C. §16(b) Note: BIA follows the law of the Fifth Circuit in this case because the case arose out of the Fifth Circuit
Sexual abuse of a minor (indecency with a child by exposure)	*Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999); *U.S. v. Zavala-Sustaita,* 214 F.3d 601 (5th Cir.) *cert. denied,* 531 U.S. 982 (2000)	Tex. Penal Code §21.11(a)(2)	AF — category A* *even though physical touching of the victim is not an element of the state crime
Aggravated criminal sexual contact	*Restrepo v. AG,* 617 F.3d 787; (3d Cir. 2010)	N.J. Stat. Ann. § 2C:14-3(a)	AF — category A* *state offense proscribes conduct that categorically fits into the BIA's definition of "sexual abuse of a minor" from *Matter of Rodriguez-Rodriguez*.
Oral copulation with individual under 18; Sexual penetration with individual under 18; and Sodomy with individual under 18	*Estrada-Espinoza v. Mukasey,* 546 F.3d 1147 (9th Cir. 2008); *U.S. v. Munoz-Ortenza, 563 F.3d 112 (5th Cir. 2009)*	Cal. Penal Code §288a(b)(1); Cal. Penal Code § 289(h); and Cal. Penal Code § 286(b)(1)	<u>NOT</u> AF under category A as sexual abuse of a minor (for both immigration and illegal reentry sentencing purposes)* *state statute proscribes conduct against persons under 18 years of age. The generic offense of "sexual abuse of a minor" requires an age difference of at least four years between the defendant and the minor. This statute is missing this entire element of the generic offense and thus, a conviction does not categorically meet the generic definition of sexual abuse of a minor. The modified categorical approach cannot be applied because a jury could not have been required to find the element of the generic crime which requires a four-year age difference between the defendant and the minor since this element is missing from the statute.

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Sexual intercourse with a minor (statutory rape)	*Estrada-Espinoza v. Mukasey,* 546 F.3d 1147 (9th Cir. 2008)	Cal. Penal Code §261.5(c)	<u>*NOT*</u> AF under category A as sexual abuse of a minor* *state statute proscribes conduct against persons under 18 years of age and only requires an age difference of more than three years between the defendant and the minor. Therefore, a conviction does not meet the generic definition of sexual abuse of a minor which requires a four year age difference between the defendant and the minor. The modified categorical approach cannot be applied because the statute is not divisible and t is not possible that a jury was actually required to find all the elements of the generic offense.
Sexual indecency to a minor (Public sexual indecency), attempted	*Rebilas v. Mukasey,* 527 F. 3d 783 (9th Cir. 2007)	Ariz. Rev. Stat. § 13-1001 and Ariz. Rev. Stat. § 13-1403(B)	<u>*MAYBE*</u> AF under category U/A as sexual abuse of a minor* *statute includes conduct that the minor may not have even been aware of and the statute does not require that the minor be touched. Therefore, a conviction does not categorically meet the generic definition of sexual abuse of a minor. Under the modified categorical approach, the record of conviction could be consulted to determine whether the offense, by its nature, meets the generic definition of "sexual abuse of a minor."
Endangering the welfare of a child	*Stubbs v. Attorney General,* 452 F.3d 251 (3d Cir. 2006)	N.J. Stat. Ann. §2C-24-4(a) (3rd degree)	<u>*NOT*</u> AF under category A as sexual abuse of a minor* *BIA definition of sexual abuse of a minor requires that a past act with a child actually have occurred; however, state statute punishes conduct that *would* coerce or entice a child, even if the coercion or inducement did not occur
Statutory rape	*U.S. v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006)	Tenn. Code Ann. §39-13-506	<u>*MAYBE*</u> AF under category A* *statute punishes conduct that may or may not involve physical or psychological abuse. For example, consensual sex between a 17-year-old and a 22-year-old does not involve substantial risk of physical force and does not necessarily result in physical harm or injury. Also, state courts do not require that conduct involve or result in physical abuse. Consensual sex with a late teen may not be psychologically harmful. A conviction for sexual penetration of a young teen or child would constitute sexual abuse of a minor. Note that 9th Circuit follows a bifurcated approach, in which it might give different meanings to the same term in criminal illegal reentry cases and immigration cases. This is an illegal reentry case and so the Court conducted de novo review. In *Afridi v. Gonzales*, an immigration case, the 9th Circuit afforded deference to BIA interpretation of the term, finding that statutory rape involving a minor under the age of 18 was sexual abuse of a minor.
Statutory rape	*Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006)	Cal. Penal Code §261.5	AF — category A as sexual abuse of a minor* *a conviction under statute requires sexual intercourse with a person under 18 years of age, which satisfies BIA interpretation that sexual abuse of a minor includes offenses that involves "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in…sexually explicit conduct." Note that Court afforded deference to BIA interpretation because this was a removal case. In *U.S. v. Lopez-Solis,* 9th Circuit held in an illegal reentry case that a similar state statute was not necessarily sexual abuse of a minor, and determination depended partly on age of minor.
Rape (sexual intercourse with a minor)	*Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006)	Ore. Rev. Stat. 163.355	AF — category A as rape *ordinary, contemporaneous and common meaning of "rape" requires sexual activity that is unlawful and without consent. Element of "without consent" does not require forcible compulsion, force or fear and is met by provision that a minor is incapable of consent.

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Contributing to the delinquency of a minor	*Vargas v. DHS*, 2006 U.S. App. LEXIS 15175 (10th Cir. 2006)	Colo. Rev. Stat. §18-6-701	<u>*MAYBE*</u> AF under category A as sexual abuse of a minor* *state statute punishes inducing, aiding or encouraging a minor to violate a law; whether the offense is sexual abuse of a minor depends on the nature of this predicate offense. *in the instant case, defendant was convicted of encouraging a minor to violate Colo. Rev. Stat. §18-3-404(1)(a), unlawful sexual contact, and therefore, was convicted of 'sexual abuse of a minor'
Sexual contact (illegal sexual contact with child under 16)	*Santos v. Gonzales*, 436 F. 3d 323 (2d Cir. 2005)	Conn. Gen. Gen. Stat. §53-21(a)(2)	AF — category A as sexual abuse of a minor
Indecent solicitation of a child	*Hernandez-Alvarez v. Gonzales*, 432 F. 3d 763 (7th Cir. 2005)	720 Ill. Comp. Stat. 5/11-6(a)	AF — category U/A as sexual abuse of a minor* *solicitation of a minor to engage in sexual activity constitutes sexual abuse of a minor because it contains an inherent risk of exploitation or coercion *impossibility of completing offense is not a defense under state statute or similar federal criminal statutes and do not preclude its categorization as an aggravated felony under category (U) (conduct involved soliciting an undercover adult police officer posing as a minor)
Sexual abuse, attempted	*Calilap v. Gonzales*, 137 Fed. Appx. 912 (7th Cir. 2005) (unpub'd)	720 Ill. Comp. Stat. 5/12-15(C)	AF — category U/A as sexual abuse of a minor* *impossibility of completing offense is not a defense under state statute or similar federal criminal statutes and do not preclude its categorization as an aggravated felony under category (U) (conduct involved adult police officer posing as a minor)
Sexual act, solicitation	*Gattem v. Gonzales*, 412 F. 3d 758 (7th Cir. 2005)	720 Ill. Comp. Stat. 5/11-14.1(a)	AF — category A as sexual abuse of a minor* (complaint establishes conduct involved a person under age 18, and Respondent admitted in immigration court that minor was under age 17) *verbal solicitation of a minor, though not necessarily coercive or threatening, is still abusive because it exploits minor's vulnerabilities
Sexual seduction	*U.S. v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005)	Nev. Rev. Stat. §§200.364, 200.368	AF — category A as sexual abuse of a minor* (even though offense is not a traditional felony and is classified as a misdemeanor under state law) *the use of young children for the gratification of sexual desires constitutes an abuse
Communication with a minor for immoral purposes	*Parrilla v. Gonzales*, 414 F.3d 1038 (9th Cir. 2005)	Wash. Rev. Code §9.68A.090	<u>*MAYBE*</u> AF under category A as sexual abuse of a minor* *conviction under statute is not categorically 'sexual abuse of a minor' or attempt to commit sexual abuse of a minor because the term 'immoral purposes' includes some conduct that is not 'abusive,' such as talking to a minor for the purpose of allowing him into a live erotic performance. Under the modified categorical approach, court examined the Certificate for Determination of Probable Cause (CDPC) as part of the record of conviction because defendant had explicitly incorporated it into his guilty plea, and found that his conduct was 'sexual abuse of a minor.' Note that Court afforded deference to BIA interpretation of sexual abuse of a minor because the INA did not define the term.
Sexual assault of a minor (with a 10 year age difference)	*Rios v. Gonzales*, 132 Fed. Appx. 189 (10th Cir. 2005) (unpub'd)	Colo. Rev. Stat. Ann. §18-3-402 (1)(e)	AF — category A* (even though offense may be a misdemeanor under state law) *conviction falls within scope of 18 U.S.C. §3509(a)(8)
Sexual activity with a child, soliciting	*Taylor v. US*, 396 F.3d 1322 (11th Cir. 2005)	Fla. Stat. §794-011(8)(a)	AF — category A sexual abuse of a minor* *Court applied the same definition of sexual abuse of a minor as *U.S. v. Padilla Reyes*, supra. Solicitation under this statute is 'nonphysical conduct committed for purposes of sexual gratification' which is included in this definition *whether Florida considers this offense less serious than other sex offenses is not relevant to this inquiry

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Sexual conduct, unlawful	*Singh v. Ashcroft*, 383 F. 3d 144 (3d Cir. 2004)	Del. Code Ann. tit. 11, §767 (3rd degree)	<u>*NOT*</u> AF under category A as sexual abuse of a minor* *Under the formal categorical approach, a conviction under this statute cannot be 'sexual abuse of a minor' because it does not include as an element that the conduct involve a minor *The formal categorical approach applies to the analysis of whether a conviction under this statute is a 'sexual abuse of a minor' because (a) the statute of conviction is not phrased in the disjunctive in a relevant way; and (b) the phrase 'sexual abuse of a minor' in the INA does not call for a factual inquiry; it is listed in the same section as the common-law offenses of murder and rape; and many states specifically criminalize sexual abuse of a minor, supporting the conclusion that Congress intended a formal categorical approach. Note that Court decided agency was not entitled to deference in this case, and expressly reserved decision on whether some BIA interpretations of the AF definition are entitled to deference.
Sexual abuse, aggravated criminal	*Espinoza-Franco v. Ashcroft*, 394 F. 3d 461 (7th Cir. 2004)	720 Ill. Comp. Stat 5/12-16(b)	AF — category A as sexual abuse of a minor* *Respondent's conviction fits squarely within the 'ordinary, contemporaneous and common meaning of the words' sexual abuse of a minor Note: State statute criminalizes sexual conduct on a family member younger than 18 years of age and defines 'sexual conduct' to include, in the case of a victim under 13 years of age, touching any part of body for sexual gratification or arousal. Court held that it was permissible to look beyond the indictment to determine victim's age, as long as it would not require an evidentiary hearing, and determined that Respondent had been convicted under this specific definition.
Sexual battery	*Larroulet v. Ashcroft*, 108 Fed. Appx. 506 (9th Cir. 2004) (unpub'd)	Cal. Penal Code §243.4(a)	<u>*NOT*</u> AF under category A as sexual abuse of a minor* *State statute does not include age of victim as an element of offense, so conviction does not meet generic definition of sexual abuse of a minor. Court also notes that although Respondent had stipulated to the facts in the police report as part of plea of no contest, he stipulated to only those facts necessary to support his conviction; therefore, age of victim could not be considered.
Annoying or molesting a child	*U.S. v. Pallares-*Galan, 359 F.3d 1088 (9th Cir. 2004);	Cal Penal Code §647.6(a)	<u>*MAYBE*</u> AF under category A as sexual abuse of a minor* *sexual abuse requires more than "improper motivation" (e.g. conduct motivated by desire for sexual gratification is not, by itself, sexual abuse). Statute punishes conduct that would constitute 'sexual abuse' and conduct that would not, such as annoying or molesting without injuring, hurting or damaging the minor. Here, under the modified categorical approach, the record of conviction failed to establish that the conduct for which person was convicted falls within sexual abuse of a minor.
Enticing a minor over the Internet	*Farhang v. Ashcroft*, 104 Fed. Appx. 696 (10th Cir. 2004) (unpub'd)	Utah Code Ann. §76-4-401	<u>*MAYBE*</u> AF under category A* *Court deferred to BIA's interpretation using 18 U.S.C. 3509(a)(8) as a guide to determining whether an offense is sexual abuse of a minor. State statute is arguably divisible because it punishes conduct involving a minor (which falls within scope of 18 U.S.C. 3509(a)) as well as conduct involving a person the defendant believes to be a minor (which might be broader than conduct punished by 18 U.S.C. 3509(a)(8)). In this case, Petitioner was responsible for proving jurisdictional facts (i.e. that his offense was not AF); because the administrative record did not show that the offense did not involve a minor, Court dismissed the petition.
Indecent assault of a child under 16	*Chuang v. US AG*, 382 F.3d 1299 (11th Cir. 2004)	Fla. Stat. Ann. 800.04	AF — category A as sexual abuse of a minor* *every prong involves "a purpose associated with sexual gratification"

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Lewdness with a child under 14	*Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003)	Nev. Rev. Stat. §201.230	AF — category A as sexual abuse of a minor* *although reach of the state statute is expansive, its punished conduct falls within common everyday meaning of the terms 'sexual,' 'minor,' and 'abuse.'
Sexual assault, attempted	*U.S. v. Deagueros-Cortes*, 2003 U.S. App. LEXIS 16462 (9th Cir. 2003) (unpub'd)	Ariz. Rev. Stat. §13-1001 and Ariz. Rev. Stat. 13-1406	AF — category U/A as rape* *the words 'of a minor' in category A qualifies 'sexual abuse' and not rape or murder; therefore, an offense need not involve a minor to be a rape AF
Sexual assault (lewd assault) on a child	*U.S. v. Londono-Quintero,* 289 F.3d 147 (1st Cir. 2002)	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
Rape	*U.S. v. Yanez-Saucedo,* 295 F.3d 991 (9th Cir. 2002)	Wash. Rev. Code §9A.44.060	AF — category A
Rape (statutory rape involving minor under age 17 but over age 16)	*Mugalli v. Ashcroft,* 258 F.3d 52 (2d Cir. 2001)	N.Y. Penal Law §130.25-2	AF — category A as sexual abuse of a minor* *even though minor was over the age of sixteen
Sexual abuse of a minor, misdemeanor	*U.S. v. Gonzales-Vela,* 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	*Guerrero Perez v. INS,* 242 F.3d 727 (7th Cir. 2001)	720 Ill. Comp. Stat. 5/12-15 (c)	AF — category A (even though offense is a misdemeanor under state law)
Sexual assault	*Lara-Ruiz v. INS,* 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 (lewd assault) on a child	*U.S. v. Padilla-Reyes,* 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)
Indecent liberties with a child	*Bahar v. Ashcroft,* 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)
Child molestation, attempted, misdemeanor	*U.S. v. Marin-Navarette,* 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)
Indecent assault and battery on a child under 14	*Emile v. INS,* 244 F.3d 183 (1st Cir. 2000)	Mass. Gen. Laws ch. 265, §1313	AF — category A as sexual abuse of a minor

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Rape	*Castro-Baez v. Reno,* 217 F.3d 1057 (9th Cir. 2000)	Cal. Penal Code §261(a)(3)	AF — category A
Sexual assault (consensual sexual penetration)	*U.S. v. Navarro-Elizondo,* 2000 U.S. App. LEXIS 7215 (9th Cir. 2000) (unpub'd opinion)	N.J. Stat. Ann. §2C:14-2a(3)	*NOT* 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 behavior (lewd behavior) with individual 14 or under	*U.S. v. Baron-Medina,* 187 F.3d 1144 (9th Cir. 1999), *cert. denied,* 531 U.S. 116 (2001)	Cal. Penal Code §288(a)	AF — category A as sexual abuse of a minor
Sexual abuse, attempted	*U.S. v. Meza-Corrales*, 2006 U.S. Dist. LEXIS 11199 (E.D. Wa. 2006)	Or. Rev. Stat. §§161.405(2)(c), 163.427	*MAYBE* AF under category A as sexual abuse of a minor* *Some sections of state statute require the involvement of a minor, and some do not. The record of conviction, which the Court held does not include a police report, did not establish that the offense had involved a minor; therefore, under modified categorical approach, conviction was not sexual abuse of a minor.
Child pornography (parent's consent to use of children in a sexual performance)	*Gonzalez v. Ashcroft*, 369 F.Supp. 2d 442 (S.D.N.Y. 2005)	N.Y. Penal Law §263.05	*MAYBE* AF under categories I or A* *portion of the state statute penalizing consent by parent does not require scienter level of at least "knowing," which is required for a conviction under 18 U.S.C. §2251 (for purposes of AF category I) and also required for an offense to be a "sexual abuse of a minor" AF under category A.
Murder, attempted	*Cabreja v. U.S. I.N.S.*, 2003 U.S. Dist. LEXIS 26715 (SDNY 2003)	State and statute are not identified	AF — category U/A as murder

(B) Illicit trafficking in a controlled substance

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, simple possession without a prescription (second conviction)	*Carachuri-Rosendo v. Holder, No. 09-60,* 560 U.S. __ (June 14, 2010)	Tex. Health & Safety Code Ann. §481.117(a) and (b).	NOT AF under category B* *second or subsequent simple possession offense is not "recidivist possession" and therefore not a felony under the federal Controlled Substances Act unless the prior drug conviction had actually been established in the criminal case in a process that, at a minimum, provided the defendant with notice and an opportunity to be heard on whether recidivist punishment was proper. Therefore, a conviction would not be a "drug trafficking crime" AF.
Controlled substance, aiding and betting simple possession of cocaine (first conviction)	*Lopez v. Gonzales,* 549 U.S. 47 (2006)	S. D. Codified Laws §22-42-5 (1988); §22-6-1 (Supp. 1997); §22-3-3 (1988) (classified as a felony under South Dakota law)	NOT AF under category B (for both immigration and illegal reentry sentencing purposes)* *a state drug offense is a 'felony punishable under the Controlled Substances Act' and therefore a "drug trafficking crime" AF only if it proscribes conduct punishable as a felony under federal law. Conduct made a felony under state law but treated as a misdemeanor under federal law is not a "drug trafficking crime" AF. In this case, the conviction for aiding and abetting simple drug possession is not AF because simple possession is generally treated only as a misdemeanor under federal law. For more on *Lopez, see* App. G, section 1.b
Delivery by actual transfer of a simulated controlled substance	*Matter of Sanchez-Cornejo,* 25 I&N Dec. 273 (BIA 2010)	Texas Penal Code	NOT AF under category B* *state offense punishes conduct that is not considered a felony under the Controlled Substances Act because the delivery of a simulate controlled substance is not an offense that is punishable under the Controlled Substances Act. The Controlled Substances Act makes it unlawful to "create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." In this case, the respondent's offense does not fall within this definition.
Controlled substance, simple possession without a prescription (second conviction)	*Matter of Carachuri-Rosendo,* 24 I&N Dec. 382 (BIA 2007)	Tex. Health & Safety Code Ann. §481.117(a) and (b).	NOT AF under category B* *at a minimum, all state recidivism prosecutions must correspond to the Controlled Substance Act's treatment of recidivism by providing the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper in order for a particular crime to be deemed to correspond to a federal "recidivist" felony offense.
Possession of a controlled substances with intent to deliver	*Catwell v. AG,* __ F.3d __, 2010 WL 3987664 (3d Cir. 2010)	35 PA. Stat. Ann. § 780-113(a)(30)	AF — category B* *In this case, the respondent had 120.5 grams of marihuana and this is not a "small" amount of marihuana for the purposes of 21 U.S.C. § 841(b)(4) and therefore the conviction is a "drug trafficking aggravated felony."
Criminal sale of a controlled substance	*Davila v. Holder*, 2010 U.S. App. LEXIS 12230 (5th Cir. 2010) (unpub'd opinion)	N.Y. Penal Law § 220.41	MAYBE AF under category B* *state offense proscribes an "offer to sell" a controlled substance which is not an offense under the Controlled Substance Act, and therefore is not categorically a "drug trafficking crime aggravated felony" Under the modified categorical approach, the record of conviction does not reveal anything about the nature of the "sale" because the indictment merely tracked the language of the statute
Possession of a controlled substance for sale	*Check Fung S-Yong v. Holder,* 600 F.3d 1028 (9th Cir. 2010)	Cal. Health & Safety Code § 11379(a)	MAYBE AF under category B * *this state drug offense includes more substances than are proscribed under section 102 of the federal Controlled Substances Act. Under the modified categorical approach, the Immigration Judge erred in relying on the admissions of the respondent and an extra-record document to determine that conviction of this offense was for a substance included in section 102 of the federal Controlled Substances Act.

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Possession of a controlled substance with intent to deliver	*Vasquez-Martinez v. Holder,* 564 F.3d 712 (5th Cir. 2009)	Tex. Health & Safety Code Ann. §481.112(a)	AF — category B* *possession with intent to deliver a controlled substance is a "drug trafficking crime" AF.
Possession with intent to deliver marihuana	*Julce v. Mukasey,* 530 F.3d 30 (1st Cir. 2008)	Mass. Gen. Laws ch. 94C § 32C(a)	AF — category B* *possession of any amount of marihuana up to fifty kilograms with intent to distribute is a "drug trafficking crime" AF. The respondent did not meet his burden to show that his conduct fits within 21 U.S.C. § 841(b)(4), which punishes the distribution of small amounts of marihuana as a federal misdemeanor.
Criminal Possession of a controlled substance	*Alsol v. Mukasey,* 548 F.3d 207 (2d Cir. 2008)	N.Y. Penal Law §220.03	*NOT* AF under category B* *second of subsequent simple possession conviction is not a "drug trafficking crime" AF where the respondent did not admit to his status as a recidivist or have that status determined by a court or jury within the prosecution for the second possession offense.
Criminal Sale of Marihuana	*Martinez v. Mukasey,* 551 F.3d 113 (2d Cir. 2008)	N.Y. Penal Code § 221.40	*NOT* AF under category B* *state statute punishes non-remunerative transfer of small quantities of marihuana. This conduct would be considered a federal misdemeanor under 21 U.S.C. § 841(b)(4) and thus not a "drug trafficking crime" AF.
Possession with intent to deliver a controlled substance	*Evanson v. Atty. Gen.,* 550 F.3d 284 (3d Cir. 2008); *Jeune v. Atty. Gen.,* 476 F.3d 199) (3d Cir. 2007)	35 Pa. Stat. Ann. § 780-113(a)(30)	*MAYBE* AF under category B* *state statute does not include remuneration as an element and therefore is not categorically a "drug trafficking crime" AF. Under the modified categorical approach in this case, the record of conviction did not establish any evidence of remuneration.
Criminal possession of a controlled substance (second conviction)	*Rashid v. Mukasey,* 531 F.3d 438 (6th Cir. 2008)	Mich. C.L. § 333.74032(d)	*NOT* AF under category B* *state drug possession conviction made no reference to the first conviction. Since there was no finding of recidivism in the criminal proceeding, this second conviction is not a "drug trafficking crime" AF.
Possession of a controlled substance with intent to distribute	*Rendon v. Mukasey,* 520 F.3d 967 (9th Cir. 2008)	Kan. Stat. Ann. § 65-4163(a)	*MAYBE* AF under category B* *state offense is divisible as it proscribes solicitation of a controlled substance, which is not a "drug trafficking crime" AF, as well as possession with intent to distribute a controlled substance, which is necessarily a "drug trafficking crime" AF. Under the modified categorical approach in this case, the record of conviction established a conviction for possession with intent to distribute a controlled substance and thus, the conviction was a "drug trafficking crime" AF.
Criminal possession of a controlled substance	*Escobar v. Attorney General of U.S.,* 221 Fed. Appx. 85 (3d Cir. 2007) (unpublished	N.Y. Penal Code § 220.16	*MAYBE* AF under category B* *state offense that includes a subsection penalizing possession with intent to sell should not categorically be considered a "drug trafficking crime" AF, if the government is unable to show by clear and convincing evidence that the individual was convicted under the "intent to sell" subsection.

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Criminal sale of marihuana (second conviction)	*McNeil v. AG of the US,* 238 Fed. Appx. 858 (3d Cir. 2007) (unpub'd opinion)	N.Y. Penal Law § 221.40	<u>*NOT*</u> AF under category B* *this state statute proscribes "selling for consideration less than two grams or one cigarette of marihuana" or "distributes without consideration more than two grams or one cigarette of marihuana." This conduct falls within the scope of 21 U.S.C. § 841(b)(4) and is thus not a federal felony. The court quoted from *Gerbier v. Holmes*, 280 F.3d 297 at 300, stating that "a prior conviction cannot be used to enhance a sentence for purposes of determining whether the alien has been convicted of an 'aggravated felony' when his prior conviction was never litigated as part of the criminal proceeding in the crime for which the alien is being deported."
Unlawful delivery of a controlled substance	*U.S. v. Gonzalez,* 484 F.3d 712 (5th Cir), cert. denied, 127 S.Ct. 3031 (2007)	Texas Health & Safety Code § 481.112	<u>*MAYBE*</u> AF under category B (for illegal reentry sentencing purposes)* *state offense is divisible as it punishes offering to sell a controlled substance which falls outside the definition of "deliver" under U.S. Sentencing Guideline § 2L1.2 and thus, a conviction is not categorically a "drug trafficking crime." Under the modified categorical approach, the record of conviction must establish that the offense falls within the definition of "deliver" for § 2L1.2.
Controlled substance, simple possession of crack cocaine (second conviction)	*Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006)	Mass. Gen. Laws ch. 94C, § 34 (classified by the state as a misdemeanor or felony, depending on whether the recidivism sentence enhancement has been applied)	<u>*MAYBE*</u> AF under category B* *a state drug offense may be a "drug trafficking crime" AF if it is (i) punishable as a felony under federal law or (ii) if it is classified as a felony under state law. Both federal and Massachusetts law provide for recidivism-based sentence enhancements that punish a second or subsequent drug offense as a felony, but require that the prior conviction be charged before the government can seek the sentence enhancement. A second state misdemeanor drug possession is not punishable as a felony under federal law if the person was not so charged. Here, using the modified categorical approach, the Court held that the second conviction was not punishable as a felony under federal law because the record of conviction for this second offense did not contain any reference to the prior conviction. Note: **Superceded as to prong (ii) above by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b
Controlled substance, possession with intent to distribute marihuana	*Henry v. Gonzales*, 464 F.3d 74 (1st Cir. 2006)	Mass. Gen. Laws ch. 94C, § 32C(a) (misdemeanor)	AF — category B* *A "drug trafficking crime" AF includes a state offense that is punishable as a felony under one of the three enumerated federal statutes. Even if this state statute is broader in scope than these three federal laws, the particular conduct to which respondent pled guilty, possession with intent to distribute, clearly is punishable as a felony under federal law and therefore a "drug trafficking crime" AF.
Controlled substance, sale of marihuana (second conviction)	*Smith v. Gonzales,* 468 F.3d 272 (5th Cir. 2006), superceded in part by *Lopez v. Gonzales,* 549 U.S. 47 (2006) (see above)	N.Y. Penal Law §221.40 (misdemeanor)	<u>*NOT*</u> AF under category B* *Court indicates that Fifth Circuit precedent may be that 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 the law of the convicting jurisdiction. However, the Court does not conclusively reach this issue because it finds that this offense is not a drug trafficking crime under either convicting jurisdiction or hypothetical federal felony approach. Under the hypothetical federal felony approach, a second state misdemeanor possession offense is not a drug trafficking crime where the first conviction was not final at the time of the second conviction. The Court held that the first conviction in this case was not final at the time of his second conviction because the period to seek discretionary review of his first conviction had not yet elapsed. *(continued)*

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
			(continued) Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b.
Controlled substance, simple possession of cocaine (first conviction)	*Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006)	Illinois state law (classified by the state as a felony)	<u>*NOT*</u> AF under category B* *A state law felony that is punishable as a misdemeanor under federal law is not a drug trafficking AF
Controlled substance, simple possession of cocaine (first conviction)	*United States v. Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005), superceded by *Lopez v. Gonzales,* 549 U.S. 47 (2006) (see above)	Md. Code, Art. 27, 287(e) (misde-meanor)	<u>*NOT*</u> AF under category B* *A drug trafficking AF is an offense that is (i) a felony and (ii) punish-able under the CSA. A state drug offense is a "felony" under prong (i) if it is classified by the state as a felony. It is not a "felony" if it is classified by the state as a misdemeanor but punishable by a term of imprisonment of more than one one year. Here, the offense was classified by the state as a mis-demeanor, and therefore did not meet the "felony" requirement, even though it carried a possible sentence of four years imprisonment. Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b.
Controlled substance, possession of a cocaine (second conviction)	*United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005), superceded in part by *Carachuri-Rosendo v. Holder, No. 09-60,* 560 U.S. __ (June 14, 2010) (see above)	Ohio Rev. Code Ann. § 2925.11(A) (felony); Ky. Rev. Stat. Ann. § 218A. 1415(1) (first degree felony)	<u>*MAYBE*</u> AF under category B (in both immigration and sentencing contexts)* *State felony conviction which does not contain a trafficking element must be punishable *as a felony under federal law* in order for it to be deemed a drug trafficking crime AF. A second state possession offense is not "punishable as a felony under federal law" if it occurred before the prior drug conviction was final. Note: **Superceded in part by *Carachuri,*** which held that second or subsequent simple possession offense is not "recidivist possession" and thus not a felony under the federal Controlled Substances Act to be considered a "drug trafficking crime" AF where the state conviction was not based upon the finding of a prior conviction.
Controlled substance, simple possession of heroin (first conviction)	*Liao v. Rabbett*, 398 F.3d 389 (6th Cir. 2005)	Ohio Rev. Code § 2925.11 (fifth degree felony)	<u>*NOT*</u> AF under category B* *Court, without taking a position on which approach applies, held that offense was not a drug trafficking crime under either the hypothetical felony or guidelines approach. Under the guidelines approach, a state drug offense is not a "felony," even if it is labeled as such, unless it is punishable by a term of imprisonment of more than one year. Note: **Cf. *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b.

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, trafficking marihuana over 8 ounces, less than 5 pounds (first conviction)	*Garcia-Echaverria v. United States*, 376 F.3d 507 (6th Cir. 2004)	K.R.S. 218A.1421(3) (felony)	AF — category B* *The court does not take a position on the proper analysis to determine whether a state drug offense is a drug trafficking crime AF. However, the court found that the state felony offense is a drug trafficking crime AF even under the more favorable hypothetical federal felony approach. State statute penalizes possession with intent to distribute at least 8 ounces of marihuana, which is analogous to the federal felony offense of distribution. Although federal law contains an exception to the felony classification for gratuitous distribution of a small amount of marihuana, 8 ounces of marihuana is not a "small amount," and would therefore not be covered by this exception. Note: **Cf. *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b.
Controlled substance, possession of methamphetamine	*Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004)	Ariz. Rev. Stat. Ann. §13 3407 (felony)	<u>*NOT*</u> AF under category B (for immigration purposes)* *A state drug offense is a "drug trafficking crime" AF only if it is punishable as a felony under one of the three enumerated statutes. Court notes that a state offense is "illicit trafficking" drug AF if it contains a trafficking element.
Controlled substance, possession of methamphetamine (second conviction)	*Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004)	Cal. Health & Safety Code §11377(a) (wobbler offense; misdemeanor conviction)	<u>*NOT*</u> AF under category B (for immigration purposes)* *The Court applied the same legal standard as *Cazarez-Gutierrez v. Ashcroft,* supra, and *U.S. v. Corona-Sanchez*, infra, to determine whether this offense was an AF under category B. Simple possession of methamphetamine, without considering the separate recidivist enhancements, is punishable as a misdemeanor under federal law, and is therefore not a drug trafficking crime AF. The state offense does not contain a trafficking element, so it is also not an illicit trafficking AF. Court also noted that even if it were to consider the state felony approach, conviction would not be AF. State statute is a California wobbler offense, which is potentially punishable as a felony but is automatically converted to a misdemeanor punishable by a maximum of six months when a state prison sentence is not imposed — which was the situation in this case.
Controlled substance, traveling in interstate commerce to promote illegal activity	*Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003)	18 U.S.C. § 1952 (Travel Act) (felony)	<u>*MAYBE*</u> AF under category B* *"Illicit trafficking" involves illegally "trading, selling or dealing" in specified goods. Here, the Court looked to the plea agreement, which revealed that the petitioner pled guilty to traveling in interstate commerce for the specific purpose of promoting a "business enterprise involving cocaine." The court first held that this conviction related to a controlled substance because there was a "sufficiently close nexus between the violation and the furtherance of a drug-related enterprise." Court then determined that carrying on a business enterprise that deals in narcotics is within the ambit of illicit trafficking.
Controlled substance, sale of a hallucinogenic/narcotic	*Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003)	Conn. Gen. Stat. § 21a-277(a) (felony)	AF — category B* *State felony conviction constituted "illicit trafficking in a controlled substance" under 8 U.S.C. 1101(a)(43)(B) and was therefore AF. The act of selling a controlled substance is illicit trafficking. *Under the categorical approach, where the record of conviction is inconclusive as to the substance that formed the basis for the conviction, the conviction is not an AF if the state offense covers substances outside the federal definition of "controlled substance." Here, the scope of "narcotic drugs" under Conn. state law is not broader than the scope of "controlled substances" under federal law.

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, possession with intent to manufacture, distribute or dispense at least one ounce, and less than five pounds, of marihuana	*Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003)	N.J. Stat. Ann. § 2C: 35-5(b) (11)	<u>*MAYBE*</u> AF under category B* *The Court applied the same legal standard as *Gerbier v. Holmes*, supra, to determine whether offense was an AF under category B. A conviction under this statute is not a "drug trafficking crime" because the offense is not punishable as a felony under federal law – the state statutory elements may be satisfied by distribution of marihuana without remuneration, and federal law punishes gratuitous distribution of a small amount of marihuana with a maximum sentence of one year imprisonment (i.e. a misdemeanor). Note: The court did not decide whether a conviction under this statute may satisfy the "illicit trafficking" prong of category B.
Controlled substance, simple possession of unknown quantity of cocaine (first conviction)	*U.S. v. Wilson,* 316 F.3d 506 (4th Cir. 2003), superceded by *Lopez v. Gonzales,* 549 U.S. 47 (2006) (see above)	Virginia law (felony)	AF — category B* *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) 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 Note: **Second paragraph above is superceded by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b.
Controlled substance, simple possession of marihuana (first and second conviction)	*United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003), superceded in part by *Lopez v. Gonzales,* 549 U.S. 47 (2006) (see above)	Arizona statute (misdemeanor)	<u>*NOT*</u> AF under category B (for illegal reentry sentencing cases)* *a drug offense is a "drug trafficking crime" AF if it is (i) punishable under the federal Controlled Substances Act and (ii) a felony *punishable by more than one year's imprisonment* under applicable state or federal law. Punishment includes only punishment for the substantive offense, not recidivist enhancements. (following *U.S. v. Corona-Sanchez*, infra. Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b.
Controlled substance, trafficking in marihuana, cocaine, illegal drugs, methamphetamines, LSD (first or second drug conviction)	*Gerbier v. Holmes,* 280 F.3d 297 (3d Cir. 2002)	16 Del. Code Ann. §4753A (a)(2)(a) (felony)	<u>*MAYBE*</u> AF under category B* *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"). Here, the defendant's conviction was *NOT* 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. 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)** **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 *Steele v. Blackman,* infra)

Crime	Case(s)	Basis for Underlying Conviction	Holding plus Notes
Controlled substance, simple possession (first conviction)	*U.S. v. Arellano-Torres,* 303 F.3d 1173 (9th Cir. 2002), superceded in part by *Lopez v. Gonzales,* 549 U.S. 47 (2006) (see above)	Nev. Rev. Stat. §453.336(2)	AF — category B (for illegal reentry sentencing cases)* *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 more than one year's imprisonment under applicable state or federal law 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 *U.S. v. Rivera-Sanchez*, infra). 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 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"). *Cf. U.S. v. Robles-Rodriguez,* infra 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 *U.S. v. Rivera-Sanchez,* infra) Note: **Superceded in part by *Lopez,*** which held a state drug offense is a "drug trafficking crime" AF, for both immigration and illegal reentry sentencing purposes, only if it is punishable as a felony under *federal* law — s*ee* App. G, section 1.b
Controlled substance, distributing marihuana (first conviction)	*U.S. v. Zamudio,* 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)	AF — category B* *as "illicit trafficking in a controlled substance" as defined in 28 U.S.C. §802 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
Controlled substance, marihuana, transport, import, sell, furnish, administer, giver away, or offer to do any of above, or give away or attempt to import or transport	*U.S. v. Rivera-Sanchez,* 905 247 F.3d (9th Cir. 2001) (en banc)	Cal. Health & Safety Code §11360(a)	<u>*MAYBE*</u> AF under category B (for illegal reentry sentencing cases)* *To determine whether a state offense in 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. 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 punish-able under the state statute is not an AF under category B, see *Leyva-Licea v. INS,* 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
Solicitation to possess marihuana for sale	*Leyva-Licea v. INS,* 187 F.3d 1147 (9th Cir. 1999); see also *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001), supra, 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

(C) Illicit trafficking in firearms or destructive devices, or in explosive materials

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Firearms, conspiracy to export without a license	*Kuhali v. Reno,* 266 F.3d 93 (2d Cir. 2001)	22 U.S.C. §2778; 18 U.S.C. §371	AF — category U/C

(D) Certain offenses relating to laundering of monetary instruments or engaging in monetary transactions in property derived from specific unlawful activity <u>if the amount of the funds exceeded $10,000</u>

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Money laundering ($1,310 check, but restitution amount ordered to victim had exceeded $10,000)	*Chowdhury v. INS,* 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)
Money laundering, aiding and abetting	*U.S. v. Cordova-Sanchez,* 2006 U.S. Dist. LEXIS 23575 (S.D. Tex. 2006)	18 U.S.C. 2 / 18 U.S.C. 1956(a)(2)(A)	AF — category D *court used PSR to determine that offense was AF, but does not discuss whether this is appropriately a part of ROC Note: offense falls under category D if amount of funds exceeds $10,000
Money laundering, conspiracy	*Oyeniyi v. Estrada,* 2002 U.S. Dist. LEXIS 17267 (N.D. Texas 2002)	18 U.S.C. §1956(h)	AF — category U/D Note: offense falls under category U/D only if amount of funds involved in the transaction exceeds $10,000

(E) Certain explosive materials and firearms offenses

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Firearms, possession by a felon	*Matter of Vazquez-Muniz,* 23 I&N Dec. 207 (BIA 2002); *U.S. v. Castillo-Rivera,* 244 F.3d 1020 (9th Cir.), *cert. denied,* 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, possession by person convicted of serious offense	*U.S. v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir. 2003)	Wash. Rev. Code §9.41.040(1)(a)	AF — category E relating to firearms* *state statute defined "serious offense" as offense punishable by more than one year, and therefore is analogous to U.S.C §922(g)(1)
Firearms, possession by illegal alien	*U.S. v. Powell,* 2001 U.S. App. LEXIS 21868 (2d Cir. 2001) (unpub'd opinion)	18 U.S.C. §922(g)(5)	AF — category E
Firearms, possession by non-citizen without a license	*U.S. v. Sandoval-Barajas,* 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 noncitizens 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 shotgun	*U.S. v. Villanueva-Gaxiola,* 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)

(F) Crime of violence <u>for which a term of imprisonment is at least one year</u>

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Simple Battery	*Johnson v. U.S.,* 130 S.Ct. 1265 (2010)	Fla. Stat. § 784.03(1)(a)	<u>*NOT*</u> Violent Felony (under the Armed Career Criminal Act's "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)* *state statute may be violated by any intentional physical conduct, no matter how slight. The phrase "physical force" in the "violent felony" definition under the ACCA means "violent force- that is, force capable of causing physical pain or injury to another person." Thus, conviction under this state statute falls outside the definition of "violent felony" under 18 U.S.C. § 924(e)(2)(B). The "violent felony" definition in 18 U.S.C. § 924(e)(2)(B) is similar to the "crime of violence" definition in 18 U.S.C. §16.
Failing to report to a penal institution	*Chambers v. U.S.,* 129 S.Ct. 687 (2009)	Ill. Comp. Stat., ch. 720, § 5/31-6(a)	<u>*NOT*</u> Violent Felony (under the Armed Career Criminal Act's "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)* *this state offense is a crime of inaction and is distinct from "escape from a penal institution." Since this is a crime of inaction, it does not "involve conduct that presents a serious potential risk of physical injury to another." The "violent felony" definition in 18 U.S.C. § 924(e)(2)(B) is similar to the "crime of violence" definition in 18 U.S.C. §16.
Driving under the influence and causing serious bodily injury	*Leocal v. Ashcroft*, 543 U.S. 1 (2004)	Fla. Stat. Ch. §316.193(3)(c)(2)	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *offense must require a higher mens rea than negligent or mere accidental conduct in order to be a "crime of violence" under 18 U.S.C. §16(a) or (b). §16(b) requires substantial risk of use of force, which does not encompass all offenses which create a substantial risk of injury. *court also observed that the plain and ordinary meaning of "crime of violence" and its emphasis on use of physical force "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses" and reaffirmed, in a footnote, the rule of lenity requiring that ambiguity in statutes with criminal and non-criminal applications be interpreted in the petitioner's favor. Finally, Court did not decide whether an offense that requires mere *reckless* use of force might be a crime of violence.
Unauthorized use of a motor vehicle	*In re Miguel Antonio Brieva-Perez*, 23 I.&N. Dec. 766 (BIA 2005)	Texas Penal Code §31.07(a)	AF — category F crime of violence within 18 U.S.C. §16(b)* *but not within 16(a) because use of force is not an element of the offense *offense carries a substantial risk that an unauthorized driver may use physical force to gain access to a vehicle and to drive it; G*alvan- Rodriguez*, supra, remains good law after *Leocal*. Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, misdemeanor	*Matter of Martin,* 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 *Chrzanoski v. Ashcroft, 327* F.3d 188 (2d Cir. 2003), below. *Note that this case was decided before the Supreme Court issued its decision in* Leocal v. Ashcroft*,* 543 U.S. 1 (2004), *infra.* 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*
Driving while intoxicated (operating a motor vehicle while under the influence)	*Matter of Ramos,* 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) and will require that an offense be committed *at least recklessly* 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 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) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.*
Driving while intoxicated	*Matter of Olivares,* 23 I&N Dec. 148 (BIA 2001)	Tex. Penal Code §§49.04 and 49.09	<u>*NOT*</u> AF under category F
Contempt, criminal	*Matter of Almonte* (BIA Dec. 5, 2001) (unpub'd opinion)	N.Y. Penal Law §215.51 (b)(iii) (1st degree)	<u>*NOT*</u> AF under category F
Child abuse, criminally negligent	*Matter of Sweetser,* 22 I&N Dec. 709 (BIA 1999)	Colo. Rev. Stat. §18-6-401(1) & (7)(a)(II)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or 16(b)** *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). **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 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)
Contempt, criminal	*Matter of Aldabesheh,* 22 I&N Dec. 983 (BIA 1999)	N.Y. Penal Law §215.51 (b)(i) (1st degree)	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* 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*
Arson (intentionally starting a fire)	*Matter of Palacios-Pinera,* 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
Terrorism	*Matter of S-S-,* 21 I&N Dec. 900 (BIA 1997)	Iowa Code Annotated §708.6	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter, attempted	*Matter of Yeung,21* I&N Dec. 610 (BIA 1996)	Florida law	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Rape (statutory rape)	*Matter of B-,* 21 I&N Dec. 287 (BIA 1996)	Mar. Ann. Code Art. 27, §463(a)(3) (2nd degree)	AF — category F as crime of violence under §16(b)* *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 Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter, involuntary (reckless)	*Matter of Alcantar,* 20 I&N Dec. 801 (BIA 1994)	Ill. Rev. Stat. Ch. 38, para. 9-3(a)	AF — category F as crime of violence within 18 U.S.C. §16(b)* *the *nature* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Criminal possession of a weapon	*Brooks v. Holder,* 621 F.3d 88 (2d Cir. 2010)	N.Y. Penal Law § 265.03(1)(b)	AF — category F as crime of violence within 18 U.S.C. §16(b)* *this state statute punishes the possession of a loaded firearm with the intent to use it unlawfully against another person which "plainly involves a substantial risk that physical force against the person or property of another may be used," and therefore constitutes a "crime of violence."
Aggravated Assault	*U.S. v. Palomino-Garcia,* 606 F.3d 1317 (11th Cir. 2010)	Ariz. Stat. § 13-1204(A)(7)	<u>NOT</u> AF under category F for illegal reentry purposes* *state statute does not require either the use of a deadly weapon or the intent to cause serious bodily injury, and m therefore, its elements do not substantially correspond to the elements of the generic offense of aggravated assault and a conviction of this crime is not categorically a "crime of violence" under the Sentencing Guidelines. Under the modified categorical approach, the record of conviction did not establish that the defendant committed the assault either intentionally or knowingly, and therefore, does not constitute a "crime of violence.".
Unlawful use of a vehicle	*Serna-Guerra v. Holder,* 354 Fed. Appx.929 (5th Cir. 2009) (holding after remand from the Supreme Court in 129 S.Ct. 2764 (2009)	Tex. Pen.Code § 31.07(a)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *this state offense doest not include any essential element of violent and aggressive conduct. The generic definition of "crime of violence" "must itself involve purposeful, violent and aggressive conduct." Thus, conviction under this state statute is not a "crime of violence" AF. 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*
Criminal recklessness	*Jimenez-Gonzalez v. Mukasey,* 548 F.3d 557 (7th Cir. 2008)	Ind.Code § 35-42-2-2(b)(1), (c)(3)	NOT AF under category F as crime of violence within 18 U.S.C. §16(b)* *this state statute punishes reckless conduct, does not punish any purposeful conduct, and "does not necessarily create a risk that force may be used as a means to an end during the commission of the offense." Reckless crimes are not "crimes of violence" under 18 U.S.C. §16(b) and thus a conviction under this statute is not a "crime of violence" AF. Note: offense falls under category F only if prison sentence of at least one year imposed
Assault on a public servant	*United States v. Zuniga-Soto,* 527 F.3d 1110 (10th Cir. 2008)	Tex. Penal Code § 22.01(a)(1)	NOT AF under category F for illegal reentry purposes* *this state statute punishes reckless conduct and is not categorically a "crime of violence" since negligent, merely accidental and reckless conduct do not meet the definition of "crime of violence" under **§ 2L1.2 for a sentencing enhancement in the illegal reentry context.** Under the modified categorical approach, the record of conviction may only be consulted to determine which part of the statute was offended. In this case, the record of conviction established that the statute could have been violated with reckless conduct and therefore this conviction was not a "crime of violence."
Assault and battery upon a police officer	*Blake v. Gonzales,* 481 F.3d 152 (2d Cir. 2007)	Mass. Gen. Laws ch. 265 sec. 13D	AF — category F as crime of violence within 18 U.S.C. §16(a) and (b)* *this statute statute prohibits the employment of "intentional and unjustified use of force" against a police officer and this constitutes "the use of physical force" within the meaning of §16(a), The requirement for intentional and unjustified use of force against a police officer "inescapably involves a 'substantial risk that physical force ... may be used'" as required under §16(b). This state statute includes a possible incarceration punishment of two and one-half years. Under federal law at 18 U.S.C. § 3559(a), a crime is a felony if "the maximum term of imprisonment" is more than one year. Thus, it is not relevant that the state categorizes this statute as a misdemeanor and therefore conviction under this statute is a "crime of violence" AF under 18 U.S.C. §16(b). Note: offense falls under category F only if prison sentence of at least one year imposed
Stalking (harassment)	*Malta-Espinoza v. Gonzales,* 478 F.3d 1080 (9th Cir. 2007)	Cal. Penal Code § 646.9	NOT AF under category F as crime of violence within 18 U.S.C. §16(b)* *this statute includes conduct carried on only at a long distance from the victim (i.e., sending letters or pictures) and therefore it cannot be said that a substantial risk of physical force to the person or property of another is required to violate this statute and thus it is not a "crime of violence" AF under §16(b). Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault (statutory rape)	*Aguiar v. Gonzales*, 438 F.3d 86 (1st Cir. 2006)	R.I. Gen. Laws §11-37-6	AF — category F crime of violence within 18 U.S.C. §16(b)* *but not within 16(a) because the offense does not have as an element the use, attempted use or threatened use of force *there is a substantial risk of use of force during sexual contact with a person who *cannot legally consent* under state law; court refuses to distinguish between legal and factual consent and also discusses legislative motivation for the statute is that physical force may be used by an older perpetrator. The Court clarifies that the "substantial risk" requirement in 16(b) relates to the use of force and not the possible effect of a person's conduct, such as injury. Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* 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*
Assault of a police officer	*Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006)	Conn. Gen. Stat. §53a-167c(a)(1)	AF — category F crime of violence within 18 U.S.C. §16(b)* *assault of a *police officer* while *intentionally preventing* officer from performing his/her duties involves a substantial risk of physical force — this risk is inherent in the offense, even though one may imagine scenarios where the conduct does not create the genuine possibility that force may be used. Note that this is a divisible statute that punishes assault of several categories of people. Court held that a statute that lists alternative elements sequentially, instead of in discrete enumerated subsections, is still divisible; Court then looked at record of conviction to determine that the Respondent had been convicted of assault of a police officer, and did not determine whether the conclusion is same for the other persons protected by statute. Note: offense falls under category F only if prison sentence of at least one year imposed
Contact with child's intimate parts	*Dos Santos v. Gonzales*, 440 F.3d 81 (2d Cir. 2006)	Conn. Gen. Stat. §53-21(a)(2)	AF — category F crime of violence within 18 U.S.C. §16(b)* *the affirmative act of touching a *child* who *cannot consent* contains an inherent risk that force may be used. Court affirmed that 16(b) refers only to those offenses in which there is a substantial likelihood that perpetrator will *intentionally* employ physical force, and that the risk to which 16(b) refers is risk of *force* and not simply risk of *harm*. Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter	*Vargas-Sarmiento v. U.S. DOJ, BCIS*, 448 F.3d 159 (2d Cir. 2006)	N.Y. Penal Law §125.20(1) or (2)	AF — category F crime of violence within 18 U.S.C. §16(b)* *actions with an *intent* to take a life or to inflict serious physical injury are likely to meet vigorous resistance from a victim, and therefore, present an inherent substantial risk that person may intentionally use physical force to achieve his objective. Physical force is power, violence or pressure directed against a person or thing. Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, simple (menacing)	*Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006)	18 Pa. Cons. Stat. §2701(a)(3)	AF — category F crime of violence within 18 U.S.C. §16(a)* *but not within 16(b) because it is classified as a felony under state law *'physical menace,' which requires physical act intended to cause fear of imminent serious bodily injury, categorically involves specific intent to attempt or threaten use of physical force. Court also affirms that 16(a) requires specific intent, and not mere recklessness. Note: offense falls under category F only if prison sentence of at least one year imposed
Endangerment (reckless)	*Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006)	18 Pa. Cons. Stat. §2705	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a)*or (b)** *the mens rea requirement in this statute is mere 'recklessness,' which does not sufficient **offense is classified as a felony under state law
Murder-for-hire, use of interstate commerce facilities in the commission	*Ng v. AG of the US*, 436 F.3d 392 (3d Cir. 2006)	18 U.S.C. §1958	AF — category F crime of violence within 18 U.S.C. §16(b)* *under the categorical approach, the actual intent of the hitman hired by the Respondent was irrelevant because there will always be a 'substantial risk' that physical force may be used (hitman was an informant who never intended to kill the victim) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* 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*
Assault, felony	*Garcia v. Gonzales*, 465 F.3d 465 (4th Cir. 2006)	N.Y. Penal Law §120.05(4)	<u>*NOT*</u> AF under category F crime of violence within 18 U.S.C. §16(b)* *§16(b) requires substantial risk that force will be employed *as a means to an end in the commission* of the crime, not merely that reckless conduct could result in *injury*. This statute punishes recklessly causing physical injury to another,which does not meet this substantial risk requirement.
Battery, aggravated (intentionally causing physical contact)	*Larin-Ulloa v.Gonzales*,462 F.3d 456 (5th Cir. 2006)	Kan. Stat. Ann. §21- 3414(a)(1)(c)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)*
Firearms, discharge	*Quezada-Luna v. Gonzales*, 439 F.3d 403 (7th Cir. 2006)	720 Ill. Comp. Stat. §5/24-1.2(a)(1)	AF — category F crime of violence within 18 U.S.C. §16(a)* and (b) *firing a gun is use of physical force. Note: offense falls under category F only if prison sentence of at least one year imposed
Battery	*Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006)	Cal. Penal Code §242	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or (b)** *under *Leocal*, a 'crime of violence' must actually be violent in nature. Although a conviction under this statute requires 'use of force or violence,' this is a term of art in California state jurisprudence meaning 'harmful or offensive touching' and is satisfied by non-violent force that does not cause bodily harm or pain; mere offensive touching does not rise to the level of 'crime of violence.' **offense is not a felony under California law because it is punishable by a maximum of six months imprisonment in county jail Note that the Court did not address whether and how the modified categorical approach might apply to a conviction under this statute.
Evading an officer	*Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006)	Cal. Veh. Code §2800.2	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16* *statute may be violated with negligent conduct, which is not sufficient under 18 U.S.C. 16. State statute punishes conduct done with 'willful or wanton disregard for the safety of persons or property,' and 'willful or wanton disregard' includes, but is not limited to, driving during which time three or more traffic violations occurs (and the specified traffic violations include violations committed with negligence). Because record of conviction (which does not include probation report) did not establish whether Respondent was convicted of a negligent or reckless offense, government did not meet its burden of proving that offense fit within 18 U.S.C. 16.
Sexual intercourse with a minor (statutory rape)	*Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006)	Cal. Penal Code §261.5(c)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *the full range of conduct proscribed by the state statute includes consensual sexual intercourse between a twenty-one year old and a minor who is almost 18 years old; such a minor is fully capable of freely and voluntarily consenting to sexual relations, and therefore, such conduct does not present a substantial risk that physical force may be used in the course of committing the offense. Court differentiates between legal and actual non-consent, and finds that *actual* non-consent is the relevant inquiry under 16(b) *under the modified categorical approach, record of conviction could be consulted to determine whether the offense, by its nature, involved the risk of use of physical force; however, Court notes that an increase in the age of the Respondent, if it can even be considered, does not increase this risk. Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.*

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Assault, simple (reckless)	*Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005)	18 Pa. Cons. Stat. §2701(a)(1)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* or 16(b)** *"use of force" requires specific intent to use force; recklessness is not sufficient. Although state statute punishes reckless, knowing and intentional conduct, the record of conviction did not establish that Respondent had pled guilty to anything higher than *reckless* simple assault **classified as a misdemeanor under Pennsylvania law
Burning or exploding (reckless), conspiracy	*Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005)	18 Pa. Cons. Stat. §3301	<u>NOT</u> AF under category U/F as crime of violence within 18 U.S.C. 16(a)*or (b)** *use of physical force requires specific intent to employ, generally to achieve some end; mere recklessness as to causing harm is not sufficient. **16(b) requires a substantial risk that actor will intentionally use physical force in committing the offense; substantial risk of damage to property in not sufficient. Here, the risk is only that the reckless act will cause damage, not that the actor will "step in" and commit an intentional act of violence.
Vehicular homicide (reckless)	*Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005)	N.J. Stat. Ann. §2C:11-5(b)(1)	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *a conviction under this statute requires mere *recklessness*, which is not sufficient for crime of violence. Court grounds this holding, at least partly, on the Supreme Court's repeated statement in *Leocal* that accidental conduct is not enough to qualify as a crime of violence and its [Court of Appeal's] determination that accidental conduct would 'seem to encompass recklessness'
Manslaughter, simple involuntary	*Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005)	Va. Code Ann. §18.2-36	<u>NOT</u> AF under category F crime of violence within 18 U.S.C. §16(a) or (b)* *although offense involves substantial risk of physical harm, it does not involve a substantial risk that force will be applied. Court also noted that a reckless disregard for human life, required for a conviction, is distinguishable from a reckless disregard for whether force will need to be used.
Sexual abuse	*Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005)	720 Ill. Comp. Stat. §5/12-16	AF — category F crime of violence within 18 U.S.C. §16(b)* *a conviction inherently involves a 'substantial risk' that physical force may be used because statute punishes sexual conduct with a victim who is *unable to give consent* Note: offense falls under category F only if prison sentence of at least one year imposed
Harassment by telephone	*Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7th Cir. 2005)	720 Ill. Comp. Stat. §135/1-1(2)	<u>NOT</u> AF under category F crime of violence within 18 U.S.C. §16(a)* *a conviction requires only an *intent* to abuse, threaten or harass, and does not require an *actual* threat. Court further notes that "threats" is very broad in scope and not limited to threats of physical force. Facts of the particular conduct that led to the conviction have no bearing on whether this offense is a crime of violence.
Sexual battery (non-consensual touching)	*Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005)	Cal. Penal Code §243.4(a)	AF — category F crime of violence within 18 U.S.C. §16(b)* *but not within 16(a) because statute has no requirement of actual or threatened physical force *a conviction always involves a substantial risk that physical force may be used because it requires lack of consent by and restrain of the victim Court noted that the fact that this offense is excluded from the state's list of "violent offenses" is not dispositive of the crime of violence AF inquiry Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* 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*
Vehicular manslaughter while intoxicated	*Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005)	Cal. Penal Code §191.5(a)	NOT AF under category F as crime of violence within 18 U.S.C. §16(a) or (b)* *a conviction under this statute requires only *gross negligence*, and therefore does not constitute the kind of *active* employment of force required by *Leocal*
Use of vehicle to facilitate discharge of weapon (drive-by shooting)	*Nguyen v. Ashcroft,* 366 F.3d 386 (5th Cir. 2004)	Okla. Stat. tit. §21, 652(b)	AF — category F crime of violence within 18 U.S.C. §16(b)* *a conviction requires an actual, intentional discharge of a weapon (although not necessarily by the person charged with this offense); therefore there is always a 'substantial risk' that physical force may be used. Also, the language "*uses*… vehicle to facilitate" suggests intentionality. Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Exhibiting a deadly weapon, with the intent to prevent or resist arrest	*Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937 (9th Cir 2004)	Cal. Penal Code §417.8 (felony)	AF — category F crime of violence within 18 U.S.C. §16(a)* *by drawing or exhibiting a deadly weapon to resist or prevent an arrest, a person is *threatening to use the weapon*, which is 'threatened use of physical force' under 18 U.S.C. §16(a) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual battery	*Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004)	Okla. Stat. Ann. Tit. §21, 1123(B)	AF — category F crime of violence within 18 U.S.C. §16(b)* *a conviction involves a 'substantial risk' that physical force may be used to complete offense because statute presupposes a lack of consent by the victim. Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, misdemeanor	*Chrzanoski v. Ashcroft,* 327 F.3d 188 (2d Cir. 2003)	Conn. Gen. Stat. §53a-61(a)(1) [Note: identical to NYPL §120.00(1) misdemeanor assault]	NOT 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 *use physical force* 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)
Manslaughter	*Jobson v. Ashcroft, 326* F.3d 367 (2d Cir. 2003)	N.Y. Penal Law §125.15(1)	NOT 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 *use physical force.* It also contemplates risk of an *intentional* 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 *use* physical force 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 *Matter of Jean,* 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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Sexual assault (statutory rape)	*Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003)	Conn. Gen. Stat. §53a-71	AF — category F crime of violence within 18 U.S.C. §16(b)* *sexual intercourse with a victim who cannot consent is affirmative conduct that inherently involves a substantial risk that physical force may be used in the course of committing the offense — particularly because of the age difference between defendant and victim, mental incapacity or physical helplessness of victim, or defendant's position of authority over victim. Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Unlawful imprisonment	*Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003)	N.Y. Penal Law 135.10	<u>*MAYBE*</u> AF under category F crime of violence within 18 U.S.C. §16(a) or (b)* *statute is divisible: restraint of a non-consenting competent adult using physical force or intimidation satisfies 16(a), and restraint of non- consenting competent adult using deception satisfies 16(b); restraint of an incompetent person or child under 16 years of age with acquiescence of the restrained person is not a crime of violence within 16(a) or (b). *under the modified categorical approach, the record of conviction can be consulted to determine whether Respondent was convicted of unlawful imprisonment of a competent adult. The narrative statement of facts in a pre-sentence report cannot be consulted for this purpose because it may not be reliable and may contain allegations that were not proven or would have been inadmissible. Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Terrorist threats	*Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003)	Cal. Penal Code §422	AF — category F crime of violence within 18 U.S.C. §16(a)* Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Terrorist Threats	*Bovkun v. Ashcroft,* 283 F.3d 166 (3d Cir. 2002)	Pa. [Cons. Stat.] §2706 (1998) subsequently redesignated as §2706(a)(1)-(3))	AF — category F as crime of violence under §16(a) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Death by motor vehicle, misdemeanor	*U.S. v. Alejo-Alejo,*286 F.3d 711 (4th Cir. 2002)	N.C.Gen. Stat. §20141.4(a)(2)	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Robbery, with a deadly weapon	*Chambers v. Reno,* 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
Assault with bodily injury, misdemeanor	*U.S. v. Urias-Escobar,* 281 F.3d 165 (5th Cir.), *cert. denied,* 122 S. Ct. 2377 (2002)	Texas law	AF — category F crime of violence* *even though offense is a misdemeanor under state law Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *infra.* 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*
Injury to a child, felony	*U.S. v. Gracia-Cantu,* 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)
Burglary of vehicle	*U.S. v. Alvarez-Martinez,* 286 F.3d 470 (7th Cir.), *cert. denied,* 123 S. Ct. 198 (2002)	720 Ill. Comp. Stat. 5/19-1(a)	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(a)* *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) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Luring a child under age 16 into vehicle or building for unlawful purpose	*U.S. v. Martinez-Jimenez,* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004)*, supra* Note: offense falls under category F only if prison sentence of at least one year imposed
Robbery	*U.S. v. Valladares,* 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
Battery causing substantial bodily harm, gross misdemeanor	*U.S. v. Gonzalez-Tamariz,* 310 F.3d 1168 (9th Cir. 2002)	Nev. Rev. Stat. §200.481	AF — category F (even though offense is not a felony under state law) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Driving while intoxicated (driving under the Influence (with multiple priors))	*Montiel-Barraza v. INS,* 275 F.3d 1178 (9th Cir. 2002); *U.S. v. Portillo Mendoza,* 273 F.3d 1224 (9th Cir. 2001)	Cal. Vehicle Code §23152 (a) (along with §23175, an enhancement provision for multiple priors	<u>*NOT*</u> AF under category F (even with prior DUI convictions)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Endangerment, felony	*U.S. v. Hernandez-Castellanos,* 287 F.3d 876 (9th Cir. 2002)	Ariz. Rev. Stat. §13-1201	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16 (b)* *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) Note: offense falls under category F only if prison sentence of at least one year imposed
False imprisonment	*Cortez-Quinonez v. Ashcroft,* 2002 U.S. App. LEXIS 6053 (9th Cir. 2002) (unpub'd opinion)	Cal. Penal Code §§236-37	<u>*MAYBE*</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *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 Note: offense falls under category F only if prison sentence of at least one year imposed
Unlawful driving or taking of vehicle	*U.S. v. Cruz-Mandujano,* 2002 U.S. App. LEXIS 24417 (9th Cir. 2002) (unpub'd opinion)	Cal. Vehicle Code §10851	<u>*NOT*</u> AF under category F (following *Ye v. INS,* see "Burglary of vehicle", *supra*) <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.
Child abuse, misdemeanor (cruelty toward child)	*U.S. v. Saenz-Mendoza,* 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) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
False imprisonment	*Brooks v. Ashcroft,* 283 F.3d 1268 (11th Cir. 2002)	Fla. Stat. §787.02	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Driving while intoxicated (with two prior DWIs, a felony)	*Dalton v. Ashcroft,* 257 F.3d 200 (2d Cir. 2001)	N.Y. VTL Law §1192(3)	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Vehicular homicide (misdemeanor conviction with one year sentence)	*Francis v. Reno,* 269 F.3d 162 (3d Cir. 2001)	75 Pa.C.S.A. §3732**	<u>NOT</u> AF under category F as crime of violence within §16(a) or §16(b)* *state vehicular homicide statute *at the time of conviction* 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
Driving while intoxicated, felony	*U.S. v. Chapa-Garza,* 243 F.3d 921 (5th Cir. 2001)	Tex. Penal Code Ann. §49.09	<u>NOT</u> AF under category F as crime of violence within 18 U.S.C. §16(b)* *a COV as defined by §16(b) must involve the substantial likelihood that the offender will *intentionally* 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
Firearms, felony possession (unlawfully carrying a firearm in an establishment licensed to sell alcoholic beverages)	*U.S. v. Hernandez-Neave,* 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 hand-gun onto premises, but such *intent* 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 *Chapa-Garza* framework (*see* "Driving while intoxicated" *supra*)).
Firearms, unlawful possession of short-barreled shotgun	*U.S. v. Rivas-Palacios,* 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 Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: This holding has subsequently been called into question by the Fifth Circuit in *U.S. v. Hernandez-Neave,* 291 F.3d 296 (5th Cir. 2001), *supra*, as it appears to conflict with the *Chapa-Garza* framework for analyzing crime of violence AFs (*see* "Driving while intoxicated" *supra*). Note: offense falls under category F only if prison sentence of at least one year imposed
Mischief, criminal (intentional marking of another's property)	*U.S. v. Landeros-Gonzalez,* 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
Vehicular homicide (homicide by intoxicated use of vehicle)	*Bazan-Reyes v. INS,* 256 F.3d 600 (7th Cir. 2001)	Wisc. Stat. §940.09	<u>NOT</u> AF under category F as crime of violence within §16(a)* or 16(b)** *because the word "use" in §16(a) requires volitional conduct **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.

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Driving while intoxicated (driving under the influence with injury to another)	*U.S. v. Trinidad-Aquino,* 259 F.3d 1140 (9th Cir. 2001)	Cal. Vehicle Code §23153	<u>*NOT*</u> AF under category F as crime of violence within 18 U.S.C. §16(a) or 16(b)* *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)
Firearms, possession of short-barreled shotgun	*U.S. v. Avila-Mercado,* 2001 U.S. App. LEXIS 13335 (9th Cir.) (unpub'd opinion), *cert. denied,* U.S. LEXIS 10704 (2001)	Nev. Rev. Stat. §202.275	AF — category U/F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Inflicting corporal injury on spouse	*U.S. v. Jimenez,* 258 F.3d 1120 (9th Cir. 2001)	Cal. Penal Code §273.5	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Manslaughter, involuntary	*Park v. INS,* 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) *statute requires criminal negligence, which is defined in such a manner as to require a minimal mens rea of reckless Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Assault with a dangerous weapon	*U.S. v. Ortega-Garcia,* 2001 U.S. App. LEXIS 14266 (10th Cir.) (unpub'd), *cert. denied,* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Menacing	*U.S. v. Drummond,* 240 F.3d 1333 (11th Cir. 2001)	N.Y. Penal Law §120.14	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary	*U.S. v. Borbon-Vasquez,* 2000 U.S. App. LEXIS 31861 (2d Cir. 2000) (unpub'd opinion)	New York law (second degree)	AF — category F Note: offense falls under category F only if prison sentence of at least one year imposed
Simple domestic assault, misdemeanor	*U.S. v. Pacheco,* 225 F.3d 148 (2d Cir.2000), *cert. denied,* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *supra.* 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*
Sexual battery, misdemeanor	*Wireko v. Reno,* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of vehicle	*Solorzano-Patlan v. INS,* 207 F.3d 869 (7th Cir. 2000)	720 Ill. Comp. Stat. 5/19-1(a)	*MAYBE* AF — category F as crime of violence within 18 U.S.C. §16(b)* Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* *NOT* AF under category G as a burglary offense** *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 Note: offense falls under category F only if prison sentence of at least one year imposed **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 Note: but court did not reach issue of whether offense was an AF under category G as a 'theft offense'
Burglary of vehicle	*U.S. v. Guzman-Landeros,* 207 F.3d 1034 (8th Cir. 2000)	Texas Law	AF — category F crime of violence within 18 U.S.C. §16(b)* *court did not reach issue of whether offense was also an AF under category G Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of vehicle	*Ye v. INS,* 214 F.3d 1128 (9th Cir. 2000)	Cal. Penal Code §459	*NOT* AF under category F (entry of a vehicle is not necessarily violent in nature) *NOT* 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) *but court did not reach issue of whether offense was an AF under category G as a 'theft offense'
Sexual assault (consensual sexual penetration)	*U.S. v. Navarro-Elizondo,* 2000 U.S. App. LEXIS 7215 (9th Cir. 2000) (unpub'd opinion)	N.J. Stat. Ann. §2C:14-2a(3)	*NOT* 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')
Assault with a deadly weapon/ dangerous instrument, aggravated, attempted	*U.S. v. Ceron-Sanchez,* 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 within 18 U.S.C. §16(a) and §16(b) Note that conviction was based on reckless driving, and this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), *infra.* Note: offense falls under category U/F only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Trespass, criminal	*U.S. v. Delgado-Enriquez,* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Unauthorized use of a motor vehicle	*U.S. v. Galvan-Rodriguez,* 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 *U.S. v. Charles,* 301 F.3d 309 (5th Cir. 2002)) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual assault of a child (statutory rape)	*Xiong v. INS,* 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	*U.S. v. Alas-Castro,* 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 that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a minor (indecency with a child sexual contact)	*U.S. v. Velazquez-Overa,* 100 F.3d 418 (5th Cir. 1996), *cert. denied,* 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 attempts to sexually touch a child, there is always a substantial risk that physical force would be used to ensure the child's compliance Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of a non-residential building	*U.S. v. Rodriguez-Guzman,* 56 F.3d 18 (5th Cir. 1995)	Tex. Penal Code Ann. §30.02	AF — category F as crime of violence under §16(b) Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary	*U.S. v. Solis-Estrada,* 1995 U.S. App. LEXIS 21024 (9th Cir. 1995) 1995) (unpub'd opinion)	Cal. Penal Code §460(1) (1st degree)	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* 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*
Sexual assault (lewd assault on a child), attempted	*Ramsey v. INS,* 55 F.3d 580 (11th Cir. 1995)	Florida Statutes §§777.04(1) & 800.04(1)	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Burglary of a habitation	*U.S. v. Guardado,* 40 F.3d 102 (5th Cir. 1994)	Tex. Penal Code Ann. §30.02	AF — category F Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, infra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a child, attempted, felony	*U.S. v. Reyes-Castro,* 13 F.3d 377 (10th Cir. 1993)	Utah Code Ann. §76-5-404.1(1) (1990)	AF — category F as crime of violence under §16(b)* *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 Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Sexual abuse of a minor (lascivious acts with a child)	*U.S. v. Rodriguez,* 979 F.2d 138 (8th Cir. 1992)	Code of Iowa §709.8	AF — category F as crime of violence under §16(b)* *the crime by its nature involves a substantial risk of physical force Note that this case was decided before the Supreme Court issued its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004)*, supra.* Note: offense falls under category F only if prison sentence of at least one year imposed
Unauthorized use of a motor vehicle	*Ramirez v. Ashcroft*, 361 F. Supp. 2d 650 (S.D.Tx. 2005)	Texas Law	AF — category F crime of violence within 18 U.S.C. §16(b)* *a conviction requires intentional or knowing conduct and involves a 'substantial risk' that physical force may be used to commit the offense, for example to gain access to and drive the vehicle; *Galvan-Rodriguez*, supra, remains good law after *Leocal*. Note: offense falls under category F only if prison sentence of at least one year imposed
Assault, felony	*Persaud v. McElroy,* 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
Reckless endangering, misdemeanor .	*Amaye v. Elwood,* 2002 U.S. Dist. LEXIS 14276 (Middle Dist. Pa. 2002)	Del. Code Ann. tit. 11, §603 (2001) (2d degree)	<u>NOT</u> AF under category F as crime of violence under §16(a)* or 16(b)** *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 **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)
Firearms, possession of shotgun	*U.S. v. Villanueva-Gaxiola,* 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)

(G) Theft or burglary offense for which the term of imprisonment is at least one year

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft and unlawful driving or taking of a vehicle	*Gonzales v. Duena-Alvarez,* 549 U.S. 183 (2007)	Cal. Veh. Code Ann. § 10851(a)	AF — Category G theft offense* *the Court held that the generic definition of "theft" includes offenses where there is a "taking of property or an exercise of control over property without consent, with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." This state statute is categorically a "theft" AF even though it punishes "aiding and abetting" a theft (under the California "aiding and abetting" doctrine, a defendant is criminally responsible for not only for the crime he intends, but also for any crime that naturally and probably results from his intended crime). Note: offense falls under category G only if prison sentence of at least one year imposed
Welfare fraud	*Matter of Garcia-Madruga,* 24 I&N Dec. 436 (BIA 2008)	Gen.Laws of Rhode Island § 40-6-15	NOT AF under category G as a theft offense (could be considered a Category M — "fraud" offense)* *the BIA clarified the generic definition of a "theft" offense which is "the taking of or exercise of control over property without consent 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." Welfare fraud does not categorically satisfy this generic definition of "theft."
Burglary of vehicle	*Matter of Perez,* 22 I&N Dec. 1325 (BIA 2000)	Tex. Penal Code Ann. §30.04(a)	NOT 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 into, or remaining in, a building or structure with intent to commit a crime 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'
Stolen property, possession, attempted	*Matter of Bahta,* 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
Unlawful driving or taking of vehicle	*Matter of V-Z-S,* 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 *de minimis* deprivation Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Larceny, conspiracy	*Almeida v. Holder,* 558 F.3d 778 (2d Cir. 2009)	Conn. Gen. Stat. §§ 53a-4123	AF — Category G theft offense* *this state statute proscribes conduct where there is an "intent to deprive" or an "intent to appropriate" property of another. The statute expects the taking to be permanent or "sufficiently permanent to cause the owner to lose, or the defendant to acquire the major portion of the property's economic value or benefit." The generic intent requirement of a "theft" AF includes both an intent to deprive and an intent to appropriate and thus, a conviction under this statute is a "theft" offense. Note: offense falls under category G only if prison sentence of at least one year imposed
Bank fraud	*Martinez v. Mukasey,* 519 F.3d 532 (5th Cir. 2008)	18 U.S.C. § 1344	NOT AF under Category G theft offense (but is an AF- Category M "fraud" offense)* *this federal statute is not a hybrid fraud-theft offense because the definition of fraud is not subsumed within the definition of theft even if bank fraud "always, in varying degrees, involves a deprivation on terms different than those to which the victim believed she was assenting." Since this statute is not a "theft" AF, it is not a hybrid fraud-theft crime. Thus, the crime only has to satisfy the elements of a "fraud" AF under Category M to be considered an AF.
Burglary, attempted	*U.S. v. Velasquez*, 2006 U.S. App. LEXIS 13665 (3d Cir. 2006) (unpub'd)	N.Y. Penal Law §§140.25 and 110.00	AF — category U/G burglary offense* *generic definition of burglary is 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.' Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of services (diversion of services)	*Ilchuk v. Attorney General*, 434 F.3d 618 (3d Cir. 2006)	18 Pa. Cons. Stat. §3926(b)	AF — category G theft offense* *State statute is a theft offense because it requires 'taking or exercise of control over something of value knowing that its owner has not consented.' Note: offense falls under category G only if prison sentence of at least one year imposed. In this case, Court also held that house arrest is 'imprisonment' for this purpose.
Theft, petty (with prior jail term)	*Mutascu v. Gonzales*, 444 F.3d 710 (5th Cir. 2006)	Cal. Penal Code §666	AF — category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed. In this case, Court decided that previous jail term was element of this recidivist statute, and considered the full sentence imposed for this offense as a 'term of imprisonment.'
Unlawful driving or taking of a vehicle	*Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006);	Cal. Vehicle Code §10851(a)	MAYBE AF under category G theft offense* *statute criminalizes accessory and accomplice conduct, which does not involve taking of or exercise of control over property and is therefore not a theft offense. under the modified approach, the record of conviction must establish that person was convicted of 'unlawful driving or taking of a vehicle' as a principal and not merely as accessory or accomplice. Note: offense falls under category G only if prison sentence of at least one year imposed
Bank fraud	*Ogundipe v. DHS*, 2005 U.S. App. LEXIS 14306 (3d Cir. 2005) (unpub'd)	18 U.S.C. §1344	AF — category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Credit card fraud	*Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005)	Va. Code §18.2-195	*MAYBE* AF under category G *theft and fraud are distinct offenses. 'taking of property' and ' without consent' are essential elements of a theft offense. Using modified categorical analysis, court determined that conviction was not theft AF because indictment did not allege "taking goods without consent" or that defendant actually obtained property. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft, identity	*U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2005)	Iowa Code §715A.8	AF — category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed
Theft	*Martinez-Perez v. Ashcroft*, 417 F.3d 1022 (9th Cir. 2005)	Cal. Penal Code §487(c)	*MAYBE* AF under category G as theft offense* *generic definition of theft offense is: taking property or exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even is such deprivation is less than total or permanent, as principal and not as aider or abettor. This state statute is divisible — it proscribes conduct that might fall within generic definition, but a person may also be convicted under an aiding and abetting theory. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft	*Fernandez-Ruiz v. Gonzales*, 410 F.3d 585 (9th Cir. 2005)	Ariz. Rev. Stat. §13-1802(A)(1) & (C)	AF — category G theft offense* *state statute requirement that taking be 'without lawful authority' is not materially different from generic theft definition's requirement that taking be 'without consent.' Note: offense falls under category G only if prison sentence of at least one year imposed
Entering motor vehicle with intent to steal thing of value	*Novitskiy v. Ashcroft*, 2005 U.S. App. LEXIS 1178 (10th Cir. 2005) (unpub'd)	Colo. Rev. Stat. §18-4-502	AF — category G theft offense* *Court found reasonable and deferred to BIA's construction of theft AF statute, defining theft as 'taking of property or exercise of control over property without consent [and] with the criminal intent to deprive owner of the rights and benefits of ownership.' Note: offense falls under category G only if prison sentence of at least one year imposed
Theft	*Jaggernauth v. AG of the US*, 432 F.3d 1346 (11th Cir. 2005)	Fla. Stat. ch. §812.014(1)	*MAYBE* AF under category G as theft offense* *conviction under statute, which contains disjunctive clauses, is not facially a theft offense. A conviction under subsection (a) requires an "intent to deprive owner of rights and benefits of ownership," and therefore meets the BIA definition of theft; a conviction under subsection (b) lacks this intent requirement and therefore may not necessarily meet the definition of theft. Court also held that it may look to the ROC for the offense alleged to be AF, and not to the ROC for a separate conviction, in order to determine the subsection of conviction. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft by deception	*Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004)	18 Pa. Cons. Stat. Ann. §3922	*MAYBE* AF under category G/M* *a theft offense that is also an offense involving fraud or deceit must meet the one-year sentence requirement (AF category G) and the $10,000 loss to victim requirement (AF category M) in order to be deemed an aggravated felony under either category. Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Stolen mail, possession	*Ibrahim v. Ashcroft*, 2003 U.S. App. LEXIS 18917 (5th Cir. 2003)	18 U.S.C. §1708	AF — category G theft offense* *generic definition of theft is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." a conviction under this state statute requires that defendant 'knowingly possesses stolen mail,' which is included in this generic definition. Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary	*Maddela v. INS*, 65 Fed. Appx. 125 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §459	*MAYBE* AF under category G burglary offense* *conviction under statute does not "facially qualify" as burglary AF because it punishes conduct that may fall outside generic definition of burglary, which is (1) an unlawful or unprivileged entry into, or remaining in, (2) a building or structure, with (3) intent to commit a crime. State statute is broader than this generic definition because it does not require that the entry be unlawful. Court then held that record of conviction established that person pled guilty to all elements of generic definition, including unlawful entry, and conviction was therefore AF. Note: offense falls under category G only if prison sentence of at least one year imposed
Stealing from elder	*Macapagal v. INS*, 68 Fed. Appx. 109 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §368(d)	*MAYBE* AF under category G as theft offense* *this statute is not categorically a theft offense because it criminalizes taking of 'money, labor, or real or personal property,' and taking of labor is not theft under 9th Circuit law Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen vehicle, possession	*Huerta-Guevara v. Ashcroft,* 321 F.3d 883 (9th Cir. 2003)	Ariz. Rev. Stat. §13-1802	*MAYBE* AF under category G theft offense* *Conviction under Arizona statute does not 'facially qualify' as a theft offense (as generically defined in *Corona-Sanchez,* 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 * Also, despite the label of the offense (possession of a stolen vehicle), the statute does not facially fall under "receipt of stolen property" because one may be convicted without knowledge that vehicle was stolen and without requisite criminal intent. Note: offense falls under category G only if prison sentence of at least one year imposed
Theft	*Rodas v. Ashcroft*, 2003 Fed. Appx. 872 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §484(a)	*MAYBE* AF under category G as theft offense Note: offense falls under category G only if prison sentence of at least one year imposed
Theft of a means of transporttation	*Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003)	Ariz. Rev. Stat. §13-1814(A)	*MAYBE* AF under category G as theft offense* *conviction under statute is not facially a theft offense because it punishes conduct that falls outside the generic definition of theft. Subsections (2), (4) and (5) do not require an "intent to deprive" for conviction, which is required under this generic definition. Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft of vehicle	*U.S. v. Lopez-Caballero*, 69 Fed. Appx. 382 (9th Cir. 2003) (unpub'd)	Cal. Penal Code §487(h)(a)	<u>*MAYBE*</u> AF under category G as theft offense *defendant can be convicted under this statute for aiding and abetting a grand theft (even if aiding and abetting is not specifically charged), so offense is not categorically AF; record of conviction must establish defendant convicted of grand theft as principal and not as aider/abettor. Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary, attempted	*U.S. v. Hidalgo-Macias,* 300 F.3d 281 (2d Cir. 2002)	N.Y. law (3d degree)	AF — category U/G Note: but the court did not analyze whether a conviction for vehicle burglary under New York's 3rd degree burglary statute may *not* be an AF "burglary" offense (*cf. Matter of Perez,* 22 I&N Dec. 1325 (BIA 2000) under "Burglary of vehicle" infra) *(continued next page)*
(continued) Burglary, attempted			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)
Robbery, attempted	*U.S. v. Fernandez-Antonia,* 278 F.3d 150 (2d Cir. 2002)	N.Y. law (3d degree robbery) & N.Y. Penal Law §110.00	AF — category U/G theft offense* *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 Note: offense falls under category U/G only if prison sentence of at least one year imposed
Robbery	*Perez v. Greiner,* 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
Stolen property, possession	*Williams v. INS,* 2002 U.S. App. LEXIS 25126 (3d Cir. 2002) (unpub'd opinion)	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
Concealment of merchandise	*Ramtulla v. Ashcroft,* 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
Burglary	*U.S. v. Velasco-Medina,* 305 F.3d 839 (9th Cir. 2002)	Cal. Penal Code §459 (2d degree)	<u>*MAYBE*</u> AF under 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 Note: offense falls under category G only if prison sentence of at least one year imposed
Stolen mail, possession	*Randhawa v. Ashcroft,* 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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Theft, misdemeanor (petty theft with or without prior)	*U.S. v. Corona-Sanchez,* 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 of auto	*U.S. v. Rodriguez-Lopez,* 2002 U.S. App. LEXIS 23861 (9th Cir. 2002) (unpub'd opinion)	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. Note: offense falls under category G only if prison sentence of at least one year imposed
Unlawful use of means of transportation	*U.S. v. Perez-Corona,* 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
Theft of retail, felony (indeterminate sentence of 0–5 years)	*U.S. v. Garcia-Armenta,* 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)
Burglary of vehicle	*U.S. v. Martinez-Garcia,* 268 F.3d 460 (7th Cir. 2001), *cert. denied,* 534 U.S. 1149 2002)	Illinois law	AF — category U/G as attempted theft offense* <u>*NOT*</u> AF under category U/G as attempted burglary offense (following *Solorzano-Patlan,* supra) *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 Note: offense falls under category U/G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Stolen vehicle, possession	*Hernandez-Mancilla v. INS,* 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
Burglary	*U.S. v. Fernandez-Cervantes,* 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 *intent* to commit theft is not a 'theft offense' (cf. Ninth Circuit's subsequent definition of 'theft offense' in *U.S. v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002), infra, at "Theft, petty (with prior)"
Stolen vehicle, receiving or transferring, attempted	*U.S. v. Vasquez-Flores,* 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
Theft, misdemeanor (theft by shoplifting)	*U.S. v. Christopher,* 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, misdemeanor (shoplifting; larceny under $500)	*U.S. v. Pacheco,* 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 of at least one year imposed
Theft, misdemeanor (petit larceny with maximum 1 year prison sentence)	*U.S. v. Graham,* 169 F.3d 787 (3d Cir.), *cert. denied,* 528 U.S. 845 1999); *Jaafar v. INS,* 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
Burglary, attempted	*Wonlah v. DHS*, 2005 U.S. Dist. LEXIS 40 (E.D. Pa. 2005)	18 Pa. Cons. Stat. §3502	AF — category U/G burglary offense Note: offense falls under category G only if prison sentence of at least one year imposed — court held that this refers to maximum term for indeterminate sentences, not minimum term.
Larceny	*Plummer v. Ashcroft*, 258 F. Supp. 2d 43 (Dist. Conn. 2003)	Conn. Gen. Stat. §53a-123(a)(3) (2d degree)	AF — category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Stolen property, possession	*Kendall v. Mooney*, 273 F.Supp.2d 216 (E.D.N.Y. 2003)	N.Y. Penal Law §165.45	AF — category G theft and receipt of stolen property offense* *intent to deprivation *permanently* not required for offense to be theft offense. Also, state does not separately penalize receipt of stolen property; instead, its criminal possession of stolen property offense contains the same elements as 'receipt of stolen property' as defined by majority of states. Thus, it is properly categorized under the 're-ceipt' segment of category G. Note: offense falls under category G only if prison sentence of at least one year imposed
Burglary	*Rivas v. Ashcroft,* 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
Theft, misdemeanor (shoplifting)	*Erewele v. Reno,* 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
Bank larceny	*U.S. v. Nwene,* 20 F. Supp.2d 716 (D. N.J. 1998), *aff 'd*, 213 F.3d 629 (3d Cir.), *cert. denied,* 531 U.S. 864 (2000)	Unspecified	AF — category G theft offense Note: offense falls under category G only if prison sentence of at least one year imposed

(M) Offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or certain offense relating to tax evasion in which the revenue loss to the government exceeds $10,000

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Conspiracy to commit mail fraud, wire fraud, bank fraud, and money laundering	*Nijhawan v. Holder,* 129 S. Ct. 2294 (2009)	18 U.S.C. §§ 371, 1341, 1343, 1344, and 1956(h)	AF — category (M)(i)* *the "fraud or deceit" language refers to a generic crime and, therefore, must be analyzed under the traditional categorical approach requiring the fact finder to look only at the elements of the statute of conviction and the record of conviction, and not the alleged underlying facts, in order to establish deportability. An offense is not a "fraud or deceit" AF unless fraud or deceit is a necessary or proven element of the crime. The $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." Nevertheless, the Court stated that the evidence relied on under this "circumstance-specific approach" must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction." Thus it can be argued that evidence outside the record of conviction is relevant to establish loss only to the extent that it is consistent with jury findings or pleas of guilt.
Mail fraud (conspiracy)	*Matter of Babaisakov,* 24 I&N Dec. 306 (BIA 2007)	18 U.S.C. §§ 1341	AF — category M* *the crime necessarily involves "fraud or deceit." The $10,000 loss amount is not subject to the limitations of the categorical approach, the modified categorical approach, or a divisibility analysis and may be proved by evidence outside the record of conviction, provided that the loss is still shown to relate to the conduct of which the person was convicted and, for removal purposes, is proven by clear and convincing evidence. In this case, the presentence investigation report should have been considered to establish the loss amount and the Immigration Judge was not restricted to consideration of the respondent's record of conviction.
Fraud, attempt (submitting false insurance claim with intent to defraud)	*Matter of Onyido,* 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 defraud and that substantial step toward commission of the fraud occurred; here, record of conviction showed substantial step was taken. Note: Cf. *Sui v. INS,* 250 F.3d 105 (2d Cir. 2001) under "Counterfeit securities, possession", *supra*, for Second Circuit's discussion of "attempt" as applied to category U/M analysis. Note: offense falls under category U/M only if attempted loss to the victim(s) in excess of $10,000
Knowingly filing a false tax return	*Arguelles-Olivares v. Mukasey,* 526 F.3d 171 (5th Cir. 2008)	26 U.S.C. § 7206(1)	AF — category M* *knowingly signing and filing a false federal tax return unquestionably "involves fraud or deceit." The $10,000 loss amount was satisfied by utilizing the presentence investigation report (PSR) which could be used as evidence of the amount of loss as there was clear and convincing evidence that the PSR accurately reflected the amount of loss (i.e., the defendant admitted in the underlying criminal proceedings that the amounts of loss reflected in the PSR were correct).

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Fraud and related activity in connection with access devices	*Dulal-Whiteway v. U.S. D.H.S.,* 501 F.3d 116 (2d Cir. 2007), superceded in part by *Nijhawan v. Holder,* 129 S.Ct. 2294 (2009) (see above)	18 U.S.C. § 1029(a)(2)	<u>*MAYBE*</u> AF under category M* *this federal statue is a fraud offense. The modified categorical approach was employed to analyze the $10,000 loss amount. The restitution order was not part of the record of conviction because it was based on a loss amount established by a preponderance of the evidence and need not be tied to the facts admitted by a defendant's plea. The fact that the restitution order referred to the presentence investigation report to identify the payees is irrelevant because it is designed to be a sentencing aid and typically describes conduct that demonstrates the commission of an offense even if the alien was never convicted of it. Note: **Superceded in part by *Nijhawan,*** which held that the $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." The evidence relied on under this circumstance-specific approach must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction."
Fraud and related activity in connection with access devices	*Obasohan V. United States,* 479 F.3d 785 (11th Cir. 2007), superceded in part by *Nijhawan v. Holder,* 129 S.Ct. 2294 (2009) (see above)	18 U.S.C. § 1029(b)(2)	<u>*MAYBE*</u> AF under category M* *this federal statue is necessarily a fraud offense. However, the $10,000 loss amount could not be established on the restitution order since it was based on findings made by a preponderance of the evidence and could not, standing alone, establish removeability by clear, unequivocal and convincing evidence since neither the indictment nor the plea agreement specified a loss amount. Note: **Superceded in part by *Nijhawan,*** which held that the $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." The evidence relied on under this circumstance-specific approach must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction."
Bank fraud, conspiracy	*Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006)	18 U.S.C. § 371 with 18 U.S.C. §1344	AF — category U/M* *A conviction includes an intent to deceive a bank in order to obtain money or other property. 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Counterfeiting, conspiracy	*Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006)	18 U.S.C. §371 with 18 U.S.C. §513(a)	AF — category U/M* *A conviction includes an intent to deceive another person, organization or government. 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Forgery	*Bobb v. AG*, 458 F.3d 213 (3d Cir. August 3, 2006)	18 U.S.C. §510(a)(2)	AF — category (M)(i) or (R)
Passing bad checks	*Mirat v. AG of the U.S.*, 2006 U.S. App. LEXIS 14244 (3d Cir. 2006) (unpub'd)	18 Pa. Cons. Stat. §4105(a)(1)	<u>*NOT*</u> AF under category M* *statute penalizing passing bad check with knowledge that it will not be honored, but not containing an express element of fraud or deceit, is not AF. Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Conspiracy	*Iysheh v. Gonzales,* 437 F.3d 613 (7th Cir. 2006)	18 U.S.C. §371	<u>*MAYBE*</u> AF under category U/M* *Conviction for conspiracy under 18 U.S.C. § 371 may be divisible because it punishes two things: conspiracy to defraud the United States, and conspiracy to commit "any offense" against the United States — only the former requires as an element the intent to deceive or fraud. Here, defendant was convicted of an aggravated felony where the judgment order and plea agreement showed he pled guilty to a count of the superseding indictment; that count charged, among other things, conspiracy to defraud a financial institution in violation of 18 U.S.C. § 1344; and the plea agreement established total loss of $200,000. 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Fraud and related activity in connection with access devices, conspiracy to commit	*Fierarita v. Gonzales,* 2006 U.S. App. LEXIS 15947 (9th Cir. 2006) (unpub'd opinion)	18 U.S.C. §1029(b)(2) [conspiracy to commit any of the offenses set forth at 1029(a)]	<u>*MAYBE*</u> AF under category U/M* *Statute is divisible, because not all subsections of 18 USC 1029(a) require as an element the intent to deceive or defraud . Here, under the modified categorical approach, the court found AF where the judgment of conviction included mandatory restitution order in amount exceeding $10,000, and because restitution was to providers of credit, ruled that respondent must have been convicted of conspiring to commit an offense under a subsection that does require fraud or deceit as an element. 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Olowu v. Chertoff*, 2005 U.S. App. LEXIS 7126 (3d Cir. 2005)	18 U.S.C. §1344	AF — category M* *where count of conviction incorporates a "scheme to defraud," the amount of loss is based on the entire scheme and amount of restitution, and is not limited to the amount specifically identified in the count of conviction. Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Conspiracy to commit interstate transportation of stolen property	*Omari v. Gonzales,* 419 F.3d 303 (5th Cir. 2005)	18 U.S.C. §§ 371, 2314	<u>*MAYBE*</u> AF under category U/M* *18 U.S.C. § 2314 is divisible in that it does not necessarily involve fraud or deceit. Here, the judgment and indictment do not indicate that Omari was necessarily convicted of an offense involving fraud or deceit, and the plea agreement and colloquy are not a part of the record, so the court concluded that the record does not suffice to establish AF. 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005)	18 U.S.C. §1344	<u>*MAYBE*</u> AF under category M* *'amount of loss' focuses on convicted counts alone and does not include amounts attributable to unconvicted counts, even if plea agreement includes stipulations to 'relevant conduct' in those unconvicted counts for sentencing and restitution on purposes. Unity of victims and common purpose of 'obtaining money for own ends' does not, by itself, create a common scheme (but court does not decide whether amount of loss includes losses from unconvicted counts that are encompassed by an overall fraudulent scheme, as held by 10th Circuit in Khalayleh). *(continued)*

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
(continued) Bank fraud			Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Embezzlement	*Balogun v. U.S. AG*, 425 F.3d 1356 (11th Cir. 2005)	federal embezzlement statute (not identified)	AF — category M* *BIA's holding that government can be a 'victim' for purposes of INA 101(a)(43)(M)(i), is reasonable. Note that Court left open whether the statute might be ambiguous on this issue, but held that the BIA decision was entitled to Chevron deference. Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Tax evasion (attempt to evade or defeat tax)	*Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004)	26 U.S.C. §7201	AF — category M(ii)* *'defeating a tax' is an offense 'relating to tax evasion.' Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Counterfeit access devices, conspiracy to use and traffic	*Karavolos v. Ashcroft*, 95 Fed. Appx. 397 (3d Cir. 2004) (unpub'd)	18 U.S.C. §1029(a)(1) and §1029(c)(2)	AF — category M(i) *court used amount of restitution, as stated in judgment of conviction, to determine amount of loss Note: **See *Nijhawan,*** which held that the $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." The evidence relied on under this circumstance-specific approach must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction." Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Filing false income tax returns	*Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004)	26 U.S.C. §7206(1)	<u>*NOT*</u> AF under category M(i)* *INA §101(a)(43)(M)(i) does not apply to tax offenses. INA §101(a)(43)(M)(ii)specifies tax evasion as the only deportable tax offense. (C.J. Alito dissents.) Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Theft by deception	*Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004)	18 Pa. Cons. Stat. Ann. §3922	<u>*MAYBE*</u> AF under category G/M* *a theft offense that is also an offense involving fraud or deceit must meet the one-year sentence requirement (AF category G) and the $10,000 loss to victim requirement (AF category M) in order to be deemed an aggravated felony under either category. Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Theft of government funds	*Thompson v. Ashcroft*, 117 Fed. Appx. 817 (3d Cir. 2004)	18 U.S.C. §641	AF — category M* *restitution amount applied to single offense to which defendant pled guilty (18 U.S.C. §641), although defendant had also been indicted for 18 U.S.C. §642, the companion statute punishing aiders and abettors Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Conspiracy to commit bank fraud	*Akkaraju v. Ashcroft*, 118 Fed. Appx. 90 7th Cir. 2004) (unpub'd); *Sharma v. Ashcroft*, 57 Fed. Appx. 998 (3d Cir. 2003) (unpub'd)	18 U.S.C. §371 and §1344	AF — category U/M* *the co-conspirators simply must have contemplated acts that would cause a loss in excess of $10,000; no actual loss must have been suffered by the victim Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Fraud, welfare	*Ferreira v. Ashcroft*, 390 F.3d 1091 (9th Cir. 2004)	Cal. Welf. & Inst. Code §10980(c)(2)	AF — category M(i)* *state statute at time of conviction did not explicitly require scienter, but Court looked to California case law indicating that the offense contained an element of intent to defraud or deceive. court may look to restitution to determine amount of loss (distinguishing cases in which plea agreement or indictment contradicted that amount) Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Theft by deception	*Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003)	N.J. Stat. Ann. §2C: 20-4	AF — category M(i)* *amount of restitution may be helpful to inquiry into amount of loss if plea agreement or indictment is unclear; however, when restitution is not based on a finding as to amount of loss, and instead intended solely to affect immigration status, it does not control. Court held conviction was AF, even after state court had later reduced amount of restitution from $11,522 to $9999. (majority opinion by Alito) Note: **See *Nijhawan,*** which held that the $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." The evidence relied on under this circumstance-specific approach must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction." Note: offense falls under category M 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 *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Theft, embezzlement or misapplication by bank officer or employee (embezzlement of bank funds)	*Valansi v. Ashcroft,* 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" supra)

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Bank fraud	*Chang v. INS,* 307 F.3d 1185 (9th Cir. 2002), superceded in part by *Nijhawan v. Holder,* 129 S.Ct. 2294 (2009) (see above)	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 improper at least where such information was contradicted by explicit language in the plea agreement 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 Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra) Note: **Superceded in part by *Nijhawan,*** which held that the $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." The evidence relied on under this circumstance-specific approach must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction."
Fraudulent tax return	*Abreu-Reyes v. INS,* 292 F.2d 1029 (9th Cir. 2002)	26 U.S.C. §7206(1)	AF — category M (court may look to presentence report to establish amount of loss to victim) Note: **See *Nijhawan,*** which held that the $10,000 loss amount need not be analyzed under the traditional categorical approach. "Rather, the monetary threshold applies to specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." The evidence relied on under this circumstance-specific approach must meet a clear and convincing standard and be "tied to the specific counts covered by the conviction." 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Bank fraud	*Khalayleh v. INS,* 287 F.3d 978 (10th Cir. 2002)	18 U.S.C. §1344(1)	AF — 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 Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Counterfeit securities, possession with intent to deceive	*Sui v. INS,* 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. *Matter of Onyido,* 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
Theft, embezzlement or misapplication by bank officer or employee (misapplication of auction drafts)	*Moore v. Ashcroft,* 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" supra))

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Fraud (unauthorized possession of access devices with intent to defraud)	*Agdachian v. INS,* 1999 U.S. App. LEXIS 23214 (9th Cir. 1999) (unpub'd opinion)	Unspecified	AF — category M (based on value of loss specified in plea agreement) 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 *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)
Mail fraud	*Akorede v. Perryman,* 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 *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" supra)
Counterfeiting	*Bazuaye v. INS,* 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 *attempted* offense, to fall under category U/M, may not require actual loss, see *Matter of Onyido,* 22 I&N Dec. 552 (BIA 1999) under "Fraud, attempt" infra)

(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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Alien smuggling	*Matter of Paulin Guzman-Varela*, 27 Immig. Rptr. B1-35 (BIA 2003) (non- precedent decision)	8 U.S.C. §1325	<u>*NOT*</u> AF under category N* *category N is limited to convictions under 8 U.S.C. §1324 and does not extend to other offenses
Alien smuggling (harboring aliens)	*Castro-Expinosa v. Ashcroft,* 257 F.3d 1130 (9th Cir. 2001); *Patel v. Ashcroft,* 294 F.3d 465 (3d Cir. 2002); *Zhen v. Gonzales*, 2006 U.S. App. LEXIS 8734 (10th Cir. 2006)	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
Alien smuggling (transporting aliens)	*Matter of Ruiz-Romero,* 22 I&N Dec. 486 (BIA 1999); *U.S. v. Solis Campozano,* 312 F.3d 164 (5th Cir. 2002); *U.S. v. Galindo-Gallego,* 244 F.3d 728 (9th Cir. 2001); *Salas-Mendoza,* 237 F.3d 1246 (10th Cir. 2001)	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.
Alien smuggling (conspiracy to transport and harbor aliens)	*Gavilan-Cuate v. Yetter,* 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 (aiding and abetting illegal entry)	*Matter of Alvarado-Alvina,* 22 I&N Dec. 718 BIA 1999); *Rivera-Sanchez v. Reno,* 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 (aiding and abetting illegal reentry)	*U.S. v. Virgen-Preciado*, 2006 U.S. Dist. LEXIS 20578 (Dist.Az 2006)	8 U.S.C. 1324(a)(1)(A)(v)(II)	AF — category N
Alien smuggling (conspiracy to smuggle illegal aliens)	*Chan v. Gantner,* 374 F.Supp. 2d 363 (SDNY 2005)	18 U.S.C. 371 (underlying offense of 8 U.S.C. 1324(a)(2))	AF — category U/N

(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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Fraud and misuse of visas, permits and other documents	*Pena-Rosario v. Reno,* 83 F. Supp.2d 349 (E.D.N.Y. 2000); *Chukwuezi v. Ashcroft,* 2002 U.S. App. LEXIS 23391 (3d Cir. 2002) (unpub'd opinion)	18 U.S.C. §1546(a)	AF — category 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 Note: offense falls under category P only if prison sentence of at least twelve months imposed

(R) Offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered <u>for which the term of imprisonment is at least one year</u>

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Forgery	*Matter of Aldabesheh,* 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	*Caesar v. Gonzales*, 2006 U.S. App. LEXIS 13528 (2d Cir. 2006) (unpub'd decision)	N.Y. Penal Law §170.10(1) (2nd Degree)	AF — category R Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	*Bobb v. AG*, 458 F.3d 213 (3d Cir. August 3, 2006)	18 U.S.C. §510(a)(2)	AF — category (M)(i) or (R)*
Forgery	*Onyeji v. AG of the U.S.*, 2006 U.S. App. LEXIS 11956 (3d Cir. 2006) (unpub'd opinion)	18 Pa.C.S.A. §4101(a)(1)	AF — category R* *even though the Pa. statute encompasses an intent to injure, which might be beyond the traditional definition of forgery, because "Congress evidenced an intent to define forgery in its broadest sense." Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery (possession of forged instrument with intent to defraud, deceive, or injure)	*Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005)	Conn. Gen. Stat. § 53a-139	AF — category R* *"Even if possession of a forged instrument with intent to defraud, deceive or injure is not 'forgery' as defined at common law, it is unarguably an offense 'relating to' forgery within the broad construction we have given that term." Note: offense falls under category R only if prison sentence of at least one year imposed
Counterfeiting, trademark	*Fofana v. Ridge*, 2004 U.S. App. LEXIS 23335 (3d Cir. 2005)(unpub'd opinion)	18 Pa. C.S.A. § 4119(a)	AF — category R Note: offense falls under category R only if prison sentence of at least one year imposed
Counterfeit securities, conspiracy to utter and possess with intent to deceive	*Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. 2004)	18 U.S.C. §§371, 513(a),	AF — category U/R Note: offense falls under category R only if prison sentence of at least one year imposed
Vehicle trafficking (receiving & possessing w/ intent to sell cars with altered I.D. numbers	*U.S. v. Maung*, 320 F.3d 1305 (11th Cir. 2003)	18 U.S.C. §§371, 2321(a)	AF — category R* *as an "offense relating to… trafficking in vehicles the identification numbers of which have been altered" Note: offense falls under category R only if prison sentence of at least one year imposed
Forgery	*U.S. v. Johnstone,* 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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Forgery	*Drakes v. Zimski,* 240 F.3d 246 (3d 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
Counterfeit obligations, possession	*Albillo Figueroa v. INS,* 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 and counterfeit securities)	*Wilson v. INS,* 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

(S) Offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness <u>for which the term of imprisonment is at least one year</u>

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Perjury	*Matter of Martinez-Recinos,* 23 I&N Dec. 175 (BIA 2001)	Cal. Penal Code §118(a)	AF — category S (because state law is essentially the same as the federal perjury statute at 18 U.S.C. §1621) Note: offense falls under category S only if prison sentence of at least one year imposed
Accessory after the fact	*Matter of Batista Hernandez,* 21 I&N Dec. 955 (BIA 1997); *Matter of Espinoza-Gonzalez,* 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
Misprision of felony	*Matter of Espinoza-Gonzalez,* 22 I&N Dec. 889 (BIA 1999)	18 U.S.C. §4	<u>*NOT*</u> AF under category S Note: also should *NOT* be an AF under category B (even if underlying offense is a drug-trafficking felony)
Obstructing and hindering	*Matter of Joseph,* 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 one's own arrest falls within "obstruction of justice" for purposes of category S Note: offense falls under category S only if prison sentence of at least one year imposed
Accessory after the fact	*Ramos-Chavez v. Gonzales,* 2006 U.S. App. LEXIS 935 (9th Cir. 2006) (unpub'd opinion)	Cal. Penal Code §32	AF — category S Note: offense falls under category S only if prison sentence of at least one year imposed
Contempt, criminal (disobedience of a court order)	*Alwan v. Ashcroft,* 388 F.3d 507 (5th Cir. 2004)	18 U.S.C. 1401(3)	AF — category S Note: offense falls under category S only if prison sentence of at least one year imposed
Hindering prosecution	*U.S. v. Vigil-Medina,* 2002 U.S. App. LEXIS 4961 (4th Cir. 2002) (unpub'd opinion)	N.Y. law (1st degree)	AF — category S Note: offense falls under category S only if prison sentence of at least one year imposed
False declarations before a grand jury	*Patel v. Ridge*, *2004 U.S. Dist. LEXIS 13296 (N.D. Ill. 2004)*	18 U.S.C. § 1623	AF — category S Note: offense falls under category S only if prison sentence of at least one year imposed

(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

Crime	Case(s)	Basis for Underlying Conviction	Holding *plus Notes*
Failure to appear before a court	*U.S. v. Mejia,* 2000 U.S. App. LEXIS 21765 (9th Cir. 2000) (unpub'd opinion), *cert. denied,* 532 U.S. 936 (2001)	Cal. Penal Code §1320	AF — category T Note: offense falls under category T only if a prison sentence of two or more years may be imposed for the underlying crime for which the defendant failed to appear
Failure to appear before a court	*Ferraj v. Ashcroft*, 2003 U.S. Dist. LEXIS 25361 (D.Conn. 2001)	Conn. Gen. Stat. §53a-172	*MAYBE* AF under category T* *state statute is divisible — permits conviction for failing to appear 'when legally called', which is more expansive than failing to appear 'pursuant to a court order' required to fall within category T. Here, court granted habeas petition because the only document in the record of conviction produced by the government was the transcript of petitioner's guilty plea, which did not indicate the existence of the required court order. Note: offense falls under category T only if a prison sentence of two years or more may be imposed for the underlying crime for which the defendant failed to appear
Failure to appear before a court when legally called	*Barnaby v. Reno,* 142 F. Supp.2d 277 (D. Conn. 2001)	Conn. Gen. Stat. §53a-172	*NOT* AF under category T* *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