

GUIDE TO REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN PENNSYLVANIA

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Introduction: Representing Non-citizen Defendants in Pennsylvania

Purpose of the Chart: Under the recent decision of the Supreme Court in *Padilla v. Kentucky*, 559 U.S. __ (2010), the Sixth Amendment requires defense counsel to provide immigration advice to defendants regarding the deportation consequences of pending criminal charges. The purpose of this guide is to provide an introductory tool for criminal defense attorneys to assist in navigating the complex field of immigration law, and to aide attorneys in complying with their constitutional and ethical obligations by offering a starting point for analysis. What this guide does NOT intend to do is to replace the need for individual research in each case that takes into account the particularities of each client's situation. Competent advice about the best criminal disposition in an individual noncitizen defendant's case will depend on that individual's prior criminal record, his or her immigration status, the status of immediate relatives and a number of other factors. This guide does not purport to provide legal advice or to give an opinion as to the immigration consequences that might result from a criminal disposition in a particular case.

For practice advisories and developments in the law following *Padilla*, please visit www.defendingimmigrants.org.

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

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

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DISPELLING SOME DANGEROUS MYTHS REGARDING IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

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

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

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

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

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

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

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

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

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

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

WRONG. A noncitizen without legal status at a particular point could be eligible to obtain lawful immigration status in a number of different ways. Many, if not most, of those avenues could be foreclosed by certain types of criminal convictions. There are also many discretionary waivers of deportation for which a noncitizen could qualify, but again many of these waivers are not

available to those convicted of certain offenses. But even if a person will not be able to avoid deportation in the end, criminal convictions can have harsh additional consequences. For instance, most noncitizens being deported because of a criminal conviction will face mandatory detention pending their removal. Many may be ineligible for a type of relief called "voluntary departure," which allows them to depart the country on their own and therefore avoid additional sanctions. Finally, if an undocumented individual reenters the country after being deported, she or he may face federal criminal charges if they are caught by immigration authorities, and the potential sentences they would face are much longer if they were deported subsequent to certain types of criminal convictions. For all of these reasons, immigration consequences comprise an issue that is important to every noncitizen defendant.

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

WRONG. Immigration practitioners have found that nothing is "sealed" for purposes of immigration law. Applicants for immigration benefits are often required to provide information for all prior arrests and convictions. Defense attorneys are therefore advised to assume that all criminal records will be available to immigration authorities and could trigger immigration consequences—regardless of the fact that those records are considered "sealed" as a matter of state law.

- × ***MYTH: This issue is just too complicated and there's nothing I can really do about it.***
- × ***MYTH: My clients just want to avoid serving time and they won't care about the immigration consequences.***

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

WHAT ARE THE CATEGORIES OF CRIMES THAT CAN LEAD TO IMMIGRATION CONSEQUENCES?

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

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

Aggravated Felony (AF):

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

Controlled Substances Offenses (CS):

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

Crimes Involving Moral Turpitude (CMT):

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

Other categories:

Other categories of offenses are more specific: crimes of domestic violence, crimes against children, firearm offenses, etc... Many of these categories of offenses will have their greatest negative impact on noncitizens who have been lawfully admitted to the country, especially

lawful permanent residents (LPRs). However, unlike Aggravated Felonies, these categories of offenses will often (but not always) preserve a lawful permanent resident's eligibility for discretionary waivers of deportation.

REPRESENTATION DO'S AND DON'TS

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

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

- ✓ **Avoid a “conviction” whenever possible:** Although even just some forms of criminal-related conduct can have immigration consequences, most immigration issues arise after a conviction. Obviously, obtaining an outright dismissal or a nolle prosequi would be ideal. However, Pennsylvania also provides a number of pre-trial diversion programs, some of which do not require an admission of guilt or a “no contest” plea and which lead to dispositions that would not be considered “convictions” for immigration purposes. The best option in Pennsylvania is the Accelerated Rehabilitative Disposition (ARD) program, which does not require an admission or finding of guilt and which is not considered a conviction for immigration purposes. Defense attorneys should note, however, that some of Pennsylvania's pretrial diversion programs do require an admission of guilt. Therefore these programs will NOT prevent immigration consequences, such as the Section 17 and 18 drug treatment programs, which are considered convictions for immigration purposes. For cases involving juveniles, delinquency adjudications in Pennsylvania are not considered convictions, however remember there are certain types of conduct, particularly if it is related to controlled substances, which may have independent immigration consequences.
- ✓ **Avoid an “Aggravated Felony”:** In most situations, and especially when a defendant is a lawful permanent resident (LPR) (also known as a “green-card holder”), a conviction for an aggravated felony will have the worst immigration consequences. Practitioners should be particularly careful with the subcategories of “aggravated felony” that hinge on sentence or amount of loss: here, simple changes to a plea agreement can make huge differences.
- ✓ **Avoid a “Controlled Substance Offense”:** Virtually all drug offenses will result in harsh immigration consequences for most noncitizens. The only exception is a first offense for simple possession of 30 grams or less of marijuana (30g = 1.05 ounces), which will not trigger deportability for a lawful permanent resident (but which may affect ability to return from travel abroad). Other controlled substance offenses will make a lawful permanent resident deportable, and some will bar relief from deportation. Most undocumented immigrants with a drug offense will be barred from getting legal status, unless the offense is for simple possession of 30 grams or less of marijuana.
- ✓ **Avoid “Crimes of Domestic Violence,” “Firearm Offenses,” and others:** these categories have particularly serious consequences for lawful permanent residents (LPRs). Other kinds of convictions to be avoided in this area are: crimes of stalking, crimes against children, and violations of protective orders.
- ✓ **Avoid a “Crime Involving Moral Turpitude” (CMT):** Depending on the individual's status and prior criminal history, this category may make the person removable; however, it may leave open more avenues for relief than would a conviction for an aggravated felony. If a CMT cannot be avoided completely, but the defendant does not have any

prior convictions for an offense that would be considered a CMT, a defense attorney should consider the following options:

- *If the defendant is a Lawful Permanent Resident (LPR), but has had this status for less than five years:* avoid conviction for a CMT for which a sentence of more than one year may be imposed (i.e. first and second degree misdemeanors and all felonies)
- *If the defendant is undocumented:* avoid a conviction for a CMT with a maximum possible sentence of more than one year (i.e., avoid all second and third degree misdemeanors and felonies) and obtain a maximum sentence imposed of six months or less. This should preserve the client's eligibility for the "petty offense exception" if they are otherwise eligible to apply for lawful status.

What are the things to DO when representing a noncitizen defendant?

- ✓ **Ask detailed questions about client's current immigration status:** This information is essential to an attorney's ability to provide specific and accurate immigration advice. We have provided a sample intake form in this guide, however additional information may be needed depending on the details of a particular client's situation.
- ✓ **Conduct independent research into the immigration consequences of pending charges:** This guide offers a starting point for analysis, but updated research into recent case law that takes into account the individual details of a client's situation and defense priorities is *always* necessary.
- ✓ **Communicate your specific, detailed conclusions regarding the immigration consequences of pending charges to your client:** Under *Padilla v. Kentucky*, it is an attorney's constitutional obligation to advise a noncitizen client of the deportation consequences of their criminal charges.
- ✓ **Urge client to consider pre-trial diversion programs, if applicable:** In many situations, if an outright dismissal is not possible, a pre-trial diversion program like ARD that avoids a "conviction" for immigration purposes will be the best possible outcome for a defendant. Although these programs impose significant requirements, a client should be advised of the benefits in the immigration context.
- ✓ **Pay careful attention to crafting a plea agreement:** In many situations, small changes to how the plea agreement is crafted can have a huge impact on the consequences stemming from the conviction. For instance:
 - If the conviction is one which could constitute an aggravated felony if a sentence of 1 year or more is imposed, a plea agreement with a sentence (whether suspended or to be served) of 364 days instead of 1 year may well make the difference between an essentially permanent deportation and possibly no immigration consequences at all.
 - Consider crafting pleas to charges that do not trigger immigration consequences, or that trigger less serious categories (for instance, it is often better to plea to a CMT than to plea to an aggravated felony).

“Sentence Imposed” in Pennsylvania

Definition of “sentence imposed” for immigration purposes. The immigration statute defines sentence imposed as the “period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part.”

- Under Pennsylvania's minimum/maximum sentencing structure the “sentence imposed” for immigration purposes is the maximum sentenced imposed. Example: 11 ½ to 23 months is a sentence of one year or more. A sentence of 5 1/2 to 11 months is not.
- This language refers to the sentence actually imposed, not to the potential sentence.
- It does not include the period of probation, although the additional sentence imposed by a court after a probation or parole violation is included within the “sentence imposed.”
- It includes the entire sentence imposed even if the client has been immediately paroled and never actually served any period of incarceration.

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

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

Vacated sentences: Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent some convictions from being considered aggravated felonies. This will only help avoid an aggravated felony that is triggered by a one year sentence. Remember that many aggravated felony categories do not have any sentence requirement.

The petty offense exception. The above definition of “sentence imposed” also applies to persons attempting to qualify for the “petty offense” exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum possible sentence of one year or less and a sentence imposed of six months or less. See 8 USC § 1182(a)(2)(A)(ii)(II).

Applicability of this Guide outside the Third Circuit and the impact of *Silva Trevino*

This chart was written with reference to Third Circuit case law. This is because most decisions that discuss the consequences of Pennsylvania crimes arose in the Third Circuit, and most persons who are convicted of crimes in Pennsylvania and are placed in immigration proceedings will remain in the Third Circuit. However, a person may have their removal proceedings brought in another jurisdiction if the person is detained in another Circuit, if they are taken into custody at a port of entry, if they move out of the Third Circuit or they file an immigration application in another area. Should your client have his/her immigration case heard outside the Third Circuit, our analysis may not be applicable.

Our suggestions regarding crimes involving moral turpitude is particularly limited in its usefulness to cases arising in the Third Circuit due to former Attorney General Mukasey's decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. November 7, 2008). *Silva Trevino* attempts to re-write the analysis for the category of crimes involving moral turpitude under federal immigration law. The new analysis has disastrous consequences for noncitizens, as it proposes a broader definition of the category, dramatically expands the type of evidence admissible to show the nature of a conviction and may even shift the burden of proof to noncitizens in deportation proceedings.

Following the decision in *Silva Trevino*, the Third Circuit rejected the Attorney General's new analysis in *Jean Louis v. Holder*, 582 F.3d 462 (3d Cir. 2009). With sharp criticism for the Attorney General's impermissible reading of the federal statute and for the secretive manner in which *Silva Trevino* was issued, the Court held that it would continue to follow its previous decisions regarding crimes involving moral turpitude and would not apply the Attorney General's new opinion.

The Third Circuit is the first and only Circuit Court of Appeals to issue an opinion regarding *Silva Trevino*. The decision itself is also being challenged, as a motion for reconsideration is currently pending with the current Attorney General Holder. There are numerous reasons to believe that other jurisdictions will follow this decision, however, until new decisions have been issued, immigration courts outside the Third Circuit are still following *Silva Trevino*. The analysis in this chart regarding crimes involving moral turpitude therefore only pertains to cases arising in the Third Circuit.

For an in-depth discussion of the decision in *Silva Trevino* and advice for immigration and criminal defense practitioners, see Norton Tooby and Dan Kesselbrenner, "Living under [Silva Trevino](http://www.nationalimmigrationproject.org)," available at www.nationalimmigrationproject.org and Isaac Wheeler and Heidi Altman, "Recent Developments in the Categorical Approach: Tips for Criminal Defense Lawyers Representing Immigrant Clients," at www.immigrantdefenseproject.org.

INTAKE

NAME _____ A# _____ INMATE# _____

IN CUSTODY? Y N IF YES, WHERE? _____ ICE DETAINER? Y N

CONTACT INFO: _____
_____ (TEL.) _____

PENDING CASE NUMBER(S): _____

COUNTRY OF ORIGIN _____ DATE OF LAST ENTRY INTO U.S. _____

STATUS:

UNDOCUMENTED
DATE OF ENTRY: _____

LAWFUL PERMANENT RESIDENT / GREEN CARD
SINCE WHEN? _____

APPLICATION PENDING
WHAT TYPE? _____

REFUGEE / ASYLEE
SINCE WHEN? _____

UNKNOWN

OTHER _____

COPY OF DOCUMENTATION AVAILABLE? Y N (please copy and attach)

PRIOR DEPORTATION ? Y N PRIOR HEARING BEFORE IMMIGRATION JUDGE? Y N

FAMILY CONTACT _____

FAMILY TIES:

SPOUSE: USC LPR UNDOCUMENTED PARTNER: USC LPR UNDOCUMENTED

CHILDREN: NUMBER ____ AGES: _____ USC LPR UNDOCUMENTED

MOTHER: USC LPR UNDOCUMENTED

FATHER : USC LPR UNDOCUMENTED

USC GRANDPARENTS? YES NO

DOES CLIENT HAVE AN IMMIGRATION ATTORNEY? YES NO

IF YES, NAME AND CONTACT INFORMATION: _____

PLEASE ATTACH FULL CRIMINAL HISTORY OF ALL ARRESTS ANYWHERE IN THE US, INCLUDING ALL CHARGES AND DISPOSITIONS

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

OFFENSE	AGGRAVATED FELONY (AF)	CRIME INVOLVING MORAL TURPITUDE (CMT)	OTHER INDEPENDENT GROUNDS FOR INADMISSIBILITY / DEPORTABILITY INCLUDING CONTROLLED SUBSTANCES, DOMESTIC VIOLENCE, CRIMES AGAINST CHILD, FIREARMS ETC.	ALTERNATE PLEAS AND PRACTICE TIPS
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Inchoate Crimes				
Attempt (generally)	Attempt to commit an aggravated felony is itself an aggravated felony.	Attempt to commit a CMT is a CMT, unless the underlying offense has a mental state of recklessness. Attempt to commit a crime with a reckless mental state is not a CMT. <u>Knapik v. Ashcroft</u> , 384 F.3d 84 (3d Cir. 2004).	Attempt to commit any controlled substance or, firearm offense is generally a controlled substance or firearm offense. Attempt to commit a CODV or crimes against child offense may be a CODV or crimes against child offense.	
18 Pa. C.S. § 902 Solicitation	Solicitation to commit an aggravated felony may be an aggravated felony.	Solicitation to commit a CMT is probably a CMT.	Solicitation to commit any controlled substance, CODV, firearm or other offense is probably a CODV, firearm or other offense.	Tip for immigration attorneys: Congress specifically included attempt and conspiracy in the aggravated felony definition but did not include solicitation. Good 9 th Cir. case law that solicitation is not an aggravated felony.
18 Pa. C.S. § 903 Conspiracy	Conspiracy to commit an aggravated felony is itself an aggravated felony.	Conspiracy to commit a CMT is generally a CMT.	Conspiracy to commit any controlled substance, CODV, firearm or other offense is generally a controlled substance, CODV, firearm or other offense.	
Homicide				
18 Pa. C.S. § 2502 Murder	Yes.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is	

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			currently co-habiting co-habited with or co-parent with	
18 Pa. C.S. § 2503 Voluntary manslaughter	Yes, crime of violence AF if term of imprisonment is imposed of one year or more.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with	
18 Pa. C.S. § 2504 Involuntary manslaughter	Recklessly—No. Grossly negligent—No. Under <u>Tran v. Attorney General</u> , 414 F. 3d 464 (2005) specific intent is required for a crime of violence AF, so a conviction under this statute would never qualify.	Yes if reckless conduct. No if negligent conduct.	No.	Tip for criminal attorneys: Try to plead specifically to a grossly negligent act to avoid CMT.
Assault				
18 Pa. C.S. § 2701(a)(1) Simple Assault	No. Not a crime of violence. <u>Popal v. Gonzales</u> , 416 F.3d 249 (3d Cir. 2005); <u>Leocal v Ashcroft</u> , 125 U.S. 377 (2004).	Yes if knowing or intentional conduct. No if reckless conduct. <u>Jean-Louis v. Attorney General</u> (3d Cir. 2009).	CODV: No because not a crime of violence. Crimes Against Child: Sentencing enhancement for assault against child under 12 could qualify.	Tips for criminal attorneys: Attempt to plead to (a)(1) generally with no mention of the level of intent on the record or specify reckless or negligent mental state. Tip for immigration attorneys: If

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OFFENSE	AGGRAVATED FELONY (AF)	CRIME INVOLVING MORAL TURPITUDE (CMT)	OTHER INDEPENDENT GROUNDS FOR INADMISSIBILITY / DEPORTABILITY INCLUDING CONTROLLED SUBSTANCES, DOMESTIC VIOLENCE, CRIMES AGAINST CHILD, FIREARMS ETC.	ALTERNATE PLEAS AND PRACTICE TIPS
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				subsection of statute is not specified, argument against CMT is that statute includes negligent assault, which does not meet mental state requirement. <u>Partyka v. Attorney General</u> , 417 F.3d 408 (3d Cir. 2005) (NJ simple assault is not a CMT where subsection is not specified and statute includes negligent conduct).
18 Pa. C.S. § 2701 (a)(2) Simple Assault (negligently)	No.	No. See <u>Partyka v. Attorney General</u> , 417 F.3d 408 (3d Cir. 2005) (negligent assault not a CMT).	CODV: No. Crimes Against Child: No.	Tip for criminal attorneys: Make sure the record is clear that client is pleading to or convicted of (a)(2).
18 Pa. C.S. § 2701 (a) (3) Simple Assault (physical menace)	Yes, crime of violence AF if term of imprisonment of one year or more is imposed. <u>Singh v. Gonzales</u> , 432 F.3d 533 (2006).	Maybe.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Crimes Against Child: Sentencing enhancement for assault against child under 12 would qualify.	Tip for criminal attorneys: If conduct clearly meets the (a)(3) standards, plead or have reflect guilty to 2701(a) generally with no mention of subsection on the record to avoid AF and CMT. Try to keep record clean of any specific intent, relationship between parties and age of victim. Avoid sentence enhancement for victim under 12 to avoid crimes against child. Keep term of imprisonment to 364 days or less to avoid AF. Tip for immigration attorneys: If

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				subsection is not specified in the record, argument against AF and CMT could be that statute includes negligent conduct. See advice for 2701(a)(1) above.
<p>18 Pa. C.S. § 2702(a)(1) Aggravated Assault</p>	Probably AF as crime of violence if term of imprisonment of one year or more is imposed.	Yes. Under <i>Matter of Danesh</i> , 19 I. & N. Dec. 669 (BIA 1988), mental state of at least recklessness with element of serious bodily injury is a CMT.	CODV: If record reflects attempt or knowing or intentional conduct, this is probably CODV offense if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Plea specifically to reckless conduct or leave record vague as to the level of intent to avoid AF and CODV.</p> <p>Tip for immigration attorneys: If mental state is not specified in the record of conviction and the government bears the burden of proving the elements of the conviction, this should not be an AF as a crime of violence because the statute includes reckless conduct.</p>
<p>18 Pa. C.S. § 2702(a)(2) Aggravated Assault</p>	Maybe AF as crime of violence if term of imprisonment of one year or more is imposed.	Yes. Under <i>Matter of Danesh</i> , 19 I. & N. Dec. 669 (BIA 1988), mental state of at least recklessness with element of serious bodily injury is a CMT.	CODV: Maybe if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	<p>Tip for criminal attorneys: Keep sentence of confinement to 364 days or less to avoid AF. Plea specifically to reckless conduct or leave record vague as to the level of intent to avoid AF and CODV.</p> <p>Tip for immigration attorneys: If mental state is not specified in the record of conviction and the</p>

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

OFFENSE	AGGRAVATED FELONY (AF)	CRIME INVOLVING MORAL TURPITUDE (CMT)	OTHER INDEPENDENT GROUNDS FOR INADMISSIBILITY / DEPORTABILITY INCLUDING CONTROLLED SUBSTANCES, DOMESTIC VIOLENCE, CRIMES AGAINST CHILD, FIREARMS ETC.	ALTERNATE PLEAS AND PRACTICE TIPS
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				government bears the burden of proof, this should not be an AF as a crime of violence because the statute includes reckless conduct.
<p>18 Pa. C.S. § 2702(a)(3), (a)(4), (a)(5), (a)(6) Aggravated Assault</p>	<p>Yes, crime of violence AF if term of imprisonment of one year or more is imposed if convicted under (a)(4) or (a)(6).</p> <p>Possible crime of violence AF if convicted under (a)(3) or (a)(5).</p>	<p>Yes if convicted under (a)(3),(4) and (5). Probably under (a)(6).</p>	<p>CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p>	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.</p>
<p>18 Pa. C.S. § 2702(a)(7) Aggravated Assault</p>	<p>Probably AF as crime of violence if term of imprisonment of one year or more is imposed.</p>	<p>Probably.</p>	<p>CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p>	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.</p> <p>Tip for immigration attorneys: Argument against AF could be that crime could be strict liability offense, so would not rise to the level of intent necessary for an AF or a CMT.</p>
<p>18 Pa. C.S. § 2705 Recklessly Endangering Another Person</p>	<p>No. Not a crime of violence under <u>Singh v. Gonzales</u>, 432 F.3d 533 (2006).</p>	<p>Probably. See <u>Knapik v. Ashcroft</u>, 384 F.3d 84 (3d Cir. 2004) (New York REAP is a CMT); <i>In Re: Arben Braimillari</i>,</p>	<p>CODV: no because not a crime of violence.</p>	<p>Tip for criminal attorneys: A plea to attempted REAP may avoid CMT under <u>Knapik v. Ashcroft</u>, 384 F.3d 84 (3d Cir. 2004). Not clear if this is possible plea in PA.</p>

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		2006 WL 729794 (BIA 2006) (unpublished BIA opinion, PA REAP is a CMT)		Tip for immigration attorneys: There is a strong argument under <u>Jean Louis v. Holder</u> that this is not a CMT.
18 Pa. C.S. § 2706 Making Terroristic Threats (a)(1)	Yes, crime of violence AF if term of imprisonment of one year or more is imposed. <u>Bovkun v. Ashcroft</u> , 283 F.3d 166 (3d Cir.2002).	Probably. No published or 3 rd Cir. case law, but unpublished BIA opinion held NJ statute, which is similar to PA, to be CMT. <i>In Re: Sosa</i> , 2007 WL 1192268 (BIA 2007).	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Harassment may be a safer alternative. Tip for immigration attorneys: <u>Bovkun v. Ashcroft</u> only addressed the previous version of terroristic threats statute, which was not subdivided. In dicta, the court stated that the analysis would not change, however there is a strong argument that this statute now includes multiple forms of conduct which would not be AFs or CMTs.
18 Pa. C.S. § 2706 Making Terroristic Threats (a)(2), (3)	Probably AF as crime of violence if term of imprisonment of one year or more is imposed.	Maybe.	CODV: Probably if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Harassment may be a safer alternative. Tip for immigration attorneys: See above.
18 Pa. C.S. § 2709 Harassment (a)(1)-(3) S	No. Not an AF as a crime of violence because this is a summary offense	Probably not.	CODV: (a)(1) may be CODV if against current or former spouse, person with whom the defendant is currently co-	Tip for criminal attorneys: To avoid potential CMT or CODV, plea specifically to (a)(3) for "engages in a course of conduct or repeatedly

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	which is not subject to a 1-year term of imprisonment.		habiting co-habited with or co-parent with. Sections (a)(2), (a)(3) may be "stalking" ground of deportability.	commits acts which serve no legitimate purpose" and keep record clean of any reference to stalking and/or threats of violence. Tip for immigration attorneys: Argument against CMT could be that intent is only to "harass or annoy," with no requirement of injury or threat. See <u>Matter of Sanudo</u> , 23 I. & N. Dec. 968, 970-71 (BIA 2006) (where no requirement of injury or intent to cause injury, battery is not a CMT).
18 Pa. C.S. § 2709 Harassment (a)(4)-(7) M3	No.	Probably not.	Crime of Stalking: Maybe.	Tip for criminal attorneys: Subsection (a)(3) is a safer alternative. See above.
18 Pa. C.S. § 2709.1 Stalking	Possible crime of violence AF if a term of imprisonment of one year or more is imposed and crime is graded as a felony. No case law on this specific statute, but see <u>In re Malta-Espinoza</u> , 23 I. & N. Dec. 656 (2004) (BIA held that CA conviction for	Probably.	Crime of Stalking: Yes. Crimes Against Child: Sentencing enhancement for victim under 12 might qualify.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less and have crime graded as a misdemeanor to avoid AF. Avoid sentence enhancement for victim under 12 to avoid crime against child. Tip for immigration attorneys: Argument against AF could be that PA statute is broader than the statute in <u>Malta Espinoza</u> and would include activity that did not

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	<p>stalking constitutes crime of violence under 18 USC 16(b)).</p> <p>Probably not AF for a misdemeanor conviction, especially under (a)(2).</p>			constitute AF.
<p>18 Pa. C.S. § 2901 Kidnapping (intentional or knowing)</p>	<p>Probably AF as crime of violence if record reflects removal or confinement by force and term of imprisonment of one year or more is imposed.</p> <p>Possible AF as crime of violence if record reflects removal or confinement by threat or deception and term of imprisonment of one year or more is imposed.</p>	Yes.	<p>CODV: Maybe if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p> <p>Crimes Against Child: Sentence enhancement for victim under 14 would qualify.</p>	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Avoid any reference to relationship between the parties or age of victim to avoid CODV and crimes against child. Keep record clear of injury or threats and specify that crime was accomplished by deception, not force to possibly avoid AF.</p> <p>Tip for immigration attorneys: Argument against AF could be that statute includes unlawful confinement accomplished by deception or without the consent of a parent, which may not be crime of violence.</p>
<p>18 Pa. C.S. § 2902</p>	May be crime of violence AF if term	Yes. <u>Sharpe v. Riley</u> , 271 F. Supp. 2d 631 (E.D.	CODV: Possible if against current or former spouse,	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less

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Unlawful Restraint	of imprisonment of one year or more is imposed.	Pa. 2003) (crime is a CMT).	<p>person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p> <p>Crimes Against Child: Sentence enhancement for victim under 18 might qualify.</p>	to avoid AF. Avoid any reference to relationship between the parties to avoid CODV. Avoid sentence enhancement for victim under 18 to avoid crimes against child..
18 Pa. C.S. § 2903 False Imprisonment	Probably not.	Possible CMT.	<p>CODV: Probably not.</p> <p>Crimes Against Child: Sentence enhancement for victim under 18 might qualify.</p>	<p>Tip for criminal attorneys: Keep record clear of any use or threat of force or injury to avoid AF and CMT. Avoid sentence enhancement for victim under 18.</p> <p>Tip for immigration attorneys: Argument against AF as crime of violence could be that under PA case law, the only requirements for a conviction under this statute are (1) detention and (2) the unlawfulness of the detention. See <i>In the Interest of M.G.</i>, 2007 PA Super 27 (Pa. Super. Ct. 2007).</p>
18 Pa. C.S. § 2904 Interference with custody of children	Probably not.	Probably.	<p>CODV: Probably not.</p> <p>Crimes Against Child: Probably.</p>	<p>Tip for criminal attorneys: Keep record clear of any use or threat of force to avoid CMT.</p> <p>Tip for immigration attorneys: Possible argument against CMT is</p>

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				that simple interference with liberty does not rise to the level of CMT.
Sexual Offenses				
18 Pa. C.S. § 3121 Rape (intentional or knowing)	Yes, regardless of sentence imposed.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Crimes against child: yes.	
18 Pa. C.S. § 3122.1 Statutory Sexual Assault	Yes, crime of violence AF if term of imprisonment of one year or more is imposed Also AF as sexual abuse of a minor regardless of sentence imposed. <u>In re Pedro Aguilar</u> , 2004 WL 2952287 (Unpublished BIA opinion finding statutory rape under RI statute is crime of violence); <u>In re Cabrera-Gutierrez</u> ,	Yes. The BIA has held that statutory rape is CMT. <u>Matter of Torres-Varela</u> , 23 I&N Dec. 78, 84 (BIA 2001) (statutory rape is CMT even though it is strict liability). See <u>United States v. Grey</u> , 87 Fed. Appx. 254, 256 n.4 (3d Cir. 2004) (stating in unpublished opinion that statutory rape is CMT, cites to similar holdings in other circuits.)	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Crimes Against Child: Yes.	

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	2007 WL 1129208 (unpublished BIA opinion finding statutory rape to be sex abuse of minor).			
<p>18 Pa. C.S. § 3123(a)(1) – (2) Involuntary Deviate Sexual Intercourse</p>	<p>Yes, crime of violence AF if term of imprisonment of one year or more is imposed</p> <p>Possible AF as rape regardless of sentence imposed.</p>	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	
<p>18 Pa. C.S. § 3123(a)(3) – (5) Involuntary Deviate Sexual Intercourse where victim cannot consent</p>	<p>Yes, crime of violence AF if term of imprisonment of one year or more is imposed because victim is unable to give consent. See <u>Okocci Remoi v. AG</u>, 175 Fed Appx 580, 585 (3rd Cir. 2006) (unpublished opinion finding that “a sexual crime against a physically helpless victim, unable to give</p>	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	

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	<p>consent, involves a substantial risk that physical force will be used").</p> <p>Probably also AF as rape. See <u>In re Xavier Gregory Solomon</u>, 2007 WL 2825103 (BIA 2007) (unpublished opinion finding that nonconsensual sexual intercourse with a person not the spouse of the perpetrator falls under "rape"); <u>IN RE JUAN CARLOS MENDOZA</u>, 2008 WL 2079304 (BIA 2008) (similar finding).</p>			
<p>18 Pa. C.S. § 3123(a)(7) Involuntary Deviate Sexual Intercourse where victim is less than 16</p>	<p>Yes. AF as sexual abuse of a minor regardless of sentence imposed. See <u>Singh v. Ashcroft</u>, 383 F3d 144, 153 (3d Cir. 2004) (sexual abuse</p>	<p>Yes.</p>	<p>Crimes Against Child: yes.</p>	

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	of minor will be found where age is specified as element of statute).			
18 Pa. C.S. § 3123(b) Involuntary Deviate Sexual Intercourse With a Child less than 13	Yes. AF as sexual abuse of a minor regardless of sentence imposed. See also <u>Singh v. Ashcroft</u> , supra.	Yes.	Crimes Against Child: yes.	
18 Pa C.S. § 3123(c) Involuntary Deviate Sexual Intercourse with a Child with Serious Bodily Injury	Yes. AF as sexual abuse of a minor regardless of sentence imposed. Also AF as a crime of violence if a term of imprisonment of one year of more is imposed.	Yes.	Crimes Against Child: Yes.	
18 Pa. C.S. § 3124.1 Sexual Assault	Yes. AF as rape. Also AF as crime of violence if a term of imprisonment of one year of more is imposed.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	
18 Pa. C.S. § 3124.2 Institutional	Probably crime of violence AF if a term	Yes.	No.	

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Sexual Assault	of imprisonment of one year or more is imposed because victim is either an inmate, detainee, patient or resident who could be seen as incapable of consent.			
18 Pa. C.S. § 3125(a)(1) Aggravated Indecent Assault without consent	Yes. AF as rape because it involves nonconsensual sexual penetration. See <u>In re Xavier Gregory Solomon</u> , supra. Also AF as a crime of violence if a term of imprisonment of one year of more is imposed.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	
18 Pa. C.S. § 3125(a)(2) – (3) Aggravated Indecent Assault (a)(2) with force (a)(3) with threat of force	Yes. AF as a crime of violence if a term of imprisonment of one year of more is imposed.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	

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<p>18 Pa. C.S. § 3125(a)(4) – (6) Aggravated Indecent Assault (a)(4) victim is unconscious (a)(5) victim is impaired (a)(6) victim is disabled</p>	<p>Yes. AF as crime of violence if a term of imprisonment of one year or more is imposed because victim is unable to give consent. See <u>Okocci Remoi v. AG</u>, supra.</p>	<p>Yes.</p>	<p>CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p>	
<p>18 Pa. C.S. § 3125(a)(7) and (8) Aggravated Indecent Assault (a)(7) victim is less than 16 (a)(8) victim is less than 13</p>	<p>Yes. AF as sexual abuse of a minor regardless of sentence imposed.</p>	<p>Yes.</p>	<p>Crimes Against Child: yes.</p>	
<p>18 Pa. C.S. § 3125(b) Aggravated Indecent Assault of a Child</p>	<p>Yes. AF as sexual abuse of a minor regardless of sentence imposed. (The statutory definition of 3125(b) is the same as 3125(a)(7) except in terms of grading which shouldn't make a difference for immigration</p>	<p>Yes.</p>	<p>Crimes Against Child: yes.</p>	

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	purposes).			
18 Pa. C.S. § 3126(a) Indecent Assault (where subsection of statute is not specified in record of conviction).	Possible AF.	Yes. <u>Mehboob v. AG</u> (3d Cir. 2008) (published opinion finding all sections of 3126 to be CMTs).	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	Tip for criminal attorneys: To possibly avoid AF, keep record clear of subsection of statute and have client plea to 3126(a) generally. Tip for immigration attorneys: If subsection is not specified in record of conviction, this might not be an AF because conviction under subsection (a)(1) might not be an AF. See 18 Pa C.S. § 3126(a)(1) below.
18 Pa. C.S. § 3126(a)(1) Indecent Assault without consent	Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed.	Yes, requires at least recklessness.	CODV: Probably not.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Tip for immigration attorneys: 3d Circuit has not ruled that crime of violence will be found with simple lack of consent, but other circuits have. See <u>Zaidi v. Ashcroft</u> , 374 F3d 357, 361 (5 th Cir. 2004); <u>Sutherland v. Reno</u> , 228 F.3d 171, 176-77 (2d Cir. 2000). Not AF as rape because it does not involve at least sexual penetration. See <u>In re Xavier Gregory Solomon</u> , supra. Not AF as sexual abuse of minor, as statute

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				does not specify age; see <u>Singh v. Ashcroft</u> , supra.
18 Pa. C.S. § 3126(a)(2) – (a)(3) Indecent Assault (a)(2) with force (a)(3) with threat of force	Yes, crime of violence AF if term of imprisonment of one year or more is imposed.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF.
18 Pa. C.S. § 3126(a)(4) – (a)(6) Indecent Assault (a)(4) victim is unconscious (a)(5) victim is impaired (a)(6) victim is disabled	Yes, crime of violence AF if term of imprisonment of one year or more is imposed because victim is unable to give consent. See <u>Okocci Remoi v. AG</u> , supra.	Yes.	CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF.
18 Pa. C.S. § 3126(a)(7) and (a)(8) Indecent Assault (a)(7) victim is less than 16 (a)(8) victim is less than 13	Yes. AF as sexual abuse of a minor regardless of sentence imposed.	Yes. <u>Mehboob v. AG</u> , supra.	Crimes Against Child: yes.	
18 Pa. C.S. § 3127 Indecent exposure	No.	Yes.	CODV: No because not a crime of violence.	

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Property Destruction				
<p>18 Pa. C.S. § 3301(d) Reckless Burning or Exploding</p>	<p>No. Not AF as a crime of violence. <u>Tran v. Attorney General</u>, 414 F. 3d 464 (2005)</p>	<p>Possible CMT.</p>	<p>CODV: No because not a crime of violence.</p>	<p>Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding, see <u>Knapik v. Ashcroft</u>, 384 F.3d 84 (3d Cir. 2004) (offense involving attempted reckless mens rea is not a CIMT).</p>
<p>18 Pa. C.S. § 3304 (1), (2) Criminal Mischief</p>	<p>Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed and plea is to intentional conduct.</p>	<p>Possible CMT.</p>	<p>Possibly a "destructive device offense" if record of conviction establishes that offense involved "destructive device" (as defined in 18 U.S.C. 921 (a)).</p>	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. For safest outcome, plea specifically to negligent conduct to avoid AF and CMT.</p> <p>Tip for immigration attorneys: There is no case law on this statute specifically, but for argument against AF, see <u>US v. Landeros-Gonzales</u>, 262 F.3d 424 (5th Cir. 2001) (Texas criminal mischief that penalized intentional marking of another's property not an AF as a crime of violence). If the government bears the burden and the level of intent is not specified in the record, this should not be an AF or CMT because statute includes negligent conduct. See <u>Matter of Herndon Melendez</u>, 34 Immig.</p>

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				Rptr. B1-58 (unpublished 2006 BIA decision that a Texas conviction for intentional property damage is not a CMT).
18 Pa. C.S. § 3304 (3) Criminal Mischief	May be fraud AF if there is a loss to victim of more than \$10,000.	Possible CMT.	No.	Tip for criminal attorneys: To avoid AF, keep record clear of any language regarding specific intent or amount of loss if more than \$10,000. If possible, plea specifically to reckless or negligent conduct. Under <u>Nijhawan v. Holder</u> No. 08-495, 557 U. S. ____ (2009), DHS can look at outside documents, like presentence investigation reports, to establish amount. Plea should specifically be to amount less than \$10,000 to avoid AF.
18 Pa. C.S. § 3304 (4)(5)(6) Criminal Mischief	Possible crime of violence AF if a term of imprisonment of one year or more is imposed.	Possible CMT.	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
Burglary and Criminal Intrusion				
18 Pa. C.S. § 3502(c)(1) Burglary	Probably burglary AF if a term of imprisonment of one year or more is imposed. "Occupied	Probably. See <u>Matter of Louissant</u> , 24, I&N Dec. 754 (BIA 2009).	CODV: Possible. It it's a crime of violence, would be CODV offense if against current or former spouse, person with whom the defendant is currently co-habiting co-	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Keep record vague with regard to what was entered to possibly avoid generic burglary AF. Because definition of "occupied

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OFFENSE	AGGRAVATED FELONY (AF)	CRIME INVOLVING MORAL TURPITUDE (CMT)	OTHER INDEPENDENT GROUNDS FOR INADMISSIBILITY / DEPORTABILITY INCLUDING CONTROLLED SUBSTANCES, DOMESTIC VIOLENCE, CRIMES AGAINST CHILD, FIREARMS ETC.	ALTERNATE PLEAS AND PRACTICE TIPS
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	<p>structure" definition includes vehicles and other structures which would not qualify as a generic burglary. <u>Taylor v. United States</u>, 495 U.S. 575 (1990).</p> <p>May also be crime of violence AF if a term of imprisonment of one year or more is imposed. <u>Leocal v. Ashcroft</u>, 125 U.S. 377 (2004) (in dicta, burglary of a dwelling is a crime of violence).</p>		<p>habited with or co-parent with.</p>	<p>structure" in Pennsylvania includes vehicles and securely fenced lots, a specific plea to the language of the statute may avoid AF as a burglary offense. Specify vehicle or fenced lot if applicable.</p> <p>Tip for immigration attorneys: If the record of conviction does not specify what the client actually entered and the government bears the burden of proof, argument against AF is that generic burglary does not include vehicles or securely fenced lots, which are included in the PA statute. See <u>United States v. Bennett</u>, 100 F.3d 1105 (3d Cir. Pa. 1996) (finding that the Pennsylvania burglary statute includes entering a fenced lot, which would not qualify as federal generic burglary). Possible argument against CMT is that conviction under this statute is distinguishable from the FL statute in <u>Louissant</u> because PA statute punishes entry of non-dwellings.</p>
<p>18 Pa. C.S. § 3502 (c)(2) Burglary of a Non-dwelling F2</p>	<p>Probably burglary AF if a term of imprisonment of one year or more is</p>	<p>Probably. See <u>Matter of Louissant</u>, 24, I&N Dec. 754 (BIA 2009).</p>	<p>CODV: Should not be because statute specifically states that structure is not adapted for overnight</p>	<p>See advice above.</p>

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	imposed. See advice above.		accommodation so this should not qualify as a crime of violence.	
<p>18 Pa. C.S. § 3503(a) Criminal Trespass-- Buildings and Occupied Structures (1)(i) F3 (unprivileged entry)</p>	Probably not.	Possible. Compare <u>Matter of Esfandiary</u> , 16 I&N Dec. 659, 661 (BIA 1979) (conviction for malicious trespass only CMT because required finding of intent to commit petty larceny) with <u>Matter of Louissant</u> , supra.	CODV: Probably not.	<p>Tips for criminal attorneys: If possible, plea specifically to entry without force or damage to property and keep record clear of any intention to commit a crime on the property to potentially avoid CMT. Keep record vague as to what structure was entered or plea specifically to vehicle or fenced lot if applicable.</p> <p>Tip for immigration attorneys: Criminal trespass uses the same vague definition of "occupied structure" as burglary; see advice for §3502 above.</p>
<p>18 Pa. C.S. § 3503(a) Criminal trespass Buildings and Occupied Structures (1)(ii) F2 (breaking and entering)</p>	Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed.	Possible.	CODV: Possible crime of violence, so possible CODV if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Keep record clear of damage to property or intention to commit crime inside structure to potentially avoid AF and CMT.</p> <p>Tip for immigration attorneys: For argument against CMT, see <u>Matter of Herndon Melendez</u>, 34 Immig. Rptr. B1-58 (unpublished 2006 BIA</p>

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				decision that intentional property damage may not be a CMT).
18 Pa. C.S. § 3503(b) Defiant Trespass	No.	Probably not.	No.	Tip for immigration attorneys: Statute punishes mere presence, which should not qualify as an AF or CMT.
18 Pa. C.S. § 3503(b.1) Simple Trespass	No. While this offense may qualify as a crime of violence, it is a summary offense and only punishable by up to 90 days so it cannot be an aggravated felony.	Probably.	CODV: Possible crime of violence, so possible CODV offense if against current or former spouse, person with whom the defendant is currently co-habiting or co-parenting with.	Tips for criminal attorneys: Section (b.1)(1)(iii) for attempted defacement of property is a safer option. Tip for immigration attorneys: If conviction is for property defacement or damage, possible argument against CMT that crime is similar to criminal mischief and should not be CMT. See criminal mischief analysis under §3304.
Robbery				
18 Pa.C.S. § 3701 Robbery	Yes, theft or attempted theft AF if term of imprisonment of one year or more is imposed. Also a possible AF as a crime of violence if a term of imprisonment of one	Yes.	CODV: If it is a crime of violence, yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Firearms: Probably not because crime by statute does not require firearm.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. A plea to 3701(a)(1)(iii) may also avoid the crime of violence category if the underlying felony is not a crime of violence and does not create a risk that substantial harm will be used.

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	year or more is imposed.			
18 Pa. C.S. § 3702 Robbery of a Motor Vehicle	Yes, theft AF if a term of imprisonment of one year or more is imposed. Also a possible AF as a crime of violence if a term of imprisonment of one year or more is imposed.	Probably.	Firearms: Probably not because crime by statute does not require firearm.	<p>Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. UUA is safer alternative to avoid AF and CMT.</p> <p>Tip for immigration attorneys: Possible argument against CMT is that statute could include a temporary taking. See <u>Commonwealth v. Jones</u>, 2001 PA Super 81, P6 (Pa. Super. Ct. 2001) (no requirement of permanent taking for conviction under this statute).</p>

Theft Offenses				
18 Pa. C.S. § 3921(a) Theft by unlawful taking Movable Property	Yes, theft AF if a term of imprisonment of one year or more is imposed. <u>Matter of V-Z-S</u> 22 I & N Dec. 1338 (BIA 2000).	Yes. <u>Nugent v. Ashcroft</u> , 367 F. 3d 162, 165 (3d. Cir. 2004) (in dicta, crime is generally a CMT).	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. If case involves an auto, unauthorized use of an automobile is a safer option to avoid AF and CMT.
18 Pa. C.S. § 3921(b) Theft Unlawful taking Immovable Property	Probably not.	Probably not.	No.	<p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.</p> <p>Tip for immigration attorneys: This</p>

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				conviction should not be a theft AF or CMT because there is no element of intent to deprive.
18 Pa. C.S. § 3922(a) Theft by Deception	Possible AF as both fraud and theft offense, but only if the loss to the victim reflected in the record is \$10,000 and a term of imprisonment of one year or more is imposed. <u>Nugent v. Ashcroft</u> , 367 F. 3d 162, 165 (3d. Cir. 2004) (note: this holding is particular to the 3 rd Circuit).	Yes. <u>Nugent v. Ashcroft</u> , 367 F. 3d 162, 165 (3d. Cir. 2004) (in dicta, crime is generally a CMT).	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Under <u>Nijhawan v. Holder</u> No. 08-495, 557 U. S. ____ (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount. Plea should specifically be to amount less than \$10,000 to avoid AF. Bad checks is a safer alternative to avoid CMT if amount is less than \$10,000.
18 Pa. C. S. § 3925 Receiving stolen property	Yes, theft AF if a term of imprisonment of one year or more is imposed.	Yes.	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
18 Pa. C. S. § 3926 Theft of Services	Yes, theft AF if term of imprisonment of one year or more is imposed. <u>Ilchuk v. Att. Gen.</u> , 434 F.3d 618 (3d Cir. 2006).	Yes.	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.

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	Possible AF as deceit offense if convicted for deception and loss to victim is more than \$10,000. See 3922(a) Theft by Deception for advice.			
18 Pa. C.S. § 3928 Unauthorized Use of an Automobile	Possible AF as theft offense if a term of imprisonment of one year or more is imposed.	No. BIA has held that crime is not CMT because the statutory language does not have intent to permanently deprive. <i>In Re Brieva-Perez</i> , 23 I & N Dec. 766 (BIA 2005) (Texas statute that is similar to PA not a CMT).	No.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Tips for immigration attorneys: This should not be a crime of violence AF under 16(a) because no force element, and because it is a misdemeanor in PA, cannot be a crime of violence under 16(b). <i>In Re Brieva-Perez</i> , 23 I & N Dec. 766 (BIA 2005).
18 Pa. C. S. § 3929 Retail Theft	Probably theft AF if a term of imprisonment of one year or more is imposed.	Yes. <i>Matter of Jurado-Delgado</i> , 24 I. & N. Dec. 29 (BIA Sept. 28, 2006).	No.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Avoid any language regarding a lack of consent of the owner of the property or any exercise of control over the property in the allocution. Tip for immigration attorneys:

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				Possible argument against AF could be that sections (1), (2) and (3) do not require that the offense be committed without consent, so not generic theft offenses. For sections (4) and (5), possible argument that these are not theft offenses because there is no requirement of exercising control over property.
<p>18 Pa. C.S. § 3934 Theft from a Motor Vehicle</p>	Yes, theft AF if a term of imprisonment of one year or more is imposed.	Yes.	No.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.

Forgery and Fraudulent Practices				
<p>18 Pa.C.S. § 4101 Forgery</p>	<p>Yes, forgery AF if a term of imprisonment of one year or more is imposed.</p> <p>Also would be fraud AF if convicted of intent to defraud and documents related to conviction show loss is greater than \$10,000.</p>	Yes.	No.	Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid forgery AF. For fraud AF, under <u>Nijhawan v. Holder</u> No. 08-495, 557 U. S. ____ (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Avoid pleading to “intent to defraud” or “facilitating a fraud” subsections, or plea specifically to amount less than \$10,000 to avoid fraud AF.

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<p>18 Pa.C.S. § 4105 Bad checks</p>	No. Not fraud AF because no intent to defraud.	No, statute does not require intent to defraud; <i>In re Balao</i> , 20 I & N Dec. 440 (BIA 1992).	No.	
<p>18 Pa.C.S. § 4116 Copying; recording devices</p>	Probably not.	Maybe.	No.	Tip for immigration attorneys: This should not be an AF because there is no intent to defraud or deceive or any reference to counterfeiting in the statute. In the Immigration Law and Crimes database, there is a citation to a case called In Re EA (BIA 2001) as addressing the PA statute in particular and finding that it is not a CMT.
<p>18 Pa.C.S. § 4119 Trademark Counterfeiting</p>	Yes, counterfeiting AF if a term of imprisonment of one year or more is imposed. <i>Fofana v. Ridge</i> , 114 Fed.Appx. 490 (3d Cir. 2004) (unpublished opinion finding PA statute to be counterfeiting AF; rejected argument that counterfeiting only applied to	Probably.	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Tip for immigration attorneys: This statute was recently found to be unconstitutionally vague by the PA Supreme Court, which may be an argument against AF or CMT. <i>Commonwealth v. Omar</i> ; <i>Commonwealth v. O'Connor</i> , 2009 Pa. LEXIS 2104 (Pa. Oct. 5, 2009).

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	counterfeit currency).			
18 Pa.C.S. § 4120 Identity Theft	Probably not.	Probably.	No.	Tip for Immigration attorneys: Under Nijhawan, intent to defraud or deceive is a required element of the statute, so this should not be a fraud AF.

Offenses Against the Family

18 Pa.C.S. § 4304 Endangering welfare of children (a)(1) violation of duty of care	Probably not.	Maybe.	Crimes Against Child: Possible. <i>Matter of Rodriguez-Rodriguez</i> , 22 I&N Dec. 991 (BIA 1999) (Crimes Against Child includes negligent treatment of a child).	Tip for criminal attorneys: Keep record clear of any mention of sexual conduct, or plea specifically to non-sexual conduct to avoid CMT. Tips for immigration attorneys: The argument against AF is that sexual abuse of a minor is a generic offense that requires sexual conduct as an element of the offense. See <i>Singh v. Ashcroft</i> , 383 F3d 144 (3d Cir. 2004).
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Falsification

18 Pa.C.S. § 4902 Perjury	Yes, perjury AF if a term of imprisonment of one year or more is imposed. <i>In re MARTINEZ-RECINOS</i> , 23 I. & N. Dec. 175	Yes. <i>Matter of H</i> , 1 I. & N. Dec. 669 (BIA 1943) (perjury convictions are CMTs where materiality is either an element or incorporated by common law).	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
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	(BIA 2001) (AF where conviction under CA perjury encompassed the elements of the federal perjury statute 18 U.S.C. § 1621 (1994)).			
18 Pa.C.S. § 4903 False Swearing	Probably not unless the false statement involves fraud or deceit in which loss to the victim exceeds \$10,000.	Probably. <i>Matter of C</i> , 1 I&N Dec. 14 (BIA 1940) (holding that deliberate false oaths are CMTs).	No.	Tip for criminal attorneys: Under <u>Nijhawan v. Holder</u> No. 08-495, 557 U. S. ____ (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF.
18 Pa.C.S. § 4904 Unsworn Falsification	Probably not unless the false statement involves fraud or deceit in which loss to the victim exceeds \$10,000.	Yes. <i>In Re Jurado-Delgado</i> , 24 I. & N. Dec. 29 (BIA 2006) (“intent to mislead” under this statute is the definitive factor in the analysis).	No.	Tips for criminal attorneys: Under <u>Nijhawan v. Holder</u> No. 08-495, 557 U. S. ____ (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF.
18 Pa.C.S. § 4906 False reports to law enforcement	No.	Probably. <i>Matter of Daibo</i> , Slip Copy, 2008 WL 410122 (Unpublished 3d Cir. 2008) (affirming	No.	

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		BIA's analysis that determination of whether a false statements crime is a CMT turns on whether the crime is "inherently fraudulent.")		
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Obstruction				
18 Pa.C.S. § 5101 Obstructing administration of law or other governmental function	May be obstruction of justice AF if a term of imprisonment of one year or more is imposed.	Probably not.	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF.
18 Pa.C.S. § 5104 Resisting Arrest	No. Third Circuit held not a crime of violence under 16(a), and R/A is a misdemeanor in Pa thus not a crime of violence under § 16(b). <i>Frances v. Reno</i> , 269 F.3d 162 (3d. Cir. 2001).	No. Unpublished BIA opinion held that this crime is not a CMT. <i>In Re: Dariusz Garncarz</i> , 2005 WL 1104185 (BIA 2005). Under <i>Matter of Danesh</i> , 19 I. & N. Dec. 669 (BIA 1988), statutes like this that punish "passive resistance" are not CMTs.	No.	
18 Pa.C.S. § 5105 Hindering apprehension or prosecution	Probably obstruction of justice AF if a term of imprisonment of one year or more is imposed.	Possible CMT.	No.	Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Criminal contempt for failure to appear in court is a safer alternative.

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<p>18 Pa.C.S. § 5124 Default in required appearance (failure to appear)</p>	<p>Yes if pursuant to court order for disposition where maximum possible sentence of underlying charge is 2 years or more or to serve time for offense where maximum possible sentence is 5 years or more.</p>	<p>Possible CMT.</p>	<p>No.</p>	<p>Tip for criminal attorneys: Criminal contempt for failure to appear in court may be a safer alternative.</p>
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Prostitution

<p>18 Pa.C.S. § 5902(a) Prostitution</p>	<p>No.</p>	<p>Yes.</p>	<p>Prostitution: Yes. "Engaging in" prostitution or "procuring" prostitutes, even absent conviction, is separate basis for inadmissibility.</p>	<p>Tip for criminal attorneys: Alternate safe havens: -Obstruction of Highway -Disorderly Conduct -Loitering -Defiant Trespass</p>
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<p>18 Pa.C.S. § 5902(b)(1) Promoting Prostitution</p>	<p>Yes, regardless of sentence imposed. Separate AF category for "supervising, owning," etc. prostitution business or transportation of prostitute for commercial</p>	<p>Yes.</p>	<p>Prostitution: Yes.</p>	
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	advantage.			
<p>18 Pa.C.S. § 5902(b)(2), (3), (4), (5) Promoting Prostitution</p>	Possible AF.	Yes.	Prostitution: Yes.	<p>Tip for criminal attorneys: To potentially avoid AF, keep record clear of any reference to ownership, supervision, or management or to interstate travel.</p> <p>Tip for immigration attorneys: Argument against AF could be that there is no requirement of ownership, supervision or profit, and no requirement of interstate travel.</p>
<p>18 Pa.C.S. § 5902(b)(6) Promoting Prostitution</p>	Probably AF if record reflects interstate travel. Statute is divisible because it includes interstate and intrastate travel.	Yes.	Prostitution: Yes.	<p>Tip for criminal attorneys: To potentially avoid AF, keep record clear of reference to interstate travel.</p> <p>Tip for immigration attorneys: If record does not specify whether travel was interstate or intrastate, argument against AF is that only interstate travel is included in the federal statute.</p>
<p>18 Pa.C.S. § 5902(b)(7), (8) Promoting Prostitution</p>	Probably not. No requirement of supervision, ownership etc. of the actual business.	Possible CMT.	Prostitution: Probably not. No requirement of engaging in prostitution or procuring prostitutes.	

Firearms Offenses

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<p>18 Pa.C.S. § 6105 Persons not to possess, use, manufacture, control, sell or transfer firearms</p>	<p>Yes if record establishes offense akin to federal offenses listed under 8 USC §1101 (a)(43)(E). See <u>In re Vasquez-Munis</u>, 23 I&N Dec. 207 (BIA 2002) (CA felon-in-possession firearm possession conviction is an AF because equivalent of federal felony).</p>	<p>No.</p>	<p>Firearms: Yes.</p>	
<p>18 Pa.C.S. § 6106 Firearms not to be carried without a license</p>	<p>See above.</p>	<p>No.</p>	<p>Firearms: Yes.</p>	<p>Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW).</p>
<p>18 Pa.C.S. § 6108 Firearms not to be carried on public streets in Philadelphia</p>	<p>No.</p>	<p>No.</p>	<p>Firearms: Yes.</p>	<p>Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW).</p>
Minors				
<p>18 Pa.C.S. § 6301 Corruption of minors</p>	<p>Possible AF as sexual abuse of a minor regardless of</p>	<p>Probably not. <u>Subah v. Attorney General</u>, 2007 U.S. App. LEXIS 28086</p>	<p>Crimes Against Child: Probably. See definition in <u>Velazquez-Herrera</u>, 24 I. & N.</p>	<p>Tip for criminal attorneys: If possible, to minimize risk of AF and CMT, make a record of merely negligent</p>

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(1)(a) corrupting morals of minor	sentence imposed. <i>IN RE: BLAZIU PALFI A</i> , 2004 WL 1167145 (BIA 2004) (Unpublished decision finding this conviction to be AF where record shows sexual conduct). If no sexual conduct, not AF.	(3d. Cir. 2007) (unpublished decision holding this conviction is not a CMT because the least culpable conduct does not meet the requirements for a CMT.)	Dec. 503, 512 (BIA 2008) ("any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation")	conduct. To avoid crimes against child, plead guilty to an offense that does not include the age of the victim as an element, like simple assault. Avoid or if possible controvert any mention of sexual conduct anywhere in the record. Tip for immigration attorneys: The argument against AF is that sexual abuse of a minor is a generic offense that requires sexual conduct as an element of the offense. See <i>Nijahawan v. Holder</i> , 129 S. Ct. 2294 (2009) and <i>Singh v. Ashcroft</i> , 383 F3d 144 (3d Cir. 2004).
18 Pa.C.S. § 6301 Corruption of minors (1)(b) assisting minor in violating parole	No.	This is probably a CMT. Requires knowing, intentional acts.	No.	
18 Pa.C.S. § 6301 Corruption of minors (2) assisting minor in truancy	No.	Probably not. See <i>Matter of C-----</i> 2 I. & N. Dec. 220, 222 (BIA 1944) (aiding a student in skipping school is not enough for a CMT).	No.	
18 Pa.C.S. § 6310.2 Manufacture or	Possible false documents AF if	Probably CMT for knowing and	No.	Tip for criminal attorneys: Definition of ID card under § 6310.6 indicates

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sale of false identification card	term of imprisonment of one year or more is imposed and if document could be used as evidence of authorized stay or employment in the United States.	intentional offenses. Possible CMT for recklessness.		that purpose of statute is to prevent minors from buying alcohol. This statute should not be used to prosecute persons possessing false immigration papers. Keep record clean of any false statements regarding immigration status. To lessen risk of CMT, plead specifically to reckless violation of statute or, if that is not possible, keep record inconclusive as to mens rea.
18 Pa.C.S. § 6310.3 Carrying a false identification card	Possible. See advice above.	Probably under "obtains or attempts to obtain liquor" prong. Probably not under "possesses" prong.	No.	Tip for criminal attorneys: See above regarding AF risk. To lessen risk of CMT, plead to mere possession prong of statute and negate or keep record clear of intent to utter or use the ID. If that is not possible, keep record inconclusive as to prong of statute violated. Tip for immigration attorneys: For argument against CMT, see <u>Matter of Serna</u> , 20 I&N Dec. 579 (BIA 1992) (possession of false immigration document not a CMT because no requirement of an intent to defraud.)
18 Pa.C.S. § 6312 Sexual abuse of children:	Probably AF as sexual abuse of a minor regardless of	Yes.	Crimes Against Child: Yes.	Tip for criminal attorneys: To preserve possible arguments against AF, keep record clear of any reference to

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Photographing, videotaping, depicting on computer or filming sex acts	sentence imposed. Possible child pornography AF, regardless of sentence imposed.			physical contact or depiction of sexual act. If possible, plead specifically to photographing simple nudity. Tip for immigration attorneys: Argument against child pornography AF is that PA statute is broader than federal statute because it includes photographs of simple nudity, which the federal statute does not.
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Domestic Violence, Protection Orders and Child Support				
23 Pa.C.S. § 6114 Contempt for violation of protection order	No.	Probably CMT. <u>Matter of Sharp</u> , 2002 WL 32149034 (BIA Oct. 7, 2002) (citing a PA case discussing this offense).	Violator of Protective Order: Probably.	Tip for criminal attorneys: To preserve possible argument against CODV offense, keep record of conviction clear of any reference to threats, repeated harassment, or bodily injury and attempt to plead specifically to violating portion of order that does not involve physical abuse of victim, threats of violence, repeated harassment or injury, such as eviction or simple contact. If this is not possible, keep record silent as to portion of order violated. Safer alternative pleas: --Harassment --Simple Assault

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				Tip for immigration attorneys: Possible argument against CODV is that this is not a deportable offense unless a portion of the order was violated that involved threats of violence, repeated harassment or bodily injury. Beware: unpublished BIA decisions go both ways.
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Controlled Substances				
<p>35 Pa.C.S. § 780-113(16) Knowing or Intentional Possession of a controlled or counterfeit substance</p>	<p>No (see exception below). <u>Gerbier v. Holmes</u>, 280 F.3d 297 (3d Cir. 2002).</p> <p>However YES if substance involved is more than 5 grams of crack or any amount of flunitrazepam. <u>Lopez v. Gonzalez</u>, 549 U.S. 47 (2006).</p>	<p>No.</p>	<p>Controlled substance: Yes if substance specified is included on list of federal schedule of controlled substances.</p> <p>Exception: A first offense for possession of less than 30 grams of marijuana would not qualify as grounds for deportation for lawful permanent residents, but the second and subsequent offenses would.</p>	<p>Tip for criminal attorneys: Avoid specifying the substance involved in the record of conviction.</p>
<p>35 Pa.C.S. § 780-113(30) Manufacture, Delivery, or possession w/ intent to deliver a controlled</p>	<p>Yes as drug trafficking AF if substance specified is included on list of federal schedule of</p>	<p>Yes.</p>	<p>Controlled substance: Yes if substance specified is included on list of federal schedule of controlled substances.</p>	<p>Tip for criminal attorneys: Avoid specifying the substance involved in the record of conviction.</p>

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substance ALL DRUGS EXCEPT MARIJUANA (SEE BELOW FOR MARIJUANA)	controlled substances.			
35 Pa.C.S. § 780-113(30) Manufacture, Delivery, or possession w/ intent to deliver a controlled substance MARIJUANA	Yes as drug trafficking AF, regardless of the sentence imposed, with one narrow exception. If record does not establish the amount of the substance or specifies a small amount, and does not reflect actual or intended transfer, delivery, sale or any remuneration, this may not be an AF. <u>Very complicated area! See advice!</u>	Yes.	Controlled substance: Yes	Tip for criminal attorneys: Keep record clear of amount of marijuana other than a small amount; any remuneration involved; and manufacturing for other than self, i.e have the complaint amended to take out these facts, and do not mention in the colloquy. If client transferred drugs without remuneration make sure the record indicates so. Sample vague language for amended complaint: "client did manufacture, deliver, or possess with an intent to manufacture or deliver a controlled substance, to wit: marijuana." Tip for immigration attorneys: For argument against AF, see <i>Garcia v. Attorney General</i> , 462 F.3d 287 (3d Cir. 2006), <i>Jeune v. Attorney General</i> , 476 F.3d 199 (3d Cir. 2007); <i>Evanson v. AG</i> , 550 F.3d 284 (3d Cir. 2008) (finding that a conviction

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				under this statute involving an unknown amount of marijuana, without proof of delivery, sale or transfer and without remuneration, is not an AF).
<p>35 Pa.C.S. § 780-113(31) Marijuana Offenses - Possession or distribution, but not sale, of a small amount of marijuana (30 grams or less of marijuana or 8 grams of hashish).</p>	No.	Simple possession: No Delivery but not for sale: Probably.	Controlled substance: Yes. Exception: A first offense for possession of less than 30 grams of marijuana would not qualify as grounds for deportation for lawful permanent residents, but the second and subsequent offenses would.	
<p>35 Pa.C.S. § 780-113(35) Possession with intent to distribute a noncontrolled substance</p>	No.	No.	Controlled substance: No.	Tip for immigration attorneys: It is clear from the language of the statute that this is not "relating to" a controlled substance" because <i>all</i> convictions under this statute do not, by definition, involve controlled substances.
Traffic Offenses				
<p>75 Pa. C.S § 1543 Driving While Suspended</p>	No.	No. However if DUI conviction involves driving on suspended license see DUI below.	No.	
<p>75 Pa. C.S. §</p>	No. <u>Francis v. Reno</u> ,	Probably not.	No.	Tip for immigration attorneys: statute

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3732 Homicide by Vehicle	269 F.3d 162 (3d Cir. 2001).			includes negligent conduct, which should not qualify as an AF or CMT.
75 Pa. C.S. § 3735 Aggravated Assault by DUI	No. See <u>Leocal v Ashcroft</u> , 125 U.S. 377 (2004). Not a crime of violence because of specified negligent intent.	No.	Controlled substance: Yes if record specifies controlled substance.	Tip for criminal attorneys: Keep record clean of any substance other than alcohol to avoid controlled substance offense. Tip for immigration attorneys: Argument against CMT is that negligence is not enough for a CMT. See <u>Partyka v. Attorney General</u> , 417 F.3d 408 (3d Cir. 2005) (negligent assault not a CMT). BEWARE: If license revoked or suspended, see below.
75 Pa. C.S. § 3802 Driving While Under the Influence of Alcohol or controlled Substance	No.	Probably not unless record of conviction establishes circumstances such as knowing license suspended or revoked due to prior DUI. See <u>Matter of Lopez-Meza</u> , 22 I&N Dec. 1188 (BIA 1999).	Controlled substance: Yes if record specifies controlled substance.	Tip for criminal attorneys: Keep record clear of any mention of substances other than alcohol to avoid CS.
Misc.				
62 P.S. § 481 Welfare Fraud	Probably AF as fraud offense if loss to the victim	Yes.		Tip for criminal attorneys: Under <u>Nijhawan v. Holder</u> No. 08-495, 557 U. S. ____ (2009), DHS can look at

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	exceeds \$10,000.			<p>outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF.</p> <p>Tip for immigration attorneys: Possible argument against AF or CMT that it is possible to commit offense by non-willful impersonation, which would not qualify as fraud offense.</p>